That is the most difficult case; but even here the factor would be able to give the proper superintendence, while he employed all the usual officials in the actual working of the concern. In the second place, the railway may be leased to another company. This is a very simple case, for all that the factor would have to do is to draw the rent which is paid under the lease. Then, in the third place, the company may have entered into a working agreement with another company; and this was a more complicated position—one of a mixed character—intermediate betwen the other two. But in all these cases there is no distinction in the powers which the judicial factor possesses. In the one form and in the other he is appointed to undertake the management of the company, whatever that may involve.

It is very possible, indeed, if there be no objection to their appointment, that one or more of the directors or other officials may be chosen to undertake the management under the control of the Court. That is quite a possible case. On the other hand, the directors may be unsuitable; and the creditors are perfectly entitled to come forward and ask that some one else should be appointed. But this, too, is a matter of detail of little value in the construction of the statute. The factor, whoever he may be, is to be manager of the company, and that can mean nothing less than the entire control of its affairs under the supervision of the Court.

The respondents have referred to the English statute and to the language which is made use of in it. In England judicial factors are unknown. The law of England has two names—receiver and manager—to denote the office which we know by one name—judicial factor; and the distinction between a receiver and a manager was explained to be—and I think very clearly explained to be—that if a receiver only was appointed on the company it necessarily came to an end; if the company was to be continued, the receiver must also be appointed manager, and hence in the English Act provision is made for the appointment of both officers. But in the Scotch Act the Court are directed to appoint a judicial factor; and this makes the matter much more simple, because the powers of the factor would be limited or extended according to the position of the railway company's affairs. If the line was leased, then there would be nothing to be done but to receive the rent, and the factor would in that case be simply what in England is called a receiver. If, however, the company was working its own line, the factor would have to manage it, and thus take the place of the directors. On the whole matter, the conclusion I have come to is, that this application for special powers is unnecessary; but it may be quite proper to make a declaration in terms of the alternative prayer of the note, that in virtue of his appointment the sole and exclusive power of management of the undertaking, works, and property was vested in the judicial factor.

Lord Mure and Lord Shand concurred.

Lord Deas was absent.

The Court pronounced an interlocutor in terms of the opinion of the Lord President.

Counsel for the Petitioners — D.F. Kinnear, Q.C. — Graham Murray. Agents — Tods, Murray, & Jamieson, W.S.

Counsel for Railway Company — J. P. B. Robertson. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for the other Respondents—Asher—Mackintosh. Agents—Henry & Scott, S.S.C.

HOUSE OF LORDS.

Thursday, March 24.

(Before Earl Cairns, Lord Blackburn, and Lord Watson).

SCOTT AND OTHERS *v.* HOWARD AND OTHERS.

(*Ante*, June 22, 1880, vol. xvii, p. 678, 7 R. 997.)

Property—Sale of Heritage—Conditions.

A theatre and the ground on which it stood were sold under burden of payment of certain annuities to a body of shareholders, who up to the date of the sale were proprietors of the subjects, and under stipulation that each of these shareholders should be entitled to free admission to the building then standing there, it being declared that this right was personal to the shareholders, and that the purchaser should not be entitled to convert the theatre to any other purpose. That theatre was burnt down and a new theatre built—the subject had also been conveyed more than once to new purchasers, the shareholders' rights to payment of their annuities, which had been declared real burdens, being always reserved, and it being always provided that they should be allowed "the privilege to which they are entitled;" and that privilege of admission they had enjoyed for several years. *Held*, in an action brought against the lessees of the new theatre by the shareholders to have it declared that they were entitled to the privilege of free admission, that their right being a mere personal right depending on contract, must be renewed with each successive disponee, and that neither the reservation of "the privilege to which they are entitled," nor the possession had by them, was habile to impose the obligation contended for on the disponees of the party, with whom they had originally contracted, and with reference to a theatre other than that mentioned in the deed by which their privilege was created.

This case was reported *ante*, June 22, 1880, vol. xvii, p. 678, 7 R. 997. The contentions of the pursuers (the rentallers), to which effect had been given by LordCurriehill in the Outer House, were rejected by the Lords of the Second Division, Lord Ormidale dissenting, and the defenders assoilzied from the conclusions of the summons. The pursuers now appealed to the House of Lords. The terms of the deeds by which their rights were constituted, and, as they alleged, transmitted, and the history of the transmission of the subjects and of the buildings thereon, will be found in the former report.

At delivering judgment—

Earl Cairns—My Lords, this case lies in an extremely short compass, and for the purpose of the observations which I have to submit to your Lordships it will not be necessary for me to refer to more than two of the deeds or documents which have been commented upon in the argument.

I will take, in the first place, the deed of 1858. If it is the case that that deed confers upon those who are called in it the rentallers, and who are represented by the appellants at your Lordships' bar, a right to have free admission into whatever theatre may from time to time stand upon the ground mentioned in that deed, then of course, inasmuch as the present theatre is standing upon that ground, the appellants are right in their contention, and do not require to refer to the other documents in the case. My Lords, that deed of 1858 is in the nature of a disposition in favour of one John Brown, who appears to have been one of a certain number of persons who had carried on for some time prior to 1858 the Queen's Theatre and Opera House in Edinburgh as an adventure in which they were all interested, and the expenses of which they had in some way or other among themselves provided. They appear for some reason to have been anxious to change that state of things and for the future to make John Brown the person who would be the owner of the property and who would carry on the theatre, and accordingly the deed is itself a conveyance to this John Brown.

Now, the consideration of the deed appears to me to be that John Brown in place, as I understand it, of paying the purchase money to them, undertook to pay, and in point of fact did pay, the debts owing upon the concern, and relieve his co-adventurers of those which were not actually paid by him at the time. That was the consideration on the one side. In return the co-adventurers seem to have had two considerations passing to them. The one was a burden upon the property of an annuity of £2 sterling to each of the rentallers, that sum I suppose representing in some rough way the interest upon the money which each had contributed. The other was certain conditions for free admission which were secured to them.

What passed to John Brown was the ground upon which the property stood (which I understand was held in feu of the Governors of Heriot's Hospital) and the edifice which is thus described—"The edifice which is now called the Queen's Theatre and Opera House, and the shops and others adjoining thereto or connected therewith, all erected on the area or piece of ground above described, and the whole furnishings and fittings of and in said whole buildings, as well heritable as moveable." We all know that the furnishings and fittings of a theatre—the moveable property—are generally of very considerable value. No doubt they represented an important item in that which was conveyed to John Brown. Then, to pass over a provision for the payment of the annuity of £2 to each rentaller, the privilege of free admission is thus described—"Providing and declaring that each of the said shareholders or rentallers, or the assignee or successor of such shareholder or rentaller, shall at all times be admitted to free admission to the audience department of said theatre other than the present private boxes and the box presently set apart for us, the first and second parties hereto, as trustees foresaid, and which box shall continue to be set aside for the sole use of us, the said first and second parties, as trustees foresaid, and our successors." Then further on—"In the event of a share being acquired by more than one individual, only one of such individuals shall be entitled in virtue thereof to free admission." Then it provides and declares that Brown shall not be entitled, without the consent of the shareholders or rentallers, "to convert the said theatre or opera house to any other use or purpose than a theatre and opera house;" and also providing and declaring that the said theatre and opera house shall be kept open for performances during at least six months in each year; and in the event of the said John Brown or his foresaids letting the said theatre and opera house to the lessee or tenant for the time being of the Theatre Royal, Edinburgh, he shall take such lessee or tenant bound, so long as he continues tenant or lessee of Theatre Royal, to give the shareholders or rentallers of the said Queen's Theatre and Opera House free admission to the said Theatre Royal."

Now, my Lords, every word of that is a stipulation guarded by and carefully connected with this "said Theatre Royal"—that is to say, the edifice which then stood upon the ground called by that name. It appears to me that, stopping there, there is nothing in any one of those sentences which would enable you to say that if without any act done by Brown himself something has happened which causes that edifice entirely to disappear and no longer to be in existence, there is an engagement on the part of Brown to give this right of free admission to an wholly different building. Supposing it had been the case that under the last sentence I read, in place of continuing to occupy it himself he had let the building to a tenant, and the building had disappeared, so long as that building was there he was bound to make the tenant agree to continue the right of free admission, but could it be contended that the tenant would be under an obligation if he subsequently substituted a different building upon the property to continue this free right of admission? It was put in argument by the learned counsel at the bar, Would John Brown be bound, or would his tenant be bound, if the theatre was burnt down, to build upon the ground another theatre? Might he not build a house of a different kind? It would be very difficult indeed to contend that there was anything here which would oblige him to replace the theatre if it was burnt down by another theatre. There is no such contract in any part of the document.

Then, let us see what the reason of the thing would lead us to expect to find. This theatre, as I pointed out, with all its furniture and fittings, was provided, apparently, in the first place, by the money of the adventurers, and that money was repaid to them by Brown as the purchase-money for the theatre. It was quite natural that when they were dealing with that which had been provided by their own money, they might, as part of the consideration in parting with it in favour of Brown, make a stipulation for free admission into that building which they virtually had built, but is there any

such reason for supposing that without any stipulation binding them to contribute to the expense of a new theatre they could have imagined that they would have a similar right to extend their right of free admission into another theatre, provided not by their own money but by the money of another person? Then, again, if it had been intended that this right of admission should pass from the existing theatre to a new theatre, one would have expected to find stipulations as to effecting insurance, as to keeping-up the insurance, as to employing the money secured by the policy in rebuilding a theatre of a similar kind if the existing one had been burned down, and indeed express stipulations as to the new building and the right of admission to the new building. But we find nothing of the sort, and yet it is impossible not to see that the possibility of the theatre being burned down would be in the minds of those who were entering into this contract, because in point of fact the theatre had been burnt down only a few years before.

My Lords, I therefore come to the conclusion that upon this deed, if it stood there, and if the question had been brought before your Lordships, no other deed having intervened, but the theatre having been burnt down and rebuilt, we will say by Brown or by some one representing him—if the case had arisen upon that state of things—I do not see how any one of these rentallers could have maintained seriously his right to have a free admission into the new theatre. Indeed, I am bound to say that I do not think that the learned Judges of the Court below who took the view for which the appellants contend, rested their opinions so much upon the deed of 1858 as upon the subsequent deed.

Then, my Lords, as to the subsequent deed the case is this—It is said, even supposing that we (the appellants) cannot support our case upon the deed of 1858, still, after the theatre was burnt down and after a new theatre was erected, there comes another deed in 1874 (in the meanwhile the property had passed from Brown to his trustee Soutar), and in that other deed there are stipulations contained, no doubt as between Soutar and the person to whom he was selling, by which Soutar stipulated in favour of the rentallers in words which secured to them this right of free admission, and the person who took under this deed from Soutar was therefore bound by that deed to give these rentallers the right which Soutar stipulated for in their favour, whether they would or would not have been entitled to that right under the earlier deed.

Now, there again, my Lords, I am bound to say, in the first place, that it would have been a very singular thing if Soutar had been found to have stipulated in favour of the rentallers for these rights, supposing that they had not got them already; Soutar had no interest in doing so; he was not in any way concerned for the rentallers; he was simply acting as the representative of the estate of John Brown, and trying to do the best he could for that estate—trying to get the largest sum of money he could in parting with this property. Of course the closer the bargain he was making for conditions for third persons the less he would get for that estate. I therefore certainly should expect to find very clear and unambiguous provisions before I could come to the conclusion that Mr Soutar, of all people in the world, was securing for those rentallers something which the rentallers were not entitled to. But, on the other hand, looking at Mr Soutar's position, it is exactly what one would expect to find that in selling this part of the estate for which he was a trustee, he would take very good care that he should not, by anything that he did in his conveyance, prejudice any existing right on the part of third parties, because in doing so he would very possibly bring upon himself, or bring upon the estate of which he was a trustee and representative, some claim from those persons whose rights he might thus be supposed or alleged to have prejudiced by the form of his conveyance.

That, of course, my Lords, is merely an *a priori* observation, and does not decide the case. It may be that the words are so clear that we shall find that the rights were actually created for the benefit of the rentallers; but if any other exposition can be given to the deed, that other exposition would certainly be more in accordance with the antecedent probability of the case.

Now, when I look at this deed of 1874 (I will not complicate the case by referring to the subsequent lease), the words in that deed seem to me to be nothing more than words of ordinary style, fitted and calculated for passing, as to the person taking under the deed, any obligations which at present were existing in connection with the property—not at all words which in any way necessarily create any new obligation a new benefit for any third party—"Declaring always that the whole subjects and others hereby disponed are so disponed with and under and subject to the whole burdens and others incumbent on me, the said William Shaw Soutar, as trustee foresaid, or on the said Allan M'Laren Brown, or on the trust estate of the said John Brown, under the titles of said subjects from and after" a certain date, "and specially, without prejudice to the said generality, the said William Hugh Logan and his foresaids shall thenceforth pay the annual sums or annuities due to the rentallers or shareholders whose names are enumerated in the schedule, and allow these parties the privileges to which they are entitled." There is no enumeration of the privileges; there is not even a recital here in the earlier part of the deed of certain privileges of free entry. There is simply a use of these general words, in order to answer which you must first satisfy yourselves as to what the privileges are to which the persons at that time were entitled—that is to say, entitled in point of law. It is not to continue to them advantages which they had been used to have—which they were enjoying *de facto*—but to continue to them privileges which they were entitled to *de jure*. This is what is secured to them, and only that.

My Lords, I cannot see there a single word which in any way creates for any third party any new privilege. It leaves the rentallers in the enjoyment of everything they had in point of law, and gives them nothing further. That I understand to be the view which was taken by the majority of the learned Judges in the Court of Session. It seems to me most satisfactory, and I therefore move your Lordships that the interlocutor appealed from be affirmed and the appeal dismissed with costs.

Lord Blackburn—My Lords, I so entirely agree with what has been said that I scarcely think it necessary to do more than point out the

particular things upon which I think the matter turns, and say that I agree in what has already been said upon them.

I think the first question of all is upon the deed of 1858—What was it that the parties meant by that deed, and what is the effect of the instrument as far as regards this privilege of admission to the theatre? It seems quite clear that it was agreed first of all that there should be an annuity of £2 a-year secured upon the land as a real burden, and it was intended that that annuity should be transmitted with each share, and a special manner was provided in which the share might pass. Then there was added, that besides the annuity passing with the share there should also pass the privilege of free admission after mentioned, and that that privilege of free admission after mentioned is stated in these words "be entitled to free admission to the audience department of said theatre other than the present private boxes," and so forth. Now, what does that mean. It would have been perfectly competent to the parties if they had wished it, and had expressed it, to say there shall be free admission to this present existing theatre so long as this present existing theatre continues to exist and no longer. If they had said that, nobody could have doubted their meaning or that it could be carried out; or they might have said—There shall be a right of free admission to this present theatre so long as it exists, and if this present theatre is destroyed by fire or other accident, the disponee shall be obliged to erect another theatre and give us a similar right of admission into the other theatre when it is erected. They might have done that, but certainly it is pretty clear upon this deed that they have not done it. There would have been a great many provisions required to be made if they had been going to do that, it would have been necessary to provide who should furnish the money and so on. But there is nothing said about it.

My Lords, there is a third provision, which I may call a half-way provision, which they might have agreed to; they might have said—We (the rentallers) shall be entitled to free admission to this theatre so long as it exists, and if it perishes by fire the disponees shall be under no obligation to rebuild it, but if they should rebuild the theatre they shall be under an obligation to give us free admission into the new theatre when rebuilt as much as into the old one. There would have been the same difficulties to some extent as before, nearly all the same difficulties as before, if that had been done—difficulties about providing who was to furnish the money and so on. I mention this because I think that the Lord Ordinary, though he does not in express terms say so, must have persuaded himself that the meaning of the deed of 1858 was to adopt the middle course I have spoken of. He does not give his reasons for that, and I have looked in vain to find them. I do not think that that would be the natural and *prima facie* thing that one would expect the parties to do, and I cannot find a single word in the deed of 1858 doing it.

I come therefore to the conclusion that under the deed of 1858 the shareholders would have a right of free admission to the theatre so long as that theatre continued to exist, and yet when that theatre was destroyed by fire that right of free admission was gone—had perished with the theatre—and was not revived when the new theatre was built in its place. That, I think, is the opinion of the majority of the learned judges of the Court of Session—that is to say, of the two judges whose opinion at present stands—and I can only say that I agree in it.

Then it was said (and that, I think, is the ground upon which Lord Ormidale puts it) that the right was given by a subsequent deed of conveyance. I do not think it is necessary to refer to the same terms in subsequent deeds, because in the deed of 1874 there are the words which are relied upon. In that deed there is a conveyance of this property subject to all the burdens that were imposed by the deed of 1858, and then come the words—"And specially without prejudice to the said generality, the said William Hugh Logan shall pay annually the sums or annuities due to the rentallers or shareholders, and their successors and assignees, and allow these parties the privileges to which they are entitled." Now, it is to be observed that that is mentioned "specially and without prejudice to the said generality" as one of the burdens imposed by the deed of 1858, and if the burden imposed by the deed of 1858 had been a burden to admit them to any subsequently built theatre, I have little doubt that that would have continued it to them. But if that burden was not to admit them to any subsequently built theatre, can it be said that this creates *de novo* and gives a fresh right to these rentallers, and that it was intended to do that by these words? I think not. I think you must look at the words in their natural meaning and signification, and I am convinced that it must have been the object of the parties to say this—We do not say whether or no under the deed of 1858 you (the rentallers) have a right to enter into the substituted theatre as you had into the old one. Mr Soutar, judging from his expression, seems to have rather assumed that they had, but the parties do not say in the deed whether they have it or not. They say, "if the rentallers have that right, we specially agree that you (the disponees) must keep it up, but if they have not that right, we will say nothing about it; we do not settle it in one way or the other. All we say is, that if they have that right you shall admit them. If they have not that right, but assert that they have, and you assert that they have not, you two must fight it out between you. I (Mr Soutar) have nothing to do with that." That, my Lords, certainly seems to me to be what is intended.

Lord Ormidale, I observe, says he cannot think that that is the meaning of it. He says, after quoting the words I have just read,—"This cannot, I think, on any fair principle of construction be held to mean, as was contended by the defenders, merely to import a reservation of rentallers' claim to privileges if they had any." He does not explain why he does not think that is a fair construction. I own that it strikes me very much that that was what they really intended to do. He says they might have expressed it more clearly. Perhaps they might. I scarcely know anything that is so expressed that it might not have been put in clearer language, but certainly if they meant that which Lord Ormidale says they meant, namely—We give this privilege which they assert now exists—I think they might have used clearer language than they have done if that was their meaning. I confess, my Lords,

that my own impression is strongly that the meaning of the words, upon any principle of construction that should be applied, ought to be exactly that which Lord Ormidale thinks it was not. Taking that view of the matter, I think this deed cannot possibly give any new privileges, and consequently there is no ground whatever for maintaining the contention of the appellants founded upon it.

The next deed of conveyance is in exactly similar terms, and carries the matter therefore no further. Then comes the lease, which is expressed in words of a different kind altogether; but it is sufficient to say that if the conveyances do not give the privilege, certainly the lease cannot.

Lord Watson—My Lords, the appellants are the representatives of a body of gentlemen who up to the year 1858 were the beneficial owners of the Queen's Theatre and Opera House in Edinburgh, and of the land upon which it was built. In the year 1858 they sold the subjects to the late Mr John Brown—a conveyance being granted by the gentlemen who held the property in question in trust as feuars from Heriot's Hospital. The considerations upon which the conveyance was granted were three—first, that the purchaser (the disponee) should pay the debts owing by the rentallers to the amount of £14,000; secondly, that each of them should be secured in perpetuity in an annuity of £2 per annum over the subjects conveyed; and thirdly, that they should have a certain privilege of admission to the then existing theatre, that last stipulation being the one which has given rise to the present contention.

The annuity was intended to run with the lands, and accordingly it has been effectually made a real burden, but the privilege of admission to the theatre, which was the third consideration, is a right of a description which cannot according to the law of Scotland be made a feudal burden. It is a mere personal right—a right by contract—and if transmitted at all it must be transmitted by its being made successively a matter of contract with all the subsequent disponees who are not the representatives of the original purchaser. It would have been perfectly valid so long as it existed and was in vigour as against Mr Brown, and as against the representatives of Mr Brown, but it would not have been of any force whatever against a third party—a purchaser from Mr Brown or his representatives—unless it was imposed as a personal obligation upon them by the deed of conveyance which they obtained.

Now, my Lords, in this case the circumstances requiring to be noticed further are these—the property has been held successively by two purchasers who are not the representatives of Mr Brown. The theatre since the deed of 1858 was granted has been twice destroyed by fire, and as often rebuilt. The appellants maintain that the privilege accorded to them by the deed of 1858 is still extant and available to them as against the proprietor of the present theatre, and they maintain, alternatively, that even although that obligation had ceased to exist by reason of the destruction of the theatre or theatres by fire, still a new obligation to the same effect has been raised by those deeds transmitting the property from one to another of the singular successors.

My Lords, I do not find that any countenance is given by the learned Judges in the Court below to the first of these contentions. And it appears to me, for the reasons that have already been stated by your Lordships, that it is not well founded. In the first place, the obligation is attached to "the said theatre"—it does not extend further—and "the said theatre," when reference is made to the antecedent, must be held to be the edifice which was then standing. Further, as a contract burdening land, I think it must be strictly read, and, apart from that rule altogether, I can find nothing in the terms of the deed of 1858 which imply that there was to be either a continuing obligation to maintain a theatre upon the land disponed, or that in the event of a fire and of a new theatre being built on the site the disponees should have any right of admission to it. No doubt there is an obligation laid upon Mr Brown and his representatives not to convert the theatre to any other purpose. No question arises under that clause. Probably Mr Brown would have been entitled under it to alter the theatre, and to enlarge it without affecting the right of the rentallers—in fact it might be that he was entitled under that clause to improve the theatre by taking it down and rebuilding it; that would not put a stop to the right of the rentallers, but that is not the case which arises here. The theatre perished through no act or default on the part of the disponee or his representatives, and the question which arises is, whether any stipulation is to be found to the effect that the rentallers shall have access to the new theatre? My Lords, I can find no language in the deed which expresses, or even indicates, such an intention on the part of the two contracting parties. Then there being no obligation extant under the deed of 1858, it is next contended that the deeds which have transmitted the feu of the land have also re-created this burden upon the owners. Now, upon turning to the deed of 1874, which is in the same terms as the subsequent transmissions, what I find there is that Mr Soutar in parting with this portion of the trust-estate which was held by him desired to impose upon the disponee under that deed all the obligations to which he or his author Mr Brown could possibly have been subject under the deed of 1858, and accordingly the conveyance is expressly made subject to all the burdens, conditions, and declarations which are contained in that deed. If the deed had stopped there, it could not have been contended that any greater burden was imposed than that which was to be found existing under the conditions of the deed of 1858. But then it is said that the particular words which follow have the effect of creating a new right, and those words are—"to allow those parties the privileges to which they are entitled." These words, it is necessary to observe, are not inserted as a new burden or a new stipulation, but are only inserted as a particular explanation of certain conditions and declarations in the deed of 1858. I cannot read them therefore as meaning anything else than this—to allow to those parties the privileges to which they are entitled by the deed of 1858. I cannot read them as implying that the parties are to be allowed to enjoy privileges which are not accorded to them by the terms of the deed of 1858. And that, my Lords, appears to me, as your Lordships have held, to be quite sufficient for the decision of this appeal.

I would only desire to say further, that the opinion of the two learned Lords of the Court of Session who took a different view of the case from the majority of the Second Division appears to have been influenced a good deal by the state of possession which is proved to have existed in this case—the fact, in other words, that from 1865 to 1879, after the theatre referred to in the disposition of 1858 was reduced to ashes, these rentallers had for a long period of years enjoyed the right of admission as fully and as freely as if the right had been given to them under the deed. But, my Lords, it humbly appears to me that these facts as to the possession cannot legitimately be taken into consideration in construing these deeds. If the deeds had been defective in any solemnity required by law—if they had been imperfect in execution—these facts might have been referred to as perfecting the deeds; and if there had been any ambiguity, such as has occurred in this case in regard to the right which was implied in the right of free admission—whether it involved a right of booking or not—I think these circumstances might have been legitimately referred to to explain the ambiguity. But when you have deeds like these—probative deeds which embody the whole contract and obligations of the parties—it appears to me to be entirely out of the question to import possession for such a time—a possession which conflicts with the first construction of the deeds themselves.

I therefore concur with your Lordships in the judgment which you propose.

Interlocutor appealed from affirmed and appeal dismissed with costs.

Counsel for Appellants — Solicitor-General (Balfour)—Benjamin, Q.C. Agents—Simson & Wakeford and J. & J. Ross, W.S.

Counsel for Respondents — Solicitor-General (Herschell) — Kay, Q.C. — Rhind. Agents — Andrew Beveridge and William Officer, S.S.C.

Thursday, April 7.

(Before Lord Chancellor Selborne, Earl Cairns, Lord Penzance, and Lord Blackburn.)

LORD BLANTYRE *v.* CLYDE NAVIGATION TRUSTEES.

(*Ante*, March 5, 1880, vol. xvii., p. 476, 7 R. 659.)

River—Operations on Alveus—*Clyde Navigation Consolidation Act* 1858, *secs.* 76 *and* 84.

Held (*aff.* judgment of the Court of Session) that a proprietor whose right of property in the foreshore had been judicially determined, was yet not entitled, looking to the powers given to the Clyde Navigation Trustees by Acts of Parliament, to interdict them from dredging on the foreshore, all questions as to claims for compensation being reserved.

This case was determined in the First Division of the Court of Session on March 5, 1880, and is reported *ante*, vol. xvii., p. 476, and 7 R. 659. The application originally made to the Court of Session was for the object of interdicting the Navigation Trustees from removing soil or dredging upon certain portions of the river Clyde. The terms of the clauses of the Act of Parliament on which the respondents relied in defence, and the respective rights of parties in the ground in question, will be found in the former reports. The Lord Ordinary (Young) and the First Division of the Court having refused the application for interdict, the complainer appealed to the House of Lords.

At delivering judgment—

Lord Chancellor—My Lords, the question in this case arises upon the construction of an Act "to consolidate and amend the Acts relating to the River Clyde and Harbour of Glasgow," passed in 1858, by which a series of earlier statutes as to the same river and harbour was repealed. The original Act passed in 1758, as explained and amended in 1770, empowered the predecessors in title of the respondents to "cleanse, scour, deepen, and enlarge, or straighten and confine the said river and channel thereof, or any part or parts of the same" (within certain defined limits), "and to dig and cut the soil, ground, or banks of the said river, and soil, sand, and gravel in the bed thereof." These operations were to be carried on until the river and harbour should throughout its course within the prescribed limits have attained a minimum depth, which was from time to time increased, till in 1840 it was fixed at 17 feet at neap tides. No consent of any proprietor who might be entitled to any estate or interest in any part of the bed or foreshore of the river which might be affected by them was required for the exercise of these powers. In 1825 the authorities were enabled (in enlargement of their former powers, and still without requiring any consent) to "dredge, cleanse, and scour by machinery worked by power of steam, or otherwise, the said river and bed or channel thereof; to remove all sand-banks or shoals which might obstruct the navigation, and to erect and construct such new works as should seem to them proper and expedient for directing the stream of the river; for removing obstructions to the course of the tide; for bringing up a greater quantity of tide-water, and for making, continuing, maintaining, and securing the navigable channel of the said river, at least of (the prescribed) depth, and of as great width as might be found expedient for enabling vessels resorting to the harbour of Glasgow to pass each other with safety and facility." From the beginning power was given to make locks, dams, weirs, jetties, walls, &c. The earliest Act which authorised the acquisition by purchase of lands for permanent works connected with the navigation was that of 1825. A wet dock, wharf, and other specified works, according to maps and plans, were authorised in 1840, to which others were added in 1857. For these compulsory powers to take land were in 1840 for the first time given. All the Acts from 1758 downwards provided for compensation to the owners of lands, &c., for any damage to be done to them by the construction of authorised works, and generally by "any work, matter, or thing to be done by authority, or in pursuance of the Acts."

The appellant (Lord Blantyre) is the owner of the estate of Erskine, including the foreshore of the river Clyde for a considerable distance on