

wish to show that I have come to the conclusion that I have done after careful consideration of the matter. The result in my opinion is that the judgment of the Lord Ordinary should be affirmed.

LORD M'LAREN—If the judicial factor is entitled to raise the rates leviable at the harbour, that can only be on the theory that by his appointment the management of the Trustees is displaced and their whole power of administration devolved upon the judicial factor; because if the judicial factor can alter the rates leviable on the landing of goods—the most important perhaps of all the powers the Trustees possess—I think it follows that every other power which the Trustees have hitherto exercised may equally be taken out of their hands. Now it is perfectly clear that such was not the intention of the Legislature in passing this private Act of Parliament. I do not need to consider whether the Court in the exercise of its ordinary jurisdiction could have appointed a judicial factor on the undertaking in such terms as would divest the Trustees of their administrative powers. It is quite plain that by the last Greenock Harbour Act the jurisdiction of the Court of Session to appoint a judicial factor is excluded altogether, and that a much more limited power is given to the Sheriff, and only to the Sheriff—that is, the power of appointing a judicial factor, who is to receive the revenues of the Trust and out of these to pay the dividends to the holders of the two classes of debenture stock. Now the difference between the two appointments is perfectly obvious; but the appointment of a factor such as is competent in this case is really the appointment of a person who is to protect the interests of the debenture holders. He can give them at least this protection, that he would not allow the Trustees to squander the revenue in extravagant management, or to apply the money to new works which would more properly be chargeable against capital. These two protections the debenture holders undoubtedly have, because the whole revenue comes into the hands of the judicial factor. He of course cannot divide the whole of it, otherwise the harbour would come to an end; but it lies with him to assign such sum as he may judge to be necessary for the payment of salaries and wages, and then the balance is appropriated by statute to the two classes of stockholders in their order.

I should have come without hesitation to this conclusion upon the words of the statute, but I agree with your Lordship that our opinion is strongly confirmed by the decisions that have been given upon the analogous and almost identical clauses of various general Acts of Parliament, of which the most important is the Companies Clauses Act. It is perhaps unfortunate that the judicial factor has no veto upon the action of the Trustees in fixing the rates, and that even where he may think it perfectly clear that the rate might be raised without injury to the traffic of the harbour he has no power to do it. I hope,

however, with your Lordship, that the law is not entirely powerless in giving a remedy in the case of *mala fide* administration, were such a case to arise. I see great difficulty in holding that we could interfere with the action of the Trustees so long as they maintained the rates at the scale which was fixed in the past. On the other hand, I can hardly doubt that if the Trustees were arbitrarily to lower the rates so as to deprive the bondholders of their dividend without any corresponding advantage to the harbour, that would be a breach of duty for which these Trustees, like all other trustees, would be accountable to this Court.

I therefore agree with your Lordship that the Lord Ordinary's interlocutor should be affirmed.

LORD KINNEAR—I agree with your Lordship in the chair.

LORD PEARSON was absent.

The Court adhered.

Counsel for the Pursuers (Respondents)—Scott Dickson, K.C.—Macmillan. Agent—W. B. Rainnie, S.S.C.

Counsel for the Defender (Reclaimer)—Clyde, K.C.—R. S. Horne. Agents—J. & J. Ross, W.S.

Friday, June 12.

FIRST DIVISION.

CUTHBERT v. CUTHBERT'S TRUSTEES.

Process—Special Case—Competency—Alimentary Liferent—Assignment of Liferent in so far as in Excess of a Sufficient Alimentary Income—Competency of Questions whether Assignment would be Effectual.

A special case was presented to which the parties were (1) a liferenter entitled to half the income of an estate for his liferent alimentary use allenary and free from his debts and deeds and the diligence of his creditors, and (2) the trustees of the granter of the provision; and the Court was asked (1) whether the liferenter had power, in order to raise funds to pay off his creditors, to grant an assurance company a valid and effectual assignment to £2100 per annum payable out of the said income, and if not (2) whether he could grant a valid and effectual assignment to his liferent provision in so far as in excess of a sufficient alimentary income, and if so (3) whether in the circumstances £1000 per annum was a sufficient alimentary provision for the liferenter.

The Court *dismissed* the case as incompetent, on the grounds (1) that it could not be decided *ab ante* that the deduction of £2100 would leave in future years a sufficient alimentary income,

nor that £1000 would in future years necessarily be a sufficient alimentary allowance, and (2) that a decision of the validity of the assignation would not be *res judicata* between the assignees and alimentary creditors of the liferenter whose claims might emerge from year to year.

By trust-disposition dated 6th April, and registered 4th May 1904, the now deceased John Cuthbert, who then resided at Carpow, Abernethy, Perthshire, on the narrative that on account of advancing years and infirmities he had resolved for the purpose of settling his affairs in his lifetime to create the trust thereafter written, thereby assigned, conveyed, and made over to trustees for the purposes therein mentioned his whole means and estate, heritable and moveable. The ninth purpose of the said trust-disposition provided, *inter alia*—“In the ninth place . . . I direct the said trustees to hold and apply, pay and convey, the whole free income of the said trust means and estate to the said Arthur Cuthbert and Claude Arthur Cuthbert, equally between them, or to the survivor of them, in liferent for their and his liferent alimentary use alienably, and free from their and his debts or deeds or the diligence of their or his creditors.”

A question having arisen as to the power of Arthur Cuthbert to grant an effectual assignation to his liferent provision in so far as in excess of a sufficient alimentary allowance, a special case was presented, the parties to which were (1) Arthur Cuthbert, *first party*, and (2) the trustees acting under the trust-disposition of John Cuthbert, *second parties*.

The case stated—“The said John Cuthbert, the truster, died on 20th May 1905, survived by the said Arthur Cuthbert and Claude Arthur Cuthbert . . . The said Arthur Cuthbert is forty-seven years of age and is married, and has only one child, the said Claude Arthur Cuthbert, who is seventeen years of age. His wife is still living. She is possessed of separate estate, and is not dependent upon him for her support. . . . The whole free income of the said trust means and estate is at present in terms of the said trust-disposition divisible equally between the said Arthur Cuthbert and Claude Arthur Cuthbert. The present free annual income of the trust is estimated at upwards of £11,000, of which the said Arthur Cuthbert is entitled to one-half. Of said annual income, about £3100 is derived from the rents of landed estates in Scotland, about £1100 from tea estates in Ceylon, and the balance of the income is derived from investments held by the second parties under special powers contained in the trust-disposition. The affairs of the first party have recently become embarrassed in consequence of his having contracted debts amounting to £23,000. He has no available assets other than the alimentary income payable to him under the above-mentioned trust-disposition. In these circumstances his creditors are threatening him with action or sequestration with a

view to attaching by diligence the income payable to him under the said trust-disposition in so far as in excess of a reasonable alimentary provision. The first party is desirous of obviating such proceedings, and has made a provisional arrangement with the Norwich Union Assurance Society whereby, in consideration of his granting to them an assignation to the sum of £2100 per annum payable out of his said liferent provision, together with covering policies of insurance on his life, the society will advance to him a sum sufficient to enable him to pay off his whole creditors at once in full. The parties are agreed that the said debts are due and payable by the first party, and that the balance of the first party's income under the said trust-disposition, over and above the annual sum of £2100 proposed to be assigned, will, if the trust income be maintained at its present amount, constitute an ample alimentary allowance to the first party. The creditors of the first party have been apprised of the proposed transaction, and have agreed to hold their hands in the meantime. The second parties consider the proposed arrangement a reasonable one and advantageous for the first party.

“The first party contends that in order to raise funds to pay off his creditors he is entitled to grant a valid assignation of such an annual sum out of the alimentary liferent payable to him under the said trust-disposition as will leave him a reasonably alimentary provision, and in particular that he is entitled to grant an assignation of an annual sum of £2100 payable out of the said liferent, and that the second parties are bound to recognise and give effect to such an assignation when duly intimated to them. In any event the first party contends that he is entitled to grant a valid assignation to his said liferent provision in so far as in excess of £1000 per annum. The second parties contend that the first party is not entitled to assign any part of his income from the trust estate. They maintain that he is not now entitled to determine what shall be a sufficient alimentary provision for him during the whole of his life, and that in any event £1000 is not sufficient as an alimentary provision. They further maintain that in any event he must *primo loco* have secured to him such sums as shall from time to time, and having regard to all circumstances, be a sufficient alimentary provision for him, and that he cannot effectually grant, and that they are not bound to recognise, an assignation for the whole of his life of a fixed amount out of his income, thus restricting his alimentary liferent to the balance, whatever it may happen to be, of the yearly income.”

The questions of law for the opinion and judgment of the Court were—“(1) Has the first party power, in order to raise funds to pay off his creditors, to grant a valid and effectual assignation to the sum of £2100 per annum, payable out of the income provided to him under the said trust-disposition? And if so, are the second parties bound to give effect to such an assignation?”

(2) In the event of the first question being answered in the negative, has the first party power, in order to raise funds to pay off his creditors, to grant a valid and effectual assignation to his liferent provision under the said trust-disposition in so far as in excess of a sufficient alimentary income? And if so, are the second parties bound to give effect to such an assignation? (3) In the event of the second question being answered in the affirmative, is the sum of £1000 per annum a sufficient alimentary provision for the first party?"

Argued for the first party—(1) The question whether an alimentary liferenter had power to assign his right, so far as in excess of a sufficient alimentary provision, was competently raised. It was similar to the question raised in *Thomson's Trustees v. Thomson*, October 22, 1897, 25 R. 19, 35 S.L.R. 16. (2) The first party's contentions in the special case were supported by *Livingstone v. Livingstone*, November 5, 1886, 14 R. 43, 24 S.L.R. 30; *Claremont's Trustees v. Claremont and Others*, November 10, 1896, 4 S.L.T. 144; *Haydon v. Forrest's Trustees*, November 30, 1895, 3 S.L.T. 182; *Lewis v. Anstruther*, December 17, 1852, 15 D. 260; *Rogerson v. Rogerson's Trustee*, November 6, 1885, 13 R. 154, 23 S.L.R. 102. As to what was a proper alimentary allowance, reference was made to the above cases and to *Fraser on Husband and Wife*, vol. i, p. 765.

Argued for the second parties—Their contentions, and especially the proposition that future income was not assignable in anticipation, were supported by the following authorities:—*Mackenzie v. Morison*, M. 10,413; *M'Donnell v. Clark*, November 25, 1819, F.C.; *Rennie v. Ritchie*, April 25, 1845, 4 Bell's Ap. 221 (Lord Campbell at 242, Lord Cottenham at 244); *Hewats v. Robertson*, November 30, 1881, 9 R. 175, 19 S.L.R. 149; *Earl of Buchan v. His Creditors*, July 11, 1835, 13 Sh. 1112; *Harvey v. Calder*, June 13, 1840, 2 D. 1095; *Lewis v. Anstruther*, June 11, 1852, 14 D. 857, and December 17, 1852, 15 D. 260.

At advising—

LORD M'LAREN—This is a special case between Arthur Cuthbert, who is the nephew and beneficiary under the testament of the late John Cuthbert, of the first part, and the said John Cuthbert's trustees of the second part. The question relates to the effect of an alimentary liferent interest, and the extent to which that alimentary interest can be alienated so as to make it available for payment of debts.

The provision under consideration is the ninth purpose of Mr John Cuthbert's will, which provides that the trustees shall hold and apply, pay and convey, the whole free income of the trust estate to Arthur Cuthbert and another equally between them or to the survivor of them in liferent for their and his liferent alimentary use allanarly, and free of their and his debts or deeds, or the diligence of their or his creditors. Arthur Cuthbert has, we do not know how, but probably through business transactions, incurred debts to the extent of £23,000, but having no capital, and being

threatened with diligence by his creditors, he has entered into a preliminary arrangement with the Norwich Union Assurance Society whereby, in consideration of his granting to them an assignation to the sum of £2100 per annum, payable out of his said liferent provision, together with covering policies of assurance on his life, the society will advance a sum of money sufficient to enable him to pay off his whole creditors at once. The trustees seem willing to support this agreement, which is one, no doubt, very advantageous to Mr Cuthbert at the present moment, but they decline to take the responsibility of doing so unless with the approval of the Court. In these circumstances three questions have been submitted for our opinion. The first is as to the first party's power to grant a valid and effectual assignation to the sum of £2100 per annum, payable out of the income provided to him under the said trust-disposition—that is to say, cutting off that fixed sum from the amount of the alimentary interest and leaving the remainder for his enjoyment. The next question, in the event of the first question being answered in the negative, is whether the first party has power to grant a valid and effectual assignation to his liferent provision under the said trust-disposition in so far as it is in excess of a sufficient alimentary income. Now that seems quite a harmless question, as it is in accordance with the spirit of the law on this subject, but it is followed by the third question, which is to the following effect—"In the event of the second question being answered in the affirmative, is the sum of £1000 per annum a sufficient alimentary provision for the first party?"—so that by questions two and three, taken together, we are asked to say whether it is a legal arrangement that Mr Cuthbert's income should be reduced for all time coming to the minimum sum of £1000 as being sufficient to satisfy his alimentary requirements. The Court has recognised the principle that where a person is in the enjoyment of an annual income under the form of an alimentary liferent, that sum may be made available to his creditors year by year in so far as it is in excess of the amount which is required for an alimentary provision, and no difficulty attends this view, because in any one year the income is known, and an opinion can be formed as to what is the necessary sum to maintain the person in the rank of life to which he belongs, without deteriorating to a lower style of living. These facts can be ascertained from year to year. But I am not aware that it ever has been held that an alimentary interest is adjudgeable, and it is impossible to determine the question in this case, because other parties who would be interested in the decision of that question are not here, that is to say, the alimentary creditors of the beneficiary whose claims may emerge from year to year. But we are asked in the first question to affirm that the Norwich Union Society have an effectual assignation to this liferent provision, and we are asked to do so on the ground that the sum remaining is sufficient

to satisfy the wants of the first party. This year we are told the income amounts to over £5000. But that is only the condition in this year. There is no difficulty in holding that for the present more than sufficient would be left for alimentary maintenance. But then we do not know what the income in future years will be. There may be losses through the depreciation of securities or from other causes which may sweep away the fund altogether. Such things have happened, and in some future year the estate of the uncle might be so diminished as not even to provide the £2100 payable to this Insurance Company. In such a case nothing would be left for the beneficiary, and I need hardly say that an alimentary income of *nil* is not enough for anybody. This seems to be an insuperable obstacle to giving any answer whatever to the first question.

Questions two and three proceed on the supposition that the Insurance Company instead of having security over the entire estate should limit that security to the annual income, less £1000, which would always remain for the aliment of the beneficiary. Well, if he has considered this question, and has come to the conclusion that £1000 is enough to satisfy his alimentary wants, it is highly probably that this would be a satisfactory arrangement, but as one of your Lordships observed, this only goes to prove that the Insurance Company have a good speculative security for their advance. I do not think that this Court in administering this somewhat delicate equitable jurisdiction can assume that a sum sufficient for the aliment of a party in the present year would remain sufficient for his aliment in all time. We do not know that the value of gold, for instance, may not change, and that a sum now sufficient to maintain a person with decency in the position in life which he now occupies would be insufficient to maintain him in a similar position twenty years hence. Accordingly, I see considerable difficulty in answering questions two and three at all. Indeed, the theory of this case involves the startling assumption that an alimentary interest is adjudgeable, because I do not see how otherwise a security can be created over that interest for the money it is proposed should be advanced. I have therefore come to the conclusion that it is impossible to give any answer to either of these questions. It must be left to the Insurance Company, if they are satisfied with the security, to consider whether they will make this advance without the authority of the Court. If we were so ill advised as to answer the questions as the parties to this case desire, this would not prevent creditors coming forward in the future to make a claim on the annual income, because our decision would not be *res judicata* in a question with them. The question would then arise, whether the assignation which had been made to the Insurance Company was valid, and whether it gave a preference to the

tors. I therefore move that we should dismiss the case.

LORD KINNEAR—I also think that this case must be dismissed as incompetent. I do not think that the incompetency arises from the shape in which the case is presented, for I assent to the view which was stated by counsel, viz., that the Court may entertain in the form of a special case any question which might be entertained as a declaratory conclusion in an action of declarator. But I think that if an action of declarator had been brought in which the Court was asked to affirm the proposition which we are asked to affirm in this case, such an action must have been dismissed. The question we are asked is, whether if the first party grants an assignation to the Insurance Company of part of his income, that will be a valid and effectual assignation in circumstances about which it may be easy to speculate, but which it is impossible to foresee, and we are to decide this in the absence of persons who may have an interest and who are not now before the Court. Whether there is left a sufficient margin of income to make the proposed loan a safe investment is a question of which the lenders may be able to judge, but about which they are not entitled to ask the Court to speculate or to advise them. The practical question is, whether if this assignation were now granted, it would be valid and effectual in the event of questions arising at some future time between the assignees and creditors of the grantor, who might arrest a term's income for an alleged alimentary debt. This question we cannot decide, because our decision would not be *res judicata* against the hypothetical arrester. It is perhaps natural that as both parties desire a judgment they should not have called our attention to the many cases in which the Court has refused to entertain questions of this kind. The Court has uniformly refused to consider a declaratory conclusion that if such and such a thing were done it would make a valid and effectual deed; and that is just the proposition that we are asked in this case to affirm or deny. I need only refer to two authorities, viz., *Earl of Galloway v. Garlies*, June 26, 1838, 16 S. 1212, and *Harvey v. Harvey's Trustees*, June 28, 1860, 22 D. 1310. In the latter case the principle is explained by Lord Justice-Clerk Inglis. The question there was, whether children who had an interest in certain provisions were entitled to test on their provisions, and Lord Justice-Clerk Inglis said, p. 1325—“The question presents itself for our consideration whether if we were to pronounce judgment upon this question of the right of the younger children to test upon any portion of the provisions settled by the deed of 1839, that would be an operative and conclusive judgment when the question really arises. It might or might not. . . . There might be parties coming before the Court at a distance of years and trying that question over again and representing

your Lordship's judgment pronounced now as utterly inoperative and useless. For what reason? Simply because it was a premature judgment that ought never to have been pronounced." His Lordship goes on to point out that the fatal objection to such a premature judgment is that it will not become *res judicata* against all persons who can become interested in the matter.

Upon the same ground, viz., that any judgment we pronounced now would be premature, I think this case ought to be dismissed.

LORD JOHNSTON—I concur. I regret that we cannot save Mr Arthur Cuthbert from one of the disagreeable results of the circumstances which have placed him in his present position. I am afraid he must either execute a trust deed or go through the Bankruptcy Court, and then the question, which we are asked to decide *ab ante*, may properly be tried between his trustee and his creditors.

It is unfortunate that this should be necessary. But I do think the questions attempted to be raised can be otherwise competently and effectually raised.

The LORD PRESIDENT and LORD PEARSON were absent.

The Court dismissed the case as incompetent.

Counsel for the First Party—Dickson, K.C.—Macmillan. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Second Parties—Chree. Agents—E. A. & F. Hunter & Company, W.S.

Friday, June 12.

FIRST DIVISION.

[Sheriff Court at Kirkcudbright.

M^cINNES v. RIGG AND BELL.

Poor — Settlement — Lunatic — Lunatics (Scotland) Act 1857 (20 and 21 Vict. cap. 71), sec. 75.

The Lunatics (Scotland) Act 1857, enacts — Section 75 — "Every pauper lunatic detained in any district asylum under this Act shall be deemed and held to belong and be chargeable to the parish of the legal settlement of such lunatic at the time the order for his reception in such asylum was granted, and the expense of his maintenance in such district asylum shall be defrayed by such parish accordingly, and the residence of any pauper lunatic in any such district asylum shall be deemed to be the residence of such lunatic in the parish legally chargeable with the maintenance of such lunatic."

A woman who had previously acquired a residential settlement in a parish was on 15th August 1895, being

a pauper and a lunatic, admitted upon a warrant of the Sheriff to the district asylum, which was outwith the parish. The parish maintained her until 2nd November 1895. From that date till 1st May 1906 she was maintained in the same asylum by her brother, her name being transferred from the list of pauper patients to that of private patients. After 1st May 1906 her brother ceased to support her.

Held (diss. Lord Johnston) that she had not lost the residential settlement which she had on 15th August 1895, and that the parish of her residential settlement, and not the parish of her birth, was liable for her maintenance.

Kirkwood v. Lennox, July 10, 1869, 7 Macph. 1027, 6 S.L.R. 670, followed.

The Lunatics (Scotland) Act 1857, section 75, is quoted *supra* in rubric.

Miles M^cInnes, inspector of poor of the Parish of Dumfries, and as such representing the Parish Council of the Parish, raised an action in the Sheriff Court at Kirkcudbright against Samuel Rigg, inspector of poor of the Parish of Kelton, and James Bell, inspector of poor of the Parish of Parton, both in the Stewartry of Kirkcudbright, and as such inspectors representing the Parish Councils of said Parishes. The pursuer prayed the Court to ordain the defender Rigg, or otherwise the defender Bell, to free and relieve him of the advances made and to be made by him to or on account of Janet Cannon, a pauper lunatic, then residing in the Crichton Royal Institution, Dumfries.

The pursuer, *inter alia*, pleaded—“(2) The pauper having a residential settlement in the parish of Kelton, the pursuer is entitled to decree as concluded for against the defender Samuel Rigg, as representing the Parish Council of that parish. (3) Alternatively, and assuming that such residential settlement has been lost by absence, the pursuer is entitled to decree against the defender James Bell, as representing the Parish Council of the parish of Parton, which is the parish of the pauper's birth settlement.”

The defender Samuel Rigg (parish of Kelton), *inter alia*, pleaded—“(1) The pauper Janet Cannon having been resident outwith the parish of Kelton, and not having been in receipt of parochial relief for the period from 2nd November 1895 to 1st May 1906, and having thus lost her residential settlement in the said parish, the defender Samuel Rigg is entitled to be assoilzied. (2) The pauper Janet Cannon having lost her residential settlement in the parish of Kelton as before mentioned, and being a lunatic and incapable of acquiring a residential settlement, the parish of Parton, as her birth settlement, is bound to support her, and the defender Samuel Rigg should be assoilzied.”

The defender James Bell (parish of Parton), *inter alia*, pleaded—“(1) The pauper not having a parochial settlement in the parish of Parton, said parish of Parton is not liable in relief to the pursuer for the pauper's maintenance. (2) The pauper hav-