Court, and remit to the Auditor to tax the same and to report: Find no expenses due in this Court by either party to the other. and decern."

Counsel for Pursuer (Respondent)— D.-F. Balfour, Q.C.—Guthrie. Agents—Dove & Lockhart, S.S.C.

Counsel for Defenders (Appellants)—W. Mackintosh—Jameson. Agents—Carment, Wedderburn, & Watson, W.S.

Friday, November 6.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

ROGERSONS *v.* CROSBIE (ROGERSON'S TRUSTEE).

(*Ante*, vol. xxii. p. 673, 26th May 1885.)

Provisions to Children—Assignation of Provision by Child to Creditors—Alimentary or Non-Alimentary.

A bankrupt granted in favour of his trustee a separate assignation for behoof of his creditors, and with the approval of the creditors, of his interest in the rents of certain lands which were payable to him during his lifetime by his father's testamentary trustees under the terms of his father's settlement, reserving to himself out of the rents an annual sum equal to about a quarter the whole as an alimentary allowance. The father's settlement contained a clause to the effect that the rents should not be attachable by the son's creditors, nor should he have power to sell or assign the same to any party whatever. It contained no clause declaring these provisions alimentary or for subsistence only. In an action by the bankrupt against his trustee to reduce, as having been *ultra vires*, the trust-assignation granted by him, *held*, assuming it to be an open question whether the pursuer's interest in the provision was alimentary or not, that his transaction with his creditors, embodied in the trust-assignation, constituted a compromise between him and them of a doubtful claim, and that he could not reduce it.

Held by Lord M'Laren (Ordinary), and *opinion per* Lord Rutherfurd Clark, that the interest of the bankrupt in his father's estate was not alimentary.

Opinion per Lord M'Laren (Ordinary) that if there had been an alimentary trust it had been sufficiently recognised by the reservation of the alimentary allowance by the bankrupt.

The pursuer in this action sought to reduce a trust-assignation granted by him for behoof of creditors. The defender was the trustee.

John Rogerson, Esq. of Girthhead, in Dumfriesshire (pursuer's father), and his wife, executed a trust-disposition and settlement in 1859, conveying their whole means and estate to trustees for certain purposes. By the second purpose of the trust John Rogerson directed and appointed his trustees to hold the lands of Broomhillbank and Shawside, belonging to him, together with the whole stock and farm implements on the same, in trust for Samuel Rogerson, his eldest son, and Joseph Kirkpatrick Rogerson, his second son (the pursuer), equally betwixt them, each son being entitled to one-half of the return or annual produce thereof during his lifetime, and on their death to dispone the said lands to the eldest heir-male of the bodies of each of his said sons equally between them. The settlement also contained the following clause—"And further, we hereby expressly declare that none of our said sons shall have power to sell the lands respectively to be held for them, or to burden the same with debt, neither shall the lands or rents be attachable by their creditors, neither shall our sons have power to sell or assign the same or any interest or annual produce thereof to any party whatever, with this exception," that in the event of their marrying they should have power to make a certain provision for their widows.

John Rogerson died in 1864, predeceased by his wife.

The trustees appointed in his settlement entered into possession of and administered his estate.

In 1878 Joseph Kirkpatrick Rogerson having become embarrassed in his affairs, his estates were sequestrated under the Bankruptcy Acts, and a trustee appointed. Shortly after the sequestration the pursuer granted the trust-assignation which he now sought to reduce.

By this deed, on the narrative that he was under his father's will entitled to one-half of the rents of Broomhillbank, Shawside, and others, which rents were thereby declared unattachable by his creditors, that he was desirous that all his creditors should be paid in full, and that they had agreed to accept of his offer to make the assignation, he assigned to the trustee under the assignation in trust for his creditors the rents of Broomhillbank, &c., with power to uplift the rents and grant discharges for them for certain purposes, and, *inter alia*, for payment to him out of the rents of £60 per annum by monthly instalments, and also any sum which might be received as his proportion of rent of the game on the lands of Broomhillbank, &c., which sums were declared to be the proportion of rents due to him, and which should during the subsistence of the trust be considered a reasonable alimentary allowance, and necessary for the maintenance and support of himself and his family; and (lastly) that whatever balance of free rents should remain after fulfilling the previous purposes should be held to be part of the assets of his bankrupt estate, and applied by the trustee in terms of the statutes till his whole creditors should be paid in full.

The lands of Broomhillbank, &c., were then, and at the date of this action, let by the trustees at a rental of £515, one-half of which was paid to the widow of Samuel Rogerson, who had died, and the other half was applied under the assignation.

In April 1885, J. K. Rogerson, his wife, and his six children raised the present action against William Glendonwyn Crosbie, as trustee under the assignation, concluding for reduction thereof. They averred—"(Cond. 6) The said trust-assignation was *ultra vires* of the granter, and in contravention of the terms of the trust-disposition and

settlement under which the said Joseph Kirkpatrick Rogerson acquired rights to the rents in question. The provisions made by the late John Rogerson for his second son (pursuer) were expressly designed for the purpose of protecting him, and those dependent upon him, against the consequences of his improvidence, and the said assignation, if it remains unreduced, would defeat the object which the testator had in view. The said assignation is therefore null and void, or at all events reducible."

They pleaded that the deed being *ultra vires* should be reduced.

The defenders stated that after the sequestration a question had been raised as to whether the interest under John Rogerson's trust which fell to the pursuer was alimentary or not, and that the trust assignation had been executed to avoid all question as to that matter.

They pleaded—"(5) The transaction contained in the deed under reduction is binding on the pursuers, and cannot be set aside by them. (6) Assuming that by the said trust-deed the interest conferred on the pursuer Joseph Kirkpatrick Rogerson is declared to be alimentary, the amount of the said interest beyond what is required for the aliment of the said pursuer, passed to the trustee in the said sequestration by virtue thereof, and due provision for the aliment of the said pursuer having been made in the deed under reduction, the defender is entitled to absolvitor. (7) The arrangement now challenged being legal, as well as reasonable, and having been entered into and acted upon by all parties concerned in the full knowledge of their respective rights, and within their powers, the action is groundless, and the defender is entitled to absolvitor."

The Lord Ordinary (M'Laren) pronounced this interlocutor:—"Finds that the pursuer's interest in his father's estate was not an alimentary trust, and that the pursuer had power to grant the assignation libelled in favour of his creditors: Therefore sustains the defences, dismisses the action, and decerns.

"*Opinion.*—In this case the pursuer seeks to reduce a deed of assignation granted by himself in favour of his creditors, who are now represented by the defender. The deed conveys the pursuer's interest in the rents of the lands of Broomhillbank to the trustee on his sequestrated estate, to the effect that after payment of certain expenses and an alimentary allowance to the cedent the surplus rents may be applied by the trustee in satisfaction of the claims of the pursuer's creditors in conformity with the rules of bankruptcy.

"The ground of reduction is, that the pursuer's interest in the rents is of an alimentary nature, that the rents are payable to him in virtue of the provision in his father's settlement, which contains a declaration that the grantees shall not have power to sell or assign the lands to be held in trust for them, 'or any interest or annual produce thereof,' and that the pursuer was thus put under disability to grant the conveyance which he desires to have reduced.

"The action therefore raises the question—What is necessary, in substance and expression, to the constitution of an alimentary gift which shall be effectual against the voluntary acts of the donee? In one view of the case the further question arises whether the reservation of an alimentary allowance in the deed of assignment is not a sufficient fulfilment of the alimentary trust, if such be its character.

"There is not much doubt as to what is the regular and complete mode of expression of an alimentary trust. In the ordinary clause of style, the truster begins by declaring his intention that the gift shall be an alimentary provision for the subsistence of the grantee, and in order that his intention may not be defeated by the improvidence of the grantee, the truster declares that the subject of the gift shall not be assignable or be subject to the diligence of creditors.

"It may be doubted whether a declaration that the gift is not assignable or subject to diligence really adds to the force of the intention announced that the gift shall be 'alimentary.' In the case of a gift not intended for alimentary subsistence, but to be used by the grantee for commercial or speculative investment, I apprehend that the fund would be arrestable for debt notwithstanding the granter's declaration that it is not to be assignable or arrestable. In such a case a truster could no more withdraw the property of his grantee from the operation of the civil law of the country than he could withdraw his own property from its operation. Trusters may do many things, but they cannot create special personal laws for the benefit of the objects of their favour to the prejudice of creditors. I conceive, therefore, that the privilege which the law extends to gifts of this description depends entirely on the intention to give the annuity or annual rent as subsistence money; and that if this intention is clearly declared, the law will supply what is necessary to execute the trust by restraining the diligence of creditors, and, if necessary, cutting down alienations contrary to the terms of the trust.

"In the present case it appears to me that the essential part of a provision of aliment is awanting—I mean the expression of an intention that the liferent shall be used for subsistence only; and I cannot read such an expressed intention into a clause which merely forbids the grantee to sell or assign his life interest. This is not in my opinion a merely technical view, because the gift occurs in a general settlement by the father, in which he makes a fair division of his estate amongst his children, and what we are asked to treat as an alimentary provision is really the pursuer's patrimony. There is nothing in the deed to show that this was appropriated to the pursuer's maintenance in any special sense, or that it was anything different from the ordinary case of a gift of a share of succession by a father to a son.

"I do not overlook the circumstance that the father has said that his sons shall not have power to sell or assign their shares. A prohibition against selling heritable estate is a clause very familiar to the legal profession. Until the passing of the Entail Amendment Act it was effectual if fortified by irritant and resolutive clauses. Under that statute such a clause is ineffectual unless it is accompanied by the other clauses necessary to a complete entail. It is noticeable that under the older law a trust of the heir's life interest was not regarded as a contravention of the prohibition against alienation, because such a trust was not inconsistent with the purpose of the entail, namely, the transmission of an unencum-

bered estate to heirs. In this case I consider that the pursuer had power to grant a trust for creditors notwithstanding the prohibition against alienation.

"Although in my view unnecessary for the decision of the case, I shall state my opinion on the other point raised in argument, that this was a good assignment of surplus rents. Under the deed of assignation the pursuer reserves to himself an alimentary allowance of £60 per annum, and this is made a first charge upon the estate after allowing for expenses of administration and the payment of insurance premiums. The surplus available for division amongst creditors must be small, because it is admitted that these payments, extending over seven years, have not amounted to more than five shillings in the pound. £60 a-year has not been shown to be an unreasonably small alimentary allowance. It was considered sufficient by the pursuer himself when he made the assignment, and I think that if there is here an alimentary trust, the trust has been recognised in the arrangement between the pursuer and his creditors."

The pursuer reclaimed, and argued—The Lord Ordinary's ground of decision was a purely technical one, and he had cited no authority in support of it. It was enough to render the assignation *ultra vires* of the pursuer that it defeated the obvious purpose of his father's will. If the will showed a clear intention to make the fund alimentary, the mere want of the word "alimentary" would not invalidate the intention provided equivalent words were used. He was not barred from suing the reduction by the fact that he had reserved a certain amount of aliment—Bell's Comm. i. 124; *Rennie* v. *Ritchie*, 4 Bell's App. 221.

Defender's counsel were not called upon.

At advising—

Lord Justice-Clerk—This is a kind of question which has been often discussed, but I do not recollect of having seen it raised in circumstances precisely like the present, for here the person who seeks to reduce the deed was, when he granted it, *sui juris* and capable of acting for himself. He made a bargain with his creditors, making over to them the rents of certain lands, and now he seeks to set it aside on the ground, as I understand, that it was not within his power to grant the assignation, for the fund was alimentary and for his subsistence only, and he was not entitled to give up any part of it even to his creditors. I have a very strong impression that it was not alimentary in any sense which could bar this transaction, and that he was entitled to enter into it. He might or might not get a benefit according as the fund was or was not alimentary, but that is a question which he was entitled to deal with his creditors about, and to deal with them on what he thought fair terms.

Lord Young—I am of the same opinion. It is quite plain that the father's trustees do not consider that they have any duty to interfere, because they have not appeared and opposed, and I agree with what is presumably their opinion that there are no grounds for their intervention, for this is not like a case of trustees appointed for the protection of some married woman or similar person. There are many cases of this kind in which there are examples of trustees interposed to protect a person who is unable to protect himself—or more frequently herself. But this is a case of a man *sui juris*, with a wife and family, who had got into debt. He had a small fortune from his father. It was represented to the Court that the gross rental of this property was about £250–£500 between two brothers, the pursuer being one of the two. But after all deductions from the gross rental it appears that the revenue was £60 per annum *plus* some game rents, the amount of which is not mentioned, and from £80 or £100 per annum besides.

I assume it to be a question whether, looking to the terms of the father's will, by which this estate was provided to the two sons, it was protected against the diligence of creditors. The Lord Ordinary has decided that it was not, but nevertheless I assume it to be questionable whether it was so protected or not. He became bankrupt, and he and his creditors had that question before them. If it were protected against their diligence, then he had the whole £250, or as much of it as remained after necessary deductions. If, on the other hand, it were exposed to their diligence they might take it all and leave him penniless. They arranged the question between them. They agreed not to litigate and to leave him £60 a-year and the game rents, they taking the balance, amounting to £80 or £100 a-year. That is as plain a case as I could put by way of illustration of a transaction for the settlement of doubtful claims, and if there were the further question—assuming that the estate was not fully protected against the creditors, but only a just and reasonable allowance to keep the man off the parish—that also was a fair occasion for transaction, and they gave him £60 and the game rents, taking only from £80 to £100. I do not find it necessary to pronounce any judgment on the question decided by the Lord Ordinary. It is not necessary to do this, but I am inclined to think that his judgment was right. But it is sufficient to say that whichever way the judgment was on the question before him, it was a judgment on a fair question for the parties to compromise, and I am as clear about the power of the parties to compromise that question as I am of their power to compromise the present litigation. They might have compromised it by not reclaiming against the Lord Ordinary's interlocutor, or before his judgment by splitting the difference between them and so settling the action. Of course if there were other interests involved these could not be prejudiced. If any person with any interest whatever came forward and said, "You had not power to settle this yourself, and your settlement shall not affect me," it would not have affected any such party, but there is no such party here. There are none except such as have their interest only through the pursuer, and so there is no case before the Court of the interests of these parties.

Lord Craighill—I agree with Lord Young.

Lord Rutherfurd Clark—So do I. I am perfectly clear that this was a transaction which cannot be set aside. It was a settlement of a doubtful claim, and the pursuer had power to make it. Perhaps it may be right to say further—though I have not been able to judge of this—that the strong impression of my mind is that the pursuer was a gainer by the transaction, for I am

disposed to think, without deciding the question, that this fund was not alimentary.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Scott—Salvesen. Agent—Thomas M'Naught, S.S.C.

Counsel for Defender (Respondent)—Comrie Thomson — T. Rutherfurd Clark. Agent — Robert Broatch, S.S.C.

Friday, November 6.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

DICKSONS & LAINGS *v.* MAGISTRATES AND BURGH OF HAWICK.

Property — Disposition — Disposition of Piece of Ground Occupied by an Underground Mill-lade—Right to Surface.

A contract of excambion conveyed the "portion of ground occupied by a mill-lade" which ran below the surface of the ground, and bound the disponees to maintain the arch which covered it over, the surface of which arch was to be possessed and enjoyed by the disponer, the disponees having always access to the lade, with liberty of opening it up for cleaning and repairs. *Held* that on a sound construction of this deed it gave the disponee no right of property in the surface of the ground above the lade, but merely a right of access to the lade at reasonable times and places, and a right to protection against any operations on the surface which might be injurious to the lade.

By contract of excambion dated 13th and 17th December 1833, and duly recorded, the Rev. David Stevenson, minister of Wilton, Roxburghshire, with consent of and as authorised by the Presbytery of Jedburgh, and the Rev. John Paton, minister of Ancrum, as moderator of said Presbytery, for their right and interest, disponed to Archibald Dickson of Housebyres, and David Laing, hosier in Hawick, as trustees for the manufacturing firm of Dicksons & Laings at Wilton Mill near Hawick, (first) All and whole certain parts and portions of the glebe of Wilton extending from the buildings of Wilton Mill eastward to the new road leading from Hawick to Selkirk, and (second) "All and whole that portion of ground, part of the glebe lands of Wilton, occupied by the lately formed mill-lade or dam-course of Wilton Mill, extending from the parts or portions of ground above disponed along the east side of the said glebe to where the said mill-lead or dam-course joins the Water of Teviot, near to the march betwixt the said glebe lands and the farm of Burnfoot, and which mill-lead or dam-course is thirteen feet and a-half in breadth over the said walls throughout the whole length thereof."

The deed contained this clause—"And further, the said Archibald Dickson and David Laing, as trustees and for behoof foresaid, do hereby become bound to maintain and uphold the arch over the said lately formed mill-lade or dam-course, the surface of which is to be possessed and enjoyed by the said Rev. David Stevenson and his foresaids; declaring, as it is hereby provided and declared, that the said Archibald Dickson and David Laing, as trustees foresaid, and their foresaids, shall have access to the said mill-lade or dam-course, or any part thereof, and full power, liberty, and privilege to open up any part thereof at all times necessary for the purpose of cleaning out and repairing the same, and for all other necessary purposes whatever."

Infeftment was taken in the subjects, and by successive conveyances they were at the date of this action vested in Mr Walter Laing as sole surviving trustee for the firm.

By contract of excambion in the year 1878, and relative feu-charter, the Magistrates and Council of the burgh of Hawick acquired from the minister and heritors of Wilton the portion of glebe land then known as Mansfield Park, "but always with and under the burden of the right which Messrs Dicksons & Laings, manufacturers at Wilton Mills, Hawick, or their trustees or successors, have to a mill-lead or dam-course through part of the said ground." The tail-race or mill-lade of Wilton Mills belonging to the firm of Dicksons & Laings runs for a considerable distance by means of a covered archway under a road made by the burgh, and called Mansfield Road.

In 1875 the burgh of Hawick, under the powers of the Public Health Act 1867, took steps for the disposal of the sewage of the town, and obtained leave, conform to a deed of agreement between them and the firm of Dicksons & Laings, dated August and September 1877, to carry it by a way-leave through the archway belonging to Dicksons & Laings several feet above the level of the bed of the lade. They also acquired a way-leave for the purpose of carrying manure to the loading-bank near the North British Railway. After they bought Mansfield Park they feued it out, and property to the value of about £25,000, consisting of houses and public works, was built upon it. In 1878 they and their sub-feuars proceeded to build a stone wall or coping with a railing fixed to it on the surface of the ground under which the mill-lade ran, and also a footpath of concrete covering the whole width of the lade, and also inserted pipes through the archway for the conveyance of sewage, gas, and water. Messrs Dicksons & Laings alleging that these operations damaged the archway, proceeded to open it up in a manner which was alleged by the burgh and by Blenkhorn, Richardson, & Company, sub-feuars of the burgh in Mansfield Park, to block and obstruct Mansfield Road to an unnecessary extent. The burgh then brought an interdict before the Sheriff to prevent them digging holes in or obstructing the road, which process was subsequently removed *ob contingentiam*, and conjoined with that now reported.

This action was raised by Dicksons & Laings against the Magistrates and burgh of Hawick to have it found and declared that they were proprietors of "All and whole that piece of ground occupied by the mill-lade or dam-course" as described in the contract of excambion quoted *supra*, and that they were entitled to possess it free of any use, servitude, or burden whatsoever, with the exception of the two servitudes of the way-leave of the public sewer through the archway