No. 11. **WILLIAM EATON and HUGH COWAN, Appellants.**
John Campbell—Fullerton—Keay.

ALEXANDER MURDOCH, Curator Bonis to JOHN and ROBERT WATSONS, Respondent.—*Adam—Sandford.*

Cautioner—Tutor—Curator.—A curator bonis having been appointed to two uncognosced lunatics, and found caution for performance of his duties; and having, by authority of the Court of Session, (given in an action of cognition and sale at his instance alone), sold the heritage in which the lunatics were fiars; and having become bankrupt, indebted to them in a large balance;—Held, (affirming the judgment of the Court of Session,) That the cautioners were responsible for the balance, although it was alleged that, as curator bonis, he had no title to insist in a cognition and sale, nor the Court any authority to empower him to sell.

July 4. 1828.

1ST DIVISION.

ROBERT and JOHN WATSONS were vested in the fee of certain heritable property in Ayrshire, liferented by Smith. Although they had not been cognosced, they laboured under severe mental derangement, and were incapable of managing their affairs. In 1815, the Court of Session, on a petition for that purpose at the instance of their father and nearest of kin, appointed 'John 'Aitken to be curator bonis to the within designed Robert Wat-'son and John Watson, during the subsistence of their infirmity, 'and this with all the usual powers, and the said John Aitken 'always finding caution before extract, in terms of the Act of 'Sederunt.' Thereafter, Eaton and Cowan, as cautioners, sureties, and full debtors with and for Aitken, bound themselves, conjunctly and severally, their heirs, executors, and successors, that 'I, the said John Aitken, shall duly and faithful-'ly manage the means and estate belonging to the said Ro-'bert Watson and John Watson, during the subsistence of 'their infirmity, or till the curatory shall be recalled; that I 'shall make up inventories thereof, and do exact and timeous 'diligence for recovering the same, and shall hold just count and 'reckoning for my intromissions in virtue of said act of cura-'tory, during the continuance thereof, and make payment to such 'person or persons as the said Lords shall appoint; and that I 'shall obtemper, fulfil, and obey the whole rules and regulations 'prescribed by the Act to be observed by Lords' factors in the 'like cases—under the penalties, and with certification as therein 'contained.'

In 1816, Aitken, in the character of curator bonis, raised a summons, to which he called as defenders Smith the liferenter, the nearest in kin to the lunatics, their father, and John Watson,

one of the lunatics, (who, it was alleged, had sometimes lucid intervals), and setting forth, that the said Robert and John Watson required 'a constant and daily advance for their support; and 'true it is that the pursuer, as curator bonis foresaid, has no 'lands or heritages, except the fee of the heritable property 'before-mentioned, and no moveable estate or fund whatever, 'out of which to advance the sums necessary for the aliment 'and support of the said Robert Watson and John Watson, 'or out of which he can be reimbursed of the advances already 'made on their account as aforesaid, or make payment to the 'said John Smith, during his lifetime, of the annualrent of the 'said moveable estate expended as aforesaid; and that the said 'John Smith being entitled to the liferent of the said heritable 'estate, and having also a claim on the fee thereof for the life-'rent of the said moveable estate, the fee of the said heritable 'property is thereby, and by the growing interest upon the pur-'suer's advances, greatly deteriorated; and the said Robert and 'John Watson have, in the mean time, no fund for their ali-'ment and support; whereas, by a sale of the said heritable pro-'perty, the same may yield a price sufficient to provide a fund 'for payment to the said John Smith of the liferent interest to 'which he is entitled as aforesaid, to reimburse the pursuer of 'the advances already made by him for the said Robert and 'John Watson, with interest thereon, and afford a surplus suffi-'cient to yield a fund for their aliment and maintenance; so that 'it becomes necessary that the foresaid lands and heritages 'should be sold for the purposes above-mentioned. Therefore 'the Lords of our Council and Session ought to take cognition 'of, and ascertain the amount of the pursuer's advances on ac-'count of the said Robert Watson and John Watson, the pursuer 'being ready to produce the vouchers, and depone to the verity 'thereof; as also to take cognition of the yearly value of the 'said John Smith's liferent interest above-mentioned, and of the 'yearly value of the foresaid lands, houses, and others, with the 'pertinents: which cognition being so taken, our said Lords 'ought and should find and declare, that there is a necessity for 'selling the said lands and others belonging to the said Robert 'Watson and John Watson, and that such a measure will be 'for the utility and advantage of the said Robert and John 'Watson, and of the pursuer as their curator bonis foresaid. 'And the same being so found and declared, the said Lords of 'Council and Session ought and should grant full power, li-'berty, and warrant to the pursuer, and his successors in the said 'office of curator bonis to the said Robert Watson and John

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July 4. 1828. 'Watson, with or without the consent of the said Robert and 'John Watson, or either of them, to sell, alienate, and dispone 'the said lands, houses, and others, belonging to the said Robert 'Watson and John Watson, or any part or portion thereof, he-'ritably and irredeemably, or under reversion; and that it shall 'be lawful to the pursuer, as curator bonis foresaid to the said 'Robert Watson and John Watson, or his successors in that 'office for the time, with or without the consent of the said Ro-'bert Watson and John Watson, to make, grant, subscribe, and 'deliver to the purchaser or purchasers of the said lands; houses; 'and others, dispositions, alienations, assignations, conveyances, 'and other writs, rights, and securities necessary for establishing 'the rights thereof in their persons,' &c. Along with this summons, letters from Smith and the two lunatics were produced, granting concurrence to the sale, on the ground that the 'mea-'sure is evidently for the good of all concerned,' and authorizing a dispensation of the legal induciæ, and holding the summons as legally served on them. The body of these letters were in the handwriting of Eaton. Thereafter, evidence was taken as to the value of the lands, (Eaton acting as commissioner), and the report of an accountant obtained as to the expediency of the sale; upon considering which, the Court found the necessity and expediency of the sale sufficiently instructed; and therefore granted full power to Aitken, or his successors in the office of curator bonis, with or without the consent of the Watsons, upon due advertisements being previously made, to sell and dispone the lands libelled; and found and declared, 'that all dispositions, alienations, assig-'nations, and other writs, rights, and securities so to be made 'and granted, shall be as good, valid, and sufficient to the re-'ceivers thereof, as if the same had been made, granted, and 'subscribed by the said John and Robert Watsons themselves, 'in perfect sanity, with all solemnities requisite; and that the 'same are never to be revoked by the pursuer, as curator bonis 'foresaid, or his successors in that office, or by the said Robert 'Watson or John Watson, their heirs or successors, in time 'coming,' &c. There was no order made as to reporting the sale, or securing the balance of the price.

The sale produced L.5725. Out of this sum Aitken paid all claims on the estate, and retained in his hands the balance, about L.3000. It remained there six years, but without any step being taken by the cautioners to have it secured. Aitken became bankrupt, was sequestrated, and compounded for 6s. 3d. in the pound. Alexander Murdoch was appointed cura-

tor bonis to the Watsons, and made appearance in an application by Eaton and Cowan to the Court of Session, to ascertain the state of the curatory accounts, and for discharge and exoneration from their cautionary obligation. This application having been remitted to an accountant, he reported a balance against the cautioners of L. 3306. 11s. 5d.—holding, as an article of charge against them, the whole price produced by the sale, with interest, under deduction of the payments made by Aitken. The cautioners objected to this report; but the Court, (9th June 1826), approved of the accountant's report, and decerned, with expenses.* July 4. 1828.

Eaton and Cowan appealed.

Appellants.—1. Cautioners for the performance of the duties of a curator bonis, vested with the usual powers, are not liable for the consequence of abuse of powers different from and more extensive than those usually attached to the office. The rule is fixed, that cautionary obligations are rigidly interpreted according to the letter of the obligation. A change of risk frees the cautioner. Therefore here the appellants, although bound for intromissions in virtue of the act of curatory, and obliged to obey the regulations prescribed by the Acts of Sederunt, were not responsible for a sale effected in virtue of an act of the Court, proceeding on a narrative of special circumstances, held sufficient to shew that unusual powers should be conferred on the curator. The appellants were only liable for the due exertion of his usual powers, and under these usual powers no sale of the heritage could have taken place. The appellants were not called as parties to the summons of cognition and sale, nor had they any interest to appear. 2. The reparation of the injury sustained by the misconduct of the party intrusted with the power of sale, is to be sought for, not in the form of a claim against the appellants for the due exercise of a power of a different kind from that for which they were responsible, but in an action for the recovery of the heritable subjects themselves, the sale of which was clearly illegal and incompetent. The appointment of a curator bonis by the Court is necessarily limited to the administration of the property. He does not represent the person of the ward, and has no power to sell. Even, then, had the proceedings been regular, the sale was null; and the securities, or the person now representing them, have their recourse, and can yet vindicate the property itself. But the proceedings were

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* 4. Shaw and Dunlop, No. 417. where the opinions of the Judges will be found.

July 4. 1828. grossly irregular, and contain in gremio ample grounds of reduction, independent of those which may be founded on want of power to sell at all.

Respondent.—1. The obligation and responsibility undertaken by the appellants was of a general and comprehensive nature, making no distinction between ordinary and extraordinary management. If the principal was awanting in either, his sureties became liable. In particular, they were bound for his 'intromissions;' and he did intromit with the sums for which, under the cautionary undertaking, they made themselves, and have been made by the Court, responsible. It is of no consequence, however, whether the sale was an act of ordinary or of undue management. If the former, the curator was bound to have secured the balance in his hand, and if the application for a sale was an uncalled-for measure on his part, his cautioners are as liable for that unjustifiable act (supposing it to be so) as any other. ' Still the price was received by him in the full knowledge of the appellants, and allowed to remain in his own hands, and exposed to the risk of his insolvency. 2. But truly he was quite entitled to take the measures he adopted. He was entitled and called upon to do so; and the necessities of the case of his wards left no alternative. The present action is, therefore, properly directed against the appellants; and as to the recourse against third parties, purchasers, that is no concern of the respondent. It is his duty to protect the lunatics—beyond that it ends.

The House of Lords ordered and adjudged, 'that the appeal 'be dismissed, and the interlocutors complained of be affirmed.'

LORD CHANCELLOR.—My Lords, There is another case, that of Eaton *v.* Murdoch, which was heard some time ago, and which stands for the judgment of your Lordships. I have considered every thing that was advanced at your Lordships' Bar, and have read over the papers several times with the greatest attention; and having done so, I see no reason whatever to differ from the judgment pronounced by the Court below. The appellants were nominated cautioners for the management and intromissions of a Mr John Aitken, who was appointed curator bonis to a lunatic; and they entered into bonds accordingly. Property, which came to the hands of Aitken, having been misapplied by him, an action was brought against the sureties in the bond. The Court below thought that action well sustained; and after having very maturely weighed the decision, and the grounds on which it proceeded, I see no reason whatever to differ from the judgment which has been pronounced. I would therefore move your Lordships that the judgments be affirmed.

Appellants' Authorities.—University of Glasgow, Nov. 18. 1790, (2104.); Elton Hammond, June 24. 1812, (F. C.); Houston's Executors, March 4. 1820; A. of S. Feb. 13. 1730; Vere, Feb. 29. 1804, (16,389.); Henderson, Jan. 1803, (14,982.)

Respondent's Authority.—Mackay, March 9. 1796, (16,384.)

RICHARDSON and CONNELL—SPOTTISWOODE and ROBERTSON,—Solicitors.

THOMAS HARVIE of Westthorn, Appellant.—*Dean of Faculty Moncreiff—Brougham.* No. 12.

GEORGE RODGERS, and Others, Respondents.—*Adam—Keay.*

Prescription—Road—Presumption.—The uninterrupted use and enjoyment of a foot-path by adjacent feuars, &c. as far back as the memory of man could extend, through the property of a party infeft under titles which did not mention any such path prior to 1789, having been proved; and the proprietor having proved a series of interruptions from and after 1789, but which were resisted, and the use of the foot-path continued; and the Judge having directed the jury, 1. That, from the evidence of uninterrupted possession prior to 1789, they were entitled in law to presume forty years' possession; and, 2. That the interruptions by the proprietor were not sufficient to defeat the right acquired by such possession;—Held, (affirming the judgment of the Court of Session), That the direction was correct.

July 8. 1828.

2D DIVISION.

Jury Court.

THE estate of Westthorn, belonging to Harvie, was described in his titles as 'bounded by the river Clyde on the east, south, and south-west; on the west by the paling,' &c. The city of Glasgow lies on the bank of the river, a few miles lower down, and the village of Carmyle a short distance above. Harvie having erected stone walls, surmounted with iron railings, across his property, and running into the bed of the river, so as to prevent all passage by its banks, Rodgers and others, feuars, residenters, and proprietors in the neighbourhood, raised against him an action of declarator, stating, that the slip of ground extending along the north bank of the Clyde from the Green of Glasgow to Carmyle (of course including Harvie's property midway, touching the river), had remained free and unclosed past the memory of man; that through its whole extent a path runs along the bank, and for time immemorial had been resorted to and used and enjoyed by them, and other inhabitants of the neighbourhood, and their predecessors, without challenge, molestation, or interruption; and concluding that it should be found and declared, that the pursuers, inhabitants of and feuars and proprietors of the neighbourhood, have, by themselves, their pre-