the Commissioners, remitted to them to disallow the deduction of £2465, 4s. 1d. claimed by the company, and to refuse a certificate of overpayment of duty, and decerned.

Counsel for the Appellant—Cullen, K.C.—A. J. Young. Agent—Solicitor of Inland Revenue (Philip J. Hamilton Grierson).

Counsel for the Respondent—Hunter, K.C.—Macmillan. Agents—J. & J. Ross, W.S.

Thursday, June 6.

SECOND DIVISION.

[Lord Johnston, Ordinary.

BURGH-SMEATON *v.* WHITSON (BURGH-SMEATON'S JUDICIAL FACTOR) AND OTHERS.

Marriage Contract—Trust—Succession—Destination—Right by Implication—Gift-over on Failure of Issue—Interest of Issue—Implied Gift to Issue of Rights Sufficient to Disentitle Wife on Divorce to Immediate Reconveyance of Estate.

By antenuptial contract of marriage a wife conveyed her estate, heritable and moveable, to trustees, and directed, *inter alia*, at what period in the various events of the wife surviving the husband, the husband surviving the wife and re-marrying, the husband surviving the wife and not re-marrying, the trustees were to convey the estate to herself or to her testamentary assignees and disponees. In each case the fee of the heritage was disposed of unless at the date in question there were issue of the marriage or children of predeceasing issue alive, but no rights were expressly given to such children or their issue. The wife, divorced for adultery, brought an action, which was defended by, *inter alios*, the children of the marriage, seeking declarator that she was entitled to the sole right, title, and beneficial interest in the fee of the heritable estate.

Held that the children of the marriage had by implication a right to the estate, at all events if they survived their mother and the death or second marriage of their father, and that, whatever the precise nature of their right it was at any rate sufficient to disentitle the pursuer, in the existing circumstances, to the declarator sought.

Mrs Elizabeth Margaret Burgh-Smeaton, residing at Coul, Auchterarder, Perthshire, brought an action against, *inter alios*, (1) Thomas Barnby Whitson, C.A., Edinburgh, judicial factor on the trust estate constituted by the marriage contract between Thomas Wright Burgh-Smeaton, Manitoba, Canada, and the pursuer; (2) Thomas Wright Burgh-Smeaton; (3) the children of the marriage between Thomas Wright Burgh-Smeaton and the pursuer; and (4) Mrs Mary Margaret Young or Smeaton.

The pursuer sought (First) to have it found and declared that she had the sole right and title to and beneficial interest in the fee of the heritable estate of Coul; (Second) to have it found and declared that Thomas Barnby Whitson, as judicial factor foresaid, was bound forthwith to denude and divest himself of the said subjects, and to convey the same to the pursuer and her heirs and assignees as her and their absolute property, under reservation always of, and without prejudice to, certain burdens and rights in security or otherwise, and in any event, that upon the extinction of the liferent right of the defender Thomas Wright Smeaton, and upon the pursuer paying off or puting the defender Thomas Barnby Whitson, as judicial factor foresaid, in funds to pay off the heritable securities affecting the said subjects and others, the said last-mentioned defender would be bound to denude and divest himself of the said subjects and others, and to convey the same to the pursuer and her heirs and assignees as her and their absolute property, under reservation always of, and without prejudice to, the right of liferent of the defender Mrs Mary Margaret Young or Smeaton, and the right of the defender Thomas Wright Smeaton to the free yearly annuity of £200 out of the said subjects and others in the event of said liferent and annuity, or either of them, still subsisting at the date of such conveyance; (Third) In the event of its being found and declared in terms of the first alternative of the second conclusion above written, to have the defender Thomas Barnby Whitson, as judicial factor foresaid, decerned and ordained forthwith to denude and divest himself of the said subjects and others, and to convey the same to the pursuer and her heirs and assignees as her and their absolute property, under reservation always of, and without prejudice to, certain specified burdens and rights in security.

The pursuer, *inter alia*, pleaded—"(1) The pursuer is entitled to decree of declarator in terms of the first conclusion of the summons, in respect that (1st) she was, prior to the marriage contract referred to, proprietrix of the subjects specially described in said conclusion under and by virtue of the disposition of the said Patrick Burgh-Smeaton, dated 10th April and recorded 4th October 1872, and the decree of special and general service in her favour as heir under said disposition; (2nd) said marriage contract contains no destination of the fee of the said subjects to the children of the marriage, and no other destination of the fee applicable to the contingency which has occurred, namely, the dissolution of the marriage by decree of divorce in the lifetime of the pursuer; (3rd) by virtue of her radical right in the said subjects, the full beneficial interest in the fee thereof, or otherwise the fee itself, is vested in the pursuer, under reservation of and without prejudice to the burdens and rights in security validly affecting the same. (2) In respect

that the whole of said burdens and rights in security can be effectually provided for consistently with a conveyance of the said subjects to the pursuer, the pursuer is entitled to decree of declarator in terms of the first alternative of the second conclusion of the summons, and to decree for denuding in her favour by the defender the judicial factor on the marriage contract trust, in terms of the third conclusion. (3) In any view the pursuer is entitled to decree of declarator in terms of the second alternative of the second conclusion."

The defender Whitson, *inter alia*, pleaded — "The present action should be dismissed with expenses because . . . (3) On a sound construction of the said marriage contract the pursuer is not entitled to decree as concluded for. . . . (5) The present action, at least in so far as it asks that this defender should denude, is premature, and should be dismissed."

The defenders Thomas Wright Burgh-Smeaton and others, *inter alia*, pleaded— " . . . (3) In respect that the fee of the heritable subjects referred to falls to be disposed of under the marriage contract, and that the pursuer has not at present the full beneficial interest therein, the defenders are entitled to decree of absolvitor. . . . (6) In any event the conclusions for a conveyance are premature, in respect that the said estate must continue to be held by the judicial factor for trust purposes."

The *terms of the marriage contract* and the *facts* are given in the opinion (*infra*) of the Lord Ordinary (JOHNSTON), who on 25th February 1907 pronounced this interlocutor —"On a sound construction of the marriage contract between the pursuer and the defender Thomas Wright Burgh-Smeaton mentioned in the summons, Finds (1) that there is provided by said marriage contract to the said defender a liferent and contingent annuity out of the estates of the pursuer vested by her in their marriage-contract trustees, and now in the defender Thomas Barnby Whitson as judicial factor; that said liferent and contingent annuity will determine on the death or second marriage of the said Thomas Wright Burgh-Smeaton, but that meanwhile they are declared to be strictly alimentary: Finds therefore that in any event the trust created by said marriage contract must be kept up until the death or second marriage of the said Thomas Wright Burgh-Smeaton: Finds (2) that there is conferred on the defenders Leila Margaret Mary Burgh-Smeaton and others, children of the marriage between the pursuer and the said defender Thomas Wright Burgh-Smeaton, by necessary implication from the terms of said marriage contract, a contingent fee in said estates, and particularly in the estate of Coul mentioned on record, conditional on the natural lives of their parents, and not affected by the dissolution of their marriage consequent on the divorce of the pursuer: Finds that it is not necessary for the disposal of the present case, and would be premature, to determine absolutely the rights of said Leila Margaret Mary Burgh-Smeaton and others, defenders, in the said estates, at any rate until the death of the first deceaser of their parents, as before that date other interests may emerge: Therefore assoilzies the compearing defenders from the first and third and from the first alternative of the second conclusion of the summons: *Quoad ultra* dismisses the action, and decerns."

Opinion. — "Thomas Wright Smeaton and Elizabeth Margaret Smeaton, only child of the deceased Patrick Burgh-Smeaton of Coul, were married on 30th November 1882, and in view of said marriage Miss Smeaton by antenuptial contract of marriage, dated 27th November 1882, conveyed to trustees her whole heritable and moveable estate then belonging to her or which she might acquire during the subsistence of the marriage, and particularly a fee of her father's estate of Coul, which, under a disposition by him, dated 10th April, and recorded in the Register of Sasines 4th October 1872, stood vested in her mother Mrs Mary Margaret Young or Smeaton in liferent, and was destined to the heir of the marriage between her father and mother in fee. Miss Smeaton made up a title to the fee on her father's death by general and special service in her favour, dated 20th November and recorded in the Register of Sasines 20th December 1882, and therefore her conveyance to the marriage-contract trustees enabled them to make up a feudal title to the fee of the estate, which they accordingly did. The conveyance by Miss Smeaton was subject not only to her mother's liferent but to certain bonds on the estate.

"The spouses on their marriage assumed the name of 'Burgh-Smeaton.' There have been three children born of the marriage, a son and two daughters, one of whom is a minor and the other two pupils. Mrs Burgh-Smeaton was, on 19th December 1902, divorced by her husband for adultery with a certain David M'Clellan, and Mr Burgh-Smeaton and the children of the marriage are now living in Canada.

"Owing to the difficulty of managing the marriage-contract trust, the trustees one by one resigned, and in 1902 Thomas Barnby Whitson, C.A., was appointed judicial factor on the trust estate held under the marriage contract. Mrs Mary Margaret Young or Smeaton, the liferentrix, who still survives, and both Mr and Mrs Burgh-Smeaton themselves being bankrupt, and either sequestrated or under cessio, Mr Whitson as judicial factor found great difficulty in carrying on the trust and preserving the trust estate, which practically consists of the fee of Mrs Burgh-Smeaton's heritable estate of Coul, of which postponed creditors are in possession. Accordingly, in April 1905, he presented a petition for power to make up title to the fee of the estate, and either to sell the same or to borrow thereon. His proposal to sell was opposed by Mrs Burgh-Smeaton. I heard parties on the factor's application for special powers, and believing it in the interest of all concerned that the heritable estate, which was no practical benefit to them in its present involved condition, and

which was evidently fast deteriorating for want of funds to keep it up, should be sold, and that after the debts were paid off the reversion converted into money should be held by the factor as a *surrogatum* for it, I endeavoured to induce the parties to consent to its realisation. But I understand that they have failed to come to any agreement. As there are important questions arising under the marriage contract as to the prospective rights of Mrs Burgh-Smeaton and her children, which required to be cleared up before I could grant the judicial factor the powers of sale which he craved, I limited my interlocutor of 17th July 1905, in the petition process, to power to him to make up a title, and Mrs Burgh-Smeaton has now raised the present action for the purpose of clearing up these questions. When that is done it is possible that the parties may agree to a sale of the estate, which I still think is very much in the interest of them all. But, if not, I shall then be in a position to deal with the remainder of the judicial factor's application. . . .

"The provisions in the marriage contract which raise the questions at issue entirely relate to the disposal of Mrs Burgh-Smeaton's property, and are these:—

"(1st) The trustees are, on the death of the liferentrix Mrs Mary Margaret Young or Smeaton, and during the subsistence of the marriage, to ingather the annual proceeds of the estate, and pay the net amount to Mrs Burgh-Smeaton.

"(3rd) On the dissolution of the marriage by the predecease of Mr Burgh-Smeaton, the trustees are, 'if there be issue of the marriage or children of predeceasing issue alive at said date,' to continue to hold the estate and pay over the net annual proceeds to Mrs Burgh-Smeaton during her lifetime, 'or until the failure of the issue of the marriage, should these all predecease' her.

"(4th) In the same event, that is, on the dissolution of the marriage by the predecease of Mr Burgh-Smeaton, the trustees are, 'if there be no issue of the marriage, or on the failure of such issue by predeceasing' Mrs Burgh-Smeaton, to reconvey the whole heritable estate to her, and to the series of heirs set forth in the destination contained in her father's disposition of 1872, and to hand over to her absolutely the whole moveable estate conveyed by her.

"These are all the provisions providing for the event of Mr Burgh-Smeaton's predecease, and it is clear that there is in that case no direct or express destination of the fee to the children of the marriage.

"Then (5th) on the dissolution of the marriage by the predecease of Mrs Burgh-Smeaton, the trustees are from and after the death of her mother, the liferentrix, and in the event of there being issue of the marriage or children of predeceasing issue alive at that time, to permit Mr Burgh-Smeaton to occupy the mansion-house of Coul, and to pay over to him the net rents and proceeds of the estate, under burden of the maintenance and education of the issue of the marriage or children of predeceasing issue, and that for his life or until the failure of such issue or children of predeceasing issue. And there is a discretion to the trustees to allow Mr Burgh-Smeaton to administer the estate and ingather the rents and proceeds himself, and a declaration that on his entering into a second marriage his rights under this head are *ipso facto* to cease and determine.

"(7th) In the same event, that is, on the dissolution of the marriage by the predecease of Mrs Burgh-Smeaton, but in the event of there being no issue or children of predeceasing issue of the marriage, either then or on the death of her mother, the liferentrix, 'or on the failure of such issue or children of predeceasing issue should these have survived' Mrs Burgh-Smeaton and her mother, the liferentrix, the trustees are to hand over the moveable estate to Mrs Burgh-Smeaton's heirs *in mobilibus*, exclusive of her husband's *jus relicti*, and to convey the heritable estate, under burden of an annuity of £200 to Mr Burgh-Smeaton, to whomsoever Mrs Burgh-Smeaton may direct, and failing such direction, then to the heir entitled to succeed under the destination in her father's disposition. The annuity of £200 to Mr Burgh-Smeaton to commence the first term after the dissolution of the marriage or after the failure of such issue as aforesaid, but to be forfeited on Mr Burgh-Smeaton entering into a second marriage.

"And (8th) on the death or second marriage of Mr Burgh-Smeaton, after having enjoyed the rights conferred on him by the 5th head, the trustees are to hand over the moveable estate to Mrs Burgh-Smeaton's heirs *in mobilibus*, exclusive of her husband's rights as aforesaid, and, failing issue or children of predeceasing issue of the marriage, to convey the heritable estate to whomsoever Mrs Burgh-Smeaton may direct, and failing such direction to the heir in the destination contained in her father's disposition of 1872.

"Now it is also clear that in the second event provided for, viz., the dissolution of the marriage by predecease of Mrs Burgh-Smeaton, there is no express or direct destination of the fee of the estate in favour of the issue of the marriage.

"Lastly, there is an important declaration following all these heads or trust purposes, to the effect 'that the whole provisions contained in favour of the said intended spouses are strictly alimentary, and shall not be affected by their debts or deeds or the diligence of their creditors.'

"Now, in these circumstances, seeing that the marriage has been dissolved by her divorce in 1902, Mrs Burgh-Smeaton, maintaining that there is no destination of the estate to the issue of the marriage, demands an immediate reconveyance to her of the fee by the judicial factor, subject to her husband's rights of liferent or annuity. I do not think that it is necessary to canvass particularly the conclusions of the summons by which this end is sought to be attained. It is sufficient that the above indicates their general object.

"Were it not for the necessity of determining these questions, in order to the

disposal of the petition for the judicial factor to which I have referred, legitimately presented by him as I conceive, I should have been of opinion that it was premature to entertain or dispose of Mrs Burgh-Smeaton's action. But having regard to the circumstances, and seeing that the interests of the issue of the marriage and their children, should any predecease, are sufficiently represented and protected, I think that it is proper to dispose now of the questions raised.

"In the *first* place, there can be no doubt that Mrs Burgh-Smeaton has still a radical right in the estate, in the fee of which she is infeft, subject to the trust title of the judicial factor. And, seeing that her mother is independently infeft in the liferent, were Mrs Burgh-Smeaton's contentions otherwise well founded, the judicial factor would I think have no answer to a demand for a reconveyance.

"But, in the *second* place, whatever may be Mrs Burgh-Smeaton's right in the fee of the estate, she is not entitled during her husband's life and his remaining unmarried to require an immediate reconveyance of the estate. Mr Burgh-Smeaton has an expectant liferent of the estate, reducible in certain circumstances to an annuity out of it of £200, and these provisions in his favour are declared to be strictly alimentary. Even were he a concurring party, which he is not, no combination of parties can defeat the intention of a settlement to render an annuitant's right alimentary. Such intention can only be fulfilled by a continuing trust, and to reconvey to Mrs Burgh-Smeaton, subject to her husband's rights, would be to determine the trust, and leave his rights open to his free disposal, and to the diligence of his creditors—*Hughes* v. *Edwards*, 19 R. (H.L.) 33.

"In the *third* place I think that Mrs Burgh-Smeaton's view of the effect of the dissolution of her marriage by her divorce is not well founded. I think it is clear, upon the authorities, that dissolution of a marriage by divorce is not equivalent, to all intents and purposes, to its dissolution by the death of the offending spouse. The injured spouse is indeed entitled generally to his or her rights, as on the death of the offending spouse, and the offending spouse forfeits, as on his or her predecease, all benefits other than tocher accruing through the marriage. But the rights of third parties, and *inter alios* of the issue of the marriage, or children of predeceasing issue, are not affected. They are neither accelerated nor defeated, and continue to depend on the particular provisions in their favour, legal or conventional, as these depend on the natural lives of their parents. *Harvey's Factor*, 1893, 20 R. 1016; *Smart, &c.* (*Gavin's Trustees*) v. *Dawson, &c.* (*Johnston's Trustees*), 1901, 4 Fr. 278, and 1903, 5 Fr. (H.L.) 24.

"In the *fourth* place, reading the marriage contract in a question with the children, as I think that I am bound to do, as if the marriage were to be dissolved in natural course by the predecease of one or other of their parents, I think that the fee of their mother's estate is impliedly, though not expressly provided to them. And in my opinion, though I am not called on to decide this finally, they take this fee contingently on their surviving their mother, and surviving also the death or second marriage of their father. Therefore, so long as issue of the marriage or children of predeceasing issue survive, the trust must be kept up for the children's contingent interests, and Mrs Burgh-Smeaton is not, irrespective of the alimentary provision in her husband's favour, entitled to a reconveyance of the estate. It has repeatedly been said that implied intention must be ascertainable with sufficient certainty to afford the Court justification for giving effect to it, *e.g.*, *Dolphin's Trustees*, 1888, 15 R. 733; *Bate's Trustees*, 1906, 8 Fr. 861. I think it is so ascertainable in the present case. The third head above referred to is inconsistent with any other view. On Mr Burgh-Smeaton's death there was no conceivable object for tying up the estate any longer in trust during the lifetime of Mrs Burgh-Smeaton, until the failure of issue of the marriage during her life, unless on her death they surviving her were to take. The fourth head is equally so inconsistent. Reconveyance to Mrs Burgh-Smeaton on her husband's predecease is expressly directed, but there is no meaning in postponing it to the failure of issue during her life, unless such issue, surviving her, were to take. Similarly, I think the provisions dependent on the predecease of Mrs Burgh-Smeaton are inconsistent with that lady's contention. For instance, heads 7 and 8 expressly provide in certain circumstances for conveyance of the heritable estate according as Mrs Burgh-Smeaton may direct, and failing such direction to the heir of provision under her father's disposition. But this express direction is contingent on the failure of issue, and children of predeceasing issue of the marriage, should these have survived their mother, and this fact necessarily implies that they are to take in preference to Mrs Burgh-Smeaton's disponee, or to said heir of provision, should they not fail.

"In the *fifth* place I do not think it necessary for me to dispose of the plea raised by Mr Burgh-Smeaton and his children, founded on the Scots Act of 1592, chap. 119. This is not now necessary for their defence to the action; there may be some question as to whether it is relevantly raised, and in any event it could not be disposed of without proof.

"That it may aid in the disposal of the relative petition I shall pronounce findings in assoilzieing from the conclusions of the action. As regards the expenses, as the action was necessary to obtain a judicial interpretation of the marriage contract in the interest of the estate, I think that the estate must bear the expenses of the judicial factor; that Mrs Burgh-Smeaton should be found liable in expenses to her husband and children; and that the compearing defenders Mrs Anderson and others should pay their own expenses, as I cannot see any necessity for their intervention."

The pursuer reclaimed, and argued—

There was in the marriage contract not only no express destination of the fee of the heritage to the children of the marriage, but not even by implication was the fee disposed of. The fee, on the contrary, was still in the truster, the pursuer, for she was only divested in so far as money was directed to be applied, and the conveyance was only a burden on her right—*Higginbotham's Trustees* v. *Higginbotham*, June 23, 1886, 13 R. 1016, 23 S.L.R. 730; *Scott's Trustees* v. *Scott*, June 3, 1902, 10 S.L.T. 122. The pursuer was accordingly entitled to the declarator sought. Had it been intended to give a fee to the children it would have been stated, as was done in the husband's marriage contract. In the cases of *Douglas* (*cit. infra*) and *Campbell* (*cit. infra*) testamentary deeds were under construction. Reference was also made to *Ralph* v. *Carrick*, 1879, L.R., 11 Ch. Div. 873.

Argued for the defenders (respondents)—A gift of fee to the children could be here as clearly implied as in *Douglas* v. *Douglas*, December 21, 1843, 6 D. 318; and *Campbell* v. *Campbell*, December 3, 1852, 15 D. 173. True, in these cases the deeds from which the implication was drawn were testamentary, but even granting that the implication in a marriage contract must be stronger, it had been recognised that in a marriage contract such an implication might be drawn—*Dolphin's Trustees* v. *Baxter*, June 12, 1888, 15 R. 733; *Bate's Trustees* v. *Bate*, June 5, 1906, 8 F. 861, 43 S.L.R. 660. Here the implication was inevitable, for the fee was disposed of in each event subject to there being no issue of the marriage or children of predeceasing issue alive.

At advising—

LORD LOW—I agree substantially with the conclusion at which the Lord Ordinary has arrived, and the reasons upon which he proceeds.

It is not unimportant to remember that the instrument under construction is an antenuptial marriage contract which purports not only to regulate the rights of the parties in regard to their respective estates, but to make provision for the children of the marriage should there any be; and I do not think that anyone could read the contract without coming to the conclusion that the intention of the parties—that to which they had agreed—was that the children of the marriage should have a right to the estate, heritable and moveable, of the wife, at all events if they survived both their parents, or if they survived their mother and the second marriage of their father, which, so far as the right of the children was concerned, was made equivalent to his death. Unfortunately, however, the conveyancer who prepared the contract omitted to insert any express gift of the wife's estate to the children, and the question is whether the implication from the language actually used is sufficiently plain to supply the place of, and be equivalent to, an express gift, to the extent, at least, of disentitling the pursuer to have it declared now that she has the sole right and beneficial interest in the fee of the estate of Coul, and is entitled to dispose thereof.

I am of opinion that that question falls to be answered in the affirmative, and I shall shortly state the reasons which have led me to that conclusion.

The third and fourth purposes of the trusts upon which the wife conveyed her estate to trustees provided for the case of the dissolution of the marriage by the death of the husband. The third purpose provided that upon that event, "if there be issue of the marriage or children of predeceasing issue alive," the trustees should continue to hold the estate and pay the income to the wife during her lifetime, "or until the failure of the issue of the marriage should they all predecease her;" and by the fourth purpose it was provided that in the same event (the predecease of the husband) the trustees should, "if there be no issue of the marriage, or on the failure of such issue by predeceasing the wife, re-convey the whole heritable estate" to the wife and a certain series of heirs, and hand over to her the moveable estate.

Now, the contracting parties must have had some purpose in view in agreeing that the extent and character of the right of the wife to her own estate after the death of her husband should depend on whether there were or were not surviving children of the marriage. They agreed that if, and so long as such children existed, the wife should have only a liferent of her estate; and they agreed that in the event, and only in the event, of there being no issue, or of the issue failing during the wife's lifetime, the trustees should be directed to re-convey the estate to the wife. It seems to me that the Lord Ordinary is right in saying that there was no conceivable object in so limiting the rights of the wife unless the parties intended and had agreed that if the wife was survived by issue her estate should pass to them at her death.

These are the trust purposes in the event of the predecease of the husband, and those applicable to the event of the predecease of the wife are to the following effect:—If issue of the marriage survive the wife the husband is to have a liferent of the whole estate, under burden of the maintenance and education of such issue, until such issue shall fail or until he marries again; if there is no issue, or if the issue fail during the husband's life, his right is restricted to an annuity of £200, and the trustees are directed to hand over the moveable estate to the wife's heirs *in mobilibus*, exclusive of any right on the husband's part, and to convey the heritable estate, under burden of the husband's annuity, to such persons as the wife may direct by settlement or other writing; and failing such direction, to the person entitled to succeed under the destination in a certain disposition: finally, in the event of the husband marrying again his right to the annuity is to cease, and in that event, or in the event of his death, the trustees are directed to hand over the moveable estate to the wife's heirs *in mobilibus*,

exclusive of the husband's rights, and "failing issue of the marriage or children of predeceasing issue," to convey the heritable estate as directed in the event of failure of issue.

The most important of these purposes is the last, which provides for the disposal of the wife's estate upon the second marriage or death of the husband survived by children. In either of these events the moveable estate is to be handed over to the wife's heirs *in mobilibus;* and, of course, children who had survived her, and who also survived the husband, would be among the heirs *in mobilibus* of the former. Whether, however, they would be entitled to the whole moveable estate might depend upon whether other children had predeceased leaving issue, and upon the question whether the expression "heirs *in mobilibus*," as used in the contract, means the person answering to that description at the wife's death or at the husband's death or second marriage.

In regard to the heritable estate, the nominee of the wife, or the heir under the destination referred to, is only given right "failing issue of the marriage, or children of predeceasing issue," and would therefore not be entitled to a conveyance of the estate if issue existed at the death or second marriage of the husband. Here again I can imagine no reason for making the right of the wife's nominee, or of the heir under the old destination, depend upon whether or not there were surviving children of the marriage, unless it was that the parties intended and had agreed that if there were surviving children they should have right to the estate. What precisely are the nature of the rights may be a question; but the implication from the whole trust purposes read together, that surviving children should have a right to the heritable estate which would be preferable to that of the wife's nominee or the heir under the destination, seems to me to be sufficiently plain to make it impossible to give the pursuer the declarator which she seeks. I am inclined to think, however, that it would be premature to do more than to hold that in existing circumstances the pursuer is not entitled to decree, because a change of circumstances—as, for example, the predecease of all the children without issue—might entirely alter her position and rights. It therefore seems to me that instead of assoilzieing from the first conclusion of the summons it would be safer simply to dismiss it. I think, however, that the Lord Ordinary was right to assoilzie from the first alternative of the second conclusion and from the third conclusion, because under them it is sought to have the judicial factor ordained "forthwith" to denude of the estate in the pursuer's favour.

LORD STORMONTH DARLING—I entirely agree with Lord Low and in substance with the Lord Ordinary. I only desire to add two things. First, it is a peculiarity of this case that the pursuer Mrs Burgh-Smeaton seeks, by her first conclusion, to have it declared that she has the sole right of fee in the estate of Coul (which she conveyed to her marriage-contract trustees for the purposes therein set forth) at a time when not only her husband survives and has not married again, but her three children survive, and when the only thing that has occurred to dissolve the marriage has been her divorce for adultery. I agree with the Lord Ordinary that this kind of dissolution of the marriage is not equivalent to its dissolution by the death of the offending spouse, and, in particular, that the rights of third parties, and, *inter alios*, of the issue of the marriage, are not affected thereby. It is true that the pursuer does not now ask for declarator of her right to sell and dispose of her beneficial interest in the fee. But the whole conception of the first conclusion being, at all events, premature, I agree that the best way to deal with it is to dismiss it, and to assoilzie from the first alternative of the second conclusion and from the third conclusion, both of which ask that the judicial factor should "forthwith" denude of the heritage. The second thing which I would add is that in my view the cases cited are all too special to have any application.

LORD JUSTICE-CLERK—I concur with your Lordships. I am satisfied that the conveyance by the wife tied up the estate while issue should be alive, and that given children alive, she could only enjoy a liferent, and I agree with the Lord Ordinary that the purpose evidently was to secure the fee to the children, should they or any of them survive the spouses, or should predeceasing children leave descendants. This, I agree with Lord Low, applied to both classes of estate.

I also agree that the judgment should not go beyond what has been proposed by Lord Low at this stage in the history of this trust.

The result will be to recall the Lord Ordinary's interlocutor, and to substitute dismissal for absolvitor, and *quoad ultra* to adhere.

LORD ARDWALL was absent.

The Court pronounced this interlocutor—

> "The Lords having heard counsel for parties on the reclaiming note against the interlocutor of Lord Johnston, dated 25th February 1907, Recal the said interlocutor in so far as it assoilzies the defenders from the first conclusion of the action, and in lieu thereof dismiss the action in so far as the said first conclusion of the action is concerned, and with this variation adhere to the said interlocutor reclaimed against, and decern."

Counsel for the Pursuer (Reclaimer)—Cooper, K.C.—A. A. Fraser. Agents—Cockburn & Meikle, W.S.

Counsel for the Defenders (Respondents) T. B. Whitson and Others—Clyde, K.C.—W. Thomson. Agents — Drummond & Reid, W.S.

Counsel for the Defenders (Respondents) T. W. Burgh-Smeaton and Others—Clyde, K.C.—Hon. W. Watson. Agents—Hope, Todd, & Kirk, W.S.