The Court pronounced this interlocutor:—

"Grant authority to the petitioner to proceed in the sequestration and to take all necessary steps therein for the division of the estate and otherwise, notwithstanding the loss of the claims and other documents, and the petitioner's consequent inability to use or produce the same in terms and for the purposes of the statute: And remit to the Sheriff of the Lothians and Peebles to proceed therein."

Counsel for the Petitioner—Cullen—R. S. Brown. Agents—Patrick & James, S.S.C.

Counsel for the Respondent—Watt—Kennedy—Trotter. Agent—M. G. Yool, S.S.C.

Tuesday, March 7.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

PATERSON (CHRISTIE'S JUDICIAL FACTOR) *v.* HARDIE AND OTHERS.

Marriage-Contract--Antenuptial Marriage-Contract—Power of Wife to Assign Marriage-Contract Provision Granted by her Husband.

By antenuptial marriage-contract a husband bound himself to pay to his wife, in the event of her survivance, an annuity of £300. He also assigned to trustees a policy of insurance on his life, to be held and applied by them in security to his wife "for implement and satisfaction to her of the provisions hereinbefore conceived in her favour."

During the subsistence of the marriage the husband and wife assigned in favour of a creditor of the husband the wife's interest in the annuity of £300, and also in the said policy.

In a competition with regard to the proceeds of the policy arising after the husband's death between the assignee and the judicial factor on the marriage-contract trust-estate, *held* (*aff.* judgment of Lord Kyllachy) that the assignation by the spouses was valid, and that therefore the assignee fell to be preferred.

Interest—Rate of Interest—Debt.

Interest at the rate of 5 per cent., following the general rule, *allowed* on a debt, *morata solutione.*

By antenuptial contract of marriage executed in 1885 Charles Jameson Christie bound himself, and his heirs, executors, and successors, to pay to his promised spouse Janet Anderson Rintoul after his death "a free yearly jointure or annuity of £300" so long as she should survive him, or in the option of his said spouse, and in place of the said annuity, to convey to her "in liferent for her liferent use allenarly" one-third of his whole estate, heritable and moveable. The annuity or liferent, as the case might be, was to be restricted to £120 in the event of his widow contracting a second marriage, and it was declared that such restricted annuity "shall be purely alimentary and not alienable or assignable by" the wife.

In security of the foregoing provisions Mr Christie assigned to certain trustees a policy of insurance for £2000, in trust for the following trust-purposes—"First, for payment of any expenses which may be incurred in the execution of the trust hereby created; second, that the said trustees may hold and apply the said policy of assurance, sums of money therein contained, and bonuses and additions, and others before assigned, after fulfilling the preceding purposes of this trust, in security to the said Janet Anderson Rintoul for implement and satisfaction to her of the provisions hereinbefore conceived in her favour." Mr Christie bound himself to pay the annual premiums on the policy, and declared that in the event of the provisions to his wife being otherwise secured to the satisfaction of the trustees they should be bound to execute any writings necessary to reinvest him in the policy.

In the same deed Janet Anderson Rintoul on the other part made over to and in favour of herself and her husband and the survivor in liferent, and the children of the marriage in fee, all her property and *acquirenda* "other than the provisions before specified."

By assignation in security dated 29th October 1879 Mr Christie for himself, and as administrator-in-law for his wife, and the said Mrs Janet Anderson Rintoul or Christie his wife, assigned to John Hardie and his heirs and assignees whomsoever, all right, title, and interest which Mrs Christie had or might thereafter have in the said annuity of £300, and also in the said policy of insurance. The assignation proceeded upon the narrative that "I, the said Charles Jameson Christie, am presently justly indebted to John Hardie . . . . the sum of £1321, 2s. 3d., and that we both [*i.e.*, Mr Christie and his wife] are desirous of securing him in payment thereof, as well as of legal interest now due and to become due."

The marriage-contract trustees never accepted office, and on Mr Christie's application a judicial factor was appointed on the trust-estate in 1871.

Mr Christie died on 7th March 1897, survived by his wife and ten children. Mr Alexander James Paterson, C.A., the judicial factor, received payment of the sum contained in the insurance policy, amounting with bonus additions to £3600, and raised an action of multiplepoinding with a view to the distribution thereof.

Claims were lodged (1) by Mr Paterson, who, as judicial factor, claimed the whole fund *in medio* "in order that he may administer and apply the same in implementing the provisions contained in the said antenuptial contract in favour of Mrs Christie and the children of the marriage;" and (2) by Mr Hardie, who claimed to be ranked and preferred to the extent of £2386, being the amount of the debt due to him by Mr Christie, *plus* interest at five

per cent. from 1879, when the money was lent.

The judicial factor pleaded, *inter alia*—"(2) Mrs Christie having no power to burden or renounce, *stante matrimonio*, the provisions in her favour constituted by her antenuptial contract of marriage, the claimant is entitled to be ranked and preferred in terms of his claim."

Mr Hardie pleaded—"(1) The claimant being validly vested in the whole rights of the spouses under the said antenuptial contract of marriage in the fund *in medio*, is entitled to be ranked and preferred in terms of one or other of the branches of his claim."

On 25th June 1898 the Lord Ordinary (KYLLACHY) ranked and preferred Mr Hardie in terms of his claim, and repelled the judicial factor's claim.

Opinion.—"This multiplepoinding is brought to distribute a sum of £3600, which represents the proceeds of a policy of insurance on the life of the late Mr C. J. Christie, who was formerly a farmer in East Lothian, and is now deceased. The fund is claimed in the first place by the judicial factor under Mr Christie's marriage trust, who seeks to retain the whole sum for the security of the marriage-contract provisions for the deceased's widow. On the other hand, a portion of the fund—amounting to £2300—is claimed by Mr Hardie, a merchant in Haddington, who some time ago obtained, in security of a certain debt, an assignation to Mrs Christie the widow's interest under the marriage-contract. And the question I have to decide really is, whether it was within the power of Mrs Christie, *stante matrimonio*, to assign to Mr Hardie her marriage-contract provision.

"I had a very careful argument on that question, which involved the usual reference to the case of *Menzies & Murray* on the one hand, and the case of the *Standard Investment Company* v. *Cowe* on the other. And what I have to decide is, whether this case belongs to the class of cases in which it has been held that a wife cannot, even with her husband's consent, during the subsistence of the marriage, part with her marriage-contract provision, or do anything to qualify her marriage-contract rights.

"Now, there can be no doubt as to the nature of the lady's interest in this marriage-contract. Her interest is just this—Her husband binds himself to pay her an annuity of £300 a-year, restrictable on her entering into a second marriage. He binds himself to pay her that annuity, and does so absolutely. She gets it without any restriction or qualification, except that it is (in the event of her second marriage) declared to be alimentary; and as we all know, such a declaration, unless protected and fortified by a trust, is of no effect. So far, therefore, as Mrs Christie's primary right under the contract is concerned, it was certainly a right which was absolute, and which she might assign or deal with as she pleased.

"But then it is said that in the case of *Menzies & Murray*, following the case of *Torry Anderson*, and that class of cases, it has been decided that where a marriage-contract provision is protected by a trust—the provision being to be held by trustees and administered for the widow's behoof—that is held to imply as part of the contract an exclusion of the widow's right to alienate during the marriage; and of course that is a doctrine about which there is no dispute as applicable to the case of a marriage-contract provision duly protected by a trust. But the difficulty in the present case is, that the only trust which is created by this marriage-contract is a trust for the ingathering of the security subject—viz., the policy of insurance which the husband effected in order to secure his wife's rights. The trustees are not directed to recover the proceeds of the policy and to hold these for the widow, and to pay her therefrom an annuity from year to year. The trust is simply a trust to levy and hold the proceeds of the policy for her security; and, indeed, it is provided that if her annuity is otherwise secured, the trustees are immediately to hand over the proceeds of the policy to the husband. I am not, therefore, able to hold that this is a case in which the wife's annuity is protected by a trust in the sense of the cases referred to; and accordingly I have come to the conclusion that Mr Hardie's claim is a claim to which there is no good answer, and that he must be ranked and preferred to the proceeds of the policy, I think, in terms of the first head of his claim. Of course his claim does not exhaust the proceeds of the policy. He merely recovers out of the proceeds the amount of the debt for which he holds the assignation in question—granted jointly by the husband and the wife. The policy being the property of the husband, subject to the wife's security, and the wife's assignation disburdening the proceeds of any claim on her part, the result is that Mr Hardie's debt is a first charge on the fund.

"Another question was raised as to whether the trustees here might not have certain rights on behalf of the children of the marriage, and be entitled to recover their provisions for their behoof. It was suggested that they were in the position of creditors of Mr Christie for the children's provisions, and so entitled to retain for the benefit of the children the proceeds of this policy. I thought at first there might be something to say for this view, but on reading the contract, and looking into the matter, I see that it will not hold. There is no security created in favour of the children; and in any case the trustees hold primarily for the security of the wife, and they cannot interpose any claim of retention to the prejudice of her or her assignees.

"The only other matter about which there was some discussion was as to the rate of interest to be allowed on Mr Hardie's debt. I am afraid I cannot decide that question very satisfactorily, because the rule on the subject is somewhat unsettled, and I have to fix a rate of interest which shall be applicable both to recent years and to a period going back as far as 1879. I am

far from saying that with regard to debts unpaid there is any absolute rule that 5 per cent. any more than 4 per cent. shall be the rate of interest to be implied. On the other hand, 5 per cent. has for a long time been the rate of interest implied; and in this case, the transaction going back to 1879, I have come to the conclusion that there is no sufficient reason for restricting the rate below 5 per cent. I am less disposed to do so because of this circumstance, that the debt here is of long standing, and that there have been annual or periodical accumulations. The creditor has not got his interest paid regularly. It has been allowed to accumulate, and he cannot get compound interest. Now, 5 per cent. is not more than 4 per cent. with annual accumulations, and therefore I doubt whether this case quite raises the general question.

"On the whole, I propose to sustain Mr Hardie's claim in its first head, and to find both parties entitled to their expenses out of the trust estate."

The judicial factor reclaimed, and argued—1. The Lord Ordinary's interpretation of the marriage-contract was wrong. There was something more in it than a mere obligation to pay; there was a trust to secure the fulfilment of that obligation; in short, there was a proper marriage-contract provision, and such a provision was irrevocable. This case fell within the same category as *Hope, &c.*, March 15, 1870, 8 Macph. 699; *Menzies* v. *Murray*, March 5, 1875, 2 R. 507; and *Ker's* v. *Trustees* v. *Ker*, December 13, 1895, 23 R. 317. It was distinguished from the other class of cases represented by *Ramsay* v. *Ramsay's Trustees*, November 24, 1871, 10 Macph. 120; *Standard Property Investment Co.* v. *Cowe*, March 20, 1877, 4 R. 695; *Laidlaws* v. *Newlands*, February 1, 1884, 11 R. 481; *Reliance Mutual Life Assurance Society* v. *Halkett's Factor*, March 4, 1891, 18 R. 615; *Watt* v. *Watson*, January 16, 1897, 24 R. 330. If the true meaning of the contract was to put funds into the hands of trustees to secure the wife in an annuity, the form in which that meaning was expressed did not matter. 2. In any event, the rate of interest allowed by the Lord Ordinary, viz., 5 per cent., was too high; 4 per cent. was quite high enough—*Greig* v. *Magistrates of Edinburgh*, March 12, 1879, 6 R. 801; *Ross* v. *Ross*, June 16, 1896, 23 R. 802; *Melville* v. *Noble's Trustees*, December 11, 1896, 24 R. 243; *Campbell's Executor* v. *Campbell's Trustees*, March 4, 1898, 25 R. 687; *Grant* v. *Grant's Trustees*, June 4, 1898, 25 R. 948.

Argued for Mr Hardie—1. The Lord Ordinary was right. The annuity which the husband came under an obligation to provide to his widow was not declared to be alimentary, and indeed did not fall under the trust at all. So far as it was possible to exclude the annuity from the trust the spouses did so. There was no attempt to protect the wife against herself. The marriage-contract trustees had no duty to the wife when the marriage was dissolved. In the class of cases of which *Menzies* v. *Murray* was typical, the attempt was always to terminate or break down a trust. Here, if the claimant should be successful, the trust would still go on, and the factor would hold and administer the balance of the fund *in medio* in terms thereof. [The cases cited *supra* were referred to and commented upon by the claimant.] (2) On the question of the rate of interest, the claimant supported the interlocutor of the Lord Ordinary, and referred to *Bishop's Trustees* v. *Bishop*, March 17, 1894, 21 R. 728; *Dunn & Co.* v. *Anderston Foundry Co., Limited*, June 8, 1894, 21 R. 880.

Lord M'Laren—We have had an excellent argument on this question—the mode of securing a married woman's provisions—but after careful consideration of all that has been offered against the interlocutor I think the Lord Ordinary's view is sound, and that this is not a case in which the wife is debarred from granting an assignment of the provisions given to her by her husband.

I am not satisfied that the law as to the assignability of a married woman's provisions from her husband is exactly the same as that which governs the case of the assignability of her own estate, which in anticipation of marriage she secures by means of a trust. It may be that the results desired and attained are substantially the same, but I hardly think they are quite identical either as regards the machinery necessary to protect the rights or as regards the legal foundations on which they rest. In this case the wife is creditor in an obligation by her husband to give her an annuity of £300 in the event of her survivance, and then in security of that obligation the husband assigns to trustees a policy of life assurance which had been maturing for some time, and which was considered to be a fund sufficient eventually to secure that annuity.

Now, when a husband makes a gift to his wife on marriage, supposing that there are no considerations on the other side, I should think that, exactly as in the case of a testamentary bequest, or an out-and-out gift to any third person, the husband is entitled to attach such conditions to the grant as he chooses, and that if the proper means are taken to make those conditions effectual, they will be effectual according to their terms. Thus if a husband puts his estate in the hands of trustees in trust to secure his widow in an alimentary and non-assignable annuity, I should think that, altogether independently of the support which such an obligation receives from the marriage that follows upon it, the condition would be good. It would be good if it were even executed, not as a marriage-contract, but as a voluntary provision made by the intended husband in anticipation of the marriage and its social obligations.

In the case of a wife's settlement of her own estate, the fact that it is a contract executed on marriage makes all the difference in the world, for if she executes a settlement without making her husband a party to it, and makes it as secure as language and legal machinery can effect by

constituting a trust, and imposing the usual conditions in regard to the benefits to be taken out of it, nevertheless, as was found in the recent case of *Watt*, such a trust can be recalled after marriage, and affords no protection to the grantor against her own acts or the influence of her husband. But if the settlement be part of a marriage-contract, then according to the doctrine of *Menzies* v. *Murray*, which has the support of many previous cases, the expediency or policy of protecting the wife's estate in view of marriage has been conceded to be a sufficient reason for upholding the trust according to its terms, which is an exception to the rule that no one can tie up his own estate so as to put it beyond his control or that of his creditors.

Now, in the present case I venture to think that we are outside the chapter of cases at the head of which stands *Menzies* v. *Murray*, and what we have to consider is, what degree of protection did the husband intend to give to this settlement on his wife? What he did was to create a trust, the leading purposes of which were as follows — he binds himself to pay an annuity of £300 to his wife if she should survive him, secured by the proceeds of the policy of assurance, and then she has the option of getting the liferent use allenarly of the whole estate. If she takes the first provision, which is the case we have to consider, there is nothing said as to its being alimentary or non-assignable; if she takes her share of her husband's estate, then it is for her liferent use allenarly, and that might or might not be held to impose a certain disability upon her. But so far as I can see, the provision as to the assignment of the policy of assurance, while it gives security in the sense of providing a fund out of which this jointure shall be payable, makes no change upon the purposes of this deed. The provision is that the granter assigns and transfers to certain trustees a certain policy of assurance upon trust, first, to pay the expenses of the trust; second, to "hold and apply"—[*Here his Lordship quoted from the deed.*] So far as the wife is concerned, the purpose of the trust is to secure an annuity in satisfaction of the provision before conceived—that is to say, an annuity neither alimentary nor protected in any way. While, therefore, it may be that it would not have been possible to revoke this trust, and while it certainly could not have been revoked by the husband alone, because it is part of the contract of marriage that the money should be held by trustees, yet it seems to me that, as regards the substance and beneficial interest of the provision, it was not guarded in such a way as to disable Mrs Christie from assigning. It would have been very easy to declare the policy non-assignable, and then effect would have been given to the condition. But my general view of the principle of interpretation of such clauses—which I expressed in the case of *Halkett*—is that parties are to receive just that degree of protection which they themselves intended and expressed by their deed. Given the principle of the irrevocability of the marriage-contract trust, the degree of protection which the wife receives under it is to be ascertained by considering the language of the deed of provision in all its clauses, and especially the conditions attaching to it. This I think is an unconditional provision, the assignment in my opinion is a valid assignment, and the Lord Ordinary's interlocutor is right.

With regard to the rate of interest, the question on the statute (17 and 18 Vict. cap. 90, sec. 3) was not argued by Mr Cook, but I am not to be understood as giving any opinion upon the effect of the clause in the Act, because I think there is a great deal to be said for the view that the intention of the Act was that interest at the legal rate of 5 per cent. should continue to be recoverable.

LORD ADAM—I entirely agree, and the only observation I require to make is as to the question of interest. I think this is the ordinary case of a claim for payment of a debt *morata solutione*, and I think the usual rate of interest allowed in such cases is 5 per cent.

LORD KINNEAR — I concur upon both points.

LORD PRESIDENT—So do I.

The Court adhered.

Counsel for the Pursuer and Real Raiser —Chisholm. Counsel for the Claimant, the Judicial Factor — Campbell, Q.C. — Blackburn. Agents — Murray, Beith, & Murray, W.S.

Counsel for the Claimant John Hardie—Dundas, Q.C.—Cook. Agent—Peter Macnaughton, S.S.C.

Tuesday, March 7.

SECOND DIVISION.

[Lord Low, Ordinary.

RUSSELL *v.* ABERDEEN TOWN COUNCIL.

Road—Prohibition against Building within Certain Distance from Centre of Road – Statute—Construction—General Turnpike Act 1831 (1 *and* 2 *Will. IV. c.* 43), *sec.* 91 — *Aberdeen Municipality Extension Act* 1871 (34 *and* 35 *Vict. c.* 141), *sec.* 133—*Aberdeen Corporation Act* 1891 (54 *and* 55 *Vict. c.* 124), *secs.* 8, 22, *and* 27.

By section 91 of the General Turnpike Act 1831 it is enacted that no buildings above 7 feet high shall be erected without the consent of the turnpike road trustees within 25 feet of the centre of any turnpike road.

By section 133 of the Aberdeen Municipality Extension Act 1871 it is enacted that it shall not be lawful to erect any building more than 7 feet high within 18 feet of the centre line of any street