

the idea that the case is to be bandied about between the parties *inter se*, and between them and the clerk, as if it was intended to be a concerted statement.

In the next place, they are to state their determination, and their determination is also solely in their own breasts. What they have to add, and this only, I think, brings them in contact with the parties, is the statement of reasons of appeal, and replies thereto. Beyond that they have nothing to do. I can quite understand that if a statement were submitted to them which did not contain reasons of appeal or replies, it would be their duty to send back such statement, and decline to accept it until it was altered in conformity with the statutory intention.

But otherwise their duty in connection with the preparation of appeals simply is to state the facts found, to state their determination, and to append the reasons of appeal and replies tendered to them. The only other thing they have to do is to append the notes of evidence, where such notes have been taken at the request of the parties.

I state this with your Lordships' approval in order that the public interested may know that the procedure in stating cases has evidently hitherto been lax and dilatory, and that such delays will not for the future be allowed. The object of the statute is, as I have shown, to get the valuation roll finally adjusted as soon after 10th October in each year as conveniently can be. The sittings of this Court in the future will be fixed at an earlier date than of recent years. They were fixed so late as December this year in order not to make the resumption of a proper practice too abruptly, but in future years the Court will, we trust, be held early in the month of November at latest.

As regards the case of Stein at present before us, on inquiry into the circumstances we find that the delay in presenting it was not the fault of the parties or their agents, but entirely that of the Town Clerk of Falkirk. Were the case refused a hearing, the appellant would suffer injustice for a cause for which he is not responsible, and we have therefore consented to hold a special sitting for its disposal. But it must be apparent that where Judges have to be withdrawn from three different departments of the Court, this has not been done without great inconvenience. And we think it right to say that in the future appeal cases are peremptorily required to be in the hands of the Inland Revenue in time for the sittings of the Appeal Court, of which due notice will be given in the rolls.

The Court then proceeded to dispose of the appeal in question.

Counsel for the Appellant—M'Robert.
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Counsel for the Respondent—D. Wilson.
Agents—Macpherson & Mackay, S.S.C.

COURT OF SESSION.

Thursday, February 8.

SECOND DIVISION.

[Lord Skerrington, Ordinary.]

HARDIE v. BROWN (MACFARLAN'S
JUDICIAL FACTOR).

Aliment—Succession—Trust—Alimentary Liferent—Liferenter Indebted to Trust—Retention of Liferent in Satisfaction of Debt.

A beneficiary entitled under a trust settlement to a share of the income of the residue in liferent "strictly alimentary alienarly" and "not assignable nor attachable" for his "debts, deeds, or obligations," was also a debtor to the trust. *Held* that the trustees were not entitled to retain the share of income in satisfaction of the debt except *quoad excessum* over a reasonable aliment.

Joseph Hardie raised an action against Alexander Herbert Brown, judicial factor on the trust estate of the late Alexander Macfarlan, concluding for (1) declarator that the pursuer was entitled in terms of the trust-disposition and settlement of the late Alexander Macfarlan to one-fourth of the income of the residue of his estate in alimentary liferent; (2) count and reckoning of the defender's intromissions with the said estate to Whitsunday 1910 and payment of £1500 as the balance due to the pursuer thereon; and (3) payment to the pursuer during his lifetime of one-fourth of the income of the residue of the said estate.

The following *narrative* is taken from the opinion of the Lord Ordinary (SKERRINGTON)—"The pursuer Joseph Hardie is a nephew of the late Alexander Macfarlan, who died on 1st July 1909 leaving a trust-disposition and settlement dated 23rd April 1909, by which he disposed *mortis causa* of his whole estate. The trustees having declined to accept office, the defender was appointed judicial factor on the trust estate. By the 11th or residue clause of the trust-disposition and settlement the testator directed his trustees 'to hold the residue of my means and estate and produce and proceeds thereof for my nephews and nieces, Joseph Hardie' (the pursuer) and three others 'in liferent, for their liferent use alienarly, equally share and share alike, and their lawful issue *per stirpes* in fee.' He further declared that 'the whole of the alimentary provisions hereinbefore provided shall be strictly alimentary alienarly, and shall not be assignable nor attachable for the respective beneficiaries' debts, deeds, or obligations.' At the date of the will the pursuer was indebted to the testator in a sum of nearly £5000, being advances received by the pursuer from time to time in order to enable him to carry on his business as a

farmer in the United States of America. There is an action in this Court at the instance of the judicial factor against Mr Hardie, in which he sues the latter for £4795, 12s. 8d., being the amount of said advances. The present action was debated upon the assumption that the judicial factor's claim was a good one, and that he held a decree for the amount."

The defender pleaded, *inter alia*—“(1) The defender being justly entitled to retain the pursuer's share of the revenue of the trust estate against, and apply it towards satisfaction of, the debt due by the pursuer to the testator and interest thereon, decree of absolvitor should be pronounced with expenses. (4) In any event the sum of £300 a-year, in view of the station and circumstances of the pursuer, being a reasonable provision for his aliment, the defender is entitled to apply the pursuer's said share of the revenue of the trust estate—in so far as it exceeds said sum—in satisfaction of pursuer's indebtedness to the trust estate.”

On 19th January 1911 the Lord Ordinary pronounced the following interlocutor—“Finds that on a sound construction of the trust-disposition and settlement of the deceased Alexander Macfarlan, he directed that the share of the trust estate bequeathed to the pursuer should be held by the trustees for the purpose of alimenting him, and that it should not be made available for any other purpose: Repels the whole pleas-in-law stated for the defender, and *quoad ultra* continues the cause . . . Grants leave to reclaim.”

Opinion.—[After the narrative above quoted]—“The question in the present case is whether the defender, the judicial factor, is entitled to operate repayment of his debt by impounding the pursuer's liferent interest under his uncle's trust. It is obvious from the averments of both parties that the judicial factor may find it difficult to recover payment of the debt by taking proceedings in the United States. The pursuer, who is 62 years of age, alleges that he retired from business three years ago, that his farm was purchased in the name of his wife and belongs to her, and that the stock belongs to his eldest son. In these circumstances the defender claims that he is entitled, on the principle of retention or of compensation, to impound either the whole of the pursuer's liferent provision or at least so much thereof as exceeds a reasonable aliment. He alleges that an allowance of £300 of aliment from the trust estate would enable the pursuer to maintain himself and his wife comfortably according to their position in life. The estate left by the testator was very considerable. The pursuer estimates his one-fourth share of the income of the residue at £1500 per annum, and the defender at £1000.

“Except that it confers upon the trustees power to compromise or refer disputed claims, the trust-disposition and settlement contains no express directions as to the recovery of the testator's estate in general or of the pursuer's debt in particular. The

inference is that the testator either overlooked the pursuer's debt or intentionally refrained from giving any directions in regard to it. If it were legitimate to speculate on such a matter I should think it probable that the testator knew perfectly well what he was doing, and that he had excellent reasons in his own mind for making no reference to the debt in his will either by a clause expressly remitting it or by a clause directing that it should be paid out of the pursuer's life interest. Counsel on both sides referred to the clauses above quoted as throwing light upon the testator's intention in regard to the matter in dispute. The defender's counsel founded upon the words ‘residue’ and ‘equally.’ He argued that there could be no proper residue upon which the residuary clause could operate until the pursuer had first paid his debt, and further that there would be no equality, but on the contrary inequality, among the beneficiaries unless the debt was repaid out of the pursuer's life interest. This argument is fallacious. Whether the pursuer does or does not ultimately pay his debt to the trust estate, the free estate now in the hands of the defender must be held by him for behoof of four several groups of beneficiaries according to their respective rights of liferent and fee. The only question is whether according to the wishes of the testator as expressed in his will the income from one equal fourth share of the residue now in the hands of the defender falls to be paid to the pursuer or must be applied in payment of the pursuer's debt.

“The pursuer's counsel pointed to the clauses declaring the pursuer's provisions to be alimentary as impliedly excluding any right of retention or compensation on the part of the defender. But for these clauses it would have been not merely the right but also the plain duty of the defender to operate repayment out of the pursuer's share of the trust estate, but that duty would not have arisen out of any legal fiction as to the testator's intentions. The duty would have been equally imperative in the case of a debt of which the testator was wholly ignorant. The law itself casts upon trustees the duty of acting in an ordinary business-like manner, and it forbids them to expose any asset of the estate to unnecessary risk. The question is whether the terms of this particular trust sufficiently indicate that the testator did not desire his trustees to proceed according to the ordinary rules of trust management in regard to the recovery of the pursuer's debt. I am of opinion that the testator's directions are free from ambiguity. He directed that the share of the trust estate bequeathed to the pursuer should be held by the trustees for the purpose of alimenting him, and that it should not be made available for any other purpose. Although the word ‘attachable’ property refers to legal proceedings at the instance of third parties, I do not think it is possible to read the clauses as if they expressly excepted from their operation debts due by beneficiaries to the testator.

Such a construction would amount to the insertion into the will of a direction which the testator might have been the first to repudiate if his attention had been called to the matter.

“Assuming that the defender is debarred from impounding the whole of the pursuer’s life interest his counsel argued that the provision was in excess of what was reasonable in the circumstances. It followed that so far as excessive the provision was not truly alimentary, and that it might be made available for payment of the pursuer’s debt. Although I do not see the relevancy of this proposition, I admit that either a creditor or an assignee from the pursuer might partially defeat the testator’s expressed intention and might insist upon receiving payment of so much of the pursuer’s life interest as exceeded what the Court might decide to be a reasonable aliment. In defence to such an action it would be the duty of the defender to protect the pursuer against his own providence, and to endeavour so far as possible to carry out the wishes of the testator. It is conceivable that the defender might satisfy the Court that the provision as it stands is not in the whole circumstances excessive. The peculiarity and novelty of the present case is that no one impeaches the validity of the trust except the defender, whose duty it is to protect it. There is a difference of opinion between the defender and the testator as to what sum would form a reasonable aliment for the pursuer. I propose to follow the opinion of the testator and to direct that the trust shall be executed according to its terms. I accordingly repel the whole pleas stated for the defender and *quoad ultra* continue the case.”

The defender reclaimed.

Argued for the defender (reclaimer)—(1) The pursuer was bound to pay his debt to the trust estate and so increase the residue, and till he did so he could not claim anything out of that residue—in *re Ackerman*, [1891] 3 Ch. 212; in *re Cordwell’s Estate*, [1875] L.R., 20 Eq. 644; in *re Taylor*, [1894] 1 Ch. 671; in *re Rhodesia Goldfields, Limited*, [1910] 1 Ch. 239. The residue was not completed or ascertained till the pursuer’s debt had been paid—*Mackenzie’s Trustees v. Macdonall*, February 13, 1852, 14 D. 739—and before that was done the pursuer could not receive a share of the income of the residue. The nature of the pursuer’s right could not be considered before completion of the fund out of which it was payable, and there was no question, therefore, of retention of an alimentary life interest. (2) In any event the provision in favour of the pursuer was in excess of what was required for his maintenance, and *quoad* the excess there must be retention.

Argued for the pursuer (respondent)—(1) The pursuer’s provision was alimentary, and retention of any part of it was in violation of the settlement and incompetent—Bell, Com. (7th ed.), i, pp. 124-6; *Reid v. Bell*, November 25, 1884, 12 R. 178, 22 S.L.R. 136. The English cases cited by

the defender had no application, because a declaration that a provision was alimentary was ineffectual to protect it against creditors in English law—in *re Fitzgerald*, [1904] 1 Ch. 573, per Cozens-Hardy, L.J., at p. 589; Stirling, L.J., at p. 593. The settlement did not expressly make payment of the pursuer’s debt a condition precedent to the enjoyment of his life interest; and there would need to be very clear implication to infer it and to apply the doctrine of approbate and reprobate—Bell, Com. (7th ed.), i, p. 143. (2) Even if the provision to the pursuer was larger than was required for his maintenance, there was still no right to retain. The defender certainly could have no higher right than the other beneficiaries, and they could not be heard to say in contradiction of the settlement that the life interests were not wholly alimentary. That would be reproaching the deed under which they took.

At advising—

LORD SALVESEN—It is unnecessary to recapitulate the facts of this case, as these are fully stated in the Lord Ordinary’s opinion. It may be noted, however, that since the interlocutor under review was pronounced the defender has obtained a decree against the pursuer for a sum of £4795 odds with expenses, being the amount of the pursuer’s indebtedness to the trust estate. It has thus been judicially affirmed that the testator did not discharge his debt, but that it was one which it was the duty of the defender in a due course of his administration to recover for behoof of the residuary legatees.

The questions of law for our decision are two—(1) Is the defender entitled to retain from the bequest in favour of the pursuer his indebtedness to the trust estate as now constituted, paying him no part of the income until the debt has been fully satisfied? and (2) Assuming that he is bound in the first place to provide for the reasonable maintenance of the pursuer in accordance with the testator’s expressed desire, is the defender entitled to retain the balance until the pursuer’s debt is extinguished?

The defender’s contention on the first question was that the pursuer had no right to demand any benefit under the will until he had first repaid his debt to the testator; and reference was made to certain English authorities, of which *Ackerman*, L.R., 1891, 3 Ch. 212, may be taken as typical. These authorities do not in my opinion support the defender’s contention. It is common ground that the law of England, differing from the law of Scotland, does not recognise as in a question with creditors a condition of a bequest of income that it shall not be attachable for debt. These authorities are therefore in line with the law of Scotland, which, but for the condition imposed by the testator on this bequest for the protection of the pursuer, would have made it not merely the right but the duty of the defender to retain the pursuer’s share of income as it accrued until his indebtedness to the trust estates was

completely satisfied. That condition, however, makes it plain that the testator was anxious to provide for the maintenance of the pursuer, and his desire would be defeated if the whole income were absorbed for several years in discharging the pursuer's debt. I have therefore come to the same conclusion as the Lord Ordinary with regard to this question.

The second question is one of more difficulty. It is settled law that an alimentary provision is not protected against creditors except to the extent of a reasonable provision, and that *quoad excessum* it is open to diligence. The most authoritative decision on this subject is that of *Livingstone*, 14 R. 48, where Lord President Inglis discussed all the earlier authorities. The Lord Ordinary appears to admit this, but he puts his judgment upon the ground that the defender cannot impeach the validity of the alimentary provision in favour of the pursuer to any extent, because it is his duty to protect it. I am unable to concur in this view. The defender's duty to recover debts due to the trust is just as imperative as his duty to divide the income of the residue according to the testator's directions. If it were otherwise, and the pursuer had no other funds (and here he alleges that he has none), there would be in effect an implied discharge of the debt which the defender has now constituted against the pursuer, and the other residuary legatees would be paid a less income than the testator intended them to receive. The two duties appear to me to be sufficiently reconciled by holding that to the extent of a reasonable provision for the pursuer's maintenance the defender must pay him the income of his share of residue, and that *quoad* the balance the defender is entitled to retain it until the pursuer's debt is extinguished. This is just doing directly what I think could be done in a more circuitous way. I see no reason why the defender should not have sold his claim against the pursuer to a third party; and that third party would have been under no duty to restrict his diligence to funds other than those which the pursuer derived by way of annual income from Mr Macfarlane's trust estate. The claim against the pursuer is just an ordinary claim of debt, payment of which can be recovered by the person in right of it by any legal diligence against any income which, although declared to be alimentary and not attachable for debt, happens to be in excess of a reasonable provision for maintenance. The ground upon which the Lord Ordinary proceeds is, I think, impliedly negatived in the case of *Rothwell*, 1 F. 81. That case no doubt related to a capital sum which was declared to be alimentary and not assignable, and which when once paid over to the legatee was not protected from creditors and could have been disposed of by her as she pleased. But the claim to retain was made by the trustees who were the holders of the fund; and if the principle which the Lord Ordinary has given effect to had been well founded in law it was a good answer to them that it was

their duty to give effect to the trustor's declared intention. This was expressly pleaded, for one of the arguments as recorded is as follows—"At all events, in a question with the trustees the legacy must be held to be incapable of assignment; and even if third parties could plead that the clause was ineffectual, the machinery of a trust not being provided for, the trustees could not maintain that plea." The First Division rejected this contention and sustained the claim of the trustees to repay themselves their advance before paying the legacy. The reasoning upon which they proceeded appears to me to be applicable to so much of the income payable to the pursuer as is not effectually protected against creditors.

It is a question of circumstances (including the social position of the party in whose favour the alimentary provision has been conceived) what annual sum will constitute a reasonable provision for maintenance. Parties are not agreed upon the facts, and I think it is necessary accordingly that we should remit the case back to the Lord Ordinary to allow a proof of the averments so far as bearing on this matter. I indicate no opinion at this stage as to the relevancy of the averment that the expenses of living in America are higher than the corresponding expenses here, but in the meantime the whole facts bearing on this matter had better be ascertained.

LORD GUTHRIE—I concur. The claimer maintained that he was in a better position than an ordinary creditor, and could not merely use the income of the share of the deceased's estate bequeathed to the respondent for repayment of the debt due by him, so far as that income might exceed what was necessary for his aliment, but that he was entitled to retain the whole income till the debt was liquidated. The respondent, on the other hand, maintained, in the first place, the view given effect to by the Lord Ordinary, namely, that the testator's direction was that "the share of the trust estate should be held by the trustees for the purpose of alimentering him (the respondent), and that it should not be made available for any other." Alternatively the respondent asked payment of the fund so far as necessary for his aliment.

I concur in rejecting the Lord Ordinary's construction of the clause in question. I do not find any instruction, either express or implied, by the deceased to his trustees that the respondent's share of his estate should not be made available for any other purpose than that of alimentering him. The Lord Ordinary holds that the respondent has not the ordinary rights of a creditor in the case of an alimentary provision. It is true that the judicial factor happens not to represent creditors, who have all been paid. But that is an accident which cannot affect a question of construction. I cannot attach importance to the view thus stated by the Lord Ordinary—"The peculiarity and novelty of the present case is, that no one impeaches the validity of

the trust except the defender, whose duty it is to protect it." It does not appear to me that the claimer's position involves any impeachment of the validity of the trust. His extreme view only suggests a suspension for a time of the respondent's interest under the trust, and the alternative view, which we are upholding, gives full effect to the trust as an alimentary provision. In addition, while the claimer has a duty to protect the trust, he has also a duty, under the trust, to ingather the trust estate.

The LORD JUSTICE-CLERK concurred.

LORD DUNDAS was sitting in the First Division.

The Court recalled the interlocutor of the Lord Ordinary; found the defender entitled to retain until the pursuer's debt to the testator was satisfied the income of the pursuer's share of the residue of the testator's estate to the extent to which that income exceeded a reasonable aliment to the pursuer; and remitted the cause to the Lord Ordinary to determine what in the circumstances was a reasonable aliment.

Counsel for Pursuer—D. F. Scott Dickson, K.C.—J. R. Christie. Agent—Robert H. Paterson, S.S.C.

Counsel for Defender—Horne, K.C.—Black. Agents—Dove, Lockhart, & Smart, S.S.C.

Saturday, January 20.

FIRST DIVISION.

[Dean of Guild Court of the
City of Glasgow.]

PORTER v. NISBET.

Burgh—Police—Dean of Guild—Statute—Building Regulations—"Hollow Square"—"Background"—Glasgow Building Regulations Act 1900 (63 and 64 Vict. cap. cl), sec. 4.

The Glasgow Building Regulations Act 1900, section 4, enacts—"In this Act, unless the context otherwise requires, the following words and expressions shall have the several meanings hereby assigned to them, viz.—... 'Hollow square' means any square, parallelogram, triangle, polygon, circle, or other regular or irregular figure, formed by one or more streets or buildings, or streets and buildings in such a manner as to contemplate the erection or continuance of buildings (other than wash-houses and offices) enclosing or nearly enclosing a space of background, and includes—(1) The buildings enclosing or nearly enclosing such space of background; and (2) the buildings (if any) erected within such space of background. . . ."

Illustration of what constitutes a "hollow square" and "background" within the meaning of section 4 of the

Glasgow Building Regulations Act 1900. *Explanation (per the Lord President) of the meaning of the terms.*

Burgh—Dean of Guild—Jurisdiction—Discretion—Statute—Glasgow Building Regulations Act 1900 (63 and 64 Vict. cap. cl), sec. 38.

The Glasgow Building Regulations Act 1900, section 38, enacts—"No building, other than the usual one-storey wash-houses and offices, shall be erected within the enclosed space of background in any hollow square the buildings of which, or any of them, are or may be used or are intended to be used as dwelling-houses: Provided that in the case of any hollow square in which the enclosed space of background exceeds the dimensions specified in the immediately preceding section, the Dean of Guild may, if satisfied that the arrangements for ingress and egress, drainage, cleansing, lighting, and ventilation are adequate, suitable, and satisfactory, grant decree for the erection in such enclosed space of background of buildings not exceeding two storeys in height, on condition that such buildings shall not be used for purposes which may be injurious or offensive to the inhabitants of the surrounding or adjacent buildings. But no such building shall be authorised by the Dean of Guild unless an entry not less than ten feet in width be provided leading from a street to such building."

Held that even if the requirements as to ingress and egress, drainage, cleansing, lighting, and ventilation were fulfilled, the granting of a lining under the proviso of the section was in the absolute discretion of the Dean of Guild.

The Glasgow Building Regulations Act 1900 (63 and 64 Vict. cap. cl), enacts—Section 4 (*quoted in first rubric*). Section 38 (*quoted in second rubric*). Section 99, sub-section (4)—"The exits from public buildings other than hotels, and from each floor or section thereof, shall when taken together be not less than one foot in width for every seventy persons who can be seated within the building or floor or section thereof, and the minimum width of any exit shall be four feet." Section 134—"Nothing in this Act contained shall affect, alter, or limit any right of review of the decisions, decrees, interlocutors, or orders of the Dean of Guild, and all decisions, decrees, interlocutors, or orders of the Dean of Guild pronounced in virtue of any of the provisions of the Police Acts [*which include the Glasgow Building Regulations Act 1900*], shall be subject to review by the Court of Session, and such review shall not be excluded by reason of the Dean of Guild having pronounced such decision, decree, interlocutor, or order, upon a matter of fact, or in the exercise of any discretionary or administrative power conferred upon him by the Police Acts, or without a written record having been made up, and the Dean of Guild shall in his decision