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

them upon the security of the estate and the interest which may accrue thereon. Now the pursuers are creditors in a bond and disposition in security granted by the trustees for money borrowed by them, and the question is whether they are entitled to call on these trustees to account for their intromissions with the estate which they administer on account of their being persons mentioned in the second purpose of the deed. This trust is a trust *inter vivos* for the management and administration of the estate of Ballachulish, and the trustees are liable for the fulfilment of their duties to the truster, who could at any time recall the trust and resume possession of the estate. It appears to me that the case cited by the Lord Ordinary does not at all support the contention necessary to sustain the position of the pursuers, and that for these reasons. In the first place, because in the case of the *Bon-Accord Company* there was no discussion on the question of title at all. It seems to have been assumed that the pursuers had a title, and there is no decision by the Court on that subject. In the second place, it appears that the creditors were creditors of the deceased suing his trustees who were his executors; and probably no objection was taken to the pursuers' title for the best of reasons, that the creditors were suing the executors on their legal obligation to make the deceased's estate forthcoming to his creditors. But the trustee under this deed is merely an administrator appointed by living people for their own convenience—he is accountable to them only, and has no duty to their creditors directly at all, although one of his duties to his trusters is to pay their debts as set out in this second purpose. The defender therefore is in quite a different position from an executor or a trustee under a trust for creditors where the trustee and the creditors have a direct relation.

LORD ADAM concurred.

LORD M'LAREN—I agree with your Lordships. I only wish to add with reference to the passage quoted by the Lord Ordinary from my book on Wills, that while it is possible that the statement with regard to the title of a truster may be expressed in too general terms, it is plain enough from the context that the trusts which are there in view are trusts of the *universitas* of an estate—either trusts of a testamentary nature or trusts for behoof of creditors—because the creditors who are there said to have a title to sue are creditors of the trust-estate. That was the position of matters in the case of the *Bon-Accord Company* to which reference has been made, and while in that case the question of title was not raised, the Court did in effect sustain action at the instance of creditors against trustees who were trustees and executors of a testamentary estate. I can hardly doubt that in such a case the creditors had an excellent title to sue, because there by the first purpose of the trust they had a right over the trust-estate which was preferable to all other rights, and if the estate proved insufficient, it was on them that the loss would fall. They accordingly had an interest to diminish that loss by taking objection to unauthorised acts of administration on the part of the trustees. In the present case the pursuers have no interest whatever. Their right is to obtain payment from their debtor or out of his estate, and that right is in no way affected by a trust which the debtor constitutes for his own benefit or that of his family, because it is a universal rule that no man by creating a trust for behoof of himself can place his estate beyond the diligence of his creditors.

On these grounds I am of opinion that the action falls to be dismissed.

LORD KINNEAR concurred.

The Court recalled the interlocutor of the Lord Ordinary, sustained the first plea-in-law for the defenders, dismissed the action and decerned.

Counsel for Pursuers and Respondents—Lees — Sym. Agents — A. P. Purves & Aitken, W.S.

Counsel for Defenders and Reclaimers—Comrie Thomson — Guthrie. Agents — Morton, Smart, & Macdonald, W.S.

Thursday, June 30.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

MACFARLANE *v.* BEATTIE & SONS.

Process—Jury Trial—Abandonment by not Proceeding to Trial within Twelve Months of a New Trial being Allowed—A.S., 16th February 1841, *sec.* 46—*Court of Session Act* 1850 (13 *and* 14 *Vict. cap.* 36), *sec.* 40.

The Act of Sederunt, 16th February 1841, sec. 46, provides—"That if it shall be made to appear to the Court that a party has abandoned his suit, or if the pursuer or party appointed to stand as pursuer shall not proceed to trial within twelve months after issues have been finally engrossed and signed, the Court shall proceed therein as in cases in which parties are held as confessed, unless sufficient cause be shown for the delay to the satisfaction of the Court."

The Court of Session Act 1850, sec. 40, provides — "That where an issue or issues is or are approved as aforesaid, it shall be competent to the Lord Ordinary in the cause, on the motion of either of the parties, to appoint a time and place for the trial of such issue or issues."

This was an action by Andrew Macfarlane, labourer, against William Beattie & Sons, contractors, Edinburgh, for damages for personal injury sustained by him while in their service. The case was tried before