a restricted interpretation, which would mean that notice is only required when the particular claim which emerges is the one in respect of which the notice is given.

Some exception is taken to the unqualified way in which the Lord Ordinary expresses his views as to the cause of the delay, and I think it may be that in one or two respects those observations might well be modified; but the following facts appear to me to be indisputable. According to a chart of the weather which has been prepared and used by the appellants in this case, it appears that from the 12th April until the 13th May there was no frost at all. A few days were showery, and three days or three days and a-half were very stormy. It would be difficult even in the fairest months of summer to find weather much more favourable than this, and it is obvious that a delay of one month after the frost and storms of winter had passed away, before the contractor began to lay the pipes, could not have been fairly attributable to the conditions upon which, and which alone, the engineer of the company would have been at liberty to extend the time of completion. The appellants, however, urge that the construction of the pipes might have been hindered during the earlier bad weather, and that this would have been a sufficient explanation. It appears to me that even that explanation is not open upon the chart. From the 18th or 19th March down to the 12th April there were only four days when there was frost, and a period of about a week in which the days appear to have been partially frosty. When it is remembered that the contract provided that the work was to be begun in February, and that consequently January would have been the month during which the pipes would in the ordinary way have been manufactured, it seems hard to think that frost to this limited extent could possibly have been the sole justification for the delay in preparation of the pipes.

I do not think it is necessary to pursue the case beyond this point, for a delay in commencing the work so serious in extent could not have been due to frost and bad weather, and must have involved the possibility of the contractors being unable to complete within the proper time, with the resultant claim for damages in favour of the appellants, from which claim the engineer could not have fairly exonerated the contractor by his certificate. That the delay was a breach of the conditions of the contract is of course beyond dispute. It was a breach which in my opinion might have involved loss for which the surety would have been responsible. It might have involved such loss even if the frost and bad weather were really the causes of the delay, and in those circumstances it was essential in order to satisfy the condition-precedent in the bond that due notice should be given to the insurance company that such breach had occurred. In fact the delay was never overtaken, and I cannot help thinking that in these circumstances the subsequent occasions when the pipes were not laid at the contracted rate were also breaches of which notice should have been given to the surety, since in the circumstances of the contract as it then stood any such default made the prospect of completion of the contract become more and more visionary as each default occurred.

For these reasons I think the judgment appealed from is correct; in my opinion this appeal fails, and should be dismissed, with costs.

LORD ATKINSON—I concur, and I have nothing to add.

LORD SHAW—I concur.

LORD PARKER—I concur.

LORD SUMNER—I concur.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellants (Pursuers)—Solicitor-General for Scotland (Morison, K.C.)—Morton. Agents—John Hepburn, Clydebank—Douglas & Miller, W.S., Edinburgh—Beveridge, Greig, & Company, Westminster.

Counsel for the Respondents (Defenders)—Wilson, K.C.—MacRobert. Agents—Fife & Littlejohn, Glasgow—Cadell & Morton, W.S., Edinburgh—Broad & Company, London.

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# COURT OF SESSION.

*Tuesday, November 16.*

## SECOND DIVISION.

[Lord Hunter, Ordinary.

## DOUGLAS GARDINER & MILL *v.* MACKINTOSH'S TRUSTEES.

*Trust — Marriage Contract — Alimentary Provisions—Arrestment.*

A woman, E. F., by her antenuptial marriage contract conveyed all her property to trustees for, *inter alia*, the following trust purpose, viz.—"For payment of the free revenue to arise therefrom to the said E. F. during all the days of her life, exclusive of the *jus mariti* and right of administration, and all other rights of the" (husband), "and exclusive of all rights of her or his creditors, and receipts for such revenue signed by the said E. F. alone shall be sufficient to the said trustees, and after her death, for payment of the said free revenue to" (him) "in the event of him surviving her, and during all the days of his life unmarried after her death, and which revenue shall be alimentary to him, and shall in no way be liable for his debts or deeds, or subject to the legal diligence of his creditors." After the marriage creditors of the wife arrested the income of the trust funds in the hands of the trustees. In an action of furthcoming at their instance against the trustees the Court granted decree, *holding* that the wife's liferent was not pro-

tected against the diligence of creditors in respect that it had not been secured for her alimentary use, but was assignable by her.

On 13th November 1914 J. Douglas Gardiner & Mill, S.S.C., *pursuers*, brought an action of furthcoming against Francis James Cochran and another, the antenuptial marriage-contract trustees of the Rev. Mr and Mrs Mackintosh, *defenders*. The pursuers were creditors of Mrs Mackintosh, who had obtained in the Court of Session a decree for payment against her, and had arrested in the hands of the trustees income of the trust funds due by them to her.

By the antenuptial marriage-contract Mrs Mackintosh had conveyed to the trustees all her property, *acquisita* and *acquirenda*, during the subsistence of the marriage. The material purpose of the trust is *quoted supra in rubric*. Previously to the pursuers obtaining decree of payment against her, Mrs Mackintosh had granted several assignations in security of her interest in the trust funds, and had made agreements with creditors that part of the income of the trust funds should be paid to them.

The defenders pleaded, *inter alia*—"(2) The sum arrested by the pursuers not being subject to the diligence of creditors, and the arrestments therefore being invalid, the defenders, the arrestees, should be assoilzied."

On 2nd February 1915 the Lord Ordinary (HUNTER) repelled the pleas-in-law for the defenders, and granted decree with expenses.

*Opinion.*—"... The remaining question is upon the merits, the defenders maintaining that the income payable to Mrs Mackintosh under the marriage contract is not arrestable by her creditors. In terms of that document Mrs Mackintosh conveyed her whole estate to trustees for payment of the free revenue to her during her lifetime, exclusive of the *jus mariti* and right of administration and all other rights of her husband, and 'exclusive of all rights of her or his creditors.' The provision is not said to be alimentary, nor is it declared to be unassignable. The actual use of the word alimentary may not be necessary to the protection of the fund, but there is nothing in the language of the deed to suggest dedication of the income to alimentary purposes. I cannot think that a party to a marriage-contract trust can withdraw his or her funds from the diligence of creditors by merely placing them under trust with a declaration that rights of creditors are excluded. The cases of *Rogerson, &c.* v. *Rogerson's Trustee*, 1855, 13 R. 154, 23 S.L.R. 102, and *Reliance Mutual Life Assurance Society* v. *Halkett's Factor*, 1891, 18 R. 615, 28 S L.R. 589, appear to me to be authorities against this proposition. It is significant that on Mrs Mackintosh's death the income from her estate under the deed is given to her husband under an express declaration that the revenue is to be alimentary, and in no way liable for his debts or deeds or subject to the legal diligence of his creditors. I repel the pleas for the defenders and grant decree of furthcoming."

The defenders reclaimed, and argued—The liferent interest of the wife was not arrestable by her creditors. No words of style were required to effect that purpose if the purpose was plain from the deed—*Reliance Mutual Life Assurance Society* v. *Halkett's Factor*, (1891) 18 R. 615, *per* Lord M'Laren at 621, 28 S.L.R. 589, at 593; *M'Callum* v. *M'Culloch's Trustee*, (1904) 7 F. 337, 42 S.L.R. 256, *per* Lord Ordinary (Stormonth Darling), pp. 341, 258; *Rogerson, &c.* v. *Rogerson's Trustee*, (1885) 13 R. 154, 23 S.L.R. 102. The result of making a provision alimentary was to alter the order of preference of the creditors, and since the liferent in the present case was not in excess of a reasonable alimentary provision other creditors were excluded—*Ruthven (Lord)* v. *Pulford & Sons*, 1909 S.C. 951, *per* Lord M'Laren at 954, 46 S.L.R. 612, at 615. *Menzies* v. *Murray*, (1875), 2 R. 507, 12 S.L.R. 373, was also referred to.

Argued for the respondents—The liferent provision to the wife was not a proper alimentary provision, because she was entitled to assign it. Therefore since the protection of the liferent was not a complete protection, it was open to the diligence of her creditors—*Reliance Mutual Life Assurance Society* v. *Halkett's Factor* (*cit.*), *per* Lord M'Laren at 18 R. 622, 28 S.L.R. 593; *Dewar's Trustees* v. *Dewar*, 1910 S.C. 730, 47 S.L.R. 674; *Murray* v. *Macfarlane's Trustees*, (1895) 22 R. 927, *per* Lord M'Laren at 943, 32 S.L.R. 715, at 724; *Rogerson, &c.* v. *Rogerson's Trustee* (*cit.*); *White's Trustees* v. *Whyte*, (1877) 4 R. 786, 14 S.L.R. 499; *Irvine & Shepherd* v. *M'Laren*, (1829) 7 S. 317, *per* Lord Glenlee at 318; M'Laren, Wills and Succession (3rd ed.), vol. i, pp. 619 and 621.

LORD JUSTICE-CLERK—In this case I think the judgment of the Lord Ordinary is right. The question turns upon the clause which occurs in the marriage contract, in the following terms:—[*His Lordship quoted the clause*]. Now it is noticeable that the language used in the part of the clause providing that the wife shall have the liferent is in marked distinction to the language appearing in the portion of the clause dealing with the husband's liferent. In the husband's case the revenue is declared to be alimentary and not liable for debts or deeds or subject to the legal diligence of his creditors. But in the wife's case all that is said is that the revenue is to be exclusive of all rights of her or the husband's creditors. Accordingly it was conceded that that clause could not be regarded as sufficient to make the income alimentary so long as the wife was in the enjoyment of it.

In that state of matters the wife was of course entitled to assign her whole interest in the income of the trust funds both during and after the subsistence of the marriage. On the authorities which have been cited to us, especially the cases of *The Reliance Mutual Life Assurance Society*, *M'Callum*, and the most recent case of *Dewar's Trustees* v. *Dewar*, to which Lord Dundas referred, I think the law is plain, that unless there is an absolute protection there is no

protection at all; if the beneficiary is in such a position that the fund can be sold or assigned then the exclusion of creditors will not be effectual.

Accordingly, where, as here, you have not only no express provision to the effect that the revenue is to be alimentary, but also a clause so expressed that the beneficiary can at once dispose of and alienate the income in question, I think it is idle to suggest that the attempt to prevent creditors from using diligence so as to enable them to get the benefit of the fund has been effectively carried out. Therefore in my opinion the judgment of the Lord Ordinary in sustaining this arrestment and furthcoming is right and ought to be adhered to.

LORD DUNDAS—I agree with your Lordship and with the Lord Ordinary. I think this case is really covered by the tenour if not by the terms of previous decisions.

LORD SALVESEN—The general rule of the law of Scotland is that it is impossible for a person, male or female, by any deed or any contract so to settle money as to secure the income to himself or herself and put it beyond the reach of his or her creditors. The law is so stated by Lord President Inglis in the case of *Corbet* v. *Waddell*, (1879) 7 R. 200, 17 S.L.R. 106. To that rule there has been admitted one single exception, that in the case of a married woman who has by antenuptial contract settled her property in such a way that during the subsistence of the marriage she has debarred herself from any right to it except the right of drawing the income. But in order effectually to protect such income against creditors the clause must be expressed in language that clearly shows its purpose to be alimentary, and in addition deprives her of the right of dealing by way of assignation or otherwise with the income. In the case of *Dewar's Trustees*, to which we were referred, it was held that the income of a fund settled by a wife on her husband after the dissolution of the marriage on the footing that it should not be assignable and should not be subject to the debts or deeds of the liferenter nor open to the diligence of his creditors, was an alimentary provision, and was effectually protected against creditors although neither the word "alimentary" nor any equivalent language had been used. But there is admittedly no case in which protection has been given to the liferenter where, as here, the right of assignation remained unimpaired in his person.

It seems to me that if the liferenter has a power to assign it necessarily follows that any attempted exclusion of creditors is invalid. An arrester who follows up his arrestment by a process of furthcoming is a legal assignee. So is a trustee in bankruptcy. The test was put by Lord M'Laren I think very concisely and forcibly when he said that if the subject is one that can be sold it is also a subject that can be adjudicated. In short, you cannot have a liferenter in the position of having all the privileges of an owner and in addition the privilege of defeating her creditors if she chooses.

Accordingly I am of opinion with your Lordships that this case has been rightly decided in favour of the pursuer.

LORD GUTHRIE—I agree. The reason of the exceptional favour which the law has accorded to a woman entering into a marriage contract, where she is dealing with her own free estate, seems to be that she ought to be entitled out of that estate to secure herself against want during the subsistence of the marriage. That does not involve the use of the word "alimentary," but it does involve the existence of two conditions, namely, first, exclusion of her own right to deal with the money so as to put it beyond her alimentary use, and second, exclusion of the rights of her creditors. Here we have only got one of these conditions, and therefore the whole view on which this very exceptional provision of law is founded would be swept away if we gave effect to the plea which the Lord Ordinary has rightly negatived.

The Court adhered.

Counsel for the Reclaimers (Defenders)—Constable, K.C.—Dykes. Agents—Haggart & Burn Murdoch, W.S.

Counsel for the Respondents (Pursuers)—Chree, K.C.—W. Mitchell. Agents—J. Douglas Gardiner & Mill, S.S.C.

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*Friday, November* 19.

## FIRST DIVISION.

[Lord Anderson, Ordinary.

## MENZIES *v.* POUTZ.

*Bankruptcy — Sequestration—Succession—Competing Sequestrations—Sequestration of Heir followed by Sequestration of Ancestor—Recal—Bankruptcy (Scotland) Act* 1913 (3 *and* 4 *Geo. V, cap.* 20), *secs.* 11, 30, *and* 97.

A succeeded to B as universal successor in heritage and moveables; made up a title to the heritage and confirmed to the moveables; and, within three years after B's death, was sequestrated, a trustee being elected and confirmed. Creditors of B having applied for and obtained sequestration of B's estates, a petition for the recal of this sequestration was presented. *Held* (*rev.* Lord Anderson) that B's sequestration was incompetent and recal *granted.*

*Bankruptcy—Administration of Justice—Sequestration—Recal of Sequestration—Duty of Lord Ordinary in Petition for Recal—Bankruptcy (Scotland) Act* 1913 (3 *and* 4 *Geo. V, cap.* 20), *sec.* 30.

The facts and arguments stated in opposition to a petition for sequestration were fully considered by the Lord Ordinary on the Bills in Vacation, who thereafter awarded sequestration, In a petition for the recal of the sequestration the same facts and arguments were founded on, and the Lord Ordinary on the Bills holding that it was not