Counsel for Reclaimers — Trayner — Taylor Innes. Agents—Boyd, Macdonald, & Co., S.S.C.

Counsel for Respondents—Salvesen. Agents —Beveridge, Sutherland, & Smith, S.S.C.

Friday, March 18.

OUTER HOUSE.

[Lord Fraser.

PATTISON (SIME'S JUDICIAL FACTOR) PETITIONER.

Judicial Factor—Special Powers—Nobile officium —*Husband and Wife*—Jus mariti—*Aliment.*

Authority granted to a judicial factor on a small moveable estate to which a woman in poor circumstances had succeeded, her husband having been absent from her without making any provision for her support, and not having been heard of for a period of eight years, to pay over the estate to the wife on obtaining a discharge from a man of business whom she and her children had previously appointed to be their factor and commissioner.

In 1869 Mrs Helen Fraser or Sime became entitled on the death of her uncle James Ross to a share of his estate *ab intestato*. Shortly thereafter, and before Mr Ross' estate was wound up, Mrs Sime and her husband went to America, leaving a factory and commission in favour of Mr James Ross, solicitor, Montrose, with full power to uplift the sums due to them out of the executry estate of Mrs Sime's uncle.

In 1873 Mr Sime disappeared, and had not been heard of since that time. He had made no provision for his wife's support. She was in poor circumstances, and unable to support herself.

On 5th July 1880 Mrs Sime and her three children granted a factory and commission in favour of Mr Purves, W.S., and presented a petition for the appointment of a judicial factor on the sum that might be found due by Mr Ross as the balance of his intromissions with the executry estate before mentioned. Mr Pattison, accountant in Edinburgh, was appointed factor on 16th September 1880, and received a balance amounting to £60, 14s. 9d.

Mr Pattison now made application to the Court in the circumstances set forth—of the truth of which he stated he was satisfied—for authority to make payment to Mrs Sime of the balance remaining due in his hands; or otherwise, for authority to make payment to Mrs Sime of the sum of £15 yearly. The application was made with concurrence of her three children, two of whom were settled in America, and the third, a daughter, was married.

The Lord Ordinary, after remitting to a man of business to investigate the facts and circumstances set forth, pronounced this interlocutor—"Grants authority to the petitioner Mr Gilchrist Gray Pattison, as judicial factor mentioned in the petition, to make payment to the petitioner Mrs Helen Fraser or Sime of the free balance remaining due in his hands on a discharge to be granted by A. P. Purves, W.S., factor and commissioner for said Mrs Helen Fraser or Sime and her children, after deducting the expenses incurred and to be incurred by the judicial factor prior to his discharge; and decerns."

Counsel for Petitioner—D. Robertson. Agent —A. P. Purves, W.S.

Friday, March 18.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

HALL (COLLECTOR OF POOR'S ASSESSMENTS FOR THE CITY PARISH OF GLASGOW) *v.* THE CITY OF GLASGOW UNION RAILWAY COMPANY.

Poor—Assessments and Recovery—Lands Clauses Consolidation Act 1845 (8 *and* 9 *Vict. cap.* 19), *sec.* 127—*Deficiency in Assessments.*

In a claim for deficiency in assessments for poor-rates made against a railway company by reason of certain lands having been taken for the purposes of the railway's undertaking —*held* that the whole subjects taken for that purpose must be taken together in order to ascertain whether or not any deficiency actually existed, and that as the assessment for the whole subjects so taken showed no deficiency, no claim could be made against the company even although certain portions of them could be shown to be deficient.

This was an action at the instance of the collector of the assessment for relief of the poor in the City parish of Glasgow, to recover a sum of £158, 3s. 8d. from the City of Glasgow Union Railway Company, which was alleged to be due by the company under the 127th section of the Lands Clauses Consolidation Act 1845, in respect of deficiency in the assessment for the poor upon lands taken by the company for the purposes of their undertaking, as for the years 1878–9 and 1879–80. By virtue of an Act of Parliament passed in 1864 the defenders had become possessed of certain lands in the City Parish of Glasgow, which they entered upon and held for the purposes of their undertaking; upon the lands so acquired they proceeded to construct part of their railway lines, their station, and the various accesses and approaches thereto. The undertaking was a large and complex one, and by the terms of their Acts of Parliament the company were authorised to construct seven different railways or branch railways. In order to carry out the various parts of their scheme they had to acquire, and did acquire, various different parcels of lands in different streets, but all, as far as regarded this action, situated in the City Parish. Besides the railway undertaking proper, shops, an hotel, and arches which served as warehouses were erected upon the lands so taken. The 127th section of the Lands Clauses Consolidation Act, under which the claim was made, provides "that if the promoters of the undertaking become possessed, by virtue of this or the Special Act, or any Act incorporated therewith, of any lands charged with the land tax, or liable to be assessed with the poor-rate or prison assessment, they

shall from time to time, until the works shall be completed and assessed to such land tax and poor-rate and prison assessment, be liable to make good the deficiency in the several assessments for land tax and poor-rate and prison assessment by reason of such lands having been taken or used for the purposes of the work; and such deficiency shall be computed according to the rental at which such lands, with any building thereon, were valued or rated at the time of the passing of the Special Act; and on demand of such deficiency, the promoters of the undertaking, or their treasurer, shall pay all such deficiencies to the collector of the said assessments respectively; nevertheless, if at any time the promoters of the undertaking think fit to redeem such land tax, they may do so, in accordance with the powers in that behalf given by the Acts for the redemption of the land tax.'

The main pleas by which the defenders resisted the claim so made were—"(1) That the 'works' for which the ground, in so far as acquired by the defenders, was taken are completed and assessed to poor-rate; (2) that the said ground, not being required for their works, has been disposed of by them, and is now held by others; and (3) that the said new street is not one of their works."

The Lord Ordinary gave decree for certain sums admitted to be due, but assoilzied the defenders from the rest of the claims, on the ground that in so far as the subjects on which the claim was made were not actually occupied by completed works of the defenders, they had ceased to belong to them or to be in their possession.

The pursuer having appealed, the Lords appointed a minute to be put in showing the state of the assessable valuations before and since the undertaking was set on foot. This minute bore—"1st, That the *cumulo* valuation of the properties from time to time acquired and demolished for the purposes of the undertaking, and for which they were assessed, was, at the date of the passing of the Special Act, about £35,500. 2d, That the valuation of the railway and stations (so far as within the City parish), conform to valuation by the assessor of railways and canals, was for the assessing year 1879-80 £31,324. 3d, That the *cumulo* valuations upon which defenders paid assessments, including the rent of the hotel, shops, and arches, all erected upon the *solum* of the subjects specified in article 1, was for the year 1879-80 £46,000.

Authorities—*Directors of East London Railway Company* v. *Whitechurch*, 1874, 7 L.R. (H. of L.) 81; *Queen* v. *Metropolitan District Railway Company*, L.R. 6 Q.B. 698; *Wheeler* v. *Metropolitan Board of Works*, L.R. 4 Exch. 303.

At advising—

Lord Young—This is an action at the instance of the collector of assessment for the relief of the poor of the City Parish of Glasgow against the City of Glasgow Union Railway Co. It is founded upon clause 127 of the Lands Clauses Consolidation (Scotland) Act, which is incorporated in the defenders' Private Act of 1864. That clause of the General Act makes provision for the case of a deficiency in the poor-rates of a parish arising in consequence of such a party as the present defenders taking land therein for the purposes of their undertaking. The pursuer here says that in the two years 1878-79 and 1879-80 there had thus arisen a deficiency, caused by the defenders taking land, to the amount of £158, 3s. 8d. The Lord Ordinary informs us, no doubt correctly, that the parties have come to an agreement except with respect to the latter year. The agreement is complete as to the former, the defenders acknowledging that they are due certain sums, which accordingly are decerned for, but the parties are in conflict as to whether or no there is a deficiency such as the clause of the General Act founded upon provides for in the year 1879-80. And in order to enable us more satisfactorily to determine this in reviewing the Lord Ordinary's judgment on the subject, we required the parties to state in a minute how the assessment for the poor in the parish stood upon the whole property taken by the defenders at the time of their taking it, and how that assessment stands now. And the minute informs us, both parties agreeing, that the assessment for the poor at the time the properties were taken amount to the sum of £35,500, and that for the year 1879-80, being the year—and as I have said the only year—with respect to which there is any dispute, it has fetched a sum of £46,000. *Prima facie* there is here no deficiency, for comparing the two periods there is an excess in the latter year of about £10,000.

But it is said that nevertheless there is a deficiency within the meaning of the clause. I may observe, before adverting particularly to the clause, that this is said to be so by taking, not the actual property in the lump acquired by the railway company for the purposes of their undertaking in the parish in question, but by taking individual houses or plots of building ground; and then it is said that they can pick out of the whole property acquired and taken in the parish for the purposes of the undertaking certain houses or vacant ground now at the time of the taking occupied by houses, and if you confine your attention to these alone there will be a deficiency—the excess arising upon other parts of the subjects taken.

I am of opinion—and I may state it before proceeding to express my opinion more particularly upon the terms of the clause—that the undertaking of the defenders I regard as one undertaking. Like every other undertaking of the kind it consists of various parts. There are many things to be done in the accomplishment of it. They have to make the line—frequently to make branch-lines, sidings, stations, accommodation roads—but the land taken for these purposes is land taken for the purposes of the undertaking; and I think the land taken by this railway company within the parish in question—for there is only one parish in question—is all land taken for the purposes of their undertaking.

Now, I refer to the clause, which is stated at length in Cond. 7—"If the promoters of the undertaking become possessed by virtue of this or the Special Act, or any Act incorporated therewith, of any lands charged with the land-tax or liable to be assessed to the poor-rate or prison assessment, they shall from time to time, until the works shall be completed and assessed to such land-tax, poor-rate, and prison assessment, be liable to make good the deficiency on the several assessments for land-tax, poor-rate, and prison assessment, by reason of such lands having been taken or used for the purposes of the undertaking; and such deficiency shall be computed ac-

cording to the rental at which such lands with any buildings thereon were valued or rated at the time of the passing of the Special Act." Now, I think it strikes one at first sight that this is a provision to guard those who are interested—in the present case the poor-law authorities—against any loss of assessable subjects or of assessment in respect of the diminished value of the assessable subjects prior to the time of these becoming assessable after the completion of the works thereon — of their coming into the state into which it is intended they shall be finally put. When they come into that condition the assessment must be according to the actual value, whether that be more or less—I suppose the case has never occurred of land or property acquired in the manner referred to in this case being, when the works were executed, of less assessable value than they were before; but if that should happen there is no provision for any deficiency being made good. But prior to the completion of the works, if there be a deficiency—and necessarily only if there be a deficiency—they shall make it good. I say "necessarily," because if there is no deficiency there is nothing to make good. Now, here, in the view which I take, there was no deficiency for the year in question, for I think it is clear in principle, and stands upon the only authority on the subject to which we were referred—the embankment case, *Wheeler* v. *Metropolitan Board of Works* — that the increased revenue by any buildings erected upon any part of the property taken is to be taken into account in estimating whether there is a deficiency or no. And indeed the results are almost extravagant, from the statement of them, of any contrary rule. It was not intended to make a gift—to bestow a boon by the railway upon the poor-law authorities or collectors of the land-tax or prison rates—merely to make good any deficiency. You are to take the assessable rental, for the purposes of these rates, of the property acquired by the company for its undertaking at the date of the acquisition; and if, taking the rental—that is, the assessable value—during the period that the works are in operation, there is a deficiency, that shall be made good as a personal claim—the railway company shall make it good. But if there is no deficiency—if these subjects taken as a whole afford as great or a greater assessable rental than they did at the time of the taking, then there is within the meaning of this clause, in my opinion, no deficiency to make good. Now, that is the case here, upon the statement which we have in the minute, and therefore I am of opinion that, except in so far as the defenders have admitted their liability as applicable to the year 1878-79, this action is not well founded, and the defenders are entitled to be assoilzied, and that without any reference to the particular views on which the Lord Ordinary has proceeded in regard to land rating. It is really not doubtful, and I have not adverted to the subject—I did not think it necessary to advert to it—that the assessable value of the station, and of the shops under the arches, and so on, constructed upon the property taken by the defenders, must be taken into account in considering whether there be a deficiency or no.

My opinion is that the defenders, in so far as they have not admitted liability, are entitled to be assoilzied.

Lord Craighill—I am of the same opinion, and I think the case a very clear one upon the facts as these are ultimately before the Court. Apart from the statutory provision contained in section 127 of the Lands Clauses Act, the railway company would have been dealt with as regards assessment just as other owners of property. The houses or lands taken by them would be taken year by year at that which was their value for the period, but as it was probable that if this were the rule that was applied to undertakings such as the defenders' undertaking, there would for a period of years be some loss to the parish, it was thought expedient that provision should be made against such loss being incurred, and accordingly this clause, which is the foundation of the pursuer's claim, was introduced into the statute referred to. But the purpose of that provision was exclusively, as I think, to prevent loss, and it cannot reasonably be construed in such a way as to make it a source of gain to the parish and a source of loss to the railway company. It appears to me that once lands are taken they are to be looked upon as having been taken for the purposes of the undertaking, and up to the time when the assessable value of the undertaking shall reach the value of the property that has been taken for those purposes the value of the subjects taken as they appear in the year in which the Act was passed is to be the rule by which the rights of the parochial authorities are to be determined. Now, it appears that of the properties in question here, while many of them have been turned to account, there are still some whose yearly value is less than the value at which those properties appear in the valuation roll of 1864. If the question is to be determined simply with reference to those properties, whether or not there has been a deficiency, of course the answer must be that there is a deficiency. But we are not to ask that question with reference to each property separately. We are to ask the question with reference to all the properties taken for the purposes of the undertaking. And once we find that the assessable value of the works, so far as completed, and as now subject to assessment, is greater than was the value at the period the properties were taken, then I think the case for which the Act of Parliament made provision no longer exists, because the case for which this clause was passed was the existence of a deficiency, and it was not intended to be applicable to any case where the deficiency had been supplied. Now, the deficiency has been supplied, is far more than supplied, and therefore I agree with Lord Young that except to the extent to which the defenders here have admitted their liability, they are entitled to be assoilzied.

The Lord Justice-Clerk concurred.

The Court adhered to the interlocutor with respect to the sum for which it is thereby found that the defenders admit liability, *quoad ultra* recalled the same, and assoilzied the defenders.

Counsel for Pursuer — Trayner — Pearson. Agents—W. & J. Burness, W.S.

Counsel for Defenders—R. Johnstone—Jameson. Agents—Murray, Beith, & Murray, W.S.