sub-sections of the 6th section of the defenders' statute.

On the one hand, it is said for the defenders that they having presented to the pursuers' engineer plans showing a ventilating shaft, he approved of it, and that this having been done under sub-section 7, the pursuers cannot challenge the shaft. The defenders say also that the engineer's approval may also be held to be the consent of the company under sub-section 4, and thus to legalise the shaft.

On the other hand, the pursuers say that even assuming (which they did not unreservedly do) that a ventilating shaft may be treated as a work incidental to the railway, yet that inasmuch as it necessarily involves breaking upon the surface of the ground, the previous consent of the company was necessary under sub-section 4 to its construction at this place; that the engineer had no authority, express or implied, to grant such consent; and that his approval of the plans cannot supply the want of the company's antecedent consent. The question is also complicated by the defenders not having served notices to take the land on which the shaft is constructed.

This, or something like this, is the controversy; and if it contains the elements of fact and engineering skill, it is, or may prove ultimately to be, mainly a question of law.

Not the less, however, do I hold that the dispute is a difference or differences with respect to some of the matters referred to in section 6, and therefore must be determined in manner provided in sub-section 10. I see no warrant for limiting the very wide terms of the clause to matters in which an engineer is a peculiarly well qualified arbiter by reason of his professional skill. The statute has drawn no such distinction.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Balfour, Q.C.—Cooper. Agent—James Watson, S.S.C.

Counsel for the Defenders and Respondents—Ure—Dickson—Malcolm. Agents—Clark & Macdonald, S.S.C.

Thursday, November 7.

FIRST DIVISION.

[Sheriff of Aberdeen.

GARDEN CAMPBELL *v.* BARBER AND ANOTHER.

Executor — Confirmation — Allegations of Conduct Disqualifying—Danger to Estate —Judicial Factor.

A petition for confirmation as executrix presented in the Sheriff Court by the wife of the deceased was opposed by a beneficiary under a former will on the grounds (1) that an action to reduce the will and other testamentary provisions executed by the deceased in favour of the petitioner was being raised in the Court of Session; and (2) that the whole of the estate had not been included in the inventory lodged, and that the petitioner had removed jewellery and other articles of value belonging to the estate outwith the jurisdiction of the Court. The objector accordingly asked that a judicial factor should be appointed.

The petitioner met these averments by a general denial and by an explanation that any jewellery possessed by the deceased had been given before his death as presents to the petitioner and to other friends.

Held that the pleadings showed a *prima facie* case of danger to the estate, and that the proper course was to appoint a judicial factor.

Colonel Garden Campbell, heir of entail in possession of the estate of Troup in Banffshire, died on 16th May 1895. He was twice married, his first wife having died without issue in August 1893, and was survived by his second wife whom he married on 23rd July 1894. On that day he executed a general disposition and settlement, by which he conveyed to his second wife Mrs Thorne or Garden Campbell his whole means and estate, and appointed her his sole executrix.

Mrs Garden Campbell presented a petition for confirmation as executrix-nominate in the Sheriff Court of Aberdeen. Thereafter a *caveat* was lodged by Mrs Laura Johnstone or Barber, with the consent and concurrence of her husband. She stated in her objections that she was the adopted daughter of the deceased and the sole beneficiary under a former will which he had executed shortly after his first wife's death. The objector further averred that the petitioner had been previously to her marriage a woman of immoral character, and that the deceased was of intemperate habits, which had reduced him to a state of such mental weakness that he had fallen entirely under the influence of the petitioner, who had induced him to sign the deeds leaving everything to her and revoking his former will. These statements were denied by the petitioner.

The objectors further averred—"(Obj. 14) The inventory of the real and personal estate does not include the whole of the estate of the said deceased liable to duty."

The petitioner answered — "(Ans. 14) Denied. The objector is well aware that the liabilities considerably exceed the assets, and that even if the general disposition and settlement was reduced and the will in her favour, of 8th August 1893, set up, she would get nothing from the estate."

The objector also stated that an action was being raised in the Court of Session for reduction of the deeds of settlement and other deeds executed in favour of the petitioner, and craved the Court to sist proceedings till the determination of that action.

On 13th September the Sheriff-Substitute (BROWN) pronounced an interlocutor sisting the application for one month.

On 5th October the Sheriff (CRAWFORD) affirmed this interlocutor, and further sisted the application for six months.

The petitioner appealed.

On 29th October the Court pronounced the following interlocutor:—"Allow the respondents to lodge to-day a minute of such amendment or amendments as they propose on the record, and allow the appellant to lodge such answers to the said proposed amendment as she may be advised."

A minute of amendment for the respondent and answers thereto for the appellant were accordingly lodged. The respondent made the following addition to objection 14 above quoted:—"At the date of his death Mr Garden Campbell was possessed of a large amount of jewellery, the most valuable portion of which consisted of diamond ornaments of various kinds, which his deceased wife had been in the habit of wearing. Many of these jewels had been in the family for a considerable period, and consisted, *inter alia*, of necklaces, pendants, brooches, rings, bracelets, hair ornaments. The value of this collection was about £2000. Further, the deceased, shortly before his marriage to the appellant, purchased from a London firm of jewellers additional jewellery to the value of over £1000. To enable him to purchase this jewellery the deceased obtained an advance from Messrs Cox & Company, bankers, London, who now claim on the estate for the amount of the said advance. None of the said jewels are entered in the inventory, the only jewellery returned being the deceased's watch and chain, valued therein at £10. The objector has ascertained and avers that all these jewels have been removed by the petitioner from Troup to her present residence in London. The objector has, however, no inventory of the jewels, and no means of obtaining a valuation of the same so long as they remain in the possession of the petitioner. The petitioner has also displenished the mansion-house at Tore of Troup, of the greater part of the furniture, the whole of the silver plate and family pictures, and removed them to London. The plate, which comprised a large amount of solid silver, has only been entered at nominal values in the inventory. In order to facilitate their speedy removal to London, some of the valuable oil paintings in the house had been cut from their frames. In these circumstances the objector considers that a judicial factor should be at once appointed to take charge of the estate pending the decision of the action of reduction, and she is prepared at once to present a petition if the Court should consider it necessary to have such an appointment made. The objector was unable to condescend upon the facts now stated in her original objections, because at that time the mansion-house was in the possession of the petitioner's agent, as factor on the estate, and it was only recently, when a new factor was appointed by the heir of entail, that the facts as to the displenishing of the house were ascertained by her."

The appellant made the following addition to answer 14:—"With reference to the statement by the respondent, added by minute of amendment, it is admitted that prior to his marriage the deceased purchased some jewellery in London, and obtained an advance from his bankers to enable him to pay for it. He presented it to the pursuer in the spring of 1894. Further admitted that after her husband's death, but before the pursuer was aware of any opposition on the part of the respondent, she removed to London the silver plate, some pictures and curios (including two swords), and a few articles of furniture of little value. *Quoad ultra* denied. Explained that after her husband's death, in the ordinary course of administration, the pursuer employed Messrs John Taylor & Son, licensed appraisers, 110 Princes Street, Edinburgh, to inventory and value all the furniture and other effects belonging to the deceased at Troup. The inventory and valuation is complete, and includes the silver plate, which was weighed by a silversmith, and all the effects at Troup, including the small portion removed therefrom as above stated. On or about 20th June 1895 the silver plate, some pictures and curios, and a few articles of furniture of little value, were carefully removed to London under the charge of Messrs John Taylor & Son. This was done for safe custody, and in order to obtain a better sale if it became necessary to dispose of them. A few of the articles may realise a little more (while others will realise less) than the values put on them by Messrs Taylor, but they will be sold to the best advantage in the interest of the pursuer as well as the creditors. The value put upon them by the respondent is absurd. The pursuer has disposed of nothing belonging to the deceased save some dogs. None of the effects have been in any way injured. The deceased was not possessed of any jewellery at the date of his death. After his first wife's death he gave some of her jewellery as presents to friends, and the rest he gave to the pursuer. It is explained that the creditors of the deceased have no objection to the pursuer obtaining confirmation, and it is in their interest as well as her own that it should be granted.

Argued for appellant—The only relevant objection made to confirmation was that the objectors were raising an action of reduction, and that was not a good answer to the application, as was laid down in the cases of *Grahame* v. *Bannerman*, February 28, 1822, 1 S. 403, and *Hamilton* v. *Hardie and Others*, December 7, 1888, 16 R. 192. In the latter case Lord Shand expressed the opinion that there must be special circumstances, such as the impecuniosity of the executors, to justify the Court in refusing or delaying confirmation. No such allegations were made

here, and the averments contained in the amendment did not materially alter the case. The property dealt with by the petitioner did not consist of heirlooms, it had all been assigned to her by the will, and it was not extraordinary that she should take it up to London six months after the testator's death. The heir of entail did not appear to oppose confirmation; the only opposition was by one who, even if she succeeded in her action of reduction, would only have a right to the property of the same nature as that which the petitioner now had, viz., a right under a will. Accordingly, no reason had been given for so strong a step as the appointment of a judicial factor.

Argued for respondents—Where there was a *prima facie* case averred of danger to the estate the Court would appoint a judicial factor to protect it. This was laid down by Lord Shand in *Hamilton* v. *Hardie*, 16 R. p. 198. Such a case had been averred here, and no sufficiently specific denial had been made by the petitioner. Moreover, the respondents had averred a *prima facie* case for reduction of the will, and accordingly the application should be sisted and a judicial factor appointed pending the settlement of the action of reduction.

At advising—

LORD PRESIDENT—I am not sure that had the record stood as it did in the Sheriff Court I should have agreed with the conclusion come to by the Sheriff. But the amendment of the record presents a case different in quality from that which the Sheriff had to consider, and it appears to me to be a case which requires careful attention. The case now made is a case of the estate not being in safety, and that was an aspect of the case not presented to the Sheriff, because the record then contained no impeachment of the conduct and intentions of the executrix-nominate in that regard. But, as I have said, the new statements do touch that delicate question, and they constitute a direct appeal for our immediate action. We must necessarily determine this with a *prima facie* regard to the admitted facts and the reasonable inferences to be drawn from the state of the pleadings. And I cannot say that I think we have adequate assurance for the safety of this estate. Without entering into the various considerations which lead me to that conclusion, I think we should appoint a judicial factor on the estate. It will do no harm, whatever be the event of any pending litigation, and in the meantime it seems to me we could not disregard the pointed statements which have been made, met as they are by answers which are lacking in the precision which I think was called for by what I would call the general aspects of the case. I am therefore for recalling the judgments of the Courts below, and appointing a judicial factor on the estate.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court pronounced the following interlocutor:—

"Sustain the appeal: Recal the interlocutor of the Sheriff-Substitute dated 13th September 1895 and subsequent interlocutors: Appoint A. H. Cooper, W.S., to be judicial factor on the executry estate of the deceased Francis William Garden Campbell, and in respect of said appointment dismiss the petition, reserving right to the petitioner to present such other petition as she may be advised in the event of the action of reduction now pending being dismissed or absolvitor pronounced therein and of the factory being recalled, and decern: Find neither party entitled to expenses."

Counsel for the Petitioner and Appellant — Balfour, Q.C. — G. Watt. Agents — Mackenzie, Innes, & Logan, W.S.

Counsel for the Objectors and Respondents —Salvesen—Morison. Agent—Peter Morison, S.S.C.

Thursday, November 7.

FIRST DIVISION.

[Lord Low, Ordinary.

W. R. GRAHAM & COMPANY *v.* RAEBURN & VEREL AND OTHERS.

Right in Security—Specific Appropriation—Undertaking to Pay out of Profits—Breach of Trust.

An undertaking by a company to repay a debt by fixed annual instalments payable out of the profits earned by a steam vessel owned by the company, does not operate a specific appropriation of such profits in favour of the creditor, or create a right in security entitling him to a preference upon the profits over the general creditors of the company. Accordingly, there is no breach of trust on the part of the directors or managers of the company, who have entered into the agreement on behalf of the company, in applying the profits to the payment of other debts.

This action was raised at the instance of Messrs W. & R. Graham & Company, merchants, Glasgow, against four sets of defenders, viz., (1) Messrs Raeburn & Verel, shipowners, Glasgow; (2) the Bank of Scotland; (3) James Bain, assistant manager of said bank; and three other members of the committee of the shareholders of the Steamship "Bonnington" Company, Limited, of which committee Mr Bain was also a member; (4) the "Bonnington" Company.

The first conclusion of the summons was for payment by the defenders "jointly and severally, or severally, or in such proportions as shall be ascertained in the