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

pursuer's claim was against the under-paying heritors, and not against the Crown; (2) that it was prescribed in so far as regards payments beyond forty years. *Held* that neither of these pleas could be satisfactorily disposed of without ascertaining the facts, and a remit to that effect *made* before answer.

The first of these actions was at the instance of Kenneth Mackenzie, C.A., judicial factor on the trust-estate of the late James Cheape of Strathtyrum, against the Lord Advocate, for Her Majesty's interest.

The pursuer's averments were shortly as follows:—

The late James Cheape was proprietor of the lands of Strathtyrum and Balgove, in the parish of St Andrews. In 1821 he executed a trust-disposition and settlement of his whole estate, heritable and moveable. On his death, in 1824, his trustees entered upon the management of his estates, and continued therein till April 1852, when they executed a disposition and deed of entail of the lands, in terms of Mr Cheape's trust-disposition and settlement. The trust having lapsed by the death of all the trustees, Mr Mackenzie was, on 17th April 1867, appointed judicial factor on the trust-estate.

On 24th January 1810 the first minister of St Andrews obtained an augmentation of his stipend, to commence with the last half of crop and year 1809. An interim decree of locality was extracted July 8, 1812, which continued as the rule of payment up to and including crop and year 1825. On 29th June 1826 a rectified locality was approved of as a second interim rule of payment, which subsisted as such up to and including crop and year 1829. On 8th December 1830 the then first minister of St Andrews obtained a second augmentation, commencing with crop and year 1830. An interim decree of locality was obtained 22d December 1832, and continued to be the rule of payment up to and including crop of 1859. On 31st May 1834 the Court conjoined the processes of locality; and on 25th May 1860 final localities were approved of.

"Under the interim decree of locality of the stipend in 1810, the lands of Strathtyrum, then belonging to the said James Cheape, were allocated on to the amount of three bolls and a half lippy meal, three bolls and a half lippy barley, and £1, 5s. sterling money. The said James Cheape had an heritable right to the teinds of these lands; and as there was abundance of teinds in the parish not held on heritable rights to make up the minister's stipend without encroaching on those teinds to which there were such rights, the lands of Strathtyrum ought not to have been allocated on for any part of the stipend modified in 1810. They were accordingly exempted in the rectified locality of 1826, and also in the final locality; but the stipend allocated on these lands by the first interim locality was regularly paid to the first minister of the said parish during the currency of that locality. The effect of thus allocating a portion of the stipend on the teinds of the said James Cheape was to relieve to that extent the teinds without heritable rights in the hands of the Crown or its tacksman, and the proprietor of Strathtyrum was in this way obliged to pay and did pay stipend, which, according to the locality as finally approved of, should have been laid upon and paid out of the teinds belonging to the Crown as titular. *The teinds so relieved, being the whole free teinds of the under-paying heritors, other than those allocated as stipend to the minister, were paid to the Crown, as titular, or to its tacksman.*" [The words in italics were added at the suggestion of the Inner House, to make the statement more explicit.]

Mr Cheape had no heritable right to the teinds of Balgove. These lands were localled upon by the interim decree of 1810, and also by the interim decree of 1830. The stipend payable under these interim localities was paid by Mr Cheape and his trustees from the respective dates of the localities. By the final locality of 1860 the lands of Balgove were altogether exempted, on the ground that the teinds were bishops' teinds, or were payable to the Crown in rental bolls. Meanwhile the whole valued teind had been paid by Mr Cheape and his trustees to the Crown, without deducting the amount paid as stipend to the minister. This double payment arose from an error, it not being known at the date of the interim decree in 1810, or for sometime afterwards, that the full valued teind of Balgove was included in a sum paid yearly by the proprietor to the collector of bishops' rents for these and other lands, and the error was continued by a mistake of the Teind-clerk in framing the interim locality of 1830. "The effect of the mistake was either that there has been an over-payment of teind by the proprietors to the Crown as titular to the amount allocated as stipend from the teinds of Balgove, or that there has been an over-payment of stipend by the said proprietors to the same amount, the benefit of which has been derived by the Crown as titular of the teinds upon which the said portion of stipend should have fallen." The pursuer also averred that a sum of £4 Scots of vicarage teind, which had been paid for time immemorial out of the teind of Balgove to the minister of the neighbouring parish of Cameron, had not been deducted from the valued teind of the same as paid to the Crown from 1831 to 1851 inclusive.

Under these circumstances the pursuer now claimed repetition from the Crown of the various sums arising from the grounds which have been stated, and also the proportion of the Teind-clerk's account paid by the proprietors of Strathtyrum, which amounted to £153, 13s. 9d.

The whole sums concluded for were as follows:—

1. Stipend erroneously allocated on Strathtyrum, under interim locality of 1810, . .	£128	11	11¼			
Interest on annual payments composing same, from 5th April 1810 to 5th April 1860, . .	264	16	9¼			
				£393	8	8½
2. Stipend or teind erroneously paid for Balgove during currency of interim locality of 1810, .	£296	5	3¼			
Interest on annual payments composing said sum, from 5th April 1810 to 5th April 1860, .	611	2	7½			
				907	7	10¾
3. Stipend or teind erroneously paid for Balgove during currency of interim						
Carried forward,				£1300	16	7¼

	Brought forward,			£1300	16	7¼
locality of 1830 up to 1851 inclusive, .	£58	3	8			
Interest on annual payments composing said sum, from 5th April 1830 to 5th April 1860, .	53	2	3			
				111	5	11
With interest at 5 per cent. on the principal sums in 1, 2, and 3, from 5th April 1860 till payment.						
4. Vicarage teind paid to minister of Cameron, . .	£6	7	6			
Interest on annual payments composing said sum, from 5th April 1831 to 5th April 1851, .		9	2			
				9	16	8
With interest at 5 per cent. on £6, 7s. 6d., from 5th April 1851 till payment.						
5. Proportion of Teind-clerk's account, . . .				153	13	9
With interest at 5 per cent., from 16th May 1866 till payment.						
				£1575	12	11¼

The defences for the Crown were numerous. *Inter alia*, the following pleas were stated:—"(4) It is only against the under-paying heritors, and not against the Crown as titular, that the pursuer has any claim for repayment. (7) The pursuer's claim for repetition of any of the over-payments of stipend, and other payments condescended on by him, is prescribed in so far as regard payments beyond forty years."

While the case was before the Lord Ordinary the following minute was put in for the pursuer:—

"LEE, for the pursuer, stated that, without prejudice to the pursuer's pleas, and the pursuer being still uninformed what teinds are alleged not to have been received by the Crown, he was willing, before farther procedure, to sue the principal under-paying heritors for the proportion of over-payments due to the pursuer, and effeiring to the lands belonging to such heritors; and in case the said heritors should successfully establish in defence that they have paid their surplus teinds to the Crown, he craved that the present process might be sisted *in hoc statu*, to afford the pursuer an opportunity of proceeding against the under-paying heritors or their representatives."

The Lord Ordinary, on 13th June 1871, of consent, sisted process *in hoc statu*, in terms of the foresaid minute.

On 30th November 1871 the pursuer raised an action against the United College of St Andrews, and St Mary's College, St Andrews, who were said to be the principal under-paying heritors in the parish, concluding against them respectively for £271, 9s. 0¾d. and £31, 13s. 6¼d., in respect of over-payments of stipend by Mr Cheape and his trustees, with interest from 5th April 1865; and for £12, 9s. 4d. and £1, 9s., as their respective shares of the Teind-clerk's account, with interest from 16th May 1866.

On 21st June 1872 the Lord Ordinary conjoined the latter action with the former; and before answer, and under reservation of the pleas of parties, allowed the parties a proof of their averments, to be taken before himself.

The Lord Advocate reclaimed.

SOLICITOR-GENERAL and IVORY, for him, maintained that the action against the Lord Advocate should be dismissed, the under-paying heritors being the parties liable to the pursuer.

MILLAR, Q.C., and LEE, for the pursuer.

BALFOUR, for the Colleges, stated that he supported the interlocutor of the Lord Ordinary.

At advising—

LORD PRESIDENT—The first plea for the defenders is, that the pursuer's right of action is against the under-paying heritors, and not against the Crown as titular. I am not prepared to affirm this general doctrine. Until the circumstances have been investigated and ascertained, I am not prepared to dispose of the plea. If, as is alleged, the whole teinds of the parish, other than those paid to the minister as stipend, have been paid to the Crown or its tacksman, the action will be against the Crown, and that on the simple principle that the teinds which ought to have borne the burden of the stipend have come into the hands of the Crown.

The plea of prescription is very much in the same position. Before disposing of it we must know the state of the facts.

The other Judges concurred.

The Court pronounced the following interlocutor:—

Edinburgh, 10th July 1872.—"Allow the record to be amended, as now proposed by the pursuer at the bar; adhere to the said interlocutor, except in so far as the Lord Ordinary allows the parties a proof, and appoints the same to be led before his Lordship: In place thereof, remit to Roger Montgomerie, Esq., advocate, to inquire into the matters in issue between the parties in the conjoined actions, and to report, with power to him, if necessary, to take evidence; and grant diligence against witnesses and havers, and appoint the said Roger Montgomerie to be Commissioner to take the depositions of witnesses and havers, and receive their exhibits: Find the defender (reclaimer) liable in expenses since the date of the interlocutor reclaimed against, and remit," &c.

Agents for Pursuer—Mackenzie & Kermack, W.S.

Agent for Lord Advocate—Donald Beith, W.S., Solicitor H. M. Woods, &c.

Agents for United College and College of St Mary's, St Andrews—W. & J. Cook, W.S.

Tuesday, July 9.

THE BELFAST AND ULSTER BREWING COMPANY (LIMITED) *v.* WILLIAM TRIMBLE.

Partnership—Joint-Stock Company—Articles of Association.

The articles of association of a joint-stock company provided—"The directors may commence the business of the company as soon as they see fit, notwithstanding the whole of the capital may not be subscribed for or taken."