into his own hands and he has debarred himself, under contract with third parties, from any voice in its disposal. He may take benefit by the manner in which the money is applied, but this benefit does not take the form of the application of income recoverable by him and at his disposal in liquidation of his debt. Upon this branch of the case, accordingly, I am of opinion that the determination of the Special Commissioners ought to be affirmed.

The Court answered both questions of law in the negative.

Counsel for the Appellants—The Lord Advocate (Hon. W. Watson, K.C.)—Skelton. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Counsel for the Respondent—Moncrieff, K.C.—Kinross. Agents—Dundas & Wilson, C.S.

Saturday, February 2.

SECOND DIVISION.

HAMILTON'S TUTORS, PETITIONERS.

Nobile Officium — Tutor-nominate — Payment Out of Ward's Estate to Destitute Pupil Cousin of Ward—Ex post facto Sanction.

An estate was held in trust for the liferent use allenarly of a lady and the heirs of her body in fee. Her two sons A and B were both killed in action in 1915, A being survived by an infant daughter and B by an infant son. On the death of the liferentrix in the year 1917 A's daughter succeeded to the estate, which had an annual rental of over £3000. By his marriage contract A had bound himself, if and when he succeeded to the estate, to charge upon it annuities in favour of his father and B, not exceeding a total sum of £350 per annum. B's son having been left destitute by his father's death the liferentrix paid out of her own income an allowance of £150 per annum for his support, and on the death of the liferentrix in 1917 the tutors of A's daughter continued to make payment of a similar allowance out of their ward's estate until 1921, when B's son succeeded to certain estate. The ward's tutors having presented a note to the Court for sanction of the payments made by them, the Court *granted* the prayer.

Authorities considered.

Robert Robertson Shersby Harvie of Brownlee, in the county of Lanark, and others, the surviving tutors-nominate and assumed of Miss Elspeth Mary Campbell Hamilton of Dalserf, in the county of Lanark, presented a note to the Court in which they prayed the Court, *inter alia*, "(1) to sanction the payment of the allowances amounting to £612, 10s. made by the petitioners for the maintenance of James Leslie Campbell Henderson Hamilton."

The circumstances in which the application was presented sufficiently appear from the note (*infra*) of the Lord Ordinary (CONSTABLE), who on 13th December 1923 reported the application to the Second Division.

Note.—"The petitioners are tutors-nominate and assumed of Miss Elspeth Campbell Hamilton under a contract of marriage between her parents, who are both dead. The pupil, who is eight years of age, is proprietrix of the estate of Dalserf in the county of Lanark—a property with a gross rental of about £3700. The present application is made to obtain the sanction of the Court (1) to the payment of certain allowances made by the petitioners for the maintenance of the pupil's cousin, who is next heir to the estate, and (2) to the amount of certain estate duties paid by the petitioners being charged on the estate.

"The first of these purposes raises a question which having regard to the authorities I think should be reported to the Inner House. I should not have considered it necessary to report the other purpose if it had stood alone, but in order to avoid the possibility of the petition coming twice before the Inner House I have included both points in my report.

"The circumstances attending the payments for the maintenance of the next heir were very exceptional. The estate of Dalserf was destined to Mrs Mary Henderson Hamilton, the grandmother of the pupil, in liferent and the heirs of her body in fee. She had two sons, Charles and James, who were killed within a month of one another in 1915. The pupil is the only child of Charles, the elder son, and the next heir is a posthumous child of the younger son James. James left no estate, and his widow and child were unprovided for with the exception of the widow's annuity from the Advocates' Widows' Fund. By the marriage contract of Charles the elder son he bound himself in the event of and immediately on his succeeding to the estate to charge the same with annuities in favour of his father and younger brother not exceeding a total sum of £350 per annum, but as he predeceased his mother this obligation never took effect. Mrs Henderson Hamilton, the liferentrix, survived till May 1917, and until that date she contributed a sum of £150 per annum for the maintenance of her son James's child. After her death the petitioners continued this allowance out of the surplus income of the tutory estate until 1921, when James' son succeeded to some estate by the death of his grandfather. The total amount of the allowances is £621, 10s., and that is the payment which the petitioners desire to be sanctioned. It is right to add that the child's mother married again in 1920, but the petitioners were satisfied that the change of circumstances did not affect the necessity for continuing the allowance.

"While the circumstances of the payments were thus exceptional and urgent, the past decisions of the Court present serious difficulties in the way of their being sanctioned. There was no legally enforceable obligation on the pupil to aliment her cousin. In such circumstances the Court

has refused to sanction the payment of aliment by a *curator bonis* to the nephew of the ward (*Court*, 10 D, 822), to an insane brother (*Primerose*, 15 D. 37), to a brother in delicate health (*Dunbar*, 3 R. 554), and to a cousin (*Balfour*, 26 S.L.R. 268), though in all these cases the person to be alimented was the next heir, and in most of them his circumstances were necessitous and the curatory estate ample. On the other hand the principle has been recognised that the Court will sanction the continuance of allowances which had been made by the ward before his incapacity supervened (*Gardner*, 20 S.L.R. 165). It is submitted by the petitioners that the circumstances of the present case are analogous, because both the father of the pupil as prospective fiar of the estate and her grandmother as liferentrix unequivocally recognised either an obligation or a natural duty to aliment the next heir, but unfortunately the pupil did not take the estate directly from either of those persons.

"I should also refer to another case—*Boyle* (17 D. 790)—where the Court seems to have exercised a considerably wider discretion in granting authority to a factor *loco tutoris* to pay an annuity to an old tenant on a landed estate and his wife.

"Having regard to the authorities the Accountant of Court has reported that while in his opinion the payments were in the circumstances justifiable, he does not feel in a position to report in favour of the application being granted.

"There is the additional circumstance in the case that the sanction sought is for payments which have been already made. In various cases the Court has refused to grant special powers *ex post facto*—*Clyne*, 21 R. 849; *Drummond*, 21 R. 932—though exceptions have been made in special circumstances—*Gilray*, 3 R. 619; *Blair's Curator Bonis*, 1921, 1 S.L.T. 248. The special difficulties which it was pointed out in *Clyne's* case might result from the *ex post facto* sanction of the sale of an estate would not appear to apply in the present case. . . ."

Argued for the petitioners — Where a person of full capacity had indicated a line of action before his incapacity supervened the Court would carry out the line of action so indicated. In the present case the infancy of the ward had rendered that impossible, but her father and grandmother had indicated the line to be followed. In these circumstances the Court would sanction the course her tutors had followed—*Gardner*, 1882, 20 S.L.R. 165; *Blackwood*, 1890, 17 R. 1093; *Bowers* v. *Pringle Pattison's Curator Bonis*, 1892, 19 R. 941, 29 S.L.R. 812. Even where no allowance had been paid prior to the incapacity of the ward, nevertheless where the Court was satisfied that the proposal to pay an allowance was one which the ward would have approved of had it been possible to put the proposal before him the Court would authorise the guardian to make it—*Boyle*, 1855, 17 D. 790; *Gordon's Curator Bonis*, 1902, 4 F. 577, 39 S.L.R. 396, *per* Lord President (Blair Balfour) at 4 F. 578, 39 S.L.R. 397. In the present case the allowance was a necessary one, and had the ward been of age she would have made it. The infancy of the ward was a favourable consideration. The case of *Court*, 1848, 10 D. 822, was distinguishable. It was a decision on competency. *Primerose*, 1852, 15 D. 37, was also distinguishable. In that case there was a risk that an allowance from the War Office might be withdrawn if the ward's money were handed over to others — see Lord Justice-Clerk (Hope) at p. 37. *Dunbar*, 1876, 3 R. 554, 13 S.L.R. 352, was also distinguishable. That was a case where it was held that the matter was one for the consideration, not of the Court but of the curator. *Balfour*, 1889, 26 S.L.R. 268, was also distinguishable. The circumstances in that case were different from those in the present case. The *ex post facto* nature of the present application was no impediment —*Drummond's Judicial Factor*, 1894, 21 R. 932, 31 S.L.R. 777; *Gilray*, 1876, 3 R. 619, 13 S.L.R. 395; *Clyne*, 1894, 21 R. 849, 31 S.L.R. 692, *per* Lord Kinnear at 21 R. 850, 31 S.L.R. 693; *Blair's Curator Bonis*, 1921, 1 S.L.T. 248.

At advising—

LORD JUSTICE-CLERK (ALNESS) — The questions which we are invited to determine arise out of a note presented to Lord Murray by the tutors-nominate and assumed of Miss Elspeth Mary Campbell Hamilton. These tutors were appointed under a contract of marriage, dated in 1914, between the parents of the ward. She is now over eight years of age, and is proprietor of the estate of Dalserf. The circumstances under which the note is presented are peculiar. The grandmother of the ward was liferentrix of Dalserf. The fiars under the destination of the estate were her sons Charles and James. Both were killed in the field during the year 1915. The ward is a daughter of Charles, and the next heir to the estate is a posthumous child of James. By his marriage contract Charles bound himself if and when he succeeded to the estate of Dalserf to charge upon it annuities in favour of his father and his brother James not exceeding £350 per annum, but as he predeceased his mother that obligation did not mature. His mother, however, contributed £150 per annum to the support of James's child until the date of her death in 1917. The child was really unprovided for, as his father left no estate apart from his widow's annuity from the funds of the Faculty of Advocates and his gratuity from the War Office. After the death of the liferentrix the tutors of the ward continued to pay £150 per annum to James's child till 1921, when upon his succeeding to certain estate they ceased to make that payment. The amount of the payments which up to that date they had made to the next heir is £621, 10s. The note prays the Court to sanction these payments. It also asks the sanction of the Court to a charge being laid upon the estate of Dalserf in respect of the estate duty, amounting to £2578, 9s. 4d., which was paid by the tutors on the death of the liferentrix. It should be added that the Accountant of Court has reported against both branches of the application made by the petitioners.

Argument in support of the note was heard by Lord Constable on behalf of Lord Murray, and he has reported the case to this Division. It is to be observed *in limine* that the Lord Ordinary and the Accountant of Court concur in regarding the application as exceptional and indeed urgent, but they consider that certain decided cases present a formidable obstacle in the way of granting it. Two reflections at once suggest themselves upon perusal of the report by the Lord Ordinary and by the Accountant. The first is this—that the difficulty which has emerged is solely due to the war tragedy whereby Charles and James lost their lives. And the second is this—that had Charles survived his mother and taken the estate, the next heir would have been supported in terms of his marriage-contract obligation. In other words, Charles had he survived would have been doing just what the applicants have been doing. Two further considerations fall to be borne in mind—(*a*) that the next heir was at the time when the payments were made not only destitute but in babyhood, and (*b*) that the ward is heir to an estate which yields an income of £4500 a-year. The *concursus* of circumstances to which I have alluded renders the present application, in my judgment, not only exceptional but unique.

Of the cases cited that of *Gardner* (20 S.L.R. 165) probably presents the closest analogy to the present. There the Court recognised the principle that the continuance of an allowance made by a ward before mental incapacity supervened may properly be sanctioned by them after incapacity has supervened. It is argued in the present case that though it is true that the line of action followed by the tutors was not laid down by the ward herself, who in point of fact was an infant, it was nevertheless laid down by her father and by her grandmother, both of whom recognised the natural obligation which lay upon them to make a payment for the aliment of the next heir. The cases of *Blackwood* (17 R. 1093) and *Bowers* v. *Pringle Pattison's Curator Bonis* (19 R. 941) are substantially to the same effect as *Gardner*. The cases of *Boyle* (17 D. 790) and *Gordon's Curator Bonis* (4 F. 577) go further, and indicate that even where nothing has been done by the ward before incapacity, if the Court are satisfied that had his health remained unimpaired he would in all probability have sanctioned an eleemosynary allowance, they may competently do so on his behalf. If that be a sound principle, its application to this case is too obvious for comment. The Lord Ordinary seems, however, to have felt embarrassed by the decisions in the following cases, in which the Court refused to sanction the payment of aliment by a *curator bonis*:—*Court* (10 D. 822) (to a nephew of the ward), *Stewart or Primerose* (15 D. 37) (to an insane brother), *Dunbar* (3 R. 554) (to a brother in delicate health), and *Balfour* (26 S.L.R. 268) (to a cousin). To these cases may be added the case of *Robertson* (25 Scot Jur. 554), where the proposed beneficiary was a sister. The first observation to be made upon these cases is that while relationship may have formed an element in their decision, it is clear that the Court thought it proper to review all the circumstances in which the application was made and reach a conclusion upon them. Further, when carefully examined I am of opinion that the cases referred to by no means conclude the issue against the applicants. In *Court* the decision in so far as the report—which, I venture to think, is not a satisfactory one—bears turned largely upon the competency of the application there made. It was suggested by the Bench that an action rather than a summary petition would have been a more appropriate form of process, and it was also pointed out that the proposed object of the curator's bounty might not after all be the heir of his ward. The petition was withdrawn. In *Stewart or Primerose* the chief consideration which appears to have weighed with the Lord Justice-Clerk in refusing the application appears to have been that if it were granted a certain War Office allowance which was being enjoyed by the lunatic might be withdrawn. But it is no doubt true that both the Lord Justice-Clerk and Lord Cockburn express dislike of the application which was made *per se*. In *Dunbar* it was held that the curator should decide for himself whether an allowance from the estate under his control should be made to a destitute relative of his ward—as indeed the tutors have in the first instance done here—and that the *ab ante* intervention of the Court was inappropriate. There was, however, no suggestion made that it was beyond the power of the curator to make the allowance proposed. Indeed, the decision suggests a contrary conclusion. In *Balfour* the proposal was that a number of relations of the ward, one of whom at least was able to earn good wages, should be alimented from their cousin's estate, and that out of the amount of the aliment proposed certain houses should be repaired. It is not surprising that that application was refused. In *Robertson*, where the Court declined to grant the application, the circumstances were very special. The sister of the *incapax* appears to have been grown up, the parties were on the border line of pauperism, and the amount of estate available for the proposed gift was small. Moreover, it is to be observed that the Lord President said in dealing with the question—"We cannot deal with it in this shape." As in *Court*, the decision seems to have turned in part at least on the form of process which was adopted. So far from these cases being destructive of the success of the present application they appear to me inferentially to support it. They do not decide that in no circumstances can such an application as the present be granted. Indeed several of them postulate the contrary. In their circumstances they are widely different from the case in hand. Further, I apprehend that though the applications presented were negatived, the rigidity of the rules which formerly obtained with regard to these matters has been considerably relaxed in these later days. And if it be said in this case that the tutors are proposing to take

A's money and give it to B, a fair *riposte* is that they are merely restoring to B that portion of A's money of which the war deprived him.

That the application is subsequent to and not antecedent to the payments which have been made does not in the least move me. The need of the next heir was obviously urgent and it was met. That seems reasonable. The cases of *Clyne* (21 R. 849) and *Drummond* (21 R. 932), where *ex post facto* ratification of a transaction already carried through was refused, differ so widely in their circumstances from the present, and are indeed so special, that they appear to me to have no bearing on the controversy with which we are concerned. It is to be observed, however, that in *Drummond* the competency of ratification by the Court of a completed transaction was expressly recognised. The cases of *Gilray* (3 R. 619) and *Blair's Curator Bonis* (1921, 1 S.L.T. 248) on the other hand, where *ex post facto* sanction was given, appear to me to be in point.

To sum up—I think the present application is unique in its circumstances. I think that these circumstances are so compelling in their character that the first part of the application falls to be granted. And I also think that there is nothing in the decided cases which renders that course inexpedient far less incompetent. Neither precedent nor principle forbid the ratification sought. [*His Lordship then dealt with the second branch of the application.*]

I suggest to your Lordships therefore that we should grant the first crave of the note.

LORD ANDERSON—The prayer of the note craves the Court (1) to sanction *ex post facto* the payment of allowances, amounting to £612, 10s., made by the petitioners for the maintenance of James Leslie Campbell Henderson Hamilton, the cousin and heir-at-law of the ward, and (2) to approve of the estate of Dalserf being charged by the petitioners with the estate duty, amounting to £2518, 9s. 4s., paid by the petitioners in respect of the death of the ward's grandmother, who was the predecessor of the ward in the said estate.

With regard to the first crave, the Accountant of Court reports that while he considers that the allowances were justifiable, he does not feel in a position in view of certain decisions to which he refers to report in favour of the crave being granted. The view of the Accountant of Court appears to be that if the allowances are sanctioned the Court will be going further than has been done in any previous case. I am not satisfied that this view is well founded, but if it be so the circumstances of the present case are much more cogent in favour of the application than those of any decision to which we were referred, and in my opinion fully justify the Court in granting the sanction which is craved. The general rule in a question of this nature is well settled. It is that the Court will not sanction the expenditure of the funds of a ward for the purpose of the maintenance of a person whom the ward is under no legal obligation to support—*Court*, 10 D. 822; *Primerose*, 15 D. 37; *Dunbar*, 3 R. 554; *Balfour*, 26 S.L.R. 268. If there is legal obligation to maintain, aliment may be exacted by means of an ordinary action. While this is the general rule, expenditure of this nature may be sanctioned when made in special circumstances. What are these special circumstances?—1. There must in the first place be ample funds in excess of what is required for the ward's own maintenance to meet the proposed allowances—*Primerose, supra; Robertson*, 25 Scot. Jur. 554. 2. As a rule the ward and the person to be benefited must be of kin to each other—see, however, *Boyle*, 17 D. 790, where the Court empowered the factor *loco tutoris* of a pupil landlord to grant annuities to aged tenants. 3. The proposed beneficiary must be destitute. In the present case it is a circumstance in favour of the application that the allowances were made, not to an adult but to a child who was of an age so tender as to be incapable of doing anything to maintain himself. These are essential conditions in all cases, but they are not in themselves sufficient to justify the suggested expenditure. There must be other favouring circumstances. In the present case there are these further exceptional circumstances—(*a*) The person benefited is the heir-at-law of the ward. (*b*) The estate in which he has a contingent interest has an annual rental of over £3000. It does not seem to be inequitable to allow a part of that large revenue to be utilised to save from destitution one who may eventually succeed to the whole estate. (*c*) The Court is ready to sanction the continuance of an allowance which has been paid by a ward before incapacity supervened on the principle that it thereby authorises what the ward would presumably have done had he remained *capax—Gardner*, 20 S.L.R. 165; *Blackwood*, 17 R. 1093; *Bqwers*, 19 R. 941. It is a justifiable extension of this principle to sanction the granting of a provision which it is reasonably probable that the ward would have made had not mental incapacity supervened—*Gordon*, 4 F. 578.

In the present case the father of the ward was under obligation to make a provision in favour of his younger brother, the father of the beneficiary. Had this been done the boy would have had the benefit of that provision. Accordingly the petitioners in making the foresaid allowances appear to have done as matter of reasonable administration what the boy's uncle had he survived the war would have done as matter of obligation. These exceptional circumstances seem to me to afford ample justification to the Court for sanctioning the allowances. It is true that the sanction craved is *ex post facto*. But the circumstances which called for intervention were urgent, and in such a case there is no reason why *ex post facto* approval by the Court may not be given—*Gilray*, 3 R. 619; *Blair's Curator Bonis*, 1921, 1 S.L.T. 248.

I therefore agree that the first crave of the note should be granted. [*His Lordship then dealt with the second crave.*]

LORD MORISON—I concur.

LORD ORMIDALE and LORD HUNTER did not hear the case.

The Court pronounced this interlocutor—

". . . Direct the Lord Ordinary to grant the crave in branch (1) of the prayer of the note. . . ."

Counsel for the Petitioners—C. H. Brown, K.C. — Maconochie. Agent — Wm. Hugh Hamilton, W.S.

Tuesday, February 5.

SECOND DIVISION.

WHITE CROSS INSURANCE ASSOCIATION, LIMITED, AND ANOTHER, PETITIONERS.

Bankruptcy — Sequestration — Recording Abbreviate of Sequestration — Failure Timeously to Transmit Abbreviate to Keeper of Register of Inhibitions—Abbreviate Transmitted more than Two Days after Date of First Deliverance—Application for Confirmation of Abbreviate already Recorded, or Alternatively for Authority to Record New Abbreviate—Nobile Officium—Bankruptcy (Scotland) Act 1913 (3 *and* 4 *Geo. V, cap.* 20), *sec.* 44.

The Bankruptcy (Scotland) Act 1913, sec. 44, enacts—"The party applying for sequestration shall present, before the expiration of the second lawful day after the first deliverance if given by the Lord Ordinary, or present or transmit by post before the expiration of the second lawful day after the said deliverance if given by the Sheriff, an abbreviate of the petition and deliverance, signed by him or his agent, in the form of Schedule A (No. 1) hereunto annexed, to the Keeper of the Registers of Inhibitions and Adjudications at Edinburgh, who shall forthwith record the said abbreviate in the said Registers, and write and subscribe a certificate thereof on the said abbreviate in the form also specified in the said Schedule A (No. 2), and shall, on the request of the party transmitting such abbreviate, and on payment by him of the fees of such registration, and of the postage, re-transmit the said abbreviate by post to the said party. . . ."

The petitioners in a petition for the sequestration of a bankrupt presented an abbreviate of the petition and the first deliverance of the Sheriff thereon to the Keeper of the Registers of Inhibitions and Adjudications, which he received and recorded, but the date on which the petitioners so transmitted the abbreviate was sixteen days after the date of the first deliverance, the petitioners having omitted *per incuriam* to transmit it within two days of the date of the first deliverance as required by the Bankruptcy Act. Thereafter the petitioners presented a petition to the Court of Session praying the Court either to confirm the abbreviate already recorded, or alternatively to authorise the petitioners to transmit a new abbreviate to the Keeper of the Registers of Inhibitions and Adjudications within two days of the date of the interlocutor granting the authority prayed for, and to authorise the Keeper to receive and record the abbreviate. The Court *refused* the first alternative of the prayer, but *granted* the second alternative.

The Bankruptcy (Scotland) Act 1913, sec. 44, is quoted *supra* in rubric.

The White Cross Insurance Association, Limited, 5 Moorgate Street, London, and Thomas Campbell, accountant, 170 Hope Street, Glasgow, as trustee on the sequestrated estates of Daniel Livingstone Maclachlan, motor salesman, lately carrying on business at 83 West George Street, Glasgow, and thereafter at 65 North Wallace Street, Glasgow, *petitioners*, presented a petition to the Second Division of the Court of Session in which they craved the Court "To ratify, approve, and confirm the recording of the abbreviate of the said petition for sequestration and deliverance by the Keeper of the Registers of Inhibitions and Adjudications at Edinburgh, or alternatively to authorise the petitioners the White Cross Insurance Association, Limited, to transmit within two days of your Lordship's final interlocutor hereon to the Keeper of the Registers of Inhibitions and Adjudications at Edinburgh an abbreviate of the petition for sequestration and the first deliverance thereon, and to grant warrant to and authorise the said Keeper of the Registers of Inhibitions and Adjudications to receive and record in the said Registers the said abbreviate, and to write and subscribe a certificate thereof on said abbreviate in the prescribed form. . . ."

The petition stated, *inter alia*, that on 9th May 1923 the petitioners the White Cross Insurance Association, Limited, presented a petition to the Sheriff of Lanarkshire for sequestration of the estates of Daniel Livingstone Maclachlan, and that on 14th June 1923 the Sheriff confirmed the appointment of the petitioner Thomas Campbell as trustee, and awarded sequestration. The petition stated further—"That *per incuriam* the petitioners the White Cross Insurance Association, Limited, omitted to present or transmit to the Keeper of the Registers of Inhibitions and Adjudications an abbreviate of the petition and the first deliverance thereof within the time prescribed by the statute.

"The petitioners the White Cross Insurance Association, Limited, however, presented an abbreviate of the petition and deliverance in the form of Schedule A (No. 1) to the Keeper of the Registers of Inhibitions and Adjudications at Edinburgh on 25th May 1923, and this abbreviate was recorded by the said Keeper in said Registers, and a certificate in the form prescribed was written thereon. As, however, the abbreviate was not presented in accordance with the provisions of said Act, this petition is presented to the