



Scottish Law Commission

(SCOT. LAW COM. No. 59)

REPORT ON POWERS OF JUDICIAL FACTORS

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SCOTTISH LAW COMMISSION

*To: The Right Honourable the Lord Mackay of Clashfern, Q.C.,
Her Majesty's Advocate*

In pursuance of our duty under section 3(1)(a) of the Law Commissions Act 1965 to receive and consider any proposals for the reform of the law which may be made to us, we have examined proposals relating to the powers of judicial factors to do certain acts under the Trusts (Scotland) Act 1921. We have the honour to submit our Report.

J. O. M. HUNTER,
Chairman of the Scottish Law Commission.

18 April 1980.

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REPORT ON POWERS OF JUDICIAL FACTORS

PART I: INTRODUCTION

1. The Law Society of Scotland have drawn our attention to the difficulty which faces a judicial factor when he has to consider whether the exercise by him of one or other of the powers specified in section 4 of the Trusts (Scotland) Act 1921 (hereinafter referred to as 'section 4 powers') would or would not be 'at variance with the terms or purposes of the trust'. The same difficulty had been considered by the Halliday Committee in their Report on the amendment of the law relating to conveyancing legislation and practice.¹ The essence of the difficulty is that a judicial factor, unlike a testamentary trustee, will often have no clear guidance as to the circumstances in which he may safely exercise a section 4 power.

2. In Memorandum No. 19² we discussed in some detail the nature of the problem and, in particular, the uncertainty of a judicial factor's position and the restraints upon his freedom of action as regards the exercise of section 4 powers. We questioned whether those restraints were still apt for modern conditions, but accepted that the working out of a new statutory code for judicial factors would both be a formidable task and take time. We therefore proposed an interim solution based upon the introduction of the Accountant of Court's consent, for the removal of the current uncertainty as to the exercise of section 4 powers.³ We received a number of useful comments and criticisms and we are grateful to those who submitted them. The organisations and individual persons from whom we received comments are listed in Appendix I to this Report. The majority of the commentators welcomed the proposed interim solution and their comments or criticisms were directed mainly at questions of detail such as the activities and the classes of judicial factors to which the solution should apply. But one commentator objected strongly to the proposal, his main objection being that the proposal would achieve its purpose, if at all, only by disregard of the principle that the court—and only the court—should authorise the exercise of powers when this may be at variance with the purposes of a trust. We discuss that and other criticisms of the proposal in Part III of this Report.⁴

PART II: THE PROBLEM FOR THE JUDICIAL FACTOR UNDER EXISTING LAW

A. The nature of the problem

3. In Memorandum No. 19 we set the stage for consideration of our interim solution for removal of the current uncertainty as regards the exercise by a judicial factor of section 4 powers, by describing in some detail his problem under existing law. It may be convenient if we describe the problem again. The

¹Cmnd. 3118 (1966). The Committee's proposal for reform is discussed in paragraph 138 of the Report.

²Published in October 1974.

³See Memorandum No. 19 at para. 15.

⁴See para. 14.

starting point is the Trusts (Scotland) Act 1921 (referred to herein as 'the Act of 1921') as amended by subsequent enactments. Section 2 of the Act of 1921 defines a trust as meaning and including 'any trust . . . and the appointment of any tutor, curator, or judicial factor by deed, decree, or otherwise'; and a trustee as meaning and including 'any trustee under any trust . . . and . . . any trustee *ex officio*, executor nominate, tutor, curator, and judicial factor'. 'Judicial factor' is defined in the same section as amended by section 3 of the Trusts (Scotland) Act 1961 (referred to herein as 'the Act of 1961') as meaning 'any person holding a judicial appointment as a factor or curator on another person's estate'. Section 4(1) of the Act of 1921 empowers trustees to do certain specified acts 'where such acts are not at variance with the terms or purposes of the trust'. Among the section 4 powers are powers to sell the trust estate (whether heritable or moveable), to grant feus and leases, to borrow money on the security of the trust estate, and to acquire any interest in residential accommodation 'reasonably required to enable the trustees to provide a suitable residence for occupation by any of the beneficiaries'. Lastly, reference may be made to section 5 of the Act of 1921 which empowers the court (the Court of Session) on the petition of the trustees under any trust to grant them authority 'to do any of the acts mentioned [in section 4], notwithstanding that such act is at variance with the terms or purposes of the trust, on being satisfied that such act is in all the circumstances expedient for the execution of the trust.'

4. A judicial factor who has to consider whether the exercise of a section 4 power would or would not be at variance with the terms or purposes of the trust (that is, his appointment) may find that, unlike a testamentary trustee, he has no guidance apart from the general law and his decree of appointment to indicate what those terms and purposes are. In the usual case the terms of the decree will not forbid the exercise of a power, but may offer no clear guidance as to whether its exercise would or would not be at variance with the purposes of the factor's appointment. And so the factor must decide that question (if decide it he can) simply from consideration of the whole relevant circumstances, including the grounds set out in the petition for his appointment. The Lord President (Clyde) put it thus in *Leslie's Judicial Factor*:—⁵

'It will be observed that the purposes of a judicial factor's appointment, and their bearing on his power to sell, may raise questions at least as difficult as those which occur on the interpretation of a trust-deed. The mere terms of the appointment may be neutral and uninformative, as in the present case; but that will not absolve the judicial factor from the duty of ascertaining its purposes, and making up his mind that they are not "at variance with" a sale of the estate, before he takes the responsibility of selling at his own hand. The purposes in question may even in some cases have to be derived from the grounds set out in the petition for his appointment.'

5. In those circumstances it is not surprising that in cases attended with any doubt judicial factors have been reluctant to exercise their section 4 powers without the authority of the court. This has from time to time produced the result that petitions for powers presented to the court have been dismissed as

⁵1925 S.C. 464 at p. 470.

unnecessary.⁶ Cases of doubt are most likely to arise where the judicial factor's function is one of general management and there is no document specifying the powers available to him or the circumstances in which he may exercise a section 4 power—for example, where the judicial factor is a factor *loco tutoris*, factor *loco absentis* or curator *bonis*. The problem is much less likely to occur where the judicial factor comes in place of a testamentary trustee (where the trust disposition or other testamentary writing will usually give guidance) or where the factor is appointed for a specific purpose such as the distribution or sale of property, as in the case of a judicial factor appointed on an intestate or partnership estate.

6. The pressure upon a judicial factor to safeguard his position by petition to the court in a case where the circumstances or terms of his appointment may prove an uncertain guide is perhaps strengthened by two other considerations. The first of those is that historically the function of a judicial factor such as a factor *loco tutoris*, factor *loco absentis* or curator *bonis* is to conserve and protect the estate under his charge. The second consideration is that the court has tended to encourage factors to seek judicial approval in any doubtful case.⁷ The attitude of the court has, in general, been to approve the presentation of petitions for powers even where they have been dismissed as unnecessary.⁸

7. Statute has tended to ease the restraints imposed by the common law upon judicial factors and to create the possibility of greater freedom of action, and it may be argued that Parliament has encouraged factors to display initiative in taking whatever steps are appropriate for the benefit of the estates under their charge. In 1884 the statutory powers of trustees were granted to certain classes of judicial factors,⁹ and the Act of 1921 as amended by the Act of 1961 has, as we have noted,¹⁰ conferred upon every (or virtually every) class of judicial factor the power to do the acts mentioned in section 4 of the Act of 1921, where they are not at variance with the terms or purposes of the factor's appointment. Moreover, section 2 of the Act of 1961 (which protects parties transacting with trustees who purport to do any of the acts specified in paragraphs (a) to (ee) of section 4(1) of the Act of 1921) should have eliminated any reluctance or refusal of a person to engage in a property transaction with a judicial factor without the approval of the court. It may be noted, however, that the section neither empowers a trustee to do acts which are at variance with the trust purposes nor affects the liability of a trustee in a question with a co-trustee or beneficiary.¹¹

⁶See, for example, *Marquess of Lothian's Curator Bonis* 1927 S.C. 579; *Francis Cooper and Son's Judicial Factor* 1931 S.L.T. 26; *Bristow* 1965 S.L.T. 225. In the great majority of cases, however, the court now do not dismiss the petition as unnecessary but grant the powers requested.

⁷In *Marquess of Lothian's Curator Bonis* 1927 S.C. 579 the Lord President observed (at p. 585) that in any case of doubt as to the exercise by a judicial factor of a power of sale 'his only safe course is to apply under section 5 [of the Act of 1921].'

⁸See, for example, *Stirling's Judicial Factor* 1917, 1 S.L.T. 165; *Francis Cooper and Son's Judicial Factor* 1931 S.L.T. 26 at p. 27; *Cunningham's Tutrix* 1949 S.C. 275 at p. 277; *Bristow* 1965 S.L.T. 225 at p. 227.

⁹See the Trusts (Scotland) Act 1867 as amended by the Trusts (Scotland) Amendment Act 1884 (both now repealed).

¹⁰See para. 3.

¹¹See *Barclay* 1962 S.L.T. 137.

8. Where a judicial factor is uncertain whether the doing of an act mentioned in section 4 of the Act of 1921 would or would not be at variance with the terms or purposes of the trust, the safe and obvious course is for him to seek the approval of the court to the doing of the act. In order to obtain this approval he will present to the court a petition under section 5 of the Act of 1921, which provides that the court may grant authority to do the act for which approval is sought 'notwithstanding that such act is at variance with the terms or purposes of the trust, on being satisfied that such act is in all the circumstances expedient for the execution of the trust'. On first impression there may appear to be some element of contradiction in the proposition that an act can be at variance with the terms or purposes of a trust and yet expedient for its execution. Section 5 of the Act of 1921 bears some resemblance to section 3 of the Trusts (Scotland) Act 1867, which empowered the Court of Session to authorise trustees to do any of specified acts 'on being satisfied that the same is expedient for the execution of the trust and not inconsistent with the intention thereof'. This formula was considered in *Weir's Trustees*¹² where the Lord President (Inglis) expressed the opinion¹³ that its true meaning was that 'the authority sought shall not be inconsistent with the main design and object of the trust'. And similarly in *Chalmers Hospital (Banff) Trustees*,¹⁴ a case relating to a petition under section 5 of the Act of 1921, the Lord Justice-Clerk (Alness) proceeded on the view¹⁵ that an act was expedient for the execution of a trust if it was directed towards achieving its primary object. The words 'at variance with' do, however, suggest inconsistency, disagreement or dissension between persons, objectives or propositions, and it may be asked how an act can be 'at variance with the terms or purposes' of a trust and yet expedient for its execution. A key to the interpretation of the provision may be found in *Tennent's Judicial Factor v. Tennent*.¹⁶ In that case the Lord President (Cooper) construed the words 'at variance with the . . . purposes of the trust' as equivalent to 'involving a variation of the purposes of the trust',¹⁷ and such a construction undoubtedly makes the language of section 5 of the Act of 1921 more readily intelligible. So construed, its meaning becomes that it empowers the court to grant the authority sought, notwithstanding that it involves a variation of a term or purpose of the trust, on being satisfied that the act to be authorised is in all the circumstances expedient for the execution of the main design and object of the trust.

B. Some particular aspects of the problem

Classes of judicial factors

9. The necessity or otherwise for a judicial factor to obtain special powers depends upon both the character of his appointment and the particular circumstances in which the exercise of the power is contemplated. It is useful to remember that judicial factors are appointed for a wide range of purposes.

¹²(1877) 4 R. 876.

¹³At p. 880.

¹⁴1923 S.C. 220.

¹⁵At p. 226.

¹⁶1954 S.C. 215.

¹⁷At p. 225.

Eleven kinds of factors are listed in the Encyclopaedia of the Laws of Scotland,¹⁸ namely—

- Factors *loco tutoris*
- Factors *loco absentis*
- Curators *bonis* to minors
- Curators *bonis* to insane persons
- Judicial factors on trust estates
- Judicial factors on intestate estates
- Judicial factors on partnership estates
- Judicial factors appointed pending litigation
- Judicial factors appointed under section 163 of the Bankruptcy (Scotland) Act 1913
- Judicial factors appointed under section 14 of that Act
- Judicial factors appointed under certain other statutes to protect the interests of creditors eg under the Companies Clauses Consolidation (Scotland) Act 1845.

No list can be exhaustive. The Lord President stated in *Leslie* that ‘there is no limit to the circumstances under which the Court, in the exercise of its *nobile officium*, may appoint a judicial factor, provided the appointment is necessary to protect against loss or injustice . . .’¹⁹ The versatile nature of the remedy afforded by the appointment of a judicial factor is well illustrated by a case where a contempt of court was effectively dealt with by sequestration of the offender’s estate and the appointment of a factor thereon.²⁰ In a recent case the court appointed a judicial factor upon the estate of a limited company where there were complaints of irregularities in its administration.²¹

Effect of character of judicial factor’s appointment upon the need for special powers

10. A judicial factor contemplating, say, a sale of heritage forming part of the estate under his charge must first consider the nature and purpose of his appointment. If, for example, he is a factor *loco tutoris* he will no doubt bear in mind that under the common law the court would sanction the sale of a pupil’s heritage only in circumstances where this was necessary for payment of a debt or to avoid loss or for aliment of the pupil.²² On the other hand a factor of another kind may be appointed primarily or solely for the purposes of the distribution or sale of heritable property. In *Stirling’s Judicial Factor*,²³ the court dismissed as unnecessary a petition by a judicial factor on a trust estate for power to sell heritable property in circumstances where he was **directed** by the trust deed to sell the property. Again, in *Francis Cooper and Son’s Judicial Factor*²⁴ it was held that a judicial factor on a partnership estate (both partners being dead) required no authority to sell the heritable property of the partnership. Accordingly, the need for special powers depends not only upon the

¹⁸Vol. 8, p. 442.

¹⁹1925 S.C. 464 at p. 469.

²⁰*Edgar v. Fisher* (1893) 21 R. 59; and see also *Fisher v. Edgar* (1894) 21 R. 1076.

²¹*Fraser* 1971 S.L.T. 146.

²²*Colt v. Colt* 3rd July 1801 M. App., Tutor; see also Thoms, *Judicial Factors*, 2nd edn., p. 214 and Fraser, *Parent and Child*, pp. 336–338. A strict approach to the question of the powers of a tutor to sell his ward’s property is illustrated in *Linton v. Inland Revenue* 1928 S.C. 209; cf. *Cunningham’s Tutrix* 1949 S.C. 275.

²³1917, 1 S.L.T. 165.

²⁴1931 S.L.T. 26.

nature of the course of action contemplated by the factor and its attendant circumstances, but also to a great extent upon the character of his appointment.

Activities for which special powers are likely to be required

11. It will be apparent that the difficulties encountered by judicial factors in connection with section 4 of the Act of 1921 have mainly arisen in connection with transactions relating to heritage. The Appendix to the Ninth Report of the Law Reform Committee for Scotland²⁵ shows a total of 360 petitions by judicial factors (including curators *bonis*) for powers to sell heritage over the ten years 1949–1958. Moreover, the Law Society of Scotland and the Halliday Committee both directed attention to the problem in relation to the sale, or the sale and purchase, of heritable property. The fundamental difficulty is that a sale or purchase of heritable property forming part of an estate inevitably and probably irreversibly changes the form and character of that estate. Accordingly, where such a sale or purchase is proposed by a judicial factor he must consider the proposal against the well established rule that it is his duty to preserve the estate so far as possible unchanged.²⁶ The reason for the rule is thus explained by Lord McLaren:—

‘ . . . the primary duty of a curator *bonis* is to preserve the estate in the same form and condition in which it comes into his hands for the benefit of the ward. The ward may recover, if it is a case of mental incapacity, or attain majority in the case of a pupil, and will then come into the possession of his estate, and it ought to be preserved unaltered for his use in that event.’²⁷

Accordingly, there is inevitably a certain inflexibility and restraint on a factor’s freedom of action in any such case.

PART III: PROPOSAL FOR SOLUTION OF THE PROBLEM

Long-term solution of problem

12. The problem under review derives from the fact that the provision of section 4 of the Act of 1921, introduced in order to afford trustees greater freedom to effect purely administrative acts (such as the disposal of heritable property), is apt to be frustrated in its application to judicial factors. Factors may find it difficult to satisfy the condition subject to which the freedom is conferred, namely that the act should not be at variance with the purposes of the trust, because the trust purposes in question may not be obvious and because the common law sees the essential function of a judicial factor as being to conserve and protect an estate rather than to deal with it. The circumstances of today might rather suggest that the administrative role of a judicial factor demands that his freedom to exercise discretionary powers should be enlarged. But a satisfactory permanent solution to the problem might well require the enactment of a statutory code for judicial factors, separate from the legislation

²⁵Cmnd. 1102 (1960).

²⁶Thoms, *Judicial Factors*, 2nd edn., pp. 69, 194–196 and authorities cited there; *McAdam’s Executor v. Souters* (1904) 7 F. 179; *Macqueen v. Todd* (1899) 1 F. 1069 per Lord President Robertson at p. 1075.

²⁷*McAdam’s Executor v. Souters supra* at p. 181.

relating to trustees, and dealing with the powers and duties which are appropriate to judicial factors as such. The enactment of such a statutory code would be a formidable task, there being no limit on the purposes for which a judicial factor may be appointed and the range of activities for which special powers have in the past been sought by judicial factors being astonishingly wide.

Proposed interim solution of problem

13. Having regard to these considerations, we pointed out in Memorandum No. 19²⁸ that the working out of a solution of the kind mentioned would take time, and leave judicial factors and those who transact with them in the current uncertainty as to the exercise of section 4 powers. We therefore invited views on the desirability of an interim solution. The solution which we proposed was that section 2 of the Act of 1961 be amended by the addition of a provision to the effect that where a judicial factor, acting with the consent of the Accountant of Court, did any of the acts mentioned in specified paragraphs of section 4(1) of the Act of 1921 in relation to the estate under his charge (not being an act prohibited by the terms of his appointment), the factor would not be subject to liability on the ground that the act in question was at variance with the terms or purposes of his appointment. A provision on those lines would, we thought, allow the Act of 1921 to stand unaltered until such time as a more fundamental re-examination of the law could be made.

Comments received on proposed interim solution

14. We received a number of comments on the proposal and, as we have already stated,²⁹ the majority of the commentators were in agreement with what we proposed. So, for example, the Law Society of Scotland welcomed the interim solution and the Faculty of Advocates considered that it was justified. The Scottish Law Agents Society, on the other hand, were opposed to the proposal perhaps not so much on its own merits as on the ground that the creation of a distinction between short term and long term proposals 'could become a reason for no action.' But there was vigorous opposition to the interim solution in a long paper submitted by an individual commentator.

15. The Scottish Law Agents Society argued that the correct approach was not to propose a limited solution that was principally concerned with the sale and purchase of heritable property, but to prepare a comprehensive scheme setting out and regulating the use of the powers available to each and every class of judicial factors. The dominant theme was that a judicial factor should be given a wide discretion in the exercise of his powers and that in any case where special authority was necessary, 'the consent of the Accountant of Court itself should be sufficient, unless he, giving special reasons for it, requires judicial approval.' We accept that there is a case for examining the feasibility of a comprehensive scheme for the regulation of the functions of judicial factors, but we are also conscious of the formidable difficulties that the creation of such a scheme is likely to present.³⁰ The Law Society questioned whether a satisfactory comprehensive solution could be found, pointing out that 'circumstances can vary so enormously that a general code even for [a curator *bonis*] may prove impossible'.

²⁸At para. 15.

²⁹See para. 2.

³⁰See para. 12.

We think, therefore, that there is much to be said for proposing at this stage a remedy for one difficulty that commonly arises in practice, that relating to the sale and purchase of heritage by a judicial factor.

16. The individual commentator who expressed strong opposition to the interim solution as described in paragraph 13 of this Report attacked it on a number of grounds. The essence of his criticism was that the appointment of a judicial factor constituted a trust; that a factor should not have discretion to do an act which might be at variance with the terms or purposes of his appointment; that it was wrong to give him this discretion even where he acted with the consent of the Accountant of Court, as only the Court of Session itself had, and should have, power to authorise variation of a trust; and that in any event the criteria by which the Accountant should decide whether to consent to a sale or purchase of heritable property were not defined and perhaps could not be defined.

17. This criticism assumes that the appointment of a judicial factor is entirely analogous to the constitution of a trust. We think, however, that the statutory equiparation of a judicial factor to a trustee is artificial and that a judicial factor is analogous to an administrator or manager rather than to a trustee. Accordingly, in our view, the nature of a judicial factor's office makes it appropriate that unnecessary inhibitions on his freedom to effect administrative acts should be removed and that he should be enabled to carry out certain of the acts within section 4 of the Act of 1921 without the necessity of petitioning the court under section 5 of the Act. We remain of the view, therefore, that the proposal or rather, as we explain in the next paragraph, a modified version of it should proceed.

Recommendation for amendment of the Trusts (Scotland) Act 1961

18. We recognise that if the Accountant is to be empowered to consent to a judicial factor doing an act specified in section 4 of the Act of 1921 where the factor thinks it expedient to do the act but it might be at variance with the terms or purposes of his appointment, it will be necessary to specify the circumstances in which the Accountant may grant consent. We think that the Accountant should be entitled to give his consent subject to such conditions as he thinks fit where he considers that the doing of the act is in the best interests of the owner of the estate being administered by the judicial factor or of any person to whom the owner owes a duty of support. The Accountant should also be satisfied that the course of action proposed by the judicial factor is not expressly prohibited by the terms of his appointment and that the factor has brought the proposed course of action to the attention of those persons who may reasonably expect to be informed of it.³¹ Accordingly, we consider that before the factor applies for the Accountant of Court's consent he should be obliged to intimate the proposal to any such person or obtain his written agreement to it. These details can appropriately be regulated by rules of court, and we propose to provide accordingly. In the event of an objection by any person to whom the proposal has been intimated the Accountant would not be entitled to consent to the proposal, and the usual consequence would be that a petition for special powers

³¹We would envisage that the proposal would be intimated to persons such as the ward (unless the circumstances justified dispensation with intimation), the petitioner for appointment of the judicial factor, and the factor's cautioner.

would be necessary. Where, however, a judicial factor does a specified act in accordance with the procedure outlined above, it should be treated as being not at variance with the terms or purposes of the trust, that is, the factor would be protected from attack on the ground that the act is in breach of the purposes for which he was appointed.³² We recommend, therefore, that section 2 of the Act of 1961 be amended by the addition of a provision as above described. A draft clause giving effect to the recommendation is contained in Appendix II to this Report. The proposed legislation is in the form of a draft clause alone rather than a draft Bill because it is more likely that it would form part of a Bill dealing with miscellaneous law reforms than proceed as an independent enactment.

Activities specified in section 4(1) of the Act of 1921 that should be brought within the scope of the proposal

19. We also invited observations on two subsidiary questions, the first being the question of which of the acts specified in section 4(1) of the Act of 1921 should be brought within the scope of the proposal, and the second the question of the classes of judicial factors to be brought within its scope. So far as the first question is concerned, experience has amply demonstrated that the great majority of petitions for special powers relate to sales and purchases—and in particular sales—of heritable property.³³ The majority of those who commented upon this aspect of the matter considered that the proposed interim solution should apply to only some of the acts specified in section 4(1) of the Act of 1921. The Law Society, for example, agreed with our provisional conclusion that the proposal should apply only to the acts specified in paragraphs (a) to (ee) of section 4(1). Our conclusion was influenced by the consideration that the proposal would thus apply to the same acts as the validating provisions of section 2(1) of the Act of 1961,³⁴ and this would both be tidy and tend to reduce confusion. In practice, moreover, very little purpose would be served by bringing all the acts specified in section 4(1) of the Act of 1921 within the scope of the proposal, because the relatively small number of petitions for special powers that do not relate to the sale or purchase of heritage almost always seek power to do acts that do not come within the scope of section 4 at all. Examples are petitions for power to make gifts to family servants, to grant annuities and to elect between legal rights and conventional provisions in testamentary dispositions. We recommend, therefore, that the proposal should apply only to the acts specified in paragraphs (a) to (ee) of section 4(1) of the Act of 1921. We observe in this connection that paragraph (a) of section 4(1) refers to the selling of 'the trust estate or any part thereof, heritable **as well as moveable**', and there arises the question whether moveable property should be excluded from the application of our proposal. We do not think that this is necessary. Petitions for special powers for the sale of moveable property appear to be practically

³²The protection given to the factor would be protection against attack on the ground that the act as such was *ultra vires*. But it would not give protection (any more than would section 4(1) of the Act of 1921) against a charge of imprudent management, for example, that a factor who has sold property did not advertise it sufficiently before sale or that he sold it at too low a price—see Thoms, *Judicial Factors*, 2nd edn., p. 104; Irons, *Judicial Factors*, p. 98.

³³During the period of ten years from 1 January 1969 to 31 December 1978 there were 602 applications by judicial factors for special powers and 572 of those related exclusively to the sale or purchase (or sale and purchase) of heritage. 544 applications related solely to the sale of heritage.

³⁴See Memorandum No. 19, paras. 7 and 19.

unknown, and in any event it is logical that a judicial factor should have the same power of decision in relation to moveable property as in relation to heritable property.

Classes of judicial factors who should be brought within the scope of the proposal

20. We also invited observations upon the question of the classes of judicial factors who should be brought within the scope of the proposal. In Memorandum 19 we stated³⁵ that 'it seems to us that factors *loco tutoris*, factors *loco absentis* and curators *bonis* (with the possible exception, perhaps, of a curator *bonis* to a minor *capax* . . .) are the leading candidates in this respect'. In general the opinion of those who commented upon the question was that the proposal should apply more widely. The Law Society considered that it should apply to all classes of judicial factors except (a) factors upon trust estates,³⁶ and (b) factors under section 14 of the Bankruptcy (Scotland) Act 1913, and the Faculty of Advocates considered that there should be excluded only (a) factors upon trust estates, (b) curators *bonis* to minors, and (c) factors under section 163 of the Bankruptcy (Scotland) Act 1913. One individual commentator saw no reason for exclusion of any kind of judicial factor except perhaps a factor upon a trust estate. The Society of Writers to the Signet on the other hand considered that the proposal should apply only to factors *loco tutoris* and *loco absentis* and to curators *bonis* to minors and *incapaces*. In practice almost all applications for special powers are brought by judicial factors who fall within the categories mentioned in the preceding sentence, and the great majority of applications are brought by curators *bonis* to persons who are incapable of managing their own affairs. All but seven of the six hundred and two applications presented by judicial factors during the period from 1 January 1969 to 31 December 1978 were at the instance of curators *bonis* or factors *loco tutoris* or *loco absentis*, and five hundred and seventy-five of the applications were presented by curators *bonis* to *incapaces*. This would suggest that our proposal would largely achieve its purpose even if it were confined to curators *bonis*. Nevertheless, on reconsidering the question with the benefit of the views of our consultees, we see no reason in principle to exclude from the scope of the proposal any kind of judicial factor. All judicial factors have this in common—that for one reason or another they are appointed by the court to administer an estate under the supervision of the Accountant of Court. If the circumstances arise where any factor thinks it expedient to transact in property in his management of the estate, there seems no good reason for his not having, if necessary, the benefit of our proposal. Our consultees were, as we have noted, disposed to favour the exclusion of judicial factors on trust estates from the proposal, no doubt because in such a case the administration of the estate is regulated by a deed and the powers and duties of the trustees under the deed should in the usual case be discoverable without undue difficulty from its terms. But the position is complicated by the fact that a judicial factor appointed in place of a testamentary trustee may not enjoy the same range of powers as the trustee. Each case depends upon its own circumstances. In *Orr Ewing v. Orr Ewing's Trustees*³⁷

³⁵At para. 20.

³⁶The expression 'trust estate' is used in this paragraph not in the wide sense of any estate being administered by a judicial factor but in the narrower sense of any estate whose administration is regulated by a deed.

³⁷(1884) 11 R. 600.

the Lord President (Inglis) observed³⁸ that where a trust has become unworkable the court will 'appoint new trustees, or a judicial factor, who will occupy the same position, and possess the same powers of extra-judicial administration which the trustees named by the testator occupied and possessed'. And so the court will dismiss as unnecessary a petition by a factor for power to do something which the deed constituting the trust directs to be done.³⁹ But where a trust deed confers discretionary powers upon trustees, it is always a question of circumstances whether a judicial factor or even assumed trustees can exercise the powers, or exercise them to the same extent as the trustees originally appointed under the deed.⁴⁰ It may be cautiously suggested that as the law now stands a judicial factor on a trust estate may exercise all the powers which are necessary to fulfil the directions of the truster, and may also exercise discretionary powers which are of an administrative character unless there was *delectus personae* in the choice of persons on whom the discretion was conferred.⁴¹ In this uncertain state of the law it would seem undesirable—and it might also be confusing—to exclude a judicial factor on a trust estate from the benefit of our proposal. We therefore recommend that the proposal should apply to (1) all classes of judicial factors, and (2) every judicial factor whensoever appointed.⁴²

Judicial Factors appointed in the Sheriff Court

21. We have discussed the problem with which Memorandum No. 19 was concerned in the context of the frequent need for a judicial factor who wishes to buy or sell property to petition the Court of Session under section 5 of the Act of 1921. Judicial factors may, however, be appointed by the sheriff,⁴³ and in the event of a judicial factor so appointed desiring special powers, he makes application to the sheriff.⁴⁴ We consider that a judicial factor appointed by the sheriff should have the benefit of the proposals recommended in this Report in like manner and to the same extent as a judicial factor appointed by the Court of Session. The draft clause in Appendix II would, of course, achieve that result, but we think it as well to make our intention clear by this specific reference to

³⁸At pp. 627/8.

³⁹*Stirling's Judicial Factor* 1917, 1 S.L.T. 165.

⁴⁰See eg *Hill's Trustees v. Thomson* (1874) 2 R. 68 (where it was held that a wide discretionary power did not transmit to assumed trustees); *Molleson v. Hope* (1888) 15 R. 665 (where the court refused to authorise a factor to sell heritable property forming part of a trust estate even although the trust deed conferred power to sell heritage); and *Carmichael's Judicial Factor* 1971 S.C. 295 (where it was held that a judicial factor coming in place of trustees who enjoyed very wide powers of investment under the trust deed enjoyed not these powers but only the powers given to him by statute and by the court).

⁴¹See *Angus's Executrix v. Batchan's Trustees* 1949 S.C. 335 per Lord President Cooper at p. 368 (where he cites the power to realise heritage as an example of a power 'of a purely administrative character'); *Leith's Judicial Factor v. Leith* 1957 S.C. 307.

⁴²It is unnecessary to make any express provision that the proposal will apply to any judicial factor whensoever appointed, because this result will follow from an existing provision of the Trusts (Scotland) Act 1961 (section 7(2)), which is as follows—'This Act shall apply to trusts which have come into operation before, as well as to trusts coming into operation after, the commencement of this Act.'

⁴³Judicial Factors (Scotland) Act 1880, s. 4.

⁴⁴1880 Act, s. 4(6).

judicial factors appointed by the the sheriff, particularly in view of the possible increase in the number of judicial factors appointed in the sheriff court.⁴⁵

The effect of a judicial factor's acts upon rights of succession

22. We referred in paragraph 11 to the duty imposed by the common law upon a curator *bonis* to preserve the estate under his charge in an unaltered condition. A corollary to that duty is that the succession to the estate cannot be altered except by an act of necessity. In *McAdam's Executor v. Souters*⁴⁶ Lord McLaren stated:—⁴⁷

'Out of this duty of preservation there has been developed the principle that the curator cannot by any act of administration alter the succession to the estate . . . the succession cannot be affected by any act of ordinary administration, but only by an act done of necessity, and to that, so far as I know, there is no exception.'

The rule has been affirmed in many cases.⁴⁸ Accordingly, if heritage is sold not because it is necessary but simply because it is the sensible thing to do, conversion will not operate and the price will be held to form part of the heritable estate.⁴⁹ The assimilation of heritable and moveable property for purposes of intestate succession accomplished by section 1 of the Succession (Scotland) Act 1964 has, of course, diminished the importance of the rule. An alienation or purchase of heritage could, however, still be material in relation to succession (a) if the heritable property and the moveable property have been separately bequeathed (under, say, the will of an *incapax*), or (b) as affecting the legal rights of a surviving spouse or children, or the prior rights of a surviving spouse, under sections 8 and 9 of the Succession (Scotland) Act 1964. But our proposal, if implemented, will make no change in the common law rule which determines what effect (if any) a factor's act has upon rights of succession. That will continue to depend upon whether the act is one of necessity or merely in the interests of the good management of the estate. Accordingly, we make no recommendation for legislation in relation to this matter.

PART IV: POWERS OF INVESTMENT OF JUDICIAL FACTORS

23. An additional question which was not touched upon in Memorandum No. 19 but which has been raised by some of our consultees relates to the investment powers of a judicial factor, and in particular to his power to retain

⁴⁵During the period of 10 years from 1 January 1969 to 31 December 1978 only 35 of the 602 applications by judicial factors (that is, approximately 6%) were sheriff court applications. But clause 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Bill currently before Parliament will, if it passes into law, remove the limitation in section 4 of the Judicial Factors (Scotland) Act 1880 whereby the sheriff may appoint a judicial factor only where the yearly value of the estate does not exceed £100. If clause 10 becomes law the sheriff would have concurrent jurisdiction with the Court of Session in relation to the appointment of judicial factors.

⁴⁶(1904) 7 F. 179.

⁴⁷At p. 181.

⁴⁸See Thoms, *Judicial Factors*, 2nd edn., pp. 69, 194–196 and authorities cited there; *Macqueen v. Todd* (1899) 1 F. 1069 per Lord President Robertson at p. 1075; *McAdam's Executor v. Souters* *supra*; *Dick v. Dick* 1925 S.L.T. 337; *Laurie's Trs. v. Stewart* 1952 S.L.T. (Notes) 20.

⁴⁹*Laurie's Trs. v. Stewart* *supra*.

investments forming part of the estate to which his appointment relates. It was decided in *Carmichael's Judicial Factor v. Accountant of Court*⁵⁰ that the investment powers of a judicial factor, even where he is appointed in room of testamentary trustees with wide powers of investment, 'are circumscribed by Acts of Parliament, unless the Court grants him additional power.'⁵¹ In effect, therefore, a judicial factor must arrange the estate investments to conform with the statutory powers conferred by the Trustee Investments Act 1961 unless any wider powers are conferred upon him by the court. It has been represented to us by the Law Society of Scotland, the Scottish Law Agents Society and two individual commentators that this has two undesirable aspects. In the first place, the re-arrangement of the estate investments to comply with the provisions of the Trustee Investments Act 1961 may result in the creation of a liability for capital gains tax which would not otherwise have arisen. In the second place, the re-arrangement may require the sale of some item of estate property which for one reason or another it is very likely the estate owner himself would not have wished to sell.

24. Whatever the force of these criticisms they undoubtedly raise large questions, and they are not questions which can be adequately dealt with in the context of this Report. Although, as we have already argued, a judicial factor is truly an administrator or manager rather than a trustee, it is appropriate that for so long as the legislative scheme is to give to judicial factors the same administrative and other powers as trustees, the investment powers of a judicial factor, apart from any special powers granted to him by the court, should be neither more nor less than those conferred upon a trustee by the Trustee Investments Act 1961. It is, of course, always open to a judicial factor to apply to the court for special powers to hold or acquire any specific investment or investments. But any major alteration of the law relating to the powers available to judicial factors—such as the extrication of judicial factors from the Trusts Acts—must, we think, be preceded by a thorough examination of questions such as the powers that should be conferred upon judicial factors, and the manner and circumstances in which the powers may be exercised. Accordingly, we make no recommendation for alteration of the law in respect of the powers of investment available to judicial factors.

⁵⁰1971 S.C. 295.

⁵¹*Per* Lord Wheatley at p. 303.

NOTE OF RECOMMENDATION (*paragraphs 18 to 21*)

It is recommended:—

- (1) that section 2 of the Trusts (Scotland) Act 1961 be amended by the addition of a provision that where a judicial factor thinks it expedient to do any of the acts specified in paragraphs (a) to (ee) of section 4(1) of the Trusts (Scotland) Act 1921 but the act might be at variance with the terms or purposes of his appointment, he may apply to the Accountant of Court for consent to the doing of the act;
- (2) that the Accountant may consent to the doing of the act subject to such conditions as he thinks fit if—
 - (a) he considers that the doing of the act is in the best interests of the owner of the estate being administered or of any person to whom he owes a duty of support;
 - (b) he is satisfied that the judicial factor is not expressly prohibited by the terms of his appointment from doing the act and has complied with the statutory requirements for intimating the proposal to interested persons; and
 - (c) no such person objects to the proposal; and
- (3) that where a judicial factor does an act in accordance with the consent of the Accountant of Court and in compliance with the statutory requirements, it should be treated as being not at variance with the terms or purposes of his appointment.

APPENDIX I

Organisations and Individuals who commented on Memorandum No. 19

Faculty of Advocates
Mr J. C. Henderson, Solicitor, Glasgow
Institute of Chartered Accountants of Scotland
Law Society of Scotland
Mental Welfare Commission for Scotland
Professor M. C. Meston, University of Aberdeen
Mr James Risk, Solicitor, Glasgow
Scottish Law Agents Society
The Sheriffs' Association
Society of Writers to H.M. Signet
Mr Robert Sutherland, W.S., Senior Lecturer in Private Law, Glasgow
University.

APPENDIX II

Draft Clause amending section 2 of the Trusts (Scotland) Act 1961

1961 c.57

In section 2 of the Trusts (Scotland) Act 1961 (validity of certain transactions by trustees), for subsection (2) there are substituted the following subsections—

- ‘(2) Nothing in subsection (1) of this section shall affect any question of liability [or otherwise]⁵² between any of the trustees on the one hand and any co-trustee or any of the beneficiaries on the other hand.
- (3) Without prejudice to the operation of subsection (1) of this section, where in relation to the trust estate or any part thereof a judicial factor thinks it expedient to do any of the acts mentioned in that subsection but the act in question might be at variance with the terms or purposes of the trust, he may, subject to the following provisions of this section, apply to the Accountant of Court for his consent to the doing of the act.
- (4) Where an application is made under subsection (3) of this section to the Accountant of Court for his consent to the doing of an act to which that subsection applies, he may grant the application subject to such conditions (including conditions as to price) as he thinks fit if—
 - (a) he considers that the doing of the act is in the best interests of the owner of the trust estate to which the judicial factor’s appointment relates or of any person to whom the owner owes a duty of support; and
 - (b) he is satisfied—
 - (i) that the judicial factor is not expressly prohibited by the terms of his appointment from doing the act; and
 - (ii) that there has been compliance with the provisions of subsection(5) of this section and of any rules made thereunder; and
 - (c) no objection is made to the doing of the act under subsection (5) of this section.
- (5) A judicial factor proposing to make an application under subsection (3) of this section to the Accountant of Court shall notify such persons or such class or classes of persons as may be specified in rules of court in such manner as may be so specified of the proposed application, the act to which it relates, and of their right to object to him doing that act within such time and in such

⁵²The words in square brackets are contained in the existing section 2(2) of the Trusts (Scotland) Act 1961, but their effect is not clear and we are doubtful if they are necessary.

manner as the rules may specify, and the rules may make different provision in respect of different classes of judicial factors, and may make provision exempting a judicial factor or a class of judicial factors from giving notification under this subsection in such circumstances as the rules may specify.

- (6) Where a judicial factor does any act in accordance with the consent of the Accountant of Court granted under subsection (4) of this section and in compliance with the provisions of this section and of any rules made thereunder, it shall be treated as being not at variance with the terms or purposes of the trust.'

Note It will be necessary to postpone the coming into operation of the clause until the rules of court mentioned in subsection (5) have been made.

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