his funds, the wife's claim in bankruptcy shall be postponed to the claims of other creditors. It appears to me, agreeing with the Lord Ordinary, that the restriction thus imposed is one affecting the estate itself, and that it would therefore affect the claim of any assignee to the rights which the wife had against her husband.

It was endeavoured to distinguish the claim here made from the case contemplated in the statute by the circumstance that the husband had granted to his wife a promissory-note for the money lent to him, and it was said that the clause referred to in the Bills of Exchange Act contains an exhaustive enumeration of all the objections which can be maintained against the onerous assignee of a bill. I agree with your Lordship that the case contemplated by the Bills of Exchange Act is the case of a claim against a solvent debtor. The argument on that clause would really amount to a reversal of all the conditions of bankruptcy law intended to secure against improper alienations, because we know very well that bills come under the bankruptcy laws, although we do not find any reference to the exceptions in the Bills of Exchange Act, which is not intended to regulate every possible legal proposition that might be maintained with reference to bills of exchange, but only those points which are in immediate connection with the subject. Agreeing with the views of the Lord Ordinary, I am of opinion that the present claim is not well founded, and that the judgment ought to be affirmed.

LORD KINNEAR — I am of the same opinion. It appears to me that the effect of sub-section 4 of section 1 of the Married Women's Property Act of 1881 is to put the wife in exactly the same position as regards her husband's bankruptcy as any other creditor of his in so far as she has lent money to him, subject only to the condition that her claim to a dividend is after the claims of the other creditors have been satisfied.

It is provided in the Act that any money "lent by a wife to her husband shall be treated as" assets of his estate in bankruptcy. That is exactly the position of money lent to anyone else who becomes bankrupt. The money is treated as part of the whole assets of the bankrupt estate, and the lender is ranked with the rest of the creditors. The effect of this provision therefore is, that the wife is not entitled to have the money separated from her husband's estate, but must submit to having it treated as part of his estate in bankruptcy. But the Act proceeds to add a very material qualification, and provides that the wife shall be entitled to claim a dividend for the value of the money she has lent to her husband "after but not before" the claims of the other creditors have been satisfied. It appears to me, then, that the wife's right is simply a personal claim to a debt which she may assign if she please, but only subject to the qualification which attaches to it in her own person.

I agree in thinking the Bills of Exchange Act has no application whatever.

The Court adhered.

Counsel for the Appellant — Salvesen. Agents—Gill & Pringle, W.S.

Counsel for the Respondent — Cosens. Agent—F. J. Robertson, W.S.

Saturday, January 25.

SECOND DIVISION.

[Lord Low, Junior Lord Ordinary.

THE HON. T. H. A. E. COCHRANE, PETITIONER.

Parent and Child — Tutorial Power of Father—Factor loco tutoris Refused.

In proceedings for borrowing over entailed estates, the value of a consenting heir of entail—a pupil—was fixed, but her curator *ad litem* failed to see that the sum was paid or secured. The heir of entail in possession subsequently executed a trust-deed for his creditors, and the realisation of his estates paid the secured creditors in full, leaving for unsecured creditors a dividend of 7s. 6d. per pound. The pupil's father settled with the unsecured creditors, except his daughter, took assignations to their debts, and thus acquired right to the reversion of the entailed estates subject to the debt due to his daughter. As the trustees considered that his interest was thus adverse to that of his daughter he obtained the appointment of a factor *loco tutoris* to uplift, discharge, and apply the debt due to her. The factor sued the curator *ad litem* for any loss resulting from his failure to see that the debt was paid or secured, but the action was dismissed as beyond the limits of the factor's appointment. The pupil's father then petitioned for recal of the factor's appointment and the appointment of a new factor, especially to sue for, uplift, and receive the debt due to the pupil.

Held that as in regard to this claim there was no conflict of interest between the pupil and her father, they were the proper parties to prosecute such an action.

In 1882 the late Earl of Glasgow borrowed under the sanction of the Court £150,000 over his entailed estates. Miss Louisa Gertrude Montagu Cochrane, daughter of the petitioner the Hon. Thomas Horatio Arthur Ernest Cochrane, Dunkeith, Kilmarnock, was one of the heirs of entail whose consent was required. In these proceedings Mr William Smith, LL.D., Edinburgh, was appointed curator *ad litem* to Miss Cochrane. The value of her interest was fixed at £9250, but this sum was not paid or secured.

In 1885 Lord Glasgow conveyed his whole

estate to trustees for behoof of creditors. He was made notour bankrupt in 1886, but the creditors agreed that his estates should be realised by the trustees under the trust-deed.

The entailed estates were accordingly realised by Lord Glasgow and his trustees, and the secured creditors paid in full. There remained a balance of Lord Glasgow's means which it was estimated would be sufficient to pay to his unsecured creditors, including Miss Cochrane, a dividend of 7s. 6d. in the pound.

The petitioner and his wife Lady Gertrude Cochrane, Lord Glasgow's eldest daughter, settled with the unsecured creditors, with the exception of Miss Cochrane and Lady Muriel Boyle, Lord Glasgow's second daughter, to whom a similar debt was due. Mr Cochrane and Lady Gertrude Cochrane obtained assignations to the claims of the creditors, with whom they settled, and thus acquired right to the reversion of Lord Glasgow's estates, subject to the debts due to their daughter and Lady Muriel Boyle.

Lord Glasgow's trustees were willing to pay to Miss Cochrane a dividend of 7s. 6d. in the pound in full of her claim, but as she was a pupil, having been born in 1882, they were not satisfied that they would be in safety to take a discharge from the petitioner, who, having acquired the reversion of Lord Glasgow's estate, had an interest adverse to that of his daughter.

Mr Cochrane accordingly applied for the appointment of a factor *loco tutoris* to his daughter, for the purpose of uplifting, discharging, and applying for her behoof the said debt of £9250, and Mr James Auldjo Jamieson was appointed to the office.

Mr Jamieson after his appointment found that Dr Smith had been Miss Cochrane's curator *ad litem* in the entail proceedings, in which she had been found entitled to £9250 as the value of her consent. He therefore raised an action against Dr Smith to compel the latter to make good any loss sustained by Miss Cochrane from his having failed to see that the sum of £9250 was paid or secured.

The action came before Lord Kyllachy, who dismissed it on the ground that Mr Jamieson's title was limited to uplifting and discharging the debt.

In these circumstances the present petition was presented, praying (1) for recal of Mr Jamieson's appointment, and (2) for the appointment of a new factor *loco tutoris* with larger powers, and in particular with power "to sue for, uplift, and receive the said sum of £9250 from such persons or estates as may be legally liable therefor."

Upon 13th January 1891 Lord Low reported the case to the Second Division.

"*Opinion.*—[*After stating the facts*]—The primary, and so far as the statements in the petition go, the only object for asking that extended powers should be given to the new factor is that he may have a title to prosecute the action against Dr Smith. I doubt if this is a sufficient reason for granting the powers craved, because I do not think the Court has been in use to supersede the father of a pupil, or to relieve him of the tutorial duties involved in his position, unless there is a conflict of interest between him and his child, or unless the circumstances of the father, as, for example, from insolvency, are such that it is apparent that the child's interest would not be safe in his hands.

"As regards the claim against Dr Smith, I do not think that there is any conflict of interest between the petitioner and his daughter, and I observe that Lord Kyllachy in his judgment in the action to which I have referred takes the same view. As to the title of Mr Cochrane to make the claim as administrator-in-law to his daughter, I do not think there can be any doubt.

"It is, however, right to say that it was stated at the bar that the claim against Dr Smith is not the only matter with which the factor, if appointed, may have to deal, but that he may have to raise questions with Lord Glasgow's trustees and with the petitioner himself. I can understand that this may be the case. If, for example, the reversion of Lord Glasgow's estate acquired by the petitioner greatly exceeds in value the amount for which he settled with the creditors, Miss Cochrane may be entitled to demand payment of her debt in full either from the trustees or from the petitioner.

"In the whole circumstances I should hesitate to refuse the petition, but as it seems to me to raise a question of novelty in regard to a jurisdiction which the Court have always exercised with caution I have thought it right to report it. I may add that I think it better not to deal with the recal of Mr Jamieson's appointment until it is settled whether a new factor with additional powers is to be appointed."

It was stated at the bar that in consideration of having settled with the other unsecured creditors, the trustees had conveyed to Mr Cochrane the estate of Crawford Priory in Fife at a valuation the amount of which did not appear.

The petitioner argued—The application was necessary, as owing to the position of her father to the late Lord Glasgow's estate, and his dealings with the trustees, it was impossible for him to sue an action against Dr Smith, who might allege in defence that if sequestration had been taken out, all the creditors would have been paid in full and there would have been no loss to Miss Cochrane, and therefore no damage for him to make good. It was quite possible that when the affairs of the estate were looked into, the interests of Miss Cochrane and her father might be conflicting, looking at the position each had towards the trust-estate, and that had always been held to be a good ground for the appointment of a factor *loco tutoris*—*Mars* v. *Riley*, March 9, 1848, 20 Jur. 308; *Mann*, July 19, 1851, 14 D. 12; *Robertson*, July 12, 1865, 3 Macph. 1077; *Sawers, Petitioner*, March 9, 1850, 12 D. 905.

At advising—

LORD YOUNG—I do not mean to say that where it appears to the Court that the interests of a pupil child and of the father

are in opposition, that the Court will not appoint an officer of its own to attend to the interests of the pupil, if there is any doubt that these might otherwise be neglected. Subject, however, to that consideration, where provision is made for exceptional circumstances, the rule of law is that the father is tutor of his pupil children while he lives, and he cannot divest himself of his position or avoid the duties and responsibilities of that character, and the law commits to him the duty of naming a tutor to the pupil children in the event of his decease. Now, in this case Miss Cochrane has a father alive, and so far as we know he is quite capable of performing the duties incumbent upon him as the tutor and guardian of his pupil child.

The circumstances of the case are quite intelligible. There is a debt due to Miss Cochrane of £9250 by the trustees of the late Lord Glasgow, and this sum is payable out of his estate so far as the estate goes. That sum was the value of her consent to a petition by the late Lord Glasgow to charge his entailed estate with debt to the amount of £150,000, she occupying a position as a future heir of entail. That claim was constituted and the value ascertained, but the money was not paid over nor secured, and she now has a claim for this debt against his trustees. Unfortunately, however, for her and the other unsecured creditors, in the opinion of the trustees and of Mr Jameson, her factor *loco tutoris*, the estate will yield no more than 7s. 6d. per pound, and if that is so, then Miss Cochrane will only get 7s. 6d. per pound.

Her father, who is her tutor, with the view, I suppose, of acquiring part of the estate and keeping it in the family, ascertaining that 7s. 6d. in the pound was the outside of what the creditors would get, represented that fact to a number of the creditors, and arranged to pay their debts at 7s. 6d. per pound, and took assignations of the debts. He thus became the only unsecured creditor on the estate except his daughter. Then he arranged with the trustees that they should have the estate of Crawford Priory valued and conveyed to him as payment to the extent of its valuation of the debts which he had acquired by payment from the other creditors; to that extent then his debt is paid off, and we were informed that he holds that as payment of his debt to account only, and if the trust-estate should yield more than 7s. 6d. in the pound his debt remains for any surplus there may be. Well, it appears upon the proceedings that Mr Cochrane being satisfied that the estate would yield 7s. 6d. in the pound only, was willing, as his daughter's tutor and guardian, that her claim should be settled upon that footing, but the trustees thought that a factor *loco tutoris* should be appointed, and Mr Jameson was appointed to that office. After his appointment it appeared to him that his ward had a claim upon Dr Smith because he had been appointed curator *ad litem* to Miss Cochrane in the proceedings in which her claim to the entailed estate had been valued at £9250, and he had given consent for her to charging the estate with debt without seeing that the money was paid or secured. The amount of the claim against him would be the difference between 7s. 6d. in the pound and the amount of the whole debt.

Now, why should Miss Cochrane and her father not sue Dr Smith if they have any claim against him for having failed in his duty so that his ward suffered? Dr Smith may have quite a good defence to the action, but his defence would be the same whether against Mr Cochrane and his daughter or against anyone else. His defence has been stated to be that the measure of damages may be much less than between 7s. 6d. in the pound and the whole debt, or that there may be no damage at all. The whole of the trust-estate is in the hands of the trustees except the estate of Crawford Priory, and it must be assumed that they parted with that at a proper valuation. If the estate is to yield more or less than 7s. 6d. in the pound, that is a question to be tried with the trustees, and if Dr Smith is found liable, then it will be for Mr Cochrane to find how much more the estate will pay, because it is his interest to get more than 7s. 6d. in the pound. I can see no distinction between the case being tried with a factor *loco tutoris* as pursuer, or with Mr Cochrane and his daughter as pursuers. The only suggestion that was made was that Dr Smith might put forward as a defence that the trustees and Mr Cochrane had entered into a collusive arrangement to hand over Crawford Priory to him at too low a valuation. Probably there is no ground for such a suggestion, but the most proper action in which such a question could be tried is one in which Mr Cochrane, one of the parties, is the pursuer.

Upon the whole matter, I am of opinion that we have no ground stated here why we should appoint an officer of Court to pursue this action, and that upon every ground Mr Cochrane is the proper party to pursue an action against Dr Smith on his daughter's behalf, as it is his interest to see that Lord Glasgow's trust-estate yields every shilling it can. So far as I know, Mr Cochrane and his daughter are the only two unsecured creditors on the estate, and the interest of these two parties are the same to make the most of the trust-estate.

LORD TRAYNER—The purpose for which the appointment of a factor *loco tutoris* is sought by this petitioner is to enable him to bring an action of damages against Dr Smith. In the ordinary case any action would be at the instance of the pupil child with the consent of her tutor-at-law—that is to say, her father. Circumstances no doubt might emerge which would make it improper or inexpedient for the father to join as pursuer in an action where, for instance, there is any conflict between the interests of the pupil child and those of the father, and if there had been any such thing here, I would have been for granting the prayer.

But I do not think that any conflict of

interests has been shown to exist, and therefore I think it would not be inexpedient or improper for the father to exercise his curatorial rights and sue this action along with his daughter.

The LORD JUSTICE-CLERK concurred.

LORD RUTHERFURD CLARK was absent.

The Court remitted the case back to the Lord Ordinary.

Counsel for the Petitioners—Murray—Maconochie. Agents—Mackenzie, Innes, & Logan, W.S.

HIGH COURT OF JUSTICIARY.

Friday, December 19, 1890.

(Before the Lord Justice-Clerk, Lord Adam, and Lord Rutherfurd Clark.)

KERR *v.* AULD.

Justiciary Cases—Validity of Bye-Law of Harbour Trustees—Greenock Port and Harbours Act 1866, *sec.* 93—*Harbour Docks and Piers Clauses Act* 1847 (10 *Vict. cap.* 27), *sec.* 83.

The Greenock Port and Harbours Act 1866 authorises the Harbour Trustees to make bye-laws, *inter alia*, "for regulating the conduct of the owners, masters, and crews of vessels propelled by steam with regard to the rate of speed at which they may proceed within the port and harbours."

The Harbour Docks and Piers Clauses Act 1847, sec. 83, provides that harbour trustees may make bye-laws for the purpose of "preventing damage or injury to any vessel or goods within the harbour or dock or at or near the pier."

Held that a bye-law purporting to regulate the speed of vessels in the fairway of the river or Firth of Clyde *ex adverso* of the harbour works was beyond the powers of the trustees either under the special or general Act, and invalid.

This was a bill of suspension for John Kerr, mate of the steamship "Eleanore," of Glasgow, against James Auld, writer in Greenock, Procurator-Fiscal of the burgh of Greenock for the public interest, craving suspension of a conviction of the complainer in the Police Court of Greenock, upon a complaint charging Daniel Kerr, master of the said steamship, and the complainer, "with being guilty of an offence within the meaning of the Greenock Port and Harbours Act 1866, and of the relative bye-laws and regulations enacted by the Parliamentary trustee of the port and harbours of Greenock, dated at Greenock 7th January 1868, and approved and allowed by Hugh Lyon Tennent, then Sheriff-Substitute of Renfrewshire, on 25th June 1868, in so far as on the 9th day of July 1890 they did, while in charge of the said steamship 'Eleanore,' and while sailing on the river or Firth of Clyde between Cartsdyke Quay on the east and Forsyth Street on the west, fail to slow the engines and to keep at a slow rate."

The complainer averred, *inter alia*, "(Stat. 5) The conviction and sentence of the complainer were most wrongous and unjust, being entirely unwarranted by the evidence adduced, which disclosed that the Magistrates of the Police Court of Greenock had no jurisdiction to deal with the offence charged. Furthermore, the complaint upon which the complainer was tried and convicted, as above mentioned, is irrelevant, in so far as it does not libel that the *locus* of the alleged offence was within the port and harbours of Greenock. On the contrary, the complaint libels that the said *locus* was on the river or Firth of Clyde. (Stat. 6) By the evidence adduced at the said trial, it was proved that the said steamship 'Eleanore' was, on the occasion libelled, proceeding in the fairway or navigable channel of the Firth of Clyde as defined by the 'Clyde Navigation Consolidation Act 1858,' and was at no time nearer the port and harbours of Greenock than between 120 and 150 yards. The face of the pier at West Quay, being the part of the Greenock harbour works nearest the vessel, was at least 120 yards distant from the vessel at the nearest point of her course. The said steamship was on a voyage from Glasgow to Lochranza, and had no intention of touching at Greenock. She was sailing at the rate of nine knots an hour, which was nearly her full speed. (Stat. 7) By the 44th section of the Greenock Port and Harbours Act 1866, the limits of the said port and harbours are defined as follows—'The limits of the port and harbours shall extend to and include the whole works, lands, and property vested in and belonging to the trustees by virtue of the Act, or which shall pursuant to the powers of this Act be vested in and belong to the trustees.' The said trustees have no works, land, or property vested in or belonging to them in the said fairway or navigable channel of the Firth of Clyde, or nearer thereto than the said West Quay. (Stat. 8) The offence charged against the complainer is an offence alleged to be constituted by No. 68 of the bye-laws and regulations enacted by the Greenock Harbour Trustees in virtue of section 93 of the said Greenock Port and Harbours Act 1866, which authorises the said trustees to make bye-laws, *inter alia*, 'for regulating the conduct of the owners, masters, and crews of vessels propelled by steam, with regard to the rate of speed at which they may proceed within the port and harbours.' The said section confers upon the trustees no power to regulate the speed of vessels outside the limits of the said port and harbours, and the trustees have no power to make bye-laws, except by virtue of said section. (Stat. 9) By the 68th of said bye-laws it is, *inter alia*, provided—'The master or other person in charge of every steam vessel shall, sailing between Forsyth Street on the west and Cartsdyke Quay on