20th March 1897 authority to charge the said estate with a sum expended by him in the improvement of the estate, which together with the expenses of the application for authority to charge, amounted to £3785. The interlocutor, after a finding that the sum in question was *bona fide* expended by the petitioner in the improvement of the estate, proceeded as follows—"Grants warrant to and authorises the petitioner to execute at the sight of C. S. Rankine Simson, W.S., in favour of himself or of any person or persons he may think fit, or of any person or persons who may advance the money, a bond or bonds of annual-rent in ordinary form over the said entailed estate or any part or parts thereof other than the mansion-house, offices, and policies thereof, binding himself and his heirs of tailzie to make payment of an annual-rent during the period of twenty-five years from and after the date of this decree, or during such part of the said period of twenty-five years as shall remain unexpired at the date or dates of said bond or bonds, such annual-rent not exceeding the sum £7, 2s. for every £100 of the said sum of £3785."

Mr Cadell exercised the power thus conferred to the extent of £3000 by granting a bond of annual-rent in favour of the Edinburgh Life Assurance Company for £213 (being at the rate of £7, 2s. per cent on £3000). For this bond he received from the company the sum of £3436, 5s. 9d.

Mr Rankine Simson in presenting his report on the bond, called the attention of the Lord Ordinary to the fact that the amount received by the petitioner was thus in excess of the capital amount he was authorised to charge, and pointed out that the sum of £3000 could have been obtained for an annual-rent of £186.

The Lord Ordinary approved of the bond.

Counsel for the Petitioner—F. M. Anderson. Agents — Mackenzie & Kermack, W.S.

Friday, May 14.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

ANNAN *v.* HUTTON (ANNAN'S CURATOR BONIS).

Judicial Factor—Curator Bonis to Minor — Liability of Curator for Investment ultra vires—Accountant of Court—Pupils Protection Act 1849 (12 *and* 13 *Vict. c.* 51), *sec.* 13.

Where in an action raised by a ward against his *curator bonis* to make good the loss accruing on an improper investment of the curatorial funds, the curator founded upon section 13 of the Pupils Protection Act 1849 as relieving him of liability, in respect that the Accountant of Court had for several years passed the said investment in the curator's accounts,—*held* that the section in question did not limit the curator's responsibility at common law, and that he must consequently be found liable to make good the loss.

On 13th December 1895 Jessie Annan, with consent of her sister, raised an action against James Hutton, C.A., Glasgow, her *curator bonis*, to have it declared that a loan of £1750 made by the defender in February 1885 to the Greenock Harbour Trust upon a bond was not an investment of the ward's estate authorised or warranted either at common law or by the Trusts (Scotland) Amendment Act 1884, and was *ultra vires* of him as curator foresaid. There was also a conclusion to have the defender ordained to invest the said sum of £1750 in any of the stocks or securities enumerated in sections 2 and 3 of the said Act; and there was an alternative conclusion for payment by the defender of the aforesaid sum with interest.

The defender admitted that he had granted the loan to the Greenock Harbour Trust on the security of a bond, the material terms of which will be found *supra*, p. 450.

The defender averred that the loan was duly entered as an investment of the curatorial funds in the accounts lodged by him with the Accountant of Court for the years ending 31st March 1886, 1887, and 1888, and that no objection was taken by the Accountant to the investment.

It appeared that the Greenock Harbour Trust was declared to be insolvent on 11th May 1887; and that in his report on the defender's accounts for 1888-89 the Accountant of Court remarked as follows—"A sum of £1750 was invested by the factor on Greenock Harbour Trust Bond which is not yet due. When the date of payment arrives, this bond should be realised. Meantime all questions are reserved."

In a note to his report the Accountant of Court, in reply to a letter from the defender, wrote—"The words referred to in the factor's letter of 12th April imply that, should there be a loss on realisation of the bond of the Greenock Harbour Trust, parties interested are not to be prejudiced by the investment having been passed by the Accountant."

The investment, if realised, would at the current market price have fetched about £38 per cent.

The defender pleaded, *inter alia*—"The pursuer's statements are irrelevant and insufficient to support the conclusions of the action."

Two questions were raised in the action —(1) Whether the investment of the ward's funds in a bond of the Greenock Harbour Trustees was within the class of investments sanctioned by the Trusts Act 1884? and (2) Whether, assuming that to be the case, this particular investment was a good one of its class?

The former question was disposed of and settled in the negative in the case of *Bringloe* v. *Cowan's Trustees*, Feb. 26, 1897, *ante*, p. 449. The latter question, though

proof was allowed in regard thereto, need not here be further adverted to.

On 8th August 1896 the Lord Ordinary (KYLLACHY) pronounced an interlocutor finding that the loan in question was not a loan which in the circumstances was justified, and therefore the defender was bound to make good the loss, which had accrued or might accrue thereon.

The defender reclaimed.

The Pupils Protection Act 1849 (12 and 13 Vict. cap. 51), sec. 13, enacts that—"The Accountant shall see that the factor's accounts of charge and discharge, with the vouchers thereof, are duly lodged, and shall thereafter examine the same without undue delay, and audit the account on the general principles of good ordinary management for the real benefit of the estate and of those interested therein, and he shall consider the investments of the estate and the sufficiency thereof, and he shall be entitled to require from the factor all necessary information and evidence . . . and he shall strike the balance and shall state the result of his audit in the form of a short report; and if he has made any corrections on the account, he shall, if required by the factor, explain such corrections and his reasons for making them." Section 14 enacts that "the Accountant shall have power upon report to and with the approval of the Lord Ordinary, where the sum involved exceeds twenty pounds . . . to dispense with the rules of exact diligence in any matter of factorial management." Section 15 provides for the factor objecting to the Accountant's report and for such objections being disposed of by the Court. Section 17 enacts that during the subsistence or after the termination of the factory it shall be competent for any party beneficially interested to make appearance and upon cause shown to open up the audit of all accounts which have been audited by the Accountant in his absence. Section 32 enacts that "nothing herein contained shall . . . alter the rules of" the curator's "responsibility as by law now existing except in so far as is herein expressly provided."

In addition to the suitability of the investment in the circumstances, the only question raised in the discussion on the the reclaiming-note was whether the fact that the Accountant of Court had passed the investment in the curator's accounts without comment for several years, relieved the curator of liability for loss accruing upon it.

The arguments of parties on this point are sufficiently indicated in the opinion of Lord Adam.

LORD ADAM—The question in this case is whether a judicial factor for a ward is liable personally for a certain investment made by him upon a bond of the Greenock Harbour Trust. The Lord Ordinary has found that he is liable, and I think the Lord Ordinary is right. The sum here invested appears to have been £1750. It was invested in February 1885. We have had the matter of these Greenock Harbour bonds before us in the recent case of *Bringloe*. In that case we held that the investment was not of the class of investment in which a judicial factor is entitled to invest the money of a ward, and in accordance with that decision we held the factor in that case liable. The grounds being the same in this case we must simply adhere to our judgment in that case; we must hold that this investment was not of the class in which a judicial factor is entitled to invest his ward's money. But an additional argument is made to us in this case which was mentioned but not maintained in the previous case, mainly, that in this case in the annual audit by the Accountant of Court of the factor's accounts this particular investment was brought under his notice and was passed as a sufficient investment. The documents bearing upon that show that from 1886 onwards this particular investment was brought under the Accountant's notice and was originally passed by him without observation. But he seems to have observed upon it as early as the year 1889, and then it seems to have been passed. It was argued to us that if this investment was brought under the notice of the Accountant of Court, and was passed by him without objection, it is to be held, under the 13th section of the Pupils Protection Act 1849, that that absolves the judicial factor from liability for the investment, and that it must be held that it was an investment which it was permissible for the judicial factor to make; that the mere fact of its being passed by the Accountant of Court is conclusive of its being a permissible investment. The words of the 13th section of that Act throw this duty upon the Accountant of Court—"The Accountant shall see that the factor's accounts of charge and discharge, with the vouchers thereof, are duly lodged, and shall thereafter examine the same without undue delay, and audit the account on the general principles of good ordinary management for the real benefit of the estate and of those interested therein, and he shall consider the investments of the estate and the sufficiency thereof, and he shall be entitled to require from the factor all necessary information and evidence," &c. The duty laid upon the Accountant of Court was to consider the investment, the sufficiency thereof, and to require all necessary information and evidence, and judge of their sufficiency. My opinion is that that clause is not introduced for the purpose and with the object and result of removing from the shoulders of the judicial factor the responsibility which prior to the Act rested upon him—but that it is for him to judge of the class and sufficiency of any investment he chooses to make, and that if he fails in his duty to the Court in that matter, and makes an investment not of the proper class or sufficiency he will be held personally responsible for so doing. I do not think that the object of the 13th section was to remove a judicial factor's responsibility in any way in that respect. It does not say so. I think the object and

intention of introducing that provision into the Act was to provide an additional protection and additional security in favour of the pupils. I altogether demur to the proposition that that clause removes any liability which prior to the Act rested upon the judicial factor. Indeed, it would be a very strong thing to say that the factor and the Accountant, in the absence of the parties truly interested, namely, the wards themselves, could finally decide as to the permissibility and sufficiency of an investment. Therefore I am of opinion that the 13th section is not applicable as contended for by Mr Salvesen. I do not think it is necessary to advert in detail to the other clauses, because I think the 14th and 15th clauses point in the same direction.

LORD KINNEAR—I entirely agree with Lord Adam for the reasons he has given, that this case is not distinguishable from that of *Bringloe*. The only additional observation which I desire to make is that it appears to me that the statute itself expressly provides against the contention of Mr Salvesen that an audit by the Accountant is equivalent to a discharge. It appears to me to be quite clear that the Accountant's audit is merely an additional precaution for the protection of the pupil. But the statute makes that perfectly obvious by providing in the 17th section that it shall be competent to any party beneficially interested in the estate to make appearance, and upon cause shown to open up the audit of all accounts which have been audited by the Accountant in absence of such party. Therefore when the factor or his representatives come and apply for a discharge, it appears to me that the statute has made express provision that his liabilities shall not be held to be discharged by any audit, but, on the contrary, that every question which has not been already decided between the parties shall still be open.

The LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court adhered to the interlocutor of the Lord Ordinary with this variation, that the words "in the circumstances" be deleted; and refused the reclaiming-note.

Counsel for the Pursuer—Sol.-Gen. Dickson, Q.C.—Deas. Agents—W. & J. Burness, W.S.

Counsel for the Respondent — Balfour, Q.C.—Salvesen. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, May 21.

FIRST DIVISION.

[Lord Pearson, Ordinary.

COCHRAN'S TRUSTEES *v.* CALEDONIAN RAILWAY COMPANY.

Process — Suspension — Sheriff — Interim Decree ad factum præstandum—Sist of Execution.

In a Sheriff Court action of interdict, concluding also for restoration of property to its condition as existing before an alleged encroachment, the Sheriff granted interdict, and also granted warrant to the pursuers to carry out the restoration at the sight of a man of skill, and at the defenders' expense. The Sheriff's interlocutor did not exhaust the merits of the cause, there being no finding as to the expenses of process. The defenders thereafter brought a suspension of the Sheriff's interlocutor in the Bill Chamber, and the Lord Ordinary sisted execution of the interlocutor and passed the note of suspension. The respondent then applied to the Sheriff to deal with the question of expenses so as to enable the merits of the cause to be brought under review by an appeal. The Sheriff refused this motion on the ground that the action could not finally be disposed of in the Sheriff Court until the expense of the restoration had been ascertained. The respondents reclaimed against the Lord Ordinary's interlocutor, and maintained that as the merits could not be reviewed until execution of the restoration, the passing of the note effected a permanent and not merely a temporary sist of execution. The Court *adhered*, holding that it was sufficient to support the interlocutor passing the note of suspension, that there was a question between the parties, viz., the propriety of a sist of execution at this stage.

The trustees of the late Robert Cochran, of the Verreville Pottery, Glasgow, presented a petition in the Sheriff Court of Glasgow craving the Court to interdict the Caledonian Railway Company from encroaching on their property at Verreville Pottery, and from interfering with the retaining wall forming the boundary of the pursuers' and defenders' property, and to ordain the defenders to restore the wall to the condition in which it was before their interference, or failing that to grant warrant to the pursuers to restore the wall at the expense of the defenders.

The pursuers founded on an agreement which gave them certain rights to make cellars in the wall so far as it stood on their property, which rights they averred had been violated by the defenders having, in order to accommodate electric-light machinery, cut two large recesses in the wall, which weakened it to a dangerous extent.

The defenders maintained that they were