of the petitioners. For one year, at least, there will be no income accruing to the petitioners' father from the trust-estate.

At the time of the said John Pattison's death, the petitioners' father was indebted to him in the sum of £695, 5s. 3d., with interest; at least, his trustees claim that sum as a debt incurred by him to his father for advances made to him or on his account, from time to time, and they claim the right to apply, and intend to apply, any income falling to him from the trust in repayment of these advances. Even if this claim of debt should not be well founded, it is not expected that, so long as the annuities above mentioned continue to be payable, the share of the income of the trust accruing to the petitioner's father can amount to more than £100 per annum. The person to whom, in the event of the petitioners all predeceasing their father without issue, their share of the estate has been conveyed by their father, as well as the petitioners' father and mother themselves, concur in the application.

Answers were put for Pattison's trustees.

The case depended before LORD NEAVES, Ordinary, who reported the case with the following Note:—"The peculiar nature of the recent enactment in the 'Trusts (Sotland) Act 1867,' here founded on, and the importance of so far fixing its meaning and limitations, induce the Lord Ordinary to report this case.

"The object of the enactment is to benefit minors in certain circumstances who may be eventually interested in a trust fund, by allowing an advance of the capital for their maintenance and education in the meantime, until the fund becomes fully available to them. The statute establishes certain pre-requisites for such an advance being made, and subjects it to certain conditions and provisions.

"The petitioners in the present case seem to be sufficiently in need of some assistance, and there is a considerable fund to which eventually they will have right. The statute requires that the minors should be beneficiaries having a vested interest in such fund; but it also indicates that the destination may be expressed either 'absolutely or contingently,' It is further provided 'that the rights of parties other than the heirs or representatives of such minor beneficiaries shall not thereby be prejudiced.' It is not very easy to see how this provision can be observed in a case of a contingent destination, if there is any substitution or ulterior destination.

"The petitioners here have the concurrence of their father, who has a liferent of their share of the fund, and it is presumed that this concurrence implies that his liferent should suffer a defalcation corresponding to the amount of any share of the capital that may be advanced for the children. The father has executed deeds of nomination or appointment with the view of getting over some difficulties in the case, but it is not clear that these will contribute much to the solution of the questions at issue.

"The trust at present is not in a very flourishing state; but there is reason to hope that it will soon be better able to meet the demands upon it. In any view, the allowance asked by the minors in their petition is plainly excessive, and of this they are now satisfied themselves."

SOLICITOR-GENERAL and JOHN M'LAREN for petitioners.

HORN and GLOAG in answer.

The Court granted the prayer of the petition, holding that the words, "being beneficiaries having a vested interest" must in this Act be held to mean having a primary interest; and that although it may be contingent as being dependent on survivance, still, if primary, the Court may interfere. A vested interest could not, in strict language, be held contingently; but the Court must either overcome that difficulty by construction, or hold that the Act is a dead letter, and gives no power whatever. The saving clause as to the rights of parties other than the heirs or representatives of minor beneficiaries, might refer to the existence and interests of a liferenter. But the liferenter here consented. The intention of the clause was to secure the interests of strangers only, whose claims as a testator must be considered and construed differently from those of his direct descendants.

Agents for Petitioner—Millar, Allardice & Robson, W.S.

Agents for Respondents—Wilson, Burn & Gloag, W.S.

Monday, February 21.

FIRST DIVISION.

TRAILL *v.* DANGERFIELD.

Singular Successor—Judicial Sale—Burden on Lands—Mortification. On 19th December 1840 Mr George Traill became proprietor of the lands of Elsness in a process of judicial sale. From a period prior to 1710 down to the institution of the present action the proprietor of these lands had annually paid the salary of the reader or precentor of the parish kirk. *Held* (Lords Deas, Benholme, and Kinloch dissenting) in an action of declarator at the instance of Mr Traill, that the annual payment of this salary was not a burden on the lands which was transmitted to singular successors, and that he was not liable for payment of it.

The pursuer is proprietor of the lands of Elsness and others in the island of Sanday in Orkney. These, along with certain other lands in the island of Stronsay, were purchased and acquired by him in a process of judicial ranking and sale of the estates of the late Mr Traill Urquhart of Elsness in 1840. The defenders are the minister and kirk-session of the parish of Lady, in the island of Sanday, and the reader or precentor and the schoolmaster of the parish of Lady.

The defenders averred that from time immemorial, previous to crop and year 1864, and at all events for a period exceeding a century and a half previous to the said year, there has been paid by the proprietors of the lands of Elsness and others, in the parish of Lady, to an officer appointed by the kirk-session of the parish, styled the reader or precentor, as salary, the commuted value of 9 meils of bere, 4 settings oatmeal, and 12 merks of butter, according to the weights and measures of Orkney. During this period the office has occasionally been held conjointly with the office of parish schoolmaster, but it is a separate and distinct office; and whether held jointly with the office of schoolmaster, or as a separate office, the appointment to the readership or precentorship has always been made by the kirk-session, while the schoolmaster has been elected by the heritors of the parish.

In 1820 Mr Urquhart failed to pay the salary of the reader for the crop of 1819. The then reader or precentor brought an action against Mr Urquhart in the Sheriff-court of Orkney for payment of his arrears of salary; and after discussion, decree was given in favour of the pursuer. In the judgment of the Sheriff, however, there was the following reservation:—"Reserving to the defender, if he be advised that he had any grounds therefor, to sue a declarator of immunity from the payment pursued for, and reserving to the pursuer and his successors in office their defences thereto as accords." Mr Urquhart accordingly paid the sums decerned for, and the reader's salary up to his death in 1840; and the pursuer, on acquiring the lands of Elsness from Mr Urquhart, continued to make the payment till 1864. But having then ceased to make this payment, the reader or precentor raised an action in the Sheriff-court of Orkney for payment of these arrears. And the pursuer now brought an action of declarator to have it found that the defenders were not entitled to demand any of the salary claimed as payable from his lands. He adduced two minutes of the Presbytery of North Isles, which were in the following terms:—"At Kirkwall, 5th day of August 1726, the Presbytery of North Isles met and constituted. *Inter alia.* As to the honourable society being informed of something of funds settled for schools in Stronsay, Sanday, and Shapinshay, the minister of Lady parish, in Sanday, reports that there is paid to the precentor 9 meals of beer on the beer pundler, 4 settings of meal, and 12 merks of butter, by John Traill Urquhart of Elsness, but there are no written documents."—"At Greentoft, in Eday, 28th day of March 1839, the Presbytery of North Isles met and constituted. *Inter alia.* Mr Traill reports that, according to appointment of this Presbytery, he had spoke to Magnus Muir, present clerk of Lady parish, concerning the mortification there, and asked him if the said mortification was now paid conform to use and wont who answered it was, and that he had received to this time, as his father formerly had, to wit,—9 meals of beer on the beer pundler, 4 settings of oatmeal, and an half lispund of butter."

The Lord Ordinary (JERVISWOODE) found, "as matter of fact, that from time immemorial the office of reader in the parish of Lady, with salary attached thereto, has existed, and has been held by individuals appointed thereto successively, in manner set forth in the first statement of facts for the defenders;" and, "as matter of law, with reference to the preceding finding, that the office of reader is, as such, known and recognised in law, and that a salary payable to the holder of such office may be exigible from a proprietor or proprietors of lands within a parish, in accordance with immemorial usage, as above found."

The pursuer reclaimed.

SOLICITOR-GENERAL and NEVAY for him.

DEAN OF FACULTY and LEE in answer.

In consequence of a division of opinion on the Bench, the case was reheard before seven Judges.

At advising—

The LORD JUSTICE-CLERK said that, apart from the facts admitted, it was sufficiently established that from a period prior to 1710 down to the institution of this action the sum in dispute had been regularly paid to the precentor. There could, moreover, be no doubt that the office of precentor, though not essential to the polity of the Church of Scotland, might be the object of a gift. But though, in the case of a public burden, long usage, would raise the presumption of a prior act of a competent public authority originating the usage, here the payment was by only one heritor, and must rest on a presumed private grant. There were, therefore, two questions—Whether this right ever attached to the lands? and, if it did, whether it had been transmitted against the pursuer? There was no evidence that it had ever been laid on the lands. A title was necessary, and none was shown to have ever existed. The argument that it was not necessary, the lands being udal, failed both in point of fact and of law. Again, though the rule *decennalis et triennalis possessor non tenetur docere de titulo* raised a presumption in favour of a title, that operated in favour of ecclesiastics only, not in favour of laymen, even in the case of sums devoted to pious uses. The case of *Burnett* v. *Gibb*, M. 15,725, referred to in Mr Duncan's book as a decision to that effect, was imperfectly reported, and indeed was not in its terms applicable to laymen. As to the second branch of the argument, it was admitted that this was not a real burden. The pursuer, however, bought subject to the burden, and was said to have received a deduction from the price in respect of it. Where the purchaser so bought in the way of private sale, and continued to pay the amount in question for twenty years, the seller's claim for relief was very strong, and the creditor might even plead a *jus quæsitum*. In the present case the equity was so similar that it was impossible not to regret that this question should have been raised. But his Lordship could not give this effect to a purchase in a ranking and sale. The bankrupt was not the purchaser's author; and the purchaser took the land free from all burdens not appearing on the face of the titles. Though the burden here appeared on the face of the proven rental and other documents in the process of ranking and sale, it was well settled that neither creditors nor purchaser have any concern with such calculations. Mr Bell made this quite plain in a passage which his Lordship quoted (ii, 283); and on the principle there explained he was of opinion that the purchaser in 1840 came under no obligation to pay the annuity.

LORD ARDMILLAN concurred, with this qualification, that he did not think that, even if the lands had not passed by judicial sale, the claim could have been enforced against singular successors.

LORD DEAS said that this was a declarator of immunity from a payment which had been continued for a long time, in which the pursuer did not propose that he should be relieved by another party, or only as proprietor, but concluded for absolute immunity or extinction of the defender's right. The question was, whether he had proved enough to succeed? This mortification to the kirk-session for payment of a reader or precentor went so far back that its origin could not be traced in any of the documents now extant, though they went back for the greater part of two centuries. It was paid by the pursuer's predecessors and by himself since he acquired the lands in 1840, and was only disputed by him after the lapse of that period. Two leading questions arose—(1) Could the pursuer's predecessors have succeeded in such an action as this? and (2) Was the pursuer now entitled to succeed? As to the former, it must be observed that this was not a question of the title

to a landed estate. Mortifications such as this did not require a formal written title. Any title must suffice to constitute them, such as a letter engrossed in the records of the kirk-session. The existence of such a title was presumed, and its terms were explained by long possession of the right. In this case there could be no doubt that the terms of the original obligation by the granter, whoever he was, bound himself and his successors in the estate. His Lordship referred to the proceedings in a Sheriff-court action in 1822 as shewing that the proprietors of the estate ought to be held bound. In regard to the contention that the proprietor who sold in 1840 was not bound to continue to pay the annuity, his Lordship would not go on the ground that the recipient was an ecclesiastic, but proceeded to show, by reference to authorities, that in similar cases the effect of long possession in raising a presumption of an anterior title had not been confined to the case of churchmen. His Lordship referred to the cases of dry multures (Ersk. ii. 9, 28), the constitution of corporations by prescription, fish teinds, &c. The Lord Justice-Clerk had not differed from his (Lord Deas's) view in regard to the obligation of the proprietor who sold in 1840; nor had he held that, if this had been a sale by a private party, the purchaser would have been bound to continue the payment. In regard to the question of judicial sale, he thought there was a fallacy in the Lord Justice-Clerk's view. Bell did not lay down that the purchaser in a judicial sale may shut his eyes to everything. Here he did look at the whole matter, and he was bound by his title to look at this matter. His Lordship then pointed out fully the nature of the purchaser's rights under a judicial sale, which was a lump sale, inferring no warrandice or rights which would not attach to a lump sale; and this was all that Mr Bell meant in the passage cited, where he was speaking simply of warrandice. In this case, the matter had been put most plainly before the purchaser, as his Lordship proceeded to show at some length. Under this branch the question was, in short, whether this was a public burden or was so dealt with in the sale as to be put on the same footing as a public burden, and so was not struck at by the reduction-improbation of all rights not produced which was implied in every ranking and sale. His Lordship held that, though the phrase public burden was somewhat vague, it meant not a burden paid by every body, but one paid for public purposes or to a public officer, even if it were paid only by an individual; and he referred to cases to show this. A public burden might originate in usage as well as in statute. This gentleman had paid it for twenty-five years, and was as much bound as his predecessors. It was really a question of relief, and the pursuer virtually admitted his own liability by not calling the other party, who must be bound if he were free. His Lordship should be sorry if the law of Scotland should be found to sanction as bold an attempt at injustice as he ever saw in a Court of justice.

Lord Benholme concurred with Lord Deas, holding that the opposite view deprived long possession of the chief effects that have been attached to it in our law.

Lord Neaves agreed with the Lord Justice-Clerk and Lord Ardmillan, pointing out the necessity of a written title for a burden or rent charge on land.

Lord Kinloch said, I have arrived at the same conclusion with Lords Deas and Benholme. I consider the payment now in question to stand in a wholly different legal category from a payment to a private party, alleged to form a real burden on lands. It is a due, or perquisite of office, payable to a known and recognised church officer. Whether in the abstract, and as a matter of legal terminology, the payment is properly designated a public burden, I think comparatively immaterial. I am of opinion that the long use of payment, and the proceedings in the ranking and sale, give to it, in a question with the pursuer, the essential character of such a burden; and make it a charge on the property. I consider the kirk-session, or the official himself, entitled to enforce the payment against the pursuer, in his character of proprietor of the lands.

The Lord President said that the facts, that this was a declarator of immunity of lands, that the pursuer was a singular successor, and that he acquired at a judicial sale, were the whole elements necessary for the decision of the case. It was not necessary to consider what would have been the result if the pursuer himself had paid for forty years, or if he were a descendant of the family who had done so. He was also unwilling to consider the effect of a purchase at a private sale, where the question would have depended on the terms of the disposition—*i.e.*, on whether the right was made a burden on the conveyance. He would also pass over the analogies pressed into his service by Lord Deas from servitudes, corporations, &c. The real question was, whether at the judicial sale the pursuer took the estate free of all burdens, except public burdens? In a judicial sale, public burdens were burdens affecting the lands, or the proprietor as such, and these only. These were good against the purchaser, whether mentioned in the memorial and abstract or not. The mention of the payment in question there, in the present case, was not for the information of the purchaser, but of the Court; and the reference in the articles of roup and decree, being for the special purpose of identifying the lands, could not on the ordinary principles of construction be held to import anything about the sum now in dispute into these documents. The kirk-session might have claimed against the bankrupt, and not having done so, their right was extinguished.

The Court therefore, by a majority of one, altered the judgment of the Lord Ordinary, and gave judgment in terms of the conclusions of the summons.

Agents for Pursuer—Messrs Horne, Horne, & Lyell, W.S.

Agents for Defender—Messrs Menzies & Coventry, W.S.

Wednesday, February 23.

SECOND DIVISION.

WATSON *v.* THE EARL OF SEAFIELD.

Appeal—Act Geo. IV., c. 120*—Jury Trial.* An appeal was brought from a judgment in the Sheriff-court, in a case raising the question of the character and extent of the public right of white fishing in competition with a grantee of the Crown in salmon fishings, with a view to the trial of the case by jury. After some