I am therefore of opinion that the interlocutor of the Court below ought to be affirmed.

Lord Macnaghten—My Lords, I am also of the same opinion.

Interlocutors appealed from affirmed and appeal dismissed with costs.

Counsel for the Appellant—Sol.-Gen. Robertson—Asher, Q.C. — Cosens. Agents — Iliffes, Henley, & Sweet, for Tait & Crighton, W.S.

Counsel for the Respondents—Balfour, Q.C. —Graham Murray — W. C. Smith. Agents — Keeping & Gloag, for Andrew Newlands, S.S.C.

COURT OF SESSION.

Saturday, May 19.

FIRST DIVISION.

BROAD *v.* DAY AND OTHERS.

(*Ante*, p. 445.)

Company—Companies Clauses Consolidation (Scotland) Act, 1845, *secs.* 56 *and* 57—*Judicial Factor.*

In a petition under sections 56 and 57 of the Companies Clauses Act, 1845, presented by a mortgagee upon whose mortgage the interest was overdue, for the appointment of a person "to receive the whole or a competent part of the tolls or sums liable to the payment of such interest" until it should be fully paid, *held* that though the person to be appointed was called in sec. 56 a judicial factor, he was in reality only a receiver, and had none of the powers of management belonging to a judicial factor, and that therefore a nominee of the petitioner, to whom there was no personal objection, might be appointed, though this was opposed by other mortgagees.

This petition was presented by Mr Harrington Evans Broad, the holder of certain mortgages for £3370 and other sums of the Edinburgh Northern Tramways Company, incorporated under the Edinburgh Northern Tramways Act, 1884, for the appointment of Mr D. N. Cotton, chartered accountant, Edinburgh, who was the auditor of the company, as judicial factor upon the undertaking, in terms of the provisions of the 56th and 57th sections of the Companies Clauses Consolidation (Scotland) Act, 1845, such an application being authorised by the terms of the Tramway Company's special Act.

The Companies Clauses Act provides, section 56—"Where, by the special Act, the mortgagees of the company shall be empowered to enforce the payment of the arrears of interest, or the arrears of principal and interest, due on such mortgages, by the appointment of a judicial factor, then, if within thirty days after the interest accruing upon any such mortgage or bond has become payable, and after demand thereof in writing, the same be not paid, the mortgagee may, without prejudice to his right to sue for the interest so in arrear in any competent court, require the appointment of a judicial factor, by an application to be made as hereinafter provided; and if within six months after the principal money owing upon any such mortgage or bond has become payable, and after the demand thereof in writing, the same be not paid, the mortgagee, without prejudice to his right to sue for such principal money, together with all arrears of interest, in any competent court, may, if his debt amount to the prescribed sum alone, or if his debt does not amount to the prescribed sum, he may, in conjunction with other mortgagees whose debts being so in arrear, after demands as aforesaid, shall, together with his, amount to the prescribed sum, require the appointment of a judicial factor, by an application to be made as hereinafter provided."

Section 57—"Every application for a judicial factor in the cases aforesaid shall be made to the Court of Session, and on any such application so made, and after hearing the parties, it shall be lawful for the said Court, by order in writing, to appoint some person to receive the whole or a competent part of the tolls or sums liable to the payment of such interest, or such principal and interest, as the case may be, until such interest, or until such principal and interest, as the case may be, together with all costs, including the charges of receiving the tolls or sums aforesaid, be fully paid; and upon such appointment being made all such tolls and sums of money as aforesaid, shall be paid to and received by the person so to be appointed; and the money so to be received shall be so much money received by or to the use of the party to whom such interest, or such principal and interest, as the case may be, shall be then due, and on whose behalf such judicial factor shall have been appointed; and after such interest and costs, or such principal, interest, and costs have been so received, the power of such judicial factor shall cease, and he shall be bound to account to the company for his intromissions, or the sums received by him, and to pay over to their treasurer any balance that may be in his hands."

Answers were lodged for S. H. Day and others, who stated that they were interested as mortgagees and shareholders of the company to the extent of nearly £20,000. They objected upon various grounds to the appointment of a nominee of the petitioner, but stated no personal objection to Mr Cotton. They also stated that they had no objection to the appointment of a neutral person selected by the Court.

At advising—

Lord President—Although the person to be appointed is called a judicial factor in the petition and in the statute that is a little misleading, because he is not clothed with the powers of an ordinary judicial factor at all, nor is he appointed under the statute as manager as in the case of *Haldane* v. *Girvan and Portpatrick Junction Railway Company*, March 18, 1881, 8 R. 669. He is what is called in England a "receiver," and so far as indicated he is appointed to receive a competent part of the income, and apply it in payment of the overdue interest on the petitioner's mortgage. That is the whole object of the application. The mortgagee, as soon as his interest is overdue, is entitled as a matter of legal right

to have a factor appointed, and it is only fair that the creditor should suggest to the Court the name of a party to look after his interests. If there was any personal objection to the nominee that would be given effect to, but not a word of the sort is said in regard to Mr Cotton, except that he knows a good deal about the affairs of this company. Now that appears to me a very good qualification for the post. Mr Cotton is the auditor of the company, and I cannot conceive a safer person to trust with part of the income of the company with the view of paying the overdue interest.

Lord Adam and Lord Kinnear concurred.

Lord Mure was absent from illness.

The Court granted the petition.

Counsel for the Petitioner—Graham Murray. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for Respondents — G. W. Burnet. Agents—A. & G. V. Mann, S.S.C.

HIGH COURT OF JUSTICIARY.

Friday, May 25.

(Before Lord Young, Lord M'Laren, and Lord Rutherfurd Clark.)

GUNN *v.* CADENHEAD.

Public Health (Scotland) Act, 1867 (30 *and* 31 *Vict. c.* 101), *sec.* 68—*Common Lodging-house —Refusal to give Access to Officers of Local Authority.*

Held that a room in a common lodging-house which was not registered, the only access to which was through one of the registered rooms, was subject to inspection, and that the lodging-house keeper was rightly convicted for refusing access to the inspector.

Opinions per Lord Young and Lord M'Laren in regard to two rooms in a common lodging-house, which were registered and licensed, but which had a separate access from the outside, the communication with the rest of the house being nailed up, that the lodging-house keeper was entitled to let these rooms to a monthly tenant, and was neither bound nor able to give access to the inspector, but that he could not cut them off from the rest of the house consistently with retaining his licence, and that the magistrates would be entitled to cancel his licence in consequence.

The Public Health (Scotland) Act, 1867 (30 and 31 Vict. c. 101), provides by section 68 that "the keeper of a common lodging-house shall, at all times when required by any officer of the local authority, give him free access to such house, and every part thereof."

Robert Gunn, keeper of a common lodging-house at No. 12 Burnett's Close, Aberdeen, was on 21st October 1887 brought before one of the Magistrates of the burgh of Aberdeen, in the Police Court there, on a complaint at the instance of George Cadenhead, Procurator-Fiscal of Court, which charged him with having contravened the 68th section of the Public Health (Scotland) Act, 1867, by having refused free access to part of his house to two officers of the local authority on 30th September 1887.

The accused was convicted, and fined 40s., with the alternative of ten days' imprisonment.

Gunn took a case for appeal to the High Court of Justiciary.

It was proved, as set forth in the case, that in May the appellant had thirteen rooms licensed and registered as each capable of accommodating lodgers, and that among these rooms were two on the ground floor, numbered 2 and 2A, to which access was refused on the day libelled. These two rooms had a separate entrance from the close, they had been let in August to a monthly tenant named Matthew, and the communication with the rest of the house had been nailed up. The appellant had returned the tickets applicable to these rooms to the inspector, but he had refused to receive them. On the occasion of the same visit the inspectors discovered a room upstairs which had not previously been disclosed to the authorities, which was not one of the registered rooms. The only entrance to this room was through one of the registered rooms, and the door was locked, with the key on the inside. To this room also access was refused, and it was said that it contained lumber, and that the key had been lost.

The question of law for the opinion of the Court was—"Whether the facts found proved were sufficient to warrant a conviction under the charge libelled?"

Argued for the appellant—With regard to rooms 2 and 2A, they had been *bona fide* let to a monthly tenant, they were no longer part of the licensed lodging-house, and therefore no longer liable to inspection. The Act made no provision for removing some of the rooms from the register, and the appellant had acted in the best and most straightforward way he could by informing the inspector and offering him the tickets. It would not only have been a breach of his contract with Matthew to have given access to these rooms, but it was a physical impossibility, as the communication with the rest of the house had been effectually nailed up. With regard to the upstairs room, it was not, and had never been, part of the licensed lodging-house, and therefore the officers had no right to demand access to it. The interpretation clause of the Act (section 3) contemplated a common lodging-house being part of and not necessarily the whole of a house, and only the rooms registered were open to inspection. This room had never been registered.

Argued for the respondent—When the house was licensed the authorities thought they were licensing the whole house. The room upstairs had not been disclosed, but as part of the house it was open to inspection. The 68th section of the Act said "such house, and every part thereof." Besides, it was only an adjunct to a licensed room. The magistrates might very possibly have refused to license the house except as a whole. They had not only to see that the sanitary arrangements were suitable, but they had to guard against overcrowding, which might easily take place if spare rooms existed free from inspection. The appellant had no right to with-