there has been possession according to the contention of the appellant.

My Lords, my opinion entirely concurs with that of the learned Lord Ordinary. I do not detain your Lordships longer, because I adopt in its integrity, both in result and in argument, the opinion of the learned Lord Kinnear, whose interlocutor has been appealed to the First Division and reversed there, and will also be reversed in your Lordships' House.

Their Lordships affirmed the interlocutor and dismissed the appeal with costs.

Counsel for the Appellant—Sir C. Pearson, Q.C., Sol.-Gen. for Scotland—W. C. Smith. Agents—John Graham, for Menzies, Black, & Menzies, W.S.

Counsel for the Respondents—The Lord Advocate—H. Johnston. Agents—Loch & Goodhart, for Mackenzie & Kermack, W.S.

Thursday, June 25.

(Before Lords Herschell, Watson, and Morris.)

DEWAR *v.* DEWAR.

(*Ante*, November 8, 1890, 28 S.L.R. p. 85, and 18 R. 90.)

Incapacity — Partial Insanity — Curator Bonis—Appointment on Petition—Opposition of Alleged Lunatic—Necessity of Cognition—No Absolute Title to Cognition.

In a petition at the instance of a wife for the appointment of a *curator bonis* to her husband, who was a medical man of considerable property, and at the time was confined in an asylum under warrant of the sheriff, it was proved by medical certificates that the husband had a clear and intelligent comprehension of business matters, and in particular of his own financial affairs, but that he suffered from delusions with regard to spiritualism, and entertained groundless feelings of mistrust regarding members of his own family, which might affect the propriety of his directions respecting the management of his own property.

Held (*aff.* the decision of the First Division) (1) that the Court of Session had jurisdiction to entertain the petition; (2) that in spite of opposition, the Court had discretion to determine the nature of the inquiry to be made; and (3) that the certificates produced were sufficient to justify the Court in appointing a *curator bonis*.

This case is reported *ante*, vol. xxviii. p. 85, and 18 R. 90.

The respondent in the Court of Session appealed.

At delivering judgment—

LORD HERSCHELL—My Lords, this is an appeal from a judgment of the Court of Session affirming an appointment made by the Lord Ordinary of a *curator bonis* in the case of the appellant, who at that time was under detention in an asylum as a person of unsound mind. He was so detained in conformity with the law, by reason of the certificates which were given by two medical men with reference to his mental condition. He being thus under confinement as a person of unsound mind, an application was made by his wife for the appointment by the Court of a *curator bonis*. The appellant opposed any such appointment being made, and those who were acting for him, after putting before the Court the certificates which had been given by various medical gentlemen, to whom I will refer in a moment, "submitted his case to the consideration of the Court" and prayed that "after making such further inquiry as shall appear to the Court to be necessary or desirable in the circumstances, the Court, in the event of considering it necessary that a *curator bonis* should be appointed to the respondent, may be pleased to appoint such person as the Court in its wisdom may select." And then objection is taken to the appointment of the person whose name had been suggested by the petitioner.

Now, my Lords, it appears that on the 20th of May of last year, the appellant, having been confined in the lunatic asylum in the month of April, was examined by two medical men, Dr Stewart and Dr Watson, and that they gave this certificate —"While we should not recommend it as safe that Dr Dewar should be relieved from a restraint which has acted most beneficially in favouring recovery, and is, we believe, fitted to secure the best prospect of ultimate restoration to health, we feel it impossible at the present moment, from facts observed by ourselves, to grant a certificate for the appointment of a *curator bonis*. What we do recommend is delay; and we beg to advise that after the lapse of a month or six weeks a further examination of Dr Dewar should be held for the purpose of deciding upon the necessity of appointing a curatory."

A few days after that, a little more than a week, Dr Dewar was examined by two other medical men, Dr Balfour and Dr Littlejohn—the one on the 28th of May, and the other on the 31st. On the 28th of May Dr Balfour certified that he had "seen and examined" Dr Dewar, and was "of opinion that he is of unsound mind and incapable of managing his own affairs or of directing their management." And on the 31st of May a similar certificate was given by Dr Littlejohn.

My Lords, if the matter had rested only on those certificates it might have been open to some possible question, regarded from a medical point of view, whether Dr Dewar was incapable of managing his affairs, by reason of the terms of the certificates given in the first instance by Dr Stewart and Dr Watson. But naturally enough those who were acting for Dr Dewar as his law agents secured the services of two medical gentlemen in whom Dr

Dewar had confidence (I rather think one of them was named by himself), namely, Dr Clouston and Dr Byrom Bramwell. They, on behalf of the appellant, made an examination of his condition with a view to expressing their opinion as to whether he was or was not capable of managing his affairs, and they came to the conclusion which is thus expressed—"We found him coherent and acute in regard to business matters. His memory seemed to be good with regard to everything except the events of the morning of the 3rd of April last; but taking into account the whole of the facts elicited at our prolonged examination of his mental condition, we feel unable to give a certificate that he is yet fit to manage his affairs or to give directions for their management."

Now, my Lords, it appears to me that anything more calculated to produce in the mind of anyone the conviction that this gentleman was incapable of managing his affairs it is impossible to conceive. That two medical men visiting him at the instance of his law agents, and at his own instance, with the view of, if possible (for, of course, they would understand that to be the object of their visit), certifying that he was capable of managing his own affairs, should feel themselves unable to give such a certificate, shows that the conclusion arrived at by those who had examined him on behalf of the petitioner was not a conclusion which resulted merely from bias or prejudice in their minds, or from any want of skill, but was a conclusion which those selected by himself or his advisers felt themselves unable to controvert.

My Lords, the matter does not rest there, because the appellant was also examined by three other medical men at his own instance or the instance of his advisers. Dr Howden and Dr Ferguson saw him in the month of November 1890. I need not trouble your Lordships with the detail of the statement which they make, which is of considerable length, but in that statement they detail a conversation which they had had with him, which indicated that he was under the belief that for many years those about him had been attempting to poison him with arsenic. "He stated that he had frequently seen a suspicious white powder in the doses of Epsom salts he was in the habit of taking, that he tasted arsenic in his tea, that he had overheard some remarks about the drug in his house, and that he believed someone was procuring it from a firm who advertised neuralgic pills. As proof of the last supposition he had found the cover of a journal in which the pills in question were advertised. Inside the cover there were two pieces of red silk. When asked to explain what connection the silk had with the arsenic" (a very natural question, of course, for one medical man to put to another medical man) "he said he believed that the pieces of silk had contained arsenic, and that he regarded them as important links in the chain of suspicion. When asked to name the person whom he suspected of obtaining the poison he declined to do so." The conclusion which these gentlemen state is that he was "of unsound mind, that if at large he might be dangerous to the persons who are the object of his suspicions, and that the nature of his delusions unfits him to treat with fairness the members of his own family and household, and renders him liable to be biassed in a similar manner against others; (third) that, nevertheless, he is capable of clearly appreciating his worldly interests in many ways; (fourth) that if management of his affairs includes a just and natural regard to the interests of his family, we do not consider he is worthy of being entrusted with their management; but (fifth) that we are not prepared to say that his mental condition, as ascertained by us, incapacitates him from administering his affairs in other respects"—which obviously means that he is, in their opinion, suffering from insane delusions which might affect the disposal by him of his property, and might lead him to employ it in a manner in which he would not employ it if he were sane; that is to say, he might dissipate it upon objects on which if he were sane he would not desire to spend it.

On the 7th of November 1890 he was examined by Dr Yellowlees, who had an interview with him lasting over two and a-half hours, and he says—"I believe that Dr Dewar is conversant with his business affairs and investments, and that he could give directions concerning them, but such directions would be influenced or swayed or determined by the presence of delusions as to relatives or others conspiring against him and desiring to injure him, and might be influenced by insane ideas as to spiritualism and its devotees, supposing Dr Dewar to entertain such delusions and ideas."

Now, my Lords, those were the opinions which were before the Court. It appears to me that if the Lord Ordinary was justified in being guided by the expression of medical opinion it is difficult to conceive a stronger case justifying the conclusion that it was proper not to leave Dr Dewar in the management of his own affairs, but to appoint, during the period for which his insanity should continue, a *curator bonis*. My Lords, when the matter came before the Lord Ordinary, notwithstanding these medical opinions he determined not to act upon them alone. The later opinions which I have read were, I think, given after the date of the Lord Ordinary's judgment; they were before the Inner House but not before the Lord Ordinary. But the Lord Ordinary not being satisfied to act upon the medical opinions which were before him, remitted the case to Sir Arthur Mitchell, who I believe (it is so stated by Lord M'Laren) fills the office of Chief Commissioner in Lunacy, to report to him upon the subject. About the competency and the high character of Sir Arthur Mitchell there cannot be a question. Sir Arthur Mitchell accordingly reported to the Lord Ordinary that in his opinion the present appellant was "of unsound mind," and that in consequence of this "he was incapable of managing or of giving direc-

tions for the management of his affairs." Sir Arthur Mitchell states that he "arrived at this opinion without hesitation or difficulty." My Lords, I understand that to mean that in his opinion his unsoundness of mind was of such a character that he was incapable of managing or giving directions for the management of his affairs. The Lord Ordinary was not left merely to a consideration of the terms of that written opinion, because he had a personal interview with Sir Arthur Mitchell, and learned from Sir Arthur Mitchell that in his opinion Dr Dewar was "subject to delusions related to what is known as spiritualism, of such a nature as to render him quite an unsafe guardian of his own property, and which might render him liable to be very readily imposed on by designing people who were aware of his weakness." The Lord Ordinary adds—"He entertains besides, Sir Arthur informs me, feelings of mistrust towards his family which cannot be altogether disregarded."

Now, my Lords, that was the information which the Court possessed. If it was open to the Lord Ordinary and the Inner House to exercise their discretion, relying upon the information afforded by these medical opinions and the report of Sir Arthur Mitchell on the remit to him, I do not think it can be doubted for a moment that the conclusion at which they arrived in their discretion cannot possibly be questioned—no ground for questioning it has been made out. There was really no conflict of opinion in this case between the medical men who were consulted. Those consulted on behalf of the appellant were manifestly as fully persuaded as those consulted by the petitioner that it was a case in which it was not expedient that he should be left to manage his affairs.

But then it was argued on behalf of the appellant, first of all, that there was an absolute right in such a case as this, where the appointment of a curator was opposed, to have a cognition and an investigation by a jury, and that only after a finding by a jury could he be deprived of the management of his affairs. My Lords, I think it is impossible so to maintain after the judgment of this House in the case of *Bryce* v. *Graham*, 1828, 3 W. & S. 323. That was a case where a curator of an admittedly insane person had been appointed, and it was alleged that he was at that time convalescent, and sought on that ground to get rid of the curator. The Court there remitted to the Sheriff-Depute to make certain inquiries. I shall have occasion to deal with the terms of that remit presently—it is unnecessary to go into them for the moment; but notwithstanding that inquiry by the Sheriff, it had been contended before your Lordships' House that there was an absolute right to a cognition and to the verdict of a jury upon the question then at issue. Lord Eldon, influenced by the English practice, appears at first to have been disposed to entertain that view, but after learning what had been the practice of the Court of Session he thus expressed himself—"When this cause was heard, it was thought necessary by this House to desire the Court of Session to consider whether they could take this course according to their law, or whether there was not a necessity for a cognition to issue in order to have the finding of a jury on the case. My Lords, we have since received the answer to that question so propounded by your Lordships, and that is, that the Court have been in the habit of proceeding in this course for a very long period of years, for so long a period that I do not think it is proper to advise your Lordships to hold that this is not a legal proceeding on their part." Now, my Lords, that I take to be an absolutely unequivocal decision of this House that there is no such right to a cognition as has been contended for here, and that the Court can without any such cognition deal with the question of the appointment of a *curator bonis* in the case of a lunatic.

But then it was contended on behalf of the appellant that even if there be not the absolute right to a cognition contended for, yet the Court can only appoint a curator after a judicial inquiry, that is to say, after evidence has been taken in the ordinary way upon oath with the opportunity of cross-examination by the opposing party—I do not mean to say that it was contended that this must be done in every case. It was admitted that in many cases a curator was appointed without such an inquiry, but the argument was, that in every opposed case where the alleged lunatic was objecting to the appointment of a curator, the appointment of a curator could only be made after a judicial inquiry. Some reliance was placed by the learned counsel, for the purpose of supporting that argument, upon the course taken in the case of *Bryce* v. *Graham* to which I have just alluded. It is quite true that in that case the Court remitted to the Sheriff-Depute "to inquire concerning the condition of intellect and state of faculties of the petitioner James Bryce, and his abilities to manage and conduct his own affairs," and they authorised and directed the Sheriff "to proceed to the inquiry by personal visitation of and intercourse with the said James Bryce at various times, and without previous warning or concert, as also by examination upon oath of such witnesses suggested by either party who had sufficient cause of knowledge respecting the premises, and likewise by the opinion of medical persons named by the Sheriff to visit him;" and they then ordained the Sheriff "to report his opinion on the said matters to the said Lords." But, as I understand, such a remit to the Sheriff was a course taken by the Court only for the purpose of informing their own minds and enabling them to decide, after receiving that report, what was in their judgment the proper course to be pursued. It was not a remit to the Sheriff to try the case. Whatever conclusion had been arrived at by the Sheriff, as I understand, it would have been open to the Court to disregard it, and notwithstanding the opinion of the Sheriff that a curator

ought or ought not to be appointed, the Court might have come to the very opposite conclusion. It was only for the purpose of assisting them to form a judgment that the remit was made. Now, my Lords, I do not understand that remit to have been made in a form which can be regarded as a precedent universally to be followed and applicable to every kind of case. In that particular case it was considered by the Court, having regard to circumstances, to be a proper form of remit, but I do not consider it either to have decided that in every case a remit to the Sheriff was necessary, or that if there were such a remit that was the proper form.

My Lords, I think the contrary is proved by the authorities. In the case of *Gordon* v. *Gunn*, 11 S. 235, which was also a question as to the appointment of a *curator bonis*, and where there was a remit to the Sheriff, the remit was in these terms—"To inquire concerning the condition of intellect and state of the faculties of Mr John Gordon of Swiney, and his abilities to manage and conduct his own affairs, and with power to examine medical men and witnesses on the subject, and to report." Now, the power is no doubt given to examine witnesses as well as to examine the alleged lunatic himself, and to examine medical men, but no obligation is imposed on the Sheriff, nor is any direction given, as I understand, to the Sheriff to do so, as was given in the case of *Bryce* v. *Graham*, where he was not only empowered but was in terms directed to do so. Here all I can find is that power was given to him to examine medical men and other witnesses on the subject.

My Lords, the case does not stop there, because in *Dewar* v. *Dewar*, 12 S. 315, which is a later case, the Court made a remit to the Sheriff-Substitute "to inquire as to the facts and circumstances alleged by the parties, and report whether in his opinion it was necessary or expedient for the protection of the respondent to appoint a judicial factor or factors or curator or curators *bonis*." "The Sheriff-Substitute having personally visited the respondent, and made due inquiry otherwise, returned the following report." I need not trouble your Lordships with the terms of that report. It is manifest that in that case the appointment neither directed him to examine witnesses, nor did he take proof as upon a judicial inquiry, but he made his report to the Court, and then the Court were in a position to act after receiving the information which he supplied to them. Now, that case seems to me to be a distinct authority against the proposition contended for by the learned counsel for the appellant, because it is obvious that if in every case where there is opposition there is the right to a judicial inquiry either by the Court itself or by a remit to the Sheriff, the Court neglected its duty in that case by not making the judicial inquiry which it is contended must in all cases be made.

Therefore, my Lords, I confess it appears to me that so far as authority goes, there is no authority for the proposition that in every case the Court is bound to make a judicial inquiry, or to remit the case to the Sheriff in order that he may do so. And it seems to me that there is authority for the course being taken which was taken in the present case, for in *Forsyth* v. *Forsyth*, 24 D. 1435, the Court made a remit to two men of skill in order to have the advantage of their opinion upon the subject. In the present case a remit was made by the Lord Ordinary to Sir Arthur Mitchell, a man, as I have said, highly competent to fulfil such a function, and the Court had the advantage of his report before arriving at any conclusion. Therefore, my Lords, there appears to me to be no authority justifying the assertion that the Court can only act by taking proof itself or having proof taken before the Sheriff. There is authority for the proposition that the Court may act, and has been in the habit of acting, upon a remit to a medical man or medical men of skill to assist it in forming its conclusion. But all these authorities together leave, without any doubt, the impression upon my mind that in every one of these cases it is for the Court to form its own conclusion, and it is for the Court to determine in its discretion what assistance it will obtain towards forming that conclusion. That assistance has been of a different character in different cases, but whatever its character has been, whether in the way of proof before the Sheriff or not, it appears to me only to have been such assistance as the Court thought right to acquire in order to enable it to come to a conclusion as to how the discretion reposed in it ought to be exercised.

My Lords, if that be so, I think it disposes of the whole of the contentions which have been put before your Lordships on behalf of the appellant, and it shows the course taken in this case to have been correct. I therefore move your Lordships to affirm this judgment, and to dismiss the appeal.

LORD WATSON—My Lords, I cannot say that I have anything to add to the statement of this case which has been made by my noble and learned friend. To anyone conversant with the law and practice of Scotland, this must, in my opinion, appear to be a most groundless appeal. I think there can be no doubt whatever, in the first place, that the Court of Session had jurisdiction to entertain the application made to it in its present form; in the second place, that notwithstanding the appearance of the present appellant to oppose its prayer being granted, it was a matter entirely within the discretion of the Court to determine what inquiry was necessary for the purpose of enlightening them as to the capacity or incapacity of the appellant to manage his own affairs at the time; and in the third place, I think it equally clear that the certificates of the medical men which were produced were quite sufficient to justify the Court in taking the course which they did take, and making the appointment without further inquiry.

LORD MORRIS concurred.

Their Lordships affirmed the judgment appealed from and dismissed the appeal.

Counsel for the Appellant—Rigby, Q.C.—J. Guthrie Smith—Haldane, Q.C.—Birrell. Agents—Keeping & Gloag, for Mitchell & Baxter, W.S.

Counsel for the Respondent—Sir Horace Davey, Q.C.—Graham Murray. Agents—Grahames, Currey, & Spens, for Tods, Murray, & Jamieson, W.S.

Thursday, July 2.

(Before the Earl of Selborne and Lords Watson, Bramwell, Macnaghten, and Morris.)

NORTH BRITISH RAILWAY COMPANY *v.* WOOD.

(*Ante*, vol. xxviii. p. 130.)

Reparation—Railway Accident—Nervous Shock — Document Discharging All Claims—Consideration Inadequate.

A person was injured in a railway accident. Nine days after he accepted £27 from the railway company, and granted a discharge "in full of all claims competent to him in respect of injury and loss sustained." Eighteen months afterwards he brought an action for damages against the railway company, who pleaded that the action was barred by the discharge. After a proof, the Lord Ordinary awarded the pursuer £500 as damages. This award was affirmed by the Second Division, on the ground that it was a reasonable sum.

Held that the document was in terms a final discharge, and that there was no evidence to support the contention of the pursuer that he did not understand the document as a final discharge, or that he had told the representative of the railway company that if he did not recover he would still hold them liable.

This case is reported *ante*, vol. xxviii. p. 130.

The North British Railway Company appealed.

At delivering judgment—

EARL OF SELBORNE—I think all your Lordships are likely in this case to agree that the judgment appealed from cannot be maintained. One always feels a certain degree of compassion for persons who have suffered injuries of this description if it turns out that the compensation which they have been content to receive is apparently inadequate to the amount of the injury, but I cannot think, my Lords, that this is a proper ground on which to proceed if the parties have really and *bona fide* come to an accord and satisfaction with each other. I cannot help thinking that the consideration of the apparent inadequacy subsequently ascertained of the remuneration had very considerable weight with the Court of Session. In one of the judgments (Lord Young's I think) it is very prominently put forward, but with the greatest respect to that learned judge and to the others who may have concurred in that view, I cannot bring myself to adopt it. I think we must look at the circumstances as they stood at the time.

Now, the first question is a question of principle. Was there anything in the relation of these parties and in the nature of the question which they had to settle which precluded them or precluded the company from making a settlement at the time when it was done without assuring themselves that the pursuer had advice and assistance of a character which is not shown to have been had by him? There was no relation of influence or of confidence between the parties; they were certainly at arm's length. It was simply the case of a man having a cause of action for damages in respect of personal injury against those with whom he had entered into the contract which always subsists between persons travelling by railway and the railway company as carriers, and so long as there was nothing in the circumstances known to the company or in their conduct to give them an undue advantage of which they improperly availed themselves, I cannot think that parties so at arm's length are disabled by law from settling without litigation, and without going through any preliminaries for the purpose of ascertaining that each party is sufficiently informed as to the injuries. I cannot think that there is anything in the law to prevent them from making such a settlement; and it is fair to remember that while on the one hand the railway company offers compensation, and may offer what may turn out to be too little, on the other hand the party injured not infrequently over-estimates his injury, and asks a great deal more than he is fairly entitled to.

Well, then, we must look at the circumstances as they stood. There had been an accident of a peculiar kind, which in point of fact had inflicted no external injury. Whatever injury there might be latent in the case was either upon the nerves arising from the shock of the accident, or consisted in some internal effect upon the bodily system not at the time known to or discoverable by either party. In that respect it seems to me that the reports of Dr Watson are of importance. They show that he had more than once visited the patient and had discovered nothing more than that.

If he had told the company this was a case of a certain kind involving a permanent disability, it may be that the company having received that information, would have been acting in a manner not becoming them in keeping it back and taking advantage of that knowledge to obtain a settlement which under those circumstances might reasonably have been said to be too favourable to themselves. But there