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.

Argued for the first parties—It was not necessary to use the word "alimentary," or to use any other *voces signatæ* to make a liferent alimentary—*Chambers' Trustees* v. *Smiths*, April 15, 1878, 5 R.(H.L.) 151, *per* Lord Hatherley at p. 156, Lord Blackburn at p. 163, 15 S.L.R. 541, at pp. 544, 550. The intention to make the provision alimentary clearly appeared, and that was all that was necessary. The exclusion of the acts and deeds and diligence of creditors of the liferenter could have no other object than making the liferent alimentary. The case of *Rogerson* v. *Rogerson's Trustee* was distinguishable.

At advising, the opinion of the Court (the LORD JUSTICE-CLERK, LORDS LOW, ARDWALL, and DUNDAS) was delivered by

LORD DUNDAS—In 1878 the Rev. John Dewar (the second party to this case) entered into an antenuptial marriage contract with Miss Andrew, afterwards Mrs Dewar. That lady conveyed to the marriage-contract trustees her whole estate (with an immaterial exception) for the purpose, *inter alia*, of paying to the second party, in the event (which happened) of her predeceasing him, "the interest, dividends, and annual proceeds that may accrue upon the means and estate held under this trust . . . during his lifetime and so long as he remains unmarried, exclusive always of his acts and deeds and the diligence of his creditors. . . ." No children were born of the marriage. The fee of the marriage trust funds is now vested—subject to the second party's liferent and to the trustees' power of advance, afterwards referred to—in Mrs Dewar's heirs *in mobilibus* as at the date of her death, who are the third parties to the case. The second and third parties desire that the trust should be brought to an end, and they propose to execute an agreement whereby the second party shall receive a certain sum in cash and renounce his liferent, and the balance of the trust funds shall be paid over by the trustees to the third parties. The trustees, who are the first parties to the case, decline to denude of the trust without the sanction of the Court. The question at issue is whether or not the trustees are bound, looking to the terms of the clause above quoted, to retain the trust estate until the death or remarriage of the second party. In support of the negative view two points were specially maintained upon the construction of the marriage contract. It was pointed out that in an earlier part of the deed the second party provided an annuity for his wife, if she should survive him, of which it is expressly declared that it is "for the alimentary use only of the said Margaret Campbell Andrew, and shall not be assignable by her nor affectable by her debts"; and it was maintained that the difference in this language, as contrasted with that of the wife's counter-provision to her husband, shows that the latter was not intended to have the alimentary character which is expressly imprinted on the former. I do not think there is much force in this view. The deed as a whole is not a very happy specimen of legal draughtsmanship, and I do not think that the absence of the word "alimentary" from the clause in question warrants the inference that the express words of exclusion contained in it are intended to have no meaning or effect at all. Reliance was also placed upon a power given to the trustees to make advances from the capital of the whole trust funds for behoof of the spouses or the survivor of them, or of the children of the marriage to such extent as the trustees might in their discretion consider proper. This was said to be inconsistent with the view that the second party's liferent was intended to be of an alimentary character. But the power applies expressly to the whole trust funds, including that part of them out of which Mrs Dewar's annuity (unquestionably alimentary) would have been payable, and I presume that the trustees would be entitled to exercise it (as they apparently have done on one occasion) even on the assumption that the second party's liferent is of the same character.

As matter of construction, the intention to exclude the acts and deeds of the liferenter is plain and unambiguous. The transaction which the second party desires to enter into seems unquestionably to infer an act and deed on his part. I see no reason why legal effect should be denied to the plain words of the truster in this onerous contract. It was matter of concession (*a*) that the word "alimentary" by itself would be sufficient and effectual to protect the liferent; and (*b*) that no *voces signatæ* nor any particular terms of legal art are essential to achieve that result. I should hold, therefore, apart from authority, that the words of exclusion here used impose a perfectly legal and effectual limitation upon the right of the beneficiary and the powers of the trustees. But counsel argued that authority is against this view, and founded strongly upon the case of *Rogerson* (1885, 13 R. 154). In that case a father by his trust settlement disponed heritage to trustees, with directions, *inter alia*, to pay the income of part thereof to one of his sons, on whose death the fee was to be conveyed to his children, and it was declared that the lands and rents should not be attachable by the son's creditors, and that he should not have power to sell or assign the same, or any interest or annual produce thereof, to any party whatever. There was no express declaration that this provision was alimentary. The son's estates were sequestrated after his father's death, and he assigned in trust his interest under the settlement to his trustee in sequestration, retaining an allowance of £60 per annum as the proportion of the total income which should, during the subsistence of the assignation, be considered a reasonable alimentary allowance. The son subsequently sought to reduce this assignation, on the ground that it was *ultra vires* of him to grant it, the fund being alimentary. The Second Division, adhering to the interlocutor of the Lord Ordinary (M'Laren), refused to reduce the

deed, because the pursuer was not entitled to go back upon the transaction he had deliberately entered into. But the Judges did express *obiter* opinions to the effect that the fund was not alimentary, and that the rents might have been subject to diligence for debts notwithstanding the declaration that they were not to be assignable or attachable. These opinions, although *obiter*, must of course be accorded all due weight. Lord M'Laren alone deals with this matter in any detail. If he is right in holding that the intention to give a liferent "as subsistence money" is the essential condition of its protection against the acts and deeds of the liferenter, I am prepared to hold that intention to be sufficiently evidenced by the words used in the contract in this case. But I observe further that Lord M'Laren appears to base his view, for which no authority is cited, to a considerable extent upon some supposed analogy derived from a prohibition against sale in a deed of entail. It seems to me, with the utmost respect, that the analogy is misleading and inapplicable, for the two cases appear to be quite distinct from one another. In the case of a strict entail, though the fee of the estate is effectually protected from alienation, there is no prohibition against the heir of entail in possession dealing as he pleases with his own life interest. But a liferenter under a trust is not fiar at all, but must take his liferent right upon the conditions under which the trustees are directed to pay it to him. I am the less disposed to accept as accurate and complete the Lord Ordinary's *obiter dicta* in *Rogerson's* case, because I find the law of this matter laid down by the same learned Judge at a later date in terms which I have no difficulty in agreeing with. In Lord M'Laren's work on Wills and Succession (3rd ed., 1894) there seems to be no reference to *Rogerson's* case (decided in 1885), but at the foot of p. 619 the following passage occurs—"The proper case of an alimentary provision is that of an annuity or life interest declared to be neither assignable nor subject to the diligence of creditors. According to the law of Scotland, a gift in such terms is effective without the aid of a resolutive clause, and by custom the use of the word 'alimentary' would seem to be sufficient to qualify the right." I have not been able to find any more direct and authoritative statement than this to the effect that a trust for payment of a liferent, excluding the acts and deeds of the grantee and the diligence of his creditors, is (so far as of reasonable amount) protected as if it had been expressly declared to be alimentary, unless it be in the opinion of Lord Neaves, as Lord Ordinary in the case of *Martin* (1861, 23 D. 705, 707). Lord Neaves said that "in order to have that effect" (*i.e.*, to make the fund alimentary) "the deed, it is thought, must declare that the fund is given solely for maintenance and support, or it must be exempted from the deed of the party or the diligence of creditors, or there must be a clear pronouncement in some other way that the liferent is wholly appropriated to the specified and privileged purpose in question." I read this opinion as importing that an exclusion of the liferenter's acts and deeds and the diligence of his creditors is one of the recognised methods by which a strictly alimentary character may be validly imposed upon a liferent. It is perhaps also worth while to refer to some observations by Lord Glenlee in the case of *Irving* (1829, 7 S. 317, at p. 318). In this apparent paucity of authority the balance is I think in favour of the conclusion at which I should have arrived, apart from authority, and looking to what appears to me the good sense and principle of the matter. I am therefore of opinion that what the second party desires to do is struck at by the language of the marriage contract, and that the question put to us in the special case ought to be answered in the negative.

The Court answered the question of law in the negative.

Counsel for the First Parties—J. G. Jameson. Agent—F. J. Martin, W.S.

Counsel for the Second and Third Parties—Ingram—Mercer. Agents—J. & A. Hastie, Solicitors.

HIGH COURT OF JUSTICIARY.

Friday, June 3.

COURT OF APPEAL.

(Before the Lord Justice-General, Lord Kinnear, Lord Dundas, Lord Johnston, and Lord Salvesen.)

GILLAN *v.* H. M. ADVOCATE.

(*Ante*, February 25, 1910, 47 S.L.R. 444, 1910 S.C. (J.) 49.)

Justiciary Cases—Habitual Criminality—Verdict, Form of—Prevention of Crime Act 1908 (8 *Edw. VII, c.* 59), *sec.* 10 (2).

The Prevention of Crime Act 1908, sec. 10 (2), enacts—"A person shall not be found to be a habitual criminal unless the jury finds on evidence (*a*) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged . . . been convicted of a crime . . . . and that he is leading persistently a dishonest or criminal life. . . ."

At the trial of a person charged on indictment with being a habitual criminal the jury returned a verdict of "guilty."

Held, in an appeal, that the verdict was in proper form, and that it was unnecessary for the jury to make an express finding in their verdict that the accused had, since attaining the age of sixteen, been at least three times previously convicted of a crime.