A further objection is stated to the effect that while the factor entered in his accounts that £1000 of this bond was held for a beneficiary Miss Ritchie, he did not adhere to that allocation. The facts are that on being requested to pay the legacy he obtained the authority of the Court to do so. He then did not pay Miss Ritchie by calling up the bond or assigning a proportion of it to her, but paid her by cash obtained from the deposits, and kept the entire bond as an investment. At the time he did so the bond seemed to be a thoroughly good investment, and it is difficult to see how the proceeding can be objected to, seeing that it practically put another £1000 of the money still held in trust under heritable investments, which is exactly what it is maintained against him he should have done more consistently than he did. On this matter I also agree with the Lord Ordinary, and am of opinion that his interlocutor should be affirmed.

LORD YOUNG concurred with the LORD JUSTICE-CLERK.

LORD MONCREIFF (whose opinion was read by the LORD JUSTICE-CLERK)— The objections stated by the appellant to the late factor's accounts which the Lord Ordinary has repelled call for serious consideration. We heard a full argument on behalf of the appellants, which I have considered all the more anxiously because I had at one time some doubt upon one at least of the objections.

But on consideration of the Lord Ordinary's careful judgment I have come to be satisfied that it is justified by the facts proved or admitted, and should be affirmed.

LORD TRAYNER, who was absent at the hearing, gave no opinion.

The Court adhered.

Counsel for the Objectors and Reclaimers —Campbell, K.C.—Salvesen, K.C.—Crabb Watt. Agent—William Cowan, W.S.

Counsel for the Compearer and Respondent (Strong's judicial factor)—Jameson, K.C.—M. P. Fraser. Agents—Ronald & Ritchie, S.S.C.

Thursday, June 12.

SECOND DIVISION.

[Sheriff of Lanark.

THOMSON *v.* THOMSON & COMPANY.

Bankruptcy — Sequestration — Alimentary Annuity Payable to Bankrupt—Right of Obligant to Dividend Derived solely therefrom.

The sole estate of a bankrupt who had been sequestrated consisted of an alimentary annuity payable to him under an onerous mutual contract. The obligants by whom the annuity was payable were creditors of the bankrupt under a decree. *Held* (*diss.* Lord Moncreiff) that they were not barred from claiming and receiving a dividend upon the ground that it was necessarily derived from the annuity.

Bankruptcy — Sequestration — Procedure —Interdict against Trustee Paying Dividend—Deliverance not Appealed against —Res judicata — Process — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 129.

Where the trustee in a sequestration had sustained a claim for a creditor and his deliverance had not been appealed against, *held* that an action of interdict brought for the purpose of preventing him paying the dividend upon the claim so sustained was incompetent, upon the ground (1) that the question had been already finally decided by the trustee, who was competent to adjudicate upon it, and (2) that the action was an attempt to prevent the trustee from carrying out the explicit and imperative direction contained in the 129th section of the Bankruptcy (Scotland) Act 1856.

By minute of agreement entered into between William Thomson, engineer, Glasgow, and William Thomson & Company, engineers, Glasgow, dated 22nd January 1894, William Thomson, on certain conditions therein mentioned, assigned and transferred to William Thomson & Company the engineering business which he had previously carried on. In the minute of agreement it was provided that the assignees should pay to William Thomson an annuity of £250 sterling during all the days and years of his life, "which annuity shall be strictly alimentary, and free of all burdens and deductions whatsoever, and shall not be arrestable or affectable by his debts or deeds or by the diligence of his creditors."

On 15th August 1900 the pursuer's estates were sequestrated, and on 4th September thereafter William Ramage, C.A., Glasgow, was appointed trustee.

On 2nd November 1900 the trustee raised an action of multiplepoinding in the Sheriff Court of Lanarkshire at Glasgow, in the name of William Thomson & Company as pursuers and nominal raisers, against William Thomson and himself as defenders, and claimed that the annuity fell to be paid to him as trustee foresaid. This claim was sustained by the Sheriff-Substitute (GUTHRIE).

The trustee having ingathered two half-yearly payments of the annuity (being the only estate ingathered by him) intimated his intention of paying a dividend on the claims in the sequestration.

William Thomson & Company had lodged a claim in the sequestration for £61, 6s., being the unpaid expenses of an unsuccessful action brought against them by William Thomson, for which they held a decree against him. This claim was admitted by the trustee to a ranking, and no appeal was taken against his deliverance.

In these circumstances William Thomson brought the present action against the trustee and William Thomson & Company, to have the trustee interdicted from paying any part of the said funds by way of dividend to the defenders William Thomson & Company. Defences were lodged by William Thomson & Company.

The pursuer pleaded—"The defenders William Thomson & Company having agreed that the annuity payable by them should be 'strictly alimentary,' and should not be 'arrestable or affectable by the pursuer's debts or deeds or by the diligence of his creditors,' are barred from claiming any part of the funds presently in the pursuer's hands by way of dividend on their claim."

The defenders pleaded, *inter alia*—"(1) The action is irrelevant and incompetent. (2) The said defenders having lodged their claim on the pursuer's sequestrated estates, and said claim having been adjudicated by the trustee on said sequestration, any other attempt to deal with said claim is incompetent, and the present action should be dismissed, with expenses. (3) The question involved by the present action being *res judicata*, the action should be dismissed, with expenses. (4) The said defenders being entitled to recover the amount due under their decree from the pursuer, decree of absolvitor should be granted with costs."

By interlocutor dated 18th July 1901 the Sheriff-Substitute (GUTHRIE) sustained the defenders' first plea-in-law and dismissed the action.

The pursuer appealed, and on 9th January 1901 the Sheriff (BERRY) pronounced the following interlocutor:—"Finds that it is admitted at the Bar by the defenders William Thomson & Company that the funds in the hands of the defender Ramage (trustee on the pursuer's sequestrated estate), out of which payment of the dividend sought to be interdicted is proposed to be made to the defenders the said William Thomson & Company, consist solely of two instalments of the annuity payable to the pursuer under the minute of agreement of 22nd January 1894 condescended on: Finds that the said defenders William Thomson & Company are barred by the terms of their said agreement from claiming or receiving payment of the said dividend. Therefore, and under reference to the subjoined note, recalls the interlocutor appealed against; sustains the plea-in-law for the pursuer; repels the defences; and grants interdict as craved; and decerns."

The defenders William Thomson & Company appealed, and argued—(1) The trustee having established his right to the annuity in the action of multiplepoinding in the Sheriff Court was entitled to deal with it as with any other asset he might have recovered. The defenders were not barred by the agreement from claiming or receiving payment of a dividend. They had paid the annuity to the pursuer (or to his trustee, which was the same thing), and now the trustee could pay them—*Hewat* v. *Roberton*, November 30, 1881, 9 R. 175, 19 S.L.R. 149. All that was decided in *Reid* v. *Bell*, relied on by the pursuer, was that "compensation" was incompetent. In the present case the estate had been reduced into possession, and therefore *Reid* v. *Bell* was inapplicable. An alimentary fund was only protected till the beneficiary received it; after that it was no longer alimentary, and the beneficiary or his trustee could do what he liked with it. (2) The present action was incompetent, as the Bankruptcy Act 1856 had provided (section 169) a remedy, viz., an appeal in the sequestration process, and no such appeal having been taken the pursuer had lost his remedy—*Robertson* v. *Robertson's Trustee*, December 19, 1885, 13 R. 424, 23 S.L.R. 265. The trustee's scheme of division ought to have been objected to. Standing the deliverances of the trustee, the process of interdict was incompetent. The statute had provided a code of procedure, and any other form of procedure was by implication incompetent. The former Bankruptcy Act contained similar provisions, and where they had not been followed it was decided there was no alternative remedy available—*Barbour* v. *Williamson*, November 19, 1835, 14 S. 27.

Argued for the pursuer—The defenders cannot approbate and reprobate their own contract, nor are they entitled to found on the sequestration so as to plead it against their own agreement—*Reid* v. *Bell*, November 25, 1884, 12 R. 178, 22 S.L.R 136. *On the question of competency.*—The proceeding by way of interdict was competent where the remedy sought was craved on the ground of personal bar and was directed against a particular creditor receiving payment of a dividend. Such a question would not have been appropriate for disposal by the trustee in the sequestration process. The question at issue was a personal one and outwith the sequestration. Section 169 was permissive, and did not exclude any other remedy. In *Ritchie* v. *Balgarnie*, January 14, 1875, 2 R. 297, 12 S.L.R. 208, a trustee was interdicted from paying a dividend till a creditor's claim had been disposed of by a deliverance admitting or rejecting it, a previous deliverance being held incompetent under the 126th section of the Bankruptcy Act 1856. The process of interdict was equally competent in the circumstances of the present case.

At advising—

LORD KINCAIRNEY—This case has arisen in the sequestration of William Thomson, engineer, Glasgow. It is an appeal from a judgment of the Sheriff pronounced in a petition by the bankrupt Thomson against the trustee on his sequestrated estate, and against Thomson & Company, praying the Court to interdict the trustee from paying to Thomson & Company the dividend allotted to them out of the sequestrated estate. The Sederunt Book has not been produced, but it appears from excerpts from it that on 18th April 1900 the trustee pronounced a deliverance whereby he admitted the claim of Thomson & Company for £61, 6s., and that he thereafter, under

section 28 of the Bankruptcy Act, prepared a scheme of division in which Thomson & Company are entered as entitled to payment of £6, 9s. 10d., being the amount of the dividend on the debt of £61, 6s. due to them. No appeal was taken against the trustee's deliverance or against the scheme of division, and in the ordinary course the dividend would have been paid to Thomson & Company in terms of section 129 of the statute but for this petition for interdict by the bankrupt.

The Sheriff has granted interdict, thereby in effect recalling the deliverance of the trustee, and Thomson & Company have appealed and have maintained that the petition for interdict was incompetent, and that the deliverance of the trustee ranking Thomson & Company was well founded.

The case is very singular, and there are some points about it not well cleared up. It appears that at Thomson's sequestration he had no apparent or admitted estate. It appeared, however, that he was entitled to an annuity under an agreement with Thomson & Company and others, whereby for the considerations mentioned they bound themselves to pay to Thomson an annuity of £250 per annum, it being declared that the annuity should be "strictly alimentary and free of all burdens and deductions whatsoever, and shall not be arrestable or affectable by his debts or deeds or by the diligence of his creditors."

It seems to have been taken for granted that Thomson & Company were the sole granters of this deed. That is not apparent from the deed itself, but I assume it to have been so.

The bankrupt maintained that the annuity was alimentary, and therefore did not fall under the sequestration. But in a multiplepoinding brought in the Sheriff Court of Glasgow it was decided in a competition between Thomson and the trustee that the alimentary provisions were ineffectual and that the annuity did fall under the sequestration.

That judgment was acquiesced in; it was not challenged in the debate; and I understand that two instalments of the annuity have been paid to the trustee.

I also understand that these two instalments form the whole estate now in the trustee's possession, and it is not disputed that they fall to be divided among Thomson's creditors other than Thomson & Company. The trustee has not, I suppose for good reasons, realised the annuity but only the two instalments.

An objection was stated against the competency of the appeal on the ground that the sum involved was only £6, 9s. 10d., but it was not pressed.

The Sheriff decided in favour of the bankrupt, and granted interdict on the ground that under the agreement mentioned Thomson & Company became bound to pay the annuity free from the diligence of creditors, and that it would be contrary to the terms of their agreement if they were to be allowed to receive a portion of the fund in the form of a dividend on their debt.

After careful consideration I have found myself unable to concur in this judgment, and I think the appeal should be allowed.

The immediate interest of the bankrupt in the question is infinitesimal. But the plea that he had no interest was not taken. What he has gained by the interdict is merely that £6, 9s. 6d. shall be in some way divided among his other creditors, diminishing his debt to them to that extent. These other creditors, who benefit by the judgment directly, did not object to the trustee's deliverance. No doubt if future dividends be taken into account the advantage to the bankrupt will be much greater, and if the judgment of the Sheriff be sustained the result no doubt will be that he will be relieved of his debt of £61, 6s. to Thomson & Company—a debt against which nothing is said—without making any payment on account of it—a result which certainly is somewhat remarkable.

It appears to me, first of all, that the question has been already decided. The question is what payments should be made out of the bankrupt's estate. I think that when Thomson & Company claimed on the estate the trustee was competent to adjudicate on their claim, and if the bankrupt or the other creditors had an objection to their claim being sustained, they might have stated that objection to the trustee, and the trustee might have decided the point; and when he sustained the claim of Thomson & Company, then either the bankrupt or the other creditors might have appealed under section 169 of the Act. An appeal by the bankrupt under the Bankruptcy Acts is no doubt unusual; but from the case of *Robertson* v. *Robertson*, December 19, 1885, 13 R. 424, it appears to be competent. In like manner, when the trustee issued the scheme of Division, the bankrupt might have appealed against that. No appeal having been taken against the trustee's deliverances, I am of opinion that they are conclusive.

Further, it appears to me that it was the imperative statutory duty of the trustee to pay to Thomson & Company the dividend allotted to them. The words of the 129th section are explicit and imperative, and it appears to me that it is quite incompetent to interdict the trustee from fulfilling that statutory duty.

But supposing these views, which are more or less formal or technical, to be unsound, and supposing the question to be open for judgment, I am of opinion that the claim of Thomson & Company was well founded, and that they are entitled to receive the dividend allotted to them.

Their claim could not have been rejected on the ground that the fund in the hands of the trustee was an alimentary fund. It could not possibly be that. It would never have formed the bankrupt estate or part of it if it had been so; and it, of course, has not been treated as an alimentary fund, but as a fund for division among the general body of creditors. It would be an absurdity to speak of a trustee in bankruptcy dividing an alimentary fund. It so happens that there are no other funds.

But there might have been; and if there had been other funds, I apprehend that such funds and the annuity instalments would have formed one common fund divisible among all the creditors in proportion to their debts.

But then it is said that the position of Thomson & Company is exceptional, inasmuch as they were the granters of the deed. Now I think it clear that the mere fact that they granted an obligation to pay an annuity, if there were no alimentary clauses, could raise no objection to their claim in bankruptcy. In that case they might have been in a position to recover their whole debt by pleading compensation. But certainly there could have been no objection to their claim in the sequestration. The objection to the claim must necessarily be rested, and indeed in the Sheriff's judgment is rested, on what I may call the alimentary clauses. But it is to be noticed that these clauses do not express any obligation by the granters Thomson & Company, but are addressed to all the world and to Thomson & Company as members of the public, and it is not obvious that if these clauses are ineffectual against the public they should be effectual against Thomson & Company. But supposing them to be so, what is the obligation which they import. It is not an obligation not to recover debts due to them out of this particular estate; it is only to abstain from interfering as creditors with the bankrupt's enjoyment of the estate. It does not mean that they are to be barred from taking payment out of that fund in order to preserve it for other creditors. All that they are bound to do is to respect the personal enjoyment of Thomson. Now, it is impossible to do that when the whole estate which was the subject of protection has ceased to be the property of the alimentary creditor, and has been transferred to the trustee on his sequestrated estate. There is then no creditor in the alimentary obligation.

On these grounds I am of opinion that the interlocutor of the Sheriff ought to be recalled, and that the petition for interdict should be refused.

LORD JUSTICE-CLERK—I agree with Lord Kincairney. I agree on the technical points and on the merits.

When the pursuer was sequestrated he was divested of all of which he could be divested, and it is not disputed that the money in question is included. His rights to it have ceased, and the trustee is bound to divide it with the rest of the estate between all creditors who would have a claim of debt against the bankrupt had he been solvent. It does not seem to me to make any difference that the creditor now claiming could not have enforced payment against the annuity because of the condition on which he had granted the annuity. That only prevented him from depriving the pursuer of the annuity. But he has been legally deprived of it. He cannot now enjoy it. Those only can get benefit from it who are his creditors. The defenders are in that position, having been ranked for a debt due.

I cannot hold that the trustee is not bound to pay the defenders a dividend out of the estate in his hands on the admitted debt due to them, and which the trustee holds only for creditors. The defenders are bound to pay the annuity, and cannot keep anything back from it. But the pursuer having lost the beneficial enjoyment by incurring debts which he cannot pay, cannot, I think, be entitled to insist that the money taken by his trustee shall be applied otherwise than in the ordinary course of sequestration proceedings.

LORD MONCREIFF (whose opinion was read by the LORD JUSTICE-CLERK)—The case is exceptional, but I think the Sheriff is right.

There is no doubt that the annuity is available to pay the general body of creditors other than the appellants. A man cannot as a general rule put his funds beyond reach of his creditors while reserving to himself an interest in them. But this case must be considered just as if the appellants were the only creditors.

Now, I see nothing to prevent a man binding himself in an onerous contract to pay another an alimentary annuity and thereby barring himself from withholding payment in order to compensate a debt subsequently incurred to him by the annuitant. The object of declaring a fund alimentary is just to render it not attachable by creditors.

Now, that is what the appellants did when they acquired the *universitas* of the bankrupt's estate in return for the alimentary annuity.

The most plausible way of stating the appellant's case is to say that the annuity has lost its alimentary character, because meanwhile it must all in any case be paid to creditors.

But this I think is a narrow and fallacious view. But for the other creditors the respondent's trustee would never have received the annuity; and the respondent has an interest that the other creditors should be paid off, leaving him to deal with the appellants alone, who, as I have indicated, are personally barred from withholding payment. Of course, if other estate becomes available the appellants will be entitled to be paid out of it.

I have no sympathy with the respondent, the debt to the appellants having been incurred by needless litigation; but I think he is entitled to our judgment.

LORD LOW, who had not been present at the hearing, gave no opinion.

The Court sustained the appeal, and recalled the interlocutor of the Sheriff; affirmed the interlocutor of the Sheriff-Substitute; and of new dismissed the action.

Counsel for the Pursuer and Respondent—Salvesen, K.C.—M. P. Fraser. Agent—W. G. Sibbald, W.S.

Counsel for the Defenders and Appellants—Jameson, K.C.—Orr. Agents—George Inglis & Orr, S.S.C.