Wednesday, December 18.

FIRST DIVISION.

COTTON *v.* BEATTIE AND OTHERS.

(*Ante*, vol. xxv., p. 445, and 15 R. 615, 641.)

Judicial Factor—Companies Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 17), *sec.* 57—*Discharge—Title of Minority of Mortgagees and Shareholders to object to Discharge.*

The Companies Clauses Consolidation (Scotland) Act 1845, sec. 57, provides that a judicial factor appointed to secure payment of the arrears of interest due to a mortgagee shall receive the whole or a competent part of the tolls of the company for the use of the said mortgagee, "and after such interest and costs have been received the power of such judicial factor shall cease, and he shall be bound to account to the company for his intromissions, or the sums received by him, and to pay over to their treasurer any balance that may be in his hands."

A factor was appointed at the instance of a mortgagee "upon the undertaking and property of the company, and to receive the whole or a competent part of the tolls or sums liable in the payment of the interest."

In a petition by this factor for exoneration and discharge with consent of the company and the mortgagee at whose instance he had been appointed, who held the greater part of the company's mortgages, a minority of the mortgagees and shareholders of the company appeared and opposed the petition on the ground that the factor had exceeded his powers.

Held (1) that the factor's appointment was in the statutory terms; (2) that he was not entitled to assume the financial management of the company's affairs, and had exceeded his powers in so doing; (3) that he could only receive exoneration and discharge from the Court for his proper actings as judicial factor, and was accountable to the company only so far as he had exceeded his powers on their employment; and (4) that the objectors had no title to oppose the granting of the petition.

On 20th March 1888, upon the application of Mr H. E. Broad, a holder of mortgages of the Edinburgh Northern Tramway Company to the extent of £6270, Mr David Nicolson Cotton, C.A., Edinburgh, was appointed by the Court to be interim judicial factor upon the undertaking and property of the said company, and to receive the whole or a competent part of the tolls or sums liable in payment of the interest payable on the said mortgages until the same with all costs should be fully paid. Having found caution Mr Cotton entered upon the duties of his office, and on 19th May 1888 the Court continued his appointment as judicial factor on the undertaking of the company. In the exercise of the office so conferred upon him Mr Cotton assumed what was practically the financial management of the company's affairs. The gross amount of the tolls were paid into bank, to an account in the judicial factor's name, amounting during the term of his office to £12,638, and as desired by the directors he disbursed therefrom the working expenses of the line and met various claims against the company of a pressing nature. He also kept the books of the company, and submitted the accounts at the meeting of shareholders.

On 19th July 1889 the judicial factor presented the present petition for examination and discharge.

He averred—"The petitioner has now a balance in hand after providing for the expenses incident to factory, including the expenses of the petition for his appointment, and of the present application, and his own remuneration, and the current working expenses so far as unpaid, sufficient to pay the arrears of interest due upon the said mortgages, held by the said Harrington Evans Broad, as at the date of his appointment. Subject to your Lordships' orders, the petitioner proposes to pay to the said Harrington Evans Broad the sum of £152, 3s. 8d. as the interest due upon the said mortgages up to 10th February 1888, under deduction of income tax. He also proposes to pay to the said Harrington Evans Broad interest at 5 per cent. upon the said arrears of interest up to the date of payment. After paying the expenses of factory as the same shall be taxed, and retaining such amount for his own remuneration as shall be fixed by the Auditor of Court, the petitioner proposes to pay to the company any balance that may remain in his hands."

He craved the Court—"to remit the process to the Lord Ordinary on the bills, with power to his Lordship to authorise and empower the petitioner, the said David Nicolson Cotton, as judicial factor foresaid, to pay to the said Harrington Evans Broad the sum specified in the petition, with interest as therein mentioned, and to pay over to the said The Edinburgh Northern Tramways Company the balance of the funds remaining in the factor's hands (after deducting the current working expenses so far as unpaid), and the expenses of and incident to the factory, including the expenses of the present application, as the same shall be taxed by the Auditor of Court, and retaining such sum for his own remuneration as shall be fixed by the said Auditor; and to exoner and discharge the petitioner as judicial factor foresaid; to grant warrant to and ordain the Accountant of Court to deliver up to him his bond of caution." . . .

Answers were lodged to the petition by William Hamilton Beattie, George Villiers Mann, Peter Couper, James Galloway, and Augustus William Rixon, who were besides Mr Broad the remaining mortgagees of the tramway company, holding mortgages to the amount of £3280, and who were also a minority of the shareholders of the com-

pany. The respondents objected to the granting of the petition, *inter alia*, in respect (1) of the undertakings and representations made on the occasion of Mr Cotton's appointment, to the effect that he would not pay the interest on one mortgage more than another; and (4) that Mr Cotton had acted *ultra vires* of his appointment, and that the funds in his hands were not the tolls or other sums of money which alone, by virtue of his appointment, he was authorised to receive, but the net returns of 15 months' working of the undertaking, as if he had been appointed judicial factor or manager under the Railway Companies (Scotland) Act 1867 (30 and 31 Vict. cap. 126).

On 19th November the factor lodged a minute, offering, with consent of the company and Mr Broad, if authorised by the Court, to make payment of the arrears of interest due to all the mortgagees at the date of his appointment.

The accounts of the factor having been lodged, objections were lodged thereto by the respondent.

They averred, *inter alia*, that the account now produced by the petitioner showed that the petitioner had, as averred by them in their answers, not confined himself to performing the duties of his office, but had acted *ultra vires* of his appointment. His duties, as defined by the statute under which he was appointed, were purely "to receive the whole or a competent part of the tolls or sums liable to the payment of" the interest due to the mortgagees on whose petition he was appointed, until such interest, "together with all costs, including the charges of receiving the tolls or sums aforesaid, be fully paid." From said account it appeared that between the date of his appointment on 20th March 1888 and the end of that month the petitioner had received of such tolls or other sums of money the sum of £115, 4s. 7d., and during the following month he had received the further sum of £526, 0s. 5d. The interest due to Mr Broad, the nominal mortgagee at whose instance the petitioner was appointed, amounted at the date of said appointment to the sum of £192, 0s. 8d., and that due to the other mortgagees of the company amounted at same date to £70, 13s. 3d. The petitioner had been thus in a position, within a few weeks after his appointment, and certainly before the end of April 1888, to have paid the interest due to the mortgagees on whose petition he had been appointed, and he had been also in a position to pay *pari passu* the interest due at the same date to the respondents, if he was entitled and bound to do so in virtue of the statement made at the bar by counsel for the petitioning mortgagee on the occasion of his appointment being confirmed, as well as to pay any costs legitimately incurred in connection with his appointment and his own reasonable remuneration. In these circumstances there had been no necessity for his appointment being continued, and had these circumstances been disclosed his appointment could not competently have been confirmed on 19th May 1888. The respondents submitted that the petitioner's whole intromissions and actings—at any rate from and after the date at which the tolls and other sums received by him had amounted to a sum sufficient to pay the interest due at the date of his appointment upon the mortgages of the company, together with the costs of his appointment—had been *ultra vires* and illegal, and that the petitioner was not entitled to be discharged thereof in the present process, or to receive any remuneration therefor. 2. The respondents believed and averred that the petitioner had acted not as judicial factor under the statute, but as if he had been manager of the undertaking of the company, and that he had so acted in his own interest and in the interests of certain parties who were represented by Mr Broad, the nominal petitioning mortgagee on whose application he had been appointed, who were a majority of the mortgagees and shareholders of the company, and greatly to the prejudice of the respondents and other mortgagees and shareholders of the company who formed a minority thereof. As he had maintained himself in his position of judicial factor until his collections had amounted to £12,638, as per account now rendered, it might be assumed that his claim for remuneration at 5 per cent. on his collections would amount to £631, which was more than three times larger than the sum he had been appointed to collect. . . . 15. On a sound construction of the statute in virtue of which the petitioner had been appointed, and under which alone he could act, he was, as above set forth, bound to account direct to the company for the balance of the tolls and other receipts remaining in his hands, after paying the interest due at the date of his appointment, to the mortgagee at whose instance he had been appointed, or, in the special circumstances attending his appointment, to the whole mortgagees of the company, and this he ought to have done within six weeks of his appointment. There was no provision in the said Act for the petitioner obtaining judicial exoneration and discharge, and it was not in contemplation of the statute that he should do so. Accordingly the respondents objected to his being discharged of the intromissions contained in his account now produced, and to his being remunerated in respect thereof.

The petitioner in answer, in the first place, submitted that the respondents had no title to object to the prayer of the petition being granted. He submitted, in the second place, that he had confined himself to performing the duties of his office, and that he had not acted *ultra vires*. According to the 57th section of the statute above referred to it was the duty of the factor to receive the whole or a competent part of "the tolls or sums liable to the payment of such interest" until such interest, "together with all costs, including the charges of receiving the tolls or sums aforesaid, be fully paid." The view of the factor was, that the sums available for payment of interest in terms of this section were the nett receipts, after deduction of all costs, working ex-

penses, and other necessary outgoings, not the gross receipts, as contended by the respondents. It was in the interest alike of the mortgagees and shareholders that the property of the company which might have been attached by ordinary diligence should be protected from unsecured creditors. This was effected by the appointment of the factor, and in consequence the undertaking as a going concern was preserved, and had yielded revenue which was now available for the payment of interest on mortgages. If the factor had acted upon the construction contended for by the respondents there would have been no earnings at all, as there would have been no fund out of which working expenses could have been paid. If the view taken by the factor was correct, then there were not at the end of April 1888 funds in his hands sufficient to pay even the interest due upon Mr Broad's mortgages. There was herewith produced a statement of the financial position of the judicial factory as at 30th April 1888. This statement showed that the gross receipts as at that date amounted to £652, 10s., the payments actually made to £427, 18s., and the working expenses incurred but unpaid to £401, 14s. 6d. The point now raised by the respondents was before the Court when the factor's appointment was confirmed on 19th May 1888. The respondents maintained that the factor had already received all that was due to Mr Broad, and the counsel for the factor replied that there had not been enough money received to keep the company going, as the current expenses had to be paid. It was not till at or about the date of presenting the petition for his discharge that the factor was in a position to pay even the interest due to Mr Broad out of the nett receipts. Even assuming that the petitioner was wrong in his construction of the statute, yet he was allowed to continue to act as factor, and down to the date when he applied for his discharge was never requested by the company, or any one interested, to demit office. The factor therefore submitted that in either view he was entitled to remuneration for the period during which he had acted. The factor has had nothing to do with the general management of the company, or the control of the line, which remained with the directors and officials of the company.

Under its special Act the company had power to borrow money on mortgage.

By the 40th section of the Companies Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 17) it is provided as follows—"If the company be authorised by the special Act to borrow money on mortgage or bond, it shall be lawful for them, subject to the restrictions contained in the special Act, to borrow on mortgage or bond such sums of money as shall from time to time, by an order of a general meeting of the company, be authorised to be borrowed, not exceeding in the whole the sum prescribed by the special Act, and for securing the repayment of the money so borrowed, with interest, to mortgage the undertaking, and the future calls on the shareholders, or to give bonds in manner hereinafter mentioned." Section 43 provides—"Every mortgage and bond for securing money borrowed by the company shall be by deed under the common seal of the company, duly stamped, and wherein the consideration shall be truly stated; and every such mortgage, deed, or bond may be according to the form in the Schedule (*c*) or (*d*) to this Act annexed, or to the like effect; and every such mortgage deed shall have the full effect of an assignation in security duly completed." The form of mortgage in Schedule (*c*) is as follows—"By virtue [here name the special Act], we, The Company, in consideration of the sum of pounds, paid to us by A B of , do assign unto the said A B, his executors, administrators, and assignees, the said undertaking . . . and all the tolls and sums of money arising by virtue of the said Act, and all the estate, right, title, and interest of the company in the same," &c.

Section 44 of the Edinburgh Northern Tramways Act 1884 gave priority to the claims of mortgagees over all other claims against the company. Section 57 enacts—"Every application for a judicial factor in the cases aforesaid shall be made to the Court of Session, and on any such 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 such principal and interest, as the case may be, until 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 intromissions, or the sums received by him, and to pay over to their treasurer any balance that may be in his hands."

Argued for the petitioner—(1) The respondents had no title to object to the petition being granted, or to raise the question whether the factor had exceeded his powers. The company had an interest to raise such a question, but did not resolve to do so. (2) The factor had not exceeded the powers enforced on him by the terms of his appointment. He had not ousted the directors or acted as a judicial manager of the undertaking, but had merely disbursed the sums necessary to preserve the undertaking of the company as a fruitbearing concern—*Primrose* v. *Caledonian Railway Company*, January 14, 1851, 13 D. 464, June 21, 1851, 13 D. 1214; *Haldane* v. *Rushton, &c.*, March 8, 1881, 8 R. 669, December 10, 1881, 9 R. 253. The factor's duty was to receive the

"tolls or sums liable in payment of interest" — Companies Clauses Consolidation (Scotland) Act 1845, sec. 57. It would very much depend on the meaning of these terms what his duty was. A distinction seemed to be made between "tolls" and sums liable in payment of interest. "Tolls" in that section might be taken then to mean "tolls proper" arising where a company leased out the use of its plant, and sums liable in payment of interest as equivalent to nett earnings, where a company worked its own business, as in the present case. "Tolls was a word of flexible meaning sometimes used as meaning "tolls proper," where such existed, sometimes as equivalent to nett earnings where there were no tolls proper. In the following cases under secs. 88 and 90 of the Railway Clauses Consolidation (Scotland) Act 1845, it was held to mean "tolls proper" — *Highland Railway Company* v. *Jackson*, June 16, 1876, 3 R. 850; *Scottish North-Eastern Railway Company* v. *Anderson*, July 8, 1863, 1 Macph. 1056; In the case of *Gardner* v. *London, Chatham, & Dover Railway Company*, L.R., 2 Ch. App., *per* Lord Cairns, p. 216, 217, "tolls and sums of money" were treated as the equivalent of earnings. In the following cases there were no "tolls proper." and the word "tolls" was held to mean nett profits — *Ames* v. *The Trustees of the Birkenhead Dock*, 1855, 20 Beavan 332; *in re Manchester & Milford Railway Company*, April 14, 1880, L.R., 14 Ch. Div. 645. The intention of the Legislature was to keep the undertaking as a fruitbearing subject. It was therefore necessary for the factor to meet the current expenses in order to secure the receipts. What the mortgagees were intended to have was the produce of the permanent undertaking, and it was only the nett receipts which were inpignorated. The factor here had paid no unsecured creditors, save these whose claims it was necessary to meet in order to preserve the undertaking as a fruitbearing concern.

Argued for the respondent—(1) The title of the respondents to appear and object to the granting of the petition arose from the fact that the factor had used his position to favour the interests of the majority of the company at the expense of the minority, and that it was impossible to obtain redress from the company. A dissentient minority in such a position was entitled to appear and be heard—*Rixon* v. *Edinburgh Northern Tramways Company*, March 20, 1889, 16 R. 653; *Orr* v. *Glasgow, &c., Railway Company*, April 23, 24, 1860, 3 Macq. 799. (2) The factor had exceeded his powers, which were merely those of a receiver. The interest due should have been paid out of the gross receipts. The "costs" which the factor was entitled to deduct under sec. 57 were the "charges of receiving," and included the expenses of his appointment and remuneration, and the expenses of collection. There was no provision in sec. 57 for deduction of working expenses as in 30 and 31 Vict. c. 126, sec. 4. The absence of such a provision showed that under the 1845 Act no such deduction was anticipated. Under the mortgage were assigned all the tolls and sums of money arising in virtue of the company's special Act—Edinburgh Northern Tramways Act 1884. These were, under the Tramways Act 1870, sec. 45, and the special Act, secs. 58 and 60, clearly the same as fares. The cases referred to under the Railway Clauses Act 1845 were not relevant. By sec. 44 of the Special Act priority was given to mortgagees over all other creditors of the company. Down to 1867 the creditors had the power of paralysing the work of a concern by seizing the rolling stock. The Railway Companies Act of 1867 was passed to obviate that. The English and Scotch Companies Acts of 1845 were in identical terms as nearly as the differences in legal language allowed. A judicial factor was just the same as a receiver. The argument was not affected by Lord Cairns' opinion in the case of *Gardner*. There was nothing in that opinion, in the Acts and in the forms of mortgage provided for, to show that in taking the fruit of a concern a factor was bound to provide for the growth of fruit in the future. The case of *Ames* was not under the Act of 1845, the appointment then under consideration having been made on the authority of the Court of Chancery without reference to any statute. The case of the *Manchester Railway Company* arose under the Railway Act of 1867, the terms of which were, as had been shown, quite different from those of the Act at present under consideration. In that case also the Master of the Rolls clearly distinguished between the functions of a receiver and a manager, and laid down that a receiver was not a receiver of nett profits—pp. 648-9.

At advising—

LORD PRESIDENT — These proceedings commenced with a petition by Mr Harrington Broad, who was a mortgagee of the company. His petition prayed for the appointment of a judicial factor in terms of the 56th and 57th sections of the Companies Clauses Act of 1845, and the terms of the appointment were these —"Appoint Mr Cotton to be interim judicial factor upon the undertaking and property of the company, and to receive the whole or a competent part of the tolls or sums liable in the payment of the interest payable on the mortgages mentioned in the petition until the same, with all costs, shall be fully paid, he finding caution before extract." This was done of consent of the company.

The criticism made upon this interlocutor is that it should have been confined to an appointment to receive the whole or a competent part of the tolls, and so forth, and that there should not have been an appointment of a judicial factor upon the undertaking and property of the company, but I am not disposed to acquiesce in that criticism at all, because I think the words used are really statutory words, and although it may be that they have led to some misunderstanding as to the proper powers of a judicial factor under that statute, the words themselves, I think, are fully justified. It must be observed as to the mortgages which are authorised to be issued by the company, the 40th section

provides that they shall have a certain power of borrowing money, and for securing the repayment of the money so borrowed with interest, they are empowered to mortgage the undertaking and the future calls on the shareholders or to give bonds. Now, the undertaking is allowed to be mortgaged for securing the repayment of the money. Then in the 43rd section it is provided that every mortgage and bond for securing money borrowed by the company shall be in certain form, and every such mortgage shall have the full effect of an assignation in security duly intimated—that is, an assignation of the undertaking. Then the schedule to which that section applies gives the form of the mortgage in these terms—"The company do assign unto the said A B, his executors, administrators, and assignees the said undertaking, and all future calls on the shareholders, and all the tolls and sums of money arising by virtue of the said Act, and all the estate, right, title, and interest of the company in the same, to hold under the said A B, and so forth." The undertaking therefore is the thing that is mortgaged, and of course with that undertaking are also assigned the income arising from tolls and other sums of money. Then to go to the 57th section of the statute, which fixes the way in which the judicial factor is to be appointed, we have this provision—"Every application for a judicial factor shall be made to the Court of Session, and on such application being 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 sum liable to payment of the interest, and so forth." Therefore the appointment of the factor seems to me to be perfectly correctly expressed in so far as statutory language is concerned, as an appointment of a factor on the undertaking of the company. But it is quite plain at the same time that the meaning of that is that he shall be appointed as factor on the undertaking for the purpose of receiving the whole or a competent part of the tolls or sums liable in the payment of interest, and so forth. So that the appointment in this case, I think, is in its terms a statutory appointment.

Now, the duty of the factor so appointed is to procure payment to himself as factor of so much of the tolls and other sums coming into the hands of the company as will enable him to pay the balance of interest due to the mortgagee at the time of his (the factor's) appointment, and the 57th section further provides that he shall continue to receive so much of the tolls, and so forth, until 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 all such tolls and sums of money 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 is due. Therefore as soon as the amount of interest due to the mortgagee has been provided for by the collection of tolls or sums of money by the judicial factor his office comes to an end, and all he has got to do is to pay over the money so received to the mortgagee to the extent of the mortgagee's claim as it stood at the date of the factor's appointment, and to pay the balance to the company. But of course he is to pay the balance to the company after deducting the expenses concerning the factory, whatever expense has been occasioned by the remedy adopted by the mortgagee by applying for the appointment of the factor.

All that seems to me to be very simple, and this factory having been assented to originally by the company, I do not see that there ought to have been any difficulty whatever in carrying out the object of the appointment. But most unfortunately the gentleman appointed to the office, apparently with the sanction of the company, seems to have misunderstood his own position, and he assumed, and was allowed to assume by the company, the office of manager of the finances of the company, and accordingly he has received the whole income of the company, and now proposes to account for the same. Now, that is an accounting with which we have nothing whatever to do. All that this Court have to deal with is the factory—to see that everything has been properly and regularly done under the factory, and to discharge the factor with regard to his proper actings as such. And therefore the solution of this case, to my mind, is very simple.

I think the money in the hands of the factor, so far as it is necessary to discharge the interest due to the mortgagee at the time of the factor's appointment, must be paid in the first place. Then, there being a balance beyond that in the factor's hands, he is entitled to retain so much as will pay the expenses of the proceedings under the factory—of course not all the proceedings that have been adopted by this gentleman, but the proceedings properly adopted by him as factor, including of course a reasonable charge for his own remuneration as factor; and that being done, we should then be in a condition to discharge Mr Cotton of his intromissions as factor. But as regards his accounts generally, I apprehend we have nothing whatever to do with them. That is a question between him and the company, and must be settled between themselves. Of course he must account to the company for any balance that may be in his hands as judicial factor, and he will also have to account, but upon a totally different footing, for what he has done in excess of his duties as judicial factor.

It seems to me therefore, in the first place, that Mr Johnston's clients have no concern with this matter whatever. It no doubt has been very convenient that he should point out, as he did very clearly, that there had been great irregularities in the proceedings of Mr Cotton in going beyond the proper functions which he was appointed to discharge by this Court. But Mr Johnston's clients are, in the first place, shareholders of the company, and as such it does not appear to me possible to say

that they can interfere between the mortgagee of the company and the factor appointed upon the application of the mortgagee and the company in settling the accounting and the discharge between these parties. No individual shareholder can possibly have any such right. But then they are mortgagees also, and as mortgagees they would certainly in one point of view have been quite entitled to appear if they wanted to secure payment of any outstanding interest, or of any principal to become due to themselves as mortgagees, because it was their interest in that view to prevent one mortgagee from carrying off the income of the company, or any part of it, to their prejudice, for all the mortgagees are appointed to rank *pari passu* under the statute, and they all have an equal right therefore to the income accruing to the company at any particular time. And so, if they had appeared as mortgagees in answer to this petition, and sought to have a factor appointed for themselves at the same time, or had asked to have the appointment of Mr Cotton extended, so as to embrace the interest or principal and interest due to them at that date, they would have been listened to of course, and would have obtained what they asked. But that is all they could ask as mortgagees. So that neither as shareholders nor as mortgagees do I think they have any right of interference as between the mortgagee who petitioned for this appointment and the factor appointed and the company in settling the discharge of the factor as proper factor. The result of my opinion therefore is that we ought to have this case put into such a shape in point of figures as to enable Mr Cotton to pay over the sum due to the mortgagee, and then to have his account for the expenses of the factory audited in common form, and be allowed to deduct that from any balance he may have.

LORD ADAM—I concur. I never from the beginning of this discussion could understand how individual shareholders or mortgagees, such as those represented by Mr Johnston, could have the title to appear in these proceedings. The appointment was made under the 56th and 57th sections of the Companies Clauses Act of 1849, and by that appointment it humbly appears to me that the judicial factor had, and was intended to have, the powers conferred by the 57th section, and no other or higher powers. These powers are very clearly set forth in that section. He is to receive the whole or a competent part of the tolls or sums liable to the payment of such interest. We had a long and interesting discussion as to what he was entitled to receive and to take under the words "tolls and sums liable to the payment of such interest." I could have understood that a very interesting and difficult question might have arisen if the judicial factor in the execution of his office had attempted to seize certain sums of money which the company said he was not entitled to have under his appointment. But I do not see that that question arises here for our determination, because the clause goes on to say that upon such appointment "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." Now, there is no question in this case that the judicial factor has received tolls and sums liable to the payment of such interest; and it appears to me that this section is equally clear as to what he is to do with them. "After such interest and costs, or such principal, interest, and costs, have been so received, the power of such judicial factor shall cease." That is to say, as soon as the judicial factor has received tolls and sums of money sufficient to meet the interest, if it is interest, or the capital and interest if it is capital and interest, of the mortgagee on whose behalf and for whom he was appointed, the factory ceases and there is nothing more to do. Well, we are exactly in that position here. There is no dispute that the factor has received sufficient to pay the mortgagee, and that he is ready to do so, and it is proposed to authorise him to do so. Therefore the factory has ceased and determined, and what more is there to do? Only this, that he shall account. And to whom? To the company and nobody else for his intromissions. That is all that remains to be done—to account to the company for his intromissions and to pay over the balance. That is the position of matters. Now, that being so, I cannot say that I have ever been able to see at what point of the proceedings Mr Johnston's clients had a right to interfere. There may be questions between them and the company as to whether the judicial factor should or should not have been allowed to assume larger powers. There may have been liabilities incurred by the directors or there may not; but these are questions not *hujus loci*, and with which it humbly appears to me that neither the judicial factor nor we have anything whatever at present to do. And therefore I concur with your Lordship that the factory having come to a conclusion, all we have to do is to see that he accounts to the company for his intromissions in his proper character as judicial factor.

LORD M'LAREN—I agree with the exposition of this case given by your Lordship in the chair, and also with Lord Adam, and I shall only indicate the points which I think have been established by the argument and by the consideration which the case has received from your Lordships.

In the first place, I hold that an appointment under the 57th section of the Companies Act is the appointment of a judicial factor on the estate of the company, and therefore that the Court was well founded in the form in which the interlocutor conferring the appointment was expressed. And I think it follows from the fact that his is an appointment of a judicial factor

on the estate that the judicial factor is entitled to go directly to the cashier or officers of the company who levy the tolls and to receive from them these tolls or other sums of money, and that he is not obliged to go to the directors and take from them what they may please to give him. If he had to go to the directors the mortgagee might not be in a better position than he was before the application, because they would just say after the appointment as they had done before that they were without funds—that all their funds were carried away as fast as they were earned by the necessary outgoings of the company. But being a judicial factor on the estate he has direct access to the funds of the company, and it is for the purpose of his having such access that the appointment is made—to enable the mortgagee to enter into the possession of the revenues of the company to such extent as shall enable him to pay himself through the factor the interest of his debt.

Then, in the second place, I conceive that the duties of the judicial factor, notwithstanding the title which his appointment gives him, are strictly confined to those of a receiver—that he has no power of interfering in the administration of the affairs of the company, but is only to receive so much of its revenues as may be necessary for the special purpose of his appointment.

That being so, the question arises, how are the duties of a factor with such limited powers to be reconciled with the necessity of carrying on the business of the company, through which alone the sums can be obtained that are to be applied in the payment of interest. There is, of course, the weekly payment of wages which must be made if the company is to go on, and there are tradesmen's accounts which have to be paid at uncertain intervals. Now, it seems to me that if the factor can obtain as much money from the revenues of one week as will pay the interest on the debt, he is entitled to take it to pay the mortgagee and leave the directors to provide for wages and outgoings as they can. But if the revenue of one week is not sufficient to pay the debt, he must face the question whether he will be content with that sum and let the business then come to an end, or whether under the power given to him to draw the whole or a competent part of the tolls he will be content to draw from time to time a portion of the tolls, leaving the balance in the hands of the directors to be applied by them under their responsibility to the shareholders. That, I should imagine, would be the way in which such an appointment would be worked—that the judicial factor would decide for himself what portion of the tolls or earnings he would draw, and what he would choose to leave for the purpose of enabling the business to be carried on. I have thought it right to mention this because before I could pronounce the factor to be in the wrong, in the course of administration on which he has acted, I must first satisfy myself what would have been the right and proper course for him to take in the execution of his statutory duties. I see no objection to his leaving from week to week a certain portion of the revenues in the hands of the directors, to be applied by them in carrying on the business of the company.

The next question is, seeing that the judicial factor has misconceived the nature of his powers, and has entered into an arrangement with the sanction of the company for taking the whole administration of its affairs into his hands, or at least the whole financial administration into his hands during his appointment, what is the result of this irregularity? It appears to me that we can only deal with the balance which he states he has in hand. His primary duty is to pay the mortgagee out of that balance, and then, subject to the costs of the original application and the application for discharge, he is to account to the company for the surplus. I agree with your Lordships that we can only discharge the judicial factor in a question with the mortgagee, and that any discharge which he may receive in this process will not settle any question between himself and the company arising ont of his financial dealings entered into with their authority. It does not seem likely that any such question will be raised, because he has been acting with the consent of the company, but I think that our discharge should be granted so as not to cover any question of that kind which might possibly arise either with the company or with dissentient shareholders.

And lastly, I agree that the mortgagees have really no title to contest this question, and specially do I object to this process of discharge being made the vehicle for carrying on hostilities between different sections of the company, a kind of proceeding for which this petition is totally inappropriate. But we have undoubtedly received some assistance from the counsel for the other mortgagees in considering the case, which may, perhaps, be an element in the decision of one part of this case.

The Court pronounced this interlocutor:—

"Authorise the judicial factor to pay over to the original petitioner, Harrington Evans Broad, the sum of £152, 3s. 8d. in discharge of the arrears of interest due to him as mortgagee at the date of the factor's appointment: Find that the factor is bound to account to the company for any balance in his hands as factor after deducting the said payment, but under deduction of the expense incurred by him under the factory, and a reasonable remuneration for his trouble as such factor: Allow him to lodge an account of such expenses, but limited strictly to expenses reasonably incurred in the proper business of the factory, excluding expenses incurred by him under the employment of the company," &c.

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