

prove both the mandate and the disbursement if he can.

The Court allowed the amendments upon condition of the pursuers paying expenses, and afterwards, upon evidence being produced that the expenses had been paid, of new closed the record, and remitted to the Lord Ordinary to allow the parties a proof of their respective averments.

Counsel for Pursuers and Reclaimers—Dickson—Crabb Watt. Agents—Miller & Murray, S.S.C.

Counsel for Defender and Respondent—H. Johnston—Dewar. Agent—William White, S.S.C.

Tuesday, June 28.

FIRST DIVISION.

BOWERS, PETITIONER.

Curator Bonis—Annuity out of Lunatic Ward's Estate—Amount Fixed by Ward—Petition by Beneficiaries for Increase of Amount—Nobile Officium.

Where a voluntary annuity, of an amount fixed by a lunatic before being placed under curatory, is being paid out of his estate, the Court will not authorise its increase because of the greater exigencies or altered circumstances of the beneficiary.

Upon 8th March 1892 Miss Jane Elizabeth Bowers and Miss Euphemia Douglas, aged respectively sixty-two and fifty-seven, presented a petition to the Junior Lord Ordinary, in which they explained that they were the only or nearest relatives of Mrs Pringle Pattison, their first cousin, who had been under curatory since 26th July 1888; that for many years before that date they had received an annuity from her of £30; that that annuity had been continued to them out of her estate with the sanction of the Court; that in their declining years they were more in need of support than ever; that they felt their present annuity insufficient for their necessities; and that a small increase would be inappreciable as regarded the ward's income. They accordingly prayed the Court to authorise the *curator bonis* (Mr J. A. Molleson) to increase the annuity to £50 per annum.

The Lord Ordinary remitted to the Accountant of Court to report as to the powers craved, who reported that the ward's gross annual income exceeded £4000, and that there was a free annual surplus from the ward's estate of £341 after paying all expenses, including the annuity of £30; that he was not aware of any case where an annuity formerly paid by a ward had been increased by the Court, but that he knew of nothing to prevent the same being done if the Court were satisfied as to the expediency of it.

The Lord Ordinary (Low) on 14th April

1892 reported the petition to the First Division, with the following note:—"I know of no authority for increasing an annuity under such circumstances as those which are disclosed in this case, and I doubt if I have the power to do so. As the question is one of novelty, and as there seems to be no doubt as to the necessitous circumstances of the petitioners, I have thought it best to report the case."

It was argued for the petitioners that their request was reasonable, and that there was no legal impediment to complying with it. In *Gardner's* case, November 28, 1882, 20 S.L.R. 165, and in this case at a former stage, authority to continue an annuity had been granted. In *Balfour's* case, January 26, 1889, 26 S.L.R. 268, the petition, which was refused, was to pay an annuity for the first time. The ward here had in 1871 herself been a party to the increase of the annuity from £24 to £30, and would doubtless now have further increased the amount.

The *curator bonis* was represented by counsel, but did not oppose the petition.

At advising—

LORD PRESIDENT—I do not think that we are entitled to authorise the Lord Ordinary to grant the prayer of this petition. The duty of the Court in relation to the estate of a ward is that of conservation. No doubt there have been cases, and this is one, in which the Court has regarded the payment of an annuity which the ward himself has paid as part of the expenditure authorised by the ward, but it appears to me to be a long step to take to increase an allowance, the amount of which the ward himself has settled, because of an alleged increase in the exigencies of the donee or owing to a change of circumstances. It is admitted that there is no reported instance of the Court having authorised an expenditure of this sort, and there is certainly no example of a fresh act of benevolence even where the circumstances were most clamant. It appears to me that it would be a bad precedent were we to grant this application.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court refused the prayer of the petition.

Counsel for Petitioners—Wm Campbell. Agent—Andrew Clark, Solicitor.

Counsel for *Curator Bonis*—C. K. Mackenzie. Agents—Strathern & Blair, W.S.

Wednesday, June 29.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

LUCAS' TRUSTEES v. SCOTT.

Trust—Title to Sue—Inter vivos Deed of Trust—Liability of Trustees to Account to Creditors of the Trust for Intromissions with the Trust-Estate.

A truster executed an *inter vivos* deed of trust, by which he conveyed certain property to trustees for, *inter alia*, the following purpose—“(Second) In payment of the sums which might be borrowed by the trustees upon the security of the trust-estate, and the interest which should accrue thereon.”

Held (rev. Lord Kincairney) that the creditors in a bond and disposition in security over the trust-estate were not entitled, by reason of the said second purpose, to sue an action of count, reckoning, and payment against the trustees for their intromissions with the trust-estate.

Case of Bon-Accord Company v. Souter's Trustees, June 13, 1850, 12 D. 1010, and December 11, 1850, 13 D. 295, *relied upon* by Lord Ordinary, and *distinguished* in the Inner House.

The late Sir George de la Poer Beresford, Bart., executed an *inter vivos* deed of direction and declarator of trust, dated 9th November 1870 and recorded 16th April 1881, by which he conveyed “the quarries, lands, and estate of Ballachulish in favour of the said Edward Averil Lucas, Charles Davis Lucas, Admiral Lucas, and Lady Beresford, and the acceptors and survivors, and acceptor and survivor, and such other persons as might be assumed into the trust, for the purposes following—(First) For payment of the expense of executing the trust-deed, and of managing and executing the trust; (second) in payment of the sums which might be borrowed by the trustees upon the security of the estate, and the interest which should accrue thereon.” . . .

In 1873 the estate was conveyed to the said trustees, who in 1879 assumed Mrs Drummond, the only child of Sir George and Lady Beresford, and the fiar of the trust-estate, to be a trustee along with them, and Admiral Lucas thereafter resigned the office of trustee. By deed of assumption, dated 26th December 1882, Ebenezer Erskine Scott, C.A., and Thomas Bennet Clark, C.A., were assumed trustees. Upon the same date the trustees, who assumed Mr Scott, resigned, and Mr Scott immediately entered upon possession and management of the trust-estate.

Sir George Beresford's trustees granted a bond and disposition in security for £10,000, dated 27th and 31st March and 8th April, and recorded 30th April 1879, in favour of the said Admiral Lucas, his heirs, executors, or assignees whomsoever, and this bond and disposition in security was

in the same year by deed of assignation assigned to Admiral Lucas' marriage-contract trustees. They called up the sum in their bond and disposition in security upon 22nd November 1889, and in December 1891 they brought an action of count, reckoning, and payment against the said Ebenezer Erskine Scott and Thomas Bennet Clark, the acting trustees under Sir George Beresford's trust, to have them decerned and ordained to exhibit and produce a full and particular account of their whole intromissions as trustees under the said deed of direction and declarator of trust, whereby the true balance due by them to the pursuers might appear and be ascertained.

The defenders pleaded, *inter alia*—“(1) The pursuers have no title to sue.”

Upon 28th March 1892 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—“Having considered the cause, Repels the first plea-in-law for the defenders, and before further answer, and under reservation of the whole other pleas of the parties, appoints the defenders to produce an account of their intromissions as trustee or trustees under the deed of direction and declaration of trust libelled, with the vouchers thereof, by the third sederunt day of the ensuing session: Grants leave to reclaim.

“*Note.*— . . . The pursuers sue simply as creditors under their bond and disposition in security, and the motion made on their behalf was that the trustees should be ordered to produce the trust accounts. In support of their title to sue they referred to *The Bon-Accord Company v. Souter's Trustees*, June 13, 1850, 12 D. 1010, and December 11, 1850, 13 D. 295, and to *M'Laren on Wills*, ii. 499. The defenders did not, I think, refer to any authority in support of their plea against the pursuers' title. The case seems somewhat unusual, seeing that the pursuers are merely postponed heritable creditors, with a somewhat remote prospect of ultimate benefit, whether they make out their objections or not. But in the face of the authorities quoted by the pursuers, I am not prepared to sustain the plea against their title. I think that without the trustees' accounts I am not in a position to dispose safely of any of the other pleas.”

The defenders reclaimed.

At advising—

LORD PRESIDENT—This is an action of count, reckoning, and payment directed against the trustees under a deed of trust. The defenders plead that the pursuers have no title to sue, but the Lord Ordinary has repelled that plea, and he rests his judgment on the case mentioned in his note. The action is by creditors of these trustees, and they found their right to call the trustees to account upon the provision contained in the second purpose of the trust-deed, and claim that they are entitled to enforce that provision. By that provision the trustees are directed to apply the produce of the trust-estate in payment of the sums which may be borrowed by