thing to say that a combination is old or new. For instance, take a clock. As a clock it is as old as the hills. But you may make a clock in a way that as a combination would be perfectly new. There can be no doubt that the first man who made an electric clock would have a perfectly good patent for an electric clock, although there had been clocks from time immemorial. I think, taking Lord Cairns' judgment, he would have handed in his claim and have claimed nothing but his combination as described. If he had done so, I do not think he could be held to say that he had invented a clock—what he had invented was an electrical arrangement by which the hands are driven, and so on, but the combination itself would be the merit and novelty.

There is another judgment, which is too long to quote, but of which I express my humble approval and admiration. It is the judgment of Lord Justice Moulton in the case of the *British United Shoe Machinery Company* v. *Fussell & Sons*, in 25 Patent Reports, 631. There is one passage in which he puts this matter of what are the necessities of the form of a claim in a nutshell, although it is in the form of a criticism of the argument of the counsel before him. He says (at p. 651)—"If I were to sum up my criticism of the point which Mr Terrell seeks to make, I should say that a man must distinguish what is old from what is new by his claim, but he has not got to distinguish what is old and what is new in his claim. If the combination which he has claimed and for which he asks a monopoly is novel, that is sufficient."

Now I entirely agree with that, and applying that to this case I think the combination here was novel. It was a thing made up entirely of old parts, because the spits, trolleys, fire doors, containing case, and gravy dripper in this sense were all old, but they were not arranged in that particular way. Taking again what, as I have already said, I consider is a very useful test—Will the thing do something that has never been done by a roasting machine before? In both of the patents I answer yes. The first patent is doing what has never been done before, namely, keeping in a self-contained machine suitable for placing in a ship, meat at a steady distance from the fire, and the second, while doing what had never been done before except by the first machine, did also something else, viz., gave an appliance which would allow of roasting at one distance from the fire and roasting at another. Therefore it was a new combination. It is different from the case of a man who invents a gridiron pendulum and substitutes it for one part of a known combination. His improved pendulum does nothing except what an old pendulum has done before, or does it a little better. But it is different when you put in something which does not do simply better what an old part of the combination has done before, but gives the combination as a whole the power of doing something which the first combination could not do; then that seems to me to create a combination. And I think, as I say, that the argument really was based upon a fallacy which I quite confess is exceedingly easy for anyone to drop into, by not remembering that an old thing is one thing and an old combination is another, and a new thing is one thing and a new combination is another. Where the whole thing is new then you are in the domain of what has often been called a master patent. Where it is not that, but where you have not invented a thing for the first time but have merely made a new combination, the result is different. There is a difference between merely improving upon a combination by making one piece of it rather better, and introducing something quite new by which you to a certain extent change the character of the whole combination. That I think is this case. Therefore upon the whole matter I am of opinion that the Lord Ordinary's judgment is right and ought to be adhered to.

LORD KINNEAR—I concur.

LORD PEARSON—I also concur.

LORD M'LAREN, who was present at the advising, gave no opinion, not having heard the case.

The Court adhered.

Counsel for Complainers (Respondents)—Sandeman — Black. Agent — R. Ainslie Brown, S.S.C.

Counsel for Respondents (Reclaimers)—Hunter, K.C. — Hamilton. Agents — Carmichael & Millar, W.S.

Friday, March 19.

FIRST DIVISION.

LORD RUTHVEN AND ANOTHER *v.* PULFORD & SONS.

(See *Lord Ruthven* v. *Drummond*, 1908, S.C. 1154, 45 S.L.R. 901.)

Arrestment—Aliment—Arrestment of Alimentary Income for Arrears of Alimentary Debts.

The holders of a decree for payment of an alimentary debt incurred in previous years arrested in the hands of trustees the income for the current year due to the debtor from an alimentary fund.

Held that the arrestment was valid—*Monypenny* v. *Earl of Buchan*, July 11, 1835, 13 S. 1112, *followed.*

Husband and Wife—Joint Estate—Alimentary Fund—Income of Alimentary Fund Destined to Husband and Wife "during their Joint Lives upon their Joint Receipt."

The income of an alimentary fund held in trust was destined to a husband and wife "during their joint lives upon their joint receipt."

Held that there was no severance of the fund into two halves, but that it was a joint-fund which either spouse might burden by means of proper alimentary debts.

The Right Honourable Walter James Hore Ruthven, Baron Ruthven of Freeland, and the Right Honourable Lady Ruthven, his wife, residing at Newland, Gorebridge, presented a petition for recal of arrestments used by Messrs Pulford & Sons, tailors and military outfitters, St James's Street, Piccadilly, London, creditors of his Lordship, for whom answers were lodged.

The petition set forth, *inter alia*—"(1) That on 18th May 1906 Messrs Pulford & Sons, of 65 St James's Street, Piccadilly, London, tailors and military outfitters, raised an action against the petitioner Lord Ruthven in the High Court of Justice in England for payment of £832, 8s. 1d., with interest and costs. The service copy of the summons bears that 'the plaintiffs' claim is for the price of goods sold and delivered, and for work and labour done, and money paid, and materials provided in and about the same, full particulars whereof have been given before action, and exceed three folios in length; also as drawers of a dishonoured bill of exchange, accepted by the defendant and payable on demand, dated 8th October 1901, and for interest thereon.' The 'particulars' of said claim were also therein stated to be as follows—. . . [*The claim was made up of* (a) £596, 9*s.* 11*d.*, *the amount of the account as at October 8th*, 1901, *for which sum the said bill of exchange had been accepted;* (b) £137, 6*s.* 8*d.*, *being interest thereon from October 8th*, 1901, *to May 17th*, 1906; *and* (c) £98, 11*s.* 6*d.* *for further goods supplied between October 8th*, 1901, *and April 28th*, 1903.] . . . (2) That on 12th July 1907 the present respondents obtained judgment against the said petitioner in said action 'for payment of the sum of £866, 14s. 5d. on account of principal and interest due on a bill of exchange, the consideration for which was the price of goods sold and delivered, with the sum of £4, 14s. for costs, which judgment was obtained by default of appearance after personal service of the writ of summons.' . . . (3) That a certificate of said judgment was issued on 14th November 1907, and on 29th November 1907 the present respondents caused said certificate to be registered in your Lordships' books in terms of The Judgments Extension Act 1868, and obtained extract and warrant for diligence in common form. (4) That in virtue of said extract registered certificate of judgment and the warrant of your Lordships, the present respondents on 3rd November 1908 caused arrestments to be used in the hands of C. J. G. Paterson, Esq., C.A., Edinburgh, and A. R. C. Pitman, Esq., W.S., Edinburgh, as trustees for behoof of Lord Ruthven, or as individuals, for the sum of £1000 more or less due and addebted by them to the said petitioner. The said arrestments were repeated on 13th November 1908, and none of said arrestments have been withdrawn. The respondents claim that the whole sum for which they have obtained judgment, and in respect of which they have used arrestments as aforesaid, is an alimentary debt for which they are entitled to attach the whole alimentary fund after mentioned. . . . (6) That the said C. J. G. Paterson and A. R. C. Pitman are trustees for behoof of the petitioners under the agreement and deed of declaration of trust after mentioned, and in their capacity as such trustees administer the fund from which the petitioners are entitled to the alimentary provision after mentioned, which in consequence of said arrestments the trustees have refused to pay to the petitioners. (7) That in the beginning of 1892 a sum of £30,000 of entailed money, being the balance of the price of the entailed estates of Freeland and others to which the petitioner Lord Ruthven had succeeded as heir of entail, and thereafter sold, was invested in the names of certain trustees for the purposes set forth in section 9 of the Act 31 and 32 Vict. cap. 84. . . . (11) That the conditions on which the Master of Ruthven consented to the disentail of the said sum of £30,000, and to the discharge of his claims against the petitioner, were *inter alia—In the first place*. . . . *In the second place*, (1) the said trust fund of £30,000, subject to the foregoing provisions [*i.e.*, those contained in '*In the first place*']; (2) a mortgage over the estate of Harperstown in Ireland for £6989 then vested in the said George Auldjo Jamieson; and (3) the reversion of the said estate of Harperstown (then belonging to Lord Ruthven, which he was taken bound to convey, and has since conveyed, to said trustees) should be conveyed, assigned, and paid over to the said trustees for the following purposes: (First) for payment of the expenses of the trust; (Second) for payment of the expenses of the disentail; (Third) 'To pay in each year from the 1st day of January 1892 out of the free income of the residue of the trust estate £1000 in the event of the free income for the year exceeding that sum, or the whole free income in the event of its not exceeding £1000, to the said Baron Ruthven and Lady Ruthven during their joint lives upon their joint receipt, and to the said Baron Ruthven if he shall be the survivor, during his life after the said Lady Ruthven's death, and that as a provision for their and his alimentary support and maintenance, and for the alimentary support, maintenance, and education of the children of the marriage between the said Baron and Lady Ruthven other than me, the said Master of Ruthven; declaring, as it is hereby specially provided and declared, as an essential part of the arrangements . . . . that the said provision of income to the said Baron Ruthven and Lady Ruthven, and to the said Baron Ruthven if he shall be the survivor, shall be purely alimentary and for the purpose above expressed, and shall not be affectable for or by the debts or deeds of the said Baron Ruthven and Lady Ruthven, or either of them, or of the said Baron Ruthven if the survivor, or the diligence of their, his, or her creditors,' any balance of

income after payment of said £1000 being payable to the Master of Ruthven; (Fourth) for securing said balance of annuity to Lady Ruthven on the death of Lord Ruthven . . .; (12) . . . The said alimentary income payable from the said balance of the said trust estate to the petitioners is the only money in the hands of said trustees in which the petitioner Lord Ruthven is interested. (13) That the free annual income of the said trust estate in the first years of the trust, seldom exceeded £850, and is now about £750. On only three occasions since 1892 has it reached the sum of £1000. . . . (15) That the petitioners have through their agents pointed out to the respondents' solicitors that one-half of the arrested fund belongs, in terms of said agreement, to Lady Ruthven, and have requested them to release the fund to the extent of one-half, but they have declined to do so. (16) That the account, for part of which the respondents took the bill of exchange founded on in said summons, commenced on 4th January 1892, and ended on 1st May 1903, and amounted to £804, 17s. 11d., which sum spread over a period of about ten years is in excess of an alimentary allowance for tailoring on an income such as the petitioner's. Moreover, no part of said account relates to supply of aliment or other necessaries during the period in which the alimentary sums, which are the subject of the respective arrestments, accrued. (17) That in the *cumulo* amount for which judgment was obtained as aforesaid there is included a sum of £137, 6s. 8d., which is stated in the summons to be interest on said bill of exchange. There was no bargain between the parties that the respondents should charge interest on their account, and the debt, so far as it consists of said sum of £137, 6s. 8d. of interest on said bill, is not alimentary, and the arrestment *quoad* this sum is invalid. . . . (19) That the total amount of said alimentary income is not more than sufficient for the yearly maintenance of the petitioners, and the portion thereof arrested is required to provide present aliment. . . . (20) The petitioners called on the respondents to raise an action of furthcoming forthwith, but they have not done so, and have now desired that procedure be by way of petition. The present application is therefore necessary in order that the petitioners may receive payment of said aliment, the arrestment of which is causing them great inconvenience."

In their answers the respondents stated, *inter alia*—"(15) Admitted that the petitioners have through their agents intimated to the respondents their view that one-half of the arrested fund belongs to Lady Ruthven, and that the respondents did not accept this view or agree to a restriction of the arrestment accordingly. The respondents respectfully submit that, upon a sound construction of the terms of the agreement under which the trust fund was created applicable to the income thereof, and the relative declaration of trust, the whole of the annual payment thereby provided for is payable to Lord Ruthven as an alimentary annuity to be administered by him for himself and Lady Ruthven and their younger children, and is liable for alimentary debts contracted by him. (16) . . . Averred that all the items comprised in the said account in respect of which the said judgment has been obtained are properly alimentary in their nature, and are due by the petitioner, Lord Ruthven, as such. Admitted that no part of the items in the account are for the supply of aliment or necessaries during the particular period in which the alimentary sums which are the subject of the arrestments in question accrued. It is, however, respectfully submitted that while this may entitle creditors for aliment furnished during this period to operate a preference on the arrested fund in a furthcoming, the respondents are nevertheless entitled effectually to attach the fund by arrestment so far as it may not be open to the claims of such creditors, and that the present petitioners are not entitled to have the arrestments recalled. *Quoad ultra* denied. (17) Admitted that to the extent mentioned the sum for which said judgment was obtained comprises interest on the outstanding balance of said account for which on October 8th, 1901, the bill referred to in the summons was granted. These outstanding balances were long overdue, and it was the understanding of parties when the bill was granted that interest was to be paid on the amount outstanding from time to time. Moreover, in the circumstances interest was payable on the amount so outstanding by the law of England, by which the contract between the said petitioner and the respondents fell to be governed, and interest was accordingly decerned for in the said judgment, which is *res judicata* against the petitioner Lord Ruthven. The interest in question is properly accessory to the principal alimentary debt, and the respondents submit that it falls to be treated as alimentary. In any event, the question raised in this article goes to the extent of the claims of the respondents in respect of the arrestments, and not to the validity of the arrestments themselves. . . . (19) . . . Denied that the total amount of the said alimentary income is not more than sufficient for the yearly aliment of the petitioners, and that the portion thereof arrested is required to provide present aliment for them. . . . (20) Admitted that the respondents have not so far raised an action of furthcoming, and that they are content that the question whether the funds arrested are from their nature subject to arrestment for the respondents' claim should be tried in the present process. For the reasons stated in the preceding answers, the respondents respectfully submit that the arrestments used by them in respect of their said claim are effectual to attach the funds arrested as in a question with the beneficiaries the present petitioners, without prejudice to any questions as to the preference (if any) which may be acquired by creditors making proper alimentary furnishings during the period in which the sums presently arrested accrued, such questions being properly re-

served for decision in an appropriate process. They accordingly submit that the present application for recall of the arrestments used by them should be refused."

The case was heard on 18th March 1909, when the following *authorities* were referred to—(1) On the question raised in article 16 of the petition and answers—*Monypenny* v. *The Earl of Buchan*, July 11, 1835, 13 Sh. 1112; *Countess of Caithness* v. *Her Creditors*, August 10, 1757, M. vol. 13, Personal and Transmissible, App. 1, 5 Br. Sup. 337; *Greig* v. *Christie*, December 16, 1837, 16 Sh. 242; Bell's Com. vol. i, p. 126 (5th ed. p. 130). (2) On the question raised in article 15 of the petition and answers—*Bruce's Trustees* v. *Bruce's Trustee*, February 27, 1894, 21 R. 593, 31 S.L.R. 462; *Thom* v. *Thom*, June 11, 1852, 14 D. 861.

At advising—

LORD PRESIDENT—This is a petition for recal of arrestments. We have already decided in the case of *Drummond*, 1908, S.C. 1154, that the fund here is a proper alimentary fund. But the debt which is sued upon, and in respect of which this arrestment is used, is without doubt an alimentary debt, because it is a debt for clothing; and, looking to the period, it is not of such a great amount as necessarily to fall upon the ground of excess. Accordingly, the points really raised in defence are twofold. The first is that the debt sued upon is admittedly for furnishings not supplied during the current term of the aliment which is arrested. It seems to me that the whole law is settled in the case of *Monypenny*, 13 S. 1112, which is an authority which is both good in itself and is certainly binding upon us and cannot be gone back upon. Therefore, although as between different creditors a creditor for an alimentary debt incurred during the current term can have preference, yet there is no competition as between the recipient of the alimentary fund himself and the alimentary creditor.

The second point that is put is this—the alimentary fund was constituted by means of a trust, and the provision of the trust with regard to the fund was that the trustees are to pay in each year £1000 "to the said Baron Ruthven and Lady Ruthven during their joint lives upon their joint receipt," and to the survivor as a provision for alimentary maintenance. Now it was said that being joint we ought to recal the arrestment at least as regards one-half. I am afraid I cannot take that view. It seems to me that when an alimentary fund is destined jointly to two people who are spouses and who are living together there is no severance of the fund into two moieties one of which is taken by each, but it is a joint fund which either of the spouses may burden by means of proper alimentary debts, and other alimentary debts of a proper character must just come in *pari passu* the one with the other.

Accordingly, I do not think that the idea of its being a proper debt of the husband's alone really arises. To a certain extent some of these furnishings may have been for the benefit of the family. It is not the father who clothes the children, more than the mother, in a family in circumstances similar to this; they both clothe them out of the alimentary fund. Accordingly I cannot see any reason for interfering with the arrestments upon that point; and therefore, upon the whole matter, I think the petition must be refused.

LORD M'LAREN—On the question of the order of preference, I think there is really no room for doubt on the matter. The order is that the alimentary fund is to be drawn on, in the first place, for the current alimentary debts; secondly, for arrears of alimentary debts; and thirdly (though I do not think this point has ever arisen), if there is any balance over, I suppose that it would go to the ordinary creditors. Now, in the absence of any creditor who is suing for current debt, it follows that the alimentary creditors who have supplied goods in previous years are entitled to attach the fund by their arrestments, subject only to this, if it had been pleaded to us, which it was not, that it was necessary that a sum of ready money should be retained for the current expenses of the family, that claim would perhaps have taken precedence over all others.

On the second question, it is one, no doubt, of some nicety, but having regard to the definition of joint estate, the law seems to be clear. The theory is that in a case of joint estate the whole property belongs to each, so that on the death of one of the joint owners or the renunciation by one of his right in the fund, the fee expands and the right to the whole property vests in the remaining grantee. Now, if that is the principle, it seems impossible, without doing violence to the interests of Lady Ruthven, to effect a division of a fund which is intended for her benefit as much as that of her husband.

LORD PRESIDENT—I ought to have said—though the question does not actually arise in this case, because the sum arrested here was not enough to pay the debt, yet, as it is very expedient that there should not be more litigation here, I ought to have said—that the opinion I have delivered applies only to the debt and does not apply to the interest.

LORD KINNEAR—I agree with your Lordship, and upon the last point also.

LORD PEARSON—I concur.

The Court refused the prayer of the petition and decerned, and found the respondents Pulford & Sons entitled to expenses.

Counsel for the Petitioners—Hon. W. Watson. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondents—J. R. Christie. Agents—Simpson & Marwick, W.S.