Tuesday, November 28.

OUTER HOUSE

[Lord Kinnear, Junior Lord Ordinary.

GARDNER, PETITIONER.

Nobile Officium—Curator Bonis—*Special Powers—Payment by Curator where Ward not Legally Liable.*

Circumstances in which the Lord Ordinary allowed a *curator bonis* to a lunatic, who was possessed of a considerable estate above what was necessary for his maintenance, to continue payment to a near relative of the ward who was in destitution, but had no legal claim against him, of an annual sum previously allowed by the ward.

This note was presented by Peter Gardner, W.S., as *curator bonis* to Robert Paterson, a lunatic, and its purpose was to obtain the direction of the Court in the exercise of its *nobile officium* as to whether the curator was entitled to continue payment to Mrs Christy, a half sister of the ward, of an annuity of £200 which the ward had been in the habit of paying to her before he became insane. As the ward was not legally bound to make this payment, the curator did not feel entitled to continue the payment without authority of the Court. The circumstances were thus detailed by the Accountant of Court in the following passage of a report upon the position of the curatory made by him to the Court:—"Mrs Elisa Mackay or Christy is a daughter of the ward's mother by a former marriage, and is about 79 years of age. Since 1877 the ward had been in the habit of paying to her an annuity of £200, and in a letter to her, dated 18th October 1877, intimating a remittance to her of £100, he states:—'I will continue to send you £100 each half-year, at the terms of Whitsunday and Martinmas, so that you can calculate on receiving £200 per annum from me.' In a memorandum by him, dated 26th October 1877, produced, he states:—'Your next remittance will be sent off at Whitsunday, say 20th May, and will be followed up by a remittance every half-year term, as advised in my former letter.' It is thus clear that it was the ward's intention to continue to pay to Mrs Christy an annuity of £200, but the documents produced do not constitute a legal obligation on the factor to carry out the ward's intention without special powers from the Court. The ward is unmarried, and has no near relations. The Accountant reports the circumstances to the Court, with the remark, that should the Court see cause to grant the special powers craved, the surplus income of the ward is amply sufficient for the purpose." The ward's estate, as reported by the Accountant and set forth in the note, consisted of heritable subjects in Glasgow which were let at £2662, and of other heritage worth £600, but unlet at the date of the application. This heritage was not burdened with debt. The expenses of taxes, repairs, management, &c., amounted to £400. The clear income of the estate, deducting this sum and the interest on an overdraft which the ward had from a bank, was £2052. From this had to be deducted the expenses of the ward's board, with an allowance for his clothing, which together amounted to £340. There was thus a large amount of surplus income.

Mrs Christy, besides being far advanced in years, was stated in the note to be in delicate health. She was a widow, and it was stated that none of her children, of whom she had several, were in a position to render her any assistance.

The factor in these circumstances craved powers to continue the annuity, or to allow Mrs Christy such other annuity as should seem fit.

LORD KINNEAR (Junior Lord Ordinary) on 28th November 1882 granted special powers as craved, and authorised the curator to pay to Mrs Christy an annuity of £200 as the ward had previously done.

Counsel for Curator—Mitchell. Agent—F. J. Martin, W.S.

Tuesday, November 28.

SECOND DIVISION.

[Sheriff of Dumbartonshire.

GLEN *v.* ROY.

Landlord and Tenant—Previous Possession—Presumptio juris—Onus probandi.

In an action of maills and duties at the instance of a heritable creditor against R., as tenant and occupant of the subjects of the security, the defender averred that he was not a tenant, but that he had held the subjects from the debtor, his father, as compensation for certain advances made to him. *Held*, on a proof, that the presumption being that the defender was a tenant, he had not discharged the *onus* of showing that he did not possess the subjects in that character.

Husband and Wife—Possession of Wife qua *Liferentrix under* Mortis causa *Settlement—Effect of Repudiation of Settlement on Title of Possession.*

By his father's settlement R.'s wife was made liferentrix of a house. The father's estate was insufficient to pay his debts, and in consequence R. and his wife repudiated it. *Held* (*dub.* Lord Rutherfurd Clark) that the repudiation barred the plea on the part of R., who had occupied the house before and after his father's death, that he was not liable for rent after his father's death in respect his wife's possession as liferentrix extinguished any obligation to pay rent under which he might previously have been.

William Roy, grocer and feuar at Garelochhead, in the county of Dumbarton, died in February 1877. He was at the time of his death proprietor of certain heritable subjects situated at Garelochhead known as Victory House, Cairphilly House, and Lilybank Cottage. He left a disposition and settlement dated in June 1876, by the first purpose of which he conveyed to his daughter-in-law Joanna Murray or Roy, wife of his son William Roy, one of the defenders of this action, that portion of his heritable estate known as Cairphilly House and offices, with furniture, plate, &c., therein, in liferent, with the fee to their

children. Lilybank House he conveyed in like manner to another married daughter and her children. To his widow he conveyed Victory House, with furniture, &c., in fee, binding his other disponees to free and relieve her of any burdens that might affect it at the time of his death, in order that she might obtain the same disencumbered of debt. He also left to her a policy of insurance on his own life and the residue of his estate, heritable and moveable, real and personal, but excluding the *jus mariti*, courtesy, right of administration, and every other right of the husbands of her and of his other female disponees. He further appointed her his sole executrix as regarded both heritable and moveable estate, with power to make up titles thereto and to convey to the disponees named in his settlement, for which purpose his disposition and settlement was to be held to be a disposition to her of all his means and estate, heritable and moveable, in trust, with which object she was to have all the powers and privileges conferred on gratuitous trustees. After his death his widow made up a title by notarial instrument to the whole heritable subjects as general disponee in trust.

At the time of Roy's death the heritable subjects above mentioned were burdened with two bonds, both dated 11th and recorded 21st May 1862, each for the sum of £450, one in favour of Alexander Brownlie, baker in Pollokshaws, and the other in favour of his son William Roy, each of which contained a disposition in security of the said subjects to the respective lenders. The former of these two bonds, after some intermediate transmissions, was finally acquired by assignation from the last previous holder by the pursuer in the present action, James Glen, solicitor in Greenock.

In the beginning of 1881 Victoria House was burned down. It had been insured with its contents for £450, and the policy had been conveyed by the pursuer's author (by whom it had effected as heritable creditor *primo loco*) to the pursuer, who obtained £313 in respect of the loss.

In 1881 Mrs Morrison, another daughter of the deceased, who was not mentioned in the settlement, attempted to reduce it by action in the Sheriff Court at Dumbarton, in which she was unsuccessful. To this action William Roy junior was a party. In the course of the same year the pursuer and Mrs Roy, the executrix, had obtained in the Court of Session, against William Roy, a decree of declarator and removal from Cairphilly House, which he was then occupying, as after mentioned. Glen then raised the present action of maills and duties in the Sheriff Court against Mrs Roy, the widow of the deceased William Roy, as general disponee and proprietrix in trust of the said subjects, and against William Roy junior and other three defenders, as tenants or occupants of the subjects conveyed in the bond and disposition in security to which he had acquired right, concluding against the defenders, other than the widow, for certain sums in name of rent and arrears of rent. In particular, William Roy was sued as tenant or occupant of Cairphilly House. Pursuer alleged that no interest had been paid on the bond since Martinmas 1880.

William Roy alone defended the action.

Before the record was closed the pursuer had acquired an *ex facie* valid title to the second bond above mentioned—that in favour of the defender—in the manner narrated in the Sheriff-Substitute's note.

The defence was that the defender was not then, nor ever had been, tenant of Cairphilly House, and therefore was not liable in this action at the instance of a heritable creditor. He pleaded, *inter alia*—"(4) In any view, the pursuer is bound to apply the sum recovered from the insurance company in extinction, *primo loco*, of the said bond, whereby the same is extinguished or at least reduced *pro tanto*."

Proof was led before the Sheriff-Substitute (GEBBIE), at which the pursuer produced a letter written by the defender to his father from Old Calabar, where he was then engaged in business, on 3d Jannary 1876, in which he said—"As it is impossible to say when I will be home, I think it better to let our house in Glasgow, providing you can let us Cairphilly for this year. You can arrange with Joan [defender's wife] about the rent, but I think you offered it to us before for £30." The pursuer maintained that the defender had occupied Cairphilly House in terms of an arrangement following this letter down to the date of the action of removal above mentioned, but had never paid any rent either to him or to the executrix. In his own evidence the defender stated that for about twenty years previous to 1876 he had been in Africa in the course of his business, but during that time had been coming and going between there and this country. While there he began about 1861 to make pecuniary advances to his father, which he continued to do for several years, to the amount altogether of about £1150. He produced several receipts and vouchers for sums so advanced, and stated that he had never received repayment beyond £60. It was in consequence of these advances that his father had granted him the second of the two bonds for £450 above mentioned. These advances were merely out of generosity on his part, and not in fulfilment of any legal obligation. "My family went down to Cairphilly House, and occupied it about 1875. . . . I had occupied Cairphilly House, or some of the other houses belonging to my father, previously for some years from time to time, but I was never in the proper sense a tenant. I went down to this house from my relationship to my father, and as having a right, having made the advances I have already stated. My father has asked me to go and occupy any of the houses whenever I pleased, when these houses were unlet, and I have done so, and paid him more or less for the time that I did so, but that was to assist him. It was a matter of family dealings, and no receipts were given or anything of the sort. There was no fixed rent agreed upon for Cairphilly House. . . . There was never any real intention between my father and me to pay rent, and I am due no rent for Cairphilly House. The possession since my father's death has been under his will. I had an unoccupied house in Glasgow, and I could have occupied it if I had desired, and would have done so if I had thought rent was to be charged." In reference to the letter of 3d January 1876 his explanation was that he wrote that merely as a blind to please "old Mrs Roy and my father. It was to shut the mouth of old Mrs Roy gossipping, as I knew

she was doing so." He was a party to the case of *Morrison* v. *Roy*, in reference to which the following passage occurred in his evidence:—"(Q) When you were examined as a witness in the case of *Morrison* v. *Roy*, did you make a statement to the following effect:—'Myself and family from time to time have occupied one of these houses, and I paid rent to my father for my own house'?—(A) If it is there, I must have said it. I gave him a sum of money, and that is what is meant by that. (Q) Listen to this—'I told my father before I went abroad that I would take possession of one of the houses, and pay him £25 sterling a-year, with half of the garden.' Did you make that statement in your evidence in the case *Morrison* v. *Roy*?—(A) I may have done so; if it is there, I must have done so."

At the proof parties consented to the process in *Morrison* v. *Roy*, then pending in the same Court, being produced and forming part of the process in this action.

The Sheriff-Substitute (GEBBIE) pronounced this interlocutor:—"Finds it proved that the pursuer is vested in a bond and disposition in security granted by the late William Roy senior for £450 sterling, on 19th May 1862, over certain subjects that belonged to him at Garelochhead which, along with the interest due thereon since the term of Martinmas 1880, is still due and unpaid; that William Roy, defender, has been tenant or occupant of Cairphilly House and pertinents, part of the subjects embraced in the said bond and disposition in security, since the term of Martinmas 1878, at the annual rent of £30 sterling; . . . . that none of the defenders called to the action, except William Roy, have appeared to defend the same: Finds in law that the pursuer, as heritable creditor foresaid, is entitled to decree of maills and duties, and warrant to arrest, poind, and distrain as concluded for: Therefore repels the defences, decerns against the defenders, and grants warrant—all as prayed for: Finds Mrs Helen Leitch or Roy, principal debtor, liable in the expense of raising and bringing the action into Court: And finds the defender William Roy liable in the expenses occasioned by his appearance and opposition therein.

"*Note.—Ex facie* of his title the pursuer is a heritable creditor possessing a valid right to the subjects in question, and it can scarcely be questioned that one in his position is entitled to sue such an action as the present. It requires an effort to suppose that the defender who has appeared could seriously believe that any of the defences he has proposed would likely prove in any degree successful. Vague and shadowy statements of his having made advances to his father about twenty years ago, in proof of which not a single regular document of debt has been produced, unless it be a bond and disposition in his favour to be afterwards noticed, can avail nothing as against the pursuer, who is clothed with a regular and valid title, unchallenged and unreduced. If the defences have been rightly appreciated, they seem to resolve into the following—that he was not a tenant; that his possession was attributable to his father's deed of settlement, which gave the liferent of Cairphilly House and pertinents to his wife, and the fee to his children.

"The matter of tenancy in its inception appears at least to be put beyond all doubt, for there is a letter, dated 3d January 1876, by the defender himself to his father, in which he offers to take the house for £30. Following upon this his wife and family entered into possession, and have continued to occupy it ever since, and no receipt for payment of rent has been produced for the period embraced in the action. Then valuation returns from 1877 to 1881 are produced corroborative of the same fact, one of which is written by the defender's father, and at least one written by the defender himself. Beyond all this a decree of removing was in February last obtained against him in the Supreme Court.

"As regards the title of possession claimed under the father's deed of settlement, it is to be observed that while the deed confers a right of liferent upon the defender's wife, and of fee in his children, that is subject to payment of the granter's debts, of which the bond and disposition in security vested in the pursuer forms one. The deed further, by a general clause, constitutes the granter's widow, one of the defenders, who is also his executrix, general disponee in trust, and she has made up a title to the subjects in that character. The debts, so far as can be judged, unhappily far exceed the value of the estate. In these circumstances it is felt to be impossible to give any effect whatever to the defences in so far as they can be said to have any relevancy.

"It may be as well to notice the defender's fourth plea, which refers to the sum recovered under a policy of insurance effected over Victory House, which was destroyed by fire, and the contention is that it should be applied in extinction *pro tanto* of the pursuer's bond. The pursuer, who has other claims constituted against the estate beyond the bond founded on, has, with consent of the executrix, applied the sum to another purpose. There are two conclusive answers to that contention. One is, that a creditor is entitled to apply such funds as he may recover to payment of the debt least secured; and the other is, that it is *jus tertii* to the defender, seeing that old Mr Roy by his deed of settlement conveyed Victory House to his widow free of debt.

"Another matter which came out in the evidence, although it was not mentioned in the record, may be referred to. It appears that old Mr Roy on the same day, though subsequent to the bond before mentioned, granted a second bond for the like sum of £450 in favour of his son, the defender. It is stated that the defender was sequestrated on 15th August 1876, and discharged without composition on 10th June 1878. This second bond, it would appear from the defender's evidence, was not given up specially as an asset to his trustee, and could not well be, as he does not seem to have become aware of its existence until quite recently. The pursuer has made up an *ex facie* valid title to this bond, which was sold on 8th December 1881 for £375 by public roup in Glasgow by the trustee and commissioners on the defender's sequestrated estate. On the other hand, the defender alleges he was reinvested in all outstanding debts and claims belonging to his estate by virtue of an assignation in his favour granted by his said trustee and commissioners, a copy of which only is produced, and which bears to be in consideration of the sum of £35, and is dated 12th and 13th April 1881. From the terms of the assignation (if a copy can be looked at) it

is perhaps more than doubtful if it carried any right to the second bond. Besides, the defender says he has assigned his interest, and his assignee is not a party to this process. It is thus difficult to see what benefit the defender can take from a right which he has assigned. Plainly, if a competition is to arise between the two rights it must be determined in some other process than the present. The most conclusive answer, however, to the whole of this matter probably is that it is not pleaded on the record.

"The authorities cited by the pursuer were *Cockburn* v. *Young*, 1674, M. 11,624, and *Blair* v. *Galloway and Others*, December 21, 1853, 16 D. 291."

William Roy appealed to the Sheriff (GLOAG), who adhered, finding him liable in additional expenses.

He added this note:—"The Sheriff cannot feel certain that he has fully appreciated the defence in this somewhat confused case. He has, however, carefully considered the argument addressed to him with the record, and he has since examined the proof, a considerable part of which he must regard as irrelevant, and the extremely voluminous documents, the precise application of which to the defence was not pointed out; neither could he clearly understand on what precise documents the defender mainly relied. He has not, however, been satisfied that the Sheriff-Substitute's judgment is in any respect erroneous, and in adhering to it he considers it unnecessary to explain his views at any length.

"To this action by a bondholder to enforce his apparent rights under his bond there seems to be, and apparently there can be, only two relevant defences—(1st) that the money is not due to the bondholder, and (2d) that the alleged rents are not due by the tenants. The evidence as to the alleged transactions and relations between the defender and his father have no bearing at all on the first question, and no direct bearing on the second. The bond would be due not the less whatever the defender's claims against his father or his estate may be. On this point it seems unnecessary to say more than that while the sum in the bond is *prima facie* due to the pursuer, it is not, in the Sheriff's opinion, established that he was bound to impute to it either the sum obtained on the policy of assurance over Victory House, or any other payment which has been made out.

"The second question seems the more difficult, but it appears to be the fair result of the whole evidence that the defender's occupation of Cairphilly House began on the footing of tenancy, and on the understanding that a rent of £30 was paid; that since old Mr Roy's death the defender's wife has never received or accepted possession as the liferentrix; that Cairphilly House must be held as still occupied by the defender, and that not in right of his wife, nor on account of her right, but in unbroken continuance of his previous occupation, and on the old footing; and lastly, that £30 is a fair rent, that that was the rent agreed to at first, and that that agreement was never altered.

"These views seem sufficient for the disposal of the case without adverting to any of the other points referred to. The fact that the defender's wife is under old Roy's settlement liferentrix of the estate does create a puzzle, but does not, it is thought, in the highly special circumstances afford a sufficient defence."

William Roy appealed to the Court of Session, and argued — Whatever the pursuer's rights against him might be, they were not for rent, for during the old man's lifetime he was a gratuitous occupant only, under no obligation to pay rent, and after his death his possession was his wife's as liferentrix under the will—*Brown* v. *Scott*, December 21, 1859, 22 D. 273.

The pursuer replied—By his own writ and out of his own mouth the appellant was tenant under an engagement to pay rent during the old man's lifetime, and the character of his possession was not changed after his death, for his wife and himself had repudiated the settlement, and could not now found on it to explain their possession as other than that of tenants—*Macbrair* v. *Rome*, M. 5246.

At advising—

LORD JUSTICE-CLERK—This case presents at its first aspect some complication, but on the whole matter I have in reality not much difficulty in coming to a satisfactory conclusion. The action is one of maills and duties—a petitory action—by a heritable creditor who is not in possession, with the object of course of obtaining possession, and he calls the tenants and the representative of his debtor, his widow, who has made up a title as general disponee, and who has been in possession. The conclusion against the appellant is that he be ordained to make payment of rents, maills, and duties, and certain specific sums in name of these, and he is cited along with other tenants of certain houses to pay these rents to the pursuer as heritable creditor. I think the action is otherwise sufficiently regular. It is an old form of action by which a heritable creditor or other party not in possession takes steps to be put into possession of heritable property belonging to his debtor, and here accordingly the tenants and the general disponee are made parties. The defence on the part of Roy is that he is not tenant, and his allegation is that he possessed as occupant at will or precarious occupant, who had obtained possession from his father, and that his possession was in reality a kind of compensation for various advances which he had made to his father at different times. His father died in 1879, and Roy had for several years previously, and continued for two years after, to occupy the house in question. He is an African trader, and during a considerable part of the time was absent himself, but his wife and family were living there during the whole time. And the defence in these circumstances, as I have said, is, that though in occupation of the house he was never there as a tenant under an obligation to pay rent. There are some other considerations which should not be left out of view. The old man, who is said by the appellant to have been his debtor, died leaving a settlement by which he left his widow general disponee and executrix, simply for the purpose of making up a title. He gave her, however, a certain portion of his heritable property, and divided the rest among certain other relatives, one of whom was the wife of the defender, to whom he gave Cairphilly House in liferent. Mrs Roy has thus a personal right to Cairphilly House, and the executrix is bound to dispone it to her. But it turned out that the whole estate left by the old man was not enough to liquidate his debts, and this action is raised by

a heritable creditor. Roy and the rest of the family repudiated the settlement, and an action was raised in the Sheriff Court by another daughter to have it set aside, which was unsuccessful.

The first question is, Was Roy tenant, or only possessor on the terms maintained by himself? This seems the only question raised directly in the case. Without going into the evidence, I think that his plea cannot receive effect. He admits he was in occupation, and the presumption of law is that he was tenant, whether he had a written title or whether there was only a verbal agreement, or neither of these. That was the principle of the decision, cited by the Sheriff-Substitute, of *Cockburn* v. *Young*, where it was held that an occupant, though under no direct obligation to pay rent, is bound to pay the annual value of the subject, the *onus* lying on him to prove that he got it for less or, as in this case, for nothing. It therefore lay on Roy to prove that he was not a tenant, and I think he has failed entirely to make good his allegation on this head. He says that he was his father's creditor, and that his occupation was in payment of his father's debt to him, but there is nothing to raise even a probability of this. I think it is clear that he did not consider himself a creditor or his father a debtor. Besides, a letter is produced by the pursuer, dated December 1876, in which he directly makes an offer of £30 of rent for the house. I find also in the evidence that when asked by the Court—[*reads* "When you were examined," &c., *above quoted*]. This seemed so remarkable a piece of evidence that I referred to the process in *Morrison* v. *Roy* to see how far it was borne out, and I found it was not only borne out, but a great deal more than borne out by what I read there. I have thus no hesitation in finding that the appellant has failed to prove that he was occupant under no obligation to pay rent, and therefore the presumption must apply.

Then there remains a question of some difficulty—whether the wife of the tenant, having become liferentrix under a personal title, the debt was not thereby extinguished *confusione?* But the *jus mariti* of the husbands of his female disponees is expressly excluded by old Roy's settlement, and this would not therefore make any change in the position of the husband, for the wife might be proprietrix and the husband possessor, and he be liable to pay rent or account for rent to his wife. The only result would be that the wife should have been called as a party to the action. It would have made no difference in my opinion on the result of the case; but it is not necessary to discuss that, though a question of some subtlety, for as a fact Mrs Roy never took possession under the will. On the contrary, she and her husband repudiated the settlement, and the possession continued to be as before the old man's death, with consent of Mrs Roy. I am not, however, indisposed to give some effect to the plea that the appellant's wife has a title to possession. It is true the right never was acted on, but if she had taken possession on her personal title she would not have had to pay interest on the whole debt, but only on a certain portion, and £22, 10s. is the share which she would have had to pay. I am of opinion, therefore, that we should adhere to the Sheriff's judgment, reducing the amount payable by the defender to that sum.

Lords Young and Craighill concurred.

Lord Rutherfurd-Clark—I have no doubt that the appellant was tenant during his father's lifetime, but I have grave doubts as to whether his wife's liferent did not extinguish the tenancy so as to relieve him from liability for rent after his father's death, but as your Lordships have decided the question it is not necessary for me to say more.

Their Lordships pronounced the following interlocutor:—

"Find that the defender has failed to prove that he possessed the subjects in question otherwise than as tenant, and is bound to account for the fair value of his occupation: Fix the same at £22, 10s., and to that extent vary the interlocutors of the Sheriff-Substitute and of the Sheriff appealed from: *Quoad ultra* affirm the same: Find the pursuer entitled to expenses in this Court," &c.

Counsel for Pursuer (Respondent)—Guthrie Smith—J. Burnet. Agent — J. Smith Clark, S.S.C.

Counsel for Defender William Roy (Appellant)—Ure. Agent—W. T. Sutherland, S.S.C.

Wednesday, November 29.

FIRST DIVISION.

YOUNG *v.* THE GLASGOW TRAMWAY AND OMNIBUS COMPANY (LIMITED).

Process — Jury Trial — Reparation — Excessive Damages—Personal Injury.

In an action of damages against a tramway company for bodily injury, consisting of a fracture of the thigh, caused by the fault of the defenders, the jury found for the pursuer, and assessed the damages at £800. The Court, while of opinion that the damages were in the circumstances large, *held* (*diss.* Lord Shand) that the amount awarded was not so excessive as to justify the granting of a new trial on the ground of excess of damages.

Martha Young, grocer at Neilston, Renfrewshire, raised this action against the Glasgow Tramways and Omnibus Company (Limited), concluding for £1000 damages for injuries sustained by her through a fall from one of the defenders' cars on 23d May 1882, which was caused by the fault of the tramway conductor. This cause was tried before Lord M'Laren and a jury on 15th November, when a verdict was returned for the pursuer assessing the damages at £800. The pursuer was about forty-five years of age, and the injury sustained was a fracture of the thigh bone a little below the hip joint.

The defenders obtained a rule on the pursuer to show cause why the verdict should not be set aside on the ground of excessive damages, but were refused a rule for which they moved on the ground that the verdict was against the weight of evidence.