Saturday, May 14.

FIRST DIVISION.

(SINGLE BILLS.)

CORPORATION OF TRINITY HOUSE, LEITH *v.* CLARK AND OTHERS.

Process—Reclaiming Note without Printed Record Appended—Competency—Printing Dispensed with in Outer House on Respondents' Motion—Judicature Act 1825 (6 *Geo. IV, c.* 120), *sec.* 18.

A Lord Ordinary having on the pursuers' motion, to which the defenders assented, dispensed *in hoc statu* with the printing of the record, and having afterwards (in vacation) decerned as craved, the defenders reclaimed, but did not print either the reclaiming note or the record appended thereto. On the case appearing in the Single Bills the respondents objected to the competency of the reclaiming note. The Court *repelled* the objection.

On 22nd October 1909 the Corporation of Trinity House, Leith, incorporated under the Act 1 Geo. IV, c. 37, brought an action against Janet L. Clark, 5 Hermitage Place, Leith, and others, for declarator, *inter alia*, that the feu-duty payable to the pursuers as superiors of the said subjects had been unpaid from Whitsunday 1893 to Whitsunday 1909; that an irritancy of the feu had thereby been incurred; and that the defenders had lost all right thereto *ob non solutem canonem*.

On 17th November 1909 the Lord Ordinary (GUTHRIE) on the pursuers' motion (to which the defenders assented) dispensed *in hoc statu* with the printing of the record. On 28th March 1910 his Lordship decerned as craved.

The defenders reclaimed.

On 14th May 1910 the reclaimers presented a note to the Lord President, in which they stated that as the Lord Ordinary had on the respondents' motion dispensed with the printing of the record, they had not been able to append printed copies thereof to the reclaiming note. In the circumstances they accordingly craved his Lordship to move the Court to dispense with the printing of the reclaiming note, and to allow the manuscript reclaiming note to be received.

Counsel for the respondents objected to the competency of the reclaiming note, and cited *M'Evoy* v. *Brae's Trustees*, January 16, 1891, 18 R. 417, 28 S.L.R. 276.

The opinion of the Court (LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE) was delivered by

LORD KINNEAR—This is an application to dispense with the printing of a reclaiming note, and to allow the reclaiming note in manuscript to be received.

I think the application should be granted, for otherwise the reclaimer would be denied a hearing because of a non-compliance with regulations, for which he is in no way to blame.

There is no question that the condition on which, in general, a reclaimer can have his reclaiming note received at all is that he must print the reclaiming note, and must box it with a copy of the printed record attached thereto, according to the regulations of the statute. The present reclaimer has failed to do so, but he has given an explanation which I think is satisfactory. It appears that when the case was in the Outer House his opponent obtained from the Lord Ordinary a dispensation from the obligation to print the record, to which the reclaimer assented. The dispensation granted by the Lord Ordinary was *in hoc statu*, and only applied to the Outer House and not to this Court. The case proceeded in the Outer House on the manuscript record, and the Lord Ordinary pronounced an interlocutor on 28th March 1910 deciding against the defender. Now, according to the statute, the strict duty of the defender, if he wanted to reclaim, was to print the reclaiming note and to attach to it a copy of the printed record. But there was no printed record in existence at that time, and I apprehend that the reclaimer should not be barred by a failure to do what was not in his power to do. The assumption of the regulation is that the reclaimer finds a record already printed which he may attach to his reclaiming note. But there was no such record, because the Court had dispensed with printing; and although the reclaimer might no doubt have satisfied the regulation by printing at his own expense the whole record as well as the reclaiming note, I think that he was under no such absolute obligation to do so as to preclude his applying to the Court for a similar indulgence as that which had been accorded to his opponent in the Outer House.

The only question therefore is whether he is now too late to make this application to dispense with printing. I think it is obvious that he is not, for the interlocutor reclaimed against was only issued in vacation, and the reclaimer has brought this application before us on the second day of session. The respondents' objection was supported by a reference to the case of *M'Evoy* v. *Brae's Trustees* (16th January 1891, 18 R. 417), which is an important decision and is binding on us. But the circumstances there were quite different, for in that case the party reclaiming was the party who had got a dispensation from printing in the Outer House, and when he came to reclaim he simply assumed that the dispensation granted in the Outer House would apply in the Inner House as well. Of course he was wrong in that assumption, and there was no ground in that case, such as we have here, to entitle him to an indulgence. I think that the true ground for disposing of this case in the way I have suggested is that otherwise we should be requiring this reclaimer to do what it was not in his power to do.

The Court granted the prayer of the note.

Counsel for Pursuers (Respondents)—D. Anderson. Agents—Melville & Lindesay, W.S.

For Defenders (Reclaimers)—Party.

Tuesday, June 7.

SECOND DIVISION.

DEWAR'S TRUSTEES *v.* DEWAR.

Trust—Succession—Liferent—Alimentary or Non-Alimentary—Exclusion of Acts and Deeds and Diligence of Creditors—Denuding.

An antenuptial marriage contract directed the trustees in the event of the survivance of the husband to pay the annual proceeds of the wife's estate to him "during his lifetime and so long as he remains unmarried, exclusive always of his acts and deeds and the diligence of his creditors."

Held that this provision was alimentary, and that the trust could not be brought to an end by paying over the estate to the husband and the fiars in proportions agreed on between them.

A special case was presented for the opinion and judgment of the Court by (1) Duncan Campbell Andrew and another, the trustees acting under an antenuptial contract of marriage between the Reverend John Dewar and Margaret Campbell Andrew, first parties; (2) the Reverend John Dewar, second party; and (3) the said Duncan Campbell Andrew and Mary Campbell Andrew, third parties.

By the said contract of marriage Mr Dewar bound himself to pay to Miss Margaret Campbell Andrew (afterwards Mrs Dewar) in the event of her survivance an annuity of £60, which annuity it was provided "shall be for the alimentary use only of the said Margaret Campbell Andrew, and shall not be assignable by her nor affectable by her debts."

Mrs Dewar, on the other hand, conveyed her whole estate (with a certain immaterial exception) to the trustees for, *inter alia*, the following purpose:—"The said trustees or their foresaids may, . . . upon the decease of the said Margaret Campbell Andrew survived by the said John Dewar, pay over the interest, dividends, and annual proceeds that may accrue upon the means and estate held under this trust to the said John Dewar during his lifetime and so long as he remains unmarried, exclusive always of his acts and deeds and the diligence of his creditors . . . Declaring further, that in the event of the said John Dewar's remarrying he shall forfeit all right and interest in the estate of the said Margaret Campbell Andrew."

The marriage contract also directed the trustees, in the event of there being no children of the marriage on the death of Mrs Dewar, to pay over or convey the estate to such persons as she might appoint by will, and failing such appointment to her heirs *in mobilibus*.

The trustees were also empowered, "with the consent of the spouses while both are in life, or of the survivor, and without such consent after the death of both, to make advances from the capital of the said whole trust funds of such extent and amount as may be considered fair and proper to and for behoof of either of the spouses during the subsistence of the marriage, or to and for behoof of the survivor of them, or of the children of the marriage or their issue for the benefit and advantage of them or either of them, and at such times and from time to time as may be so resolved upon, of all which the said trustees shall be the sole judges."

No children were born of the marriage, which was dissolved by the death of Mrs Dewar on 3rd January 1902. She died intestate and her heirs *in mobilibus* were the third parties in whom the estate therefore vested on her death.

The special case narrated that Mr Dewar and the third parties had come to a provisional agreement whereby Mr Dewar was to receive £1500 in lieu of his liferent, and that the trustees had been called upon by Mr Dewar with the concurrence of the third parties to denude of the trust by paying over the sum of £1500 to Mr Dewar and the balance of the estate to the third parties.

The *question* for the opinion of the Court was—"Are the parties of the first part entitled to denude of the trust by paying the said sum of £1500 to the second party and the balance of the trust-estate to the parties of the third part?"

Argued for the second and third parties—The liferent was not an alimentary one. Though it was no doubt true that it was not necessary to use the word "alimentary" to make a liferent alimentary, the essential element of an alimentary provision was an expressed intention that the liferent should be used for subsistence only, and if that were awanting the provision did not become alimentary by reason of the exclusion of the diligence of creditors—*Rogerson* v. *Rogerson's Trustee*, November 6, 1885, 13 R. 154, 23 S.L.R. 102—nor because it was in point of fact the sole fund of subsistence—1 Bell's Comm., 7th ed. p. 125. Now in the marriage contract not only was there no clear expression of intention that the liferent should be for subsistence only, but it appeared from the terms of the deed that the liferent was not meant to be alimentary. There was a power to advance capital; the liferent ceased on remarriage; the terms in which the liferent was conveyed were in marked contrast with the provisions as to the wife's annuity, which was clearly alimentary. If the liferent was not alimentary, then the trustees were bound to denude on being called upon to do so by the sole beneficiaries—the liferenter and the fiars—*Roberton* v. *Davidson*, November 24, 1846, 9 D. 152; *Pretty* v. *Newbigging*, March 2, 1854, 16 D. 667; *M'Pherson's Trustees* v. *Hill*, June 13, 1902, 4 F. 921, 39 S.L.R. 657. Counsel also referred to *Jameson* v. *Houston*, November 14, 1770, F.C., M. 5898.