Hamilton continued to subsist after 1708, it was then a burden upon all the parties to the transaction of that year. It was a burden on the superior, so far as it extended to the coal under the lands resigned, it was a burden on Hamilton of Wishaw, so far as regards the lands acquired by him, and it remained a burden on Townhead and Townfoot as before.

But it rather appears to me that these proceedings in 1708 had the effect of extinguishing the right of Claud Hamilton altogether. The legal diligence divested him of all he had under the charters of 1530 or 1605, while at the same time this peculiar right of coal did not pass to Hamilton of Wishaw, or to the superior, and therefore disappeared altogether in 1708. If it did not, most certain it is that it did not pass into the person of the present complainer.

I am consequently of opinion (1) that the right created in 1530 in favour of Hamilton of Garion, and reserved in the grants to the Davidsons from 1622 onwards, was not a right of property in the coal, and is not such a right as would entitle its possessor to interdict as here craved. (2) That an examination of the titles show that Mr Harvie is not in the right of Claud Hamilton of Garion, as he asserts himself to be. On both grounds, therefore, I am for altering the Lord Ordinary's interlocutor.

Agent for Complainer—Henry Buchan, S.S.C.
Agents for Respondent—Duncan, Dewar & Black, W.S.

Thursday, November 17.

SECOND DIVISION.

DREW *v.* DREW.

Alimentary Fund, Arrears of—Concursus debiti et crediti. A and B, two brothers, were made trustees under their father's trust-disposition and settlement. B received a liferent of certain subjects, under the real burden of paying half-yearly to A the interest of a sum of £250. This provision to A was declared purely alimentary, and not assignable or attachable by his creditors. The father died in 1838, and B entered into possession of the subjects, and drew the rents, but retained the interest due to his brother, who was his partner in business, for debts due to him and for advances. *Held*, in an action by A to recover the arrears of interest, that the debt was extinguished by compensation, there being a *concursus debiti et crediti* between A and B, and arrears of an alimentary provision being attachable by a creditor of the beneficiary.

This was an appeal from the Sheriff-court of Lanarkshire in an action at the instance of Alexander Drew against Peter Drew and himself, as the trustees of his late father, William Drew, brought in the following circumstances. By trust-disposition, dated in 1836, William Drew disponed his whole property to his three sons, as trustees for certain purposes. The pursuer and defender were the sole surviving sons. By this deed it was provided that the trustees were to hold and retain in their hands, for the sole use and benefit of Peter Drew, the subjects described in the 4th, 5th, and 6th places, and allow Peter Drew to uplift the free rents thereof, but under the special condition that part of these subjects should lie under the real burden of a sum of £250 in favour of Alexander Drew. The trustees were directed to pay half-yearly the interest of this sum to Alexander; and it was expressly declared that the said principal and interest should be purely alimentary, and that it should not be competent to Alexander Drew to burden or alienate the same. William Drew died in 1838, and the trustees accepted the trust. It was averred by the pursuer that no part of the principal sum or interest had been paid to him since 1838; and he claimed in this action £761, 1s. 6d., being the interest on £250, at 5 per cent., since 1838, together with £60 of liquidate penalty for non-payment of the interest at the terms when it was due.

The defender explained that, in 1848, the pursuer and defender referred to Thomas Leburn, S.S.C., all claims and disputes between them, including this claim of interest since 1838; and that, in 1859, the arbiter pronounced a judgment which was final and binding on the parties.

The defender produced a decree of the Court of Session for £309 odd against the pursuer, dated in 1853, with a recorded charge thereon; and also an assignation to a debt of £1881, due by the pursuer to the liquidators of the Western Bank, and paid by the defender.

He further alleged—"The defender, on 5th July last, raised an action of furthcoming in this Court against the pursuer and the Sighthill Cemetery Company of Glasgow, founding on said several decrees and horning. The pursuer did not dispute the debts, but pled payment. In this process the present defender lodged a minute, giving credit for the sum of £179, 4s. 5d., being the amount of interest on the £250 mentioned in the summons, from Whitsunday 1848 to Martinmas 1866 inclusive, after deducting the sums mentioned in the defender's statements 4 and 5. On the 4th February last your Lordship, the Sheriff-Substitute, repelled the present pursuer's said defences, and restricted the sum in the diligence as reduced by said credit of £179, 4s. 5d.; and, on the 8th March last, the said interlocutor was adhered to on appeal."

The Sheriff-Substitute (STRATHEARN) on 17th May 1867 pronounced an interlocutor—"Finding, in point of law, (1) that the interest on the principal sum concluded for is due, not by Peter Drew as an individual, but by the said Peter Drew and Alexander Drew as trustees and executors of their father; and that Peter Drew is neither entitled to plead in compensation, nor to retain said interest for or in liquidation of the debts due to him as an individual by the pursuer: (2) Finds that, even if the pursuer, and Peter Drew as an individual, did stand in the relation of debtor and creditor, yet as the interest was declared to be alimentary and inalienable by the pursuer, and not affectable for his debts or deeds, nor by the diligence of his creditors, that the defender cannot lawfully retain it or compensate it by his said debts: Finds, however, that all interest due at and prior to Whitsunday 1848 was finally adjudicated and determined by said award, which operated as *res judicata*: Therefore so far sustains the defence, and assoilzies the defender from the conclusions of the action *quoad hoc*: Finds, with respect to the interest since due on said principal sum, that the pursuer is not entitled to charge the same at the fixed rate of 5 per cent. per annum, but at such rate as was charged from time to time by and paid to the said Bank of Scotland, and other banks, on discounting bills: Therefore, before further answer, allows the pur-

suer a proof of said rate of discount as between Whitsunday 1848 and Whitsunday 1866." He observed in his note—"The defender, both as a trustee and as an individual (for he defends in both characters), has maintained that he was entitled to withhold payment because the pursuer was indebted to him in sums to a far larger extent than all the interest claimed, and of that statement there can be no doubt whatever. But he, as an individual, even if he had right to touch the pursuer's interest, has no legal title to retain a provision due by the trust in extinction of a private debt due to himself. On the same principle, he has as little title to plead compensation of the one debt by the other; there is no *concursus debiti et crediti* between the parties in the representative relation of the defender as a trustee, in which he is debtor for the interest, and the pursuer, who is not indebted to the trust at all.—1 Bell's Com., 5th ed., p. 39; *Ib.* vol. 2, p. 131. Again, although there had been a proper concourse, the interest due the pursuer being alimentary and not affectable by his debts or deeds nor by the diligence of creditors, the defender can neither retain it nor attach it for his debt; the very settlement under which his own provisions are derived has declared any such attachment void and null. Their father had unlimited faculty so as to fence the pursuer's provision, and the defender is bound to respect its exercise; and if authority were required for supporting a proposition so just it will be found in Ersk. 3, 6, 7; 1 Bell's Com., p. 129; *Moneypenny* v. *Earl of Buchan, Rose, Marshall, and Forbes, and Others*, 11th July 1835, 13 Shaw, 1112; *Harvey and Others* v. *Calder and Earl of Buchan*, 13th June 1840, 2 Sess. Cases, 1095; *Lewis* v. *Anstruther*, 11th June 1852, 14 Sess. Cases, 857; Same, 17th December 1852, 15 Sess. Cases, 260: and *Bell* v. *Innes*, 29th May 1855, 17 Sess. Cases, 778. The defender, as part of his defence, and justifying his right to retain the interest, has pleaded that, notwithstanding the terms of the settlement, arrears could not be considered alimentary to the exclusion of creditors; and that is sometimes true. Reference was made to Erskine's Institutes, 3, 6, 7, in support of this doctrine, and the text of that author will show the distinction between such a case and the present. It is there stated that 'alimentary rights granted for the personal subsistence of the grantee are not arrestable; but the past interest due upon an alimentary debt may be arrested by him at whose expense the alimony was supplied— that is, that the debtor to whom alimentary interest was due was not entitled to prevent a creditor, who had already alimented him, to take payment out of the very fund which was destined to provide him with the means of subsisting. But this is not a case of that kind; not one of the defender's debts against the pursuer are of an alimentary nature. There is, however, another answer to this defence, and it is this—that the pursuer's interest can never be regarded as arrears which have been allowed to accumulate in the hands of the party bound to pay them, because not absolutely needed by the pursuer, and therefore not alimentary; the trustees were the parties bound to pay that interest, the defender was the party who *de facto* uplifted it, and withheld payment in the face of two previous but abortive actions which were instituted to compel him to pay; and to admit such an argument would be to countenance and give the defender benefit from his own perhaps wrongful act. With respect to the pursuer's demand for compound interest, it cannot be sustained—'Interest does not in the general case, *ipso jure*, bear interest: Therefore, however long arrears of interest may have continued unpaid, they cannot, without some voluntary or judicial operation, be converted into a principal bearing interest.' 1 Bell's Com. 5th ed. p. 651. The learned author in the same paragraph points out instances where compound interest does become exigible; as where the holder of a fund is under an obligation to lay out and accumulate the interests, and fails; and in cases where there has been fraud or a tortious conversion of the money on which interest is claimed; but in the Sheriff-Substitute's apprehension the defender cannot be so blamed."

Thereafter, after various procedure, the Sheriff-Depute pronounced an interlocutor finding that the defender was liable in payment to the pursuer of the arrears of interest. He observed—"Finds that it has been fixed by final interlocutors in this cause —1*st*, That the defender Peter Drew is liable, in respect of his own wrongous acts, in payment of the interest due to the pursuer, both as a trustee and individually; 2*d*, That in as far as said defender's liability is *qua* trustee, he cannot retain the interest in liquidation of debt due to him as an individual by the pursuer, in respect that there is no *concursus debiti et crediti* between the parties in these different capacities; 3*d*, That although there had been a proper concourse, the interest, being alimentary, and not affectable by the pursuer's debts or deeds, or by the diligence of his creditors, the defender cannot, either individually or as trustee, attach or retain it for his debt; and 4*th*, That this inability is not altered by the fact that the interest now payable consists mainly or entirely of arrears; both because arrears of an alimentary fund are equally exempt from the diligence of ordinary creditors as the fund itself, except in the exceptionable case referred to by Erskine, b. 3, t. 6, sec. 7, and because, even if this were not so, the accumulation of a number of terms' interest, which has not arisen voluntarily and of consent, but in consequence of the interest payable at each term having been tortiously withheld, is not properly arrears; and, at all events, the wrongdoer cannot be put, as regards such accumulation, in a better position than he was before."

The defender appealed.

MACKINTOSH for him.

RHIND in answer.

At advising—

LORD JUSTICE-CLERK—This is an action at the instance of Alexander Drew against Peter Drew and himself, as the trustees of the late William Drew, father of the pursuer, for payment of the arrears of certain provisions due to him under his father's settlement. The defender Peter Drew pleads compensation in respect of a debt due to him, and for which he holds a decree. The pursuer answers (1) that there is no *concursus debiti et crediti;* (2) that this was an alimentary fund which was neither alienable nor assignable. I am of opinion that both these pleas are unfounded. I think there was a *concursus debiti et crediti*, because under the terms of William Drew's settlement and the actings of the parties under it, the defender is made or has become the immediate debtor of the defendant for the provision in question. The second question is more difficult. There is no doubt that the law looks with great favour on alimentary provisions, but only so long as they are used for the support of the beneficiary, and not

where, as in this case, the provisions are allowed to be in arrear for twenty years. The fund has been allowed to remain in the hands of Peter Drew as his brother's banker, and accordingly no such privilege can be extended to them, and therefore I think that the plea of compensation must be sustained, and the defender assoilzied.

LORDS COWAN, BENHOLME, and NEAVES, concurred on both points. The fact of the accumulation of the fund year by year deprived it of its alimentary character, and rendered it attachable for the debts of its owner.

The Court found that the debt had been extinguished *compensatione*, and assoilzied.

Agents for Appellant—J. & R. Macandrew, W.S.
Agent for Respondent—Wm. Officer, S.S.C.

Saturday, November 19.

FIRST DIVISION.

WILKIE (CATHCART'S TRUSTEE) *v.* CATHCART AND COOK.

Process—Jurisdiction—Competency—Effect of an English Adjudication of Bankruptcy in Scotland. A, whose domicile of origin was Scotch, contracted debt in England while quartered there with his regiment. He afterwards left this country, and went to reside abroad. Two years after he left this country a petition was presented to the Court of Bankruptcy in London, in consequence of which an adjudication of bankruptcy was issued against him. He appeared by counsel at the outset of the case, but did not ultimately oppose the adjudication. B was elected creditors' assignee, and recorded the certificate in the Register of Sasines for the county of Ayr, where certain lands, out of which the bankrupt drew an annuity through a trustee, were situated, so as to make the adjudication operative in this country. The trustee raised a multiplepoinding of this annuity, and both A and B claimed the whole of it. *Held* that the proceedings of a Court established by a British statute, if *ex facie* regular, cannot be opened up by this Court, but must be accepted as valid and binding until properly set aside. This Court will not inquire into the question, whether an English Court has overstepped its jurisdiction. *Held*, therefore, that it was incompetent to plead want of jurisdiction in the English Court.

This was an action of multiplepoinding and exoneration raised by Mr Wilkie, trustee for Captain Reginald Archibald Edward Cathcart, under a trust-deed granted by Sir John Cathcart, Captain Cathcart's father, and others, in 1865, by which deed an annuity of £150 was made payable to Captain Cathcart during his father's life out of certain lands in Ayrshire as therein set forth, to have it decided to whom the said annuity for the year 1869 was payable—Captain Cathcart having been declared and adjudged bankrupt in the Bankruptcy Court of London on 17th February 1869. The defender and claimant, Thomas William Cook, military outfitter, London, was the creditors' assignee in the bankruptcy, and had duly recorded the certificate in the Register of Sasines for the county of Ayr, and also in the Register of Abbreviates of Adjudications. In consequence of these steps, Cook claimed the whole fund *in medio* for behoof of Cathcart's creditors. Cathcart also claimed the whole fund, on the ground that the adjudication of bankruptcy in England against him was null, in so far as he was not subject to the jurisdiction of the English Bankruptcy Courts, his domicile of origin being Scotch, and he being the eldest son of the proprietor of entailed estates in Scotland, and that though he had resided in England for some time with his regiment, he had left that country for nearly two years before the bankruptcy proceedings took place. He also alleged that the proceedings in the bankruptcy were otherwise irregular, and demanded a proof of his whole averments.

The Lord Ordinary (GIFFORD) preferred the claim of Cook, the creditors' assignee, holding Cathcart's averments not relevant to be admitted to probation, and that the bankruptcy proceedings in England must be held as valid and effectual until set aside, and must be enforced by the Court of Session in terms of "The Bankruptcy Act 1861," which expressly declares that orders in England shall be enforced in Scotland in the same way as if the order had been pronounced in Scotland. The annuity also was not declared to be alimentary, and was therefore attachable by diligence. His Lordship further held that the plea of no jurisdiction of the English Court was not well founded, even assuming Cathcart's averments of his Scotch domicile of origin and absence from England to be true. The debts, it was not disputed, had been contracted in England, and Cathcart had left that country without providing for their payment, and had remained away. Such conduct, without doubt, constituted an "act of bankruptcy" in the sense of the English bankruptcy statutes, which are expressly extended to aliens, and if so, must certainly include Scotchmen. Cathcart had moreover appeared by counsel in the first steps of the proceedings.

Captain Cathcart reclaimed.

MILLER, Q.C., and ADAM for him.

THE SOLICITOR-GENERAL and WATSON, for Cook, were not called upon.

At advising—

LORD PRESIDENT—My Lords, I do not think there can be any reason to doubt that the Lord Ordinary is right here. The proceedings in the English Bankruptcy Court were regular if it had jurisdiction over the claimant Cathcart. The petition is dated in September 1868; it is personally served at Christiania on Cathcart, who thereafter appeared in Court by counsel to obtain delay. He got this delay, but when the case again came on he did not appear, and an adjudication of bankruptcy was accordingly issued. The creditors' assignee when appointed duly records the certificate in the Register of Sasines for the county of Ayr, and so renders the order operative in Scotland. When the creditors' assignee claims the annuity which arises from lands situated in Scotland, the only objection offered by Cathcart in this competition is, that the adjudication of bankruptcy is void owing to want of jurisdiction in the Court which issued it. He maintains also that we may examine the proceedings in England in the same way as though the adjudication had been a foreign decree in absence. This seems to me wholly untenable; the English Bankruptcy Court is created by a British statute, and its orders are to have effect in Scotland. That, no doubt, does not give it power