

employed to do the work was John Grant, who had been paid for all expenses incurred. Now, as regards the first defence, I do not think that the triennial prescription operates here. There are two kinds of charges which are not affected by the statute:—1st, charges for money laid out on mandate—The Sheriff has cited one amongst other cases which go to establish this; and 2nd, charges made for what are simple cash advances. This latter point has been well recognised for some time, and if I am not mistaken in my recollection, it has been held in dealing with writers' accounts that where cash advances are not connected with particular charges for work done, they may be separated from these items and from the operation of the Act, and even where the items in a business account are things incident to cash advances, they follow the latter as accessory to principal even though of their own nature they would fall under the triennial prescription. The Sheriff, I repeat, has found here that the claim arises out of a contract of mandate, and therefore that thereby the operation of the triennial prescription is excluded, and I in that view concur with him.

The Lords therefore dismissed the appeal, and affirmed the judgment.

Counsel for Appellant—G. Smith—Rhind.
Agent—Robert Menzies, S.S.C.

Counsel for Respondent—M. Kechnie—Kennedy.
Agent—John Macpherson, W.S.

Saturday, December 10.

FIRST DIVISION.

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

(*Ante*, March 18, 1881, vol. xviii., p. 711, 8 R. 669.)

Judicial Factor—Railway—Special Powers—Application to Parliament for Sale of Line—Where Majority of Creditors and Shareholders do not concur with Factor—Act 30 and 31 Vict. cap. 126, sec. 4.

It is competent for the Court to grant authority to a judicial factor, appointed on the undertaking of a railway company under 30 and 31 Vict. cap. 126, sec. 4, to apply to Parliament for power to sell the line.

In the case of a railway company whose ordinary stock amounted to £250,000, there was debenture debt to the extent of £207,000, besides other debt of over £100,000. The interest on the debentures, many of which were past due, was three years in arrears, and amounted to £10,300 annually. The revenue had never been able to meet the annual working expenditure, although the deficit had been gradually diminishing, until the half-year ending August 1881, when there was a surplus in favour of revenue of £35. A judicial factor had been appointed on the undertaking of the company under 30 and 31 Vict. cap. 126, sec. 4, and he applied to the Court for authority to apply to Parliament

for power to sell the line. Of the £207,000 debenture creditors, £68,000 worth approved of the factor's proposal, £46,000 were for refusing, and the remainder were either for delay or expressed no opinion at all. The other creditors were, by a majority, and the shareholders were unanimously, against adopting the factor's proposal. In the circumstances the Court granted the authority craved, finding the expenses of the application to be made to Parliament to be a proper charge in the factory.

The Judicial Factor on the Girvan and Portpatrick Junction Railway Company presented this minute in the note for special powers formerly lodged by him, reported *ante*, July 19, 1881, vol. xviii., p. 711. In the minute he stated—“That since this note was last before their Lordships he had advertised the undertaking of the Girvan and Portpatrick Junction Railway Company for sale, and had endeavoured to obtain a purchaser or purchasers therefor. That after various negotiations he received an offer from the Glasgow and South-Western Railway, who proposed to purchase the undertaking for £100,000. That the judicial factor declined this offer as being inadequate. That thereafter the judicial factor obtained an offer of £200,000 for the said undertaking, with whole rights and privileges and appurtenances thereof. The judicial factor considers it to be in the interest of all parties that this offer should be accepted, and he has accordingly accepted it, subject to the approval of their Lordships, and his being able to obtain the necessary Parliamentary sanction.”

He therefore craved the Court “to resume consideration of his note for special powers, to approve of the course which the judicial factor has taken, and authorise him to apply to Parliament for authority to promote a bill in Parliament for giving effect to the said sale.”

Messrs Rushton and Cross, creditors of the company, upon whose petition the factor had been appointed, lodged answers, in which they stated—“The cost of construction of the said railway was about £500,000, and since its construction it has been kept in good working order by the Glasgow and South-Western Railway out of the earnings of the line. The said price of £200,000 is altogether an inadequate price for the line. It will, moreover, prove insufficient to pay the debenture-holders and preferable creditors. The Glasgow and South-Western Railway Company has for some years been working the said line under a working agreement with the directors. A new agreement had been arranged with the said company, which was much more favourable to the Girvan Company; but the judicial factor refused his sanction thereto, and at present the line is being worked by the Glasgow and South-Western Company under the old agreement from month to month. The traffic on the said line has been gradually developing, and the receipts show a steady increase. The report by the directors for the half-year to 31st August 1881 shows that after paying all working expenses there was sufficient to meet the interest for the half-year payable to the Portpatrick Railway Company for joint use of the Stranraer section of their line, and leaving a balance at the credit of the company. The respondents understand that the directors of the Girvan and Port-

patrick Railway Company are applying to Parliament for power to borrow a sum on debentures, preferable to the existing debentures, with a view to purchasing rolling-stock to work the said railway, and they observe that in the Parliamentary notice published by the judicial factor he has also asked similar powers with the same view. The respondents believe that on these powers being granted the money will be obtained, and that by working the line independently the traffic will be largely increased, and a better return obtained for all concerned than would be obtained by the carrying out of the proposed sale. The sale of the line by the judicial factor at the sum named would practically be confiscation of the interests of the ordinary and preference shareholders, while at the same time the debenture-holders would not be paid in full, and would be burdened with serious costs in carrying out such a transaction, including the discussion and adjustment of the rights of parties claiming an interest in the price. The interests of the creditors are not suffering by the delay, but, on the contrary, the line is becoming more valuable every day, and will, by careful and proper management, become still more valuable. The proposed sale of the line has not been sufficiently advertised, and a forced sale such as is proposed is contrary to the interests of all concerned. The terms of the said agreement are not known to the respondents, and have not been submitted to the directors of the company, nor sanctioned by them, nor have they been communicated to the debenture-holders, or shareholders, or creditors of the company, whose interests will be most injuriously affected by it."

The respondents therefore submitted that the prayer of the minute should be refused.

Counsel for the judicial factor intimated at the bar, after the discussion had proceeded some length, that the proposed offer to purchase the line for £200,000 had been withdrawn, and that in consequence he should now ask the Court under the note for leave to apply to Parliament for general powers to sell the line to anyone who would purchase it.

Argued for the judicial factor—There had been two meetings of creditors—one in Glasgow and the other in Edinburgh—and in addition a circular had been sent out to enable those creditors to express an opinion who were not able to attend either meeting. At the Glasgow meeting there voted for delay £30,000 odd debenture and £1000 other creditors; to accept the offer to purchase the line £8000 of debenture creditors; to refuse, £25,000 debenture and £7000 other creditors. At Edinburgh there were only two motions before the meeting—to accept or to refuse—and the result was that £12,000 debenture and no other creditors were for accepting, and £5000 debenture and £1000 other creditors voted to refuse. Then of those who were not present at either of the meetings, but who by circular stated their opinion, £48,000 debenture and £4000 other creditors voted to accept, and £16,000 debenture and £18,000 other creditors voted to refuse. There was thus a majority of debenture-holders in favour of the judicial factor of about £22,000. Now, as to the merits of the proposal to sell the line, the position of matters was this—The debentures came altogether to £207,000; Lloyd's bonds to £41,977;

outstanding claims, unpaid interest, and other expenses, to £70,509—making an indebtedness of £112,486, or a total indebtedness of £320,000, before coming to the share capital at all. To meet this debt there was nothing, but under the working management going on they had been, and still were, losing money, though the last half-year showed a surplus of £35, and the debenture interest alone was accumulating at the rate of over £10,000 per annum. The only way therefore to get anything for the creditors was to sell the line—at least if there was another way it was for the respondents to say what way that was, and not remain in their present negative attitude. The factor was acting in a ministerial capacity in the interest of all, and he was supported by a large body of creditors who ought not any longer to be kept out of their money, so far as it could be got now, because some creditors chose to take a different position.

Argued for the respondents—The judicial factor had somewhat overstated the amount of his support. Taking debenture-holders only, there were, in the first place, the present respondents, who held a debenture for £10,000, besides £35,000 of other debt, as well as ordinary and preference shares, and they had not voted at either meeting or replied to the circular. Then, some £2000 of those who had returned their circulars with a vote for accepting the offer did so under qualifications which really made their acceptance almost valueless. Thus, even of those debenture-holders who had expressed an opinion there was not a majority in favour of the factor's proposal, for those who at the Glasgow meeting voted for delay were not to be left out of account; and there certainly was not a majority of the whole £207,000 debenture creditors. But all this was on the assumption that the proposal which the factor was now pressing was the same as that which had been put before the creditors. It was not. The offer to purchase the line was what the creditors were asked to consider, and that offer had been withdrawn. [LORD PRESIDENT—The new proposal is quite within the prayer of the note of 5th July.] That was no doubt the case. But on the question whether the debenture-holders approved or not, it was a new proposal. They were asked to consider a definite offer to purchase the line; it was now proposed to apply to Parliament to sell the line, if any purchaser should come forward. But assuming that the two proposals were substantially the same, what the factor wished to obtain was the authority of the Court to a proceeding for which he had not the sanction of a majority of those mainly interested—if, indeed, he was not subjected to an out and out opposition from them. Now, the proposal itself was an unprecedented one. No instance, either in England or Scotland, had been discovered in which a receiver or judicial factor had applied to the Court, whose officer he was, for authority to go to Parliament to obtain from Parliament powers which the law did not confer on the Court itself. Apart from legislation the factor had no power to sell the line, and apart from legislation the Court had no power to authorise the factor to sell the line. But coming to the factor's proposal on its merits, the respondents submitted that a sale of the line was unnecessary. It was said that they suggested no scheme of their own. That was a mistake. The

concern had been slowly but steadily advancing, till last year the excess of expenditure over income had been converted into a small surplus the other way. [LORD PRESIDENT—Of £35. And you require over £10,000 a-year to pay the interest on the preferable debt.] That was so, but the line seemed to have turned the corner, and might be made to pay. There might be a more economical mode of working the line than by agreement with the Glasgow and South-Western Company. One plan was to borrow a sum on debentures preferable to the existing debentures, and with that to purchase rolling-stock to enable the company to work its own line. The directors of the company were promoting a bill with that object, and the factor also seemed to approve of it, both from the Parliamentary notice he had published, and from the terms of his note of 5th July, in which the present minute was presented. At any rate, those who thought that a sale of the line was necessary ought themselves to take the risk of their plan being refused by Parliament. They ought not to be allowed to use the factor as a shield, for the expense of this bill by the factor, if it had the sanction of the Court, would form a charge on the company's estate. This was really to handicap the opposition of those who thought another course preferable to that promoted by the factor.

The directors of the company also appeared by counsel, and stated that they concurred in opposing the factor's application. At a meeting of the shareholders, at which £81,000 out of £250,000 stock was represented, a resolution to that effect was unanimously carried.

Counsel for the Portpatrick Railway Coy. likewise appeared, and stated that the Girvan and Portpatrick Coy. had a user over some 11 miles of his line, and he desired that his rights might be protected in any Bill which might be brought forward.

At advising—

LORD PRESIDENT—This is not the first time that the financial condition of this company has been brought before us, and from all I have seen in the course of the several discussions we have had it would be difficult to find any concern in a state of more utter and hopeless insolvency. The sanguine picture drawn by the respondents' counsel of the company having turned the corner and being on the road to prosperity is a mere delusion. The line is hopelessly and irretrievably insolvent. They have debenture debt to the extent of £207,000, the annual interest of which amounts to about £10,400. Then they have to pay interest upon another large sum—somewhere about £112,000—of unsecured debt. The amount of that has not been precisely ascertained, but it cannot be much less than £5000 or £6000; and for the purpose of meeting these engagements they have not one farthing, so that their debt is going on accumulating every term. This has been going on for a considerable time, and there is not the slightest prospect of its coming to an end under existing circumstances. Now, when a railway company becomes insolvent and must be wound up, that cannot be done without an Act of Parliament, and it seems to follow that, if this railway company is in the condition I have mentioned, an application for an Act of Parliament is the only solution of the difficulty in which they are placed, and the only

means which they possess of gathering the estate and distributing it amongst their creditors according to their several claims. That is what takes place in the case of ordinary companies, either under the Winding-up Act or by sequestration; but it is impossible to apply either the one remedy or the other to a railway company, and an Act of Parliament is the only alternative. When the case was last before us, on an application by the judicial factor for special powers to enter into negotiations for the sale of the line, we were all of opinion that his ordinary powers as judicial factor superseding the directors, and having the whole management of the concern in his own hands, were quite sufficient without granting any additional powers, and we therefore refused his application; but we intimated to him very distinctly that he should go on with his negotiations for the sale of the line, as the only mode of extricating the company from its present position, and when he had so far completed these negotiations by obtaining an offer for the line, he should come back to the Court with the view of our approving, if we thought fit, of the bargain he had provisionally made, and authorising him to go to Parliament to get powers to carry it into effect. Now, he has come back, and he came back under the impression that he had made a provisional arrangement for the sale of the line for £200,000, but since the minute now before us was lodged that offer has been withdrawn, and there is not at present any offer for the sale of the line. The factor, however, asks the Court to put him into a position to sell the line if he should obtain a good offer, and that can be done only by applying to Parliament without delay. In the condition of this company I think the judicial factor has done very properly and wisely in asking for this power, and I am for granting it. It is not for us to anticipate in any degree what the terms of the Act may be which it may please Parliament in its wisdom to pass; but an application to Parliament generally for power to sell the line is certainly a thing which we are in a position to sanction the judicial factor in making. With regard to what is to be done with the price of the line after it is sold, Parliament may choose to fix conditions in granting the power, and so far as conditions are fixed by Parliament, they will, of course, be given effect to; but so far as the disposal of the price or anything else that may follow upon the sale is not regulated by Act of Parliament, it will be hereafter settled by this Court.

LORD MURE—It is stated that there are arrears of interest on the debentures amounting to some £30,000, and that these arrears are annually increasing. That being so, it is very difficult to see how this Company can ever get into the flourishing condition which the respondents have pictured. It appears to me to be a very judicious act on the part of the factor to come here to get authority to apply for the only remedy which in the circumstances seems possible. It is of course for Parliament to say on what conditions the sale which he proposes to effect is to be carried out.

LORD SHAND—I am also of opinion that in the very special circumstances in which this company is placed the power asked for ought to be granted. If the question be put, What is the alternative? I

can only for my own part say, that so far as the past history of this line is a fair index of the future, the alternative is simply this, that besides standing out of their past due debentures to the amount of £207,000, or thereby, the creditors must go without interest for years to come. Taking the creditors as in that position, and having in view that the very appointment of a judicial factor ties up their hands from doing any diligence against the railway, I think it is quite reasonable that they should, through the factor, be empowered to sell this line as a substitute for the diligence which the statute has taken from them. It was said on behalf of the respondents that this power should be given to the individual debenture-holders that they might carry it out at their own risk and at their own expense; but I think it is a reasonable answer to that to say that as this is a substitute for diligence, it is right that it should be done at the expense of the estate which the creditors are seeking to realise. I agree in thinking that we should grant the prayer somewhat in the terms in which it has been asked, both with reference to power to sell the line and with reference to the distribution of any sums realised. This may be entirely regulated by Parliament, or it may be left to this Court, in which latter case, of course, the rights of parties will be settled upon the single principle of which has priority in point of law.

LORD DEAS was absent.

The Lords pronounced this interlocutor:—

“The Lords having resumed consideration of the (printed) minute for the judicial factor, with the answers for Thomas Lever Rushton and James Ormrod Cross, and heard counsel for the judicial factor, for the respondents Thomas Lever Rushton and James Ormrod Cross, and for the directors of the Girvan and Portpatrick Junction Railway Company, Authorise the judicial factor to apply to Parliament for an Act to enable him to sell the undertaking of the Girvan and Portpatrick Junction Railway to such person or persons or body corporate as may be willing to buy the same upon such terms as shall be authorised by the provisions of such Act, and to apply the price realised by the sale of the said undertaking in payment of the liabilities of the Company, in such manner as may be directed in said Act, or otherwise, according to the respective order and preferences of the various parties having claims against the said Company, as the same shall be determined according to law: Further, find that the expenses of the application to be made in terms of the authorisation hereby granted form a proper charge in the factory, and decern.”

Counsel for Judicial Factor—D. F. Kinnear, Q. C. — Murray. Agents — Tods, Murray, & Jamieson, W. S.

Counsel for Messrs Rushton and Cross—Macintosh—Agents—Henry & Scott, S. S. C.

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

Counsel for Portpatrick Railway Company—Jameson. Agents—Dundas & Wilson, C. S.

Tuesday, December 13.

OUTER HOUSE.

[Lord Lee.

ELDER v. THE ENGLISH AND SCOTTISH
LAW LIFE ASSURANCE COMPANY.

Proof—Confidentiality—Haver—Reports to Insurance Company.

In an action for payment of the contents of a policy of insurance, involving a question as to the age of the party insured, diligence having been granted for recovery of documents—held (*per* Lord Lee) that reports furnished to the company by their medical officer and the friends of the insured were not protected from being recovered under that diligence on the ground of being confidential.

The late Mrs Sweet insured her life with the Law Life Assurance Company for a sum of £500 in 1857, informing them that she believed her age to be fifty-four. Mrs Sweet assigned this policy to the pursuer Elder in 1856, and died on 19th December 1880; the pursuer in claiming the sum contained in the policy produced a certificate of death which bore that the insured's age at death was eighty-two; founding on this the defenders resisted payment of the full sum contained in the policy, in respect that her age in 1857 must have been fifty-nine or sixty, instead of fifty-four as stated, and referred to a note appended to the question as to the age of the applicant, contained in the proposal, in these terms:—“If satisfactory proof be furnished with the proposal, the age will be admitted on the policy; if not, such proof will be required before the sum assured is paid.”

The pursuers pleaded—“(2) The defenders have no right to call, and *separatim* are barred from calling, on the pursuer to prove Mrs Sweet's age; further, if there is to be proof on the matter, the *onus* lies on the defenders.”

A proof having been ordered, commission was granted to W. Campbell, Esq., advocate, to see a diligence for recovery of documents in possession of the defenders executed, and to receive exhibits. A haver appeared for the Insurance Company, and having been called on to produce the reports furnished to the company by their medical officer and the friends of the insured at the date of insurance, declined to do so, on the ground that they were confidential documents.

The Commissioner repelled the objection, on the ground of the precedent contained in the case of *M'Donald* (7th Jan. 1881, 8 R. 357, and *immediately following*), and on appeal the Lord Ordinary sustained the ruling of the Commissioner.

Counsel for the Pursuer—Rhind. Agent—Wm. Officer, S. S. C.

Counsel for the Defenders—W. C. Smith. Agents—Hope, Mann, & Kirk, W. S.