England and in Scotland appear to me negative of the view that the Court contemplated that mere initiation of steps towards one remedy or the other imported final election.

The particular question which we are called upon to decide in the present case is whether an intimation of claim (an intimation necessary to be given within six months if the right to this form of remedy were not to be surrendered) must be held to import a final election. In my view, whilst the provision in the section is capable of bearing this severe construction, it is not a necessary construction or one encouraged in any way by judicial dicta, and therefore I answer the question in the negative.

If in the present case the pursuer had applied for arbitration, and whilst insisting in these proceedings had raised the present action, I desire to reserve my opinion as to the competency of such an action. In the circumstances of the present case, however, the application for arbitration having been made by the defenders, I do not think that the pursuer is foreclosed from withdrawing any claim to have compensation awarded in the arbitration proceedings and from insisting in the present action.

The Court pronounced this interlocutor—

"Find with reference to the questions of law in the case that it was premature at this stage to repel the first plea-in-law for the appellants: Therefore recal the interlocutor of the Sheriff-Substitute of 10th July 1923, and remit to him to sist the action for such period as he may think reasonable to enable the respondents to decide, and to intimate to the Court his decision, as to withdrawing the claim made by his solicitors on his behalf on 14th June 1922 as a condition of proceeding with the present action, under reservation always of the respondent's right under section 1 (4) of the Workmen's Compensation Act 1906; and decern."

Counsel for Pursuer—Wilton, K.C.—Scott. Agents—G. M. Wood & Robertson, W.S.

Counsel for Defenders—Robertson, K.C.—Russell. Agents—W. & J. Burness, W.S.

Thursday, January 17, 1924.

SECOND DIVISION.

[Sheriff Court at Ayr.

INGLIS' TRUSTEE *v.* INGLIS.

Bankruptcy — Sequestration — Alimentary Provision — Excess — Bankruptcy (Scotland) Act 1913 (3 *and* 4 *Geo. V, cap.* 20), *sec.* 98 (2).

A bankrupt had an alimentary income from trust funds amounting to £721, and besides himself had to support a wife and daughter and two sons, one of whom was at the university and the other at school. In a petition by his trustee in bankruptcy for an order on him to pay over to the trustee a part of the alimentary income accruing to him after the date of his sequestration, *held* that £300 per annum was the excess beyond a suitable maintenance which he was bound so to pay over.

The Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20), sec. 98 (2), enacts—"Where the bankrupt is in right of an alimentary provision it shall be competent to the Lord Ordinary or the Sheriff, upon a petition by the trustee, to determine whether the amount of such provision is in excess of a suitable aliment in view of his existing circumstances, and if he shall determine that it is, to fix the amount of the excess and to order the same to be paid to the trustee as part of the property of the bankrupt falling under the sequestration. . . ."

Peter Lyle, chartered accountant, Ayr, trustee on the sequestrated estates of Quentin Godfrey Inglis, Ayr, *pursuer*, brought an action against the said Quentin Godfrey Inglis, *defender*, in the Sheriff Court at Ayr, in which he craved the Court "to find that the defender is in right of the following alimentary provisions, namely—[*an enumeration of certain trust funds followed*], which said alimentary provisions amount *in cumulo* to about £1250 per annum, and that said sum is in excess of a suitable aliment to the defender in view of his existing circumstances; to fix the amount of the excess; and to order the same to be paid to the pursuer as trustee on the defender's sequestrated estates periodically as it falls due, in terms of section 98 (2) of the Bankruptcy (Scotland) Act 1913."

The pursuer averred—"(Cond. 3) The defender is about forty-four years of age. For some years he has not attempted to follow any occupation notwithstanding the fact that a job was available had he chosen to accept it. He has a wife and three of a family, two boys and one girl. The children are now of an age to maintain or partially maintain themselves. The defender and his wife and family are all able-bodied and suffer from no defect whatever, and considering the existing circumstances the foresaid alimentary provisions are in excess of what is necessary to afford suitable aliment to the defender."

The pursuer pleaded—"The said alimentary provisions being in excess of a suitable aliment to the defender in view of his existing circumstances, a portion thereof should be ordered to be paid to the pursuer as trustee foresaid in virtue of section 98 (2) of the Bankruptcy (Scotland) Act 1913."

On 27th November 1923 the Sheriff-Substitute (BROUN), after a proof, pronounced the following interlocutor:—"Finds in fact (1) that the estates of the bankrupt were sequestrated by the Court on 16th January 1923, and the pursuer was duly elected trustee thereon, and confirmed as such on 1st February 1923; (2) that on 20th October 1923 the pursuer had realised property of the bankrupt amounting to £1230, 18s. 6d., from which there fall to be deducted preferable claims amounting to £101, 4s. 6d.,

leaving a balance of £1129, 14s., and as the claims of the creditors amount to £27,339, 11s. 6d., there is available for distribution among the creditors a dividend of 9½d. per £1, or if a disputed claim amounting to £9400, 15s. 2d. be excluded, a dividend of 1s. 3d. per £1 subject to deduction of expenses; (3) that the bankrupt is in receipt of (*a*) an alimentary provision consisting of the free annual proceeds as an alimentary annuity allenarly of the 'husband's trust funds' held by the trustees acting under the antenuptial contract of marriage between the bankrupt and . . . his wife, dated 2nd October 1903, which funds are invested in the securities detailed and yield an income of £222, 10s. per annum, and (*b*) an alimentary provision consisting of the liferent for his alimentary use only of a legacy of £10,000 held by the trustees under the trust-disposition and settlement of his father . . , and relative codicil, dated respectively 7th and 22nd March 1917, and registered in the Books of Council and Session 18th July 1919, which sum is invested in the securities detailed and yields an income of £554, 0s. 10d. per annum; (4) that the bankrupt's said wife has right as an alimentary provision to a further income of £35, 2s. 7d. per annum out of the 'wife's trust funds' held by the trustees acting under the said antenuptial contract of marriage; and (5) that the Court is of opinion that the sum of £775, 10s. 10d., being the cumulative amount of the said alimentary provisions in favour of the bankrupt, is in excess of a suitable aliment to the bankrupt in view of his existing circumstances by £400 per annum: Therefore, in virtue of the powers conferred on the Court by section 98 (2) of the Bankruptcy (Scotland) Act 1913, fixes the amount of the said excess at £400 per annum, and orders and decerns the bankrupt to pay over £400 per annum out of the amount of the said incomes as and when received by him in the proportion of £100 per annum out of the income received by him from the 'husband's trust funds' held by the trustees under the said antenuptial contract of marriage, and £300 per annum out of the income received by him from the said legacy held by the trustees under the said trust-disposition and settlement and relative codicil of Dr John Inglis, from time to time to the pursuer as part of the property of the bankrupt falling under the sequestration till the further orders of the Court: Reserving always to the pursuer and to the bankrupt to apply to the Court to alter this order in the event of any change of circumstances which may make such alteration proper."

The defender appealed, and argued—Alimentary income was safeguarded from creditors so far as reasonable—*Cuthbert* v. *Cuthbert's Trustees*, 1908 S.C. 967, *per* Lord M'Laren at p. 971, 45 S.L.R. 760; *Caldwell* v. *Hamilton*, 1919 S.C. (H.L.) 100, 56 S.L.R. 529; Stair, iii, 1, 37; Ersk., iii, 6, 7; Bell's Comm., v, 1, 7. What was reasonable was a question of circumstances. The bankrupt was entitled to be kept in the same grade of society in which he had been brought up—*Livingstone* v. *Livingstone*, 1886, 14 R. 43, 24 S.L.R. 30; *Haydon* v. *Forrest's Trustees*, 1895, 3 S.L.T. 182; *Claremont*, 1896, 4 S.L.T. 144; *Craig*, 1915, 2 S.L.T. 183. In the present case the bankrupt had no earning capacity, and he was therefore entitled to a larger alimentary provision than the Sheriff had allowed.

Argued for the pursuer and respondent—Under the Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20), sec. 98 (2), the bankrupt was only entitled to an aliment suitable to his existing circumstances. In the present case the bankrupt had made no effort to earn anything. In *Caldwell* v. *Hamilton* (*cit. sup.*) the estate paid 5s. in the £1, and the bankrupt did his best to help his creditors. In the circumstances the Sheriff's decision was right.

LORD JUSTICE-CLERK (ALNESS)—This case raises a question as to what portion of certain alimentary funds enjoyed by a bankrupt should be set aside for payment to his trustee in bankruptcy. It appears that the net annual income of the bankrupt from these funds amounts to £721 or thereby. The Sheriff-Substitute has allocated £400 per annum from these funds as the proper amount to be paid to the trustee, leaving £321 or thereby to the bankrupt for his own subsistence and that of his wife and children.

The section under which our jurisdiction is invoked is section 98 (2) of the Bankruptcy (Scotland) Act 1913. It enables the Lord Ordinary or the Sheriff upon petition by the trustee to determine whether the amount of an alimentary provision is in excess of a suitable aliment to the bankrupt in view of his existing circumstances. Accordingly the Court is called upon to exercise a discretion having regard to the existing circumstances of the case. The appellant maintains that the Sheriff-Substitute has incorrectly exercised that discretion and that no part whatever of this sum of £721 per annum should be allocated to his trustee in bankruptcy. Mr Macdonald, however, in his closing sentences suggested an alternative view to the effect that at any rate the amount awarded by the Sheriff-Substitute was too large. The respondent on the other hand maintains that the judgment of the Sheriff-Substitute is sound and should be affirmed.

I regard as quite inadmissible the appellant's leading—and so far as his junior counsel's speech was concerned—only contention, viz., that no part of this sum should be set aside to his trustee in bankruptcy. I think that would be tantamount to offering judicial encouragement to profligate bankruptcy. The circumstances here are that the bankrupt's debts—and it is not his first sequestration—amount to £27,000 and the prospect is that a dividend of something under 10d. in the £ may be paid to his creditors. It is a bad bankruptcy. At the same time, in the existing circumstances, and particularly having regard to the dependants upon the bankrupt, I am disposed to think—and I humbly advise your Lordships accordingly—that the Sheriff-Substitute's allowance to the bankrupt is on the meagre side. I suggest that we should fix the excess at £300 instead of

£400, which is the figure fixed by the Sheriff-Substitute, reserving to each party as the Sheriff-Substitute has done the right to return to the Court for an alteration of the order in the event of any change of circumstances emerging which would make such an alteration proper.

LORD HUNTER—I agree. The determination of what is a suitable aliment in existing circumstances for a bankrupt, where that involves considering to what extent the bankrupt is to continue to enjoy an alimentary allowance made to him, is necessarily of a delicate and sometimes of a difficult character. I am, however, totally unable to accept the proposition that it would be at all fair or right that in such circumstances as the present where the bankrupt is in a situation to be capable of earning something, although he may in fact not be earning anything, where he is possessed of heritable property that is susceptible of yielding him some income, and he and his wife are in the enjoyment of over £800 in the shape of alimentary allowances, where the creditors in the bankruptcy are apparently to get something under 10d. in the £, he should be allowed to retain the whole of these allowances to himself without making any contribution from these funds with a view to mitigating the loss which admittedly his creditors must sustain in consequence of his not altogether creditable bankruptcy. I think, however, after the full explanation of the parties' circumstances to which we have listened from counsel at the bar, that the Sheriff-Substitute may perhaps have erred to some extent in making too large an allowance in favour of the creditors, and I am in accord with your Lordship in thinking that we ought to alter the sum from £400 to £300.

LORD ANDERSON—I agree. In a case of this sort it appears to me the decision of the Court turns upon a consideration of two matters—in the first place, the nature of the fund out of which the trustee desires to obtain an allowance on behalf of creditors, and, secondly, the actual terms of the provision of the Bankruptcy Act. Now, the fund we are concerned with here is an alimentary fund, and the primary purpose of such a fund is not to pay claims of creditors but to aliment and maintain the beneficiary, and not only the beneficiary himself but, as it seems to me, those also who are dependent upon him. The second point is the actual terms of the second sub-section of section 98 of the Statute of 1913, whereby the Court is enjoined to have in view the existing circumstances of the bankrupt. Those circumstances apparently are—there is available for the bankrupt's support £721 or thereby, and he has dependent upon him a wife, a daughter who is a young girl of seventeen, an older son who is at Glasgow University and who is not well equipped for earning his own livelihood, and a growing boy, who is fifteen and at school at Sedbergh. Even if the bankrupt is earning a little to support himself, the Sheriff-Substitute's interlocutor gives him only £321, out of which those dependants have to be supported. That seems to me to be somewhat inadequate for purposes which are necessary, and I agree with your Lordships that we should increase the income by £100, making £421 available apart from what he may earn by his own exertions, as to which I attach very little weight.

LORD ORMIDALE was absent.

The Court fixed the excess at £300 instead of £400, reserving to each party the right to apply to the Court for an alteration in the event of any change of circumstances.

Counsel for the Pursuer and Respondent —S. Macdonald. Agents — Fyfe, Ireland, & Company, W.S.

Counsel for the Defender and Appellant —J. Macdonald—Stevenson. Agents—Murray & Brydon, S.S.C.

HIGH COURT OF JUSTICIARY.

Saturday, January 19.

(Before the Lord Justice-Clerk, Lord Hunter, and Lord Anderson.)

PATERSON *v.* MACPHERSON.

Justiciary Cases—Statutory Offence—Betting—Suspected House—Search Warrant—Unopened Letters—Prospective Incompetent Evidence—Suspension—Competency—Undertaking of Prosecutor to Depart from Charge if Letters Seized Illegally.

A warrant was granted authorising the police to enter a house on suspicion that it was being used as a betting-house, and to seize all documents relating to betting which should be found on the premises. After the warrant had been executed and a complaint had been served upon the occupiers of the house for a contravention of the Betting Acts, a bill of suspension was brought by the accused in which they craved the Court to suspend the seizure and retention of certain letters alleged to have been opened by the police, and further to suspend the use of these letters in any way for the purpose of proceedings in Court. The prosecutor in his answers undertook to depart from the charge if it should be decided by the magistrate in the course of the trial that the seizure of the letters by the police had been illegal. *Held* that as the question of the admissibility of the letters as evidence could be raised in the police court it was undesirable that the application should be entertained by the High Court at this stage; that in view of the prosecutor's undertaking to depart from the charge if the evidence showed that the letters were seized unopened, the suspension was entirely unnecessary; and bill *refused*.

Question, whether in the circumstances the suspension was competent.

Christopher Cairns Paterson and Thomas Graham Paterson, both residing at 3 New-