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

third part. This lady, Miss Rachel White, is the only person who has now any interest in the provisions of the trust-deed of the late David White; the other beneficial interests have either failed or been provided for. She is therefore the only person who has an interest in having the trust kept up; in all other respects it has become a resulting trust. The heir-at-law now calls upon the trustees to concur with him in finding another security for Miss Rachel White's annuity, and thereupon to hand over the estate to him. Miss Rachel White concurs with him in this application. The trustees have very properly argued to us that they are bound to maintain the trust for securing the payment of this annuity to Miss Rachel White, even although she concurs in this application made by the heir-at-law, for they say that it is provided to her in such terms that she cannot renounce it. The only part of the trust-deed to which I need refer is in these terms—in the third purpose the truster says—"I direct my trustees to make payment to my said sister Rachel White of an annuity of £60, payable half-yearly in advance at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first of these terms after my decease for the then ensuing half-year, and so on half-yearly in advance during all the days of her life; declaring that the said annuity shall 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." Now, *prima facie*, one would be inclined to say that this lady, being expressly debarred from assigning or conveying this annuity "either onerously or gratuitously in any manner of way," is not entitled to renounce the annuity as secured by the trust-deed, for a renunciation is really a conveyance. It cannot for a moment be supposed that a lady whom the truster had striven to protect against her own deeds should nevertheless be entitled to renounce her right to the annuity as secured by him. But it is said that although an accession to this proposal by the trustees would seem at first sight to involve a breach of trust, yet if an equally good security, equally unexceptionable as this, can be substituted for this security provided by the truster, it is hard to maintain the trust merely for the purpose of paying Miss White £60 a-year in one mode instead of the other. Now in a trust where there is only one beneficial interest left, and that of a partial kind, which may be provided for as efficiently in some other way than that prescribed in the trust, so as to set free the estate, I do not say that that cannot be quite competently done in some such way as is suggested here. We have many examples of that. But it must be made quite clear that all parties interested consent, and that they all have power to consent, and that the proposed mode of providing for the beneficial interests under the trust affords as good a security for their protection as that which is afforded by the trust. Now, the question put to us in this case is—"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." The manner in which the annuity is to be secured is stated thus—"The second party proposes to grant a bond of annuity for £60 sterling in favour of the said Rachel White, in the precise terms in which that annuity is provided to her by the said trust-disposition and settlement, and in security of said annuity to convey to her the whole estate forming the foresaid residue in such manner that the said annuity may be heritably secured as a preferable debt upon said estate, as fully and freely as if the same had been a heritable burden affecting the trust subjects at the date of the truster's death," and it is said that Rachel White is willing to accept this security. Now, there is first to be a personal obligation on the heir-at-law to pay this annuity, and, in the second place, there is to be a conveyance of heritable estate in security of payment. What would have been the effect if such a bond and such a security as is proposed if this trust-deed had never existed? If a party in right of an annuity takes a personal bond in security of it and adds to that an heritable security, and puts into that bond a clause providing that the annuity is to be alimentary and not assignable or attachable for her debts, the result would be that the limitation would be quite ineffectual, and she would be absolute mistress of the annuity; for it is quite against all legal principle that a party should be able to place her property beyond the reach of creditors *extra commercium*, and yet herself enjoy the full benefit of it. But the truster here has adopted this means of placing his property *extra commercium*, viz., he has placed it in the hands of trustees. Now, what is the difference between the case I have put and that proposed to be adopted here? It is proposed that the trustees shall convey to the heir-at-law on condition that he shall create a right in Miss Rachel White which she shall not be able to assign, and which shall not be attachable by her creditors. Will the fact that he receives the property on this condition make any difference in Miss White's right? Certainly not. What is to prevent Miss White from removing her right in favour of her debtor himself? It is said that she cannot, because the deeds that it is proposed to execute will declare that she cannot. This trust-deed did that, and yet it is now proposed that she should discharge the trustees. Now, if she can discharge the trustees, *multo magis* can she discharge the heir-at-law from the obligation he proposes to undertake. That consideration is to my mind sufficient for the decision of the whole question, but I may illustrate a little further the legal principle according to which this case must be disposed of. I do not see how a right of this kind can be created without the operation of a trust. No one can tie up his own property so as to defeat the diligence of creditors, nor can that be done by a mere conveyance of the fee to some one else, but if a settlor desire to make a settlement conveying an interest which the party favoured shall not have the power of giving up, he may do so by placing his property in the hands of trustees, who cannot give it up to any one except the person to whom the settlor has destined it without committing a breach of trust. That is a power a truster has, but no one else. The

creation of a trust has long been considered a good way of creating such an alimentary right not liable to the diligence of creditors, but I know of no other way. Therefore, as the intention of the truster may, if the course suggested here is adopted, be defeated, I am for answering this question in the negative.

Lord Deas—What the truster wished to do here was to give his sister an annuity, payable half-yearly in advance, for her aliment; that he declares is not to be assignable, and in the event of her marriage the *jus mariti* should be excluded, and the diligence of creditors should not affect it. This I find expressed perfectly plainly in the deed of settlement. Now, no one will doubt that it is in the power of a truster to give an annuity under these conditions and restrictions, and we know well that it is a common mode, as far back as we can trace the history of our law, of creating rights of this kind. It would be a serious thing if any doubt were cast on the power of a truster to do this; the result would often be that a testator if he could not so protect the fund he bequeathed to some relation who would be likely in his opinion to squander it, would leave him nothing at all. Can it then be doubted that the truster is entitled to give his bounty under these conditions? I think not. That being so, it is perfectly plain that the truster here intended that this fund should be an alimentary provision, payable half-yearly, and not liable to be arrested or attached in any way by creditors. That object is effected by conveying his property to trustees; which is not only the best way of doing it, but there is no authority or precedent for saying that it could be done in any other way. The heir-at-law proposes that on his demand the trustees should hand the estate over to him, he giving security for the payment of this provision. I cannot see what right he has to make this demand, and I am quite certain that we cannot authorise it unless it is as clear as the sun that we shall not thereby defeat the purposes of the truster. Unless that can be shown we cannot entertain this demand. It is said that the lady is not unwilling; the more she is of that mind the more necessary is it for us to see that the will of the truster shall have effect. The effect of the demand made will be to put an end to the trust. The trustees are entrusted with a most important duty—a duty which they cannot violate without being pecuniarily liable, and liable besides to be removed from their office, other trustees being appointed by the Court. If the trustees are discharged and the estate made over to the heir, there is nothing to hinder either him or the annuitant from defeating the object of the truster; the heir would have no duty but that of a debtor, and no rights but those of a debtor. There is certainly no guarantee to us that the truster's intention would not be defeated, and we have no power to authorise any other arrangement than that which he has provided.

Lord Mure—I concur with your Lordships, and substantially for the reasons already stated. The annuity here is secured by a trust-deed, putting it beyond the power of the annuitant to injure or defeat her rights in any way. The only effectual mode by which that result could be secured was by a trust-deed, and that the truster was aware of this is plain from the terms of his deed. In a case of this kind the intention of the truster must always be kept in view. Now, I see from the case that Miss White during the truster's lifetime had been provided with a life-rent of part of the heritable property here, and if the truster had intended that she should hold her other rights without any additional security he would not have taken the course he has, viz., to declare that this annuity is to be alimentary and beyond the reach of her creditors. Any such proposals as we have in the case, or as has been suggested from the bar, will not prevent this lady from discharging this burden if she wishes to do so, and thereby defeating the testator's wishes.

Lord Shand—I am of the same opinion. I think it is clear that by the proposal here made the subject of the security offered is equally valuable with that which the annuitant at present possesses. The proposal is to charge the annuity by means of an heritable security over the same property upon which it is at present charged, with the addition of the personal obligation of the heir-at-law, which may be of some value; and if there were no other consideration in the case, I should hold that the heir-at-law was entitled to have the estate conveyed to him on condition of his granting the security proposed.

But the obstacle—the insurmountable obstacle, as I think—which presents itself in the way of the proposed arrangement, arises upon that clause of the trust-deed which declares that the annuity "shall 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." That clause does not in express terms prohibit the discharge of the annuity, but as assignation, either onerous or gratuitous, is prohibited, and as a discharge is substantially an assignation of the right in favour of the person getting it, it is clear that a discharge of the annuity is as effectually prohibited as an assignation. Now, that being so, it lies upon the heir-at-law, who makes this proposal, to show that this annuity would be as well secured against the lady's debtors and her own acts under the new arrangement as it is at present. I have come to be clearly of opinion that it would not be so, either if the heir-at-law were to grant a bond, as he proposes to do, with a disposition in security, or if the estate were to be conveyed to him under burden of the annuity; for I think that the moment the trust is discharged the declaration that the annuity should not be affected by the lady's debts or deeds would no longer be effectual.

Your Lordship in the chair has explained the general law on this subject, and I concur in the statement that has been made. If the proprietor of an heritable subject, either by deed of conveyance *de presenti* or *mortis causa* gives away the full dominion or fee of that estate, not to trustees, but to a third party, he cannot at the same time limit the powers of his disponee to deal with the estate. The absolute fee being conveyed, he cannot impose conditions restraining alienation or the like, which is practically executing an entail, except by compliance with the provisions of the entail statutes. He cannot fetter the property

with conditions which are inconsistent with the right of fee, as, for example, with the condition that the person vested with the property shall not be entitled to assign his right to it, or that the estate shall not be liable for his debts or deeds.

Again, the estate may be conveyed to one in liferent and to another in fee, and the former right may be described as "in liferent" simply, or for "liferent use allenarly." The result is the same as regards the granter of the deed. He is entirely divested of the fee, and the terms of the conveyance mark and define the character and limits of the rights conferred on the respective disponees. Having conveyed away the entire property, he cannot, however, affect the estate of liferent or fee with conditions which shall protect either estate against the acts and deeds of the respective owners or the diligence of their creditors. I should say it is the same with an annuity made a burden on an heritable estate which the owner has conveyed to a third party. The right of annuity cannot any more than the right of fee or liferent, be affected by conditions against alienation or protecting the right against diligence.

There is a way by which a proprietor can effectually impose such restrictions as he desires to create either on the fee or liferent, or on any right of annuity granted, viz., by a conveyance to trustees, who hold the property for him so long as the trust subsists, and are bound to fulfil his directions, and in a position to enforce the fulfilment of the conditions which the truster has imposed. On the whole, being of opinion that if this trust is brought to an end this lady could discharge her right (whether the one proposal or the other to secure the annuity against her debts and deeds were carried out), I am of opinion with your Lordships that the question must be answered in the negative.

The Court pronounced the following interlocutor:—

> "Find and declare that the parties of the first part are not bound or entitled to denude themselves of the trust committed to them by the trust-disposition and settlement of the late David White, or to convey the residue of the trust-estate to the party of the second part, on the terms and conditions proposed in this Case; and decern."

Counsel for First and Third Parties—Kinnear—Pearson. Agents—Macandrew & Wright, W.S.

Counsel for Second Party—Trayner—Young. Agent—W. R. Skinner, S.S.C.

Saturday, May 12.

SECOND DIVISION.

[Sheriff of Lanarkshire.

WALKER *v.* REID.

Process — Appeal — Competency — Printing — Act of Sederunt, March 10, 1870.

Circumstances in which the Court *repelled* an objection to the competency of an appeal that the provisions of the above Act of Sederunt had not been complied with, in respect of a failure to print timeously.

By Act of Sederunt of March 10, 1870, passed in terms of the authority to that effect contained in the Court of Session Act of 1868, it is provided as follows in reference to the procedure in appeals:—Section 3, sub-section 1—"The appellant shall during session, within fourteen days after the process has been received by the Clerk of Court, print and box the note of appeal, record, interlocutors, and proof, if any, unless within eight days after the process has been received by the Clerk he shall have obtained an interlocutor of the Court dispensing with printing in whole or in part; . . . and if the appellant shall fail within the said period of fourteen days to print and box or lodge and furnish the papers required as aforesaid, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein except on being reponed as hereinafter provided."

By sub-section 2 provision is made with regard to appeals during vacation.

By sub-section 3 it is provided that it shall be lawful for the appellant, "within eight days after the appeal has been held to be abandoned as aforesaid, to move the Court during session, or the Lord Ordinary on the Bills during vacation, to repone him to the effect of entitling him to insist in the appeal, which motion shall not be printed except upon cause shewn, and upon such conditions as to printing and payment of expenses to the respondent or otherwise as to the Court or the Lord Ordinary shall seem just."

By sub-section 5 it is provided—"On the expiry of the said period of eight days after the appeal has been held to be abandoned as aforesaid, if the appellant shall not have been reponed, . . . the judgment or judgments complained of shall become final, and shall be treated in all respects as if no appeal had been taken against the same."

This was an appeal taken against a judgment of the Sheriff of Lanarkshire, and was received by the Clerk of Court on the 12th March 1877. The appellant did not print or box any papers within the fourteen days allowed by the Act of Sederunt, and he did not apply for an order to dispense with printing. The fourteenth day expired in vacation. The appellant allowed the period of eight days after the expiry of the fourteen days to expire without applying to be reponed. On the first box-day in vacation the appellant printed and boxed the whole papers.

On the appeal appearing in the Single Bills the respondent objected to the competency—(*Park* v. *Weir*, 15th Oct. 1874, 12 Scot. Law Rep. 11.)