inspection of all persons assessed; and this particular defender could under section 75 have stated to the Sheriff any objections he thought fit. Then there is a further provision in the Act that if any person objects to the assessment, his objection should be made the subject of an appeal to the Commissioners, and that their decision should be final. There was no such appeal by the defender, and I should be disposed to hold that the objections to the accounts should not be received in this Court, and that objections to the assessment which was levied here upon this particular individual could not be objected to except in the expedient and economical manner, both in time and money, provided by the Act of Parliament.

Mr Vary Campbell stated that the Commissioners acted *ultra vires*. If a public body who are entitled to expend money on an object expend it in an improper manner by exercising an erroneous judgment, or making erroneous entries on the credit or debit side of the accounts, that is wrong, and you may say it is *ultra vires*, but if their action is wrong it is precisely of that character which is to be the subject of litigation before the Sheriff, and precisely of that character which may be made the subject of an appeal to the Commissioners. I cannot hold upon the mere use of the expression *ultra vires* that we can entertain a defence of this character to an action for payment of an assessment. The inexpediency of such a course is obvious. The defender here is in no different position from the other ratepayers within the No. 2 district who are liable for the special sewer rate, and thousands of people who are liable by using the expression *ultra vires* could become defenders to an action for recovery of assessment. Now, I do not think that could be allowed at all. If there was no special remedy provided by the statute then the common law would afford a means of calling the Commissioners to account for their expenditure, but in this case I think such special remedy exists.

LORD RUTHERFURD CLARK—As I read the record I understand that it is not maintained that the assessment in question is illegal, that is, it is not disputed that the Commissioners have power to impose it. The only ground which the appellant puts forward as exempting him from payment is that if the Commissioners had properly applied the money in their hands there would have been no need of an assessment. I think that is not a good defence to an action for payment of assessments. If the statement is true in fact it may possibly give the defender a right to repetition from the Commissioners of the sums improperly paid by him, but it is no ground for entitling the defender to refuse payment of the assessment in the first instance. I go no further than this.

LORD TRAYNER—I think the whole objections stated by the defender to the demand made upon him by the pursuers resolve themselves into an objection to the manner in which the Commissioners have stated their accounts. I have gone over the statements of the defender, and I can find no other grounds for his defence than this, that if sums improperly inserted in the debit side of the accounts were deducted, and that if sums already paid were credited to the account, the assessment has been sufficiently provided for. I think that such objections to items of or omissions from the accounts should have been stated in the mode laid down in section 75 of the General Police Act, and under that section the judgment of anybody but the Sheriff on the subject is excluded.

The Court adhered.

Counsel for Pursuers—Shaw—Cullen. Agents—Carmichael & Miller, W.S.

Counsel for Defender—Vary Campbell—W. C. Smith. Agent—Alexander Morison, S.S.C.

Friday, November 10.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

AITKEN, PETITIONER.

Judicial Factor — Delivery of Bond of Caution—Audit by Accountant of Court where Judicial Discharge not Asked—Judicial Factors (Scotland) Act 1889, *secs.* 6 *and* 20.

Held that a judicial factor, although appointed before 1889, and although he does not ask for a judicial discharge, cannot demand redelivery of his bond of caution until his accounts have been passed by the Accountant of Court; but that the Accountant of Court may, if he think fit, dispense with a full and strict audit of such accounts.

The Judicial Factors (Scotland) Act 1889 (52 and 53 Vict. cap. 39), by section 6 provides, that "in addition to the factors specified in the recited Act of 1849 (The Pupils Protection Act), the Accountant of Court shall superintend the conduct of all other factors and persons already appointed or to be appointed by the Court of Session." . . .

Section 20 provides that "section 23 of the Pupils Protection Act (as to factories informally settled) shall be held to apply to all factories under the supervision of the Accountant by virtue of this Act. And section 23 of the Pupils Protection Act provides that any settlement made of any such factory (viz., factories constituted before the passing of the Act), though informal, shall be held as a *prima facie* discharge to the factor, and the Accountant shall not report the same as a subsisting factory, or require further proceedings therein, . . . and in any such factory in which, though there has been no settlement, it shall appear that no benefit is likely to be derived by the parties

interested in the estate from further proceedings therein, and no party interested shall make appearance and require such proceedings, the Accountant shall place amongst the papers connected with the estate a memorandum of the circumstances, and shall state in his report that further proceedings are for the present unadvisable.

Robert Easton Aitken, C.A., Glasgow, presented a petition to the Junior Lord Ordinary, in which he stated that he had by decree of the Court of Session been appointed judicial factor upon February 3, 1877, to administer a trust fund of £300, that he had duly administered that fund in terms of the trust-deed, had now paid it over to the beneficiary who had recently come of age, and had received from him a discharge. He accordingly prayed the Court, after due intimation and service, to grant warrant to the Accountant of Court to deliver up his bond of caution.

No answers were lodged, but upon 8th August 1893 the Lord Ordinary (KYLLACHY) pronounced this interlocutor:—"Having heard the agent for the petitioner, and considered the petition and proceedings, remits to the Accountant of Court to examine and audit the account of the factor, with the relative vouchers, and to report; and in respect that the petitioner objects to the said remit as an innovation on the practice previous to the passing of the Judicial Factors Act of 1889, and desires leave to have the procedure authoritatively settled, grants leave to reclaim."

Against this interlocutor the factor reclaimed, and argued—Where a judicial discharge was not asked, but only a warrant for delivery of the factor's bond of caution, an extrajudicial discharge by the sole beneficiary being produced in process, it had been the invariable practice of the Court to grant such warrant without a judicial audit. This was settled by a decision of the Inner House in *Rollo, Petitioner*, 1852, 14 D. 990; followed by *Mackay and Others, Petitioners*, 19 D. 503; and it was so stated in Thoms on Judicial Factors (2nd ed.) p. 503; and in Mackay's Manual of Court of Session Practice, p. 545. This practice had been departed from since the passing of the Judicial Factors Act in 1889, and the expense of an audit, where the factory had been in existence for some time, was a great hardship in the case of small estates. Here the estate was under £300, and the factory had been in existence since 1877. The case was different where the factory had been under the supervision of the Accountant of Court from the first, and the audit would only cover the portions of a year which had elapsed since the date of the last annual audit. Here the audit must cover the period from the appointment of the factor in 1877, and the estate having been handed over to the sole beneficiary and the factor discharged, no useful purpose was to be served by such an audit.

At advising—

LORD ADAM—This is a reclaiming-note against the interlocutor of the Lord Ordinary, presented with the view of having a certain question of practice authoritatively settled. Before the passing of the Judicial Factors Act of 1889 factories were divided into two classes, viz., those that fell under the provisions of the Pupils Protection Act, and those that did not. With regard to those two classes the practice was different.

If a factor under the Pupils Protection Act asked for re-delivery of his bond of caution, he had at the same time to exhibit his accounts audited by the Accountant of Court. Factors not under that Act might be in either of two positions. If they asked for a judicial discharge, then their accounts were remitted to an independent accountant, and if found correct discharge was granted and their bond of caution given up. If, on the other hand, they were willing to dispense with the security and protection of a judicial discharge, deeming a discharge by the beneficiaries sufficient, the Court dispensed with such a remit and *de plano* granted warrant for the re-delivery of their bond of caution.

Now, it is said that the passing of the Act of 1889 has had the effect of putting all factories not formerly under the Pupils Protection Act in the same position as those under that Act, rendering all alike subject to the supervision of the Accountant of Court, that the practice of granting warrant for delivery of the bond of caution without an audit is at an end even in cases where no judicial discharge is asked, that the Accountant of Court is never bound to give up a bond of caution unless he has first audited the factor's accounts, and that this operates as a hardship in the case of small estates.

In my opinion, the intention of the Legislature was that all classes of factories should be treated in the same way and as those then under the Pupils Protection Act were treated. There may or there may not be reasons for the Accountant of Court, under the 23rd section of the Pupils Protection Act and the 20th section of the Judicial Factors Act, thinking that more or less investigation short of a strict audit will be sufficient before he gives up the bond of caution, but that is for him to judge. I think that under the Act of 1889 the procedure of submitting the accounts to the Accountant of Court in the case of all factories must be the same, and that meantime the accounts of the petitioner here must be laid before the Accountant.

LORD M'LAREN—I see no need of introducing any difference of practice in the case of judicial factors upon trust-estates. The general intention of the Act of 1889 was to place all such factories under the supervision of the Accountant of Court, exactly in the same way as factories under the Pupils Protection Act, the accounts in which were audited by him.

I am confirmed in that view when I see that the Act of 1889 provides by section 20 that section 23 of the Pupils Protection Act

shall apply to all factories brought under the supervision of the Accountant of Court. That section refers to factories brought under the supervision of the Accountant for the first time, and applies to old factories in which it may be inadvisable to incur the expense of an exhaustive audit from the beginning of the factory. That inadvisability may arise from the fact that the factor is not asking for a judicial discharge, or from the fact that minute investigation into all the details of the factory is not desirable.

The exigency which is said to have arisen here is therefore completely provided for by the Act, and it is for the Accountant of Court to consider whether in the special circumstances of the case he will dispense with a full audit, either because a discharge by the beneficiary has been produced or because the amount of the estate does not warrant the expense of such an audit. That discretionary power being left to the Accountant of Court in exceptional circumstances, I see no ground for the Court, who have no knowledge of such circumstances, interfering to dispense with the necessity of submitting these accounts to the Accountant of Court.

The LORD PRESIDENT and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Petitioner—Tait. Agent—F. J. Martin, W.S.

Friday, November 10.

FIRST DIVISION.

EDGAR, PETITIONER.

Parent and Child—Custody of Child—Petition—Competency in Bill Chamber in Vacation.

Held by Lord Kinnear that it was competent for the Lord Ordinary on the Bills in vacation to deal with a petition for the custody of a child.

Parent and Child—Custody of Child—Sequestration of Estate to Enforce Compliance with Orders of Court.

A father presented a petition for the custody of his child which had been taken away from him by its aunt. The Court granted the petition, but before the interlocutor was pronounced the aunt absconded, taking the child with her. The aunt was thereafter charged at her usual residence to implement the decree, but without effect. The father then presented a second petition craving the Court to ordain the child's aunt to compear personally at the bar, and in the event of her failing to appear to sequestrate her estate. The aunt having failed to appear, the Court, being of opinion that she was acting in manifest contempt of Court, *granted* sequestration of her estate.

James Glen Edgar was married to Mary Tollance Fisher on 29th July 1881. Mrs Edgar died on 24th June 1884. There was one child of the marriage, Everina Burns Edgar, born on 26th May 1882.

After Mrs Edgar's death the child was sent by her father to reside with her maternal grandmother Mrs Fisher, and her aunt Margaret Fisher, at 2 Morris Place, Glasgow. Mrs Fisher died on 25th August 1893, predeceased by her husband. By mutual trust-disposition executed between them their whole estate was bequeathed to their children as trustees for behoof of the survivors of such children, and the issue of any who might have predeceased. At the date of Mrs Fisher's death Margaret Fisher was the only surviving child of Mr and Mrs Fisher, and accordingly she was the sole trustee under the mutual trust-disposition. The only other person interested as a beneficiary under the mutual trust-disposition was Everina Burns Edgar. In 1892, prior to Mrs Fisher's death, Margaret Fisher assumed John M'Killop and Michael Dunbar to act along with her under the mutual trust-disposition.

On 1st September Mr Edgar, who had married again in 1887, removed the said child Everina Burns Edgar from the care of her aunt Margaret Fisher, to his own home at 6 Hampden Terrace, Glasgow. On 3rd September, while the child was out for a walk, she was taken away by a youth, and Mr Edgar was unable to ascertain where she had been taken to.

Mr Edgar thereafter presented a petition in the Bill Chamber for recovery of the custody of his child, wherein he set forth the above facts, and stated that he had removed the child from the care of her aunt Margaret Fisher because he had ascertained that she was being brought under Roman Catholic influences, whereas he desired that she should be brought up as a Protestant, and further, that he had reason to believe that the youth who had taken her away was Archibald Fisher, a cousin of Margaret Fisher.

On 5th September intimation and service was ordered by the Lord Ordinary on the Bills, and the petition was thereafter duly intimated, and on 7th September was served personally on Margaret and Archibald Fisher. No answers were lodged, and on 21st September the Lord Ordinary on the Bills (KINNEAR) heard counsel for the petitioner on the question whether the Lord Ordinary on the Bills had power to exercise in urgent cases the functions of the Court in such applications. (Authorities cited—Fraser's Parent and Child, 222; *Buchan* v. *Cardross*, May 27, 1842, 4 D. 1268.) The Lord Ordinary thereafter granted an order for delivery of the child to the petitioner.

On 20th October Mr Edgar presented a second petition to the Court, in which he made the following statements:—"That after the service upon her of the said petition, and while the matters therein were *sub judice*, the said Margaret Fisher left her home at 2 Morris Place aforesaid, taking with her the said child. The pursuer has