Their Lordships allowed the appeal and restored the judgment of the Lord Ordinary, with expenses.

Counsel for the Appellants—Macmillan, K.C.—C. H. Brown. Agents—Maclay, Murray, & Spens, Glasgow—J. C. Brodie & Sons, W.S., Edinburgh—Sherwood & Co., Westminster.

Counsel for the Respondents — Condie Sandeman, K.C.—MacRobert. Agents—MacRobert, Son, & Hutchison, Glasgow—Pringle & Clay, W.S., Edinburgh—Balfour, Allan, & North, London.

COURT OF SESSION.

Friday, November 23.

SECOND DIVISION.

DIXON'S TRUSTEES *v.* DUNEHER.

Succession — Vesting — Conditio si sine liberis—Marriage Contract.

The trustees under an antenuptial marriage contract held funds in liferent for the wife, in liferent for the husband should he survive her, in fee for any child or children of the marriage, but not to vest till the wife's death. The wife was divorced but survived her husband and her only son, whose children claimed the funds under the *conditio si sine liberis decesserit.*

Held that no right could vest in the children at a date sooner than that at which it would have vested in their father, the institute, and as no right could have vested in him during the life of his mother no right had yet vested in them.

A Special Case was presented, *inter alios*, by G. A. D. Kirkland, writer, the sole trustee acting under the antenuptial marriage contract, dated in 1878, between George Dixon, stockbroker in Glasgow, and Alice Margaret Alexandrina Shirer, *first party;* the said Alice Margaret Alexandrina Shirer or Dixon, now Mrs H. G. Duneher, with her husband's consent, *third party;* Camille Clifford Dixon, daughter of George Clifford Dixon, who was the only child of the marriage between George Dixon and Miss Shirer, with her tutors, *fifth parties;* and William Gair Chrystal, C.A., factor *loco tutoris* to George Ian Paring Dixon, son of the said George Clifford Dixon, *sixth party*, dealing with the rights of parties under the said antenuptial marriage contract.

The *marriage contract*, with regard to certain funds conveyed by Miss Shirer to the trustees, directed, *inter alia*—"*In the second place*, they shall hold the estate conveyed by her for behoof of the said Alice Margaret Alexandrina Shirer in liferent for her liferent use allenarly, exclusive of the *jus mariti*, right of administration, and curatorial powers of the said George Dixon, all of which the said George Dixon hereby renounces and discharges; Declaring that the receipts by the said Alice Margaret Alexandrina Shirer herself shall form sufficient discharges to the said trustees and their foresaids in the premises. *In the third place*, should the said George Dixon survive the said Alice Margaret Alexandrina Shirer, the said trustees shall hold the said means and estate hereby conveyed by the said Alice Margaret Alexandrina Shirer for behoof of the said George Dixon in liferent for his liferent use allenarly. *In the fourth place*, subject to the said rights of liferent, the said trustees shall hold the fee of the trust estate hereby conveyed by the said Alice Margaret Alexandrina Shirer for behoof of all the children or any child of the said intended marriage who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or be married, and that equally among them if more than one, and the fee of the said trust estate shall not vest in the child or children until the death of the said Alice Margaret Alexandrina Shirer, but on or after her death the same shall vest in the case of a son or sons on attaining majority, and in the case of a daughter or daughters on attaining majority or being married."

George Dixon, who on 2nd August 1883 had obtained a decree of divorce against his wife, died on 30th October 1913. From the date of the decree of divorce until his death he had received the whole revenue from the marriage-contract funds contributed by both the parties, out of which, however, he had made a voluntary allowance of £200 per annum to his former wife, who had since married H. G. Duneher, and who was still in life at the date of this case. The only child of the marriage, George Clifford Dixon, died on 20th September 1914, survived by his widow, a daughter (fifth party), and a son (sixth party).

The following *question of law* was, *inter alia*, submitted—"1 (*a*) Is the third party entitled to immediate payment of the capital of the funds contributed by her under the antenuptial contract of marriage between her and the said George Dixon; or (*b*) is the fee of said funds now vested in the fifth and sixth parties subject to the third party's liferent; or (*c*) is the first party bound to retain the said capital to await the event either of one or both of the fifth and sixth parties surviving the third party and attaining majority, or, in the case of the fifth party, surviving the third party and marrying or attaining majority; or (*d*) is the first party bound in any event to retain the said capital until the death of the third party or the complete failure of all issue of the said George Clifford Dixon?"

Argued for the third party—The fund could not vest in the grandchildren until Mrs Duneher's death. The radical right to it belonged to her, and in the event of the whole *stirps* predeceasing her she could justly claim payment of it to herself. Her son by her marriage to Mr Dixon could only have taken if he had survived her, and his children could not claim under the *conditio si sine liberis* any higher right than their father would have enjoyed. He only had a *spes successionis* to the funds, and there was no gift to the grandchildren. Counsel

referred to *Harvey's Judicial Factor* v. *Spittall's Curator ad litem*, (1893) 20 R. 1016, 31 S.L.R. 13; *Dawson* v. *Smart*, (1903) 5 F. (H.L.) 24, *per* Lord Robertson at p. 28, 40 S.L.R. 879.

Argued for the fifth and sixth parties—The children of the institute, having the right to succeed under the *conditio*, were not affected by the condition depending on survivance which applied to their father—*Cattanach* v. *Thom's Executors*, (1858) 20 D. 1206. The *conditio* in the present case had the effect of calling them on the death of their father just as if there had been a clause expressly calling them, and in such a case it was decided that the condition as to attaining majority did not apply to them—*White's Trustees* v. *White*, (1896) 23 R. 836, 33 S.L.R. 660. Mrs Duneher's grandchildren therefore took a vested interest on their father's death, as the conditions which bound their father were inapplicable to them. Counsel also cited *Cattanach's Trustees* v. *Cattanach*, (1901) 4 F. 205, 39 S.L.R. 154; *Martin* v. *Holgate*, (1866) 1 E. & I. App. 175; *Campbell's Trustee* v. *Dick*, 1915 S.C. 100, 52 S.L.R. 78; *Macdonald* v. *Hall*, (1893) 20 R. (H.L.) 88, 31 S.L.R. 279; *Young* v. *Robertson*, (1862) 4 Macq. 337; and on the applicability of the *conditio* to marriage contracts in addition to wills—*Robertson v. Houston*, (1858) 20 D. 989; *Hughes* v. *Edwardes*, (1892) 19 R. (H.L.) 33, 29 S.L.R. 911.

At advising—

LORD DUNDAS—It is unnecessary to narrate at the outset the various written instruments with which this case is concerned and the facts relative thereto. It will be sufficient to refer to the documents and the facts, so far as necessary, in answering the questions put to us *seriatim*.

1. The first question has regard to the funds contributed by Mrs Dixon (now Mrs Duneher) under the antenuptial marriage contract between her and the now deceased George Dixon. The trustees under that contract were directed to hold these funds for behoof of the lady for her liferent use allenarly, and for behoof of Mr Dixon if he should survive her, which in fact he did not, for his liferent use allenarly; and, subject to the said rights of liferent, to hold the fee of the said funds for behoof of the children of the intended marriage who being sons should attain the age of twenty-one years, or being daughters should attain that age or be married; it being provided that the said fee should not vest in the children until the death of their mother, but on and after her death it should vest in the case of sons on majority, and in the case of daughters on majority or marriage. One child was born of the marriage, George Clifford Dixon. He attained majority, married, and died leaving issue, who are represented in this case. Mrs Duneher is still alive, and is the third party to the case.

Head (*a*) of the question asks whether the third party is entitled to immediate payment of the capital of the said funds. It was conceded at the bar by her counsel—and I see no reason to doubt the wisdom of the concession—that the answer must be in the negative, because the children of George Clifford Dixon may have an interest in the capital by virtue of the *conditio si sine liberis*.

Head (*b*) asks whether the fee of the said funds is now vested in the said children, subject to the third party's liferent. The answer must, in my judgment, be in the negative. If George Clifford Dixon were now alive he could not successfully make such a claim, looking to the terms of the marriage contract, and to the fact that his mother is still living. I am unable to see how his children, claiming in virtue of the *conditio si sine liberis*, can in this respect have any higher right than their father if now alive would have had. The principle of the *conditio* is that of substitution, the children being placed in room of their father, and entitled to take what he would have taken had he survived, but no more. The case of *Martin* v. *Holgate*, (1866) 1 E. & I. App. 175, was pressed on our attention. It is a decision of the highest authority, and has twice recently been the subject of judicial consideration in our Courts. In *Addie's Trustees*, 1913 S.C. 681, it was distinguished by the First Division, and in *Campbell's Trustee*, 1915 S.C. 100, its doctrine was followed by the Extra Division. But the case seems to me to have no bearing on the present question. It was one in which the House of Lords had to consider a destination in favour of certain of the testator's nephews and nieces and of their issue, and decided upon a construction of the instrument before them that the gift to the issue was original, not substitutional, and therefore the fact that the gift to the parents was contingent did not affect the nature of the gift to the issue, which was an independent bequest. There is here no destination of the kind present in *Martin* v. *Holgate*. The gift to George Clifford Dixon was made dependent upon his survival of his mother. There is no express gift to his children. I do not see how under the *conditio si sine liberis* they can take benefit sooner than their father could have taken it. It was admitted that the fact of the third party's divorce from Mr Dixon could have no effect in accelerating the period of vesting. [*His Lordship then dealt with matters with which this report is not concerned.*]

The LORD JUSTICE-CLERK and LORD SANDS concurred.

The Court answered head (*b*) of the first question of law in the negative.

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Counsel for the Second and Seventh Parties—W. H. Stevenson. Agent—J. S. M'Culloch, W.S.

Counsel for the Third Party—Macphail, K.C.—Inglis. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for the Fourth Party—Gentles. Agents—Manson & Turner Macfarlane, W.S.

Counsel for the Fifth and Sixth Parties—Chree, K.C.—J. A. Christie. Agents—Manson & Turner Macfarlane, W.S.