Monday, February 28.

(Before Lord Herschell (in the Chair), and Lords Watson, Shand, and James.)

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

(*Ante*, May 14, 1897, vol. xxxiv. p. 641, and 24 R. p. 851.)

Judicial Factor—Curator Bonis—Investment on Security of Harbour Rates—Real or Heritable Security—Rates Levied by Municipal Corporation—Trusts (Scotland) Amendment Act 1884 (47 *and* 48 *Vict. c.* 63), *secs.* 6 (*b*), 10 *and* 12.

The Trusts (Scotland) Amendment Act 1884, by section 6, authorises trustees (including judicial factors) to invest trust funds (1) "on real or heritable securities," and (2) "on bonds, debentures, or mortgages secured on rates or taxes levied under the authority of any Act of Parliament by municipal corporations in Great Britain authorised to borrow money on such security."

By their special Acts the Greenock Harbour Trustees, a corporation consisting of the Magistrates and Council and nine elected members, were empowered to borrow money "on the credit of the several rates and duties by this Act granted, and the other revenues of the trust . . . and for securing the repayment of the money so borrowed, with interest, the trustees may assign over the said rates and duties or other revenues." Mortgagees were also empowered to enforce payment of arrears by the appointment of a judicial factor "to receive the whole or a competent part of the rates and duties, and other revenues of the trust, until all the arrears . . . be fully paid."

A *curator bonis* lent a sum out of his ward's funds to the Harbour Trustees on a debenture by which the "rates, duties, and other revenues of the trust" were assigned in security of the loan.

Held (*aff.* the judgment of the First Division) (1) that the investment was not on real or heritable security nor on a debenture secured by rates levied by a municipal corporation within the meaning of the Act of 1884, and (2) that it was not justified at common law, in respect that the rates or dues which formed the revenue of the undertaking were entirely dependent on its success as a commercial enterprise.

Judicial Factor—Curator Bonis—Investment of Curatorial Funds—Pupils Protection Act 1849 (12 *and* 13 *Vict. c.* 51), *sec.* 12.

The Accountant of Court, at the annual audit of the accounts of a *curator bonis*, approved of certain investments of the curatorial funds.

Held (*aff.* judgment of the First Division) that the Accountant of Court's approval did not relieve the *curator bonis* from liability for improper investments.

This case is reported *ante, ut supra*. In the Court of Session the case as regards the first point was held to be ruled by *Cowan's Trustees* v. *Bringloe* (*Ferris's Curator Bonis*), February 26, 1897, *ante* vol. xxxiv. p. 449, and 24 R. 590.

The *curator bonis* appealed to the House of Lords.

At the conclusion of the argument on behalf of the appellants, counsel appearing for the respondents not being called on, their Lordships delivered judgment as follows:—

LORD HERSCHELL—In this case the question involved is, whether the appellant has rightly been made responsible for the investment of a sum of £1750 in the bonds or debentures of the Greenock Harbour Trust. He was appointed originally in January 1885 factor *loco tutoris* to one Jessie Annan, and in that year he made the investment in question. It turns out now that the Greenock Harbour security is not sufficient to safeguard the capital investment, and that the payment of interest also ceased some years ago owing to the large indebtedness and the diminished income of the Greenock Harbour Trust.

It is alleged on behalf of the appellant that the investment in the Greenock Harbour bonds was authorised by the terms of the Trusts (Scotland) Amendment Act 1884. Two of the provisions in section 3 of that Act were relied upon. It was said that the investment was one "on real or heritable security in Great Britain." The Court below have held, contrary to the opinion of the Lord Ordinary, that this was not an investment "on real or heritable security." It appears that the opinion was expressed by the Lord President and concurred in by the other Judges of the Court of Session as far back as the year 1880, that loans upon bonds of this very Harbour Trust of which we are now speaking were not loans upon real security. Reliance has been placed upon the views expressed by the Court of Session in *Breatcliff's* case (14 R. 307) with regard to a loan upon debentures of the Port Girvan Railway. That case appears to me to be essentially distinguishable from the present. I need say no more about it than that. In the present case the undertaking is in no way conveyed as part of the security; the only security is an assignment of the dues, rates, and receipts of the Harbour Trust. In case of a failure to pay the interest, there is a power to appoint a judicial factor, who has to enter into the receipt of those payments. Beyond that, however, there is no power given. There is no power to take possession, and there is no assignment of the undertaking. It seems to me under these circumstances that it is impossible to assert that the loan in the present case was a loan "upon real security."

Then it was argued that the loan was authorised as being upon bonds or debentures "secured on rates or taxes levied

under the authority of any Act of Parliament by a municipal corporation." I think it is equally clear—or perhaps still more clear—that the present case is not within these words. This was not a loan upon rates or taxes within the meaning of that sub-section. The word "rate," no doubt, is used in relation to the payment by the ships that used the docks for the services rendered to them and the accommodation afforded; but that, in my opinion, is not a "rate or tax levied under the authority of an Act of Parliament" within the meaning of the subsection, nor can it be said in the present case, even if it were, that it was levied by a municipal corporation. The rates are rates which the Harbour Trustees are authorised to take. The fact that the members of the corporation or the corporation itself formed a part of the Harbour Trust, in which certainly were some who were not members of the corporation, seems to me not to establish by any means that these rates were levied by a municipal corporation, even if, as I have said, they were rates within the meaning of the subsection, which I think they are not.

Then, it is next said that, quite apart from the provisions of the Act of Parliament, there is no rigid and inflexible rule which confines the investments by a judicial factor to investments of the classes authorised in the Act of 1884, and that before that year, at common law, it had been laid down that a judicial factor was not to be rigidly limited within the class of securities which can be properly denominated real securities. Two cases were relied upon to establish that proposition. The first (*Grainger's Curator*, 3 R. 479) was a case in which it was held that the Court would sanction an investment by a judicial factor upon loans to the county authority in Aberdeen upon the security of certain rates which they were authorised to levy. Undoubtedly that was very closely analogous to a loan upon real property, and it seems to me to be a sanction of a class of security wholly different from that which your Lordships have now to consider. In the other case (*Lloyd's Curator*, 5 R. 289) sanction was given to a loan upon debentures of the Caledonian Railway Company. That is a class of security which has since been expressly authorised by Act of Parliament. In the present case it is said that the security of dock rates is analogous to the security of railway receipts. It seems to me by no means to follow that because the Court had sanctioned in the case of *Lloyd's Curator* investments in debentures of the Caledonian Railway Company—a class of investments since authorised by the Legislature—every investment in an industrial undertaking is therefore to be regarded as a proper security for the investment of money by a judicial factor. If we were dealing with a case of an investment upon railway debentures it might be said that the Court had shown by the decision in *Lloyd's* case that that was a security in which, if prudence were displayed, a judicial factor might invest without complaint. But we are not dealing with that. We are dealing in the present case with the bonds or debentures of the Greenock Harbour Trustees, and no case has been cited in which such a security as was given in the present case has been sanctioned by the Court.

But even if it could be shown that an investment upon a security which, speaking generally, was of the same nature as the present, could be made without the judicial factor incurring liability, it has to be considered whether the actual investment made in the bonds of this Harbour Trust can be justified. I agree with the learned Judges in the Court below, who were unanimous on that point, in thinking that it cannot. The judicial factor in the present case obtained possession of the accounts for the one year preceding the time when he was considering this investment—the accounts for the year 1884—and those accounts show a surplus of revenue over expenditure for that year of about £2000.

Quite apart from the amount that it was known had been expended on additional works, I confess I cannot feel satisfied that it was a prudent thing to accept without further investigation the accounts for 1884 as establishing the propriety of this security. It seems to me that it would have been, to say the least, only prudent—and I think prudence was requisite—when the margin appeared to be so small and the liabilities, which were certainly maturing, to be so large—I think, as I say, it would have been only prudent to look at the accounts of some of the previous years to see whether there was an expanding or a diminishing income. Now, if the accounts for several previous years had been examined it would have been seen that the receipts of the Harbour Trustees had not been increasing receipts. In the year 1881 the harbour dues had amounted to £53,000, in 1882 to £52,000, in 1883 to £51,900, and in 1884 to £47,600. There had been a continually decreasing revenue from harbour dues, which of course was by far the principal revenue of the Trust. The surpluses during those years had been £5000, £4200, £6300, £2000, in round figures. Now, it seems to me that a study of these figures would have suggested a doubt, even in view of the harbour undertaking as it then stood, whether the loan to the Harbour Trustees was a safe one—one which would not only have secured the capital invested but also the certain payment of the interest upon it.

But it was known, and it is perfectly frankly admitted to have been known, by the appellant at the time, that a very large amount of money had been and was being expended on the creation of a new dock. There was, in point of fact, something like £600,000 or £700,000 to be raised for that purpose, and the interest upon this sum, which had been capitalised for the time, would amount, as soon as the dock was opened, to between £20,000 and £30,000 a-year. Unless enough additional revenue was received to pay all the additional expenses which would necessarily be incurred at the creation of a new dock, and

to provide in addition to that a sum of at least £40,000 or £50,000, there would not be enough to pay the interest upon the loans raised by the Harbour Trustees. Would that or would that not be the case? Well, this was a mere speculation; there was no test of experience which could possibly establish that it would. It depended upon a variety of circumstances—the extent to which this new dock might prove no more than sufficient for the increase of traffic which would come to it, the changes necessarily taking place in the amount of shipping that visited that particular port, and the competition between that port and neighbouring ports—on all these circumstances, which could in no way have then been brought to the test of experience, did it depend whether or not this harbour undertaking would be able to pay its way, to safeguard the capital entrusted to it, and to pay the interest upon it.

It seems to me that although that may have been an undertaking in which a person might well invest his own money if he had confidence in the future of the port, and might so have invested it without being chargeable with being a man indulging in rash or hazardous speculation, yet it is a totally different thing when he is dealing with the capital of a ward, the safety of whose investments of the provision made for her he is bound to guard with care and diligence.

I therefore entirely agree with the Court below in thinking that the investment cannot be justified.

I arrive at this conclusion, in a sense, with much regret. I have not the least doubt that the appellant acted with perfect honesty—that he thought it at the time an advantageous investment, and that he had no motive to serve except to invest for the benefit of his ward. It must always be a painful thing when under such circumstances it is necessary to make a judicial factor, whose remuneration in such a transaction as this is but small, responsible for a sum comparatively very large. On the other hand, where provision is left for a child by a parent, and the care of the sum thus left is entrusted to a judicial factor, it is very important that the ward, who is entirely in the hands of that factor as regards the safety of that investment, should not be allowed to be deprived of the provision made for her by want of the requisite judgment aad prudence on the part of the judicial factor.

I move your Lordships that the interlocutor appealed from be affirmed.

I would only add this—Mr Haldane took exception to the omission from the interlocutor of the words "in the circumstances of the case," which had appeared in the interlocutor, as I understand, as originally settled by the Lord Ordinary. To my mind the reinsertion of those words would not make any difference, inasmuch as every decision is really a decision on what is the law and what is the result in the circumstances of the case. Therefore I do not think there would be any advantage in restoring the words as suggested by the learned counsel.

LORD WATSON—I agree with the opinion that has just been delivered by my noble and learned friend.

I am quite satisfied that in this case the factor *loco tutoris*, the appellant, acted in perfect good faith, but I do not think it would be consistent with my duty as a judge to accept that fact as a justification of the security upon which he has invested the funds of his ward.

I do not think that under the Pupils Protection Act, or under any statutory warrant or warrants at common law, the Accountant of the Court has any power to approve of improper investments. I think that is a point upon which the Court must be the sole judges. I do not find a trace of such a power in the Acts under which the Accountant of Court's office was constituted and now exists.

In the second place, I think it is in vain to say that the security taken by the factor was a security in any sense of "land or real or heritable estate." It was a charge upon the Board of Administrators who managed the Harbour and Docks of Greenock. No doubt the Acts under which they administer contain a provision to the effect that if there is a shortcoming of funds the creditors who have lent their money may obtain the appointment of a judicial factor; but a judicial factor for what purpose? to receive the rents and revenues—nothing more.

The next question, and what is probably the most important point to be considered in this case, is this—In what sense was this a justifiable loan? I am not going to follow my noble and learned friend through the various classes of investment which he has noticed—those classes of investment which have been sanctioned by the Court and those which have not; I will only say that I think in the present case the security falls within the latter class. In the first place, apart from the figures and without going into them in detail, it is perfectly clear on the face of the record, and it becomes still more clear when the evidence is looked at, that this security was one which depended for its worth wholly upon the success or failure of what was no doubt a legitimate commercial adventure. The adventure might succeed; there were great expectations that it would succeed; but expectations of that kind as to commercial prosperity are a very unsafe subject upon which to lend money. In many cases it may be perfectly safe; in others when a casualty comes I think we should be infringing a—I was about to say a very well-known, but I am sorry to say it is not so,—rule of the law of Scotland if we were to sanction such an investment as this as a proper one for either a tutor or factor *loco tutoris* dealing with the property of his pupil or ward. I therefore concur in the judgment that has been moved, and I have only to remark that the order of the House must be so framed as to exclude the three interlocutors pronounced by the Lord Ordinary, which have been by mistake or otherwise included in the petition of appeal. They are not appealable, and they

are contrary to the provisions of the Act of George III.

LORD SHAND—It is undoubted that the defender in this case acted in *bona fide*, and he gave his evidence with very great candour when he was under examination before the Lord Ordinary. That being so, I need not say that I concur with what has fallen from your Lordships in the expression of regret that nevertheless responsibility should rest upon him for this investment. Loss has been sustained; it must either fall upon the judicial factor who made the investment or upon the minor pupil; and as it appears to me, concurring as I do with all of the Judges in the Court below, that there was a want of that caution and care that should be exercised by a judicial factor in such circumstances, I think it must follow that the loss should fall upon him rather than upon the pupil, who had no protection except that care and caution which the factor alone could exercise.

With reference to the investment itself, it has no doubt been shown—and I am very far from leaving such a consideration out of view in this class of cases—that investments in the Greenock Harbour securities were very popular in the town itself and in that district, and perhaps throughout Scotland to some extent. That is a circumstance which should not, I think, be thrown out of view; but upon the other hand it will not in any way relieve the judicial factor from the duty of exercising care and prudence and examining the particular investment for himself when he has his ward's money to invest. It has been said that this is a class of security which has been sanctioned by the Court in other cases. In that I do not agree. It is quite true that investment in railway debentures has been sanctioned, and indeed these are now made lawful investments under Act of Parliament; but there is the broad distinction which has been pointed out by your Lordships, that in that class of cases there is a power of entering into possession—the security holder can get into possession—of the property from which the income was derived, but in this particular case there is no such power; there is a power merely to receive such revenues as the administrators of the trust may get into their hands under their administration, an administration which in its detail was subject to their discretion. I entirely agree in the view that was expressed by the First Division of the Court in the last of the cases which was cited (*Cowan's Trustees*, 24 R. 590), that the two cases are quite distinguishable.

In regard to the prudence of the investment itself, I see that the learned Judges in the First Division contented themselves with simply referring to what had been said by the Lord Ordinary, and expressing their concurrence. I do not think I can do more. Lord Kyllachy has very clearly stated the grounds which make this investment open to objection. It appears to me it is not enough, particularly in dealing with what after all is to some extent a mercantile speculation, that a judicial factor should look only at the very last balance-sheet which had been issued before he made the investment. That ought to be considered and compared, as it appears to me, by a man of business making an investment for his ward or for the estate he administers, with the balance-sheet and report of previous years, and if that had been done, I think whatever may have been the public opinion of investments of this class, the judicial factor himself would have come to the conclusion that there was a gradually deteriorating income, and that it was not safe to put his ward's money in an investment of this class, particularly as the trustees in the administration of the harbour were about to borrow an extremely large sum of money for a new enterprise, imposing therefore upon their undertaking a very large amount of additional interest to be met, which required a very large corresponding amount of income, and which involved considerations of a speculative kind.

Upon these grounds, and expressing great regret that we must decide the case so, for the reasons I have stated, I concur in thinking that the appeal must be refused.

In regard to the position of the Accountant of Court, the duties which he has to discharge are undoubtedly a useful and valuable check on the actings of judicial factors, and it may be in many cases, specially on their actings with reference to the securities in which the funds of the estate may be invested. But I am not prepared to say that this check will in any way or to any extent relieve the factor from responsibility for his own acts. In the present case the Accountant might well have thought that the security was of a class similar to the debentures of a railway company, in which there was a power to have a factor appointed to enter on possession of the undertaking. In order to ascertain whether this was so, the Accountant would require to have the details of the constitution of the company before him, and it would scarcely be possible for him in the discharge of his duties to examine securities in such detail as to enable him in many cases to say that the investment was an improper one, whether regard is to be had to either the class of the security or the propriety of the investment, looking to the position and history of the particular undertaking. It appears to me that the responsibility for the class and nature of the investment must rest with the judicial factor, although it is a benefit alike to him and to the estate that the Accountant of Court shall to some extent in the execution of his duties form a valuable check.

LORD JAMES—With the statement of facts and the observations upon those facts made by my noble and learned friend now on the woolsack I entirely agree. Therefore I concur in the conclusion that this appeal must be dismissed.

Ordered that the interlocutor of the Lords of Session of the First Division of 14th May

be affirmed, and the appeal dismissed with costs.

Counsel for the Appellant—Balfour, Q.C. — Haldane, Q.C. Agents — Grahames, Currey, & Spens, for Menzies, Black, & Menzies, W.S.

Counsel for the Respondents—The Lord Advocate — Shaw, Q.C. — Deas. Agents—William Robertson & Company, for W. & J. Burness, W.S.

COURT OF SESSION.

Friday, January 28.

SECOND DIVISION.

MACKENZIE FRASER *v.* CROFT.

Succession—Bequest of Furniture in House—Ademption—Silver Plate Deposited in Bank.

By his last will dated 8th July 1895 a testator left to his widow for her use during her life, and to his heir after her death, "the whole furniture, plenishing, furnishings, and articles which may be in the mansion-houses" on his estate. He also appointed his widow his sole residuary legatee. At the date of the testator's death there was in a bank at Aberdeen a chest of silver plate valued at £159, 10s. belonging to the testator. This chest had been deposited there by him for safe custody prior to 8th July 1895, and was there at that date. Towards the end of August or beginning of September 1895 the chest was taken from the bank to one of the mansion-houses, and various articles were removed from it. The chest with the remaining articles was redeposited in the bank for safe custody in November 1895, and remained there till the testator's death on 19th May 1897.

Held that the chest and its contents were not included in "the whole furniture, &c., in the mansion-houses," and were the property of the widow as residuary legatee.

Fee and Liferent—Rights of Liferenter—Power to Grant Lease to Endure Longer than Lifetime.

A testator made his wife the liferentrix of his heritable estates and provided that she was to have "the absolute control and management of the estates so long as she shall survive me, and without any interference from the heir who is appointed to succeed after her death."

Held that the widow had no power to grant leases to endure longer than her lifetime.

Heir and Executor—Relief—Payment of Moveable Debts and Duties out of Heritage.

A testator appointed his wife liferentrix of his heritable estate and his residuary legatee, and further gave and left to her "full power to raise such sums as may be required to pay all death and succession duties which may fall upon her after my decease, as well as all my debts and funeral expenses."

Held that the widow was not entitled to charge the heritable estate with the personal debts and funeral expenses of the testator, or with the estate-duty beyond the rateable part effeiring to the heritage.

Lieutenant-Colonel Frederick Mackenzie Fraser died on 19th May 1897, leaving a holograph last will and testament dated 8th July 1895, in the following terms:—"I hereby leave to my wife Mrs Theodora Lovett Darby or Mackenzie Fraser, for her sole use and enjoyment during the term of her natural life, so long as she shall survive me, my whole lands and estates of Castle Fraser and Inverallochy, and the whole plenishing, furnishings, and articles in the mansion-house thereon; and after the death of my said wife I hereby dispone, convey, and make over my said lands and estates of Castle Fraser and Inverallochy, and the whole furniture, plenishing, furnishings, and articles which may be in the mansion-houses thereon, to Thomas Fraser Croft, son of Thomas Denman Croft and his wife Eleanor Fraser Tomlinson or Croft, and the heirs whatsoever of his body; . . . And I hereby specially ordain that my wife the said Mrs Theodora Lovett Darby or Mackenzie Fraser is to have the absolute control and management of the estates of Castle Fraser and Inverallochy so long as she shall survive me, and without any interference from the heir who is appointed to succeed after her death; and I further give and leave to my said wife full power to raise such sums as may be required to pay all death and succession duties which may fall upon her after my decease, as well as all my debts and funeral expenses: And I hereby constitute and appoint the said Mrs Theodora Lovett Darby or Mackenzie Fraser to be my sole executrix and sole residuary legatee."

At the death of Colonel Fraser his estate consisted of heritage valued at £27,289, 4s. 6d., and of moveables valued at £7418, 9s. 4d. The personal debts and funeral expenses amounted to £1194, 0s. 10d. On the basis of the above figures the amount of estate-duty due in terms of the Finance Act 1894, in respect of the free heritable and moveable estate (£33,513, 13s.) was £1507, 10s. At the date of Colonel Fraser's death there was a plate chest containing silver plate in the office of the Union Bank of Scotland, Limited, at Aberdeen, which chest had been deposited there by him for safe custody prior to 8th July 1895 (the date of his will), and was there at that date. Towards the end of August or beginning of September 1895 the chest was uplifted from the bank and taken to the mansion-house at Castle Fraser. Various articles were then taken from the chest. Some of the articles uplifted were used by Colonel Fraser in a house at North Berwick, and thereafter in a house at Ascot. The remain-