leading ground upon which I base my opinion is that the testator certainly contemplated that there would be an immediate division of his whole estate with the exception of this one heritable property and the furniture therein, which he specially destined on his wife's death to one of his children, and that such division could not take place if the trustees required to retain a capital sum the interest of which would cover not merely existing burdens but any possible increment in rates.

That has been described by Lord Shaw in what is now the most authoritative decision on this subject as a cogent consideration, and it has led me to the conclusion that the testator intended that his wife should just occupy the house as he had occupied it and subject to the same burdens that he himself had been in use to pay. In other words, that you have here—although not expressed in words that would have been the most appropriate from a lawyer's point of view—the constitution of a liferent proper, which carries with it the obligation to pay the owner's burdens.

For these reasons I am of opinion that we should answer the first question in the affirmative in both branches, and that we should answer the second question in the affirmative also.

LORD GUTHRIE—Hitherto in cases of this kind there have been two categories, and two categories only, put forward, namely, either of liferenter or occupier. In the one case the liferenter can sublet, but he must pay the burdens; in the other case the occupant cannot sublet, but he is free from landlord's taxes, feu-duty, repairs, and insurance. Mr Chree proposed to bring this case under a third category, which hitherto has been unknown to the law in cases of this kind, namely, that of a tenant for life who can sublet and is subject to no burdens except those appropriate to a tenant.

One would not have been disposed to introduce the third category unless the words made it necessary, but it appears to me that the words are quite sufficient—although the word "possess" is new in cases of this kind—to enable the Court to say that this clause, read as a whole along with the deed as a whole, brings the case within the category in which your Lordships propose to place it, namely, that of a liferenter who can sublet, but who in return for that benefit must bear the burdens which the testator himself bore and must pay the different items mentioned in the case, to wit, the feu-duty, the proprietor's rates and taxes, repairs, and insurance.

LORD DUNDAS—This is a very peculiar case, and I confess that I have had much more doubt and difficulty about it than seems to have been the case with either of your Lordships.

I agree so far that I think none of the authorities form any guide or assistance to us in the matter, and we must decide solely upon the construction of this odd clause: and so the case appears to be of more importance to the parties than to the law. Owing perhaps to the alternative form in which the argument for the third parties was advanced, I came near to doubting whether either alternative would do, and was almost tempted to decide that the right here conferred must be regarded as *tertium quid*, belonging to a new category intermediate between an ordinary liferent on the one hand and mere personal right of occupation on the other. It seemed to me that it is not unlike a tenancy for life; and the phrases, especially "rent free" and the word "possess," would aptly fit in with that view. But as both your Lordships are clear in your view to another effect I have no intention to dissent, though I confess that my mind is not clear in the matter. We answer the questions as Lord Salvesen proposes.

The LORD JUSTICE-CLERK was absent.

The Court answered the first question in the affirmative as regards both branches, and answered the second question also in the affirmative.

Counsel for the First and Third Parties—Macmillan, K.C.—Scott. Agents—Ronald & Ritchie, W.S.

Counsel for the Second Party—Chree, K.C.—Dykes. Agents—Martin, Milligan, & Macdonald, W.S.

Wednesday, March 31.

FIRST DIVISION.

[Lord Hunter, Ordinary.

GLEBE SUGAR REFINING COMPANY, LIMITED, AND ANOTHER *v.* TRUSTEES OF PORT AND HARBOURS OF GREENOCK AND OTHERS.

Statute—Construction—Trust—Harbour—Ultra vires—Lease of Graving Dock to Ship Repairers.

The management of a port and harbours was vested under statute in trustees, who under their statutes might "from time to time, and at any time appropriate or grant the exclusive right to use any . . . of their . . . works and conveniences to any corporation, company, or person, on such terms and conditions as the trustees think fit." Further, with regard to lands vested in them they might from "from time to time appropriate . . . such parts as they think fit, of any such lands for the purpose of shipbuilding yards . . . and generally for manufacturing, trading, or commercial purposes and lease such lands or any parts thereof for such periods or upon such terms and for such rent or other consideration as they think fit, or sell, feu, or dispose of such lands or any part thereof." The trustees leased a graving dock which formed part of their statutory undertaking, said to be the only graving dock which they had suitable for

modern freight steamers, to a firm of ship repairers for ten years.

In an action concluding for declarator that the trustees had no power to appropriate or grant the exclusive use of the graving dock to any person, and for reduction of the lease, *held* that the granting of the lease was not *ultra vires*, on the ground (*per* the Lord President, Lord Mackenzie concurring, *sus.* Lord Hunter) that the trustees had power to grant the lease in question in terms of the clause first above quoted; (*per* Lord Skerrington, Lord Cullen concurring) that although the graving dock, while remaining part of the undertaking as such, could not be leased, still upon the pleadings the trustees had good reason to discontinue the use of the graving dock and to sever it as such temporarily from their undertaking as they were entitled to do, and in those circumstances they had power to lease the graving dock as "land" in terms of the clause second above quoted.

The Greenock Port and Harbours Consolidation Act 1913 (3 and 4 Geo. V, cap. xlii), enacts—Section 109—"The Trustees may from time to time and at any time appropriate or grant the exclusive right to use any of the quays, wharfs, berths for ships, warehouses, sheds, quayage space, timber yards, and timber ponds, and any of their other works and conveniences, to any corporation, company, or person, on such terms and conditions as the Trustees think fit." Section 111—"With respect to lands for the time being vested in the Trustees the following provisions shall have effect, that is to say, . . . (2) The Trustees may from time to time appropriate and adapt such parts as they think fit of any such lands for the purpose of shipbuilding yards or of warehouses, and generally for manufacturing, trading, or commercial purposes, and lease such lands or any parts thereof for such periods and upon such terms, and for such rent or other consideration as they think fit; or sell, feu, or dispose of such lands or any part thereof." Section 193—"The regulations set forth in Schedule N to this Act annexed shall be enforced respecting the graving docks for the time being belonging to the Trustees, and the Trustees may enforce the same in the same manner and to the same effect as if the said regulations were bye-laws made by them under the Harbour, Docks, and Piers Clauses Act 1847 and this Act, or either or both of them, and were confirmed or allowed as therein required, but the Trustees may from time to time, if and as they think fit, revoke, amend, or add to those regulations, or any of them, such revocation, amendment, or addition before coming into force, to be allowed and confirmed as provided by the said Act of 1847."

The Glebe Sugar Refining Company, Limited, and the Westburn Sugar Refineries, Limited, *pursuers*, brought an action against (1) the Trustees of the Port and Harbours of Greenock, and (2) James Lithgow and Henry Lithgow, both shipbuilders in Port-Glasgow, lessees of the Garvel Graving Dock, *defenders*, concluding for decree of declarator that the defenders first called had no power or right to appropriate or grant to the defenders second called, or any other manufacturer, trader, shipbuilder, or other individual member of the public, the exclusive right to use and to control and regulate the use of that portion of the undertaking of the Trustees known as the Garvel Graving Dock, and for reduction of a lease of the Garvel Graving Dock and its appurtenances for ten years from 15th August 1918 granted by the defenders first called to the defenders second called.

The *lease* of the Garvel Graving Dock between the defenders first and second called provided—"*First*—In so far as they are empowered by their said Act to do so the lessors agree to let to the lessees, and the survivor of them, and the heirs of the survivor, but excluding assignees and subtenants, legal or conventional, without the consent in writing of the lessors, provided always that the lessors shall not unreasonably refuse their consent to an assignment of this lease to a limited liability company to be formed under the Companies Acts, if the memorandum and articles of association are in ordinary form, and provided the lessees remain liable for the obligations of the lease if so required by the lessors. In the event of difference of opinion the question shall be referred to arbitration as after provided, and the lessees agree to take from them on lease (First) the dock with the jetty and dolphins used in connection therewith, and the whole appurtenances thereof (including caissons, sluices, engine, boiler, machinery, plant, boiler and engine-house and chimney-stack); and (Second) the areas of ground adjoining the dock extending to 2000 square yards or thereby, all as delineated and coloured red on the plan annexed and signed as relative hereto, and that for the space of ten years from and after the 15th day of August 1918 (which is hereby declared to be the date of entry) subject to the provision for renewal hereinafter stipulated. . . . *Fourth*—The engineer and firemen required for the working of the engine, boilers, and machinery used in connection with the docks and the hydraulic system at the lessors' docks, shall be appointed by the lessors, and the lessors shall also supply the coal and stores for said engine, boilers, and machinery. The engineer and firemen though appointed by the lessors shall be under the control of the lessees for all work required by them in connection with the lease; and in the event of the engineer and firemen misconducting themselves, the lessees may require them to be changed, and the lessors shall give effect to this requirement. In the event of any difference of opinion as to the reasonableness of the requirements, the same shall be referred to arbitration as after provided. *Fifth*—During the currency of the lease the lessees shall be responsible for all running charges incident to the working of the dock, including the wages of engineer and firemen, and cost of coal and stores paid and supplied by

the lessors as aforesaid. The sums due by the lessees under this article shall be paid half-yearly along with the rent. *Sixth*—The lessees shall allow the lessors such use of the said engine, boiler, machinery, and plant as shall be necessary in connection with the hydraulic system at their docks, and the lessors shall pay to the lessees a proportional part of the said running charges corresponding to the use so made by them as the same shall be fixed by the lessees and the lessors' general manager for the time being, or, failing agreement, by the arbiter hereinafter appointed. *Seventh*—Subject to the provisions of article eighth hereof, the lessees shall have full liberty to erect on the ground hereby let sheds and other buildings for the purpose of their business. *Eighth*—The lessees shall have power, but shall not be bound to do so, to widen the entrance to the dock, but always solely at their own expense and subject to the lessors' approval in writing by the hand of their secretary. Before any alterations are made to the dock at any time, or any buildings erected on the ground before referred to, the lessees shall submit to the lessors for their approval a plan of their proposed alterations or erections, which plan when approved shall be signed by the lessors' chairman or deputy chairman before such alteration or erections are commenced, and the whole alteration or erections shall be at the sight and to the satisfaction of the lessors or their engineer. *Ninth*—In the event of the lessees obtaining the sanction of the lessors to the widening of the entrance to the dock, and the same having been duly made to the satisfaction of the lessors, the lessees shall have the option of extending this lease for a further period of ten years at the same rent hereinbefore stipulated for, but so as not to extend the period of the lease beyond twenty years in all: Declaring however that the foresaid option shall not be exerciseable by the lessees unless intimated in writing to the lessors or the secretary at least twelve months before the expiry of this let. . . . *Twelfth*—As and when required by the lessors, the lessees hereby undertake to make the dock available for the repair of the lessors' caissons, and to undertake the repair thereof at such reasonable times as may be mutually agreed, and in the manner and to the extent to be specified by the lessors' engineer, at the rates and charges current at the time. The lessees further agree that they shall not unreasonably refuse the use of the dock to vessels using the port of Greenock. The docking and any repairing of such vessels shall be done by the lessees. *Thirteenth*—The subjects hereby let shall be used by the lessees for the purpose of carrying on their business of ship repairers and engineers and for the other ordinary purposes for which a dry dock is used and for no other purpose whatever."

The pursuers pleaded, *inter alia*—"1. In respect that upon a sound construction of the Greenock Port and Harbours Consolidation Act 1913 the defenders the Trustees of the Port and Harbours of Greenock are vested with and are bound to exercise the control, regulation, and administration of the Garvel Graving Dock as part of their statutory undertaking, and in particular the use of said graving dock by vessels resorting thereto as regards time and order of admission, and that the grant to any private firm or individual of the exclusive use of said graving dock is inconsistent and incompatible with the statutory rights and duties of the Trustees on the one hand, and the public and in particular the pursuers on the other hand, the pursuers are entitled to decree in terms of the declaratory conclusions of the summons. 2. The lease between the Trustees of the Port and Harbours of Greenock and the defenders second called libelled in the summons being upon a sound construction of the said Greenock Port and Harbours Consolidation Act 1913 *ultra vires* of the Trustees, the pursuers are entitled to decree of reduction in terms of the recissory conclusion of the summons."

The defenders pleaded, *inter alia*—"1. The pursuers having no title and no interest to sue, the action should be dismissed. 2. The averments of the pursuers being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. 3. The transaction and in particular the lease complained of being *intra vires* of these defenders, they are entitled to absolvitor. 4. The said Garvel Graving Dock not being a part of their undertaking which the defenders are under statutory obligation to carry on, the defenders should be assoilzied."

On 2nd July 1919 the Lord Ordinary (HUNTER) repelled the first plea-in-law for the defenders, sustained their second plea-in-law, and dismissed the action.

Opinion (from which the *facts* of the case appear).—"The pursuers in this action are the Glebe Sugar Refining Company, Limited, and the Westburn Sugar Refineries, Limited, both companies having their registered offices in Greenock. The defenders are (1) the Trustees of the Port and Harbours of Greenock, and (2) James Lithgow and Henry Lithgow, both shipbuilders there. The first conclusion of the action is for declarator that the first named of the defenders have no power or right to appropriate or grant to the defenders second called or any other manufacturer, trader, shipbuilder, or other individual member of the public, the exclusive right to use or to control and regulate the use of that portion of the undertaking of the Trustees of the Port and Harbours of Greenock known as the Garvel Graving Dock. Under the second conclusion of the summons the pursuers seek reduction of a lease dated 3rd and 5th September 1918 entered into by and between the defenders first called and the defenders second called, whereby the defenders first called have purported to lease to the defenders second called for a period of ten years from 15th August 1918, *inter alia*, the said Garvel Graving Dock with the jetty and dolphins used in connection therewith and the whole appurtenances thereof.

"The first plea taken by the defenders is

that the pursuers have no title or interest to maintain the action.

"On the record as it originally stood the pursuers merely averred that they were traders who resort to and use the harbours of Greenock; that their business is largely served by vessels delivering goods to them at the port of Greenock; that they are entitled to own or charter at any time for the purposes of their business vessels which will use the port, and that they require or may require to use the graving dock. I greatly doubt whether on the strength of such averments I should have felt justified in holding that they were entitled to prosecute the present action. In the course of the argument before me, however, the pursuers asked leave to amend the record by making a statement to the following effect:—'The pursuers are in respect of rates on goods ratepayers within the meaning of sections 8, 10, 13, and 14 of the Greenock Port and Harbours Consolidation Act 1913, and as such have and exercise through their directors pursuant to section 17 of said Act the right of voting in the election of the five of defenders' trustees who under sections 10 and 13 of said Act fall to be elected by and from shipowners and ratepayers registered as electors.' I understand the accuracy of this statement is admitted by the defenders. It appears to me, therefore, that the decision in the case of *D. & J. Nicol* v. *Dundee Harbour Trustees*, 1915 S.C. (H.L). 7, is an authority in favour of my sustaining the pursuers' title to maintain the action. In that case Lord Dunedin, after reviewing the Scots cases bearing upon the question of title to sue, said—'When I find that the respondents in the capacity of harbour ratepayers are members of the constituency erected by the Act of Parliament to elect the trustees, and as such are also persons for whose benefit the harbour is kept up, I cannot doubt that they have a title to prevent an *ultra vires* act of the appellants, which *ultra vires* act directly affects the property under their care.' These words appear to me to cover the case of the present pursuers as it is disclosed in the amendment made by them.

The question as to the powers and duties of the Greenock Harbour Trustees with reference to the property vested in them must be determined by the provisions of the Act of Parliament under which they act, *i.e.*, the Greenock Port and Harbours Consolidation Act 1913. By section 8 of that Act it is provided—'The port and harbours means and includes the port and harbours of Greenock together with all tidal harbours, docks, locks, works, yards, lands, property, houses, streets, roads, ways, jetties, wharves, piers, quays, warehouses, sheds, slipways, harbour rails, and premises whatsoever for the time being belonging to the existing Trustees and the Trustees and the whole harbour undertaking of the existing Trustees and the Trustees.' The Trustees are the Trustees appointed under the Act and section 46 vests the whole port and harbours in them. [*His Lordship quoted sections* 109 *and* 111 (2), *which are quoted supra.*]

"A graving dock or docks are no part of the necessary equipment of a harbour. From the terms of the Act, however, it was contemplated that the Greenock Harbour Trustees would or might hold such docks as part of the undertaking vested in them. Section 128 of the Act contains a provision as to the rates to be charged for vessels using the graving docks, and section 193 provides that the regulations set forth in Schedule N annexed to the Act should be enforced respecting the graving docks for the time being belonging to the trustees who may enforce them as bye-laws made under the the Harbours, Docks, and Piers Clauses Act 1847 and the Greenock Act, but the Trustees have power to revoke, amend, or add to those regulations.

"The pursuers say that the statutory undertaking of the Greenock Harbour Trustees includes, *inter alia*, three graving docks. Two of these docks are alleged to be small and their equipment not modern or up-to-date in character. The third, known as the Garvel Graving Dock, is said to be comparatively modern and up-to-date in its equipment and also to be the only graving dock available for or capable of use by modern freight steamers. This averment is denied by the Trustees, who state that Garvel Graving Dock was built in 1871 and is not available for or capable of use by modern freight steamers because of the form of the entrance to the dock. According to their case the arrangements made by them for leasing this graving dock to the other defenders are aimed at remedying, *pro tanto*, the deficiency of the graving dock and repair accommodation at the port. For the purposes of the present argument I assume the accuracy of the pursuers' averment. It is to be noted, however, that the pursuers do not allege that the Trustees have acted *in mala fide* or contrary to what they honestly believe to be in the interests of the undertaking vested in them. Their case is that the grant to any private firm of the exclusive use of the graving dock for a lengthened period of time by lease is *ultra vires* of the Trustees.

"Under the Act there is nothing to indicate that the Trustees are bound to maintain the graving docks in efficient condition in all time coming. These docks are works ancillary to the harbour, and under the Act the Trustees have powers conferred upon them under section 109 to grant the exclusive use thereof to any person on such terms as they think fit. This clause confers wide discretionary powers upon the Trustees, and appears to me to cover the granting of a lease for a period of years of a graving dock. The Trustees also found upon the provisions of section 111 (2), but that provision seems rather to contemplate the case where land is leased to an independent party or firm for the purpose of being used as a shipbuilding yard or other commercial purpose, which I think would include a graving dock. In my opinion the averments of the pursuers are irrelevant, and I shall therefore sustain the second plea-in-law for the defenders."

The pursuers reclaimed, and argued—The lease in question was *ultra vires*. The trust

being statutory the Trustees had no powers except those expressly given to them or necessarily implied under their statutes. Their duty was to place and keep at the disposal of the public certain things of which the graving dock was a part. That was part of the necessary equipment of a first class port. Further, as a result of the trust being statutory, equality of treatment was obligatory—*Somerville* v. *Leith Dock Commissioners*, 1908 S.C. 797, 45 S.L.R. 590; *Pedrus Steamship Company* v. *Burntisland Harbour Commissioners*, 1909 S.C. 1421, 46 S.L.R. 1004; Greenock Port and Harbours (Consolidation) Act 1913 (3 and 4 Geo. V, cap. xlii), sec. 128 and Schedule G; Dock and Piers Clauses Act 1847 (10 Vict. cap. 27), section 33. The lease took away the right of the public to the use of the dock and to equality of treatment. A private speculative firm had obtained a monopoly of the dock and the Trustees had surrendered one of the facilities it was their duty to provide, viz., a graving dock in their undertaking suitable for modern freight steamers. Section 109 of the Act of 1913 did not authorise such a grant of exclusive possession as the lease conferred: the dock had become part of the equipment of a private firm. Further, section 109 did not apply to graving docks, which were specially dealt with in section 193 and Schedules G and N. The regulations therein contained were imperative, and section 109 conferred no power to abrogate them. Section 111 only applied to property which had ceased to be part of the undertaking and could not apply to a necessary part of the proper equipment of the port. If section 109 applied it must be construed in harmony with the general purpose of the Act, *i.e.*, for the public benefit, not to deprive them of the right to a facility which they would otherwise have had.

Argued for the defenders—There was no question of impropriety or inexpediency as regarded the action of the Trustees; the sole question was of *ultra vires*. The Trustees had not exceeded their powers. The general law—Brice on *Ultra Vires*, p. 158—was not in dispute, but here the Trustees had power to do what they had done under section 109 and section 111 of the Act of 1913. A graving dock was part of the port and harbours—section 8—and was a work in the sense of section 109. The work and conveniences referred to in that section were places to which the public were entitled to resort, yet those could be appropriated to individuals. Appropriate was a very strong word, approximating in meaning to dedicate. A lease was a form of appropriation. The regulations as to graving docks—section 193, Schedule N—only applied so long as the graving dock remained in the hands of the Trustees, and did not prevent appropriation. The provisions as to rates—section 128, Schedule G—gave the public a right to equality in rating, but were merely directory, and could be altered by the Trustees—section 193. Further, the Trustees' action was warranted by section 111, which overlapped section 109. A graving dock was land—section 3 of the Act of 1847—and section 111 authorised the leasing of land. The Trustees were not under obligation to maintain a graving dock. They might let it fall into decay—section 65. If so, it would clearly come under section 111. The monopoly was simply of docking and repairing, but the interests of the public were safeguarded by clauses 10, 12, and 13 of the lease. The general power of the harbourmaster was not affected. To lease the graving dock as had been done was for the benefit of the harbour in general.

At advising—

LORD PRESIDENT—I agree with the judgment of the Lord Ordinary, to whose opinion I refer for a full and accurate statement of the circumstances which have given rise to the present controversy. The sole question argued before us was whether or not the 109th section of the Greenock Port and Harbours Act 1913 means what it says. The pursuers contend that it does not. I think it does. That section empowers the Trustees to "appropriate or grant the exclusive right to use any of their . . . works and conveniences to any . . . person on such terms and conditions as the Trustees think fit." Taking advantage of this power the Trustees have granted to a firm of shipbuilders at Port-Glasgow the exclusive right to use the Garvel Graving Dock for a period of ten years on the terms set out in the lease sought to be reduced in this action. The Garvel Dock is admittedly one of the "works" vested in the Trustees as part of their statutory undertaking, although they are under no statutory obligation to provide or maintain it. Their good faith in entering into the arrangement expressed in the lease is not challenged. They aver and offer to prove, if necessary, that the right granted to the shipbuilders is highly advantageous to the statutory undertaking. But neither party moved for inquiry. Both were desirous of obtaining a judgment on the question whether the grant of exclusive right to use the Garvel Graving Dock was within the statutory powers of the Trustees, assuming their honest belief that it was advantageous to the statutory undertaking. It was not disputed that the terms of section 109 covered the case. In other words, it was not disputed that the Garvel Graving Dock was one of the Trustees' "works," and that an exclusive right to use it had been given to the shipbuilders in terms which the Trustees deemed fitting, acting to the best of their judgment. But it was contended that section 109 did not apply to the case before us, and this on a variety of grounds which in the end really resolved themselves into a challenge of the particular terms and conditions of the agreement expressed in the lease. Thus it was said that such an arrangement as we find expressed in the lease was *ultra vires*, because it was for the benefit of the shipbuilders and prejudicial to the public to give the former exclusive control of the Garvel Dock. This would be so, it was argued, because the shipbuilders would be enabled to work the dock as ancillary to their business and give a preference to their own customers. At the same time it was

conceded that exclusive right to use the dock might be given to a particular line of steamers or to those trading in a particular character of goods, although not to shipbuilders, always provided that right was reserved to the public to have the use of the dock when it was not required by the grantees. I acknowledge that I was quite unable to follow this argument. It appeared very like making nonsense of the 109th section of the statute as applied to a graving dock. If the exclusive right to use a "work" such as a graving dock can be conferred on any person, then naturally it would be given to a ship-repairer, who would put down his own plant and equipment and use it for the benefit of his own customers. Whether the public should have the use of the dock when he did not require it would be matter of arrangement with him, but plainly any such arrangement would not be indispensable to the validity of the appropriation of the dock to his exclusive use. In short, if graving docks are "works" within the meaning of section 109, then the lease before us appears to me to be the most natural and business-like way of exercising the powers conferred by that section. Indeed, unless the Trustees adopt the course they have taken here there is no method short of their undertaking the business of ship-repairers themselves by which the Garvel Dock can be made a useful and profitable part of the statutory undertaking. It was, however, maintained that by the arrangement expressed in the lease before us the regulations relative to graving docks set forth in Schedule N to the statute, the enforcement of which is rendered imperative by the 193rd section, were abrogated, and that the shipbuilders would take the place of the Trustees in the management and control of the dock. I think this is so, but it is the necessary and inevitable result of the appropriation of the dock to the exclusive use of shipbuilders or of anyone else. To read into section 109, as we were invited to do, a proviso that its powers were to be exercised only on terms not inconsistent with the statutory regulations applicable to the "works" therein referred to would be in effect to destroy the section. The terms of a grant of exclusive right to use under that section are to be such "as the Trustees think fit," and not such as are conform to regulations in force at the date of the grant. Conformity to the regulations in Schedule N is quite incompatible with an exclusive right to use being conferred on anybody. It is right, I should add, that no attack was directed against the particular terms of the lease sought to be reduced, provided section 109 applied to a grant of an exclusive right of use of this dock to a firm of shipbuilders. No modification or qualification of the grant was suggested as admissible. All shipbuilders must, it was argued, be placed on an equality so far as the use of this graving dock was concerned, and must make use of it conformably to the statutory regulations even although the trustees should, as they here aver, consider that the terms imposed on the grantees constitute "the most advantageous practicable way of executing their powers." To my mind this simply means that Schedule N is to be substituted in all grants of the exclusive right to use graving docks for the terms and conditions which the Trustees think fit. In other words, that section 109 has no application to the case.

Section 111 (2) was appealed to, not as directly applicable to the Garvel Graving Dock, but as showing an indirect method by which the same object might be attained as is attained here by invoking the aid of section 109; and from that point of view it is a useful aid to the Trustees' argument. But on the only question raised in this action and argued to us—the applicability of section 109 to the lease sought to be reduced—I agree with the Lord Ordinary, and move that we adhere to his interlocutor.

LORD MACKENZIE I concur.

LORD SKERRINGTON—I agree with the Lord Ordinary's judgment but not with his reasoning. It seems to me to be clear that section 109 of the Greenock Harbour Act of 1913 has no application to graving docks. Though graving docks are not specially mentioned in this section, the general expression "other works and conveniences," is wide enough to include them and would have done so if the section stood alone, and if there had not been a later section (193) which deals specially and exclusively with graving docks, and which legislates for them according to a scheme different from and inconsistent with that which was laid down in the earlier and general section. In the case of one of the "works and conveniences" to which section 109 applies, the Trustees may "from time to time and at any time appropriate and grant the exclusive right to use" it "on such terms and conditions as the Trustees think fit." On the other hand, in the case of one of "the graving docks for the time being belonging to the Trustees" they are plainly forbidden to do anything of the kind. So long as a graving dock forms part of the harbour undertaking, the only use of it which they can lawfully grant is a use which is in strict conformity with the regulations set forth in Schedule N or in any substituted regulations which may from time to time be approved of by the Sheriff—(Act of 1913, section 193; Act of 1847, section 85). The scheme of the Act as regards "transit sheds" seems to be very similar. They may be "discontinued" (section 69) but until discontinued their use is subject to express statutory regulations (section 74, Schedule D). The special clauses as to warehouses and sheds other than transit sheds (sections 80, 87, and 131), and that as to timber-ponds (section 132), show that section 109 may be construed so as to harmonise and not to conflict with sections 74 and 193. Moreover, the contrast is instructive between the imperative language of these two sections and that of the rating clauses which are expressed to be "subject to the provisions of this Act" (sections 124, 125, 128, 129, 131).

Although section 193 is expressed in very imperative terms it cannot in my judgment be construed (*a*) so as impliedly to impose upon the Trustees a duty to maintain in

efficient condition a graving dock which in their opinion it is expedient for them to discontinue; or (*b*) so as impliedly to deprive them of any right which they would otherwise have possessed to sever such a graving dock from the harbour undertaking and to alienate it either temporarily or permanently. Section 111 (2) of the Act of 1913 confers upon the Trustees express powers of alienation either temporary or permanent with respect to "lands for the time being vested in them." By section 3 of the Harbours Clauses Act of 1847 (incorporated by section 6 of the 1913 Act), "unless there be something in the subject or context repugnant to such construction . . . the word 'lands' shall include messuages, lands, tenements, and hereditaments, or heritages of any tenure." "Lands," as used in section 111 (2) of the 1913 Act might possibly include a graving dock which cannot be maintained in efficient condition except at a cost which the Trustees consider to be more than they can afford to pay, or more than the dock is worth to the harbour. In this view of the matter the question is, whether upon the pleadings alone and without evidence the pursuers have been able to demonstrate beyond all reasonable doubt that the Trustees exceeded their powers when they granted the lease, a copy of which will be found in the print. I think that the pursuers have failed to establish their case. They expressly admitted by their counsel that the Trustees acted throughout in good faith, and they did not move for any inquiry into the facts. Every presumption and inference of fact is therefore in favour of the Trustees. In particular, it must be presumed that before they decided to grant the lease they had come to the conclusion (*a*) that the needs of the smaller vessels are sufficiently provided for by the two smaller graving docks; (*b*) that the Garvel Graving Dock is not available for "modern freight steamers" because of the form of its entrance; and (*c*) that the vessels of the limited class which might have been expected to use this dock are deterred from doing so because the Trustees cannot afford to provide the necessary plant and other facilities. The pursuers did not ask for further specification in regard to this last averment, but a perusal of the lease and of the inventory of plant annexed thereto would probably make its meaning clear to any person with a practical knowledge of graving docks. For example, article 11 of the lease suggests that the Garvel dock was not supplied with electricity, and that such an instalation was required. It is of course true that the dock was not in a "derelict" or ruinous condition, but on the contrary is of considerable value to a ship-repairer whose customers are sufficiently numerous to keep it always occupied and who are ready to pay for the accommodation without reference to any statutory schedule. It does not, however, follow that in the hands of the Harbour Trustees this graving dock must necessarily pay its way either directly through the rates which they are authorised to charge for its use or indirectly through the trade which it attracts to the harbour. It is impossible to assume without evidence that the Trustees had not good reasons both for discontinuing the use of the Garvel Dock and also for temporarily severing it from their undertaking and for substituting in its place a substantial annual rent. So far as I am in a position to express an opinion upon a question of mixed law and fact in regard to which I possess nothing more than general and perhaps erroneous information, I think it possible that the lease was authorised by section 111 (2) of the Act.

In the course of their argument the pursuers' counsel suggested that the lease disclosed an illegal delegation on the part of the Harbour Trustees of their right and duty to control the general hydraulic installation of the harbour; but this point was not insisted on, and nothing could have been made of it in the absence of the necessary averments and evidence.

LORD CULLEN concurred in the opinion of Lord Skerrington.

The Court adhered.

Counsel for the Pursuers (Reclaimers)—The Lord Advocate (Clyde, K.C.)—Gentles. Agent—Hugh Patten, W.S.

Counsel for the Defenders (Respondents)—Macmillan, K.C.—A. M. Mackay. Agent—W. B. Rainnie, S.S.C.

Thursday, April 1.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

A. G. MOORE & COMPANY *v.* DONNELLY.

Master and Servant — Workmen's Compensation — "Arising out of and in the Course of"—Breach of a Statutory Rule Fenced by a Penalty — Added Peril — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1) *and* (2) (*c*)—*Coal Mines Act* 1911 (1 *and* 2 *Geo. V, cap.* 50), *sec.* 86 — *Explosives in Coal Mines Order, dated* 1st *September* 1913, *S.R. and O.* 1913, *No.* 953, *par.* 3 (*a*).

Two shots close together were laid and lighted in a mine by two miners; one explosion occurred; one of the miners within ten minutes returned to the *locus;* the other shot exploded in his face causing him injuries. In an arbitration to recover compensation the arbitrator held that in returning within the prescribed time the workman was guilty of serious and wilful misconduct, as he had acted in breach of paragraph 3 (a) of the Coal Mines Order of 1st September 1913 (an offence against which Order is a statutory offence under the Act of 1911, sections 86 and 101), but awarded him compensation in respect that his injuries were serious and permanent. *Held* in a stated case, following *Conway* v. *Pumpherston Oil Com-*