payment of the annuity would be to them in the first instance, and through them to Mrs Graham. I should not approve of the annuity being from an insurance company. It might turn out to be valueless, and such a contingency (however remote) the second parties are bound to provide against.

A Government annuity is proposed to be bought by a payment out of the residue which belongs to Mr Graham's children. All the parties interested in the residue consent to such payment except one, James Graham. He is absent in Australia or elsewhere, is now if alive about thirty years of age, and has not been heard of for about five years. There is no presumption that he is dead; on the contrary, the presumption is that he is still alive. If he were present it is probable, perhaps likely, that he would concur with the others in the proposed purchase of the annuity in order that with the others he might obtain a present payment of the share of the residue, instead of waitting therefor until Mrs Graham's death. He is, however, represented in this case by a factor *loco absentis*, who in the interests of his ward objects to the purchase of an annuity out of residue as leading to a diminution of his ward's share of residue to an extent of something over £300. I think the factor was bound to take this objection in his ward's interest, and standing that objection I think the first parties are not entitled to take the residue, or any part of it which belongs to James Graham, for the purpose of purchasing the annuity. It is said that the proposed purchase is proper administration of the trust, and within the power of the trustees. I think otherwise. It can scarcely be called proper administration to take the share of one beneficiary and give it to another. That is what is proposed, to confer a right on Mrs Graham for which in part James Graham shall have to pay. If the parties cannot arrange so as to preserve (in the meantime at least) the share of the residue falling to James Graham undiminished, if and when he is entitled to call for it, the first parties must continue to hold the trust estate, pay the widow's annuity out of it, and hold the residue so far as necessary to secure the annuity for the parties entitled to it. I think the questions should be answered accordingly.

Lord Moncreiff—I agree with the majority of your Lordships. The first question which we have to decide is whether the trustees who are directed to pay an annuity to the truster's widow would be protected by the purchase of an annuity. So far as the widow's interest is concerned it could be protected sufficiently by an annuity of £100 taken in name of the trustees.

The next question which we have to decide is practically whether the trustees who are directed to pay an annuity to the truster's widow, but are not given power to purchase an annuity, are entitled in their discretion, and as an ordinary piece of trust administration, to sink part of the capital in an annuity without the consent and against the wishes of a residuary legatee who is entitled to a part of the capital of the fund. I know of no authority to the effect of that being an understood power. Primarily an annuity is payable out of income, and capital can only be trenched on if income fails. If part of the capital is applied to the purchase of an annuity, it is no longer available for division on the annuitant's death. No doubt if the expectation of the annuitant's life is satisfied the residuary legatee might in the end be no worse off than if the annuity had been paid out of income. But on the other hand the annuitant may die immediately, or soon after the annuity is bought, in which case the capital is sacrificed.

On these grounds therefore I think—although I quite see the expediency if possible of bringing this testamentary trust to a close—that we must find that the trustees have no power against the wishes of the factor *loco absentis* to purchase an annuity. I have only to add that I should think there were means by which any such absent person might be secured—I mean by agreement between the parties—but that is really a question for the parties to arrange among themselves. The question of law that has been put to us we must answer.

The Court pronounced the following interlocutor:—

"Answer the first question therein stated by declaring that the first parties will sufficiently implement the obligation undertaken by the deceased Robert Graham, under his antenuptial contract of marriage, by purchasing a Government annuity: Answer the first alternative of the third question therein stated in the negative: Find and declare accordingly, and decern."

Counsel for the First and Fourth Parties—Younger. Agents—J. & J. Ross, W.S.

Counsel for the Second and Third Parties—Sym. Agents—J. & J. Ross, W.S.

Counsel for the Fifth Party—Cullen. Agents—Wallace & Guthrie, W.S.

Saturday, December 24.

FIRST DIVISION

[Lord Pearson, Ordinary.

BROWN *v.* PORT SETON HARBOUR COMMISSIONERS.

Arrestment — Validity of Arrestment — Special Appropriation—Statutory Direction to Apply Revenues in a Certain Order.

By the terms of their incorporating Provisional Order, harbour commissioners were empowered to levy certain rates, tolls, and duties, and the order enacted that "the commissioners shall apply all money received by them" therefrom "for the purposes and in the order following, and not otherwise

(that is to say)"—(1) in paying the costs connected with the obtaining of the order; "(2) in paying the feu-duties and rents payable in respect of the lands belonging to and leased by the commissioners, and the expenses of the reconstruction, maintenance, management, and regulation of the existing harbour, and of the new works. . . . (3) In paying year by year the interest of any money borrowed, and in payment of the principal of money borrowed." The commissioners were also empowered to contract debt up to a certain amount upon the security of the rates and dues, and it was provided that the creditor in a bond granted by them, in the event of principal or interest being in arrear, "may, without prejudice to any rights, remedies, or security otherwise competent to or held by" him, require the appointment of a judicial factor.

A creditor who had lent money to the commissioners on deposit-receipt, and the principal and interest of whose loan were in arrear, arrested, in the hands of a bank, the money standing at the commissioners' credit, obtained decree in an undefended action against the commissioners for the amount of his debt, and raised an action of furthcoming to make his diligence effectual. The commissioners proved that there were outstanding arrears of feu-duty and the unpaid balance of a contractor's account amounting together to more than the sum arrested, and pleaded that the arrestments were invalid, the money being specifically appropriated by the Provisional Order to certain objects which were declared to have a preference over repayment of loans. *Held* (*rev.* judgment of Lord Pearson) that the arrestments were valid, there being nothing in the Provisional Order either expressly or by implication excluding a creditor from using the ordiary legal means of enforcing payment of his debt.

By the terms of their Provisional Order 1878, the Port Seton Harbour Commissioners were authorised to levy rates (sec. 15) for the use of the harbour, and (sec. 17) for the use of any warehouses, sheds, &c., belonging to them. The property on which the harbour and works of the Commissioners were situated was held by them in feu from Lord Wemyss.

The Provisional Order contained the following enactments:—"27. The Commissioners may from time to time borrow and re-borrow at interest such money as may be required for the purposes of this order, not exceeding in the whole the sum of eleven thousand pounds, on the security of the works authorised by this order, and of the lands and property connected therewith, and of the rates and dues authorised by this order, or on the security of any one or more of these, or of any other the property of the Commissioners; or they may accept and take from any bank or banking company credit to such amount as they may deem expedient, not exceeding in the whole the said sum of eleven thousand pounds, on a cash account to be opened and kept in the name of the Commissioners, according to the usage of bankers in Scotland; and they may assign the rates and dues hereby authorised by this order, and the lands and property connected therewith, and any other lands and property belonging to them in security of the repayment of the sum or sums so borrowed, or of the amount of such credit, or of the sums advanced from time to time on such cash account, with interest thereon respectively, by bonds and assignations under their common seal, and signed by three of their members; and which bonds and assignations, and all transfers thereof, shall be in the form, or as near as may be, of Schedules (B) and (C) to The 'Burgh Harbours (Scotland) Act 1853,' annexed respectively, and shall be recorded in the Division of the General Register of Sasines at Edinburgh applicable to the county of Haddington, and have preference according to the priority of their registration therein, except in so far as a *pari passu* preference may by the bonds and assignations have been established among all or some of them, as being assignations of parts of one capital sum which the Commissioners may, by a resolution of a specified date, have resolved to borrow in parts. 28. Every part of the money borrowed under this order shall be applied only for the purposes authorised by this order. 29. If within two months after the interest of any bond and assignation granted by the Commissioners has become due, or after the period prescribed for the payment of the principal sum in any such bond and assignation has expired, such interest or principal, as the case may be, shall not be paid, the holders of such bonds and assignations may, without prejudice to any rights, remedies, or security otherwise competent to or held by them, require the appointment of a judicial factor by an application to be made as hereinafter provided. . . . 31. The amount to authorise the application for appointment of a judicial factor shall be one thousand pounds in one or more bonds and assignations."

It was further provided as follows by sec. 32 of the order:—"32. The Commissioners shall apply all money received by them from the rates, tolls, and duties, authorised by this order, for the purposes and in the order following, and not otherwise (that is to say)—(1) In paying the costs of and connected with the preparation, obtaining, and making of this order; (2) in paying the feu-duties and rents payable in respect of the lands and property belonging to and leased by the Commissioners, and the expenses of the reconstruction, maintenance, management, and regulation of the existing harbour and of the new works, with all accesses, roads, and conveniences, and of the lands and property connected therewith; (3) in paying year by year the interest of any money borrowed, and in payment of the principal of money borrowed; (4) in creating a sinking fund in

manner and, in so far as the nature and circumstances of the case will admit, in the proportions specified in 'The Commissioners Clauses Act 1847,' and this order; (5) subject to and after answering the purposes aforesaid, the surplus revenue, if any, shall be applied by the Commissioners in the further improvement of the harbour, and for no other purpose."

On 14th July 1884, John Brown, fisherman, Cockenzie, lent to the Commissioners the sum of £70 on deposit-receipt taken in these terms—"Received from Mr John Brown, N. Lorimer Place, the sum of seventy pounds sterling as a fixed deposit, repayable at the end of twelve months after notice of withdrawal has been given, bearing interest payable half-yearly at the rate of five per centum per annum from the date hereof. The depositor shall not have any claim against the Commissioners personally in any manner of way in respect of said deposit. For the Port Seton Harbour Commissioners—W. T. MacDonald, *Chairman*, Robt. Ovens, *Clerk*."

On 6th May 1896 Brown gave notice to the Commissioners of the withdrawal of the said sum, and on 23rd April 1897, no part thereof having been repaid, he arrested the sum of £249 at the credit of the Commissioners in the hands of the Royal Bank, on the ground that they were *vergentes ad inopiam*.

On 13th May 1897 Brown raised an action against the Commissioners for payment of £70 with interest. On the 14th May he used arrestments on the dependence of the said action in the hands of the Royal Bank. No appearance was entered by the Commissioners, and decree was granted against them in terms of the conclusions of the summons on 1st June.

On 25th June 1897 Brown raised this action against the Commissioners and against the bank to make furthcoming the sum for which he had obtained decree.

He pleaded, *inter alia*—"The sums condescended on having been validly arrested in the hands of the arrestee, decree should be pronounced as concluded for."

The defenders denied that any sum had been validly arrested by the pursuer. They founded on section 32 of their Provisional Order, and averred that the sums at their credit with the Royal Bank consisted of money "received by them from the rates, tolls, and duties authorised by the provisional order aforesaid, to be applied for the purposes and in the order prescribed" in the said section. They further averred that at the date of the arrestments they owed sums amounting to considerably more than the sum arrested to (1) the superior, (2) the Public Works Loan Commissioners, who had lent them money on a bond and assignation, and (3) a contractor for works executed on the harbour.

The defenders pleaded, *inter alia*—"(2) The Provisional Order having enacted that the money received by these defenders from the rates, taxes, and duties authorised by their Provisional Order should be applied to certain purposes in a prescribed order and the arrears of feu-duty and the expenses incurred in maintaining the harbour having exhausted the funds referred to in the summons, and all other funds belonging to these defenders, the pursuer's arrestments are illegal and inept, and have attached nothing, and the defenders should be assoilzied with expenses. (5) The pursuer is barred *personali exceptione* from maintaining that the loan in question was *ultra vires* of the defenders."

The proof disclosed that at the date of the loan the pursuer had himself been one of the Harbour Commissioners, that the money arrested consisted entirely of rates, tolls, and duties levied by the Commissioners in terms of the Provisional Order; that all the money spent since the date of the loan had been expended upon the upkeep of the harbour; that the pursuer's £70 had as a matter of fact been probably paid to Messrs Morrison, contractors; and that at the date of the arrestments the Commissioners were owing to the superior in respect of arrears of feu-duty £142, to a firm of contractors for repairs on the harbour £792, to a firm of engineers £170, and to bondholders in respect of arrears of principal and interest about £1050.

On 4th August 1898 the Lord Ordinary (Pearson) assoilzied the defenders.

Opinion. — . . . "At the date of the arrestment there was due by the Harbour Commissioners among other things (1) a sum of £142 of arrears of feu-duty to Lord Wemyss, (2) to Messrs Morrison, contractors, for repairs on harbour subsequent to 1894, £792, (3) to Messrs Stevenson, C.E., for work done in connection with the operations of 1884, £170. In the clause (sec. 32) providing for the application of the rates and dues, these charges came second in order, and take precedence of the payment of the annual interest and of the capital of money borrowed, which come third in order. This amounts to a statutory appropriation of the money in bank to those prior purposes, and excludes the diligence of a creditor of lower rank seeking to attach those funds even on the assumption that such diligence would have been effectual against them if none of the prior purposes had remained unsatisfied.

"The answer made by the pursuer appears to me to fail both in fact and in law. His case is that his original deposit of £70 has been in bank all along, or at least that the defenders have failed to prove that it has not, and therefore to that extent sec. 32 does not apply to the arrested fund. And he points to the fact that at 11th October in each year (the date at which the current account was annually balanced), the account shows a credit of more than £70 with the exception of 1893, when it was just about that sum, and of 1896, when £160 had been withdrawn from the account and placed on deposit-receipt. This, however, merely shows that the account stood at credit on a particular day once a year, and does not exclude the occurrence of a debit balance showing the exhaustion of the account, which in fact occurred in November 1890. It seems clear that the pursuer's £70 was paid into the bank account within two or

three days after it was borrowed, and was thereafter paid out to the contractors along with the other subscriptions in payment of the repairs and improvements then in contemplation. The treasurer depones that all the money that was collected at that time for the repairs of the harbour was expended, and that among the capital expenditure on the harbour works between 1884 and 1886 there are payments to Messrs Morrison, the contractors, amounting to £3605.

"But the pursuer puts this alternative, that the borrowing and taking up of his £70 was *ultra vires* of the Commissioners, that they were wrong in paying it away as under the order, but that having done so for the benefit of the undertaking, they are now bound to make any money in their hands forthcoming to answer his debt. He relies on the cases of *Blackburn Building Society*, L.R., 22 Ch. Div. 61; and *Lady Wenlock*, L.R., 10 App. Cas. 354, and 19 Q.B.D. 155. These cases, however, seem to me to have no application to the present, for this reason if for no other, that I am not prepared to hold that the borrowing of the £70 was an *ultra vires* act. It was borrowed in pursuance of a resolution passed at a meeting of Commissioners on 29th March 1884 (the pursuer being, as it happens a Commissioner at the time, and present at the meeting) to the effect that £4000 should be spent on the improvement of the harbour, and 'that the Commissioners should receive from the community on deposit-receipt £2500, for which they will grant interest at 5 per cent. per annum for sums lodged twelve months.' It is not suggested that this was in excess of their borrowing powers in point of amount, but only that it was not borrowed in exact conformity with the Provisional Order. No doubt the order contemplates borrowing by way of bonds and assignations in security. But I am not aware of any authority for holding that where a corporation has power to borrow up to a certain limit, and to pledge its property and rates in security, it is *ultra vires* to borrow (within the limits) without pledging its property or rates if it can obtain the money on those terms. If this argument were sound, it would result it putting the creditor in an *ultra vires* loan in a better position than one whose money had been advanced upon statutory security in strict conformity with the order. In the view I take it is not necessary to consider the Commissioners' fourth plea, that the pursuer is barred by having been a commissioner and member of the finance committee from maintaining that the loan was *ultra vires.*

"The result is that I assoilzie the defenders." . . .

The pursuer reclaimed, and argued—The Lord Ordinary was wrong. (1) The arrestments were valid, and the pursuer was entitled to prevail. There was no such specific appropriation of the fund arrested as to exempt it from the operation of ordinary legal diligence. The Provisional Order expressly reserved to creditors the common legal remedies. A similar defence to that of the defenders' had been unsuccessfully set up in the case of the *Mersey Dock Trustees* v. *Gibbs*, L.R., 1 H.L. 93. According to that decision a corporation could not evade liability for damages by pleading that it had no funds available to meet such a claim, the whole of its revenues being appropriated by statute to certain purposes. The principle was equally applicable to the case of a creditor. (2) Alternatively, the loan was *ultra vires.* The powers of a public body like the defenders depended upon their incorporating Act or order, and they must be held to have no power to do what they were not expressly empowered to do—*Ashbury Railway Carriage Co.* v. *Riche*, L.R., 7 H.L. 653; *Blackburn Building Society* v. *Brooks*, L.R., 22 Ch.D. 61; *Wenlock* v. *River Dee Co.*, L.R. 10 A.C. 854. If that view were sound, then the pursuer was entitled to step into the shoes of the contractor and avail himself of his preference, if any, to whom the pursuer's money had been paid away in the ordinary course of administration of the harbour. This equitable doctrine was well established by the cases of the *Blackburn Building Society, ut sup.*, and *Wenlock, ut sup.*, and L.R., 19 Q.B.D. 155.

Argued for the defenders—(1) The arrestments were invalid, the money arrested having been specifically appropriated by the Provisional Order—Bell's Comm. ii. 71; Bell's Prin. sec. 2276; *Baillie* v. *Naismith*, 1674, M. 703; *Stalker* v. *Aiton*, 1759, M. 745; *Souper* v. *Smith's Creditors*, 1756, M. 744; 5 Brown's Sup. 308; *Mackenzie* v. *Finlay*, Oct. 29, 1868, 7 Macph. 27. To hold that the arrestments were good would be to render sec. 32 of the Provisional Order wholly nugatory. The contractors might have refused to undertake the work if they had not supposed themselves to have a statutory preference. (2) The loan was not *ultra vires*, and the equitable doctrine invoked by the pursuer did not apply. But in any event none of the cases on which he relied decided that a statutory preference could be displaced. (3) The pursuer was at all events barred *personali exceptione* from pleading that the loan was *ultra vires*, he having been a member of the Commission when he took the deposit receipt—*York Tramways Co.* v. *Willows*, L.R., 8 Q.B.D. 685; *In re Great Oceanic Telegraph Co.* (*Harward's* case), L.R. 13 Eq. 30.

At advising—

Lord Kinnear—The question in this case is whether the pursuer is entitled to enforce repayment of a sum of money borrowed from him by the Port Seton Harbour Commissioners by means of the diligence of arrestment. It is conceded that the debt is due to the pursuer, and that the decree which he has obtained for payment is, in so far at least as it may operate as a decree of constitution, a good and unchallengeable decree, although it is maintained that it is not a good warrant for diligence, and that the arrestments used by the pursuer are therefore invalid. We are relieved by this concession of the necessity for considering a plea stated somewhat oddly by the pursuer that the

contract of loan upon which he sues was *ultra vires* of the defenders as the administrators of a statutory corporation. If it were to be held that the Commissioners had no power to borrow in such a way as to leave open to their creditors the ordinary remedies of diligence it might be very difficult to maintain that the pursuer could enforce repayment by arrestment of the funds of the corporation. But I suppose that that is not the meaning of the pursuer's plea; and the defenders' counsel declined to argue that any such objection could be taken to his case. The defenders conceded, or I should rather say maintained, that the transaction was entirely within their powers, and that the debt is perfectly good, if they had money to pay it, inasmuch as they have not transgressed the limit within which they are empowered to borrow, and they have applied the pursuer's money to the purposes of their trust.

The only question therefore is, whether the pursuers' decree, which is admitted to be a valid decree for payment of a just debt, can be enforced by the arrestment of money due to the defenders in the hands of their debtors the Royal Bank.

The Lord Ordinary has held that the arrestment is ineffectual because the money in the bank which is said to have been arrested consisted of rates and duties levied by the Commissioners which are appropriated by their Provisional Order to meet prior claims, and the defenders' counsel endeavoured to support this view by reference to the well-established rule of law that money or goods specially appropriated cannot be arrested. I am not satisfied that the Lord Ordinary's opinion is founded upon this doctrine, and at all events I think it is inapplicable to the circumstances. The doctrine is very clearly stated by Prof. Bell—"Arrestment is not good in the hands of a person in whose possession goods or bills are which have been appropriated to a specific purpose or consigned to a factor or agent for the benefit of persons to whom notice is given so as to complete the right and vest the *jus quæsitum*." All the cases which were cited to show the effect of special appropriation were illustrations of this doctrine. It is a perfectly clear doctrine, and seems to me to be a corollary of the fundamental principle as to the diligence of arrestment, to wit, that it operates by placing the arresting creditor exactly in the shoes of his debtor as in a question with the arrestee, and by compelling the latter to perform to the arrester the obligations which but for the arrestment would have been prestable to the common debtor. The liability of the trustee to the common debtor is therefore the exact measure of what the arresting creditor takes by his diligence, and it follows that when funds of the common debtor have been so appropriated in the hands of the holder as to complete a right and vest a *jus quæsitum* in third persons, an arrestment is inept, because that diligence attaches nobody's right excepting only the right of the common debtor. But then there was no such appropriation in the hands of the Royal Bank, and no notice to any third person that the money lay in the bank for his benefit, so as to create a *jus quæsitum* in him. The bank are simply debtors to the Harbour Commissioners upon a current account, and were bound to pay the debt when called upon, and there is nothing to suggest that they could have met the Commissioners' demand by any plea founded on the rights of creditors or on other interests with which they had no concern. It makes no difference that if there had been no arrestment, and the Commissioners had obtained payment, they would be bound to apply the money in their hands in the payment of prior creditors, because the arresting creditor takes what is payable to the common debtors, but he does not take under them. He cannot take what they could have recovered in their own right, but if he arrests what they could have recovered, he has no concern with obligations which only attach when the money has come into their hands.

It appears to me, therefore, that the defender can take no aid from the common law doctrine of special appropriation. But I do not think the Lord Ordinary proceeds upon this ground, and, as I understand it, his Lordship's view raises a different and perhaps a more difficult question. The Lord Ordinary holds that the rates and duties are dedicated by statute to a special purpose, and therefore that all diligence which interferes with the prior claims is excluded. This is founded on section 32 of the Provisional Order, by which it is provided—[*quoted supra*].

The Lord Ordinary points out that at the date of the arrestment "there was due by the Harbour Commissioners among other things (1) a sum of £142 of arrears of feu-duty to Lord Wemyss; (2) to Messrs Morrison, contractors, for repairs on harbour subsequent to 1894, £792; (3) to Messrs Stevenson, C.E., for work done in connection with the operations of 1884, £170. In the clause (section 32) providing for the application of the rates and dues these charges come second in order, and take precedence of the payment of the annual interest and of the capital money borrowed, which come third in order. This amounts to a statutory appropriation of the money in bank to those prior purposes, and excludes the diligence of a creditor of lower rank seeking to attach those funds, even on the assumption that such diligence would have been effectual against them if none of the prior purposes had remained unsatisfied."

Now, in considering the effect of section 32 in the circumstances thus stated, we must proceed upon the assumption, which is common ground between the parties, that the pursuer has a perfectly good claim of debt against the defenders. I do not think it makes any difference that the money borrowed from the pursuer was to pay a debt due to Messrs Morrison, the contractors. That would be material if

we had to determine whether the pursuer is a lawful creditor of the Harbour Commissioners, because the pursuer would be in a position to say that the money borrowed from him had added nothing to the liabilities of the Commissioners but had resulted only in a change of creditors, and that the Commissioners, having taken the benefit of his money to pay a debt which they were bound to meet, cannot be allowed to retain the money and make him pay their debts. But all that is admitted, and I do not see that it will enable him to place himself in Messrs Morrison's place in the order of ranking. What is material is that it is admitted that he is a lawful creditor holding a good decree, and the question is whether there is anything in the prescribed order of payment which should deprive him of the ordinary remedies open by law to all creditors who have obtained decree for payment. I have come to the conclusion that there is nothing to affect his right to arrest money in the hands of the Commissioners' debtors. The creditors cannot be deprived of their legal remedies except by express provision or plain implication of the Provisional Order. Now, it certainly is not expressed that creditors shall have no right to do diligence, and I have found no sufficient reason for saying that it is plainly implied. The order prescribed is a statutory direction to the Commissioners for the administration of the revenue in their hands, but it is not a pledge to the first class of creditors, and it does not purport to confer upon them any real right which should be preferable to lawful diligence. It may give them a claim against the Commissioners while they are in the administration of their revenues but I do not see that it gives them anything more: and therefore I cannot hold that it would enable them to interdict a creditor from doing diligence so as to prevent money from coming into the hands of the Commissioners. The pursuer does not require the Commissioners to invert the order in which they are directed to pay. He does not take the money through them. But he uses the remedy which the law allows, to take the arrested money by force of law as against them and their other creditors. This view is confirmed by a consideration of the sections which provide a special remedy for lenders who have obtained an assignation of the rates in terms of the 32nd section. They are empowered on default being made in payment to require the appointment of a judicial factor. But then it is provided that the special statutory remedy shall be without prejudice to any rights, remedies, or securities otherwise competent to them. That appears to me to save the ordinary remedies given by law to creditors whose debts are unpaid, and therefore even in the case of those creditors who have the special remedy of putting the revenues into the hands of a factor for their benefit the right to use diligence according to law is still left open. It does not follow that either they or any other creditor could use diligence after a judicial factor had been appointed. That is a different question. But it does not arise and I express no opinion upon it, because no such appointment has been made or required at the date of the pursuer's arrestment. In like manner I do not consider whether contractors or other favoured creditors are precluded from enforcing payment by diligence, so as to acquire a preference *inter se*. But if their right to be paid first in order will not prevent the creditors holding assignations from using the ordinary remedies given by law, I do not see why it should exclude the legal remedies of creditors holding decrees for payment. The argument is that since their right is statutory nobody can come in before them. But that fails if creditors who come after them according to the order prescribed may acquire a preference either by virtue of the special statutory remedy or by taking advantage of the ordinary remedies which the law allows.

Another argument of a different kind was urged with great ingenuity. It was said that the pursuer knew what the prescribed order of payment was, and therefore that it was an implied term of the contract of loan that he should do nothing to interfere with it. I do not think that this is sound. If the Provisional Order with the force of a statute excludes the pursuer's right to use arrestments it is of no consequence whether he knew it or not. If it does not, then his knowledge of conditions that do not exclude arrestment cannot imply an obligation on him to abstain from using that diligence.

I desire to add that I express no opinion with reference to the right of creditors to use any other diligence than that now in question—that is to say, the arrestment of money due to the Commissioners in the hands of a banker. It by no means follows that creditors would be entitled to attach by diligence any property or plant belonging to the statutory undertaking and forming part of it. That would raise a different question. The difference is pointed out by the judges in *Howden* v *The Lossiemouth Harbour Trustees*, and I express no opinion upon it. All that we require to consider is is whether the money said to have been arrested can be lawfully attached by that diligence, and I see no sufficient ground for holding that it cannot be so attached.

Lord Adam, Lord M'Laren, and the Lord President concurred.

The Court recalled the interlocutor of the Lord Ordinary and granted decree in terms of the conclusions of the summons.

Counsel for the Pursuer—Baxter—Guy—W. L. Mackenzie. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders—Ure Q.C.—J. H. Millar. Agents—Tods, Murray & Jamieson, W.S.