upon general considerations which do not seem to have been raised in the Sheriff Court.

When we appoint a judicial factor upon an estate, we take that estate into our own management, and appoint him as our officer to do all that is necessary for the ingathering and distribution of the estate among the parties having right thereto, he having regard to the rights of all parties who are interested in it. We put this estate into the hands of the defender as judicial factor, and he proceeded to do what he considered to be his duty in ingathering Miss Stirling's estate. Assuming it to be true that he got possession of these articles from the pursuer—who was a servant in the house where all the factorial estate was situated—for the purpose of deciding whether she was entitled to the furniture, he is nevertheless of opinion—and I concur with him—that he got them into his possession as judicial factor for the purpose of doing his duty as such, and in no other capacity, and that he is entitled to retain them.

There is no doubt that a judicial factor may recover writings or property from others in such circumstances, and that it would be his duty to restore them to the original owners when his purpose was served, but that would be a matter for him to determine in the first instance, and upon his own responsibility, and if there were grounds for saying that the circumstances under which he had acquired them did not warrant him in keeping them as judicial factor, that would be a question for our judgment, as he is an officer of our Court, and for the judgment of no other. We might have come to the conclusion that it was his duty as our officer not to retain them, but to hand them back to the person from whom he got them, or we might have arrived at a contrary result, but at anyrate it would be for anyone desiring the return of such writings to appeal to us as his master and superior in the matter to give him instructions how to act. Thus, an action in the Sheriff Court like this against an officer of Court to compel him to give up documents which he thinks it according to his duty as judicial factor to retain, is, in my opinion, utterly incompetent.

There is another ground upon which I think we ought to dismiss this case which I think I ought to state, and it is this, that where, as in the present case, there is manifestly and grossly no interest in the property sought to be recovered, the labels with writing on them being of no use whatever as property, although no doubt they may be of use as evidence in some other action, I do not think it is reasonable that we should be called upon to adjudicate upon the question whether they are property at all or not. The documents sought to be recovered in this action are quite safe in the possession of the judicial factor, and he thinks perhaps they might not be so safe elsewhere.

I am of opinion upon all these grounds that the pursuer in this action has taken up a most untenable position, and that the action ought to be dismissed.

LORD RUTHERFURD CLARK—The documents in question were given by the pursuer to the judicial factor in support of a claim she made for certain articles which belonged to the late Miss Graham Stirling. They were given for the determination of that question alone. After that question was settled, it was the duty of the factor to return them to the pursuer, unless he was able to show that he had a right to retain them.

I think, therefore, that this case is to be determined as if it were an action by the judicial factor against the present pursuer for recovery of the documents. I am satisfied that the judicial factor is entitled to retain them. There is no proof that they belong to the pursuer. They were in the house of the deceased at her death, and I think that they belonged to her.

LORD TRAYNER—This case is based upon the allegation that the articles sought to be recovered are the property of the pursuer, and the defence is that they are not her property, and that she has no right, title, or interest in them. I agree with Lord Rutherfurd Clark in thinking that the pursuer has failed to establish her alleged right of property, and am prepared to sustain the defence to which I have referred, and therefore to assoilzie the defender.

I desire to reserve my opinion on the question raised as to the competency of the action.

The Court refused the appeal.

Counsel for the Appellant—Strachan—Crabb Watt. Agents—W. T. Sutherland, S.S.C.

Counsel for the Respondent — Sym. Agent—Robert Broatch, L.A.

Wednesday, July 4.

FIRST DIVISION.

[Lord Low, Ordinary.

MILNE AND OTHERS *v.* COMMISSIONERS OF THE BURGH OF LOCKERBIE.

Burgh — Gas - Rates — Duty of Commissioners in Fixing the Price of Gas—Levying of Gas Contingent Guarantee Rate—Burgh Gas Supply (Scotland) Act 1876, *secs.* 38 *and* 41.

The Burgh Gas Supply (Scotland) Act 1876, by sec. 41, enacts that the gas commissioners shall from time to time fix the price to be paid for gas, which shall, as nearly as can be estimated, raise sufficient income to discharge all the costs incident to the manufacture and distribution of the gas, together with the interest on all money borrowed in respect of the works, and by section 38 it provides for the levying upon all ratepayers, whether consumers of gas or not, of a

gas contingent guarantee rate, if required to pay the interest on money borrowed under the provisions of the Act.

The commissioners of a burgh in October 1893 fixed the price of gas at 6s. 3d. per 1000 cubic feet for the year 1893-94, and as they foresaw a deficit of £320, they levied a gas contingent guarantee rate at 5d. per £, to meet the interest upon money borrowed. Certain ratepayers of the burgh brought an action to have it declared that the commissioners were bound to fix the price of the gas so as to meet any foreseen deficiency, and were not entitled to levy a gas contingent guarantee rate in anticipation, but only if at the end of the year a deficiency resulted. They did not allege that the commissioners had not applied their minds to the question of the proper price to be fixed in the interests of all concerned, or that if the price had been made higher the total yield would necessarily have been greater.

Held that the action fell to be dismissed as irrelevant.

The Burghs Gas Supply (Scotland) Act 1876, by section 41, enacts—"The commissioners shall from time to time fix the price to be paid for gas to be supplied during any succeeding year or half-year, and, until such price be altered by the commissioners the price so fixed shall remain in force, provided that the price shall be such as will, as nearly as can be estimated, raise sufficient income to discharge all the costs and expenses of and incident to the manufacture and distribution of the gas made, together with the interest on all money borrowed in respect of the works, and to provide the sinking fund required by this Act, and to provide for a depreciation and renewal fund sufficient to maintain the works in perpetuity, and for all charges incident to the occupation of such works, and the moneys received in respect of and incident to the manufacture and distribution of gas shall be applied to such purposes only, and any balance at the termination of any year shall be carried to the debit or credit of the succeeding year." The same Act by sec. 38 provides—"It shall be lawful for the commissioners, and they are hereby required from time to time to fix, impose, and levy such a rate, to be termed 'The Gas Contingent Guarantee Rate,' as may be required to pay any annuities and any interest due thereon, and the interest of money borrowed or to be borrowed under the provisions and for the purposes of this Act." And by sec. 39 it provides—"The gas contingent guarantee rate shall be imposed, levied, and collected on property situated within the burgh, on the requisition of the commissioners, by the authority in the burgh empowered by law to levy any assessment for police purposes therein, along with and in the same manner in all respects and from the same descriptions of persons and property as such assessment for police purposes, and the amount of such rate, when imposed, levied, and collected by such authority, shall be paid over to the commissioners for the purposes of this Act."

The Police Commissioners of the burgh of Lockerbie, being also the Gas Commissioners of the burgh, met upon 9th October 1893 and fixed the gas rate for the year from May 1893 to May 1894 at 6s. 3d. per 1000 cubic feet, and as the estimates showed that there would be an apparent deficiency of about £320, they at the same time imposed a gas contingent guarantee rate of 5d. per £ for the current year ending 15th May 1894, to meet the interest due upon mortgage.

In January 1894 Thomas Milne and other four ratepayers in the burgh of Lockerbie raised an action against the Commissioners of the said burgh, to have it found and declared, "*Primo*, that the defenders, in fixing the price of gas to be supplied by them to consumers thereof during any succeeding year or half-year, are bound to fix the price of such gas at such a rate as will, as nearly as can be estimated, raise sufficient income to discharge all the costs and expenses of and incident to the manufacture and distribution of the gas made, together with the interest on all money borrowed in respect of the works, and to provide the sinking fund and other charges specified in section 41 of the said Act; and further, and in particular, in such a way, as nearly as can be estimated, as will prevent them, when fixing the price of gas as aforesaid, from designedly fixing the price so as to create a deficiency in such income, to be provided for out of the gas contingent guarantee rate under said statute, or otherwise than out of the price of gas to be estimated as aforesaid; *Secundo*, that it is illegal and *ultra vires* of the defenders to fix, impose, and levy upon and from the pursuers and all others, ratepayers in the burgh of Lockerbie, 'The Gas Contingent Guarantee Rate' specified in the 38th section of the said Act, unless the same is or may be required by the defenders to pay annuities and interest thereon, and interest on money borrowed by them in terms thereof by reason of a deficiency arising during any year or half-year succeeding their estimate, after the price of gas has been fixed, as nearly as can be estimated, at such a figure as will pay all the annual charges as aforesaid." They also sought to have the minute of the meeting of 9th October 1893 reduced, and the defenders interdicted from enforcing the gas contingent guarantee rate of 5d. per £ then fixed.

The pursuers averred—"In fixing the said price of gas at 6s. 8d. per 1000 cubic feet for the year to 15th May 1892, the defenders were aware that the necessary result upon that year's working, after allowing for the cost of making the gas, and all interest to become due upon the said mortgage during such period, would be a deficit of at least £45. Such an estimate as that upon which the said statement of accounts for the year to 15th May 1892 was based, was illegal and *ultra vires*

of the defenders, and in violation of the 41st section of the said statute. The defenders were bound in making their estimate to fix the price of gas at such a rate as would meet all annual charges, including mortgage interest, and obviate the creation by them of any apparent deficiency upon their annual workings. Instead, however, of doing so, the defenders at their meeting on 12th October 1891, simultaneously with their having fixed the price of gas at 6s. 8d. per 1000 cubic feet, resolved, as in pretended exercise of their right under the 38th section of the said statute, to fix, levy, and impose upon the pursuers and other ratepayers, as occupiers of lands and heritages within the burgh, an assessment termed the gas contingent guarantee rate of 1d. per £ according to the rental of the property occupied by them within the burgh." That in October 1892 and October 1893 they had adopted the same illegal course, having at their last meeting reduced the ordinary gas rate by 5d. and increased the gas contingent guarantee rate to 5d. per £.

The pursuers pleaded—"(2) The defenders, upon a sound construction of the statute libelled, being bound in their yearly estimate to fix the price of gas at such a rate as will discharge all the costs and expenses of and incident to the manufacture and distribution of the gas made, together with the interest due by them on money borrowed in respect of the works, without creating any apparent deficiency, the pursuers are entitled to decree of declarator to that effect, as craved. (3) The defenders not being entitled to impose the said gas contingent guarantee rate, unless in the event of a deficiency arising after the price of gas has been fixed by them as aforesaid, decree of declarator ought to be pronounced to that effect as craved. (4) The imposition of the gas contingent guarantee rate of 5d. per £ being illegal, and *ultra vires* of the defenders, their resolution of 9th October 1893 should be reduced as craved, and the defenders should also be interdicted from levying the same from the pursuers, all as craved, with expenses."

The defenders explained—"The whole actings of the defenders have been strictly in accordance with the terms of the statute, under which they are empowered to levy an assessment under section 38, to the extent of the amount of the interest upon said mortgage. During the three years in which the assessment has been levied, it has been imposed at a rate which was calculated never to produce more than the respective amounts of interest due in each year." And pleaded—"(1) The pursuers' averments are irrelevant."

Upon 7th June 1894 the Lord Ordinary (Low) pronounced this interlocutor—"Sustains the second and third pleas-in-law for the pursuers, and finds, decerns, and declares in terms of the first and second conclusions of the summons: Appoints the cause to be enrolled for further procedure: Reserves all questions of expenses, and grants leave to reclaim.

"*Opinion.*—The first question in this case is as to the true construction of the 41st section of the Burghs Gas Supply (Scotland) Act 1876. Reading that section alone I do not think that it is ambiguous. It makes it imperative upon the Gas Commissioners to fix the price to be paid for gas at such an amount as will, as nearly as can be estimated, raise sufficient income to discharge all the charges mentioned in the section, including the interest on all money borrowed in respect of the works.

"*Prima facie*, the defenders have not adhered to the provisions of the section, because they have deliberately and intentionally fixed the price at an amount not capable of raising a sufficient income to pay the interest upon money which they have borrowed as well as the other charges specified in the section. The position taken up by the defenders is this—They say that the price which they have fixed is that which is calculated to bring in the largest possible income, because if they made the price higher many people would not use gas and the income would fall. They have, they contend, a discretion in the matter, and the words, 'as nearly as can be estimated, must be read as meaning 'as nearly as can be estimated consistently with the prudent and profitable management of the undertaking.' That construction, they argue, must be put upon the 41st section when it is read in connection with the 38th section.

"When read alone it does not appear to me that the 41st section gives any discretion to the Commissioners, or that the words 'as nearly as can be estimated' admit of the construction for which the defenders contend. It is therefore necessary to consider the terms of the 38th section.

"That section occurs in the part of the statute (from the 27th to the 40th sections, both inclusive), which deals with the 'borrowing powers of commissioners.' The 27th section authorises the commissioners to borrow on mortgage any money which may be necessary for the purchase or erection of gas works, and to grant mortgages of any rates or charges leviable by them under the provisions of the Act in security of the payment of the money so borrowed and interest thereon. Provision is then made by sections 28th to 37th for the form of mortgages and interest warrants for the appointment of a judicial factor in the event of annuities or interest on borrowed money falling into arrear for the application of borrowed money and kindred matters. Then the 38th section provides—'It shall be lawful for the commissioners, and they are hereby required from time to time to fix, impose, and levy such a rate, to be termed "The Gas Contingent Guarantee Rate," as may be required to pay any annuities and any interest due thereon, and the interest of money borrowed or to be borrowed under the provisions, and for the purposes of this Act.'

"That section appears to me to be designed for the security of mortgagees and

annuitants. If the price of the gas fixed in terms of the provisions of the 41st section does not produce a sufficient income to meet the interest of borrowed money as well as the other charges laid upon the income, then, and not till then, the Commissioners are authorised and required to levy the 'Gas Contingent Guarantee Rate.' I arrive at that conclusion because, in the first place, the provisions of the 41st section as to the basis upon which the price of gas is to be fixed are imperative; and in the second place, the terms in which the 38th section is expressed, and the rate thereby authorised described, appears to me to show that the rate was only to be levied when required to meet a contingency, the contingency, namely, of the income derived from the sale of the gas not being sufficient to meet the interest upon money borrowed.

"I am therefore of opinion that the defenders in designedly fixing the price of gas from year to year at an amount lower than that which they estimated would be required to provide an income sufficient to meet all the charges specified in section 41 acted illegally, and that the pursuers are entitled to have decree in terms of the leading declaratory conclusions of the summons."

The defenders reclaimed, and argued—There was no suggestion made that they had not carefully considered the matter. They had taken a business-like view of their duty, and had acted for the best in the interests of all concerned. Raising the price would not necessarily increase the amount of money received for the consumption of gas; it might have the very opposite effect by materially decreasing the number of consumers. They had to fix a price so as to raise the largest amount of money possible, looking to all the circumstanees of the case. This they had done, and the levying of a gas contingent guarantee rate had been found necessary to meet the interest due upon mortgage.

Argued for the respondents—The Commissioners had no right by anticipation to meet a probable deficit by the levying of a contingent guarantee rate. If they foresaw a deficit they were bound to raise the price of gas to meet it, and were only entitled to levy the guarantee rate if after having done so an unforeseen deficit remained at the end of the year. They did not aver that by raising the price they would have decreased the number of consumers. They should at least have tried the effect of raising the price. They were endeavouring to impose a heavy burden on the ratepayers, whether consumers of gas or not, in the interests of and for the relief of the gas consumers.

At advising—

LORD PRESIDENT—In this case it is perhaps best first to consider what is the due and statutory administration by the commissioners of the system set up in the Act of 1876. I take it that it is perfectly clear that the commissioners are bound before imposing a guarantee rate to exhaust the yielding power of their price clause—that is to say, that they have no right without making the most they can out of the sale of gas by raising the price if necessary, to impose a rate. To put it in another way, they have no right to impose the burden of the establishment partly on the consumers and partly on the ratepayers. They must make the most they can out of the concern before they resort to a rate.

But then while the statute is very imperative, as the Lord Ordinary has said, in the terms of section 41, there is underlying section 41 an element of conjecture or estimate; because, read in a condensed form, section 41 bids the commissioners, as their first duty, make up their minds what price is likely to yield the largest sum. Now, I take it that this may be a higher price or a lower price, according to the position of the purchasers. If you could count upon every man who pays sixpence continuing to pay a shilling, then it would be a very simple process just to raise the rate and then you are sure of your return. But the contrary notoriously is the fact, and the word "estimate," and the duty of estimating imposed upon the commissioners seem to me to make it necessary that they should make up their minds not on the mere question whether sixpence or a shilling is the larger sum, but whether a sixpence or a shilling price will bring in the most money.

Now, they may be right or they may be wrong, but they say that they could not raise their price without reducing the yield, because their purchasers would not pay the enhanced price. As I have said, they may be right or they may be wrong upon that; it is not a matter we have anything to do with. The duty we have to see that they have performed, is, that they estimate and that they fix the price with reference to the object to be attained, namely, paying the expenses of the establishment out of the price.

Now, when I turn from the consideration of the duty of the commissioners to what is said on record, I cannot discover a relevant case laid against their administration. If you assume that their duty is the mechanical one of raising the price as often as they find a deficiency, then it is plain sailing—they have done quite wrong. But the pursuer's case seems to leave out of account that there are two factors in the computation of how much will be brought in by the price, and these are not merely the price, but the future number of payers of the price; and in this action, looking at the record from beginning to end I do not find that these commissioners are said to have omitted this duty of making up their minds as to the best way of exhausting the yielding power of the price clause.

Now the practical question is, whether the laying on of this guarantee rate is to be set aside or not; and it seems to me we could only set it aside if it were either admitted or proved that the price clause had not been worked according to the meaning which I have described. There is

no such averment here. On the contrary, Mr Rankine has frankly admitted—he is not in a position to deny—that the commissioners have fixed the price at what they consider the highest figure to bring in the largest yield. That being so, it seems to me that the case falls to the ground. I think I made it sufficiently clear that in my opinion the commissioners are not entitled to resort to a guarantee rate until the price has produced the largest amount obtainable under the clause.

Having said that, I only desire to add that I think the Lord Ordinary's judgment proceeds upon an omission to observe the defect in the pursuers' case to which I have adverted. His Lordship treats it as if it were to be assumed in this case that the commissioners had only to raise the price in order to enhance the yield. Now unfortunately that fact is entirely omitted, and it seems to me that his Lordship's judgment, while stating a perfectly sound view of the working of the statute, is not maintainable, because he does not bear in view, or his attention was not called to the fact that the commissioners here, for all that appears, have applied their minds to the question of how much they can get from the consumers of Lockerbie taken as a whole.

I am therefore for recalling the Lord Ordinary's interlocutor, and I think the action should be dismissed.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court recalled the Lord Ordinary's interlocutor, sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for Pursuers and Respondents—Rankine—Wilton. Agent—Alex. Stewart, S.S.C.

Counsel for Defenders and Reclaimers—D. Anderson. Agent—Marcus J. Brown, S.S.C.

Friday, June 22.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

BYNG AND ANOTHER *v.* CAMPBELL AND SCOTT.

Process—Arrestment and Forthcoming—Arrestment of Joint-Property—Action of Forthcoming—Competency.

Held that an arrestment used in the hands of a tenant of property belonging jointly to him and his landlord for a debt of the landlord, and which could not be worked out by an action of forthcoming, was futile.

A quarry was let upon a lease under which during its continuance the plant remained the joint-property of the proprietor and tenant, the landlord at its termination being bound to pay the tenant one-half of the value of said plant. Towards the close of the lease creditors of the landlord arrested the plant in the hands of the tenant, and thereafter brought an action of forthcoming which prayed the Court to ordain the arrestee to pay the whole debt or such other sum arrested in his hands as might be owing by him to the landlord, and to pronounce such further orders as the Court might deem necessary for satisfying the pursuers' claim.

Held that the summons contained no conclusion available for working out the diligence, even assuming it had been competently used, but an opportunity was given to the pursuers to amend.

They thereafter craved the Court to ordain the whole plant arrested to be exposed for sale, and the price thereof, or so much as would satisfy the debt, paid to them, or alternatively to pronounce this order upon their paying to the arrestee one-half of the value of the plant.

The action was *dismissed* as incompetent.

The trustees of the late Sir George Beresford of Ballachulish, as proprietors of the slate quarries there, in 1878 entered into a fifteen years lease of said quarries with Dr Donald Campbell, to run until Whitsunday 1893. The lease contained, *inter alia*, the following provisions—"Further, the said Donald Campbell having paid to the said first party [the trustees] the sum of £3792, 8s. sterling, being one-half the amount of valuation of the engines, waggons, drums, rails, tools, horses, carts, and other moveable plant for the said quarries, as the same were taken over by the said first party from James Gardner, the last person in possession of the said quarries (a full list of all which has been made out and signed by both parties as relative hereto), the same shall be held to be the joint-property of the proprietors and tenant; and it is hereby agreed by and between them that during the currency of this lease, so often as the said plant now on the quarries, or other plant hereafter to be purchased as after mentioned, shall become deteriorated or unfit for use, or requiring to be renovated by other plant, the same shall be sold by the said Donald Campbell, and one-half of the free price thereof shall be paid to the said first party and their foresaids, and the other half retained by the said Donald Campbell; and on the other hand, should the necessity arise for the purchase of new plant, either in the opinion of the said parties, or, in the event of their differing in their opinion, of a person mutually chosen, whom failing to the arbiters hereinafter appointed, the price or prices and expense thereof shall be borne by the said parties in equal moieties, and the same shall be held to be the plant of the said quarries, and maintained as such as after provided; and the said first party or their foresaids shall be bound, at the termination of this lease, to pay to the said Donald Campbell or his