

differ from the opinion expressed by your Lordships. We have three witnesses speaking distinctly to words clearly importing donation, and nothing adduced sufficient to discredit their testimony. It was proved that the lady objected to a medical man being called in, and she seems to have been dying of nothing but old age, which it was not in the power of any doctor to cure. I do not see ground for holding that stimulants were applied for the purpose of affecting the mind of the deceased, and obtaining a donation in favour of the defender; and I believe, on the other hand, that the words of gift were spoken. I think that these words expressed her deliberate intention, and that they ought to receive effect.

Agent for Appellants—T. F. Weir, S.S.C.
Agents for Respondent—Morton, Whitehead, & Greig, W.S.

Saturday, November 18.

GEORGE AULDJO JAMIESON (POTTS'
FACTOR), PETITIONER,

Judicial Factor — Powers — Audit of Accounts.

Where a trust created before the passing of 31 and 32 Vict. c. 84, § 17, threatened to become unworkable from the multiplication of liferenters, the judicial factor who had been appointed to manage it incurred an account of expenses in an attempt to go to Parliament for a Private Act to authorise the winding up of the trust. This account consisted of items spent in obtaining advice, and items spent in the attempt to go to Parliament. *Held* that the former, as expenses incurred in obtaining advice to guide him in the conduct of the factory, were proper charges against the factory estate; but that the latter had been properly disallowed in the audit of the factor's accounts.

The petitioner was appointed judicial factor in 1861 upon the trust-estate of the deceased Mrs Isabella Potts, who died on January 17, 1826.

By her trust-deed Mrs Potts left certain legacies, and over the residue of her estate she created a series of liferents to the heirs of certain parties, so long as any of them should exist. Since the death of Mrs Potts these heirs had increased so much in number that the trust threatened to become unworkable from the gradual diminution of the shares of the liferent payable to each beneficiary, though the total sum liferented was of considerable amount. Under these circumstances the factor felt it to be his duty to apply to Parliament for a Private Act enabling the trust to be wound up. In course of doing so he incurred an expense of £81, 17s. 8d., and the attempt ultimately proved abortive.

In the present petition for interim audit of his accounts, the accountant (Mr William Moncreiff) drew the attention of the Lord Ordinary to the circumstances in which this account of expenses had been incurred, in the following terms:—"In the year 1869, in consequence of the difficulties in the management of the trust, arising from the gradually increasing numbers of the beneficiaries, and the very small amount of the shares of annual income payable to each, the judicial factor, by desire of some of the beneficiaries, instituted proceedings for obtaining an Act of Parliament

authorising the trust to be wound up and the funds divided. These proceedings fell through from the whole of the beneficiaries not consenting, or rather omitting to intimate their concurrence, in the application as required by Parliament, but certain expenses were incurred, amounting to £81, 17s. 8d., which have been stated in the factor's accounts as a charge against capital. As the judicial factor took these proceedings on his own responsibility, without having obtained special powers from the Court, the accountant has thought it right to report the circumstances, in order that the Lord Ordinary may judge whether the above sum of expenses ought to be sustained and sanctioned. In reference to this the factor explains:—"Before the application was made to Parliament for an Act, the opinion of counsel was taken by the factor, and counsel advised that the factor should not apply to the Court for special powers, as in his opinion the Court could not be expected to sanction the winding up of the trust by giving the fee to the liferenters, and thus acting in a way not authorised by the trust-deed; but he recommended that, with the concurrence of some of the beneficiaries who were in receipt of the larger annuities, the factor should apply to Parliament, and he thought that the provision in the 17th section of the Entail Amendment Act, 31 and 32 Vict. c. 84, preventing the creation of a series of liferents, would justify Parliament in passing a similar Act in this particular case. The section of the statute referred to would have enabled the trust to be wound up if the trust-deed had been executed after the passing of that Act. The factor accordingly, in conformity with the advice of counsel, made application to Parliament for an Act, but, as before stated, the proceeding had to be abandoned in consequence of the consent of the whole of the beneficiaries not having been obtained."

The Lord Ordinary (MACKENZIE), in approving the petitioner's accounts, disallowed the above sum of £81, 17s. 8d.

Against this the petitioner reclaimed.

SHAND and BRAND for him.

At advising—

LORD PRESIDENT—It is, of course, impossible for us to deal with the items of this account one by one, as the account itself has not been properly placed before us. But I am not disposed to say that, even if we had the account before us in a shape that we could consider, it would be the province of this Court to extricate these items and deal with them in detail. I have, however, a distinct opinion upon the question of principle to be applied to the case. I think that, whatever charges embraced in the account were incurred by the factor in obtaining necessary advice for his clients, these are good charges against the estate. On the other hand, whatever charges were incurred merely in an attempt to go to Parliament to obtain a private Act, are bad charges against the estate. I think, therefore, that the proper course for us to take is to send back the case to Mr Moncreiff, who has already reported on it, with instructions to separate the items for us on these principles, and again report.

The other Judges concurred in the propriety of this course.

The Court accordingly pronounced the following interlocutor:—"Find that any expenses embraced in the sum of £81, 17s. 8d., disallowed by the Lord Ordinary, which were incurred by the factor in obtaining advice to guide him in the conduct of the

factory, are proper charges against the factory estate; but that expenses incurred in attempting to go to Parliament to obtain a private Act are properly disallowed as charges against the factory estate: Remit to the accountant Mr William Moncreiff to report of new in accordance with this finding."

The accountant reported on 13th November, separating the items according to the terms of the above interlocutor.

The Court of this date (18th November) approved his report.

Agents for Petitioner—Tods, Murray, & Jamieson, W.S.

COURT OF JUSTICIARY.

Monday, November 27.

BAILEY v. LINTON.

(Before the Lord Justice-Clerk, Lords Cowan, Ardmillan, and Neaves.)

Jurisdiction—Police—Edinburgh Provisional Order—Public Place. Where an offence was charged under the above Act as having been committed in a "public place," the accused stated that the place was not public, but his own property, and pleaded that a question of heritable right was raised, which was incompetent in the Police Court. *Held* that the fact of the public resorting to it was sufficient to make it public; that the magistrate had power, for the purposes of the trial, to decide what was a public place; and that having convicted the accused, he must be held to have decided that question.

This was a note of suspension and interdict by Messrs Bailey, china merchants, Bristo Port, Edinburgh, complaining of a sentence pronounced by the Sheriff-Substitute (HAMILTON) in the Police Court of Edinburgh. This sentence found the complainers guilty of wilfully causing an obstruction in the public thoroughfare in or near Bristo Place, in or near Edinburgh, by means of six crates, four wooden boxes, and three barrels, upon the 7th day of July current, and fined and amerced the complainers in the sum of five shillings. This sentence proceeded on a complaint charging the complainers with a contravention of the 99th section of the Edinburgh Provisional Order.

The DEAN OF FACULTY (GORDON) and THOMS, for the complainer, argued that the place where the alleged offence was committed was not a public place in the meaning of the Act of Parliament, but was the private property of the complainers. At all events, the allegation that the street belonged to the complainers raised a question of heritable right, which could not be decided in a Police Court.

The Lord Advocate (YOUNG) and M'LAREN for the respondent.

At advising—

LORD DEAS—There is always great difficulty in sustaining an appeal on the ground of want of jurisdiction, unless there be something on the face of the proceedings which clearly shows such want of jurisdiction. If there were a gross overstepping of jurisdiction the Court would interfere, but in the present case there is no ground for doing so. It was maintained that the police authorities had

no right to regulate the traffic unless the *solum* of the street was public property. The object of the Act is to secure the public safety, and if there be a lane or court in the city where people are in the habit of going, it is quite proper that they should not be injured by crates and packing-boxes. The fact that people are in the habit of going to the place is enough to give the police right to interfere. It is admitted that the street has existed since 1863. I do not see in the definition of street in the Act anything to confine its meaning to a thoroughfare.

Now, thoroughfare is only one of many things included under the word street. There may be hundreds of people living in this *cul de sac*, and they are not to have their lives and limbs endangered by the packing-boxes of the appellant.

One of the things to be proved was that the place where the boxes and crates were was a street, and we must presume that it was proved. It would not do to allow such cases to be brought up here merely on the allegation that it had not been proved that the street was public. It is surely enough if in time past the public have been using the street.

In no view can we interfere with the conviction.

LORD ARDMILLAN—We have no question of heritable title to decide. All that we have to look to is, whether the street has been proved to be a public street, so far as for the purposes of this conviction. The Commissioners of Police were entitled to raise the question, and the Sheriff-Substitute was bound to decide it. The complainer may be entitled to try the question, whether the street belongs to him, in another process. But so far as the present appeal is concerned, the judgment of the Sheriff-Substitute must stand.

LORD NEAVES—I concur. It would never do that an obstruction in a reputedly public street should not be removed merely on the allegation that it was a private street and the alleged proprietor produced a paper. The complainer says that the police have been encroaching upon his private rights, and "the last and boldest step taken by the police authorities was the complaint in which the sentence now complained of was pronounced." It is sufficient for the present question that it is a lane up which people may go. The allegation that the police have for years been encroaching will not do. *Principiis obstant.* It will not do to allow the encroachment, and then to turn round and challenge the last act.

As to the meaning of the word thoroughfare, I am not sure that it is necessary to have an exit at both the ends. When you say a man is run *through* the body, it is not necessary that the sword should come out at the other side.

I think the appeal should be dismissed on the statement of the appellant himself.

LORD JUSTICE-CLERK—I concur. There are two objections—(1) that in point of fact this is not a thoroughfare, and (2) that the Sheriff had no jurisdiction to try the case, as a question of heritable title was involved. We cannot entertain the first objection, as we would then be reviewing the judgment of the Sheriff on a matter of fact. On the second objection, it is plain that the question raised by the defence was one which it was necessary for the Sheriff to decide in order to carry out his authority. He must have power to expiscate