

the residuary legatees of another testator.

Miss Jessie Scott of Ferniebank bequeathed the residue of her estate "to Robert Methven, Robert Russell, and James Russell, equally between and among them, share and share alike, and failing all or any of them by their predeceasing me to their several and respective executors and representatives whomsoever, whom I do hereby appoint to be my residuary legatees."

Robert Methven died before Miss Jessie Scott. The bequest in favour of his representatives and successors came into effect on her death, and the residue of her estate is now payable to them as her residuary legatees.

There is no question that the residue is chargeable with duty as a legacy under Miss Scott's will. But the Lord Advocate maintains that it must also be charged with a second duty as a legacy under Robert Methven's will, because by 8 and 9 Vict. cap. 76, sec. 4, every gift "out of any personal or moveable estate or effects which" a testator "hath had or shall have power to dispose of" is to be deemed a legacy within the meaning of the statutes. The argument is that Robert Methven was empowered by Miss Scott's will to dispose of Miss Scott's estate, and that his will is to be treated as an exercise of the power notwithstanding that he died before her and knew nothing of her bequest to his executors. I think this untenable. It is not by force of Robert Methven's will, but of Miss Scott's will, that the executors of the former take their share of the residue of Miss Scott's estate. This was a ground of judgment in the competition between these executors and their testator's next-of-kin—*Scott's Executors v. Methven's Executors*, 17 R. 389—and I think it is the ground on which our judgment in the present case ought to proceed. Moveable property appointed by will, in pursuance of a general power for that purpose, is chargeable with duty as a legacy under that will. But to bring this enactment into operation, it is indispensable that a power to dispose shall have been vested in the testator, and effectually exercised by him. Now, Robert Methven had no power to dispose of Miss Scott's estate, because her will did not come into effect until after his death. His representatives take as conditional institutes in consequence of the lapse by his death of a bequest in his favour. It is playing with words to say that they take by virtue of a power of disposal in him.

The cases which have been cited as to the beneficial interest in a bequest to executors appear to me to have no direct bearing. The question of liability for duty must be determined with reference to the terms of the will by which a legacy is bequeathed. Methven's executors take under Miss Scott's will as *personæ designatae*. It is of no consequence that her executors must have recourse to another will in order to identify the persons, because the legacy is not a gift by that other will, but by Miss Scott's will alone. Robert Methven's will has no force or

effect except as evidence for the purpose of identifying Miss Scott's legatees. Nor is it material whether they take beneficially for themselves or in trust for others, because the beneficial interest in either case depends upon the true construction of Miss Scott's will, is given by her directly, and cannot with any correctness of language be said to arise from a power vested in anyone else.

For the same reasons I think that inventory duty is payable on the residue as part of Miss Scott's estate, and not as part of Robert Methven's. It did not belong to him but to Miss Scott at his death, and he had no power whatever to dispose of it by will.

The LORD PRESIDENT, LORDS ADAM and M'LAREN concurred.

The Court adhered to the judgment of the Lord Ordinary.

Counsel for the Pursuer and Reclaimer—Sol.-Gen. Asher, Q.C.—A. J. Young. Agent—P. J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for the Defenders and Respondents—Lorimer—Baxter. Agent—William Black, S.S.C.

Tuesday, February 28.

FIRST DIVISION.

BOARD OF SUPERVISION *v.* LOCAL AUTHORITY OF LOCHMABEN.

Public Health (Scotland) Act (30 and 31 Vict. cap. 101), sec. 97—Board of Supervision—Petition and Complaint—Procedure where Local Authority makes No Appearance.

By a petition and complaint in terms of sec. 97 of the Public Health (Scotland) Act 1867, the Board of Supervision applied to the Court to find that the police commissioners of a burgh as local authority had refused or neglected to do what is required of them in the said Act or otherwise by law, by refusing or delaying to introduce a proper water supply and carry out a proper drainage system in their district, and to ordain the local authority forthwith to execute the necessary works at the sight of a person to be named by the Court. Reports by men of skill condemning the existing water supply and sanitary arrangements and correspondence passing between the Board and local authority were produced by the petitioners. The respondents did not lodge answers.

Held (1) that these documents showed a *prima facie* case of neglect of duty, and (2) that the local authority were bound to take the proceedings required by statute for carrying out a proper system of drainage and introducing an adequate water supply.

It was remitted to a man of skill to inquire and report upon a scheme for water supply and drainage.

This was a petition and complaint under the 97th section of the Public Health (Scotland) Act 1867 (30 and 31 Vict. cap. 101), at the instance of the Board of Supervision against the Police Commissioners of the royal burgh of Lochmaben, as the local authority charged with the execution of the Public Health Act within the burgh.

Section 97 provides—"In case any local authority shall refuse or neglect to do what is herein or otherwise by law required of them, or in case any obstruction shall arise in the execution of this Act, it shall be lawful for the Board, with the approval of the Lord Advocate, to apply by summary petition to either Division of the Court of Session, or during vacation or recess to the Lord Ordinary on the Bills, which Division or Lord Ordinary are hereby authorised and directed to do therein, and to dispose of the expenses of the proceedings as to the said Division or Lord Ordinary shall appear to be just."

The petitioners stated—"The whole sanitary arrangements of the said burgh are in such a state as to be most injurious to the health of the inhabitants. The water supply is most defective, and is deficient both in quantity and quality. It is derived entirely from private and public wells sunk in a soil of porous sand and gravel. These wells are all of them so situated as to be liable to be contaminated with sewage from houses and middens, surface water from cultivated ground within the burgh, and with other organic matter to such an extent as to render the water unfit for domestic use, and liable to produce or promote epidemic and contagious disease. Many, if not all the wells are, in point of fact, so contaminated. There is no public supply of water suitable for the sanitary and other public purposes in the burgh. That at present there is no system of drainage in the said burgh. In some cases the sewage from the houses is conducted into cesspools which are not kept properly cleaned, and of which the connecting pipes are in most cases very defective and dangerous, as their joints are not closed with cement. In other cases there are midden heaps at the backs of and in close proximity to the houses, and on these much of the liquid and solid excreta of human beings and of domestic animals kept within the burgh is deposited. The want of any system of drainage is not only in itself exceedingly dangerous to the health of the inhabitants, but further, these middens, as well as the privies throughout the burgh, are placed on the bare earth, and are frequently in such proximity to the wells from which the whole domestic supply of water for the burgh is taken, that the drainage from them must, owing to the porous nature of the soil and the natural gravitation of the sewage, contaminate the water supply. Many of the wells are thus, in point of fact, rendered unfit for domestic use."

In support of these averments the petitioners referred to adverse reports on the sanitary condition of the burgh by Mr Barclay, their inspecting officer, dated 17th September 1892, and by Dr Chalmers of the

Glasgow Public Health Department, who was selected by the respondents to make an independent investigation and recorded the conclusion he arrived at in these terms—"A review of the foregoing leads irresistibly to the conviction that the present condition of Lochmaben is such as to create the gravest anxiety amongst those who have the best interests of the burgh at heart." On 18th November 1892 Dr Stevenson Macadam, Edinburgh, reported as the result of an analysis of samples of water taken from Lochmaben public wells, that all the waters were impure and unfit for drinking, cooking, and other dietetic purposes, and that he would strongly recommend that other and purer water be used instead, as all such contaminated waters might any day assume positively unwholesome and dangerous properties.

The petitioners also referred to correspondence passing between the parties between the months of July and December 1892, from which it appeared that the petitioners on 29th September called upon the respondents to submit to them a scheme of water supply and drainage for the burgh. On 11th October the respondents replied that they had had a scheme under consideration for some time and that they desired an extension of time in order to mature the scheme. On 15th October the petitioners intimated that they would grant an extension of time for one month. On 14th November the clerk to the Police Commissioners wrote to the petitioners stating that "at the recent municipal election the ratepayers elected candidates (with one exception) who were opposed to the policy carried out by a majority of the old Commission," and that now only two members "are in favour of a forward policy; the remaining seven members prefer to allow matters to remain in *statu quo*, in accordance with the wishes of the great majority of the ratepayers, or at least they are not inclined to concur in a water or drainage scheme until they are satisfied on independent evidence that there are strong grounds for doing so."

The petitioners accordingly averred as their belief that the local authority had now no intention of proceeding with any plan in order to introduce a proper water supply and system of drainage into the burgh, and they craved the Court after such inquiry (if any) as might seem fit, to find "that the said local authority have refused or neglected to do what is required of them in the said Act, or otherwise by law, by refusing or delaying to introduce . . . a supply of water . . . and to carry out a proper system of drainage . . . and that their said refusal or delay is an obstruction in the execution of the Act; and further, to ordain the said local authority forthwith to take such steps and execute such works as shall be necessary to secure a sufficient and suitable supply of water . . . and to effect the adequate drainage of the said burgh, and that at the sight and to the satisfaction of some person" to be named by the Court.

The respondents did not lodge answers

to the petition, and made no appearance.

MACONOCHIE, for the petitioners, stated in answer to the Court that in all the previous cases of a petition and complaint under the 97th section of the Public Health Act the respondents had lodged answers—*Local Authority of Montrose*, December 3, 1872, 11 Macph. 170; *Local Authority of Pittenweem*, July 8, 1874, 1 R. 1124; *Local Authority of Galashiels*, December 5, 1874, 12 S.L.R. 111. Though in the present case there were no answers, and there was no precedent as to how the Court should proceed in these circumstances, he submitted that the correspondence with the respondents and the reports of the men of skill produced by the petitioners were *prima facie* evidence of a neglect of duty on the part of the respondents.

LORD PRESIDENT—The documents produced with this petition shew *prima facie* a case for our interference under the statute; and as the local authority when confronted with this charge of neglect of duty have thought fit to lodge no answers and to make no appearance, we must hold that they have no answers to make to this charge, and we are therefore in a position now to pronounce that there has been a neglect of duty, and to remit to a man of skill to report a scheme. The interlocutor will be in terms of the precedents quoted by Mr Maconochie, and we shall remit to the gentleman mentioned by him who is already conversant with the subject.

The Court pronounced this interlocutor:—

“The Lords, no answers having been lodged for the respondents, having heard counsel for the Board of Supervision on the petition and complaint, Find that the respondents have hitherto failed to do what was required of them by the Public Health (Scotland) Act 1867, or otherwise by law, and that obstructions have thereby arisen in the execution of the said Act, and that the respondents are bound to take the proceedings required by statute for carrying out a proper system of drainage in the burgh of Lochmaben and procuring a sufficient and suitable supply of water for the domestic use of the inhabitants of said burgh and for the sanitary and other public purposes of the said burgh: Therefore remit to James Barbour, Civil Engineer, Dumfries, to prepare a scheme for procuring a sufficient and suitable supply of water for the domestic use of the inhabitants and for the sanitary and other public purposes of the said burgh and for effecting the adequate drainage of the said burgh, and to report to the Court within fourteen days.”

Counsel for the Petitioners—Maconochie.
Agents—Macrae, Flett, & Rennie, W.S.

Thursday, March 2.

SECOND DIVISION.

WHITE AND ANOTHER (CUMMING'S TRUSTEES) v. WHITE AND OTHERS.

Succession—Vesting—Lapsed Share.

A testatrix directed her trustees to hold the residue of her estate for behoof of her grandniece Janet White in life-rent, and her issue, if any, in fee, “declaring that in the event of the said Janet White predeceasing me or dying without lawful issue, the whole residue of my estate hereby provided to her shall in any or either of these cases fall and belong to Janet White's four brothers and sister, equally among them, and in the event of any of the saids dying without leaving lawful issue, the share of the predeceaser shall . . . be equally divided among the survivors, but should the predeceaser leave lawful issue, then such issue shall be entitled to succeed to their parent's share, equally among them, and in the same manner and as fully as if such parent had survived.” All the beneficiaries named survived the testatrix. Janet White, the liferentrix, died without issue, survived by one brother and the sister. Three of her brothers predeceased her, two of whom left issue. Held (1) that the right to the fee of the residue of the testatrix's estate did not vest until the death of the liferentrix, and accordingly that no part of the residue vested in the three brothers who predeceased the time of distribution; and (2) that the issue of the two predeceasing brothers were only entitled to the shares originally destined to their respective parents, and were not entitled to participate in the lapsed share of their uncle who died childless.

Miss Mary Cumming, daughter of John Cumming of Fairfield, died on 11th March 1843, leaving a trust-disposition and settlement dated 17th January 1828, whereby she conveyed to trustees her whole estate for various purposes, and, *inter alia*, she provided—“Fourthly, with regard to the free residue and remainder of my estate and effects, heritable and moveable, real and personal, above conveyed, I appoint my said trustees to realise and hold the same in trust for behoof of the said Janet White, my grandniece, whom I do hereby appoint as my residuary legatee. And I do hereby empower and require my said trustees, as soon as possible after my death, to lend out the residue of my estate upon good security, and to apply the annual proceeds thereof for the benefit of the said Janet White, in such a manner as they may think proper, during all the days and years of her lifetime; and in case the said Janet White shall marry and have children, then the fee of the residue of my estate hereby provided to her shall belong to her lawful children, share and share alike. . . . And declaring that in the event of the said