SCOTTISH LAW COMMISSION

MEMORANDUM No: 19

POWERS OF JUDICIAL FACTORS

10 October 1974

This Memorandum is published for comment and criticism, and does not represent the final views of the Scottish Law Commission.

The Commission would be grateful if comments were submitted by 31 December, 1974. All correspondence should be addressed to:

Mr A J Sim
Scottish Law Commission
Old College
South Bridge
EDINBURGH
EH8 9BD

(Telephone: 031-667 3437)

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PART I

INTRODUCTION - THE PROBLEM

1. The Law Society of Scotland have drawn our attention to the difficulties which face 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 would or would not be "at variance with the terms or purposes of the trust". This Memorandum analyses the relevant problems, proposes tentative solutions to the difficulties, and canvasses the desirability of changes in the law.

2. The difficulties in question were considered by the Committee on Conveyancing Legislation and Practice (the Halliday Committee) whose Report[1] was published in December 1966. The nature of the problem and the Committee's proposal for reform are set out as follows in paragraph 138 of the Report:-

"Sale and purchase by judicial factor

138. Under present law a judicial factor is a trustee and as such may exercise any of the general powers of trustees (which include the power to sell heritable estate and in certain circumstances to acquire an interest in residential accommodation) where it is not at variance with the terms or purposes of the trust. It may, however, often not be readily apparent to a judicial factor whether a sale or purchase of heritable property is at variance with the terms or purposes of the trust. If he is uncertain, he is likely to err on the side of caution and make application

[1] Cmnd.3118 (1966).

to the Court for authority to make the sale or purchase and it may happen that the Court will decide that the application was unnecessary. Thus expense may be unnecessarily but not unjustifiably incurred.

> WE RECOMMEND that a judicial factor should be empowered, with the approval of the Accountant of Court and subject to the safeguards of valuation and advertisement in the case of a sale and of valuation in the case of a purchase, to sell heritable property forming part of the trust estate or to acquire with funds of the trust estate any interest in residential accommodation required to enable the factor to provide a suitable residence for occupation by any of the beneficiaries".

3. The relevant statute 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 shall include 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". Section 4 of the Act of 1921 as amended by section 4 of the Act of 1961 and section 10 of the Trustee Investments Act 1961 is set out in an Appendix to this Memorandum. Among the powers conferred by section 4 (referred to herein as "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_7, 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 be presented with the problem 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 decree in terms 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[1]:-

> "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 unnecessary[2]. And so expense is often unnecessarily (but,

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[1] 1925 S.C.464 at p.470.

[2] See, 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. There are, of course, many cases where petition to the court has been held to be necessary.

as the law stands at present, not unjustifiably) incurred. The problem is most likely to arise where the judicial factor is appointed to administer the estate of a person who for some reason is unable to manage the estate himself - 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 or where the judicial factor's primary function is the distribution or sale of property, as in the case of a judicial factor appointed on an intestate or partnership estate[1].

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. Thoms expresses it thus - "The appointment of a judicial factor is an extraordinary remedy. Hence his powers are limited to what the necessity of each particular case demands....."[2] In a case concerning the sequestration of a trust estate it was stated that a judicial factor was merely a conservator[3]. The Lord President ex-

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[1] We discuss this point further in paragraph 12 infra.

[2] Judicial Factors, 2nd ed., p.64.

[3] Paterson and Others (1865) 3M.559 per the Lord Justice-Clerk (Inglis) at p.560.

pressed the opinion in Leslie that "administration does not include alienation"[1] and in Bristow Lord Cameron observed that the difficulty of applying section 4 of the Act of 1921 to a case of judicial factory was not lessened by the fact that the function of a factor was to conserve and manage the estate under his charge[2]. The second consideration which is likely to persuade a judicial factor to seek the authority of the court, where there is the least trace of doubt as to the validity of his proposed course of action, is that the court has tended to encourage that practice. In Marquess of Lothian's Curator Bonis the Lord President observed that in any case where there was doubt whether the exercise of a power of sale would or would not be at variance with the terms or purposes of the appointment of a judicial factor "his only safe course is to apply under section 5 /of the Act of 1921_7, for the title he ultimately gives to the purchaser or feuar will be equally good whether the Court gives him the authority craved or refuses his petition as unnecessary"[3]. 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[4].

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[1] 1925 S.C. 464 at p.471.

[2] 1965 S.L.T. 225 at p.226.

[3] 1927 S.C. 579 at p.585.

[4] See, 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.

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[1], and the Act of 1921 as amended by the Act of 1961 has, as we have noted[2], 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. The conveyancing difficulty which arose in Leslie[3], stemming from the fact that a judicial factor was not a person having right to land within the meaning of the conveyancing statutes, was removed by section 1 of the Conveyancing Amendment (Scotland) Act 1938. 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 transacting with a judicial factor to proceed without the approval of the court. It may be noted, however, that the said section 2 neither empowers a trustee

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

[2] Paragraph 3 supra.

[3] 1925 S.C. 464.

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[1].

8. In a situation where a judicial factor 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 (the factor's appointment), it is clear that two distinct questions arise for consideration. The first is the ascertainment of the terms and purposes of the appointment, and the second whether the proposed act would or would not be at variance with them. In relation to the first question it has already been remarked[2] that a judicial factor may have no documentary guidance as to the purposes of his appointment, and a factor so placed is likely to be in a less advantageous position than a testamentary trustee, who can look for guidance to the trust settlement. In the case of the trustee, the task will be to infer the purposes of the trust from the constitutive deed whereas, in the case of the factor, the inference must be made simply from the reasons for and circumstances of his appointment. And it is, of course, clear that the factor must ascertain the purposes of his appointment before he can address his mind to the second question - that is, whether the proposed act would or would not be at variance with the terms or purposes of his appointment.

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[1] See Barclay 1962 S.L.T. 137.

[2] Paragraph 4 supra.

9. In cases where the exercise of a power by a factor would be at variance with the terms or purposes of the trust (his appointment) or where he is uncertain of the position, he is likely to seek the approval of the court under section 5 of the Act of 1921. When the matter comes before the court, the court must consider the two questions referred to in paragraph 8 and additionally (where it considers that the proposed act will be at variance with the terms or purposes of the trust) the question whether the act is, nevertheless, "in all the circumstances expedient for the execution of the trust". It may be that a legitimate distinction can be drawn between the nature of the first two questions - the ascertainment of the terms and purposes of a trust and whether a proposed act would be at variance with them - and that of the question whether a proposed act would be expedient for the execution of the trust. The first two questions depend for their answers upon the inferences to be drawn from an examination and analysis of the documents and relevant circumstances whereas the third question, while it will demand identification of the main design and object of the trust[1] and may involve the exercise of judicial discretion, will often be dominated by administrative and financial considerations - particularly where the question relates to the sale or purchase of heritable property. Moreover, where the third question arises in relation to (say) the estate of an incapax or an absent person and there is no competition of interests

[1]See paragraph 10 infra.

between beneficiaries, the need for the exercise of judicial discretion is likely to be diminished or to disappear entirely.

10. The actual terms of section 5 of the Act of 1921 are that the court may grant authority to do an act specified 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". 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 is modelled to some extent on 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[1] where the Lord President (Inglis) expressed the opinion[2] 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[3], a case relating to a petition under section 5 of the Act of 1921, the Lord

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[1](1877) 4 R.876.

[2]At p.880.

[3]1923 S.C.220.

Justice-Clerk (Alness) proceeded on the view[1] 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[2]. 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"[3], 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.

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[1] At p.226.

[2] 1954 S.C. 215.

[3] At p.225.

PART II

BACKGROUND TO THE PROBLEM

Classes of judicial factors

11. 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. Eleven kinds of factors are listed in the Encyclopaedia of the Laws of Scotland[1], 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.

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[1] Vol. 8, p.442.

The list is not 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....."[1] 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[2].

The need for special powers

12. 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[3]. 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.

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[1] 1925 S.C. 464 at p.469.

[2] Edgar v. Fisher (1893) 21 R. 59; and see also Fisher v. Edgar (1894)21 R. 1076.

[3] Colt v. Colt 3rd July 1801 M. App., Tutor; see also Thoms, Judicial Factors, 2nd ed., p.214 and Fraser, Parent and Child, pp. 336-338. A strict approach to the question of thepowers 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.

In Stirling's Judicial Factor[1], 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[2] 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 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.

The effect of special powers

13. If the judicial factor should decide that he cannot embark upon the proposed course of action without court authority, it is likely that he will proceed by petition under section 5 of the Act of 1921[3]. A grant by the court

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[1] 1917, 1 S.L.T. 165.

[2] 1931 S.L.T. 26.

[3] In Tennent's Judicial Factor v. Tennent 1954 S.C. 215 the Lord President (Cooper) observed that although the court still possessed a residuum of common law powers in dealing with trusts and judicial factories, these did not apply to matters which had been made the subject of specific regulation by statute. Accordingly, the Lord President was of the opinion that it was only as an application under section 5 of the Act of 1921 that the court was at liberty to entertain and dispose of the question in that case (which related to the proposed compromise of an action).

under that section of authority to exercise a section 4 power apparently merely adds "so much to the title of the factor" but does not guarantee any of his acts, ordinary or special[1]. The court "in granting special powers does not in any way relieve the officer obtaining them from the responsibility which would otherwise attach to his act"[2]. Accordingly, in Mathieson[3] the court advisedly "authorised" but did not "direct" a curator bonis to sell certain shares, the court being conscious that the giving of a direction would have interfered with the discretion and responsibility of the curator. In brief, the authority of the court will protect a judicial factor against attack on the ground that the authorised act is ultra vires but not against a charge of imprudent management[4]. In some cases the impetus for applications for special powers will have come from persons transacting with judicial factors who have been concerned to ensure that the transaction was intra vires and secure

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[1] Thoms, Judicial Factors, 2nd ed., p.105; Irons, Judicial Factors, p.98.

[2] Irons, Judicial Factors, p.99; Milne (1837) 15 S. 1104; Wood (1855) 17 D. 580; Mathieson (1857) 19 D. 917; Jamieson (1870) 8 M. 976. There are dicta in some of these cases which suggest that the factor might be relieved of responsibility in a case where the court has investigated the whole circumstances - see eg opinion of Lord Mackenzie in Milne supra.

[3] (1857) 19 D. 917.

[4] The duty of a factor is to exercise ordinary care and prudence in the conduct of his administration (Crabbe v. Whyte (1891) 18 R. 1065).

from reduction on the ground that the factor had exceeded his powers[1]. As regards the acts specified in section 4(1)(a) to (ee) of the Act of 1921, the need for a person transacting with trustees to concern himself about the trustees' powers has been eliminated[2]. In other respects, apparently even the authority of the court does not exclude entirely the risk of successful challenge of the transaction[3].

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[1] See Marquess of Lothian's Curator Bonis 1927 S.C. 579 at p. 581 where the Accountant of Court stated that "practically all judicial factors now apply for special powers to sell, it having been found that, in consequence of said observations /in Leslie's Judicial Factor 1925 S.C. 464 7, purchasers' agents would not accept titles granted by factors unless the same were fortified by decrees of Court...."; see also paragraph 20 of the Ninth Report of the Law Reform Committee for Scotland (Cmnd. 1102, 1960).

[2] Act of 1961, s.2. Where the trustee acts under the supervision of the Accountant of Court, the section operates only if the Accountant has consented to the transaction.

[3] The consensus of opinion supports the view that challenge is always possible particularly on some ground such as minority and lesion - Thoms, Judicial Factors, 2nd ed., pp. 105-107; Irons, Judicial Factors, pp. 98-99; Fraser, Parent and Child, pp. 640-641. In Vere v. Dale (1804) M. 16389, the court reduced its own decree authorising the feu of a pupil's lands, the reason for the reduction being that the measure "was at the best only an object of apparent advantage, but not of urgent necessity to the pupil's affairs". And the possibility of challenge is recognised in other cases eg Auld (1856) 18 D. 487; Maconochie (1857) 19 D. 366; Jamieson (1870) 8 M.976. Nevertheless, in Muller v. Dixon (1854) 16 D. 536 the court held that the defender, who had refused to implement a contract for the purchase by him of certain lands on the ground that an unexceptionable title could not be granted by inter alios a judicial factor for children "born or to be born", was bound to accept the title tendered.

PART III

PROPOSAL FOR SOLUTION OF PROBLEM AND EXTENT OF APPLICATION OF PROPOSAL

Long-term solution of problem

14. The problem under review is clearly a consequence of the unsatisfactory and uncertain state of the law concerning the purposes of factorial appointments and the circumstances in which, and the extent to which, judicial factors may exercise their various powers, and particularly those powers conferred upon them by statute. If the purpose of section 4 of the Act of 1921 was to give greater freedom in administration, it has failed to achieve much of its intended effect in relation to judicial factors if the powers it confers may be exercised only where they are not at variance with purposes which are obscure or unsuited to modern conditions. Factors loco tutoris, factors loco absentis and curators bonis to persons incapable of managing their own affairs are probably the classes of judicial factors who have most frequently encountered difficulty. The characteristic function of all those factors is the conservation and protection of the estates entrusted to their charge. Speculation is denied to them[1]. They are appointed "with the view of doing no acts but those of necessary administration"[2]. This emphasis on caution and aversion to change may have been apt for the more stable conditions of previous centuries, and for an era when judicial factors enjoyed very limited powers of independent action under statute, but it is arguable that modern conditions

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[1] Kirkland (1848) 10 D. 1232.

[2] Thoms, Judicial Factors, 2nd ed., p.105.

make it desirable for factors to have greater opportunity to exercise the larger powers of independent action which they now, at least in theory, possess. Additional problems are caused by the scheme of the Act of 1921 (and its predecessor) in conferring upon judicial factors the artificial status of trustees and regulating the powers conferred upon them by reference to criteria which are often difficult to apply outside the scope of trusts whose administration is regulated by a deed. It has been stated "that the process whereby tutors of certain types are spatchcocked into a Trusts Act is highly artificial"[1], and the observation applies with equal force to judicial factors. These considerations suggest that there can be no permanent solution which does not recognise and make provision for the different functions respectively of judicial factors and trustees properly so called. Such a solution might require that judicial factors be extricated from the Trusts Acts and provided with a new statutory code which would so set out their powers and duties that much of the existing doubt about the need or otherwise for a judicial authorisation would be dispelled. But the task is formidable: no limit can be put upon the purposes for which judicial factors may be appointed[2], and the range of activities for which judicial factors have sought special powers is astonishingly wide.

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[1] Shearer's Tutor 1924 S.C. 445 per the Lord Justice-Clerk (Alness) at p. 447.

[2] See paragraph 11 supra.

Proposed interim solution of problem

15. The working out of a solution of the kind mentioned would therefore 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 would, therefore, welcome views on the desirability of an interim solution. The solution which we propose is 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, does 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 will not be subject to liability on the ground that the act in question is at variance with the terms or purposes of his appointment. (The factor would, of course, remain subject to liability on any other ground of fault, for example, if it is contended that he has sold heritage at too low a price.) A provision on those lines would allow the Act of 1921 to stand unaltered until such time as a more fundamental re-examination of the law could be made.

Activities to which proposed interim solution might apply

16. We have observed 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 Scotland[1] shows a total of 360

[1] Cmnd. 1102 (1960).

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 addressed 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 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 rules (a) that it is his duty to preserve the estate so far as possible unchanged, and (b) that he cannot alter the succession to the estate by any voluntary act of management[1]. The reasons for these rules are 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. 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

[1] Thoms, Judicial Factors, 2nd ed., 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.

by any act of ordinary administration, but only by an act done of necessity, and to that, as far as I know, there is no exception"[1].

17. The basis of these rules seems to be worthy of re-examination. The question whether heritage should be alienated should, we think, depend solely upon the individual circumstances of the case, and it should not be presupposed that such a sale is prima facie adverse to the proper administration of the estate. We think that the question of the expediency of a sale of heritage is (as we have suggested in paragraph 9) likely to be dominated by administrative and financial considerations and that it may safely be entrusted to the judicial factor concerned and the Accountant of Court. In Barclay[2] (a case where Lord Cameron rejected the view of the Accountant of Court that section 2 of the Act of 1961 had made it unnecessary for curators bonis to obtain special powers from the court to sell heritable property) his lordship observed that "if the Accountant's view were correct then the anomalous situation would arise in which trustees not under supervision would require to come to Court to seek special powers, whereas a curator bonis would only require to go to the Accountant". His lordship added, however, that "the question may really be of little importance as the Accountant would not be likely to give assent to a proposed transaction unless

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[1] McAdam's Executor v. Souters (1904) 7 F. 179 at p. 181.

[2] 1962 S.L.T.137.

he were satisfied by inquiry that it was proper that the heritage should be sold"[1]. This statement is supported by the information in the Appendix to the Ninth Report of the Law Reform Committee for Scotland[2] which shows that during the years 1949 to 1958, 360 petitions were presented by judicial factors (including curators bonis) for the sale of heritage, and 10 for the purchase of heritage, and that all of them were either granted (361) or refused as unnecessary (9)[3].

18. The second question is the effect (if any) which our proposal, if applied to the sale and purchase of heritage, would have upon the rule or principle that a judicial factor cannot alter the succession to the estate entrusted to his charge except by an act of necessity. The assimilation of heritable and moveable property for purposes of intestate succession accomplished by section 1 of the Succession (Scotland) Act 1964 has to some extent destroyed the relevance of that principle. 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.

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[1] 1962 S.L.T. 137 at p.138.

[2] Cmnd. 1102 (1960).

[3] Refusal on the ground that the transaction would or might not be expedient for the execution of the trust is not unknown eg Conage's Judicial Factor 1948 S.L.T. (Notes) 11.

But our proposal, if implemented, will make no change in the legal rules which determine what effect, if any, a sale or purchase of heritage has upon rights of succession. The proposal relates only to the exemption of a judicial factor from liability in one respect and has no bearing upon the other legal consequences of the act in question.

19. Our provisional conclusion is, therefore, to recommend that the proposal should apply to a judicial factor's transactions with heritage and so to the doing of the acts specified in paragraphs (a), (b), (c), (e) and (ee) of section 4 (1) of the Act of 1921. This would remove the difficulty in the situations in which it commonly arises. It is for consideration, however, whether the proposal should also apply to any of the acts specified in the remaining paragraphs of section 4 (1) of the Act of 1921. We suggest that the proposal should also apply to the borrowing of money on the security of the trust estate (paragraph (d)) as it may be necessary for a judicial factor to borrow money to enable him to exercise the powers conferred by paragraph (e) or (ee). Moreover, the borrowing of money is also likely to be dominated by administrative and financial considerations.
We see no need for the proposal to apply to the acts specified in paragraphs (f) (appointment of agents), (h) (discharge etc of debts) and (k) (granting of deeds necessary to give effect to trustees' powers). We would agree with the view expressed by the Lord President (Cooper) "that it is exceedingly difficult to figure how they (the acts last mentioned) could ever be at variance with the purposes of the trust"[1]. The same may,

[1] Tennent's Judicial Factor v. Tennent 1954 S.C. 215 at p. 225.

we think, be said of the act specified in paragraph (1) (payment of proper debts without the necessity of constitution). We would also suggest that the proposal should not apply to the acts specified in paragraphs (g), (j) and (n). The act specified in paragraph (j) (refraining from doing diligence for the recovery of debts) is of a negative kind and is unlikely to be the subject of a petition under section 5 of the Act of 1921. In any event, we do not think that the proposal should apply to passive conduct or omissions. The acts specified in paragraph (g) (discharge of trustees and their representatives) and (n) (use of trust funds to be employed for purchase of heritable property for payment of heritable debts) are probably wholly or mainly applicable to trusts whose administration is regulated by a deed[1].

There remain for consideration the acts specified in paragraphs (i), (m), (o) and (p) - the last two paragraphs being added to section 4 (1) of the Act of 1921 by section 10 of the Trustee Investments Act 1961. We would suggest that the proposal should not apply to the act specified in paragraph (i) (compromise of claims): the compromise of a claim will normally be an act of ordinary administration, but there is always the possibility of cases where judicial intervention is desirable[2]. We have not formed any view about the acts specified in paragraphs (m) (abatement of rent etc) and (o) and (p) (which relate to the powers of trustees to concur

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[1]See paragraph 22 infra where we suggest that the proposal should not apply to judicial factors on trust estates.

[2]See Tennent's Judicial Factor v. Tennent 1954 S.C. 215.

in company schemes of arrangement and otherwise to transact in company securities), but we may observe that transactions with company securities do not normally give rise to the difficulties discussed in this Memorandum, which are a peculiar feature of transactions relating to heritage, and in particular sales of heritage. Finally, we have not thought it appropriate or necessary to consider in the context of an interim solution the relevance of the proposal to special matters which have been brought by particular statutes into the scope of section 4 of the Act of 1921[1] or to matters which lie outside the scope of that section altogether, for example, "improving the estate in a manner not coming within the ordinary course of factorial management"[2] or electing as between legal rights and conventional provisions[3]. We would, however, welcome comments on the proposals and suggestions contained in this paragraph.

Classes of judicial factors to whom proposed interim solution might apply

20. We should welcome comments on the question of the classes of judicial factors to whom the proposal might apply. It seems to us that factors loco tutoris, factors loco absentis and curators bonis (with the possible exception, perhaps, of the case of a curator bonis to a minor capax, to which we refer later[4]) are the leading candidates in this respect. These three

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[1] See, for example, section 13 (5) of the Countryside (Scotland) Act 1967 (power of trustees to enter into access agreements).

[2] Judicial Factors (Scotland) Act 1849, s.7.

[3] See Burns' Curator Bonis v. Burns' Trustees 1961 S.L.T. 166.

[4] Paragraph 21 infra.

classes have in common a managerial function, and an extension of their freedom of action might enable them to discharge their duties with less expense and greater efficiency. The functions of a curator bonis is discussed in Inland Revenue v. McMillan's Curator Bonis[1] where the Lord President (Clyde) contrasts the nature of the office of curator bonis to an incapax with that of a trustee and of a judicial factor on a trust estate. The Lord President observes[2] that the "essential purpose of the ammpointment of a curator bonis to an incapax is to supersede the latter in the management of his estates ....." and that a curator bonis "is in the same category ..... as an agent or factor appointed by a capax to manage his affairs and ingather his estate". In the management by a curator bonis of those affairs, the question whether a sale or purchase of heritage is or is not advisable will depend upon its own (possibly highly individual) circumstances and considerations of business or financial policy. In making his decision the curator may have to consider not only the interests of the ward but also those of his dependants[3], and the decision may often call for careful judgement. Our proposal would allow a factor loco tutoris, factor loco absentis or curator bonis to make the decision without reference to the court, but the balancing safeguard would be that he must secure the agreement of the Accountant of Court and would be liable, as at present, for any failure in his duty of careful management.

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1 1956 S.C. 142

2 At p. 147

3 See Bristow 1965 S.L.T. 225.

21. The appointment of a curator bonis to a minor is, in the opinion of Thoms, "anomalous"[1]. As a broad general rule, a minor without a curator has full capacity to enter into contracts, and a minor with a curator has a like capacity when he acts with the consent of the curator. In the latter case, the curator does not supersede the minor in the management of his estate. He merely advises the minor and consents to his transactions. But the true function of a curator bonis - as opposed to a curator - is to supersede the ward in the management of his estate[2]. There are obvious difficulties in justifying the appointment of a judicial manager to act for a person who has capacity to conduct his own affairs, with or without consent according to whether he has or has not a curator. The difficulties have been discussed, but not laid to rest, both in the text books[3] and in the courts[4]. It is unnecessary to consider here either the historical reasons which led to the recognition of the appointment of a curator bonis to a minor in appropriate circumstances or the circumstances in which an appointment will be made. It is sufficient to say that the appointment of a curator bonis to a minor will usually be made with reference to some specific act

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1 Judicial Factors, 2nd ed., p. 254.

2 See paragraph 20 supra.

3 See Thoms, Judicial Factors, 2nd ed., p.254 et seq; Irons, Judicial Factors, p.260.

4 Perry (1903) 10 S.L.T. 536 where it was observed that "the precise position held by such a curator has not been well cleared up in practice"; In Mayne (1853) 15 D. 554, Lord Ivory referred to the "delicacy" of interference by the Court.

of administration[1] or for some specific safeguarding purpose[2]. It may also be noted that a factor loco tutoris to a pupil becomes ipso facto curator bonis to the child on the attainment of minority[3].

The expression "judicial factor" is defined in section 2 of the Act of 1921 as amended by section 3 of the Act of 1961 as meaning "any person holding a judicial appointment as a factor or curator on another person's estate", and it seems likely that a curator bonis to a minor would come within the definition. Nevertheless, we would suggest that a curator bonis to a minor should not be specially excepted from the application of the proposal. Such a special exception would, we think, be premature and undesirable in view of our intention to issue a Memorandum concerning minors and pupils[4].

22. We must now consider the position of judicial factors on trust estates[5]. It will already have been noted by readers of

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1 See eg Perry (1903) 10 S.L.T. 536 and Waring 1933 S.L.T. 190 (sale of heritage).

2 See eg McNab v. McNab (1871) 10 M. 248 (protection of minor's property from misuse by father); Sharp v. Pathhead Spinning Co. (1885) 12 R. 574 (preservation of award of damages to minor). Provision is made by the Rules of Court (II, 131) for the appointment by the court in specified circumstances of a factor to administer an award of damages to a pupil or minor. The appointment has effect only for that purpose.

3 Judicial Factors (Scotland) Act 1889, s.11.

4 See our Eighth Annual Report - (1974) Scot. Law Com. No. 33, paragraph 30.

5 The expression "trust estate" is, for the sake of convenience, used in this paragraph to denote an estate where a trust has been formally constituted and trustees appointed. We intend, however, that the expression should cover any estate whose administration is regulated by a deed, whether or not a trust has been formally constituted - see Leslie's Judicial Factor 1925 S.C. 464 at pp. 469/70.

this Memorandum that our proposal will give rise to what Lord Cameron described in Barclay as "the anomalous situation..... in which trustees not under supervision would require to come to Court to seek special powers, whereas a curator bonis would only require to go to the Accountant[1]. But the very fact that a factor loco tutoris, a factor loco absentis and a curator bonis are not permitted to exercise a section 4 power without the agreement of the Accountant introduces a safeguarding element which is absent in the case of a testamentary trustee. Furthermore, the duty of a testamentary trustee to carry out the directions of the testator as expressed in his settlement is, as already noted, rather different in kind from the function of a "managerial" factor. The powers and duties of the testamentary trustee should be discoverable without undue difficulty in the usual case from the terms of the settlement. A judicial factor on a trust estate enjoys, to a greater or lesser extent according to the circumstances of the case, the powers given to the trustee under the trust deed. In Orr Ewing v. Orr Ewing's Trustees[2] the Lord President (Inglis) observed[3] 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

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1 1962 S.L.T. 137 at p. 138; see also paragraph 17 supra.

2 (1884) 11 R. 600.

3 At pp. 627/8.

constituting the trust directs to be done[1]. 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[2]. It may be cautiously suggested that the present state of the law is that a judicial factor on a trust estate may exercise all the powers which are necessary to fulfil the directions of the truster, and that he 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[3]. Our provisional view is that a judicial factor on a trust estate who wishes to invoke powers additional to those should proceed by way of petition to the court, and accordingly that our proposal should not apply to him, but we should be grateful for views on this matter.

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

2 See 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.L.T. 336 (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).

3 See 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.

23. Having looked at the main classes of judicial factors who apply for powers under section 5 of the Act of 1921, we now turn to the question whether the proposal should apply to all or any of the remaining classes of judicial factors who are likely to come within the definition of "judicial factor" in section 2 of the Act of 1921 (as amended by section 3 of the Act of 1961). Among the remaining classes, the principal classes who may have to transact with heritage and in particular to sell heritage, are -

judicial factors on intestate estates

judicial factors on partnership estates

judicial factors appointed under section 163 of the Bankruptcy (Scotland) Act 1913.

It may even seem superfluous to apply the proposal to those classes of factors. It will normally be clear to a factor on an intestate estate whether it is appropriate or his duty to sell heritable property forming part of the estate. In the case of a judicial factor appointed to wind up a partnership estate, it will usually be his duty to dispose of the heritable property[1]. The duties of a judicial factor appointed under section 163 of the Bankruptcy (Scotland) Act 1913 (which makes provision for the appointment of a judicial factor on the estate of a deceased person on application at the instance of his creditors) are closely regulated by that section and the Rules of Court[2]. And yet petitions to the court by such judicial

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1 Francis Cooper and Son's Judicial Factor 1931 S.L.T.26.

2 IV, 201.

factors are not unknown[1]. Moreover, the specification of particular classes of factors to whom the proposal should apply has other dangers, in respect that it is not always easy to fit a factor appointed to deal with a particular case into one of the usual categories. Accordingly, our provisional view is to recommend that the proposal should apply to every class of "judicial factor" as that expression is now defined in section 2 of the Act of 1921, other than factors on trust estates and any other class or classes of factors which may be identified as suitable for exclusion from the proposal - perhaps, for example, factors appointed under section 14 of the Bankruptcy (Scotland) Act 1913 (which makes provision for the appointment of a judicial factor for the protection of an estate which is the subject of a petition for sequestration). We should welcome observations on these suggestions.

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1 The Appendix to the Ninth Report of the Law Reform Committee for Scotland (Cmnd. 1102, 1960) shows a total of 7 petitions by judicial factors on intestate estates for authority to sell heritage over the ten years 1949 to 1958. Lowe's Judicial Factor 1925 S.C. 11 was a case concerning a petition by a factor under section 163 of the Bankruptcy (Scotland) Act 1913 for power to sell heritage - although the principal question at issue was really whether such a factor was a "judicial factor" within the meaning of section 2 of the Act of 1921 as originally enacted.

SUMMARY OF PROVISIONAL CONCLUSIONS AND OTHER MATTERS ON WHICH VIEWS ARE SOUGHT

1. The difficulties confronting a judicial factor desirous of exercising a power conferred by section 4 of the Trusts (Scotland) Act 1921 may be serious, but the investigations required for a comprehensive solution would be protracted. A possible interim solution would be to amend section 2 of the Trusts (Scotland) Act 1961 by the addition of a provision to the effect that where a judicial factor, acting with the consent of the Accountant of Court, does 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 will not be subject to liability on the ground that the act in question is at variance with the terms or purposes of his appointment (without prejudice, however, to any liability of the factor on any other ground). Would such an interim solution be desirable? (paragraphs 14 and 15).

2. 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, and the Commission's provisional recommendation is that the foregoing proposal (at 1 above) should apply only in relation to the acts specified in paragraphs (a) to (ee) of section 4(1) of the Act of 1921 and not to the acts specified in the remaining paragraphs of the said section 4(1) - except, perhaps, the acts mentioned in paragraphs (m), (o) and (p) thereof. (paragraphs 16 and 19).

3. The Commission would welcome views upon the implications of the proposal in relation to (a) the rule that it is the

duty (generally) of a judicial factor to preserve the estate under his charge so far as possible unchanged, and (b) the principle that he cannot alter the succession to the estate by any act other than an act of necessity. (It is thought that the rule at (a) above should be subservient to the consideration that the proper administration of an estate should be determined by reference to what appears advantageous or of benefit in relation to the circumstances of the particular case.) (paragraphs 16 to 18).

4. To which classes of judicial factors should the proposal at 1 above relate? The Commission consider that factors loco tutoris, factors loco absentis and curators bonis are the leading candidates in this respect. It is not thought that a curator bonis to a minor (whatever the anomalies of that office) should be specially excepted from the application of the proposal. It is thought, however, that the proposal should not apply to a judicial factor on a trust estate. Are there any other classes of factors who should be excluded from the proposal? (paragraphs 20 to 23).

5. Views on any other matters which might have a bearing upon the proposal would also be welcomed.

APPENDIX

Section 4 of the Trusts (Scotland) Act 1921 as amended by section 4 of the Trusts (Scotland) Act 1961 and section 10 of the Trustee Investments Act 1961.

General powers of trustees.

4(1) In all trusts the trustees shall have power to do the following acts, where such acts are not at variance with the terms or purposes of the trust, and such acts when done shall be as effectual as if such powers had been contained in the trust deed, viz.:-

(a) To sell the trust estate or any part thereof, heritable as well as moveable.

(b) To grant feus of the heritable estate or any part thereof.

(c) To grant leases of any duration (including mineral leases) of the heritable estate or any part thereof and to remove tenants.

(d) To borrow money on the security of the trust estate or any part thereof, heritable as well as moveable.

(e) To excamb any part of the trust estate which is heritable.

(ee) To acquire with funds of the trust estate any interest in residential accommodation (whether in Scotland or elsewhere) reasonably required to enable the trustees to provide a suitable residence for occupation by any of the beneficiaries.

(f) To appoint factors and law agents and to pay them suitable remuneration.

(g) To discharge trustees who have resigned and the representatives of trustees who have died.

(h) To uplift, discharge, or assign debts due to the trust estate.

(i) To compromise or to submit and refer all claims connected with the trust estate.

(j) To refrain from doing diligence for the recovery of any debt due to the truster which the trustees may reasonably deem irrecoverable.

(k) To grant all deeds necessary for carrying into effect the powers vested in the trustees.

(l) To pay debts due by the truster or by the trust estate without requiring the creditors to constitute such debts where the trustees are satisfied that the debts are proper debts of the trust.

(m) To make abatement or reduction, either temporary or permanent, of the rent, lordship, royalty, or other consideration stipulated in any lease of land, houses, tenements, minerals, metals, or other subjects, and to accept renunciations of leases of any such subjects.

(n) To apply the whole or any part of trust funds which the trustees are empowered or directed by the trust deed to invest in the purchase of

heritable property in the payment or redemption of any debt or burden affecting heritable property which may be destined to the same series of heirs and subject to the same conditions as are by the trust deed made applicable to heritable property directed to be purchased.

(o) To concur, in respect of any securities of a company (being securities comprised in the trust estate), in any scheme or arrangement -

(i) for the reconstruction of the company,

(ii) for the sale of all or any part of the property and undertaking of the company to another company,

(iii) for the acquisition of the securities of the company, or of control thereof, by another company,

(iv) for the amalgamation of the company with another company, or

(v) for the release, modification, or variation of any rights, privileges or liabilities attached to the securities or any of them,

in like manner as if the trustees were entitled to such securities beneficially; to accept any securities of any denomination or description of the reconstructed or purchasing or new company in lieu of, or in exchange for, all or any of the first mentioned securities; and to retain any

securities so accepted as aforesaid for any period for which the trustees could have properly retained the original securities.

(p) To exercise, to such extent as the trustees think fit, any conditional or preferential right to subscribe for any securities in a company (being a right offered to them in respect of any holding in the company), to apply capital money of the trust estate in payment of the consideration, and to retain any such securities for which they have subscribed for any period for which they have power to retain the holding in respect of which the right to subscribe for the securities was offered (but subject to any conditions subject to which they have that power); to renounce, to such extent as they think fit any such right; or to assign, to such extent as they think fit and for the best consideration that can reasonably be obtained, the benefit of such right or the title thereto to any person, including any beneficiary under the trust.

(2) This section shall apply to acts done before as well as after the passing of this Act, but shall not apply so as to affect any question relating to an act enumerated in head (a), (b), (c), (d), or (e) of this section which may, at the passing of this Act, be the subject of a depending action.