Scotland or had his domicile there I would have no difficulty in making the appointment craved. But he has no heritable property in Scotland, and whether his domicile is in England or Scotland will depend upon circumstances requiring investigation. Mr Reid has, however, some moveable estate in Scotland, and is confessedly unfit to manage his own affairs. His incapacity, if it did not commence in Scotland, at least developed itself there to such an extent as to require him to be placed in confinement. His affairs require in the interests of all concerned to be attended to, and he has no guardian or anyone with an unquestioned title to do so. In these circumstances it appears to me that the Court, within whose jurisdiction the necessity has arisen for the appointment of such a guardian, should make such an appointment, and I will accordingly do so. But the statement in the answers certainly indicates that the appointment might best be made where the bulk of the ward's estate is situated. I therefore make the present appointment in the first instance only *ad interim*, so that the respondents may not be embarrassed by the appointment I make in any proceedings they may be advised to take in England."

Counsel for Petitioner—D.-F. Mackintosh, Q.C.—M'Lennan. Agents—Liddle & Lawson, S.S.C.

Counsel for Respondents — H. Johnston. Agents—Davidson & Syme, W.S.

Wednesday, January 26.

FIRST DIVISION.

KNOX AND ANOTHER *v.* KNOX'S TRUSTEES.

Husband and Wife—Antenuptial Marriage-Contract—Testamentary Deed—Vesting.

By antenuptial marriage-contract the intending spouses mutually conveyed "to and in favour of each other, and the longest liver of them two in liferent, for their respective liferent use allenarly, and to their child or children to be procreated of the said intended marriage . . . whom failing to the heirs or assignees whomsoever of the said two spouses equally, at the decease of the longest liver of them in fee," the whole estate, heritable and moveable, "belonging" or "which shall belong to them respectively at the time of the dissolution of the marriage by the decease of either" of them. The husband died leaving a settlement, by which he conferred on his wife a liferent of his whole estate, and directed that on her death his estate should be realised and divided equally among his children who should then be alive. Some years after his death, there being then only one child alive, the widow desired to renounce her liferent, and that the child should receive the capital of the estate. *Held* that the marriage-contract was the ruling deed, and the effect of it was that the fee of the husband's estate vested in the children, at latest, at the dissolution of the marriage, and that the widow could renounce her liferent, and the child, in whom the estate had vested, receive payment of the capital from the trustees.

By antenuptial contract dated 4th December 1855 Andrew Knox and Betsy Meall, intending spouses, did "mutually give, grant, assign, and dispone to and in favour of each other, and the longest liver of them two in liferent, for their respective liferent use allenarly, and to the child or children to be procreated of the said intended marriage (in such proportions, and under such conditions, limitations, and restrictions as may afterwards be determined and fixed by a writing executed by the said spouses during their joint lives, with consent of one another, or by the survivor of them, and failing such writing, then to the child or children, and the survivors and survivor of them, and the lawful issue of such of them as may predecease leaving issue, such issue being entitled to the share that would have fallen and belonged to their respective parents severally had they been alive, equally among them, share and share alike), whom failing to the heirs or assignees whomsoever of the said two spouses, equally, at the decease of the longest liver of them, in fee, all and sundry the heritable and moveable estate, of whatever nature or denomination the same may be, now belonging to them respectively, or which may be acquired and shall belong to them respectively at the time of the dissolution of the marriage by the decease of either of the said Andrew Knox and Betsy Meall."

Mr Knox also bound himself to insure his life for £500 in favour of trustees for his intended wife's behoof. Mrs Knox accepted these provisions in full satisfaction of her legal rights. It was further agreed that these provisions should be without prejudice to Mr Knox "augmenting" the provision in favour of his intended wife "in every way and to every extent" he might think proper.

By trust-disposition and settlement dated 15th April 1871 Mr Knox conveyed to trustees his whole means, heritable and moveable. By the second purpose thereof Mr Knox directed payment to Mrs Knox of the free yearly revenue of the trust-estate, and allowed her the liferent use of his furniture, at the same time binding her to educate and maintain the children of the marriage. By the sixth purpose he directed his trustees on the death of his wife "to realise my whole trust-estate, and to pay, divide, and distribute the same equally among my children who shall then be alive, and the lawful issue of such as may have predeceased leaving issue" . . . "which provisions before conceived in favour of my said wife are hereby declared to be, and shall be accepted of by her, in full satisfaction and in lieu of her provisions under the contract of marriage entered into between us, excepting the proceeds of a policy of assurance by the Standard Life Assurance Company for five hundred pounds on my life, which I effected for her behoof, in terms of an obligation in said contract, and which policy is taken to certain parties in trust for her; which provisions before conceived in favour of my said children shall be accepted of by them, and the same are hereby declared to be, in full of all legitim, portion natural, bairns' part of gear, executry or others whatsoever, which they or any of them can ask or demand through my decease."

Mr Knox died on 13th August 1871. He was survived by Mrs Knox and three children, Andrew James, Janet, and Margaret. The two daughters died unmarried and intestate—Janet on 18th February 1874, and Margaret on 25th May 1875. Their brother A. J. Knox and their mother succeeded to their moveable estate. A. J. Knox attained majority on 28th August 1884.

Mrs Knox and Andrew James Knox became desirous that the latter should receive immediate payment of the whole capital of the trust-estate and delivery of the said furniture presently in her possession as liferentrix. They applied therefor to Mr Knox's trustees, and Mrs Knox offered to renounce and discharge her liferent in the trust estate, and she also offered along with the said Andrew James Knox fully and completely to discharge the trustees of the trust in common form and of all claims against them thereanent in any manner of way. The trustees did not accede to the request, as they were doubtful of it being in their power so to do, having regard to the terms of the trust-disposition and settlement by which the trust-funds were directed to be divided, on the death of Mrs Knox, among the truster's children then alive, and to the terms of the marriage-contract, the destination wherein was to the truster and Mrs Knox and the longest liver of them in liferent allenarly, and their child or children and the survivors and survivor of them, whom failing to the heirs or assignees whomsoever of the said two spouses equally at the decease of the longest liver of them in fee.

A Special Case was accordingly adjusted, and the judgment of the Court was asked upon the following questions—"(1) Whether the second parties, the said trustees, are bound instantly to denude of the trust and make over the trust-estate to the said Andrew James Knox, upon receiving a renunciation by the said Mrs Knox of her liferent of the said trust-estate and of all interest she has in the premises, and a discharge by her and the said Andrew James Knox of the said trust, and of the said trustees' whole actings and intromissions, and of all claims under the said marriage-contract? (2) Or whether the said trustees are bound to keep up the trust until the decease of the said Mrs Knox?"

It was argued for the first parties that the marriage-contract was the regulating settlement. It was an onerous contract. By its terms the fee vested in the children as disponees on the dissolution of the marriage. The only parties now interested in the estate were the deceased's widow and son. The widow had been enjoying a liferent, and now proposed to renounce all interest she had in the premises. In such a case the rule applied that the trustees were bound to denude. Even were the trust-settlement to be regarded as the controlling deed, it ought to be held that the fee of the residue had vested in the only surviving child of the marriage. There was no destination-over except to his issue.

It was argued for the second parties—(1) That the trust-disposition was to be taken as the ruling settlement; the fee had not yet vested in the son, and therefore he was not *in titulo* to agree with his mother. "Death" of the widow was the condition prescribed in the survivorship clause; and accordingly renunciation would not do; *Ross' Trustees*, December 18, 1884, 12 R. 378; *M'Alpine*, March 20, 1883, 10 R. 837; *Snell's Trustees* v. *Morrison*, March 20, 1877, 4 R. 709; (2) That in the antenuptial marriage-contract the husband had reserved a power "to augment" the wife's provision in any way he might think proper. The trust-disposition and settlement was a fair exercise of this power. It augmented the wife's liferent provision by (1st) appointing trustees to protect the estate which produced the liferent, and (2d) making it indefeasible even with her consent by postponing the vesting of the fee until after her death. (3) That where a "*universitas*" was provided in an antenuptial contract of marriage to a wife and children, the husband still had a discretionary power over the estate, and the Court would give effect to the exercise of this power if not in fraud of the marriage-contract—*Champion* v. *Duncan*, November 9, 1867, 6 Macph. 17, and authorities there cited. The power might be exercised not only by deed *inter vivos*, as in *Champion* v. *Duncan*, but also by deeds to take effect after death; *Lowden's Trustees* v. *Lowden*, June 1, 1881, 8 R. 741. The trust-disposition and settlement in the present case was in no sense a fraud on the antenuptial marriage-contract.

At advising—

Lord President—The second parties to this case are the testamentary trustees of the late Andrew Knox, and the demand made upon them by the sole surviving child and the widow of the testator is that after the lady renounces her liferent of the trust-estate the trustees shall be bound to convey the entire estate to the son.

Now, it appears to me that the intention of the parties is to be ascertained by reference to the antenuptial contract entered into by them, and not by the trust-disposition. It does not appear that Mr Knox had power to alter the contract by a testamentary deed; and accordingly the latter must be disregarded. It comes to a question, therefore, as to the rights under the marriage-contract. It is said that Mrs Knox has drawn her liferent from the trustees ever since her husband's death. It is not said that the son has taken any benefit under the trust-deed, nor that he could take under it any benefit greater than under the contract. I am quite sure that Mrs Knox is not in any way barred from doing what is now proposed. Nor can the fact that she permitted the trustees to administer the estate prevent her son from claiming his right under the marriage-contract. Now, by that contract the spouses mutually "give, grant, assign, and dispone to and in favour of each other, and the longest liver of them two in liferent, for their respective liferent use allenarly, and to the child or children to be procreated of the said intended marriage . . . whom failing to the heirs or assignees whomsoever of the said two spouses equally at the decease of the longest liver of them in fee." And the subject thus conveyed is the entire estate "now belonging . . . or which shall belong" to the spouses respectively at the time of the dissolution of the marriage by the decease of either of them. These are the whole words which occur for construction with the exception of a parenthesis. That interjected sentence provides that the children of the marriage are to take in such proportions as should afterwards be determined by a writing executed

by the spouses during their joint lives, and failing such writing, that they are to take equally. Now as the spouses during their joint lives executed no such writing, and as the widow by the present action renounces all purpose of doing so, the distribution fell to be made equally.

But the question comes to be, at what date did vesting take place? It is quite clear, looking to the words of the contract, that the estate given was the estate as at the date of the dissolution of the marriage. It vested at latest at the dissolution of the marriage. Whether it vested in the children at the date when they came into existence there is no need to inquire. There were three children of the marriage. Two of these were daughters who have died unmarried and intestate, and accordingly they are represented by the parties before us. Accordingly, the whole fee vested in Mr Andrew James Knox as one of the three surviving children at the time of the dissolution of the marriage, and as along with his mother representing the children who have since died. The trustees contended that they should hold the estate for the possible event of Mr Knox having children and predeceasing his mother. I do not think that question arises here. It is upon the marriage-contract, and on the marriage-contract alone, that I base my judgment.

LORD MURE concurred.

LORD SHAND—I am of the same opinion, and I concur entirely with what your Lordship has said as to the construction of the marriage-contract. And I am further of opinion that it does not matter upon which deed the view of the Court is rested. For in either case the same result would follow. A liferent is given to the widow, and the fee to the children. There is no indication of there being a purpose of suspending vesting in the truster's mind. The only reason why the children did not get instant distribution on their father's death was the interposition of the widow's liferent. On his death the class is in every respect fixed. And accordingly, even if the destination had been simply to the children of the marriage without reference to issue, and if the widow had renounced her right, the money would have been divisible among the children. I think the money vested in the children as a class *a morte testatoris*, and I think if several of the children had claimed the money, and the widow had renounced, I should have thought the case ruled by the authority of *Newbigging* v. *Russell*, 1853, 15 D. 489.

But here the case is much clearer. The widow is plainly entitled to renounce the liferent, and where is the fee if it is not in the son?

The only other argument that was pressed was that the trust-disposition contained a destination-over. The truster directs his "trustees to realise my whole trust-estate, and to pay, divide, and distribute the same equally among my children who shall then be alive, and the lawful issue of such as may have predeceased leaving issue." But this is nothing more than the condition *si sine liberis*.

LORD ADAM concurred.

The Court found that the second parties as trustees were bound to denude of the trust and make over the trust-estate to A. J. Knox on receiving a renunciation by Mrs Knox of her liferent of the trust-estate and all her interest in the premises, and a discharge of her and Andrew James Knox of the trust and their whole accounts and intromissions, and of all claims under the marriage-contract.

Counsel for the First Parties—A. J. Young. Agents—Duncan & Black, W.S.

Counsel for the Second Parties—Macfarlane. Agents—Macrae, Flett, & Rennie, W.S.

Thursday, January 27.

SECOND DIVISION.

[Sheriff of Lanarkshire.

THOMAS OGILVIE & SON *v.* TAYLOR (BUCHANAN & JOHNSON'S TRUSTEE).

Bankruptcy—Private Trust for Creditors—Accession to Trust-Deed—Right of Non-Acceding Creditor to Sue Trustee directly for a Dividend.

An insolvent debtor conveyed his estate to a trustee for behoof of all his creditors who should accede to the trust, with the powers belonging to a trustee under the Bankruptcy Acts, it being declared a condition of the trust that "creditors who accede hereto, or who shall take a dividend out of my said estate, shall be held to have thereby discharged me of the whole debts due by me to them without the necessity for any formal deed of accession or discharge." A creditor demanded a dividend on his debt, but refused to accede to the trust or to give any discharge further than a simple receipt for the money. *Held* (1) that he was not bound to do so, but was entitled to receive the dividend on his simple receipt therefor, and (2) that he was entitled to sue the trustee directly for the dividend.

On 11th March 1885 John Johnson, tailor, sole partner of the firm of Buchanan & Johnson, Glasgow, executed a trust-deed for behoof of his creditors. By this trust he conveyed to James Taylor, C.A., Glasgow, as trustee, "for behoof of my whole lawful creditors at the date hereof, and who shall accede hereto," his whole estate, heritable and moveable, with the exception of his household furniture, "with the same powers as belong to a trustee under the Bankruptcy Statutes." The trust purposes were—"In the first place, in payment of the expenses hereof. . . . . In the second place, I appoint the said trustee to apply the proceeds that shall remain of the said estate and effects in satisfying and paying the whole debts due by me to my creditors acceding hereto, rateably and proportionally, according to their respective debts, which debts, preferable or ordinary, shall be ranked according to the principles of the Bankruptcy Statutes as if my estate had been sequestrated, or otherwise as the trustee may consider expedient for the estate, and that at such times and by such dividends as the said trustee shall judge proper." The trust-deed contained this clause — "Declaring always, as it is hereby specially provided and declared, that this trust-disposition is granted by me on the condition that the creditors who