into two branches—the discretionary and the judicial; and I am disposed to think that by "an action connected with teinds" the statute means nothing more than to refer to all those actions which are the proper subject-matter, according to its existing jurisdiction, of the Teind Court, and taking this as already ascertained by previous legislation or practice, to say that one class shall go before the Division as a quorum of the Court and the other must go before a quorum of the whole Court. I am therefore of opinion that the plea as to competency is also unfounded.

I consider, therefore, that as regards the declaratory conclusions the action is perfectly competent before this Court, and is rightly before this Division. It may be that if these declaratory conclusions should be decided in such a way as to make it necessary for the pursuers to apply for a modification and locality of stipend, the conclusions for that purpose might not be conclusions which this Division ought to consider at all, but may raise questions for a quorum of the whole Court of Teinds. I am disposed to think that that would be so. But then, when that question arises there will be no difficulty in sending these conclusions to the whole Court of Teinds by whatever procedure may be found to be necessary and appropriate for that purpose; and I should be disposed to think in the meantime, without finally deciding a point which the Court may have to consider hereafter, that an interlocutor of the Division would be quite sufficient for that purpose. For the present, however, it is enough to say that in my opinion the declaratory conclusions are competently before us.

In accordance with these views, if your Lordships agree with me, I think we must repel the first and second pleas for the defenders. As to the bearing of an interlocutor to that effect on the conclusions of the summons, we have in the first place to consider the first conclusion to which I have not previously referred, which is for the conjunction of this summons with a summons of disjunction and erection at present pending before the Commissioners of Teinds. That conclusion we could not in any case give effect to at present, because I presume that summons is not here, but if it were, I confess I see no advantage in that conclusion at all, and there might be some embarrassment in effecting such a conjunction. My impression is that Mr Ure is of that opinion, and will therefore assent to what I propose to do, to dismiss that conclusion of the summons. Then the remaining second and third conclusions cannot be disposed of on their merits without an inquiry into the facts. I should propose to your Lordships that we should repel the first and second pleas for the defenders, and remit to the Lord Ordinary to proceed; and the parties will no doubt consider before his Lordship, and his Lordship will consider, what is the proper method of conducting an inquiry which will be necessary for him to dispose of these conclusions on their merits. Whether there is any necessity for proof at large, or whether the facts might not be more satisfactorily ascertained by a remit, is a question which I think the parties ought to consider with some care. I should observe, however, that there is a plea which will have to be disposed of in the first place, to the effect that the action is irrelevant. We did not hear any argument on that plea as a separate point, and I do not know on what ground it is said to be irrelevant if the first and second pleas are not well founded. But having heard no argument on it, I should not propose that your Lordships should in the meantime foreclose anything that may be said about it, and should remit the case for further consideration to the Lord Ordinary.

LORD ADAM—I concur.

LORD M'LAREN—I concur. May I add this on the second point which Lord Kinnear has so ably stated in his opinion—that it seems to me that whenever it is established that the jurisdiction which we exercise under the Acts relating to teinds and the plantation of kirks is properly Court of Session jurisdiction, all other difficulties disappear, because if an action or a case of any kind is competently brought before the Court of Session, and from any cause has rightly or wrongly found its way into a branch of the Court which cannot conveniently dispose of what remains of the case, the practice is to remove it to another branch of the Court which is the proper Court for dealing with that particular question; and I see no reason why the forms with which we are familiar in other branches of the jurisdiction should not be applicable to teind processes.

The LORD PRESIDENT was absent.

The Court repelled the first and second pleas-in-law for the defenders, and remitted to the Lord Ordinary to proceed with the cause.

Counsel for the Pursuers—Ure, Q.C.—John Wilson. Agents—Forbes Dallas & Company, W.S.

Counsel for the Defenders — Solicitor-General (Dickson, Q.C.)—C. N. Johnston. Agents—Forrester & Davidson, W.S.

Wednesday, February 21.

SECOND DIVISION.

LYNCH'S JUDICIAL FACTOR *v.* LYNCH.

Trust — Gain on Investments — Rights of Beneficiaries inter se—Division and Distribution of Estate.

A testator directed his trustees to divide the residue of his estate into two equal portions, to pay to his son and daughter respectively £1000 each, and to hold the remainder of each

portion for behoof of the son and daughter respectively in liferent for their liferent alimentary use only, and for behoof of their children in fee, but with a power to make advances out of capital to the son. Advances were made in pursuance of this power, first to the son, and after his death for the maintenance of his children, with the result that their share was gradually diminished. Part of the estate came to be invested in ground annuals which increased greatly in value. At the dates when they were purchased the share of the estate held for behoof of the daughter and her children was more than double that held for behoof of the children of the son. Thereafter the difference between the respective interests of the beneficiaries continued to increase, and when the share of the son's children became payable it only amounted, taking the investments at cost price, to the sum of £287, whereas the share held for the daughter and her children amounted on the same basis to the sum of £4376. No apportionment of the investments as between the two sets of beneficiaries had been made. *Held* that, notwithstanding the difference between the interests of the two sets of beneficiaries when the ground annuals were purchased and the still greater difference between them thereafter, each set of beneficiaries was entitled to be credited with an equal share in the amount of the increase in the value of the investment.

Teacher's Trustees v. *Teacher*, Jan. 10, 1890, 17 R. 303; and *Scott's Trustees* v. *Scott*, November 1, 1895, 23 R. 52, *followed*.

James Lynch, sometime coach proprietor and funeral undertaker in Glasgow, died on 19th November 1873 leaving a trust-disposition and settlement whereby he conveyed his whole estate, heritable and moveable, to the trustees and for the trust purposes therein mentioned. By this deed he directed his trustees, *inter alia*, to divide the residue of his estate into two equal portions; to pay £1000 to his son James Lynch junior; to retain one-half of the residue (after deducting the said sum of £1000) for behoof of James Lynch junior in liferent for his alimentary liferent use of the free annual proceeds only, and for behoof of his whole lawful children and the survivors and survivor of them equally in fee, but with a discretionary power to the trustees to pay to James Lynch junior such further sum of his share of residue as they might think proper after the expiry of four years from the date of the truster's death; to hold the other half of the residue for behoof of his daughter Mary Margaret Lynch, to pay her out of this share of residue a liferent alimentary annuity of £80 from the date of the truster's death until she attained the age of twenty-one; to accumulate the balance of revenue of the produce of her share of residue until she attained the age of twenty-one; and thereafter to hold the same for her behoof in liferent for her liferent alimentary use of the free annual proceeds only, and for behoof of her whole lawful children and the survivors and survivor of them equally in fee, but declaring that the trustees should be bound to pay to her £1000 out of her share of residue at any time she might require payment of the same from them after she attained majority, to be applied by her as she might think proper.

The truster also desired and requested his trustees to carry on a pawnbroking business carried on by him, and to retain the property in which it was carried on until his daughter attained the age of twenty-one.

The truster empowered the trustees to sell the whole or any part of the residue, to invest, *inter alia*, in heritable security in Scotland, or in the purchase of heritable property, and to alter and vary the investments.

The truster was survived by his son James Lynch junior and by his daughter Mary Margaret Lynch. James Lynch junior died on 10th February 1878 survived by a widow and three daughters, of whom two died unmarried and intestate in 1888 and 1894 respectively, and aged respectively sixteen and nineteen years. The only persons interested in their succession were their mother and their surviving sister.

The truster's daughter attained majority on 25th April 1883. She was married on 27th April 1880, and had issue.

The estate remained under the charge of the trustees until 18th November 1879, when Mr David Simpson Carson, chartered accountant in Glasgow, was appointed judicial factor thereon.

Prior to the last-mentioned date, the trustees had paid to the said James Lynch junior the sum of £1000 referred to in the settlement, and had also paid to him considerable sums to account of the capital of his share of the residue. They had further paid to or for behoof of the said Mary Margaret Lynch certain sums out of the income of her share, including the annuity of £80 referred to in the settlement, and had accumulated the balance of revenue of her share in terms of the settlement. They had further realised certain portions of the estate, and had carried on the pawnbroking business referred to in the settlement.

At the date of the judicial factor's appointment the estate was reported as of the value of £7169, 13s. 3d., the principal items being (1) a bond and disposition in security for £2000, (2) capital invested in the pawnbroking business £3907, and (3) the property in which that business was carried on, estimated at £600.

On adjustment of the accounts between the two beneficiaries as at the said date it was found that the following were the respective interests in the estate, viz.—

1. Representatives of James Lynch junior . . .	£1991 0 6
2. Mary Margaret Lynch (now Mrs Griffin) . . .	5178 12 9
	£7169 13 3

On 24th March 1880 the Court, upon a note by the first party asking for special

powers, authorised him to pay to the testamentary trustees of the said James Lynch junior (who were also tutors and curators to such of his children as were in pupillarity and minority) the sum of £120 per annum for the board, maintenance, and education of the children of the said James Lynch junior.

The pawnbroking business was carried on under the direction of the judicial factor until September 1883, when it was disposed of, realising a surplus on capital account over the value, as estimated at the judicial factor's appointment, of £309, 6s. 4½d., which was credited to the two sets of beneficiaries in equal shares. Between the date of the factor's appointment and that date the profits and loss of the business had been credited or debited in equal shares between the truster's daughter Mrs Griffin and the representatives of her brother, and the revenue accounts between the two beneficiaries were adjusted by debiting James Lynch junior's representatives with interest at 5 per cent. on the amount paid to him in excess of what Mrs Griffin had received.

The judicial factor between 20th March and 29th August 1883 paid to Mrs Griffin the sum of £1000, directed to be paid to her on her majority.

Since 31st December 1883 the judicial factor each year made a division of the revenue of the estate between the two beneficiaries, in the proportion of the capital respectively appearing at their credit as at 31st December of the previous year. He paid Mrs Griffin the actual amount of revenue thus accruing on her share, and paid to or for behoof of the children of James Lynch various sums within the limit allowed by the Court's interlocutor. These sums, however, always exceeded the revenue belonging to their shares, with the result that their capital had gradually been reduced to a small sum.

On 15th December 1880 the judicial factor purchased two ground-annuals at the price of £920, and on 15th May 1882 he purchased two other ground-annuals at the price of £864. At 31st December 1880 the two sets of beneficiaries were interested in the estate to the extent of £1656 and £5112 respectively, and at 31st December 1882 to the extent of £1579 and £5378 respectively.

At 31st December 1898 the estate as entered in the accounts of the judicial factor was valued at £4664, 4s., the principal items being (1) the property in which the pawnbroking business had been carried on, estimated at £600; (2) cost price of ground annuals, £1784; (3) bond and disposition in security for £2000, and (4) cost price of £200 Consols, £214, 15s. 11d. The respective interests of the beneficiaries at the same date as estimated by the judicial factor without allowing for profits and losses arising from the increase or decrease of the value of the assets were as follows—

1. James Lynch's representatives	£287 7 10
2. Mrs Griffin	£4376 16 2
	£4664 4 0

The only surviving daughter of James Lynch junior attained majority on 14th June 1898, and it became necessary for the judicial factor to pay out the balance of the share belonging to her in her own right, and to her and her mother the share belonging to them in right of her deceased sisters.

No apportionment of any of the individual items of the estate between the two sets of beneficiaries had ever been made, the estate having both during the management of the trustees and that of the judicial factor been treated as one fund, and the revenue divided as above mentioned.

The judicial factor intended to apply to the Court for leave to sell the property in which the pawnbroking business had been carried on. He had obtained a valuation, from which it appeared that it might realise a sum of £450. He desired to retain the ground-annuals as an investment. He had obtained a valuation of them, from which it appeared that as at 14th April 1899 they were worth £2340, being £556 more than the sum at which they stood in the judicial factor's accounts, and that this increase had taken place progressively between the years 1885 and 1897.

In these circumstances it became necessary that the statement of the interests of the beneficiaries as at 31st December 1898, above set forth, should be readjusted so as to give effect to the interests of the beneficiaries in the possible profit and loss on valuation of the property in which the pawnbroking business had been carried on, and in the enhanced value of the ground-annuals. The parties were agreed that the profit or loss on the valuation of the former asset should be divided equally between the two sets of beneficiaries, but certain questions arose with reference to the ground-annuals, and in these circumstances the present special case was presented for the opinion and judgment of the Court.

The parties to the special case were—(1) The judicial factor; (2) Mrs Griffin, the truster's daughter, with consent of her husband, and her children, and her husband as their tutor, curator, and guardian-at-law; and (3) the surviving daughter of James Lynch junior, and his widow.

The parties were agreed that the statement of the estate and of the beneficiaries' respective interests therein as at 31st December 1898 above set forth was correct, subject to such alterations as might be necessitated by the valuation or realisation of the assets, and by the decision of the Court on the questions submitted in this case.

The second parties maintained that the profit accruing by the increased value of the ground-annuals should be divided in the proportions of the interests of the beneficiaries as at 31st December 1898, or alternatively that it should be divided in the proportions of their respective interests as at the dates when the ground-annuals were purchased.

The third parties maintained, *inter alia*, "That the value of the various assets belonging to the estate should be ascertained by sale, or alternatively by valuation, as

at the date of division of the estate (which the parties are agreed to hold as at 31st December 1898), and that the profits or losses arising from certain assets of the estate having increased or decreased in value between the date of their acquisition by the first party or his predecessors and the date of division, should be divided equally between the two sets of beneficiaries."

The questions of law for the opinion and judgment of the Court were, *inter alia*, as follows—"(4) Is the profit accruing if the said ground-annuals be sold, or the enhanced value as appearing from the said valuation if they be retained, to be credited equally to the second and third parties? or (5) In what proportion is it to be credited?"

Argued for the second parties—When the ground-annuals were purchased the interest of the second parties in the estate with which that purchase was made was much greater than that of the third parties, and the difference between their respective interests continued to increase continuously thereafter. So much was this the case indeed that if the second parties had received as much out of the estate as the third parties received, the judicial factor would not have been able to retain the ground-annuals as an investment. It was only fair therefore that the second parties should get a greater benefit from the increase in value of these investments than the third parties. At most the third parties were only entitled to a share in the increase proportionate to the amount of their interest in the estate as at the date when the ground-annuals were purchased.

Argued for the third parties—There was here no specific appropriation of any particular investments to the share of any of the beneficiaries, and the whole estate was held as an unallotted whole. That being so, both sets of beneficiaries were entitled to share equally in the increase upon the value of any investment which might happen to have increased in value—*Teacher's Trustees* v. *Teacher*, January 10, 1890, 17 R. 303, *per* Lord Shand at page 314; *Scott's Trustees* v. *Scott*, November 1, 1895, 23 R. 52, *per* Lord Trayner at pp. 58 and 59.

LORD ADAM — There are six questions which we are asked to answer in this case, some of them alternative, and some after concession we are relieved from answering. The first we need not answer because of the concession that the judicial factor might hold instead of realising. As regards the second question, it has, I understand, been arranged of consent that the first party is to be entitled to hold the ground-annuals and to pay the third parties their share on the basis of the valuation. The third question it becomes unnecessary to answer now for the same reason.

The real question we have to answer is this—"Is the profit accruing if the said ground-annuals be sold, or the enhanced value as appearing from the said valuation if they be retained, to be credited equally to the second and third parties?" I think there is a little ambiguity in that question, because I for one misunderstood the question, and thought at first that Mr Grainger Stewart was claiming the half after division, but upon explanation it appears that it is not so, and that all that Mr Grainger Stewart meant to ask under the question was, that before division the value should be credited equally to the two. That is, I think, the correct statement of Mr Stewart. Therefore while answering that question as I propose to do in the affirmative, I would wish to qualify it in that way. That would make it clear, and I think that brings out the real question. Now, the history of these shares seems to have been this, that the testator here after giving some liferents apparently left the fee of his estate to the children of a son and the children of a daughter as I understand. That was in equal proportions, one-half to each. And the estate vested in these children *a morte testatoris*, payment being postponed in respect of those liferents. The estate was in fact divisible between them long ago, but it has never been divided. It has been kept and administered as a joint trust-estate up to this present time, first under the care of trustees, and now under the care of a judicial factor appointed by the Court. The estate is now to be divided, and the question arises in the division of that estate, how these ground-annuals are to be apportioned. I think there is no other question that we have to answer.

Now, these ground-annuals, as I understand, were bought by the judicial factor in the course of administering the estate. They were bought out of trust money, and bought as an investment, and they were allowed to remain as part of the general trust-estate up to this hour. In the meantime it appears that while the share of the children of the daughter and the share of the children of the son in the trust-estate were equal, the children of the son from time to time got not only payment of their share of the income of the estate, but they got from time to time payment of sums to account out of the capital of the trust estate, with the result that, speaking generally, the representatives of the son, I think, when the judicial factor came into possession of the estate, had got larger payments than the representatives of the daughter, or at anyrate that the one was entitled to about £2000, and the other to about £5000, the difference being produced by the payments made. Now, in consequence of further payments being made the son's representatives in one view would only be entitled to £287, and the daughter's representatives to £4376. But that sum of £287 will be increased if we answer the question in the affirmative, by an additional sum, and the daughter's representatives instead of getting the £4376 will also get a somewhat increased sum. These are the grounds on which this question arises.

I think the proper way to deal with this estate, like every other trust-estate in similar circumstances is this, when all the investments are kept together, no allocation being made of an investment to one party

or to the other party, but the estate kept as a joint-estate, with all the profits and losses arising on the investments of the trust-estate falling on the parties equally if they had equal shares, and proportionally if they had not—I say the proper way to state the account when a division comes to be made is to put into the account the present value of this trust-estate—the present value of those investments—and having thus ascertained the gross amount of the joint undivided estate, then to divide it into the respective shares of the parties. It may be one-half each originally, but if one of the parties has got payment of nine-tenths of his share of the estate, then he will only now get the remaining one-tenth. That is the way that this question should be treated, and accordingly I think in the account which is proposed to be dealt with here, to those sums of £920 and £864, which represent the purchase value of these two ground-annuals, there should be added (which is another way of coming to the same amount) the sum of £556 of increased value. Of course, the more correct way to do with them would be that the increased value of each annual-rent should be stated in the account. I think the account should be dealt with in that way, and that to the amount of £4664 there should be added £556 of increased value, because it has increased the value of the joint-estate which is now for division.

LORD TRAYNER—The third party having conceded that the second question should be answered in the affirmative and the sixth question in the negative, there remains only the fourth question to be determined by us. In reference to it I confess to feeling some sympathy with the argument offered by the second party. The ground-annuals in question were bought by the judicial factor in December 1880, and at that time the estate held by him belonged, taking it roughly, in the proportion of one-third to the third party and two-thirds to the second party. Now, as the capital invested in the ground-annuals was furnished by the factor in this proportion, it is not unreasonable to maintain that the profit or gain (by way of increased market value) made on the investment should be divided between the parties in a like proportion. But the answer to this view is, I think, that neither party was investing capital—no part of the capital of the factory estate had been appropriated or set aside for any beneficiary. In the due administration of his office the judicial factor invested part of the estates held by him, and any profit made on that investment must go to the estates generally just as a loss (if loss had been sustained) would have been borne by the estate generally. The profit goes into the residue of the estate, and falls to be divided among the beneficiaries according to their rights in the residue. This was the view given effect to in the cases of *Teacher* and *Scott*, and I think the same view must be given effect to here. That leads to the fourth question being answered in the affirmative.

LORD JUSTICE-CLERK—I am of the same opinion.

LORD YOUNG and LORD MONCREIFF were absent.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties to the special case, Find it unnecessary to answer the first, second, third, and sixth questions therein stated: Answer the fourth and fifth questions therein stated by declaring that the enhanced value of the ground-annuals falls to be credited equally to the second and third parties: Find and declare accordingly, and decern: Find the third parties entitled to their expenses as against the second parties: Allow them to lodge an account thereof," &c.

Counsel for the First and Second Parties—Younger. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Third Parties—W. Campbell, Q.C.—Grainger Stewart. Agents—Gray & MacDermott, W.S.

Wednesday, February 21.

SECOND DIVISION.

[Dean of Guild, Coatbridge.

BROWN *v.* YOUNG.

Police—Buildings—Light and Ventilation—Open Space Attached to Dwelling-Houses—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 170.

The Burgh Police (Scotland) Act 1892, section 170, enacts that "every building erected for the purpose of being used as a dwelling-house . . . shall have all the rooms sufficiently lighted and ventilated from an adjoining street or other open space directly attached thereto equal to at least three-fourths of the area to be occupied by the intended building." All the rooms in a proposed building were designed to have each a door and a chimney and one window which opened upon a court containing more than the minimum area specified in the section, and belonging to the proprietor of the proposed building. *Held* that the provisions of the statute as to ventilation and lighting had been sufficiently complied with.

The section does not require that there should be any open space upon more than one side of a proposed building, provided that all the rooms in it have windows which look out upon some open space which satisfies the requirements of the statute.

When all the rooms are each provided with a door, a chimney, and a window opening upon a space which satisfies the requirements of the statute, the Dean of Guild is not entitled to refuse a lining upon the ground that, looking to the