the general ground that the banks are not the property of the gentleman who is required to fence them.

Lord Shand—I concur. I wish to remark that the case is presented to us in a different aspect from that in which it was presented to the Lord Ordinary. Then it was apparently conceded that the river was within the property of Barrowfield, but now that we have this joint-minute before us it appears that the boundary of the property of Barrowfield is the north side of the river Clyde—that is to say, that the property being bounded by the river Clyde, and that river being tidal and navigable, the river is therefore no part of the property of Barrowfield. These appear to me to be the material facts for the decision of the case.

I agree with your Lordship in the chair as to the purport and construction of the 384th section of the statute, and if this had been the case of a private river, neither tidal nor navigable, I should certainly have held that the case was ruled by the decision in the case of *Bruce*, and that the river, being the property of the adjoining proprietor, and a source of danger, he was bound to fence it. But I think that the source of danger not being the property of the proprietor of Barrowfield, and the statute laying the burden of fencing on the proprietor of the dangerous subject, there is no obligation on the complainer to fence. It has been said that as the proprietor here has allowed the public to exercise the right of footpath for the period of prescription he is bound to ensure their safety in the exercise of that right. But I know of no principle of law that requires him to do more than suffer the use of this footpath by the public, or that requires him to repair or improve the path, or that imposes any further obligation than that he shall allow them to use it. If we had the case of a mill-lade or a private river in close proximity to the path, then, as owner of that source of danger he would be required to fence it. I may further say that I am not sure that the argument presented to us, viz., that this is a public navigable river, and that its banks are therefore not the property of the proprietor of Barrowfield, was presented to the Lord Ordinary. From the passage already referred to I see that the distinction his Lordship had in view between this case and that of *Bruce* was the distinction between an artificial subject and a natural subject. He says—"It appears to the Lord Ordinary that it would be a too limited construction of the statute to restrict it to cases where the danger arises from artificial causes." I quite agree with that, and if it had appeared that the source of danger was a natural one, and was the property of the complainer, I should certainly have held him liable to fence it. It has been said by my brother Lord Deas that some one must be bound to fence this river. That probably is so, and it may very well be that the magistrates have that duty laid upon them if the public are resorting extensively to this place. But we have here no question as to whether that responsibility rests on the magistrates, or possibly on the Crown. All I say, and all that is necessary for the decision of this case, is, that the proprietor of Barrowfield is not bound to fence off a source of danger not on his property.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the reclaiming note for Kerr, Anderson, & Co., complainers, against Lord Rutherfurd Clark's interlocutor of 13th June 1876, together with the joint-minute for the parties, No. 22 of process, Recal the interlocutor: Sustain the reasons of suspension: Suspend the proceedings complained of: Interdict, prohibit, and discharge as prayed; and decern: Find the respondent liable in expenses, and remit to the Auditor to tax the account thereof and report."

Counsel for Complainers — Fraser — Gloag. Agents—Mackenzie & Kermack, W.S.

Counsel for Respondent—J. G. Smith—Lang. Agents—Campbell & Smith, S.S.C.

Friday, June 1.

SECOND DIVISION.

[Lord Craighill, Ordinary.

PRINGLE *v.* DUNSMURE.

Process—Proof—Leave to Appeal to House of Lords.

Where the Inner House allowed proof before answer, and the competency of proof was not impugned, leave to appeal to the House of Lords *refused.*

This was an action of reduction at the instance of Andrew Pringle, Edinburgh, against Mrs Grace Dunsmure or Turnbull, widow and executrix of the deceased W. B. D. D. Turnbull, advocate and barrister-at-law. The pursuer sought to have two deeds reduced; one of which had been, he alleged, obtained from him by Mr Turnbull by fraudulent misrepresentation and concealment, and the other by similar conduct on the part of the defender or of her and her agent. A record was made up and issues adjusted by the Lord Ordinary. Both parties thereupon moved the Court to vary the issues allowed, and the defender also reclaimed against the interlocutor approving of the issues, and maintained that the action was irrelevant, The pursuer moved for leave to amend the record, and this was allowed in the form of a revised condescendence, to which the defender put in revised defences. After further hearing, the Court allowed a proof before answer, and ordered the same to be taken before Lord Ormidale. Against this interlocutor the present motion was made for leave to appeal to the House of Lords.

Argued—The Court exercised its discretion here wrongly, as the case was one of fraud, turning entirely upon the evidence of two witnesses.

At advising—

Lord Justice-Clerk—In this case there is an order for proof standing, and an order which was to be obtempered without delay. In such circumstances it is out of the question to allow an appeal. Whether a case is to be sent to a jury or is to be tried by a proof is a matter entirely within the discretion of the Court, and that discretion has been in this case exercised by making an order for proof before answer.

Lord Ormidale—I do not understand that the

pursuer disputes the competency of the order for proof already made by the Court. The only question before your Lordships refers to a matter of procedure, the determination of which is certainly within the discretion of the Court. It would be absurd to grant leave to appeal against an order pronounced by a Court in the exercise of its discretion, whether such an order should be pronounced or not. It might be reasonable to ask for leave to appeal when the competency of the order was doubtful, or if reasonable grounds of appeal could be shown, or if the order were in point of procedure one made for the first time, but no one of these grounds can here be shown, and I am accordingly for refusing the motion.

Lord Gifford—It cannot be doubted that it is within the discretion of the Court to determine whether a case shall go to a jury or be tried before a judge. I think the motion should be refused.

Motion refused, with three guineas of expenses.

Counsel for Pursuer — J. C. Smith—Brand—M'Kechnie. Agent—T. Spalding, W.S.

Counsel for Defender — Fraser — Balfour — Rhind. Agents—Hill & Fergusson, W.S.

Friday, June 1.

FIRST DIVISION.

SPECIAL CASE—WHITE'S TRUSTEES AND WHITE.

Trust—Discharge of Trustees—Alimentary Fund—Annuity.

Where all the purposes of a trust are satisfied with the exception of an instruction to pay an annuity, which is specially declared to be an alimentary provision, not arrestable for the beneficiary's debts or deeds, and which it shall not be in the power of the beneficiary to assign or convey in any manner of way, the Court will not authorise the trustees to denude in favour of the heir-at-law, although he offers to secure the annuitant in payment of an equivalent provision by a bond and disposition in security containing clauses with the same limitations on the annuitant's right.

Observed that the creation of a trust is the only means of placing a fund *extra commercium.*

David White died in 1870 leaving a trust-disposition and settlement for payment of various legacies, of the liferent of his property to his daughter, and of an annuity of £60 to his sister Rachel White. It was declared that this annuity was to "be purely an alimentary provision to my said sister, and that the same shall not be arrestable for her debts or deeds, nor shall it be in her power to assign or convey the same either onerously or gratuitously in any manner of way." The said settlement further provided—"Excluding, as I hereby expressly exclude, the *jus mariti* and right of administration of any husband whom my daughter or grand-daughters or my said sister may marry, in reference to the provisions conceived in their favour under these presents; and declaring that the said provisions shall noway be affected by nor liable to be attached for the debts or obligations of their husbands, and that they shall not be at liberty to assign the same.' The annuitant had been heritably vested in a right of liferent over certain portions of the heritable estate belonging to the trust, that right having been conferred upon her by the truster during his lifetime. She had never been married, and was now 76 years old.

The legacies had been paid, the liferentrix had died, and all the purposes of the trust had been satisfied with the exception of the annuity. The heir-at-law called on the trustees to hand over to him the estate upon his granting to the annuitant a bond of annuity and a disposition in security over the heritable estate for £60, in the precise terms in which the annuity is provided in the trust-settlement. In these circumstances this Special Case was brought by the trustees, the heir-at-law of the truster, and the annuitant, to have it determined "Whether on obtaining a full discharge from the parties interested, and on the second party granting bond of annuity in the terms and with the conveyance in security above mentioned, the first parties are, with the consent of the said Rachel White, bound, or are entitled and in safety, to denude of the said trust, and to convey the residue of the trust-estate to the second party as heir-at-law foresaid."

Argued for the second parties—The trustees were bound to denude now that all purposes of the trust had been exhausted, or at least when the only purpose that remained to be fulfilled could be equally well provided for in the way suggested. The Court have often authorised such a transaction. *Watt* v. *Greenfield's Trs.*, Feb. 18, 1825, 3 S. 544; *Nicholson* v. *Nicholson's Trs.*, Dec. 5, 1850, 13 Dunlop 240; *Pretty* v. *Newbigging*, March 2, 1854, 16 D. 667; *Smith* v. *Campbell*, May 30, 1873, 11 Macph. 639; *Cosens* v. *Stevenson*, June 26, 1863, 11 Macph. 761. In the cases of *Smith* and *Cosens* power to renounce the special provision was refused because the security was to be altered from being an heritable security to a personal obligation in the one case, and in the other was to be discharged for a sum down.

Argued for the first and third parties—There is no power in the trustees to do this, and no power in the annuitant to consent to its being done, for by the terms of the deed she is incapacitated from assignation, which is what she is here asked to do. The only principle under which trustees are entitled to wind up a trust is that all parties still interested have transacted as to their rights. Here there can have been no such transaction. The only ground of argument on the other side is that the beneficiary should grant a discharge, which she is specially debarred from doing by the truster.

At advising—

Lord President—This case is presented by the testamentary trustees of the late David White, being the parties of the first part, Robert Whyte, heir-at-law of the truster, the party of the second part, and Miss Rachel White, sister of the truster, as party of the