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 8¾ 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 8¾ 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 dis entail. The money was thereafter dis-

entailed and conveyed to trustees under the agreement, and subsequently arrestments were used in the trustees' hands at the instance of certain creditors of A. *Held*, in a petition for recal at A's instance, that as it appeared *in gremio* of the agreement that at its date B's claims against A thereby discharged exceeded the balance remaining after payment of A's debts, the alimentary provision was made by B and not by A, and was therefore not attachable by A's creditors, and arrestments recalled.

Process—Arrestment — Alimentary Fund — Competency of Discussing Objection that Fund Alimentary in Petition for Recal.

Held that an objection to arrestments that the fund sought to be attached was alimentary could, where there was no action of furthcoming, be discussed in a petition for recal of the arrestments.

In 1873 the Right Hon. Walter James Hore Ruthven, Baron Ruthven of Freeland, heir of entail in possession of the estate of Freeland, sold that estate for payment of debts affecting it, and the balance of the purchase price after payment of debts and expenses was invested in the names of certain trustees in terms of section 9 of the Entail Amendment (Scotland) Act 1868 (31 and 32 Vict. c. 84). Thereafter Lord Ruthven acquired a portion of this money in fee-simple, and there remained in 1892 a balance of £30,000 invested in the names of the trustees.

In 1892 Lord Ruthven presented a petition to disentail and acquire the said balance in fee-simple, and entered into an agreement with his eldest son, the Master of Ruthven, who was the heir next in succession under the entail, and whose consent was necessary to the disentail.

The agreement narrated, *inter alia*, that in order to enable Lord Ruthven to pay debts then due by him, and to effect an arrangement of the claims against him of the Master amounting to £11,300, he was anxious to acquire, with the consent of the Master, the said balance of £30,000 in fee-simple; that the value of the Master's expectancy had been ascertained to amount to £12,300; and that the Master had agreed, provided the arrangements thereinafter expressed in "the first place," "in the second place," and "in the third place" were given effect to, to accept the rights conferred upon him in terms thereof in satisfaction of his claim for compensation in respect of the disentail. It was provided in the said agreement (in the second place) that (1) the said sum of £30,000 under deduction of certain provisions in favour of Lady Ruthven and the younger children and of £9000 to be applied in payment of Lord Ruthven's debts, and the reversion of the estate of Harperstown in Ireland belonging to Lord Ruthven, should be conveyed to trustees for, *inter alia*, the following purposes:—(*Third*) To pay out of the free income of the estate thereby conveyed the sum of £1000 per annum to Lord and Lady Ruthven as a provision for their alimentary support and maintenance, under the declaration that it was an essential part of the arrangements in course of which the Master consented to discharge his claim for compensation in respect of the disentail and the debts due to him by Lord Ruthven as thereinafter provided in the fourth place that the said provision of income to Lord and Lady Ruthven should be purely alimentary, and should not be affectable for or by the debts or deeds of either of them or the diligence of their creditors; and (*Fourth*) to pay the whole remainder to the Master on the death of Lord Ruthven. "In the fourth place," the Master bound himself to execute and deliver when required a valid deed of consent to the disentail, and on the whole arrangements being given effect to agreed to accept his rights to be thereby conferred as in satisfaction of his claim to compensation in respect of the disentail, and to discharge the debts amounting to £11,300 due to him by Lord Ruthven. The prayer of the petition for disentail was thereafter granted, and the money paid over to C. J. G. Paterson, C.A., and A. R. C. Pitman, W.S., as trustees under the agreement.

On 17th April 1907 Messrs Drummond, bankers, 49 Charing Cross, London, and George James Drummond, partner thereof, raised action against Lord Ruthven for the sum of £1772, and on the dependence arrested in the hands of the trustees. Decree was pronounced of consent in the said action for £1379, and Messrs Drummond thereafter extracted and arrested on 12th May 1908 in the hands of the said trustees the sum of £1600.

On 30th June 1908 Lord Ruthven presented a petition for recal of these arrestments on the ground that the fund sought to be attached was alimentary. Answers were lodged by Messrs Drummond, who maintained that the funds alleged to be settled in alimentary liferent on Lord Ruthven in the foresaid agreement truly belonged to himself, and that he could not settle them on himself as an alimentary provision so as to defeat the claims of his creditors.

Argued for the petitioner—It appeared *ex facie* of the agreement that the funds settled on Lord Ruthven in alimentary liferent belonged not to him but to the Master. The disentail would not have been possible without getting the Master's consent or paying him the value of his expectancy. The Master's claim for that value, together with his other claims against Lord Ruthven, amounted to more than the balance of the sum disentailed remaining after payment of Lord Ruthven's debts, and the Master had given his consent to the disentail and discharged all his claims on condition that the funds, which he could have carried off, be settled on Lord Ruthven in alimentary liferent. Lord Ruthven's interest in said funds was therefore alimentary and not attachable by his creditors.

Argued for the respondents—(1) The funds

arrested were not alimentary. The balance of the £30,000 after payment of £9000 in settlement of Lord Ruthven's debts belonged, in virtue of the decree under the petition, to Lord Ruthven. In any event, the funds settled on Lord Ruthven in alimentary liferent included the reversion of the Irish estate which belonged to Lord Ruthven. In so far as the funds belonged to Lord Ruthven the alimentary provision was ineffectual to defeat the claims of creditors. (2) The question whether the fund was alimentary could not be disposed of in a petition for recal of arrestments—*Brand* v. *Kent*, November 12, 1892, 20 R. 29, 30 S.L.R. 70; *Vincent* v. *Lindsay (Chalmers & Co.'s Trustee)*, November 2, 1877, 5 R. 43, 15 S.L.R. 27.

LORD PRESIDENT—[*After narrating the facts as given in the agreement*]—The sole question to be decided is, whose money was so settled? If it was Lord Ruthven's money, he could not, of course, create an alimentary liferent in favour of himself. But if it was his son's money the provision was good. In my opinion the money that was settled was the son's money, and I arrive at that result by a simple arithmetical process. To begin with there was £30,000—£12,000 of that belonged to the Master as the value of his expectancy. That left £18,000, and of this £18,000 £9000 was paid to Lord Ruthven, for it was immediately paid over to his creditors, and thus was really paid to him, for his liabilities were reduced to that extent. That still left £9000 ostensibly for Lord Ruthven, but that sum was swallowed up by the debt of £11,000 which he still owed to the Master. Now if the Master had chosen to exact payment of that sum he could have done so, and could have put it in his pocket and walked off with it, but if he preferred to put it in trust along with the £12,000, he could settle that money in any way he chose, and one way was by settling it on his father by the creation of an alimentary liferent in his favour. Therefore on the face of this deed it appears to me that a perfectly proper alimentary liferent has been created.

Two little questions, however, remain which must not be left out of consideration. The first is that besides this £30,000 there was also included in the property settled by this deed the reversion of a certain Irish estate; and Mr Fleming says that if that was of any value it upsets the calculation based on the figures I have given. That is certainly true if it can be said there was substantially more included in this settlement than was the property of the Master. But if Mr Fleming had intended to say so he should have averred it, and there is no averment to that effect here. And I do not wonder that it has not been averred, for by the look of the deed I should suspect that there was very little surplus value in the Irish estate. However, Lord Ruthven cannot be called upon to prove a negative, and it was for the other parties to aver there was a substantial value in this Irish estate if in reality any such value existed.

The other point is whether these matters are properly raised in a petition for the recall of arrestments, and an expression used by Lord Kinnear in the course of his opinion in the case of *Brand*, 20 R. at p. 31, was founded on. I only point out that that expression must not be carried beyond the circumstances of the particular case with regard to which it was used, and I have nothing to add to what I said on this matter in the case of *Barclay, Curle, & Company*, 1908 S.C. 82. There is no doubt that the questions raised here could have been tried in a furthcoming, and if a furthcoming had been raised at once I expect your Lordships would have been inclined to let the *nexus* remain until the furthcoming had been decided. But in this case these arrestments have remained on for a year, and what was the petitioner here to do? He could not raise a furthcoming himself, and he could not compel the creditors to do so, and I think it would be very unfortunate if the law were as Mr Fleming—founding on that expression of Lord Kinnear's—stated it to be, and if the petitioner were to be deprived of this remedy. I therefore think that where there is no furthcoming the only plan is to consider the recal of the arrestments, and for the reasons I have stated I am of opinion that they should be recalled in this instance.

LORD M'LAREN—This is a petition for recal of arrestments, and I should be content to rest my judgment upon the clause in the deed which has been put before us which provides that "as an essential part of the arrangements, in terms of which I the said Master of Ruthven have consented to discharge my claim for compensation in respect of the disentail or acquisition in fee-simple of said trust fund and the said debts due to me by the said Lord Ruthven. . . . ." In the fourth place, "that the said provision income to the said Baron Ruthven and Lady Ruthven . . . shall be purely alimentary and for the purpose above expressed, and shall not be affected for or by the debts or deeds of the said Baron Ruthven and Lady Ruthven." The deed further provides that if from any cause the agreement could not be carried out then the debts of the Master of Ruthven should immediately revive. I do not find a separate clause discharging the Master of Ruthven's claim, but nothing can be more clear than that he did discharge that claim, and that it was made a condition to that discharge that the fund which was available for the payment of that claim should be settled in liferent upon his father and mother. If that is not an alimentary provision made by the son I do not see how it would be possible to create such a provision. The son might have taken the whole sum from his father and mother had he chosen to stand on his rights.

Then it is said that the addition of the Irish estate to the settled fund makes a difference. I am unable to agree with this contention. As regards the Irish property,

there is no averment on the record and no expression in the deed to show that its inclusion contributed any material addition to the value of the fund.

I therefore think that the case for recal of the arrestments has been made out, because *ex facie* of the deed it appears that this is a good alimentary liferent provision, and one which is not prohibited by law.

LORD KINNEAR—I concur, and only desire to add that I entirely agree in all that your Lordship has said with regard to the case of *Barclay, Curle, & Company.*

LORD PEARSON was absent.

The Court granted the prayer of the petition and recalled the arrestments.

Counsel for the Petitioner—Hunter, K.C. —Hon. Wm. Watson. Agents — Hope, Todd, & Kirk, W.S.

Counsel for Respondents—Fleming, K.C. — Macphail. Agents — Tods, Murray, & Jamieson., WS.

Friday, July 17.

FIRST DIVISION.

[Lord Johnston, Ordinary.

CROWE *v.* COOK (HALL MAXWELL'S EXECUTOR).

Succession—Testament—Words Importing Gift of Heritage.

Terms of testamentary writing which were *held* to carry heritage.

On 24th December 1907 James F. Crowe, 2 Ashbrook Terrace, Dublin, brought an action against James Cook, Wrangholme Lodge, Portobello, executor-nominate of the late Mrs Mary MacNeil Jolly or Hall Maxwell, Wrangholme Lodge aforesaid, in which he sought declarator that Mrs Hall Maxwell died intestate *quoad* her heritable estate, and that he, as assignee of her heir-at-law, was entitled thereto. At the date of her death Mrs Hall Maxwell possessed heritable property to the value of about £2000. The net value of her moveable estate was about £10,750.

Mrs Hall Maxwell left three testamentary writings, with only the last of which, however, this report is concerned. It was as follows:—

"39 Melville Street, Edinburgh,
"March 20th 1903.

"I, Mary M'Neill Hall Maxwell, being in my proper mind, do herebye leave and Bequeath to James Cook the sum of ten thousand pounds Sterling—*my* that is the said ten thousand that is at present lent to the Borough of Motherwell. I also wish him in case any thing happens to me to see to my funeral and that all my animals are shot, and I appoint Mr Wedderburn of Carmet Wedderburn and Watson to assist him, all my Jewels—save a diamond Broch Diamond pendant, which Mrs Jolly gave me, to be retured to her. eveythg else to be sold. I leave one hndred ponds to the Home for falln Sisters and one hundred to prevention of Cruelty to Animals, and Five hundred to my Mother, Mrs Magaret Jolly. Thre Hundred to my Aunt Miss Doro Fitzgerald who will also get all my clothes that are of any use and I leave the remainder to fond and endow a small Home for old Colliers that have become unable to work, and the same to be furnished & a dinner given at Xmas and New Year, the same to have Beer and tobocoa, and I appnt the before said Mr Wedderburn and James Cook to see that this is carried out A site to be got on Newarthill grond but not on that owned by Messrs Nimo the preference to be given to those Colliers that may have worked in Stevenston and Newarthill Pits. And I sign this on the above date being of sond mind. (*Signed*) MARY M'NEILL HALL MAXWELL. Witnessed by Jemina Sutherland (*Signed*) JEMIMA SUTHERLAND, Wittness." [The word *my* (in italics) was deleted.]

The defender, *inter alia*, pleaded—"(3) The heritable estate of the testatrix being carried by her testamentary writings, the declarator sought should be refused."

On 25th June 1908 the Lord Ordinary (JOHNSTON) granted decree as craved.

Opinion.—"In the application of the enactments of the 20th section of the Titles to Land Act 1868, to concrete circumstances, there are many cases, as was said by Lord M'Laren, as Lord Ordinary, in *M'Leod's Trustee*, 10 R. 1056, which come near the dividing line. It may be that this is one of them, though for my own part I think it not only does not cross, but is a good long way from reaching the rubicon.

Mrs Hall Maxwell left three documents of a testamentary nature. The first two, though informal, are exceedingly concise, businesslike, and clear in their intention. Mrs Hall Maxwell was in 1899 possessed of certain heritable property in Leith Walk, not, I gather, in itself of much intrinsic value, but possessing a potential or fictitious value, because it was known that the Caledonian Railway Company wanted it for the purposes of their line. By a very brief document, dated 29th March 1899, by which time I think the Railway Company must have actually entered on possession, she bequeathed this property expressly to the defender James Cook, and there is no doubt that by virtue of the 20th section of the Act of 1868 this document would have been a valid conveyance.

"But the sale to the Railway Company at £9000 was completed very shortly after, and on May 30th of the same year Mrs Hall Maxwell, on the narrative of the sale, bequeathed 'the said sum to James Cook.' Four years afterwards Mrs Hall Maxwell executed the third document, which is the cause of the present question. It does not expressly appoint executors. But it does so, I think, impliedly, and is an effectual though informal testament, and so good to transmit moveables. The question is, does it also carry heritage?

"It first bequeaths to James Cook £10,000, at present lent to the burgh of Motherwell.