was insane or incapable of managing his affairs —*held* by Lord M'Laren, Ordinary, that the question of the respondent's capacity might be determined in a proof before the Lord Ordinary. The respondent having reclaimed, on the ground that when the insanity was denied a cognition was necessary, the Court, without deciding the point, and of consent of the respondent *appointed ad interim* curator a person in whom the respondent had confidence, and whom he had previously appointed his factor and commissioner during the respondent's detention in the asylum.

Mrs Barbara Logan or Yule presented a petition for the appointment of a *curator bonis* to her husband George Yule. The petition was in common form, and accompanied by the certificates of two medical men to the effect that Mr Yule was at the time incapable of managing his affairs or giving directions for their management. The petitioner suggested a person to be *curator bonis*. Mr Yule, who at the time the petition was presented was in an asylum, lodged answers denying that he was incapable of managing his affairs or giving directions for their management. On the contrary, he alleged that he was quite able to do so, and that during his absence from Arbroath, where he had resided, his affairs were managed by Mr W. K. Macdonald, town-clerk of Arbroath, who held a factory and commission from him.

The Lord Ordinary allowed the parties a proof of their averments in the petition and answers.

The respondent reclaimed, and argued—Such a proof as the Lord Ordinary had allowed was unknown in practice. The respondent, ere the management of his affairs could be taken from him, was entitled to have the question of his sanity tried in a cognition—*Lockhart* v. *Ross*, July 17, 1857, 19 D. 1075. The petitioner might raise that process, which was not, as some thought, only competent to the nearest male agnate, but was competent to all relatives—*Bryce* v. *Graham*, Jan. 25, 1828, 6 S. 425, and authorities there cited; *Larkin* v. *M'Grady*, December 8, 1874, 2 R. 170, where a cousin, who was not the nearest male agnate, was found entitled to raise that process. See also *Downs, Petitioner*, reported in Shand's Practice, ii. 1008; and *Forsyth*, July 19, 1862, 24 D. 1435.

Argued for petitioner—The only questions were—(1) Whether there was a *prima facie* case for the appointment craved? and the medical certificates answered that question. (2) Whether the procedure the Lord Ordinary had adopted was competent? *Bryce* v. *Graham*, *supra*, was in the petitioner's favour on that matter; Nicolson's Ersk. i. 7, 48; *Macfarlane*, July 20, 1847, 10 D. 38, where there was a proof by remit to the Sheriff-Substitute in an opposed petition like the present.

The Lords, after hearing counsel, continued the cause for a week, that parties might consider whether Mr W. K. Macdonald, who, as above stated, held an unrecalled factory and commission for Mr Yule, might not be appointed *curator bonis* of consent of parties, and on the case being called on, it was intimated by the respondent's counsel that that course had been agreed on.

The Lords pronounced this interlocutor:—

"Recall the" Lord Ordinary's "interlocutor: Of consent appoint Mr W. K. Macdonald, town-clerk of Arbroath, to be *curator bonis* to the said George Yule, with the usual powers, he always finding caution before extract, and his said appointment to last only so long as the said George Yule is an inmate of a lunatic asylum, and decern."

Counsel for Petitioner—Guthrie Smith—Orr. Agents—Rhind, Lindsay, & Wallace, W.S.

Counsel for Respondent—Solicitor-General (Asher)—Keir. Agents—Lindsay, Howe, Tytler, & Co., W.S.

Tuesday, November 29.

FIRST DIVISION.

[Lord M'Laren, Ordinary on the Bills.

BLACK *v.* WATSON.

Bankruptcy—Notour Bankruptcy where Imprisonment rendered incompetent—Debtors (Scotland) Act 1880 (43 *and* 44 *Vict. cap.* 34), *sec.* 6—*Bankruptcy (Scotland) Act* 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 7.

Held (1) that in those cases in which imprisonment was rendered incompetent by the Debtors (Scotland) Act 1880, it is not necessary, in order to constitute notour bankruptcy, that the duly executed charge for payment should be followed by arrestment, poinding, or adjudication, as was provided by the Bankruptcy (Scotland) Act 1856 for cases in which imprisonment was at that time incompetent or impossible; but (2) that in those last-mentioned cases arrestment, poinding, or adjudication is still necessary.

This was an application by J. W. Black for the sequestration of the estates of Robert Watson. The application was opposed by Watson, and was reported to the First Division by the Lord Ordinary on the Bills (M'Laren) on the following point:—The 7th section of the Bankruptcy (Scotland) Act 1856 (19 and 10 Vict. cap. 79) provided that notour bankruptcy should be constituted by, *inter alia*, the following circumstances, viz:—"By insolvency concurring either (*a*) with a duly executed charge for payment, followed," where imprisonment is competent, by imprisonment, or formal and regular apprehension of the debtor, or by his flight or absconding from diligence, or retreat to the sanctuary, or forcible defending of his person against diligence; or where imprisonment is incompetent or impossible, by execution of arrestment of any of the debtor's effects not loosed or discharged for fifteen days, or by execution of poinding of any of his moveables, or by decree of adjudication of any part of his heritable estate for payment or in security; or (*b*)," &c.

The Debtors (Scotland) Act 1880 (43 and 44 Vict. cap. 34) abolished imprisonment for debt except in certain specified cases, and in its 6th section provided that "In any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall

be constituted by insolvency concurring with a duly executed charge for payment followed by the expiry of the days of charge without payment, or where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment followed by the lapse of the days intervening prior to execution without payment having been made. Nothing in this section contained shall affect the provisions of section seven of the Bankruptcy (Scotland) Act 1856."

The question reported by the Lord Ordinary was—Whether in order to constitute notour bankruptcy in cases in which imprisonment was rendered incompetent by the Act of 1880, it was necessary that there should also be arrestment, poinding, or adjudication, as provided by the Act of 1856?

At advising—

Lord President—By the Bankruptcy Act of 1856 notour bankruptcy may be constituted either, first, "by sequestration, or by the issuing of an adjudication of bankruptcy in England or Ireland," or secondly, "by insolvency concurring either with a duly executed charge for payment, followed, where imprisonment is competent, by imprisonment" or its equivalent. But there is an alternative under this second subsection, which is, that 'where imprisonment is incompetent or impossible" the charge for payment is to be followed "by execution of arrestment of any of the debtor's effects not loosed or discharged for fifteen days, or by execution of poinding of any of his moveables, or by decree of adjudication of any part of his heritable estate." Now, it must be observed that the cases in which the charge required to be followed by arrestment, poinding, or adjudication are cases in which, as the law then stood, imprisonment was incompetent or impossible. But the 6th section of the Act of 1880 provides, not for cases in which previous to that Act imprisonment was incompetent or impossible, but for cases in which imprisonment was rendered incompetent by force of the provisions of that Act itself. Therefore the two sections do not deal with the same subject-matter. Cases in which imprisonment is incompetent or impossible, not by reason of the Act of 1880, but on other grounds, will still continue to be regulated by that part of the Act of 1856 which I have read. I apprehend that these provisions of the Act of 1856 remain in full force, and in such cases the expired charge must be followed by arrestment, poinding, or adjudication. But in cases under the Act of 1880 a new form of procedure for constituting notour bankruptcy is introduced. The 6th section provides that "In any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment followed by the expiry of the days of charge without payment, or where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment followed by the lapse of the days intervening prior to execution without payment having been made." Now, the meaning of this part of the section does not admit of doubt. It is perfectly plain and distinct, and the only difficulty arises from the concluding provision of the section, that "Nothing in this section contained shall affect the provisions of section seven of the Bankruptcy (Scotland) Act 1856." But I do not think that in construing the 6th section of the Act of 1880 in the way I propose we shall be doing anything to affect the provisions of the 7th section of the Act of 1856. The provision of that section which relates to cases in which imprisonment was incompetent or impossible will still remain law. In such cases arrestment, poinding, or adjudication must still be resorted to. But in cases in which imprisonment is rendered incompetent by the Act of 1880, these proceedings are not necessary, as they are not required by the Act.

Lord Mure—I have come to the same conclusion. The Act of 1880 has introduced a new mode of constituting notour bankruptcy, but I agree with your Lordship in thinking that the whole provisions of the Act of 1856 remain in force, except in regard to those cases in which under the Act of 1880 imprisonment has been abolished. In regard to such cases I am of opinion that they are regulated solely by the Act of 1880, and consequently that in reference to them arrestment, poinding, or adjudication are unnecessary. The two sections thus seem to me perfectly consistent, and may be read together.

Lord Shand—I concur generally in the views stated by your Lordships. It appears to me that the 6th section of the Act of 1880 is to be read with the 7th section of the Act of 1856, on the footing that both provisions are still subsistent; and that while the Act of 1880 has produced a radical change in the mode of constituting notour bankruptcy, by making the mere expiry of the days of charge sufficient in the ordinary case—for it is now the ordinary case—in which imprisonment was rendered incompetent by the Act, it was nevertheless intended to save the other modes of constituting notour bankruptcy under the Act of 1856, and these modes of constituting notour bankruptcy accordingly are still effectual.

Lord Deas was absent.

The Court directed the Lord Ordinary accordingly.

Counsel for Petitioner—Shaw. Agent—John Gill, S.S.C.

Counsel for Respondent—Goudy — Baxter. Agent—R. Starke.

HIGH COURT OF JUSTICIARY.

Tuesday, November 29.

(Before the Lord Justice-Clerk, Lord Young, and Lord Craighill.)

ANDERSON *v.* WOOD.

Prevention of Cruelty to Animals Act 1850 (13 *and* 14 *Vict. c.* 92)—*Relevancy.*

Held (*diss.* Lord Young) that a complaint against a cab-driver for a contravention of the Act above cited was relevantly laid