

At advising—

LORD PRESIDENT—The only duty incumbent on the Court in the present stage of the case is to see to the carrying out of the interlocutor of 1st March 1895.

Admittedly the defenders have commenced building, and it is not disputed that the building so commenced is to cost £15,000. What is said by Mr Dick Peddie, the architect to whom certain duties are assigned in the interlocutor of 1st March 1895, is, that if the plans be executed the buildings will not be so adapted for the purposes of a hydropathic establishment as to be of the market value of £15,000. To this the defenders reply that there is no such thing as a market for ready-built hydropathic establishments, and that the formula of the reporter is meaningless and misleading. They say that they are under obligation to build a hydropathic establishment of the value of £15,000, that they admittedly are going to spend that sum, that they have no intention of throwing away the money, and that they know their own business. With more direct reference to the question immediately before the Court, they question the right or duty of the reporter to criticise their plans, and on some of his objections they remark that the things objected to were in the original building the plans of which were approved by the superior.

Now, it is to be observed that the interlocutor which we have to construe and follow, because it is final, bids the defenders begin the building within a certain time, without reference to Mr Dick Peddie at all. His duties begin after a commencement has been made—he is to see that the work is proceeded with. But a commencement can only be made with plans and after plans have been decided on. Accordingly, the defenders have got to act on their own responsibility, and what Mr Dick Peddie has got to do is to see that they keep at the work. It will be his duty, once the work is completed, to report as to whether it is what was ordered; and the most obvious prudence will make the defenders very ready to conform to his suggestions made in progress of the work. But I do not think that it is incumbent on him to raise for judicial decision abstract questions of value which it would be very difficult to decide at all, and premature to decide until they necessarily arise.

I think it well to note that the pursuer did not found on the fact that his consent had not been obtained to the new plans, or that they did not involve a reproduction of the original building. There are obvious and good reasons for this course being taken.

I am for recalling the Lord Ordinary's interlocutor. It is clear that the last finding could not stand if the building is to go on at all, for it would only be appropriate if the alternative claim of damages were to be now resorted to. The views which I have stated as to the duties of the reporter and the defenders respectively sufficiently explain my difference with the rest of the

interlocutor, and it does not seem necessary to express by interlocutor our estimate of the duties of Mr Dick Peddie. Recalling the interlocutor we may continue the cause. Either party will be at liberty to come to the Court; neither is invited to do so.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court recalled the interlocutor reclaimed against and continued the cause.

Counsel for the Pursuer—Balfour, Q.C.—J. Wilson. Agents—J. & J. Turnbull, W.S.

Counsel for the Defenders—D.-F. Asher, Q.C.—W. Campbell. Agents—Simpson & Marwick, W.S.

Saturday, March 13.

FIRST DIVISION.

SYDNEY AND ANOTHER (ALLAN'S TRUSTEES), PETITIONERS.

Trust—Nobile Officium—Jurisdiction—English Trust—Authority to Sell Heritage in Scotland forming Part of English Trust Estate.

English trustees under an English marriage-contract containing no power of sale, being desirous of selling certain heritage in Scotland which formed part of the trust estate, obtained an order from the Chancery Division of the High Court of Justice to the effect that the judge being of opinion that the sale was in the interest of the beneficiaries, and that by the law of England such a sale would be competent under the Settled Land Act 1882, empowered the trustees to obtain authority from the Court of Session to sell the said property.

The trustees having thereafter applied to the Court of Session for such authority, the Court granted the petition.

This was an application presented by Henry Sydney and another, James Allan's marriage-contract trustees, and formed the sequel of the proceedings reported *ante*, p. 186.

The trust in question was an English trust, and the trustees were domiciled in England; but certain shops and dwelling-houses forming part of the trust-estate were situated in Scotland, at Penicuik. The marriage-contract conferred no power to sell upon the trustees.

The petitioners narrated the unsuccessful result of their previous application to the Court for authority to sell under section 3 of the Trusts (Scotland) Act 1867, and proceeded:—"In view of the disadvantage to the trust for want of power to sell, and with the object of obtaining the judgment of the English Court on the question of the trustees' powers, the petitioners thereafter made application to the Chancery Division

of the High Court of Justice in England, and on 8th February 1897 obtained an order from Mr Justice Stirling."

The order was in the following terms:—"The Judge being of opinion that it is expedient in the interest of the beneficiaries under the said settlement, and further that by the law of England, so far as it controls the said settlement, a sale might be made of the property at Penicuik aforesaid, part of the settled property, under the Settled Land Act 1882, but the said Act does not extend to property in Scotland: It is by consent ordered that the said Henry Sydney and Charles Murray, as such trustees aforesaid, be empowered to apply to the Court of Session at Edinburgh aforesaid for all necessary relief to enable them to give effect to this direction, and particularly to obtain power and authority to sell the said property."

The petitioners accordingly, after stating that the trust-estate would be seriously disadvantaged unless the subjects in question could be sold, craved the Court "to grant power and authority to the petitioners as trustees foresaid to sell and dispose of the said heritable subjects on such terms and in such manner as they may consider most beneficial to the trust estate . . . and for that end to enter into articles of roup, to grant dispositions . . . and to grant all other deeds requisite and necessary for rendering such sale effectual."

Argued for the petitioners—The petition should be granted. It was presented on an entirely different footing from the previous unsuccessful application.

At advising—

LORD M'LAREN—When the Court was applied to under the former petition the application was made in terms of the Trusts Act 1867, and we were all of opinion that the case was not covered by the section of that Act which empowers the Court to authorise the sale of trust-estate. But it was observed in disposing of that case that the Court had jurisdiction to authorise the sale of trust estate, and that before the date of the Trusts Act this jurisdiction was exercised, although sparingly and only in cases amounting to a legal necessity. As in this case the domicile of the trust was in England, we did not think that this was the proper Court to consider the expediency or necessity of the sale in view of the terms of the trust. The difficulty we felt has now been completely removed, because a Judge of the High Court of Justice in England having jurisdiction has considered the matter, and has issued an order pronouncing a sale as expedient in the interests of the trust. It is added that the sale might have been ordered in the exercise of the powers of the English Court under the Settled Land Act 1882 if the property had been situated in England. The question accordingly which we have now to consider is, whether we can exercise an auxiliary jurisdiction to enable the order of the English Court to be carried out. There are analogies which support the exercise of our jurisdiction in the way pro-

posed; the nearest perhaps is the case of applications by foreign trustees or executors for confirmation in Scotland, or for authority to complete a title to estate coming to them by an imperfect conveyance. In such cases the Court never hesitates to grant trustees the necessary authority for maintaining their title to real or personal property when it is necessary to explicate a foreign trust.

It appears to me that when the authority of the Court is necessary to enable trustees to convert trust-estate into money the proceeding is of the same kind, that is to say, a purely administrative proceeding, and that the petitioner is entitled to our assistance after the Court of the domicile has decided that the sale is competent and expedient in the interest of the trust.

LORD ADAM—I also think this petition should be granted.

LORD KINNEAR—I agree. As I understand, the only purpose of the present application to this Court is to enable English trustees to give a good title to a purchaser, it being established by the order of Mr Justice Stirling that it is competent under the trust to sell heritable property, and also that it is expedient in the interest of the beneficiaries that the property should be sold. I entirely agree with what Lord M'Laren has said to the effect that it is proper that we should give our assistance in carrying out that order.

LORD PRESIDENT—I concur.

The Court granted the prayer of the petition.

Counsel for the Petitioners—A. J. Young—Macaulay Smith. Agent—Robert D. Ker, W.S.

Tuesday, March 16.

SECOND DIVISION.

(With Three Judges of the First Division.)

[Sheriff-Substitute at Glasgow.]

WILKINSON v. THE KINNEIL CAN-
NEL AND COKING COAL COM-
PANY, LIMITED.

*Reparation—Volenti non fit injuria—Risk
Voluntarily Incurred to Save Life.*

A miner, as tutor of his pupil son, raised an action of damages against a coal company for injury received by his son while in their employment. The pursuer averred that while the boy and another man in the employment of the company were standing on a stationary truck trimming coal, the boy observed an uncontrolled waggon approaching them with great speed on the same line of rails; that he in a moment of hurry and confusion incident to his surroundings and the