Bank to them. The pursuers' books contain accounts headed "North British Railway Co. — Temporary Loan Account," "Clydesdale Bank — Current Account," "Clydesdale Bank—Loan Account," and "Interest Account," and in the books of the North British Railway Company there is an account styled "Kirkcaldy and District Railway Co.—Temporary Advance Account." Under these accounts large advances of money were made to or on behalf of the pursuers, and the advances so made to the pursuers by the North British Railway Company, or upon their credit, were in effect repaid to them by fully paid shares of the pursuers' company being allotted or issued to the North British Company, who ultimately became the sole shareholders of the pursuers' company. Still the relation between the pursuers and the North British Railway Company appears to me to have remained debtor and creditor as regards the advances made by the latter; guaranteed and guarantor as regards the advances made by the Clydesdale Bank; and latterly, company and shareholder during the period down to the amalgamation on 6th July 1895.

As to the actual payment of the expenses towards which the pursuers seek by this action to compel the defenders to contribute, it appears from Mr More's evidence that about £1000 was paid out of a credit which the pursuers had with the Royal Bank before they had any relations with the North British Railway Company, that another part was paid by the pursuers out of a loan which they received from the North British Railway Company, and that the remainder was paid out of advances made by the Clydesdale Bank to the pursuers, but it does not appear that any part was paid by the North British Railway Company to the persons to whom the expenses were due. I am therefore unable to see sufficient ground for holding that the effect of any of the dealings between the pursuers and the North British Railway Company was to release or discharge the defenders' obligation to contribute to the expenses under the supplementary agreement of 2nd and 4th March 1891.

I may add that I concur in the view expressed by the Lord Ordinary in his judgment of 20th December 1895, that although the pursuers' company was dissolved by the Amalgamating Act of 1895, it continues to exist for the purpose of winding-up, and that its title to insist in this action is saved by section 43 of the Railways Clauses Act 1863.

LORD M'LAREN—I agree with your Lordship in the chair, and only desire to add an observation upon what appears to me to be the determining point in the case. The Caledonian Railway Company are bound by contract to pay a proportion of the expenses incurred in promoting in Parliament the Kirkcaldy and District Railway Bill, and it is not disputed that the share of these expenses for which the Caledonian became liable has not been paid by that company, and that the Kirkcaldy Company has not disharged the Caledonian from this obligation. The defence put forward by the Caledonian is that the Kirkcaldy Company are entitled to be indemnified from other sources against all liability for these expenses. Now, there is no better settled principle of commercial law than that a contract of indemnity with one party is no answer to a demand against another who has undertaken an independent obligation. For instance, if I sue my neighbour for negligently setting fire to my haystack, he cannot successfully plead in defence that I am insured against loss by fire, or even that I have actually been paid the insurance money. It is *jus tertii* for him to inquire into my arrangements with my insurers, or whether I am suing him in my own interest, or have lent my name to enable my insurers to recover.

This is perhaps a rare case, but the same principle is more frequently applied in marine insurance, where it has long been settled that the party liable in damages has no concern with the fact that the party who has suffered is protected by insurance.

In this case it appears to me that as the Kirkcaldy Company might have discharged the North British, or might have made any financial settlement they pleased with that company without consulting the Caledonian, the money arrangement between the Kirkcaldy Railway Company and the North British can have no effect in releasing the Caledonian Railway Company from its contractual liability for these expenses.

LORD ADAM and LORD KINNEAR concurred.

The Court adhered.

Counsel for Pursuers—Ure, Q.C.—C. K. Mackenzie. Agents — Dundas & Wilson, C.S.

Counsel for Defenders—Guthrie, Q.C.—Clyde. Agents—Hope, Todd, & Kirk, W.S.

---

*Tuesday, June 26.*

## SECOND DIVISION.

## PATERSON *v.* BEST.

*Judicial Factor—Judicial Factor on Undertaking of Railway Company—"Undertaking"—Works Authorised not Begun—Railway Companies (Scotland) Act* 1867 (30 *and* 31 *Vict. c.* 126), *secs.* 3 *and* 4—*Nobile Officium—Directors not Known or Ascertainable—Railway.*

In 1900 a creditor of a railway company, who had obtained decree for the amount of his debt in an action against them, presented a petition for the appointment of a judicial factor on the company's estates, invoking the *nobile officium* of the Court, and founding on section 4 of the Railway Companies (Scotland) Act 1867.

The railway company had been in-

corporated by Act of Parliament in 1884, but the works authorised by the Act were never begun. In 1888 the estates and effects of the company had been sequestrated, and a judicial factor had been appointed to preserve the estate till a board of directors had been constructed. The petitioner averred that thereafter a duly constituted board of directors had been elected, but did not say who they were or when they had been appointed. He also averred that he had been unable to ascertain the names of the present directors and secretary, that information having been refused by the solicitors of the company, who had obtained and unwarrantably retained possession of the documents and seal of the company, and that there was no-one now in charge of the company's affairs.

*Held* (1) that as this company had no "undertaking" within the meaning of the Railway Companies (Scotland) Act 1867, section 4, that section did not apply here, and consequently that this was not a case in which a judicial factor could be appointed thereunder; and (2) that this was not a case for the exercise of the *nobile officium* of the Court.

*Held* also (*per* Lord Trayner and Lord Moncreiff) that, the company having already been sequestrated and a judicial factor appointed, and the statements made by the petitioner as to the supersession of the judicial factor by a duly constituted board of directors being too vague to be remitted to probation, the petition was incompetent.

In May 1900 Duncan Wilkie Paterson, S.S.C., Edinburgh, presented a petition to the Second Division of the Court, in which he craved the Court to sequestrate the estates and undertaking of the Dundee Suburban Railway Company, and to appoint a judicial factor thereon with all the usual powers, and further with the power, after making due provision for all proper outgoings, to apply and distribute all money received by him 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.

The petitioner averred that he was a creditor of the Dundee Suburban Railway Company for £300, with interest at 5 per cent. per annum from 25th July 1894, and £8, 12s. 8d. of expenses and dues of extract conform to decree dated 31st January and extracted 28th February 1900; that the Railway Company had been duly charged to pay these sums, but had failed to do so, and that the days of charge had expired; that the Dundee Suburban Railway Company was incorporated by the Dundee Suburban Railway Act 1884; that the capital authorised to be raised for the purpose of the undertaking was £250,000 in 25,000 shares of £10 each, and £83,300 by borrowing, and that by the company's Act directors were appointed until the first ordinary meeting, three of whom alone qualified and continued as directors after the first meeting of the company.

He also averred as follows:—"In the year 1888 difficulty arose in regard to the management of the company, and in consequence thereof the intervention of your Lordships was sought. In a petition presented to your Lordships on the 17th day of July 1888 the whole estate and effects of the said company were sequestrated, and Mr George Todd Chiene, chartered accountant, Edinburgh, was appointed judicial factor to preserve the estate of the company, and to undertake the management of the company's affairs until such time as a board of directors could be duly constituted. In the petition it was stated that the minutes, minute-book of the company, the register, subscription contracts, seal, and various principal deeds and other documents were in the possession of Ferdinand Strousberg, Parliamentary agent and contractor, 13A Cockspur Street, London, and decree was granted for delivery thereof to Mr Chiene. Mr Chiene has had no intromissions with any funds of the company, and with the exception of making an attempt (which proved futile in consequence of erroneous proceedings adopted by him) to obtain possession of the books and documents, he has done nothing under his appointment. His appointment as such factor has lapsed, and his powers were superseded by the election which took place thereafter of a duly constituted board of directors. Subsequently the company's affairs have been carried on independently of and without reference to him as judicial factor foresaid. In particular, the company applied for and obtained in 1889, 1892, 1894, and 1896 special Acts of Parliament for extending the time for completion of the works authorised by the original Act. Mr Chiene took no part in the obtaining of these Acts, and offered no opposition to the passing thereof.

"The time for the completion of the works expired on 26th July 1898, but no part of the work was begun. Notices for compulsory purchase of land were duly served, and provisional arrangements were made with some of the owners. . . .

"The capital of the company . . . was fully subscribed. The larger amount was subscribed for by the said Ferdinand Strousberg, and by an assignment executed on 8th July 1891 he assigned his subscription contract to the extent of £235,000 to John Best, contractor, Edinburgh. Mr Strousberg further assigned 1000 shares to Henry Houseman, 3 Princes Street, Westminster, in or about the year 1889 or 1890, and 200 shares to Church King, 10 Basinghall Street, London, in or about the year 1890. Neither the said Ferdinand Strousberg nor his assignees (who are still vested in the shares) have paid anything to the company in respect thereof, and they are still liable for the whole amount due on them. The said assignees have been accepted by the company as shareholders, and have acted and voted as such.

"There are other shareholders who are also liable for payment of the shares held by them.

"Mr Best, Mr Houseman, Mr King, and others who have right to and in the capital are solvent, and are responsible for and bound to pay all claims against the company to the extent of the shares held by them respectively, but access to the share register has been denied to the petitioner by Messrs Poole & Robinson, who have been acting as solicitors for the company, and they give no reply to inquiries made to them for information as to who has the register.

"Of the three directors appointed by the company's Act of Incorporation who accepted office and qualified, Colonel Blair is dead and Mr Couper has left this country. It is not known whether General Harris is alive or not, and all efforts to trace him have failed. Letters sent to his last known place of residence have been returned through the Post-Office.

"The management of the company's affairs fell into the hands of the said Ferdinand Strousberg and his solicitors, the said Messrs Poole & Robinson.

"The said Ferdinand Strousberg died in London on or about 4th May 1900. Up to the time of his death he and Messrs Poole & Robinson, or others under their control, were, and it is believed that Messrs Poole & Robinson now are, in possession of the minutes and minute-book of the company, the register of shareholders, subscription agreements, seal, and various principal deeds and other documents belonging to the company. They have no title to have the custody of these documents, and retain them at their own hand and unwarrantably. They have been requested to state the names of the present directors of the company and of the secretary, but they have refused to give the information, although they professed to act for the company. It is believed and averred that there are now no directors and no secretary. . . . In any case, there is no-one now in charge of the company's affairs.

"In connection with the original application to Parliament, sums of £7999, 19s. and £1645, 5s. were lodged with the Exchequer as the Parliamentary fund, and a petition has been brought by Mrs Helen Allen Agnes Mason and others, the testamentary trustees of the late Samuel Lack Mason, who allege they are creditors of the company, before Lord Stormonth Darling as Lord Ordinary in Exchequer Causes, for determining the rights of parties in that fund. That petition is still undisposed of, and the company is not represented in it.

"In respect of the circumstances above mentioned, and in particular of the fact that there is no one legally in the management of the affairs of the company, the petitioner has presented this petition. In addition to invoking the *nobile officium* of the Court the petitioner founds on the Railway Companies (Scotland) Act 1867 (30 and 31 Vict. cap. 126), and in particular section 4 thereof."

The Railway Companies (Scotland) Act 1867 (30 and 31 Vict. cap. 126) enacts as follows:—Section 3. "In this Act the term 'company' means a railway company; that is to say, a company constituted by Act of Parliament, or by certificate under Act of Parliament, for the purpose of constructing, maintaining, or working a railway (either alone or in conjunction with any other purpose);" . . . Section 4. "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 purposes of the traffic on their railway, or of their stations or 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 the 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 a 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 way 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 judicial factor."

John Best lodged answers to the petition, in which he submitted, *inter alia*, that the petition was incompetent and irrelevant, and should be dismissed.

Argued for petitioner—On the appointment of a duly constituted board of directors as averred in the petition, Mr Chiene's appointment as judicial factor fell, and the company was at present without anyone in charge of its affairs. If necessary he desired a proof on this point. The petitioner having an extracted decree against the company was entitled to get a judicial factor appointed in terms of section 4 of the Act of 1867. That section applied in the present case. "Company" was defined by section 3 of the Act as a railway company constituted by Act of Parliament for the purpose of constructing, maintaining, and working a railway. In order that a judicial factor should be appointed, the company did not itself require to be working its own line—*Haldane* v. *Girvan and Portpatrick Railway Company*, July 20, 1881, 8 R. 1003. In any event, the petitioner was entitled to appeal to the *nobile officium* of the Court. The company was possessed of plenty of funds, and it was unjust that its debts should remain unpaid because there was no one to ingather these funds.

Argued for respondent Best—The Railway Company had no plant or rolling-stock or works of any kind. It had never acquired a single rood of land. It was therefore not an undertaking at all, and section 4 of the Act of 1867 had no application. Besides, the recovery of unpaid capital, which was the object the petitioners had in view, was not part of the duty of a receiver appointed under section 4. Under no statutory enactment could a judicial factor enforce payment of calls. The statute had no bearing on the present case. *In re Birmingham and Lichfield Junction Railway Company*, 1881, L.R., 18 Ch. D. 155; *West Lancashire Railway Company*, 1890, 63 L.T. 56. At common law the *nobile officium* of the Court had never been stretched in order to provide a creditor with a simple mode of recovering a debt. Besides, a judicial factor had already been appointed on this company's estate, and that appointment had never been recalled. The averments of the petitioner as to the election of a board of directors were not specific enough to go to proof.

Counsel appeared for Mr Chiene, the judicial factor appointed in 1888, and argued—He was still judicial factor on the company's estate. He had already attempted to get possession of the minutes and other documents, but had failed to do so. A judicial factor, whether appointed under the statute or at common law, had, however, no power to get in unpaid capital. The petition was therefore incompetent.

Lord Justice-Clerk—So far as we can get at the history of this company it never seems to have had any business at all except going to Parliament in order to get leave to put off doing business till some later time. There appears to have been a succession of Acts passed prorogating the time for executing works for reasons which are not at present before us. There are two grounds on which it is said that this factor should be appointed. The first is that there is power given to appoint such a factor by section 4 of the Railway Companies Act of 1867. Now, section 4, upon the face of it, has a distinct and clear object in my opinion. It was obviously not for the public advantage that creditors of a railway company should be allowed to do what creditors could do under ordinary circumstances when they have got a judgment, viz., seize the property of their debtor. This would be an injury to the public, for railways are constituted for the public convenience. Authority is given to establish railways in view of public requirements, and it would obviously be a most unsatisfactory state of things if, for the purpose of enforcing their claims against debtors, creditors should be entitled to stop the running of that road which exists for the public convenience. I remember very well myself when a now very prosperous railway had every article it possessed ticketed by the solicitors for the creditors of the company. And accordingly this Act was passed preventing creditors from taking any such steps. It is no longer in the power of the creditors of a company to stop the running of a railway. But in order to provide them with a remedy, in respect they could not exercise their usual remedy of practically seizing the whole rolling-stock of the company, authority is given by Parliament for the appointment of a factor who shall take possession of the earnings of the company, and who, after making provision for the expenses of the railway company, and the other outgoings of the company, shall apply and distribute the balance in his hands to meet the claims of its joint-creditors. Whatever the definition may include under the word "company," my reading of clause 4 is that it applies to a company in the position of having an undertaking, with appliances and vehicles for the purpose of running, and engaged in running, the purpose of the Act being to provide for the continuance of the running of the road, while at the same time safeguarding the interests of the creditors. Therefore in my opinion that clause of the Act of Parliament has no application in this case. So far as we know, from anything which is stated in the petition, or the answers, or at the bar, this company never had a single yard of road, or any plant, or vehicles of any kind. But then it is said that the *nobile officium* of the Court is properly invoked here. Under what circumstances? The creditor here says he is unable to ascertain how to go against his debtor, because although he believes that a board of directors was established, he is unable to get any information about it. That is just the position of a great many creditors who get judgments of the Court entitling them to attach their debtors' property directly by diligence in order to recover the debts which are due them. It is not to be said that creditors who have difficulty in finding out where funds are, or where property is, belonging to their debtors, are to come to the Court, and ask the Court, in the exercise of its *nobile officium*, to appoint a judicial factor for the purpose of helping them to find out where the property is, and helping them to work out their claims. I think that would be quite out of the question, and therefore on the whole matter I think the petition must be dismissed.

Lord Trayner—I am of the same opinion. The first difficulty in the way of granting this application arises from the fact (stated by the petitioner) that the estate in question has already been sequestrated and a judicial factor appointed thereon. The Court cannot grant a second sequestration, or appoint to an office that is already filled. It is said, however, that the appointment has fallen in respect that the judicial factor was only appointed to hold office until there was a duly constituted board of directors. That appears to be so. But it does not appear that any board of directors has been constituted. The petitioner says there has, but he cannot tell who the directors are or when they were appointed. Indeed, it appears, from

what the Solicitor-General said, that the petitioner's statement that a board of directors has been constituted is not a statement of fact within his knowledge, but an inference from other facts which are not before us. We were asked to allow a proof that a board had been duly constituted, but the statements on that subject are too vague to be remitted to probation.

I agree with your Lordship in thinking that the 4th section of the Act of 1867 does not authorise such an appointment as is here sought, and also that there is here no case for the exercise of the *nobile officium* vested in the Court.

LORD MONCREIFF — I am of the same opinion. I am inclined to concur with Lord Trayner in the first place that we must hold that Mr Chiene is still in the saddle. His appointment was until a board of directors should be duly constituted, and I do not think that the averments made by the petitioner are relevant, or are such as should be remitted to probation, to establish that any board of directors ever was duly constituted. But if we could get past that difficulty, I agree with your Lordships in regard to the rest of the case. In the first place, I am quite convinced that section 4 of the Act of 1867 has no application to this case. This is a company which has no undertaking; no land has been taken for it, and no stock has been purchased for its use. And then, with regard to the *nobile officium* of the Court, I think this is not a case in which we should exercise the *nobile officium* of the Court by appointing a judicial factor. The creditor must just attach any funds which he may be able to lay his hands upon in the usual way.

LORD YOUNG was absent.

The Court dismissed the petition.

Counsel for the Petitioner — Solicitor-General Dickson, Q.C.—Maclennan. Agent —A. & G. V. Mann, S.S.C.

Counsel for respondent Best — Clyde. Agents—Macpherson & Mackay, S.S.C.

Counsel for George Todd Chiene—W. C. Smith. Agents—Mackenzie & Kermack, W.S.

---

*Wednesday, June 27.*

## SECOND DIVISION.

[Lord Kyllachy, Ordinary.

## BARRAS *v.* SCOTTISH WIDOWS' FUND AND LIFE ASSURANCE SOCIETY.

*Husband and Wife—Parent and Child—Postnuptial Provision—Revocation with Consent of Wife and Children and Trustees.*

A husband and wife were married in 1867, and several children were born of the marriage. In 1881 the husband, on the narrative that he had made no specific provision for his wife and children by antenuptial contract of marriage or otherwise, assigned to three trustees, including his wife, certain policies of insurance in trust for behoof of the wife and the children of the marriage, all as the wife might see proper or might direct or appoint by writing under her hand, it being declared that the wife should be a trustee *sine qua non*, and that the other trustees should be guided by her as to how and in what manner and in what sums the funds at the disposal of the trustees should be apportioned for the foresaid purposes. The provisions in favour of the wife and children were declared to be for their own separate alimentary use allenarly. The assignation was intimated to the Insurance Company and delivered to the trustees.

In 1900, after all the children had attained majority, *held* (*aff.* judgment of Lord Kyllachy) that, the provision being reasonable in amount, the husband was not entitled to revoke the assignation even with the consent of the wife, children, and trustees.

*Low* v. *Low's Trustees*, November 20, 1877, 5 R. 185, and *Peddie* v. *Peddie's Trustees*, February 6, 1891, 18 R. 491, *followed.*

Dr James Barras was married to Miss Rachel Anderson Hyde or Barras on 9th April 1867. The following children were born of the marriage, viz.—(1) William George Barras, M.D., born 30th March 1868; (2) Margaret Mary Barras, born 18th January 1873; (3) Florence Helena Barras, born 5th September 1875; (4) Alice Smith Barras, born 21st February 1877; and (5) Ada Beatrice Barras, born 7th August 1882, who died 8th February 1898.

By a deed of provision and assignation dated 8th April 1881, Dr James Barras, on the narrative that he had not by antenuptial contract of marriage or otherwise made any specific provision for his wife Mrs Rachel Anderson Hyde or Barras, or for the children born or to be born of their marriage, and that he had from time to time taken out policies of insurance on his own life with a view to make suitable provision for them, and on the further narrative that to give effect to his said intention it was necessary that he should execute the said deed of provision and assignation in manner therein underwritten, assigned to and in favour of his wife, the Rev. J. T. Graham, and Thomas Hart, writer, Glasgow, and the survivors or survivor of them, the certificates or policies of assurance granted by the Scottish Widows' Fund and Life Assurance Society on his own life, viz.—(*First*) a policy for £500, dated 20th December 1865; (*Second*) a policy for £500, dated 27th August 1873; and (*Third*) a policy for £1000, dated 23rd December 1880, together with the whole sums and profits already due and to become due thereon respectively, "in trust for behoof of my said spouse for her own separate use and maintenance, and the maintenance, upbringing, and advancement in life of the