evidence is that he has not learned how the measurement of pit props is taken which is filled into the bills of lading, but they are not taken alongside the ship. They are taken, he says, in the country at different depôts, from which they are brought by lighters or by railway. "They arrive at the measurement by some method I have no doubt." It is the captain who signs the bill of lading. He says —"In signing the bill of lading I had no information to check the number of feet or the quantity stated in standards." Mr Von Westermann of Riga says the cargo was measured for him there about a fortnight before the props were loaded, but the man who measured (Feigelmann) was not examined, nor was Zehrpe, who wrote out the particulars in the specification endorsed on the bill of lading. None of the measurement sheets have been produced. The tally slips for the number of pieces are produced. It cannot, in my opinion, be held that a proper measurement was made at the port of loading.

In these circumstances the intaken measure not having been ascertained, it is necessary in order to calculate the freight to have recourse to such materials as there are in the case. The measurement made by Mr Cook, the Customs measurer at Grangemouth, seems to have been carefully made, and the scale he applied was the Gothenburg scale. No doubt it was made in the receiver's yard, and no one representing the ship was present. It was, however, made by an impartial person, and is the only trustworthy measurement in the case. I think the freight should be calculated upon it. He measured the cargo at 534·36 Gothenburg standards.

I am therefore of opinion that the appellants' position as stated in ans. 3 is correct, and that they are only due the sum of £12, 0s. 4d., which they tendered.

The LORD JUSTICE-CLERK and LORD ARDWALL were absent.

The Court pronounced this interlocutor

"Sustain the appeal and recal the interlocutor appealed against: Find (1) that by the charter-party and bill of lading condescended on the shipper (whom the defenders now represent) was bound to pay freight, after true and right delivery of the cargo of props carried by the pursuers' ship 'Newport' from Riga to Grangemouth, at the rate of 19s. per Gothenburg standard intaken; (2) that the pursuers claim payment of freight in accordance with the alleged measurement (amounting to 642·093 Gothenburg standards) contained in the specification attached to the bill of lading; (3) that it is not proved that the timber of which the details are given in the said specification was put on board ship at Riga or that the timber which was put on board there was measured; (4) that all the timber put on board at Riga was delivered to the defenders at Grangemouth, and that the timber so put on board, carried, and delivered amounted to 534·36 Gothenburg standards; (5) that in these circumstances the defenders are only bound to pay freight at the stipulated rate upon the amount of timber delivered, namely, 534·36 Gothenburg standards; and (6) that upon that footing the amount still due by the defenders to the pursuers is £12, 0s. 4d., for which sum with interest as libelled grants decree against the defenders," &c.

Counsel for Pursuers (Respondents)—Murray, K.C.—Spens. Agents—J. & J. Ross, W.S.

Counsel for Defenders (Appellants)—Sandeman, K.C.—C. H. Brown. Agents—Webster, Will, & Company, W.S.

HOUSE OF LORDS.

Thursday, March 3.

(Before the Lord Chancellor (Loreburn), Earl of Halsbury, and Lord Atkinson.)

GREENOCK HARBOUR TRUSTEES *v.* CARMICHAEL.

(In the Court of Session, June 11, 1908, 45 S.L.R. 753, and 1908 S.C. 944).

Judicial Factor—Powers—Statute—Power to Raise Rates of a Statutory Undertaking—Factor "to Receive the Whole or a Competent Part of the Rates and Duties and Other Revenues of the Trust"—Greenock Harbour Act 1880 (43 *and* 44 *Vict. cap. clxx*), *sec.* 70.

The Greenock Harbour Act 1880, sec. 70, enacts—"Every application for a judicial factor under the provisions of this Act shall be made to the Sheriff, and on any such application the Sheriff may, by order in writing, after hearing the parties, appoint some person to receive the whole, or a competent part of the rates and duties and other revenues of the trust until all the arrears of interest or of principal, as the case may be, . . . be fully paid."

Held (*aff.* judgment of the Court of Session) that a judicial factor so appointed had no power at his own hand to raise the rates, his only power being to receive them when collected, and to apply the funds so received.

This case is reported *ante ut supra.*

The statutes in question are quoted in Lord Atkinson's opinion (*infra*) and in the previous report.

The defender, the judicial factor, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—I agree with Lord Atkinson's reasons for affirming the Order of the First Division, which I have had the advantage of reading in print.

The only observation of my own which I desire to add is this. It seems to me that the Lord Ordinary has accurately stated the conditions under which the Court might act. If it were "satisfied that those charged by Parliament with the management of the undertaking were acting unreasonably in refusing to raise a rate or rates," the Court might require them to do so, for they owe a duty to the debenture stockholders. I do not think it would be necessary to show dishonesty on their part. Unreasonableness in the sense of perversity would in my opinion suffice, though without that the Court would not interfere with their discretion.

That point, however, does not arise in the present case.

EARL OF HALSBURY—I concur.

LORD ATKINSON—[*Read by the Lord Chancellor*]—The question for decision in the present case is whether the appellant, as judicial factor of the Greenock Harbour Trust, is entitled to demand and receive for sugar shipped into, or unshipped from, vessels (foreign) at the port and harbours of Greenock the rate of 1s. 3d. per ton—being the rate authorised by the Greenock Harbour Act 1880—in place of the rate of 10d. per ton fixed by the Harbour Trustees prior to the appointment of the appellant, the former rate having been fixed by the judicial factor himself, not only without the consent or approval but in opposition to the wishes of the Trustees; and this again depends upon the question whether or not the judicial factor had, having regard to the provision of the Greenock Harbour Act 1888, power to increase the tolls fixed by the Trustees under the provision of the 77th section of the Greenock Harbour Act of 1880.

The Lord Ordinary decided that the judicial factor had not the power he sought to exercise. The Judges of the First Division, from whose decision this appeal has been taken, upheld the decision of the Lord Ordinary.

In my opinion both these decisions were right. They were arrived at on the ground that the judicial factor was merely the receiver of the tolls and incomings of the undertaking and not its manager, and that he did not supersede the Trustees in the discharge of their duties further than this receipt necessarily involved, and was not clothed with their powers.

By the above-mentioned Statute of 1888 persons who had certain claims against the Harbour Trustees were allotted debenture stocks of two different kinds, namely, A debenture stocks and B debenture stocks, having somewhat different privileges and rights.

The interest on the latter description of stocks having fallen into arrear, the holders applied to have a judicial factor appointed over the undertaking.

By the 21st section of the statute the right to have a factor appointed otherwise than as provided in the section following, namely section 22, is expressly taken away, and the powers and privileges of the judicial factor when appointed must therefore be determined by the provisions of that section, coupled with the provisions of section 70 of the Greenock Harbour Act of 1880, which it in effect incorporates, and upon those alone.

The two sections run as follows—Section 22—"In the event of the Trustees failing at any time to make payment of the interest due at the expiry of any half-year, it shall be lawful for any holder of A debenture stock, and, after the expiration of a period of seven years from the passing of this Act, for any holder of B debenture stock, to apply to the Sheriff for the appointment of a judicial factor, in manner provided by section 70 of the Greenock Harbour Act of 1880."

Section 70—"Every application for a judicial factor under the provisions of this Act shall be made to the Sheriff, and on any such application the Sheriff may, by order in writing, after hearing the parties, appoint some person to receive the whole or a competent part of the rates and duties and other revenues of the trust, until all the arrears of interest or of principal, as the case may be . . . be fully paid."

The period of seven years above mentioned was afterwards by the Greenock Harbour Act of 1895 extended to ten years, but the extended period had expired long before the proceedings in this case commenced.

It would appear to me to be clear that the power conferred upon the factor to be appointed under section 70, at the suit of the debenture holders, is the power described in it and none other, namely, the power to "receive the whole or a competent part of the rates and duties and other revenues of the trust until all the arrears of interest or of principal be fully paid," and nothing more.

So far, but only so far as it is necessary to effect this purpose, the judicial factor necessarily supersedes the Trustees, but the power to "receive" rates or tolls or income does not, and in my opinion cannot, imply the power either to increase these different sources of income or to destroy them. The power and duty of the factor is confined in this respect to receiving those sums which at the time of his appointment the Trustees were then entitled to receive, not the sums which by some act of theirs which they never performed they might thereafter entitle themselves to receive.

Independent, then, of the close analogies between the provisions of these statutes and those other Acts referred to by the Lord President, I think, on the words of section 70 alone, the powers of the judicial factor must be of the limited character I have mentioned, whatever may be his powers when appointed under other circumstances.

If the authority to receive the income of the Trustees included by implication authority to take all steps necessary in order to augment the income to be received, the appointment of the judicial factor

would, as was pointed out by Lord M'Laren, almost necessarily involve the complete supersession of the Trustees in their office, since all the powers they enjoy directly or indirectly subserve that end, since this object is by making the harbour better, safer, or more commodious, to attract ships to it and increase their receipts. Indeed, if this were not so it would be almost impossible to define the exact limits of the factor's authority or to determine precisely what remnant of their powers should remain with the Trustees. Of course the judicial factor must not starve the undertaking. He must out of the income he receives make as far as possible adequate provision for the carrying on of the undertaking as a going concern. He is then free to divide such surplus as may remain amongst the incumbrancers according to the priority of their respective claims.

In my opinion, therefore, the appeal is entirely unsustainable and should be dismissed with costs. I concur in the observations which have been made by the Judges of the First Division as to the power of the courts of law to compel the Trustees not to cheat their creditors by a *mala fide* refusal to exercise their power to increase the tolls or rates.

LORD CHANCELLOR—I may add that my noble and learned friend Lord Atkinson has signified to me that he does not differ from the observation I made upon the last part of his judgment.

Their Lordships dismissed the appeal with expenses as agreed between parties.

Counsel for the Pursuers (Respondents)—D.-F. Scott Dickson, K.C.—C. A. Russell, K.C.—Macmillan. Agents—W. B. Rainnie, S.S.C., Edinburgh—Thomas Cooper & Company, London.

Counsel for the Defender (Appellant)—Sir R. Finlay, K.C.—Sir C. A. Cripps, K.C.—Horne. Agents—J. & J. Ross, W.S., Edinburgh—Lowless & Company, London.

Tuesday, March 8.

(Before the Lord Chancellor (Loreburn), Lord Ashbourne, Lord Kinnear, and Lord Shaw.)

MACKISON'S TRUSTEES *v.* DUNDEE MAGISTRATES.

(In the Court of Session, March 18, 1909, 46 S.L.R. 577, and 1909 S.C. 971.)

Master and Servant—Recompense—Wages—Contract—Extra Services—Burgh Surveyor—Mora.

In 1868 a burgh appointed a burgh surveyor who was to devote all his services to their business. He received a substantial but not a large salary. He held office till 1906, and during that period he did work not in the contemplation of parties at the time of his appointment, for which he received the outlays, and on three occasions small honoraria. He made no definite claim for special remuneration until 1906, when his claim was repudiated. It was proved he had himself worked in the belief or hope his claim would be recognised, and that the burgh had not treated his claim as one to be summarily and without investigation rejected. After his removal from office in 1906 he brought an action to recover a large sum as special remuneration.

Held that, after the lapse of so long a period and in the circumstances of himself and the defenders, the *onus* upon him to establish a contract for special remuneration was heavy, and as he had failed to discharge it, the defenders must be *assoilzied.*

This case is reported *ante ut supra.*

The pursuers appealed to the House of Lords.

At the conclusion of the appellants' argument—

LORD CHANCELLOR—I think your Lordships will desire to make an acknowledgment to the learned counsel for the appellants for the great conciseness and clearness with which they have stated the case, therein saving much, I have no doubt, of the valuable time of the House.

In regard to the case itself, I cannot help feeling the same sympathy which was expressed by the learned Judges in Scotland with the late Mr Mackison and his representatives, because he seems from what we have heard to have been a very zealous and deserving public servant. But while saying that, I have no right to say any more, nor to in any way convey any opinion in regard to the propriety or impropriety of the respondents' action in this matter. They are themselves the judges of what they ought to do outside the law, and I do not wish to say anything to convey an opinion upon that subject, which it is not my function or right to criticise.

We have to deal with this case upon its legal merits, and the question is one entirely of contract as to whether the late Mr Mackison, who was employed as borough surveyor, was by contractual relations with his employers entitled to something more than the salary for which he was serving. That he did a great deal of work is apparently not disputed, but it is necessary for those who represent him to show that he made a contract, express or to be inferred from evidence, that he was to be paid something beyond his salary in respect of the work which he did.

Now I think Mr Morison in his admirable argument has shown that there is evidence of that kind. But that is not enough. He must show that it is sufficient evidence to justify a court of law in acting upon it under the circumstances of this case.

The circumstances of the case, put in the manner most favourable to Mr Morison's