been doing work on the employment of the defenders, and that the defenders on their part have been doing work for him, that the accounts between them have never been settled, and that the balance upon the accounts is unascertained at this moment. If the pursuer be right the balance is in his favour; but it may be shown that the balance is otherwise. The Lord Ordinary has very properly, before determining any question of prescription, allowed a diligence with regard to the first item of the claim. With regard to the three others, the accounts being all of the same description, it appears that although the total accounts amount to thousands of pounds, the sum sued for is a balance of £186. Now, I should like to see all the correspondence between the parties before determining any question of prescription here. It is not necessary to pronounce a judgment as to whether prescription applies here or not; the general course is to allow a diligence. In the meantime, on the same principle on which the Lord Ordinary proceeded as to the first item, I should allow the diligence to extend to the other items also. It is a case where there have been business and mutual accounts going on between the parties, which have been settled partially, and I think there should be a general proof.

LORD TRAYNER—I have no difficulty in agreeing with the views of the Lord Ordinary. In considering whether the sums sued for are subject to the triennial prescription we must look at the statements of the pursuer and the case which he presents. Now, this is a case for recovery of a debt incurred for goods supplied and work done; and there is no doubt that the triennial prescription applies to such a claim.

The pursuer's only grounds for maintaining that these accounts are not subject to the triennial prescription are (first) that this is an action of accounting, and (second) that the sum sued for is part of a very large account, and for work done under an important contract.

The first ground is answered by the terms of the summons—it concludes for payment of a specified debt. There are no *termini habiles* upon which an accounting could be ordered or given effect to. The only thing said in support of an accounting is this—that from the three items last concluded for there falls to be deducted the amount of a contra account of £729. The pursuer says, no doubt, that while he gives credit for the account for £729, he reserves his right to have that account investigated and adjusted, but *quoad* this case it is an admitted payment to account, and a payment to account cannot change the pursuer's claim from an ordinary claim of debt into a claim for an accounting.

The second ground is that it is a large sum due under an important contract. Surely this is irrelevant—*Majus aut minus non variat speciem.* The account, large or small, is still "a merchant's account or other the like debt."

The Lord Ordinary has allowed a diligence to enable the pursuer to show that the sum first concluded for was incurred on a written contract, and therefore not subject to the triennial prescription. I think the Lord Ordinary has dealt generously with the pursuer in allowing him this diligence, for I should not have read the pursuer's record as averring any written contract. But I am not disposed to interfere with what the Lord Ordinary has done.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Salvesen, K.C.—Gunn. Agents—Mackay & Young, W.S.

Counsel for the Defenders and Respondents — Campbell, K.C. — W. Thomson. Agents — W. & J. Burness, W.S.

Thursday, May 29.

SECOND DIVISION.

[Bill Chamber—
Lord Pearson, Ordinary.

MANNERS *v.* STRONG'S JUDICIAL FACTOR.

Judicial Factor — Administration — Discharge—Funds Lodged on Deposit-Receipt —Liability for Higher Interest—Loss on Loan on Heritable Security—Valuation—Three-Fourths of Valuation Lent—Allocation of Legacy to Particular Investment —Subsequent Payment out of General Estate—Trust.

In a petition for, *inter alia*, the discharge of a judicial factor, objections were stated by certain of the beneficiaries, upon the ground (1) that loss of income had resulted from sums having been improperly left on deposit-receipt; (2) that loss had resulted from an investment of £3250 on insufficient heritable security; and (3) that although in his accounts he had entered this investment as allocated and held to the extent of £1000 for a certain legatee, he had ultimately paid that legatee in full out of the general estate.

Circumstances in which the Court (*affirming* the judgment of Lord Pearson, Ordinary) *repelled* these objections, holding that the judicial factor's management had been proper, and that he had not been guilty of any breach of duty.

A petition having been presented for the appointment of a new judicial factor upon the trust-estate of the late George Gordon, and for the discharge of the late judicial factor, John Roxburgh Strong, C.A., Glasgow, objections to his discharge were stated by Mrs Margaret Gordon or Manners and others, being certain of the beneficiaries. These objections were three in number, namely, (1) to the loss of income resulting from the factor having held large sums on deposit-receipt for an unreasonable length

of time without just cause; (2) to loss of capital upon the realisation of a bond and disposition in security for £3250; and (3) at all events to the loss of a certain proportion of that sum, being the proportion of the whole loss corresponding to a legacy of £1000, for which it was said that this bond was *pro tanto* held and appropriated, but which, notwithstanding such appropriation and the loss upon valuation, had been paid in full by the judicial factor. The question in this case was whether these objections were well founded.

In answer to the first of these objections the late judicial factor's representative maintained (1) that he retained a considerable part of the estate upon deposit-receipt between 1892 and 1898, the period to which the first objection mainly applied — (*a*) because it was necessary to have sufficient funds available to meet the claims of beneficiaries who were entitled to payment; (*b*) because it was necessary to have the whole estate realised in order to determine the amount payable to these beneficiaries, and the realisation of the estate took much longer than he had anticipated; (*c*) because at the time it was difficult to get good heritable securities without tying up the money for a fixed period, which was not desirable considering the position of the estate; and (*d*) because during the period between 1892 and 1898 all other good trust investments were standing at such a price as to make the factor apprehensive that if he invested capital in the purchase of such securities he might not be able to get it back in full on realisation, an apprehension which events proved to have been well founded.

The second objection was based upon the grounds (1) that in 1880 £3250 had been lent upon a property valued at £4150, showing a loan of more than two-thirds of the value; and (2) that this bond should have been called up sooner than it was seeing that the assessed value of the property fell from £353 in 1879-80 to £325, and to £295 in 1889-90, while the actual rental fell from £320 in 1879-80 to £246 in 1885-86 and £255 in 1889-90.

A remit was made to the Accountant of Court, and a report was lodged by him. Thereafter a proof was allowed and led.

From the Accountant's report and relative states, and from the proof and documents and admissions of parties, it appeared that when Mr Strong was appointed factor in 1879 the estate amounted to about £15,000. He proceeded to realise and ingather the estate, to pay such beneficiaries as were entitled to payment, and to make investments of those portions of the estate which he required to hold. As at 31st May in each of the years from 1880 to 1890 inclusive the factor had on deposit-receipt the following sums, viz.—In 1880, £3000; in 1881, £1750; in 1882, £750; in 1883, £350; in 1884, £350; in 1885, £300; in 1886, £1550; in 1887, £450; in 1888, £1150; in 1889, £1150; in 1890, £150.

As at 30th June in each of the years from 1891 to 1898 inclusive the factor had on deposit-receipt the following sums, viz.— In 1891, £1630; in 1892, £2530; in 1893, £3325; in 1894, £5680; in 1895, £3130; in 1896, £4605; in 1897, £4855; in 1898, £475.

At the beginning of 1892 the position of the trust was that the truster's widow, who was entitled to an annuity of £150, had died, and three of the five liferenters who were entitled to the liferent of the residue had also died, with the result that the fiars became entitled to payment upon attaining majority. During the period from 1891 to 1898 the factor was constantly receiving demands for further payments from beneficiaries.

Between 1891 and 1898 the factor was endeavouring to realise certain investments which he considered it advisable to realise both on account of their character as investments and also because he desired to know the amount of the estate with a view to making a division, and paying out the shares of those beneficiaries who were entitled to payment.

The investments referred to were—(1) a bond for £3250 over property in Hill Street and Renfrew Street, Garnethill, Glasgow, being the investment referred to in the second objection above mentioned; (2) a bond over property in Cowcaddens, Glasgow; and (3) a ground-annual over property in Howard Street, Glasgow. The factor began to endeavour to realise these investments in 1891. He regarded the first two as doubtful. Great difficulty was experienced in realising them. The Garnethill property was exposed for sale eleven times on various dates between May 1891 and March 1894 before it was sold. There was ultimately a loss of about £900 on this investment. The Cowcaddens property was exposed six times on various dates between February 1892 and January 1896, when it was sold at a price which resulted in this investment being realised without loss. The Howard Street ground-annual was exposed five times on various dates between April 1894 and September 1896, when it was sold with a resulting profit to the trust of £362. The factor considered that it was impossible to make a division of the estate and to pay out the beneficiaries who were entitled to payment until these investments had been realised, and in the expectation that they would be realised, and that he would be able to make a division he retained somewhat large sums on deposit-receipt. The sums on deposit-receipt during the above period largely exceeded the sums actually payable to beneficiaries. Between 1895 and 1898 £7600 was reinvested.

The Accountant of Court reported that the income lost to the estate by unnecessarily retaining excessive sums on deposit-receipt was £246, 15s.

By section 4 of the Trusts (Scotland) Act 1891 trustees are not to be chargeable with loss if they have obtained a valuation from a competent valuator, and have not lent more than two-thirds of the valuation on the security in question.

The other facts in the case sufficiently appear from the opinion of the Lord Ordinary, *infra*.

On 1st August 1901 the Lord Ordinary (PEARSON) pronounced this interlocutor—"Repels the objections stated to the late factor's discharge by the respondents Mrs Margaret Gordon or Manners and others: Exoners and discharges the representatives of the deceased John Roxburgh Strong and Archibald Francis Hamilton as judicial factor on his estate, of his the said John Roxburgh Strong's whole actings, intromissions, and management as judicial factor on the trust estate of the deceased George Gordon mentioned in the petition: Grants warrant for delivery of his bonds of caution, and decerns: Finds the petitioners entitled to the expenses of and incident to this petition out of the estate of the said deceased George Gordon: Finds the compearer Archibald Francis Hamilton, as judicial factor on the estate of the deceased John Roxburgh Strong, entitled to expenses against the respondents Mrs Manners and others, and remits," &c.

Note.—"The late Mr J. R. Strong, C.A., Glasgow, was appointed in 1879 to be judicial factor on the trust estate of the deceased George Gordon, and continued to hold the office until his death on 1st November 1899. The questions now to be decided arise upon objections stated on the part of certain of the beneficiaries to the discharge of the late factor and his representatives.

Mr George Gordon died in January 1879, leaving a will and codicils, the trustees nominated in which declined to accept office. He was survived by three daughters, Mrs Neil, Mrs Manners, and Mrs Clarke, and by two sons, Robert Gordon and Charles Gordon. Mrs Neil died a few weeks after the truster. Robert Gordon died in 1883, and Charles Gordon in 1891.

"The residue of the estate was to be held in five shares, one-fifth for each of his three daughters for their alimentary liferent only and their respective children in fee; one-fifth for payment of an alimentary annuity of £30 to his son Robert, and subject thereto the income and fee to go to his children in certain proportions; and the remaining fifth to be held for his son Charles Gordon and his wife and the survivor for their alimentary liferent and his children in fee, subject to a deduction from this share of the sum of £1000 in full of advances made by the truster to his son Charles Gordon.

"He also directed his trustees to set aside the sum of £1000, and to hold it for the use and behoof of his granddaughter Andrewmina Ritchie (daughter of Mrs Clarke), in liferent for her liferent use allenarly, but with a discretionary power to the trustees to pay the capital to Miss Ritchie at any time after she attained the age of twenty-one, provided they should be satisfied with her conduct.

"In 1889 the factor, in respect of the death of his cautioners, petitioned the Court for interim audit of his accounts and for warrant to uplift his bond of caution. The factory not having been brought within the Accountant of Court's department until the passing of the Judicial Factors' Act 1889, the Court remitted his accounts to Mr L. H. Watson, C.A., Glasgow, for examination and audit. On Mr Watson's report the factor's accounts and intromissions from the date of his appointment down to 31st May 1889 were approved, the balance due by him fixed, and the representatives of his deceased cautioners discharged.

"The objections now stated to the final discharge of the late factor are made on behalf of Mrs Manners and her two children, being the liferentrix and fiars of one-fifth share of the residue. It does not appear that any of the other beneficiaries desire to take advantage of these objections so far as they may be sustained, and in some instances those beneficiaries have already discharged the factor.

"The objections are three in number, namely—(1) to the loss of income resulting from the factor having held large sums on deposit-receipt for an unreasonable length of time without just cause; (2) to loss of capital upon the realisation of a bond and disposition in security for £3250; and (3) at all events, to the proportion of such loss of capital corresponding to Miss Andrewmina Ritchie's legacy of £1000, for which it is said that this bond was *pro tanto* held and appropriated.

"1. As to the sums on deposit-receipt, the Accountant reports that for the earlier period of the factory, say down to May 1892, those sums were not in the circumstances excessive, and in this I agree with him. But for the six years which followed, down to May 1898, he reports that the sums so retained largely exceeded the sums due to beneficiaries, and that it was unnecessary to retain such large sums uninvested to await the ascertainment of the amount of the estate. I agree that it was unnecessary, as the event has proved. But the test of the factor's liability in what is really a claim of damages is not whether the course adopted by the factor was unnecessary, but whether it was unreasonable and imprudent, so as to amount to a breach of duty. I am not prepared to hold that it was so in the circumstances of this case, and in a matter of this kind each case must be decided according to its own circumstances. In the first place, while I am far from saying that a factor will be protected against a breach of duty by the circumstance that it has not been adverted to in his annual audit, yet on the question whether the course here followed amounted to a breach of duty, it is pertinent to observe that although the accounts and investments were annually submitted to the department for audit, no observation seems ever to have been made as to the amount on deposit-receipt being or continuing to be excessive. That may well have been left to the discretion of the factor, and if he applied his mind to it at all, as in my opinion he must have done, then I know of no authority for holding him liable to make good the amount presumed to have been lost to the income of the estate through what in that view was at most an error in judgment. The probability is that this objection would not have been stated

but for the case of *Melville*, 24 R. 243, decided in December 1896—the first case of its kind. But that case proceeded on the proved fact that the trustees had entirely failed to apply their minds to the investment of the trust funds during the whole currency of the trust, and on the basis of that fact their failure to make proper permanent investments was held to bring them within the ordinary rule as to breach of duty. Here the judicial factor is dead, and while that circumstance does not of course shift the burden of proof, it admits inferences as to the motives and causes of the factor's conduct which could not have been resorted to if he had been personally examined. Now, during the years in question a number of the beneficiaries who had been paid in part were pressing for a settlement of the balance, and others were coming of age and might be expected to ask to be paid out. The view taken by the factor seems to have been that he ought to ascertain by realisation the total amount of the estate before finally settling with any. There were several items of the estate in which the realisation turned out to be somewhat protracted, notably certain heritable subjects in which the estate was interested at Garnethill and in Cowcaddens, and also a ground-annual, which involved a good deal of time and trouble. I do not say that the factor must necessarily have taken this course. He might, so far as I can see, have paid out those who desired it upon a valuation, under reservation of their liability to recoup the estate if the ultimate realisation should show they had received more than their share. But the course he adopted, while cautious, was not, as I think, unreasonable, and it involved keeping more money at call than otherwise would have been necessary or proper. Then it seems pertinent to consider what alternative courses were open to him, and what the objectors say he ought to have done. The suggestion is that he should have invested the money on heritable bonds or on good marketable securities. But during the period in question first-class bonds were not very easy to get, except upon conditions as to fixity which were not well adapted to the circumstances of this estate. And as to other good securities, the prices ran so high that a person in a position of trust, who had to hold the balance between liferenters and fiars, might well hesitate before incurring the risk of the possible drop in prices which has in fact come about, although in point of fact, and as things have turned out, it has been so long deferred that it would not have affected adversely the realisation of this estate. These considerations, moreover, affect both income and capital; for with Consols over 110 the return does not differ widely from that yielded by deposit-receipts, while the risk of the capital shrinking on realisation is considerable. I do not say there is direct proof that the factor had all these considerations present to his mind in adopting the course which he followed. But they are such as must almost necessarily have been present to the mind of a business man in the circumstances in which he was placed, and I regard it as a matter not of conjecture but of reasonable inference from the facts proved that he used his own judgment in the matter, and followed a course which, though cautious and possibly over-cautious, does not involve breach of duty on his part.

"2. The next question has regard to a bond and disposition in security over house property in Garnethill for the sum of £3250. The loan was made by the late factor at Whitsunday 1880, the borrower being Mr Ewen Mackenzie, painter in Glasgow. Mr Mackenzie had bought the property for £4800 in 1877, when prices were much inflated, and had borrowed a sum of £3500 on the security of it from trustees. In 1880 they required payment, and the money was provided by the judicial factor to the extent of £3250 as a first security, and by the debtor's agents to the extent of the balance of £250, which was postponed. This transaction proceeded on a valuation by Mr Thomas Binnie, who on 28th April 1880 valued the security subjects at £4150, adding, 'I think a loan of £3250 on the security of the property would be quite safe.' The borrower and lender had separate agents, and the valuation was obtained by the lender's agents. They employed a skilled valuator of high repute, and his valuation as at the date it was made is really not impeached, though the witnesses for the respondents describe it as a full valuation. As to the proportion of the valuation which it would be safe to lend on the security, I am not aware that in 1880 there was any recognised rule in Scotland. It depended in each case on the circumstances, and it does not appear to me to have been in any respect beyond the province of the skilled valuator to name a sum which in the circumstances he thought it safe to advance on the security. It is true that Mr Binnie had a year or two previously given to the borrower a valuation of the same subjects, and in that view he was in a sense revising his former valuation. But he really revised it, and reduced it by a substantial amount in view of the altered state of the market. In the inception of this transaction therefore I cannot find any sufficient ground for holding the factor liable for loss on realisation.

"But it is said that in what happened afterwards the factor's conduct was inexcusable, and that he ought to have called up the bond much earlier than he did. Mackenzie, the borrower, died in December 1882, and this must have been known not long afterwards to the factor, for the interest on the bond was thereafter paid on behalf of his representatives. He left £1000 of estate or thereby, and this was all expended in paying his personal debts, the factor not claiming under the personal obligation in the bond. But the interest was regularly paid each half-year until Martinmas 1890, and so far as the security subjects were concerned there was no such marked fall in rental as to call for instant

realisation. It must be kept in mind that the considerations affecting the propriety of realising a security are quite different from those which bear on the propriety of originally accepting it, for the holder of it has no longer a perfectly free hand. His duty is to make the best of what he has got, and in the state of the Glasgow property market between 1880 and 1890, and even later, as shown in the proof, it is not surprising that so long as the interest was regularly paid the factor should consider it better to hold on. The market was expected by every one to improve, but the depression lasted a good deal longer than was anticipated. At last, in September 1890, the factor decided upon having a re-valuation of all the trust securities, with the result that Mr Binnie valued this security at £2950. The factor having thereupon called up the loan entered into possession, and after repeated exposures the security subjects were sold in March 1894 for £2660. The loss, including interest and expenses, amounted to £902, 8s. 2d. Now I recognise that there were circumstances here—and specially the small margin of value on the loan originally, and the fact that the locality was changing its character from a residential to a business neighbourhood—which should have made the factor keep his eye on this investment and watch it with some vigilance. But there is nothing in the circumstances to suggest that he did not do so. The interest was being punctually paid. The change of the locality to business purposes, though it involved a temporary depreciation, was almost certain, in a city like Glasgow, to restore the former value, and even to enhance it. The property market was commonly expected to recover itself long before it did. These considerations suggest strongly that while opinions might differ as to the probabilities, it cannot be represented as an imprudent or unreasonable thing at the time to have held on rather than to have realised.

"It was urged on the part of the factor that the objections on this head are foreclosed by the interim audit of the accounts and intromissions which proceeded under remit from the Court in 1889, and resulted on 15th April 1890 in the approval of the factor's intromissions, the fixing of the balance due by him, and the discharge of his cautioners' representatives. Even if the other two respondents are barred, the position of William Manners seems to be different in this respect. But in the view I take as to the factor's liability, it is unnecessary to decide this question.

"2. The third objection relates to the legacy of £1000 which the trustees were directed to set aside for the liferent use allenarly of the truster's granddaughter Andrewmina Ritchie, and which they were empowered to pay over to her in fee after she had attained the age of twenty-one. From the very first the judicial factor, in entering the bond by Mr Mackenzie for £3250 as an asset in his accounts, added this note—'£1000 of this bond is held for behoof of Miss Andrewmina Ritchie;' and the interest of the bond corresponding to the £1000 was paid annually to Miss Ritchie at the rate of 4½ per cent. So in the Accountant's general report to the Court in the application made in 1889 for interim audit similar entries occur.

"Then in July 1889, the factor being requested to pay Miss Ritchie the capital of this legacy in pursuance of the discretionary power conferred on the trustees, petitioned the Court for special power to do so. In the petition he stated that the sum of £1000 had as directed been placed aside and invested for behoof of Miss Ritchie, and the interest paid or applied for her behoof. The factor asked authority 'to pay over the said capital sum of £1000' to Miss Ritchie; and he was authorised accordingly in December 1889, and paid it to her in cash in January 1890. In place of calling up the bond, or assigning it to the extent of £1000 to Miss Ritchie he paid her out of the funds in bank, and thus virtually substituted this security in place of a deposit-receipt as an investment for £1000 of the residue. Thus it comes about that the whole loss on this bond is borne by residue, instead of Miss Ritchie bearing the loss effeiring to £1000 of it, as she would have done if the appropriation of the security to her legacy had stood. The Manners family, as interested in one-fifth of the residue, now claim that this should be made good to residue out of the late factor's estate, with recourse against Miss Ritchie if the factor was entitled so to appropriate the security towards her legacy.

"I assume that he was entitled to do so, and that he effectually did so. But the factor's duty was not merely to set apart the £1000, and to hold it, but also in his discretion to pay her that sum if he should obtain special power to do so, which he did. Now, if the bond were good and beyond suspicion, I see nothing *ultra vires* or wrong in the factor, notwithstanding the appropriation, paying her out in cash and investing a corresponding amount of the money deposited in bank upon heritable security. This in fact is the very thing which the respondents say, under their first objection, that the factor ought to have done. If indeed the change had been made merely on paper, still more if it had been done for the purpose of favouring Miss Ritchie at the expense of residue, I should have thought their objection good. But the bond for £3250 had not come under suspicion at the time the money was paid to Miss Ritchie. The re-valuation of the securities was not made until the September following, and no default was made in payment of the interest until Martinmas. The point of difficulty is, whether from the residuary legatees' point of view this should not have been treated as if it were an investment of £1000 upon an outside security, in which case I presume a re-valuation would have been demanded, which would probably have disclosed that the bond was no longer a good investment. On the whole, however, I think that in this question of a claim against the factor

for pecuniary loss he must be dealt with according to his state of knowledge at the time. And if he is not (as I think he is not) to be held liable to the residuary legatees directly in respect of the remainder of the bond for not having sooner obtained a re-valuation, so neither can I hold him liable on the same ground in respect of the £1000. If he is to be held as having committed a breach of duty as regards part of the bond, I think he must be held to have done so as regards the whole of it, in which case I should have sustained the second objection."

Mrs Gordon or Manners and others reclaimed, and argued—*On the first objection* (loss of income from sums placed on deposit-receipt)—In the opinion of the Accountant the funds should have been invested, and not placed on deposit-receipt. The judicial factor should be dealt with as a trustee, and according to the rule laid down in the case of *Melville* v. *Noble's Trustees*, December 11, 1896, 24 R. 243, 34 S.L.R. 210. No satisfactory reason had been assigned for not having found suitable investments. The judicial factor might have taken any of the investments sanctioned by the Trust Acts. The amount left to lie on deposit-receipt was unnecessarily large. *On the second objection* (loss on loan of £3250)—The security was very doubtful, and the factor ought to have been specially careful before advancing so much upon it. The property had been much too highly valued in 1882, and the factor ought to have been aware of that fact. There was also a gradually diminishing rental, which should have put the factor on his guard. When the debtor died and the personal obligation was lost the judicial factor ought to have been specially vigilant, as he had only the heritable security to look to. The rental in the valuation roll had steadily declined, and the factor should have noted that fact and acted more prudently. In *Raes* v. *Meek*, August 8, 1889, 16 R. (H.L.) 31, 27 S.L.R. 8, trustees were held liable although they had employed a law-agent, and in *Maclean* v. *Soady's Trustee*, July 19, 1888, 15 R. 966, 25 S.L.R. 696, it was observed that where the primary purpose of a trust is to secure an alimentary provision a trustee is bound to be exceptionally careful. *On the third objection* (loss arising from the legacy of £1000 having been paid out of residue), the Lord Ordinary had proceeded on the erroneous assumption that the sum in the bond was amply secured, but after 1890 the rental had fallen so low that the factor ought to have known that the bond was bad. The case of *Robinson* v. *Fraser's Trustee*, August 3, 1881, 8 R. (H.L.) 127, 18 S.L.R. 740, was in point. In paying the £1000 legacy out of the general estate the factor had thrown the whole risk of the investment of £3250 on one set of beneficiaries—the residuary legatees. The person for whose benefit the heritable security was originally taken, and to whom it had been virtually allocated, was thus unduly favoured at the expense of the other beneficiaries.

Argued for the respondents—*On the first objection*—The decision in the case of *Melville* was not in point, as the circumstances were entirely different. That was the first case of its kind, and there the trust funds had been kept for twenty years on deposit-receipt, and no consideration had been given to the expediency of investing them. In the present case the state of the trust justified the course taken by the judicial factor. From 1891 to 1896 the division of the estate was as it were "in suspense," and the factor might have been called upon to realise it at any moment. There was no need for permanent investments, as in *Melville's* case. Such investments would have been out of place in the circumstances. Mr Strong had intentionally allowed the funds to lie on deposit-receipt after full consideration. The proof showed that heritable investments were very difficult to get at the time, and that Mr Strong was always very careful about the choice of investments. *On the second objection*—The valuation made by Mr Binnie in 1880 showed that the property was a good one, and the factor had had it revalued in 1890. Valuations were often allowed to stand for several years. The fall in value was gradual and could not have been anticipated. *On the third objection* (assuming the second objection to the factor's accounts sustained)—The factor had got judicial authority to pay £1000—not £1000 out of any particular investment. He had properly paid it out of money lying in bank, otherwise he would have had to call up the whole sum in the bond. The case of *Scott's Trustees* v. *Scott*, November 1, 1895, 23 R. 52, 33 S.L.R. 65, was more in point than the case of *Robinson*.

At advising—

LORD JUSTICE-CLERK — The complaints made against the late factor on George Gordon's estate are (1) that he held considerable sums on deposit-receipt longer than in the circumstances was justifiable; (2) that a loss was caused by his negligence upon the realisation of a bond.

As regards the sums retained on deposit-receipt, I agree with the Lord Ordinary in the opinion that even if there be ground for holding that the factor committed an error in judgment in what he did, there is no sufficient ground on which it can be declared that he committed a breach of duty. The Lord Ordinary has stated the grounds so clearly and fully that I think it unnecessary to repeat them. They seem to me to be sufficient to support his judgment.

As regards the bond and disposition in security, I am satisfied that in granting the original loan upon it the late factor was in no way in fault. He took the very best advice. But then it is said that loss was incurred through his failure to call up the bond. But the interest was being regularly paid, and it is certainly not made out that there was any real ground at the time for apprehending such a fall in value as would make it a fault on the part of the factor not to have realised at a time when the loss would have been less than in the event it turned out to be. The remarks of the Lord Ordinary on this matter are most pertinent, and I concur in them.

A further objection is stated to the effect that while the factor entered in his accounts that £1000 of this bond was held for a beneficiary Miss Ritchie, he did not adhere to that allocation. The facts are that on being requested to pay the legacy he obtained the authority of the Court to do so. He then did not pay Miss Ritchie by calling up the bond or assigning a proportion of it to her, but paid her by cash obtained from the deposits, and kept the entire bond as an investment. At the time he did so the bond seemed to be a thoroughly good investment, and it is difficult to see how the proceeding can be objected to, seeing that it practically put another £1000 of the money still held in trust under heritable investments, which is exactly what it is maintained against him he should have done more consistently than he did. On this matter I also agree with the Lord Ordinary, and am of opinion that his interlocutor should be affirmed.

LORD YOUNG concurred with the LORD JUSTICE-CLERK.

LORD MONCREIFF (whose opinion was read by the LORD JUSTICE-CLERK)— The objections stated by the appellant to the late factor's accounts which the Lord Ordinary has repelled call for serious consideration. We heard a full argument on behalf of the appellants, which I have considered all the more anxiously because I had at one time some doubt upon one at least of the objections.

But on consideration of the Lord Ordinary's careful judgment I have come to be satisfied that it is justified by the facts proved or admitted, and should be affirmed.

LORD TRAYNER, who was absent at the hearing, gave no opinion.

The Court adhered.

Counsel for the Objectors and Reclaimers —Campbell, K.C.—Salvesen, K.C.—Crabb Watt. Agent—William Cowan, W.S.

Counsel for the Compearer and Respondent (Strong's judicial factor)—Jameson, K.C.—M. P. Fraser. Agents—Ronald & Ritchie, S.S.C.

Thursday, June 12.

SECOND DIVISION.

[Sheriff of Lanark.

THOMSON *v.* THOMSON & COMPANY.

Bankruptcy — Sequestration — Alimentary Annuity Payable to Bankrupt—Right of Obligant to Dividend Derived solely therefrom.

The sole estate of a bankrupt who had been sequestrated consisted of an alimentary annuity payable to him under an onerous mutual contract. The obligants by whom the annuity was payable were creditors of the bankrupt under a decree. *Held* (*diss.* Lord Moncreiff) that they were not barred from claiming and receiving a dividend upon the ground that it was necessarily derived from the annuity.

Bankruptcy — Sequestration — Procedure —Interdict against Trustee Paying Dividend—Deliverance not Appealed against —Res judicata — Process — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 129.

Where the trustee in a sequestration had sustained a claim for a creditor and his deliverance had not been appealed against, *held* that an action of interdict brought for the purpose of preventing him paying the dividend upon the claim so sustained was incompetent, upon the ground (1) that the question had been already finally decided by the trustee, who was competent to adjudicate upon it, and (2) that the action was an attempt to prevent the trustee from carrying out the explicit and imperative direction contained in the 129th section of the Bankruptcy (Scotland) Act 1856.

By minute of agreement entered into between William Thomson, engineer, Glasgow, and William Thomson & Company, engineers, Glasgow, dated 22nd January 1894, William Thomson, on certain conditions therein mentioned, assigned and transferred to William Thomson & Company the engineering business which he had previously carried on. In the minute of agreement it was provided that the assignees should pay to William Thomson an annuity of £250 sterling during all the days and years of his life, "which annuity shall be strictly alimentary, and free of all burdens and deductions whatsoever, and shall not be arrestable or affectable by his debts or deeds or by the diligence of his creditors."

On 15th August 1900 the pursuer's estates were sequestrated, and on 4th September thereafter William Ramage, C.A., Glasgow, was appointed trustee.

On 2nd November 1900 the trustee raised an action of multiplepoinding in the Sheriff Court of Lanarkshire at Glasgow, in the name of William Thomson & Company as pursuers and nominal raisers, against William Thomson and himself as defenders, and claimed that the annuity fell to be paid to him as trustee foresaid. This claim was sustained by the Sheriff-Substitute (GUTHRIE).

The trustee having ingathered two half-yearly payments of the annuity (being the only estate ingathered by him) intimated his intention of paying a dividend on the claims in the sequestration.

William Thomson & Company had lodged a claim in the sequestration for £61, 6s., being the unpaid expenses of an unsuccessful action brought against them by William Thomson, for which they held a decree against him. This claim was admitted by the trustee to a ranking, and no appeal was taken against his deliverance.