LORD TRAYNER—I think the question here put to us must be answered in the negative.

By her father's trust-settlement a right of liferent is conferred on Mrs Barnett in a certain share of the trust-estate, the fee thereof being destined to her children. But that right of liferent is to cease and be replaced by a right of fee in the event of Mrs Barnett being predeceased by her husband. That event has not happened, Mr Barnett being yet alive. Until that event does happen, Mrs Barnett has, and can only have, in my opinion, a right of liferent. It appears that Mrs Barnett divorced her husband last year, and it is maintained by her that the divorce of her husband is equivalent to his death. In some circumstances and to certain effects divorce is recognised in our law as equivalent to death. But I think Mrs Barnett cannot maintain her present contention on that ground. For the language of the trust-settlement does not appear to me to be open to construction, or to admit of the condition of "predecease" being fulfilled by any equivalent. The terms of the settlement are unambiguous. The predecease of Mrs Barnett's husband means, I think, only one thing—the death, namely, of Mr Barnett during his wife's lifetime. If that term were now to be read as meaning "divorce" or "termination of the marriage," which is what we are asked to do, we would not be giving effect to the expressed will of the truster, but making a different will for him. Where the language of the trust-settlement is plain and unambiguous we must give effect to its meaning as expressed; and where the truster has conferred a right conditionally, on the happening of a certain event, it is not permissible to hold that the right can be claimed in circumstances where the specified event has not, but something said to be equivalent to that event has happened.

The LORD JUSTICE-CLERK was absent.

The Court answered the question in the negative.

Counsel for First Parties—Lees. Agents—Ronald & Ritchie, S.S.C

Counsel for Second Party — Craigie. Agents—Ronald & Ritchie, S.S.C.

Wednesday, July 19.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

WEBSTER *v.* HARVEY.

Husband and Wife—Parent and Child—Divorce—Marriage-Contract Provisions—Casus improvisus—Vesting.

In their marriage-contract a husband and wife each conveyed certain funds to trustees, and provided that during their joint lives the annual proceeds should be paid to the husband for the maintenance of the family, and that on the dissolution of the marriage by the death of either spouse the trustees were to pay the annual proceeds of the whole trust funds to the surviving spouse, and after the death of such survivor the principal to the children of the marriage, equally among them. The marriage-contract further provided that on the dissolution of the marriage by the death of either of the spouses without issue, or leaving issue who should predecease the surviving spouse, the trustees should pay such survivor his or her own contribution to the marriage-contract funds, and on his or her death pay the fee of the deceased spouse's funds to his or her heirs and assignees.

A child was born of the marriage. Six years after the marriage the wife obtained decree of divorce against the husband. Thereafter the wife died, survived by her former husband and the child of the marriage. From the date of the divorce till the wife's death the trustees paid the annual proceeds of the marriage-contract funds to the wife.

Held (1) that the divorced husband was entitled to the liferent of the funds which he had contributed to the marriage trust; (2) that he had no interest in the funds contributed by the wife to the marriage trust, but that the income of these funds during the divorced husband's survivance had been undisposed of by the marriage-contract, and fell to be paid to the heirs and assignees of the wife; and (3) that no right with respect to the capital of the marriage-contract funds had vested in the issue of the marriage—*diss.* Lord Young to findings (2) and (3), he holding that on the death of the wife the child of the marriage became entitled to the capital of the share contributed by the wife to the marriage trust.

By contract of marriage dated 1st February 1842 between William Harvey and Rachel Hunter, William Harvey bound himself to pay to trustees, for the purposes therein expressed, the sum of £4000, and in security thereof assigned to them his right and interest under his father's trust-disposition and settlement, and the said Rachel Hunter, on the narrative that her father William Chambers Hunter had agreed to execute in favour of her and his other younger children (1) a bond of provision over his entailed estate, and (2) a bond for £4000 over his unentailed lands of Gateside, and that it had been agreed that such sums as might fall to her or her representatives under said bonds should be settled and secured by said contract of marriage, conveyed to the same trustees with consent of her said father, "the whole sums of money, subjects, and effects of every description, heritable as well as moveable, to which she may succeed or be entitled by virtue of the said bond of provision by her said father, or by virtue of any will, testament, or settlement made or to be made by him either anent the said

lands of Gateside, or otherwise in any manner of way."

The purposes of the trust were—First, that the sums of money falling under the trust should be held by the trustees exclusive of the *jus mariti* or right of administration of the said William Harvey; second, that the trust funds should be invested on good heritable or personal security, or in such other manner as should be approved of by the trustees; third, that during the joint lives of the said William Harvey and Rachel Hunter the trustees should pay the interest or annual proceeds of the trust funds to the said William Harvey for the maintenance and support of himself and his spouse and family, after deduction always of all expenses and disbursements incurred by the trustees in the matter of the trust. The fourth purpose of the trust was in these terms—"On the dissolution of said marriage by the death of either of the said contracting parties, in the event of there being children of the said marriage alive at that time, the said trustees shall pay the interest or annual proceeds of the whole trust funds to the survivor of the said William Harvey and Rachel Hunter during all the days of his or her life, and after the death of such survivor they shall pay the principal sums to the children of the marriage equally among them, share and share alike, as they attain the age of majority," with declaration as to the application of the interest in the event of there being any children in minority at the death of the survivor. The fifth and last purpose of the trust was as follows—"That on the dissolution of the said marriage by the decease of the said Rachel Hunter without issue thereof, or leaving issue thereof, who shall all predecease the said William Harvey, the said trustees shall pay and make over to him, as his own absolute property, the principal sum of £4000 now conveyed to them in trust by him, and shall further pay to him during his life the free annual proceeds of such funds as shall come into their hands as trustees foresaid in virtue of the bond of provision and settlement of Gateside, or other writings to be executed by the said William Chambers Hunter, hereinbefore assigned to them in so far as regards the said Rachel Hunter, and that after his death, they shall pay the said principal sums received under said bond of provision and settlement to the heirs and assignees whomsoever of the said Rachel Hunter, and in the event of the said William Harvey predeceasing the said Rachel Hunter under the like circumstances, then the said trustees shall pay and make over to her, as her own absolute property, such funds as shall have come into their hands under the said bond of provision and settlement or other writings by her said father, and also during her life the annual free proceeds of the said principal sum of £4000 sterling hereinbefore conveyed to them in trust by the said William Harvey, and that after the death they shall pay the said principal sum of £4000 sterling to the heirs and assignees whomsoever of the said William Harvey."

The marriage was duly solemnised, and Mr Harvey subsequently implemented his obligation in said contract by granting bond to the trustees for £4000 over his estate of Monecht, of which bond payment was afterwards received by the trustees. On the death of the said William Chambers Hunter in 1866, they also received payment from his representatives of his said daughter's share of the bond of provision executed by him over his entailed estates, amounting to £1000; of her share of the bond over Gateside, £688, 15s. 4d.; and of her share of his general or executry estate under his testamentary settlements, £1909, 12s. 9d.—in all, £3598, 8s. 1d.

Three children were born of the marriage, two of whom died without attaining majority or being married, viz., William, born and died in 1847, and John, born in 1844, died in 1864. The third, Rachel Harvey or Spittal, still survives. On 6th June 1848 Rachel Hunter or Harvey obtained decree of divorce against William Harvey before the Court of Session on account of his adultery, and in 1851 she married Keith Jopp.

In 1864 Rachel Harvey married Charles Grey Spittal, with whom she, with consent of her mother, entered into an antenuptial contract of marriage dated 25th August 1864, by which on the narrative of her parents' said contract of marriage, and that she was the only surviving child of their marriage, she "the said Rachel Harvey, with consent of the said Rachel Hunter or Jopp, and the said Rachel Hunter or Jopp for herself and in exercise of any power of disposal or other right or power competent to her under her said contract of marriage or otherwise, but always under reservation of her own liferent right therein, and they both with mutual advice and consent, for their respective rights and interests" conveyed to certain trustees, "All and whole their, the said Rachel Harvey's and Rachel Hunter or Jopp's, right, title, and interest, present, future, or contingent, in and to said sum of £4000 sterling conveyed in trust by the said William Harvey under the said contract of marriage as above narrated, with full power and liberty to the foresaid trustees to uplift, receive, and discharge the same, and do all action and execution competent to them, the said Rachel Harvey and Rachel Hunter or Jopp, or either of them, thereanent, surrogating and substituting the foresaid trustees and their foresaids in their full right and place of the premises; and in the second place, all goods, gear, and sums of money and all property heritable or moveable now belonging to the said Rachel Harvey, or which she may succeed to or acquire, or which may be bequeathed or fall to be paid or delivered to her during the subsistence of the marriage."

In 1887 all the marriage-contract trustees of Mr and Mrs Harvey having died, Alexander Webster, advocate, Aberdeen, was appointed judicial factor upon the marriage-contract trust.

On 2nd January 1889 Rachel Hunter or Jopp, with the special advice and consent of the said Keith Jopp, her husband, executed a deed of apportionment and settle-

ment, apportioning the sum of one thousand nine hundred and nine pounds twelve shillings and nine pence, or thereby, as the share falling to her from the general or executry estate of her father, the said William Chambers Hunter, under his testamentary settlement, in the proportions and to the extent following, viz., (first) the sum of fifty pounds to her daughter Margaret Catherine Jopp, wife of William Beattie, and (second) the residue and remainder of the said sum of one thousand nine hundred and nine pounds twelve shillings and ninepence, or estate to that amount, to and equally between her son, the said William Chambers Hunter Jopp, and her daughter Minnie Abercrombie Jopp, and reserving her own liferent of the estate and effects so apportioned.

Rachel Harvey or Spittal became insane, and in 1891 Charles Grey Spittal died.

On 1st March 1892 Rachel Hunter or Jopp died, survived by her husband, the said Keith Jopp, who under the provisions of a mutual testament executed by him and his said wife on 9th January 1892, was her executor and universal legatory.

After the decree of divorce obtained in 1848 by Rachel Hunter or Harvey against William Harvey, the trustees under the contract of marriage of Mr and Mrs Harvey paid the interest of the funds under their charge to Mrs Harvey, afterwards Mrs Jopp. William Harvey on 26th April 1869 raised an action of count, reckoning, and payment in the Court of Session against Mr Arthur Farquhar, W.S., the then only surviving and acting trustee under the marriage-contract, on the ground that he was entitled under the provisions of the said contract of marriage to the interest and annual proceeds of the trust funds. The Second Division on 12th July 1870 assoilized Mr Farquhar from the conclusions of the action, and Mr Harvey having thereafter appealed to the House of Lords, that House dismissed the appeal and affirmed the judgment of the Court of Session with expenses—*Harvey* v. *Farquhar*, 8 Macph. 971, 10 Macph. (H. of L.) 26. Mr Farquhar, until his death, and Mr Webster since his appointment as judicial factor, continued to pay the income of the trust funds to Mrs Jopp until her death, the last payment to her being the interest received at Martinmas 1891.

After Mrs Jopp's death, in consequence of competing claims which were made both upon the interest and capital of the trust funds, Mr Webster raised an action of multiplepoinding and exoneration. The value of the trust estate amounted to about £7616.

The Court appointed Sommerville Greig curator *ad litem* to Mrs Spittal.

William Harvey lodged a claim in the multiplepoinding, in which he claimed—"1. Payment to him of the interest or free annual proceeds of the whole funds received and held or directed to be received and held by the trustees or judicial factor in virtue of or under said marriage-contract, from 1st March 1892, during the joint lives of the claimant and his surviving daughter, the said Rachel Harvey or Spittal, for his right of liferent therein. 2. In the event of the said Rachel Harvey or Spittal predeceasing the claimant, then payment to him of (*a*) the principal sum of £4000 provided by him under said marriage-contract, as his absolute property, and also (*b*) of the interest or free annual proceeds of the whole of the remaining funds held under said marriage-contract, as aforesaid, from the date of such predecease during his life, for his right of liferent therein. 3. In the event of its being held that any portion of a right or interest in the funds or estate received and held, or directed to be received and held, under said marriage-contract, vested in the said deceased children of the said marriage, or either of them, then the claimant, in virtue of the Intestate Moveable Succession Act 1855 (18 Vict. ch. 23), claims to be ranked and preferred to the extent of one-half or other legal share of whatever funds or estate, or right or interest, in or through said marriage-contract, may be held to have vested in or to form any part of the succession of the said deceased John Harvey."

Mr and Mrs Spittal's marriage-contract trustees lodged a claim as follows—"1. In the event of its being held that the fee of the whole marriage-contract funds of Mr and Mrs Harvey vested in the only surviving child of the marriage—Mrs Rachel Harvey or Spittal—prior to her marriage with the deceased Charles Grey Spittal in 1864, it fell under the conveyance in her marriage-contract in favour of the claimants. On the death of the said Mrs Harvey or Jopp, the said funds became payable to the claimants as in right of the said Mrs Rachel Harvey or Spittal. 2. In the event of its being held that no vesting took place prior to or during the subsistence of the marriage of Mr and Mrs Spittal, then that part of the fund *in medio* contributed by Mrs Jopp vested in Mrs Spittal on her mother's (Mrs Jopp's) death, and falls to be paid over to her curator *ad litem* now, and that part of the fund *in medio* contributed by William Harvey will vest in the issue of his marriage with Mrs Jopp at his death. 3. In the event of its being held that that part of the fund *in medio* contributed by William Harvey does not vest in the issue of his marriage with Mrs Jopp until his death, then on his death it will fall to be paid to the claimants if Mrs Spittal survive her said father, under the special conveyance to them in her marriage-contract, but if Mrs Spittal predecease her said father, it will fall to be paid to her issue should such issue survive her said father."

Sommerville Greig, Mrs Spittal's curator *ad litem*, lodged a claim concurring in the claim lodged for Mr and Mrs Spittal's marriage-contract trustees. But he further claimed that in the event of its being held that the fund *in medio*, or any part thereof, did not vest in the said Mrs Rachel Harvey or Spittal prior to her marriage with the said Charles Grey Spittal in 1864, and did not pass by the conveyance to the claimants, the trustees under the said marriage-contract, he, Sommerville Greig, as

curator *ad litem* foresaid, was entitled to payment thereof on behalf of Mrs Spittal now; or otherwise, in the event of William Harvey, her father, or any person deriving right from him, being found entitled to a life interest in the said fund, or any part thereof, on the death of the said William Harvey.

The children of Mr and Mrs Jopp also lodged claims claiming by virtue of the deed of apportionment and settlement by Mrs Rachel Hunter or Jopp to be ranked and preferred to the fund *in medio*, Mrs Margaret Catherine Jopp or Beattie to the extent of £50, and William Chambers Hunter Jopp and Mrs Minnie Abercrombie Jopp or Roden to the extent of one-half of the residue and remainder of the sum of £1909, 12s. 9d. after deducting the sum of £50 to which Mrs Margaret Catherine Jopp or Beattie was in right.

By minute lodged in process Mr Jopp, as Mrs Jopp's executor, assigned in favour of his children the claimants Mrs Margaret Catherine Jopp or Beattie, William Chambers Hunter Jopp, and Minnie Abercrombie Jopp or Roden any right he might have to the income of the funds conveyed by his wife Mrs Rachel Hunter or Jopp to the trustees under the marriage-contract between her and William Harvey.

On 4th February 1893 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor—"Finds (1) that the claimant William Harvey is entitled as from the death, on 1st March 1892, of Mrs Rachel Hunter or Jopp, formerly his wife, but from whom he was divorced on 6th June 1848, to the free income during his life of his own contribution to the marriage-contract funds which form the fund *in medio*, the said contribution amounting to £4000 under deduction of a proportion of the expenses chargeable against capital: . . . (2) That the claimant William Harvey is not entitled to the liferent, or to any other right or interest in the balance of the fund *in medio*, being the contribution of his said wife Mrs Rachel Hunter or Jopp to the marriage-contract funds — any interest in the said funds provided to him by the marriage-contract having been forfeited by the said divorce: (3) That with respect to the income of the wife's contribution to the said marriage-contract funds set free by her death and by the forfeiture of the said William Harvey's liferent, the said income is undisposed of, and falls to be paid to the heirs and assignees of the said Rachel Hunter or Jopp, that is to say, to the claimants the appointees under her deed of apportionment, in whose favour her executor, Mr Keith Jopp, has renounced all claims competent to him as such executor: . . . (6) That with respect to the capital forming the fund *in medio*, no right thereto has vested in the children of the marriage, the right of such children being on the just construction of the marriage-contract contingent on their surviving both parents: (7) That the deed of apportionment by Mrs Rachel Hunter or Jopp, on which the claim for the children of her second marriage is founded, is ineffectual to control the dispositions contained in the marriage-contract with respect to any part of the capital of the fund *in medio*, reserving always such effect as may be given to the said deed in the event of the destination in the marriage-contract in the granter's heirs and assignees becoming operative: (8) That it is premature *in hoc statu* to decide whether in the event of Mrs Spittal, the surviving child of the marriage, predeceasing her father, the said William Harvey, her interest in the capital of the fund *in medio* passes to her children either under the terms of the deed or under the *conditio si sine liberis:* . . . Therefore (1) sustains the claim of the said William Harvey in so far as applicable to the liferent of the £4000, forming (under deduction as aforesaid) his own contribution to marriage trust funds, and ranks and prefers him accordingly: Supersedes *in hoc statu* consideration of his claim to be ranked and preferred to the capital of the said £4000 in the event of his surviving his daughter Mrs Spittal: *Quoad ultra* repels the claim of the said William Harvey: (2) Repels the claim of the claimant Keith Jopp and others, the marriage trustees of Mrs Spittal: (3) Repels *in hoc statu* the claim of the claimant Sommerville Greig, Mrs Spittal's *curator bonis*, reserving to him, or to Mrs Spittal, to renew the said claim in the event of Mrs Spittal surviving her father: . . . (5) Repels *in hoc statu* the claims of the claimants Mr and Mrs Beattie, William Chambers Hunter Jopp, and Minnie Abercrombie Jopp or Roden, so far as applicable to the capital sums settled by the marriage-contract: *Quoad ultra* sustains their said claims.

"*Opinion.*—I may summarise in a sentence the facts which have given rise to the various questions which are the subject of the above interlocutor.

"Mr and Mrs Harvey were married in 1844. They executed an antenuptial contract of marriage by which Mr Harvey conveyed to trustees a sum of £4000, while Mrs Harvey conveyed certain funds belonging to her in possession or expectancy, which amounted, as it turned out, to £3598, 8s. 1d. There were issue of the marriage two boys, who died young, and a daughter Mrs Spittal, who still survives. The marriage was dissolved in 1848 by decree of divorce, obtained by Mrs Harvey in respect of her husband's adultery. Mrs Harvey married again and died on 1st March 1892, survived by her husband Mr Keith Jopp and by three children of their marriage, in whose favour she executed a deed of apportionment of part of the funds falling under her marriage-contract with Mr Harvey. Mrs Jopp enjoyed up to her death the income of the whole funds falling under the marriage-contract, it having been decided both in this Court and in the House of Lords that her rights as regards that income were the same as if her divorced husband was naturally dead. Mr Harvey now claims the liferent both of his own funds and of his wife's, and he further claims, that in

the event of his surviving his daughter Mrs Spittal he shall be found entitled to the capital of his own funds, which amount, as I have said, to £4000. Mrs Spittal, through her marriage trustees, claims the whole fund *in medio* as having vested in her and fallen under her marriage-contract. Her *curator bonis* makes a similar claim, on the footing that Mrs Spittal has right to the fund, but that her right did not vest during her marriage and was not therefore carried to her marriage-contract trustees. There are other claims founded on Mrs Jopp's deed of apportionment, and there are other minor claims as to which there is no dispute.

"(1) The first point to be settled is, what is to become of the income of Mr Harvey's £4000 which has been set free by Mrs Jopp's death? Under the contract it is directed to be paid to Mr Harvey during his survivance. Does the forfeiture by the divorce extend to this reversionary liferent? The affirmative is maintained, on the ground that for the whole purposes of the marriage-contract the divorced husband is to be held as dead, and that therefore the forfeiture operated after the wife's death in favour of the children of the marriage.

"I am not able to accept this argument. There is no authority, so far as I can find, for such an extension of the doctrine of forfeiture in divorce. It is sometimes said that as regards pecuniary consequences the guilty husband is to be treated as if naturally dead. But this only means that he is to be so treated in a question with the wife. Her provisions, legal and conventional, take effect as if she were a widow, and for this reason, that she has by her husband's misconduct been made in effect a widow. But it has never, so far as I know, been suggested that the children of the marriage take a similar benefit. Their relation to their father remains unchanged. Their mother has in effect become a widow, but they have not become orphans. Neither in the statute 1573, c. 55, which introduced divorce for desertion, nor in the earlier practice in separations on the ground of adultery, is there any enactment or recognition of forfeiture except as between the spouses. Stair, i. 4, 20, puts the matter thus—'The party injurer loses all benefit accruing through the marriage, but the party injured has the same benefits as by the other's natural death.' Erskine, i. 6, 46, is to the same effect—'The offending husband is bound,' he says, 'to make good to the wife all the provisions in her favour, as well legal as conventional, so that she hath immediate access to them upon the decree of divorce.' The case of *Macalister*, July 18, 1854, assumes, if it does not decide, that after the injured spouse dies the funds contributed by the guilty spouse cease to be affected by the divorce. And the same doctrine is expressly recognised by Lord Westbury in the case of *Harvey* v. *Ligertwood*, July 22, 1872, 10 Macph. (H. L.) 33, a case which had reference to the fund now in dispute. I have therefore not much difficulty in sustaining Mr Harvey's claim so far as regards the income of his own £4000.

"(2) On the other hand, the same authorities which I have just quoted, plainly, to my mind, exclude all claim on the part of Mr Harvey to the provisions made for him by his wife, or out of his wife's funds, whether taking effect during her life or after her death. To repeat the words of Stair—'the party injurer loses all benefit accruing through the marriage.' And although it is now probably to be held as settled that this does not apply to 'tocher' which has been paid to the husband and mixed with his funds, there can, I think, be no doubt that it applies to everything coming from the wife's side, and not reduced to possession prior to divorce. That this is so as regards provisions taking effect during the wife's life, has been indeed decided in a former suit between the parties—*Harvey* v. *Farquhar*, July 12, 1870, 8 Macph. 971. And if that be so, I do not, I confess, see how a distinction can be drawn with respect to provisions taking effect after the wife's death. In other words, I do not see why the wife's estate after her death should remain burdened with provisions which *ex hypothesi* could not affect the wife during her life.

"(3) It being thus determined that Mr Harvey takes no liferent of the £3598, 8s. 1d. which formed his wife's contribution to the fund, the next question is, what becomes of the income of that fund which is set free by her death and his forfeiture? I have not heard any argument on that question, nor do any of the claims of parties specially deal with it. But I think it is sufficiently clear that the income in question must be held to be undisposed of, and falls back into Mrs Harvey's estate. It cannot be claimed by the children of the marriage, because their right is expressly limited to the principal sums put in settlement; and that being so, I rather assume that the only question is, whether the income goes to Mr Jopp as Mrs Jopp's executor, or to the claimants, her children, who claim under her deed of apportionment? As to that matter I am not at all sure that there is any real conflict of interest, and I am now relieved from considering it by the minute.

"(4) The next question is as to the disposal of the fee or capital of the marriage-contract funds. There are two claims which I have here to deal with. On the one hand, Mr Harvey asks to have it now determined that in the event of his surviving his daughter Mrs Spittal he will have right to the capital of his own £4000. On the other hand, the marriage trustees of Mrs Spittal and her *curator bonis* maintain that the capital of the whole marriage-contract funds has now vested in Mrs Spittal, and that she or her trustees are entitled to a judgment to that effect. It does not appear to me that I can do more at present than decide the question whether there has been already vesting in Mrs Spittal. If upon the just construction of the marriage-contract vesting is postponed until the death of the survivor of the spouses, I

cannot, I think, now, and under this record, decide the questions which may then arise. Of course if Mrs Spittal survives her father, there will be no difficulty. In that case there will be nothing to decide. But if she predecease her father there will arise what may be a very difficult question, viz., whether her interest passes to her children (either as issue of the marriage in the sense of the contract, or under the *conditio si sine liberis*); or whether, on the other hand, it lapses altogether, leaving the funds contributed by each spouse to revert to himself or herself, or to his or her assignees? I need hardly say that I cannot decide that question here. It is a quite hypothetical question to begin with; but apart from that I have not the parties here to try it. The marriage-contract trustees do not represent the children of Mrs Spittal. They certainly do not represent the descendants whom she may leave at the term of her death. Moreover, the executor of Mrs Jopp would of course require to make a new and different claim; as would also probably the children who claim under her deed of apportionment. Just now, therefore, I can only, as I have said, decide the one question, whether the fee or capital of the whole or part of the marriage-contract funds has already vested in Mrs Spittal? And on that question I am of opinion in the negative. As I read the marriage-contract, the children of the marriage take no right under it except in the event of their surviving both spouses. It is expressly provided that if they fail so to survive, the funds put in the trust revert to the spouses respectively, or to their heirs or assignees. And that is—as it seems to me—conclusive against vesting either at birth or at the dissolution of the marriage. No doubt it was argued that the destination-over to which I have just referred is to be found only in article fifth, and that that article applies only to the event of the marriage being dissolved by death, whereas here the marriage was dissolved not by death but by divorce. I cannot, however, accept that argument. For one thing, it goes too far. It may be that article fifth proceeds on the hypothesis that the dissolution of the marriage shall be by death. But the whole contract proceeds on the same hypothesis, and particularly article fourth does so, on which the whole rights of the children of the marriage depend. Moreover, apart from all that, the true meaning of the contract appears to me to be plain enough. When the contract speaks of the dissolution of the marriage by death, the event really in view is, and must be, the event of death. Divorce is of course not contemplated. The dissolution is mentioned only as the assumed consequence of death. Construing, therefore, the contract on the ordinary principles, I cannot say that I have any doubt that what was intended was that the interest of the children in the settled funds should be postponed until the natural death of the survivor of the spouses.

"(5) The only other point on which I need say anything is as to the claim of the appointees of Mrs Jopp to receive out of the marriage trust funds, the sums which she has attempted to appoint to them. On that matter I have given full consideration to the argument which I heard on their behalf. But I am unable to adopt either of the views which were urged in support of the deed of appointment. I cannot read the conveyance in the marriage-contract as confined to what the wife might succeed to during the subsistence of the marriage. It is true that a general conveyance of *acquirenda* is presumed to apply only to *acquirenda* during the marriage—*Wardlaw*, 7 R. 1017, and cases there cited. But this rule of construction only applies where the conveyance is a conveyance of a *universitas*, and not where, as here, a specific fund or succession is conveyed to the marriage-contract trustees. Neither am I able to hold that the present case falls within the principle that marriage-contract provisions are always subject to the debts and onerous deeds of the grantor, including in the latter category proper and reasonable provisions for the children of a second marriage. That principle applies in two cases—(1) where the spouse conveys to trustees the *universitas* of his or her estate, as the same may exist at his or her death; (2) where without any conveyance or other deed divesting the grantor, the estate is settled on the heirs of the marriage by way of protected succession. In the present case there is, on the one hand, no conveyance of an *universitas*, and on the other, there is certainly conveyance divesting the grantor. I must therefore repel the claim of the children of the second marriage so far as adverse to the marriage-contract. Whether ultimately, and in the event of failure of the immediate children of the marriage, the deed of apportionment shall receive effect, as a testamentary disposition by Mrs Jopp, is a question which I cannot determine at present. It is a question which, when the proper time comes, must be determined as between the present claimants as assignees of Mrs Jopp, and the descendants, if any, of Mrs Spittal, claiming under the *conditio si sine liberis decesserit*."

The claimant Sommerville Greig, curator *ad litem* to Mrs Spittal, reclaimed, and argued—Mrs Spittal's right to the capital of the trust funds in terms of Mr and Mrs Harvey's marriage-contract emerged on Mrs Harvey or Jopp's death on 1st March 1892. As far as the marriage-contract funds were concerned, Mr Harvey must be held to have died when decree of divorce was pronounced against him. When a widow renounced her provisions, that had been held to be equivalent to her death—*Alexander's Trustees* v. *Waters*, January 15, 1870, 8 Macph. 414. Divorce should operate in the same way.

Argued for the claimant William Harvey—The Lord Ordinary's judgment, in so far as it gave to the claimant the liferent of his own contribution to the marriage trust funds, was right—*Macalister* v. *Macalister*, July 18, 1854, 26 S.J. 597; *Harvey* v. *Ligertwood*, February 22, 1872, 10 Macph. (H.L.)

33. But the claimant was also entitled to the liferent of the funds contributed to the marriage trust by his former wife. The husband's rights revived as soon as the wife had exhausted all the interests secured to her under the contract—Lord Chancellor Hatherley's opinion in *Harvey* v. *Ligertwood supra*, 10 Macph. (H. of L.) 36; and in *Ferguson* v. *Thomson*, January 30, 1877, 14 S.L.R. 277, a divorced husband was held to be entitled to sue for what *stante matrimonio* was his.

Argued for the claimants the children of Mr and Mrs Jopp—After the death of Mrs Harvey or Jopp the liferent of her contribution to the marriage-contract funds fell to be paid to the claimants as her assignees under the deed of apportionment. What had happened was a *casus improvisus* not contemplated in the marriage-contract. Nothing vested in Mrs Spittal till the death of her father William Harvey.

At advising—

LORD YOUNG—Conveyancers in drawing marriage-contracts seem to think that it would be of evil omen to contemplate the possibility of marriage being dissolved by divorce, and so make express provision for such an untoward event. Accordingly, in the contract before us no express provision is made for the event which has unfortunately occurred. Provision is expressly and in terms made for dissolution by death, but not otherwise, and dissolution having occurred otherwise, leaving both spouses alive and with an indefinite prospect of life before them, but so that the death of either or both could not operate dissolution of the marriage, the result is that the occurrence of the unprovided for event of divorce extinguished the possibility of dissolution by death, the only dissolution contemplated or provided for. This strictly logical view would void the contract from the date of the divorce, for its provisions applicable to the subsistence of the marriage would then cease, and also its provisions applicable to the dissolution thereof by death, and it contains no other provisions.

It is agreed that this result is, to a certain extent at least, avoided by a rule of law to the effect that divorce dissolves the marriage as if by the death of the guilty party—that is, of the spouse whose misconduct led to it. But there is a question as to the extent of this rule. If absolute, all difficulty is removed, and on the dissolution of the marriage by divorce the contract will have effect according to its provisions applicable to the dissolution of the marriage by the death of the guilty spouse. It is, however, said not to be absolute, but to be so limited in its operation as to lead only to this, that the innocent spouse shall have his or her legal rights whether by contract or at the common law on the footing of the death of the guilty spouse at the date of the divorce. I think it is so limited, subject only to this qualification, that the rule extends (as I think) to the estate of the innocent spouse and the contracts respecting it in contemplation of the guilty spouse's death. That a divorced husband so long as he survives retains all his rights and is subject to all his obligations and duties, domestic and social, except only that he is no longer a husband, and that his once wife, from whom he is free, is free from him, and is dealt with in all respects as if he were dead, is almost too clear to require expression. But this only leads up to the question—or to the only question of difficulty—in this case, viz., what is the operation of the rule, or has it any operation, with respect to estate of the wife as to the disposal of which she had onerously contracted with him, and with her children by him (for they are parties to the contract) in the event of the dissolution of the marriage by his death or by her own should she survive him. If it has no operation in such case, then her contract in favour of her children with respect to her own estate is annulled by the divorce, for her contract in their favour is limited and confined to the event of the marriage being dissolved by his death or hers, an event which has not occurred—and never can—the possibility being excluded by the divorce. If, on the other hand, it has operation, it can have no other than this, that the divorced husband is, with respect to this contract (as to the wife's estate), to be regarded as dead, so that any term thereof conditional on his death shall be satisfied as to such condition by his divorce. He, the divorced husband, is in no way interested in such contract, for he can neither benefit nor suffer by it. But the children are, and the question is, whether their right under it is annulled by the divorce whereby fulfilment of the condition on which it is given is rendered impossible. Her contract with respect to this estate (her own) is twofold—First, that if her husband dies before her, and the marriage is thus dissolved by his death, she shall have the liferent; and second, that on her subsequent death her children shall have the fee. Of that contract she could not free herself to the detriment of her children, but in the view that the rule of the assumed death of the sinning husband is confined to her liferent the children can take nothing, for the divorced husband did not predecease her, and the marriage was not dissolved by his predecease.

The Lord Ordinary distinguishes soundly, in my opinion, between the husband's own money in the hands of the marriage trustees and that of the wife. With respect to the former he has held that after the wife's interest in it (as on the husband's death) has been satisfied, the contract provision regarding it in his favour shall have effect, and has accordingly directed the income to be paid to him while he survives. With respect to the latter he has held that his right and interest was absolutely annulled by the divorce as by his death, and has accordingly disallowed his claim to the income thereof during his survivance. This, which I think right, proceeds on the view that with respect to this money, and the contract provision regarding it, he is to be regarded as dead—not merely to the

effect of giving the wife the income of it as if he were, but to all effects. But then his Lordship, in the view that the right to the capital given to the children of the marriage is contingent on their surviving him, has directed the trustees to hold the capital till it is seen whether the contingency shall be satisfied, and meanwhile to deal with the income as estate outwith the contract and passing according to the wife's will, rendered so by the assumed decease of the husband, for there is, so far as I see, no other reason for so dealing with it. Now, this necessarily means that by the divorce the husband is so dead that this money of hers will, as by his death, pass to her legatees, but not so dead that it will go to her children under the contract.

I am unable to adopt this view. I differ from the Lord Ordinary in thinking that with respect to the wife's money the right of the children is contingent on their surviving both parents. The fourth purpose of the contract, on which, as the Lord Ordinary observes, "the whole rights of the children of the marriage depend," is in these terms—"On the dissolution of said marriage by the death of either of said contracting parties, in the event of there being children of said marriage alive at that time, the said trustees shall pay the interest or annual proceeds of the whole trust funds to the survivor of the said William Harvey and Rachel Hunter during all the days of his or her life, and after the death of such survivor they shall pay the principal sums to the children of the marriage equally among them, share and share alike, as they attain the age of majority."

This is a simple example of a direction to trustees, in whose hands money has been placed, to pay the interest or annual proceeds to a certain person (here the survivor of two spouses), and on his or her death to pay the principal to another or others, which certainly involves no contingency to suspend vesting. Lay out of view the divorce, and suppose that the husband predeceased, survived by the wife and a child or children of the marriage, it is, I think, clear that the children would take a vested right to the principal, subject to no contingency, although they had not survived both parents.

The Lord Ordinary refers to the fifth purpose as containing what he regards as a "destination-over." But the fifth purpose, so far as regards the wife's money in the hands of the trustees, applies only to an event which did not happen, and after the divorce never could, viz., "the dissolution of the marriage by the decease of the said Rachel Hunter." Whatever the effect of the divorce, or had there never been a divorce, the marriage was not dissolved by the decease of Rachel Hunter. The Lord Ordinary thinks that the event truly provided for by this fifth purpose is simply the death of Rachel Hunter, the dissolution of the marriage thereby being merely an assumed consequence. But besides the obvious fact that this was not a necessary consequence of her death, I think it clear that the contract distinguishes between the case where her death causes dissolution of the marriage and that where it does not, and makes provision accordingly. The reason is manifest, for in the one event (her death causing dissolution) there is a liferent of her money to her widowed husband, and in the other not, there being no widowed husband to take it. If her death caused the dissolution of the marriage she must of necessity be survived for a longer or shorter time by a widowed husband to take the liferent. If it did not, then there was of necessity a prior dissolution which rendered the survivance of a widowed husband to take the liferent impossible, and whether such prior dissolution was caused by the death or by the divorce of the husband is, I think, immaterial, the consequences being the same in either case. Rachel Hunter's death did not cause the dissolution of the marriage; her husband by that marriage was for many years prior to her death legally dead, and incapable of taking a right of liferent or otherwise in her property. The Lord Ordinary has on these grounds, and rightly in my opinion, rejected the claim of the divorced husband to the income or liferent of the money in question. There are no other grounds for the rejection. But the same grounds and their consequence so far allowed by the Lord Ordinary lead in my opinion to this, that from the date of the divorce, which is their sole foundation, the marriage trustees held the money for behoof of the wife in liferent and the children of the marriage in fee, and for no other interest whatever, the only other interest which ever existed, viz., that of the husband, being legally extinguished and incapable of revival.

I am therefore of opinion that the children of the marriage who survived their mother were then entitled to the immediate fee of the money in question, and that although their enjoyment would by the contract have been postponed for their father's behoof that he might have the income during his life, there is no legal or reasonable ground for postponing it for behoof of legatees under their mother's will.

With respect to the husband's money the law is otherwise, for as to it his divorce is not equivalent to his death except during his wife's lifetime, and to the effect of giving her the immediate liferent thereof which he would otherwise have retained while the marriage subsisted. On her death the liferent is restored to him although a divorced husband, as being the liferent of his own money. The Lord Ordinary has so held, thus distinguishing between his money and hers, the liferent of which is not restored to him on her death. This limitation of the effect of the divorce, so far as his own money is concerned, rests on obvious enough considerations of justice and expediency, and I am indisposed to criticise it on logical grounds—as, for example, that he thus gets the liferent of one part of the trust property and not of another under a contract which, as regards the liferent, makes no distinction between them, but gives him the liferent of the

whole not only during the subsistence of the marriage, but also after its dissolution if he shall be the surviving spouse.

With respect to the capital of the husband's money, I gladly postpone consideration of it as the Lord Ordinary has done *in hoc statu.* He claims it only in the event of his surviving all the children of the marriage, which he may not do. If the right to the capital of this money depended on the fourth purpose of the contract, as the right to the capital of the wife's money does, I should of course hold the same opinion as to both. But it may depend on the latter half of the fifth purpose, which it will be observed is applicable to the event of the marriage being dissolved by the predecease of the husband, just as the first half is applicable to its being dissolved by the decease of the wife. Now, it may be argued that the marriage having been dissolved by his divorce, as being to that end in legal estimation equivalent to his decease with living issue who survived their mother, the capital vested in such issue on the death of their mother, subject to the liferent of their father, given to him on the considerations to which I have referred as qualifying and limiting the rule implying his death.

LORD RUTHERFURD CLARK—I am satisfied with the judgment of the Lord Ordinary when he holds that the claimant Mr Harvey is entitled to the interest of the moneys brought by him into the marriage-contract, and that he is not entitled to the interest of the moneys settled by his wife.

The important question is, to whom does the income derived from the last-mentioned moneys belong during the lifetime of Mr Harvey? It is claimed (1) by the *curator bonis* of the only child of the marriage; and (2) by the executor of the wife.

The marriage was dissolved for the adultery of the husband. He therefore lost all interest in the funds settled by his wife, and the *curator bonis* contends that these funds are now held for the sole benefit of his ward. If he is right, it would follow that he would be entitled to the capital and not to the income only.

On the other hand, the executor maintains that the children of the marriage take no benefit under the marriage-contract until the death of Mr Harvey, that the interest arising prior to that date is not disposed of by the contract, and that in consequence it belongs to him.

Of course the marriage-contract makes no provision for the dissolution of the marriage by divorce, and as a necessary consequence the children cannot under its provisions take any benefit by the occurrence of that event. It contemplates the dissolution of the marriage by death only, and the rights of the children are determined by reference to the death of the spouses. On the dissolution of the marriage by death, or to express it otherwise, on the death of the first deceaser of the spouses, it is provided that the survivor takes a liferent interest in the entire fund, and "after the death of the survivor" the trustees are directed to pay it to the children as they attain majority. The two forms of the expression of the event are necessarily equivalent. The second one omits to state the effect of death on the marriage. It is true that in the case which has occurred death will not dissolve the marriage. But it is, to my mind, not the less true that the deaths of the spouses are the only periods which the deed contemplates.

The fifth clause is very important. It provides that on the dissolution of the marriage by the death of the wife "without issue thereof or leaving issue thereof who shall predecease" the husband, the trustees shall at once repay to the husband the money settled by him, and the moneys settled by the wife to her heirs and assignees. It seems to be clear therefore that on the event which has occurred, and apart from the divorce, no interest could vest in the children until the death of the husband. For nothing is given to them until the occurrence of that event, and if they died before him the money settled by the wife goes to her heirs and assignees, or in other words, it remained at her disposal as not being required for the purposes of the marriage-contract.

Unless the divorce of the husband is to be taken in a question with the children as equivalent to his death, it seems to me that the claim of the curator cannot be maintained. But we have held the very reverse, for we have given to the husband the interest of the money settled by himself. If we were to sustain the claim of the curator, we should, I think, be enlarging the estate settled on the children of the marriage, and accelerating the period at which they take right to it. This, in my opinion, we cannot do. I am therefore of opinion that the judgment of the Lord Ordinary is right.

The LORD JUSTICE-CLERK concurred in the opinion of Lord Rutherfurd Clark.

LORD TRAYNER was absent.

The Court adhered to the judgment of the Lord Ordinary.

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