

scribing the person who shall be liable to the penalty these statutes all describe the person who is in possession of the diseased meat. Therefore I can hardly doubt that the decisions upon the interpretation of any of these statutes as to what will amount to possession would be useful in the present case.

The first in order of these two cases is the case of *Cairns v. Linton*, where the prosecution was under the Police Act of 1850. In that case Lord Adam stated that while the possession was that of the manager of the Dead Meat Market, he was by no means to be understood as expressing any doubt that the possession of the servant was the possession of the master. Lord Trayner concurred, and the Lord Justice-Clerk in the course of his opinion pointed out that the fact that the person apprehended was a servant of the true owner was a material fact in the case, while dealing also with some of the other points argued. Then the second case was the case of *Dixon v. Linton*, 2 White; and in the conclusion of his opinion Lord Young says—"On both grounds, viz., that in the first place the legal error attributed to the magistrate was not brought under his notice, and, secondly, that there was in my opinion no legal error on the part of the magistrate if he was satisfied that the appellant was in possession of the dead meat through the possession of his employees, I think this appeal must be dismissed." The same opinion was expressed by myself in the passage read at the bar, and I observe that Lord Rutherford Clark, who was also on the bench, concurred in the opinions delivered. So that there are two judgments of this Court, at least *dicta*, apparently concurred in by all the Judges in those two cases, to the effect that civil possession through a servant is sufficient to render the employer responsible for the penalties in the Act. I must say, that looking at this question again in the light of principle, I see no reason to doubt the soundness of these opinions, because this is not like a case of crime involving the more serious elements of character and malice which are always implied in crime. It is a statutory offence created for the purpose of enforcing requirements which are necessary for the health of the community, and that offence may consist in nothing more than negligence where such negligence may result in injury to the health of the community. It therefore seems to me not at all inconsistent with the scope of these statutes that a dealer in meat or provisions, who is so neglectful of his duties to the public who frequent his shop that he takes no personal supervision, but delegates the purchase and sale of his goods to servants instead of inspecting for himself, should be treated as a person who has contravened the statute. Then if we look to the words of the statute we find that nothing more is requisite to constitute a contravention of the statute than the fact that the meat or unwholesome provision is found in possession of the party accused,

and is in fact unsound. For these reasons I have to move your Lordships that the judgment of the magistrate should be reversed, and that we should remit in order that he may repel the objection and proceed with the case.

LORD WELLWOOD—I concur. I only wish to add that we do not decide that there might not be circumstances in which it would be proper that the person in whose custody the carcase actually is found, though merely a servant, should be proceeded against; as, for instance, if the servant refused to give his master's name. But here the prosecutor knew the employer's name from the first.

LORD LOW—I also concur. The complaint sets forth that the carcase was on a barrow belonging to the respondent, and was driven by his servant and under his order. Now, I think that is an averment of possession. Mr Jameson therefore tried to take the case out of section 20, and argued that a comparison of that section with section 19 disclosed a distinction between a person in possession of a carcase or other article within the meaning of section 20, and a person merely conveying the article in a public thoroughfare. No doubt section 19 provides that the person conveying the article may be required to give certain information upon pain of being taken into custody. But that provision in no way limits the 20th section, which provides that the possessor of the article shall be liable to a penalty. Under the latter section the Court must determine according to the ordinary rules of law who the person in possession is, and Lord Wellwood has pointed out there is no reason why in certain cases the person conveying the article should not, if he is the true possessor, be proceeded against under the 20th section.

The Court sustained the appeal and remitted to the Magistrate.

Counsel for the Appellant—Lees—Ure. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondent—Jameson—Craigie. Agent—Party.

## COURT OF SESSION.

Friday, December 16.

### OUTER HOUSE.

[Lord Low.]

GARDNER AND OTHERS (PATERSON'S TRUSTEES) v. FINDLAY.

Agent and Principal—House Factor—Commission—Usage of Trade.

A house factor who had managed a property for many years, receiving as remuneration a commission of 2½ per cent. upon the rents collected by him,

upon the property being sold by his principal, claimed in addition to be entitled to a commission of  $1\frac{1}{4}$  per cent. upon the rents, due at the next term, of premises let from year to year, and of  $2\frac{1}{2}$  per cent. upon one year's rent of premises let on leases negotiated by him, and averred that these charges were in accordance with the custom and practice of house-agents in Glasgow, which the proprietors knew or ought to have known, and with the scale of charges for the management of property authorised and acted on by the Association of House Factors and Association of Landlords in Glasgow, and were reasonable and proper charges.

Held that as the parties had acted during the currency of the employment upon the footing of the factor being paid a commission upon rents collected, and no additional payment had been stipulated for or asked in respect of leases negotiated, the claim was bad.

This was an action at the instance of Peter Gardner, Writer to the Signet, Glasgow, and others, the accepting trustees acting under the trust-disposition and deed of settlement of Robert Paterson, sometime merchant in Glasgow, against James Findlay junior, house factor and property valuator, Glasgow, concluding for payment of £55, 4s. 1d., being the balance of the rents of property belonging to the pursuers collected by the defender. The property had belonged to the late Robert Paterson, and had been managed by the defender as factor (1) from 1864 to 1882 for Mr Paterson; (2) from 1882 to 1889 for Mr Paterson's *curator bonis*; and (3) from 1889, when Mr Paterson died, to Martinmas 1890 for his trustees. During the whole of that period the defender charged and was paid a commission of  $2\frac{1}{2}$  per cent. upon the rents which he collected as remuneration for his management of the properties, which included the letting thereof whether by the year or upon lease. The property was sold by the trustees, with entry at Martinmas 1890.

In settling accounts with the pursuers at that date, the defender claimed to retain the sum of £55, 4s. 1d., in respect he was entitled in addition to commission on rents actually collected by him to  $1\frac{1}{4}$  per cent. on the whole rents of said property (other than those due under leases) due at Whitsunday 1891, and to  $2\frac{1}{2}$  per cent. on a full year's rent of the premises let under leases negotiated by him as factor for the *curator bonis* or the trustees.

The pursuers disputed the claim, and raised the present action.

The defender averred that these charges for commission were in accordance with the custom and practice of house agents in Glasgow, which the pursuers knew or ought to have known, and with the scale of charges for the management of property authorised and acted on by the Association of House Factors and the Association of Landlords in Glasgow, and were reasonable and proper charges, and such as the defender was entitled to make.

The pursuers pleaded that the defences were irrelevant, and *separatim*, that the defender's averments as to custom were irrelevant, and should not be remitted to probation.

Upon 16th December 1892 the Lord Ordinary (Low) pronounced this interlocutor:—  
“Sustains the pursuers' pleas: Repels the defences, and decerns in terms of the conclusions of the summons: Finds the pursuers entitled to expenses, &c.

“*Opinion.*—It appears that the defender had acted as house factor for the properties which were sold by the pursuers at Martinmas 1890, since 1864. From that year until 1882 the defender was employed by Mr Paterson, the proprietor. In 1882 Mr Paterson became incapable of managing his affairs, and Mr Gardner was appointed *curator bonis* to him. In March 1889 Mr Paterson died, and the pursuers, his testamentary trustees, came into possession of the properties. The defender's employment as house factor was confirmed by the *curator bonis* and by the trustees.

“During the whole of the twenty-six years during which he managed the properties the defender charged and was paid a commission of  $2\frac{1}{2}$  per cent. upon the rents which he collected. For that commission he performed the ordinary duties of a house factor, including the letting of the subjects, whether by the year or upon lease.

“There is no dispute that the factor is entitled to the full commission in use to be paid to him down to the date of the sale of the properties at Martinmas 1890. But in addition to that commission the defender claims right to charge the pursuers with commission at the rate of  $1\frac{1}{4}$  per cent. on the rents due at Whitsunday 1891 of subjects which are not let upon leases for more than one year, and at the rate of  $2\frac{1}{2}$  per cent. upon the rents up to Martinmas 1891 of subjects let upon leases negotiated by him as factor of more than one year's duration. The pursuers dispute the defender's right to these additional commissions, and as he has retained the amount, viz., £55, 4s. 1d., in accounting to them for the rents collected by him, they have brought this action for payment of that sum.

“The defender maintains that the commission which he charges is no more than fair and reasonable remuneration for the work that he has done, that such extra charges in the event of a factory being brought to an end are recognised by custom, and in particular by the scale of charges adjusted and approved by the Glasgow Landlords Association and the Association of House Factors in Glasgow in 1875. The defender further urged in regard to the subjects let upon lease that the negotiation of leases involves a great deal of work on the factor's part, and that although he is sufficiently remunerated for that work if he draws the ordinary yearly commission during the whole term of the leases, he is not sufficiently remunerated if his employment is terminated during their currency.

“In my opinion the contention of the defender cannot be sustained. If this had

been a case of work done for which no remuneration had been paid, and no rate of remuneration agreed upon, either expressly or by implication, I should have been disposed to attach considerable weight to the scale of charges upon which the defender relies. But this is not a case of that description. The defender managed the properties in question for more than a quarter of a century under three different sets of employers, and during that period has been paid for his services at a certain rate; he has never suggested, and does not suggest now, that the remuneration was inadequate; and he does not say that he has done anything beyond the ordinary work of a factor. In such circumstances it seems to me that there was an implied contract in regard to the remuneration which the defender was to receive, and that he was not entitled without notice to charge a higher rate for ordinary factor's work than that which had been charged and paid in the past. If he was dissatisfied with his remuneration, he could have notified his employers that he would not continue his services except upon better terms, but unless and until he gave notice that he proposed to charge at a higher rate than formerly, I think that his employers were entitled to assume that the employment was being continued upon the same terms as in previous years.

"But the defender's extra charges do not appear to me to be of the nature of charges for work done. They amount rather to a claim of compensation for loss sustained by the defender by reason of the factory being brought to an end. If that is the nature of the charges, they are plainly untenable. The pursuers were under no obligation to continue the defender as their factor, much less were they under obligation to retain the properties in order that he might have the benefit of the factor's fee.

"If a case had been made of unusual or extraordinary work falling upon the defender during the last year of his factory, it may well be that he would have been entitled to claim extra remuneration. But not only is there no case of that kind, but the circumstances appear to me to be extremely unfavourable to the defender. Most of the unexpired leases (and these the leases of the most valuable subjects) are renewed leases, in regard to which the defender had very little trouble—much less trouble, I should imagine, than if he had let the subjects year by year. Further, as regards a considerable part of the properties, it appears that the defender has not lost his employment, because the purchasers have continued him in the factory.

"I am therefore of opinion that the pursuers are entitled to decree, with expenses."

Counsel for the Pursuers — Salvesen.  
Agent—F. J. Martin, W.S.

Counsel for the Defender — Dickson.  
Agents—J. & J. Ross, W.S.

Friday, January 13, 1893.

FIRST DIVISION.

FORBES AND ANOTHER (FORBES' TRUSTEES) v. FORBES.

*Succession—Marriage-Contract Provision—Legacy—Misdescription.*

A testator, after providing for payment of his debts, directed his trustees to allow his wife the use of a particular house at a rent of £10 a-year, to deliver to her his furniture, and to pay her the "annuity provided to her under our marriage-contract of £150 sterling." The marriage-contract only provided for an annuity of £100.

*Held* that the intention of the testator was to confer a bounty upon his wife, and therefore that she was entitled to the annuity of £150.

By antenuptial contract of marriage, dated 6th June 1860, John Forbes bound and obliged himself to make payment to Miss Susan Carnegie, his intended wife, if she should survive him, during all the days of her lifetime after his decease, of "a free yearly annuity of £100 sterling, and that in advance, beginning the first year's payment thereof as on the day of his decease, for the period of one year from that date, and the next yearly payment on the corresponding day of the following year, and so forth yearly during her lifetime, with interest of each yearly payment of the said annuity during the not-payment thereof." He also bound himself to make her an allowance, should she survive him, of £20 for mournings.

John Forbes died on 9th June 1891, leaving a deed of settlement whereby he disposed his whole estate to trustees for, *inter alia*, the following purposes—First, For payment of debts and expenses: "Second, He directed his trustees to give to the fourth party to this case (his wife), for her personal use all the days of her life, if she should wish to reside at Auchencleuch, at a yearly rent of £10 sterling, the principal dwelling-house at South Auchencleuch, with the garden attached thereto, and the policies around the same between the two avenue gates: Third, He directed his trustees to deliver to his said wife the whole household furniture, silver plate, books, pictures, bed and table linen, glass, and stone ware, and all cooking utensils in his house, for her life and use, or as long as she should choose to reside at Auchencleuch: 'Fifth, For payment to my said wife of the free yearly annuity provided to her under our marriage-contract, dated 6th day of June 1860, of £150 sterling, and that in advance, beginning the first year's payment thereof as on the day of my decease, for the period of one year from that date, and the next yearly payment on the corresponding day of the following year, and so forth yearly during her lifetime, with interest of each yearly payment of the said annuity during the not-payment