præstandum, but the thing asked for is sold, and the creditors would have to go to the market and buy new shares. Now, to compel them to do this would be practically to convert an action *ad factum præstandum* into an action for damages.

I am therefore of opinion that we should refuse this petition, but without adhering to the interlocutor of the Sheriff.

LORD DEAS—There is here no requisition under the 62d section of the statute, and the action is not founded upon it, but upon the 65th section only. The question is, whether a creditor holding a security is bound to give notice to the trustee before selling the security? and I cannot find in the statute anything to prevent the creditor selling. No time is fixed by the statute within which the trustee must give notice, and the consequence of this is, that if the creditor cannot realise without notice, the time which he is prevented from realising is of indefinite duration. This might often result in the ruin of the creditor, for the creditor might be prevented from realising until the company whose shares he held became bankrupt. This ground is, in my opinion, alone sufficient to decide the question. I am of opinion that we should adhere to the interlocutor of the Sheriff.

LORD ARDMILLAN—I entirely concur that this petition should be refused. I think that the judgment of the Sheriff is well considered, and that we should adhere.

LORD KINLOCH—This question is entirely under the 65th section of the statute. I think that under that section the trustee was bound to demand the assignation in due time, and that if he failed to do so, the creditor was entitled to realise. I also agree with your Lordship in the chair, that, as the creditors had realised, this was a case for an action of damages, and not for specific implement. I am of opinion that we should adhere.

Agent for the Petitioner—Laurence M. Macara, W.S.

Agents for the Respondents—Webster & Will, S.S.C.

Saturday, July 6.

MRS MARY ANNE DOUGLAS, PETITIONER.

Trust—Pupil—Maintenance—Allowance.

Trustees under a trust-disposition and settlement made a yearly allowance to each of two pupil children of the truster of £150, out of an estate worth about £900 a-year after reduction of burdens and necessary payments. The mother, who was also a trustee, presented a petition for the increase of these allowances, on account of the extremely delicate health of the pupils.

The Court refused the petition, and held that the circumstances founded on were not strong enough to warrant the Court interfering with the trustees.

This was a petition at the instance of the widow of the late Mr Douglas of Orbiston, who died in 1866, leaving issue of his marriage with the petitioner a son and a daughter, both in pupillarity, the son being eight and the daughter eleven years of age at the date of the petition. The petition proceeded on the following narrative:—"The said Robert Douglas was, at the time of his death, proprietor in fee-simple of the lands and estate of Orbiston, including the lands of Douglas Park, in the county of Lanark; and he was also fee-simple proprietor of the undivided moiety of an estate in Ceylon, called Sylvakanda. The Orbiston estate is of great value, especially on account of its mineral resources. The gross land rental of the estate, including the rent of the mansion-house furnished, is now, and has been since Mr Douglas' death, about £1390 a-year. The minerals, which consist of coal and ironstone, at present yield £1000 a-year of fixed rent. The mineral rental for the year to Whitsunday 1867 was £400; and for the next year, that to Whitsunday 1868, £700. Since Whitsunday 1868, down to the present time, it has amounted to £1000; and this rental will in all probability be largely increased, as the mineral resources of the estate, which are undoubtedly very large, have as yet been only partially developed." The gross rental of the estate, including minerals, is thus about £2300 a-year, and "the public burdens and interest on debt affecting the estate amount together to £610 a-year, so that the net rental of the Orbiston estate, inclusive of minerals, and of the rent of the furniture in the mansion-house, is about £1780 per annum." By antenuptial contract of marriage with the petitioner, Mr Douglas, who had not then succeeded to the estate of Orbiston, made the following provisions in favour of the petitioner and their children, viz.:—(1) He bound himself to provide and secure £4000 to her in liferent, and their children in fee. (2) He conveyed to her absolutely his household furniture and others, subject to a right of redemption by his heir on payment to her of £400. (3) He bound himself to pay to her £50 for mournings, and *interim* aliment corresponding to the rate of interest on said £4000. (4) The fee of said £4000 is declared to be payable to the children at the first term after the deaths of both spouses, and the majority or marriage of daughters and the majority of sons, and to bear interest from the term of payment. (5) Mr Douglas bound himself, and his heirs, executors, and successors whomsoever, "to aliment, entertain, and educate his said children suitably to their station, until the term of payment of their said provisions, or until they shall be otherwise provided for." (6) The legal provisions of both wife and children are barred.

By his trust-disposition and settlement, and codicils, the said Mr Douglas conveyed his estates in general terms to trustees, who are also appointed his executors. Of these, the petitioner, the Hon. Lord Mackenzie, one of the Senators of the College of Justice, and Alexander Wood, doctor of medicine in Edinburgh, now survive and act. The trust-purposes are the following, viz.:—(1) To pay debts, deathbed charges, and the trust expenses. (2) To pay to the petitioner £250 a-year, in addition to her liferent of £4000 under her contract of marriage. (3) To deliver to her his household furniture and others, for her absolute use. (4) To make payment of certain legacies, amounting in all to about £1000. (5) To hold the residue for his children, in the proportion of two-thirds to his son, and one-third to his daughter.

The trustees are directed, "if necessary, to realize and convert into money my whole estates, heritable and moveable, hereby conveyed, and to divide and allocate the said residue into the shares above mentioned, if there shall be more than one child,

and to pay, assign, and make over the same, with the accumulated interest or annual produce thereof, to the child or children entitled thereto—to his son at majority, and to his daughter at majority or marriage. The residue is declared not to vest in the children until the time of payment.

The trustees are declared to "have power to make such allowance as they may think proper to the said children, for their proper maintenance and education, out of the free interest" of their presumptive shares; and also to make advances to sons, out of their presumptive shares, for their benefit or advancement in the world. The trustees are also appointed tutors and curators to the truster's children. The petitioner receives from Mr Douglas' trustees annual payments on her own account to the amount of £490, which, being deducted from the net rental of Orbiston as before stated, leaves a free surplus revenue of £1290. The trustees have paid fixed annual allowances to each of the children of £100 before 1870, and £150 since that time, besides extra allowances for medical attendance.

"The allowances which the trustees have hitherto made to the petitioner for her children are quite insufficient, having regard to their station and pecuniary prospects, and the state of their health, which has always been and is exceptionally delicate. They require constant medical attendance, change of air, and carriage exercise, the care of separate servants, and a sumptuous diet, to keep them in life. The petitioner cannot afford, upon the allowances which she has hitherto received for her children, to provide all these requirements for them. She is even unable, upon the present allowances, to employ a governess for their education, and she has been obliged hitherto to educate them herself."

The petitioner applied to the trustees for increased allowances, and they selected Dr Sieveking to examine the children and report. In his report Dr Sieveking *inter alia* states—"Without laying any stress upon information supplied to me by Mrs Douglas, I am satisfied by my examination of the children that the greatest judgment will be necessary to fortify and secure their health, and to bring them up to manhood; that they require constant medical supervision, and that they must be especially guarded against the influences of cold and inclement climates. I regard them both as delicate, and devoid of that constitutional vigour which will enable them to resist the inroads of disease, or to pass through its phases, if attacked, with the average prospect of recovery. . . . . I cannot but think that their constitutions have been undermined by the ordeals through which they have passed, and that neither of them can, to use the phrase of life insurance, be considered 'good lives.' The age of puberty will, in the case of Mr and Miss Douglas, be attended with special risk; . . . and in the meantime everything that domestic care and hygiene, under wise medical control, can secure for their physical and moral development should be carefully attended to. As the boy is nearly of an age to be sent to school, I may add that I do not think him strong enough to be subjected to the ordinary course of scholastic training. I am of opinion that both he and his sister should have such climatic changes as their physician may from time to time enjoin." Upon considering this report and the application of the petitioner, the trustees expressed their willingness to consider from time to time any application for extra allowance, in order to give the children the benefit of such climatic changes as were indicated by Dr Sieveking, but expressed their opinion that the £300 paid to Mrs Douglas annually on account of her two children was an ample allowance.

"On account of this refusal on the part of the majority of Mr Douglas's trustees, the petitioner is placed in a situation of great pecuniary embarrassment. She has been obliged to incur debt to a considerable amount, in order to find the necessary means of maintaining her children, and even to apply to her own relatives for gratuitous assistance; and this has been communicated to the trustees."

The petitioner accordingly prayed the Court to fix the allowance to be made to her for the maintenance and education of her children at £750 per annum.

To this petition the trustees lodged answers in the following terms:—Allowing that the allegations of fact in the petition were generally correct, they stated "that the land rental of the estate was £1310 a-year, £80 of the £1390 mentioned in the petition being paid to the petitioner in respect of the use of the furniture; and that the total surplus revenue of the estate, necessary payments being deducted only, amounted to £900 a-year, and further, that it was only during the last few years that the income of the estate had exceeded the expenditure. That the trustees considered the allowance of £150 to each child amply sufficient, and as much as they were warranted to give, looking to the position of the property, and the terms of Mr Douglas's settlements, but that they were still ready, as they had always been, to make every necessary allowance, and to reconsider the question of fixed allowances as the children grew older, or as other circumstances might render expedient. That if the petitioner had fallen into pecuniary embarrassments, incurred debt, and applied to her relatives for gratuitous assistance, this had not arisen from any inadequacy of the allowances made by the trustees to meet the expenditure upon the children. That, in the respondents' judgment, £750 per annum would be an excessive and unnecessary allowance for the children, even if the trust-estate could safely afford it, and that so large an allowance could not and would not be applied advantageously or beneficially for them. That the respondents do not consider the trust-estate can be relied upon to afford so large a fixed allowance, as, but for the mineral rents, there would be no surplus income, and circumstances might occur which would lead to a cessation in whole or in part of the receipt of these rents. That, in the whole circumstances, the respondents felt it to be their duty to submit that the prayer of the petition ought to be refused."

WATSON and M'DONALD for the petitioner.

The SOLICITOR-GENERAL and BALFOUR for the respondents.

At advising—

LORD PRESIDENT—We are here asked to interfere with trustees as to the allowances which they make to two children. The Court is not in the habit of interfering with trustees except on very strong grounds, and no such grounds have been stated here. The income of the estate is not large, and the utmost which the two children would have, even in event of their mother's death, would be about £1500 a-year. Now, one of the first duties of trustees is to take advantage of minority to increase the value of the trust estate; and this is just an instance, looking at the value of the pro-

perty and the position of the children, in which it is very desirable that the estate should be increased during minority.

But, on the other hand, what are the duties of the trustees to the children at present. Mrs Douglas has a jointure of £500 a-year; a very liberal allowance considering the size of the estate; and the allowances to the children are above what are usually given in similar circumstances. The trustees have given these large allowances on account of the peculiar circumstances in which the children are placed, owing to the critical state of their health. I think that the trustees have taken a sound view of the application for still further increase of their allowances when they say in their answers that, "after the most careful inquiry, and repeated and most anxious consideration, the respondents consider that they could not, in the proper discharge of their duty, and having regard to the terms in which they are instructed to act by Mr Douglas' settlement, make to the petitioner higher fixed allowances in respect of the children; and they are convinced that, with the exercise of ordinary prudence, everything essential or even advantageous for the children could readily be supplied upon the said allowances, and such additional allowances as the respondents have all along been and still are ready to grant for the purpose of meeting special emergencies. These allowances they have expressed their willingness to continue under such precautions as shall ensure, as far as possible, that the money so given is really applied for the benefit of the children." The trustees would be exercising a very delicate discretion in giving extra allowances, for if they were induced by the mother's over anxiety to do so, they might have great difficulty in justifying their disbursements.

The minute of meeting of the trustees of 3d June, when they considered Mr Douglas' application for increase of allowance to her children is as follows:—"The trustees present having carefully considered Dr Sieveking's report, are of opinion that the sum of £300 now paid to Mrs Douglas annually on account of her two children, is an ample allowance for their proper maintenance and education. But they will be prepared to consider, as they have hitherto done from time to time, any application which may be made for an extra allowance, in order to give the children the benefit of such climatic changes as are indicated by Dr Sieveking, which their physician may from time to time enjoin. It must, however, be understood by Mrs Douglas that any expense on this account must not be incurred without previous sanction and authority of the trustees. Should the physician of the children be able to point out beforehand the climatic changes which the children may require during any year, or other stated period, the trustees will be ready to consider what, if any, additional allowance the same may render necessary." Now, I think that the trustees here take up a most fair position, and that the Court cannot interfere. I am therefore of opinion that this petition should be refused.

Lord Deas—The late Mr Douglas gave powers to his trustees under his trust-disposition and settlement "to make such allowance as they may think proper to the said children for their proper maintenance and education out of the free interest or annual produce of the presumptive shares which will respectively belong to them." Now, the trustees have been exercising these powers, and the Court should not interfere unless gross abuse of their powers by the trustees is stated. In this case there is nothing of that kind, but quite the reverse. Then the trustees express their willingness to increase the allowances if necessary, with the proviso that they must know beforehand the purpose to which the money is to be put. In this the trustees do not go beyond their powers. I concur with your Lordship that this petition should be refused.

Lord Ardmillan—I concur with your Lordships. Nothing but a very strong case could warrant our interference here, and the case presented to us is not a very strong one. The trustees have fully recognised their duty of taking all possible care of the children in their very precarious state.

Lord Kinloch concurred.

Agents for Petitioner—T. & R. B. Ranken, W.S.
Agents for Respondents—Mackenzie & Kermack, W.S.

Saturday, July 6.

SECOND DIVISION.

WILLIAM TAYLOR KEITH, PETITIONER.

Bankrupt—Liberation—19 *and* 20 *Vict. c.* 79, § 93.

Circumstances in which a bankrupt, incarcerated under the Act 19 and 20 Vict. c. 79, *held* entitled to succeed in a petition for liberation, the trustee not appearing to support the warrant.

This was a petition for liberation by a bankrupt incarcerated under the Act 19 and 20 Vict. c. 79, for refusing to give satisfactory answers to questions asked during his examination.

Scott, for the petitioner, argued that the warrant was informal, the question and answer not being engrossed therein in full.

The Court held that, while it would have been more satisfactory had this been done, it was unnecessary to decide that question, and that, in the absence of opposition by the trustee, the bankrupt was entitled to liberation.

Agent for Petitioner—J. M. Macqueen, S.S.C.

Tuesday, July 9.

FIRST DIVISION.

MACKENZIE (CHEAPE'S JUDICIAL FACTOR) *v.* LORD ADVOCATE.

ID *v.* UNITED COLLEGE OF ST ANDREWS AND ST MARY'S COLLEGE OF ST ANDREWS.

Teind—Interim Locality—Over and Under Payments—Titular—Prescription.

In an action by an heritor against the Lord Advocate, as representing the Crown, for repetition of over-payments of stipend for a long course of years under interim decrees of locality, the pursuer averred that the whole free teinds of the under-paying heritors, other than those allocated as stipend to the minister, had been paid to the Crown as titular, or its tacksman. The Crown, *inter alia*, pleaded (1) that the