his object, and if he was there for that purpose then the accident arose out of and in the course of his employment, because his duty was—and he was employed—to assist Innes in whatever work he might be engaged.

LORD M'LAREN—On the question of competency, I agree entirely with what has fallen from your Lordship, and will only add that every question on the construction of a statute is a question of law, and has been so considered in the other class of special cases with which the Court is familiar. But sometimes it happens that it is very difficult to formulate a question on the construction of a statute except by putting a real or hypothetical case, and inquiring whether the statute governs it. The present case is a good illustration of what I mean. I have myself found it difficult to formulate the question of law upon which our opinion is asked apart from the facts of the case. But then the facts raise a question of the construction of the Act, the decision of which may govern a great number of cases, not identical in their facts, but having an element in common which would make the decision a precedent.

On the merits it appears to me that the Sheriff's decision can only be supported on the ground that as the death of Durham was attributable to his personal negligence, it could not be said to arise "out of and in the course of the employment," but that is virtually to qualify the enactment by introducing the doctrine of contributory negligence, which was plainly intended to be abolished in cases governed by the Act. Instead of contributory negligence we have a different exception to the employees' liability, viz., "serious and wilful misconduct on the part of the workmen." When there is no serious or wilful misconduct, or apart from serious and wilful misconduct, it seems to me that the accident must be taken to arise out of and in the course of the employment, if the accident happens to a workman who is lawfully there for the purpose of carrying on the work for which he is hired, and the man has not left his place of work for his own purposes. Of course, if the workman leaves the part of the works where he is employed, and goes to another part where he has no business, and the accident happens to him there, a very different question would arise.

Now, although it may be that Durham's act in climbing up to the neighbourhood of the revolving shaft was unnecessary, it is not found as a fact that he did so for his own pleasure, or that he was acting otherwise than in the *bona fide* exercise of his vocation as a boilermaker's assistant. I agree accordingly that we should answer the first question in the affirmative.

I agree also that we are unable to answer the second question, because we have no jurisdiction except in appeal, and no decision was given by the Sheriff on this question from which an appeal could be taken.

LORD KINNEAR—I concur. Whether the deceased was bent on his master's business or on a different object of his own is a question of fact, but as I read the case that is not the question put to us. The Sheriff has stated the specific facts on which the answer to that question depends, and I agree with your Lordships that he went wrong, not because of any erroneous inference in fact, but because he misconstrued the statute. It appears to me that he puts a construction on the Act which is a great deal too narrow, and would exclude cases which are clearly intended to fall within it. It is not necessary to recapitulate the points arising in the case, because I agree with all that has been said by your Lordships upon them. There are two points which seem to be raised by the Sheriff's statement which may be considered as points of law, and which I think are reasonably clear. First, that a man does not cease to be in the course of his employment merely because he is not actually engaged in doing what is specially prescribed to him, if in the course of his employment an emergency arises, and without deserting his employment he does what he thinks necessary for the purpose of advancing the work in which he is engaged in the interest of his master. In this case the duty which the Sheriff finds lay on the other boilermaker, and consequently on the deceased, to see what was wrong, makes it manifest that he was not deserting his employment, but was carrying out his duty at the time of the accident. Second, it does not seem to be arguable that a man ceases to be in the course of his employment because he takes a wrong or dangerous method of doing what might be done safely if it was to be done at all. On these grounds I agree that the first question should be answered as your Lordship proposes.

On the second question I also agree that if it arises we cannot answer it, because the Sheriff has not determined it in stating the facts upon which it may be raised.

The Court answered the first question in the affirmative, and remitted to the arbitrator to proceed.

Counsel for Appellant—G. Watt—Trotter. Agent—J. Kinghorn Miles, Solicitor.

Counsel for Respondents—Sol.-Gen. Dickson, Q.C.—J. Wilson. Agents—Morton, Smart, & Macdonald, W.S.

Tuesday, December 6.

SECOND DIVISION.

STIRLING'S TRUSTEES *v.* STIRLING.

Succession—Vesting—Accretion—Power of Appointment—Validity of Exercise of Power—Partial Appointment.

In a marriage-contract it was provided that upon the decease of the husband the trustees should uplift certain life policies conveyed to them and invest the proceeds for behoof of the persons interested in the trust; that they should pay the income to the wife if

she survived the husband (as she did), and upon her second marriage or death should pay one-half of the fee to the children of the husband by a former marriage, and to the survivors or survivor of them, reserving power to the husband and wife jointly, and to the survivor of them, to apportion the fee among the children of the husband's former marriage. The spouses executed a deed of appointment, whereby they apportioned one-half of the estate, less the sum of £10, to the children of the former marriage (excepting one of them, A) equally among them, share and share alike, and to A the sum of £10, the children of any child deceasing before the period of payment taking equally the share which their parent would have taken. All the children of the former marriage, who were living at the date of the deed of appointment, viz., A, B, and C, survived the husband, but one of them, C, predeceased the widow without issue.

Held (1) that the fee of the fund destined to the children of the former marriage vested at the death of the widow; (2) that the power of appointment had been effectually exercised, in so far as it appointed the estate among the objects of the power; and (3) (*diss.* Lord Young) that the share which C would have taken if he had survived the widow did not accresce to B, but fell to be divided equally between A and B.

On 15th August 1853 John Stirling, grocer in Edinburgh, and Euphemia Scougal, afterwards his wife, entered into an antenuptial contract of marriage, whereby the said John Stirling assigned, disponed, and conveyed certain policies of assurance to trustees in trust for behoof of the said Euphemia Scougal in liferent for her liferent use allenarly, exclusive of his *jus mariti* and right of administration, and for the use and behoof of the parties thereinafter named in fee. By the contract it was directed that the trustees, upon the decease of the said John Stirling, should uplift and invest the proceeds of the policies, taking the writs, titles, or transfers to and in favour of themselves and survivors or survivor of them in trust for behoof of the persons interested in the marriage-contract trust according to their respective rights and interests. The marriage-contract then proceeded as follows:—"I [*i.e.*, the said John Stirling] direct said trustees to pay to the said Euphemia Scougal, in case she shall survive me, the free yearly rents, interests, income, and profits to be received by them from the said investments, and that in liferent for her liferent use allenarly during all the days of her lifetime and while she shall remain my widow and unmarried, and upon her second marriage or death, whichever event shall first happen, I direct my trustees to pay or apply the fee of the principal sums so to be invested as follows:—One-half thereof to the children procreated of my former marriage with the deceased Flora M'Intosh or Stirling, and to the survivors or survivor of them, and the other half thereof I direct my said trustees to pay to the children to be procreated of my intended marriage, whom failing to myself, my heirs and assignees, reserving always to myself and the said Euphemia Scougal jointly, and to the survivor of us, to apportion and divide the fee of said provisions amongst the children of my former and present marriage according to the exact proportions hereby settled upon them respectively."

On 4th May 1870 John Stirling and Euphemia Scougal or Stirling, in virtue of the powers contained in the antenuptial contract of marriage, executed a deed of appointment of new trustees and apportionment of provisions.

The deed, after narrating the provisions of the marriage-contract immediately above set forth, proceeded as follows:—"Therefore we do hereby apportion and divide the said sums as follows, viz.:—One-half of the same to the children of the said marriage between us, the said John Stirling and Euphemia Scougal, now Stirling, equally among them, share and share alike, and the other half of the same, except the sum of £10, to the children of the marriage between me the said John Stirling and the said Flora M'Intosh or Stirling (excepting Mrs Isabella Stirling now Donaldson, the eldest daughter of the said marriage) equally among them, share and share alike, and to the said Isabella Stirling now Donaldson the sum of £10, the children of any child deceasing before the period of payment taking equally among them, share and share alike, the share which the parent would have taken had he or she survived; and we direct the above-named trustees, original and hereby assumed under the said contract of marriage, to make payment of the said sums accordingly, and we consent to the registration hereof for preservation: And we reserve power to us jointly, or to the survivor of us solely, to alter, innovate, or revoke these presents in whole or in part, and to appoint new trustees in place of or additional to those above named, as also to apportion and divide the sums above mentioned in such other way and manner as to us jointly, or the survivor of us solely, may seem fit."

The said John Stirling died on the 28th day of July 1873 survived by his widow, the said Euphemia Scougal or Stirling, and by the following children of his first marriage, viz.—Robert Stirling (now deceased), James Stirling, and Mrs Isabella Stirling or Donaldson. He was also survived by three children of his second marriage. On his decease his marriage contract trustees, in terms of the directions in the contract, uplifted the sums falling due on his death under the before-mentioned policies of assurance, invested the same, and paid the income thereof to his widow, the said Euphemia Scougal or Stirling, during her lifetime. The amount of the funds held by the trustees was £942, 3s. 10d.

Mrs Euphemia Scougal or Stirling died on 11th August 1897. At the date of her death the only children surviving of the

first marriage were James Stirling and Mrs Isabella Stirling or Donaldson. Robert Stirling died intestate on 16th May 1877 having survived his father, but having predeceased Mrs Euphemia Scougal or Stirling. He left no children, but was survived by his wife Mrs Isabella Wilson or Stirling or Reid. James Stirling and Mrs Isabella Stirling or Donaldson were his sole next-of-kin. Mrs Isabella Wilson or Stirling or Reid was married to her second husband Andrew Reid on 12th April 1882.

Upon the death of Mrs Euphemia Scougal or Stirling, the period for the division of the funds held by the marriage-contract trustees arrived. No question arose as to the division of the share thereof falling to the children of the second marriage, but certain questions arose as to the division of the share falling to the children of the first marriage, and accordingly the present special case was presented for the opinion and judgment of the Court.

The parties to the special case were—(1) The marriage-contract trustees, (2) James Stirling, (3) Mrs Isabella Stirling or Donaldson, and (4) Mrs Isabella Wilson or Stirling or Reid, formerly widow of Robert Stirling.

The second party maintained (1) that the interest of Robert Stirling in the fund falling to the children of the first marriage lapsed through his predeceasing the period of division, and that the whole of that fund fell to be divided between the second and the third parties, who were the only children of the first marriage surviving at the death of Mrs Euphemia Scougal or Stirling, that being the term of vesting of the children's provisions; and (2) that the effect of the deed of apportionment was to carry to him the whole fund with the exception of £10, which fell to the third party. The third party (1) adopted the contention of the second party as to the term of vesting and the effect of Robert Stirling's predecease, but (2) she maintained that the deed of apportionment was *ab initio* invalid, in respect it did not have regard to the clause of survivorship in the contract of marriage, or otherwise that the validity of the deed of apportionment depended on all the children to whom the apportionment thereby made applied being alive at the term of vesting, and that in consequence of Robert Stirling's predecease the apportionment as a whole became ineffectual, and that in either view the fund fell by virtue of the marriage-contract to be divided equally between her and the second party. Alternatively, she maintained (3) that in any view the share, being half the fund, less £10, appointed to Robert Stirling by the deed of appointment must be treated as unappointed, and fell by virtue of the marriage-contract to be divided equally between her and the second party. The fourth party maintained (1) that under the marriage-contract the provisions in favour of the children of the first marriage vested at the dissolution of the second marriage; (2) that by the deed of apportionment one-half of the fund destined to the children of the first marriage, less £10, was validly apportioned to Robert Stirling, her husband, and that he acquired a vested right thereto, and (3) that the fourth party as his widow was entitled to one-half of his said provision as *jus relictæ*, the other half thereof falling to the second and third parties in equal shares as his next-of-kin.

The second and third parties admitted that the share apportioned to Robert Stirling was divisible in this manner if vesting took place at the dissolution of the second marriage.

The following were the questions of law for the opinion and judgment of the Court:—"(1) Did the provisions conceived by the marriage-contract between the said John Stirling and Mrs Euphemia Scougal or Stirling, his second wife, in favour of the children of his first marriage, vest in said children at the dissolution of his second marriage, or at the death of the said Mrs Euphemia Scougal or Stirling? (2) In the event of it being held that said provisions did not vest until Mrs Stirling's death, is the apportionment of said provisions by the said John Stirling and Mrs Euphemia Scougal or Stirling effectual; or was it invalid *ab initio;* or did it lapse on the death of the appointee Robert Stirling? (3) In the event of said apportionment being held effectual, is the second party entitled to the whole provision except £10, or does the half of the fund (under deduction of £10) apportioned to Robert Stirling, fall to be divided equally between the second and third parties?"

Although it was not stated in the case, it was conceded and assumed that the three children above mentioned were the only children of the first marriage alive at the date of the deed of appointment."

Argued for the second party—(1) Although it might be that the dissolution of the marriage was the natural and presumable period of vesting in the case of provisions under a marriage-contract, yet that presumption must yield to the special terms of the deed. Here there was a clause of survivorship which must be taken to refer to the period of payment. It was impossible to say who were the survivors until the period of payment. The period of vesting, therefore, in this marriage-contract was the death or re-marriage of the second wife—*Blackburn's Trustees* v. *Blackburn*, March 20, 1896, 23 R. 698; *Cuming's Trustee* v. *Cuming*, November 14, 1896, 24 R. 153. [Lord Trayner referred to *Young* v. *Robertson*, February 14, 1862, 4 Macq. 314.] (2) The deed of appointment was valid. It was said to be invalid because the clause as to the children of a deceasing child taking the share which their parent would have taken was inconsistent with the clause of survivorship in the marriage-contract. It might be that this provision was invalid, but as events had happened it was of no effect. It was consequently simply to be held *pro non scripto*, and it did not affect the validity of the rest of the deed, which was the only effective part of it as matters now stood—*Wallace's Trustees* v. *Wallace*, June 12, 1891, 18 R. 921; *Wright's Trustees* v. *Wright*,

February 20, 1894, 21 R. 568. (3) There was nothing in the deed of appointment to show that it only contemplated the case of all the children surviving. There was no reference in the deed to the number of the children. On the other hand, there was a clear indication of intention that in any event the third party was not to get more than £10.

Argued for the fourth party—(1) Counsel for the fourth party adopted the argument for the second party as to the validity of the deed of appointment. (2) The clause of survivorship in the marriage-contract referred to survivorship at the dissolution of the second marriage. Survivorship as at the date of death was a possible, though admittedly not a usual, reading for a claim of survivorship. The half of the fund, less £10, therefore vested in Robert at the date of the dissolution of the marriage, and the fourth party as his widow was entitled to one-half of his share.

Argued for the third party—(1) Counsel for the third party adopted the argument for the second party on the subject of vesting, and in addition pointed out that this was a gift by means of a direction to pay at a postponed period, which involved postponement of vesting till the period of payment—*Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142. (2) The deed of appointment was invalid and ineffectual. The true test was not whether it was valid in so far as it ultimately came to be operative, but whether it was a valid exercise of the power when the deed was originally executed. In that view it could not be maintained that the deed was a valid exercise of the power.—See *Blackburn's Trustees* v. *Blackburn*, *cit.*, and *Cuming's Trustee* v. *Cuming*, *cit.* If the appointment was in part invalid, then the deed of appointment should not receive any effect whatever, because it was impossible to tell what the person entrusted with the power would have done if he had known that what he in fact did was to some extent inept—*Baikie's Trustees* v. *Oxley*, February 14, 1862, 24 D. 589; *Gillon's Trustees* v. *Gillon*, February 8, 1890, 17 R. 435, *per* Lord Rutherfurd Clark at p. 442. (3) Alternatively, the share appointed to Robert lapsed, and fell to be divided equally between the surviving children of the first marriage, in terms of the provision in the marriage-contract. Under the deed of appointment the second party could only take the share appointed to him—that was to say, one-half of the whole fund less £10. He could not take anything by accretion, in respect that there was here a gift to a plurality of persons sufficiently described for identification, viz., the children of the first marriage other than Mrs Donaldson the third party—*Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191; *Wilson's Trustees* v. *Wilson's Trustees*, November 16, 1894, 22 R. 62.

At advising—

Lord Justice-Clerk—Mr John Stirling and his second wife entered into an antenuptial contract of marriage by which certain policies were conveyed to trustees, who were directed on his death to realise them and to pay the liferent to his widow as long as she should remain such, and thereafter to pay or apply the fee, one-half to the children of a former marriage, and to the survivors or survivor, and the other half to the children of the contemplated marriage, whom failing to himself, his heirs and assignees. Power was reserved to the spouses to apportion and divide. Accordingly by deed of apportionment, they, as regards the half provided to the children of the first marriage, directed that it should be divided, except the sum of £10, equally among the children, other than a daughter Isabella, and apportioned the sum of £10 to her. It was appointed that the children of any child deceasing before the term of payment should take the sum apportioned to the parents, share and share alike. This latter event did not happen. There were only two children besides the daughter to whom £10 was apportioned. One of these died childless after his father's death but before the death of the widow.

The question now is, how in these circumstances is the one-half destined to the children of the first marriage to be disposed of. That involves more than one question. First, when did vesting take place. I am of opinion that it took place on the death of the widow. Second, does the apportionment stand to any effect. I am of opinion that it does, and that the daughter under that apportionment takes £10, and the only other child alive at the widow's death takes the one-half apportioned to him. Third, what is to be done with the remaining share in respect of the predecease of the one child. As regards that half, there is no disposal by the deed of apportionment that can take effect. The original bequest by the contract was to known and ascertained children and the survivors, and the children of such of them as should not survive the term of payment. The apportionment did not in dividing the fund declare any right in a survivor to the whole fund less the £10 to the daughter. In these circumstances it seems to me that that part which would have been taken by the deceasing child must be disposed of as directed by the contract, as if there had been no apportionment, and that it falls to be divided among the surviving children in terms of that contract. I do not find any expression of intention in favour of accretion. The result would be that it would be divided between the second and third parties.

Lord Young—The first parties are the trustees under the marriage-contract between Mr Stirling and his second wife made in 1857, and as such the holders of £942, 3s. 10d., being the capital proceeds of certain policies of insurance conveyed to them in the contract. The questions in the case regard only one-half of that sum. The parties before us have no interest in the other. The direction in the contract as to the half in dispute is that the trustees shall, on the death of the second Mrs Stirling, pay or apply it to the children of Mr Stir-

ling's first marriage "and to the survivors or survivor of them," with a reserved power to himself and his second wife jointly, and to the survivor of them, to apportion and divide amongst the children. In 1870 they jointly executed a deed of apportionment which I will notice by and by.

Mr Stirling died in 1873 survived by his second wife and by three children of his first marriage, one of whom (Robert) died in 1877 childless but leaving a widow. The second Mrs Stirling, who liferented the funds in dispute, died in 1897, and clearly and admittedly the time has thereby come for division of the capital, that is to say, of one-half of the sum of £942, 3s. 10d.

The first question on which the competing claimants desire our judgment, and which presents the dispute between the second and third parties on the one hand, and the fourth party on the other, is, when did the provision or bequest by the contract of 1857, to the children of Mr Stirling's first marriage, vest?

On this question the fourth party (the widow of Robert, who died in 1877) contends that the provision vested at the dissolution of the second marriage by the death of Mr Stirling in 1873, and this contention is her only ground of claim.

The second and third parties, while admitting that if this contention be sound the claim of the fourth party is good, concur in maintaining that the period of division, viz., the death of the liferentrix in 1897, is the term of vesting, and that a child dying before that term took nothing.

On this first question my opinion supports the view of the second and third parties. When the counsel for the fourth party had opened her case it was pointed out by one of your Lordships, with the concurrence of all of us, that the words which direct payment at a specified term to the children and to "the survivors or survivor of them" are on the authorities adverse to vesting before that term, and the counsel for the second and third parties were not required to speak to the first question. We must answer the first question accordingly, and such answer is admittedly conclusive against the claim of the fourth party.

The second and third parties, the only other claimants, concur, as is distinctly stated in the case, in this view of the vesting, which indeed, as I have already pointed out, is their answer and only answer to the claim of the fourth party. Their difference *inter se* must, I should think, necessarily and obviously be considered and decided in the same view—that is to say, in the view that under the direction to the trustees in the contract of 1857 there was no vesting in any child of the first marriage who predeceased the second Mrs Stirling. But this view (so far as the contract of 1857 goes) excludes Robert Stirling, who died in 1877. If it does not, the claim of the fourth party is confessedly good. It is thus, in my opinion, not doubtful that under the contract of 1857, taken by itself and irrespective of the subsequent deed of apportionment, the sum in question (one-half of £942, 3s. 10d.) is divisible equally between the second and third parties.

But of course regard must be had to this deed of apportionment, and the contest between the second and third parties depends on these questions — 1st, was the apportionment by this deed invalid *ab initio?* and if not, then, 2nd, did it lapse on the death of Robert Stirling in 1877? These constitute the second question in the case which, as expressed, and I presume as intended, proceeds on the assumption of the answer which I have given to the first, as the assumption on which the dispute between the second and third parties is to be determined.

As to the contention that the appointment was void *ab initio*, I think it unnecessary to say more than that it is so clearly untenable that we did not call for an answer to it. The alternative view that it lapsed on the death of Robert Stirling I individually thought equally untenable, but a possible difference of opinion on this point having been indicated I will state what occurs to me upon it.

The apportionment is by the spouses whose marriage-contract contains the bequest apportioned, which is indeed a contract bequest that the deed of apportionment reserves power to them jointly, or to the survivor solely, "to alter, innovate, or revoke these presents in whole or in part." The apportionment is of the fund (half of £943, 3s. 10d.), "except the sum of £10," to the children of the first marriage, "excepting Mrs Isabella Stirling now Donaldson" (the third party), equally among them, share and share alike, and to Mrs Donaldson "the sum of £10."

The third party, to whom £10 only is thus apportioned, contends that "the validity of the said deed depended on all the children to whom the apportionment thereby made applied being alive at the term of vesting, and that in consequence of the said Robert Stirling's predecease the appointment as a whole became ineffectual." I can see no reason or sense in this contention. Suppose the apportionment to Mrs Donaldson had been, as it lawfully might, of the whole fund "except the sum of £10," and that £10 had been apportioned to the children "excepting Mrs Donaldson," the corresponding contention that the whole apportionment depended on the survivance of all the children would not have been more untenable.

An alternative argument (and the only other) for the third party is stated in the case thus—"Alternatively she maintains that in any view the share, being half the fund less £10, appointed to Robert Stirling by said deed of appointment must be treated as unappointed, and falls by virtue of the marriage-contract to be divided equally between her and the second party." Assuming the meaning of this to be that the apportionment is good in so far as it apportions the sum of £10 to the third party, but bad in so far as it apportions the fund, "except the sum of £10," to the children of the first marriage, excepting Mrs Isabella Stirling, now Donaldson (the third party), I think it is inconsistent with the plain—I should say very plain—import and meaning of the testator's language, because

whether you regard both the spouses as the testators by the contract of 1857, or regard the husband (Mr Stirling) as the sole testator, he was, in conjunction with his wife or alone, at liberty to deal with it as he pleased in 1870 or while he lived—that is to say, to cancel it wholly or partially, or vary it as he saw fit, or as he and his wife together saw fit. Now, just as the contract expresses what both saw fit in 1857, so the deed of 1870, added to and read along with the contract, expresses what they saw fit in 1870. The change which they then saw fit to make is, I think, intelligible and very clearly expressed. It is only reasonable to suppose that in the course of the interval of thirteen years between 1857 and 1870 something occurred which induced them to make the change—probably the fact that Isabella, the "eldest daughter of the said marriage," had in the meantime grown up and got married and been reasonably provided for. And what is the change made? It is so simple as this —that Isabella (the third party), instead of sharing the legacy in question equally with the other children of her father's first marriage, shall have £10 out of it and be excluded from any participation in the division of the remainder. Is it doubtful that she is so excluded, or that it was in the power of the testators so to exclude her? The fund, "except the sum of £10," is to be paid to the children of Mrs Stirling's first marriage, "except Mrs Isabella Stirling, now Donaldson, the eldest daughter of the said marriage, equally among them, share and share alike." We have to deal with a simple legacy of a specific sum of money in amount under £500. If Mr Stirling had in 1870 or subsequently (with or without the concurrence of his second wife) directed his executors or testamentary trustees to pay the whole amount to the children of his first marriage excepting the eldest daughter of said marriage, equally amongst them, share and share alike, or if his surviving wife had done so after his decease, is it not too clear to be disputed that the eldest daughter would have been thereby excluded altogether? It was, I think, suggested that the exclusion might fail, because the plural word "children" used in the clause is not satisfactory, if at the period of vesting there is only one child alive besides the excluded eldest daughter. But the plural includes the singular, and we are familiar with cases in which only one of a numerous class—children, brothers and sisters, or nephews and nieces—takes the whole of a bequest made to them, equally among them, share and share alike. Besides, the deed of apportionment must, I think, clearly be read and taken along with the contract which contains the words "and to the survivors or survivor of them." The repetition of these words would have been superfluous.

I have perhaps failed to comprehend the idea intended to be expressed by the words —"The share, being half the fund less £10, appointed to Robert Stirling by said deed of appointment must be treated as unappointed, and falls by virtue of the marriage-contract to be divided equally between her (the third party) and the second party." The language is, I think, obviously erroneous. If Robert survived the period of vesting, whether by the contract alone, or by it and the deed of apportionment taken together, his share, whatever it is, now belongs one-half to his widow (the fourth party), and the other to the second and third parties as his next-of-kin. But as he clearly (and indeed by the second and third parties admittedly) did not, he had no share to go to anybody any more than if he had predeceased his father as well as his stepmother, or indeed had never been born. No doubt if he never existed, or having existed predeceased the term of vesting, the surviving children will benefit by the diminution of the divisor, but to speak of the division or apportionment of his share is erroneous and misleading language. The result is, that if the third party is not well excluded from the division and participation of the bequeathed fund (*minus* the £10 which she clearly enough takes), she is entitled to share it equally with the second party, and consequently to take out of the bequest £10 more than the second party does.

Lord Trayner — 1. The share of his estate destined by Mr Stirling to the children of his first marriage was to be paid to them, or to "the survivors or survivor of them," on the death or re-marriage of his second wife. The survivors or survivor must be sought for at the period of distribution or payment, according to a well-settled rule, and vesting was postponed until that period arrived. In this case that period was the death (for she did not marry again) of Mrs Euphemia Stirling.

2. The objection stated to the validity of the apportionment, that it contained provisions *ultra vires* of the maker of it, does not seem to be sound. The provisions objected to never became operative, seeing that the persons in whose favour they were conceived never existed, and those provisions never interfered with what was lawfully done within the power. This view is in accordance with what was settled by the cases of *Wright's Trustees* (21 R. 568) and *Macdonald*, 2 R. (H.L.) 125.

3. The third question put to us relates to the effect of the deed of apportionment. By it Mr Stirling apportioned £10 to his daughter Mrs Donaldson, and the remainder of the estate "to the children of the marriage between me the said John Stirling and the said Flora M'Intosh or Stirling . . . equally among them, share and share alike." When that deed was executed Mr Stirling had three children of his first marriage, who survived him, viz., Robert, James, and Mrs Donaldson. The apportionment, therefore, according to its terms which I have quoted, allotted £10 to Mrs Donaldson, and equal shares of the balance to each of the two sons. To each son, however, it only gives a share, it makes no provision for the case which has happened of one of the sons not surviving and taking his share. Mr Stirling could of

course have competently enough declared that if one of the sons failed his share should go to the other—in other words, that if one of the sons failed, then he apportioned the whole estate (less the £10 given to Mrs Donaldson) to the surviving son. This, however, he did not do, and I can see no ground for the contention that the surviving son took by accretion the "equal share" apportioned to the son who failed. I cannot read the provision which gave James only "a share," as in any circumstances having the effect, or expressing the intention, of giving him the whole. In my opinion, the share allotted to Robert never vested in him because he predeceased the period of payment; in consequence thereof the apportionment to him of a share equal to that apportioned to James became inoperative, and not having been otherwise apportioned in the event (which has happened) of Robert's failure, it remained unapportioned. In these circumstances the right to the share so unapportioned is governed by the provision in the marriage-contract which provides for equal division in the event of there being no apportionment. The result, in my opinion, is that Mrs Donaldson takes the £10 allotted to her, and James one-half of the remainder as allotted to him. With regard to the balance, being the share which would have fallen to Robert had he survived, I think it belongs in equal shares to the survivors James and Mrs Donaldson, under the destination in the marriage-contract.

Lord Moncreiff—On the questions put to us I am of opinion, first, that vesting was postponed till the death of Mrs Euphemia Scougal or Stirling, and accordingly that nothing vested in Robert Stirling.

Secondly, the apportionment of the provisions in favour of the children of the first marriage is effectual so far as it goes, that is, Mrs Donaldson is clearly entitled to £10, and James Stirling to one-half of the balance of the fund.

The third question, viz., how is the share destined to Robert Stirling to be disposed of, is more difficult. Does it go by accretion to James, or does it fall to be divided as unappointed between James Stirling and Mrs Donaldson, the survivors of the first family, in terms of the antenuptial marriage-contract?

The law is settled that, where a legacy is given to a plurality of persons named or sufficiently described for identification, "equally among them" or "share and share alike," there is (in the absence of expressions by the testator importing a contrary intention) no room for accretion. Now, here, although James and Robert are not named in the deed of appointment, they are sufficiently described for identification as the children of the first marriage, excepting Mrs Donaldson, as there were only three children of that marriage and could be no more. Therefore it is just as if the provision had run "to my sons Robert and James Stirling equally among them, share and share alike."

The doubt which I have felt is whether the deed does not contain expressions of intention by the testator that there should be accretion. I think it is not improbable that he intended that in any event Mrs Donaldson should not get more than £10. But he has not said so. The gift is not to Robert and James "and the survivor," which would have put the matter beyond doubt; and it is not certain that if he had contemplated the possibility of Robert predeceasing he would not have made a larger provision for Mrs Donaldson.

In this state of matters, although the question is very narrow, I think that Mrs Donaldson is entitled to the benefit of the doubt, and that the usual rule of construction should be applied. Even in that case, James, the second party, will get nearly three-fourths out of the fund—£700 out of £942.

The Court pronounced the following interlocutor:—

> "Find, in answer to the first question therein stated, that the provisions there referred to vested at the death of Mrs Euphemia Stirling: Find, in answer to the second question, that the deed of apportionment was effectual when executed, in so far as it apportioned the estate among the objects of the power, and did not lapse on the death of Robert Stirling: And find, in answer to the third question, that the fund in question which would have been taken under the deed of apportionment by Robert Stirling had he survived falls to be divided equally between the second and third parties: Find and declare accordingly, and decern."

Counsel for the First Parties—Kinloch. Agents—Donaldson & Nisbet, Solicitors.

Counsel for the Second Party—R. S. Horne. Agent—Irvine R. Stirling, S.S.C.

Counsel for the Third Party—Wilton. Agents—Donaldson & Nisbet, Solicitors.

Counsel for the Fourth Party—A. M. Anderson. Agents—Donaldson & Nisbet, Solicitors.

Tuesday, December 13.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

WEIR *v.* GRACE.

Agent and Client—Will in Favour of Law-Agent—Undue Influence.

Circumstances in which *held* that a law-agent had discharged the *onus* resting on him to show that a will made in his favour by his client expressed the true and deliberate intention of the testatrix, and had not been impetrated from her by his undue influence.

Alexander Weir, Melbourne, Australia, and Mrs Ann Weir or Key, St Andrews,