A special case was presented by (1) the trustees, (2) the widow, and (3 and 4) the surviving children and trustees of deceased children, for answer to, *inter alia*, the following question — "Is the testator's widow entitled under the deed of settlement and third codicil to the liferent of Thornhill House, offices, grounds, and agricultural lands, or to any and which part thereof, over and above the annuity of £500 and the yearly payment of £75?"

Cases cited—*Straton's Trustees* v. *Cunningham*, March 10, 1840, 2 D. 820; *Horsbrugh* v. *Horsbrugh*, January 12, 1847, 9 D. 329; Jarman on Wills, i. 499.

At advising—

LORD JUSTICE-CLERK — [*Having stated the facts*]—I am unable to read this clause as giving a new legacy of the rents of Thornhill lands to the widow. That result can only be reached by implication, and I see no reason for such an implication. I think the clause means this only, that the trustees are to apply the rents of Thornhill lands so far as they may go to payment of the annuity, and in this way to relieve the moveable estate to that extent of the burden of paying the annuity, so that only so much of the moveable estate is to be retained as will be sufficient to meet the balance of the annuity. Therefore I propose to answer the first question in the negative.

LORD YOUNG—I may say I am generally of the same opinion. I cannot say however that the decision of the first question is altogether free from difficulty. The question is whether the widow Mrs Chivas is entitled under two deeds by her late husband, in addition to a liferent of £575, to the liferent of the house and grounds of Thornhill House? She is certainly not entitled to any such liferent under the original deed, but it was contended—and I cannot say without plausible grounds for the contention—that she was so entitled under a codicil. This codicil is in the form of a letter by the testator to his trustees, by which he indicates his intention to make certain alterations on his original settlement, and which he desires should be carried out if he does not find any opportunity of putting them into a more formal deed with the help of a practised conveyancer. I think any document of that kind should be read liberally and with a desire to carry out what was the intention of the testator.

Now, it is clear, when he wrote this codicil that he intended his widow should have an annuity of £500, and that his trustees should lay aside sufficient funds to pay this annuity, and the free rental of the lands to form part of the annuity. Now, there are difficulties in holding that he intended this liferent should be held by the trustees only as part of the funds put aside to meet the payment of the £500 annuity, and therefore I say it is a plausible contention that he meant his wife's income should be increased by the rent brought by the villa and grounds. That contention receives some confirmation from a clause which occurs later in the codicil, that after his wife's death the free rental of Thornhill is to be divided equally among his four children. But on the best consideration I have been able to give to the subject, I have come to the conclusion that it would be unsafe to read this provision as giving the rental of Thornhill to his widow, in addition to the annuity formerly provided for her. To do so would mean that we should read into the codicil the words "in addition to" instead of "form part" of the annuity.

Then with respect to the argument that there is an implied gift of the liferent of Thornhill to his wife by the delay which he says is to take place in the payment of it to his children, that would have been very strong if it had not been for the previous words which explain the reason for delaying the payment until her death.

LORD TRAYNER concurred.

The Court answered the first question in the negative.

Counsel for First and Second Parties—Comrie Thomson—Abel. Agents—Auld & Macdonald, W.S.

Counsel for Third Parties — Glegg. Agents — J. Douglas Gardiner & Mill, S.S.C.

Counsel for Fourth Parties — Lees. Agent—S. Greig, W.S.

Wednesday, October 18.

SECOND DIVISION.

[Lord Low, Ordinary.

NATIONAL BANK OF SCOTLAND, LIMITED *v.* WILLIAM DIXON, LIMITED, AND COWANS.

Bankruptcy—Husband and Wife—Married Women's Property Act 1881 (44 *and* 45 *Vict. cap.* 21), *sec.* 1, *sub-secs.* 3 *and* 4—*Deposit-Receipt in Name of Husband and Wife.*

The Married Women's Property Act 1881 provides that the wife's separate estate shall not be liable to diligence for the husband's debts if invested in the wife's name, or in such a way as clearly to distinguish it from the husband's estate, but (sub-section 4) if entrusted to the husband or inmixed with his funds, it shall be treated as assets of the husband's estate in bankruptcy.

At her marriage a wife had a sum of £70 invested in deposit-receipt in her own name. She afterwards drew and re-deposited this sum in the joint names of herself and husband, and to this she subsequently added various sums received from her husband, the money being lodged on deposit-receipts in the names of the spouses and repayable to either or survivor. The husband was seques-

trated, and the trustee claimed the sums on the deposit-receipts. The wife claimed to prove that she had kept the said sum of £70 as her own property.

The Court *refused* a proof, holding that this sum not having been invested in her own name, nor clearly distinguished from the husband's funds, fell to the husband's trustee.

The Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. cap. 21), sec. 1, provides:—"(3) Except as hereinafter provided, the wife's moveable estate shall not be subject to arrestment or other diligence of the law for the husband's debts, provided that the said estate (except corporeal moveables as are usually possessed without a written or documentary title) is invested, placed, or secured in the name of the wife herself, or in such terms as shall clearly distinguish the same from the estate of the husband. (4) Any money or other estate of the wife lent or entrusted to the husband or inmixed with his funds shall be treated as assets of the husband's estate in bankruptcy under reservation of the wife's claim to a dividend as a creditor for the value of such money or other estate, after but not before the claim of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."

Mrs Betsy Laurie or Cowan was married to John Cowan, sometime cashier and bookkeeper, Calder Iron Works, Coatbridge, on 1st August 1887. At the date of her marriage she had £70 invested in a deposit-receipt in her own name in the National Bank of Scotland in their branch at Fauldhouse, where it so remained until February 20, 1888. It was then drawn and re-lodged by Mrs Cowan in the Coatbridge branch of the bank in the joint names of herself and her husband. This sum was several times drawn and re-deposited during the marriage along with other moneys given to Mrs Cowan by her husband, until on 25th October 1891 the amount was £450, 10s. in two deposit-receipts of £305, 10s. and £145 respectively, in these terms—"Received from John and Betsy Cowan, Calder, Coatbridge, payable to either or survivor," &c.

On 25th November 1891 William Dixon, Limited, iron and coal masters, Glasgow, raised an action in the Sheriff Court at Airdrie against John Cowan for payment of £1000, and arrested in the hands of the bank all sums of money belonging to Cowan.

Cowan's estates were sequestrated on 11th October 1892, and David W. Kidston, C.A., Glasgow, was appointed trustee. Mrs Cowan and Mr Kidston both claimed payment of the amount in the deposit-receipts, and the bank raised a multiplepoinding calling all parties.

The trustee claimed that the whole amount was part of the sequestrated estate of Cowan.

Mrs Cowan admitted that the sums given to her by the husband and lodged on deposit-receipts passed to the trustee in the sequestration, but that the £70 deposited by her before marriage should be repaid with interest.

She averred—"Said deposit-receipts were taken in her husband's name as well as her own, *animo donandi*. If the terms of the said receipts import a gift of the said sum of £70 to her said husband, the claimant was entitled to recall, and accordingly had recalled, the same as a donation *inter virum et uxorem*. In any event, said sum of £70 being part of the claimant's separate estate, and not having been inmixed with her husband's estate, has not been attached by said arrestments or sequestration."

And pleaded—"(1) The said sum of £70 being part of the claimant's separate estate, she ought to be found entitled to payment thereof, and to be ranked and preferred in terms of her claim. (2) *Esto* that the terms of the said receipts import a gift of the said sum of £70 to the said John Cowan, the said gift having been recalled, the said sum is not affected by the arrestment used by William Dixon, Limited, or by her husband's sequestration."

Upon 31st May 1893 the Lord Ordinary sustained the claim for the trustee in the sequestration.

Mr and Mrs Cowan reclaimed, and argued—They only desired a proof that the £70 still belonged to Mrs Cowan, and could be traced through the deposit-receipts. She admitted that any sums given her by her husband must fall under the sequestration. This sum of £70 was in fact a donation by her to her husband, and as the sequestration operated as a revocation of all donations by her husband to her it also recalled her donation to him—*Lord Advocate* v. *Galloway*, February 8, 1884, 11 R. 541; *Gibson* v. *Hutchison*, July 5, 1872, 10 Macph. 923. It was true that the £70 was put into deposit-receipts along with the husband's money, but the receipts remained in the hands of the wife and under her control; that was all that was necessary—*Clark* v. *Clark*, May 25, 1881, 8 R. 723.

The respondent argued—This sum of £70 had been invested along with the husband's money in the name of the spouses or of the survivor; on his bankruptcy the whole was therefore the property of the husband, and passed to the trustee in bankruptcy. The sum could not be divided up, but must be taken as a whole. Even the averment of donation to the husband, afterwards recalled, would not entitle her to a proof, because the only way in which a wife could prevent her private estate falling under her husband's bankruptcy was by keeping it quite separate. The wife had not done that in this case, and therefore she could not claim any exemption of the ordinary law or of the statute—*Anderson* v. *Anderson's Trustee*, March 18, 1892, 19 R. 684.

At advising—

LORD YOUNG—I do not think that the decision in this case is difficult. My opinion coincides with that which the Lord Ordinary must have had in his mind when he pronounced his decision, although we have not got any expression of his views.

Irrespective of the Act of 1881, the wife

would have had no case, so that her contention rests entirely upon that statute. She says that she had a sum of £70 at the time of her marriage, and that her husband during the marriage gave her certain sums, and she put all these sums together in two deposit-receipts, one for £305 and the other for £140. She admits that the donations by him to her would not interfere with the trustee in bankruptcy taking the property gifted to her during the marriage. The only claim she has is as to the property she had at the date of her marriage, and she proposes to prove that this sum of £70 exists separately in the two deposit-receipts, and the question is whether that is competent.

Now, undoubtedly this £70, which I will assume belonged to her at the time of her marriage, was mixed up with the other sums in the two deposit-receipts for £305 and £140. The provisions of the statute alone give any substance to her contention that she is entitled to recover this sum of £70, but then they expressly exclude her getting it unless she has kept it separate and unmixed with her husband's estate. But she has not kept it separate and unmixed; she has put this sum of £70 into two deposit-receipts payable to her or her husband or the survivor, along with other money which admittedly passes to the husband's trustee. The case is just the same as if she had lent this £70, along with other money belonging to her husband or any third person on a bond which acknowledged that the money had been received from him or her, and by which the borrower had bound and obliged himself to repay the money borrowed to her or her husband or the survivor of them. In that case there is no doubt the sum repaid would fall to the bankrupt's trustee. I am of opinion that the Lord Ordinary's judgment is right.

LORD TRAYNER and the LORD JUSTICE-CLERK concurred.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for Reclaimers — J. C. Watt. Agents—Dove & Lockhart, S.S.C.

Counsel for Respondents — Dundas. Agents—W. & J. Burness, W.S.

Wednesday, October 18.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

ANDERSON'S TRUSTEES *v.* M'GREGOR'S EXECUTORS.

Caution—Septennial Limitation Act 1695, c. 5—*Allegation of Agreement Barring Cautioner from Pleading Statutory Limitation—Relevancy.*

The creditors in a bond sued the cautioner upon it more than seven years after its date. They averred that they had intimated to the cautioner their resolution to call up the bond within seven years from its date, and that the cautioner "made application for indulgence, and specially requested that the loan should be allowed to lie over until the children of his said son (the principal debtor) were of age. He further informed the executors (the creditors) that if this indulgence were granted, he would negotiate a further loan of £500 from the bank and advance £400 to his said son in order that he might make a fresh start in business, and so improve his financial position. Said loan was negotiated and said advance made, and the executors granted the indulgence craved and permitted the bond to lie over." The creditors pleaded that the cautioner was barred from pleading the operation of the Act 1695, c. 5, as extinguishing his liability under the bond.

The pursuers admitted that the children of cautioner's son were still under age.

The Court *assoilzied* the defender, *holding* that the creditors had made no relevant averment of an agreement on the part of the cautioner to abstain from pleading the operation of the statute; the Lord President and Lord Adam further *holding* that such an agreement could only have been proved by writing.

By personal bond dated 25th and 31st May 1882 James Anderson junior, as principal debtor, and James Anderson senior and another as cautioners, bound themselves conjunctly and severally to pay the executors of Mrs Catherine M'Gregor the sum of £300.

On 20th February 1893 the executors of Mrs Catherine M'Gregor, having failed to recover the full amount of the claim from James Anderson junior, sued the trustees and executors of his father James Anderson senior, who was by that time deceased, for the balance remaining due under the bond.

The pursuers averred—"(Cond. 3) During the year 1888 the said executors resolved to call up said bond, and intimated this resolution to the cautioners. On receipt of this intimation the said deceased James Anderson made application for indulgence, and specially requested that the loan should be allowed to lie over until the children of his said son were of age. He further informed the executors that if this indulgence were granted he would negotiate a further loan of £500 from the bank, and advance £400 to his said son in order that he might make a fresh start in business, and so improve his financial position. Said loan was negotiated and said advance made, and the executors granted the indulgence craved, and permitted the bond to lie over. But for the intervention and actions of the said deceased James Anderson the executors would have called up the bond in the year 1881."

At the bar the pursuers admitted that the children of the cautioner's said son were still under age.