merits of his complaint, that the Corporation are carrying their occupation further than is necessary for their works, but this is not a process in which that can be determined, for this depends on whether there has been, on the part of Mr Blackburn, a violent inversion of the state of possession for the previous seven years. That being so, I see no reason for interfering with the judgment of the Sheriff.

The other Judges concurred, LORD KINLOCH expressing an opinion tha tthe seven years' possession by the respondents was longer than was necessary in the circumstances to support their case.

Agents for Appellant—Mackenzie & Black, W.S.
Agents for Respondents—Campbell & Smith, S.S.C.

Saturday, February 6.

SECOND DIVISION.

WARDROP AND OTHERS, PETITIONERS.

Parent and Child—Right of Administration—Factor loco tutoris. Circumstances in which the Court refused to interfere with a parent's right of administration, and to appoint a factor *loco tutoris* on a pupil's estate.

This is a petition by the trustees and executors of the late Henry Wardrop and certain others for the appointment of factor *loco tutoris* on a pupil estate. At the date of the execution of the trust-deed the truster had had two children by his marriage with Mrs Rosalie Wilhelmine Meyer or Wardrop, viz., Rosalie Augusta Wardrop and Frederick Meyer Wardrop. After specifying certain purposes, the trust-deed provided—"At the majority or marriage of the youngest of my children, the said trustees shall convey my subjects in Queen Street, partly herein conveyed in the sixth place, and partly held by the trustees under my antenuptial contract foresaid, and known by the name of Wardrop's Court, to or for behoof of my children, Rosalie Augusta Wardrop and Frederick Meyer Wardrop, equally, in the following manner, namely, they shall convey the one-half *pro indiviso* to my said son, Frederick Meyer Wardrop, and his heirs and assignees, and the other *pro indiviso* half thereof to my daughter, for her liferent use allenarly, exclusive of the *jus mariti* and curatorial right of any husband she may marry, and not attachable or assignable by or for their debts or deeds, or either of them, and to her children equally, and share and share alike, in fee; whom failing, to her nearest lawful heirs or assignees: Further, I direct my trustees to convey to my said son the following properties—*videlict*, my subjects in King Street and Saltmarket Street, above conveyed in the sixth place, and my lands of Bossfield, Orrfield, Crookedshiell, and my burial ground in the Necropolis; and to hold or convey to or for behoof of my daughter in liferent, for her liferent use alimentary allenarly, exclusive of the *jus mariti* and curatorial rights of any husband she may marry, and not attachable or assignable by or for their debts or deeds, and to her children equally, and share and share alike, in fee; whom failing, to her nearest lawful heirs or assignees, my properties of Alleysbank, shops in Argyle Street, and dwelling-house and attics in Oswald Street: And in order that the direction and appointment relative to my Queen Street properties may be more effectually carried out, I do hereby, in virtue of the powers of direction and apportionment reserved to me in my antenuptial contract foresaid, direct and appoint the trustees under said antenuptial contract to convey the *pro indiviso* half of said Queen Street property held by them equally to or for behoof of my said son and daughter, and their foresaids, as aforesaid, subject always to the liferent therein provided to my said spouse: Further, should my trustees deem it proper, they may either hold the portions of my heritable estate so provided to my daughter and her heirs, or they may convey the same to other trustees for behoof foresaid, or to herself and her heirs, according to the previous destination, and under the previous conditions and restrictions; and whichever of these courses they adopt, the discharge of my said daughter shall be a sufficient exoneration to them for the provisions to her and her children: And I likewise hereby expressly provide and declare that my said trustees shall have in their power to reduce the right and interest of my son in my heritable estates, before provided to him, in whole or in part, to a liferent alimentary interest and right allenarly, with a destination of the fee equally among his children; whom failing, to his nearest and lawful heirs whomsoever: And in order that this provision may have full effect, I do hereby declare and provide that my said son's right and interest in my means and estate shall not vest in him so as to be attachable for his debts, or assignable by his deeds, until six months after the period fixed for the conveyance of said estates, or until the said estates are conveyed, whichever shall first happen."

By the 7th purpose of the trust it was provided that the whole residue of the estates should be converted into money, and divided equally between the truster's children or their issue.

The truster died on the 9th December 1851, survived by his wife and the two children of the marriage. Rosalie Augusta Wardrop attained majority on 29th May 1864, and on the 17th of January 1868 was married to Barker Gossling, Esq., residing at Kilcreggan. An antenuptial contract was entered into between these parties. Among other purposes—"For payment, in the event of her predeceasing her husband and leaving children, of an annuity of £400, from the first and readiest of the annual income of the estate thereby conveyed by her to the said Barker Gossling, the said annuity to be restricted to £200 in the event of the said Barker Gossling marrying again. And it was farther declared that the said annuity, whether unrestricted or restricted, should be alimentary in its nature, and not be liable to or for the debts or deeds of the said Barker Gossling, nor subject to the diligence of his creditors, present or future, and should in no case be secured so as to form a burden on the heritable property belonging, or which might thereafter belong, to the said Rosalie Augusta Wardrop, or to others for her behoof."

The marriage between Barker Gossling and Miss Wardrop was dissolved by the death of the latter on the 17th of February 1868, and there were two children, issue of the marriage, who are the objects of the present application. The truster's son had not attained majority at the date of his sister's contract of marriage, or at her death. He is now major, and the time accordingly has arrived for the execution by the petitioners of the fifth and seventh purposes of the trust.

The petition then states—"The beneficial right to the heritable subjects, destined in the fifth pur-

pose to the truster's daughter in liferent and her children in fee, has, through the decease of Mrs Rosalie Augusta Wardrop or Gossling, vested in her children, Douglas Granville Gossling and Edith Augusta Gossling, who are both pupils. The petitioners believe that under the trust-deed they are entitled in their discretion—(1) To continue to hold the said subjects for behoof of the children; (2) To convey to other trustees for behoof of the same; or (3) To convey at once to the children themselves. They are willing, however, to adopt the last-named course, and convey at once to the children, provided they are satisfied that they are in safety to do so, and that the rents of the property will be truly applied for the children's behoof.

"Mr Barker Gossling, the children's father, being still alive, would in ordinary circumstances, be entitled to the position of tutor and administrator-in-law, and the petitioners would have simply to execute and record a conveyance of the heritable subjects, leaving the management thereof, during the pupilarity of the children, to their father. But the petitioners do not think that, in the circumstances to be immediately mentioned, they would be justified in conveying the property without ample security, or the authority of the Court.

"The petitioners believe and aver that Mr Gossling has no profession, business, or other ostensible means of making a livelihood. The only occupation which, so far as the petitioners know, he ever followed, was farming; this, however, he abandoned about a year ago, as it proved, it is believed, unsuccessful, and was attended with considerable pecuniary loss. The petitioners have reasonable grounds for believing that in consequence of this loss, or from other causes, Mr Gossling's private means were exhausted, and that his affairs became embarrassed. Mr Gossling, or his agents on his behalf, have recently stated that he is unembarrassed and entitled to a considerable income; but on inquiry it appeared that his only expectation of an income sufficient for his support consists of a chance of receiving payment, under his contract of marriage, of the annuity of £200 or £400, as the case may be, above mentioned. But it is doubtful whether the marriage-contract trustees will have any funds out of which to pay this annuity. Mrs Gossling having died before her brother attained majority or was married, a doubt has arisen whether the share of residue falling to her under her father's settlement vested in her or not. If it vested, it would pass to her marriage-contract trustees, and if so, there might possibly be funds for payment of Mr Gossling's annuity; but if it did not vest in her, it belongs to her children, and then there will be no funds, the petitioners believe, out of which the annuity can be paid.

"In consequence of this doubt, the petitioners have raised a process of multiplepoinding in regard to the residue of Mr Wardrop's trust-estate, in which the said share is claimed, on the one hand, by Mrs Gossling's marriage-contract trustees, and, on the other, by the *tutor ad litem* appointed by the Court to the children.

"It will thus be seen that, while Mr Gossling has at present no means of his own, and has only the chance of obtaining an annuity (alimentary in its nature, and to be restricted to £200 in the event of his marrying again), he is, through his marriage-contract trustees, engaged in a competition with his children, and so, at least, at present has an interest adverse to theirs, which presents an additional and separate reason for the present application being made.

"In these circumstances the petitioners, having been called upon by Mr Gossling to convey the property to his children, felt themselves bound, looking to the prospect of a long pupilarity, to ask him what security or caution he was prepared to offer in the event of their doing so, and offered to convey, in the event of satisfactory caution being found for the management of the property, and intromissions with the rents and interests. Mr Gossling, however, refused to offer any security whatever, and threatened to institute proceedings against the petitioners in the event of their refusing to convey the subjects to his children, or pay the rents thereof to him as their administrator-in-law on his receipt alone.

"It has thus become necessary to present this petition to your Lordships, for the appointment to the said pupil children of a factor *loco tutoris quoad* the property bequeathed to them in Mr Wardrop's will, to act during their pupilarity, or at least till the issue of the multiplepoinding. The property which can at present be conveyed to them, consists of the heritable subjects specially bequeathed by the fifth purpose of the trust; but in the event of their being successful in the multiplepoinding, they will also be entitled to payment of half the residue, and, on their grandmother's death, to a conveyance, under the sixth purpose of the trust, of the truster's house and offices in Queen's Crescent. The said factor will be required to manage the said property, uplift the rents and interests, and apply the same, under authority of the Court, for behoof of the pupils.

"The petitioners humbly beg to suggest Mr Moses Provan, chartered accountant in Glasgow, senior partner of the firm of D. & R. Cuthbertson, accountants, as a fit and proper person to be appointed factor.

"The next of kin to the children, on the mother's side, are the petitioners, the said Mrs Rosalie Wilhelmine Meyer or Wardrop, and Frederick Meyer Wardrop."

The Lord Ordinary (MANOR) pronounced the following Interlocutor in the petition:—"*Edinburgh, 27th January* 1869.—The Lord Ordinary having considered this petition at the instance of the trustees of the deceased Henry Wardrop, with answers for the respondent Mr Barker Gossling, and whole proceedings, and heard counsel thereon: Grants the prayer of the petition, and appoints Mr Moses Provan, chartered accountant in Glasgow, to be factor *loco tutoris* to Douglas Granville Gossling and Edith Augusta Gossling during their pupilarity, or at least till the issue of the process of multiplepoinding, raised by the said trustees upon the heritable subjects and others destined and bequeathed to them under Mr Wardrop's trust-deed, with the usual powers, he always finding caution before extract, and decerns.

"*Note.*—The petitioners state that they are now willing to convey and make over to the pupils the property which was destined to them by their grandfather's trust-deed, and which has now vested in them through the decease of their mother, Mrs Rosalie Wardrop or Gossling, the daughter of the truster, provided they can do that safely and with reasonable assurance that the rents and proceeds of the property will be truly administered and applied for the children's behoof. But, looking to the very peculiar position of Mr Gossling, the father of the pupils, the petitioners doubt if they would

be justified in making the conveyance without taking some security for the protection of the pupils' interests. Their father, Mr Gossling, is their natural guardian, and *ipso jure* their administrator-in-law, and no imputation whatever is made against his character or conduct, but his circumstances are such as to render it extremely questionable whether it would be prudent or right to entrust him with the management of his children's income. It is averred that he has no profession or business, nor any other means of gaining a livelihood, and the explanation which he has offered on this point in his answers, is, in the Lord Ordinary's opinion, very far from being satisfactory. Though he alleges that he is free from debt or pecuniary embarrassment, it appears, for aught he says, that he has no present means, and that the only fund to which he can look forward for support is an annuity of £400 a year, provided to him under his marriage-contract with his deceased wife. But his right even to that annuity is contingent on the issue of a process of multiplepoinding now in dependence at the instance of the petitioner, in which he is practically in competition with his children, and has an interest adverse to them. This seems to furnish an additional reason for the present application being made.

"The leading cases regarding the circumstances which will justify the appointment of a factor or curator to supersede a father's natural right of administration where he is in such a state of embarrassment, or even of mere poverty, as to render him suspect, are *Govan* v. *Richardson*, Mor. 16,263; *Graham* v. *Duff*, Mor. 16,383; *Johnston* v. *Wilson*, 1 Sh., 528, and the modern case of *Stevenson, &c.*, v. *Drumbreck*, D. 19, 462, and Macqueen's Appeal Cases, vol. iv., 86. The case of *Govan* is particularly adverted to by Stair, i., 5–12, and by Erskine i., 6–5,5, in speaking of this subject, and the result of a consideration of all these authorities is to show that trustees, or others holding funds for behoof of children under age, are not safe in making payment to parents or other legal guardians for the children, without seeing that such guardians are in a situation duly and faithfully to manage the funds when placed in their hands. The present appears to the Lord Ordinary to be a case in which the risk of maladministration is sufficiently great to warrant the trustees in protecting themselves, and the estate of the pupils, either by obtaining caution or the appointment of a factor. If the result of the multiplepoinding is to improve Mr Gossling's circumstances, he may then apply for a recal of the factory."

Mr Gossling reclaimed.

SOLICITOR-GENERAL and GIFFORD for him.

CLARK and H. J. MONCRIEFF in answer.

At advising—

LORD JUSTICE-CLERK—I do not know that there is much to be said. It would be difficult for us to hold that the administration of an estate belonging to children is to be taken from their father on such allegations as we have here. The trustees who make the application aver that they have the right to keep the money in their own hands, to assign it to other trustees, or to hand it over to the father only on his finding caution. If so, there was no need for this application.

But even assuming that they have to denude in a particular event, their interest would cease on their denuding. They are not even appointed tutors and curators to these children. None of the cases referred to seem to me to relate to money, the principal of which is safe; but here the property is vested in the pupils, the father will have no power to dispone, his only power will be to administer it. When the trustees say that they anticipate maladministration on his part, they would require to substantiate it by very strong circumstances indeed. Now, what are the averments here? It is said that Mr Gossling has a claim for some £400 or £500 a-year off his wife's property; and, as far as we can judge from the documents before us, he seems to have a very reasonable chance of making good that claim. Then it is said that he had a farm, and that he lost money, and that the petitioners have "grounds for believing" that he is embarrassed. But even although that was true, it would not be sufficient. It will not do to allege mere embarrassment. I would have expected at least some statement of the grounds on which the petitioners believed him to be embarrassed—that he was under horning for debt—that his creditors were clamorous and so forth. To say that a man merely in poor circumstances is to be dealt with as if he was a notorious bankrupt is quite out of the question.

I do not think that the demand for caution is in any better condition. It would be a serious matter to ask any one to be cautioner for the administration of this property till these children arrive at puberty. One is a boy and very young, so that the cautioner might be bound for nearly fourteen years.

The first case referred to, viz., that of *Govan*, if correctly reported, is directly opposed to that of *Dumbreich*, where the Lord Chancellor stated that poverty by itself was no ground for interference; and in the case of *Graham* the father was not resident within the jurisdiction of the Court.

I see nothing to justify the doubts which these petitioners seem to entertain as to the father in this case—certainly we have had no facts stated to us sufficient to cause them.

LORD BENHOLME concurred.

LORD NEAVES—I am quite of the same way of thinking. This father is under thirty. His father and mother are still alive. These children are their grandchildren as well as the grandchildren of their maternal grandfather and grandmother,—and are we to say that they are to have no interest in them. The father is not said to be under obligation, and he has a right to a liferent of £400 a-year. Now, under these circumstances, are we to take the right of administering his children's property from him? I do not think poverty alone is sufficient. I do not think these trustees had any good grounds for making this application, and it will be satisfactory to them to have it dismissed with costs against themselves to show how utterly groundless their fears have been.

The following interlocutor was therefore pronounced:—

"*Edinburgh*, *6th February* 1869.—The Lords having heard counsel on the reclaiming note for Barker Gossling against Lord Manor's interlocutor,—Recall the said interlocutor; Dismiss the petition of Mrs Wardrop and Others, and decern: Find the petitioners liable in expenses; and remit to the auditor to tax and report."

Agents for Petitioner—Morton, Whitehead & Greig, W.S.

Agents for Respondent—Graham & Johnston, W.S.