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

a settlement in Scotland, to be removed by sea or land, by and at the expense of the complaining parish, to England or Ireland, or the Isle of Man respectively, according as such poor person shall belong to England, Ireland, or the Isle of Man."

The Poor Removal Act 1862 (25 and 26 Vict. cap. 113), sec. 2. enacts—"Such warrant of removal shall be granted . . . in Scotland only on the application of the inspector of the poor of the parish or combination, or other officer appointed by the parochial board of such parish or combination where such poor person shall have become chargeable, and shall contain the name and reputed age of every person ordered to be removed by virtue of the same, and the name of the place in Scotland or England or Ireland (as the case may be) where the justices or magistrates, or sheriff or justices, shall find such persons to have been born, or to have last resided for the space of . . . three years in the case of a poor person to be removed to England or Ireland; . . . provided that, in the case of any native of England, Ireland, or Scotland, where the justices or magistrate, or sheriff or justices (as the case may be), shall not be able to ascertain, upon the evidence before them, the place of birth or of such continued residence as aforesaid, they shall order the pauper to be removed to the port or union or parish in England or Ireland (as the case may be), or port or parish in Scotland, which shall, in the judgment of such justices or magistrate, or sheriff or justices (as the case may be), under the circumstances of the case be most expedient."

Sec. 4—"Such warrant shall order the removal of the poor person to be made to the place mentioned therein as aforesaid, and shall order the persons charged with the execution thereof to cause such poor person, with his family (if any), to be safely conveyed to such place in England, Ireland, or Scotland (as the case may be), to be delivered . . . in the case of a removal to England or Ireland, at the workhouse of such place, or of the union or parish containing the port or place nearest to the place mentioned in the warrant as the place of the pauper's ultimate destination."

Andrew Thomson Alston, Inspector of Poor for the Parish of New Monkland, brought a petition in the Sheriff Court of Lanarkshire at Airdrie, praying the Sheriff, "it being proved" that Mary Ann Thomson or Bartlett, or her husband William Bartlett, "last resided for three years in Whitechapel, and has not acquired, or if acquired has not retained, a settlement in any parish in Scotland, and that the said Mary Ann Thomson or Bartlett has actually become chargeable to the said parish of New Monkland, and that the health of the said Mary Ann Thomson or Bartlett is such that she would not suffer bodily or mental injury by her removal, to grant the necessary order for her removal to the workhouse of the Guardians of the Union of Whitechapel, Mile End Road, London East."

Mary Ann Thomson or Bartlett, presently an inmate of Hartwood Asylum, was born in France, and was the wife of William Bartlett, 343 Commercial Road, London, a native of England, who last resided for three years in the parish of Whitechapel, within the Union of Whitechapel in London. She had become chargeable to and was receiving parochial relief from the parish of New Monkland. Her reputed age was forty-nine years. She had for years lived separate from her husband, who now refused to maintain her on the ground that she had been guilty of adultery, and that he was therefore free from the obligation of affording her aliment.

The petitioner averred that Mrs Bartlett had not acquired a settlement in any parish or combination in Scotland, or if she had acquired had not retained such settlement. The petition set forth or referred to the Poor Law (Scotland) Act 1845, sec. 77; the Poor Removal Act (25 and 26 Vict. cap. 113). secs. 1, 2, and 4; the Local Government Act 1894 (57 and 58 Vict. cap. 58), sec. 21; and the Poor Law Act (61 and 62 Vict. cap. 21), sec. 6.

From the depositions it appeared that Mrs Bartlett's parents were of Scottish birth, although she herself was born at Boulogne.

A medical certificate was produced that the health of Mrs Bartlett was such as to admit of her removal, as craved, either by land or water.

On 19th March 1903 the Sheriff-Substitute (A. O. M. MACKENZIE) pronounced this interlocutor—. . . "Finds in fact that Mary Ann Bartlett, who has become chargeable to and is in course of receiving relief from the parish of New Monkland, was born in France: Finds in law that, as the said Mary Ann Bartlett was not born in England, the petitioner is not entitled to an order for her removal to that country: Therefore refuses the petition, and decerns."

Note.—[*After narrating the facts.*] . . . "The question is, whether in these circumstances it is competent for me to pronounce an order for the removal of Mary Ann Bartlett to England.

"The enactment primarily founded on is section 77 of the Poor Law Act of 1845. That section enacts 'that if any poor person born in England, 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,' he may be brought before the sheriff, who is authorised to examine such person or any witness touching the place of birth or last legal settlement of such person, and to take such other evidence . . . as may . . . be deemed necessary for ascertaining whether he has gained any settlement in Scotland;' and if it shall be found by such sheriff that the person so brought before him 'was born in England . . . and has not gained any settlement in Scotland, and has actually become chargeable to the complaining parish or combination either by himself or his family,' then the sheriff is empowered 'to cause such poor person, his wife, and such of his children as may not have gained a settlement in Scotland' to be removed to

England. It is clear that by this section power to order the removal of a poor person to England is only given where such poor person was born in England, and that it cannot be applied to the case of Mrs Bartlett, unless her husband and not she is in the sense of the section the person who is receiving parochial relief, and 'has become chargeable to the parish.'

"Is it then possible to hold that the husband is really the person in receipt of relief? I am of opinion that it is not. A man is not pauperised by the fact of his wife being admitted to an asylum as a pauper lunatic. This was admitted in argument, and in view of the authorities the admission could not have been withheld—*Palmer* v. *Russell*, 10 Macph. 185; *Milne* v. *Henderson*, 7 R. 317. That being so, I am unable to see how Mrs Bartlett's husband can be held, in the sense of the above section, to have become chargeable to the parish of New Monkland.

"I am of opinion, accordingly, that, so far as section 77 of the Act of 1845 is concerned I have no power to grant the order craved.

"It was argued, however, that the power of granting orders of removal was extended by section 2 of the Poor Law Removal Act 1862 to the case of poor persons receiving relief in Scotland, and not having a settlement there, who had a residential settlement in England although not natives of that country. Now the purpose of this Act, as declared by the preamble, is to provide better means for the safe conveyance to their destination of poor persons ordered to be removed from England, Ireland, or Scotland in pursuance of previous Acts of Parliament, and therefore, so far as its main object is concerned, the Act is not intended to enlarge the power of magistrates to grant warrants of removal. It may be, however, that section 2 contains provisions which go beyond the declared purpose of the Act, but if its provisions are susceptible of two constructions, one in accordance with, and one out of harmony with, the declared purpose of the Act, the former would of course fall to be preferred. The section enacts that the warrant of removal shall contain certain particulars, and, *inter alia*, 'the name of the place in Scotland, England, or Ireland (as the case may be) where the justices or magistrate, or sheriff or justices, shall find such person to have been born, or to have last resided for the space of five years, in the case of a poor person to be removed to Scotland, and three years in the case of a poor person to be removed to England or Ireland,' and that it shall be addressed to the inspector of poor or guardians of the parish or union to which the poor person is to be removed; provided that, 'in the case of any native of England, Ireland, or Scotland,' where the justices or magistrate, or sheriff or justices, cannot ascertain the place of birth, or of such continued residence, they shall order the poor person to be removed to the port or union or parish which they shall think most expedient. I am quite unable to hold that this section authorises the granting of a warrant of removal from Scotland in any case to which the former Act did not apply. It does not purport to set forth the grounds upon which an order of removal may be granted, but merely provides what the order for removal, assuming it to be granted, shall contain, and to whom it shall be addressed. There was an obvious reason for enacting that the place of birth or continued residence should be inserted in the warrant, and that it should, as was evidently intended, be addressed to the inspector or guardians of the parish or union in which such place was situated, as it was clearly desirable that the pauper should as soon as possible be brought to the parish ultimately liable to maintain him. Under the Act of 1845 the warrant did not require to specify the place in England or Ireland to which the pauper was to be removed, and when no particular place was specified the duty of the removing parish was fulfilled when it had conveyed the pauper to the nearest port or place in England or Ireland. It then became the duty of the parish or union within which that port or place was situated to maintain him, and it could only obtain relief from the burden of his maintenance by ascertaining the parish or union of his settlement. It is obvious, I think, that this system must have been unduly burdensome to the parishes and unions within which certain ports and places were situated, and the provisions of section 2 of the Act of 1862 were, in my opinion, intended to remove so far as possible the hardships from which such parishes or unions suffered, and to facilitate the conveyance of the pauper to the parish or union ultimately liable to maintain him. This construction of the section seems to me to be not only in accordance with the declared purpose of the Act, but with the plain meaning of the section itself, and I am confirmed in my view that it was not intended to make the possession of an industrial settlement in England or Ireland a ground for the removal of a pauper from Scotland by the terms of sections 4 and 5 of the Poor Law (Scotland) Act 1898, which appear clearly to contemplate English or Irish birth as the only ground upon which a warrant of removal could be granted.

"I am accordingly of opinion that I have no power to grant the order craved.

"It was argued on the authority of the recent case of *Rutherglen Parish Council* v. *Glasgow Parish Council*, decided in the House of Lords on 15th May 1902, that Mrs Bartlett's settlement was that of her husband, but in the view I take of my statutory powers it is unnecessary for me to consider whether the case falls under the principle of that decision."

The petitioner appealed, and argued—For the purpose of the poor law the parochial settlement of the husband continued to be that of the wife although he had deserted her — *Parish Council of Rutherglen* v. *Parish Council of Glasgow*, May 15, 1902, 4 F. (H.L.) 19; 39 S.L.R. 621, *præsertim per* Lord Robertson, at pp. 26, 28, and 30. The doctrine of derivative settle-

ment owed its origin not to statute but to construction—*Barbour* v. *Adamson*, March 30, 1853, 1 Macq. 376, *per* Lord Cranworth, at pp. 377, 380, and 389. The doctrine was, as explained in *M'Rorie* v *Cowan*, March 7, 1862, 24 D. 723, *per* Lord Justice-Clerk Inglis, at p. 730, the necessary application to the statutory system of established common law rules. The fundamental principle was that the whole family should be kept to the settlement of the head of the family. If the narrow reading taken by the Sheriff of the statutory provisions as to removal were adopted, the result would be the breaking up of the family. As this woman, though she had been born in France, had been married to an Englishman, she must be taken for all the purposes of the Poor Law Acts as having been born in England—*Beattie* v. *Wilson*, January 25, 1861, 23 D. 412; *Hay* v. *Skene*, June 13, 1850, 12 D. 1019, *per* Lord Moncreiff, 1025, 1026. Accordingly Mrs Bartlett fell under section 77 of the Poor Law Act 1845. Further, the power of removal to England was extended by section 2 of the Poor Removal Act 1862 to the case of persons receiving relief in Scotland and not having a settlement there who had a residential settlement in England although they were not natives of England. Section 4 of the Act was important as showing that the family were not to be separated. It was admitted that in England the husband of a woman who had been guilty of adultery, which had not been condoned, was not liable to aliment her—*Culley* v. *Adamson*, 1881, 7 Q.B.D. 89.

LORD PRESIDENT—We have heard a very able argument by Mr Deas in support of this appeal, but it has not raised any doubt in my mind that the Sheriff's judgment is right, and as he has gone very fully into the question, it is not necessary that I should do so in much detail. The proposal is to remove to England Mrs Bartlett, a married woman whose husband is not in Scotland, and is not alleged to have a settlement in Scotland, but who is, on the contrary, stated to have a settlement in Whitechapel Union. It is stated in the papers before us that Bartlett declines to have anything to do with his wife, because he alleges that she has been guilty of adultery, and no step has been taken against him to enforce liability to maintain her. In considering the case it is necessary to commence with the Poor Law Act of 1845. Section 77 of that Act makes provision for the removal of paupers, and it provides—[*His Lordship read the portion of the section which is quoted supra*]. It is to be observed that the condition of the applicability of that section is that the poor person whose removal is in question shall have been born in England, Ireland, or the Isle of Man, and it is not alleged that Mrs Bartlett was born in any of these places; on the contrary, it is stated that she was born in France. The first difficulty therefore which arises is that Mrs Bartlett does not satisfy the essential condition which governs all the provisions of that section. This seems to me to be absolutely fatal to the application, unless something can be found in a subsequent statute or statutes conferring a power of removal which is not given by the Poor Law Act of 1845. The Act of 25 and 26 Vict. c. 113, contains a number of provisions as to removal, but there is nothing in any of these which seems to me to apply to a case like the present. Section 2 of that Act provides for removal, and bears that the warrant shall contain the name of the place in Scotland or England or Ireland where the magistrate shall find such persons to have been born or to have last resided for the space of five years in the case of a poor person to be removed to Scotland, and three years in the case of a poor person to be removed to England or Ireland. There is no finding, and could be no finding in this case, that Mrs Bartlett was born in any of these places, because, as I have already pointed out, she was born in France, and she was not capable of acquiring a residential settlement anywhere. The Act last referred to then continues—[*His Lordship read the last sentence of the section.*] I do not understand it to be suggested that this provision could be put in force with reference to Mrs Bartlett, the conditions for its applicability being absent in this case. I say the same with reference to section 4, which deals with the case of removal of a pauper to England or Ireland, to be delivered at a workhouse as therein provided.

The result is that none of the sections referred to have any application to the present case, and that it is out of the power of the Court to order the removal of Mrs Bartlett to the parish in England where her husband is said to be residing. For these reasons I am of opinion that the judgment of the Sheriff-Substitute should be affirmed.

LORD ADAM—It is not matter of dispute that prior to the passing of the Poor Law Act of 1845 no power existed for the removal of any paupers from Scotland to their native parish, wherever that might have been. No doubt it was a hardship, or supposed to be a hardship, that persons who were not Scotsmen and who had not acquired by industry or residence a settlement in any parish—for it was only to such that it applied—should not be removeable to their native country. Well, then, certain liberty was given, it may be not a very wide one, but a certain relief from that supposed hardship, was given by the 77th section of the Act of 1845. Now, unless the authority for the transportation as a pauper of a native Scotsman or Scotswoman is found in the 77th section I do not know where it is to be found; and, as Lord M'Laren remarked, we are not to extend by analogy the provisions of a statute like this, which interferes with the liberty of the subject, which deals only with foreigners, to the case of a Scotsman or a Scotswoman, as authorising against his or her will his or her transportation to England or Ireland. Such proceedings as these are beyond our authority. Now, it is perfectly clear to my mind that the 77th section of the Act gave relief only

to the effect that a pauper who had not acquired a settlement and who was born in England might be sent back to England, or an Irishman or Irishwoman might be sent back to Ireland, and I know no statute where you can find authority to transport a native-born Scotsman or Scotswoman to England, and I agree with your Lordship and the judgment pronounced by the Sheriff-Substitute.

LORD M'LAREN—In considering the 77th section of the Poor Law Act of 1845 it would seem that the Legislature while recognising that the conditions of an acquired settlement varied in different parts of the kingdom, yet the laws of all parts of the kingdom agreed in this, that a poor person who had never acquired a settlement, had a settlement in his or her place of birth, and the power of removal to another part of the kingdom is limited to the case of such persons. If we consider Scotland as the country from which a pauper is to be removed then the power is limited to the case of a pauper who has not acquired a settlement in Scotland and who has a birth settlement in England or Ireland or the Isle of Man. In the ordinary sense of the language used in the papers in this case Mrs Bartlett certainly had not a birth settlement in England, because it is said that her parents were Scottish and that she was born in Boulogne in France. Now, the mere statement of these facts appears to me to dispose of any argument that may be founded by the petitioner on the Act of 1845.

Then when we come to the extending clause of the Act of 1862 I do not see that the fundamental condition is in any way varied except in one particular case which obviously will not cover the present case. The hypothesis of the Act of 1862 is that the pauper to be extradited from Scotland is born in England or Ireland, and then the Act makes certain provisions with regard to the particular part of England or Ireland to which the pauper is to be removed, with the view of preventing injustice being done to those parishes which are nearest to the country of deportation. The only change in regard to birth domicile which is made by the Act of 1862 is that where the head of the family is to be removed from Scotland to England such of his children as have been maintained by a Scottish parish may be removed along with him. Now if Mr Bartlett were in Scotland and were being maintained by the parish of New Monkland, then he might be removed, and his wife might be removed with him irrespective of her birth. But as Mr Bartlett is apparently a person self-supporting, and at all events living in Whitechapel, it is impossible to say that that particular provision applies, and apparently it is the only exception to the rule that to warrant the removal the pauper must have been born in some part of the United Kingdom. I am therefore of opinion that the Sheriff-Substitute has come to a sound decision in refusing the prayer of the application.

LORD KINNEAR—I also think that the Sheriff-Substitute's judgment is quite right.

The Court refused the appeal.

Counsel for the Petitioner and Appellant—A. O. Deas. Agent—A. P. Nimmo, W.S.

Thursday, June 18.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

CROW *v.* CATHRO.

Succession — Testament — Revocation — Implied Revocation — Conditio si testator sine liberis decesserit—Partial Revocation—Implied Partial Revocation.

Where the inference of revocation derivable from the subsequent birth of a child to the testator is held to be applicable it can only apply to the effect of revoking the testament *in toto*, and it is not admissible to hold that the testament has been only partially revoked, leaving standing certain of its provisions.

A derived the greater part of his property from the will of his first wife, who died childless. He promised her on her deathbed to make some provision for her sister. Within a month of her death he made a will disposing of his whole property and leaving £500, subsequently by codicil increased to £800, to his wife's sister. He also informed the sister that he had made provision for her in his will. Two years after his first wife's death A married again and thus legitimated a child which his second wife had borne to him three weeks before the marriage. After the birth of the child A had spoken to a lawyer about getting him to make alterations on his will. Within a week of his marriage A died.

Held that the will was revoked by the subsequent birth and legitimation of the child, and that it was not admissible to hold that it had only been partially revoked so as to leave standing the bequest to the first wife's sister.

Obligation—Trust—Promise by Testamentary Disponee to Testator at Testator's Deathbed.

A, who derived the greater part of his property from his first wife under her will, had promised her at her deathbed that he would make provision for her sister by his will, and he did so, but he ultimately was held to have died intestate through his will being revoked owing to the subsequent birth of a child by a second marriage. *Held* that the promise made to the first wife did not create any obligation in favour of her sister by way of trust or otherwise which a Court of Law could enforce against his representatives.

In October 1902 Mrs Jeanette Smith or Crow, widow and executrix-dative *qua* relict of the late David Crow, and David Smith Crow, the only child of the said