the estate after the event which gives rise to the devolution. He is prohibited from doing anything at that time because, when under the entail and the devolution together his right of possession of the estate ceases, his attempt to convey that life interest which other heirs of entail have would be quite ineffectual, for it would then come to be that he would have no more right to convey an interest in the estate during his life than to convey the prospective fee of it. His right of possession was limited by the terminus which was to transfer the estate to the next heir who was entitled to all the estate. A creditor under these circumstances is claiming upon a thing done upon that estate, while his debtor was prohibited from doing it. In general, therefore, while an heir upon an estate is not prohibited from contracting debt upon his life interest in it, he is prohibited from contracting debt when the term of his successor begins; and he is just as much contracting illicit debt when he contracts debt which is to be made the foundation for conveying his life interest after his interest has ceased, as if he carried a prospective conveyance of the estate into the life of his successor after his own death. The way in which these two different things are reconciled seems to me as plain as possible, and therefore I have no difficulty in reconciling the case of Wigtown with the judgment we are about to pronounce. Here is the explanation. The Court in the former case did not express any opinion upon any point now before us. In the case of the Duntiblae estate John Fleeming remained infefted in the estate, and the consequence of that was, as it seems to be now admitted by Lord Benholme, that the estate would have been adjudged after the event of devolution took place, either for his personal debt contracted before that event, or for a sale that he had made previous to its occurrence. I am inclined to think it goes further, and the fiar of that estate being quite free of contract debt because there is no obligation of contract debt upon that entail, and there not being anything that could impair or reduce his infeftment from its original status to a lower right, I think it also laid it open to all those who by diligence might attempt to take it. Upon these grounds, with considerable confidence I concur in the opinion of the majority of your Lordships.

The Court accordingly granted the prayer of the petition, and remitted to the Lord Ordinary to give effect to the judgment.

Agents for Trustee—Scott, Moncrieff, & Dalgety, W.S.

Agent for Defenders—T. Ranken, S.S.C.

Tuesday, Feb. 5.

FIRST DIVISION.

JOHNSTONE-BEATTIE *v.* HOPE-JOHNSTONE.

Husband and Wife—Marriage-Contract Provision—Husband's Adultery—Divorce. A father bound himself in his son's marriage-contract to pay an annuity of £200 to his son, whom failing to the son's wife, whom failing to the children of the marriage. The son was divorced for adultery. Held, (diss. Lord Curriehill) that on divorce taking place the annuity enured to the wife, although the son had previously assigned his right to it to others for onerous causes.

This was an advocation from the Sheriff Court of Dumfries. The pursuer was married to the defender's son in 1860, and the marriage was dissolved by divorce on account of the husband's adultery in 1865. There was an antenuptial contract of marriage to which the defender was a party, and in it he undertook the following obligation:—"Further, the said John James Hope Johnstone binds and obliges himself, during his lifetime, to pay to the said David Baird Hope Johnstone; whom failing, to the said Margaret Elizabeth Grierson; whom failing, to the children of the said intended marriage, a yearly annuity of £200 sterling, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first payment thereof at the term of Whitsunday next to come for the half-year preceding that date, and the next payment thereof at the term of Martinmas following, and so forth half-yearly, termly, and proportionally thereafter during the lifetime of the said John James Hope Johnstone, with a fifth part more of the said annuity due at each term of liquidate penalty, in case of failure in the punctual payment thereof."

In 1863 and 1864, before the divorce, the defender's son had assigned his rights under this obligation to onerous creditors.

After the divorce the pursuer raised an action against the defender for payment of the annuity, and her right to recover it depended on the question whether, by reason of the divorce she was entitled to it under the contract.

The Sheriff-Substitute (Trotter) and Sheriff (Napier) held that she was not, on the ground that the words "whom failing," in the contract, meant failing the husband by predecease during the subsistence of the marriage. On advocation the Lord Ordinary (Kinloch) altered the judgments of the Sheriffs, and found that, on the dissolution of the marriage between the pursuer and David Baird Hope Johnstone, by decree of divorce obtained against the latter on 17th March 1865, in respect of adultery, the defender became bound to pay to the pursuer the annuity of £200 libelled." He thus explained his reasons for so finding:—

"A discussion arose before the Lord Ordinary as to the precise import and latitude of the words 'whom failing' inserted in this contract, as the condition of the husband which created the emergence of the right in favour of the wife. The defender contended that the words, legally construed, implied failure by death exclusively. The Lord Ordinary is disposed in this matter to agree with the defender. He can find no sufficient authority for holding the words 'whom failing' to mean anything else in a Scottish deed than 'whom failing by death.' He reads the deed as if the defender became bound to pay the annuity 'to the said David Baird Hope Johnstone; whom failing by death, to the said Margaret Elizabeth Grierson.' The defender cannot ask a more limited construction of the deed.

"But whilst so reading the deed, the Lord Ordinary holds it to be the settled rule of the law of Scotland that in the case of a divorce in consequence of adultery on the part of the husband, the innocent wife is entitled to all the provisions contained in her antenuptial contract, in exactly the same way as if the husband were naturally dead. The law transfers to the case of the divorce the provisions made in words for the case of death, and enforces the obligation in both cases alike. In the eye of the law, the wife is in such a case made prematurely a widow, and is entitled to her provisions as such, whether legal or conventional. All the parties to the antenuptial contract transact in the knowledge of the law, and on the footing

which the law declares. It appears to the Lord Ordinary that the law in this acts both wisely and tenderly, in the case of a wife so situated.

"The authorities appear to the Lord Ordinary to be express and unequivocal. Lord Stair says (i. 4. 20)—'Marriage dissolved by divorce, either upon wilful non-adherence (or wilful desertion) or adultery, 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.' Lord Bankton says (i. 5. 134)—'Divorce being obtained, the innocent party retains all the benefits that he or she had before the divorce, and enjoys the provisions, conventional and legal, as if the person divorced, or offender, was naturally dead. On the other hand, the offender loses all benefits that otherwise, by law or paction, might accrue through dissolution of the marriage.' Mr Bell, in his Principles (sec. 1622), lays it down as one of the consequences of divorce, 'that the innocent party has the benefit of all legal and conventional provisions, and the guilty is barred from revoking donations.' That the general principle is correctly laid down in such expressions as these was directly recognised by the Court in the case of Thom *v.* Thom, 11th June 1852, 14 D. 861.

"The defender scarcely, if at all, disputed the general principle; but he maintained that it only applied to the case of legal provisions, such as terce, and of such conventional provisions as were made by the spouses for one another, but not to a conventional provision made by a third party, as in this case. The Lord Ordinary can find no room for the distinction. When the father of one of the parties becomes, as here, a contracting party in the antenuptial contract, and comes under obligations to the other of the parties, as the defender did here to his intended daughter-in-law, he is as much under onerous contract as the party more immediately concerned. It not unfrequently happens that what is engaged for by the father of the intended husband is all that the intended wife has to look to in the event of widowhood. It might quite well have happened that this annuity of £200 was all the pursuer had given her in the case of her becoming a widow. The Lord Ordinary cannot find in such a contract a different meaning in the case of the father-in-law from what it bears in the case of the husband. If, in the latter case, provision in the case of death becomes equally provision in the case of widowhood by divorce of the husband, the Lord Ordinary sees no reason why it should not equally be so in the former. There is no hardship in so holding; for, in entering into the contract, the father-in-law knew as much about the provisions of the law, and its identification of death and divorce, as did the husband; and must be held to have bound himself in exactly the same contemplation.

"Accordingly the Lord Ordinary does not find the authorities to have drawn any distinction between conventional provisions by the husband, and those by a third party, such as the husband's father. The reverse is emphatically the case. In the case of Justice *v.* Murray, 13th January 1761, Mor. 334, the decision, as given in the rubric, was this —'A wife obtaining divorce for her husband's adultery has right to her jointure as if he was dead; but she cannot demand back her portion.' The decision on the last point has been thought open to controversy; but the judgment that the innocent wife 'has right to her jointure as if her husband were dead,' seems to have passed without dispute; and the session papers show that what is called the jointure was simply, as here, an annuity of £100 settled on her by the husband's father in the event of the husband's predecease. In the case of Thom *v.* Thom, above alluded to, the divorce was obtained in respect of the adultery of the wife. The wife's father had settled certain lands on the spouses, 'in conjunct fee and liferent, and to the longest liver in liferent, but for the husband his liferent use only.' This was a conventional provision made by a third party. But the Court had no difficulty in holding that, on the divorce of the wife, the husband was entitled to the whole liferent as if she were naturally dead. In the case of Macalister *v.* Macalister, 18th July 1854, *Scottish Jurist*, xxvi. 597, the wife had in like manner been divorced for adultery; and a provision by the wife's mother of a certain sum to the spouses 'in conjunct liferent, and the survivor of them in liferent for their liferent use allenarly, and to the child or children in fee,' was held on the divorce of the wife to give the entire liferent to the husband, so long as he survived. The Lord Ordinary cannot discover any decision to the contrary of this. The case quoted by the defender of the Countess of Argyll *v.* the Earl of Argyll, 19th December 1573, Mor. 327, is no contrary authority; for the right which was there in issue was one proceeding from a third party during the subsistence of the marriage; and the distinction was expressly taken that 'this tack cannot come under this decreet, by reason the samen was set to her umquhile husband, and to her, the longest liver of them two, long after the completing of the marriage by a stranger, and not by her husband for the causes of marriage.' There is no occasion in the present case to consider the effect of divorce on the interests of the parties, in any right proceeding from a third party during the subsistence of the marriage. Such a right, in the general case, cannot come under the head of a marriage provision, legal or conventional. The present question regards a conventional provision made in an antenuptial contract, and expressly made *intuitu matrimonii.* In such a case, it appears to the Lord Ordinary that there is no ground for a distinction, in respect of a conventional provision between the husband and the husband's father.

"It appears to the Lord Ordinary that the judgments against the claim of the pursuer, pronounced successively by the learned Sheriffs, proceed to no small extent on a *petitio principii.* It is said that, by a just interpretation of the words of the contract, the defender must be assumed to have been settling the annuity, not on the spouses, but on his son David Hope Johnstone individually, and intending to benefit him individually, so long as he lived, and only to provide for the pursuer in the event of his actual predecease. In other words, and as the plea was expressed to the Lord Ordinary, what the defender intended was personal aliment to his son, and only a reversion to the pursuer in the event of his son dying before her. But it appears to the Lord Ordinary that this begs the question in issue. Assuredly it omits the consideration, that the obligation is contained in an antenuptial contract, and was expressly contracted in contemplation of the marriage. It seems to the Lord Ordinary hopeless to say that the defender had only in view the separate and individual aliment of his son David Hope Johnstone. It was plainly the aliment of his son as living with his intended wife—in other words, the aliment of the spouses—which the defender had in contempla-

tion. It was joint aliment to the spouses during the life of David Hope Johnstone, and then the separate aliment of the defender as his widow, which the defender had in view. Any other construction is a construction contrary to the plainest reason. The question now is, What is to happen on the dissolution of the marriage, not by David's death, but his crime? Most probably this was a contingency not directly in view of any of the parties. The intending spouses would never dream of it. Very likely it was as far from the contemplation of the grave father-in-law as of the rapturous lovers. But that the intended provision was one not for the individual benefit of David Hope Johnstone, but for the aliment of the spouses, and the maintenance of the pursuer as his widow, the Lord Ordinary cannot doubt. If this be so, then the law (as the defender was bound to know) steps in and says, that the same benefit shall enure to the pursuer, made a widow by her husband's crime, as would have come to her made a widow by her husband's death.

"The practical result of the Sheriff's judgment is somewhat startling. It is, in the first place, that David Hope Johnstone, dissolving the marriage by his own misconduct, is to get, for his exclusive benefit, an annuity which was given him to sustain himself and his wife. This does not exactly tally with Lord Stair's doctrine that 'the party injurer loseth all benefit accruing through the marriage;' for in this view 'the party injurer' not only does not lose anything, but gets double benefit. With regard to the party injured, how stands the matter? She loses even the joint and common benefit which the annuity gave her during the subsistence of the marriage. She is deprived of all support from the annuity, which her husband is to enjoy by himself so long as he lives; and at some indefinite date—it may be forty or fifty years hence—when Mr David Hope Johnstone dies—she steps, as his constructive widow, into a very singularly postponed jointure.

"The Lord Ordinary cannot adopt a conclusion having such a practical result. He thinks the sound view of the case is to hold the provision in the antenuptial contract as made *intuitu matrimonii*, for the joint benefit of the spouses, and the maintenance of the pursuer as David Hope Johnstone's widow, if such she should become by his death. If this be the true meaning of the obligation, the pursuer comes now to have right under it, not indeed by virtue of the express words of the contract, but by virtue of a legal implication as to the identity of death and divorce, which must be held to have been in the knowledge of the contracting parties, and in the knowledge of which all must be held to have contracted."

The defender having reclaimed,

Young and D. B. Hope, for him, argued—The law and authorities quoted by the Lord Ordinary in his note applied only to the forfeiture of rights granted by the spouses *inter se* in contemplation of marriage, and not to rights granted, as in the present case, by a third party. It has never yet been decided that an innocent third party like the defender should suffer in consequence of his son's misconduct. The annuity was an alimentary provision provided by the father for his son, and still payable to him. The father would suffer if he had to pay the annuity to the pursuer now, because his son was unable to support himself, and his father must, in consequence of the natural obligation of law, aliment him. The result would be that the defender would have to pay the annuity twice—that is, £400 a year, instead of £200, as intended by the contract. This would be most unjust. The words "*whom failing*" meant whom failing by death—that is physical, not civil death. The parties never contemplated divorce, and the intention of parties must interpret the contract. The Lord Ordinary had erred in holding that the case of Justice *v.* Murray was an express authority in favour of the pursuer. The question as to the lady's jointure in that case was never directly raised. The lady obtained a decree for her jointure; but, as shown by the Session papers, it was a decree in absence. Years afterwards, she raised an action against her husband for repetition of her tocher; but, after three conflicting judgments, the only point decided was that an innocent wife had no claim for repetition of tocher. This case, therefore, has no bearing on the present. Neither has the case of Thom *v.* Thom, because, in that case, the jointure was constituted by a conjunct heritable right, not a personal obligation to pay a sum of money, as in this case. The same remark applies to the case of Macalister *v.* Macalister. Farther, the Act 1573, c. 55, says that the offending party shall forfeit the tocher and the *donationes propter nuptias*, but the annuity in question was not a donation *propter nuptias* in the true meaning of that phrase.

Fraser and M'Kie, for the advocator, argued—Two questions are here involved. 1. What is the meaning of the words "*whom failing*" in an antenuptial contract of marriage? 2. What are the legal effects of divorce as regards the rights of third parties? "*Whom failing*" in this contract means civil death as well as physical death. The parties when they entered into the contract knew the law, that divorce had the same legal effects as death, and must be presumed to have contracted on that footing. It was an implied part of the contract that divorce should affect the rights of parties in the same way as death. The annuity was given *intuitu matrimonii*, and constituted by an onerous deed. The whole deed must be looked at. The annuity was given for the mutual benefit and support of the spouses. The wife might reasonably expect to share a portion of it during the subsistence of the marriage. It was not given to the husband alone. If alimentary at all it was for the mutual aliment of the spouses. Besides, the wife's father settled an annuity of £100 on his daughter, exclusive of her husband, of which, however, he would share the benefit in so far as it would lessen his domestic expenditure. A sum of £5000 was also settled out of the lady's fortune on the husband or his assignees, and that sum has been assigned away by him, and it has been held that he had a right to assign it. So that it is evident from the other clauses of the contract that the annuity in dispute was part of a transaction—a *quid pro quo* given by the defender, on which the lady relied when entering into marriage. If the pursuer is not held entitled to the annuity now, the defender will derive a benefit from his son's misconduct, because his son, having broken the contract, cannot sue his father for payment of the annuity. The law cannot sanction such a result. Even admitting that the annuity was given in lieu of the father's natural obligation to aliment his son, the law, as decided in the case of Maule, only compels a father to give his son the bare necessaries of life. So, even in this view, the pursuer would still be entitled to claim half of the annuity, as the father would not be bound to pay his son more than £100 a year, if even so much. But the

annuity has been assigned, so that in any view the defender must aliment his son.

Further, the authorities referred to by the Lord Ordinary have already settled the points in dispute in this case. The institutional writers have drawn no distinction between rights constituted by the spouses *inter se* and rights constituted by a third party, in favour of one of the spouses. Divorce applies not only to the spouses, but to the contracting parties. The annuity was a donation *propter nuptias*. When by the former law marriage was dissolved by the death of either of the parties within a year and a day, everything was restored *hinc inde*, though the rights were constituted by third parties—Stair, i. 4. 19. In the present case the annuity is not given by a third party, but by a party to the contract who must be presumed to have known the law that divorce had the same effect as death, and took his risk of that. "Whom failing" does not always mean failure by death. In a deed of entail, which declares that a person shall forfeit his right on, for instance, his succeeding to a peerage, the words "whom failing" would include him if he so succeeded. The following authorities were referred to, besides those mentioned by the Lord Ordinary:—1 Bell's Comm. 634; Dirleton, *voce* Jus Mariti; Ivory's Ersk. 1. 6. 48; Wallace's Inst., p. 230-233; Calder *v.* Ross, 1610, M. 6167; Mackenzie's Roman Law, pp. 110 and 114.

At advising,

The LORD PRESIDENT said—This case appears to me to be not free from difficulty. The question is, whether by reason of the decree of divorce obtained by the pursuer against her husband, the sum of £200 per annum provided by the defender to his son, and failing him to the pursuer, and failing her to the children of the marriage, is now to be paid directly to the pursuer herself. The obligation of the defender is contained in an antenuptial marriage contract, and it is only one of several provisions contained in that deed. By it the intending husband, with consent of his father, disponed to certain trustees various interests which he had under different deeds, and the father of the intending wife, along with her, conveyed certain interests which she had to the same trustees. There was a provision made for a payment to the husband after the death of his father-in-law, and there were also provisions made by the lady and her father for the children. Among the provisions undertaken by the husband's father there is the one which has given rise to this question. It is an obligation in its terms to pay, in the first place, to the intending husband an annuity during his father's lifetime: but divorce having terminated the marriage, the pursuer contends that she has now right to receive the annuity during the defender's life. On the other hand, it is contended by the defender he only undertook to pay the annuity to his son during his life and his own. A question has arisen as to the import of the words "whom failing," and it has been contended that they mean failing by death. It has also been contended that the expression is satisfied by a divorce consequent on the adultery of the husband. I am of opinion that when this contract was framed it is presumable that there was not in the contemplation of any of the parties to it any failure except failure by death; but I do not think that that necessarily solves this question. The question arises whether the object of the provision having been disturbed, what is the right of the party wronged? I think it is material to keep in view that this is not a separate or independent bond of annuity to the son. It was intended to form a provision for the wife in the event of her survivance. It was not a jointure provided by the husband, but it was to be a means of subsistence for the wife, in the event of the husband's death. There can be no doubt of the onerosity of the obligation, but it is said the conditions have not been fulfilled so as to rear up the wife's rights. If she has a right to this annuity it depends not alone on the terms of the deed, but also on the rights which the law gives her. Now, there are some things very clearly operated on by the law of divorce. Rights provided by the husband to the wife generally become due to her by reason of his being divorced for adultery just as by his death. So it is stated by all the institutional authorities, and the general rule of law is not disputed by the defender. Here the question is raised in regard to an obligation undertaken by a third party. I think that is not the most important consideration in this question. I think it is more important to keep in view the nature of the transaction, and the purpose it was intended to fulfil; and looking to the fact that this was an obligation for the comfortable subsistence of the wife in the event of her being deprived of her husband, it appears to me that it now emerges to the wife in the same manner as if the marriage had been terminated by death. The great argument used to us was that this was imposing on the father a double obligation, because he remained under a natural obligation to provide for his son, which obligation he had discharged by providing this annuity. I think that is not a sound answer. There are many cases which might be figured in which a father's natural obligation might revive, although he had discharged it. But I don't think that it is necessary to look farther than this case to see that that misfortune may befal a father in various ways. There is no restraint in the contract on the son disposing of his provisions, and it appears from the record that he has assigned them. If he had done so effectually the question would arise with his assignees, and it would be no answer to them to say that the father had already provided for his son. In the same way the obligation might be attached by the son's creditors. Viewing the matter, then, in all its bearings, I am unable to divest myself of the feeling that this is a right which emerged to the pursuer on the marriage being dissolved through the fault of the husband.

Lord CURRIEHILL—I also have had great difficulty in this case, arising chiefly from the unprecedented character of this obligation. It is an onerous obligation, but it is only a personal one. The creditor in it was, in the first instance, the son. The pursuer was to have no right under it until after his death, for I agree with your Lordship, that the failure which the parties alone contemplated was failure by death. Then this personal obligation and the son's *jus crediti* under it was absolute and unconditional. Accordingly, we find that in the exercise of the right which the son possessed under it, he assigned it to other persons for onerous causes during the subsistence of the marriage. There were two assignations—one in 1863, and another in 1864. By them the son transferred the *jus crediti* to his assignees. Subsequently to the transfer—namely, in 1865, the marriage is dissolved by divorce on account of the husband's adultery; and the question which now arises is, had that the effect of transferring the *jus crediti* from these assignees to the pursuer of the divorce? On that question, I am not aware

of any precedent or authority to guide us, and it must be, therefore, decided according to principle. The statute of 1573 enacts that the party in the wrong tynes the *dos* and all donations *propter nuptias;* and that enactment has been very considerably extended in our law. It has been applied where the divorce is for desertion as well as adultery, and full effect must always be given to the principle. But did Mr Hope Johnstone or his assignees tyne their right in consequence of the adultery? If they did, then it was transferred to the pursuer; if they did not, then I think the pursuer's claim cannot be sustained. It cannot be that the defender became liable in double payment by his son's adultery. The result I have arrived at differs from your Lordship's. I do not see how these assignees' rights can be affected. Certainly the Act of Parliament gives no encouragement to that view. It has been no doubt extended to rights coming from third parties, and from the parent of the offending party; but in all the cases in which that has been done, the right has been already vested in both the spouses during the marriage as a conjunct right either of fee or of liferent, or partly one and partly the other. I know of no case in which it has been applied to a right coming from a third party, unless that party has been denuded, and the subject vested in both spouses. A very nice question would have arisen if the defender, instead of obliging himself to pay an annuity, had bought one from an insurance company in names of the spouses, but on the footing that the lady's right was to commence on the death of her husband; because in that case a right would have vested in the lady from the beginning. That was not the case here. In the cases referred to by the Lord Ordinary the present question did not occur. His Lordship has quite misread the case of Justice *v.* Murray. The question there was whether the *dos* should be repaid by the offending husband, and even that was decided against the wife. In the case of Thom *v.* Thom the question related to certain heritable subjects, but these had been vested in the spouses during the marriage. I think there is no principle for holding that, even in a question between the defender and his son, the latter has tyned the provision; and on this point I agree with the two Sheriffs. But the case is not in that position. The son was absolute owner, and he has assigned his rights. There is again this other view, which causes some difficulty. This is an annuity which is held to be a *quasi feudum.* It is a heritable right, and it may be said that the wife had a right to it for behoof of the children from the date of the marriage. My opinion has vacillated upon this view, but ultimately it is unaffected by it. The right of the wife and children was that of successors. They were heirs of provision, and if the case is to be viewed in that way, the husband was absolute owner during his lifetime, and had power to convey his right onerously, and he has done so. I am therefore of opinion that this interlocutor should be altered.

Lord DEAS—The question for decision is the effect of our law operating on this conventional provision. Besides the spouses, the fathers of both were parties to the contract of marriage, and incurred considerable obligations. One of these is that sued on. Is the expression "whom failing" limited to the natural termination by death, or does it include the case which has occurred? It is not contended that if this had been a direct provision by the husband the wife would not have been entitled to it; but it is said to be in a different position because made by a third party. There are two aspects in which the case may be viewed (1) as in a question with the son and his creditors; and (2) as in a question with the father. Neither the son nor his creditors are here, but the parties have taken the risk of a decision without their being called. All that is said, as in a question with them, is, that the obligation is by a third party. But a father can hardly be called a third party to his son's marriage-contract. The obligation is equally onerous on his part, and why should it make a difference that it was undertaken by the father instead of by his son? He had stipulated for counter obligations by the father of the lady. She and her father, therefore, provided the considerations in respect of which it was granted. Then, are the son's creditors in any different position? That question depends on the effect of the marriage-contract. If he can't, under it, now demand the annuity, how can his creditors? He could only assign to them his own right, subject to the conditions expressed in the contract and implied by the law. Then, as in a question with the father, of course, if he pays the annuity to the wife, he is no longer bound to pay it to his son. All that is said is, that the father may have intended to supersede the necessity of making any provision for his son; but he must be presumed to have had that natural obligation before his eyes, and the result is, as shown by what has happened, that his natural obligation remains as before, because if the lady does not get the annuity, the son's creditors do.

Lord ARDMILLAN—The question involved in this case is certainly one of great importance; but were it not for the fact that Lord Curriehill has expressed a different opinion, I should humbly say that it does not appear to me a case of much difficulty.

The obligation undertaken by Mr Hope Johnstone is in the marriage-contract of his son on the occasion of that son's marriage with the advocator, then Miss Grierson. That marriage-contract was antenuptial, and was followed by marriage on the faith of it. All the stipulations in an antenuptial marriage-contract are conditions of the marriage, and, being followed by marriage, become strictly and in the highest degree onerous. It is important to observe that this onerosity attaches not only to the obligations between the spouses, but to all the counterpart obligations by the parties to the contract, and particularly to those of the respective fathers of the respective spouses. Accordingly, the obligation of Mr Hope Johnstone to pay, during his own lifetime, to his son David B. H. Johnstone, whom failing, to the said Margaret Elizabeth Grierson, whom failing, to the children of the intended marriage, an annuity of £200, was clearly onerous. The words of the obligation have been already referred to. I need not repeat them. I read the words "whom failing" as meaning whom failing by death, or by whatever event the law holds equivalent to death. On the faith of that obligation the lady entered into the contract and solemnised the marriage. This was no private arrangement between Mr Hope Johnstone and his son, it was not merely a gift to his son, nor a mere provision for his son. It was an onerous obligation to supply £200 a year to the intended husband of Miss Grierson, and who might be the father of children of the marriage then contemplated. The provisions in such a marriage-contract must all be read with reference to the relative positions of the parties to the contract, and to the prospects of the parties to the marriage, and I think the meaning of

this provision evidently is, to supply by a provision to the husband the means of supporting the spouses and their children, if they had any, in the home of their married life. This is in short an obligation *propter nuptias.*

Now, this marriage has been dissolved by decree of divorce, in respect of the adultery of the husband. It was admitted in argument that the defender, the father of the divorced husband, cannot resist this claim on any other footing than that he is still bound to pay the annuity to his son, or to those in right of his son as assignees. The question therefore is, whether, after the dissolution of marriage by decree of divorce for adultery, this annuity is to be paid to the innocent wife or to the guilty husband? I am of opinion that the claim of the wife is preferable.

I think it is quite settled in our law, both by institutional authority and by decision, that the effect of the dissolution of marriage by divorce for adultery is, that the guilty party loses all benefit accruing through the marriage, and that the innocent party has the benefit of all onerous marriage-contract provisions, just as if the offender were naturally dead. This is the opinion of Lord Stair (1. 4. 20), of Lord Bankton (1. 5. 34), of Mr Erskine (1. 6. 46), and of Mr Bell (Prin. Sec. 1622), and no contrary institutional authority has been referred to; while, in the case of Thom *v.* Thom, 11th June 1852, the law is so stated in the clearest terms by Lord Rutherfurd as Lord Ordinary, and concurred in by the Lord Justice-Clerk and Lord Medwyn. It must, I think, be conceded that the case of Justice *v.* Murray, 30th January 1761, founded on by the pursuer, is not a decision of the point now raised. But I am of opinion that the argument in that case assumes the point now raised—that the husband, who was acting under the advice of very eminent counsel, did not dispute the claim of the wife to that extent; and that, if the question now before us had been presented to the Judges who decided that case, they would have sustained the claim of the wife. There is, in my view, neither principle nor authority to support a claim by the husband for this provision. I put it to the counsel for Mr Hope Johnstone whether, if the father had been willing to pay to the wife, his son, the divorced husband, could have compelled payment to himself? The answer was that he could. Unless he could, the defender can have no case here. Now, I am humbly of opinion that the son could not have compelled payment. In order to do so, he must have founded on the marriage-contract, and pleaded the marriage relation, which, by his own act, he had violated. No party can be permitted to found on a contract which he has broken; and the legal effect of the decree of divorce was to pass the right in the onerous provisions, not to the offender, but to the innocent party, in the same manner as if the guilty party were naturally dead.

It was argued to us that, as the defender might, in the event of his son's falling into extreme poverty, be compelled to support him, he would be a loser if ordained to pay the annuity to the pursuer, whereas, if assoilzied from this action, he would be protected against such a demand. There are many answers to this somewhat singular argument. One of these is, that, under no circumstances, would the law allow a provision of £200 a year to the son on the footing of his being a pauper. Another is the answer so well explained by your Lordship in the chair, that the defender himself states on record that the annuity has been assigned by his son to creditors, so that the assignees and not the divorced husband would draw the annuity, if it were refused to the wife. But really this argument for the defender is inapplicable. It has not been contended that the defender is released from his obligation. It is certain that he cannot be compelled to pay twice. The assignees can be in no better position, and can plead no higher right, than the divorced husband himself, and both of these assignations were granted posterior to the acts of adultery, on which the decree of divorce proceeded. The whole question—the only question—is to which of the two parties shall this onerous antenuptial provision be paid? Shall it be paid to the divorced husband, in respect of whose judicially ascertained adultery the marriage has been dissolved? Or shall it be paid to the innocent wife, to whom the law has given the redress of divorce, which divorce has, in the words of Lord Rutherfurd, an effect equivalent to the dissolution of the marriage by the offender's death? On this question I have formed a clear opinion in concurrence with your Lordship in the chair, with Lord Deas and with the Lord Ordinary.

Adhere, with expenses.

Agents for Pursuer and Advocator—Jardine, Stodart, & Frasers, W.S.

Agents for Defender and Reclaimer—Hope & Mackay, W.S.

Wednesday, Feb. 6.

SECOND DIVISION.

MORAM *v.* FORD AND OTHERS (*ante*, vol. i. p. 227).

Expenses—Validity of Testamentary Writings—Trust-Estate—Residuary Legatees. Held that claimants on a trust estate who had unsuccessfully maintained the validity of certain alleged testamentary writings, were not entitled to expenses out of the fund, as against the interest of residuary legatees, the fund divisible among whom would thereby be diminished.

On March 20, 1866, the Court found that three out of four writings left in addition to a trust-deed and settlement by the late Miss Jane or Jean Bell, daughter of the late Samuel Bell, architect in Dundee, were not of a testamentary nature, and the cause was remitted to the Lord Ordinary to give effect to this finding, and to proceed further in the cause. The unsuccessful claimants, who maintained the validity of the deeds, asked that expenses should be allowed them out of the fund, in respect the difficulty as to the validity of the writings had been induced by the testatrix herself. The successful claimants, who are also the residuary legatees, on the other hand, contended that those who were unsuccessful should be found liable in expenses.

The Lord Ordinary (Ormidale) took the medium course of neither finding the unsuccessful claimants entitled to expenses out of the fund nor subjecting them in expenses. His Lordship added the following note:—

"In regard to the matter of expenses, the only difficulty that was suggested by the parties related to the claimants who have been wholly unsuccessful—their claims having depended on papers which have been found by the Court not to be testamentary writings at all. It was maintained for these claimants not only that they ought not to be subjected in any expenses, but that they were entitled