reason or ground in respect of which the property of persons whose death must be presumed to have occurred is disposed of, the statute in its other clauses gives rights of liferent and fee respectively to the successors of the absent party after the lapse of certain specified times. Accordingly, if a petitioner finds it necessary to appeal to the provisions of the statute to make out his right of succession, he cannot, I think, ignore the enactment of section 8, or ask the Court to ignore that section. The provision of section 8 must apply not only to the succession which has opened to the petitioner, but also to that which is said to have opened to the absent person himself through the death of another. In other words, I think a petitioner cannot at one and the same time maintain that the absent person must be held to have died many years ago so as to let in the right of his successors to his property, and yet that he was also for many years after to acquire property by succession which had been transmitted through him.

It may be that the petitioner here may make out at common law a right to this property, but it must be on the assumption that the absent person has survived the period of vesting.

Lord Deas was absent at the hearing of the case.

The Lords refused the prayer of the petition.

Counsel for Petitioners—Ure. Agents—Smith & Mason, S.S.C.

Saturday, January 21.

SECOND DIVISION.

GRIERSON *v.* SCHOOL BOARD OF SANDSTING AND AITHSTING, AND WILLIAMSON.

Property—Servitude—Cutting Peat—Prescription—Interdict.

For the prescriptive period a schoolmaster and his successors in office had cut peat on a portion of a commonty. The commonty having been divided, the heritor to whom that part of the commonty had been allocated on which the schoolmaster had been in use to cut peat, raised a process of interdict against his doing so. In respect of the long usage, interdict *refused.*

Servitude—Res sua nemini servit—*Grant of Servitude Implied from Long Exercise.*

Held (1) that though the school buildings belonged to the heritors having interest in the commonty, a servitude of cutting peat might be constituted over the commonty in favour of the schoolmaster, since the school buildings belonged to the heritors as trustees for public uses, while the commonty belonged to them for their patrimonial interest, and (2) that the inference to be derived from the usage of cutting peat for so long a period was that it was due, not to tolerance, but to right—*diss.* Lord Young, who held that the usage must be of such a character as to raise the presumption of a grant, and that from the schoolmaster's usage of cutting peat for the prescriptive period no antecedent grant of a right in favour of the schoolhouse as dominant tenement to do so could be inferred.

Andrew John Grierson, proprietor of two hundred and forty-four merks and four ures land in the scattald of Aithsting, brought this process of interdict in the Sheriff Court of Zetland at Lerwick against the School Board of Sandsting and Aithsting, and Gilbert Williamson, teacher of the school at Twatt, which had become vested in that Board under the Education Scotland Act 1872, to have the defenders interdicted "from entering upon and cutting and curing any peats in or upon the mosses on that part of the scattald of Aithsting belonging to the pursuer, and removing them therefrom, or in any way interfering with said mosses."

Aithsting was originally a commonty, but had been divided in a process of division in the Court of Session, by decree pronounced on 5th June 1878, and the above-mentioned portion had by that decree been allocated to the pursuer. Neither the School Board nor the teacher were parties to the action of division of commonty. It was admitted that since that decree Williamson had cut peats for the use of the schoolhouse on the allotment of scattald set apart for the pursuer, and that the School Board claimed a right for their teacher to cut peats there. The schoolhouse was not one which had ever formally been designed and set apart for the teacher by the heritors of the parish under the Act of 1803 (43 Geo. III. c. 54) or otherwise. It stood on land belonging to the pursuer, of which he had in 1876 granted a disposition to the School Board, he being the principal heritor in the parish.

No proof was led, but the parties by joint-minute agreed "that for the prescriptive period prior to the division of the scattald of Aithsting, which then belonged to the whole heritors of that parish, the schoolmaster of that parish cut peats on said commonty."

The Sheriff-Substitute (Rampini) being of opinion that the defenders and their predecessors had a right of servitude of peat-cutting, refused the prayer of the petition.

He added this note:—"The pecuniary interest at stake is small, but the principle involved is of some importance. The pursuer is heritable proprietor in virtue of decree of division of the Court of Session of the commonty of Aithsting dated 5th June 1878, of the subjects over which the defenders, through their teacher, claim a servitude of peat-cutting. It is admitted that for the prescriptive period prior to the decree of division the schoolmaster of the parish of Aithsting cut peats on that commonty. But it is alleged by the pursuer that the right so exercised was not a servitude. The heritors being bound, under 43 Geo. III. c. 54, to settle a school, the parish schoolmaster cut peats in virtue of the heritors' rights. He was *eadem persona* with the heritors, and could not acquire a right antagonistic to their own. The Sheriff-Substitute cannot accept this reasoning. The choice of the old parochial schoolmaster no doubt lay with the heritors and minister, but once elected he was so far independent that he held his office *ad vitam aut culpam.* Contracts have been set aside where the parochial schoolmaster agreed to hold his office at pleasure, and he exercised his office not under the superintendence of the heritors but of the presbytery. By the Act

in question, as well as by the old statutes precedent, certain obligations were laid upon the heritors to provide him with a schoolhouse and to modify to him a salary. But they had no power to interfere with him in the exercise of any of his rights, and it was as competent to him to acquire a servitude over any of their lands as it was to any other person residing in the neighbourhood.

"The servitude in question having thus been competently created, the next question is, has it been competently extinguished? It is not seriously disputed that the decree of division has not altered the position of parties. A positive servitude followed by possession is effectual against singular successors, and here there has been no break in the exercise of the right. But it is alleged that the defenders, by accepting a disposition of the site of the schoolhouse from the pursuer in 1876, must be held to have relinquished this servitude. Henceforward their rights must be those to which they are entitled under that bounding charter, and no others. But a servitude cannot be extinguished inferentially, and the case does not seem to fall under any of the modes of extinction known to the law. It is not confusion, neither is it renunciation. There has been no extinction by prescription; both tenements still exist, and no change of circumstances has ensued, rendering the servitude no longer necessary or available. The Sheriff-Substitute thinks it right to add, that the case has been debated on both sides on the assumption that no change has been made upon the position of schoolmasters *quoad hoc* by the Education Act of 1872, and that the School Board has acquired right to this servitude in virtue of its exercise by the parochial schoolmaster under the old system continued by the present teacher."

The Sheriff (Thoms) adhered, adding this note:—"It seems only necessary to add to the considerations which influenced the Sheriff-Substitute in his decision, some of which have reference to the arguments submitted in the reclaiming petition. It is there argued that the schoolmaster is a mere office-holder, and not a proprietor. In this respect he is in *pari casu* with a parish minister and both of them have votes in Parliamentary elections as proprietors. But further (Esrkine ii. 9, 5) a parish minister's right to 'pasturage, fuel, feal, divot,' &c., is spoken of and treated as a privilege or servitude, and prescription runs in favour of the benefice rather than in his favour as the proprietor or possessor of any dominant tenement. The doctrine of prescription of a glebe expounded by Lord Deas in *Panmure* v. *Halket*, 3d July 1860, 22 D. 1392, seems equally applicable to a part and pertinent of a glebe and of a school, schoolhouse, and garden, such as fuel feal, or divot. The Education Act of 1872 transfers all such rights to the School Board for their schoolmaster, and as the disposition here founded on and granted by the pursuer was to give effect to that Act's provisions, it cannot be founded on adversely to the grantees. If need be, the School Board can demand a supplementary disposition, but it is apprehended that the clauses of the existing disposition carry, under the conveyancing statutes, all parts and pertinents of the lands therein specified. The tendency of modern decision, as regards such rights, especially under the combined operation of common law and a public statute of a character beneficial to a community such as a parish, is illustrated by the case of *Smith* v. *Commissioners of Police of Denny*, in Court of Session 19th March 1879, 6 R. 28, and in the House of Lords 8th March 1880, 7 R. 28.

"As the decree of the division of the commonty was obtained in a process to which the schoolmaster was not called, it is *res inter alios acta* as regards him, and in view of the admissions in the joint minute cannot be, and has not been, founded on in this action."

The pursuer appealed.

The nature of the argument sufficiently appears from the opinions of the Judges.

The Court made avizandum.

At advising—

Lord Rutherfurd Clark — The scattald of Aithsting was till recently a commonty. It was divided by decree of division dated 5th June 1878. A part of it was assigned to the pursuer, who was one of the commoners. This is of course his exclusive property. No parties claiming any right of servitude over the commonty were called as parties to the action of division. At least the defenders in the petition were not called.

Under the petition before us the pursuer asks that the School Board and schoolmaster of the parish of Sandsting and Aithsting shall be interdicted from cutting peats on that part of the scattald which now belongs to him.

In form this is a mere possessory action, for the pursuer does not seek to have it declared that his property is free of servitude, or that the defenders have no right to the particular servitude of cutting peats. Such an action would have been competent in the Sheriff Court, by virtue of the Act 1 and 2 Vict. c. 119, sec. 15, which confers on that Court a plenary jurisdiction in all questions touching the constitution or the exercise of real or predial servitudes. The pursuer has asked nothing but an interdict.

No inquiry has been instituted, but the parties have lodged a joint minute in which it is admitted that "for the prescriptive period prior to the decree of division of the scattald of Aithsting, which then belonged to the whole heritors of that parish, the schoolmaster of that parish cut peats in the said commonty." We are not informed in the minute on what part of the commonty this use prevailed. But I understood from the bar that it comprehended, if it was not confined to, that part of the commonty which now belongs to the pursuer.

In these circumstances, it is, in my opinion, impossible to grant the interdict which is asked, or, in other words, summarily to put an end to a use which has so long existed. No reason is assigned for the pursuer's demand except the division of the commonty. But the division has no other effect than that of creating individual instead of joint rights. Subordinate rights such as servitudes are not affected by the division. Certainly they cannot be prejudiced by a decree to which the persons claiming such rights were not called as parties.

But the case was argued and judgment asked on wider grounds, and I think that we ought to decide the question which has thus been raised.

The pursuer has contended that there never was any servitude of cutting peats over the commonty, and therefore that it cannot exist over his part of it.

The first argument which the pursuer urged was, that as the alleged dominant tenement, the subjects possessed by the schoolmaster, and the alleged servient tenement, the commonty, belonged to the same persons, viz., the heritors of the parish, there could be no servitude. The principle on which this argument is based is the maxim *res sua nemini servit*, and there can be no doubt of the principle if it is applicable to this case. But, in my opinion, there is no identity of estates. The school buildings belong to the heritors, but not in the same sense that the commonty belonged to them. In the one case they are mere trustees for public use. In the other they are *pro indiviso* owners for their own patrimonial benefit. Hence, in my opinion, the argument of the pursuer necessarily fails.

2. Again, it is said that the use which has existed is to be attributed to mere tolerance. But I would rather draw the inference that it was due to right. A long continued and uninterrupted use is, I think, to be presumed to be in the exercise of a right, unless there is something either in its origin or otherwise to shew that it must be ascribed to tolerance. The pursuer cannot appeal to any circumstance which can construe the use into a mere tolerance. There is no fact in the case but the use only. It is said that it is not unlikely that the heritors were willing that the successive schoolmasters should have permission to cut peats as a favour. But it seems to be just as probable, if not more probable, that it was an addition to the benefice, and that the usage is the evidence of a grant, or, in other words, was of right and not of tolerance.

3. The servitude of taking peats is a well known servitude. I see no difficulty in holding that such a servitude can be acquired for the school-buildings as a dominant tenement. Indeed, none was suggested other than the two to which I have already adverted.

I have only to add that there is here no question as to the extent or as to the regulation of the servitude. We can only determine whether it does or does not exist.

Lord Craighill—I concur in the opinion of Lord Rutherfurd Clark.

Lord Young—I also concur in thinking that this application for interdict ought to be refused; but it is not according to my opinion that we are in a position to declare the existence of a right of servitude. It is, however, probably sufficient to say that we are not called on to decide that question in order to dispose of this appeal. We have here only a summary application for interdict. The petitioner set out in statement 8 of his condescendence:—"The defender Williamson, who is teacher at Twatt school under the foresaid School Board, has since the date of the said decree of division cut peats for said schoolhouse on the allotment of scattald set apart for the pursuer." There is no doubt that the petitioner is proprietor of the ground, and he asks that Williamson and the School Board shall be interdicted from cutting peats on his ground. His only material statement is that Williamson is in the habit of cutting peats there. The case did not go to trial on that question, for the parties were content with the joint minute before us, in which they state that "for the prescriptive period prior to the decree of division of the scattald of Aithsting, which then belonged to the whole heritors of that parish, the schoolmaster of that parish cut peats in said commonty." Now, in a summary application to the Sheriff for interdict it is the reverse of a reason for interdict that the person complained of has for forty years been doing the thing of which the complaint is made. The rule is, "Continue the present position of affairs till the parties' rights are ascertained;" and where a party complaining admits that that of which he complains is not of recent origin, but has continued for forty years, he is put out of court on his own showing.

Though I think that that is a conclusive reason for dismissing this petition, I cannot concur in the view that the parish schoolmaster having for forty years cut peats, the legal conclusion is a servitude in favour of the house in which he lives. A servitude is not constituted by use for forty years, or even for 100 years.

A right of servitude requires a grant. It may be a direct grant, or it may be implied on sufficient grounds. But it is by grant alone of the proprietor of the servient tenement that it is created, though that grant be implied from usage, that is, possession. If that is proved or admitted to have existed for forty years, it is reasonable to presume that it was authorised, and a Court or jury may therefore presume a grant as the origin or foundation of the use or possession which has been proved. But it is not the law that use for any period will constitute the right, and in many cases which in former times were sent to a jury the issue was not put whether there had been use or possession for forty years, but whether the servitude had existed for forty years. It was the same with a right of public road, the question being whether the right of public road had existed during forty years, that not being a question of law but a question as to the existence of a state of facts which the jury could presume to have existed as matter of right.

Here the heritors provided a residence for the schoolmaster and allowed him to cut peats. I could not conclude in law from that that therefore a servitude was created over the commonty in favour of that particular residence in which the schoolmaster lived. The statement is—the heritors provided their schoolmaster with a residence and allowed him to cut peats—and the conclusion desired to be drawn is, therefore a servitude was constituted. I cannot assent to that. I may very well allow my parish minister to cut peats in my peat moss, but the conclusion from my admission that he has done so would not be to establish a servitude in favour of the manse. Manses have passed from parish ministers to priests, and a parish church might pass into the possession of the Roman Catholics. The house in which schoolmaster or minister has resided might pass to an occupant of a totally different class, and permission to one occupant of it who happens to hold a particular public portion or office would not be a safe ground for concluding that a servitude had been created in favour of the tenement itself in which he resided. I do not know that this case discloses even a dominant tenement. The state of the title is not clear. Nor is the extent of the use shown. But it was explained to us in the end of the discussion that the servitude was claimed for the whole school-

buildings. I do not know on what footing either schoolmaster's house or school stood. If the heritors did not provide a house for the schoolmaster, they might be compelled to do so. If they did do so, they might at any time take it away and provide another. Here there seems to have been, so far as I can find, no schoolmaster's house, designed under the Act of 1803 or otherwise. The contrary is to be inferred from the fact that the School Board did not take over the house in which the schoolmaster lived. We have no information as to the footing on which the schoolmaster lived in it. The heritors were only bound to provide a residence, and they seem to have so far satisfied the obligation. So in some Highland parishes there are no manses, though the heritors might be compelled by the minister and presbytery having charge of the interests of the benefice to provide one if they were not satisfied. Thus the minister in such parishes lives in a farmhouse, and no manse and glebe are designed for him. In many parishes the schoolmaster is in just the same position; he is provided with a residence, as apparently here, though none has been designed to him by law. Hence there is this additional difficulty in the way of our affirming in the present appeal that a right of servitude exists.

While, therefore, I entirely agree with your Lordships in refusing interdict, I have thought it right to explain my views on the more important matter, which I understand your Lordships are prepared to decide.

The Lord Justice-Clerk was absent, but Lord Rutherfurd Clark intimated that his Lordship had perused and concurred in the opinion delivered by him.

The Court affirmed the judgment of the Sheriff and refused the prayer of the petition.

Counsel for Pursuer (Appellant) — Solicitor-General (Asher, Q.C.)—A. J. Young. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for Defender (Respondent)—Mackintosh—Low. Agent—C. S. Taylor, S.S.C.

Thursday, January 26.

FIRST DIVISION.

SPECIAL CASE—DUNCAN AND ANOTHER (BOGIE'S TRUSTEES) AND OTHERS.

Succession—Division per capita *or* per stirpes—"*Between*" *or Among*—Conditio si sine liberis—*Presumption.*

A testatrix left her whole estate, heritable and moveable, to trustees, with directions "to divide the whole equally between the children of my late brother W. and the children of my late sister M." To the children of another brother D., also deceased, she left nothing. *Held* (1) that the division fell to be made *per capita* and not *per stirpes*; and (2) that although D.'s children had been omitted, that did not prevent the truster from placing herself by the terms of her deed *in loco parentis* to the children of her other brother and sister, and that since she had done so, the children of a deceased daughter of the testatrix's sister M. were entitled to succeed to the share which would have fallen to their mother had she survived the testatrix.

Mrs Janet Carstairs or Bogie died on 9th February 1881, aged eighty-three, leaving a holograph disposition and settlement, dated 15th January 1875, in these terms—"I, Mrs Janet Carstairs or Bogie, in order to regulate the management and distribution of my means and estate after my decease, do hereby give, grant, and dispone, assigne and convey, to and in favour of William Duncan, Esqr., town-clerk of Cupar, and James Mitchell, Esqr., my nephew, as trustees for the uses and purposes after mentioned, all my heritable and moveable estate of whatever kind or denomination, and to divide the whole equally between the three children of my late brother William Carstairs and the children of my late sister Margaret, otherwise Mrs Capt. Mitchell; and I appoint my trustees executors; my trustees shall, from the produce of my means or estate, pay all my just and lawful debts, death-bed and funeral expenses, together with such legacies as I may leave or bequeath by any writing under my hand. Janet Carstairs or Bogie. Cupar, West-Port House, January 15th 1875."

Mrs Bogie left no heritable estate. The total amount of her personal estate was over £7389. At the time of her death she was a widow, having been three times married, but having had no family by any of her marriages. Her next-of-kin were—(1) the children of her deceased brother David Carstairs, who took no interest under the above settlement, (2) the children of her deceased brother William Carstairs, (3) the children of her deceased sister Margaret Carstairs or Mitchell, and (4) the issue of a deceased daughter of Margaret Carstairs or Mitchell, named Mrs Duncan, who died on 14th January 1878.

The parties to this Special Case were—(1) Mrs Bogie's trustees and executors under her said will, (2) the children of William Carstairs, (3) the children of Margaret Carstairs or Mitchell, and (4) the children of the deceased Mrs Duncan.

The questions of law for the opinion of the Court were as follows:—"(1) Upon a sound construction of the settlement of the said Mrs Janet Carstairs or Bogie, do the shares of residue provided to the children of William Carstairs and the children of Margaret Carstairs or Mitchell fall to be reckoned *per capita* or *per stirpes?* (2) Are the parties of the fourth part entitled to the share which would have fallen to their mother Mrs Duncan if she had survived the testatrix?"

It was argued for the second parties, William Carstairs' children—(1) The division of the residue here should be *per capita*. The word "between" was often used in ordinary language as equivalent to "among," and the two words had been considered as interchangeable terms in repeated decisions, both Scotch and English—*M'Kenzie* v. *Holt*, 1781, M. 6602; *Grant* v. *Fyffe*, May 22, 1810, F.C.; *M'Courtie* v. *Blackie*, January 15, 1812, Hume 270; *Pitcairn* v. *Thomson*, June 8, 1853, 15 D. 741; *Laing's Trustees* v. *Sanson*, November 18, 1879, 7 R. 244; *Abrey* v. *Newman*, 1853, 16 Beavan 432; and *Barnes* v. *Patch*, 8 Vesey 604, there cited; 2 Jarman on Wills, 196; 2 Williams on Executors, 1519. (2) Mrs Duncan's children were entitled to no share of this residue.