by this scheme it is very plainly shown that while in the analysis the whole lands are separately set forth and the values set against them, there is also therein set forth as a distinct and separate subject this piece of ground belonging to Andrew Eddie of which we have heard so much, with a rent amounting to £1, 2s. 4d., and there is deducted from that the sum of 3s. 4d. as the rent of Eddie's house, supposing his house to have been upon this ground, which would leave 19s. as the rent of a separate subject. But you will observe that that sum of 19s. is included in the sum of £157 as a portion of the rents, and when you come to look at the decree of valuation you do not find this piece of ground belonging to Andrew Eddie valued as a separate subject. It is only valued as a pertinent, and the result of that is simply this, that nobody now knows or can tell where this piece of ground of Andrew Eddie worth 19s. now is. Nobody knows in what parish or barony it is. Nobody can tell that, and if that be so, it will be observed that that puts us in exactly the same position as in the case of *Macvicar*, because in that case nobody knew where the 14 cot houses there in question were, and nobody could tell the value of these particular subjects. It is exactly the same here. Nobody knows where this piece of ground of Andrew Eddie is, or whether it was a separate piece of ground or was attached to one or other of the subjects, and I mention this to show that this valuation was truly a valuation *in cumulo* of these lands. I do not think it would have been of any consequence in this case if Andrew Eddie's piece of ground had remained as a separate subject in the decree of valuation, and therefore it will make no difference in the result of this *cumulo* valuation.

Upon these grounds I have no hesitation in coming to the opinion that the Lord Ordinary's interlocutor ought to be reversed, and that the defender ought to be assoilzied.

Lord Mure—I am quite satisfied with the explanations which Lord Adam has given about this decree of approbation and valuation.

It appears to me to be quite plain that the sum tendered by the defender in his defences is all that the Crown is entitled to, because there is no doubt of the fact that for the last twenty-five years the defender has paid away either to the minister of Dunblane or to the minister of Ardoch, the latter of which parishes consists partly of what was at one time part of the old parish of Dunblane, the whole valued teinds of his lands, with the exception of the small amount of £18, 18s. 2d. brought out in the state referred to in his defences, and which the defender has tendered to the Crown.

The fact that the valued teind has been all paid away with the exception of this surplus of £18, 18s. 2d. is not disputed. But then it is said that this is a mistaken payment, that the payment so made to the minister of Ardoch was made out of the teinds of the defender's lands still left in the parish of Dunblane. That is the ground on which the Crown claims the sum now sued for in this action, but I agree with Lord Adam in thinking that this depends entirely upon whether the valuation is a *cumulo* valuation or not, and for the reasons stated by Lord Adam I think that it is a *cumulo* valuation, and that the defender is entitled to be assoilzied from the conclusions of the action.

Lord President—I am of the same opinion. I think this is a decree of valuation *in cumulo* and nothing else.

The Court recalled the interlocutor, decerned against the defender for the sum of £18, 18s. 2d.; and *quoad ultra* assoilzied the defender.

Counsel for the Pursuer—Sol.-General Robertson—H. Johnston. Agent—Donald Beith, W.S.

Counsel for the Defender—D.-F. Mackintosh—Low. Agents—Dundas & Wilson, C.S.

Tuesday, January 31.

FIRST DIVISION.

GREENOCK HARBOUR TRUSTEES AND OTHERS.

Right in Security — Statutory Assignation of Rates and Duties Leviable by Harbour Trustees —Insufficiency of Funds—Ranking.

Special case in which the Court determined the preferences of the various classes of creditors of statutory harbour trustees who had, under a series of local Acts, borrowed money and granted in security assignations of the rates and duties leviable, and who had an insufficiency of funds to meet their liabilities.

Right in Security—Statutory Assignation of Works and Property Vested in Harbour Trustees.

Under powers conferred by statute certain harbour trustees borrowed money, and granted in security assignations of "the rates, duties, and other revenues of the trust, and the works and property of the trust." *Held* that the words "works and property" were inoperative, as it was obvious the statute did not contemplate creating a security over the works and property, which could not be made effectual without doing real diligence.

Right in Security—Interim Receipt with Obligation to Grant Formal Assignation of Rates and Duties.

Under powers conferred by statute certain harbour trustees were authorised to borrow money, and grant in security assignations of the rates and duties leviable. They borrowed money, and their treasurer granted an interim receipt, with an obligation to procure an assignation in exchange for the receipt. *Held*, on there being an insufficiency of funds to meet the claims of all the creditors, that the holders of interim receipts were not in the same position as if they had obtained formal assignations at the date of their advances, as the trustees were not empowered by their statutes to grant a security in such a form over the rates and duties.

This special case was presented to determine the preferences and priorities of the various classes of creditors of the trustees of the port and har-

bour of Greenock on account of the funds in the hands of the trustees being insufficient at and since Whitsunday 1887 to meet certain loans then payable, and the interest on other loans.

These payments were due in respect of money borrowed under various Acts of Parliament. The local Acts bearing upon the questions raised were as follows—"5 Vict. sess. 2, c. 54, 1842 (repealed); 27 and 28 Vict. c. 93, 1864; 29 and 30 Vict. c. 156, 1866; 30 Vict. c. 35, 1867; 35 and 36 Vict. c. 71, 1872; 43 and 44 Vict. c. 170, 1880; 47 and 48 Vict. c. 16, 1884; and the public general statutes affecting the matter were—24 and 25 Vict. c. 47, the Harbours and Passing Tolls, &c., Act 1861; 25 and 26 Vict. c. 69, the Harbours Transfer Act 1862; and the Pier and Harbour Orders Confirmation, No. 2 Act 1882."

The Act of 1842 provided by section 20—"It shall be lawful for the said trustees from time to time to borrow at interest on the credit of the several rates and duties by the said recited Acts and this Act granted, and other property vested in such trustees, any sum of money which, together with any sum previously borrowed shall not exceed the sum of £220,000, and in the event of any part of such sum of money being repaid by the trustees to re-borrow the same, and so *toties quoties*, but so nevertheless that there shall not be owing on the security aforesaid any more than the sum of £220,000 in the whole at any one time, and for securing the repayment of the money so borrowed with interest, the trustees or any three or more of them may assign over the said rates, duties, and property, or any part thereof, to the person who shall advance or lend such money as a security for the payment of the money so to be borrowed, together with interest for the same."

The form of assignment was contained in Schedule A of the Act, by which it was provided that "we trustees, in consideration of the sum of advanced and paid to us by , do hereby sell, assign, and make over to the said , his heirs, executors, administrators, and assignees, all and sundry the rates and duties payable to us by virtue of the said Act, and of the several Acts therein cited in relation to the said harbours, and all our right, title, and interest of, in, and to the same, to be held by the said and his foresaids until the said sum of , with the legal interest thereof (or such interest as may be agreed on, if less than five pounds per centum), shall be fully satisfied and paid."

Section 22 provided—"That all persons to whom securities have before the passing of this Act been granted under the said recited Acts, and all persons to whom assignments or securities shall hereafter be made, or who are or shall be entitled to the monies thereby secured, shall, in proportion to the sums therein respectively mentioned, be creditors on the said rates or duties equally one with another without any preference in respect of the priority of advancing such monies, or of the dates of any such securities or assignments respectively."

It was stated in the case that there were no loans contracted prior to the passing of the Act of 1842. No question arose under the Act of 1864.

The Act of 1866 recited the previous Acts, except the Act of 1864, and also the fact of a loan of £100,000 having been borrowed from the Public Work Commissioners under the Public Acts of 1861 and 1862. It then repealed the recited Acts, and by sec. 66 provided that the trustees might borrow at interest on the credit of the several rates and duties by the Act granted and other revenues of the trust any sums which, together with the sums previously borrowed, should not exceed £650,000, and on repayment re-borrow the same, and for securing the repayment might assign the said rates and duties or other revenue.

The form of assignment was in similar terms to that under the Act of 1842.

By section 72 it was provided—"All assignments or mortgages for money borrowed under the authority of the recited Acts, and which shall be in force at the time of the passing of this Act shall, during the continuance thereof, have priority over any assignments or mortgages for money borrowed by virtue of this Act, and the several holders of the assignments or mortgages first mentioned shall have the same priority among themselves in respect thereof as they would have had if this Act had not been passed."

The Act of 1867, which raised the borrowing powers from £650,000 to £750,000, recited the Act of 1866, and conferred similar powers in regard to borrowing on the security of the rates and duties.

The Act of 1872 provided, by sec. 34, that the trustees might borrow "on the security of the rates and duties and other revenues of the trust, and of the works and property of the trust, any sum which, together with the amount borrowed, and not repaid by them before the passing of this Act, shall not exceed £1,000,000, and in the event of any part thereof being repaid by them, except by means of their sinking fund, they may re-borrow the same or any part thereof, and so *toties quoties*, and for securing repayment of the money so borrowed with interest, the trustees may assign over the rates and duties and other revenues of the trust, and the works and property of the trust or any part thereof, or any of those securities to the lender accordingly." Sec. 35—"All monies to be raised by the trustees under this Act from the time when the same shall be advanced, and the interest for the time being due thereon, shall have priority against the trustees, and all the rates, duties, and other revenues of the trust, and the works and property of the trust over all other claims on account of any debts incurred, or to be incurred, or engagements entered into or to be entered into by them." . . . Sec. 38—"In relation to the borrowing of money by the trustees, the following further provisions shall have effect, namely—(1) Every assignment in security made by the trustees after the passing of this Act by virtue of their borrowing powers under their former Acts or this Act, and interest warrants or coupons to be delivered with such assignments, and minutes of renewal and discharges of such assignments, may be in the respective forms given in the fifth Schedule to this Act or to the like effect. . . (3) Section 67 of the Harbour Act of 1866 (relating to forms of assignment) shall not apply to any assignment made by the trustees after the passing of this Act." The fifth Schedule was in

these terms—"By virtue of the Greenock Port and Harbour Acts 1866, 1867, and 1872, the trustees of the port and harbours of Greenock in consideration of the sum of pounds sterling paid to them by do hereby bind themselves to pay to the said executors, administrators, or assigns, the principal sum of pounds at the principal office of the trustees on the day of eighteen hundred and with a fifth part more of liquidate penalty in case of failure, together with interest on the said principal sum at the rate of per centum per annum, payable half-yearly (as per coupons or interest warrants delivered herewith), or in the option of the said or foresaids, the said principal sum shall thereafter in virtue hereof remain as a loan to the said trustees until the expiry of a further term of years to be afterwards agreed on, or the said principal sum shall be payable at the dates, and subject to the provisions contained in the said Acts in the same manner as if the said sum had been advanced on the day of payment first above specified without any period being fixed for the repayment thereof, and subject to the provisions of the said Acts the trustees do hereby assign and make over to the said his executors, administrators, and assignees, All and sundry the rates, duties, and other revenues of the trust, and the works and property of the trust, payable or belonging to the trust in virtue of the said Acts, and all their right, title, and interest of, in, and to the same, to be held by the said assignee and his foresaids until the said sum of with the interest thereof shall be fully satisfied and paid." The form of minute of renewal was this—"It has been mutually stipulated and agreed upon that the repayment of the principal sum contained in the within assignment shall be postponed, and the same shall not be due and exigible until the day of eighteen hundred and , and that interest shall become due on the said principal sum to the date last mentioned at the rate of per centum per annum, and shall be paid half-yearly on presentation of the respective coupons or interest warrants in number issued herewith." Sec. 40 provided—"All assignments for money borrowed by the trustees before the passing of this Act in force at the passing of this Act shall, during their respective continuance, have priority over any assignments for money borrowed by them after the passing of this Act, and the several holders of assignments in force at the passing of this Act shall have the same priority among themselves in respect thereof as they would have had if this Act had not been passed."

The Act of 1880 raised the borrowing powers to £1,300,000 in all. It also provided as follows:—Sec. 71. "All moneys to be borrowed under the authority of this Act may be borrowed in the several ways and manners by the Acts of 1866 and 1872 provided, and may be secured, and the security thereof be transferred in such manner and form as directed by the said Acts with respect to the money borrowed or to be borrowed under the authority thereof, and all the provisions of the said Acts with respect to the borrowing, and to the security, and to the transfer or assignment, shall extend and apply to the moneys by this Act authorised to be borrowed as if the same had been borrowed under the said Acts: Provided that in regard to sums to be borrowed under the authority of this Act, the deed of assignment shall bear reference to this Act, as well as to the trustees' former Acts, and that the form of transfers of assignments, and the provision as to the registration of transfers contained in the said Harbour Acts of 1866 and 1872, shall apply to the transfer of all sums borrowed and due by the trust." Sec. 72. "All assignments for money borrowed by the trustees before the passing of this Act, in force at the passing of this Act, shall, during their respective continuance, and subject to the provisions of the Acts under which the same were respectively granted, have priority over any assignments for money borrowed by them after the passing of this Act, and the several holders of assignments in force at the passing of this Act shall have the same priority among themselves in respect thereof as they would have had if this Act had not been passed." It was further provided by sec. 73 that the trustees, in lieu of continuing on mortgage the money they borrowed, might resolve to fund the whole or any part of the debt, and issue certificates to the holders of such funded debt, entitling them to an annuity on the sum lent at a certain rate of interest. Sec. 77 provided—"The several holders of such funded debt shall be creditors of the trustees for the payment of such annuity, and shall be deemed to hold by virtue of this Act a mortgage or assignation of the rates, duties, and other revenues of the trust in security of such payment, which mortgage and assignation shall rank *pari passu* with the other mortgages and assignations made and granted under this Act, and shall confer the like powers and privileges."

The Act of 1884 raised the borrowing powers to £1,800,000.

The trustees for the time being raised money in accordance with the powers above recited, and issued assignments therefor. Some of the assignments were from time to time renewed by minute of renewal endorsed thereon, and some were not. After the passing of the Act of 1880 the trustees continued to issue assignments under the Act of 1872 until the borrowing powers of that Act were exhausted, the first assignment under the Act of 1880 being issued on 17th April 1882.

The parties to the case were as follows:—

The *First Parties* were the trustees.

The *Second Parties* were the holders of an assignment issued under the Act of 1842, which had never been renewed.

The *Third Parties* were the holders of an assignment issued under the Act of 1842, which was renewed by minutes of renewal appended thereto of dates 19th September 1876 and 24th April 1883.

The *Fourth Party* was the holder of an assignment issued under the 1866 and 1867 Acts, which had never been renewed.

The *Fifth Parties* were the holders of an assignment issued under the 1866 and 1867 Acts, which was renewed by minutes of renewal, of dates 4th December 1876 and 23d September 1881.

The *Sixth Parties* were the holders of (*a*) an assignment issued under the 1866, 1867, and 1872 Acts, the term of payment whereof fell before the passing of the 1880 Act, and which assignment had never been renewed, and (*b*) an assignment issued under the 1866, 1867, and 1872 Acts, previous to the passing of the 1880 Act, the term of payment whereof had not yet expired.

The *Seventh Party* was the holder of an assignment dated 21st July 1876, issued under the 1866, 1867, and 1872 Acts, the term of payment whereof fell after the passing of the 1880 Act, and which assignment was renewed by minute of renewal in the statutory form, but the period of renewal expired on 15th May 1886. The assignment bore a marginal note in these terms—"*Greenock, 2nd March* 1886.—It has been agreed to continue this loan at the rate of Four pounds per cent. per annum until further notice.—WM. HUTCHESON, *Treasurer.*"

The *Eighth Party* was the holder of an assignment issued under the 1866, 1867, and 1872 Acts, which fell due after the Act of 1880 on 11th November 1883, and was renewed by minute of renewal in the statutory form, of date 21st December 1883. The postponed term of payment was 11th November 1891.

The *Ninth Parties* were the holders of an assignment issued under the 1866, 1867, and 1872 Acts, which fell due before the passing of the 1880 Act, and had been renewed twice by minutes of renewal, of dates 23d April 1880 and 24th March 1885. The postponed term of payment was 15th May 1893.

The *Tenth Party* was the holder of an assignment issued under the Acts of 1866, 1867, and 1872, and being of an amount within the borrowing powers of the 1872 Act, but issued of date 19th November 1880, being after the passing of the Act of 1880.

The *Eleventh Parties* were (*a*) the holders of an assignment issued under the Acts of 1866, 1867, 1872, 1880, 1882, and 1884, and (*b*) the holders of a certificate for £500 of the funded debt.

The *Twelfth Parties* held interim receipts for sums advanced by them respectively, which were dated 28th December 1867, 7th January 1870, and 19th January 1887. The total amount of loans on interim receipts was £6375.

They stated that "all sums received in loan by the parties of the first part were entered as received in a book called the loans book, from which the formal assignments were prepared. The assignments as issued were entered in the Register of Assignments. Formal assignments were not executed in the case of the said loans of £6375. In the ordinary course of dealing the trustees, in borrowing money under their statutory powers, granted an interim receipt therefor, which was exchangeable and was usually exchanged for a formal assignment at a later date. No distinction was made between money borrowed under interim receipts and money borrowed under formal assignments, both being equally represented in the accounts and balance-sheets of the trustees as borrowed under the said Acts. The annual accounts published by the trustees to which they were in use to refer intending lenders for information, showed the full amount of indebtedness in respect of money borrowed under statutory powers at the time, and described it as 'debt due on assignments,' without distinguishing between money standing on interim receipt and on formal assignment."

The questions submitted for the opinion of the Court were—(1) Do the *Second Parties* rank on the rates and revenues of the trust preferably to the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth parties, or to any and which of them? (2) Are the *Third Parties* in the same position as the second parties, or does their preference, if any, rank as if the loan had been granted of the date of one or other and which, of the minutes of renewal? (3) Do the *Fourth Parties* rank on the rates and revenues of the trust preferably to the fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth parties, or to any and which of them? (4) Are the *Fifth Parties* in the same position as the fourth parties or does their preference, if any, rank as if the loan had been granted of the date of one or other, and which of the minutes of renewal? (5) Do the *Sixth Parties* rank on the rates and revenues of the trust preferably to the seventh, eighth, ninth, tenth, eleventh, and twelfth parties, or to any and which of them? (6) Do the *Sixth Parties* rank on the works and property of the trust preferably to all the other parties, or to any and which of them? (7) Is the *Seventh Party* as regards the rates and revenues of the trust entitled to rank *pari passu* with the sixth parties? (8) Is the *Seventh Party* entitled to rank *pari passu* with the sixth, eighth, and ninth parties on the works and property of the trust and preferably to all the other parties to the case? or, Is she entitled to rank preferably as aforesaid only on the works and property of the trust existing at the date of her assignment? (9) Do the *Eighth and Ninth Parties* rank on the rates and revenues of the trust preferably to the seventh, tenth, eleventh, and twelfth parties, or any and which of them [and *pari passu* with the sixth]? (10) Do the *Eighth and Ninth Parties* rank on the works and property of the trust preferably to all the parties in the case except the sixth parties? or, Do the *Eighth and Ninth Parties* rank preferably as aforesaid only on the works and property of the trust existing at the dates of their respective assignments? (11) Is the *Tenth Party* entitled to rank on the rates and revenues of the trust *pari passu* with the sixth parties, class *b*, and preferably to all the other parties in the case except the second and fourth parties, or to any and which of them? (12) Is the *Tenth Party* entitled to rank on the works and property of the trust preferably to all the parties in the case, or to any, and which of them? or, Is she entitled to rank preferably as aforesaid only on the works and property of the trust existing at the date of her assignment? (13) Have the *Twelfth Parties*, or any, and which of them, the same rights and preferences as if formal assignments had been delivered to them of the dates of their respective interim receipts; or, Are they, or any and which of them, now entitled to demand such assignments from the first parties to that effect? (14) Assuming that the *Sixth, Seventh, Eighth, Ninth, and Tenth Parties* are entitled to the preferences which they claim over the works and property of the trust, are they entitled to effectuate their rights over the said works and property either (1st) by bringing the said works and property, or

such part thereof as may be necessary to meet their claims to public sale, or (21) by administering said works and property for their behoof until their claims are satisfied, or by which of these modes? (15) Alternatively to the whole of the foregoing questions, Do the *Whole Parties. other than the First*, rank *pari passu* upon the said rates and revenues?"

The arguments of the parties appear from the opinion of the Lord President.

Upon the question of the validity of the assignation of "works and property," it was maintained that this gave an additional security, upon which all competent diligence could be done. A judicial factor might be appointed, or the works and property might be sold—*Haldane* v. *Girvan and Portpatrick Junction Railway Company*, March 18, 1881, 8 R. 669; *The Mersey Docks and Harbour Board Trustees* v. *Gibbs*, L.R., 1 E. & I. App. 93; *Virtue* v. *Police Commissioners of Alloa*, Dec. 12, 1873, 1 R. 285.

Against this view the following cases were cited—*Dundee Union Bank* v. *Dundee and Newtyle Railway Company*, Jan. 25, 1844, 6 D. 521; *Gardner* v. *London, Chatham, and Dover Railway Company*, L.R., 2 Ch. App. 201.

Upon the question of the effect of the interim receipts held by the twelfth parties, they argued that as holders of these receipts they were in the same position as if they had got assignments when the receipts were granted, and the fact that the trust was in a position of temporary difficulty did not alter the position of matters. Up to Whitsunday 1887 interest was paid to them just as if they had assignments. The money was advanced on the understanding that they were to get assignments, and if such assignments were now granted that would only be completing an existing obligation—*Stiven* v. *Scott*, June 30, 1871, 9 Macph. 923; *Gourlay* v. *Mackie*, Jan. 27, 1887, 14 R. 403. It was within the powers of the trustees to give an interim receipt, along with an obligation to grant an assignment. Implement of that obligation would not be affected by the Bankruptcy Statutes—*Rose* v. *Falconer*, June 26, 1868, 6 Macph. 960.

Against this view it was maintained that if assignments were granted in implement of the obligation said to be binding on the trustees, they would require to be antedated, which in the insolvent condition of the trust could not be done.

At advising—

Lord President—The first parties to this special case are the trustees of the port and harbours of Greenock, who are, under various Acts of Parliament, vested in the property of the harbour and in the management and application of all the revenues received from the use of the harbour.

The other parties are creditors under the assignments which have been granted by the trustees for money borrowed from them under the authority of the Acts of Parliament which I shall immediately refer to.

It is stated by the first parties, with the assent of all the other parties to the case, that owing to various causes the funds at the command of the first parties were not at Whitsunday last and have not since been adequate to meet the payment of certain loans then and since payable, and the payment of interest due in respect of money borrowed under the various Acts of Parliament.

This special case has therefore been presented for the purpose of determining what may be called the order of ranking of the various classes of creditors represented by the parties before us, and as regards certain classes of these creditors the case is not attended with any difficulty.

There are four Acts of Parliament that require particular attention. The first was passed in the year 1842, by which the trustees were empowered to borrow the sum of £220,000 for the purposes of the harbour and works. The second was passed in 1866, and along with a supplementary Act of the following year, 1867, it authorised borrowing powers up to £750,000, including the previous borrowing powers.

In the Act of 1872 the borrowing powers were extended to £1,000,000, and in 1880 to £1,300,000.

Now, as regards the Act of 1842, it would rather appear that at that time there were some loans outstanding under the previous Acts of Parliament, for by the 22nd section of that Act it is appointed that the sums borrowed under the Act of 1842 should rank *pari passu* with all the previous loans, and money having been borrowed under the Act of 1842 to a considerable extent, the Act of 1866 was passed and contained a clause which secured a priority again to creditors who had lent their money under the Act of 1842, and as this clause is repeated in subsequent Acts of Parliament, I may as well read it at once. It is the 72nd section of the Act of 1866—[*reads section*]. That clause therefore makes it quite plain that the creditors under the Act of 1842 have a priority over the creditors under the Act of 1866.

And in like manner, when the next Act was passed in 1872, there was a similar clause introduced—section 40—which gave priority to all the creditors who had already lent their money under the provisions of the Acts, including the Act of 1866, over the creditors who were to advance their money under the Act of 1872.

And so in the next Act of 1880 there is a similar priority clause.

While therefore the creditors under the Act of 1842 ranked in the first place, *primo loco*, the creditors under the Act of 1866 rank *secundo loco*, the creditors under the Act of 1872 rank *tertio loco;* and lastly come the creditors under the Act of 1880, who are a different set of creditors—that is to say, creditors not under the operation of these Acts, but who also necessarily rank *pari passu* with one another, because it must be observed that the securities which are granted for the money advanced under this Act of Parliament are not real securities in any proper sense of the term. There is nothing done to confer or make real that security. To do so in the case of ordinary securities in our law we know that in the case of heritable securities there must be infeftment or its equivalent, in the case of moveables, delivery, and in the case of incorporeal moveables there must be an intimated assignation. But none of these things was done, or could be done, in the case of statutory assignments with which we are here dealing, and therefore it follows of necessity that for one thing there was no priority of time under this

Act of Parliament, and for another there was under it no priority in point of preference given.

As regards the cases which have occurred under the Act of 1842 and the Act of 1866, I do not think any difficulty occurs at all. The assignments under these Acts of Parliament specify no time of payment, and they just assign the revenues of the harbour in security, and fix a rate of interest. The debtor has the option, if he chooses, to put an end to the assignments by giving notice of payment as provided in the statutes, and of course the creditor is entitled to demand payment of his money when he pleases.

In some of the cases which we have before us under the Act of 1866 there is a form of renewal gone through, but it is perfectly obvious from the language of the assignments under that Act that nothing of the kind was necessary. The assignments remained in force until the money was paid up by the debtor, or until the creditor called up his money and got payment of it, and I suppose the form of renewal which was gone through in some of these cases was suggested by the circumstance that when these renewals took place the Act of 1872 had been passed, which required renewals of the assignments given under its authority, and that seems to have suggested to the parties that probably it was intended that there must be renewals of these under the provisions of the statutes. But that obviously is an entire mistake. Nothing of the kind was necessary, and therefore it is not at all necessary for us to consider whether, if renewals had been necessary under the Act of 1866, they were still given in the form we have before us. The creditors therefore under the Act of 1842, as I have said before, come in the first place to rank *primo loco* on the revenues of the harbour, and the creditors under the Act of 1866 rank in the second place.

But the Act of 1872 introduced a new form of assignment, and there is also a clause in that statute relating to the form of assignments which it is necessary to keep in view. The 38th section provides that in relation to the borrowing of money by the trustees the following further provisions shall have effect, and the first of these provisions is, "that every assignment in security made by the trustees after the passing of this Act by virtue of their borrowing powers under their former Acts or this Act, and interest warrants or coupons to be delivered with such assignments, and minutes of renewals, and discharges of such assignments, may be in the respective forms given in the fifth schedule to this Act or to the like effect." Then in the third sub-section of the same section it is provided that "section 67 of the Harbour Act of 1866, relating to forms of assignment, shall not apply to any assignment made by the trustees after the passing of this Act." Now, I think the effect of that clause, taking this sub-section into account, is that an assignment made after the passing of the Act of 1872, required to be in the form prescribed in the fifth schedule of that statute, because the previous forms are forbidden to be used, and that new form is substituted.

That brings us therefore to a consideration of the form contained in that fifth schedule, which differs very materially from the form in the previous statutes—[*reads schedule*]

Now, that form differs from the form in the previous statutes in this respect, that there was no day of payment specified in the previous form. The money remained until it should be called up or paid, and the creditor's security subsisted until the money was fully paid, with the specified amount of interest, but in the schedule now before us there is a day of payment specified, and it is plain that it is not intended that the security shall subsist in the same form or to the same effect after that day of payment is past, because there are delivered with the assignments, coupons, or interest warrants which come down only to the date of payment, and as soon as these coupons or interest warrants are exhausted, which is the same thing as the date of payment of the principal, there are no further means of recovering interest, and no provision for the payment of interest.

Now, the object of all this plainly is to give parties an opportunity of altering the rate of interest after a certain period has elapsed. Suppose that the period prescribed for payment is five years after the date of the assignment; well, the effect of that is that the interest warrants or coupons being exhausted, the rate of interest may be altered by agreement. Now it must be observed that it is not altered by the statute at all, but it must be arranged between the parties when the date of payment of the principal arrives, and the rate of interest is to be fixed if the loan is to be continued, and accordingly the alternative is for the creditor to say that the principal sum is to be paid, or that it may thereafter be allowed to remain as a loan to the trustees until the expiry of a further term of years to be afterwards agreed on.

Now, there is a form provided for such an agreement in this same schedule, and it is called form of minute of renewal, and it bears that it has been mutually stipulated and agreed upon that the repayment of the principal sum contained in the within assignment shall be postponed, and the same shall not be due and exigible until another specified date, and that interest shall become due on the said sum to the date last mentioned at a certain rate, which is specified also in the minute of renewal. Therefore when the term arrives for payment of the principal in the original assignment the parties may, if they think fit, come to this kind of agreement. If they do not, the money must be paid. These are the two alternatives represented.

Now, it seems to me that there are just two cases before us in which this procedure has been regularly gone about. One is the second security held by the sixth party, and the other is the security held by the ninth party.

Now, the security held by the sixth party which is distinguished by the letter *b*, is an assignment which is dated in 1878, and the term of payment is 1888, so it is not yet due. I am perhaps wrong in the form of expression I applied in this case, for there is no minute of renewal, and so it is not yet due, and so no question is raised as to this, but what I meant was this, that it is undoubtedly a well made assignment, and a subsisting assignment under the provisions of the Act of 1872, because it is an assignment made in the terms prescribed by the schedule, but the day of payment of the principal has not yet arrived, so no minute of renewal was in that case necessary.

In the case of the ninth party the payment fell due before the passing of the Act of 1880, but there was a renewal by minute, dated 23rd April 1880, which was before the arrival of the term of payment, and again it was renewed, one time on the 24th of March 1885, and that renewal was also within the term of payment specified within the first renewal, and in that second renewal the term of payment is there postponed until the 15th of May 1893. It appears to me therefore that in so far as regards the *b* security belonging to the sixth party, and the security belonging to the ninth party, these are both perfectly good under the Act of 1872, and precisely conform to the forms of that Act and its schedule.

But there are three other securities constituted under the Act of 1872 which stand in a different position. These are (1) the security *a* belonging to the sixth party; (2) the seventh party's security; and (3) the eighth party's security.

Now, as regards the security belonging to the sixth party the term of payment arrived before the passing of the Act of 1880, and that assignment never was renewed at all.

As regards the seventh party's assignment, it fell due after the passing of the Act of 1880, and it was renewed, but it was renewed too late, because the term of payment precedes the date of renewal by some months.

The eighth party is in that respect in the same position. The renewal there was too late also.

Now, then, the condition of these three parties is this—That they have not complied with that part of the schedule of the Act of 1872, which, of course, as creditors under the assignment which they received, gave them the option of postponing the term of payment for an additional period, and fixing the rate of interest for that additional period. The schedule—I shall refer to it again—gives this alternative, "the said principal sum shall thereafter in virtue hereof remain as a loan to the said trustees until the expiry of a further term of years to be afterwards agreed on."

Now, no term of years was agreed on in the case of this sixth party's *a* security, and although a term of years was agreed on in the case of the seventh and eighth parties, it was not agreed on till after the assignment had lapsed altogether by the arrival of the term of payment. But I have placed these three parties all in the same position. They have all availed themselves of that option which is given by the terms of their assignments.

But then there is another thing. The schedule of the Act of 1872, which is also embraced in the assignments of all these three parties, is thus expressed, "or said principal sum"—that is, the principal sum in the original assignment—"shall be payable at the dates, and subject to the provisions contained in the said Act, in the same manner as if the said sum had been advanced on the day of payment first above specified, without any period being fixed for the repayment thereof."

No agreement having been come to for a renewal until after the postponed period of payment, the statute says the principal sum shall be held as advanced of new upon the date of payment originally fixed in the assignment, and without any date of payment being fixed, and it shall be subject to the rules and conditions prescribed by the Acts. Now, what does that mean? It is not very happily expressed, because it leaves room for a good deal of argument upon its meaning. But it appears to me that, keeping in view that the whole object—or at least the main, if not the only object—of this new form of assignment prescribed by the Act of 1872, being to provide for fixed periods of payment, it is to give an opportunity of dealing with the rate of interest if the loan is to be further continued. This seems to me the most simple meaning, that if you do not before the term of payment arrives provide for another fixed term of payment with a fixed rate of interest, then you shall be held to continue the loan as from the date of payment in the original assignment with no fixed term of payment, and without any fixed rate of interest.

I think that answers all the expressions contained in this alternative, and it would be very difficult to find any other reasonable construction of this particular schedule, because if it were to be held that the assignment came to an end altogether and lost its whole operation and effect by allowing the term of payment to pass without any renewal, these assignments, under the Act of 1872, would be liable to lose their force altogether in regard to the order of ranking. They would lose the benefit of the priority clause in the Act of 1880.

Now, that would be a very strong thing to imply from the use of such terms as we have here. It is not so expressed, and I do not think it can be implied, in the first place, because I think that would be a most unreasonable construction, and, in the second place, because the assignment in security stands just as good as it was from the beginning. The lapse of the period of payment prescribed in the assignment does not put an end to the effect of the assignment in security. Nothing of the kind is said, and surely that cannot be implied, and therefore, being an assignment, it stands good. The assignment bears that it is to subsist and be held by the assignee until the principal sum, with interest thereon, shall be fully satisfied and paid. Now, it would be entirely inconsistent with that to hold that an assignment which is contained in the original instrument granted to the creditor under the Act of 1872 should lose all its force and efficacy as an assignment in security having a certain priority attached to it. I therefore come to the conclusion that these parties, the sixth party for this security *a*, and the seventh and eighth parties, are also entitled to preferences as coming under the Act of 1872, and secured by the 72nd section of the Act of 1880. The priority clause of the Act of 1880 is very like the one which I read from the Act of 1842, but there are certain slight variances of expression, and therefore it might be as well to advert to it. It provides that —[*reads section 72 of the Act of* 1880].

Now, I think the securities with which I have been dealing are fairly within the words of this clause. They are "assignments for money which shall be borrowed by the trustees before the passing of this Act." There can be doubt they are the governing words of the clause, for the subject of the sentence is "all assignments." It is assignments that are dealt with. This assignment, whatever may have happened to it afterwards, is undoubtedly an assignment for money

which was borrowed by the trustees before the passing of the Act of 1880. It is also an assignment which was in force at the passing of the Act of 1880, and it is still continuing. It has not fallen. It is admittedly still a subsisting obligation of these Harbour Trustees, and a subsisting security, and therefore it answers all the conditions of the 72nd section.

The result, therefore, is that these three securities which I have already mentioned are entitled to rank *pari passu* with the security *b* of the sixth party and the security of the ninth party. They were all ranked *pari passu* under the Act of 1872, and therefore *tertio loco* in this competition.

We then come to the tenth party, and there the money was borrowed under the Act of 1872. But then it was borrowed after the passing of the Act of 1880, and it therefore does not answer to the language of the 72nd section of the Act of 1880, because it is not "money borrowed before the passing of this Act," and it is not a security in force at the passing of this Act, and if it does not get the benefit of the preferences conferred by the 72nd section of the Act of 1880, I know of no preference it has, and that being so, it must fall down in the scale, and rank with the securities which are given in the Act of 1880 itself.

Then comes the eleventh party, and the money there is borrowed under the Act of 1880, and of course the eleventh party does not contend that he can rank with securities under the Act of 1872, and indeed he does not maintain anything except that the sixth, seventh, eighth, ninth, and tenth parties should be reduced to that level. That is said to be the sole contention of the eleventh party. From what I have said upon the previous cases—that is to say, upon those of the sixth, seventh, eighth, ninth, and tenth parties—it will be obvious that the conclusion I come to upon the assignment of the eleventh party is that he has not succeeded in bringing down to his own level any of these previous parties except the tenth.

There is in the case of the eleventh party also the funded debt, or share of the funded debt, but that does not seem to give rise to any difficulty so far as I can see, because by section 77 of the Act of 1880 it is obvious that his share of the funded debt ranks *pari passu* under his assignment under the Act of 1880.

Then, again, comes the twelfth party, and he is in the unfortunate position of not having any assignment at all, and thereby stands in a very unfavourable position of contrast to the other parties before us. There are in this twelfth category three cases presented. One of the securities, if it may be so called, which is held by the twelfth party is entitled an interim receipt. It bears date 28th December 1867, and it is in these terms—"I have this day received from William M'Clure, Esquire, . . . as a loan to the Greenock Harbour Trust, the sum of £300 sterling, for which I will procure an assignment by the trustees in exchange for this receipt.—John Adam, Treasurer, p. William Smith." The second is rather longer in point of expression, and it is dated 7th January 1870. The document sets out the Act of Parliament, being the Act of 1866, under which the money is advanced, and it proceeds—"I have this day received from" so and so "as a loan to the Greenock Harbour Trust the sum of £200, which has been placed to their credit in the books of the trust, and for which interest at the rate of 4½ per cent. per annum, or at such other rate as may be fixed by the Finance Committee of the said trust, on six months' notice given, will be paid half-yearly from this date, at the terms of Whitsunday and Martinmas. — John Adam, Treasurer." And then the third document is dated 19th January 1887, and bears to be "by virtue of the borrowing powers contained in the above-named Acts, I acknowledge to have this day received from" the creditors "the sum of £600 sterling as a loan to the Greenock Harbour Trustees till Martinmas 1889 at 4 per cent. An assignment and warrants for the interest thereon will be prepared forthwith, and delivered in exchange for this receipt.—William Hutchison, treasurer."

Now it will be observed that the first of these receipts was granted before the passing of the Act of 1872, and the second also, while the third is granted after the passing of the Act of 1880, and therefore they stand in a somewhat different position as regards that matter. But the great objection to them is that they are in the form of a security which the Greenock Harbour Trustees have no authority to grant. Whether they will entitle the holders to demand delivery of assignments in security for the moneys mentioned in these receipts is a different question. But there is no such question put to us in this special case. The question put to us in regard to these receipts is the thirteenth, and it is this—"Have the twelfth parties, or any and which of them, the same rights and preferences as if formal assignments had been delivered to them of the dates of their respective interim receipts, or are they, or any and which of them, now entitled to demand such assignments from the first parties to that effect?" That is the question we have to answer, and as there is no question put to us as to the right of the parties to demand delivery of assignments now, at the present date I say nothing. I say nothing about that question, or about what the effect of these assignments might be if they were granted, but I am quite prepared to answer the thirteenth question in the negative upon both branches of it.

The first part of the particular question appears to suggest to us that these receipts shall be in this competition equivalent to assignments granted of the same dates—that is to say, that the receipt No. 1, which is dated in 1867, shall rank along with the parties who are here preferred *secundo loco*, viz., the creditors advancing their money under the Act of 1866, and so also with the second, while of course the third cannot obtain any preference under that Act, but would only rank in the last grade with the creditors under the Act of 1880. But it is quite obvious, I think, that as the statutes prescribe the particular form in which the securities are to be given, and state distinctly what is to be the effect of these forms, if different forms are adopted, these receipts cannot possibly be allowed to have the same effect as the assignments prescribed by the statute. In short, the form which has been adopted here is no obligation by the Greenock Harbour Trustees at all. It is a receipt granted by their treasurer. But there are clauses in these Acts of Parliament which

expressly provide for the manner in which the Greenock Harbour Trustees can bind themselves; and the only manner in which they can bind themselves to any effect at all is by a certain number of the trustees signing documents of debt along with the clerk or some other officer, and therefore even in that view these receipts are good for nothing at all. I therefore come to the conclusion without any hesitation that the holders of these receipts are not in a position to ask anything in the nature of a preference here, because they have not got statutory documents, and in the second place, as regards the one granted in 1887, the course which is probably open to the holder of that document is to ask that an assignment may be given to him in terms of the obligation, but what the effect of that assignment might be I give no opinion, because it is not raised in this special case.

It appears to me that that disposes of the whole case with the exception of one question, and that is the question, What is to be the effect of the insertion in some of the statutory securities of the words "the works and property," in addition to the words "rates and revenues of the trust?"

Now, that stands in a very curious position as regards the statutes, as was pointed out by the Dean of Faculty, in this respect, that in the statute of 1842 the advances are made on the credit of the rates and duties and other property vested in the trustees, and it is provided that the trustees may assign their rates, duties, and property, or any part thereof, and oddly enough, the form in the schedule does not correspond with that provision in the clause of the statute, because the form in the schedule does not assign the property, but only the rates and revenues under the Act of 1866. There is no mention of anything either in the clauses or in the schedules except rates, duties, and revenues. There is no assignment of the property or works. In the Act of 1872 it is provided that the trustees may borrow on the rates, duties, and other revenues of the trust, and of the works and property of the trust, and in this case the schedule is in harmony with the clauses, which it is not in the Act of 1842, so that the Act of 1872 is the most complete in the way of assigning "works and property" in addition to "rates and revenues."

In 1880 there is no form of assignment given in any schedule, but there is a clause, 71, which is rather important in this connection, which provides—[*reads section*].

Now, that gives power in dealing under the Act of 1880 to adopt any of the forms of the previous Acts, and therefore creditors lending money under the Act of 1880, if they can agree with the trustees, may take their security in the terms provided in the Act of 1866, in which case they will have no assignment of the works and property, or they may take it under the Act of 1872, under which they will have an assignment of the works and property of the trust.

I think this only leads one to the conclusion that the insertion of these words, "works and property of the trust," was really not meant to have any real effect at all. The meaning of inserting these words at all is just to give a little more intensity to the conveyance. The works and property of the trust are revenue producing subjects, and it is quite obvious that in no event under these Acts of Parliament was it ever contemplated that a security should be created over the property and works of any efficacy, which could not be made effectual without doing real diligence against the property and works. I do not suppose any of your Lordships would have the slightest hesitation in saying that an adjudication led by one of the creditors under the Act of 1872 to carry off the harbour works from the statutory trustees would be an utterly absurd and ineffectual proceeding, and yet unless this is to be the effect of this assignment of the property and works, I do not see very well what they can get from it except the revenue derived from the works and property. They must either be content with the revenue derived from the property and works or carry off the property itself, and it is certainly obvious that the latter was not intended, and if so, then the only thing remaining is the revenue produced by the use of the harbour and works. The difficulty of giving any other construction to these words under the different statutes may be further illustrated by this, that in the Act of 1872, section 40, it is provided that all assignments given under the provisions of the statutes, and particularly under the Act of 1866, are to have a priority over the assignments granted under the Act of 1872. But if assignments granted under the Act of 1872 are to contain a more comprehensive security than those granted under the Act of 1866, then that section 40 would be to a considerable extent defeated altogether, and the preference thereby created would not be an effectual preference. And it must be observed that the language of these two priority clauses is very distinct and very complete. Assignments—that is to say, assignments in security of certain sums of money—if they be in operation and have effect at the date of the passing of the new Act, are to have priority in all respects over assignments granted after them. Now, if the assignments granted under the Act of 1872 are to have a preference over the property and works in competition with assignments granted under the Act of 1866, that is plainly just a contradiction in terms of the 40th section of the Act of 1872.

I think these remarks go over the whole points we are asked to consider, and it will not be difficult, I imagine, to apply the observations which I have made if your Lordships agree with me in answering the various questions which are appended to the case, and I do not go into them in detail at present.

Lord Mure and Lord Adam concurred.

Lord President—I suppose counsel will now be able to prepare answers to the questions and submit a concerted interlocutor.

The Court pronounced this interlocutor:—

"The Lords having considered the special case, and heard counsel for the parties thereto, in answer to the first question in the case, Find and declare that the *second* parties rank on the rates and revenues of the trust *pari passu* with the *third* parties, and preferably to the *fourth*, *fifth*, *sixth*, *seventh*,

eighth, ninth, tenth, eleventh, and *twelfth* parties: In answer to the second question, find and declare that the *third* parties are in the same position as the *second* parties, and answer the second branch of the question in the negative: In answer to the third question, find and declare that the *fourth* parties rank on the rates and revenues of the trust *pari passu* with the *fifth* parties, and preferably to the *sixth, seventh, eighth, ninth, tenth, eleventh,* and *twelfth* parties: In answer to the fourth question, find and declare that the *fifth* parties are in the same position as the *fourth* parties, and answer the second branch of the question in the negative: In answer to the fifth question, find and declare that the *sixth* parties rank on the rates and revenues of the trust *pari passu* with the *seventh, eighth,* and *ninth* parties, and preferably to the *tenth, eleventh,* and *twelfth* parties: In answer to the seventh question, find and declare that the *seventh* party ranks on the rates and revenues of the trust *pari passu* with the *sixth* parties: In answer to the ninth question, find and declare that the *eighth* and *ninth* parties rank on the rates and revenues of the trust *pari passu* with the *sixth* and *seventh* parties, and preferably to the *tenth, eleventh,* and *twelfth* parties: Answer the first branch of the eleventh question in the negative, and in answer to the second branch, find and declare that the *tenth* party ranks *pari passu* with the *eleventh* parties, and preferably to the *twelfth* parties: Answer the thirteenth question in the negative: Answer the sixth, eighth, tenth, twelfth, and fourteenth questions in the negative: Further answer the fifteenth question in the negative: Of consent find the whole parties entitled to expenses as between agent and client out of the revenues of the trust," &c.

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Wednesday, February 1.

FIRST DIVISION.

[Sheriff of Lanarkshire.

DAWSON & COMPANY *v.* GOLD.

Agent and Principal—Sale—Liability.

By an agreement between G, the proprietor of an hotel, and M, the occupant, it was acknowledged by M that the whole furniture and effects in the hotel belonged to G, and he agreed to transfer to G the licence for the hotel. M further agreed to manage the hotel for G, and to account to him for the drawings, for which he was to be paid a weekly wage. G then agreed not to charge rent for M's possession from the term immediately preceding the agreement, and M agreed to account to G for the stock in the hotel as at a certain date. The licence was thereafter transferred to G. Subsequently goods were supplied to M for the purposes of the hotel, on his order, and by a firm who were in ignorance of G's connection with the hotel. On learning of the agreement, however, they raised an action against G for the price of the goods. G's defence was that he had not ordered the goods, that the agreement had not been acted upon, and that M had not managed the business for him. *Held,* on the evidence, that G was liable.

This was an action in the Sheriff Court at Hamilton at the instance of M. D. Dawson & Company, brewers, Clydesdale Brewery, Glasgow, against John Gold, Hamilton, for £51, 10s., as the value of various quantities of stout and ale which the pursuers averred they had sold and delivered, between 4th January and 26th April 1886, to the defender, or on his behalf to his manager, W. H. M'Latchie, at the Royal Hotel, Calderbank, Lanarkshire, the defender being the proprietor thereof.

The pursuers averred that M'Latchie was the defender's manager, and had sole charge of the hotel, conform to an agreement between them, and that he received the goods, which were sold in the ordinary course of business in the hotel.

The agreement in question was entered into in October 1885 between John Gold of the first part, and W. H. M'Latchie and his wife, Rosina Gold or Armstrong or M'Latchie, of the second part. It provided as follows—"The first party having raised an action against the second party for delivery of the furniture, &c., within the Royal Hotel, Calderbank, and failing delivery, for payment of £100, both parties have agreed in manner following, that is to say—1st, The second party hereby acknowledge that the whole furniture and effects within the said hotel belong to the first party by right of purchase from John M'Queen Barr, trustee in the *cessio* of the said Rosina Armstrong or Gold, and that he is entitled to take delivery thereof at pleasure. 2nd, The second party agree, whenever they are asked to do so by the first party, to transfer to him the licence certificate and excise licences now held by Mrs M'Latchie in name of Armstrong or Gold. 3rd, The second party William M'Latchie agrees to manage the said hotel at Calderbank for the first party, to render due account of his management,