

LORD MACKENZIE—I am of the same opinion. The Lord Ordinary has given effect in this case to a well-established rule, and we cannot take any other course.

I am unable to draw any distinction between the position of Lord Cottenham in the case of *Dimes v. Proprietors of the Grand Junction Canal and Others*, 1852, 3 Clark (H.L.) 759, and the position of Mr Hogg in the present case.

With regard to the second question, as to whether the pursuer has waived any objection, I think that looking to the stage of the proceedings at which it came to his knowledge that Mr Hogg was a shareholder in the company the argument of the reclaimers cannot be successfully maintained. If it had come to his knowledge before the proceedings were opened, a different conclusion might have been reached.

LORD SKERRINGTON—I agree with your Lordships in thinking that the judgment of the Lord Ordinary was right upon each of the two points which were submitted to us for review.

LORD JOHNSTON was absent.

The Court adhered.

Counsel for the Pursuer (Respondent)—Constable, K.C.—J. S. Mackay. Agents—J. Miller Thomson & Company, W.S.

Counsel for the Defenders (Reclaimers)—Macphail, K.C.—J. H. Millar. Agents—J. K. & W. P. Lindsay, W.S.

HOUSE OF LORDS.

Friday, June 28.

(Before the Lord Chancellor (Finlay), Viscount Haldane, Lord Dunedin, and Lord Shaw.)

MONTGOMERY v. ZARIFI AND OTHERS.

(In the Court of Session, July 6, 1917, 54 S.L.R. 562, and 1917 S.C. 627.)

Husband and Wife—Marriage Contract—Divorce—Invocation by Contract of Law of England.

By a settlement executed prior to the marriage of a domiciled Scotchman to a domiciled Englishwoman it was provided—"It is hereby agreed and declared by all the parties hereto, and particularly by the husband, that these presents shall be construed, and that the rights of all parties claiming hereunder shall be regulated, according to the law of England, in the same manner as if the husband were now domiciled in England and as if the husband and wife were to remain henceforth during their respective lives domiciled in England."

The husband having obtained in the Scotch courts a decree of divorce for adultery against the wife, he sought declarator that a liferent in favour of the wife of certain funds held under the

settlement had been lost by her and should be paid to him on the footing of her death, or alternatively that he was entitled to such an equitable modification of the settlement as would have been made by the English courts if the divorce had been there granted.

Held, sus. decision of the First Division, that the trustees under the settlement fell to be assozied from the earlier conclusions, and that the alternative conclusion fell to be dismissed.

This case is reported *ante ut supra*.

The pursuer Montgomery appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—The appellant in this case is and always has been domiciled in Scotland. On the 31st October 1912 he was married to the respondent Fanny Zarifi, who prior to her marriage was domiciled in England. The other respondents are the trustees of the settlement, dated 31st October 1912, made in contemplation of the marriage, who were then and are now domiciled in England.

On the 12th October 1914 the appellant in an action raised in the Court of Session in Scotland obtained a decree of divorce against the respondent Fanny Zarifi on the ground of her adultery. There are no children of the marriage.

This action was instituted by the appellant on the 15th June 1915 to have it found and declared that since and by virtue of the said decree of divorce the respondent Fanny Zarifi had lost and amitted any provisions and rights provided to her during the lifetime of the appellant in the said settlement of the 31st October 1912 as if she were naturally dead as at the date of the said decree of divorce; and that she is bound to concur in the payment by the trustees of the said settlement to the appellant of the provisions made in her favour during the lifetime of the respondent by the said settlement; and that it should be declared that the life interest of the respondent Fanny Zarifi in the property vested in the trustees of the said settlement ceased and determined as at the date of the said decree of divorce; and that the incomes should be paid to the appellant as if she were dead; and, as an alternative, to have it found and declared that under the said settlement the appellant is entitled to such equitable modification of the provisions of the settlement as he would have obtained according to the law of England if the domicile and the decree of divorce had been in England; and that there should be paid over to the appellant such portion of the income under the said settlement as shall be determined to be in accordance with the practice of the English courts, or as shall be found to be just and equitable in the circumstances of the case.

Lord Dewar, before whom as Lord Ordinary the action was tried, dismissed it on the ground that the Court of Session had no jurisdiction to entertain the action.

His decision was reversed by the First Division of the Inner House, where it was held that the Court of Session had jurisdic-

tion, and no point is now raised as to this in the present appeal. The First Division having held that there was jurisdiction in the Court of Session, and having repelled a plea by the respondent of *forum non conveniens*, proceeded to adjudicate upon the merits of the case, and it is from their decision on these that the present appeal is brought. The Lord President, Lord Mackenzie, and Lord Skerrington concurred in holding that the respondent should be assoilzied from the earlier conclusions of the summons, and that the alternative conclusions should be dismissed. Lord Johnston concurred as regards the earlier conclusions, but as regards the alternative conclusions he was of opinion that a case should be stated for the opinion of an English court.

In accordance with the opinion of the majority of the Judges of the First Division the interlocutor of the 6th July 1917 was pronounced by which the defenders, now respondents, were assoilzied from the first three conclusions of the summons as laid, and the remaining conclusions were dismissed. It is against that interlocutor that the present appeal is brought.

The settlement of the 31st October 1912, which was executed in view of the marriage of the appellant and the respondent Fanny Zarifi, recited a marriage settlement which had been executed on the marriage of her parents and the will of her deceased father, under both of which her mother had a life interest and a power of appointment. The settlement then contained a release by the mother of her life interests under the previous settlement and the will, and an appointment by her of all the property under either of these instruments in favour of the respondent Fanny Zarifi, to be held by the respondents, the trustees, on the trusts of the marriage settlement. Under these trusts the income was to be paid to the wife (the present respondent) during her life for her separate use without power of anticipation, and after her death to the husband and his assigns during his life, and subject to these life interests the property was to be held in trust for the issue of the marriage. If no issue took under the settlement, the property so brought into the settlement by the wife was to go as she should appoint, and in default of appointment was to be held in trust for such persons as would have become entitled to the wife's fortune under the statutes for distribution of personal estate at the death of the wife had she died possessed thereof intestate and without having married.

In the last clause but one of the settlement there are found the following provisions on which the decision of this appeal must turn:—"And it is hereby agreed and declared by all the parties hereto, and particularly by the husband, that these presents shall be construed, and that the rights of all persons claiming hereunder shall be regulated, according to the law of England in the same manner as if the husband were now domiciled in England, and as if the husband and wife were to remain henceforth during their respective lives domiciled in England."

It is not necessary for the present purpose

to refer to any other of the provisions of this settlement.

As the domicile of the spouses was in Scotland the Court of Session had jurisdiction to grant the divorce of the 12th October 1914. The effect of divorce on the interests of the guilty party is thus stated by Lord Stair (Inst., book i, tit. 4, sec. 20)—"Marriage dissolved by divorce either upon wilful non-adherence (or wilful desertion) or adultery, the party injurer loses all benefit accruing through the marriage (as is expressly provided by the aforesaid Act of Parliament 1573, cap. 55, concerning non-adherence), but the party injured has the same benefit as by the other's natural death."

I may refer to the case of *Harvey v. Farquhar*, decided in this House in 1872 by Lord Hatherly, L.C., Lord Chelmsford, and Lord Westbury (10 Macph. (H.L.) 26, 9 S.L.R. 421), as finally establishing the correctness of this statement of the law.

The decision of the First Division against the appellant proceeded as regards the earlier conclusions upon the ground that the terms of the marriage settlement excluded these conclusions. The Lord President says—"The question at issue, and the sole question at issue, is, What is the legal effect on the rights of the parties under the indenture and settlement, dated 31st October 1912, of a decree of divorce between the parties pronounced by the Court of Session? The answer is that the legal effect of this Scottish decree of divorce upon the provisions of the deed must be regulated exclusively by the law of England, exactly as if the parties were now and all along had been domiciled in England. That is the answer which the law of Scotland makes, because the parties have so contracted, and the law of Scotland gives full effect to their contract."

Lord Skerrington says—"I do not think that the parties could have used clearer language in order to express their intention that the meaning and effect of the marriage settlement should be determined according to the domestic rules of the law of England. In my judgment they excluded by anticipation the leading conclusions of the present action, by which it is sought to subject the lady to a penalty peculiar to the law of Scotland and unknown to the law of England. Accordingly the defenders are entitled to absolve from these conclusions. I think it right, however, to note that the pursuer's counsel expressly admitted that the patrimonial forfeitures which the law of Scotland inflicts upon persons guilty of matrimonial misconduct leading to divorce may be effectually averted by antenuptial contract, and that our judgment proceeds on that admission." The same admission was made by the appellant's counsel at the bar of this House, and I think that in making that admission they took a correct view of the law of Scotland upon the point.

The case therefore must turn upon the construction of the marriage settlement, and in particular on the clause occurring near the end, which I have above quoted *in extenso*. Does that clause merely regulate the construction of the settlement, as was contended by the appellant, or does it

amount to a provision excluding the Scots law of forfeiture in case of divorce for adultery?

In my opinion it excludes the operation of the Scots law in this respect. It deals not merely with the construction of the settlement, which is to be according to English law, but goes on to provide that "the rights of all persons claiming hereunder shall be regulated according to the law of England in the same manner as if the husband were now domiciled in England, and as if the husband and wife were to remain henceforth during their respective lives domiciled in England." The wife is a person claiming under the settlement, and if the parties remained domiciled in England for life it is obvious that the Scots law of divorce could not affect the rights of the wife as a person claiming thereunder. This appears to me to amount to an express contract barring the operation of the Scots law in this particular. The courts of Scotland could have no jurisdiction to grant a divorce if the parties were domiciled in England, and by contract the rights of the parties are to be regulated as if they were there domiciled. Whether those who framed this clause had or had not in contemplation the possibility of such events as have occurred, it appears to me that the language they have used excludes by contract the forfeiture which would otherwise have taken place.

This clause appears to me, as it did to the learned Judges of the First Division of the Court of Session, to be fatal to the whole of the appellant's contention with regard to this part of the case.

I may add that I cannot accept the argument that if the Scots law applied it would operate by way of transfer of the wife's interest to the husband while he lived. Such a view appears to me to be inconsistent with principle and with the decision of this House in *Dawson v. Smart*, 1903, 5 F. (H.L.) 24, 40 S.L.R. 879 (*s. n. Gavin's Trustees v. Johnston's Trustees*). In the case supposed the Scots law would operate by working a forfeiture of the wife's life interest so as to bring into play the provision in favour of the husband which otherwise was postponed to her life interest. This brings into relief the fact that the appellant's claim would be to take advantage of the settlement in a manner inconsistent with its express provision that the rights of the parties were to be governed by the law of England. I think that Mr Moncrieff, who so ably argued the case for the appellant, was sensible of this, and that it was for this reason that he strongly urged that the Scots law would operate by way of transfer to the husband of the wife's life interest.

It is neither necessary nor desirable to say anything upon some questions of general importance and of considerable interest which were touched upon during the argument, but do not arise for decision on the view which I take of the construction of the marriage settlement itself.

The alternative conclusions appear to me to be wholly unsustainable. They claim that the effect of the penultimate clause of the marriage settlement is that the Court

of Session is to be bound to give relief as to property according to what would have been done by an English court if the divorce proceedings had been in England. I cannot find anything in the settlement to this effect, and concur with the majority of the Judges of the First Division in thinking that this head of claim must be dismissed.

On the whole, in my opinion this appeal fails, and should be dismissed with costs.

VISCOUNT HALDANE — Under the Scots Statute of 1573, cap. 55, where divorce takes place for desertion, the offending parties are "to tyne and lose their tocher and donations propter nuptias." The same principle seems throughout to have been treated in the law of Scotland as applying to divorce for adultery. The consequence of the principle in such cases is explained by Lord Stair (i. 4, 20) as being that "the party injurer loseth all benefit accruing through the marriage (as is expressly provided by the foresaid Act of Parliament 1573, cap. 55, concerning non-adherence), but the party injured hath the same benefit as by the other's natural death." It is now settled by decision of this House—*Dawson v. Smart*, [1903] A.C. 457, 40 S.L.R. 879—that the principle does not render the guilty party constructively dead as regards rights in property in questions with third persons, but merely confers on the other spouse the right to forfeit for his own benefit all pecuniary advantages which belonged to the guilty consort as part of the provision made for the marriage. It is only to the extent of the interests that thus accrue to the innocent party that anything passes from the guilty one as though dead. The right of the innocent party which may in this fashion emerge on a divorce in Scotland is one as to which it is not in dispute that he may either waive it when it accrues, or may deprive himself of it in advance by a properly framed stipulation.

The law of Scotland standing so, the question which we have to consider on this appeal is how it is to be applied to the divorced wife's interests in certain trust funds settled by a prenuptial marriage settlement contained in the indenture in English form, dated 31st October 1912, which is before us. The appellant, and also his future wife and the trustees appointed, all of whom are respondents to this appeal, and the father of the appellant and the mother of the divorced wife, were the parties who executed the settlement. The property settled on behalf of the wife consisted of investments and was all moveable. These investments were wholly derived from the lady and her parents, but I do not think that this makes any difference if the settlement has not excluded the principle I have referred to from applying. The investments thus brought in on behalf of the wife were grouped as three trust funds derived through different sets of trusts under earlier instruments. These trust funds were, as to two of them, to be held by the trustees for the wife for life for her separate use without power of anticipation and after her death for the husband for life, and after these life

interests, subject to certain powers of appointment, for the children of the marriage who should attain majority or marry. The third trust fund brought in on behalf of the wife was to be held on similar trusts, excepting that the husband was to have no life interest in this fund after his wife's death unless she should so appoint by will. There was also a provision that in default of children the wife's trust funds were to be held if she should survive her husband in trust for her, and if he should survive her, then subject to the preceding trusts as she should by will appoint, and subject to this to the persons entitled at her death under the English statutes of distribution. There were other clauses of a character usual in marriage settlements in the English form, and these were followed by a stipulation by the husband that he accepted the provisions in his favour in full satisfaction of all courtesy, legal share of moveables, and every other claim and provision whatever competent to him by the decease of the wife in case he should survive her. There was also a settlement in the nature of a covenant by the father of the husband first of all to pay an annuity during his own life of £500 for the benefit, first, of the husband, and then of the wife and children, and secondly to pay £15,000 after the cesser of the annuity as a provision for the children. On this part of the deed nothing turns.

A clause in the settlement material for the question before us remains to be noticed. The husband having been described in the deed as domiciled in Scotland, a recital was introduced that it was the intention that the construction of the deed and the rights of all persons claiming under it should be regulated by English law as though he were domiciled in England and he and the wife (who was in fact domiciled there) were to remain during their lives domiciled in England. To give effect to this intention the following words were introduced at the end of the deed—"And it is hereby agreed and declared by all the persons hereto, and particularly by the husband, that these presents shall be construed and that the rights of all parties claiming hereunder shall be regulated according to the law of England, in the same manner as if the husband were now domiciled in England, and as if the husband and wife were to remain henceforth during their respective lives domiciled in England." I think that it is clear that the effect of the principle of the law of Scotland under discussion was neither to extinguish the capacity of the guilty wife to hold property nor to operate a transfer *in invitam* of the entirety of her interest to everyone who would take if she were dead. What a decree might have done would have been simply to make compensation to the husband by giving him the interest which he would have taken as between her and himself in case she had died in all property, under the jurisdiction of the Court for that purpose, which had formed the subject of the provision for the marriage. For the rest she remained capable of retaining property which came to her apart from such provision or on

which the decree could not operate. I doubt whether the decree could operate on immoveable property in a country outside the jurisdiction of the courts of the domicile. And I do not think it could operate on moveable property wherever situated as to which the husband had contracted that the effects of a Scottish divorce should not apply. It was competent to the parties to create a trust from which such consequences of divorce should be excluded. The principle is of a compensatory character and it operates by conferring on the innocent spouse a title to claim a forfeiture for his own benefit. In no sense can the lady in this case be said to have made a transfer by her own act of any interest she possessed. She did not at the end make any such transfer of her own will, and her voluntary misconduct during the marriage could not, by reason of any implication of consequences, operate such a transfer in the face of the restraint on anticipation contained in the settlement if that binds her. It is only if the jurisdiction of the Courts in Scotland could control the English trust and get rid of its restrictions that any such title could accrue to the husband by reason of the divorce. Did the parties frame that trust in such a fashion to make it impossible for the Courts in Scotland to interfere with it? I am of opinion that they did.

The common law of England denied to married women the capacity to hold property or to contract. Equity, however, by its power of treating even husbands as trustees, got over this difficulty by recognising married women as capable of holding separate property in equity. But in order to make the equitable separate estate of a married woman secure against her husband, it did more than merely permit the creation through the medium of a trust of an equitable separate estate bearing a strict resemblance to the ordinary estate which a single woman, like anyone else of full age, could hold at common law. The general law of England, unlike in this respect to that of Scotland, does not allow an interest of a person who is *sui juris* to be restricted by being made alimentary only. Any attempt to fetter the alienation or anticipation of an interest given to a man or an unmarried woman absolutely is rejected for repugnancy. But as equity only gave the married woman what she got as separate estate by its power to compel trustees to carry out the directions as to the application of trust property the legal title to which was exclusively in themselves, it found no difficulty in assuming authority to create an interest of a kind which the common law could not recognise. If the trustees had been told to pay the income of the property vested in them to the married woman for her separate use without power of anticipation, this was a valid direction. The lady could claim only against the trustees in accordance with directions which equity would enforce against them and her alike. The terms of the trust, therefore, and not any estate or interest cognisable in a court of common law, were the founda-

tion and the sole foundation of the married woman's right. She could not alienate nor yet let her equitable interest be affected by legal process otherwise than as permitted by the terms of the trust. She could assert her title only by asking the court of equity, the only court which had jurisdiction to do so, to enforce the duty prescribed by these terms to the trustees. In the instance before us the wife was entitled in equity to call on the trustees of the English marriage settlement to pay to her the income as it accrued due, but she had no power to call on them in advance to pay her the instalments of future income by way of anticipation. She could do nothing which would permit the trustees to anticipate the claims which she could make only as the income accrued from time to time, either by attempting to assign her future rights expressly, or by submitting to process of law even in a court which, being the court of her domicile, had jurisdiction over her status. For her right did not depend on her legal status, but exclusively on the terms in which the court of equity would compel the trustees to pay to her. She therefore could not during the marriage bring about a constructive assignment in law in the shape of a forfeiture resulting, under the old Scots Act, from her adultery. Nothing but an imperial statute, as distinguished from an Act of the Scots Parliament before the parliamentary Union of Scotland and England, could have availed to alter the duty of the trustees under such an English settlement. No doubt after the divorce she was a *feme sole* freed from the restraint on anticipation and capable of assigning her interest, but she never did so. It is only a decree of the Court of Session, founded on what happened while the marriage still subsisted, that could have been set up as an instrument of assignment, and such a decree, as I have pointed out, could avail the husband nothing even if he possessed it. For the Court of Session, and we who sit here, have to put ourselves in the position of an English court of equity administering the directions of the trust, and to do what such a court would have to do. Its duty is exclusively defined by the words in the clause of the settlement. These are expressed in terms that may be even more than were essential for the purpose. Anyhow, they bind the Court to see what are the rights of the husband and the wife as claiming under the terms of the deed, on the footing that the law of England regulates them in the same manner as if the husband had been domiciled in England at the date of the deed, and he and the wife, who was at that time domiciled there, had remained thenceforth during their respective lives so domiciled. No doubt when the wife by dissolution of the marriage became capable of making an assignment a court of equity would have given effect to it if she had actually made one. But she has made no such assignment, and no Court either in Scotland or in England can vary the terms of the trust in the absence of power to do so conferred by a statute of the Imperial Parliament. The duty of the trustees and

of the Courts who control their action is therefore plain. Here is a lady who had the right under the terms of the trust to claim, and that right has remained unaltered by anything that has happened and must now receive effect.

As to the other point, that by their private bargain the parties have bound themselves to treat the Court of Session as possessing the statutory power to vary settlements conferred by the Divorce Acts in the English Divorce Court as an adjunct to the pronouncement of a decree, I am unable to regard it seriously. It is to the Divorce Court, and to that Court alone, that Parliament has entrusted the discretion to break into the provisions of settlements and alter the bargain which the parties made. No private contract can confer any jurisdiction of such a nature, and I do not think that the deed can be construed as even importing that they intended to attempt anything so futile. I think that the appeal fails.

LORD DUNEDIN—[*Read by Viscount Haldane*—It would be useless to trace at length the origin and development of the Scottish rule of law which regulates the patrimonial rights of the quondam spouses when a decree of divorce has been pronounced at the instance of one against the other upon the ground of adultery. The matter was examined minutely in your Lordships' House in the case of *Harvey v. Farquhar*. It is enough to say that it had its origin in pronouncements of the Ecclesiastical Courts in pre-Reformation times, which, viewing marriage as a sacrament, assumed jurisdiction as to status, and considered as a corollary the settling of patrimonial rights which depended on status. The same consequences as flowed from a decree of separation *a mensa et thoro*, which was the utmost remedy an ecclesiastical court could give for the transgression of adultery, were applied by analogy by the post-Reformation Courts of the Commissaries, whose judgments were appealable to the Lords of Session, to the more complete remedy of divorce *a vinculo*.

As to the rule itself, it may be safely taken from the oft-quoted passages of Lord Stair—"The party injurer loseth all benefit coming through the marriage, . . . but the party injured hath the same benefit as by the other's natural death."

If therefore the marriage contract here had been a Scottish deed, by which funds were vested in trustees subject to Scottish jurisdiction with direction to pay the income of the funds to the wife, and on her death to pay them to the husband if surviving, the decree asked for by the appellant would undoubtedly have been pronounced. But the defence to the case rests in the fact that the contract is an English contract with English trustees, not subject to the jurisdiction of the Scottish courts as individuals, by which contract the wife is given a life interest with restraint on anticipation, and which contains the following special clause:—"And it is hereby agreed and declared by all the parties hereto, and particularly by the husband, that these presents shall be

construed, and that the rights of all persons claiming hereunder shall be regulated according to the law of England in the same manner as if the husband were now domiciled in England and as if the husband and wife were to remain henceforth during their respective lives domiciled in England."

Now it is, I think, clear that if the appellant had chosen in the divorce action to ask the Court to append to the decree of divorce a declaratory finding couched in general terms—an echo in fact of the words of Lord Stair—he would have obtained such finding as a matter of right. The point then would have come to this—whether that finding could have been made practically available against the funds held by the trustees, and that question would have had to be determined by an English court. I point this out, not to criticise the fact that this is an action raised in a Scottish court, but to insist on what I think is the true view of the case, that while it is a question of Scottish law to say what is the extent and quality of the right of the innocent as against the guilty spouse, following upon a decree of divorce in a Scottish court, yet it is not a question of Scottish law as such to determine the effect of that right against funds held by English trustees under an English contract. This gives rise to a subtle distinction which I feel bound to point out, though in the view that the Court below took, and which commends itself to your Lordships, it becomes of no practical moment. The special clause being in ordinary non-technical English, the Scottish judges were quite entitled to do as they have done—to say that, properly construed, and given the admission that the English law does not give on divorce the right to the innocent spouse which the Scottish law gives, the clause in question prevents the applicability of the Scottish declaratory decree to the funds held under the particular contract. That being their conclusion there is no need for the interposition of the English Court. But had there been no special clause, and had the English character of the trust been affirmed by other considerations, *e.g.*, the spouses might have been domiciled English at the time of the contract, the contract in English form, and the trustees English—then there would have arisen a question which the Scottish Court could not have determined on the principles of its own law. The case would have turned upon the effect of the clause restraining anticipation, a question of English law, and I wish to express no opinion as to what the determination would have been.

I turn now to the special clause on which the decree under appeal was rested. The argument of the learned counsel for the appellant was based on one contention, *viz.*, that the appellant did not need to claim under the contract at all. He argued that the effect of the Scottish decree of divorce was to forfeit the interest of the offending spouse in favour of the innocent, to whom it was transferred. To uphold this contention he cited the expression used by Lord Neaves in *Harvey v. Farquhar (cit.)*—"The general law overrides the contract."

He also relied on the decision in the second case of *Harvey*, 20 R. 1016, 31 S.L.R. 13, which affirmed the proposition that on the death of the innocent spouse who had been put in possession of the funds to the exclusion of the guilty, the rights of the guilty spouse if surviving revive.

As regards the expression used by Lord Neaves, it bears no such necessary implication as the appellant would draw from it. The law does override the contract in so far as it suspends the interest of the guilty party and allows a deferred interest to become immediately exigible. But that does not mean that it overrides each and every term of the contract. So also the fact that the guilty spouse surviving the innocent is reinstated in his or her rights is easily explicable. The fiction of the death which allows the ulterior interest to become immediately exigible is a fiction which is introduced in favour of the innocent spouse alone, and so soon as the interest of the innocent spouse is exhausted and disappears—which it does by the death of that spouse—the fiction is gone, and the contract once more speaks according to its natural meaning. That the argument of the appellant on this head is unsound is to my mind clearly shown by the fact that it is only when there is an ulterior right given by the contract to the other spouse that that spouse when innocent takes. If that settlement on the wife (treating this for the moment as a Scottish marriage contract) had been followed by no ulterior liferent in favour of the husband, no one supposes that the husband could have taken the wife's interest. Indeed in this contract there is a separate fund in this position, as to which accordingly the conclusions of the summons are not directed. Further, I consider that this point was actually decided in an old case which did not happen to be cited on this occasion, although it was much canvassed in the case of *Harvey*. I allude to the case of *Justice*, the authority of which was in no way impugned in *Harvey's* case, though the use to which the appellant there wished to put it was not allowed.

The case of *Justice*, M. 334, was finally decided in 1761 and followed the earlier case of *Anderson*, M. 333, decided in 1734. By marriage articles Miss Murray, in consideration of the payment to her intended husband Mr Justice of the sum of £500 of tocher, was provided in a liferent annuity in the case of widowhood of £100. The marriage took place. The £500 was paid in cash and became immixed with the husband's funds. She divorced her husband in 1749 and was put in possession of the liferent annuity. Two years afterwards she raised action for return of the £500, and obtained decree in absence. Justice raised an action of reduction of that decree and succeeded. The whole ground of the decision was that as she could not have got back the £500 upon the event of her husband's death, she could not get it back on account of his divorce. This clearly shows that the right given to the innocent spouse on divorce is only to what he or she would get by the death of

the guilty spouse—under the contract if there is one, legal rights as at death if there is none—and not a right by forfeiture and transfer to whatever the guilty spouse enjoyed.

It follows from all this that the right which the appellant here would assert is and must be a right under the settlement. That brings us straight to the effect of the special clause. That clause provided not only that the contract should be construed according to the law of England, but that the rights of all persons claiming thereunder should be regulated according to the law of England, and then follow the significant words as to domicile, which stipulate not only for the present but for the whole duration of the contract. Once it is settled that the construction of the contract is to be according to the law of England, the reference to domicile would be useless and pleonastic if construction and interpretation were all; for though domicile of the parties to a contract may be a circumstance tending to show that a contract is an English contract it is no help to interpretation as such. It seems to me therefore that the words as to domicile are distinctly referable to the branch of the sentence dealing with regulation of rights. The result is that the spouses have settled by contract that such rights as arise under the contract must be rights which would arise if the domicile of the spouses were English. Now the right which the appellant seeks to enforce is a right springing from the circumstance of divorce when the domicile is Scottish, and would not arise from the same circumstance were the domicile English. I have therefore come to the conclusion that on the main point of the case the view of the learned Judges of the First Division, though not expanded in their opinions, was right and should be affirmed.

As to the alternative claim I agree with what your Lordships who precede me have said and have nothing to add.

LORD SHAW—The antenuptial contract between these married parties was executed in England on 31st October 1912. It takes the shape of an indenture in English form. To this indenture Mrs Zarifi, mother of the bride, and certain trustees, being the marriage-contract trustees of Mr and Mrs Zarifi, were parties. By the indenture in question Mrs Zarifi released and surrendered to her daughter, first, all the life estate and interest in certain property the subject of her own marriage settlement, and second, all the life estate and interest in two-thirds of the residuary personal estate of the late Mr Zarifi, her husband, and she irrevocably appointed that all the property subject to the trusts of the settlement should vest in and be held in trust for Mrs Montgomery, her daughter, absolutely. The appointed property was to be and was paid and transferred to the marriage trustees of Mr and Mrs Montgomery, who are also respondents in this appeal.

Under these trusts the income is payable to the wife "for her separate use without power of anticipation," and after her death

"to the husband if surviving and his assigns during his life." With regard to the capital itself, subject to these life interests it was to be held for the issue of the marriage, and failing issue to go as she should appoint, failing appointment to such persons as would have become entitled to the wife's fortune had she died intestate. The language used with regard to the "wife's fortune" is in these terms—"The trustees are to stand possessed thereof if she should survive her husband, for her so that during the intended coverture such contingent reversionary interest shall be her separate estate, and she shall not have power to dispose of or charge the same by way of anticipation."

The husband was and is a domiciled Scotchman. The wife has been divorced by a decree of the Scottish courts. Under the indenture in question it is, as stated, provided that the income of the trust property should be paid "after her death to the husband if surviving." He brings this action, the object of which is to declare that the effect of the decree of divorce is equivalent to her death, and that accordingly the income of the trust property now falls to be paid to him. It is manifest that this claim is founded upon a fiction. His wife is not dead in fact. In fact he has not survived her.

The claim is grounded upon the words of the Act 1573, cap. 55, namely, "the parties offender to tyne and lose their tocher and donations propter nuptias." To this is added the statement of the Scotch law by Stair (i, 4, 20)—"The party injurer loseth all benefit accruing through the marriage (as is expressly provided by the aforesaid Act of 1573, cap. 55, concerning non-adherence), but the party injured hath the same benefit as by the other's natural death." The question is whether in regard to the income falling to be distributed by these English trustees under the English indenture a claim can now be effectually made that the fiction of the death of Mrs Montgomery binds them so as to compel them to pay away to that lady's husband the income which it was expressly provided should be paid to her during her life. I think this claim of the husband to be unfounded, and I desire to be allowed to say so apart altogether from that portion of the contract which stipulates by what law the parties are to be bound.

For the demand of the husband is and must be founded upon the contract. With regard to the trustees they are bound to administer the funds in their hands in all respects according to the terms of that contract. In such a situation the one and simple question appears to me to be, what is the true construction of the indenture? That true construction of the indenture cannot be arrived at except by ascertaining through the medium of the words employed what was the true intention of the parties to it. I do not mean the parties to the marriage, but the parties to the contract. After all the most important party to this contract so far as patrimonial interests were concerned was Mrs Zarifi, who exercised her power of appointment over these large funds in favour of her daughter. Another important party was the trust who accepted

the funds conveyed. I cannot read the contract without being convinced that Mrs Zarifi intended to make a safe provision for her daughter for all the days of her life, and that the trustees accepted the trust upon that and upon no other footing.

Nor do I think it can be imported into the language so used in this English deed that the words during the daughter's "life," or the words after her "death," or the words as to the husband "surviving," were all meant or fall to be construed so that by the fiction alluded to the wife although she was still in life was not to get the income, and so that the husband was to get it although he had not survived her. This would be not only to import an intended meaning into the words, but to convert plain English into its opposite. I do not think that contracts can or ought to be so read by any court of law on either side of the Border. I will venture the further observation, that the possible result might be that Mrs Zarifi, the donor of the funds, might find her daughter under the construction contended for beggared by an evacuation in favour of her daughter's husband of the fund meant for the daughter's support. It does not appear to me that such a fantastic construction, and one so inconsistent with the natural terms employed in the deed, can be adopted.

I have thought it right to insist upon this mode of putting it for this double reason, that wherever a fund is created in such circumstances as the present—existing abroad, and to be held abroad by trustees abroad—it is improper to import into the construction of that deed implications arising from the law of Scotland itself, and secondly that in all cases the true test of the power of the husband to enter into possession of an income by forfeiting that which was expressly provided to his wife during her life is whether, upon a sound construction of the deed under which the fund is held, that result can be implied.

There is the highest authority for what I have now stated. In *Johnstone-Beattie v. Johnstone*, 5 Macph. 340, 3 S.L.R. 203, Lord President Inglis expressed the matter thus—"Here the question is raised in reference to an obligation undertaken by a third party, and that, it is said, makes all the difference. Now it appears to me that the fact that this was an obligation by a third party is not the most important circumstance in reference to such a question, but that the most important consideration is the nature of the transaction and the purposes which it was intended to serve. And seeing that this obligation was undertaken solely with reference to the intended marriage and with a view to the comfortable sustenance of the wife in the event of her being deprived of her husband in her father-in-law's lifetime, it appears to me that it falls within that class of rights which emerge to the wife in the event of the dissolution of the marriage by divorce in the same manner as if the marriage were dissolved by death."

That was a case in which the erring spouse was the husband and in which the wife was put by the result of the law in the same

position as if he was dead, and so a provision for her comfortable sustenance in that event fitted naturally into the doctrine of the Scotch law. But the true principle is where Lord President Inglis put it, namely, that the important consideration is "the nature of the transaction and the purposes which it was intended to serve." In the present case, and in all cases like the present, I think the same principle falls to be applied, and that it is impossible to interpret the intentions of a third party from that consideration. To apply this to the present case it is thus demonstrably clear that the purpose of the deed being to make a life provision by a mother to her daughter it would not be applied but would be frustrated by leaving the daughter without the income so provided and passing that income to her husband. I think that this is not only the correct result, but that the view is completely confirmed by the declaration that the income is to be enjoyed by the wife without power of anticipation.

Your Lordships have referred to the provision in this marriage settlement to the effect "that the rights of all persons claiming hereunder shall be regulated according to the law of England in the same manner as if the husband were now domiciled in England and as if the husband and wife were to remain henceforth during their respective lives domiciled in England." I agree with what your Lordships have said. That may not exclude the Scotch action, which after all may be looked upon as a corollary of the action of divorce itself. But it appears to me undoubtedly to exclude the amplification or modification alleged to arise from the law of a different domicile than that under which by contract the parties had agreed that their rights should be regulated, namely, the law of England.

I agree.

Their Lordships dismissed the appeal, with expenses.

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