

The other Judges concurred without any further observations, and the following interlocutor was pronounced:—

“Recall the interlocutor of the Lord Ordinary submitted to review, assoilzie the defenders from the whole conclusions of the summons, and decern; find the defenders entitled to expenses, and remit to the Auditor to tax the same and to report.”

Counsel for Pursuer and Respondent—Solicitor-General (Clark) Q.C., and Duncan. Agents—Tait & Crichton, W.S.

Counsel for Defender and Reclaimer—Watson & Muirhead. Agent—A. Stevenson, W.S.

R., Clerk.

Tuesday, June 24.

## SECOND DIVISION.

[Lord Ormidale, Ordinary.]

M'WILLIAM v. RONEY.

*Annuity—Intention—Term of payment.*

Where an annuity was left in the following terms:—“to my servant, Mary Roney or Rennie, who has served me long, faithfully, and well, an annuity of £30 sterling, to be secured to her by purchasing the said annuity from Government, or from some respectable insurance office, in the discretion of the said Robert M'William and James M'William, and to be payable half-yearly, and also to pay to her £10 for mournings, and as a provision till the first half-year's annuity shall be received by her.” Held that the annuitant was entitled to the annuity *a morte testatoris*.

The question in dispute in this suit was whether the pursuer was entitled to an annuity left her by her master *a morte testatoris*, and it arose under the following circumstances. The late John M'William, solicitor at Stranraer, died on 16th November 1870. The following clause occurred in his will—“to my servant, Mary Roney or Rennie, who has served me long, faithfully, and well, an annuity of £30 sterling, to be secured to her by purchasing the said annuity from Government, or from some respectable insurance office, in the discretion of the said Robert M'William and James M'William, and to be payable half-yearly, and also to pay to her £10 for mournings, and as a provision till the first half-year's annuity shall be received by her.” The defenders, the executors of the testator, averred that they had made payment to the pursuer of the sum of £10 referred to in the bequest in her favour, and that on 4th July 1871 they purchased a Government annuity in the pursuer's name of £30, payable half-yearly. The price was £410, 5s. 11d. It began to run from 5th April 1871, and the first half-year became due in October 1871. In addition, before the action was raised they made her an offer of £12, 10s., being amount of the annuity from 18th May 1871 to 5th October 1871.

The Lord Ordinary pronounced the following interlocutor:—

“Edinburgh, 30th January 1873.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, decerns and ordains the defenders, on obtaining from the pursuer the requisite discharge, to deliver to her the

document constituting the Government annuity in her favour, No. 10 of process; as also to make payment to the pursuer of the sum of £11, 13s. 5d., being the amount of the annuity to which she was entitled for the period from the 14th of November 1870, when the testator died, to the 5th of April 1871, when said Government annuity commenced to run, with interest thereof at the rate of 5 per cent. per annum from said 5th of April 1871 till paid; Finds the pursuer entitled to expenses,—reserving the question whether there should be any and what modification, until the auditor's report has been seen; allows an account of these expenses to be lodged, and remits it when lodged to the auditor to tax and report.

“Note.—The Lord Ordinary has felt this case to be one of some nicety and difficulty, and he is not surprised that the defenders should have hesitated to comply with the pursuer's demands without judicial authority. He cannot doubt that they have acted throughout in good faith.

“The disputed question is, whether the pursuer was, under the disposition and settlement of her late master Mr M'William, entitled to the annuity of £30 left to her by him, *a morte testatoris*, that is to say, from the 14th of November 1870, or whether it was to commence only nearly half a year thereafter.

“The will of the testator contains no express direction on this point; but from the nature and object of the bequest, as well as the description of the recipient, the Lord Ordinary thinks it must be held to have been his intention that the annuity should commence to run as from his death. The additional bequest of ‘£10 for mournings, and as a provision till the first half-year's annuity shall be received by her,’ was most probably meant as something to keep her in the meantime from actual want, and so may be fairly considered as leading towards the conclusion at which the Lord Ordinary has arrived, rather than otherwise.

“The Lord Ordinary is not aware of any Scotch precedent exactly in point. In the case, however, of *Cruickshank v. Sandeman*, Feb. 16, 1842, 5 D. 643, Lord Jeffrey observed, in regard to an annuity not expressly fixed as to the date of its commencement, that the granter of it was to be held to have given it ‘from the time the breath left his body.’ And in England it seems to be a settled rule that an annuity given by will commences immediately after the testator's death (2 Williams on Executors, 1288, and Roper on Legacies, vol. i, 872, and vol. ii, 1245 and 1344). In the case also of *Houghton v. Franklin* (1 Sim. and Stu. p. 390), it was decided that an annuity given by will, with a direction that it should be paid monthly, the first payment must be made at the end of a month after the testator's death—the Vice-Chancellor (Sir John Leach) remarking, that ‘as a will speaks at the death of a testator, it must be intended that the payment of an annual sum given by it is to commence from that period, unless there be some circumstances or expression in the will to control that intention.’

“It appears that in the present case the defenders have secured for the pursuer a Government life annuity, commencing as from the 5th of April 1871, which it was stated by her counsel at the debate she was willing to accept, provided she also got payment of an equivalent in money, being £11, 13s. 5d. for the prior period; and for this sum, besides delivery of the document constituting

the Government annuity, the Lord Ordinary has given decree, in accordance with the principle of decision of this Court in the recent case of *Kippen v. Kippen's Trs.*, Nov. 24, 1871, 10 Macph. p. 134.

"Any objection that could be taken by the defenders to the right and title of the pursuer in respect of the partial assignation, No. 20 of process, to her annuity, has been obviated and removed by the retrocession, No. 21 of process. And the offer referred to in the sixth article of the defenders' statement of facts being applicable, not to the period from the 14th of November 1870, when the testator died, to the 5th of April 1871 thereafter, when the Government annuity commences, but to the period from 15th May to 5th October 1871, cannot be held to affect the dispute between the parties as is has now been determined."

The defenders reclaimed.

The Court adhered.

Counsel for Pursuers—Reid and Burnet. Agents—J. & J. Milligan, W.S.

Counsel for Defenders—Solicitor-General (Clark) and Asher. Agent—R. M'William, S.S.C.

I., Clerk.

Tuesday, June 24.

## SECOND DIVISION.

[Lord Shand, Ordinary.]

### DOBIE V. LAUDER'S TRUSTEES.

*Proof—Recompense—Reparation.*

Where a party alleged that on the faith of a certain arrangement she had expended sums of money in taking and furnishing a house—held (1) that parole evidence was competent, the claim being one for actual loss sustained; and (2) that the pursuer was entitled to be reimbursed for her expenditure.

This case came up by reclaiming note against an interlocutor of the Lord Ordinary (SHAND). In a note his Lordship fully sets forth the facts of the case and the reasons of his judgment.

"*Edinburgh, 6th January 1873.*—The Lord Ordinary having considered the cause, Finds that the pursuer's claims of £45 and £3, 2s. 11d. are not disputed, and therefore finds the defenders liable to the pursuer in these sums, and grants warrant to the pursuer to uplift the sum of £48, 2s. 11d., consigned by the defenders in the City of Glasgow Bank on 23d October 1872, with the bank interest which has accrued thereon, but finds no further interest due; ordains the City of Glasgow Bank to make payment to the pursuer of the said sum and interest; and grants warrant to the Accountant of Court to deliver up the deposit-receipt to the pursuer, in order that such payment may be made to her, and decerns; further, finds that in or about the month of March 1870 the defenders arranged and agreed with the pursuer that the children of the late James Lauder, then in minority or in pupilarity respectively, other than his eldest daughter, should, at or before Whitsunday 1870, reside in family with the pursuer, and be boarded by her at the rate of £60 per annum respectively, until, in the case of sons, they should attain to twenty-one years of age, and in the case of a daughter, Agnes Lauder, until she should attain that age or be married; and that to enable the pursuer

to receive the children under this arrangement, it was stipulated by the defenders, and agreed to, that the pursuer should take a suitable house for their accommodation: and it was further agreed that to enable her to furnish the house she should have the use of the late Mr Lauder's furniture, situated in the house in Lutton Place, formerly occupied by him, and after his death by his family: Finds that, in reliance on this arrangement, and in order to enable her to perform her part thereof, the pursuer, with the knowledge and approval of the defenders, took a lease for a period of seven years of a house in Frederick Street, having the requisite accommodation, and that the furniture above mentioned was removed to it about the end of April 1870, at which date the children of the late Mr Lauder, under the said arrangement, went to reside there with the pursuer; and the pursuer incurred considerable expense in supplying a variety of articles of furniture required for the said house, beyond the furniture taken from Lutton Place: Finds that the stipulated board of £60 was paid for said children, four in number, till 25th April 1871, when Alexander Lauder, the eldest son, with the pursuer's consent, ceased to reside with her, and for the remaining three children's board (including the sum of £45, above found due) has been paid down to 25th October 1871: Finds that the defenders, though called on to do so, have declined to pay board for the children thereafter, or to proceed further in carrying out or implementing the said arrangement: Finds that this declination on their part has been caused, not by any failure on the pursuer's part to fulfil her part of the said arrangement, or of any conduct on her part to justify it, but because of her refusal to continue to board the children on different and more favourable terms for the defenders than those agreed to between her and the defenders as aforesaid; Finds that, in consequence of the defenders' declination to carry out the said arrangement, the pursuer has sustained loss to the extent of £50, in respect of outlays made by her on account of rent, taxes, and rates for said house down to April or May 1872, when she was relieved of her liability therefor, and on account of furniture provided by her for said house, to enable her to fulfil her part of said arrangement, and which she was obliged to sell at a sacrifice: Finds, in law, that the defenders are liable to reimburse the pursuer in said loss so sustained by her; therefore decerns against the defenders for said sum of £50: Finds the pursuer entitled to expenses, of which allows an account to be given in, and remits the same when lodged to the Auditor to tax and report, and decerns.

"*Note*—The present action concludes, (1) For payment of a sum of £45, on account of board of certain of the children of the late James Lauder, and £3, 2s. 11d. for outlays made by the pursuer on account of the children; and (2) For a sum of £100, in name of damages. From the correspondence which took place between the agents of the parties before the action was raised, it appears that the claim for board was for a time disputed, but in December 1871 the defenders' agent intimated that his clients would pay the sum claimed on that account, and the small accounts for outlay, if correct; and in the 13th and 14th answers to the condensation, the sums sued for on this account were admitted and consigned. This unfortunate litigation has thus arisen entirely with reference to the pursuer's claim of damages.