LORD M'LAREN—I have only to say that the essential facts of the case are these—the debtor had allowed herself to get into the position of being liable to the diligence of sequestration, because she allowed decree for the sum claimed to be followed by a charge which expired without payment. Some days then intervened before the Sheriff came to consider whether he should award sequestration, and in the interval the debtor was allowed to be reponed against the decree on which the charge had followed.

The chief condition of sequestration is that the debtor shall be notour bankrupt, and the definition of notour bankruptcy includes insolvency as an ingredient. In the ordinary case, if the other elements of notour bankruptcy exist, such as a decree for the debt followed by poinding or evasion of diligence, the Judge who is asked to award sequestration is entitled to presume insolvency, because no rational and solvent person would allow his credit to be destroyed if he had a good defence to the claim, or was able to pay in terms of the charge. Nothing that we decide is intended to throw doubt on the practice of presuming insolvency in the ordinary case. But I agree that this is not the ordinary case. While the reponing of the debtor in the petitory action left the proceedings in the sequestration unimpaired, it took away the presumption, arising from diligence on a decree, that the debtor was insolvent. It is fair to presume insolvency where a debt is left unpaid in face of an expired charge for payment, but after a debtor is reponed, and is prepared to try the question of his liability, are we still to presume that he is unable to pay his debts? I should think the presumption would be lessened very much if not entirely displaced by reponing, and in the present case I am unable to hold that the debtor is insolvent, and therefore I think that sequestration was properly refused.

LORD KINNEAR—I am of the same opinion. I quite agree that the Sheriff-Substitute's ground of judgment is not maintainable, because he proceeds upon considerations of expediency, while such considerations are expressly shut out by the statute. Under the statute the Sheriff has no alternative but to award sequestration if the statutory requisites are satisfied, but I agree that the statutory requisites were not satisfied in this case, because when the Sheriff came to consider whether sequestration should be awarded there was no evidence before him of notour bankruptcy. The only evidence before him was that a decree in absence had been granted, that a charge had followed upon that decree and had expired without payment, that the decree had been recalled by a final judgment of the Sheriff, and therefore ceased to be of any validity or capable of supporting the diligence of which it was the foundation. All that proves nothing, except that the respondent had been charged upon a warrant that has been invalidated by the Sheriff's judgment. It does not prove that there was a duly executed charge, and it does not prove insolvency, and these are the two elements which must concur in order to constitute notour bankruptcy. It appears to me to follow that there was no evidence before the Sheriff to entitle him to hold that the statutory requisites had been satisfied.

The LORD PRESIDENT was absent.

The Court refused the appeal.

Counsel for the Pursuers and Appellants—Ure, K.C.—Younger. Agents—Cairns, M'Intosh, & Morton, W.S.

Counsel for the Defender and Respondent—M'Lennan—Munro. Agent—J. T. Donaldson, Solicitor.

Friday, December 6.

SECOND DIVISION.

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

Husband and Wife — Dissolution of Marriage — Divorce — Marriage-Contract Funds—Provisions to Children—Effect of Divorce—Parent and Child.

By an antenuptial contract of marriage the trustees were directed to pay the liferent of the means and estate conveyed to them by the wife and her father to her, and after her death, in the event of her being survived by her husband, to him, and on the death of both spouses to pay and deliver over the fee or capital to the child or children of the marriage, subject to a power in favour of the spouses jointly, whom failing the wife, whom failing the husband, of appointment and division among the children and their issue, and of substituting an annuity for the share of any child, but failing children then to the survivor of the husband and wife and his or her heirs, executors, and representatives whomsoever.

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

Held (*diss.* Lord Young) that the daughter's right to payment of the funds contributed by the wife to the marriage-contract trust was contingent on her survivance of her father; that in a question regarding the provisions in her favour the decree of divorce was not equivalent to the predecease of the husband; and that the proceeds of these funds during the divorced husband's survivance fell into the wife's executry estate.

Harvey's Judicial Factor v. *Spittal's Curator ad litem*, July 19, 1893, 20 R. 1016, 31 S.L.R. 13, and *Taylor's Trustees* v. *Barnett*, July 19, 1893, 20 R. 1032, 31 S.L.R. 11, *followed.*

Marriage-Contract — Parent and Child — Provisions to Children—Power to Spouse to Direct Child's Share to be Laid out in Purchase of Annuity.

By an antenuptial contract of marriage the trustees were directed to pay the liferent of the funds contributed by the wife and her father to the marriage-contract trust to her, and after her death, in the event of the husband surviving, to him, and on the death of the spouses to pay the fee to the child or children of the marriage, subject to a power conferred upon the wife (failing a joint appointment by the spouses, as happened), to direct that the share or any portion of the share falling to any child or children should be laid out "in the purchase of an annuity for such child or children . . . [or in any other way or manner that may appear most for his or her benefit" in the opinion of the wife.

Opinion, per Lord Young, that under this power the wife was entitled to direct that the share of a child should be laid out in the purchase of an annuity for the alimentary use only of such child and not assignable by her.

By antenuptial contract of marriage dated 8th January 1866 between John Gavin, architect and civil engineer, on the one part, and Miss Mary Scott Walker, only daughter of George Walker, Doctor of Medicine, Leith, and the said George Walker, on the other part, Mr Gavin made sundry provisions in favour of his intended spouse and of the children of the marriage, and in security of the provisions conveyed to trustees a policy of insurance on his life. Miss Walker, on the other part, assigned, disponed, and made over to the trustees the whole property, heritable and moveable, then belonging to her or that should pertain and be owing to her during the subsistence of the marriage (excepting the provisions made for her by Mr Gavin and the sums to which she might have right in virtue of the obligation by her father after mentioned) in trust for the following purposes:—"To pay the rents, interests, dividends, and annual proceeds of the said means and estate to the said Mary Scott Walker during all the days of her life, and after her death, in the event of her being survived by the said John Gavin, to pay the same to him during all the days of his life and survivance; and on the death of the said spouses to pay or deliver over the fee or capital of the said means and estate to the child or children of the marriage, subject to the power in favour of the said intended spouses after written of appointment and division among the children and their issue, and of substituting an annuity; but failing children, then to the survivor of the said John Gavin and Mary Scott Walker, and his or her heirs, executors, and representatives whomsoever."

By the said contract Dr Walker bound himself to make payment to the said trustees, at the first term of Whitsunday or Martinmas occurring after his death, of £5000 in trust, to pay the interest or produce of said sum to Miss Walker during her survivance, and after her death to her husband during his survivance. The deed then proceeded as follows:—"And on the death of the survivor of the said spouses the said trustees are hereby directed to pay over one-half of the capital of the said sum to the child or children of the said marriage, subject to the power in favour of the said intended spouses after written of appointment and division among the said children and their issue, and of substituting an annuity; and failing children, to pay over the said one-half of the before-mentioned sum of £5000 to whomsoever the said Mary Scott Walker may appoint by any writing under her hand to take effect after the death, and failing such appointment, or her legal representatives whomsoever, and to pay over the other half of the capital of the said sum of £5000 on the death of the survivor of the said spouses to whomsoever the said Mary Scott Walker may appoint by any writing under her hand to take effect after her death, and failing such appointment to her legal representatives . . . : And it is hereby declared, with regard to the powers of appointment and division before referred to in relation to the fee or capital of the means and estate hereby conveyed by the said Mary Scott Walker, and to the one-half of the principal sum of £5000 before provided by the said George Walker to the child or children of the marriage, that if there shall be more than one child of the said intended marriage it shall be lawful to and in the power of the spouses jointly, and failing a joint appointment, of the said Mary Scott Walker, at any time of her life, and even on deathbed, to divide and proportion as she shall think proper among the said children the said provisions in their favour; and in case of the spouses jointly not having made such division, and of her death without having made such division, the said John Gavin, if he survive her, shall have the same power; and failing any such division the said provisions shall belong to and be divided among the said children equally, share and share alike: Declaring always that if any child or children of the said marriage shall die before the said provisions shall have under these presents and the exercise of the said power of division been paid, or become payable, leaving lawful issue of his, her, or their bodies, the said issue shall have the same right to the share of such deceasing child or children in the place of such deceasing child or children, in the same manner as such parent would have had if in life; and it shall be lawful to and in the power of the spouses jointly, and failing a joint appointment, of the said Mary Scott Walker, whom failing, of the said John Gavin, to divide and proportion among the issue of the body of any child the share to which the parent of such issue if surviving would have been entitled; and it shall also be lawful to and in the power of the said spouses jointly, and failing a joint appointment, of the said Mary Scott Walker, whom failing as aforesaid, the said John Gavin

in making such division and apportionment among the children of the marriage or the issue of any deceased child, to direct and appoint that the share or portion of a share falling to any child or children of the intended marriage, or to any of the issue of such child or children, shall be employed and laid out in the purchase of an annuity for such child or children or issue, or in any other way or manner that may appear most for his or her benefit in the opinion of the said spouses jointly, or of either of the intended spouses who may exercise this power."

By an addition made before marriage to said contract, it was provided and declared as follows:—"We, the parties within named and designed, hereby provide and declare, as was intended by the within written contract, that in the event of there being only one child of the marriage, the parents jointly or in their order, as within expressed, shall have the same power to direct and appoint that the several provisions to such child may be employed and laid out in the purchase of an annuity for such child, in the same manner as is within provided in the event of there being more children than one."

Mr Gavin and Miss Walker were married on 11th January 1866. Dr Walker died after the date of the marriage. His executor made payment to the marriage-contract trustees of the £5000 mentioned in the contract. His daughter, the said Mary Scott Walker, was exclusively entitled to his residuary estate.

One child was born of the marriage between Mr Gavin and Miss Walker, viz., Anne Georgina Gavin, born on 14th March 1867. The marriage was dissolved on 14th March 1885 by decree of divorce in an action at the instance of the wife on the ground of desertion. Mr Gavin still survived.

The said Mary Scott Walker died on 14th July 1899, leaving a trust-disposition and settlement, dated 30th July 1885, and codicils of subsequent dates, whereby she disponed the whole estate belonging to her to trustees for certain purposes. By the said trust-disposition and settlement Mrs Mary Scott Walker or Gavin made the following direction and appointment:—"In exercise of the power of disposal and appointment contained in my marriage-contract in regard to the sum of £5000 which my father, George Walker, Doctor of Medicine, bound himself to pay to my marriage-contract trustees, I do hereby, with respect to the one-half of the capital of the said sum of £5000 which is directed on the death of the survivor of John Gavin . . . and me to be paid to the child or children of my marriage, and failing children, to be paid over to whomsoever I may appoint by any writing under my hand, and failing such appointment to my legal representatives whomsoever, and in exercise of the power in my favour, also contained in said contract of marriage, to direct that the said one-half of said sum should be employed in the purchase of an annuity for the child or children of my marriage, I direct and appoint the said one-half of the said sum of £5000 to be laid out in the purchase of an annuity to and for behoof of my daughter Anne Georgina Gavin, and I direct my trustees to provide and secure that the same shall be for the alimentary use only of the said Anne Georgina Gavin, and shall not be assignable by her or arrestable by her creditors or affectable in any way by or for her debts or deeds, and shall not to any extent fall under the *jus mariti* or right of administration of any husband she may marry, or be subject in any way to the debts or deeds or to the diligence of the creditors of such husband, but shall be payable to herself alone and upon her own receipt." With regard to the other half of the said sum of £5000, Mrs Mary Scott Walker or Gavin directed and appointed it to be paid to her trustees for behoof of her mother, in liferent for her liferent use allenarly, and after her death to certain charitable institutions. By the said trust-disposition and settlement it was further provided—"and in exercise of the power in my favour to direct that the means and estate conveyed by me in said marriage-contract should be employed in the purchase of an annuity for the child or children of my marriage, I do hereby direct and appoint that the whole sums of money or other means and estate which my said daughter Anne Georgina Gavin may have right to under the said contract, and subject to my said power, shall be laid out and employed in the purchase of an annuity for her, to be for her alimentary use only, and not assignable by her or arrestable by her creditors or affectable in any way by or for her debts or deeds, and shall not fall to any extent under the *jus mariti* and right of administration of any husband or husbands she may marry, or be subject in any way to his or their debts or deeds or to the diligence of his or their creditors, but shall be payable to herself alone and upon her own receipt."

The funds in the hands of the marriage-contract trustees, being those conveyed by the said Mary Scott Walker and her father, other than the half of the said sum of £5000 directed to be liferented by the mother of the said Mary Scott Walker, amounted at the date of her death to £19,304, 2s. 9d. or thereby.

In September 1899 Miss Anne Georgina Gavin married David Johnston, merchant, Leith. By their antenuptial contract of marriage, dated 4th September 1899, Miss Gavin conveyed to trustees everything then belonging to her or that might belong to her during the subsistence of the marriage, with the exception of household furniture and plenishing.

In consequence of the death of Mrs Mary Scott Walker or Gavin certain questions arose with regard to the rights of Mrs Anne Georgina Gavin or Johnston under the marriage-contract of her parents, and also with regard to the validity of the exercise by Mrs Mary Scott Walker or Gavin of the said power of appointment and of substituting annuities. For the decision of these questions a special case was presented for

the opinion and judgment of the Court.

The parties to the special case were—(1) Mr and Mrs Gavin's marriage-contract trustees, (2) Mr and Mrs Johnston's marriage-contract trustees, with consent of Mr and Mrs Johnston, (3) the trustees under the trust-disposition and settlement of Mrs Mary Scott Walker, formerly Gavin, and (4) John Gavin.

The questions of law were—"1. Is Mrs Anne Georgina Gavin or Johnston's right to payment of the funds in question, or any part of them, contingent on her survivance of her father? 2. Do the annual proceeds of the funds in question during Mr Gavin's lifetime fall to Mrs Johnston, or do they fall into the executry estate of Mrs Mary Scott Walker or Gavin? 3. Was Mrs Mary Scott Walker or Gavin, according to the terms of the marriage-contract, entitled to direct that the provisions in favour of her daughter should be laid out and employed in the purchase of an annuity for her alimentary use only, and not assignable? 4. Are the parties of the second part entitled to have the capital of the said marriage-contract funds paid over to them forthwith by the parties of the first part?"

Argued for the first and third parties—Under the marriage contract of her parents no interest in the funds in question vested in Mrs Johnston unless she survived her father. "Failing children" meant failing children at the date of distribution. Failing children at that date there was a substitution of others in the deed. Until her father's death Mrs Johnston had no vested right, and the Court would refuse to accelerate the date of vesting. In regard to provisions to children, a husband was not held to have died when he was divorced by his wife—*Taylor's Trustees* v. *Barnett*, July 19, 1893, 20 R. 1032, 31 S.L.R. 11; *Harvey's Judicial Factor* v. *Spittal's Curator ad litem*, July 19, 1893, 20 R. 1016, 31 S.L.R. 13. Further and alternatively, the provision by Mrs Mary Scott Walker or Gavin that the annuity to be purchased for her daughter should be alimentary was authorised by the marriage-contract, and the power thereunder had been validly exercised. But if the restriction was *ultra vires*, the invalidity of the restriction did not render ineffectual the provision of an annuity, and they were bound to employ the £19,304, 2s. 9d. in the purchase of an annuity without the restriction.

Argued for the second parties—Mrs Johnston's rights under the marriage-contract must be dealt with as if both of her parents were dead, her father by the divorce having forfeited all his rights under the contract. It was *ultra vires* of Mrs Mary Scott Walker or Gavin in providing that annuities should be purchased for Mrs Johnston, to direct that the same should be for her alimentary use only and not assignable in in respect that such restriction was not authorised by the terms of the marriage-contract. The appointment was therefore invalid *in toto*. Further, unless there was a provision for a continuing trust to protect the annuity a direction to invest in an annuity was ineffectual, and the beneficiary was entitled to payment of the capital—*Kennedy's Trustees* v. *Warren*, July 19, 1901, 38 S.L.R. 827. Here there was neither in the marriage-contract a direction to create a trust for the protection of an alimentary annuity, nor had Mrs Mary Scott Walker or Gavin created any such trust. They were therefore entitled to payment of the capital—*Murray* v. *Macfarlane's Trustees*, July 17, 1895, 22 R. 927, 32 S.L.R. 715.

At advising—

LORD JUSTICE-CLERK—The first query in this special case raises the question whether the trustees under the marriage-contract of Mr and Mrs Gavin are bound to recognise a present right in their only child to payment of funds held by them under the contract, the claim against them being made by the marriage-contract trustees of the child, to whom by the contract she assigned whatever estate might come to her during the subsistence of her marriage. The special circumstances are that Mrs Gavin divorced her husband for desertion, and is now dead, while he still survives. The marriage-contract of the parents declares, among the purposes of the trust, that as regards the estate made over by Mrs Gavin, the purpose is—[*His Lordship read the purpose*]—and as regards a sum of £5000 put in trust by Mrs Gavin's father—[*His Lordship read the purpose*]. It is contended by the marriage-contract trustees of Mr and Mrs Gavin's child that as a consequence of the divorce her rights and claims must be dealt with as if both her parents were dead, Mr Gavin having by his being divorced forfeited his rights under the contract, and that accordingly the rights of his daughter have emerged and are now enforceable. I am of opinion that this contention is ill-founded, and that her rights are postponed until both her parents have been removed by death. The words "on the death of the spouses" and "on the death of the survivor of the spouses," must be read, as regards the rights of the child, in their ordinary sense, and her father being still alive the events necessary to her rights emerging are not complete. Although he has lost his own rights, he is still surviving as the parent of his child, and the contingency on which her right may emerge either for herself or her issue is still *in futuro*. The point has already been decided in more than one case in the sense of the opinion I have expressed, viz., in the cases of *Taylor's Trustees*, and the case of *Harvey*, which were referred to in the debate.

I therefore hold that the first question must be answered in the affirmative, and the second alternative of the second question in the affirmative.

If this be the view taken by the Court, the remaining questions do not at present call for decision, as they may never arise.

LORD YOUNG—The case regards not the whole funds in the hands of the first parties as the marriage trustees of Mr and Mrs Gavin, but only those conveyed to them by Mrs Gavin, and one-half of £5000 conveyed

to them by her father Dr Walker. I will in the first instance deal only with her property (£16,804). She conveys it thus—[*His Lordship read the terms of conveyance*]—The marriage after subsisting about twenty years was dissolved by divorce of the husband in 1885. There was only one child, who was eighteen years of age at the dissolution. She is still alive, and along with her husband and marriage-contract trustees a party to this case.

Mrs Gavin died in July 1899. She was then a *femme sole,* and had been so for fourteen years. She was survived by her daughter, then thirty-two years old, the only child of her marriage.

The first question is—Did the fee or capital of Mrs Gavin's estate vest beneficially at her death in her daughter, the only child of her marriage, or was there no vesting in her or any other till the death of Mr Gavin the divorced husband?

The reason suggested for the latter alternative is, that the fee, certainly destined to the child of the marriage, is by the contract burdened with a liferent to Mr Gavin should he survive his wife, which he did in the sense of being alive after her death, and that the direction is in words to convey the fee to the child or children "on the death of the said spouses."

It cannot, of course, be said that a divorced husband dies by and at the date of the divorce beyond expulsion thereby (as by death) from all his rights and powers as a husband, including all rights, powers, and duties regarding the wife's estate imposed upon him by the marriage-contract. It would be out of place to refer to the claims on his estate thereby, as by his death, given to his injured and divorcing wife, the case before us involving no question regarding them.

But he is certainly dead, as I have stated, by the divorce, in respect of all rights and powers as a husband, including all rights, powers, and duties regarding his wife's estate imposed on him by the marriage-contract. The deed provides that the trustees are "in the event of her being survived by the said John Gavin, to pay the sums" (that is, the income of the funds) "to him during all the days of his life and survivance." Now, it is certain that he did not live and survive in the sense in which these words were here used after the divorce, because if he did he would be entitled to the income of the estate. It is admitted that he is not entitled to that, which he would have been if he had lived and survived in the sense in which the words were here used. He is therefore dead in so far as he is not living and surviving in the sense in which those words "life and survivance" are here used. The deed goes on to provide that if there are no children of the marriage then the fee or capital is to be paid "to the survivor of the said John Gavin and Mary Scott Walker." He is the survivor in the sense of being alive, but it is not pretended for a moment that he is the survivor of Mrs Gavin in the sense in which the word is here used, or that he would be entitled, if there was a failure of children of the marriage, to the capital of the wife's estate, or that divorce is not equivalent to death with respect to the wife's estate, not only the income but the fee of it. Here again, therefore, we have "life and survivance" used in a sense in which he is not now alive or a survivor. Again, powers were given to the survivor of the spouses to make appointment as to the distribution of the wife's estate among the children. It is not contended, and could not be, that the divorced husband would have any such power as the survivor of the spouses.

Now let me just take the case irrespective of the extent to which death is implied by divorce, or divorce has the effect of death. Let me suppose that there was a divorce here, and that the husband was alive, but had renounced his liferent. Is it doubtful that the fee or capital of the estate, with no burden on it whatever, the wife being dead and his liferent being renounced, would have vested in the only child of the marriage, and that the postponement of payment or conveyance to the only child of the marriage would not interfere with the vesting. That is the very case which is referred to by Lord Watson and the other Judges in the case of *Muirhead*, May 12, 1890, 17 R. 45. I think that although it was a reversal of a judgment of this Court, it was altogether a sound judgment, and I do not think a judgment contrary to the opinion of the learned Judges of this Court who pronounced the contrary, because they thought they were bound by certain decisions to which they referred. But Lord Watson, in the passage which I think of importance here, says—"I see no reason to doubt that in cases where the distribution of a trust estate is directed to be made on the death of an annuitant, and it clearly appears that in postponing the time of division the testator had no other object in view than to secure payment of the annuity, it may be within the power of the Court, upon the discharge or renunciation of the annuitant's right, to ordain an immediate division. But in order to the due exercise of that power it is in my opinion essential that the beneficiaries to whom the trustees are directed to pay or convey should have a vested and indefeasible interest in the provisions. That principle appears to me to be just in itself and to be firmly established by"—and he refers to a variety of decisions, all of which I have looked at, and which go expressly to this, that where an annuity or a life interest in the proceeds of a fund is given to a certain person with directions upon his death to pay the fee or capital to A B, the son or daughter of anybody else, or to the children of the marriage, then it is vested, and that where the postponement of the satisfaction of the right which is given until the death of an annuitant or party taking the liferent is attributable only to the satisfaction of that annuity or liferent, then if the annuity or liferent is renounced there may be immediate payment or satisfaction of the right. Now that is the very case we have here. It certainly does not occur to me, and it was

not suggested, that there was any other ground for postponing the conveyance of the fee or capital to the only child of the marriage until the husband's death than to give him the income while he survived. The fund was the wife's, her own absolute property. She was entitled to deal not only with the income of it but with the fee or capital, and she deals with both. She is to have the income while she lives, and she directs her trustees after her death to give the income to her husband while he survives, and on his death to pay it over to her child. Is there any other reason suggested for postponing the payment of the capital to the child until the husband's death except that he may have the income while he lives? He being deprived of his right to the income by renunciation, or as here by divorce, why should the child not get immediate payment of the capital? It is in the same position as the case dealt with by Lord Watson and all the authorities to which he refers, and he pronounced for immediate payment. Just look at the extravagant nature of the opposite view. Mr Gavin cannot be a young man now, for his marriage took place in 1866, and he was divorced in 1885, but the principle would have been the same if he had been a young man. The daughter's interest in the estate or her right to get it is to be postponed for no cause whatever until he dies, and as I understand your Lordship's opinion, the income of the estate in the meantime, which is destined to the daughter with no burden on it, is not even to go to her. It is to go to the mother's executry. We do not know who is entitled to the mother's executry estate. She left a trust-disposition and settlement, but we do not know its terms, so for aught we know, if your Lordship's opinion is right, the income of this £19,000 odds during her deceased husband's life may go to a stranger, and be taken away from the children of the marriage in whose favour the provisions in this marriage-contract were conceived. I cannot assent to that as being according to law any more than according—I hope I may be permitted to use the expression—to reason and good sense.

I am aware that one of the cases to which your Lordship referred—the case of *Harvey*, in July 1893—is a decision of a Court consisting of three judges, of whom I was one. I dissented from that judgment, and stated my reasons for doing so at length, and I will not repeat them now. I also dissented from the judgment in *Taylor's Trustees*, also in July 1893, but I think that case is not in point here. In that case there was no liferent given to the husband. The fee was given by the testator to the daughter's children unless her husband died before her, in which case the trustees were to pay over the whole capital to her to do with as she pleased, nothing going to the children at all, and there was very plausible ground for holding that in order to defeat the right of the children—to take away the right bestowed on them—there must be the death which the deed taking it away made the condition of its destruction. There is nothing of the kind in this case at all. Here it is plain that the postponement of the children's enjoyment of the estate till after the death of the husband, if he survived the wife, was only for the purpose of enabling the trustees to pay him the liferent. The liferent of the husband having disappeared by reason of the divorce, as it would have disappeared had there been no divorce by his renunciation, as in the case of the authorities referred to by Lord Watson, there is no impediment to the immediate payment of the estate to the children. I am therefore of opinion that there was vesting here in the daughter on the mother's death, and that the time for the immediate satisfaction of the daughter's rights then arrived.

But there is another question put to us, and an important question, which your Lordship has given no opinion on. That is the third question of law—[*His Lordship read it*]. The provision in the marriage-contract about substituting an annuity is as follows—[*His Lordship read it.*] Now, I have already said that clearly the husband was ejected from any such power by the divorce, and the power was therefore confined to the wife, and she assumed that power in her trust-disposition in the manner stated in the case—that is, she directed her trustees to expend the whole fee or capital of her estate to which her daughter was entitled under the marriage-contract in the purchase of an annuity for her alimentary use and not to be assignable. The question which was argued before us, and the only question arising upon an objection to the validity of this appointment by the wife, is that the marriage-contract, although it gives her power to direct the fee or capital to be laid out in the purchase of an annuity, does not say that she may direct the annuity to be alimentary and not assignable, and that to do so is not comprehended in the words "in any other way or manner that may appear most for his or her benefit in the opinion of the" wife. Now, from the direction in her trust-deed, it plainly appears that the way or manner most advisable in the opinion of the wife was the purchase of an annuity in the daughter's name, excluding the *jus mariti*, and being alimentary and not assignable. I am of opinion that the wife's direction to purchase an annuity, taking the direction exactly as she made it, is a good direction, and that the objection taken is not a good objection. Your Lordship no doubt had some reason for not giving an opinion upon that question. I think the parties were entitled to put the question, and are entitled to have an opinion on it, whether there is to be immediate employment of the funds in the purchase of an annuity, or whether it is to be postponed until Mr Gavin's death. The question is well put, and was argued, and it would seem to me not to be at all desirable to have another case and another argument upon it.

LORD TRAYNER—I regard the question here put to us as already concluded by authority. In accordance with the deci-

sions in *Harvey's Factor* and *Taylor's Trustees,* referred to at the debate, I think we are bound to answer the first question put to us in the affirmative. According to these decisions Mrs Johnston's right to the funds in question, or any part thereof, is contingent on her surviving her father. The second part of the second question must be affirmed on the authority of *Harvey's* case. This leads to the fourth question being negatived. Answering these questions as I do renders it unnecessary and inappropriate to give (at present) any answer to the third question. That question may never need to be solved if Mrs Johnston predeceases her father.

LORD MONCREIFF was absent.

The Court answered the first question of law and the second alternative of the second question of law in the affirmative, and found it unnecessary to answer the other questions therein stated.

Counsel for the First and Third Parties—Campbell, K.C. — Macfarlane. Agents — Tawse & Bonar, W.S.

Counsel for the Second and Fourth Parties—Clyde, K.C. –Hunter. Agents—Alex. Morison & Co., W.S.

Tuesday, November 26.

SECOND DIVISION.

[Sheriff-Substitute at Edinburgh.

WYLIE'S EXECUTRIX *v.* M'JANNET.

Right in Security—Life Insurance Policy—Policy Effected by Borrower in Security of Loan—Custody of Policy Retained by Lender—No Assignation to Lender—Premiums Paid by Lender — Preference Claimed on Proceeds—Law Agent's Lien.

A, a mill-owner, who had borrowed money from B, a solicitor, effected an insurance on his life with the view of providing security for the loan. The premiums, as they fell due, were paid by B, at first, at A's request, and subsequently, on A's disappearance, in order to maintain the security for his debt. The policy remained throughout in the custody of B, but was never assigned by A to him.

In a multiplepoinding raised after the death of A, who died insolvent, to determine the rights of parties to the sum contained in the policy, B claimed a preferential ranking upon the fund for the amount of the premiums paid by him, and interest thereon, in respect (1) that he had throughout had the custody of the policy; (2) that he had paid the premiums due thereon, and so kept it in force; and (3) that he was entitled to a law-agent's lien in respect of the sums advanced by him.

Held that B was not entitled to the preferential ranking claimed by him.

This was an action of multiplepoinding raised in the Sheriff Court at Edinburgh in name of the Life Association of Scotland, pursuers and nominal raisers, by the executrix of the late James Wylie, formerly manufacturer, New Cumnock, for the ascertainment of the rights of certain claimants to a sum of £500 contained in a policy of insurance effected with the Life Association by the said James Wylie on 13th July 1868.

The facts of the case as disclosed by the proof were as follows:—Mr Wylie died insolvent on 23rd April 1900, his whole estate consisting of the sum of £500 contained in the said policy. His daughter, the real raiser, was decerned executrix-dative *qua* next-of-kin by the Sheriff of the Lothians and Peebles.

In 1868, on the suggestion of Mr W. D. M'Jannet, a solicitor, and with the view of providing security for advances made by M'Jannet to him, Wylie insured his life for £500 with the Life Association of Scotland, for whom M'Jannet was agent. The first two premiums were paid by M'Jannet at Wylie's request. Thereafter M'Jannet continued to pay the premiums as they fell due, Wylie being unable to do so. Before the 1872 premium fell due Wylie disappeared, leaving no address, and from that date until his death in 1900 M'Jannet paid the premiums as they fell due in order to maintain the security for his debt. The policy remained throughout in the hands of M'Jannet, but no assignation of it in his favour was executed by Wylie.

On Wylie's death, in consequence of claims made to the proceeds of the policy by M'Jannet and others, the present action was raised. The fund *in medio* consisted of the £500 insured by the said policy. Claims were lodged by (1) the executrix, who claimed the whole fund *in medio,* as executrix-dative *qua* next-of-kin of the deceased James Wylie, for division among the creditors on his estate; (2) W. D. M'Jannet, who claimed to be ranked *primo loco* upon the fund in respect of the premiums paid by him, and interest thereon, amounting to £603, 2s. 3d. Claims were also lodged by other creditors of the deceased, to which it is unnecessary further to refer.

The executrix pleaded—"(1) The claimant being executrix-dative *qua* next-of-kin of the said deceased James Wylie, is entitled to be ranked preferably to the whole free fund *in medio.*"

The claimant M'Jannet pleaded — "(1) The claimant is entitled to be ranked *primo loco* upon the fund *in medio* to the extent of £603, 2s. 3d., being the amount of premiums and interest thereon paid by him, in respect that (*a*) under the circumstances stated he is entitled to a lien on the proceeds of the policy for said sum, (*b*) the claimant's expenditure of said sum preserved the policy in force."

On 14th June 1901 the Sheriff-Substitute (MACONOCHIE), after a proof, pronounced an interlocutor ranking and preferring the claimant, Wylie's executrix, as executrix-dative *qua* next-of-kin of the deceased James