do so at his own hand or under the authority of the Court. In some cases he has, as regards the necessity of making an election, whether with the authority of the Court or without it, no choice. These cases arise where there are other parties in a position to force on the distribution of the estate to which the power of election relates. In such a case the guardian is under the necessity of making an election. It would be too late for the purpose of distribution if the exercise of the election were postponed until the ward had recovered from his mental incapacity and was able to make it for himself. It is clear in this case that the election has to be made, as the estate is now distributable, and the only question which remains is whether this is a case calling for a grant by the Court of special powers to the judicial factor under the Pupils Protection Act of 1849. The point presents itself in this way—either the power to be exercised is an ordinary power or an extraordinary power. Now, it is agreed that the power is an extraordinary power. It is a power that is very seldom exercised, and it involves the exercise of a discretion. This is just another way of saying that it can only be exercised under special powers with the approval of the Court.

On the merits of the application I am satisfied with the soundness of the opinion of the judicial factor, fortified by the Accountant of Court, that it is in the interest of the ward that her testamentary provisions should be accepted, because she would in that way be provided with an income sufficient for her maintainance in comfort. There might be cases where the considerations material to an election were more equally balanced, and where the judicial factor might desire to be directed in which way he ought to exercise the election, but where he does not leave this to the Court, the relation of a judicial factor to the Court is such that he ought to disclose in his application the way in which he intends to exercise the power of election for which he asks.

LORD KINNEAR concurred.

The Court remitted to the Lord Ordinary to grant the prayer of the note.

Counsel for the *Curator bonis*—Dove Wilson. Agents—Stirling & Duncan, Solicitors.

Counsel for the Testamentary Trustees of the deceased John Skinner—Spens. Agents—Stirling & Duncan, Solicitors.

Tuesday, June 9.

FIRST DIVISION.

[Lord Low, Ordinary

HUNTER & COMPANY *v.* STUBBS LIMITED.

Process—Jury Trial—New Trial—Reparation—Slander—Newspaper—Black List—Decree of Consent Published as being a Decree in Absence.

An action of damages was brought by a firm of tradesmen against the publishers of a newspaper, which the pursuers averred was published to give information as to insolvent persons and to enable traders to avoid making bad debts, for the wrongful publication of a false and calumnious paragraph, whereby, it was alleged, the pursuers were represented as being unable to pay their debts and as being unworthy of credit. The paragraph in question set forth the name of the pursuers in what professed to be a list of persons against whom decrees in absence had passed. The evidence showed that in fact the decree taken against the pursuers was a decree of consent, though the record of the decree as originally made in the Sheriff Court books by the sheriff-clerk at the time bore that the pursuers had been absent at the diet. The jury found for pursuers, and assessed the damages at £100. The defenders moved for a new trial, on the ground (1) that what they had published did not bear the meaning alleged by the pursuers; (2) that the statement published was privileged as being a fair and correct representation of what took place in a court of justice; and (3) that the damages awarded were excessive. The Court *refused* a rule.

A. Hunter & Company, coachbuilders, Crown Works, Lockerbie, Dumfries, and Adam Hunter, as sole partner of that firm and as an individual, raised an action against Stubbs, Limited, publishers of *Stubbs' Weekly Gazette*, carrying on business and having an office at 92 Princes Street, Edinburgh, to recover damages for loss and injury suffered by them, as they alleged, through the wrongful publication by the defenders of a false and calumnious paragraph in *Stubbs' Weekly Gazette*.

The pursuers averred that the object of *Stubbs' Weekly Gazette* was to give information as to bankrupts, insolvents, and defaulters in payment of their just debts, and to enable traders to avoid making bad debts; that a special part of said *Gazette*, popularly known among the mercantile community and others as the "black list," was devoted to the publication of the names of traders and others against whom decrees in Court in absence had been taken; and that the name of any trader appearing in that list was looked upon with grave suspicion as to solvency.

The pursuers further averred—"(Cond. 2 On or about 6th October 1902 the Star Cycle

Company, Limited, Wolverhampton, raised an action in the Debts Recovery Court of Dumfries and Galloway at Dumfries, against the pursuers for €40, 2s. 5d. On the day preceding the court-day the pursuers paid the agent of said cycle company £5 to account, and arranged for payment of the balance of said account. Accordingly, on the court-day, 21st October, the pursuers appeared in court by a law-agent, and consented to decree *in foro* being pronounced against them for £35, 2s. 5d., the balance of said account, which was duly done, it being duly noted in the Sheriff Court books that the pursuers appeared by an agent, and that decree had been granted 'for £35, 2s. 5d., with 23s. 7d. of expenses, and this of consent.' (Cond. 3) Notwithstanding the presence at the diet in Court of an agent for the pursuers, and the said decree *in foro*, the defenders wrongfully and falsely and calumniously published in the issue of *Stubbs' Weekly Gazette* for Thursday, October 23, 1902, the following—

'*Extracts from the Registers of Decrees in Absence.*

'*Dumfries*, 1902, *October* 21.

Amount, £35, 2s. 5d.

'*Defenders*—A. Hunter & Company, Crown Works, Lockerbie.

'*Pursuers* — The Star Cycle Company, Limited, Wolverhampton.'

. . . By said paragraph and publication thereof the defenders represented to the public that a decree in absence for £35, 2s. 5d. had been pronounced against the pursuers at the instance of said cycle company on said 21st October 1902, and it was so understood by the public. The said allegations in said paragraph are false and calumnious in respect that no such decree in absence passed, but a decree *in foro*, and that of consent. By said false and calumnious paragraph so published the defenders falsely and calumniously represented to the public and mercantile community that the pursuers were unable to pay their debts, and were in insolvent circumstances or pecuniary embarrassments, and were unworthy of credit."

The defenders explained that the following note was prefixed to the list of decrees in absence published in the *Gazette*—"The following extracts from the official registers have been received since our last issue made up to the dates given in the second column. It is probable that some of the decrees have been sisted or paid, but it is not known which of them remain unsettled or unpaid at the present time, and in no case does publication of the decree imply inability to pay on the part of the persons named. We are willing at all times to insert any authentic information or explanation relative to decrees, or to correct any inaccuracy that may exist in the registration thereof or otherwise."

The defenders further stated that when the case was called in the Debts Recovery Court on October 21, the Star Cycle Company were represented by an agent, but the pursuers were not present and had not instructed an agent to appear on their behalf; that the agent representing the Star Cycle Company moved for decree for the sum of £35, 2s. 5d., and his motion was granted; that the decree was recorded at the time in the Sheriff Court books by the Sheriff-Clerk as a decree in absence; that after the Court had risen on that date the defenders' representative examined the said register for the purposes of the defenders' *Gazette*, and copied out the entries in said register as they then appeared; that this copy was transmitted to the defenders for publication in their *Gazette*, and was published there; and that subsequently, on the representation of the agent for the Star Cycle Company that an agent for the pursuers was present and consented, the Sheriff-Clerk altered the entry in the Book of Causes to show that the pursuers were represented by an agent, and, in the book containing the decerniture, added the words "and that of consent."

The defenders pleaded, *inter alia*—"(2) The entry in the defenders' *Gazette* being a correct copy of the register as contained in the Book of Causes at the time when it was examined by the defenders, and the defenders in publishing the same having acted without malice, they are entitled to absolvitor. (3) The entry complained of being a correct record of proceedings in open court, and the defenders being privileged in publishing it, they ought to be assoilzied."

The action was tried before Lord M'Laren and a jury under this issue—"Whether on or about the 22nd October 1902 the defenders wrongfully published in a publication known as *Stubbs' Weekly Gazette* a statement in the terms set forth in the schedule appended hereto? Whether the said statement in whole or in part is of and concerning the pursuers, and falsely and calumniously represents that the pursuers were unable to pay their debts, to their loss, injury, and damage? Damages laid at £500."

The schedule appended was the paragraph published in defenders' *Gazette* on October 23rd 1902, as set forth in Cond. 3 quoted above.

The jury found for the pursuers and assessed the damages at £100.

The defenders moved for a rule on the pursuers to show cause why a new trial should not be granted.

Argued for the pursuers—The meaning of the paragraph alleged by the pursuers was not its fair meaning, having regard to the statement in the *Gazette* prefixed to the paragraph, to the effect that "in no case does publication of the decree imply inability to pay on the part of the persons named." The defenders were privileged in giving publicity to proceedings in open Court, and in the paragraph published, having regard to the circumstances in which it was published, there was on the facts no mistake of substance which could mislead the public—*Crabbe and Robertson* v. *Stubbs Limited*, July 4, 1895, 22 R. 860, 32 S.L.R. 650; *M'Lintock* v. *Stubbs*, October 15, 1902, 40 S.L.R. 10. If there was a mistake, the mistake was made by the

Sheriff-Clerk, and the extract was correctly made from the books of the Court on the afternoon of the day on which the decree passed, though these books had been subsequently altered. There was no materiality in the distinction between a decree to which the defender consents and a decree in absence. Under the Debts Recovery Act (30 and 31 Vict. c. 96), sec. 3, the form of summons was the same as in the Small Debt Act, and by sec. 6 of the former Act it was provided that the effect of a decree in absence was that the defender was held as confessed. There was evidence to the effect that at the time the decree was granted the pursuers were unable to pay their debts, and in view of this the damages awarded were excessive.

LORD M'LAREN—I cannot say that I am altogether satisfied with the verdict, but this applies rather to the amount of damages awarded than to the substantial finding of liability against the defenders. In determining whether the motion for a rule should be granted we must consider the issue as adjusted, and whether the statement published by the defenders as scheduled to the issue, was a false statement, and calculated to represent that the pursuers were unable to pay their debts. In defence to the action it might have been pleaded that the representation was made, but that it was in point of fact true. The defenders did not take an issue in justification. The only defences the defenders did take were that what they had published did not bear the meaning alleged by the pursuers, and secondly, that the statement published was privileged as being a fair and correct representation of what took place in a court of justice. On the first defence the defenders failed, and I think rightly, as one cannot help seeing from the statement itself, and on the evidence, that such publication of a debtor's name in a black list of *Stubbs' Gazette* is a representation that he is unable to pay his debts. The list is published for the purpose of warning traders of this fact.

As to the defence founded on privilege, if it could have been shown that there was no material distinction between a decree in absence and a decree to which the defender consents, the defenders would no doubt have been entitled to a verdict. But while in this particular case there was not much difference in fact, I should have difficulty in saying that as matter of construction of a published statement there is no material difference. There are many cases in which a defender refuses to pay an account, either because he thinks the amount too large or because he is not satisfied that it is properly vouched. In such cases a defender, instead of putting in defences, instructs his agent to adjust the account and to consent to decree for the true amount as adjusted. The decree would then properly bear to be of consent, and it would not be a just inference to infer from it that the defender was unable to pay his debts. Nor was it open to the defender to say that in this particular case the reason of the consent was not in fact such as I have indicated but was caused by the pursuers' inability to pay, since the defender has taken no issue in justification. A new trial is also asked on the ground that the damages awarded are excessive. The award of £100 might well seem too large, as no doubt the pursuers at the time the decree was granted were unable to pay their debts, and the fact that they were so unable was a proper element to be taken into account by the jury in estimating the damages. I cannot say, however, that the sum awarded by the jury was so manifestly in excess of what was reasonable as to justify us in granting a new trial. Another jury might award the same sum, because this is not a case in which it could be said that no body of reasonable men would take the same view as the jury has done in returning this verdict.

I am therefore of opinion that the rule should be refused.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court refused a rule, and of consent applied the verdict found by the jury on the issue in the cause.

Counsel for the Pursuers—A. J. Young—Gunn. Agents—Mackay & Young, W.S.

Counsel for the Defenders — Salvesen, K.C.—T. B. Morison. Agent—George F. Welsh, Solicitor.

Tuesday, June 9.

FIRST DIVISION.

[Sheriff of Lanarkshire.

ALSTON, PETITIONER.

Poor — Removal of Pauper — Married Woman Born in France with Husband Resident in England—Poor Law (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 83), *sec.* 77—*Poor Removal Act* 1862 (25 *and* 26 *Vict. cap.* 113), *secs.* 2 *and* 4.

A married woman, born in France, whose husband was an Englishman and had for three years been resident in a parish in England, became chargeable for parochial relief to a parish in Scotland. *Held* that the inspector of poor of the parish in Scotland to which she had become chargeable was not entitled to an order for her removal to England.

The Poor Law (Scotland) Act 1845 (8 and 9 Vict. cap. 83), sec. 77, enacts—"If any poor person born in England, Ireland, or the Isle of Man, and not having acquired a settlement in any parish or combination in Scotland, shall be in the course of receiving parochial relief in any parish or combination in Scotland, then and in such case it shall be lawful for the sheriff, or any two justices of the peace of the county in which such parish or any portion thereof is situate, to cause such poor person, his wife, and such of his children as may not have gained