continuous custody. The true question then is—If there is here sufficient evidence that an original grant or designation of a glebe took place, and whether that right subsists? On this matter, which is one of evidence, I am satisfied of these points—

1. That there was a designation.

2. That this designation not only must be presumed to have been a special designation of so much ground, but is actually proved to have been so. There would have been no need of a commissioner to designate unless there was a special designation.

3. That possession has taken place consistently with this view. Even before the designation I think the incumbent was in possession of a special extent of land to which the formal designation was made applicable. Subsequently the possession was modified that so far there was a promiscuous grazing of the minister's sheep and those of the tenant or heritor; and latterly the arrangement was of the nature of a lease by the minister to the heritor or tenant—a commodious and natural mode of possession.

4. I think the existence of a definite designation is strongly proved by the repute of definite boundaries which continued to within the memory of man, and even to the present time, and by which the glebe was known as a special subject, with no uncertainty as to its limits, except as to the watershed on the north.

5. An idea seems to have been entertained by Lord Traquair that he had succeeded in turning the minister's right to a glebe into a mere money payment. But this view did not prevail; and ever since the commencement of the present defender's right it has been held and assumed that the money paid was a variable sum according to compact, and was, as it bore to be, of the nature of rent due by the heritor of Kirkstead to the minister.

6. The same grounds, particularly in the immediately preceding article, preclude the plea of prescription as not supported by appropriate possession as proprietor.

I concur in the course proposed.

There being a difficulty in determining the northern boundary of the glebe as held to be designed, the Court remitted to a man of skill to report thereanent; and with reference to the expenses, they allowed the defender any expenses which had been caused by the pursuer's demand for a grass glebe, and *quoad ultra* they found the pursuers entitled to expenses.

Agent for the Pursuers—John Shand, W.S.
Agent for the Defenders—John Gibson, W.S.

Friday, November 12.

SANDS *v.* AULD.

Parent and Child—Filiation and Aliment—Proof of Paternity. Circumstances which *held* sufficient (*diss.* LORD BENHOLME) to corroborate the evidence of the mother of an illegitimate child as to its paternity.

This was an appeal from the Sheriff-Court of Stirlingshire in an action of filiation and aliment. The defender was an apprentice and the pursuer a domestic servant with a Mr M'Callum, a wright, near Gargunnock. The child was born on February 6, 1867, so that the conception must have taken place shortly before the May term 1866. At that term the pursuer quitted Mr M'Callum's service and went home to her parents. She swore that the defender had had connection with her on only two occasions, both within two or three weeks of her leaving. The defender swore that he never had had connection with her at all. The only corroboration of the pursuer's oath was proof of "tousling" on one occasion in spring or summer 1865, the witness being Mr M'Callum himself; and the conduct of the defender after he was charged with the paternity of the child shortly before its birth. The Sheriff-Substitute (SCONCE) decerned in favour of the pursuer; but the Sheriff (BLACKBURN) reversed and assoilzied.

The pursuer appealed.

GUTHRIE for appellant.

BURNET for respondent.

The Court returned to the Sheriff-Substitute's judgment; Lord Benholme dissenting. The majority founded strongly on the fact that when the defender was charged orally by the pursuer's mother, and in writing by herself, with being the father of the child, he had merely denied being the father, and had not also alleged, as was said to be the proper course in such circumstances, that he never had had any connection with the mother. It appeared farther that after denying paternity the defender had written a letter to the pursuer agreeing at her request to meet her. It was thought that if the women's charge against him were not true he must have known it to be concocted, and that it was not a proper answer to such a charge to travel some miles to see the pursuer; that an innocent man in such a case would have at once repudiated the charge as concocted, and would not have dallied and fenced with the question.

The Court observed that in the Sheriff-Court it was an infringement of the statute to adjourn diets of proof, as had been done here, without stating in the interlocutor the special reason of such adjournment; and Lord Cowan said there had been too many instances of such delays having been taken advantage of for the purpose of procuring fresh evidence. Further, it was a reprehensible practice to take down the evidence of the pursuer, the leading witness, merely as concurring with a previous witness (as had been done here in regard to the incident in spring 1865). In such a case as this the precise statement sworn to ought to have been taken down.

Agent for Pursuer and Appellant—N. M. Campbell, S.S.C.

Agent for Defender—A. J. Dickson, S.S.C.

Saturday, November 13.

FIRST DIVISION.

PETITION—ALLAN, FOR AUTHORITY TO INCREASE ANNUITY.

Trust—Power to Trustees to Increase Annuity—Judicial Factor—Thellusson Act. A truster having conferred on his trustees power to increase an annuity provided to his daughter, if his funds would admit and they should think proper. Circumstances in which *held* (1) that although the judicial factor could not exercise this discretion, it was competent to the Court to do so; (2) that a case had been made out warranting an exercise of it by the Court.

Observed that the result arrived at was much facilitated by the assumed application of the Thellusson Act.

This is a petition at the instance of John Allan, solicitor, Banff, judicial factor on the trust-estate of the late John Russell, Esq. of Balmaad, craving the Court to authorise the petitioner to pay out of the trust-funds to the only child of the truster an increased annuity of £300 per annum. Mr Russell died in 1821. He was survived by his daughter Olivia Russell, who was then married to Captain Mackay, and at the date of the testator's death there were three children alive, issue of the marriage. Mr Russell left a trust-deed and settlement, which contained a declaration that the trustees (who besides were nominated executors and tutors and curators of the testator's grandchildren) should, as soon as convenient after the testator's death, sell the real estate and apply the proceeds in the manner stated in the deed. After appointing the payment of debts, &c., and an annuity to his widow, the testater provided that the trustees should pay to his daughter during her life, or until she came into possession of the trust-funds, in virtue of a succeeding clause in the deed, an annuity of £50, exclusive of the *jus mariti* of her husband, "with power to his trustees, if his funds would admit, and if they should think she has occasion for it, eventually to make some addition to such annuity, according as their own good judgment should suggest." The trust-deed then provides as follows:—"With regard to the capital itself or residue of his estate, and such interests as might accumulate thereon, after satisfaction of the several purposes aforesaid, his desire was, and he thereby ordained, that in the event of the said James Duff Mackay predeceasing his spouse, the said Olivia Russell, his trustees, within twelve months next after that event, should divest themselves of the said capital or residue, with the accumulated interest thereof, and make over the whole to her, the said Olivia Russell, but with the burden always of the annuity above mentioned to the said Elizabeth Forbes, his spouse, in case she survived him, and under this express condition, to which the said Olivia Russell should be taken bound by deed sufficient for the purpose, that the said capital or residue and accumulated interests so to be made over should be preserved for behoof of her children, whether of their present or any future marriage, and at her decease equally divided amongst her said children, share and share alike, and the heirs of their bodies respectively; whom all failing, among the six children of the testator's brother, the late James Russell, farmer in Balshangie, share and share alike, and the heirs of their bodies respectively, such heirs succeeding in both cases *secundum stirpem;* whom also failing, amongst his own nearest heirs whatsoever; it being understood and thereby expressly provided and declared, that in the case of the said Olivia Russell predeceasing her husband, the said James Duff Mackay, the trustees were to make a division of the whole funds under their charge in the same way according to which she, in the event of surviving and getting possession, would have been bound to divide the same as aforesaid, with this only difference, that in no case are her children by the said James Duff Mackay to receive any part during his life; and it being farther provided and declared that, neither in virtue of his *jus mariti*, nor as administrator-in-law for his children, is the said James Duff Mackay to have interference or concern with the trust-estate, his rights in either way being excluded, and the said funds, whether falling to his wife or children, excepted altogether from the debts and deeds of himself, as well as the diligence of his creditors."

None of the trustees accepted, and Mrs Mackay (acting as she says on the advice of eminent counsel, an opinion by the late Professor George Joseph Bell being produced to that effect), took possession of the whole estate, both heritable and moveable, and appointed her husband factor on the estate. Captain and Mrs Mackay continued to intromit with and manage the trust-funds until 1839, when they left the country for Tasmania. In 1839 Mr and Mrs Ewing (the latter being a daughter of Mrs Mackay) raised an action of reduction of the titles to the estate made up by Mrs Mackay, against her and her husband and the trustee on his sequestrated estate, he having become bankrupt in 1830. The action also contained conclusions of count and reckoning. No procedure took place under that action for some time.

Since 1840 the estate has been under judicial management, the petitioner having succeeded a number of factors in 1865. Numerous applications have recently been presented to the Court by Captain and Mrs Mackay, and Mrs Ewing and her daughters, craving alimentary allowances out of the trust-funds, and these generally have involved two questions—(1) The power of the factor, or of the Court as coming in his stead, to exercise the discretion reposed by the truster in his trustees of increasing his daughter's annuity; (2) the propriety of that being done in the circumstances of the estate. Two actions have been and still are in dependence in Court, one at the instance of Mrs Mackay against the factor, claiming arrears of annuity since 1840, and the other at the instance of the factor, calling upon her to count and reckon with him for her intromissions with the trust-funds. In the latter the Lord Ordinary (MURE) made a remit to an accountant, who has reported that under the alternative views of the remit of the Lord Ordinary, a sum of either £5793, 13s. 7d. or £1202, 18s. 7d. will be due by Mrs Mackay to the trust-estate, exclusive of interest from 1840.

The question in the present case was immediately raised by a joint petition at the instance of Mrs Mackay and Mrs Ewing, asking an increased annuity—(the annuity of £50 provided by the deed having previously been paid on an application by the factor)—of £150 to Mrs Mackay, and £150 to Mrs Ewing, or alternatively of £300 to Mrs Mackay. The Lord Ordinary (MANOR), before whom that petition depended, pronounced the following interlocutor:—"The Lord Ordinary having considered the petition, with the whole relative proceedings therein referred to, and having heard counsel for the parties, grants warrant to, authorises, and ordains John Allan, as judicial factor on the estate of the late John Russell, to make payment, out of the funds of the trust-estate under his charge, to the petitioner Mrs Mackay, of the sum of £150 sterling per annum as an increased alimentary annuity over and above and in addition to the annuity of £50, of which she is now in receipt, payable to her during her life, at the terms specified in the prayer of the petition, with interest at the rate of five per cent. during the non-payment, exclusive of the *jus mariti* of her husband, Captain James Duff Mackay, and decerns: Refuses the prayer of the petition so far as it is for a like annuity of £150 to the other petitioner, Mrs Jane

Duff Mackay or Ewing: Finds the petitioner Mrs Mackay entitled to the expenses of this application out of the funds of the said trust-estate: Allows an account thereof to be given in, and remits the same to the Auditor to tax and report.

"*Note*—The application for the increased annuity of £150 to the petitioner Mrs Mackay is one as to the granting of which the Lord Ordinary would have had no hesitation or difficulty in the state of the case had it not been for the cross action now in dependence between the judicial factor and the petitioner, the action at the factor's instance calling the petitioner to account for the intromissions of herself and her husband with the trust-estate from 1821 to 1840, and the action against the factor at the petitioner's instance being for payment of the arrears of her annuity of £50 provided to her by her father's trust-deed from 1840 to 1866; in which action it is possible, and appears probable, that a considerable balance will be brought out against the petitioner. But the difficulty arising from the dependence of these actions is completely obviated by the circumstance that Mrs Ewing and her children, who are the fiars, are consenting parties to Mrs Mackay's petition. In this way they must be held to have departed from every objection which might have been competent to them in respect of the unsettled claims against the petitioner, and considering the petitioner's great age and necessitous circumstances, and the fact that by her father's trust-deed the trustees were empowered, at their discretion, to increase the annuity thereby settled on her, there seems no reason, in the improved condition of the trust-estate, for refusing her the additional annuity which she now asks. She will be entitled to the liferent of the whole estate on the death of her husband, and he is a man of 86 years of age, she herself being 78.

"With regard to the application of her daughter, Mrs Ewing, for an annuity of £150 out of the trust-estate, the case is different. She is the fiar entitled immediately to succeed to the capital or residue of the estate on her mother's death; but in the meantime there is no provision for giving her any annuity or allowance whatever, and the Lord Ordinary does not feel himself warranted in acceding to her prayer for such annuity."

Mrs EWING reclaimed.

After some discussion the Court pronounced the following interlocutor:—"The Lords having heard counsel in this cause, suspends further consideration in the meantime, that the factor may consider the proceedings and make an application to the Court, if so advised."

The factor having been advised to respond to this suggestion made by the Court, presented an application for authority to increase the annuity of Mrs Mackay by the sum of £300. In his petition the factor set forth all the circumstances of the case, and the various procedure that has occurred in it. He called attention to the action of count and reckoning at his instance, but also, on the other hand, to the advanced age of the parties (Captain Mackay being nearly 90, and his wife 80 years of age), and their necessitous circumstances; and after stating that he considered himself not to have the power to increase the annuity, craved power to that effect. The present rental of the heritable estate was stated to be £515, 18s. 10d., and there is an accumulation of funds amounting to £6600. A minute consenting to the prayer of the petition was put in by Mrs Ewing and her daughters.

The Lord Ordinary (MURE) reported the case to the Court, in order to its being taken up with the superseded joint petition at the instance of Mrs Mackay and Mrs Ewing.

WATSON and W. A. BROWN for petitioner.

SOLICITOR-GENERAL and KEIR for Mrs Mackay.

SHAND for Mrs Ewing.

In the course of the discussion the Solicitor-General called attention to the application of the Thellusson Act to the case, maintaining that his client was entitled to the accumulations of the estate after 1842, and founding upon that as an additional reason why the prayer of the application should be granted.

At advising—

LORD PRESIDENT—This case comes before us in the shape of an application by the judicial factor, who says very properly that it is not in his own power to grant the increase of annuity, but that the Court may authorize him to exercise the discretion conferred by the truster on his trustees. It is in these terms (*reads*). Now, assuming that we are to exercise that judgment and discretion, I think we have the means of arriving at one or two practical conclusions. In the first place, there is no doubt that the trust-funds will admit of this discretion being exercised, for they have greatly increased, and there is no other object at present to which they can be applied. The second conclusion to which I think we may safely come is, that this lady has great occasion for some addition to her annuity. She has only £50 a-year, and therefore £300 would be a very desirable addition. That sum is probably more than the truster meant by the words "some addition;" but I think we may so read them. I am very much moved to this result by the suggestion, made to-day for the first time, by the Solicitor-General, which seems to me almost conclusive. The way in which the income of the trust-estate is to be disposed of under the deed is, that it is to be accumulated while Mrs Mackay and her husband live. The truster died in 1821; and, if the Thellusson Act applies, the accumulation ceased to be legal in 1842, and, if so, the income belongs to Mrs Mackay. That consideration strengthens the conclusion to which I should otherwise be disposed to come, on a construction of the deed and a consideration of the circumstances.

LORD DEAS and ARDMILLAN concurred.

LORD KINLOCH—I have arrived at the same result. It is clear that we have power to authorise, if we think it proper, an addition to this annuity. If we had been called upon to exercise this power shortly after the death of the testator, the words "some addition" would scarcely have warranted the addition of £300 to the annuity of £50. But the position of matters has entirely changed since that period; and in now forming our opinion we must look at the present condition of the trust-estate, the situation of the parties, and the whole circumstances of the case. I give no opinion on the application of the Thellusson Act, nor on any question of vesting, or other legal question. I simply say that I am satisfied that in the circumstances we are giving effect to the right and rational intention of the testator in authorising the addition now sought.

Agent for Petitioner—J. C. Baxter, S.S.C.

Agents for Mrs Mackay—H. & A. Inglis, W.S.

Agent for Mrs Ewing—Alex. Morison, S.S.C.