LORD ADAM—I agree, and have very little to add. I am of opinion with your Lordship that the proceeding by way of appointment of a *curator bonis* upon the estate of a person of unsound mind is independent of the ordinary process of cognition upon a brieve from Chancery, and is further the more suitable procedure to adopt where the unsoundness of mind is not likely to be enduring, which is the case here. That is my view upon the competency of this petition, and the only remaining question is as to the expediency of the appointment in this instance.

The main matter for consideration is, what is the course most conducive to the benefit of the respondent himself? Now, his case is peculiar in this respect, that he is now in a lunatic asylum, and is admittedly of unsound mind. He does not himself say in the answers that he is of sound mind, but that he is not of unsound mind to the extent of being unfit to manage his own business affairs. But upon the evidence before us in the form of medical certificates—and some of these were obtained at his own instance—it is clear that his mental unsoundness goes further and is not of the partial character contended for by the respondent's counsel. [*After referring to the contents of the medical reports in detail in support of this view his Lordship proceeded*]—The question before us is whether it is right and proper that a person so described should have the management of his affairs in his own hands, and to that question I say no.

LORD M'LAREN—The case has not been argued so much upon the power and jurisdiction of the Court to make the appointment which is here resisted, as upon the expediency of the appointment being made, and whether the matter of the respondent's mental incapacity should not upon his demand be submitted to the verdict of a jury. That is undoubtedly the appropriate mode of trying the question where it is raised on a brieve of cognition proceeding from Chancery, but I should be sorry to give countenance to the supposition that a brieve of cognition is the only method by which such a question can be raised and settled. Alongside of that method there have for centuries subsisted other modes of ensuring protection of the property of the insane. Your Lordship has traced the history of one mode by means of the appointment of factors and *curators bonis*, and there was also another method which consisted in the appointment under the powers exercised by the Court of Session of tutors-dative to insane persons; and although there are not many applications nowadays for this latter appointment—owing probably to the fact that the office is a gratuitous one—still in both these cases the means of inquiry adopted was the same, and we have proceeded upon the reports of professional persons obtained by the parties themselves, or upon the initiative of the Court for its own guidance. I am far from saying there are not cases where a more formal proof should be exacted—it might be, for instance, that an absolute contradiction in point of fact was disclosed in the petition and answers—but we have no such issue in the present case. Here the question raised is merely whether the cerebral disease and mental unsoundness admittedly existing are of so serious a character as to necessitate a temporary withdrawal of the respondent's affairs from his own management. I apprehend this is a matter entirely within our discretion, and while thinking that the right and suitable course of inquiry has been adopted by the Lord Ordinary, I also agree in the propriety of his judgment.

LORD KINNEAR concurred.

The Court confirmed the appointment.

Counsel for the Petitioner—Low—Sandeman. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondent — Guthrie Smith — A. S. D. Thomson. Agents — Mitchell & Baxter, W.S.

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*Saturday, November* 8.

## SECOND DIVISION.

## SOUTER, PETITIONER.

*Process — Judicial Factor — Removal of Curator Bonis — Jurisdiction — Pupils Protection Act* 1849 (12 *and* 13 *Vict. cap.* 51), *sec.* 31—*Distribution of Business Act* 1857 (20 *and* 21 *Vict. cap.* 56).

Two petitions for the removal of a *curator bonis* to a person of unsound mind, and the appointment of a new *curator bonis* in his room, having been presented to the Court of Session, one before the Junior Lord Ordinary, and the other before the Second Division of the Court—*held* that under the Pupils Protection Act 1849, section 31, and the Distribution of Business Act 1857, sections 4 and 5, such a petition must be brought in the first instance before the Junior Lord Ordinary, subject to review by the Inner House, and that the petition presented before the Second Division was therefore incompetent.

By the Pupils Protection Act 1849 (12 and 13 Vict. chap. 51), section 31, it is enacted "that the Court shall have power on cause shown to remove or accept the resignation of any tutor or curator coming under the provisions of this Act, and to appoint a factor *loco tutoris* or *curator bonis* in his room." By the interpretation clause (sec. 1) it is enacted that the expression "Court" shall mean "either Division of the Court of Session," and the word "curator" shall mean "any person who after the passing of this Act shall be served as curator to any insane person or idiot."

By the Distribution of Business Act 1857 (20 and 21 Vict. cap. 56), section 4, it is enacted—"All summary petitions and applications to the Lords of Council and Session

which are not incident to actions or causes actually depending at the time of presenting the same shall be brought before the Junior Lord Ordinary officiating in the Outer House, who shall deal therewith and dispose thereof as to him shall seem just, and in particular all petitions and applications falling under any of the descriptions following shall be so enrolled before and dealt with and disposed of by the Junior Lord Ordinary, and shall not be taken in the first instance before either of the two Divisions of the Court, viz." . . . (5) "all petitions, applications, and reports under the Pupils Protection Act." By section 5 of the same Act it is provided—"The Lord Ordinary, before whom any such petition, application, or report should be enrolled or brought, shall have full power to decide on and dispose of the same . . . and his judgment on the merits shall be subject to review."

On 29th August 1890 Robert Finlay, S.S.C., presented a petition in the Bill Chamber for the removal of Peter Couper, accountant, Edinburgh, from the office of *curator bonis* to John Souter, an inmate of the Royal Edinburgh Asylum, to which office he had been appointed by the Court on 12th June 1877, and for the appointment in his room of Robert Cockburn Millar, C.A., or failing him Andrew Dodds Fairbairn, C.A. This petition was served among others on Mrs Margaret Souter, the wife of John Souter, but no answers were lodged by her.

The Lord Ordinary on the Bills not being satisfied that an application to remove a *curator bonis* could be entertained by him, declined to remove Mr Couper from his office, but on 13th September 1890 he appointed Mr Millar to the office of *curator bonis ad interim*.

After the Winter Session of the Court commenced, this petition came in usual course before the Junior Lord Ordinary, who on 23rd October 1890 ordered service of the petition on Mr Souter, and also on Mr Couper.

Meanwhile, on 15th October 1890, Mrs Margaret Souter presented a petition to the Second Division of the Court for the removal of Mr Couper as *curator bonis* to Mr Souter, and the appointment in his room of Charles John Munro, C.A. Answers to this petition for Mr Finlay and Mr Millar were lodged on 27th October 1890, in which they maintained, *inter alia*, that the application already made to the Lord Ordinary was the proper course to adopt under the Pupils Protection and Distribution of Business Acts.

Argued for petitioner—This was a case of a beneficiary petitioning to remove a *curator bonis* because he was an absconding bankrupt. In the cases founded on by the other side the *curator bonis* himself applied for his recal. This case was different; it was analogous to a petition for removal of trustees—*Petition Mitchell*, July 20, 1864, 2 Macph. 1378; *Petition Kyle*, June 10, 1862, 24 D. 1083, opinion of Lord Justice-Clerk (Inglis), 1085; *Petition Rhind*, July 20, 1875, 2 R. 1002.

Argued for respondent—This petition under the statute was incompetent in the Inner House—*Petition Kyle*, June 10, 1862, 24 D. 1084; *Petition Tweedie*, December 8, 1886, 14 R. 212; *Petition Masterton*, May 14, 1887, 14 R. 712.

At advising—

LORD JUSTICE-CLERK—The question here arises from two petitions on the same subject having been presented to the Court of Session—one before this Division, and one before the Junior Lord Ordinary. The question is—which is competent, which incompetent. The officials seem to have had some difficulty in deciding as to which was the proper tribunal. As the point is one of practice which may occur in many cases, it is therefore important. I think, however, there is no real difficulty in deciding the matter.

By the Pupils Protection Act 1849 (12 and 13 Vict. c. 51) it is enacted that certain proceedings, including petitions for the removal of a *curator bonis* to a person under mental incapacity and the appointment of another in his room, are to be taken before the Court of Session, which is interpreted to mean "either Division of the Court of Session." If that still remained law no question could be raised as to the proper tribunal. But thereafter the Distribution of Business Act 1857 was passed, and the question arises whether that Act does not take away the primary jurisdiction of the Division and make it imperative to bring such petitions as this in the first instance before the Junior Lord Ordinary. There can be no doubt that clauses 4 and 5 refer to this matter. Clause 4 is quite distinct. "All summary petitions and applications to the Lords of Council and Session which are not incident to actions or causes actually depending at the time of presenting the same shall be brought before the Junior Lord Ordinary officiating in the Outer House who shall deal therewith and dispose thereof as to him shall seem just, and in particular all petitions and applications falling under any of the descriptions following shall be so enrolled before and dealt with and disposed of by the Junior Lord Ordinary, and shall not be taken in the first instance before either of the two Divisions of the Court." Under the particular headings following, the fifth includes "all petitions, applications, and reports under the Act of the 12 and 13 Vict. c. 51, entituled an Act for the better protection of the property of pupils, absent persons, and persons under mental incapacity in Scotland." This enactment is distinct and carefully framed so as to admit of no mistake. It declares as specifically as possible that proceedings under 12 and 13 Vict. c. 51, are to be taken in the first place before the Junior Lord Ordinary. This judgment is of course open to review by the Inner House.

I have therefore come to the conclusion that the petition in the Inner House is not competent, and that that in the Outer House is alone competent. As the matter seems to have been one of doubtful practice I think no expenses should be allowed.

LORD YOUNG—I am of the same opinion. This is a pure question of practice. It being so, we thought it right before giving our decision to communicate with our brethren in the First Division of the Court, and they are of the same opinion as ourselves. It is therefore now finally settled that a petition of this sort must go in the first instance before the Junior Lord Ordinary.

LORD RUTHERFURD CLARK concurred.

Counsel for the Petitioner — Salvesen. Agents—Sim & Garden, S.S.C.

Counsel for the Respondents — Goudy. Agent—Robert Finlay, S.S.C.

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*Wednesday, November* 12.

## SECOND DIVISION.

## DRYSDALE & GILMOUR, PETITIONERS.

*Company—Liquidation—Voluntary Winding-up—Supervision Order on Note by Liquidator—Companies Act* 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 129.

A petition was presented for the winding-up of an association registered under the Companies Acts. At a general meeting of the association a resolution, which was neither special nor extraordinary, was passed for voluntary winding-up, and a liquidator was appointed, who presented a note to the Court craving that the voluntary winding-up might be continued subject to the supervision of the Court, and that his appointment might be confirmed. The Court, on the ground that the voluntary winding-up was the more expedient course, *refused* the prayer of the petition and granted the prayer of the note.

Upon 27th October 1890 Messrs Drysdale & Gilmour, contractors, Leith Walk, Edinburgh, and the individual partners of the firm, presented a petition for the winding-up of the International Exhibition Association of Electrical Engineering Inventions and Industries 1890. The petitioners alleged that under a minute of agreement between them and George Edward Watson, secretary to and duly authorised by the Executive Council of the Association, they had done work in the erection of the Exhibition buildings at a cost of £26,000, of which a balance of £9000 was unpaid. They averred that the guarantee fund of £26,000 and the buildings were the only assets, while the debts as particularly specified amounted to £43,961, 15s. 6d. The Association had suspended payment except as to what were termed "current expenses." With the view of securing a preference to the British Linen Company Bank, who were creditors to the amount of an overdraft of £19,907, the Association had delivered over to the bank the guarantee letters, and the bank upon 24th October 1890 issued a circular letter to the guarantors, stating, *inter alia*—"You will please take notice that your letter of guarantee is now in the hands of the bank, and that in the event of there being any call upon you under your guarantee the amount of such call will fall to be paid to the bank." The petition prayed that the Electrical Association should be wound up by the Court, and that certain parties should be appointed official liquidators.

Upon 29th October the petition was ordered to be intimated, advertised, and served in the usual manner on eight days' *induciæ*.

The Exhibition closed upon 31st October.

Upon 5th November 1890, at a general meeting of the Association, it was resolved—"That the purposes for which the Association was established having now been fulfilled, it is now required by the Association, in general meeting assembled, that the same be wound up voluntarily, and the meeting hereby resolve that the Association be wound up voluntarily." This was a simple resolution, and neither special nor extraordinary.

Mr J. A. Robertson, C.A., was appointed liquidator, and it was also resolved that Mr Robertson, as liquidator, should apply to the Court of Session to have the liquidation placed under the supervision of the Court. A resolution was also passed unanimously that eight members of the Executive Council should be appointed to act as a committee of advice.

Upon 7th November 1889 the liquidator accordingly presented a note for a supervision order; for confirmation of his appointment and the committee of advice; and to have Drysdale & Gilmour found entitled to expenses of their petition.

The petitioners argued—Theirs was a creditor's petition, and therefore ought to be granted. The debtor had no right to interfere with the creditor's form of process—Buckley, p. 192. Upon the face of the petition it was evident that there was no prospect of any reversion to the guarantors, and large creditors were in favour of having the liquidation carried on under the orders of Court—*Wilson* v. *Hadley, &c.*, November 8, 1879, 7 R. 178; *Pen-y-Van Colliery Company*, March 3, 1877, L.R., 6 C.D. 477; *The General Rolling Stock Company*, February 11, 1865, 34 Bevan, 314. The period for winding-up the company under a voluntary liquidation had not yet arrived, as all the purposes of the Association had not been fulfilled. Section 129 (1) of the Companies Act 1862 did not apply, and the voluntary liquidation was incompetent. They could only proceed under section 143.

Argued for the liquidator — A large number, if not a majority, of the creditors agreed to have a voluntary liquidation of this Association, and the Court would not interfere with such an arrangement—*Aitken and Others, Petitioners*, December 1, 1888, 26 S.L.R. 129. The note was competent, because the purposes of the Association had been fulfilled.

At advising—