were, according to the practice in the Courts of Scotland, founded in some degree on the civil law, but carried much further than the civil law, to pay rent for the land they so held and enjoyed. With that simple alteration, I should propose that that be the judgment of your Lordships. July 22. 1828.

Appellant's Authorities.—2. Stair, 1. 22. and 23.; 2. Ersk. 1. 21. 25. 35.; 4. Ersk. 2. 34. and 35. and 3. 5. 10.; 4. Bank. 45. 104.; 1. Stair, 9. 15. and 2. 12. 7.; 1. Bank. 8. 12.; Fonblanque on Equity, 2. 151.; Grant, Nov. 16. 1663, (1743.); Cardross, Jan. 3. 1711, (1747. and Rob. Appeal Cases, 37.); Rutherfurd, June 20. 1722, (1770.); Agnew, July 15. 1746, (1732.); York Building Company, March 8. 1793, and May 13. 1795, (13,367.); 6. Stair, 20, 21.; 6. Ersk. 1. 22.; 1584, c. 3.; 1621, c. 7.; 1663, c. 10.; 1681, c. 19.; 1695, c. 6.; 1. Ersk. 7. 38. and 41.; 1. Stair, 6. 44.; Thomson, July 3. 1781, (8985.); Cod. 5. tit. 71. § 16.; Cuningham, Feb. 19. 1635, (1738.); Gray, Feb. 23. 1672, (1755.); Milne, July 19. 1715, (1759.); Oliphant, Nov. 30. 1790, (1721.); Wedgewood, June 13. 1820, (not reported); Duke of Athole, June 20. 1822, (1. Shaw and Ballantine, No. 560.); Maberly, March 11. 1826, (4. Shaw and Dunlop, No. 362.); Wilson Bowman, March 29. 1802, (No. 4. App. Bona and Mala Fides).

Respondents' Authorities.—50. Dig. 16. 109.; 1. Stair, 7. 12.; 2. Stair, 1. 23. and 24.; 1. Bank. 8. 12. and 13.; 2. Ersk. 1. 25.; 4. Stair, 40. 21.; 1621, c. 18.; Mackenzie, July 1. 1752, (7443.); Bonny, July 30. 1760, (1728.); Grant, Feb. 9. 1765, (1760.); Lane, Jan. 17. 1782, (5179.); 4. Ersk. 1. 22.; Campbell's Executor, Nov. 20. 1815, (F. C.); 1. Stair, 6. 44.; 1. Bank. 7. 44.; 1. Ersk. 7. 34. and 41.; Lawrie, June 21. 1769, (1764.); Jackson, July 5. 1811, (F. C.); Duke of Roxburghe, Feb. 17. 1815, (F. C.); Turner, March 3. 1820, (F. C.); Potts, May 30. 1822, (1. Shaw and Ballantine, No. 499.; and 2. Shaw's Appeal Cases, 181.); Queensberry Cases, (2. Shaw's Appeal Cases, p. 43.); Moir, June 16. 1826, (4. Shaw and Dunlop, No. 438.)

J. FRASER—SPOTTISWOODE and ROBERTSON,—Solicitors.

JAMES BRYCE, JOHN DICKSON, and Others, *Appellants.* No. 16.

WALTER GRAHAM, *Respondent.*

Idiotry and Furiosity—Interdiction—Expenses—Law-Agent.—The Court of Session having appointed a curator bonis to a party alleged to be fatuous; and, on an application by him and his interdictors, (one of whom acted as his law-agent), having refused to recall the appointment, and repelled an objection that his fatuity could be ascertained only by the verdict of a jury; and having found both his interdictors and agent liable in expenses to the curator;—The House of Lords, after a remit to the Court of Session for the opinions of all the Judges, affirmed the judgment without costs.

THIS was the sequel of the case reported ante, Vol. II. p. 481. 26th May 1826, (which see). After it had been remitted to the Court of Session for the opinions of the whole Judges, as there July 23. 1828.

1ST DIVISION.

July 23. 1828. mentioned, and their Lordships had, by a majority, adhered to their judgment refusing to recall the nomination of the curator,* the House of Lords ordered and adjudged, that the interlocutors be affirmed, without costs.†

EARL OF ELDON.—My Lords, This was an appeal brought by John Dickson, Archibald Gibson, Andrew Steele, and James Knox, stating themselves to be interdictors of Mr James Bryce, who is represented to be sometime student of divinity, thereafter teacher of languages in Edinburgh, and the said Andrew Steele as his agent. The respondent was Mr Walter Graham, who was the curator bonis to James Bryce;—this gentleman, who had been sometime student of divinity, and thereafter teacher of languages, being, at the time these transactions took place, represented to be so weak in mind, and so unable to take care of his own affairs, as to make it necessary to execute an instrument, which, by the law of Scotland, is termed an instrument of interdiction,—an instrument by which he consents to do no act without the concurrence and consent of those four gentlemen who are named as interdictors.

My Lords,—The law of Scotland certainly allows a man to place himself in that situation. The books, I think, represent, that the principles of the law of Scotland is this, that a man who possesses a sufficient portion of reason to be conscious of the weakness of his own understanding, not furious or fatuous, but a man so satisfied that he ought not to trust himself with his transactions, may execute an instrument, binding him not to do any act with respect to his estate, without the consent of those persons whom, by the deed, he authorizes to superintend for him; or, in other words, without whose consent he binds himself not to act. I understand the law of Scotland to have permitted persons in that situation to which I have adverted, to place their affairs under the direction of others, in a mode which may be more pleasant to them than that of resorting, as originally it was thought necessary, to a suit, in order to pronounce that the individual was not a proper person who should be trusted to administer his affairs.

My Lords,—This instrument being executed, an application was made, on the death of a brother of this unfortunate gentleman Mr James Bryce, by a brother-in-law, a gentleman who had married his sister, to have a curator bonis appointed to take care of him, something in the nature of a committee of the estate. A medical gentleman, of the name of Abercrombie, certified that his state was such, that some person should be authorized to superintend him; and on an application to the Court of Session to appoint such a person, the Court of Session appointed Mr Graham, who was the husband of the sister.

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* See 6. Shaw and Dunlop, No. 148.

† Bryce, in the meanwhile, had died, and no farther hearing took place.

The first step taken in the Court of Session, desiring that that appointment might be recalled, was in January 1818; and on that occasion, the Court of Session pronounced this interlocutor, which is the first interlocutor appealed from:—'They refuse the prayer of the said 'petition, and assoilzie from the conclusions of the same, and decern: 'find the several interdictors, with whose consent the said petition has 'been offered, conjunctly and severally liable to the respondent in the 'expenses of process; appoint an account thereof to be lodged; 'and remit the same, when lodged, to the auditor to tax and report.' This is an appeal from this interlocutor, in respect of the expenses of the process,—an appeal by these four gentlemen who are the interdictors under this deed, this interlocutor finding them liable in the expenses of the litigation. My Lords, it appears that this order to pay the expenses of the process was resisted with respect to three of them, on the ground that they took no part in the business. There was a petition afterwards presented by Bryce himself. Mr Steele, one of them, also resisted, on the ground that he appeared only as agent for the interdictors. July 23. 1828.

My Lords,—In the petition made in the name of James Bryce, an application was made to the Court that there might be a process of cognition. That is a proceeding in the nature of our commission of lunacy, in order to determine whether this person was in that state in which it was proper that this curator bonis should be continued. Upon that petition the Court pronounced this interlocutor:—'They remit to 'the Sheriff-depute of the shire of Edinburgh 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 'also concerning the truth and sufficiency of his grounds of complaint 'of harsh or improper treatment, or neglect of his comfort, on the part 'of Walter Graham, his curator bonis: authorize and direct the said 'Sheriff to proceed in the inquiry by personal visitation of, and inter-'course with the said James Bryce, at various times, and without pre-'vious warning or concert; as also, by examination upon oath of such 'witnesses, suggested by either party, who have sufficient cause of know-'ledge respecting the premises, and likewise by the opinion of medical 'persons named by the Sheriff to visit him: and ordain the said Sheriff 'to report his opinion on the said matters, and each of them, to the 'said Lords: and in case a minute shall be offered on the part of James 'Bryce, praying for a direction to the Sheriff to proceed on the said 'matter by jury or inquest, allow the clerk of process to receive and 'mark the same as part of the process, and allow the said curator 'bonis to answer the said minute, in case he shall see cause so to do.' Your Lordships therefore observe, that so far the Court of Session corrected its own original proceedings, by requiring a more minute and careful examination of the state of this person; and under the order of the Court, the Sheriff-depute of the shire of Edinburgh, (I believe the present Lord Advocate), proceeded to inquire into the state of this

July 23. 1828. person. The report of the Sheriff-depute, the present Lord Advocate, was to this effect:—'In compliance with the remit, the reporter called 'upon James Bryce, the individual therein referred to, on various 'occasions in the course of the last four months, without any previous 'warnings; and had also particular access to see him in the course of 'the examination of witnesses which has taken place under the above 'remit. The reporter also directed Doctors Spens, Farquharson, and 'Wood, to visit James Bryce, and has taken their examination upon 'oath, as well as that of the witnesses suggested by either party as 'having sufficient cause of knowledge respecting the premises; and he 'now begs leave to report, 1st, That from the appearance, manners, 'habits, and conversations of the above-mentioned James Bryce, it 'appears most decidedly to the reporter, that that person labours under 'a very great degree of mental imbecility, and that he is utterly in-'capable to manage and conduct his own affairs. This impression 'seems fully confirmed by the united opinions of all the medical 'men who have been examined, and is indeed supported by the whole 'other evidence which has been led; and which farther shews, that 'Bryce's defect of mind is not of recent origin, but has been progres-'sive for a period of nearly thirty years. This circumstance, while it 'almost excludes the hope of amendment, is calculated to remove all 'idea of the appearance which this person exhibits being produced 'from, or even affected by, the judicial proceedings which have been 'going on concerning him. Indeed, the reporter has had occasion, in 'the course of various cognitions that have gone on before him, to 'observe, that persons of deranged intellect are at times capable of 'assuming an extraordinary command over themselves, and can con-'trive so to speak and to act for a short space, as not unfrequently to 'induce juries to return verdicts in their favour, while the real state of 'the party would warrant a different deliverance. It particularly struck 'the reporter, as affording material evidence of the state of Bryce's 'mind, that in the course of the examination of witnesses, at which 'this person was present, he evinced no power of any such command 'over himself, nor could he even frequently be induced to keep silence, 'though recommended to him by those who were attending to his 'interest. With respect to the alleged maltreatment, it will be seen 'from the proof that this rests on no better ground than that of Bryce 'having for some time past made general complaints of that nature to 'certain individuals; a circumstance on which no reliance can be 'placed, as the making groundless complaints of this nature is a very 'usual symptom of, and attendant upon derangement. In so far as the 'reporter has been able to ascertain it, the conduct of Mr and Mrs 'Graham towards Bryce has been marked with all proper degree of 'kindness and attention, and he himself appears to have been sensible 'of this, and to have been satisfied and contented, until some indi-'viduals in the neighbourhood where he resided, possibly from humane, 'but certainly from mistaken motives, appear to have encouraged the

'suspicions of ill usage, which Bryce's state of mind was so much cal- July 23. 1828.
'culated to engender. With regard to his present residence, it ap-
'pears to the reporter that his room is good; that all due attention is
'paid to his comfort; and that Mrs Paterson, with whom he resides, is
'a person well calculated for such a charge.'

This report, my Lords, was dated in the month of December 1818, and it came under the consideration of the Court as early after that as February 1819. The report being prepared, but not actually brought before the Court, Mr Steele, declining any longer to continue agent to Mr Bryce, an application was made to the Court to appoint another, who was accordingly appointed. Your Lordships will observe the period, however, at which that appointment was made. The litigation had been conducted under the direction of Mr Steele, and he was considered by the Court liable to all the expenses as the agent who had carried on the business up to the month of December 1818: He ceased at that time certainly,—and on his application another agent was appointed; but he acted down to the period which elapsed between the remit to the Sheriff-depute and his report:—when the report was about to be prepared, and the consideration of it to be entered upon in the Court of Session, then he withdrew. The appeal therefore, my Lords, has, in my opinion, been brought quite irregularly by the four interdictors with regard to the first part of the case, in which they were all of them represented by Mr Steele; and with reference to the order made, that Mr Steele should pay the expenses till he ceased to be the agent previous to the last act of the Court of Session.

My Lords,—When this case came before the House of Lords some time ago, it struck me, and it likewise struck some other Lords not now attending the House, that this was a very extraordinary course of proceeding in its nature, comparing it with what is the course of proceeding in this part of the kingdom,—that a person should have applied to the Court of Session, and should have received immediately an appointment to take care of another and his affairs, on the ground that he was incapable of taking care of himself and his affairs;—that there should be no course of inquiry on the Court being so applied to, nor any notice given to the party;—and that this was at least a proceeding with reference to which this House should very well consider what the law of Scotland was, before it concurred in the proceedings which had taken place—particularly with reference to the care exercised on matters of this kind by the Chancellor of England; it being well known that the Court of Chancery cannot appoint any person to take care of a supposed lunatic or his property, unless a jury shall find that the man is of unsound mind; and that even after the finding of a jury that the party is of unsound mind, the Court will do nothing while a traverse is depending, the traverse allowing to those who are interested another opportunity of questioning the fact. But here, according to what is stated to be the law of Scotland, the Court proceeds in this

July 23. 1828. sort of way, to appoint a person to take care of the party, and to take care of him, according to the Act of Sederunt, 'in the mean time.' Whether these words, 'in the mean time,' really mean in the mean time till there is a more regular proceeding, or whether they mean that the appointment is made to continue until the man shall be able to manage for himself, may admit of question. The Act of Sederunt was certainly open to a different construction, according to what the different parties contended.

My Lords,—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. If it was a legal proceeding, I think your Lordships will see, that, attending to all the circumstances, and all the dates of these proceedings, it was not competent for this House to say that the interlocutor was wrong, or that it was not competent for that Court to say, whatever were the motives of Mr Steele, that he was liable as an officer of the Court, and as the party applying to the Court to set aside the proceeding, for the costs of the proceeding. I say there does not appear to me to be any reasonable doubt that the judgment of the Court ought, under those circumstances, to be affirmed; and however, according to the notion I have, I may regret the effect of it on these parties, who have been under a mistake, and not acting from improper motives, I rather think the best proceeding for your Lordships to come to is to affirm the judgment of the Court of Session, but to give no costs in the appeal case. The appointing a person to exercise the duties of curator bonis is taking a very considerable liberty, to be justified only by necessity; and this is the first case which has occurred in this House, in which the practice of the Court of Session has been established. That practice is not in conformity with the course observed in this country in the case of one who is represented, according to the language of the commission, as a lunatic. A commission is issued on a sufficient ground being laid, and even then, if the jury have found that he is a man of weak mind, that will not do; but if they find, not that he is lunatic, not that he is fatuous, but that he is of unsound mind, that is sufficient to sustain the commission. The way in which we have always proceeded is to issue a commission, and if the jury so find upon that representation that he is of unsound mind, the care of the Court is thrown around him. That, I think, would have been a fair notice. If that had been adopted, and these parties had then intervened, I think the appeal ought to have been dismissed with costs; but there having been no such proceeding in the first instance,

though it appears to me that it would be too much for your Lordships to say, that the proceeding of the Court of Session, and all the proceedings incident upon their proceedings for a long series of decisions, are such as cannot be upheld, I think that they ought to be affirmed without costs. I would therefore take the liberty of proposing that as the judgment of your Lordships. I cannot, however, conclude without saying, that I wish there was some law to regulate these proceedings in Scotland. July 23. 1828.

SPOTTISWOODE and ROBERTSON—A. MUNDELL,—Solicitors.

JOHN CRICHTON, Esq. Appellant and Respondent. No. 17.
Dean of Fac. Moncreiff—Sugden—Whigham.

ELIZABETH GRIERSON and Others, Respondents and Appellants.
Brougham—Fullerton—Keay.

Testament—Trust—Homologation.—Held, 1. (affirming the judgment of the Court of Session), in a question with the next of kin, that a mortis causa conveyance to trustees was valid, whereby a testator declared, 'That it is my wish that such 'remaining means and estate shall be applied in such charitable purposes, and in 'bequests to such of my friends and relations as may be pointed out by my said 'dearly beloved wife, with the approbation of the majority of my said trustees;' and, 2. That one of the next of kin having been named, and having accepted, and taken benefit under the deed, was not barred from claiming the residue, as belonging to him and the other next of kin.

JAMES CRICHTON, a Scotchman, went early in life to India, where he acquired a large fortune, and returned in 1806 to his native country, and purchased extensive landed properties in Dumfries-shire. He married Elizabeth, daughter of Sir Robert Grierson, baronet, and, by contract of marriage, provided her in an annuity of L.400 per annum, in case she should survive him. He had no children, but had a brother, John, and sister in Scotland. He had some distant relations in Scotland, and several cousins in America. July 25. 1828.

1ST DIVISION.
Lord Alloway.

On 12th November 1821 he executed a trust-deed and settlement in favour of his wife, so long as she should remain a widow, and of four other trustees, (among whom was his brother John), or a majority of them, 'who shall accept or act, or survivor of 'them, and who are hereby declared a quorum, and to such 'person or persons who shall be assumed as trustees as here-'after specified; and that in trust always, for the uses, ends, and 'purposes herein after specified, and contained in any instruc-