because in the first place it is proved that contingencies of this kind were frequent—several berths became vacant through ships not having cargo ready at the time, and this was the second vacant berth that was at the disposal of the "Avis." Then it was proved that at the port of Methil arrangements are made to facilitate loading, because the Railway Company will at any time, and without reference to a ship having a berth, send down a quantity which is represented as about one-fifth of the total order and enough to enable the ship to go on for a day, and then the loading will proceed from day to day. In this case two vacancies had occurred out of the regular rotation, and the Lord Ordinary has not held that the charterer was bound to be ready for the first of these, and it is a circumstance in considering what would be reasonable despatch for the charterers, that they have got a warning and ought to have been ready at all events for the second vacancy. In all the circumstances I am unable to accept the view that in this case the time for loading is to be held as commencing on the hypothesis that all vessels which had arrived before the "Avis" would complete their loading in their order. I hold, on the contrary, with the Lord Ordinary, that when the second vacancy occurred the cargo ought to have been ready; and in that way two days' demurrage would have been saved, because the ship would have begun to load on Thursday instead of begining to load on Monday the 4th August—three days, not counting Sunday.

Then another point was that the coal was not there in time, and the defenders say that the delay in sending the coal was consequential on holidays. If that had been the case then the charterers would have been within one of the exceptions mentioned in the charter-party. On this subject it is important to note that when the order for coal was sent to the Coal Company on 18th July the company replied that they could not book any steam coal, because they were already booked up to the full amount by previous orders. The defenders, instead of going to another company which might perhaps have supplied them sooner, replied —"It will be impossible for us to change "Avis" as the boat is definitely fixed. She must just therefore take her turn with the rest and we must kindly ask you to prepare a full cargo for her." Now, as the sellers of the coal had given notice that they could not undertake to have the cargo ready on the date prescribed, I think it must be taken that the cargo was not in fact ready in time. That was not a circumstance due to strikes or holidays or any unexpected cause, but was the result of the charterer not having given his order in time to ensure the arrival of the coal in time for the ship—in short, that he is responsible, and is not within the exceptions.

The result, therefore, in my opinion, is that as the loading ought to have been finished at noon on Saturday 2nd August, and was not actually finished until Tuesday the 5th August at 9 p.m., the demurrage that is due is that on 57 hours, as explained in the Lord Ordinary's note under certain deductions. I therefore propose to your Lordships that the Lord Ordinary's interlocutor should be affirmed.

LORD ADAM—I am of the same opinion. I think the evidence shows that the date of arrival was the 28th, and the lay-days would have commenced on that date if it were not for the exceptions in the contract viz.—"Unless such delay is caused by general or colliery holidays, Sundays, colliery pay days, idle days, strikes of any description," and so on. Now, the 28th was, I think, the last day of the pit holidays, and that day fell within the exceptions, and therefore did not count. The next day, the 29th, was not really a working day at all—the men really went down for the purpose of clearing up the pits and so on, and that clearly was not a working day either. Therefore I think both the 28th and 29th fall within the exceptions. That being so, I think Thursday was the first working day at the pit, and the first day that did not fall within the exception. The Lord Ordinary takes the same view and says that the lay-days commenced to run at noon on Wednesday, 30th, leaving three or four hours for the cargo to reach the ship and I think he is quite right in that; and then, if that is so, the loading should have been finished in three days, that is, on the Saturday, and I agree with him that the demurrage runs from that date.

The LORD PRESIDENT concurred

LORD KINNEAR not having heard the whole of the argument gave no opinion.

The Court adhered.

Counsel for the Pursuers and Respondents —Salvesen, K.C.—Murray. Agents—Beveridge, Sutherland, & Smith, S.S.C..

Counsel for the Defenders and Reclaimers —Clyde, K.C.—Younger. Agents—J. B. Douglas & Mitchell, W.S.

HOUSE OF LORDS.

Monday, July 20.

(Before the Lord Chancellor (Halsbury), Lord Shand, Lord Davey, and Lord Robertson.)

GAVIN'S TRUSTEES *v.* JOHNSTON'S TRUSTEES.

(*Ante*, December 6, 1901, 39 S.L.R. 173, and 4 F. 278.)

Husband and Wife—Marriage-Contract—Provisions to Children—Effect of Divorce—Divorce—Succession—Vesting—Parent and Child—Fee and Liferent.

By an antenuptial contract of marriage the trustees were directed to pay the annual proceeds of the estate conveyed to them by the wife and her father to

her, and after her death, in the event of her being survived by her husband, to him, and on the death of both spouses to pay and deliver over the fee or capital to the child or children of the marriage, declaring that if any child should die before the said provision should have been paid or become payable, leaving issue, said issue should have right to their parent's share.

One daughter was born of the marriage. The marriage was dissolved by decree of divorce in an action by the wife against the husband for desertion. The wife died survived by the divorced husband and the daughter of the marriage.

Held, assuming for the purposes of the case that the fee of the trust estate had vested in the daughter, that in a question as to the daughter's rights under the marriage-contract, the decree of divorce was not equivalent to the death of the husband; that the fee was not payable to the daughter until the death of the husband; and that the proceeds of the funds during the husband's survivance fell into the executry estate of the wife.

Opinion (*per* Lord Davey) that the fee of the trust estate had not vested in the daughter, there being a destination-over to her issue in the event of her not surviving the period of payment.

Opinion upon this question *reserved per* Lord Shand and Lord Robertson.

This case is reported *ante ut supra.*

The second parties (Mr and Mrs Johnston's marriage-contract trustees, with consent of Mr and Mrs Johnston) appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—The question which arises in this case is purely a question of construction, and construction of two written documents, a statute and a marriage-contract.

The marriage-contract was between Mr Gavin and Miss Walker. They were married on the 11th January 1866. The marriage was dissolved on the 14th March 1885, the husband being in the language of the statute "the party offender." There was one child of the marriage, Anna Georgina. Mrs Gavin died in 1899. Mr Gavin is still alive. The marriage-contract, so far as the matter now in dispute is concerned, may be very shortly stated. The wife and her father gave certain property to trustees to pay the annual proceeds to Mrs Gavin for life, and after her death, if Mr Gavin survived her, to her husband for life, and to pay the capital to the child or children of the marriage. Now, the husband, as I have said, is still alive, but it is contended that, inasmuch as a divorce has taken place between the husband and the wife, and inasmuch as the husband was "the party offender," the child of the marriage is now entitled to the property so settled, because the husband has orfeited all right in the funds in question by reason of his being "party offender," and by the operation of the statute in that state of things.

The language of the statute thus relied on is very simple, and merely deals with the rights of the husband himself, but neither by express words nor by reasonable implication does it treat the divorce of the husband as if it were his death. In truth, the contention seeks to introduce into both the marriage-settlement and into the statute words that are not there. It seeks to introduce into the settlement words limiting the property either to the death of both the spouses or to the divorce, and these latter words cannot by any reasonable construction be imported into the settlement. The construction contended for seeks also to introduce into the statute words that are not there, and because the offending spouse is deprived of all his rights under the operation of the statute, it is sought to make that provision operate as though he were in fact dead.

The answer is a very simple one. The statute does not say so, nor anything like it, and unless such words are expressly or impliedly to be found therein it is impossible to contend that a contingency expressly dependent upon the husband's death has arisen because he has been divorced. To put such a construction upon these two written instruments would be to offend against very cardinal rules of construction, and notwithstanding the very learned argument of Lord Young I am wholly unable to acquiesce in so glaring a departure from the true rule for construing written instruments.

I therefore move your Lordships to dismiss the appeal with costs.

LORD SHAND—I am of the same opinion, having come clearly to the conclusion that the judgment of the Court is right and should be affirmed.

The decision depends entirely on the meaning and legal effect of these few words in the Statute of 1573, c. 55, in the case of divorce for desertion—"The partie offender to tyne and lose their tocher and *donationes propter nuptias.*" The argument of the appellants is that these words are to be taken as in effect an enactment that the "partie offender" (that is in this case Mr Gavin) is by the divorce to all effects to be regarded as dead in any question arising on the terms and provisions of his antenuptial contract, whether these affect the rights of his wife or of children or others as ultimate beneficiaries under the testamentary provisions of that deed, I cannot so read the statute, and I agree with the reasons which your Lordship has expressed on that subject.

There is a forfeiture by the statute of all such pecuniary advantages as the offending spouse has gained by the contract, with the result, but with nothing more, that the other spouse acquires such rights as he or she may have under the contract free and disburdened from any such pecuniary advantages. There is no transfer of rights

to any other party, or any enactment that the rights of children or beneficiaries are to be thereby created or enlarged or changed as these have been settled by the marriage-contract provisions. The statute might have contained a provision that in all such questions the offending spouse shall be regarded as dead, but there is no such enactment, and anything to that effect cannot be added or implied.

Applying what I have now said, and even assuming that the provisions in favour of Mrs Johnston had vested in her the right to the liferent in dispute, as to which I reserve my opinion, that right is given only on the death of the spouses, and again "on the death of the survivor of the spouses." The answer to the appellants' claim is that Mr Gavin still survives, and I find nothing in the Statute of 1573 which would warrant the Court in holding that he is to be regarded as dead in a question as to his daughter's provisions, because by the statute the enactment only is that he has forfeited his pecuniary rights under his marriage-contract.

I may add to what I have now said, that having had the advantage of reading and considering the judgment about to be read by my noble and learned friend Lord Robertson, I entirely concur in what his Lordship there says.

LORD DAVEY—In this case funds were placed in the hands of trustees by Mrs Gavin herself and by her father Dr Walker, on the occasion of her marriage, upon trust to pay the annual proceeds to Mrs Gavin during her life, and after her death to Mr Gavin, if he survived her, during his life; and on the death of the said spouses, to pay the capital to the child or children of the marriage, subject to certain powers of appointment which need not be particularly mentioned, and subject also to a declaration that if any child should die before the said provisions should have under these presents and the exercise of the power been paid or become payable leaving issue, the said issue should have the same right to the share of the deceasing child as the parent would have had if in life.

Such are the directions to the trustees as to the disposal of the funds placed in their hands, and there is no ambiguity or difficulty in construing them. By the divorce, which took place at the instance of the wife in 1886, Gavin has lost all his interest in these *donationes propter nuptias*. The wife is dead, leaving Gavin surviving. There was only one child of the marriage, a Mrs Johnston, who is still living, and it is argued that in consequence of the divorce her interest in the trust funds is accelerated, and she became entitled to have them transferred to her on her mother's death, subject only to a question which arises on Mrs Gavin's will.

The effect of the divorce is that the settlement must thenceforth be read as if the trust for payment of the annual proceeds to the husband were struck out of the instrument. It is difficult to see how this could affect the duty imposed upon the trustees or the directions given to them as to the disposal of the capital. I am of opinion that in these circumstances the annual proceeds during the life of Gavin are undisposed of, and there is consequently a resulting trust to the settler or truster. It has been said that this case must be looked at in the same way as if the husband had renounced his life interest. But I take the liberty to question whether the renunciation by the husband of his life interest in trust funds like the present would have had the effect of accelerating the interests of the children, unless it could be inferred from the terms of the renunciation that it was intended to be made in favour of the children, and amount to an assignation to them. As observed by Lord Robertson in the judgment about to be read by him, this is not the case of an estate vested in fiars subject to the burden of a liferent or an annuity. The children only derive their interests from the direction given by the truster to the trustees to pay them the capital on a given event, and in my opinion that event cannot be altered and the payment cannot be accelerated unless it can be shown that in the events which have happened they have also become entitled to the annual proceeds in the meanwhile.

I have hitherto dealt with the case on the assumption that Mrs Johnston has a vested indefeasible interest in the capital of the estate. But I do not think that such an assumption is in accordance with the terms of the settlement. I am of opinion that there is an effectual gift over or substitution in favour of her children in event of her dying in her father's lifetime leaving issue. In that event her children and not her executor would be entitled to payment on her father's death. The Lord Advocate dismissed this point rather summarily by saying that it was decided in the law of Scotland that a substitution of issue in case of death of the institute before the period of distribution did not prevent vesting or the interest of the institute being indefeasible. With respect, I cannot agree. In the case of *Bowman* (1899, A.C. 518) there was a gift of a share to each of four named children "or to their respective heirs." It was agreed that the "heirs" took as conditional institutes. It had been laid down by Lord M'Laren in the Court below that if the substitutes are described as the children or the issue, or the heirs of the institute, there being no ulterior destination, it did not prevent the estate vesting in the institute *a morte testatoris*. I will not quote my own judgment, but Lord Watson emphatically differed from that proposition. He said—"I fail to see why a gift over in favour of the heirs of an instituted child should be otherwise construed or have any different effect than a gift over in favour of another relative or of a stranger nominatim." This House came to the conclusion on the whole provisions of the will then before them (which was of a very special character) that the shares of the legatees vested *a morte testatoris*, though Lord Watson acquiesced in the decision with great hesitation. In the

present case the substitution is expressly made to take effect on death at any time before the period of distribution, and there is no context which should induce your Lordships to give any other than the ordinary construction and legal effect to the words. I hold, therefore, that Mrs Johnson's right to the capital of the trust funds is liable to be defeated by her death in her father's lifetime leaving issue, and the trustees, when the time comes for them to transfer the capital, may have to do so in favour of other persons. I am of opinion that the appellant's case fails on this ground also, and that the appeal should be dismissed with costs.

LORD ROBERTSON—The dispute in this appeal is about money now held by the trustees under the marriage-contract of Mr and Mrs Gavin. The marriage took place in 1866, and was dissolved in 1885 by decree of divorce obtained by the wife against the husband on the ground of desertion. The wife died in 1899; the divorced husband is still alive. There was one child of the marriage, Mrs Johnston, who is alive, and whose marriage-contract trustees are the appellants. The dispute is between those in right of the daughter and those in right of wife.

On the face of the marriage-contract the daughter takes nothing until the death of the survivor of the spouses. Then the trustees are to pay over to her the capital of the money which was settled by the wife, the trustees holding it till that event, and paying the interest to the wife while she lived, and to the husband during his survivance. The claim of the daughter (through the appellants) is, that the marriage having been dissolved by divorce for desertion the provision of the income to the husband lapsed, and the capital became payable to her on the death of her mother.

I shall assume in the meantime that the daughter had a vested interest in the capital, and that only payment was postponed, for otherwise she has no case at all. What is her right to the accruing interest for the period between her mother's death and her father's death (which has not yet happened)? The appellants' answer is that the father is to be held to be dead, and there being no other right to the money she takes as unburdened fiar. This answer seems to me entirely fallacious.

First of all, the forfeiture by the divorced husband is by statute, this being a case of desertion, and the words of the Act 1573, c. 55, are the "partie offender to tyne and lose their tocher and *donationes propter nuptias*." Applying this enactment to the matter in hand, Mr Gavin lost his right to the annual proceeds of this money for the period between his wife's death and his own.

This, and nothing more, is the effect on the marriage-contract of the statute read according to its terms. The result is that the trustees would still hold the capital according to the terms of the marriage-contract till the husband's death, and would then pay it to the daughter. The annual proceeds during the disputed period would be undisposed of by that instrument.

But then the appellants say two things, both of which are in my opinion unsound arguments. First, they say that the effect of the decree of divorce is the same as the death of the husband. Now what is the origin of this saying? and in what sense is it true? The origin is Stair i., 4, 20; and what is there said is "the party injurer loseth all benefit accruing through the marriage [as is expressly provided by the foresaid Act of Parliament 1573, c. 55, concerning non-adherence], but the party injured hath the same benefit as by the other's natural death." It is nowhere said that for all purposes the husband is held to be dead. In Stair and in all the authorities the antithesis is between injurer and injured; and part of the redress to the injured is that she gets back all she had given. Thus Lord Westbury in *Harvey* v. *Farquhar*, 10 Macph. (H.L.) 26, says—"The rule, I think, is this; that the interest provided by a marriage-contract for the benefit of either of the spouses is by the adultery of the delinquent lost for the benefit of the other. But when we use the words 'lost or forfeited' we must remember that the interest ceases only for the benefit of the other spouse and to the extent of the provision as if the delinquent spouse were naturally dead." [Your Lordships know that the rule is the same in desertion as in adultery, and therefore this passage may be cited without reserve.] Well, in the present case the wife gave the husband the annual proceeds of this money which she put in the hands of the trustees. The direct application of Stair's doctrine is that she gets back the right to those proceeds for the period in question, or, in other words, that the trustees hold those proceeds for her. There is, as far as I am aware, no warrant in authority and none in principle for holding that the divorce takes anything from the husband that it does not give to the wife. And the strange result of the appellants' contention is that, invoking a principle conceived in favour of the wife, they use it to give money originally coming from the wife to a third party to whom she never gave it. In truth, the appellants' argument is only another instance such as your Lordships saw lately in the *Rutherglen* poor law case of the danger of overdriving illustrations. Because a writer has said that the injured party has the same benefit as by the other's natural death, it comes to be said that divorce is the same as death, and all manner of deductions are drawn, not from the rule, but from the illustration.

But then the appellants have another argument. This, say they, is a case of fee and liferent, and in Scotch law liferent is a mere burden on the fee, and once the liferent comes to an end the fiar has necessarily the full right of enjoyment. Now it is quite true that if I convey land to A in liferent and to B in fee, and both are infeft, then on A's death B *ipso facto* comes into the full enjoyment and needs no new sasine. The two rights are not held each to be a separate estate in the land. This, as I have said, is

true, but it really has no relation to the present controversy. In the case supposed, B is vested in the estate with nothing but the liferenter's infeftment to keep him out of enjoyment. Here a sum of money is in the hands of trustees to be held until a certain event, the income again is in the hands of the trustees under a lapsed trust, and the question is one of contract. The appellants, claiming under the contract, are asking for what is expressed in the contract to be given to a third party. Nothing in the contract is left to depend on the Scotch conception of fee and liferent; the right of the husband and the right of the daughter being specifically described as rights to certain money at certain times. Now, suppose that by voluntary conveyance the husband had assigned to the wife his marriage contract right to the annual proceeds between her death and his, I cannot conceive how the daughter could have challenged her mother's right on the ground that she (the daughter) was liar of the money. And in my opinion, what the decree of divorce did was simply to give back that right to the wife just as she might have got it by assignation.

On this ground I am strongly of opinion that the appeal fails, and it is sufficient for the disposal of the case. I reserve my opinion as to the question of vesting, which I have for the purposes of the argument assumed in the appellants' favour.

Appeal dismissed with costs.

Counsel for the Appellants—The Lord Advocate (Graham Murray, K.C.)—Hunter. Agents—Alex. Morison & Company, W.S., Edinburgh, and Ingle, Holmes, & Sons, London.

Counsel for the Respondents—The Solicitor-General for Scotland (Dickson, K.C.)—Macfarlane. Agents—Tawse & Bonar, W.S., Edinburgh, and John Kennedy, W.S., Westminster.

PROVISIONAL ORDER COMMITTEES.

Friday, November 7, and Saturday, November 8, 1902.

GLASGOW CORPORATION (WATER).

(Before the Right Hon. W. G. E. M'Cartney, M.P., *Chairman;* Mr George M'Crae, M.P.; Mr Alexander Gordon; and Mr W. J. Mure, C.B.—at Glasgow.)

Provisional Order — Private Legislation Procedure—Water—Substitution of New Works for those Previously Sanctioned by Parliament—Previous Act Allowed to Pass Unopposed under Agreement with Landowner—Compensation to Landowner—Clause.

The Corporation of Glasgow promoted a Provisional Order having for its object, *inter alia*, to authorise the promoters to carry out certain works at Loch Arklet in order to increase and improve the water supply of the city of Glasgow.

The Provisional Order was opposed by the Duke of Montrose, the proprietor of the land on which the proposed works were to be executed. An Act of Parliament passed in 1885, besides giving powers to the Corporation of Glasgow to raise the level of Loch Katrine 5 feet higher than had been sanctioned by the original Act of 1858, and to execute certain other works, gave power to the Corporation to appropriate all the water of Loch Arklet and of the Arklet Water, a stream flowing out of the loch, which lies between Loch Katrine and Loch Lomond, as a supplementary source of supply, and to execute works whereby the level of Loch Arklet was to be raised 25 feet. The land to be acquired for the construction of these works belonged to the Duke of Montrose. The Act embodying these proposals was passed without opposition, an agreement having been entered into between the Corporation of Glasgow and the Duke of Montrose, whereby he consented to the Act being passed, the Corporation undertaking to pay £3000 for the privilege of storing the water of Loch Arklet, as well as compensation for lands, wayleaves, and damage to his estate.

On further investigation it was found that the works at Loch Arklet authorised by the Act of 1885 could not owing to engineering difficulties be carried out except at great expense, and if carried out would not afford an efficient reservoir. The works in question at Loch Arklet were accordingly not executed.

The present Provisional Order was promoted to obtain powers to execute works for the utilisation of the water of Loch Arklet and the Water of Arklet, different in important respects from the works which had been authorised by the Act of 1885, and to take water from Loch Arklet by means of the new works. The main differences between the works proposed under the Provisional Order and the works authorised by the Act of 1885 were as follows:—Under the Provisional Order it was