tatives have in these shares? That right is set forth in the 25th section, that if they choose they may sell within six months after the death of the partner to a partner approved of by the committee, or if they do not choose to sell they may have the value of the shares assessed or estimated by Messrs Matheson & Company, and the fair value having been so ascertained the trustees who are in this country are to pay to the representatives of the deceased partner the amount or value of the shares as so ascertained. Now, in my humble opinion that is nothing but a contract debt against this company for a sum of money. It is not a claim or a sale of a right to a proportional part of the property of the company wherever it is situated. That is not the nature of the claim. In my opinion it is clearly and simply a claim of debt, which the representatives have by this clause of the contract against the trustees in this country for payment of a sum of money. If that be so, I think there is no further question in this case about the local situation of the assets of the company, which they are not selling, and have no power to sell any right of property to. That is not what is done here. But Lord Shand says there is no difference between that case and the sale of the same subject or the same right for a sum of money to the sons. It is the sale of a right to a sum of money payable to the sons in this country, and being a sum due and paid to them in this country, I can see nothing in this case different from the ordinary case of an asset in this country, realised in this country, and properly realised in this country by the representatives of the deceased. That being so, I think the case falls under the ordinary rule, and that the asset must be given up as an asset in this country. On that short ground I concur with your Lordship.

The Court adhered.

Counsel for the Lord Advocate—Sol.-Gen. Darling, Q.C.—Young. Agent—D. Crole, Solicitor for Inland Revenue.

Counsel for the Defenders—D.-F. Balfour, Q.C.—Lorimer. Agent—W. M. Morris, S.S.C.

Tuesday, July 16.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

GORDON *v.* WILLIAMS' TRUSTEES.

Judicial Factor—Title to Sue.

Held, following *M'Gregor* v. *Beith*, 6 S. 853, that a judicial factor appointed on heritable subjects "with the usual powers" has no title to sue parties who have intromitted with the rents prior to his appointment.

In July 1888 A. W. Gordon, judicial factor on heritable subjects in Redford's Land, St Andrew's Street, Leith, which had belonged to John Young and David Young, woollen manufacturers in Leeds, raised this action against the testamentary trustees of the deceased John Williams, in which he sought to have the defenders ordained (1) to produce a full account of the intromissions had by John Williams and themselves with the rents of the heritable subjects on which the pursuer had been appointed judicial factor; and (2) to pay over to the pursuer the balance which should be found due.

The petition under which the pursuer was appointed judicial factor on the heritable subjects above mentioned was at the instance of Mrs Ellen Waite, and set out that—"The petitioner is one of the next-of-kin of the said John and David Young, and until it has been ascertained who is their heir-at-law, desires that a judicial factor be appointed on the said property, with power to recover the rents and arrears of rent thereof, and to preserve the subjects from dilapidation." The petition prayed that Mr Gordon should be appointed judicial factor "with all the usual powers, and in particular, with power to sue for and receive the arrears of rents due from said subjects." The extract decree of his appointment bore that he had been appointed "to be judicial factor with all the usual powers."

The subjects in question consisted of four small houses in the tenement known as Redford's Land, the rest of which had been purchased by Mr Williams in January 1862.

The pursuer averred—"On his appointment as judicial factor foresaid, the pursuer made the necessary inquiries as to the position of the estate under his charge, and ascertained that the defenders were in the possession of the said heritable subjects, were drawing the rents thereof and acting as proprietors therein; and farther, that their author and predecessor, Williams, had been also in possession thereof since the term of Martinmas 1861. . . . Neither the said John Williams nor the defenders have ever accounted for their intromissions with the said rents, although the defenders have recently admitted their liability to account therefor. . . . The defenders are bound to account to the pursuer for the said rents for the period mentioned, subject to annual feu-duty, taxes, and repairs, as the same may be vouched or instructed."

The defenders in answer admitted that the defenders and their author Mr Williams have collected the rents of the said dwelling-houses since Martinmas 1861, and that they are bound to account for their and his intromissions since said term to the party in right of the subjects.

In a statement of facts they further averred that it had been absolutely necessary for Mr Williams, in order to protect his own interests, (the Messrs Young by their neglect having practically abandoned the subjects), to take control of the tenement, which he accordingly had done.

The defenders pleaded—(1) "No title to sue."

On 21st June 1889 the Lord Ordinary (Wellwood) repelled the 1st plea-in-law for the defenders, and ordained them to lodge accounts of their intromissions within ten days.

"*Opinion.*—The defenders' plea to title is rested on the ground that the pursuer has no title to sue for arrears of rent which were paid before his appointment to the defenders. In the circumstances I think the plea is ill founded. The authorites relied on by the defenders—*Swinton* v. *Gawler*, June 20, 1809, F.C.; *M'Gregor* v. *Beith*, 6 Sh. 853—were

cases in which the rents had been paid before the factor's appointment to persons who had a colourable title to receive them, *e.g.*, as heir or executor. Here, while the defenders and their author may have acted excusably in collecting the rents, they had no colourable title. They really acted as self-appointed factors *loco absentis*, and were therefore bound to account to the pursuer on his appointment for their intromissions, deducting, it may be, sums *bona fide* expended on repairs, taxes, &c."

The defenders reclaimed, and argued—The factor had no title to sue parties who had intromitted with the rents before his appointment. He was appointed merely to preserve the property till the person in right thereof came forward—*M'Gregor* v. *Beith*, May 24, 1828, 6 Sh. 853.

The pursuer and respondent argued — The judicial factor had the right to receive and keep the sums due by the defenders for the persons entitled thereto—Thoms (2nd ed.), 13, 67; Stair iv. 50, 27. The Lord Ordinary had made the proper observations on both the cases quoted in this note. In *M'Gregor's* case the estate had been sequestrated. The factor there was a factor with a limited power on a sequestrated estate. Here he was a factor *loco absentis* appointed for the purpose of getting at these rents. It was not for the defender to say that he ran any risk, for the heir was here, and willing to concur with the factor in granting a discharge.

At advising—

Lord President—The only question of any difficulty is as to the title of the judicial factor to sue the action of count, reckoning, and payment. Now, the title of that officer depends upon the terms of the extract-decree which is set out in the defenders' print of documents, where we also have the petition under which he was appointed. It is stated in the petition—"The petitioner is one of the next-of-kin of the said John and David Young, and until it has been ascertained who is their heir-at-law, desires that a judicial factor be appointed on the said property with power to recover the rents and arrears of rents thereof, and to preserve the subject from dilapidation." And accordingly the prayer of the petition is that the Court should appoint Mr Gordon "to be judicial factor on the said heritable subjects . . . and that with all the usual powers, and in particular, with power to sue for and receive the arrears of rents due from said subjects, he always finding caution in common form." The interlocutor appointing Gordon, the terms of which appear from the extract, appointed him "to be judicial factor, with all the usual powers, on the said heritable subjects." That interlocutor therefore is not in terms of the prayer, because it does not give the factor in particular "power to sue for and receive the arrears of rents." I am not, indeed, prepared to say that the omission is of much importance; it only shows that it is not proposed that the factor should be vested with any powers but what are necessary to enable him to protect the subjects for the heir—one of the few usual powers being to collect the rents. In the present case the rents sought to be recovered are not due by a tenant, the person sued is one who intromitted with the rents, and he takes the ground that he is liable to account to the heir, and not to the judicial factor, and the question is, whether such a factor is entitled to proceed against him without special powers? I can see no ground for distinguishing this from the case of *M'Gregor* v. *Beith*, which seems to me precisely in point. In that case no doubt the subjects on which the pursuer had been appointed factor had been sequestrated; but I do not think that makes any difference, because he could not sue for anything but the rents. Nothing was given him but the management of the estate. Then if the fact of the estate being sequestrated is unimportant, and attention is given to the ground on which the Court disposed of that case, it will be seen that the defender pleaded that although M'Gregor, as judicial factor, might be entitled to recover arrears from tenants, he had no title to sue third parties intromitters with rents prior to his appointment. That is the very class of debt sought to be recovered here. The ground assigned is very well explained by Lord Glenlee in these words—"This is an attempt to turn a factor into a trustee for creditors. If after the date of the factory a party intromits with rents the factor may have some ground for suing him, but he never can bring an action against all and sundry for previous intromissions." I am therefore compelled by the authority of that case, and the very sound principle on which it is founded, to hold that the judicial factor's title to sue cannot be sustained, and that we must recal the interlocutor of the Lord Ordinary, and sustain the plea of no title to sue.

Lord Mure—I am of the same opinion. The case of *M'Gregor*, I think, decides the question raised here. After an authoritative judgment of that kind it would be very difficult to frame a petition to entitle the factor to proceed against parties who had intromitted with the rents.

Lord Shand—I am of the same opinion as your Lordship. Persons who have intromitted with a property—and the intromitter has acted quite *bona fide* and very properly, the property having been left derelict for many years—are bound to account to the proper heir when he appears, and he has appeared in this case. The judicial factor had a limited title to preserve and take care of the property, and to receive and intromit with the rents. That would have covered a right to sue tenants in possession for arrears, but it is quite a different question when it is proposed to sue any other party. I agree with your Lordship that a person appointed as judicial factor on an estate has no right to involve it in litigation in claims against a person who has previously intromitted with the rents.

Lord Adam concurred.

The Court recalled the interlocutor of the Lord Ordinary, sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for Williams' Trustees — Strachan—Orr. Agent—Alexander Gordon, S.S.C.

Counsel for the Judicial Factor—M'Kechnie—Wilson. Agent—Lachlan M'Intosh, S.S.C.