

title. He has done nothing. In these circumstances I am unable to take the view that he has subjected himself to personal diligence.

It was said that this liability attaches to the complainer because of the operation of section 9, by which a personal right to the estate vested in him by mere survivorship. This personal right, however, is by the section declared to be of the like nature and to be attended by the like consequences, and be transmissible in the same manner as a personal right to land under an unfeudalised conveyance according to the existing law and practice. If this be so, it cannot involve the consequences for which the respondents contend.

I am accordingly of opinion that the charge should be suspended.

LORD M'LAREN—I concur in Lord Kinneir's opinion. We recal the Lord Ordinary's interlocutor, sustain the third plea-in-law, which is the ground on which we proceeded, and remit to the Lord Ordinary to pass the note and to give decree for expenses.

The LORD PRESIDENT and LORD PEARSON were absent.

The Court recalled the Lord Ordinary's interlocutor, and remitted to him to sustain the third plea-in-law for the complainers, to pass the note of suspension, and to proceed as accords.

Counsel for Complainers (Reclaimers)—Aitken, K.C.—R. S. Horne. Agents—Drummond & Reid, W.S.

Counsel for Respondents—Cullen, K.C.—Hon. W. Watson. Agents—Tait & Crichton, W.S.

Saturday, July 4.

FIRST DIVISION.

PAUL (GUARDIAN OF THOMSON'S MORTIFICATION), PETITIONER.

Charity — Trust — Mortification — Nobile Officium—Failure of Purpose—Extension of Powers.

In 1774 and 1786 a testator mortified the residue of his estate, the interest to be applied in purchasing oatmeal, or oats to be made into meal, to be sold to poor householders in the City of Edinburgh at the price of 10d. per peck whenever the market price should exceed 1s. per peck, no family however to receive more than two pecks in one week. In 1908 the trustee under the mortification presented a petition to the Court of Session, averring that it was no longer possible to expend the whole income of the trust, which had largely increased, in pursuance of the above direction, and craving power to supply out of the interest of the mortified fund to those obtaining meal, also coal or milk at half the market price.

The Court granted power to supply to poor householders within the City of Edinburgh, and that whether they were receiving meal or not, coal, milk, oat-cakes, bread, or flour at half the market price, in such quantities, at such times, and under such regulations as the trustee might think fit.

On 18th February 1908 George Morison Paul, Deputy Keeper of the Signet, and as such Deputy Keeper the guardian of Joseph Thomson's Mortification, presented a petition for powers for the future administration of the funds and estate of the mortification.

Joseph Thomson, saddletreemaker in Edinburgh, by his deed of settlement, dated 11th July 1774 and registered 13th February 1786, conveyed his estate to trustees, and with regard to the residue of the estate provided—"And the whole residue of my estate, heritable and movable, after payment of my debts, funeral charges, and the above-mentioned legacies, or such other legacies as I may afterwards give, and the expenses of carrying this settlement into execution, I mortify as a perpetual fund, the interest whereof is to be applied in manner after directed for purchasing oatmeal, or oats to be made into meal, to be distributed only among poor householders within the City of Edinburgh when the price of oatmeal exceeds 10d. per peck; and which meal is to be sold out to these householders at 10d. per peck be the current price ever so high; but I appoint that one family shall not get above two pecks of it in one week."

By a subsequent deed in 1786 the testator altered the above purpose to the effect that no purchase or sale should be made thereunder unless the price of oatmeal exceeded 1s. per peck. In 1846 an Act of Parliament (9 and 10 Vict. cap. xvi) was obtained authorising the sale of the lands and heritages falling under the trust, and the purchase of other lands, and confirming the administration of the fund in terms of the deeds of settlement.

The petitioner averred—" Every effort has been made to bring the existence of the charity under the notice of persons entitled to its benefits, and since he became guardian of the mortification the petitioner has made every endeavour to increase the number of recipients of the charity. In 1906 he sent a circular explaining the benefits of the charity to every clergyman, missionary, parish sister, and bible woman specially appointed by any church in Edinburgh, and he had the mortification brought under the notice of the Charity Organisation Society, and also of many of the ladies who work among the poor in the city. He has also kept the charity working during practically the whole year, but notwithstanding these efforts it has been found impossible to expend the annual income of the trust in the manner desired by the testator The capital of the trust in 1846, when the Act of Parliament above mentioned was obtained, was about £9550. The capital of the trust at 31st December 1907 amounted to £26,938, 10s. 9d., consisting

of invested funds to the amount of £15,781, 8s. 9d., and the value of Wexford Farm, including sums expended on permanent improvements thereon, amounting to £11,157, 2s. Notwithstanding the publicity given by the petitioner to the objects of the mortification, the resources of the trust have not been taken advantage of to anything like the full extent, and the trust has thus for some time failed to carry out the benefits contemplated by the testator. This the petitioner believes is due to a complete change in the customs of the poor as regards the food which they give to their families, oatmeal for porridge or oatcakes being now comparatively little used. The petitioner believes that the testator desired both to benefit the necessitous poor and to encourage the consumption of oatmeal as an article of diet, and he thinks that both these intentions can now be carried out only if special attractions are extended to those making use of oatmeal. The supply of meal alone, even at a cheap price, has ceased to be a sufficient inducement. In these circumstances the petitioner makes the present application to the Court for an extension of his powers, with a view of more fully utilising the revenue of the trust, and of making it possible for the primary wish of the testator in regard to the supply of oatmeal to poor householders to be made effectual. He suggests that the main purpose of the mortification might still be carried out if the guardian of the mortification were empowered, in addition to supplying oatmeal to poor householders at a reduced rate as heretofore, to supply those families on the roll buying oatmeal also with a limited quantity of either coals or milk at a price below the current market price. Neither coals nor milk would be supplied except to those taking meal, and coals supplied at a cheaper rate could be used for the preparation of porridge, while milk supplied at a cheaper rate could be used along with the porridge."

The petitioner also set forth figures showing that the number of applicants for the benefits of the mortification had largely decreased during the last ten years, and that during the same period the average excess of income over expenditure amounted to £399 or thereby.

The petitioner craved the Court to "grant to the petitioner and his successors in office, as guardian or guardians of the funds and estate of the late Joseph Thomson, power, in addition to the power to supply oatmeal to poor householders within the city of Edinburgh at the price of 10d. per peck of 8½ lbs., to supply to poor householders obtaining meal at said reduced rate, coal at half the market price, or milk at half the market price, and that in such quantities and under such regulations and at such times as the guardian for the time being may appoint, and to defray out of the income from the funds of the mortification the difference between the market price of said coals and milk and the reduced price."

On March 10, 1908, the Court remitted to Mr James S. Leadbetter, advocate, to

inquire as to the facts and circumstances and the regularity of the procedure, and to report.

The reporter reported, *inter alia*, as follows:—"With regard to the form of the petition, it is perhaps right that I should call your Lordships' attention to the fact that the petition is not, as is usual in such cases, for approval of a scheme, but is framed as a crave for additional powers. The distinction is only one of form and not of substance, but as the form is not the usual form I have thought it right to refer to it. My attention has, however, been drawn to a petition presented by the trustees of the Carnegie Park Orphanage, in which the crave was not for approval of a scheme but merely 'to reduce the limit of age for orphans,' &c., which was granted by the First Division of the Court on 12th March 1892 (19 R. 605, 29 S.L.R. 489). I have also been referred to two other petitions (unreported), in which the additional powers asked for were not embodied in a scheme. Subject to these observations I have to report that the procedure has been regular, and that no answers have been lodged. . . . The extension craved by the petitioner is that he should be authorised to sell, at a reduced price, coals and milk to those purchasing the oatmeal, the belief being that if these additional benefits were provided a larger number of persons would be induced to purchase oatmeal for the purpose of making it into porridge. I am informed that this extension has been suggested to those interested in administering the charity not only by applicants themselves, but also by other persons engaged in distributing charitable relief throughout the city. Subject to the observation contained in the immediately succeeding paragraph of this report, I would respectfully suggest that these additional powers would tend to facilitate the carrying out of the original purposes of the trust, and that they are therefore worthy of the favourable consideration of your Lordships. The petitioner, however, bases his crave for these additional powers on the belief that 'the testator desired both to benefit the necessitous poor and to encourage the consumption of oatmeal as an article of diet.' I am not satisfied that the latter is a legitimate inference as to the intentions of the testator. As far as I have been able to ascertain from the writings of those who deal with the social life of the people of Scotland at the close of the eighteenth century, it would appear that at the time when the charity was founded—viz., 1774 and 1786—the consumption of wheaten bread in cities was comparatively small, and was confined to the well-to-do classes, while the poor subsisted almost entirely on oatmeal. It would seem then that a more legitimate inference as to the intention of the testator is that he desired to relieve the necessitous poor in times of distress by enabling them to obtain their staple article of diet—viz., oatmeal—at a reduced price. The petitioner attributes the present difficulty in administering the charity

to a 'complete change in the customs of the poor as regards the food which they give to their families, oatmeal for porridge or oatcakes being now comparatively little used.' Their place has been largely taken by wheaten bread; and there is also, I am informed, the farther change of habit that these classes do not now buy their food in the form of meal, but buy it already prepared in the form of bread or oatcakes. I would therefore respectfully suggest for the consideration of your Lordships whether the primary object of the testator will not be more nearly attained by authorising the petitioner to expend the surplus income of the trust funds in supplying necessitous persons with bread and flour and oatcakes at a reduced price rather than with coals and milk. At the same time it is to be noted that those interested in charitable work among the poor greatly deplore the change of customs above referred to, by which porridge has so largely dropped out of the staple diet of the poorer classes, and that would appear to be a reason for giving a favourable consideration to the proposed supply of coals and milk, although these articles themselves are perhaps not so directly in line with the original purpose of the testator. The suggestion as to the supply of bread and flour and oatcakes, in addition to coals and milk, has been laid before the petitioner, and he acquiesces in it, and expresses himself as anxious to obtain any additional powers which will enable him to expend the income of the trust estate for the relief of those for whose benefit it was intended, as he is not satisfied that the addition of coals and milk alone would enable him to exhaust the funds at his disposal. . . . If your Lordships are prepared to grant the additional powers above suggested, as well as those originally craved for in the petition, I would respectfully submit that that purpose might be attained by granting authority to the petitioner in the following terms:—'Grant to the petitioner and his successors in office, as guardian or guardians of the funds and estate of the late Joseph Thomson, powers—in addition to the power to supply oatmeal to poor householders within the city of Edinburgh at the price of 10d. per peck of 8½ lb.—to supply to poor householders obtaining meal at said reduced rate, coal at half the market price, or milk at half the market price, and also power to supply to poor householders within the city of Edinburgh oatcakes at half the market price, or bread at half the market price, or flour at half the market price; and all these in such quantities and under such regulations and at such times as the guardian for the time being may appoint, and to defray out of the income from the funds of the mortification the difference between the market price of said commodities and the reduced price.'

At the hearing in the Summar Roll, counsel for the petitioner moved the Court to grant the powers suggested by the reporter in addition to those craved in the petition.

LORD M'LAREN said the Court would grant all the powers craved and would not restrict the power to supply coals and milk to those only who were being supplied with meal.

LORDS KINNEAR and DUNDAS concurred.

The LORD PRESIDENT and LORD PEARSON were absent.

The Court pronounced this interlocutor—

"Grant to the petitioner and his successors in office as guardian or guardians of the funds and estate of the late Joseph Thomson, in addition to the power to supply oatmeal to poor householders within the City of Edinburgh, at the price of 10d. per peck of 8½ lbs., power to supply to such poor householders coal, milk, oatcakes, bread or flour, at half the market price; and all these in such quantities and under such regulations and at such times as the guardian for the time being may appoint, and to defray out of the income from the funds of the mortification the difference between the market price of said commodities and the reduced price: Ordain the additional powers hereby granted to be recorded in the Books of Council and Session for preservation, and decern."

Counsel for the Petitioner—Grainger Stewart. Agent—James H. Notman, W.S.

Tuesday, July 14.

FIRST DIVISION.

RUTHVEN v. DRUMMONDS.

Arrestment—Alimentary Fund—Deed—Construction—Agreement Providing for Alimentary Liferent in Favour of Party.

A, the heir of entail in possession of an entailed estate, sold the estate for payment of debts affecting it, and the balance of the price, amounting to £30,000, was invested in terms of section 9 of the Entail Amendment (Scotland) Act 1868 (31 and 32 Vict. c. 84). A subsequently presented a petition for disentail of the said sum, and entered into an agreement with B, the next heir under the entail, whose consent was required to secure disentail, whereby, in consideration of B's consent to the disentail and discharge of his claim for the value of his expectancy amounting to £12,300, and also of debts due to him by A amounting to £11,300, the whole sum was to be conveyed to trustees for (1) payment to A in liferent alimentary of the free income of the balance of the said sum after payment of A's debts amounting to £9000, and (2) conveyance on A's death of the said balance to B, in whom it was declared to vest at the date of the disentail. The money was thereafter dis-