The jury were perfectly entitled to come to the conclusion they did, and he thought that it was the only sensible conclusion at which they could have arrived. There remained a question of law. Assuming a diseased mind, and that the diseased mind gave him certain impulses—he would not call it an uncontrollable impulse, as he did not know what that meant in such a case as this—the respondent knew what he was doing, and that he was doing wrong. An act of adultery was a culpable act against the wife. He was prepared to lay down as the law of England that whenever a person did an act which was either a criminal or a culpable act, which act, if done by a person with a perfect mind, would make him civilly or criminally responsible to the law, if the disease in the mind of the person doing the act was not so great as to make him unable to understand the nature and consequences of the act which he was doing, that was an act for which he would be civilly or criminally responsible to the law. Consequently, even though the respondent's mind was diseased, he was as responsible to the law as if his mind was not diseased. The judgment of the learned President was therefore right. There was a larger question which the President touched upon, but did not decide—namely, whether, even if the respondent's mind had been such that he did not know the nature of what he was doing or that he was doing wrong, the petitioner would or would not be entitled to a divorce. It was unnecessary to decide that question, and he desired to leave it open.

Lord Justice Lindley concurred. It was very curious that, until the death of his daughter in 1883, no trace of insanity was discovered in the respondent. He then took to drinking. Giving every weight to the medical evidence, it did not come to more than this, that the respondent suffered at the time he committed the acts from acute mania, and could not control his actions. Whilst in this state, whether caused by drink or not, he committed adultery and beat his wife. Was the wife to be deprived of the protection of the law? He did not think so. It was a mistake to introduce questions of criminal law into these questions. The case seemed as plain a case as could possibly be for a divorce.

Lord Justice Kay concurred, saying that he had nothing to add.

DEWAR v. DEWAR.

The appointment of a *curator bonis* to manage the estate of a person of unsound mind is an ancient and valued prerogative of the Supreme Court of Scotland. It is a speedy and economical procedure compared with inquisition in England, which resembles the still more ancient and formidable process of *cognition*, a trial before a jury.

The appointment of a *curator bonis* is made by summary petition before a Lord Ordinary of the Court of Session. The petition is accompanied by two medical certificates, setting forth on soul and conscience that the person is incapable, and the appointment lasts until recalled upon petition or annulled by death. A recent statute has further reduced the cost of this procedure by making it competent for the Sheriff to appoint a curator to a person of limited means.

In the case of *Dewar* v. *Dewar*, the petition was at the instance of a wife for the appointment of a *curator bonis* to her husband, at the time confined in an asylum under warrant of the Sheriff. It was proved by medical certificates that he 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.

The facts of this case are concisely summarized in the opinion of the Lord Ordinary (Kincairney), subjoined —

"From the petition and answers it appears that Dr. Dewar had been, on the instructions of the petitioner's agents, visited by Dr. Grainger Stewart and Dr. Heron Watson; by Dr. George W. Balfour, by Dr. Littlejohn, by Dr. Clouston, and Dr. Byrom Bramwell.

"The certificates of these gentlemen disclose some difference of opinion about Dr. Dewar's mental condition. Dr. Grainger Stewart and Dr. Heron Watson state that they felt it impossible, at the date of their examination on 20th May, to grant a certificate for the appointment of a *curator bonis*. They recommended delay and a further examination after the lapse of a month or six weeks for the purpose of deciding upon the necessity of appointing a curator.

"Drs. Balfour and Littlejohn express the opinion in general but unqualified terms that Dr. Dewar was of unsound mind, and incapable of managing or of giving directions for the management of his affairs.

"Drs. Clouston and Bramwell state that on their visit they found Dr. Dewar coherent and acute in regard to business matters, but taking into account the whole of the facts elicited at a prolonged examination of his mental condition, they felt unable to give a certificate that he was yet fit to manage his affairs or give directions for their management.

"I rather understand that the course of making a remit to the Sheriff suggested by the respondent's counsel has not of late years been regarded very favourably, and I consider that I had hardly a right to devolve on the Sheriff a duty which appeared to be my own, and ultimately I came to think that the safest step I could take was to make a remit to a medical gentleman who had not been employed by either party, and whose opinion I could regard as of weight and authority.

"Having ascertained that Sir Arthur Mitchell had not been consulted in the case in such a way as to affect his absolute neutrality, I, on 9th July, remitted to him to examine the petition and answers and productions, and thereafter to visit Dr. Dewar, and to report whether in his opinion Dr. Dewar was in such a state of mental derangement as to render him incapable of managing or of giving directions for the management of his affairs. Sir Arthur Mitchell has now returned a report, stating his opinion 'without hesitation or difficulty' that Dr. Dewar is at present of unsound mind, and as a consequence incapable of managing or of giving directions for the management of his affairs.

"Sir Arthur Mitchell's report is expressed in general terms, but he was good enough to call on me and to explain his views in more detail. It appears that Dr. Dewar is, in Sir Arthur's opinion, 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. He entertains, besides, Sir Arthur informs me, feelings of mistrust towards his family which cannot be altogether disregarded.

"The agents of Mrs. Dewar and for Dr. Dewar have been again heard, and it has been strongly pressed, on behalf of Dr. Dewar, that he showed an intelligent comprehension of his own affairs—which seems to be true—and that he could safely be trusted with them, and in particular, that he could not, or ought not, to be deprived of the control of his own property without the verdict of a jury obtained on a brieve from Chancery, under the provisions of the 101st section of the Court of Session Act.

"I think that my duty is to appoint a *curator bonis*. My appointment is, of necessity, substantially, though not nominally, an interim one, if it shall hereafter appear to the Court that the condition of Dr. Dewar's mind should be submitted to the consideration of a jury. It rather appears to me, however, to be better for Dr. Dewar that a *curator bonis* should be appointed than that his present state of mind should be submitted to a jury. For should he shortly recover—and I have not heard anything which precludes that hope—it will be

much easier to restore to him the full control of his affairs than it would be if he were found by a jury to be insane."

In anticipation of the discussion upon the reclaiming-note, two additional medical opinions were obtained at the instance of the respondent's agents.

The first of these was given jointly by Drs. Howden and Ferguson upon 23rd October, and *inter alia* contained the following passage:—"We found him calm and self-possessed in manner, of a high degree of intelligence, with a mind widely and accurately informed, and able to reason on many subjects in a clear and rational manner. He appeared thoroughly familiar with the condition of his financial affairs, and alive to his interest in regard to them." And the conclusions of these gentlemen upon the question of the respondent's mental condition are summarized thus:—"We are of opinion (first) that Dr. Dewar is a person of unsound mind; (second) that if at large, Dr. Dewar 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."

The second opinion was that of Dr. Yellowlees, who, while saying that he found Dr. Dewar "acute and intelligent in conversation," concluded as follows:—"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, or 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."

Argued for reclaimer—(1) To deprive the respondent of the management of his property it was not enough that medical certificates should be produced in evidence of mental incapacity; he was entitled to retain the management until found incapable by verdict of a jury upon a brieve of cognition issuing from Chancery in terms of section 101 of Court of Session Act, 1868. (2) In this case the evidence did not warrant the appointment. The fact that a person was of unsound mind was not enough, for the particular unsoundness may not interfere with an intelligent view of business matters.

Argued for the petitioner—No case quoted showed that a curator had been refused by the Court when the person of unsound mind was actually resident in an asylum. It would be competent enough for his relatives to sue out a brieve of cognition from Chancery under sec. 101 of the Act, but that process the relatives did not desire to adopt. The inquiry before a jury would give both to his relatives and to the respondent much pain, and would probably injuriously affect the latter and delay his recovery, while if he did recover he would again require to have his sanity tried in a declarator of reconvalescence.

At advising—

Lord President—I do not think it is disputed as a general principle of our law that a man of full age is not to be deprived of the management of his own affairs except by the verdict of a jury finding him incapable of managing them. There has, however, been a practice in observance from very early times of appointing factors or *curators bonis* to persons in an infirm state of mental health where it appeared, or was thought probable, that the infirmity was of a temporary character. I do not say that the statutes, and particularly the last statute, regulating the procedure in cases of cognition of the insane (viz., the Court of Session Act, 1868, sec. 101) positively confine the issuing of a brieve from Chancery to the case of a person in permanently bad mental health; but I do say, generally speaking, that that is the kind of case which is with

propriety submitted to a jury. Where, on the other hand, there is a case of merely temporary incapacity, the appointment of a *curator bonis* is the more expedient and proper remedy, and if there is any doubt as to whether the incapacity is permanent or temporary, I still think the appointment of a *curator bonis* is the more judicious procedure for the parties interested and for the Court to adopt. The jurisdiction of the Court in appointing such officers existed and was exercised long before the year 1730, but the words of the Act of Sederunt of that year are important as showing the class of cases to which it was intended to apply. It defines the class whose estates factors were appointed to administer as "pupils not having tutors, and persons absent that have not sufficiently empowered persons to act for them, or who are under some incapacity for the time to manage their own estates," and the object of the appointment was "to the end that the estates of such pupils or persons may not suffer in the meantime, but be preserved for their behoof and of all having interest therein." Now, it is to be observed that the Pupils Protection Act of 1849 recites in the preamble the identical words, showing obviously that the intention of the Legislature was to continue the special remedy provided by the Act of Sederunt, and to confine it to the case of pupils or absent persons, or of persons suffering "for the time" from incapacity. It therefore appears to me that the question is whether this ought to be dealt with as a case of permanent or of temporary insanity, and that question depends upon the special circumstances we have before us here. If it was clear from the papers in the case that this gentleman's condition of incapacity was hopeless, I should be of opinion that the proper course would be to sue out a brieve of cognition from Chancery. But these are not the facts of the present case, for although Dr. Dewar appears to labour under delusions of a singular and complicated character which render it very unsafe at present to entrust him with the management of his own affairs, he still retains a considerable amount of mental energy and acumen, and I do not see anything in the medical reports to discourage the hope that his mental capacity may be completely restored. His residence in the asylum has already wrought an improvement in his condition, and that being so it would be a strong proceeding upon the part of his relatives, to whom alone it is competent to sue out a brieve from Chancery, to apply for a brieve with the object of having him cognosced insane and permanently deprived of the administration of his affairs, unless he should be reinstated by a formal declarator of reconvalescence. Everything points to this case as one for the application of a temporary remedy, and the only temporary remedy known to our law is the one asked for in this petition. As to the expression of Dr. Dewar's own opinion in this matter, I confess I do not attach much importance to that. Neither he himself nor his legal advisers thought fit to set forth in the answers to the petition a demand that the question of his mental capacity should be submitted to the judgment of a jury, but on second thoughts Dr. Dewar writes to his agents in these terms:—"Having to-day seen a copy of Sir A. Mitchell's report, I still maintain that I am perfectly competent to manage my own affairs, and I wish you to insist on the question of my capacity being tried by a jury. I cannot consent to the appointment of a *curator bonis;* still, if one must be appointed, I wish Mr. William Mitchell, S.S.C., to be appointed;" and Dr. Dewar's agents, in terms of this letter, lodged a minute in process asking that the present petition should be superseded by an inquiry upon a brieve of cognition. Now, if this suggestion had come from anybody else, I would have said it was the suggestion of an enemy, for I cannot conceive anything more likely to retard his recovery than his being exposed to a trial before a jury upon a brieve. If there is one course indeed more than another which would be likely to render him permanently mad, it is the course suggested in that letter and minute. I see no reason to doubt that in the first place the respondent's condition is such as to render him unfit in the meantime to manage his own affairs; and in the second place, as it is quite possible, if not indeed probable, that he may at some time so far recover as to be restored to the uncontrolled

management of his estate, I think the Lord Ordinary has taken the proper course in appointing a *curator bonis*.

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 mere 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.

On appeal to the House of Lords, at delivering judgment, Lord Herschell said:—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.—*The Scottish Law Reporter*, June 25, 1891.

MISS CONSTANCE NADEN'S ESSAYS: A REJOINDER.

In the "Journal of Mental Science" for April there appears a review of the late Miss Constance Naden's essays, under the heading "A New Philosophy." It must be a pleasure to those in any way identified with Miss Naden's thought-system thus to find it ably and courteously discussed in so prominent a quarter. I have shown my own appreciation of the notice in question by reprinting it—with annotations by Dr. Lewins—in the appendix to a recently published essay of my own on Miss Naden's auto-monism ("Sadducee *versus* Pharisee," Bickers). It is chiefly, however, as editor of the latest volume of her essays ("Further Reliques of Constance Naden," Bickers), reviewed in the "Journal of Mental Science," that I am interested in the matter. In that capacity, a very large amount of her posthumous papers passed through my hands for arrangement and selection. I can thus, without pretension, affirm myself to have had, at least, the opportunity of becoming as fully acquainted with Miss Naden's views as any other person, and it is because I do not think that the late notice