

pared in pursuance of Lord Medwyn's judgment, omitting therefrom all reference to Kildees, and finally approved of on 9th March and 25th May 1826.

"It appears to me that the result of all these proceedings is—(1) That the final decree of locality of 1728–29 is *res judicata* that the lands of Culdees are exempt from all liability for stipend; and (2) that the final decree of locality of 1826 is *res judicata* that the proceedings in 1728 had the effect above set forth. I do not think it is necessary or indeed competent to inquire whether the claim of exemption was well founded or not. Indeed, in this, as in almost every case in which such a plea of *res judicata* is proposed, it may be assumed that if the matter were still open the exemption claimed would not be sustained by the Court. It is impossible to read the cases of *E. of Hopetoun v. Ramsay*, 5 Bell's App. p. 69; *The Duke of Buccleuch in the Locality of Inveresk*, 7 Macph. p. 95; and *Bonar v. The Lord Advocate*, 9 Macph. p. 58, without seeing that if the plea of *res judicata* had not been there sustained, the *decimæ inclusæ* rights claimed would have been held to be invalid.

"I have therefore been unable to hold that the claim of Mr Speir for the continued exemption of his lands of Culdees from liability for stipend is open or can be now investigated. The locality must consequently proceed on the footing that these lands are not liable for stipend."

Lady Willoughby D'Eresby reclaimed.

At advising—

LORD JUSTICE CLERK—We have heard a very able argument for the reclaimer, but I do not think that any of the views suggested affect the ground upon which the Lord Ordinary has based his judgment, with which I entirely concur. When freed from details, matters stand thus. As far back as 1728 the lands of Culdees were struck out of the scheme of locality on the ground that they were not liable for teind. The precise ratio upon which the Court arrived at that decision I confess I am not able to see, but whatever it may have been we cannot go back upon it.

This was how the question stood until 1826, when it was again raised, only to have the same judgment pronounced in respect of *res judicata*, and now, 50 years later, a further attempt to open the question is made. It was ingeniously argued that in these proceedings the other heritors were not concerned, but I think that where the question was actually raised and discussed upon its merits that was enough to make it *res judicata* against all. This I think was settled by the case of *Bonar*, referred to by the Lord Ordinary, and of *Thompson v. The Lord Advocate*, 21st June 1872, 10 Macph. 849. These lands are teind free because the question was discussed and so decided in 1728, but even were that a doubtful matter the Earl of Perth was then represented, and it is impossible now for those who represent him to resist successfully the plea of *res judicata*. Accordingly I am for adhering to the Lord Ordinary's interlocutor.

LORD NEAVES and LORD ORMDALE concurred.

LORD GIFFORD—I am of the same opinion. Successive localities in one parish are really but one process, and accordingly if once a question be *res judicata in foro contentioso*, that is sufficient to settle it for ever.

The Court adhered.

Counsel for Mr Speir—Lee—Gloag. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Lady Willoughby D'Eresby—Lord Advocate (Watson)—Keir. Agents—Dundas & Wilson, C.S.

Saturday, December 16.

SECOND DIVISION.

[Lord Shand, Ordinary.]

STODART V. DALZELS.

Property—Feu—Contract—Singular Successor—Rei interventus.

The purchaser of a piece of ground brought an action against persons who were in possession of a portion thereof for declarator that the pursuer was absolute proprietor of the whole ground. The defence was that the author of the person from whom the pursuer purchased the property had twenty-five years before entered into a verbal agreement to feu to the defenders' author at a stated feu-duty the portion of the ground possessed by them. No written title was completed under the said agreement, but on the faith thereof the said portion of ground had ever since been possessed. The feu-duty had been regularly paid, and receipts granted therefor, the receipt for the first half-year's feu-duty being holograph of the granter of the right, and bearing to be for money paid as feu-duty for the ground "feued by me." The defenders had also erected buildings on the said portion of ground in connection with a house belonging to them on ground adjoining, held on long lease from a different proprietor.—*Held* (1) that the defender had right as feuar to the said piece of ground possessed by them; (2) that when the pursuer made the purchase he had notice of facts and circumstances sufficient at all events to impose on him the duty of inquiring as to the defenders' right; and (3) that the pursuer was barred from maintaining against the defenders any right to the ground possessed by them beyond the rights of superiority.

This was an action raised by Thomas Stodart, innkeeper, Lesmahagow, against the Rev. James Dalzell and J. B. Dalzell, draper, Lesmahagow, concluding for declarator that the pursuer was absolute proprietor of a certain plot of land there, and for decree of removing against the defenders. Stodart claimed under a disposition in his favour granted by Janet Taylor on 15th June 1874. The amount conveyed was 11 falls, forming a triangular piece of ground, whereof the defenders occupied 1 fall and 13 ells, which formed the subject of this action.

The defenders stated that in 1849 William Taylor (the brother of the said Janet Taylor, who succeeded him as heir), then proprietor of the whole piece of ground, agreed to convey in feu to Gavin Dalzell, the defenders' father, the disputed land, at 4s. 11½d. of annual feu-duty. In 1858 William Taylor further conveyed a few

yards more, the whole feu-duty then becoming 6s. per annum. A land measurer (Mr Hilston) measured the ground, and gave a certificate, of date 26th May 1849, in these terms:—
“The following is statement of the measurement of ground as feued by Mr Gavin Dalzell, merchant in Abbey Green, being part of the feu at the north end of the feu, the property of Mr William Taylor, sawyer, in Abbey Green, upon the lands of Peasehill, the property of J. Woodman Linning, Esq., lying in the village of Abbey Green, parish of Lesmahagow, and county of Lanark, amounts to 1 fall 15 ells Scots measure, bounded as follows—on the south by the feu the property of the said William Taylor, on the west and north by the public road, on the east by the feu the property of the said Gavin Dalzell.”

On the faith of the agreement to feu, Gavin Dalzell entered into possession of the ground at Whitsunday 1849, and thereafter erected a retaining wall to keep the property from slipping towards the road, and made cellars under the said ground, and erected various buildings upon it in connection with a house erected by him upon adjoining ground, which he held on long lease from another proprietor.

Gavin Dalzell died in 1863, and his family thereafter continued in uninterrupted possession. The defenders had regularly paid the feu-duty, and they produced their receipts, whereof the first was holograph of William Taylor, and acknowledged receipt of the money as feu-duty for the ground “feued by me.” No feu-charter was ever granted. The defenders alleged that the pursuer purchased in full knowledge of the circumstances, and that while he paid for the 11 falls £25, the buildings alone on the defenders’ ground were worth more than that sum. The defenders expressed themselves ready to pay the feu-duty.

The defenders pleaded *inter alia*—(1) “The pursuer’s authors were under a binding agreement to grant a feu of the ground in question to the late Gavin Dalzell and his heirs and successors, (2) The pursuer, when he purchased the property belonging to Janet Taylor, having been informed, or at least being well aware, that Gavin Dalzell’s heirs held and possessed a portion thereof as a feu, the pursuer’s title is subject to the feu-right so agreed to be granted by his authors. (3) The pursuer not being a *bona fide* purchaser of the subjects described in the summons, and his title being subject to the feu-right agreed to be granted by his authors, he is not entitled to decree as concluded for, but is bound to implement and fulfil the said agreement.”

On Tuesday, March 14, 1876, a proof was taken, at which the foregoing facts were established, and Mr Hamilton, the bank agent at Lesmahagow, who was present when Stodart purchased his ground, deponed that he wrote the receipt for it, adding the words “with the existing burdens thereon;” he did not, however, remember what led him to insert those words. Another witness, M’Morran, from whom the pursuer purchased, stated that he had shown a piece of paper to Stodart having on it simply a triangle, and that he had told him that was the bit Dalzell had, whereupon the pursuer asked what he paid per annum, and was told 6s. The defender J. B. Dalzell recollected the mean wall, having been built in 1859 by William

Taylor himself at his own and Gavin Dalzell’s joint expense. He also stated that the disputed ground was bounded by a high stone and lime wall, the only access to it being from Dalzell’s buildings or from the road.

On 22d March the Lord Ordinary (SHAND) pronounced the following interlocutor and note:—“Having considered the cause: Finds that . . . on 2d February 1874, when he purchased the ground from James M’Morran, acting on behalf of Janet Taylor, the proprietor thereof, the defender James Dalzell had right, as feuar thereof, to one fall and thirteen ells or thereby of said ground, being the subjects in dispute, . . . and was entitled to demand and obtain from the said Janet Taylor, as his superior, a feu charter of the said one fall and thirteen ells or thereby of said ground at the feu-duty of six shillings a year: Finds that when the pursuer made the said purchase he had notice of facts and circumstances sufficient to inform him that the defender had right as feuar to the property of the ground in dispute, or at least that the pursuer had notice of facts and circumstances sufficient to impose on him the duty of enquiring as to the defenders’ right, and that he designedly abstained from making such enquiry as would readily have informed him thereof: Finds that, in these circumstances, while the pursuer has right to the ground embraced in the title produced and founded on by him, he is barred from maintaining against the defenders any right to the ground in dispute beyond the right of superiority, and is not entitled to decree of removing as concluded for: Assolziez the defenders,” &c.

“Note.—The pursuer, on 2d February 1874, purchased from James M’Morran, acting on behalf of Janet Taylor, his aunt, a piece of ground in the town and parish of Lesmahagow of about eleven falls in extent, at the price of £25, and the present dispute refers to one fall thirteen ells of this ground situated at its northern boundary. Taking the price paid by the pursuer as the criterion of the value of the disputed ground, it is worth somewhere about £3, and it is certainly to be regretted that a litigation like the present should have been carried on about so trifling a subject. The repeated suggestions made to the parties to come to an amicable settlement of the case have been met by the difficulty that the expenses of the litigation are now so much greater than the value of the subjects in dispute as to have become really the material question in the case, and the parties having been unable to settle their mutual claims on this account, the case must be disposed of on its merits.

“The defenders claim right to retain possession of the disputed ground in virtue of an agreement of feu which they allege was entered into between their late father and the late William Taylor a number of years ago. They do not dispute the pursuer’s right to the ground within his title from Janet Taylor, William Taylor’s sister, but they maintain that the pursuer is bound to recognise their agreement of feu of the small portion in dispute in respect of the knowledge which he had when he obtained his title, and separately when he made his purchase.

“It is clear that in a question between the defenders and their father, their predecessor, on the one hand, and Janet Taylor, the seller, and

her late brother on the other, there was a binding contract of feu entered into so far back as 1849. The measurement or diagram of the ground prepared and exchanged between Taylor and the defenders' father bore expressly to be a "measurement of ground as feued by Mr Gavin Dalzell." Possession was given in 1849, and the ground was thereafter used in connection with the adjoining property belonging to Mr Dalzell. Buildings, consisting of walls, staircases, and outhouses, were erected within the ground, and payment of feu-duty was made year after year, in return for which receipts were granted as for feu-duty, at first by Taylor, and after his death on behalf of his sister. In an extension of Dalzell's building beyond the boundary of his former property, part of it was erected on the ground in dispute. It is thus clear that a contract of feu existed in a question with Janet Taylor, and that its existence is proved by the writings and actings of the parties.

"When the pursuer purchased Taylor's property, consisting, as already stated, of 13 falls, the land purchased was described in the receipt for the price granted by M'Morran, and which embodied the contract entered into as 'part of the lands of Peasehill possessed by my late uncle William Taylor . . . with the existing burdens thereon.' It is clear that this purchase gave the pursuer right to the disputed ground only, under the burden of the feu right. The ground sold was described by the possession, and the only possession which William Taylor had for many years was that of superior. The *dominium utile* had been in the possession of Dalzell, and the right to a feu was an existing burden on the property in a question with Taylor. The seller was, I think, entitled to require words of similar limitation to be inserted in the conveyance in the pursuer's favour, and if that had been done the pursuer could not have operated the right which he now maintains. The pursuer, however, got the conveyance prepared himself. It contained no qualification of the description of the subjects or reference to the state of possession, nor to the existing burdens, and it was signed by Janet Taylor without having been revised by any professional man qualified or professing to be qualified for that duty.

"In these circumstances, the question has arisen, Whether, notwithstanding the contract of feu which subsisted between the defenders and Janet Taylor, the pursuer is entitled to eject the defenders from the disputed ground, and to vindicate the property as exclusively his own because the defenders have not a completed registered title? I am of opinion that he is not so entitled, but that he had knowledge of such facts and circumstances at the date when he obtained his title, and even at the earlier date when he made his purchase, as imposes upon him the obligation of recognising the feu right.

"The case is distinguishable from those which have generally occurred hitherto for decision in this country, and of which *Petrie v. Forsyth*, 16th December 1874, 2 Rottie 214, is an instance, in two respects (1) that the dispute is not one in which each of the parties claims right to the whole subject of purchase, for the defenders maintain only that the pursuer is bound to recognise the burden affecting his right to a small part of the property; and (2), that the defenders and their

author had been in open peaceable possession of the subjects for many years. Without going in detail into the proof, I am of opinion that when the pursuer completed his title he was quite aware of the existence of the defenders' claim, and of facts sufficient in law to give the defender James Dalzell right to the feu. It was at this date only that the pursuer acquired right by the force of his title to dispute the defenders' right, for by the contract entered into in February he was bound as already stated to recognise the defenders' right. Even however in February, I am of opinion the pursuer had knowledge of facts sufficient to preclude him from maintaining that he was not bound to recognise the contract of feu. He had been on terms of great intimacy with William Taylor. He knew not only that the defenders were in possession of a small corner of the ground in question, but had been so for many years, that a part of the defenders' property was built on the ground, and that walls and a staircase existed and had existed for many years for the purpose of permanently enclosing the ground and connecting it with the defenders' other property. At the sale a copy of the measurement already referred to was given to him, and part of that measurement, viz., the triangular diagram, was, I am satisfied, directly brought under his notice. The pursuer says he thought all this indicated to him the existence of a yearly tenancy only, but I cannot accept this statement as correct. It was not reasonable to suppose that a careful measurement and diagram would be prepared for a yearly tenancy. Unfortunately Mr Hamilton has very little recollection as to what occurred when the bargain was made, but M'Morran, though evidently a person quite uneducated and unacquainted with business, states a fact of much significance on the question of the pursuer's knowledge, viz., that when the bargain was entered into the pursuer remarked that the annual payment was not entered in the measurement because Taylor had not wanted to let the measurer know the amount. This observation showed that the pursuer's attention had been pointedly called to the measurement, and that he seemed to have some previous knowledge about it. The existence and terms of the measurement itself, and the pursuer's knowledge of the long possession of the ground, are, I think, sufficient to show that he was made aware that the defenders were in possession under a permanent right, or a contract for a permanent right. The truth appears to be that he thought the contract, however it might affect Taylor or his sister, was not binding in law on him as a purchaser, that is, that as there was no completed and registered formal title he he would not be bound. Before the title was completed I am satisfied he was fully informed by the defender Mr John Brown Dalzell, that he maintained his brother's right to a feu, and there is no doubt that by that time he was fully acquainted with the terms of the measurement.

"In this state of the facts, I am of opinion that the pursuer was aware that the defenders were and had been in possession under an agreement to feu, but even this knowledge is not, I think, essential to the defenders' success in the case. If the pursuer was made aware of facts and circumstances which indicated the existence of a right on the defender's part, he was in fairness bound to make full inquiry, and cannot plead the fact

of his having wilfully abstained from making such inquiry as enabling him now to disregard the defenders' right. In this point of view the length of the defenders' possession in connection with the adjoining property, a feature which has not occurred in the previous reported cases in this country, is of peculiar importance. He was not entitled with that fact, had it stood alone before him, to assume the possession to have been precarious. In the case of *Marshall v. Hind*, 18th January 1828, 6 S. 384, Lord Alloway recognises the duty of a purchaser in many circumstances making inquiry as to the rights of third parties, and the same view was supported by the dicta in the recent case of *Petrie*. In England the law is clear, and based on broad principles of equity, equally applicable in this country. See *Holmes v. Powell*, 8 De. J. M. & G. 572, and the authorities cited in Whyte and Tudors' Leading Cases in Equity, II., p. 464, *et seq.*, and particularly p. 452."

The pursuer reclaimed, and argued—They did not know what Dalzell's position was. [LORD NEAVES—It was not necessary to have knowledge, provided sufficient reasons existed to put the pursuer upon his inquiry.] A receipt can be used only as such, and cannot be raised into a document conferring any other right by the insertion into it of a reference to another agreement. [LORD JUSTICE-CLERK—The question is, whether written evidence of a verbal contract is enough to establish a feu-right when followed by possession.] The basis of the defender's case is a verbal contract, and their mode of establishing their claim is to appeal to a document which never was intended to be so used. In *Bathie v. Lord Wharncliffe* there was a draft lease, and the only purpose of writing a draft was with a view to granting a lease; there was no analogy between that case and the present. There must be (1) something necessarily suggesting the need for an inquiry; and (2) some means for inquiry if so suggested. The writer of the receipt for the purchase money says he meant nothing by the words "existing burdens."

Authorities—*Colquhoun v. Wilson's Trs.*, March 20, 1860, 22 D. 1035; *Maxwell of Carruthars*, Hume 849, and cases there; *Smith v. Marshall*, June 8, 1860, 22 D. 1158; *Sinclair v. Sinclair*, Jan. 29, 1829, 7 S. 342; *Walker v. Flint*, Feb. 20, 1863, 1 Macph. 417; *Bathie v. Lord Wharncliffe*, March 6, 1873, 11 Macph. 490; *Rait v. Galloway*, Nov. 26, 1833, 12 S. 131; *Lang v. Magistrates of Dumbarton*, June 29, 1813, F.C.; *Petrie v. Forsyth*, Dec. 16, 1874, 2 R. 214.

At advising—

LORD JUSTICE-CLERK—I think the questions raised in this case are very narrow, and but for the long and decided *rei interventus*, I should have felt considerable difficulty and doubt in dealing with it. If a man chooses to keep heritable property in the way in which the Dalzells have done here, without any written title, for twenty-five years, it comes to be a serious matter with reference to *bona fides*, and in some circumstances might be very hard upon a singular successor. But in the present case I cannot doubt that the consecutive series of receipts, a series commencing with one holograph of the granter of the rights, added to the fact of possession, are sufficient to establish a right. Even if Stodart, the

purchaser, had been aware of the existence of the documents and of the real position of matters, I do not think he could have known that these as they stood were enough to establish the Dalzells' right. But apart from all this, I am clear that upon the evidence of Hamilton and M'Morran it was thought a questionable matter before the purchase whether they had a feu-right or not; and my impression is that the purchaser was or should have been put upon his inquiry—an entirely different matter from what the legal import of the documents might be. Therefore, upon that ground, I am not inclined to alter the interlocutor of the Lord Ordinary, and would only add that (while my opinion is that the documents, together with *rei interventus* are sufficient), I am not prepared to say that Stodart knew the position of matters, but only that he was put on his guard, and it was his duty to make inquiry.

LORD NEAVES—I do not think that any man can be permitted in this way to acquire by purchase a right to which he knows another has either a feasible or an inchoate title. To act in such a way is not fair, and is quite sufficient for a personal bar. It is enough if circumstances have occurred to put a man upon his guard, and it is upon this ground that I proceed. The evidence of *Hamilton* appears to me to be sufficient; nothing more is needed. It was not necessary for Stodart to form the opinion that in law another man had this feu-right; but if he had reason to believe that there was a question as to the tenure, and that another might possibly enforce a right, then that would bar him. Now here the purchaser was aware of the existence of materials out of which a right might arise—he had that ambiguous knowledge, and also he knew that part of Dalzell's house was built on the ground in question. I am for adhering.

LORD ORMDALE—I am of the same opinion. It would be an unfortunate thing were the opinion to prevail that the records alone are the way to obtain a proper right of property; that may often be so, but it is not so always, as was well shown in the case of *Lang v. The Magistrates of Dumbarton*, where a man was prevented from proceeding by an unrecorded prior right, although his own title was recorded. Now, I think the question here is, Whether there was enough to put the purchaser in *mala fide*? I think that there was. The first receipt bore all the elements of a feu, and it is holograph of the superior. The series of receipts after that would be enough, but if once by the first receipt a right of feu is established, then *rei interventus* can be proved by parole. Now, if all this had been known to Stodart, could he have denied that right? I doubt it. Still I am quite contented to go upon the other ground, and, supposing that he did not know, he had at least such knowledge as to put him upon enquiry. I adopt the second portion of the Lord Ordinary's finding, and am for adhering thereto.

LORD GIFFORD—I concur. The subjects here are of trifling value, but that makes it not the less the duty of the Court to see that the law is not hurt. It is a most important principle of law, that while a singular successor is entitled to claim rights without being bound by the

personal obligations of his author, that only holds good when he is in *bona fide*. In this case I think—(1) That Stodart was bound to implement Taylor's obligation and grant a feu. When C buys from A a subject on which B has a house, he must inquire into B's title, and I am of opinion that we have enough to make Stodart liable for all the obligations of his author; (2) I also think that with the *rei interventus* the receipts are sufficient to establish a title. They are very precise. I may add that I should have been quite ready to hold that the Dalzells' were bound to take that feu if the case had been reversed. With a possession of twenty-five years, and the house built as it was, Stodart was bound at the time of his purchase to make inquiry.

The Court adhered.

Counsel for Pursuer—Darling. Agent—A Morison, S.S.C.

Counsel for Defender—Lorimer. Agent—D. Macbrair, S.S.C.

Wednesday, December 20.

FIRST DIVISION.

[Lord Shand, Ordinary.

WALLACE AND OTHERS v. FRASERBURGH
HARBOUR COMMISSIONERS.

Harbour—Dues—Wreckage.

The Fraserburgh Harbour Commissioners were by Act of Parliament empowered to exact dues for "goods or merchandise that should be imported into the harbour or unloaded out of any ship or vessel coming into said harbour." A vessel was cast ashore within the precincts of the harbour; certain timber, casks, empty barrels, brass, &c., forming part of the vessel, were brought into the harbour and landed there.—*Held* (affirming the Lord Ordinary's judgment) that no dues were exigible on such articles under the Act of Parliament.

Counsel for Pursuers—Trayner—Hunter.
Agents—Pearson, Robertson, & Finlay, W.S.

Counsel for Defenders—Asher—Robertson.
Agent—Alexander Morison, S.S.C.

Thursday, December 21.

SECOND DIVISION.

[Lord Craighill, Ordinary.

GRAYS (RAMSAY'S TRUSTEES) v. BISHOP
AND OTHERS.

Succession—Settlement—Construction—Vesting—Fee and Liferent.

A testator directed his trustees to pay the free annual interests and proceeds of his

whole means and estate in equal portions to his brother and four sisters, "and that during all the days of their respective lives, whom failing without issue, to the survivors and survivor." He further directed his trustees, "upon the death of any one or other of my brother or sisters herein-before named, to pay to the child or children of such deceased brother or sisters, in equal portions, the capital sum liferented by the parent so deceasing;" and on the death of his wife he directed his trustees to "settle his whole heritable and moveable means and estate, and that in equal shares, upon my said brother and sisters, in liferent for their liferent use alienarily, in terms and under the conditions before specified, and the issue of their bodies respectively, whom failing to the issue of the survivors or survivor in fee." The brother and two of the remaining sisters left issue, and the last survivor was the fourth sister, who died unmarried.—*Held* (1) that the share of the trust-estate liferented by the unmarried sister who survived the others did not fall into intestate succession of the testator, but vested at the death of the liferentrix in the issue of the brother and the two sisters who left family; and (2) (*diss.* Lord Gifford) that the division of the share among the issue must be *per stirpes*.

This was an action of multiplepounding raised by John Gray, accountant to the Union Bank, Glasgow, and George Gray, as trustees of the late John Ramsay, merchant, Edinburgh, calling as defenders the issue of the testator's brother and sisters and their representatives. The circumstances under which the action arose are as follows:—

Mr Ramsay died on 31st August 1843, leaving a trust-disposition dated 2d February 1838, and a codicil dated 14th February 1840. The purposes of the deed were—1st, payment of debts; 2d, implement of marriage-contract obligations to the truster's wife; 3d, additional annuity of £125 to Mrs Ramsay; 4th, payment of all legacies; and the remaining purposes were in these terms:—"Fifthly, I hereby direct and appoint my said trustees to pay the free annual interest and proceeds of my means and estate (under deduction of the annuity and other provisions herein-before settled, and the necessary expense of this trust) in equal portions to the said James Ramsay, my brother, Mrs Catherine Ramsay or Finlay, Mrs Jess Ramsay or Young, Mrs Sylvester Ramsay or Duncan, and Isabella Ramsay, my sisters, and that during all the days of their respective lives, whom failing without issue to the survivors and survivor; Declaring always, as it is hereby specially provided and declared, that the said proceeds and annual interest shall not be assignable or affectable by the diligence of creditors, nor subject to the *jus mariti* of husbands, but it is of an alimentary nature, and shall be payable to my said brother and sisters on their own respective receipts alienarily: Sixthly, I hereby further direct and appoint my said trustees or trustee acting for the time, upon the death of any one or other of my brother or sisters herein-before named, to pay to the child or children of such deceased brother or sister in equal portions the capital sum liferented by the parent so deceasing (the issue of such children being en-