deed make such an arrangement reasonable and probable, and the facts—(1) of the pursuer herself undertaking the responsibility of such a lease as she entered into, and (2) of the furniture supplied by the defenders having been really necessary for the continued occupation of the house, are matters of real evidence which strongly support the pursuer's case.

"The evidence, farther, in the opinion of the Lord Ordinary, shows that the pursuer undertook the responsibility of the house, and supplied a considerable amount of furniture of her own, suitable for its occupation, with the knowledge of the defenders, and in reliance on their representations and actings, and on their fulfilment of the arrangement entered into.

"It remains only for consideration whether the defenders unwarrantably refused to go on with the arrangement, and in consequence the pursuer sustained loss in the sense already explained, and the Lord Ordinary is of opinion that both of these questions must be answered in the affirmative. It cannot, perhaps, be said that if the children, from causes over which the defenders had no control, had themselves refused to continue to reside with the pursuer, and had left her against the defenders' remonstrances and efforts, that the defenders would have been liable to such a claim as the present,—for the agreement which was entered into, without its terms being very clearly defined, taken reasonably, would probably not admit of being carried the length of an absolute undertaking by the defenders that, in any circumstances, the children should reside for the full term with the pursuer, but amounted to this only, that the defenders, who had the control of the trust-funds, would use all means in their power for this purpose. But it is unnecessary to consider this view, for it is clear to the Lord Ordinary that three of the children would have been quite ready to remain with the pursuer had the defenders desired it, and that the true cause of their being taken away, or rather of their not having returned as they intended to do after their holidays, was the pursuer's refusal to reduce the agreed-on rate of board from £60 to £45. The defenders founded on the pursuer's letter of 22d March 1871, as showing that she was quite willing that the whole family should leave her, but the explanation of that letter is evidently the same as that of some similar expressions used by the pursuer, and spoken to by some of the witnesses, viz., temporary annoyance and impatience at the conduct of one or more of the members of the family. The alleged excess in expenditure, taking the board and outlays together, of the children's income is not very clearly proved; but, even it were so, would not justify the defenders in withdrawing the children as they did, without indemnifying the pursuer. The defenders had it in their power to restrict the outlays beyond the board to such sum as they desired.

"The Lord Ordinary is of opinion that the loss proved may fairly be taken at £50. The rent of the house, with rates and taxes, is stated at £88. The pursuer had about six months' rent and charges, or £44, to pay, without any return; but she and Mrs Stevenson had the use of the house for themselves, and the loss on this head ought not to be estimated beyond £25 or £30. The loss in furniture is not very clearly proved, but the Lord Ordinary is satisfied that it must have been from £20 to £25, and, on the whole, therefore, he has fixed the total loss at £50, for which decree has been given.

"It does not appear that the defenders required the pursuer to abandon her claim of damages as a condition of paying the other sums for which decree has been given, and the Lord Ordinary has therefore allowed bank interest only on the sums consigned."

The defenders having reclaimed—

It was argued for them—(1) The contract set forth in the record being innominate, could not be proved by parole. (2) The defenders being curators of minor children, could not bind them as parties to such a contract, and the pursuer being in the knowledge of the ages of the children cannot insist against the defenders individually. (3) There was not sufficient parole evidence to prove the cont tract, at least as against the trustees, for only one of two trustees was made a party to it. (4) The breach of contract, if there was a breach, was justifiable.

The respondent in answer—(1) The action is not for implement or for damages for breach of contract, and it is not maintained, nor is it necessary for the pursuer's case to maintain, that there was a concluded contract—it is not disputed that the defenders were entitled to resile; the action is simply for the monies expended by the pursuer in reliance on the defenders' promises, leading her to understand that the children were to be placed with her under an arrangement as set forth for a term of years, and is of the same kind as the actions of *S. & P. Walker* v. *The Subscribers to the Melville Monument*, and the other case referred to in the Lord Ordinary's note—to the effect concluded for parole evidence was admissible; and (2) the proof fully established the pursuer's case to the extent of the sums decerned for by the Lord Ordinary.

The Court unanimously adhered to the judgment of the Lord Ordinary.

Counsel for Defenders and Reclaimers—Smith and M'Kechnie. Agent—T. M'Laren, S.S.C.

Counsel for Pursuer and Respondent—Pattison. Agent—R. P. Stevenson, S.S.C.

Thursday, June 26.

SECOND DIVISION.

SPECIAL CASE — GEORGE WEIR COSENS AND MRS IRWIN AND OTHERS.

Contract of Marriage—Alimentary Annuity—Power to Discharge.

Where the free rents of an estate burdened with an alimentary annuity in favour of A, the widow of the truster, were not sufficient to meet the annuity, an arrangement was entered into between the annuitant and the heir-at-law of the truster, for an unconditional sale of the annuity.—*Held* that the annuitant had no power to discharge the annuity, and that the trustees were not entitled to carry the remainder of the estate to the heir-at-law.

The parties to this Special Case were—first, the brother and heir at law of the late Robert Cosens Weir of Bogangreen—and second, the widow and trustees acting under the trust-disposition and settlement of the said Robert Cosens Weir. It was presented under the following circumstances:—

By antenuptial contract of marriage, dated 16th June 1865, between the late Robert Cosens Weir of Bogangreen and the said Caroline Louisa Antoinette Irwin, the said Robert Cosens Weir bound himself, his heirs, executors, and representatives whomsoever, to make payment to the said Caroline Louisa Antoinette Irwin, his then promised spouse, in case she should survive him, yearly, and each year during all the days of her life after his decease, of a free liferent annuity of £300; further, he bound and obliged himself and his foresaids to make payment to her, in case she should survive him, and there should be no living child of the intended marriage, and no issue of such child, of an additional free liferent annuity of £100, payable in the same manner and subject to the like condition as the annuity of £300; and it was declared that the said annuities should be paid to the said Caroline Louisa Antoinette Irwin exclusive of the *jus mariti* of her husband, in case she should enter into a second marriage, and the receipts for the same to be granted by her alone should be valid and sufficient. The contract contained a declaration in the following terms, viz., "and said annuities are hereby declared alimentary, and it shall not be competent for the said Caroline Louisa Antoinette Irwin to sell, assign, or burden the same, and they shall not be affectable by the deeds or attachable for the debts of any husband to whom she may be married." In security of the said annuities George Cosens Weir disponed by said contract to his said intended wife his lands and estate of Bogangreen, in the parish of Coldingham, in the county of Berwick. This marriage-contract was recorded in the Register of Sasines, &c., for Berwickshire, the 27th February 1868.

By trust-disposition and settlement, dated 12th May 1866, the said Robert Cosens Weir conveyed the said lands and estate of Bogangreen, and the lands of Alemill, as also his whole other estate, heritable and moveable, to the second parties hereto, other than the said Montagu Stevenson, as trustees for the purposes following, viz., first, to pay debts, &c.; second, to make payment to his said wife, in case she should survive him, during all the days of her life after his decease, of both the annuities of £300 and £100 settled upon her by their contract of marriage, and that, even although there should be a living child or children procreated of the marriage, or issue of such child or children, she should have a free liferent annuity of £400, which should be paid to her exclusive of the *jus mariti* of her husband in case she should enter into a second marriage, and the receipts for the same to be granted by her alone should be valid and sufficient to the receivers thereof. The trust-deed contained a declaration in the following terms, viz., "And said annuity is hereby declared alimentary, and it shall not be competent for my said wife to sell, assign, or burden the same, and it shall not be affectable by the deeds, or attachable for the debts, of any husband to whom she may be married." The third, fourth, fifth, sixth, and seventh purposes applied only in the case of children of the marriage being in existence; eighth, the trustees were directed, in case all the testator's children should predecease him, or, after surviving him, should predecease his said wife without leaving lawful issue, to pay, assign, and dispone the then free remainder of the moveable estate to his said wife, and her heirs, executors, and successors whomsoever, for their own absolute use and uncontrolled disposal, and to give to her during her life the free rents of the heritable estate; and lastly, the testator directed his trustees, on the death of his said wife and all his children without leaving lawful issue, to pay, assign, and dispone the then free remainder of the trust-estate, heritable and moveable, to his only brother, the said George Weir Cosens, the first party, and his heirs, executors, and successors whomsoever, for their own absolute use and uncontrolled disposal, and, failing him, then to his, the testator's nearest heir absolutely. This trust-disposition and settlement was recorded in the Division of the General Register of Sasines applicable to the county of Berwick, on the 14th October 1869.

Robert Cosens Weir died on 3d September 1867. There was no issue born of the marriage.

His widow entered into a second marriage with Montagu Stevenson, late captain in her Majesty's 30th Regiment of Foot, residing at Fairfield, by Bradford-on-Avon.

The moveable estate was exhausted in paying the debts of the truster, and there was thus no free moveable estate available for payment to Mrs Stevenson under the last purpose of the trust-deed. Since the death of Robert Cosens Weir his widow regularly received payment of the foresaid annuities, amounting together to £400, but the yearly income of the trust-estate is not sufficient to pay the same. There are no free rents available for payment to Mrs Stevenson under the last purpose of the trust-deed. The second parties are under the necessity of borrowing money from time to time on the security of the trust-estate, in order to enable them to pay said annuities. The income and fee of the estate were being rapidly diminished, and the result would be that in the course of a few years the estate would be exhausted and the annuities would cease.

In this state of matters the widow of Robert Cosens Weir (now Mrs Stevenson) and the said George Weir Cosens (the first party) informed the trustees (the second parties) that they had entered into an arrangement for the discharge by Mrs Stevenson of her right to the annuities in future in consideration of receiving from the said George Weir Cosens the sum of £4500.

The said George Weir Cosens required the trustees, the second parties, upon production and delivery of such discharge by Mrs Stevenson, to convey to him the remainder of the trust-estate still in their hands.

The following question of law was submitted for opinion of the Court:—

"Whether the said Mrs C. L. A. Irwin or Stevenson, with concurrence of her present husband, has power to discharge the provisions secured to her by the marriage-contract and trust-disposition and settlement above recited, and to disburden the lands of Bogangreen, &c., thereof; and whether, upon production and delivery of a discharge by her, with concurrence aforesaid, in favour of the trustees, the said trustees are entitled and bound to convey the remainder of the trust-estate to the said George Weir Cosens?"

Cases cited—*Kippen*, 10 Macph., 134; *Tod's Trustees*, 9 Macph., 738; Bell's Com., i. 129.

At advising—

Lord Justice-Clerk—I think the question should be answered in the negative. The cases of *Tod's Trustees* and *Kippen* have no application, for in both the trust was to come to an end on pay-

ment of the annuity. Here, however, the fund is expressly declared to be alimentary, and a trust is provided to continue and carry out the purposes specified.

LORD COWAN—I concur. The cases of *Tod* and *Kippen* proceeded on grounds not applicable to this case. Here there is a specific annuity given by the marriage-contract, declared to be alimentary, and confirmed by the subsequent settlement. I do not think a husband stands in a different position from a father giving an alimentary annuity to his daughter. By the proposed sale the alimentary character of the annuity would be completely destroyed, no conditions of any sort are proposed to be adjected, but the money to be handed over to the annuitant. I am clear any discharge so given is not good so as to compel the trustees to denude. There are many ways by which the ultimate destruction of the annuity fund might be prevented, as, for instance, a ranking and sale, by which the true value of the estate would be realised, and an annuity bought and settled on the annuitant under limitations to be imposed by the Court.

LORD BENHOLME—I concur.

LORD NEAVES—I concur. The element of alimentary provision has often been recognised, and is a substantial object for a parent or husband to look to.

The Court answered the question in the negative.

Counsel for Heir-at-Law—Marshall. Agents—J. & J. Turnbull, W.S.

Counsel for Trustees — Lee. Agents—Tods, Murray, & Jamieson, W.S.

Thursday, June 26.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

MACVEAN *v.* MACLEAN.

(*Ante*, p. 312.)

Obligation—Conditional Discharge—Grassum—Process—Sist.

An action being raised on certain bills, the defender pleaded discharge thereof in consideration of a long lease of a farm granted to the pursuer. *Held* (*diss.* Lord Benholme) that the bills had been conditionally discharged, but action sisted to allow the determination of the emerging interest of the heir of entail in a reduction of the lease.

Observed (*per* Lord Cowan) that these bills were clearly not intended to be rendered inoperative in the event of the pursuer being deprived of his lease.

In this case, it having been held that parole proof might competently be allowed to explain and supply omissions in certain documents in process, but that it could not be admitted to prove any discharge thereof, further proof was taken before Lord Neaves on 12th May, and now the question came up for argument. The circumstances of the action are partly stated in the previous report (*ante*, p. 312), but in the revised condescendence, articles 5 and 6, the position of matters, according to Macvean's statement, is clearly set forth. These are as follows:—In the beginning of April 1869 the defender offered to give the pursuer a lease for nineteen years of Sallachan, from Whitsunday 1869, at a rent of £300, provided the pursuer would discharge the debt for £1000 contained in the promissory-notes. In consequence of this offer the pursuer wrote to the defender a letter in the following terms: — "Alexander M'Lean, Esq. of Ardgour. Dear Sir,—According to your request, I now make you an offer of Three hundred pounds of yearly rent for the farm of Sallachan, as presently possessed by myself, the lease to endure for 19 years from Whitsunday first 1869, and I am to give up the promissory-notes for the £1000 as you proposed. I have the honour to be your obedient servant, DOND. M'VEAN." To this letter the defender replied, accepting the offer; and the letter quoted in the defences was written in answer to the defender's acceptance. After writing the letter quoted in the defences, the pursuer went to Fort-William and consulted the late Mr Macgregor, writer there, who was also local agent for the defender, as to whether a lease at a reduced rent, for which a grassum of £1000 had been paid, would be binding on the defender's heirs of entail, and he received an opinion to the effect that it would not. He then consulted Mr D. S. Maclaren, writer, Fort-William, on the same point, and received the same opinion. In consequence of this the pursuer, on his return to Sallachan, called on the defender, and informed him that he had been advised that the lease would not bebinding on the defender's successors, and that therefore the transaction could not be gone on with. To this the defender replied that it was all right, and he could do as he pleased. The pursuer, however, declined to enter into the transaction further. Nothing further was said upon the subject of a lease until the beginning of January 1870, when, in consequence of a report that the pursuer was looking out for another farm, the subject was resumed by the defender, who wrote to the pursuer a letter in the following terms:—"Private. Ardgour H., 1st Jany. /70. Dear Macvean,—I have by no means given up the intention of giving you a new lease of Sallachan. I hope it is not too late to do so. I should be sorry to lose you as a tenant and neighbour. Yrs. truly, ALEXR. MACLEAN. Donald Macvean, Esquire, Sallachan." In consequence of this letter the pursuer called upon the defender, when the defender offered to the pursuer to give him a lease of the farm at the old rent of £361, 6s. 10d. for twenty-one years, as from Whitsunday 1869. No agreement was come to at this interview, and the pursuer received from the defender another letter, dated 5th January 1870, in the following terms:—"Ardgour, 5th January 1870. Dear Donald,—I had intended going to see you yesterday and to-day, but the weather is so bad that I have [been] prevented. Oblige me by signing the enclosed, and return it to me. I suppose you will go to Fort-William to-morrow. I am quite prepared to complete the lease at once if you willing to take it. Yrs. very truly, ALEX. MACLEAN. D. Macvean, Esq., Sallachan. The enclosed will require two signatures—one on its face, the other on its back." The "enclosed" was an accommodation bill for £400 in favour of the defender, which the pursuer signed, and upon which the defender raised the money. This bill was eventually retired by the defender. The pursuer agreed to the defender's offer of a twenty-one years' lease, as from Whitsunday 1869, and the lease was