

in which there has been, as it appears to my mind, a change of front to a certain extent, inasmuch as the petition of interdict is not persevered in, but a declaration of right is substituted for it.

Upon these grounds I am of opinion that the order of the Court of Session should be affirmed.

Their Lordships ordered "That the said interlocutor of the Lords of Session in Scotland of the Second Division complained of in the said appeal be, and the same is hereby reversed, except in so far as it recalls the said interlocutors of the Sheriff-Substitute and of the Sheriff of Perthshire: And it is declared that, subject to the terms of any order or regulation which may be hereafter made by the Railway Commissioners, the respondent Alexander Ross, as tenant of the Royal British Hotel, Leonard Street, Perth, has no right by himself or his servants to enter upon or use the Perth General Railway Station except with the leave of the appellants, and under such conditions as they may prescribe: And it is further declared, that in respect of the preceding declaration, it is unnecessary to dispose of the conclusions of the present action for interdict: And it is further ordered that the cause be, and the same is hereby remitted back to the Second Division of the Court of Session, with directions to find in terms of the above declarations, and to dismiss the appellants' petition, and to find the defender Alexander Ross, respondent here, liable to the pursuers, the appellants here, in the expenses of process incurred by them both in the Court of Session and in the Sheriff Court: And it is further ordered that the said respondent do repay or cause to be repaid to the said appellants the expenses paid by them to the said respondent under the said interlocutor of the Lords of Session in Scotland of the Second Division: And it is further ordered, that the said respondent do pay or cause to be paid to the said appellants the costs incurred by them in respect of the said appeal to this House, the amount thereof to be certified by the Clerks of the Parliaments."

Counsel for the Appellants—D.-F. Asher, Q.C. — Balfour, Q.C. Agents—Loch & Company, for James Watson, S.S.C.

Counsel for the Respondent—Thesiger. Agents—Stibbard, Gibson, & Wills, for John Hay, L.A.

## COURT OF SESSION.

Saturday, June 26.

### OUTER HOUSE.

[Lord Pearson.

COWAN (FERRIE'S CURATOR BONIS),  
PETITIONER.

(Sequel to *Bringloe (Ferrie's Curator Bonis)*, February 26, 1897, ante, p. 449).

*Trust—Curator Bonis—Interest on Ultra vires Investment—Mode of Accounting.*

A *curator bonis* was found liable for loss incurred on an investment of curatorial funds in a debenture granted by a harbour trust. The debenture bore interest at 4 per cent., but this had for some years been in arrears. *Held (per Lord Pearson, Ordinary)* that in accounting the curator was bound to debit himself with the interest at 3 per cent. on the sum invested from the date of the investment until payment, but was entitled to retain all payments of interest actually made on the debenture.

The late Mr James Cowan was appointed *curator bonis* to Mr J. C. Ferrie in 1855. In 1882 he invested part of the curatorial funds in mortgage debentures granted by the Greenock and Port Glasgow Harbour Trust, bearing interest at 4 per cent. In 1895, when on Mr Cowan's petition, Mr F. A. Bringloe, C.A., was appointed *curator bonis*, these lands had greatly diminished in value, and it was held, as appears in the preceding report, that they were not a legitimate investment of curatorial funds, and that the trustees and executors of Mr Cowan were liable for any loss which had been incurred or might be incurred thereon. The case was remitted to the Lord Ordinary for further procedure.

Cowan's trustees lodged a state of accounts, from which it appeared that interest at 4 per cent. had been paid on the debentures until 1887, since when interest at rates varying from 2½ to 1½ had been paid. On 26th June 1897 the Lord Ordinary (PEARSON) pronounced an interlocutor finding the petitioners (Cowan's trustees) liable in interest at 3 per cent. per annum on the sum invested in the debentures in question.

*Opinion.*—"It having been determined that the Harbour Trust bonds were not legitimate investments of the curatorial funds, and that the petitioners are liable for the loss thereby incurred, the question is, how is that loss to be ascertained? The capital, as I understand, is to be replaced, and the liability of the petitioners as to interest has now to be ascertained. This involves the decision of two matters—one as to the rate of interest to be charged against the curator, and the other as to how the interest already received and credited to the curatory is to be dealt with.

"On the first question, my opinion is that

3 per cent. is a reasonable and proper rate in the circumstances. It represents about the net average yield of good trust investments over a series of years, and there are recent instances of that rate being taken as the measure of the personal liability of trustees where the circumstances are not specially unfavourable—*Heritable Securities Investment Association, Limited*, 1893, 20 R. 676; *Melville*, 1896, 24 R. 243.

“The mortgages having been 4 per cent. investments, and the interest having been paid on some of them for a time, the next question is, whether the estate is entitled to hold to the 4 per cent. so far as paid, and to charge 3 per cent. *quoad ultra*, or whether the whole account should be restated to the effect of charging 3 per cent. from the beginning, the petitioners being credited in account with the higher interest received. I am in favour of the latter view. This is not a case of a person in a trust position making or seeking to make a

profit by the use of the trust funds. Nor does the restatement of the account involve any actual repayment of moneys paid away as income so as to raise a question of *bona fide* perception. It is a case where an *ultra vires* investment is repudiated by the new curator, and where it is claimed that the estate should be put in as good a position as if the funds had been properly invested all along. This, in my view, will be done by the course proposed. The loss incurred by the bad investments will be made good to the estate, and the investments will be taken over by the late curator's representatives at their own expense.”

Counsel for the Petitioner—Balfour, Q.C.—W. K. Dickson. Agents—Menzies, Black, & Menzies, W.S.

Counsel for the *Curator Bonis*—H. Johnston—Dewar. Agents—Cornillon, Craig, & Thomas, S.S.C.

END OF VOLUME XXXIV.