tion of Tailors would allow the Master Court to decide upon the eligibility of applicants seeking to enter by the near hand, *i.e.*, sons and sons-in-law, and the respondents object to this as taking away or interfering with what they assert to be at present a right on the part of sons and sons-in-law. It does not, however, appear to me to be unreasonable that the Master Court should have the power of considering the personal eligibility even of sons and sons-in-law claiming to enter by the near hand, as they might in point of character or otherwise be so unsuitable that they ought to be excluded. The Incorporation is not a friendly society in which certain pecuniary advantages have been purchased and are payable *ex contractu* apart from the personal qualities — merits or demerits —of the persons claiming. For these reasons I think that it is for the Court to consider and decide upon the objections stated by the respondents to the proposed bye-laws, and upon careful consideration of these objections it appears to me that they are not well founded. I am therefore of opinion that the objections should be repelled, and that the prayer of the petition should be granted.

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

The Court pronounced this interlocutor:—

"Grant the prayer of the petition: Interpone authority to the additional bye-laws enacted by said Corporation of Tailors set forth in the appendix annexed to the petition: Sanction and authorise said bye-laws as approved of by this Court to be valid and binding upon said Incorporation, all in terms of the Act 9 and 10 Vict. cap. 17; and decern."

Counsel for the Petitioners — Guthrie, K.C. — Hunter. Agents — John. C. Brodie & Sons, W.S.

Counsel for the Respondents — Ure, K.C. —Guy. Agents—Campbell & Smith, S.S.C.

Tuesday, November 19.

FIRST DIVISION.

[Lord Pearson, Ordinary.

MORISON (TODD'S *CURATOR BONIS*), PETITIONER.

Judicial Factor—Curator Bonis—Special Powers—Power to Sell Shares in English Companies — Whether Special Powers Necessary—Judicial Factors (Scotland) Act 1889 (52 *and* 53 *Vict. cap.* 39), *sec.* 13—*Lunacy Act* 1890 (53 *and* 54 *Vict. cap.* 5), *sec.* 131, *sub-sec.* 3.

A *curator bonis* presented a note for authority to sell certain shares held by his ward in English companies, or alternatively for a finding that he was entitled to sell them without first obtaining the authority of the Court. It appeared that in consequence of the terms of the Lunacy Act 1890, sec. 131 (3), certain English companies had refused to register transfers granted by a *curator bonis* to a lunatic. The Court, in the circumstances, *granted* the authority craved.

Opinion (*per* the Lord-President) that a Scottish *curator bonis* has power to sell the personal estate of his ward in England without first obtaining the authority of the Court.

This was a note for special powers presented by James Morison, *curator bonis* appointed to John Archibald Todd, ink manufacturer, Perth, in which the curator craved authority to sell and execute certain transfers of shares which his ward held in English companies, or alternatively for a finding that he was entitled to sell them without first obtaining the authority of the Court.

The Lunacy Act 1890 (53 and 54 Vict. cap. 5), section 131, sub-section (3), enacts as follows:—"Where a tutor-at-law after cognition, or a *curator bonis*, has been appointed to a lunatic in Scotland who has personal property in England or Ireland, the tutor-at-law or *curator bonis* shall, without an inquisition or other proceedings in England or Ireland, have all the same powers as to such property, or the income thereof, as might be exercised by the committee of a lunatic so found by inquisition in England or Ireland."

The Judicial Factors (Scotland) Act 1889 (52 and 53 Vict. cap. 39), section 13, enacts as follows:—"An official extract of the appointment of any judicial factor, trustee, tutor, curator, or other person judicially appointed, and subject to the provisions of the recited Acts or of this Act, shall have throughout the British dominions, as well out of Scotland as in Scotland, the full force and effect of an assignment or transfer executed in legal and appropriate form of all funds, property, and effects situated or invested in any part of the British dominions, and belonging to or forming part of the estate under his charge; and all debtors and others holding any such funds, property, or effects shall be bound, on production of such official extract, to pay over, assign, or transfer the same to such judicial factor, trustee, tutor, curator, or other person."

The curator stated in the note that his ward's moveable estate consisted largely of stocks and shares of railways and limited companies in England, the capital value of which amounted to about £7800; that these stocks and shares were not of the character which a *curator bonis* was empowered to hold, and that he had accordingly, after consulting the Accountant of Court, resolved to sell them.

The curator further stated that before selling certain stocks of the Great Northern Railway Company he ascertained from the company that in their view they could not register transfers of the stock executed by him without an order from the Court, on the ground that "a *curator bonis*, with

respect to his ward's estate in England, had only the same powers as a committee of the estate of a lunatic appointed by the English courts, and that such committee had no powers to sell the ward's estate without an order from Court."

On 20th July 1901 the Lord Ordinary (PEARSON) reported the note to the First Division.

Note.—[*After narrating the facts his Lordship proceeded*]—"The matter has come up before me on several occasions during the last few years in other curatories. I found on inquiry that the purpose of the *curator bonis* would not be served by refusing his application for special powers as unnecessary; for the demand was still made by the English companies for an order of Court. I found that the practice was to grant the power craved. This, however, bears hardly upon all curatories, and especially so upon small estates, where the expense of the application for special power sometimes materially diminishes the available funds.

"The objection is not confined to the Great Northern Railway Company. It has been stated by the London and North-Western Railway Company; and it applies also to that large class of investments which are under the management of the Bank of England or are 'inscribed' (for the purposes of convenience and security) in the books of that bank.

"I understand that the objection is a perfectly general one, and that it does not depend either (1) upon whether the stock proposed to be transferred is or is not one which the *curator bonis* is entitled to hold as an investment, or (2) upon the specialty that here the *curator bonis* proposes by virtue of his act and warrant of appointment to transfer the stock direct from the ward's name into that of the transferee. The objection as stated would apply equally to the case of a *curator bonis* selling stock which is standing in his name, and which he is entitled to hold as an investment. Nor do I understand that the difficulty is in any way connected with the English rule as to a trust title not appearing on the register.

"There is no difficulty as to vesting such shares and stocks in the person of the *curator bonis*. That is provided for by section 13 of the Judicial Factors (Scotland) Act 1889 (52 and 53 Vict. cap. 29), whereby an 'official extract' of the appointment of any judicial factor (including a *curator bonis*) is declared to have the full force and effect of a duly executed assignment of all funds, property, and effects situated or invested in any part of the British dominions and belonging to or forming part of the estate under his charge. This, however, deals only with the transfer of the estate to the judicial officer, and has no application to transfers by him to a purchaser.

"The objection is founded on section 131 of the English Lunacy Act 1890 (53 Vict. cap. 5), which in this matter is a re-enactment of section 53 of the Lunacy Act of the previous year (52 and 53 Vict. cap. 41). By sub-section 3 of section 131 it is provided that where a *curator bonis* has been appointed to a lunatic in Scotland who has personal property in England, he 'shall have all the same powers as to such property or the income thereof' as might be exercised by the committee of the estate of a lunatic so found by inquisition in England. Then it is said that the expression 'all the same powers' means 'only the same powers;' and that as the committee of the estate has no power according to English practice to sell the ward's estate without an order of court, so neither has a *curator bonis* so far as regards estate situated in England. But (not very logically) it is conceded that the court which is to give the order is the Scottish Court, being the court which knows that no such order or authority is necessary.

"Thus a clause which is obviously meant to facilitate the administration of lunatic estates as between the two countries is said to have raised up a barrier in the way of dealing with the English moveable estate of a Scottish lunatic. Prior to the Act of 1890 there was no such difficulty, the stocks of English railway companies being freely transferred from the name of the ward to the name of one purchasing from the *curator bonis*, without any special order or authority being asked or obtained (*Maitland's Curatory*, 20th March 1880, Lord Adam).

"Further, it would appear (if the objection is well founded) that section 131 has overturned the practice in each country as regards property situated in the other. Apart from the statute a Scotch *curator bonis* has, and an English committee of the estate has not, the power to sell the ward's estate without an order of court. Then section 131 makes reciprocal provisions as regards the two countries. By sub-section 2 the committee of the estate of an English lunatic having personal property in Scotland is to have 'all the same powers' as to such property or the income thereof as a duly appointed *curator bonis* might exercise in the case of a person of unsound mind in Scotland. By sub-section 3 provision is made in identical terms for the converse case. So that, if a *curator bonis* cannot now sell the ward's English personal property without the order of a Scottish court, an English 'committee of the estate' can now sell his ward's Scotch personal property without the order of any court, and indeed has express statutory power to do so.

"It seems reasonably plain that the objection is founded on a misconception of the scope of section 131, and that that clause was not intended either to enlarge or restrict the common law powers of the officials in either country, for the due exercise of which they are responsible to the court whose officers they are. At all events, it seems perfectly clear that it was not intended in any way to restrict the exercise of their common law powers as regards estate situated elsewhere, or to interpose a new barrier to the free exercise of powers which existed prior to and independently of the Lunacy Act.

"I report the case because it touches a

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-