that it was even ancillary or incidental to it.

LORD STORMONTH DARLING concurred.

LORD TRAYNER and LORD MONCREIFF were absent.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the appellants on the stated case, Answer the first alternative of the question of law therein stated in the negative: Find and declare accordingly: Therefore affirm the dismissal of the claim by the arbitrator, and decern."

Counsel for the Appellant—A. M. Anderson—Hamilton. Agents — Clark & Macdonald, S.S.C.

Counsel for the Respondents—Campbell, K.C.—A. S. D. Thomson. Agent—J. Murray Lawson, S.S.C.

Wednesday, February 26.

FIRST DIVISION.

GORDON'S *CURATOR BONIS*, PETITIONER.

Judicial Factor—Curator Bonis—Heir of Entail under Curatory—Power to Grant Bonds of Annuity and Provision—Entail.

The *curator bonis* of an heir of entail in possession of an entailed estate, who was aged seventy-three and had been put under curatory two months after succeeding to the estate, presented a note in the curatory for power to grant bonds of annuity and provision in favour of his ward's wife and younger children. The two next heirs intimated that they desired the provisions to be granted. The Court upon a report by the Lord Ordinary *remitted* to him to *grant* the prayer of the note.

This was a note presented in a curatory by Kenneth Francis Gordon, *curator bonis* to Lewis Gordon, Esquire, of Abergeldie, in which the curator craved special power, *inter alia*, (1) "to grant over the entailed estate of Abergeldie a bond of annuity in favour of Mrs Isabella Lyall or Gordon, wife of the said Lewis Gordon, in the event of her surviving him, and a bond of provision in favour of Bertram Fuller Gordon, Lewis Malcolm Gordon, Emily Flaxman Gordon, Kenneth Francis Gordon, and William Maurice Gordon, the whole younger children of the said Lewis Gordon, each for the maximum amount which it is competent to grant under the deed of entail under which the estate of Abergeldie is held, or under the Act 5 Geo. IV., cap. 87, with all the clauses usual and necessary in bonds of annuity and provision by heirs of entail."

The note was duly intimated and served, and no answers were lodged.

The facts upon which the crave of the note was based sufficiently appear from the note annexed to his interlocutor by the Junior Lord Ordinary (PEARSON), who on 2nd January 1902 reported the note to the First Division of the Court.

Note.—"The ward, who is seventy-three years of age, succeeded to the entailed estate of Abergeldie on the death of his elder brother on 19th March 1901, and he was placed under curatory about two months later.

"The estate of Abergeldie at present yields a rental of £3500 a year under a lease which expires at Whitsunday 1903, and from that date a lease has been granted or is being arranged for at an increased rental of £4500. In addition a distillery on the estate is let at a rent of £600.

"Apart from Abergeldie the ward's estate is small, consisting of a house in Kent, a pension of £400 a year from a London bank, and moveable estate valued at less than £400.

"The ward has a wife and six children, and his *curator bonis* now desires special power to grant (1) a bond of annuity in favour of Mrs Gordon, and (2) a bond of provision in favour of the five younger children, each for the maximum amount competent under the deed of entail or under the Aberdeen Act.

"The Accountant reports that he is not aware of such powers ever having been granted to a *curator bonis*, and I was not referred to any case in which such an applicationn had been made.

"I was referred to the case of *Boyle*, 17 D. 790; *Blackwood*, 17 R. 1093; and *Bowers*, 19 R. 941, as affording some analogy to the present application. In the first case a *curator bonis* was authorised to pay small annuities to certain aged tenants on the ward's landed estate. It appeared, however, that but for the annuities the tenants would in all probability have to be supported by the parish in which the ward was almost the only heritor. In the case of *Blackwood* the curator, who had been in use to pay an annuity of £160 to each of the ward's two unmarried daughters, was authorised upon the marriage of one of the daughters to continue the annuity and to pay her a sum for marriage outfit. In *Bowers* the Court authorised a *curator bonis* to continue an annuity which the ward had been in use to pay to poor relations, but an increase in the amount was refused. In the present case it is said the ward is under a natural obligation to leave his wife and family provided for, and it is pointed out that the eldest son and heir-apparent and his immediate younger brother have written letters to say that they are desirous that the provisions should be granted, and offering to give such further consent as may be required.

"As the question is a novel one, and of considerable importance in practice, I have thought it right to report the case."

Argued for the *curator bonis*—It was a duty incumbent on an heir of entail in possession to provide for his wife and younger children after his decease, and that especially where he had no other means. That duty had been recognised

in the Entail Acts by giving power to do so. The Court would enable the curator to do what the *incapax* would certainly have done had he been *sui juris*—*Boyle*, June 5, 1855, 17 D. 790; *Blackwood*, July 8, 1900, 17 R. 1093.

LORD PRESIDENT—This is certainly a case of some novelty, and there can be no doubt that it is extremely desirable that the powers sought should be granted if we have power to do so. The heir of entail in possession is a gentleman of seventy-three, who we have been told was labouring under the mental incapacity from which he still suffers at the time of his succession to the entailed estate, so we are not dealing with a case in which the heir had been in possession and had had the opportunity of providing for his wife and younger children before he was overtaken by mental illness. It might have been said in that case that it was for him to decide whether he should make a provision for his wife and younger children, and that he had decided not to do so. That would at all events have founded an argument against granting such an application; but this unfortunate gentleman was subject to this mental incapacity when he succeeded, and he has therefore never been in a position to consider for himself whether he should or should not make a provision. In these circumstances of the case one can hardly doubt that if he had been spared in mental health, with a wife and family of six children, he would have made some provision for her and the younger children at all events. It appears that the two eldest sons both consent, and indeed desire, that the authority sought should be granted, and there is a great probability that the estate will descend to one or other of these gentlemen. In these very special circumstances it appears to me that we should grant the power sought, the alternative being that this lady if and when she becomes a widow would be left without any provision whatever, and that the younger children would be in the same position. It seems to me that there is no violation of principle in granting the prayer of the petition under these exceptional circumstances.

LORD M'LAREN—I am of the same opinion. It would be unfortunate for the interests of the family if a guardian were never able to exercise a discretionary power—if the powers of a guardian were confined to the payment of debts and performance of contracts. It is quite settled in practice, and it is recognised in the Pupils Protection Act, that the Court may grant extraordinary powers to curators appointed by itself, but it is perhaps right to say that in my view I should not be disposed to authorise the *curator bonis* of a lunatic to exercise a discretionary power when there was much uncertainty as to how it ought to be exercised. In the present case this difficulty does not arise, because we are all agreed that there is only one way in which a reasonable man could decide the first question which is put to us, viz., whether the gentleman under curatory ought to provide for his widow and younger children—I mean to perform the natural duty which lies upon him of providing for their maintenance after his death out of his estate. Then I think also that we are relieved in this case from considering another element of difficulty, viz., the amount of the provision. If this had depended upon a power in the deed of entail, it might be said that the entailer had given very large powers which he did not intend to be always exercised to the full extent, and that the curator should exercise a discretion as regards the amount. The Aberdeen Act, while not giving any absolute right to the widow or children independent of the will of the husband and father, assumes that the Legislature recognised the provisions there authorised as being reasonable and suitable. No doubt the heir is not compelled to give anything, yet I cannot suppose that the Legislature would authorise larger provisions than what would be considered so reasonable as not to be an encroachment on proprietary rights of subsequent heirs of entail.

LORD KINNEAR—I agree with your Lordships, and I also quite agree with Lord M'Laren that there might be cases in which we should have a much more difficult question to consider when asked to grant special powers of this kind than we have at present, and in particular if there were any serious question as to whether a reasonably prudent man would in the particular circumstances of the case have granted a provision in favour of his widow and children, or if it could be said that the heir in possession had had opportunity for granting provision while he was still *sui juris* and had not chosen to do so, we probably should have to consider whether the Court ought to interfere. But in the present case what we are asked to do is to do for a man who is suffering from incapacity what any reasonable man who was *sui juris*, and who took an ordinarily prudent view of his family obligations, would certainly desire to do for himself; and we are asked to do that with the concurrence of those members of his family who would have an interest to object to it if there were anything unreasonable in the proposal, and who say they are perfectly satisfied the thing should be done.

I rather think that the application is rested not only on the Aberdeen Act but on the express provisions of the entail, but I do not think that makes any difference or displaces anything which Lord M'Laren has said, because the particular entail fixes the limit of the provision in the same way as the Aberdeen Act, and because the proximate heirs are satisfied.

LORD ADAM was absent.

The Court pronounced this interlocutor:—

"The Lords having considered the note upon the report of Lord Pearson, and heard counsel, remit to his Lordship to grant the first head of the prayer of the note."

Counsel for the *Curator Bonis*—Chree. Agents—Alex. Morison & Company, W.S.