question of administration and practice rather than of law, and because the continuance of the present practice involves a waste of curatorial funds which (as I think) is or ought to be unnecessary. It is for consideration whether, as suggested for the *curator bonis*, it might not be sufficient to have a distinct finding and declaration by the Court that it is unnecessary to grant the powers craved, in respect they are within the ordinary powers of administration which are vested in a *curator bonis* to a lunatic, and that nothing in section 131 operates to restrict those powers. There is, however, no guarantee that such a declaration would have the desired effect. The alternative seems to be (1) an application by the *curator bonis* to obtain a similar declaration from the English Court, with a view to compelling the companies in future to register the transfers without an order, (2) the perpetuation of the present unnecessary and expensive practice, and (3) legislation.

"In illustration of the position taken up by the English companies, I may refer to *Petition, George M'Call, for curator bonis* (boxed 12th October 1900), and to *Note therein for Thomas F. Donald (M'Call's curator bonis) for special powers* (boxed 18th February 1901), and specially to the Accountant's report and relative correspondence printed as an appendix to said note."

At the hearing counsel for the *curator bonis* referred to *Allan's Trustees*, December 11, 1896, 24 R. 238, and March 13, 1897, *ibid.* 718, 34 S.L.R. 166 and 532. The argument sufficiently appears from the Lord Ordinary's note.

LORD PRESIDENT—There is no doubt that it is within the power of a Scottish *curator bonis* to realise the estate of his ward without obtaining the authority of the Court to do so, and if this question had arisen in Scotland, and an application similar to this had been made, the Court would very probably have refused it as unnecessary. The application, however, relates to certain investments in England, and the Bank of England, and one or more of the great railway companies do not feel that they would be in safety to register transfers where the authority of the Court has not been obtained by the curator to realise the stocks. It appears to me that in this particular case it will, in the interest of the estate and of the ward, be the best course to grant the power craved, otherwise the administration may be impeded or delayed. But it is to be hoped that after the statement which I have just made the Bank of England and the railway companies, and other companies in England, may be satisfied without putting curators to the expense of applying to the Court for authority to realise the estates under their care.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"Remit to the Lord Ordinary to grant the prayer of the note, and find the curator entitled to the expenses of and incident to the note out of the curatory estate, and remit," &c.

Counsel for the *Curator Bonis*—D. Anderson. Agent—Lewis Bilton, W.S.

Tuesday, November 19.

FIRST DIVISION.

[Sheriff Court of Lanarkshire,

COMMISSIONERS OF THE BURGH OF MOTHERWELL *v.* COUNTY COUNCIL OF LANARK.

Sheriff—Process—Decree by Default—Non-Appearance at Debate on Appeal—Reponing—Appeal for Reponing.

A sheriff, in an appeal, after giving sufficient opportunity for explanation, granted decree by default in respect of no appearance for the appellants. The diet for the hearing had been intimated in the Act Book of Court, which was the only official intimation, but the appellants' agent had not heard of this intimation through his clerk having failed to consult the original entries in the Act Book itself. Appeal to the Court of Session for reponing *dismissed.*

The County Council of Lanark, who were empowered under the Local Government (Scotland) Act 1889 (52 and 53 Vict. c. 50), to enforce the provisions of the Rivers Pollution Prevention Acts 1876 and 1893 within the county of Lanark, raised an action in the Sheriff Court at Hamilton against the Commissioners of the Burgh of Motherwell to have them ordained to abstain from polluting certain streams within the district of the pursuers.

On 6th March 1901, after various procedure, the Sheriff-Substitute (DAVIDSON) pronounced an interlocutor in which he repelled the defences and made a remit to a man of skill to report as to the best means of preventing the pollution complained of.

The defenders appealed to the Sheriff (BERRY), who appointed parties to debate on the appeal on 20th May 1901.

On 1st June 1901 the Sheriff pronounced an interlocutor in the following terms:—"On the motion of counsel for respondents (the pursuers), there having been no appearance by or for the appellants at the diet for hearing parties on the appeal, dismisses the appeal," &c.

The defenders appealed to the Court of Session.

They presented a note in the appeal, in which they explained that the appeal was taken for the purpose of being reponed, and craved the Court to dispense with printing of the notes of evidence. They stated as follows:—"Owing to the appellants' agent being absent in London until the day before the hearing, the appellants were unaware that the case had been put out for debate, and no appearance was made for them at the hearing. Fur-

ther, the list of appeals which is put up at the Hamilton Court-House did not contain this case in the list of Hamilton cases. It was placed by error in the list of Glasgow cases. It thus escaped the notice of the appellants' agent's clerk."

The respondents lodged a minute, in which, with reference to the statement in the appellants' note quoted above, they explained as follows:—"(1) That the printed roll above referred to is not the authorised roll of Court, but is one privately provided by the Faculty of Procurators in Glasgow. (2) The said appeal appeared in said roll for hearing before the Sheriff on the date in question. It was not, however, put under any special heading. The Hamilton cases are generally taken on a Wednesday. In this case the Sheriff allowed a special diet for debate, and fixed a Monday. The case therefore was not among the other Hamilton cases under the heading of 'Hamilton,' but was on the general roll, which is not limited to Glasgow cases. (3) That the appeal was duly entered for debate on the date in question in the 'Act Book' of the Hamilton Sheriff Court, which is the official record. (4) That on 17th May 1901, three days prior to the date fixed for the debate, the agents for the respondents communicated by telephone with the agent of the appellants reminding him that the case was put out for hearing."

The respondents also intimated an objection to the competency of the appeal.

On 19th July 1901 the First Division pronounced the following interlocutor:—"The Lords having heard counsel for the parties, Appoint the cause to be put to the summar roll, reserving the question of the competency of the appeal; meantime remit to the Sheriff to report to this Court in regard to the practice followed in fixing diets and publishing or intimating to agents the orders for the hearing of cases coming before him on appeal from Hamilton."

The Sheriff, under the remit contained in the above interlocutor, reported as follows:—"Lists of diets in appeal cases, including cases from all the districts of the county of Lanark, are made up at short intervals, generally about once a month, and a copy of each list when prepared is sent to the different sheriff-clerks-depute at the district seats of Court, including the Sheriff-Clerk Depute at Hamilton, in order that entries may be made in the Act Book of Court of each district of all diets fixed in appeals from that Court during the currency of the list. Any diets that may have to be fixed in the intervals between the issues of these lists are also, for the same purpose of publication in the Act Book, intimated to the Sheriff-Clerk-Depute of the district to which each case belongs respectively.

"With regard to the case in connection with which the present remit has been made, and in which the diet was fixed for 20th May 1901, I have made inquiry and find that the list containing it was posted to Hamilton on Saturday the 27th April, and was received by the Sheriff-Clerk-Depute there on the morning of Monday following, viz., the 29th of April. Entries of the case in question and the other Hamilton cases on the list were on the date last mentioned made in the Act Book of that Court. It will thus be seen that publication was made in the Act Book, which is open to inspection during office hours, three weeks before the diet.

"For a number of years it has been the practice of the Glasgow Faculty of Procurators to print for the use of the members of the Faculty the lists of cases made up as above mentioned, and it has been usual for the copies of these prints as they appear to be exhibited on the notice boards at each of the district sheriff-clerk's offices. This was done in the present instance. These printed lists bear on their face to be printed for the Faculty of Procurators, and are unofficial. Publication in the Act Book is the official intimation on which parties and agents must depend."

At the hearing the respondents raised in the summar roll the question of the competency of the appeal, relying on the Rivers Pollution Prevention Act 1875 (39 and 40 Vict. c. 75), sec. 11, which provides for appeals by way of stated case. The question of competency, however, was not considered, the Court desiring first to hear parties on the question of reponing.

Argued for the appellants — Reponing was a question of circumstances, and in this case there had been no gross negligence, the only fault consisting in relying on the accuracy of the printed lists. The appellants were willing to make good the expenses caused by the default, and on condition of doing so they were entitled to be reponed—*Brown's Trustees* v. *Milne*, July 17, 1897, 24 R. 1139, 34 S.L.R. 863; *M'Carthy* v. *Emery*, February 27, 1897, 24 R. 610, 34 S.L.R. 455; *Morrison* v. *Smith*, October 18, 1876, 4 R. 9, 14 S.L.R. 17.

Argued for the respondents—Negligence on the part of a party's agent was no ground for reponing—*M'Gibbon* v. *Thomson*, July 14, 1877, 4 R. 1085, 14 S.L.R. 648; *Stevenson, &c.* v. *Hutcheson and Anderson*, May 12, 1885, 12 R. 923, 22 S.L.R. 613; *Bain* v. *Lawson & Son*, Feb, 16, 1899, 1 F. 576, 36 S.L.R. 417. The appellants had had twelve days to offer sufficient excuse for their failure to appear, and the decree by default was statutory—Sheriff Court Act 1876 (39 and 40 Vict. c. 70), sec. 20.

LORD PRESIDENT—I think we now know enough of the circumstances of this case, and shortly stated they are that on 25th April 1901 the Sheriff appointed parties to debate on the appeal on 20th May. It is stated, but I do not know that it is admitted, that on 17th May, three days before the day appointed for the hearing, the agents of the respondents communicated by telephone with the agent of the appellants advising them that the case was to be heard.

The practice in the Sheriff Courts of Lanarkshire is to intimate in the Act Book the times at which cases will be heard, and the Sheriff says in his report that this is the official intimation on which parties and

agents must depend. This, the only authentic intimation, was given duly in the present case, and it must have been well known to all concerned that if they desire to ascertain when a case is to be heard they must look at the Act Book. Apparently the agent for the appellants did not consult that book, and he was not aware that the case was put out for hearing on the 20th May. The diet having been called, and no appearance made for the appellants, the Sheriff does not seem to have acted with undue haste, as he waited until 1st June, and there having been then still no appearance for the appellants, he, on the motion of the respondents, dismissed the appeal. This is the judgment appealed against, and it seems to me to have been perfectly correct.

Great weight is naturally attached to the opinion of an able and experienced Sheriff in regard to a matter of practice in his Court, and I see no reason for disturbing what he has done. I therefore think that this appeal should be dismissed.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court dismissed the appeal.

Counsel for the Defenders and Appellants —Campbell, K.C.—W. Thomson. Agents —Carmichael & Millar, W.S.

Counsel for the Pursuers and Respondents — Wilson, K.C. — C. D. Murray. Agents—Bruce, Kerr, & Burns, W.S.

Tuesday, November 19.

SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

DOUGLAS *v.* HOGARTH.

Reparation — Negligence — Two Defenders Sued Jointly and Severally or Severally — Effect of Discharge of Pursuer's Claim against One of Two Defenders—Right of Relief.

A workman who was injured while employed in discharging the cargo of a vessel, brought an action against two defenders, craving decree against them jointly and severally, or severally, for £300 in name of damages. He made averments of fault against both defenders. Before issues were adjusted the pursuer discharged his claim against one defender for the sum of £15, and this defender was assoilzied. The remaining defender maintained that he was entitled to decree of absolvitor, in respect that the pursuer by discharging the other defender had deprived him of the right of relief which he would otherwise have had. The Court repelled this contention, and the pursuer having restricted his claim by the amount which he had received from the defender whom he had discharged, *granted* an issue against the remaining defender.

James Douglas, labourer, brought an action in the Sheriff Court at Glasgow against Hugh Hogarth, shipowner, and Robert Gillespie, stevedore, Glasgow, in which he craved decree against the defenders, jointly and severally or severally, for £300 in name of damages for personal injuries sustained by him. The pursuer averred that he was employed by the defender Gillespie to assist in discharging the cargo of a vessel belonging to the defender Hogarth, and that while so employed he received the injuries complained of. He made averments of negligence against both defenders.

The pursuer pleaded, *inter alia*—"(1) The pursuer having been injured through the negligence of both of the defenders, or either of them, or their servants, is entitled to compensation from them jointly and severally, or severally, with expenses."

The Sheriff-Substitute (STRACHAN) on 28th May 1901, before answer, allowed a proof.

The pursuer appealed to the Court of Session for jury trial.

Before issues were adjusted the pursuer accepted from the defender Gillespie the sum of £15 in full satisfaction of his claim against him, and granted him a receipt, which bore that it was "granted in discharge of my claims against Robert Gillespie only, and is entirely without prejudice to any claims for damages I may have against the remaining defender Hugh Hogarth in respect of said injuries."

In pursuance of this discharge and joint-minute following thereon the Court, by interlocutor dated 9th October 1901, assoilzied the defender Gillespie.

Thereafter the defender Hogarth obtained leave to amend his record by adding a statement setting forth the facts with regard to the settlement between the pursuer and the defender Gillespie, together with the following additional pleas-in-law: —"(5) In respect that he has accepted from the defender Robert Gillespie a sum in full of his claims of damages in the present action, the pursuer is barred from insisting in the action, and this defender is entitled to absolvitor. (6) The pursuer having discharged the person alleged to be jointly responsible for his accident, and having thereby deprived the present defender of his right of relief, is barred from further insisting in the action, and the present defender should accordingly be assoilzied."

The pursuer in answer stated the following additional plea-in-law:—"The averments in the defender's amendment are irrelevant."

An issue was lodged by the pursuer.

The defender Hogarth objected to an issue being allowed. He maintained that he was entitled to decree of absolvitor, and argued —In respect of the discharge granted to Gillespie, the pursuer had lost his right to proceed against the other defender, since if the action were allowed to proceed the latter might be held liable in a sum which, added to the amount already recovered by the pursuer, would exceed the total damage which he had suffered; and further that the