me to be impossible to hold that the document founded on by the pursuers constitutes an agreement for insurance. It does not upon the face of it bear to impose any obligation upon anyone. There is no name of one of the alleged parties to the agreement, there is no statement of premium or of any means of calculating premiums, and it is in form only a request to the company to issue a policy. To hold such a paper to constitute a policy of insurance seems to me to be quite out of the question. . . .

I therefore move your Lordships to adhere to the Lord Ordinary's judgment with additional expenses.

LORD YOUNG concurred.

LORD TRAYNER—I think the Lord Ordinary is right. The writ on which the pursuers found their claim is not a policy of insurance, nor does it evidence any contract or agreement to insure. It is a proposal for an insurance made to the defenders by their agent on behalf of the pursuers, but a proposal which the defenders were at liberty to adopt or reject. The pursuers sought to represent the writ in question as a covering-note or slip which is not infrequently issued by insurers to evidence a contract of insurance actually made until the formal policy can be prepared and issued. But such covering-notes (so far as I have ever seen) set forth that a contract of insurance has been made, and with whom it has been made, and contain a receipt for a sum paid in name of or towards the stipulated premium. There is nothing of that kind here. I can only suppose that the writ produced by the pursuers was given to them by the defender's agent to show what proposal had been made on their behalf.

LORD MONCREIFF concurred.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Younger—Sandeman. Agent—Arthur Morgan, Solicitor.

Counsel for the Defender and Respondent—Salvesen, K.C.—Wilton. Agent—William Douglas, S.S.C.

Tuesday, June 9.

FIRST DIVISION.

[Lord Pearson, Ordinary.

SKINNER'S *CURATOR BONIS*, PETITIONER.

Judicial Factor—Curator Bonis to Lunatic—Powers—Special Powers—Authority to Elect between Testamentary Provisions and Legal Rights—Succession—Process—Judicial Factors Act 1849 (*Pupils Protection Act*) (12 *and* 13 *Vict. c.* 51), *sec.* 7.

The *curator bonis* of an insane ward presented a note in terms of the Judicial Factors Act 1849 (Pupils Protection Act) sec. 7, and other relative statutes, craving the Court, *inter alia*, to authorise him on behalf of the ward to elect to accept the provisions in favour of the ward contained in the trust-disposition and settlement of her deceased husband. In a report by the curator to the Accountant of Court he set forth the reasons in respect of which he desired to accept these testamentary provisions in lieu of the ward's legal rights of terce and *jus relictæ*. The Accountant of Court stated his opinion in favour of the power being granted. The Lord Ordinary reported the note as regards the prayer in question to the First Division of the Court.

The Court *found* that it was competent for the curator to apply to the Court for authority to make the election, and for the Court to direct the curator as to the manner in which he ought to make the election; and in respect the election proposed by the curator was under the circumstances in the interest of the ward, remitted to the Lord Ordinary with instructions to grant the prayer of the note.

Opinion (*per* Lord Adam) that the provisions of section 7 of the Pupils Protection Act 1849 apply to all applications by a *curator bonis* for special powers.

The Judicial Factors Act 1849 (Pupils Protection Act) (12 and 13 Vict. c. 51), sec. 7, enacts as follows:—"And be it enacted that if at any time it shall appear to the factor that there is a strong expediency for granting abatement of rent . . . he shall report the same to the Accountant, who may order any necessary inquiry, and shall state his opinion thereon in writing, and such report and opinion may be submitted by the factor to the Lord Ordinary with a note praying for the sanction of the Court to the measures proposed, and the Lord Ordinary shall, with or without further inquiry, report the matter to the Court, who, if they consider it expedient and consistent with due regard to the amount of the estate at the time, may sanction the measure, and the decision of the Court shall be final and not subject to appeal; . . . and if any factor having charge of the estate of any lunatic or other person incapable of managing his own affairs shall deem it proper for the comfort or welfare of such person that the whole or a part of such estate should be sunk on an annuity, he shall report the matter to the Accountant, who shall state his opinion thereon in writing, and such report and opinion shall be submitted by the factor, with a note as aforesaid, to the Lord Ordinary, who shall report the matter to the Court, and it shall be in the power of the Court to sanction the measure, and the decision of the Court shall be final and not subject to appeal, and in all other matters in which special powers are, according to the existing practice, in use to be granted by the Court, the Court shall have power to grant the same in like manner and form as is above provided."

James Robert Hodge, chartered accountant, 135 Buchanan Street, Glasgow, was

on 6th August 1902, upon the petition of the trustees and executors of the deceased John Skinner, chemist and druggist, Govan, appointed *curator bonis* to Mrs Martha Ure M'Kinnon or Skinner, widow of the said John Skinner, and then an inmate of the Royal Lunatic Asylum, Gartnavel, who, as appeared from medical certificates produced, was of unsound mind and incapable of managing her own affairs or of giving proper directions for their management.

The *curator bonis* having duly found caution entered upon the administration of the ward's estate.

On 21st February 1903 the *curator bonis* presented a note for special powers in terms of the Judicial Factors Act 1849 (Pupils Protection Act) (12 and 13 Vict. c. 51), and other relative statutes, craving the Court to authorise him on behalf of the ward, *inter alia*—(1) "To elect to accept the provisions in favour of the ward contained in the trust-disposition and settlement of the deceased John Skinner, chemist and druggist, Govan, dated 21st March 1900, and relative codicil dated 9th April 1902."

In compliance with the Judicial Factors Act 1849 (Pupils Protection Act), section 7, the *curator bonis* lodged with the Accountant of Court a report setting forth the circumstances under which he considered the powers craved necessary. In this report the *curator bonis* stated that the ward's whole estate consisted of her interest in the estate of her deceased husband John Skinner, who died on 26th April 1902, leaving a trust-disposition and settlement and relative codicils under which the ward was entitled to certain provisions. The report further stated that the ward was not legally bound to accept the provisions in her favour under the said trust-disposition and settlement and codicil, but was entitled to repudiate these and to claim her legal rights of *jus relictæ* and terce, and that until the curator elected between the said testamentary and legal rights the trustees of the deceased John Skinner were unable to proceed with the administration of the estate under their charge. The ward was 47 years of age, and her board at Gartnavel cost £60 annually. The curator reported that, having fully considered the question, he was of opinion that powers should be given to him to accept the testamentary provisions in favour of the ward in lieu of the ward's legal rights of terce and *jus relictæ*. The reasons for this opinion set forth by the curator in his report, as summarised by the Lord Ordinary, were as follows:—"(1) That according to skilled medical opinion the ward will never be of sound mind, though her mental illness will not shorten her life; (2) that the result of claiming her legal rights 'would completely upset the provisions of the deceased's settlement and raise difficult questions of law;' (3) that the ward's brother and sister, who are at present her nearest of kin, have intimated that they approve of the testamentary provisions being accepted; and (4) that on the footing of the testamentary provisions there will be a surplus income of £18, or in another view of £33 per annum, while on the footing of her legal rights there will be a deficit on yearly income of £14, or in another view of £16, 10s."

The Accountant of Court in his opinion, after narrating the facts, stated as follows: "In respect that the annual income under the settlement will be larger than what would be received by the ward's legal rights being accepted, that the medical report upon her physical health is good, and that her next-of-kin approve of the provisions being accepted, the Accountant is of opinion that the powers craved by the factor may be granted."

The report of the *curator bonis* to the Accountant of Court and the opinion of the Accountant of Court were submitted to the Lord Ordinary along with the before-mentioned note for the *curator bonis*, for special powers.

The trustees of the deceased John Skinner lodged a minute in which it was stated, *inter alia*, that in the interest of the other beneficiaries under the will it was desirable that the ward's right of election should be exercised as promptly as possible.

On 24th March 1903 the Lord Ordinary (PEARSON) pronounced an interlocutor reporting the note, so far as regards the first head of the prayer thereof, to the First Division of the Court and granted warrant to enrol in the Inner House rolls.

Opinion.—[*After narrating the facts*]—"If the election between legal and testamentary provisions is to be now exercised, the strongest point in favour of electing the provisions under the will is, that there will be an annual surplus; while in the other event there will be an annual deficit.

"But the prior question is, whether this is a case for the *curator bonis* making the election now, or whether it should stand over until the recovery or death of the ward. The considerations on which this question depends are fully set forth in the case of *Morison's Curator Bonis*, 8 R. 205. In that case the whole income was directed by the will to be expended for behoof of the ward (the testator's widow), the payment of legacies and residue being postponed until her death; and the Court held that the election should not be made by the curator, but should be left to the ward, if she should recover, and failing her recovery to her representatives. One important circumstance in that case was, that there was no pressing necessity for the division of the trust estate (see Lord Shand's opinion *sub fin.*) Here, on the other hand, there is some degree of urgency in the interest of the other beneficiaries under the will, as explained in the minute lodged for the trustees.

"I refrain, however, from expressing an opinion on either of these topics, because the application raises an important question of practice, which ought first to be determined, and which I think it my duty to report. It is, whether an application for special powers is a competent or necessary proceeding on the part of a *curator bonis* who desires to elect between legal and

testamentary provisions on behalf of his ward; and if so, whether the Court will go a step further, and not only grant power to make the election, but practically direct the curator how it should be made.

"The existing enactment as to the granting of special powers is section 7 of the Pupils Protection Act of 1849. This section enumerates certain circumstances in which the Court may grant special powers to a factor; and it ends with these general words 'and in all other matters in which special powers are according to the existing practice in use to be granted by the Court, the Court shall have power to grant the same in like manner and form as is above provided.'

"In the matter of procedure, the older practice was to obtain special powers by way of an action of declarator, which was brought in the Inner House and remitted to a Lord Ordinary for inquiry and report. Even before the Act of 1849, however, procedure by summary petition to the Inner House was allowed in such cases; and this remained the practice under section 7 of the Act of 1849, with this difference, that a note, with the opinion of the Accountant, was presented to the Lord Ordinary, who reported it to the Inner House for decision. This was altered by the Distribution of Business Act 1857. The granting of special powers has all along been regarded as an exercise of the *nobile officium*; but by the Act of 1857 the Junior Lord Ordinary has now cognisance of the matter by statutory delegation.

"This being so, it becomes necessary to consider whether this application is within the scope of section 7 of the Act of 1849. In particular, does it come within the 'other matters in which special powers are according to the existing practice in use to be granted by the Court'? *Prima facie* these words apply to the practice in and prior to 1849, though it may well be that the Inner House, in their practice between 1849 and 1857, extended them so as to include other cases analogous to those in which special powers had previously been granted. But even taking 1857 as the date, I can find no practice warranting the grant of such a power as is now asked.

"The only instance to which I was referred was a note which was before me a few months ago (*Duncan, Young's Curator Bonis*, January 9, 1902). My attention was not then directed to the question now raised, else I should have raised it then. But on referring to the papers I find that the *curator bonis* did not ask, as he does here, for power 'to elect to accept' the testamentary provisions, but only for power 'to exercise the right of election.' In granting that I affirmed only that the time for election had come.

"It was argued that in the absence of direct authority I should follow the analogy of certain decisions authorising the guardian of a pupil heir to collate heritage with the executry. The cases are *Robertson*, January 14, 1841, 3 D. 345, 16 Fac. Coll. 324; and *Mitchell*, November 25, 1847, 10 D. 148. They are meagrely reported, but in each the Court seems to have granted authority to the *factor loco tutoris* of pupil children to collate the heritage on the part of the eldest son with the younger children. No opinions are preserved, except that in the Faculty report of the earlier case, where power was also asked to renounce a lease, the Lord President Hope observed 'that though the renunciation of the lease required authority from the Court, as to the collation the factor must judge for himself whether it was for the interest of the pupil children or not.' This seems to leave it in doubt whether power to collate was really granted; but perhaps it was merely a reminder to the curator that though power was granted it rested with him to exercise it or not on his own responsibility. These cases, however, form a somewhat slender basis on which to found a practice in favour of granting the application now before me.

"An additional difficulty is thrown in the way of this application by the two recent cases of *Morison's Curator Bonis* (8 R. 213) and *M'Call's Trustee* (3 Fraser 1066). In both cases the *curator bonis* of a lunatic claimed payment of the legal provisions due to his ward, on the footing that he had elected them as against the testamentary provisions. The question was not as to how the election should be exercised. It was whether the election should be exercised or whether in the circumstances it should be allowed to stand over. The earlier case was an action of count, reckoning, and payment by the curator against the testamentary trustees; and the Court held that the action was premature, and that the circumstances were insufficent to justify the curator in making an election. In the later case the curator and the trustees presented a special case to the Court, and it was held that the circumstances justified the election. So far as appears, the curator had not in either case obtained or applied for any special power in the matter, nor is anything said in either case as to the absence of such powers. It was assumed that a *curator bonis* is entitled by virtue of his ordinary powers to submit such a question for decision in an ordinary action, as in the case of *Morison*. This goes far to exclude the idea that it is either necessary or appropriate to resort to the *nobile officium* of the Court, or, in other words, to obtain special power under the Judicial Factors' Acts in such a matter.

Argued for the petitioner—The course taken by the curator in applying to the Court under section 7 of the Pupils Protection Act 1849 for authority to make the election was a proper one. The words at the end of section 7 of the Act of 1849 were quite general and covered all applications by a curator for special powers in cases in which the Court were in use to grant such special powers. The words of section 7, "all other matters in which special powers are according to existing practice in use to be granted by the Court," did not confine applications to cases in which special powers were in use to be granted before 1849. Further, it was for the Court to decide the manner in which the election should be

made—*Turnbull* v. *Cowan*, March 17, 1848, 6 Bell's App. 222. Although no actual case could be referred to in which such a power as was here asked was granted, the competency of such an application was clear, on the principle that no important or extraordinary step should be taken by a factor in relation to an estate under judicial management without the Court having considered the expediency of what was proposed—*per* Lord President in *Drummond's Judicial Factor*, June 30, 1894, 21 R. 932, 31 S.L.R. 777; The prayer in the note was modelled on the prayer in a petition for power to a factor *loco tutoris* of a pupil to collate—a very analogous case. The cases—*Morison's Curator Bonis* v. *Morison's Trustees*, Dec. 3, 1880, 8 R. 213, 18 S.L.R. 160; and *M'Call's Trustee* v. *M'Call's Curator Bonis*, July 16, 1901, 3 F. 1065, 38 S.L.R. 778 showed that the power of a *curator bonis* to elect on behalf of his ward between the legal and conventional rights of the ward was an extraordinary power, only to be exercised by the curator in exceptional circumstances. In other words, in ordinary circumstances it could be exercised only under special powers granted by the Court. On the merits, the election which the curator proposed to make on behalf of the ward was right, being in the circumstances most in the interests of the ward.

For the testamentary trustees of the deceased John Skinner it was stated that the incapacity of the ward to elect between her testamentary provisions and her legal rights had brought about a deadlock in the administration of the trust, and that it was in the interest of the other beneficiaries that the *curator bonis* should be authorised to make an election on behalf of the ward.

LORD PRESIDENT—In this case two questions are raised, the first whether the Court has power to grant the application, and the second whether, if the Court has the power, this is a case in which it ought to be exercised. It appears to me that the Court has the power, and that in the circumstances of this case it is reasonable and right in the interest of the ward that it should be exercised.

The mental incapacity of the ward creates a deadlock in the administration of the trust, because she is unable to make an election between the provisions to which she has right under the trust and her legal rights, and consequently either the trust must be held in suspense indefinitely or someone must be authorised to make an election for her.

The position in which the case stands as regards the pecuniary interest of the ward appears to be this—if she adheres to her legal rights there will be a deficit of income amounting to £14 a-year, or on another calculation to £16, 10s., below what is required for her maintenance, while if she accepts her testamentary provisions the income will be ample. *Prima facie* therefore it would appear to be reasonable to grant the power asked. If it was probable or possible that the ward could recover her mental powers it might be matter for consideration whether any invasion should be made upon the capital to which she might be entitled, and whether she might not prefer to have an interest in the capital rather than in the income merely of her husband's estate. The petitioner, however, states that there is no likelihood of the ward recovering her health. Thus the main consideration is what would afford the best means of comfortable maintenance for the ward, and an adequate income would do so. For these reasons it appears to me (1) that the application is competent, and (2) that we ought to remit to the Lord Ordinary, with instructions to authorise the *curator bonis* to elect on behalf of the ward to accept the testamentary provisions as against her legal rights.

LORD ADAM—There are two questions raised here, one a question of form, and one on the merits. The interlocutor under which this matter comes before us reports the note to this Court, "so far as regards the first head of the prayer thereof." So it appears that the case is reported on its merits, for under the first head the *curator bonis* seeks power "to elect to accept the provisions in favour of the ward contained in the trust-disposition and settlement of the deceased John Skinner." That appears to me to be an indication that the *curator bonis* has made up his mind to accept the provisions should he be authorised to do so. On the merits I entirely agree with your Lordship, and I think it in the best interest of the ward that the authority asked for should be granted.

On the question of form, I think it is competent for the Court to direct the *curator bonis* as to the way in which he ought to exercise the election, and I also think that it was the proper course for the curator to adopt to apply to the Court for authority before making the election. This is in accordance with the case of *Turnbull* v. *Cowan* (6 Bell, 222), where it was laid down that it rests with the Court to decide in what manner an election should be made. It would not do for a *curator bonis*, who is an officer appointed by the Court, to ask merely for authority to elect without informing the Court as to the way he proposes to exercise the power. Otherwise he might exercise it in a way opposed to what the Court regarded as expedient. I am also of opinion that the application is properly brought under section 7 of the Pupil's Protection Act of 1849. That provision in my opinion applies to all applications by a *curator bonis* for special powers.

LORD M'LAREN—I find from a perusal of his note that the Lord Ordinary would not have reported this case apart from the question of competency which had been suggested to him, and which he thought might be set at rest by a decision of the Inner House.

No doubt in certain cases it is the duty of a judicial factor to exercise a right of election on behalf of a ward. The further question may also arise whether he should

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