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COURT OF SESSION.

Wednesday, October 20, 1920.

SECOND DIVISION.

MACDOUGALL'S TRUSTEES v. PERTH CORPORATION.

Burgh—Property—Public Health—Order to Construct Additional Water-Closets and Sinks—“Impracticable or Inexpedient” —Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 246.

A testatrix left a tenement property in a burgh to trustees for the purpose of providing dwelling-houses for poor people free of rent. She set aside no funds for the maintenance of the property but empowered her trustees to let such portions as they might consider necessary. The burgh authorities served the trustees with notices requiring them to construct additional water-closets and sinks in the property in terms of the Burgh Police (Scotland) Act 1892, section 246. The trustees appealed to the Court of Session and asked a proof, averring that they had no funds to meet the cost of the demands, which they alleged were far in excess of what was reasonable for the limited number of occupants, and that the works were accordingly “impracticable or inexpedient” in the sense of the above-mentioned section. *Held* that the appellants had failed to state a relevant case for probation.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), section 246, enacts, *inter alia*—“This enactment shall not be enforced by the commissioners where from water not having been laid under sufficient pressure, or from drains being still unmade, or from any other cause, such works shall be impracticable or inexpedient.”

William Cochrane Young, solicitor, Perth, and others, trustees of the deceased Isabella MacDougall, 24 King Street, Perth, appellants, presented a note of appeal against an

order of the Lord Provost, Magistrates, and Town Council of the City and Royal Burgh of Perth requiring them to carry out certain improvements on certain property in Perth belonging to the trust and administered by them, and craved the Court to sustain the appeal and quash the whole proceedings appealed against.

The note stated—“1. The appellants are the present acting trustees under the trust-disposition and deed of settlement of the deceased Isabella MacDougall of number 24 King Street, Perth, . . . and as such trustees are proprietors of the three storey tenement known as number 13 Cutlog Vennel, Perth. The said tenement consists of a block of workmen's dwellings of three storeys or flats with attics. On the ground floor there are four dwelling-houses, two at the front of one room and closet each, and two at the back of two rooms each, lying north and south of a mid passage to the staircase. On each of the first and second floors there are four similar two roomed houses, and in the attic flat there are four attic rooms. The tenement stands on the east side of and fronts Cutlog Vennel, which is a narrow lane running north from High Street to Mill Street. At the back of the building there is a small courtyard.

“2. By notice, dated 15th June 1920, bearing to be issued by virtue of the ‘Burgh Police (Scotland) Act 1892,’ and particularly section 246 thereof, as amended by the ‘Burgh Police (Scotland) Act 1903,’ the respondents required the appellants as owners, within the meaning of the said Acts, of the said tenement to construct and provide ‘two water-closets off staircase in flat at present without accommodation,’ and they intimated that in the event of the appellants’ failure to comply with the notice within one month from the date of intimation thereof, the respondents should cause the works to be executed and charged against the appellants in terms of section 327 of the said ‘Burgh Police (Scotland) Act 1892. . . .’

“3. The respondents further caused to be served on the complainers sixteen additional

notices under said section 246 of the said 'Burgh Police (Scotland) Act 1892,' all dated said 15th June 1920, requiring the complainers in the case of each of the houses in the said tenement occupied by the persons respectively specified in the said notices 'to introduce water thereto, and to fit up in the kitchen window of said house or other well lighted or ventilated place a sink sufficient to carry off the whole foul water.' The respondents also intimated in each of the said sixteen notices, that in the event of the appellants' failure to comply therewith within one month from the intimation thereof, the respondents should cause the works to be executed and charged against the appellants.—

"4. By her trust-disposition and deed of settlement the said Isabella MacDougall conveyed her whole means and estate, heritable and moveable, to the trustees therein named and their successors. . . . With regard to the said tenement property she directed and appointed her trustees to hold and retain the same in their possession for the following use and purpose, *videlicet*—'To provide dwelling-houses of two apartments each without payment of rent to such poor aged single men and women or widowers and widows with or without families who have been born in the county or city of Perth, as my said trustees and their foresaids may select, and to allow such poor persons to occupy said dwelling-houses for such periods and on such conditions as my said trustees and their foresaids, in virtue of the powers hereby conferred upon them, may prescribe, it being my desire to afford decent house accommodation to deserving poor men and women of the above description by whom residence in the parochial poorhouse is considered degrading, and as I trust that my said trustees and their foresaids will obtain from other charitable sources sufficient means to enable them to keep said property in repair and to pay the public, parochial, and other burdens thereon, I have not set aside any funds for that purpose; but should they fail to receive such support from the public, then I hereby authorise and empower them to let such portion or portions of said tenement for such periods and at such rents as they may consider necessary to meet the expense of upholding the same in proper repair and in payment of said public, parochial, and other burdens.' General powers were conferred upon the trustees to sell the whole estate 'with the exception of the three-storey tenement, Number 3 Cutlog Vennel, Perth.'

"5. The said Isabella MacDougall died on 12th June 1883, and for the first two years after the trustees entered into the administration of the said property the only supply of water for the whole tenants in the buildings was obtained from a pillar well in the back court, and there were no water-closets. The trustees therefore allowed the tenants who were in occupation at the death of the testatrix to remain in possession during said period of two years, in order to provide from the rents received a

sufficient sum to enable them to pay the cost of cleaning down and pointing the walls of the building, and to meet the demands of the then sanitary inspector, who pressed the trustees to introduce (1) a water supply, and (2) water-closets, in terms of section 210 of the General Police and Improvement (Scotland) Act 1862. In compliance with the first of these requirements the trustees in the year 1886, with the sanitary inspector's approval, placed sinks with water supply in the front passage of each of the first, second, and attic floors; and on his continued insistence, they in the year 1889 caused two water-closets to be constructed, viz., one on the ground floor under the turnpike stair for the use of the tenants of that and the first floor, and the other in the front attic passage for the use of the tenants of the attics and the floor immediately below same. The then sanitary inspector having been entirely satisfied with the work so executed, no further demands were received from him, and during the following twenty-five years no complaints were received from any of the tenants or sanitary officials in respect of the water supply or equipment of water-closets.

"6. Neither the present trustees nor their predecessors have at any time obtained from other charitable sources, as was hoped by the testatrix, any means to enable them to keep the property in repair and to pay the public burdens thereon. They have therefore been under the necessity of letting portions of the tenement as authorised by the settlement, but the portion so let during the last twenty years has in no year exceeded five of the dwelling-houses, and for five of these twenty years was only four. By these means the trustees and their predecessors have been enabled during the long course of thirty-five years to maintain the building in good repair, and in fulfilment of the bequest, to grant the privilege of free dwelling-houses to a long succession of poor people qualified to participate in the benefits of the trust. An abstract of the income and expenditure of the trustees on the property for the twenty years from Whitsunday 1900 to Whitsunday 1920, which is herewith produced, shows the average yearly income to have been £23, 11s. 1d. and the average expenditure £22, 8s. 9d. . . . At no time has the number of occupants exceeded twenty-one, and at present the number of actual occupants is thirteen, of whom twelve are adults.

"7. On 11th September 1914 the trustees received a letter from Mr William Asher, the present sanitary inspector, Perth, calling upon them to introduce two additional water-closets into the property, and to provide sinks with water in each of the sixteen dwelling-houses (including the four attics). . . . The appellants have no funds wherewith to meet the cost of the additional sinks and water-closets, which are far in excess of what is reasonable for the necessarily limited number of occupants. No power to sell or borrow on the security of the said property was conferred by the testatrix on the appellants. . . . The war hav-

ing commenced at that time, the introduction of the water-closets and sinks was not then insisted on.

"8. On 30th January 1920 a letter was received by the appellants from the sanitary inspector reiterating the demands in his letter of 11th September 1914. The two trustees who had formerly interviewed him again called upon him and urged him to relinquish his demands. They mentioned the position of the trust and the beneficiaries, and pointed out the heavy cost of now carrying out the work. They stated that if the appellants were required to do the work they would have to clear out the tenants and shut up the building at a time when the great want of dwelling-houses is one of the most clamant needs in the city. Their arguments proved of no avail, as without further intimation the statutory notices were served by post on the appellants.

"9. On the instructions of the trustees a master plumber of much experience was requested to furnish them with an estimate of the probable cost of the work demanded. His estimate and that of a qualified joiner who accompanied him on his inspection on 18th June 1920, is that the necessary expense of plumber, joiner, and mason work (apart from the cost of work on the drains which cannot be estimated at the present stage) would be about £220. The cost of carrying out the work required will be out of all proportion to the value of the property, which on the basis of the nett assessable rental does not exceed £500.

"10. The requirements contained in the notices complained of are unreasonable, impracticable, and inexpedient. No complaint has been made by any occupant of the inadequacy of the sanitary arrangements. On the contrary, the whole of the occupants are content and satisfied with the present water supply and water-closet accommodation, and these are quite adequate for the needs of the inhabitants. There is no danger to health either to the occupants or to the public in the continued occupancy of the houses in the said tenement in their present condition as regards sanitary conveniences. If the appellants were to carry out the requirements contained in the said notices, it would be necessary to apply to the Court for authority to dispose of the property. In any event the carrying out of the required works will entail a serious loss on the beneficiaries, and the present occupants will find it impossible to get accommodation elsewhere, as the demand in Perth for houses of the class in question is far in excess of the supply. This will be a great hardship for the occupants.

"11. This appeal is presented under section 339 of the 'Burgh Police (Scotland) Act, 1892' (55 and 56 Vict. cap. 55)."

Answers were lodged for the respondents, in which they averred, *inter alia*—"10. Not known whether any complaint of the inadequacy of the sanitary arrangements has been made by any occupant of the tenement. *Quoad ultra* denied. Explained that the introduction into the tenement of

the additional water-closets and sinks is necessary in order to make the houses fit for human habitation and for the proper sanitation of the burgh and the health of its inhabitants. In calling upon the appellants to execute the said alterations the respondents are discharging the duties imposed upon them by the Burgh Police Acts and the Public Health Acts."

Argued for the appellants—The present demand was impracticable and inexpedient in the sense of the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), section 246. It was impracticable, because owing to the peculiar terms of the trust the trustees were without funds to carry out the improvements required, and want of funds or excessive cost had been construed as making a demand impracticable—*Shepherd v. Henderson*, 1881, 7 A.C. 49, *per* Lord Blackburn at p. 69 (quoting Maule, J., in *Moss v. Smith*, 1850, 9 C.B. 94), 9 R. (H.L.) 1, 19 S.L.R. 577. It was also inexpedient having regard to the circumstances of the case. The appellants were entitled to a proof. In the case of *Brand v. Police Commissioners of Arbroath*, 1890, 17 R. 790, 27 S.L.R. 623, under the Act of 1862, a proof was allowed under similar circumstances. The discretion of the magistrates was not absolute. The Court had a higher discretion—*Police Commissioners of Govan v. Airth*, 1896, 24 R. 41, *per* Lord President at p. 46, 34 S.L.R. 37.

Argued for the respondents—It was the duty of the respondents to see that there were no insanitary premises in their burgh. Primarily this was a matter for the discretion of the town council. Under the statute the appellants were bound to state the grounds of their appeal, and they had stated no relevant grounds. There was no case for allowing a proof and the appeal was really one *ad misericordiam*.

At advising—

LORD JUSTICE-CLERK—[After describing the subjects and narrating the sanitary improvements made and requested to be made]—In my opinion the fact that the appellants are trustees acting under a somewhat peculiar trust deed cannot affect the legal rights of parties.

The statute says that the provisions in question are not to be enforced where from water not having been laid under sufficient pressure or from drains being still unmade, or from any other cause, the works required are impracticable or inexpedient, and the amending Act of 1903 [the Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33, sec. 104 (2) (p))] adds the words, "and in such case the council may, subject to the aforesaid conditions, require a sufficient earth closet to be provided."

A legal question is raised as to the interpretation of the words "impracticable or inexpedient." The appellants contend that this question may be determined by financial considerations. In my opinion this view is unsound. I do not think that because the trustees are fettered by the terms of the trust deed under which they act, their legal responsibilities in the matter which we are now dealing with can be held to be

different from what they would have been if they had been absolute proprietors in their own right. I do not think the impracticability or inexpediency of the works required is to be determined by the consideration of cost, such as the petitioners set forth in the petition, even though it were allowed to be possible that in certain circumstances the matter of expense might come to be a question of degree. I do not think it is so in this case.

Nor is the allegation of serious loss to the beneficiaries, in my opinion, relevant. I do not think a relevant averment could be made based on any such loss, but a mere statement of serious loss to six beneficiaries out of a total possible number of sixteen appears to me to be altogether insufficient even on the figures of the petitioners. The term "serious" seems to me unwarranted.

The appellants do not aver, and it was not maintained, that money could not be obtained by them to enable them to execute the works. They say if they did execute the works they would have to apply to the Court for authority to dispose of the property. What then? If the property can be relieved of the trust (as to which I indicate no opinion) that might be a fortunate result. It is only about two-thirds occupied at present, and it may be that freed from the restriction of the trust it might accommodate a greater number of persons than it now does.

The petitioners aver that the present occupants make no complaint—that the present sanitary arrangements are adequate, and that there is no danger to public health. Unfortunately in such matters the indifference of those most immediately concerned is often one of the greatest troubles requiring to be dealt with. As to the adequacy of the arrangements and the danger to public health, these must be, to a large extent, matters of opinion and administration, admirably adapted for consideration by a public health authority, and very ill adapted, in such circumstances as we have here, to be disposed of as the result of a proof where there would probably be conflicting testimony. The Act of 1892 is for regulating the police and sanitary administration of burghs, and, in my opinion, in such a matter very much more pointed averments would be required before we could allow a proof intended to set aside an administrative act of the statutory body to whom the sanitary interests of the community have been entrusted. In my opinion the petitioners' averments are irrelevant, and the appeal should be dismissed.

LORD DUNDAS—I can sympathise with the appellants who as trustees desire to carry on their charitable enterprise, which they allege must come to an end if the requirements contained in the notices are to be executed. But the primary consideration seems to me to be that of sanitation in the public interest; and so viewing the matter I am unable to see that they have presented any relevant or sufficient case for our interference with what the Magistrates propose.

The appellants aver that the requirements are "unreasonable, impracticable, and inexpedient." The second and third of these adjectives are derived from the proviso of section 246 of the Burgh Police Act of 1892, which provides that "this enactment shall not be enforced by the Commissioners where from water not having been laid under sufficient pressure, or from drains being still unmade, or from any other cause, such works shall be impracticable or inexpedient." It was argued to us that the proposed works were impracticable, because the cost of carrying them out would be out of all proportion to the value of the property; and we were referred to authority—*Shepherd*, 1881, 7 A.C., per Lord Blackburn, at p. 69, foot, quoting the opinion of Maule, J., in *Moss v. Smith*, 9 C.B. 94—to the effect that in certain mercantile matters what cannot be done without an expense in doing it, which would be unreasonable in proportion to the object, may be considered as impracticable and impossible. I do not think that these cases have any bearing upon the matter now before us in a very different region of law. It seems to me that, looking especially to their context, the words "from any other cause," occurring in section 246, should, generally speaking, be read as having reference to obstacles of a technical or mechanical rather than of a purely financial character; but in any view I do not think the financial considerations here urged are such as can be held in any reasonable sense to render the proposed works "impracticable." Apart from this argument the appellants urged that what the notices demand is unnecessary and inexpedient. The respondents, however, explain in their answers that "the introduction into the tenement of the additional water-closets and sinks is necessary in order to make the houses fit for human habitation and for the proper sanitation of the burgh and the health of its inhabitants." These are matters which the Legislature has for obvious reasons committed, primarily at least, to the administrative discretion of the local authorities, and which would manifestly be ill suited for the consideration of this Court. We should, no doubt, be entitled to interfere if the Magistrates had exceeded their powers, or deviated from the statute, or if it could be shown that what they propose to do is manifestly against the interests of the community they represent, or so clearly inexpedient and improper as to go beyond the bounds of fair administration; but such cases, especially those of the kind I have last supposed, would require to be supported by very clear and pointed averments in order to entitle them to be remitted to probation. The appellants' averments, even as amplified by their counsel at the bar, seem to me to fall far short of the quality and character I have indicated. I need not go over them in detail; the Lord Justice-Clerk has done so sufficiently. I agree with his Lordship in holding that the appellants have presented no case relevant or sufficient to warrant us interfering with the Magistrates' proposals, and that the appeal must accordingly fail.

LORD ORMDALE—[After describing the subjects and narrating the sanitary improvements made and requested to be made]—In this appeal the trustees seek to have the proceedings quashed. They found their appeal, in the first place, on the ground that the scheme of the sanitary inspector is "impracticable and inexpedient." These are statutory expressions occurring in section 246 of the Burgh Police Act of 1892, the terms of which have already been referred to by your Lordships. The appellants do not aver that the introduction of the sinks and water-closets presents any technical difficulty. What they say is that the cost of them is out of all proportion to the value of the property, and that in that sense therefore the scheme is impracticable. But in my opinion that is a consideration entirely foreign to the true intent of the section in which the word "impracticable" occurs. It seems to me that keeping in view the illustrations given in the section, and also the addendum made by way of amendment to the section by section 104 (2) (p) of the 1903 Act, what the word points to is some physical or mechanical difficulty in the way of executing the requirement, and that the words "or from any other cause" are not sufficient of themselves, having regard to their context, to warrant the consideration of the cost of the proposed works relatively to the value of the property in which the improvements are to be effected. The word "practicable" also occurs in the section, and its context appears to confirm the view I have expressed.

Even if it were to be held that this question of cost might be taken into consideration, I have come to the opinion that the facts stated by the appellants are not sufficient to raise it in the present case. The position is not so extreme as they maintain. If no other method of raising the necessary funds is open to them, I see no reason why they should not call in aid to finance the scheme the course suggested by the truster for meeting the cost of repairs, &c., viz., by letting most, if not all, of the houses. The charitable purposes of the trust would have to remain to a large extent, if not totally, in abeyance for a considerable number of years, and this no doubt is what the trustees are naturally anxious to avoid. I agree, however, that in a matter of this kind the fact that the property is held in trust cannot make any difference in the application of the law.

The second ground of the appeal is that the requirements of the Magistrates are in the circumstances unreasonable and extravagant, and this plea is based on the averment that there is no danger in the present condition of the property to the health either of the occupants or of the public. I was inclined at first to think that this raised a question requiring to be investigated, but stated baldly, as the appellants state it, it truly falls to be regarded and treated as an averment of opinion rather than of fact. The Magistrates are of a different opinion, and as the sanitation of the burgh is entrusted to their super-

vision, not in their own but in the public interest, their opinion, if deliberately formed, is entitled to the greatest weight. In the absence of any averment or suggestion even that they were acting capriciously or otherwise than quite honestly in issuing the notices complained of, I come to the conclusion that the appellants have here also failed to state a relevant case.

LORD SALVESEN was absent.

The Court refused the appeal.

Counsel for the Appellants—Macgregor Mitchell. Agents—Alex. Morison & Co., W.S.

Counsel for the Respondents—Macmillan, K.C.—J. Macdonald. Agents—Cornillon, Craig, & Thomas, W.S.

HIGH COURT OF JUSTICIARY.

Monday, September 27.

(Before the Lord Justice-Clerk and a Jury.)

H.M. ADVOCATE v. CAMPBELL.

Justiciary Cases—Murder—Plea of Drunkenness—Relevancy—Circumstances Reducing Offence to Culpable Homicide.

Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime, viz., in this case the intent to kill or to do serious injury, should be taken into consideration with the other facts proved in order to determine whether or not he had this intent. Evidence of drunkenness falling short of that, and merely establishing that his mind was so affected by drink that he more readily gave way to violent passion, is, *quoad* reducing the crime to culpable homicide, irrelevant.

Rex v. Beard (1st March 1920), 14 Cr. App. R. 159, 57 S.L.R. 743, followed.

At a sitting of the High Court at Edinburgh on 27th September 1920 Nicholas Page Campbell, plumber, Edinburgh, was charged at the instance of H. M. Advocate on an indictment which set forth that "on 29th or 30th July 1920, in the house occupied by you at 8 Nicolson Square, Edinburgh, you did assault Margaret Hendry Campbell, your wife, beat her with your fists on her head and face, knock her down, and did murder her."

The facts sufficiently appear from the charge (*infra*) of the Lord Justice-Clerk. The medical evidence for the defence was to the effect that the panel, who had been in the army from 1914 to 1919 and had served both in Gallipoli and in France and had been thrice wounded, was less under control when drunk than an ordinary person, and that his condition on the date in question was an abnormal form of intoxication.

Counsel for H.M. Advocate submitted that although drunkenness was an element to be taken into consideration, it was no excuse for crime, and that where, as here, the accused was not so drunk as to be