Thursday, June 11.

FIRST DIVISION.

[Lord Dundas, Ordinary.

GREENOCK HARBOUR TRUSTEES *v.* CARMICHAEL.

Judicial Factor — Powers—Statute—Statutory Undertaking—Factor "to Receive the Whole or a Competent Part of the Rates and Duties and Other Revenues of the Trust"—Power to Raise Rates at His Own Hand—Greenock Harbour Act 1880 (43 *and* 44 *Vict. cap. clxx*), *sec.* 10.

The Greenock Harbour Act 1880 enacts—section 10—"Every application for a judicial factor under the provisions of this Act shall be made to the Sheriff; and, on any such application, the Sheriff may . . . appoint some person to receive the whole or a competent part of the rates and duties and other revenues of the Trust until all the arrears of interest or of principal . . . be fully paid."

Held that a judicial factor appointed in terms of this section had no power to raise the harbour rates at his own hand, his right being limited to the receiving from the Trustees the gross revenue as collected under their administration.

Cotton v. *Beattie*, December 18, 1889, 17 R. 262, 27 S.L.R. 214, *followed.*

The Greenock Harbour Act 1880 (43 and 44 Vict. cap. clxx) enacts—section 69—"The mortgagees of the Trustees may enforce payment of arrears of interest or principal or principal and interest due on their mortgages by the appointment of a judicial factor. In order to authorise the appointment of a judicial factor in respect of arrears of principal the amount owing to the mortgagees by whom the application for a judicial factor shall be made shall not be less than £5000 in the whole."

Section 70 (the section is quoted in the rubric *ut supra*).

The Greenock Harbour Act 1888 (51 and 52 Vict. cap. cxiii) sec. 22, enacted—"In the event of the Trustees failing at any time to make payment of the interest due at the expiry of any half year, it shall be lawful for any holder of A debenture stock, and after the expiration of a period of seven years from the passing of this Act for any holder of B debenture stock, to apply to the Sheriff for the appointment of a judicial factor in manner provided by section 70 of the Act of 1880."

The Greenock Harbour Act 1895 (58 and 59 Vict. cap. cv), repealed section 22 of the Act of 1888, and in section 10 enacts—"In the event of the Trustees failing at any time to make payment of the interest due at the expiry of any half-year, it shall be lawful for any holder of A debenture stock, and after the expiration of a period of ten years from the passing of this Act for any holder of B debenture stock, to apply to the Sheriff for the appointment of a judicial factor in manner provided by section 70 of the Greenock Harbour Act 1880."

On 18th December 1907 the Trustees of the Port and Harbours of Greenock, incorporated by Act of Parliament, brought an action against Andrew Carmichael, shipowner, Greenock, "judicial factor appointed by the Sheriff-Substitute there to receive the whole or a competent part of the rates and duties and other revenues of the Greenock Harbour Trust until all arrears of interest or of principal, as the case may be, due to the holders of Greenock Harbour B debenture stock be fully paid," as such judicial factor and as an individual. In it they sought declarator "that the defender as judicial factor foresaid has no power to raise or reduce or in any way vary the rates and duties fixed by the pursuers for goods shipped or unshipped at any of the works of the pursuers, and in particular, but without prejudice to the foregoing generality, that the defender as judicial factor foresaid has no power to raise the rate for sugar shipped into or unshipped from vessels (foreign) at the works of the pursuers from 10d. per ton, being the rate fixed by the pursuers, to 1s. 3d. per ton; and further, that the notice issued by the defender, of which he gave intimation to the pursuers on 29th November 1907, and which notice is in the following terms:—'Greenock Harbour Acts 1866 to 1895. Notice is hereby given that on and after 1st January 1908 there will be levied, demanded, and taken for sugar shipped into or unshipped from vessels foreign, 1s. 3d. per ton, as provided in Schedule A of the Greenock Harbour Act 1880. Andrew Carmichael, judicial factor'—is *ultra vires* of the defender as judicial factor foresaid, and is illegal and ought not to receive effect, and that the defender as judicial factor foresaid is not entitled to levy, demand, or take rates, duties, or charges in terms of such notice," with a corresponding conclusion for interdict.

The pursuers pleaded, *inter alia*—"(1) The defender having no power under the terms of his appointment as judicial factor foresaid, or of the statutes thereanent, to increase, reduce, or in any way vary at his own hand the rates and duties leviable on goods shipped and unshipped at the port and harbours of Greenock, the pursuers are entitled to decree of declarator as concluded for."

The defender, *inter alia*, pleaded—"(3) The defender having under the authority of the statutes by which he holds his appointment the right to receive the duties and rates authorised by said Acts, the declarator and interdict sought should be refused, with expenses. (4) The defender having been appointed judicial factor on the undertaking of the trust, and to receive on behalf of the bondholders the rates and duties of said trust, he is entitled to impose the full rates authorised by Act of Parliament."

On 20th February 1908 the Lord Ordinary (DUNDAS) granted decree in terms of the declaratory conclusions and the pursuers' first plea-in-law.

Opinion.—[*After narrating the nature of*

the action.]—"The issues thus raised are interesting; and they are also of great importance, for it is obvious that the effect of the decision will not be confined to the particular rate in regard to which the complaint has arisen. The whole antecedent history, legislative and otherwise, which preceded and led up to the dispute, is clearly set forth in the pleadings of the parties; and a thorough understanding of these matters is essential to the decision of the case (*v. infra*, opinion of Lord President). It would, however, serve no good purpose that I should here repeat the record *ad longam;* and I have found it impossible, after attempting to do so, materially to abridge or curtail the history of the case as it is there set out. I propose, therefore, to start my own narrative at the point when, on 7th July 1905, a petition by certain holders of B debenture stock of the Greenock Harbour Trust was presented to the Sheriff-Substitute at Greenock, craving for the appointment of a judicial factor. The Sheriff-Substitute, by interlocutor dated 5th August, appointed the defender to be judicial factor, in terms which are accurately recited in the summons, where the defender is designed in language which I quoted at the outset. It is not surprising that these debenture holders should have presented their petition upon the earliest possible day competent to them under the statutes, for the existing financial situation was, from their point of view, an exceedingly grave one. It appears that, in point of fact, though interest has always been paid on the A debenture stock, the full rate of interest has not in any year been paid on the B stock; that last year only 1½ per cent. was paid on the latter; and that, as at 11th November 1907, there were arrears of interest on the B stock amounting to £490,397. It is further stated that there is, apart from arrears, an annual deficiency of more than £20,000 in the revenue required to pay the interest to the stockholders of the trust. Nor is it in these circumstances surprising that the defender, after his appointment, should look eagerly about him for the best means of alleviating the situation. On 9th October 1907 the defender addressed a letter to the pursuers' general manager, suggesting that the said rate on foreign sugar should be raised to the maximum rate, which is 1s. 3d. per ton. The suggestion was brought before a meeting of the pursuers on 5th November, when it was negatived by eleven votes to six. On 29th November the defender wrote to the pursuers' general manager enclosing for their information a copy of the notice, which is printed in the summons and in the condescendence. The present action was raised on 18th December.

"At the discussion in the procedure roll the pursuers' counsel maintained that the defender has no right or power, express or implied, to raise or vary this particular rate, or any other of the harbour rates. They urged that we are here dealing with a great public undertaking, incapable of earning profit, and worked for the benefit of the public, to the statutory trustees of which—and to no one else—Parliament has committed the entire management and control of the concern, including expressly power 'to vary the rates . . . in such manner as they think expedient' (Harbours Docks and Piers Clauses Act 1847 (10 and 11 Vict. c. 27), section 30, incorporated in the Special Acts); that the constitution of the trust has been gradually broadened by a series of legislative enactments so as to fairly represent all the public interests associated with the undertaking; and that there is no warrant for permitting the defender, representing as he does one private and limited interest only, to supersede the trustees to any extent in their management of the concern, or to interfere with their discretion as to raising or lowering rates. They further argued that, whatever may have been the nature and extent of the security held by creditors of the trust under the earlier statutes, holders of debenture stock under the Act of 1888 are merely perpetual annuitants, with no right at all to look to the security of the rates except in so far as actually imposed by the Trustees from time to time.

"To a considerable part of this argument the defender's counsel took no exception; and they especially disclaimed any intention or desire on his part to oust the pursuers from their management. They conceded also that under normal circumstances it would be for the Trustees, and for them only, to regulate the harbour rates; but they contended that the circumstances here are obviously abnormal, because it had been found necessary to appoint a judicial factor. There is, they urged, no room for doubt as to the object of such an appointment; it is 'to enforce payment of arrears'; and in order to this end 'the whole or a competent part' (*i.e.*, a part sufficient for the purpose) 'of the rates and duties and other revenues of the Trust' are to be 'paid to and received by' the factor; and when the end and object have been attained, and the arrears, &c., have been fully paid up (and only then), his 'power' (an effective power successfully wielded) 'shall cease.' The defender's counsel strenuously maintained that, if the pursuers' arguments were sound, the factor's appointment could be no better than a farce; because, being appointed at a crisis when the financial position is, from the debenture-holders' point of view, a very bad one, he is *ex hypothesi* to have no power to alleviate it by raising rates—on the contrary, the sole discretion as to maintaining, or even lowering, the rates is (if the pursuers are right) left with the trustees whose interests are adverse to those of the stockholders; and that the result must simply be that an already embarrassed situation would be burdened with the additional cost of a totally useless factory. This, it was urged, could scarcely have been the intention of Parliament; and the Court should, in construing the language of the statutes, endeavour to avoid such a result, especially where the opposite construction does no violence whatever to the words used. The defender's counsel contended that when

Parliament provides — as the means of enforcing a specific purpose—the appointment of a judicial factor, the latter is by plain implication vested (even if such vesting is not expressed in so many words) with such powers, means, and privileges as are necessary for the execution of the duty or the attainment of the object which he was appointed to execute or to effect. In support of the last proposition I was referred to text-writers on the construction of statutes—Maxwell, 4th ed. 1905, pp. 534, 536; and Hardcastle, 4th ed., by Craies, p. 108 and p. 229). I think the proposition is sound enough; and it seems to be based upon the doctrine of the Roman law (Dig. ii, 1, 2)—'Cui jurisdictio data est, ea quoque concess a esse videntur, sine quibus jurisdictio explicari non potuit.' The defender's counsel further argued that the words 'the whole or a competent part of the rates,' &c., are not limited to the rates actually levied by the Trustees at any given time; that the statute does not say so; and that the words, fairly construed, must include the whole rates (up to the *maxima*) which the Trustees are by their Acts authorised to 'levy, demand, and take.' The holders of debenture stock, although their position since 1888 was that of perpetual annuitants, are, it was argued, entitled to look to the security of the whole rates authorised by the statute, because their stocks were declared to be respectively 'the first' and 'the second charge on the undertaking'; and the defender's counsel referred in this connection to letters in process.

"I was much impressed at the discussion by the arguments put forward for the defender, which I have endeavoured to summarise, and by the broad common sense which appeared to underlie them. If it could be demonstrated that to deny the judicial factor power to raise rates would be to reduce his office to a nonentity, and his functions to mere formalities, one would, I think, be constrained to the conclusion that Parliament, in prescribing the appointment of a factor for the particular object specified, intended to confer, and must be held to have conferred, upon him the power which, on the assumption postulated, would be essential to the explication of his jurisdiction. But I am not convinced that this assumption, which lies at the root of the defender's argument, is well founded; and if it fails, I do not think I could construe the statutes as giving the factor implied authority at his own hand to raise or vary this, or any other rate, or to issue such a notice as that quoted in the summons. Now it seems to me that, apart from so raising rates, there is a good deal that the factor could do towards furthering the object of his appointment. This must, of course, depend upon what the scope of his powers and duties truly is. I was not able to extract from learned counsel upon either side any precise view upon this (to my mind) crucial matter. I have come to the conclusion, upon a careful study of the statutes, that the right of the judicial factor is to receive, if necessary, the whole (*i.e.*, gross) revenues of the undertaking, and to apply them in his discretion towards the extinction of the arrears of interest on the stock. To what extent he may consider it prudent or advisable to exercise his right is another matter; but if the view which I have indicated is sound, it can hardly be said that the power of the factor, though he may not be able to raise rates at his own hand, is necessarily an unreal or ineffectual one. On the contrary, he would have in his hand a powerful lever. A case to which I was referred at the discussion (*Cotton* v. *Beattie*, 1888, 17 R. 262, 27 S.L.R. 214), though it does not touch upon the factor's power to raise or vary rates, seems to me to support the view which I have just stated. It related to a judicial factor appointed under sections 56 and 57 of the Companies Clauses Consolidation (Scotland) Act 1845 (8 Vict. c. 17), the language of which does not appear to differ in any material respect from that under construction in the present case. The Lord President (Inglis) stated in general terms (p. 268) that 'the duty of the factor so appointed is to procure payment to himself as factor of so much of the tolls and other sums coming into the hands of the company as will enable him to pay the balance of interest due to the mortgagee. . . .' Lord M'Laren went pretty fully into the matter, and expressed the opinion that the factor—though his duties are those not of a manager but of a 'receiver'—'is entitled to go directly to the cashier or officers of the company who levy the tolls and to receive from them these tolls or other sums of money, and that he is not obliged to go to the directors and take from them what they may please to give him. If he had to go to the directors, the mortgagee might not be in a better position than he was before the application, because they would just say after the appointment, as they had done before, that they were without funds, that all their funds were carried away as fast as they were earned by the necessary outgoings of the company. But being a judicial factor on the estate he has direct access to the funds of the company, and it is for the purpose of his having such access that the appointment is made, to enable the mortgagee to enter into possession of the revenues of the company to such extent as shall enable him to pay himself through the factor the interest of his debt.' A little further on Lord M'Laren explained how in his view the relations between the judicial factor and the managing body would work out from a practical point of view, and concluded that 'the judicial factor would decide for himself what portion of the tolls or earnings he would draw, and what he would choose to leave for the purpose of enabling the business to be carried on.' Of course the concern under consideration in *Cotton's* case was only a tramway company, and not (as here) a great public undertaking. But the opinions expressed have regard to the construction and effect of statutory language substantially identical with that which I am now endeavouring to construe; and to that extent at least they seem to me to be in point.

"I ought at this stage, for the sake of

completeness, to note the other cases, Scottish and English, to which I was referred, with such brief comments on them as are necessary. *Haldane's* case (1881), 8 R. 669, 18 S.L.R. 451, was one where a judicial factor had been appointed on the undertaking of a railway company under section 4 of the Railway Companies (Scotland) Act 1867 (30 and 31 Vict. c. 126). The Lord President (Inglis) in the course of his opinion pointed out that a judicial factor so appointed is really a manager invested with the charge and management of the undertaking, and dealt—but only incidentally and by way of contrast—with the position of a judicial factor appointed under sections 56 and 57 of the Companies Clauses Consolidation (Scotland) Act 1845. The judicial factor in that case petitioned the Court for special powers, but the Court refused to grant these, upon the ground that the judicial factor was truly manager of the railway company, and that it was therefore unnecessary to confer any additional powers upon him. The *Edinburgh Northern Tramways Company* (1888), 15 R. 641, 25 S.L.R. 479, was concerned with the appointment of Mr Cotton as judicial factor on the tramway undertaking already referred to, under the sections of the Act of 1845. The Lord President (Inglis) contrasted his position with that of Mr Haldane in the preceding case, and said—'He is what is called in England a receiver, and, so far as I understand, he was appointed to receive a portion of the income of the company sufficient to pay the overdue interest upon the petitioner's mortgages. That is the whole object and aim of the appointment.' I have already dealt with *Cotton's* case (1889), 17 R. 262, which was the sequel of the case just referred to, and seems to me to be much the most useful of the decisions, Scotch or English, of which I am aware. Coming now to the English cases, I think they require to be approached with considerable caution and reserve by a Scots lawyer. The name 'judicial factor' is unknown in England. They have there 'managers' and 'receivers.' I gather that the latter word is capable of a great variety of significations and applications. I understand that the English Court of Chancery originally had, and since 1873 the High Court of Justice has possessed, power to appoint a receiver wherever the circumstances appeared to the Court to make it expedient to do so. One may refer to Kerr's Law and Practice as to Receivers (5th ed. 1905) as illustrative of the different duties and functions which a receiver may in England be appointed to exercise. I have not, I confess, been able to derive much assistance from the authorities which were cited to me. These were *Gardner* (1867, L.R., 2 Ch. App. 201), the well-known case which immediately preceded and indeed was the cause of the railway legislation of that year; *Marshall*, [1895] 2 Ch. 36—a tramway case, where a receiver was appointed at the instance of debenture holders, but the appointment of a manager was refused; *in re Manchester and Milford Railway Co.*, 1880, L.R. 14 Ch. Div. 645—a case under the English Railway Act of 1867 (30 and 31 Vict. c. 127), where the import of the words 'the appointment of a receiver, or if necessary of a manager,' were discussed and explained by the Court of Appeal; *Attree*, 1878, L.R. 9 Ch. Div. 337, referred to only for some observations by James, L.J. (at pp. 348, 350), on the functions of a receiver; and *Ames* v. *Trustees of the Birkenhead Docks*, 1855, 20 Beav. 332, for similar observations by Sir J. Romilly, M.R.

"I have considered the case before me to the best of my ability with the aid of the opinions expressed in *Cotton* v. *Beattie*. As already indicated, I do not think it can be affirmed that power to raise rates is essential to the judicial factor in order to any effectual exercise of his office. It is not for me to consider whether or not it would have been better that Parliament should have conferred such a power upon him. If such a power is not essential to him in order to give his office any real significance, it seems to me that the defender's argument loses much of its apparent weight, for, although the possession of a power to raise rates would doubtless enhance the factor's powers, that is not *per se* a warrant for construing the statutes as impliedly conferring it upon him. I cannot assume that the trustees will act obstinately or unreasonably in their management, or decline absolutely to co-operate with the judicial factor in endeavouring to further the legitimate interests of all concerned. On the other hand, I apprehend that no prudent and reasonable factor would, in the interests of his constituents, seek to reduce the working expenses of the harbour below the minimum at which the docks (his only possible source of revenue) can be efficiently carried on. But down to that limit he can, if the views I have expressed are correct, exercise a vigilant and effective control over expenditure, as indeed I gather from his pleadings he has to some extent already done. It seems to me that much must depend upon the extent to which the judicial factor and the Trustees as practical men of business are prepared to set themselves to co-operate in doing the best for all concerned, the factor having, of course, due regard to the legitimate interests of the stockholders, and the Trustees to those of the harbour. I do not prejudge the question whether under any circumstances the Court, on competent application by a factor in the defender's position, and on being satisfied that those charged by Parliament with the management of the undertaking were acting unreasonably in refusing to raise a rate or rates, might not find a remedy by granting the factor special power to do so. All that I now decide is that, in my opinion, the judicial factor was not entitled, at his own hand, to raise the rate or to issue the notice of which the pursuers now complain. Decree of declarator must therefore be pronounced, but I think the words 'at his own hand' which occur in the pursuers' first plea-in-law, though not in the summons,

should be inserted at appropriate places in the interlocutor in view of possible eventualities in the future."

The defender reclaimed, and argued—The factor had power to raise the rates, for that was indispensable to an effectual exercise of his office. The question depended on what was the security given to the "B" debenture holders. Under the Greenock Harbour Act of 1888 the "B" debenture stock with interest thereon was declared to be a charge on the undertaking. In other words, the holders of that stock got, in lieu of the mortgages which they held, perpetual annuities secured upon the powers of the undertakers, *i.e.*, the power to rate. If they were not secured on the power to rate they had no security at all. The undertaking was not one for profit-earning purposes but for public purposes, and its whole revenues had to be devoted to (1) payment of interest, (2) expenses of management, and (3) maintenance of works. Consequently there could be no surplus revenue available for security. If there was a surplus in any year the trustees were bound to apply it in reducing the rates. If the factor had no power to raise the rates his appointment would be a mere farce, for it would leave the trustees masters of the situation, and they could fix such a rate as would just be sufficient to meet the expenses of upkeep. What was assigned in security under the Act of 1888 was therefore the power to rate. There was no analogy between the position of the factor here and that of a factor appointed under the Companies Clauses Acts, or between his position and that of a creditor in possession under a heritable security. They were merely "receivers," whereas the factor here was really a "manager," and a manager had power to raise the rates of the undertaking he managed. In none of the cases cited by the Lord Ordinary—viz., *Haldane* v. *Girvan and Portpatrick Junction Railway Company*; *Broad* v. *The Edinburgh Northern Tramways Company*; *Cotton* v. *Beattie*; *Gardner* v. *London, Chatham, and Dover Railway Company*; and *in re Manchester and Milford Railway Company* — was the question now raised decided. The fact that the factor was appointed in terms of section 70 of the Act of 1880 "to receive the whole or a competent part of the rates" did not limit the scope of his powers, for he was not appointed "in virtue of" but only "in terms of" that Act. He was appointed under the Act of 1888 as amended by the Act of 1895, which did not so limit his appointment. The Act of 1888 only referred to the Act of 1880 for the manner of his appointment. In any event he was appointed as "judicial factor," and that in itself gave him full power to levy the maximum rates.

Argued for respondents—The Lord Ordinary was right. The factor had no power at his own hand to raise the rates, and that was the question at issue. He was appointed for a definite purpose, viz., "to receive the whole or a competent part of the rates and duties and other revenues of the trust." That clearly meant the rates actually levied. He had no power, expressed or implied, to alter the rates. On the other hand express power to do so was given to the Harbour Trustees, and that being so it would not be readily assumed that they were to be deprived of that power. The power to rate was the most important power they had, and it had been entrusted to a composite body representative of all interests—bondholders, shipowners, and the municipality—and if it were to be given to the factor it would be putting it into the hands of one interest only. That could not have been the intention of the Legislature. The security given to the "B" debenture holders was a second charge on the undertaking. A charge on an undertaking meant a charge on the property and works and did not include the power to rate. *Esto* that the cases cited by the Lord Ordinary did not decide the question now raised; they certainly showed that a "receiver" (such as the factor here was) could not alter the rates as he pleased. They also showed that the Court would not readily oust the governing body to suit the convenience of creditors. In particular, reference was made to the following cases cited by the Lord Ordinary, *ut supra*, viz., *Haldane* v. *Girvan and Portpatrick Junction Railway Company; Cotton* v. *Beattie; Broad* v. *The Edinburgh Northern Tramways Company; Ames* v. *Trustees of the Birkenhead Docks; Gardner* v. *London, Chatham, and Dover Railway Company; Marshall* v. *South Staffordshire Tramways Company; in re Manchester and Milford Railway Company*; and *Attree* v. *Hawe;* and also to *De Winton* v. *Mayor of Brecon*, 1858, 26 Beav. 533; and *Blaker* v. *Herts and Essex Waterworks Company*, 1889, L.R. 41 Ch. Div. 399, at p. 406. The case of *Cotton* v. *Beattie* (*cit. supra*) was especially applicable, as the section there construed, viz., section 57 of the Companies Clauses Consolidation (Scotland) Act 1845, was practically the same as section 70 of the Greenock Harbour Act of 1880, in terms of which the factor here was appointed. In any event the factor was not entitled to raise the rates at his own hand, he must apply for special powers. The debenture holders had got all the remedy which Parliament intended they should have, viz., the appointment of a factor. The advantage of such an appointment was that the trustees would be prevented from putting the revenues past the bondholders, *vide* opinion of Lord M'Laren in *Cotton* v. *Beattie* (*cit. supra*).

LORD PRESIDENT — The question that is here raised is an important and, in one sense, a novel one, and arises between the Greenock Harbour Trustees and the judicial factor, who has been appointed in terms of a statute which I shall presently examine. The question as raised is a simple one, namely, whether the factor can at his own hand and against the wish of the majority of the Trustees alter the rate which is presently charged for sugar entering the port and harbour of Greenock, it being of course understood

that the rate as altered is within the limits of the parliamentary powers of the rates as appended to the Acts.

Now, the judicial factor was appointed upon the petition of certain debenture holders. The history of the Greenock Harbour was this—After being a harbour which, I suppose, existed in a certain state from time immemorial, it was managed by the Town Council, and then there were a series of statutes which I need not go through. But the crisis of its fate in latter years came just prior to the year 1888, when it could not pay its way. At that time there were various classes of security holders—I do not particularise more because it does not matter for the purposes of this case; and these security holders had had their various rights, so far as priority was concerned, determined in an action in this Court. They were, however, in this unfortunate position, that although their rights of priority had been determined, they were practically powerless as to making their securities available, because the harbour could not be sold, and there was, to say the least of it, not much to take in the way of moveable property. At any rate, all parties concerned came to Parliament, and they got an Act of Parliament called the Greenock Harbour Act of 1888. Now, by that Act of Parliament which, as regards the pecuniary obligation of the harbour, sweeps away all that went before it, two classes of stock were created, namely, A debenture stock and B debenture stock. A debenture stock, roughly speaking, was intended to represent the liabilities which had been declared to be preferable liabilities by the action to which I have referred; and accordingly this debenture stock was to be offered to the parties in right of these preferable mortgages. If they accepted well and good; if not, they were to be paid in cash. The B stock, on the other hand, was to be given to those who had securities in whose favour a preference had not been declared, and they were to be compulsorily made to take the B stock for the very good reason that there was no money forthcoming, and they had better take that than nothing.

The point, I think, which ought to be noted is that whatever may have been the position of the parties historically, and whatever may have been their rights in the old time, once that the Act of 1888 was passed, and the A and B stock was issued and allotted to the various persons entitled to it, those persons, although in the popular sense of the word you might have called them creditors, were really not creditors at all. They, no doubt, had lent money, but their money did not represent the whole of the undertaking; there was other money there; and they became, as a matter of fact, only shareholders in the undertaking. Now as a shareholder, of course, at common law you have not any right of diligence against your own company merely because you do not get any dividend upon your shares, or, if you like to put it, because you do not get any interest for the money which you originally lent, and which is now represented by your shares. But, of course, you have other rights, and if you have got nothing and you think that the management might give you something, one right in certain circumstances might conceivably be to get a factor appointed upon the whole property. But this Act of Parliament specially says that that right is not to exist, because in the 21st section, after preventing bondholders from raising actions under certain conditions, it goes on to say—"Nor shall it be competent for the holders of the harbour stocks (the harbour stocks are the A and B debenture stocks I have mentioned) to apply for the appointment of a judicial factor except as provided in the next following section of this Act." That seems to me a clear provision—with the policy of it I have, of course, nothing to do—but that seems to me to be a clear provision by Parliament that what I may call the common law rights of these stockholders were gone, and all that they could get is what the next succeeding section of the Act gives them. Accordingly, section 22 of the 1888 Act seems to me to be the charter of the bondholders, and that section says this—"In the event of the Trustees failing at any time to make payment of the interest due at the expiry of any half-year it shall be lawful for any holder of A debenture stock, and after the expiration of a period of seven years from the passing of this Act for any holder of B debenture stock, to apply to the Sheriff for the appointment of a judicial factor in manner provided by section 70 of the Act of 1880." That period of seven years was afterwards extended to ten years by the Greenock Harbour Act 1895, but the extended period has admittedly now run out, and, admittedly, the holders of B debenture stock, after the expiry of that period, found themselves in the position that they had not got payment of the interest due at the end of the half-year; and therefore they were entitled without any question to do what they did, namely, to make an application for a factor in the manner provided by section 70 of the Act of 1880. Well, that, of course, sends us back to the Act of 1880, and section 70 of that Act says this—"Every application for a judicial factor under the provisions of this Act shall be made to the Sheriff, and on any such application the Sheriff may, by order in writing after hearing the parties, appoint some person to receive the whole or a competent part of the rates and duties and other revenues of the Trust until all the arrears of interest or of principal, as the case may be, . . . be fully paid."

It therefore comes to the simple question, What is the position of a judicial factor appointed under section 70? He is a person appointed, and he is to receive the whole or a competent part of the rates and duties and other revenues of the Trust. I think that that question is already determined by authority. This clause—I mean that part of it—is a clause which is not at all new. It is really almost word for word the same as section 57 of the Companies

Clauses Act 1845 (8 and 9 Vict. cap. 17). We were furnished by the parties with an excerpt in parallel columns of section 57 of the Companies Act of 1845, section 87 of the Commissioners Clauses Act of 1847 (10 and 11 Vict. cap. 16), section 26 of the Companies Clauses Act of 1863 (26 and 27 Vict. cap. 118), and this particular section 70, and, when reviewed, it is not too much to say that they are practically identical. They are, in my mind, so identical that it makes the authority upon the one, authority upon the other.

Now these clauses in the other Acts have already been subjected to judicial decision in both countries. In this country that clause was narrowly considered in the case of *Cotton* v. *Beattie*, 1889, 17 R. 262; and in England the clause was considered in the case of *Attree* v. *Hawe*, 1877, 9 Ch. Div. 337, and there was a comment there upon the still older and well-known case of *Gardner* v. *London, Chatham, and Dover Railway Company*, 1866, L.R. 2 Ch. App. 201. The outcome of these decisions was that a person appointed under one of these clauses was not—to use the English phrase—"a manager of the undertaking," or—to use the Scotch phrase—was not "a common law judicial factor," but that he was really a mere receiver of the revenues of the undertaking which he could get, and that, accordingly, his powers were limited to merely putting into his pocket such money as he could get and paying it out again.

We had a very strenuous argument and a very weighty argument from Mr Clyde to endeavour to bring us to the opposite conclusion, but it seems to me that the weak portion of that argument was that it went really to the policy of the statute much more than to what is actually said. All that he urged upon us as to the possibilities of the security-holders being defeated may be very true, but I am afraid the answer is that those who were, I will not say risking their money, but getting what they could get at the time of the unfortunate position of 1888, ought to have taken care that Parliament gave them something more. Mr Clyde's argument really rested upon this—he acknowledged that he could not have any rights other than what the Act of 1888 gave him, but he pointed out that his debenture was to be a second charge, just as the A debenture was to be a first charge, upon the undertaking, and he said that once his debenture was a charge as upon the undertaking, you must read the expression "the factor being appointed to receive a competent part of the tolls" as meaning not the tolls actually charged but the tolls chargeable. I am afraid that the same view was tabled and rejected in *Cotton's* case, because the Lord President (Inglis) in that case recites the interlocutor upon which the appointment was made, which is in practically the same terms as the interlocutor appointing the judicial factor in this case. I remind your Lordships again that the interlocutor was made in respect of the 56th and 57th sections of the Companies Clauses Act of 1845, which, as I have said already, are practically identical with this one. The interlocutor was—"Appoint Mr Cotton to be interim judicial factor upon the undertaking and property of the company, and to receive the whole or a competent part of the tolls or sums liable in payment of the interest payable on the mortgages mentioned in the petition until the same, with all costs, shall be fully paid." Then his Lordship goes on—"The criticism made upon this interlocutor is that it should have been confined to an appointment 'to receive the whole or a competent part of the tolls,' and so forth, and that there should not have been an appointment of a judicial factor 'upon the undertaking and property of the company;' but I am not disposed to acquiesce in that criticism at all, because I think the words used are really statutory words, and although it may be that they have led to some misunderstanding as to the proper powers of a judicial factor under that statute, the words themselves, I think, are fully justified." And then he goes on to decide that Mr Cotton in that case had no power as a manager but only that of a receiver. In other words, that is tantamount to a decision that a factor being a factor upon the undertaking, that is not inconsistent with the powers of that factor being limited to the mere powers of a receiver, using the word in the narrower sense.

That seems to me to really practically decide the whole thing. It is quite true that the body here who have the fixing of the tolls is not the factor. I can quite see that there may be disparity and discommunity of interest. My only answer is that that is how Parliament has left it. I should be slow to say that there may not be some way or other of restraining the statutory body of Trustees if they really acted in *mala fides* to the interests of those who had lent their money to the Harbour. I mean, for instance, the case as put to us by way of argument, that our decision would necessarily lead to this, that the Greenock Harbour Trustees might let in the sugar practically for nothing, that is to say, let it in for just that bare amount of charge which would be sufficient to pay the going expenses of the Harbour without having any heed to paying any money to the shareholders or creditors—call them what you will—at all. I think that would be a proceeding in bad faith, and if it could be brought up to that, I think the Court might not be without powers of coercing the Trustees. But that is not the question that is raised in this case. The question that is raised in this case is very well put by the Lord Ordinary in the end of his note where he shows that all he is deciding is that the judicial factor is not entitled, at his own hand and against the wishes of the Trustees, to suddenly change the rate leviable upon sugar or any other commodity as it comes into the harbour. I ought also to say that I am entirely satisfied with the careful note of the Lord Ordinary, who, I think, has said all that is to be said, and I should not have added the observations that I have except to indicate that I recognise that the case is a very important one, and that I

wish to show that I have come to the conclusion that I have done after careful consideration of the matter. The result in my opinion is that the judgment of the Lord Ordinary should be affirmed.

LORD M'LAREN—If the judicial factor is entitled to raise the rates leviable at the harbour, that can only be on the theory that by his appointment the management of the Trustees is displaced and their whole power of administration devolved upon the judicial factor; because if the judicial factor can alter the rates leviable on the landing of goods—the most important perhaps of all the powers the Trustees possess—I think it follows that every other power which the Trustees have hitherto exercised may equally be taken out of their hands. Now it is perfectly clear that such was not the intention of the Legislature in passing this private Act of Parliament. I do not need to consider whether the Court in the exercise of its ordinary jurisdiction could have appointed a judicial factor on the undertaking in such terms as would divest the Trustees of their administrative powers. It is quite plain that by the last Greenock Harbour Act the jurisdiction of the Court of Session to appoint a judicial factor is excluded altogether, and that a much more limited power is given to the Sheriff, and only to the Sheriff—that is, the power of appointing a judicial factor, who is to receive the revenues of the Trust and out of these to pay the dividends to the holders of the two classes of debenture stock. Now the difference between the two appointments is perfectly obvious; but the appointment of a factor such as is competent in this case is really the appointment of a person who is to protect the interests of the debenture holders. He can give them at least this protection, that he would not allow the Trustees to squander the revenue in extravagant management, or to apply the money to new works which would more properly be chargeable against capital. These two protections the debenture holders undoubtedly have, because the whole revenue comes into the hands of the judicial factor. He of course cannot divide the whole of it, otherwise the harbour would come to an end; but it lies with him to assign such sum as he may judge to be necessary for the payment of salaries and wages, and then the balance is appropriated by statute to the two classes of stockholders in their order.

I should have come without hesitation to this conclusion upon the words of the statute, but I agree with your Lordship that our opinion is strongly confirmed by the decisions that have been given upon the analogous and almost identical clauses of various general Acts of Parliament, of which the most important is the Companies Clauses Act. It is perhaps unfortunate that the judicial factor has no veto upon the action of the Trustees in fixing the rates, and that even where he may think it perfectly clear that the rate might be raised without injury to the traffic of the harbour he has no power to do it. I hope, however, with your Lordship, that the law is not entirely powerless in giving a remedy in the case of *mala fide* administration, were such a case to arise. I see great difficulty in holding that we could interfere with the action of the Trustees so long as they maintained the rates at the scale which was fixed in the past. On the other hand, I can hardly doubt that if the Trustees were arbitrarily to lower the rates so as to deprive the bondholders of their dividend without any corresponding advantage to the harbour, that would be a breach of duty for which these Trustees, like all other trustees, would be accountable to this Court.

I therefore agree with your Lordship that the Lord Ordinary's interlocutor should be affirmed.

LORD KINNEAR—I agree with your Lordship in the chair.

LORD PEARSON was absent.

The Court adhered.

Counsel for the Pursuers (Respondents)—Scott Dickson, K.C.—Macmillan. Agent—W. B. Rainnie, S.S.C.

Counsel for the Defender (Reclaimer)—Clyde, K.C.—R. S. Horne. Agents—J. & J. Ross, W.S.

Friday, June 12.

FIRST DIVISION.

CUTHBERT *v.* CUTHBERT'S TRUSTEES.

Process—Special Case—Competency—Alimentary Liferent—Assignation of Liferent in so far as in Excess of a Sufficient Alimentary Income—Competency of Questions whether Assignation would be Effectual.

A special case was presented to which the parties were (1) a liferenter entitled to half the income of an estate for his liferent alimentary use allenarly and free from his debts and deeds and the diligence of his creditors, and (2) the trustees of the granter of the provision; and the Court was asked (1) whether the liferenter had power, in order to raise funds to pay off his creditors, to grant an assurance company a valid and effectual assignation to £2100 per annum payable out of the said income, and if not (2) whether he could grant a valid and effectual assignation to his liferent provision in so far as in excess of a sufficient alimentary income, and if so (3) whether in the circumstances £1000 per annum was a sufficient alimentary provision for the liferenter.

The Court *dismissed* the case as incompetent, on the grounds (1) that it could not be decided *ab ante* that the deduction of £2100 would leave in future years a sufficient alimentary income,