interlocutor and gave decree in terms of the conclusions of the summons.

Counsel for Appellant—D.-F. Balfour, Q.C. —Salvesen. Agents—Beveridge, Sutherland, & Smith, W.S.

Counsel for Respondent—The Lord Advocate—C. S. Dickson. Agent — Andrew Wallace, Solicitor.

Saturday, December 12.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

MITCHELL & BAXTER *v.* THE BANK OF SCOTLAND AND CHEYNE (DEWAR'S CURATOR).

(*Ante*, 18 R. 90, and 28 S.L.R. 85, *affd.* H. of L. 917.)

Judicial Factor—Curator Bonis—Opposition of Lunatic to Appointment—Expenses of Opposition — Bank Cheque Granted by Lunatic—Law-Agent.

The Lord Ordinary having on 15th August appointed a *curator bonis* to a lunatic, the latter reclaimed, but the First Division on 8th November adhered to the appointment, and pending an appeal to the House of Lords authorised the *curator bonis* to extract his appointment and act thereunder. The expenses were not dealt with.

On 23rd October and 6th December the lunatic granted to his law-agents certain cheques on his bankers to cover respectively the expenses of the proceedings in the Court of Session and the House of Lords. The lunatic had also in September unsuccessfully sued the *curator bonis* and others in the Sheriff Court and Court of Session for delivery of certain securities belonging to him.

In consequence of a refusal to honour the cheques the lunatic and his law-agents raised an action against the bank and the *curator bonis* for payment thereof. The curator by note to the Court desired authority to pay the law-agents their expenses incurred before the Lord Ordinary and in the Inner House as taxed, and to advance a sum on account of expenses in the House of Lords, provided the law-agents found caution to repeat the same in the event of the House of Lords disallowing expenses.

The House of Lords meantime affirmed the decision of the Court of Session, and found the agents entitled to their expenses in that House.

Held (1) that the decision of the House of Lords carried as a consequence the expenses in the Court of Session; (2) that the expenses of the Sheriff Court action could not form a charge against the estate; (3) that the cheques were invalid, as at their date the granter had been superseded by the Court in the management of his affairs.

On 15th August 1890 Lord Kincairney, Lord Ordinary on the Bills, appointed Mr Harry Cheyne, W.S., *curator bonis* to Dr James Dewar. Dr Dewar reclaimed against this appointment to the First Division, who on 8th November adhered to the Lord Ordinary's interlocutor, and pending an appeal by Dr Dewar to the House of Lords allowed Mr Cheyne to extract his appointment and act as *curator bonis*. The First Division did not deal with the question of expenses.

On 4th September Dr Dewar raised an action in the Sheriff Court of Edinburgh against the *curator bonis* and others for delivery of all documents and papers in their possession which belonged to him. This action was dismissed, and on appeal the First Division on 8th November adhered.

Meanwhile on 23rd October and 6th December Dr Dewar granted two cheques drawn on the Bank of Scotland for £300 and £700 respectively in favour of Messrs Mitchell & Baxter, W.S., his law-agents, to meet the expenses they had incurred in opposing the appointment of a *curator bonis* in the Court of Session, and those they would incur in prosecuting the appeal to the House of Lords. These cheques the Bank of Scotland, acting on the instructions of Mr Cheyne, the *curator bonis*, declined to honour, and Dr Dewar and Messrs Mitchell & Baxter thereupon, on 13th January 1891, raised an action against the bank and Mr Cheyne for payment of the cheques.

On 24th March the Lord Ordinary (WELLWOOD) dismissed the action as irrelevant.

"*Opinion.*—The defender Mr Cheyne was appointed *curator bonis* to Dr Dewar by Lord Kincairney on 15th August 1890. The application for appointment was opposed on behalf of Dr Dewar, who was at that time in Saughton Hall Asylum, and on the appointment being made a reclaiming-note was presented on his behalf to the First Division of the Court. On 8th November 1890 the First Division adhered to the Lord Ordinary's interlocutor and refused the reclaiming-note. The curator thereafter extracted his appointment and entered on the duties of his office.

"When Dr Dewar was removed to Saughton Hall Asylum there was standing at his credit, in account with the Bank of Scotland, a considerable sum of money. After the Lord Ordinary's interlocutor, and before the case was heard in the Inner House, Messrs Mitchell & Baxter, Dr Dewar's agents, applied to Dr Dewar, who was still in confinement, for a cheque to meet expenses incurred and to be incurred in opposing the appointment, suggesting £300 as a suitable sum. Dr Dewar thereupon, on 22nd October 1890, signed the cheque for £300, which is first sued on in the summons.

"After the appointment had been confirmed by the interlocutor of the Inner House, Dr Dewar on 6th December 1890 signed a cheque for £700 (second sued on) to meet the expenses of taking the case to the House of Lords.

"This action is raised by Dr Dewar 'and Mitchell & Baxter, law-agents and conveyancers in Edinburgh, his solicitors,' to have the defenders the Bank of Scotland and Mr Cheyne ordained to make payment to the pursuers of the two sums of £300 and £700 contained in the said two cheques, together with the expenses of protesting and noting the cheques. The summons does not contain any alternative conclusions for damages, or for payment to Messrs Mitchell & Baxter of money properly and necessarily expended by them for Dr Dewar. It is framed, no doubt advisedly, on the footing that Dr Dewar was capable of granting the cheques, and that on presentation they operated as an assignation of the sums contained in them in favour of the holders Mitchell & Baxter—Bills of Exchange Act 1882, sec. 53.

"It was at first contended for the pursuers that it must be held that Dr Dewar not having been cognosced, was and is capable of managing his own affairs, or at least that it must be so held until it is finally decided by the Court of last resort that he is not. It was maintained that it lies upon any person denying his capacity to contract or dispose of his means to prove this in each case before a jury. I am unable to take this view. I am of opinion that although the appointment of a *curator bonis* is not permanent in this sense that it falls on the nearest agnate coming forward and claiming the office of tutor, or on the reconvalescence of the ward, it has while it lasts the same effect as cognition following on a brieve from Chancery and the verdict of a jury in so far as regards the ward's estate. Now, the effect of cognition is, that until a declarator of reconvalescence is brought, it is conclusive of the incapacity of the lunatic during the period which the verdict covers. It was keenly maintained in the case of *Bryce* v. *Graham*, 6 Sh. 428, *affd.* 3 W. & S. 323, that it was beyond the powers of the Court, without proceeding on the verdict of a jury, to deprive a man of the management of his own affairs, but it was solemnly decided by the House of Lords, after a remit to the Court of Session (the proceedings in which are reported in 6 Sh. 425), that in respect of a practice of above 100 years such appointments are competent. The effect of an appointment by the Court of a *curator bonis* is, therefore, as regards the estate while it lasts, practically the same as cognition following upon a verdict of a jury—that is to say, the ward is held to be as incapable as a pupil of alone managing his own affairs or disposing of his property.

"I am therefore of opinion that the effect of the judgment of the Court was to establish that at the dates when the cheques were granted Dr Dewar was incapable of effectually dealing with his means and estate. Therefore the bank and the *curator bonis* are relieved of the burden which would otherwise have been upon them to prove Dr Dewar's incapacity by other evidence. Any other view would lead to the result that it would be possible for a person of unsound mind, pending appeal from Court to Court, to dispose of the whole of his estate, and thus defeat the very object of the appointment of a *curator bonis*.

"In the concluding argument for the pursuers it was strongly urged that at least the pursuers are entitled in this process to prove that the sums sued for were in whole or part properly and necessarily expended for behoof of Dr Dewar, and that they are entitled to recover such sums as may have been instructed to have been properly expended, from the *curator bonis*. If this had been practicable, I should have been glad to utilise the action for such a purpose. But the defenders do not consent to this course, and I cannot in the absence of consent adopt it. In the first place, the action is framed upon another footing. Dr Dewar himself is made the leading pursuer, and the action is laid on the cheques alone. As I have indicated, this shape of action was no doubt intentionally adopted for this reason, that the cheques were not granted exclusively for expenses already incurred, but also in great part for expenses to be incurred in carrying the opposition further; and therefore the action, at least in so far as regards the sum of £700, could not have been laid on the footing of disbursements and expenses already made and incurred on behalf of the ward. There was also, perhaps, this consideration, that if the cheques are good no question as to the amount expended or required need arise. The bank must pay to the extent of the funds in their hands.

"I therefore feel that I have no alternative but to dismiss the action. A *curator bonis* having now been appointed, who is administering the ward's estate, the proper course is to apply to him for repayment of past expenses, and an advance of any further expenses which may be required to prosecute the defence. If he does not think fit to pay at his own hand, or to apply for special powers to the Court, it is open to the pursuers themselves to apply to the Court for special powers or instructions to the *curator bonis* to repay or advance the necessary funds. I think it right to say that I have little doubt that on proper application being made to the Court the *curator bonis* will be empowered or ordered to pay out of the ward's funds the proper expenses connected with his opposition to the application for appointment in this Court. An advance to meet the expenses of an appeal to the House of Lords is in a different position; that will be a matter for the equitable consideration of the Court, having regard to the whole circumstances of the case with which they are familiar. No doubt in disposing of the application they will give due weight to the serious importance of the question to Dr Dewar, the conflict of medical opinion, and the fact that Dr Dewar's estate, out of which the expenses must come, is so substantial."

The *curator bonis* thereafter on 9th June presented a note to the Junior Lord Ordinary for authority to pay the expenses Messrs Mitchell & Baxter had incurred in opposing his appointment

before the Lord Ordinary and in the Inner House, as taxed, and also to advance a sum on account of the expenses they might incur in carrying on the appeal in the House of Lords, provided they found caution to repeat the latter sum if the House of Lords refused to allow them their expenses.

Meanwhile on 25th June the House of Lords affirmed the decision of the Court of Session, and found Messrs Mitchell & Baxter entitled to their expenses in that House.

Dr Dewar and Messrs Mitchell & Baxter reclaimed against Lord Wellwood's interlocutor in the action on the cheques, and the Junior Lord Ordinary, on the motion of the *curator bonis*, reported his note to the First Division so that it might be heard together with the reclaiming-note.

Argued for the curator—The expenses in opposing the curator's appointment should alone be allowed. The Sheriff Court action was unnecessary for that purpose, and could not be made a charge on the ward's estate. The Lord Ordinary had decided rightly in the action for payment of the cheques. The pursuers had never presented any account of their expenses to the curator, but had sued on the cheques. Dr Dewar was precluded from signing cheques after the curator's appointment, for a man under curatory was in the same position as one cognosced—*Bryce* v. *Graham*, H. of L., 3 W. & S. 323.

The Bank of Scotland adopted the curator's argument in the action for payment of the cheques.

Argued for Messrs Mitchell & Baxter—The expenses in the Court of Session followed as a necessary consequence of the finding in the House of Lords. The other proceedings were of importance and in view of the extreme difficulty of the law agents' position they were entitled to their expenses. The law as to a lunatic had undergone modification, and expenses incurred on his behalf should be allowed—*Rhodes* v. *Rhodes*, L. R., 44 Chan. Div. 94, and *Wentworth* v. *Tubb*, 2 Younge & Collier's Ch. Rep. 537. As it was competent for him to oppose the curator's appointment, he could grant cheques for conducting that opposition.

At advising—

LORD PRESIDENT—This note deals with the expenses incurred in proceedings before the Lord Ordinary and here with reference to the appointment of the curator. I am of opinion that the decision of the House of Lords, in dealing with the expenses in that House, carries with it as a necessary consequence that the expenses of opposition in this Court are to be dealt with in the same way.

As regards the action under the reclaiming-note at the instance of Dr Dewar and Messrs Mitchell & Baxter to enforce payment of the two cheques, it is important to observe that the first cheque is dated after the Lord Ordinary's appointment of a curator, and the second cheque is dated after the interlocutor of this Division refusing a reclaiming-note. This action was raised on 13th January 1891 after interim extract of the curator's appointment had been allowed to go out. Now, were these expenses incurred for the benefit of the ward's estate, *i.e.*, could the action have succeeded? The cases quoted by Mr Smith deal with necessaries supplied to a ward, and have not much bearing on this case. We have to deal with a more specific legal problem, as to the taking of a document of debt from a person whom the Court have superseded in the management of his estate. This action should never have been brought, and consequently the ward's estate cannot bear the expenses of it. I am therefore for finding Messrs Mitchell & Baxter liable in the expenses in the action brought to recover the value on the cheques.

In the Sheriff Court action I am of the same opinion. Any question as to where the documents should be was alone competent to the curator and the Court, and for the ward and Messrs Mitchell & Baxter to go to the Sheriff was to assert that the lunatic was *dominus* of his own affairs.

LORD ADAM—I should have thought that the proper time for disposing of the expenses incurred in opposing the curator's appointment in this Court would have been when the matter was fully before the Court. We are told the practice is otherwise, and that there was consequently no finding as to expenses when the appointment was made. I concur that as the House of Lords thought right to allow the expenses of the opposition in that House, it is *a fortiori* that the expenses of the opposition here should be allowed. In the Sheriff Court action expenses cannot be allowed as a charge on the estate. If any proceedings had been thought necessary, the proper course would have been to have made a motion in the petition, when it would have been at once disposed of. In the action on the cheques I concur. The action was unfounded. The pursuers ought to have gone to the curator, and they would then have received payment of their just expenses. They, however, rendered no account to him, and as there was no hope of their succeeding in this action, the expenses of it cannot be paid out of the ward's estate.

LORD M'LAREN—It often happens in the case of persons with property to manage, and afflicted with disease affecting that capacity, that a diversity of opinion exists whether it is expedient that others should have the management of their affairs. When this exists, or the afflicted person has capacity sufficient to give instructions to agents to oppose, it is right for the Lord Ordinary to make a remit to skilled men of his own selection, instead of merely accepting medical certificates, and in that case the Court would be ready to consider and allow the expenses of opposition. But when a judgment has been given by a judge of first instance the presumption is changed, and a reclaiming-note is in a different

position, and depends on the circumstances of the case. Here, as the House of Lords have allowed the expenses of both parties to be charged against the estate, it follows that those incurred here must be so allowed. If that had not been so, I might myself have had doubts whether this action should have gone beyond the Lord Ordinary.

On the other two actions I concur with your Lordships. These proceedings were not justified, and cannot be charged on the ward's estate.

LORD KINNEAR concurred.

The Court found Messrs Mitchell & Baxter entitled to their expenses in opposing the appointment of the *curator bonis* in the Court of Session, but refused the reclaiming-note in the action at their instance against the Bank of Scotland and the *curator bonis*, and found them liable in the expenses of it.

Counsel for Messrs Mitchell & Baxter—Guthrie Smith—C. K. Mackenzie. Agents—Parties.

Counsel for the *Curator Bonis*—H. Johnston. Agents Stuart & Stuart, W.S.

Counsel for the Bank of Scotland—Pitman. Agents—Tods, Murray, & Jamieson, W.S.

Wednesday, December 16.

FIRST DIVISION.

[Lord Low, Ordinary.

BIRNIE AND OTHERS *v.* PENNY AND OTHERS.

Intestate Moveable Succession—Executor Making Agreement Adverse to Interest of Executry Estate—Removal of Executor—Judicial Factor.

The majority of certain executrices-dative, in consideration of a sum of money, agreed to take measures to vest the executry estate in a person who alleged herself to be the widow of the deceased intestate. The minority of the executrices and certain other relatives of the deceased denied that the alleged widow was entitled to that character, and an action of multiplepoinding had already been raised to have part of the moveable estate distributed at sight of the Court. The objectors further alleged that a large portion of the executry estate was still to be ingathered.

Held that as the majority of the executrices had agreed to use their powers adversely to the general interests of the executry estate, the administration thereof could not be left in their hands, and a judicial factor *appointed.*

Andrew Penny, a native of Scotland, died intestate on 18th May 1890 at Huanchaca in South America, leaving considerable heritable and moveable estate in Scotland and Bolivia.

Senora Maria Galindo de Penny obtained the administration of his estates in Bolivia from the Courts there. She averred that she was the widow of Andrew Penny, that he died a domiciled Bolivian, and that by the laws of that country she was entitled to the heritable estate there, and the whole moveable estate wherever situated.

The four sisters of Andrew Penny—Mrs Birnie, Mrs Christie, Mrs Mennie, and Mrs M'Intosh (who subsequently died)—were on 10th October 1890 decerned executrices-datives *qua* four of the next-of-kin. They denied the averment of Senora Maria Galindo de Penny both as to the marriage and as to the domicile of Andrew Penny, which they maintained had remained a Scottish domicile.

A large portion of the moveable estate in Great Britain consisted of a sum of £36,636, 7s. 9d., the proceeds of mineral ores consigned for sale by Andrew Penny during his lifetime, and which was in the hands of Messrs Gibbs & Sons, his London agents.

This sum the executrices claimed, and Messrs Gibbs & Sons thereupon raised an action of multiplepoinding, calling the executrices and Senora Maria Galindo de Penny as defenders, and consigned the fund *in medio* into the hands of the Court of Session.

On 20th August 1891 Senora Maria Galindo de Penny was married to William Craik, a Scotsman, and on 12th September 1891 he, as in right of his wife's whole estate under their marriage-contract, entered into an agreement with the agents of Mrs Christie and Mrs Mennie, by which they, as executrices and beneficiaries, withdrew their denial of the marriage of the late Andrew Penny, and agreed to accept £25,000 as in full of the claims of the next-of-kin.

The fourth article of the agreement was in the following terms—"Fourth. To enable the said first party (Craik) to be vested in the foresaid personal estate *quam primum*, the second parties bind and oblige their constituents (the said Mrs M'Intosh's trustees being bound only to the extent foresaid) to procure and deliver to the first party the necessary decree and authority of the Court of Session for his uplifting the sum consigned by the pursuers and real raisers in the said action of multiplepoinding, and also all assignations, conveyances, or transfers necessary for vesting in him the remainder of the personal or moveable estate belonging to the said deceased Andrew Penny; and in the event of the said Mrs Catherine Penny or Birnie not becoming a consenter to this agreement, the second parties bind their constituents as aforesaid to adopt and pursue all such competent judicial steps as the first party may direct, with the object of effectuating this agreement and arrangement."

Shortly afterwards Mrs Christie and Mrs Mennie raised an action in the Sheriff Court at Aberdeen against the agents of the executry for delivery of all papers connected therewith.

Mrs Birnie, who had refused to accede to