

that this is one of the class of objections to which the Court ought not to give effect. And therefore I am of opinion that we should hold that these lands are included in the valuation.

The Court recalled the interlocutor of the Lord Ordinary, and sustained the objections for the minister, with the exception of that relating to the Spittal of Ballagan not insisted in by him, as above mentioned.

Counsel for the Minister (Reclaimer and Objector)—Pearson—Graham Murray. Agents—Myrne & Campbell, W.S.

Counsel for Archibald Orr Ewing and Others (Respondents)—J. P. B. Robertson—Low. Agent—F. J. Martin, W.S.

Counsel for Sir James Colquhoun, Bart. (Respondent)—Mackay—Rankine. Agents—Tawse & Bonar, W.S.

Saturday, December 9.

FIRST DIVISION.

[Lord Kinnear, Ordinary.]

THE PROVOST AND MAGISTRATES OF ELGIN,
PETITIONERS.

Trust—Mortification—Power of Trustees to Feu—Trusts Act 1867 (30 and 31 Vict. c. 97), sec. 3.

In a petition by trustees acting under a permanent trust for charitable purposes, for authority to feu mortified lands—held that they had power to feu at common law, and petition dismissed as unnecessary.

This was a petition by the Magistrates of Elgin for authority to feu certain lands of which they were trustees for charitable purposes under a deed of mortification. The following narrative is taken from the report of Mr Black, W.S., to whom a remit was made to inquire into the circumstances set forth in the petition:—"The petition is presented by the magistrates and treasurer of the burgh of Elgin, trustees or patrons under a deed of mortification executed by Mr William Coming of Auchray on 12th October 1693, with consent of Mr James Cumine of Rattray, the heir of Mr William Coming.

"It appears unnecessary to refer to the purposes of the mortification further than to say that it has for its object the maintenance of four decayed merchants, inhabitants of the burgh.

"The application is presented for authority to approve of certain feus already granted by the petitioners in the circumstances noted below, and to empower them to feu out the remainder of the lands held by them as patrons of the mortification. These lands are held by the petitioners, as such patrons, under two dispositions and assignations granted to their predecessors in office, the first on 3d June 1696 by John Donaldson, and the other on 26th May 1696 by John Innes with consent of his wife.

"In 1851 the magistrates of Elgin feued a portion of their lands to a Mr George Morrison for a feu-duty of £5, 0s. 6d., and again in 1860 a further portion thereof to Mr Robert Morrison, at a feu-duty of £2, 16s. 8d. The charters creat-

ing these feus were granted by the magistrates as representing the burgh and community of Elgin, and an objection having been raised to the validity of the title of Mr Alexander Morrison, who came to hold both feus, he obtained, on 30th August 1876, a charter of novodamus and confirmation from the proper superiors, the magistrates and treasurer of Elgin, as patrons of the mortification created by Mr William Coming, under which he was duly infeft by registration in the appropriate register of sasines.

"At the time Mr Alexander Morrison got this novodamus he also obtained from the said magistrates and treasurer, as patrons of the mortification, a feu-charter, dated 30th August 1876, of two other pieces of ground, part of the mortified lands, for payment of a total feu-duty of £17, 8s. 10d. (being at the rate of £9 per acre). It is to be remarked here that though the petition states that Mr Morrison's ground is feued 'for nursery purposes,' the charters contain no restriction or prohibition whatever as to the use for which the ground may be applied.

"The petition states that these various feus have been granted erroneously, 'and without advertent to the necessity of obtaining authority to feu said lands,' and that it would be very much for the interests of the beneficiaries that the magistrates should obtain the authority of the Court to feu the ground, and prays the Court to sanction and interpose their authority to the feus already granted to Mr Alexander Morrison, and to authorise and empower the petitioners to feu out the whole of the lands contained in the said two dispositions and assignations forming their title as above mentioned. And the petition is founded upon section 3 of the Trusts (Scotland) Act 1867.

"The question at once arises, Is the present a case that comes under the provisions of that Act? The petition sets forth that 'there is no power to feu the lands belonging to the mortification,' and there is undoubtedly no express power of feuing given either in the deed of mortification or in the two relative dispositions and assignations. On the other hand, there is, as the reporter reads them, nothing in any of these deeds of the nature of a prohibition against feuing.

"Now, prior to the passing of the Trusts Act of 1867 the patrons of mortification were, in the absence of any prohibition to the contrary (express or implied), entitled at common law to feu out the mortified lands without authority from the Court, and the petitioner's title in the present case contains or implies no such prohibition, so that unless some change has been introduced into the law by the Act referred to, the petitioners are entitled to feu their estate without any consent. It appears to your reporter that the object of the Trust Act, as expressed in its preamble, was to give 'greater facilities for the administration of trust estates in Scotland,' and not to restrict powers which trustees already possessed. He is therefore inclined to think that the Act can only apply where trustees have already no power to feu, and that the sanction of the Court is not necessary in the present case." . . . Your reporter is of opinion that the petition is unnecessary.

Mr Morrison appeared by counsel and argued that the petition should be dismissed as unnecessary.

On 16th November 1882 the Lord Ordinary (KINNEAR) reported the petition to the First Division.

“*Note.*—The Lord Ordinary would have been disposed to dismiss this petition as unnecessary, holding that in the administration of a permanent trust for charitable purposes trustees are entitled, without obtaining the authority of the Court, to feu out mortified lands—*Merchant Company of Edinburgh v. Heriot's Hospital*, Mor. 5750. But it is stated that although there is no reported case to that effect, similar petitions have been entertained, and that power to feu has been granted under the Trusts Act 1867; and as the point is one of general importance, affecting the administration of charitable trusts, the Lord Ordinary has thought it proper to report the petition.”

At advising—

LORD PRESIDENT—I daresay that it was very right for these magistrates to present this petition for the purpose of satisfying themselves whether they are entitled as trustees under this charitable trust to grant feus of the lands mortified without the authority of the Court, and no doubt it will be satisfactory to them to have a judgment on the point. I have no doubt on the subject, and I think that the trustees of every charitable institution have power at common law to feu out the lands belonging to the institution. It was so decided in 1765 in the case of the *Merchant Company of Edinburgh*, and it has been the practice ever since. I am for refusing this petition as unnecessary.

LORD DEAS concurred.

LORD MURE—I concur, and will only say that I think it would have a pernicious effect to throw doubts on the power of a body of this kind to feu by granting the petition.

LORD SHAND—I am of the same opinion, and that being so, I have nothing to do with the restrictions to be inserted in the feu-rights granted to the respondent. That rests with the administrators of the trust; they will judge whether there should be any restrictions inserted. I only make this observation, that as the Court have found they have power to grant feus without special authority, that throws the responsibility on them as trustees.

The Court dismissed the petition as unnecessary.

Counsel for Petitioners—Orr. Agents—Boyd, Macdonald, & Jameson, W.S.

Counsel for Respondent—Hay. Agents—Rhind, Lindsay, & Wallace, W.S.

Saturday, December 9.

FIRST DIVISION.

LUMSDEN, PETITIONER.

Parent and Child—Guardianship and Custody.

In a petition by a father for custody of his son, a year old, who had been removed by the petitioner's father-in-law, the Court, pending intimation, granted interim inter-

dict against the father-in-law parting with the child.

This was a petition presented by John Dunlop Lumsden, cooper, residing at Boddam, in the county of Aberdeen, for the custody of Andrew Buchan Lumsden, the only child of the marriage between him and Margaret Smart Buchan or Lumsden, daughter of Andrew Buchan, salmon-fisher, Boddam. The petitioner set forth that he was married on 5th November 1880, and that the child was born on or about 26th September 1881, and on 26th December 1881 his wife deserted him. He further set forth that on the same date Andrew Buchan and his wife removed the child from the petitioner's house in his absence, and took it to their own house at Boddam; that he had endeavoured to get back his child, but that Andrew Buchan refused to give him up; that he was apprehensive that when Andrew Buchan became aware of the presenting of this petition that he would hand over the said child to the petitioner's wife; that in this way a new and expensive application would be rendered necessary; and that for the prevention of this he was anxious that the said Andrew Buchan should be interdicted from parting with said child to the petitioner's wife or anyone else.

The Court ordered intimation to be made on Andrew Buchan and on the petitioner's wife, and granted interim interdict against Buchan as craved.

Counsel for Petitioner—D. J. Mackenzie.
Agent—William Officer, S.S.C.

HOUSE OF LORDS.

Tuesday, December 5.

ORR EWING v. JOHN ORR EWING & CO.
AND ORR EWING'S TRUSTEES.

(*Ante*, Feb. 7, 1882, vol. xix. p. 613.)

Succession—Payment—Interest—Instalment.

A contract of copartnership provided that in the event of the death of any of the partners the surviving and solvent partners who should continue the business should pay out to the representatives of the deceased the amount at his credit in the books of the firm, by ten biennial instalments, “with interest thereon at the rate of 5 per cent. per annum from the date of the balance.” *Held (aff. decision of Second Division—diss. Lord Watson)* that at each payment interest must be paid upon the whole balance of the debt then remaining unpaid, and not upon the instalment.

This case is reported *ante*, Feb. 7, 1882, vol. xix. p. 613. The defenders John Orr Ewing & Co. appealed to the House of Lords.

At delivering judgment—

LORD BLACKBURN—My Lords, the solution of the question in dispute between the parties in this appeal depends entirely on what is the true construction of a few words—I might almost say