Moody, ([1903] 1 K.B. 56) I think there was quite sufficient notice given to the person charged here of what was going to be proved.

Accordingly I do not think there are grounds for suspending the conviction.

LORD ANDERSON — Under the form of review which the appellant has chosen, namely, a bill of suspension, he is precluded from having the merits of the case reviewed to any extent by this Court. Therefore I do not think it essential to express any view upon the question which was argued as to whether or not actual proof of obstruction must be led in order to secure a conviction under the charge libelled here. On that point I agree with what fell from my brother Lord Mackenzie, and whatever the strict legal effect of the section, I should think that no sensible prosecutor would bring a case of this sort, and no sensible magistrate would convict, unless there was real obstruction of the highway, or unless there was wilful obstruction in this sense, that the owner of the motor car refused to move it when he was asked to do so by the police.

I agree with what your Lordships have said as to the relevancy of the complaint. I do not think that the Motor Car Regulations of 1904 have impliedly repealed the 381st section of the Burgh Police Act of 1892. I think that both the said section and the Regulations are in force at the present time, the latter applying to highways generally and the former to the streets of police burghs. I am further of opinion that the prosecutor relevantly averred a quasi-criminal charge against the complainer, because he exactly followed the language of the statute said to be contravened, as he is authorised to do by the first sub-section of section 19 of the Act of 1908.

The Court refused the bill.

Counsel for the Complainer—Constable, K.C.—Maclaren. Agent—James G. Bryson, Solicitor.

Counsel for the Respondent — Fleming, A.-D. Agents—Cowan & Stewart, W.S.

COURT OF SESSION.

Thursday, December 18.

FIRST DIVISION.

DUNSMURE'S TRUSTEES *v.* DUNSMURE'S TRUSTEES AND ANOTHER.

Marriage Contract—Alimentary Provision—Construction — Liferent Settled upon Widow in Trust for her Maintenance and Aliment, and for the Maintenance, Aliment, and Education of any Surviving Child.

An antenuptial marriage contract conveyed funds provided by the husband to trustees — "After the dissolution of the marriage by the death of either spouse, for payment to the survivor of the spouses of the whole of the said free annual income . . ., but that in trust only for the maintenance and aliment of the surviving spouse, and also for the maintenance, aliment, and education of the child or children" of the marriage or of any subsequent marriage of the husband. In the event of there being no children, or their issue, subject to the liferent of the widow, the estate was to be held for such persons as the husband might appoint. The marriage having been dissolved by the death of the husband, and the children of the marriage having predeceased the widow, who was the appointee in such circumstances to the fee of the estate under a will by the husband, the trustees under the husband's will, with the concurrence of the widow, called upon the marriage-contract trustees to denude. *Held* that the liferent in favour of the widow was not alimentary, and that she was entitled to renounce her liferent.

Martin v. *Bannatyne*, 1861, 23 D. 705, *followed.*

Alexander Henderson Dunsmure and others, the antenuptial marriage-contract trustees of Henry William Henderson Dunsmure and Alice Mary Terrot Malcolm or Dunsmure, *first parties*, John Leslie Hunter and another, the testamentary trustees of Henry William Henderson Dunsmure, *second parties*, and Mrs Alice Mary Terrot Malcolm or Dunsmure, *third party*, brought a Special Case to determine questions as to whether the third party had a right to renounce or discharge a liferent given to her under the marriage contract.

By the *antenuptial marriage contract* of the third party and Henry William Henderson Dunsmure the latter undertook certain obligations in favour of the third party, and bound and obliged himself to pay over to the marriage-contract trustees 500 fully paid up shares of £5 each of and in the De Beers Consolidated Mines Company, which were referred to in the marriage contract as "the said trust estate," for a variety of purposes, which included—"(*Second*) During the subsistence of the said marriage for payment to the said Alice Mary Terrot Malcolm of the sum of One hundred pounds per annum out of the first free income or produce of the said trust estate by way of pin-money, her receipt therefor alone being a full and sufficient discharge to the said trustees, which sum shall be paid to her in half-yearly instalments; and for payment to the said Henry William Henderson Dunsmure of the balance of the said free annual income or produce, but that in trust only for the maintenance and aliment of the spouses and the maintenance, aliment, and education of the child or children of the said intended marriage, if any. (*Third*) After the dissolution of the marriage by the death of either spouse, for payment to the survivor of the spouses of the whole of the said free annual income or produce half-yearly at the terms of Whitsunday and Martinmas in each year, beginning with the first of said terms which shall happen six months after the death of the predeceasing spouse, but that in trust

only for the maintenance and aliment of the surviving spouse and also for the maintenance, aliment, and education of the child or children of the said intended marriage, if any, and also of any subsequent marriage of the said Henry William Henderson Dunsmure if he shall be the survivor of the spouses. (*Fourth*) After the death of the survivor of the said Henry William Henderson Dunsmure and Alice Mary Terrot Malcolm, survived by a child or children of the said intended marriage, or issue of any such, the said trustees shall hold or apply the fee or capital of the said trust estate or proceeds thereof for behoof of the child or children of the said intended marriage, and of any subsequent marriage of the said Henry William Henderson Dunsmure if he shall be the survivor of the spouses, payable in the case of sons on their respectively attaining the age of twenty-one years complete, and in the case of daughters on their respectively attaining that age or being married, whichever of these events shall first happen, but subject always to the powers of division and other powers hereinafter reserved: And it is hereby declared that unless otherwise directed by the said Henry William Henderson Dunsmure in exercise of the powers hereinafter expressed, the said provisions made by him in favour of the said child or children of the said intended marriage and of any subsequent marriage of his shall vest in such child or children or their respective issue on the date when the same are by these presents made payable, and any advances made by the trustees under the powers after expressed shall vest in the child or children to whom or on whose account the same may be made on the dates of such advances respectively, reserving to the said Henry William Henderson Dunsmure at any time during his life by any writing under his hand power to divide and apportion the said trust estate among the children of the said intended marriage and of any subsequent marriage of his if more than one, and to appoint that the same shall vest in and belong and be payable to them in such proportions, subject to such conditions, and at such times, as he may in his discretion think proper, and also to restrict the right of any one or more of the said children, or in the case of their being only one child to restrict the right of such one child to a liferent, or if thought proper to a strictly alimentary liferent of the share or shares of the said trust estate falling to such child or children: Declaring that in the event of such powers not being exercised by the said Henry William Henderson Dunsmure, the said Alice Mary Terrot Malcolm shall, in the event of her surviving him, have right and is hereby fully empowered to exercise similar powers in regard to the said trust estate; and further, declaring that if all or any of the said children shall die leaving lawful issue before their share of the said trust estate shall have become payable, then and in that event such issue shall, unless otherwise provided by the said Henry William Henderson Dunsmure, or failing him by the said Alice Mary Terrot Malcolm if she shall survive him, in exercise of said reserved power come in place of their deceasing parent and be entitled equally *per stirpes* to the shares which would have fallen to such parents if the parents had survived the term of payment—declaring, moreover, that failing the exercise of said reserved powers the said trust estate shall belong to and be divided among the whole children of the said Henry William Henderson Dunsmure whether by the said intended marriage or any subsequent marriage, if more than one, in equal portions, share and share alike, and at the terms respectively before specified, and until their shares of the said trust estate shall become payable the said trustees shall after the death of the survivor of the said spouses be bound to pay the yearly interest or proceeds thereof or such portions thereof as may be necessary for their suitable maintenance, education, and support to the tutors or curators or other guardian or guardians of the said child or children, and failing such tutors or curators, then, according to the said trustees' own discretion, towards the maintenance, education, and support of such child or children, with power to the said trustees if they think proper before the said term of payment to apply the whole or such portion as they may think proper of each child's presumptive share of the said trust estate in making advances to them or upon their account for fitting them out or advancing them in the world, any surplus income in any year being accumulated and invested as occasion may offer as capital along with the said trust estate and divided along therewith when the period of division shall arrive as aforesaid; but declaring that during the survivance of the said Henry William Henderson Dunsmure and Alice Mary Terrot Malcolm, or either of them, no such advance or advances shall be made without the written consent of both or of the survivor of them, but if such consent be given it shall be in the power of the said trustees if they shall think proper to make such advances also during the life of the said spouses or the survivor of them: (*Fifth*) If there shall be no child of the said intended marriage or issue of any such child alive at the death of the said Henry William Henderson Dunsmure survived by the said Alice Mary Terrot Malcolm, or if they shall all die before her, the said trust estate shall, subject to the said liferent of the said Alice Mary Terrot Malcolm, be at the disposal of the said Henry William Henderson Dunsmure, and shall belong to such persons, one or more, as he may have appointed by any will or other writing under his hand, and failing such will or writing the same shall belong to and be payable after the expiry of the said liferent of the said Alice Mary Terrot Malcolm to the next-of-kin of the said Henry William Henderson Dunsmure according to the law of Scotland applicable to intestate moveable succession; and in the event of the said Henry William Henderson Dunsmure being the survivor of the spouses, and of the children of the said intended marriage and their issue predeceasing the period of payment above mentioned, or of

there being no issue of the said intended marriage, the said trustees shall reconvey and make over the said trust estate to the said Henry William Henderson Dunsmure if he be then alive, or if he shall have died before either of these events then the said trustees shall pay or convey the said trust estate to his executors, administrators, or assigns."

The *Special Case* as amended set forth—"3. Mr Dunsmure duly made over to the trustees the said 500 shares in the De Beers Consolidated Mines Company. 4. On 27th September 1914 Mr Dunsmure died, survived by his widow and two children Henry Alexander Henderson Dunsmure (who had attained majority before his father's death), and Colin Hamilton Terrot Dunsmure (who attained majority on 25th April 1915). Mr Dunsmure left a trust-disposition and settlement dated 18th October 1905, and relative codicil dated 29th February 1908, whereby he conveyed his whole estate to the trustees therein appointed and directed them, in the event of his being survived by his wife, to convey and make over the whole of the residue and remainder of his estate to her as her absolute property." 5. [Both of Mr Dunsmure's sons obtained commissions in the army. Henry was officially reported to have been killed on 20th February 1915, and Colin was officially reported to have been killed on 25th September 1915. The parties amended the Special Case by stating that they were satisfied and agreed that both these children were dead.] "They were both unmarried. The said Henry Alexander Henderson Dunsmure left a testament dated 17th December 1914, on which confirmation was issued to the said Colin Hamilton Terrot Dunsmure as executor on 22nd May 1915. The said Colin Hamilton Terrot Dunsmure left a testament dated 26th April 1915, on which confirmation was issued to Mrs Nina Christian Borradaile and others as executors on 25th January 1917. 6. In these circumstances the trustees acting under Mr Dunsmure's testamentary deeds have, with the concurrence of Mrs Dunsmure, called upon the trustees acting under the marriage contract to make over the trust estate to them on the ground that the disposal of the estate is now regulated by the fifth purpose of the marriage contract, and that accordingly the said estate is payable to the said testamentary trustees. The trustees under the marriage contract have, however, intimated that they are not prepared to denude of the estate unless the matter is submitted to the Court, and accordingly this case is presented for the determination of the question."

The first parties *contended* that while they were prepared to make over the said trust estate, they were not in safety to do so, in respect that in terms of the third purpose of the marriage contract they were directed to pay the income of the estate to Mrs Dunsmure for her maintenance and aliment, and that the trust required to be continued for the purpose of protecting that right.

The second and third parties *contended* "that the terms of the marriage contract do not require that the trust should be kept up for the purpose of protecting the liferent conferred upon the third party, and are not such as to prevent the third party renouncing her right of liferent."

The *question of law* was—"Can the third party effectually renounce or discharge the right to the free annual income or produce of the trust estate to which she is entitled under the third purpose of the said marriage contract?"

Argued for the first parties—Those parties were not bound to denude, and the trust must be continued to secure the objects of the parties in the contract. The object of third purpose was to secure that while the surviving spouse should receive payment of the liferent, those payments were by way of an alimentary provision for the spouse receiving them and for the children if any, or, if they were not alimentary they were by way of a protected succession. If that were not so and the surviving spouse could assign away the liferent, the object of the parties would be defeated. The terms of the contract were sufficient to set up an alimentary or at least a protected right in the third party. An alimentary right required no *voces signatæ* to instruct it; the intention to do so, however expressed, if clear was enough—*Nairn*, 1893, 1 S.L.T. 56; *Dewar's Trustees* v. *Dewar*, 1910 S.C. 730, *per* Lord Dundas at p. 733, 47 S.L.R. 674; *Douglas' Trustees*, 1902, 5 F. 69, *per* Lord Adam at p. 73 and Lord M'Laren at p. 74, 40 S.L.R. 103; *Eliott's Trustees* v. *Eliott*, 1894, 21 R. 975, *per* Lord Rutherfurd Clark at p. 984, 31 S.L.R. 850. The essence of an alimentary fund was that it should be for the personal subsistence or alimony of the grantee and no other purpose—Ersk. Inst., iii, 5, 2; *Rogerson* v. *Rogerson's Trustee*, 1885, 13 R. 154, *per* Lord M'Laren at p. 156, 23 S.L.R. 102. That rendered the right given intransmissible. *Martin* v. *Bannatyne*, 1861, 23 D. 705, was distinguished, for it turned on special terms; in any event the authority of that case was doubtful; it was inconsistent with *Eliott's* case: it had not been followed in *Main's Trustees* v. *Main*, 1917 S.C. 660, 54 S.L.R. 532. Further, in *Martin's* case the power of disposal given was unqualified; here it was qualified. Further, the earlier decisions, except *Anderson* v. *Buchanan*, 1837, 15 S. 1073, had not been quoted. The earlier authorities, viz., *West-Nesbit* v. *Moriston*, 1627, M. 10,368; *Tennant* v. *Futhie*, 1637, M. 10,372; *Dick* v. *Dick*, 1676, M. 10,387, were in favour of the first parties. Graham Stewart on Diligence, p. 93, was referred to. [Lord Mackenzie referred to M'Laren, Wills and Succession, vol i, p. 689, commenting on *Martin's* case.]

Argued for the second and third parties—The *onus* was on the person who maintained that a liferent was alimentary to make that out. Here the whole circumstances were against that view. The main objects of the deed were the interests of the children not of the third party. A liferent for aliment was not the same thing as an alimentary liferent. Further, the deed used elsewhere the words a "strictly alimentary liferent." There was no exclusion of the right of creditors or declaration of unassignability.

If it was considered alimentary, it involved a trust within a trust, *i.e.*, the widow became a trustee for herself and the children. Where, as here, the children had died, the widow became a trustee for herself. Further, the power to consent to advances was equivalent to power to renounce on behalf of the children—*Martin* v. *Bannatyne* (*cit.*) *per* the Lord Justice-Clerk Inglis at p. 709 and Lord Cowan at p. 711. If the liferenter could assign the liferent, the liferent could not be alimentary—*Douglas Gardiner & Mill v. Mackintosh's Trustees*, 1916 S.C. 125, 53 S.L.R. 109. Machinery to protect the alimentary liferent was also essential—*Duthie's Trustees v. Kinloch*, 1878, 5 R. 858, 15 S.L.R. 586. The mere fact that the liferent was for maintenance and education was not enough—*M'Murdo's* case (*cit.*). *Hughes* v. *Edwards*, 1892, 19 R. (H.L.) 33, *per* Lord Watson at p. 34, 29 S.L.R. 911, was referred to.

At advising—

LORD PRESIDENT—The question submitted for our opinion and judgment in this case is—Can a widow renounce her right to the income of a trust fund to which she is entitled under an antenuptial marriage contract, there being no issue of the marriage now alive? I think she can in the case before us, which appears to me to be covered by authority. By antenuptial contract between Mr and Mrs Dunsmure, Mr Dunsmure bound himself to assign to trustees certain trust estate. The third trust purpose, on which the controversy mainly turns, runs as follows—"After the dissolution of the marriage by the death of either spouse, for payment to the survivor of the spouses of the whole of the said free annual income or produce half-yearly at the terms of Whitsunday and Martinmas in each year, beginning with the first of said terms which shall happen six months after the death of the predeceasing spouse, but that in trust only for the maintenance and alimony of the surviving spouse and also for the maintenance, aliment, and education of the child or children of the said intended marriage, if any." Mr Dunsmure is dead and so are all the children of the marriage. He left a trust-disposition and settlement by which the whole residue of his estate is bequeathed to Mrs Dunsmure. The trustees under this deed have called upon the marriage-contract trustees to make over to them the trust estate under their charge on the ground that the disposal of that estate is now regulated by the fifth purpose of the marriage contract. That purpose is as follows—"If there shall be no child of the said intended marriage or issue of any such child alive at the death of the said Henry William Henderson Dunsmure survived by the said Alice Mary Terrot Malcolm, or if they shall all die before her, the said trust estate shall, subject to the said liferent of the said Alice Mary Terrot Malcolm, be at the disposal of the said Henry William Henderson Dunsmure, and shall belong to such persons, one or more, as he may have appointed by any will or other writing under his hand." If we hold that Mrs Dunsmure can renounce her liferent right, then the marriage-contract trustees are prepared to denude. Now it so happens that there is a precedent directly in point which I think we may follow. I am unable to distinguish the case before us from the first part of the decision in *Martin* v. *Bannatyne*, 1861, 23 D. 705. There the income of that part of the trust estate which came from the husband was, on the death of the husband, survived by the wife, to be held by the trustees "for her liferent use of the annual interest or proceeds thereof only, for the maintenance and support of herself and of the children of the marriage, if any." The Lord Ordinary (Neaves) held that the expressions I have just quoted were not sufficient to make the income purely alimentary, and that it remained at the free disposal of the widow. There as in the case before us there were no children of the marriage. There too the wife took the fee of the trust estate under her husband's will. The Lord Ordinary's judgment was affirmed by the Second Division. No dissent was expressed from the view taken by the Lord Ordinary that the words I have quoted from the marriage contract there under construction vested in the trustees the trust estate for the widow's free absolute use in liferent, and not as a merely alimentary provision. On the contrary, that interpretation was approved by the Lord Justice-Clerk (Inglis) and also by Lord Cowan. All the Judges concurred in the view that in the events which happened the widow was the absolute unconditional fiar of that part of the trust estate which came from the husband, and consequently was entitled to have payment thereof made to her. Now I cannot draw any distinction, and none was suggested by counsel, between the expression used in the case before us "for the maintenance and aliment" of the wife, and the expression used in *Martin's* case "for the maintenance and support" of the wife. If the latter was insufficient to make the fund alimentary, so is the former. It may be that some day this question may require to be reconsidered; but we are not invited to reconsider it here, and I am not disposed to do so. *Martin's* case has been several times quoted in later cases, but it has never been disapproved or its soundness doubted. I am prepared to follow it in the present case, which in all material particulars is identical with *Martin*. That decision is in my opinion a satisfactory authority for the proposition that where a husband has by marriage contract placed part of his estate in the hands of trustees directing them to pay the income to his widow for the "maintenance and support" of herself and the children of the marriage, and has bequeathed his whole estates to his widow by testamentary disposition, then she at his death, if there be no children of the marriage then alive, is absolute and unconditional fiar of the whole of her husband's estate, including that portion which was placed under the marriage contract. In such a case as I have figured there is no ultimate provision for the satisfaction of which the estate placed in the hands of the mar-

riage-contract trustees requires to be held by them. The widow is consequently entitled to renounce her liferent and demand possession of the estate. It is clear to my mind that Lord President Inglis was referring to both parts of *Martin's* case when he said in the case of *Montgomery's Trustees* (15 R. 372) —"In *Martin's* case the whole trust purposes had been fulfilled — there were no longer any interests to protect, and in short the marriage contract was no longer operative, and was at an end." The marriage contract would, of course, not have been at an end if an alimentary liferent had been effectually constituted in favour of the widow.

I propose that we answer the question of law put to us in the affirmative.

LORD MACKENZIE — The first question here is, "Can the third party effectually renounce or discharge the right to the free annual income . . . of the trust estate to which she is entitled under the third purpose of the said marriage contract?" I am of opinion that that question should be answered in the affirmative. And I come to that conclusion on the authority of the case of *Martin* v. *Bannatyne*, 1861, 23 D. 705. I do not see any sufficient ground in the present case for having that judgment reconsidered.

In my opinion the third trust purpose of the marriage contract is not distinguishable from the clause in the marriage contract in *Martin's* case, so far as that refers to the fund of £5000 put in trust by the husband. There were no children in that case. Here by an amendment of the case we are told that the children of the marriage are deceased. The wife is fiar under her husband's will, and there is therefore no provision for the satisfaction of which the sum put in trust requires to be held by the trustees.

LORD SKERRINGTON—I am of opinion that the question of law must be answered in the affirmative, but only out of deference to certain decisions which seem to be in point. As at present advised I doubt the soundness of some of these decisions, and I hope that on a more suitable occasion the whole subject will be reconsidered by a larger Court. Having regard to the great practical importance of the question whether a particular liferent or annuity has or has not been effectually made alimentary, the law seems to me to stand in an uncertain and unsatisfactory position.

In the case of *Martin* v. *Bannatyne* (1861, 23 D. 705) the income of a sum of £5000 which was directed to be paid to the widow of the settlor "for the maintenance and support of herself and of the children of the marriage" was held not to be alimentary—apparently on the ground that it was "not given solely for maintenance and support" (*per* Lord Neaves, Ordinary, at p. 707). This construction appears to be an exceedingly strict one if contrasted with what was decided in the case of *Dewar's Trustees* v. *Dewar*, 1910 S.C. 730, 47 S.L.R. 674.

The clause which we have to construe is very like that which I have quoted from the case of *Martin*. If and in so far as it is distinguishable it suggests a second and independent reason for reaching the same result, viz., that the settlor has not imposed upon the trustees of the settlement the duty to make the alimentary trust effective, but has attempted to impose that duty on his widow by means of a subsidiary trust which has become inoperative owing to the death of the children of the marriage. This second argument depends for its validity upon the theory that it is not merely advantageous, but is positively essential for the constitution of an alimentary liferent or annuity that it should be protected by a continuing trust. Both from the point of view of the history of the law and from that of principle I venture to doubt this theory, though there is high authority in its favour. According to my reading of the institutional writers and of the decisions from early times down to at least the year 1852 (when in a keenly contested competition between an arresting and adjudging creditor and an alimentary annuitant the necessity for a trust was never suggested—*Lewis* v. *Anstruther*, 1852, 14 D. 857, 1852, 15 D. 260) an alimentary liferent or annuity, whether heritable, as in the case of *Blackwood* v. *Boyd* (1677 M. 10,390), or constituted by a mere personal obligation, was supposed to owe its special character to an inherent condition which was effective on the principle of special appropriation. In the ordinary case the alimentary character of the right was not protected by a trust but solely by the legal impossibility of attaching it for debt (except, of course, *quoad excessum* or as to arrears or at the instance of an alimentary creditor), and also by the legal inability of the liferenter or annuitant to make a sale or a surrender which would prevent him from afterwards changing his mind and demanding to be alimented, and which would prevent a person who had furnished him with aliment from attaching the alimentary right. In some cases, no doubt, the person liable to pay an alimentary annuity was made a trustee for the creditor. In such cases there was this additional protection, that not merely the fear of having to pay twice over (which would operate in every case), but also a sense of duty, would deter the debtor from countenancing or aiding any attempt either to alienate or to surrender or attach the creditor's right. In a series of cases where the creator of an alimentary right had set up a continuing trust for its protection the Court not unnaturally refused to sanction the substitution of an alimentary right which would not enjoy a similar protection. In the leading case on this branch of the law—*White's Trustees* v. *Whyte* (1877, 4 R. 786, 14 S.L.R. 499) opinions (*obiter* no doubt, but still of high authority) were expressed to the effect that a continuing trust was the only effective way of creating an alimentary right, and it was actually so decided in *Murray* v. *Macfarlane's Trustees* (1895, 22 R. 927, 32 S.L.R. 715) and *Kennedy's Trustees* (1901, 3 F. 1087, 38 S.L.R. 827). In both cases the opinion of the Judges of this Division of the Court was delivered by Lord M'Laren. He laid it

down as "clear" that the right of an alimentary annuitant, if unprotected by a trust, can be attached by his creditors—an opinion which it is difficult to reconcile either with the authorities in regard to alimentary rights or with the legal principle which underlies the important judgment in *Chaplin's Trustees* v. *Hoile*, 1890, 18 R. 27, 28 S.L.R. 51. An alimentary condition is in its nature as fundamental, as inseparable, and as lawful a qualification of a liferent or of an annuity as is a resolutive condition, though, of course, it operates differently. It should be noted that in the cases of *White's Trustees*, *Murray*, and *Kennedy's Trustees* the relevant authorities were not cited in argument or referred to in the opinions of the Court as would probably have been the case in a competition between an arresting or an adjudging creditor or a debtor whose sole income was derived from what he claimed to be an alimentary liferent or annuity.

LORD CULLEN—I concur in the conclusion reached by your Lordships.

Where an alimentary provision is effectually constituted through the medium of a continuing trust, the trustees holding the fund and paying over the money are placed under a duty to maintain its peculiar character by paying to the beneficiary alone, giving no effect to deeds of his purporting to affect his right to receive it or the diligence of his creditors other than alimentary creditors. Now as I read the marriage contract before us no such trust duty is imposed on the first parties. They are directed, *simpliciter*, to pay the income to the third party as the surviving spouse, and it is only *quoad* that income when she has received it that words are used which purport to place in her a trust for its application to the purposes of alimenting herself and alimenting and educating the children of the marriage, if any. Moreover, the first parties are not in the position of being debarred from allowing effect to all voluntary deeds by her affecting her right to receive the income, for under a later part of the deed they are authorised to accept from her a renunciation or discharge of her right thereto, in whole or in part, in the shape of a consent to the capital funds being paid away to the children.

If there had been children of the marriage alive a question might, perhaps, have been raised as to whether the words "but that in trust only," &c., effectually constituted the income when received by the third party a proper trust estate in her hands, or involved only an obligation on her to aliment and educate the children out of it. There are, however, no children alive, and the trust purported to be placed in her is now solely for the application of the income to her own benefit. This being so, it appears to me that there is no proper trust for alimentary purposes to be considered, and that the third party is in a position to renounce her liferent right as she proposes to do.

The Court answered the question of law in the affirmative.

Counsel for the First Parties—Fraser, K.C.—Cooper. Agents—J. L. Hill, Dougal, & Company, W.S.

Counsel for the Second and Third Parties—Macphail, K.C.—Fenton. Agents—Mackenzie & Kermack, W.S.

Saturday, December 20.

SECOND DIVISION.

[Exchequer Cause.

JOHN SMITH & SON *v.* INLAND REVENUE.

Revenue—Excess Profits Duty—Deductions—Purchase Price of Coal Contracts—Finance (No. 2) Act 1915 (5 *and* 6 *Geo. V, cap.* 89), *sec.* 40 (1) *and* (2), *and Schedule IV, Part I, secs.* 1 *and* 3, *and Part III, sec.* 1 (*a*).

A coal merchant carrying on business under a firm name instructed his trustees under his trust-disposition and settlement to make over his business with its whole assets to his son at a valuation. One of the items at his death on 7th March 1915 consisted of certain coal contracts which were entered in the valuation at £30,000, and none of which extended beyond 31st December 1915. In a question between the son, carrying on the business, and the Inland Revenue, *held* (*dis.* Lord Salvesen) that for the purpose of ascertaining the profits for the accounting period, from 7th March 1915 to 31st December 1915, the £30,000 was not an admissible deduction.

The City of London Contract Corporation, Limited v. *Styles*, 1887, 2 Tax Cases 239, *approved* and *applied*.

Revenue—Excess Profits Duty—Deductions—Remuneration of Manager—Discretion of Inland Revenue Commissioners—Finance (No. 2) Act 1915 (5 *and* 6 *Geo. V, cap.* 89), *Schedule IV, Part I, sec.* 5.

The Finance (No. 2) Act 1915, Schedule IV, Part I, section 5, dealing with the computation of profits for the purposes of excess profits duty, enacts—"Any deduction allowed for the remuneration of directors, managers, and persons concerned in the management of the trade or business shall not, unless the Commissioners of Inland Revenue, owing to any special circumstances or to the fact that the remuneration of any managers or managing directors depends on the profits of the trade or business, otherwise direct, exceed the sums allowed for these purposes in the last pre-war trade year, or a proportionate part thereof as the case requires. . . ."

A firm of coal merchants being assessed to excess profits duty for the period from 7th March 1915 to 31st December 1915, claimed as a deduction the sum of £20,615, 17s. 9d., being the remuneration of their business manager. The sum in question was not calculated by reference