May 1886, with the legal interest thereof from said date till paid: Find the petitioners liable to the respondents in expenses," &c.

Counsel for Petitioners—D.-F. Mackintosh, Q.C.—Graham Murray. Agent—C. B. Logan, W.S.

Counsel for Respondent—Lord Adv. Macdonald, Q.C.—A. J. Young. Agent—David Crole, Solicitor of Inland Revenue.

Friday, November 5.

FIRST DIVISION.

LIVINGSTONE *v.* LIVINGSTONE.

Alimentary Provision — Arrestment — Restriction of Aliment to Reasonable Provision.

An alimentary provision bequeathed to a party may, so far as exceeding the amount of a reasonable aliment for his support in his position in life, be made available to his creditors, and is therefore *quoad* the excess over a reasonable aliment subject to diligence by them.

The younger son of a landed proprietor had an alimentary income of £860 or thereby under the settlement of a relative. *Held* that arrestments used against this income by a creditor for a debt not alimentary in character, fell to be recalled *quoad* the sum of £500 a-year, which was a reasonable aliment, but to be sustained *quoad* the remainder of the income.

The deceased William Waddell of Easter Moffat, Writer to the Signet, had an only child Christian Margaret Waddell, who married Thomas Livingstone Fenton Livingstone of West Quarter.

By the fifth purpose of his trust-disposition and settlement, dated January 1868, Mr Waddell gave directions to his trustees to convert the residue of his estate into money, invest it in certain investments, and hold it for behoof of his three younger grandchildren, John, George, and Charles Fenton Livingstone, or the survivors or survivor, equally, share and share alike, payable on their attaining the age of twenty-five, but the deed contained the following declaration—"And I do hereby declare that in case any of my said three grandsons shall marry or otherwise conduct themselves so as not to merit the approbation of my said trustees, or a majority of them accepting and surviving at the time, the provisions hereby made in favour of my said grandchildren so marrying or acting shall only belong to them in liferent for their liferent use allenarly, and to their issue or heirs in fee; but it is hereby declared that a regular minute must be entered in the sederunt-book of the trustees, expressing their disapprobation of the conduct of any of my said grandchildren to restrict them to a liferent as aforesaid, and the capital or fee of the provision or share of such of my said grandsons as shall be so restricted to a liferent shall continue to be held by my said trustees during the lifetime of the party so restricted to a liferent, the interest or annual proceeds (less the expense of management) being only payable to the party or parties so restricted to a liferent; and it shall not be in the power of the party or parties whose shares have been so restricted to a liferent to sell, assign, dispone, or convey away his or their said liferent, but the same shall be applied for his or their alimentary use allenarly, nor shall it be in the power of his or their creditors to attach the said liferent by arrestment, poinding, or other legal diligence, all of which are hereby excluded."

Charles Fenton Livingstone died in minority without issue.

George Fenton Livingstone attained the age of twenty-five on 1st October 1885. Acting under the power contained in the settlement, however, Mr Waddell's trustees had, at a meeting specially convened on 21st September 1885, resolved to record their disapproval of the conduct of George Fenton Livingstone, which they then did, and by minute restricted the provisions in his favour to a liferent allenarly, the fee of his share of the residue to belong to his issue or heirs.

In January 1886 an action was raised against George Fenton Livingstone by his brother John Fenton Livingstone, concluding for payment of two sums of £500 and £5000 respectively. At the same time he had used arrestments against him on the dependence.

George Fenton Livingstone, while admitting that the first of these sums was due, and averring that he was in the course of making arrangements for its repayment, denied that the debt was of an alimentary character. As to the second, he denied any liability for it.

He presented this petition praying to have arrestments recalled *simpliciter*. He stated that his share of his grandfather's estate amounted to £26,796, 12s. 3d., the gross income being £941, and the net income £860 to £875, and he was entitled in the event of his surviving his mother to the fee of Easter Moffat.

He averred that he was desirous to pay the debt of £500, which he admitted he had owed to his brother, and that he was in the course of getting it paid off by instalments along with his other debts, which he estimated at about £800, but that he had been prevented from carrying out this arrangement by the arrestments in question, of which no notice had been given either to him or his known agent. Neither of the alleged debts to his brother was, he stated, alimentary in character. He further averred—"That on 3d March 1886 intimation was given to the trustees and to the said George M'Intosh, their agent, of an assignation in favour of Alexander P. Purves, W.S., by the petitioner of his said alimentary income for security and payment of alimentary advances agreed to be made to him periodically from the time he attained twenty-five years of age until the first payment of his said alimentary income became due; that notwithstanding said intimation, no notice was given by the trustees or their said agent either to the petitioner or to his assignee the said Alexander P. Purves of the fact that the funds assigned had already been arrested in their hands; that it was only at the term of Whitsunday 1886 that the petitioner, on demanding from the trustees through their said agent payment of the income which had accrued upon the funds held by them for his behoof, as aforesaid, from said 1st October 1885 to the said term of Whitsunday 1886,

was for the first time informed by Mr M'Intosh, as the trustees' agent, that said income had been arrested in the hands of the trustees." He also alleged that the said arrestments were inept to attach the income of funds held in trust, and declared by the truster to be an alimentary provision for the liferenter, and not attachable by his creditors by arrestment, poinding, or other legal diligence.

The respondent lodged answers, in which, after alleging that the petitioner's debts far exceeded £800, he averred as follows—"The petitioner attained the age of twenty-five on 1st October 1885; he is unmarried, and is subject to no incapacity, physical or mental. In these circumstances the respondent submits that the said alimentary liferent (the interest of £26,000) is exorbitant and excessive, and that the arrestments should not be recalled in so far as the said liferent exceeds a reasonable aliment."

Argued for petitioner—The power of the testator to exclude creditors and assignees was absolute, and this power was transmitted to and remained with his trustees so long as the fund was in their hands. The fund was alimentary, and—assuming the relevancy of such a consideration—considering the petitioner's position in life, not exorbitant in amount. The alleged debts to the arrester were not alimentary, so that he was sum not a creditor for aliment. As to the sum allowed by the Court in name of aliment, see *Monypenny* v. *Earl of Buchan*, July 11, 1835, 13 S. 1112, and *Harvey* v. *Calder*, June 13, 1840, 2 D. 1095. There was a difference between a mere indication that a fund was to be alimentary and an express direction that it was to be alimentary and not assignable, also between a fund paid over and one in the hands of trustees, the interest only of which was to be paid as aliment. As to the alimentary fund being reasonable in its amount, see Ersk. iii. 6, 7, and Bell's Comm. (5th ed.) i. 128. Bell cited no authority in support of his statement that "the sum must be reasonable." The amount of the beneficiaries' income was not to be taken into account in a question like the present—*Hunter* v. *Hunter's Trustees*, March 10, 1848, 10 D. 922; *Lewis* v. *Anstruther*, June 11, 1852, 14 D. 857, and 15 D. 260; *Bell* v. *Innes*, May 29, 1855, 17 D. 778. As to the non-assignability of alimentary funds, see *White* v. *Whyte*, June 1, 1877, 4 R. 786. Under the terms of the settlement this annuity was non-assignable and non-arrestable.

Replied for the respondent—An alimentary provision containing a direction against assignation and arrestment was really limited in amount to what was necessary for reasonable support of life. Any surplus might be attached for the benefit of creditors—Stair, iii. 1, 37. Here the funds exceeded what could be called an aliment—See *Blackwood* v. *Boyd*, 1677, M. 10,390, in which aliment was cut down *quoad excessum; Allan's Trustees* v. *Allan*, December 12, 1872, 11 Macph. 216, and *Smith and Campbell, Petitioners*, May 30, 1873, 11 Macph. 639. The trustees had no interest in what the petitioner did with this money; their responsibility ended when they made their payments to him—*Kirkland* v. *More* (*Kirkland's Trustee*), March 18, 1886, 23 S.L.R. 546. A granter could attach to his gift any lawful condition, but if the fund was declared to be alimentary, then it was protected only so far as reasonable—*Lewis* v. *Anstruther*, December 15, 1872, 15 D. 260; *Drew* v. *Drew*, November 17, 1870, 9 Macph. 163; *Westnisbet* v. *Moriston*, 1627, M. 10,368; *Edmonstone* v. *Kirkcaldy*, 1622, M. 10,365. Here the aliment was exorbitant for one in the petitioner's condition—*Smith* v. *Chambers' Trustees*, November 9, 1877, 5 R. 97.

At advising—

Lord President—This is a petition for the recal of arrestments, and the ground upon which it is presented is, that the fund which is the subject of arrestment is alimentary and not attachable by the diligence of creditors.

The petitioner under the will of his maternal grandfather succeeded to a share of his estate which is valued at about £26,000, and which was to be payable to him subject to certain conditions, upon his attaining twenty-five years of age. A power however was conferred upon the trustees by the terms of the will, that if any of the beneficiaries so conducted themselves as not to meet with their approval, they, the trustees, might enter a minute to that effect in the sederunt-book of the trust, and thereafter might restrict the provision in favour of that beneficiary to a liferent, for his liferent use allenarly; and it was further provided that the party whose share had been thus restricted should have no power to assign, dispone, or convey away his liferent, but the same should be applied for his alimentary use allenarly, nor should it be in the power of his creditors to attach the said liferent by arrestment, poinding, or other legal diligence, all of which were by the deed excluded. Now, there can be no doubt that there is here a sufficient protection in the ordinary way of this liferent right, and a protection which makes the fund strictly alimentary in its character.

But the arresting creditor says that the liferent provision here is exorbitant, and that the arrestments ought not to be recalled, in so far as the fund arrested exceeds a reasonable aliment; to which contention it is replied that there is no limit to liferent provisions such as the present when the fund is expressly declared to be alimentary. This is a very general question, and if it were an open question in the law of Scotland it would be one of no little magnitude. It is not however open, for it has long been decided that alimentary liferent provisions may be restricted, and that so long as sufficient be left reasonably to support life in the beneficiary's condition, the excess is attachable by the creditors of the beneficiary. The doctrine is thus stated by Stair when dealing with the subject of assignations. He says (iii. 1, 37)—"It is also a competent exception that the thing arrested is a proper aliment expressly constituted, and not exceeding the measure of aliment."

This shows that in the opinion of Lord Stair when the sum enjoyed by the beneficiary exceeded a fair aliment, then in so far as it was excessive it became liable to arrestment, and in support of this view he refers to two old cases. The first of these was the case of *Edmonstone* v. *Kirkcaldy*, reported in M. 10,365. In it a multiplepoinding was raised to determine a competition arising out of an arrestment used under a bond for £400. Edmonstone was obliged to pay the sum of 200 merks to Christian Kirkcaldy, wife of Walter

Adamson, for aliment "of her and her bairns for the terms of Lammas and Halloweven last by past," and Barclay had arrested it by virtue of the bond for £400 granted by Adamson, the woman's husband. Decision was given on the question whether the amount secured by the alimentary provision was or was not more than enough for the maintenance of the woman and her children, and the Court, "considering the meanness of the sum, the quality of the woman, and the number of her seven bairns, found the means enough for her aliment, and that no part of it could be subject to her husband's debt." But they might have decided otherwise had they considered the aliment excessive. The Court, however, considered the question of the amount of aliment and adjudicated upon it.

The other case is that of *Blackwood* in 1677, M. 10,390, and there the Court decided in the opposite way from the case of *Edmonstone* and let in the diligence of creditors. Both of these appear to me to be cases in point, and it has been assumed in all the subsequent decisions that creditors can arrest an alimentary fund, in so far as the provisions exceed what is sufficient for the reasonable support of the beneficiary, and since then the Court have frequently been called upon to determine how far a sum left as an alimentary provision corresponded with the position and circumstances of the beneficiary. A very remarkable example of the class of cases I have just been referring to was the case of *Harvey* v. *Calder*, reported in 2 D. 1099, when one of the questions which the Court were called upon to decide was whether £1800 per annum provided to a peer was not so large a sum as to prevent it being wholly declared alimentary and exempt from legal diligence, and the Court held it was not. If they had been of opinion that it was, then on the authority of the older cases to which I have referred they would no doubt have let in the diligence of his creditors in so far as the sum exceeded in their opinion a reasonable alimentary provision. The question here therefore comes to be, whether the income of this fund, amounting as I understand to between £800 and £900 per annum, is to be viewed as more than sufficient for the reasonable aliment of the petitioner? As I understand it to be the opinion of your Lordships that this sum is in excess of what is necessary, I think that we should find the petitioner entitled to an alimentary provision of £500 a-year, and that the balance of the income should be open to the diligence of his creditors.

Lord Mure—I agree with the interpretation of the law which has been given by your Lordship on the present question. There can, I think, be no doubt, as we see from the older cases, that excess of aliment was subject to arrestment and the diligence of creditors, while the amount of aliment was a question which had to be determined in each case separately. In the present case I quite concur in the sum fixed by your Lordship, and consider it a reasonable aliment looking to the petitioner's position and circumstances.

Lord Shand—I am of the same opinion. I am not, however, quite satisfied that the precise point which we are here called upon to decide has ever been made matter of direct decision in any previous case.

We have, however, the *dicta* of Stair referred to by your Lordship, and besides that a series of decisions settling that an alimentary fund, so far as it exceeds the measure of aliment, is arrestable. I think the principle upon which these decisions have proceeded is a sound one, and that in so far as the sum left to the annuitant exceeds a fair aliment it should be subject to the diligence of his creditors.

In the present case we have a trust interposed, and it would have been quite an effectual provision for the truster to have made if he had declared that any misbehaviour on the part of the annuitant was to involve forfeiture of any excess over and above simple aliment, and further, that any fund thus created should fall back into the trust-estate.

No doubt in the present case the deed contains no clause of forfeiture, and no such restriction as I have suggested. There is here, however, an excess of aliment amounting to several hundred pounds a-year, and I agree with your Lordships in thinking that this sum should be treated like any other excess, and should be open to the diligence of the creditors of the beneficiary.

Lord Adam—I concur in the opinion expressed by your Lordship in the chair, and do not wish to express an opinion upon any matter beyond the point now before us.

The Court recalled the arrestments to the extent of £500.

Counsel for Petitioner—Mackay—H. Johnston. Agent—A. P. Purves, W.S.

Counsel for Respondent—D.-F. Mackintosh, Q.C.—Low. Agent—John Bell, W.S.

Friday, November 5.

FIRST DIVISION.

BOSWELL'S TRUSTEES *v.* PEARSON.

Interdict—Breach of Interdict and Contempt of Court.

A tenant who had been lawfully ejected from a farm by the landlord in consequence of breach of the conditions of the lease, refused to give up possession thereof, and having been interdicted by the Court from continuing the possession and molesting the new tenant and preventing him from taking possession, committed a breach of interdict. The Court in respect thereof *sentenced* him to be imprisoned for one month.

Sir William Montgomery Cuninghame of Corsehill, Baronet, and others, trustees of the late Sir James Boswell, Baronet, of Auchinleck, in the county of Ayr, presented the present petition and complaint for breach of interdict against John Pearson, farmer, sometime tenant of the farm of Mosshouse, part of the said estate of Auchinleck, in the following circumstances:—

The petitioners, as trustees, were proprietors of the estate of Auchinleck, and Mr James Howden, C.A., Edinburgh (also one of the petitioners) was factor and commissioner for the said trustees, with full power to output and input tenants.

In his capacity of commissioner Mr Howden