matter already, and I would only mention the case of *Wade*, referred to in the course of the argument, which was a case somewhat similar. In that case the testator had drawn up his will with his own hand and signed it, and he had afterwards granted certain codicils, but he was advised by a solicitor that it would be of importance that he should have certain words of style in the declaration of his will, and accordingly after the granting of the codicils he re-executed the will of a subsequent date to the granting of the codicils. Now, it was held in that case, and held quite distinctly, that the mere re-execution or re-attestation of the will which had been previously drawn out and signed had not the effect of wiping out the subsequent codicils; that it was quite consistent with the intention and meaning of the testator, and indeed quite inconsistent with any other view; that he meant that that which he had done by the codicils should remain. And therefore I have come to the conclusion that we should answer the first question in the affirmative. Then as regards the codicil as to the specific articles, that is practically answered by what I have said as to the answer to the first question, that that part of the codicil is entitled to receive effect. Accordingly the first question must be answered in the affirmative, and the third in the affirmative.

LORD YOUNG—I am of the same opinion' and I do not know that I can usefully add anything to what your Lordship has already said. What appeared to myself, and I think to all of us at first—possibly throughout—in the case was, whether we could, or how we should, reach a judicial view as to the state of the facts, for I do not think any of us for a moment doubted that if we were judicially satisfied by competent evidence or on satisfactory grounds that the deed of 9th April was simply a re-attestation or ratification of the deed of 8th March, it would not have any effect in recalling the codicils in question. The difficulty was in reaching that conclusion, that it was only a re-attestation or ratification of the first executed deed, because of a doubt as to the formality of its execution. Having overcome that difficulty, which I agree with your Lordship in thinking we satisfactorily and quite safely do upon the language of the case as stated to us by the parties, I have no hesitation whatever in acting upon the principle as equally valid and satisfactory in the law of Scotland, upon which the English Court proceeded in the case of *Wade* and some other cases that were referred to, and which was very distinctly expressed by Lord Hannan when he was President of the Probate Court, that a mere re-attestation of a deed because of some doubt cast upon the validity of the original attestation will have no operation whatever in recalling a codicil although it is of a date subsequent to the codicil, and so makes the deed which is thereby re-attested of a date subsequent to the codicil. I do not think it is an accurate use of language to speak of the re-executed deed as a new will or another will. The will was not changed; the will remained the same, although it might be written out upon and evidenced by another paper. Now, I think it is quite clear that the will, of which the re-executed deed of 9th April is the evidence before us, is the very will which is expressed in the deed of 8th March, and that the whole purpose was a re-attestation in the way which occurred, I think very naturally and properly, to the conveyancer, of the same will written upon the paper with the date of 8th March. And that being so, I cannot doubt that we should act unjustifiably and unwarrantably if we imputed to the testator the intention when she yielded to and followed the advice of her man of business on this matter, of recalling these codicils, and if she had no such intention, as plainly upon these facts she had not, we should be doing manifest injustice by holding that they were recalled.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The Court answered the first and third questions in the affirmative.

Counsel for the First and Third Parties—Lord Advocate Sir Charles Pearson, Q.C.—Kirkpatrick — Dickson. Agents — Irons, Roberts, & Company, S.S.C.

Counsel for the Second Party — D.-F. Balfour, Q.C.—Dundas. Agents—Bell & Bannerman, W.S.

Wednesday, November 25.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

YULE *v.* M'MEEKEN AND ANOTHER.

Diligence—Curator Bonis—Competency of Charge at Instance of Party Under Curatory.

Where a charge was given for payment to a *curator bonis* of a sum of money due to his ward, *held* that it was not a good objection to the charge that it proceeded at the instance of the ward.

On 26th April 1888 Charles Yule, accountant, Glasgow, in consideration of a sum of £500 which he had received from Ottho Adrian Clayton Alexander, *curator bonis* to George Russell Alexander, a person of unsound mind, granted a bond and assignation in security over certain heritable subjects, binding himself to repay the sum borrowed "to the said George Russell Alexander, his executors and assignees whomsoever."

On 23d January 1890 James M'Meeken, accountant, Glasgow, was appointed *curator bonis* to George Russell Alexander in place of Ottho Adrian Clayton Alexander.

On 10th October 1890 George M'Meeken, having recorded the bond and assignation above mentioned, charged Charles Yule to

make payment of the principal sum due under the bond, with the interest thereon. The charge proceeded "at the instance of George Russell Alexander . . . against Charles Yule, accountant, Glasgow," but Yule was charged to make payment of the sum due "to James M'Meeken, accountant, Glasgow, *curator bonis* to the said George Russell Alexander."

Yule then presented a note of suspension of the above charge against M'Meeken, the *curator bonis*, and George Russell Alexander, the ward.

The complainer stated several objections to the competency of the charge, and, *inter alia*, pleaded—"(2) The charge under suspension bearing to proceed at the instance of and for payment to a person who is not capable of giving instructions or authority thereanent, is wrongous, and should be suspended as craved."

On 15th January 1891 the Lord Ordinary (WELLWOOD) repelled the second plea-in-law for the complainer, and before answer allowed parties a proof of their respective averments in regard to the validity of the charge.

"*Opinion.* — The complainer's counsel addressed to me a subtle argument in support of the complainer's second plea-in-law, which is founded on the allegation that the charge sought to be suspended proceeds at the instance of the ward George Russell Alexander, and not of the respondent, his *curator bonis*. I am not prepared to sustain that plea. The obligation in the bond which was granted when the ward was under curatory is to repay the sum borrowed 'to the said George Russell Alexander (the ward), his executors and assignees whomsoever.' Thus the creditor in the bond is the ward. The granter of the bond consents to registration for preservation and execution; and the registered deed is therefore equivalent to a decree in favour of the ward. The warrant authorising execution, which is inserted in terms of 49 and 41 Vict. c. 40, simply runs—'And the said Lords grant warrant for all lawful execution hereon.' Now, it is true that the charge bears to be given by virtue of the bond and warrant thereon, 'at the instance of George Russell Alexander;' but then it charges the debtor to make payment to the respondent, *curator bonis* to the said George Russell Alexander. It may be that it would have been more correct to have stated at the outset of the charge that it was given at the instance of the *curator bonis*, but I think it sufficiently appears from the charge that it was given with the concurrence of the *curator bonis*, who was to receive the money and discharge the debtor. The debt is a debt due to the ward, and the decree is a decree in favour of the ward; and the position of the *curator bonis* in recovering the debt is simply that of commissioner or factor enforcing his ward's rights. I therefore think that this very technical objection, although specious, is not well founded, and should be repelled. On the other matters I allow a proof before answer."

On 21st July the Lord Ordinary pronounced this interlocutor—"Having considered the debate, together with the proof and whole process, in respect it is admitted by the respondent that on 13th February 1891 he received payment from the complainer's factor of a sum of £28, 5s. 6d., and that he is willing that the said sum should be imputed towards payment of the sum for which the charge complained of was given of consent to the respondent, suspends the charge to the extent of the said sum of twenty-eight pounds five shillings and sixpence sterling: *Quoad ultra* repels the reasons of suspension: Finds the letters orderly proceeded, and decerns."

The complainer reclaimed, and argued—The charge was irregular and illegal in form, in respect that it proceeded at the instance of the ward, who had been found incapable of managing his own affairs. The title was in the curator—*Scott, Petitioner*, February 21, 1856, 18 D. 624—and the diligence should proceed at his instance. An action at the instance of the ward would be incompetent; *a fortiori* therefore he had no title to proceed with diligence. It might be said that the concurrence of the curator was apparent on the face of the bond, but that would not make the ward's title to use the diligence good—*Hislop* v. *M'Ritchie's Trustees*, June 23, 1881, 8 R. (H. of L.) 95.

Argued for the respondent—The curator was appointed to act for the ward and in the ward's name—*Wills*, June 20, 1879, 6 R. 1096; *Scott's* case *supra*. He was in the position of a commissioner entitled to instruct diligence at the instance of the ward. The ward was the creditor in the bond, and therefore was the person at whose instance the charge should proceed, for the curator had made up no title to the ward's estate. In any case, the diligence, on the face of it, was practically at the instance of the *curator bonis*, as the payment was to be made to him.

At advising—

LORD PRESIDENT—The first question is of a technical quality, but is sufficiently important. It proceeds upon the terms of the charge which is the subject of the present suspension. The charge bears to be at the instance of the ward, but the debtor is called upon to make payment to Mr M'Meeken, the charger's *curator bonis*. It is admitted that it would have been competent for the curator to have stated his own instance, and with that difference to have gone on in the charge as at present, and it is contended that the use of the ward's name vitiates the charge.

The position of a *curator bonis* is not that he has transferred to him the estate of the ward, nor is the ward divested of that estate. The more accurate statement is that made by Mr Bell (Bell's Prin., sec. 2121), viz., that the ward's management of his estate is superseded in favour of the curator. Accordingly it would undoubtedly be incompetent for a person who had a *curator bonis* to charge for payment to himself, as that would be an act of management. On the other hand, because the ward is not

divested, it follows that he is the creditor, and the title is on him. Accordingly the curator has a right to make use of the title in the ward and of his name in managing his affairs, and, among other things, in charging for his debts. In theory therefore and principle the objection now made does not appear to me to be a valid objection to the charge, which shows on its face that demanding payment in the name of the ward the curator requires it to be made to himself. The point is a somewhat fine one, but I think the charge is good.

LORD ADAM—With regard to the first point, I agree with your Lordship that it turns on the question whether or not the ward is divested of his estate by the appointment of the *curator bonis*. In this case the ward's estate has not been sequestrated. If that had been done, I do not know, and it is not necessary to consider, what effect it would have had on the present question, but the estate is still vested in the ward. It appears to me that the curator is appointed to supersede the ward in the management of his estate, as it is put in the passage quoted by your Lordship from Mr Bell, and the charge here seems to me to proceed on the authority of the curator, though in form at the instance of the ward. That, I think, is quite clear on the face of the charge from the fact that it demands that payment shall be made to the curator, and I think it is sufficient for the disposal of the case.

LORD M'LAREN—I agree with your Lordships that the authority and right of a *curator bonis* is correctly defined by Mr Bell when he says that a curator is appointed to supersede the ward in the management of his affairs. The appointment of a curator does not imply that the ward is divested of his estate or deprived of his civil rights, except in so far as is inconsistent with the institorial power given to the curator. When therefore an act, such as giving a charge, is done by the ward with the consent of the curator, it does not appear to me that the recognition of a right in the ward to act with the consent of the curator is in any way inconsistent with the view that the curator is the sole administrator of the ward's estate. It must be kept in view that these appointments are made on *prima facie* evidence (usually medical certificates) pointing to permanent or temporary incapacity on the part of the ward. The proceedings are not of a continuous nature, because everything that is done is supposed to be for the benefit of the ward, and he is not to be put under disability except in so far as necessary for the protection of his estate. When it is desired to have a person declared incapable of doing any legal act, *e.g.*, making a testament, a different form of proceeding is necessary. Therefore while I do not doubt that in most cases the more convenient course is for a *curator bonis* to act in his own name, I am not prepared to say that an act done by the ward with his consent is incompetent or invalid.

On the other points in the case I concur.

LORD KINNEAR—I am of the same opinion. The first point is highly technical, but in the execution of diligence technical rules must be strictly observed, and if this objection were well founded we should be bound to give effect to it, however unsubstantial the point may be. But I agree with your Lordship, for the reasons that have been stated, that it is not well founded, because although the ward is superseded in the management of his estate, the estate is not transferred to the curator, and the ward still remains vested in the rights of creditor in the bond. But since he is superseded in the management of his estate a charge in his own name for payment to himself would be bad, not upon any technical, but on this very substantial ground, that the purpose and effect of the appointment of a curator is to disable the ward from determining for himself questions of management, such as whether a bond should be called up or not. That became a question for the curator, who was bound to act, irrespective of the ward's wishes, upon his own responsibility, and could derive no additional authority from the consent or concurrence of his ward. The ward therefore cannot charge for payment, because he has no power to grant a valid discharge. But I think that this charge discloses that it is not a charge at the instance of the ward at all, but at the instance of the curator using the ward's name, that the charge is at the ward's instance in form only, and that the curator is shown to be the real charger by his demanding payment to be made to himself. On all the other points I concur with your Lordships.

The Court adhered.

Counsel for the Complainer — Comrie Thomson — Salvesen. Agent — Thomas M'Naught, S.S.C.

Counsel for the Respondent—M'Kechnie —Dean Leslie. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, November 25.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

THE LORD ADVOCATE *v.* THE CLYDE TRUSTEES.

Crown — Title — Property — Solum of Sea Lochs — Trespass — Deposit of Dredgings.

Held that the Crown possesses a title to the *solum* of sea lochs, like Loch Long, which run up into the country, entitling it, without alleging that the public rights of navigation and fishing are being in any way interfered with, to prevent any person trespassing upon such *solum* by depositing large quantities of solid matter thereon.