

Friday, March 18.

FIRST DIVISION.

HALDANE (JUDICIAL FACTOR ON GIRVAN AND PORTPATRICK JUNCTION RAILWAY) v. GIRVAN AND PORTPATRICK JUNCTION RAILWAY AND OTHERS.

Judicial Factor—Railway—Powers—Management—Railway Companies (Scotland) Act 1867 (30 and 31 Vict. cap. 126), sec. 4.

A judicial factor appointed under the Railway Companies Act of 1867 supersedes the directors in the management of the railway.

On 3d July 1879 Mr James Haldane, C.A., Edinburgh, was appointed judicial factor on the undertaking of the Girvan and Portpatrick Junction Railway in terms of the fourth section of the Railway Companies Act of 1867 (30 and 31 Vict. cap. 126), and with the usual powers. The Girvan and Portpatrick line was then being worked by the Glasgow and South-Western Railway under a working agreement. Under this agreement there had since the date of Mr Haldane's appointment been a large, though to some extent diminishing, excess of expenditure over revenue. The position of the Girvan and Portpatrick Company was otherwise very embarrassed. No interest had been paid on the debentures since Martinmas 1878, and the debentures as they fell due could not be renewed. In these circumstances it appeared to the judicial factor necessary that the working agreement with the Glasgow and South-Western Company should be brought to an end. He therefore gave notice to that Company that it would not be renewed after the 31st January 1881, and this notice the working company accepted; but in consequence of difficulties as to the respective powers of the judicial factor and the directors of the Girvan and Portpatrick Company to enter into a new agreement with the working company, and generally as to the management of the Girvan Company, the factor found it necessary to present this note, in which he prayed the Court "to grant power to and authorise the judicial factor to manage the undertaking of the Girvan and Portpatrick Junction Railway Company, and whole works and property connected therewith, or otherwise to find and declare that under and by virtue of his appointment as aforesaid the sole and exclusive power of management of the said undertaking, works, and property is vested in the said judicial factor."

The note was opposed by the Girvan and Portpatrick Railway and by two of the original petitioners for the appointment of a factor. Both sets of respondents maintained that under the Act 30 and 31 Vict. cap. 126, sec. 4, it was not competent to appoint a judicial factor to undertake the actual management of the company's undertaking, and that if it was competent to do so in some circumstances, the present was not a case in which the directors should thus be superseded by a factor. The Railway Companies (Scotland) Act (30 and 31 Vict. cap. 126), sec. 4, provides that "the engines, tenders, carriages, trucks, machinery, tools, fittings, materials, and effects constituting the rolling-stock and plant used or

provided by a company for the purpose of the traffic on their railway, or of their stations and workshops, shall not, after their railway or any part thereof is open for public traffic, be liable to be attached by diligence at any time after the passing of this Act and before the 1st day of September 1868, where the decree on which diligence proceeds is obtained in an action on a contract entered into after the passing of this Act, or in an action not on contract commenced after the passing of this Act, or on a protested promissory-note or bill of exchange, or a deed containing a clause of registration registered after the passing of this Act: But the person who has obtained any such decree may obtain the appointment of a judicial factor on the undertaking of the company, on application by petition in a summary manner to the Court, and all money received by such judicial factor shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the Court in payment of the debts of the company, and otherwise according to the rights and priorities of the persons for the time being interested therein, and on payment of the amount due to every such person who has obtained decree as aforesaid, the Court may, if it think fit, discharge such factor."

The corresponding English Act (30 and 31 Vict. cap. 127) contains a similar provision (sec. 4), the only important difference being that instead of a "judicial factor" it authorises "the appointment of a receiver, and if necessary of a manager of the undertaking of the company."

The 56th section of the Companies Clauses Consolidation (Scotland) Act of 1845 (8 Vict. cap. 17) provides—that "Where by the Special Act the mortgagees of the company shall be empowered to enforce the payment of 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 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 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 demand 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."

The 57th section of the same statute provides that "Every application for a judicial factor in the cases aforesaid shall be made to the Court of Session, and on any 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 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 intrusions or the sums received by him, and to pay over to their treasurer any balance that may be in his hands."

The corresponding English Act (8 Vict. cap. 16, secs. 53 and 54) contains similar provisions, except that the officer to be appointed is styled "a receiver," not "a judicial factor," and his appointment is to be made by two justices of the peace, not by the Court of Chancery.

The Companies Clauses Act of 1863 (26 and 27 Vict. cap. 118, secs. 25 and 26), confers upon debenture holders similar privileges to those conferred by the Acts of 1845 upon mortgagees. As in that Act, the officer is, as regards Scotland, termed a judicial factor, as regards England a receiver; and in the former case the appointment is to be made by the Court of Session, in the latter by two justices. Down to the date of the decision in the present case the line of the Girvan and Portpatrick Company continued to be worked by the Glasgow and South-Western Company, but under reservation of their rights to have the contract terminated as at 31st January, in terms of the notice sent by the judicial factor.

Argued for the petitioner—The English Act of 1867 expressly conferred on the Court of Chancery the power of appointing a receiver, "and if necessary also of a manager." That was an alteration of the common law of England, for it had been held—*Gardner v. London, Chatham, and Dover Railway, infra*—that for the Court to appoint a manager of a railway was *ultra vires*. Such a decision had never been pronounced in Scotland, but it was the obvious intention of the legislation of 1867 to put the two countries on the same footing in this respect. Creditors of railways in both countries were deprived of their common rights of diligence, and that obviously in the public interest, and in return they received the remedy of a judicial factor in Scotland and of a manager, and if necessary also of a receiver in England. When then would a manager be appointed in England? Whenever there was a business to be managed, as the necessary result of appointing a receiver only on an undertaking was to stop the business—*Manchester and Milford Railway, infra*. There was in the present case a business to be managed; it followed therefore (unless the Scotch Act was to have a radically different effect from the English) that the judicial factor here must have the powers of a manager. The directors were by his appointment entirely superseded.

The earlier Acts had obviously a different object, and probably officers appointed under them had smaller powers. This was by no means certain, however, as regards factors under the Scotch Acts—*Primrose v. Caledonian Railway, infra, per Lord Fullerton*.

Argued for the respondents—To decide what was meant by "factor" in the Act of 1867 it was necessary to compare that Act with the earlier Acts. In them factor was plainly used as equivalent to the English receiver. In the Act of 1863, which applied to both countries, the words were used as synonymous. In the last of this series of legislation—the Act of 1867—judicial factor must therefore be taken as equivalent to the English receiver, not to the English receiver and manager. But even if the factor might have power to manage in some cases, that was not a necessary consequence of his appointment, and in the present case was inexpedient. He had had no experience of railway management, however excellent an accountant; indeed, the nature of his profession showed what the Court had in view when they appointed him. Against the directors' business qualifications nothing had been alleged. They ought not therefore to be superseded.

Authorities—*Gardner v. London, Chatham, and Dover Railway*, L.R. 2 Chan. App. 201; *Manchester and Milford Railway*, 14th April 1880, L.R. 14 Chan. Div. 645; *Midland Waggon Company*, 4th Nov. 1880, 6 Q.B. Div. 36; *Primrose v. Caledonian Railway*, 21st June 1851, 13 D. 1214; *Glover's Trustees v. City of Glasgow Union Railway*, 8th Jan. 1869, 7 Macph. 338.

At advising—

LORD PRESIDENT—In this case Mr Haldane was appointed "judicial factor on the undertaking of the Girvan and Portpatrick Railway mentioned in the petition with the usual powers, he finding caution before extract in common form." The application was presented and the appointment was made under the 4th section of the Railway Companies Act of 1867, and the factor now presents this note, in which he craves the Court "to grant power to and authorise the judicial factor to manage the undertaking of the Girvan and Portpatrick Junction Railway Company, and whole works and property connected therewith, or otherwise to find and declare that under and by virtue of his appointment as aforesaid the sole and exclusive power of management of the said undertaking, works, and property is vested in the said judicial factor." The Girvan and Portpatrick Railway at the time of Mr Haldane's appointment was under a working agreement with the Glasgow and South-Western Railway Company, and in consequence was not actually working its own line; and the duties of a judicial factor under the Railway Companies Act of 1867 depend very much upon what is the condition of the company in respect of its being in the course of working its own line or of having it worked by another company. But the appointment of a factor under the Act of 1867 is a very different thing from an appointment under the Companies Act of 1845. It is quite clear from the terms of this earlier statute that it was not intended that a judicial factor appointed under its provisions should have any greater power than that of merely receiving the surplus proceeds of

the railway company, whether working its own line or getting it worked by another, and of applying these funds in payment of creditors according to their preferences. Nor does the succeeding statute of 1863 make any difference in this respect, because it merely extends to a different class of creditors—to debenture-holders—the same remedy which the earlier statute had conferred on mortgagees. But in the statute with which we are now dealing it appears to me that it was intended to confer a very different class of powers on the factor at his appointment. The section begins by depriving creditors of a right which they had at common law—the right, namely, to attach the moveable effects of the company. The provision is in these terms:—“The engines, tenders, carriages, trucks, machinery, tools, fittings, materials, and effects constituting the rolling-stock and plant used or provided by a company for the purpose of the traffic on their railway, or of their stations and workshops, shall not, after their railway or any part thereof is open for public traffic, be liable to be attached by diligence at any time after the passing of this Act and before the 1st day of September 1863, where the decree on which diligence proceeds is obtained in an action on a contract entered into after the passing of this Act, or in an action not on contract commenced after the passing of this Act, or on a protested promissory-note or bill of exchange, or a deed containing a clause of registration registered after the passing of this Act.”

Now, the effect of this provision, which by a subsequent statute was made perpetual, is that no creditor could thereafter do diligence against the moveable property of a railway company. This is a very important right, of which all creditors were by force of this statute deprived. Indeed, it is almost the only kind of diligence that can very well be available against the peculiar corporation and property of a railway company. It is only to be expected therefore, and it is only just, when the Legislature deprives creditors of this right, and that purely in the public interest, and for the sake of preventing a going railway from being stopped by a creditor using diligence against the plant, that something should be given in return. And accordingly the right which the creditor gets in return appears to me to be a right which it would be very difficult for anyone to interfere with. It is itself a kind of diligence which is conferred on the creditor in place of that of which he is deprived. Now, the right which is thus conferred on the creditor is described in these terms—“But the person who has obtained any such decree may obtain the appointment of a judicial factor on the undertaking of the company on application by petition in a summary manner to the Court, and all money received by such judicial factor shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the Court in payment of the debts of the company, and otherwise according to the rights and priorities of the persons for the time being interested therein, and on payment of the amount due to every such person who has obtained decree as aforesaid, the Court may, if it think fit, discharge such factor.” This is the right which is given to the creditor in place of

the right to use diligence, which is taken away; and therefore it appears to me that it would require a very strong reason indeed to induce the Court, when a properly qualified creditor applied for a factor, to refuse to make that appointment.

The next question is, What is the effect of the appointment? It is, I think, tolerably plain that the powers of a factor under the provision I have just quoted are very different from those of factors appointed under the two earlier statutes. He is to be appointed “on the undertaking of the company,” and by the undertaking of the company is meant the railway and its works. Now, whenever a judicial factor is appointed on any estate or interest, the meaning is that he is to undertake the management of the estate or interest whatever it may be. If it is a partnership, then the factor must either be appointed for the purpose of winding up the business if it falls to be wound up, or if it is not in that condition, his duty will be to undertake the management of the partnership estate in terms of the contract of copartnership—that is, to continue the business. When, therefore, a factor is appointed on the undertaking of a company, that can mean nothing else than that he is thereby invested with the charge and management of the undertaking. But this is made still clearer by the provision that “all money received by such judicial factor shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the Court in payment of the debts of the company.” There is thus to be an allowance made for the working expenses, and also a fixing of the other proper outgoings in respect of the undertaking. Who is to determine what the working expenses ought to be? Certainly the factor, under the direction and superintendence of the Court. And who is to determine what outgoings are proper? Certainly not the company, but the factor, who is in the direction and management of the company. I think, therefore, that the meaning of the provision we are here dealing with is that a creditor properly qualified, whose debt is unpaid, is entitled to come to the Court and to ask the Court to supersede the existing management of the railway, and to put it into the hands of a person or persons appointed by the Court under the name of judicial factor or factors, who should for the future take the place of the directors, and who should regulate the expenditure, determine what was necessary to pay working expenses and other proper outlays, and ascertain the balance divisible among creditors, and distribute that balance under the direction of the Court.

It is said that in many circumstances it may be extremely inconvenient to the gentleman appointed judicial factor to take into his own management a great railway concern. That may be so. For aught I know, this may not be the best possible remedy that can be devised to come in place of the creditors' right to do diligence against the moveable property of the company; but it is the remedy which the Legislature has given to the creditors, and it is quite clear that it may be worked out in a way not so inconvenient as the respondents have represented. The railway may be placed in three different positions. It may be working its own line.

That is the most difficult case; but even here the factor would be able to give the proper superintendence, while he employed all the usual officials in the actual working of the concern. In the second place, the railway may be leased to another company. This is a very simple case, for all that the factor would have to do is to draw the rent which is paid under the lease. Then, in the third place, the company may have entered into a working agreement with another company; and this was a more complicated position—one of a mixed character—intermediate between the other two. But in all these cases there is no distinction in the powers which the judicial factor possesses. In the one form and in the other he is appointed to undertake the management of the company, whatever that may involve.

It is very possible, indeed, if there be no objection to their appointment, that one or more of the directors or other officials may be chosen to undertake the management under the control of the Court. That is quite a possible case. On the other hand, the directors may be unsuitable; and the creditors are perfectly entitled to come forward and ask that some one else should be appointed. But this, too, is a matter of detail of little value in the construction of the statute. The factor, whoever he may be, is to be manager of the company, and that can mean nothing less than the entire control of its affairs under the supervision of the Court.

The respondents have referred to the English statute and to the language which is made use of in it. In England judicial factors are unknown. The law of England has two names—receiver and manager—to denote the office which we know by one name—judicial factor; and the distinction between a receiver and a manager was explained to be—and I think very clearly explained to be—that if a receiver only was appointed on the company it necessarily came to an end; if the company was to be continued, the receiver must also be appointed manager, and hence in the English Act provision is made for the appointment of both officers. But in the Scotch Act the Court are directed to appoint a judicial factor; and this makes the matter much more simple, because the powers of the factor would be limited or extended according to the position of the railway company's affairs. If the line was leased, then there would be nothing to be done but to receive the rent, and the factor would in that case be simply what in England is called a receiver. If, however, the company was working its own line, the factor would have to manage it, and thus take the place of the directors. On the whole matter, the conclusion I have come to is, that this application for special powers is unnecessary; but it may be quite proper to make a declaration in terms of the alternative prayer of the note, that in virtue of his appointment the sole and exclusive power of management of the undertaking, works, and property was vested in the judicial factor.

LORD MURE and LORD SHAND concurred.

LORD DEAS was absent.

The Court pronounced an interlocutor in terms of the opinion of the Lord President.

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Q. C. — Graham Murray. Agents — Todds, Murray, & Jamieson, W.S.

Counsel for Railway Company — J. P. B. Robertson. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for the other Respondents—Asher—Mackintosh. Agents—Henry & Scott, S.S.C.

HOUSE OF LORDS.

Thursday, March 24.

(Before Earl Cairns, Lord Blackburn, and Lord Watson.)

SCOTT AND OTHERS v. HOWARD
AND OTHERS.

(*Ante*, June 22, 1880, vol. xvii, p. 678, 7 R. 997.)

Property—Sale of Heritage—Conditions.

A theatre and the ground on which it stood were sold under burden of payment of certain annuities to a body of shareholders, who up to the date of the sale were proprietors of the subjects, and under stipulation that each of these shareholders should be entitled to free admission to the building then standing there, it being declared that this right was personal to the shareholders, and that the purchaser should not be entitled to convert the theatre to any other purpose. That theatre was burnt down and a new theatre built—the subject had also been conveyed more than once to new purchasers, the shareholders' rights to payment of their annuities, which had been declared real burdens, being always reserved, and it being always provided that they should be allowed "the privilege to which they are entitled;" and that privilege of admission they had enjoyed for several years. *Held*, in an action brought against the lessees of the new theatre by the shareholders to have it declared that they were entitled to the privilege of free admission, that their right being a mere personal right depending on contract, must be renewed with each successive disponee, and that neither the reservation of "the privilege to which they are entitled," nor the possession had by them, was habile to impose the obligation contended for on the disponees of the party, with whom they had originally contracted, and with reference to a theatre other than that mentioned in the deed by which their privilege was created.

This case was reported *ante*, June 22, 1880, vol. xvii, p. 678, 7 R. 997. The contentions of the pursuers (the rentallers), to which effect had been given by Lord Curriehill in the Outer House, were rejected by the Lords of the Second Division, Lord Ormidale dissenting, and the defenders assailed from the conclusions of the summons. The pursuers now appealed to the House of Lords. The terms of the deeds by which their rights were constituted, and, as they alleged, transmitted, and the history of the transmission of the subjects and of the buildings thereon, will be found in the former report.