which Euman died was consequent . . . of the accident," and he qualified that so far as to say that it may have been an indirect consequence but a consequence it was.

Now upon the question as to which the medical witnesses were so divided, it was necessary that the Sheriff-Substitute should form his opinion as to which testimony he preferred, and he preferred to accept the evidence of Professor Glaister, which was to the effect I have already read, rather than the evidence of the other doctors. That was a question for him. I do not think it is possible for us to see upon his statement—nor is it necessary that we should see—why he preferred Dr Glaister to the other, and no court could form any satisfactory opinion upon a question of that kind except the court which heard and saw the witnesses set up against one another. I think there was here a clear question for the Sheriff-Substitute which he had to decide upon evidence which was competently before him. That the opinion which he gave was an inference of fact from facts specifically proved is true, but that makes no difference either to the logical or the legal effect. As to the Sheriff-Substitute's final deliverance, I think it would be putting an undue strain upon language to say that he had not in fact decided anything more than that the evidence was competent. I cannot entertain any doubt that what he meant to say was that, the evidence being competent, he had taken it into account and decided the case in the way in which he had previously given effect to his views before he was asked to state this case.

Upon the whole I have come to the opinion of your Lordship that there is no ground upon which we ought to interfere with the decision of the Judge who is final upon fact.

LORD MACKENZIE—I have had very great difficulty in this case, but in the result I am prepared to hold that that difficulty arises more from the form in which the learned Sheriff-Substitute has presented the case for our consideration than from the substance of the case itself. I agree with the view of your Lordships.

LORD JOHNSTON did not hear the case.

The Court answered the question of law in the affirmative and dismissed the appeal.

Counsel for Pursuer—Wark—T. G. Robertson. Agents—J. & J. Galletly, S.S.C.

Counsel for Defenders—Wilson, K.C.—W. J. Robertson. Agents—Steedman, Ramage, & Company, W.S.

Thursday, November 28.

FIRST DIVISION.

(BILL CHAMBER.)

STEELE (TOSH'S FACTOR) PETITIONER.

Judicial Factor—Powers—Lease—Urban Subjects.

A judicial factor presented a note craving special power to grant a lease for ten years of urban subjects forming part of the factory estate.

The Court *remitted* to the Junior Lord Ordinary to grant the prayer of the note, but expressed the opinion that where, as here, the circumstances were in no way complicated, and the Accountant of Court was satisfied that the course proposed by the factor was beneficial for the trust estate, the application for special power was unnecesssary, the letting of urban property being within the ordinary powers of a factor.

On 11th July 1912 H. M. Steele, C.A., Glasgow, judicial factor on the trust estate constituted by minute of agreement between Mrs Jane Lauder or Tosh, widow of Henry Tosh, ironmonger, Glasgow, of the first part, her children of the second part, and others of the third part, presented a note to the Court for authority to grant a lease for ten years of certain heritable property in Buchanan Street, Glasgow, belonging to the trust estate.

The purposes of the trust were to hold the estate for Mrs Tosh in liferent and her children in fee. At the date of the note two of the beneficiaries—the issue of a predeceasing child—were in pupillarity.

On 11th April 1912 the judicial factor lodged with the Accountant of Court a report setting forth the circumstances in which he craved special power to grant the lease in question.

On 8th July 1912 the Accountant issued the following opinion:—"The estate under the factor's management includes, *inter alia*, the heritable subjects of Nos. 197 to 201 Buchanan Street, Glasgow, having an assessed rental of £380. This property, which is burdened with a bond and disposition in security for £6000, was at the time of the factor's appointment in a bad state of repair, and in consequence for the most part unlet, as is shown by the report dated 18th January 1911 of Messrs Thomas D. Smellie & Fraser, valuators, Glasgow, of which a copy is produced. By applying the proceeds of one of the other properties belonging to the estate, which he sold under powers obtained from the Court, the factor has had the Buchanan Street property put into a lettable condition, and has already secured tenants for various portions of the subjects. The bondholders are pressing for reduction of the amount of their loan, and it is important that the subjects should be fully let when they come to be realised, either to satisfy the claims of the bondholders or

for division among the beneficiaries after the death of the liferentrix. The factor has now received an offer, which he desires to accept, from the Mission to the Outdoor Blind for Glasgow and the West of Scotland to lease another part of the buildings, viz., the premises comprising the shop, saloon, and basement, No. 197 Buchanan Street, and the whole first flat of the property entering by close No. 201 Buchanan Street, and that for a period of ten years from and after Whitsunday 1913, at a rent for the first five years of £190, rising thereafter to £200, with a break in favour of the tenants at Whitsunday 1819 on their giving six months' previous notice.

"In this connection the factor at a meeting with the Accountant raised once again a question which, although it crops up repeatedly in the course of factorial management, has never been judicially decided. Can a factor as part of his ordinary administration grant a valid lease of urban subjects, or can he not do so without first obtaining powers from the Court? The point was discussed in the case of *Carnochan* (1894, 2 S.L.T. No. 89), where, on authority being asked to grant a five years' lease of urban premises, the Lord Ordinary 'suggested that the curator had power to grant the lease without authority from the Court and that the note was unnecessary,' but after hearing counsel intimated that 'In view of the doubt which appeared to exist as to the power of the *curator bonis* to grant the lease without the intervention of the Court he would grant the authority craved.'

"The statutory powers of a factor in regard to granting leases would appear to be as follows—(*a*) By the Act of Sederunt of 1730 he can 'grant tacks or leases to continue during all the time that the estate set in tack shall remain under the inspection of the said Lords of Session and for one year further.' (*b*) By the Trusts (Scotland) Act 1867, section 2, trustees have power to 'grant leases of the heritable estate of a duration not exceeding twenty-one years for agricultural lands and thirty-one years for minerals.' (*c*) By the Trusts (Scotland) Amendment Act 1884 'trustee' is defined to include tutor, curator, and judicial factor. (*d*) By the Judicial Factors (Scotland) Act 1889, section 19, factors are given power to make abatements or reductions of rent.

"By the Trusts (Scotland) Act 1867, section 3, trustees have to petition the Court before they can grant 'feus or long leases,' and it does seem anomalous that a factor should have extensive powers of granting leases of agricultural and mineral subjects, and yet be unable to let a house or shop for a period of five to ten years without on each occasion putting the estate under his charge to the expense of an application to the Court. But unless he does so, he cannot at present let that class of property to advantage. A tenant is often at considerable expense in fitting up premises to suit the requirements of his business, and naturally he is not willing to enter on a lease which, through no fault of his own, may be brought to an end at any time on comparatively short notice.

"Section 2 of the 1867 Act above quoted being somewhat ambiguous in its terms, the Accountant for his future guidance reports the matter to the Court. In the present case, if powers are considered necessary, they may, in his opinion, be granted as craved."

On 25th July 1912 the Lord Ordinary officiating on the Bills (KINNEAR) reported the note to the First Division.

Opinion—"This case is reported on the motion of the judicial factor. I should have granted the powers craved in accordance with the opinion of the Accountant, but it appears that there are other subjects within the factory with reference to which a similar question may arise, and the factor considers it to be for the interest of the estate that he should have a general power to let urban property subject to the supervision of the Accountant without incurring the expense of an application for special powers in each particular case. It is said to be an open question whether the granting of such leases falls within the general powers of administration conferred upon a judicial factor by his appointment or whether it is a special power to be given or withheld by the Court with reference to the circumstances, and it is desirable that this should be definitely settled by an authoritative judgment."

Argued for the judicial factor—The question whether a factor could grant a lease of urban subjects without the authority of the Court was still open. In the case of *Proctor* v. *Gordon*, January 31, 1824, 2 S. 659 (553), an application for power to do so had been refused as unnecessary. On the other hand, a contrary opinion had been expressed in *Smith* v. *Smith*, March 20, 1862, 24 D. 838, *per* Lord Deas at p. 843, where it was pointed out that a judicial factor did not possess the discretionary powers vested in trustees. A judicial factor was now, however, a "trustee"—Trusts (Scotland) Amendment Act 1884 (47 and 48 Vict. cap. 63), sec. 2—and the petitioner accordingly submitted that he was entitled to grant the lease in question, it being in his opinion expedient to do so—*Noble's Trustees, Petitioners*, July 10, 1912, 49 S.L.R. 888.

At advising—

LORD PRESIDENT—This case was reported by Lord Kinnear when officiating on the Bills in vacation, and raises a question as to granting special powers to a judicial factor. The factor on this trust estate has under his charge heritable property consisting of urban subjects in Glasgow, and he approached the Accountant of Court to ask whether he would be entitled to grant a lease of a certain portion of these urban subjects under circumstances which I need not detail but which leave no doubt whatsoever—and that is also the Accountant's view—that it was very desirable that the lease should be granted. But the factor, as the Accountant of Court says in a note now before the Court, "raised

once again the question which, although it crops up repeatedly in the course of factorial management, has never been judicially decided—Can a factor, as part of his ordinary administration, grant a valid lease of urban subjects, or can he not do so without first obtaining powers from the Court?" In order to bring the matter to a head the factor accordingly applied for special powers, and the application coming to depend before Lord Kinnear on the Bills, his Lordship reported the matter to the Court. The Accountant of Court brings before the notice of the Court the various provisions in Acts of Sederunt and statutes which deal with this matter. By the Trusts Act of 1867, sec. 2, trustees have power to grant leases of heritable estate of a duration not exceeding twenty-one years for agricultural lands and thirty-one years for minerals, and by the subsequent amending Act of 1884 "trustee" is defined to include "judicial factor." I am of opinion that the section does not directly apply. I think it is limited in its terms to heritable estate of the class of agricultural lands and minerals, but, on the other hand, I do not look upon the Trusts Act of 1867 as giving the only powers which trustees have got. In that matter it is probably more a declaratory Act than an enacting Act, and I am far from adopting the proposition that before the Act trustees had no power in regard to leases. I do think that there is sometimes a little confusion in the minds of those who apply for them as to what special powers are. The Court has not *ex nobili officio* to validate anything which it allows the applicant to do. It can only do so if that right resides in it either in respect of the common law or in respect of some special powers given to it by statute. These applications for special powers might, I think, more accurately be called applications for special directions, because what the Court is asked to do is to give a special direction to its own officer, namely, the factor. In a case like the present there is so far as I see no necessity for a special direction. In other words, it seems to me to be part of the duty of the factor to deal with urban property by letting it. Whether he is to let it for a term of years depends upon several considerations. It depends first of all upon the practical consideration whether the lease is a good lease for the trust estate or whether he could get better terms elsewhere. That is for the determination of the judicial factor, with of course the assistance that he gets from the Accountant of Court, to whom he must go. But there is also a set of considerations which depend upon the particular circumstances of each trust. Where a trust is likely to continue for some time, and where a beneficial return to the trust estate can be got by a lease for a term of years which could not be otherwise got, then obviously the course is expedient. On the other hand, if a trust is of such a character that in all probability there will be an early distribution of the trust estate, it is quite conceivable that even although the factor might get a better return of income for, say, the next year by granting a lease, this advantage would be more than paid for by the hampering effect of the lease upon the distribution. One cannot lay down a rule, because each case depends on its own circumstances. I only say that it is a question which the factor must consider, and in which he must also be guided by the Accountant of Court, to whom he has to refer all such matters. The result at which I come generally is that the letting of urban property is within the ordinary powers of a factor, and that it is only necessary to go beyond the Accountant to the Court for special powers where there is some special circumstances. I can figure a case where the circumstances might be so balanced as to make the proper duty of the factor a question of great difficulty, and that would be a case for coming to the Court for further direction. But where there is no complication and the Accountant is satisfied that the course proposed by the factor is beneficial for the trust estate in both senses I have mentioned, then there is no reason to come to Court for special powers. I think that as the case is here, there will be no harm in granting the special powers, but it follows from the opinion that I have just given that had it not been the absence of authoritative pronouncement upon this matter there would have been no need for the factor to come to the Court.

LORD KINNEAR—I concur.

LORD JOHNSTON—In this case the difficulty that I felt arose from the Pupils Protection Act 1849, which, while it clearly recognises that factors had no power to make leases for a period of years, makes, by section 7, a special provision for them applying for special powers to that end. Had it not been for that I do not think there would have been any difficulty. But then comes the Trust Act of 1867, which I quite agree is a declaratory Act, and which declares the powers of trustees to make leases of ordinary duration of agricultural or mineral subjects. The Trusts (Scotland) Amendment Act of 1884 follows and declares that the term "trustee" in the Trusts Acts shall for the future apply to judicial factors. That would have got over the difficulty created by the Pupils Protection Act 1849 if it had not been for the limited nature of the subjects to which the Trusts Act of 1867 expressly applies. But I think that on reading the two Acts of 1867 and 1884 together one may conclude that these Acts indicate by implication that trustees and factors have and are to have similar powers with regard to all classes of heritage. But that does not quite solve the whole matter, because, as your Lordship has pointed out, there are two circumstances in which leases have to be considered by a factor—one in deciding whether it is within the scope of the trust which he is administering, and the other in deciding whether it is a beneficial and proper lease to be entered into. On the former subject I

think he is quite entitled to direction from the Court, but on the latter that it is his duty to act on his own discretion. Accordingly I agree with your Lordship.

LORD MACKENZIE—I am of the same opinion.

The Court remitted to the Junior Lord Ordinary to grant the prayer of the note and to find the judicial factor entitled to the expenses thereof and incidental thereto out of the factory estate.

Counsel for Judicial Factor — Lippe. Agents—Dove, Lockhart, & Smart, S.S.C.

Friday, November 29.

SECOND DIVISION.

[Lord Cullen, Ordinary.

BANK OF SCOTLAND *v.* LIQUIDATORS OF HUTCHISON, MAIN, & COMPANY, LIMITED.

Company — Bankruptcy — Winding-up — Vesting of Assets in Liquidator—Tantum et Tale—Trust—Preference.

A bank entered into an agreement with a limited liability company, under which, on the bank's surrendering to the company certain corporeal moveables held by it in part security of certain debts due to it by the company, the company undertook to procure from a debtor of its own a debenture over the whole assets of his business, and as soon as the debenture was procured to make it available as a security to the bank. The bank surrendered the corporeal moveables, and the company procured the debenture duly executed by its debtor. Some delay occurred in the completion of the deeds necessary to make the debenture available to the bank, and the company meanwhile went into liquidation. On the bank's making a claim in the liquidation to be entitled to the security constituted by the debenture, on the ground that it was not an asset of the company and the company held it in trust for the bank, the Court rejected the claim, *holding* that the debenture was beneficially vested in the company at the date of the liquidation and passed to the liquidator.

On 13th September 1910 the Bank of Scotland made a claim in the liquidation of Hutchison, Main, & Company, Limited, for the sum of £23,663, 11s. 8d., for which sum they claimed an ordinary ranking on the estates of the company, and "to be entitled to the extent of £14,000 to a security constituted by a debenture to the total nominal amount of £17,000 created and issued by Frank A. Johnson, Limited to Hutchison, Main, & Company, Limited, in pursuance of and in accordance with an agreement dated the 4th day of March 1910, and made between Frank Alexander Johnson of the first part, Frank A. Johnson, Limited, of the second part, and Hutchison, Main, & Company, Limited, of the third part."

The following statement is taken from the opinion of the Lord Ordinary, *infra*—"A certain debenture for the overhead sum of £17,000 was in March 1910 granted by the English company 'Frank A. Johnson, Ltd,' in favour of Hutchison, Main, & Company, Limited. Prior to the granting of this debenture Mr Frank A. Johnson had been the agent of Hutchison, Main, & Company in London, and had accepted a series of bills drawn by that company in respect of his indebtedness to it. Some of these bills had been discounted with the Bank of Scotland and some with the British Linen Bank, while others were held by Hutchison, Main, & Company undiscounted. In or about February 1910 Johnson was in course of converting his business into that of a limited liability company. At the same time the Bank of Scotland was pressing Hutchison, Main, & Company to have the indebtedness of that company to the Bank put on a more satisfactory footing. The Bank held certain corporeal moveables by way of security, and it is averred by the Bank (ans. 7) that they agreed that they would transfer this security to the value of £2000 to the British Linen Bank, 'and should take in lieu thereof bills on F. A. Johnson for £3000 to be held in security, along with which, as collateral security, as mentioned in the next article, the company (Hutchison, Main, & Company, Limited) would give the Bank a debenture or floating charge over the assets of F. A. Johnson for the sum of £12,000.' Hutchison, Main, & Company were of course not in a position to give a debenture over the assets of F. A. Johnson, and what was meant by this is to be found in the next answer (No. 8). It is there set forth that the Bank of Scotland surrendered and passed on to the British Linen Bank part of the said corporeal moveables to the value of £2000 held by them in security, and that at the same time the agents of Hutchison, Main, & Company, Messrs W. Baird & Company, writers, Glasgow, wrote on 3rd February 1910 to the Bank of Scotland stating—'We are authorised by the directors, and our London correspondents have instructions forthwith to procure from Mr Johnson a debenture or floating charge over the whole of his assets in the name of the company for the amount required to secure the debt due by Mr Johnson to our clients. So soon as that debenture reaches our hands we have instructions to make it available to the Bank of Scotland as further and additional security for the repayment by our clients of their indebtedness to the Bank, and it is understood, in respect of the arrangements made, that the Bank will give to those interested in the company the benefit of the arrangements referred to in past correspondence.'

"This letter was acknowledged and accepted by the Bank of Scotland by letter of 4th February 1910 from their bank