

On both grounds therefore, that the legal error attributed to the magistrate was not brought under his notice, and that there was no legal error in the magistrate convicting, even if it was the appellant's salesmen who received and hung up the meat—although in that case I should consider the magistrate had taken a somewhat harsh view—I am for dismissing the appeal. If it had appeared that the appellant's premises were those of an auctioneer, who collected and inspected meat before offering it for sale, the case would have borne a totally different character. No such case is set forth, and counsel were unable to say that that was so with a view to having the case sent back to the magistrate. I propose that we answer the first question in the negative, and that we decline to answer the second question.

LORD M'LAREN—On the first question I agree with your Lordship that the procedure here was competent under the forms prescribed by the Edinburgh Police Act.

On the second question, I also concur with your Lordship in thinking that this is an undesirable form in which to bring up a question of law—indeed the case does not raise any question of law at all. Either, therefore, the question must be disallowed altogether, or, if it is considered, it must be held that the only argument in support of the appeal does not raise a case for the interference of this Court, and proceeds upon the erroneous supposition that it is essential that the accused should know of the unsoundness of the meat before he can be convicted. Now, in a prosecution under this section it is not necessary to a conviction that the accused should be in the knowledge that the meat was unsound. It is sufficient that he was actually in possession, it may be through his servants, of meat unfit for human food. There was, therefore, in the facts set forth a reasonable case for the consideration of the magistrate. But I quite adopt your Lordship's view that we should decline to answer this question.

LORD RUTHELFURD CLARK—I agree.

The Court pronounced this interlocutor:—

“Answer the first question in the case in the negative: Dismiss the appeal, affirm the determination of the inferior judge, and decern: Find the respondent entitled to expenses, which modify to five guineas.”

Counsel for the Appellant—Rhind—Dickson.
Agent—George M. Wood, S.S.C.

Counsel for the Respondent—D.-F. Mackintosh
—Boyd. Agent—W. White Millar, S.S.C.

COURT OF SESSION.

Saturday, May 26.

FIRST DIVISION.

[Lord Trayner, Ordinary.]

MOLLESON *v.* HOPE AND ANOTHER.

Trust—Trusts (Scotland) Act, 1867 (30 and 31 Vict. c. 97), secs. 3 and 4—Trusts (Scotland) Amendment Act, 1884 (47 and 48 Vict. cap. 63), sec. 2—Sale of Trust-Estate—Interests of Liferenter and Fiar.

The judicial factor upon a trust-estate presented a petition for authority to sell certain heritable subjects belonging to the trust which were held in liferent and fee. The trust-deed empowered the trustees to sell the heritable subjects either by public roup or private bargain. A price was offered for the subjects which would have increased the income of the liferentrix from £18 to £80. The petition was opposed by the *fiar* on the ground that his interests would be sacrificed by a sale, as the time was inopportune for selling, and the ground had a prospective feuing value. *Held* that it was not “expedient for the execution of the trust” to sell the subjects, and petition *refused*.

This petition was presented by J. A. Molleson, C.A., judicial factor on the trust-estate of the deceased Miss Frances Jane Hope, Wardie Lodge, Edinburgh, for authority to sell certain portions of land belonging to the trust-estate.

The petition set forth that Miss Frances Jane Hope had had the liferent of Wardie Lodge, along with certain of her sisters, under the trust-settlement of her uncle Dr Thomas Charles Hope, sometime Professor of Chemistry in the University of Edinburgh, and that while residing there, and in order to preserve the amenity thereof, she acquired certain portions of the lands of Wardie lying contiguous thereto, which at the date of the petition formed part of her trust-estate; that Dr Thomas Charles Hope's trustees had resolved to sell Wardie Lodge, and that it would be for the advantage of the trust under the petitioner's charge that the subjects lying contiguous to it, and which belonged to the said Frances Jane Hope, or part of them, should be sold along with it.

By her trust-disposition and settlement, dated 27th February 1868, and codicil thereto annexed, dated 25th January 1870, Miss Hope directed her trustees to hold and retain the residue of her means and estate for behoof of Miss Anne Jemima Hope Johnstone, daughter of John James Hope Johnstone, Esq., of Annandale, in liferent, for her alimentary liferent use alienarily, and to pay and dispose the residue of her means and estate to the youngest surviving child of her brother James Hope, writer to the signet, Edinburgh, at the time of the death of the said Anne Jemima Hope Johnstone.

The trustee gave and committed to her trustees full power and authority, *inter alia*, to sell and dispose of her lands and heritages, either by

public roup or private bargain, as they might think fit, and to grant dispositions, assignments, and conveyances thereof to the purchasers, containing all usual and necessary clauses.

By the Trusts (Scotland) Act, 1867 (30 and 31 Vict. cap. 97), sec. 3, it is provided that "it shall be competent to the Court of Session, on the petition of the trustees under any trust-deed, to grant authority to the trustees to do any of the following acts, on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof; and the Court shall determine all questions of expenses in relation to such applications, and where it shall be of opinion that the expense of any such application should not be charged against the trust-estate, it shall so find in disposing of the application—(1) to sell the trust-estate, or any part of it." . . . And by section 4 of the Act it is further provided that "all powers of sale conferred on trustees by the trust-deed, or by virtue of this Act, may be exercised either by public roup or private bargain, unless otherwise directed in the trust-deed or in the authority given by the Court." . . .

By the Trusts (Scotland) Amendment Act, 1884, sec. 2, it is provided that in the construction of the Acts recited therein, including the foresaid Act 30 and 31 Vict. cap. 97, trustee shall include tutor, curator, and judicial factor.

The petitioner stated that he was satisfied that it was expedient and for the benefit of the trust-estate that the heritable subjects should be sold, and applied for power to sell by public or private sale.

James Hope and his youngest child Cecil Arthur Hope lodged answers. They did not oppose the sale of the lot adjoining Wardie Lodge, but they objected to the sale of the other lots, and averred that there was at the time no demand for building ground, and that to sell these portions was simply to sacrifice the interests of the fiar in order to give a small increase of income to the liferentrix, a lady of seventy-one years of age.

The Lord Ordinary remitted to Mr H. B. Dewar, W.S., who reported in favour of exposing for sale, along with Wardie Lodge, the lot adjoining that house. With regard to the remaining portions of the ground the reporter stated:—"At the date of the remit in this case, when these 4½ acres were lying unoccupied and almost waste, the reporter felt much difficulty as to the practical course that he should recommend to your Lordship. The men of skill considered that they should be let at about £4 an acre to a neighbouring dairymen. They thought that if they were exposed to public sale no offer would be got for them, as there is no demand at present, nor any early prospect of a demand, for building ground in that neighbourhood. Moreover, Mr James Hope, on behalf of the fiars, with whom the reporter has had meetings on the subject, strongly objected to any endeavour to force a sale of these 4½ acres of feuing-ground. Accordingly, the position was, that the interest of the liferentrix and the interest of the fiars seemed to be directly opposed to each other. On the one hand, for the liferentrix to get only £18 a year for these three pieces of ground was like sacrificing her interests. On the other hand, as there is no doubt prospective value in the ground in question as building ground, it seemed hard to

sell the ground for what it would bring at a time when there seemed absolutely no demand for such ground." The reporter recommended that a private offer of £2100 for these lots of ground should be accepted,

The Lord Ordinary (TRAYNER) on 16th March 1888 granted warrant to sell in terms of the report.

The respondents reclaimed, and argued—The Court would not allow a sale unless it was "expedient for the execution of the trust"—*Weir's Trustees*, June 13, 1877, 4 R. 876; *Downie*, June 10, 1879, 6 R. 1013. Before the date of the Trusts Act, 1867, where there was a power of sale in the trust-deed, the judicial factor had to make out a case of necessity before being allowed to sell—*Auld*, February 5, 1856, 18 D. 487. There was no case where a sale had been ordered just because a sale was desired. Except for the interest of the liferentrix, no one would attempt to sell the property at such a time.

Argued for the petitioner—It was only necessary that a case of expediency should be made out. Were this not a lapsed trust, no application need have been made. Judicial factors were now under the Act as nearly as possible assimilated to trustees, and were clothed with more ample powers than at the time of the authorities relied on by the reclaimers. It was apparent from the report lodged that a good price had been offered.

At advising—

LORD PRESIDENT—This is an application by Mr James Molleson, as judicial factor on the trust-estate of the deceased Miss Frances Jane Hope, for authority to sell certain heritable subjects forming part of the trust-estate.

The ground of the application is that in the petitioner's opinion it is expedient for the interests of the trust that the land should be sold now, and we have the report of a skilled professional gentleman in support of the application. It seems to me that the circumstances of the case raise a very difficult question for the decision of the Court.

Miss Hope had the liferent of Wardie Lodge, along with certain of her sisters, under the trust-settlement of her uncle Dr Thomas Hope, and while in the occupancy of Wardie she purchased four lots of ground calculated to increase the amenity of Wardie.

This application deals with these pieces of ground. The ground is suitable for building purposes, but up to the present time has not been built upon, and its annual value is small, the rental being only £18 per annum.

The settlement of Miss Hope is of this nature—she leaves the estate to be liferented by two ladies and the survivor of them, one of whom still lives, namely, Miss Hope Johnstone. The fee after the death of Miss Hope Johnstone is to go to the youngest surviving child of her brother Mr James Hope. The presumptive fiar is Mr Cecil Hope, the son of the said James Hope, but it is necessary that he survive the liferentrix Miss Hope Johnstone.

The sums offered for the land are £400 for one lot, which it is proposed to sell by public roup along with Wardie. There is no dispute about this piece of land. In the view of all parties it should be sold with Wardie, being in close con-

nection with it. The other three lots it is proposed to sell by private bargain, and an offer has been made of £2100. This is evidently very favourable for the liferentrix Miss Hope Johnstone, and would raise the income she derives from this land from £18 to £80 per annum, and therefore from the point of view of the liferentrix a sale is very expedient. But the interest of the prospective fiar must also be attended to. Now, there is no doubt that this is a very bad time for selling property, and doubtless the value of the property may improve before the death of the liferentrix. If therefore it should improve the interests of the prospective fiar would be sacrificed by the present sale for the good of the liferentrix. Hence arises the difficulty to be solved. The statute authorises the Court to grant authority to trustees to sell on being satisfied that to do so is expedient for the execution of the trust, and not opposed to the directions of the testator. That is to say, instead of the Court requiring, as it did before the passing of this statute, to have a case of necessity to sell made out, it is now only necessary for an applicant to show that it is expedient to sell in the interests of the trust, and also not contrary to the directions of the truster. The trustees nominated by the truster had power to sell the property, hence the sale is not contrary to the directions of the trustee, and the question is whether this power should be exercised by the judicial factor.

We must look at the case as in the light of an application by the trustees for power to sell. This being so, it appears to me that the petitioner has not made out his case. No doubt a sale is expedient in one sense, for it would raise the income of the estate from £18 to £80, and so benefit the liferentrix. But on the other hand, the interest of the fiar will in certain events be sacrificed, and can we therefore say in the words of the statute that "it is expedient for the execution of the trust" to sell the property. It will not so far as I can see facilitate the execution of the trust, and so make it easier for the judicial factor to carry out the objects of the trust—in short, the affairs of the trust will not be improved.

I am quite satisfied as to the evidence of the skilled witnesses with regard to the price offered, and if we were to deal with the estate in fee simple it might then be doubtful whether the offer made should be refused, for in that case the owner of the estate would be the present beneficiary, and his income would be raised. But here the case is different, for the fiar gets no benefit, and may perhaps sustain future loss. This means that we should sacrifice the interests of the fiar to those of the liferentrix, and therefore I am for refusing the petition.

LORD ADAM—With reference to the three pieces of land not actually appertaining to Wardie Villa, my opinion is that a case for sale has not been made out. It does not seem to be necessary for the execution of the trust, nor do I think that it is expedient, in the sense your Lordship gives to expediency, namely, for the benefit of the working out of the trust. The judicial factor can perform his duties just as well whether the land is sold or not. If we were dealing with an unlimited fiar he would not sell at this time unless obliged to do so. Mr

Dewar in his report says that if the fields were put up for public sale at the present time no offer would be made for them—hence no one unless obliged to do so would expose them for sale. But here a private offer has been made, and, as your Lordship says, if the owner wanted to sell this is a very good offer to take. Then why not sell? The reason is that there is here a competition of interests between the fiar and the liferentrix. The result of a sale would be that on the one hand the liferentrix would benefit to the extent of a rise from £18 to £80 per annum; on the other hand the interests of the fiar would be sacrificed by our allowing a sale to take place. It appears to me that in this case the substantial and permanent interest is with the fiar, while the interests of the liferentrix are only subsidiary. As far as I can see, the loss of the fiar in the case of a sale would overbalance any gain on the part of the liferentrix, and therefore I consider that the petitioner's case is not made out.

LORD KINNEAR concurred.

LORD MURE and **LORD SHAND** were absent.

The Court recalled the interlocutor reclaimed against and refused the petition.

Counsel for the Petitioner—Sol.-Gen. Robertson—Don Wauchope. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondents—Graham Murray. Agent—James Hope, W.S.

Thursday, May 31.

SECOND DIVISION.

[Lord Fraser, Ordinary.]

TENNANT AND OTHERS v. NAPIER'S TRUSTEES AND OTHERS.

Servitude—Contract of Ground-Annual—Right to Use Canal for Water Supply and for Navigation—Obligation to Defray Expense of Maintenance.

The proprietor of subjects held burgage disposed several lots by contracts of ground-annual, which declared that upon the ground retained by the disponent it was proposed to make a canal, the south bank of which should form the north boundary of the lots conveyed. The disponent bound himself to complete the canal within a certain date, according to a plan signed as relative to the contracts of ground-annual. The disponees were given the privilege of taking water from the canal for the use of the works to be erected on the lots disposed, together with the right of navigation on the canal. The contracts provided that the disponees should be at the expense of maintaining and keeping in good order the south bank, while the disponent and his successors were under a similar obligation with regard to the north bank, the disponent and the disponees being taken bound jointly to defray all other expenses of maintaining and keeping in good order and repair