*Tuesday, November* 12.

## FIRST DIVISION.

[Lord Skerrington, Ordinary.

## MUIRHEAD'S TRUSTEES *v.* TORRIE.

*Succession—Vesting—Marriage Contract—Heirs—Destination of Wife's Funds on Expiry of Husband's Liferent, and Failing Issue of Marriage, to "her Heirs and Executors whomsoever"—Period at which Heirs to be Ascertained.*

By antenuptial contract of marriage a wife provided that in the event of the marriage being dissolved by her death without leaving issue, or if the issue of the marriage should all die during the lifetime of their father before attaining majority in the case of sons, or before attaining majority or being married in the case of daughters, the trustees should, after the death of her husband, pay over and convey her trust funds to such persons as she should have directed and appointed by any testamentary writing or other deed, and failing such direction and appointment then to "her heirs and executors whomsoever." The wife died without leaving any testamentary writing or deed of direction and appointment. She was survived by her husband and by a daughter, the only child of the marriage, who died in infancy.

*Held* (*dub.* Lord Johnston) that the wife's heirs and executors fell to be ascertained not as at her death but as at the date when the trustees were directed to pay over the trust funds, viz., the death of her husband.

*Gregory's Trustees* v. *Alison*, April 8, 1889, 16 R. (H.L.) 10, 26 S.L.R. 787, *distinguished* and *commented on.*

George Muirhead and others, the trustees acting under the antenuptial contract of marriage, dated 15th and 17th April 1873, between Claud Muirhead, M.D., Edinburgh, and his wife Mrs Janet Jane Jameson Torrie or Muirhead, brought an action of multiplepoinding and exoneration to have questions determined which had arisen with regard to the distribution of Mrs Muirhead's funds, held by them under the marriage trust.

By the antenuptial contract of marriage Mrs Muirhead conveyed her estate to the trustees to be applied by them for, *inter alia*, the following purposes—"(*Second*) If the said Janet Jane Jameson Torrie should predecease her said intended husband that the said trustees shall pay over to him during his lifetime the said income or yearly profits: (*Third*) Upon the death of the longest liver of the spouses that the said trustees shall pay over or convey the said trust funds and property to the child or children to be procreated of the said intended marriage if they shall then have attained majority if a son or sons, or attained majority or be married if a daughter or daughters, and if not, then upon their respectively attaining majority if a son or sons, or attaining majority or being married if a daughter or daughters, and that in such shares or proportions, if there shall be more than one child, as the said spouses shall direct, and failing any such joint direction then in such shares or proportions as the survivor shall appoint, and failing any such appointment then to the said children if more than one equally: Declaring that if any of the said children shall die before his or her share is payable such share shall be payable to the issue, if any, of such deceasing child or children, or failing such issue the same shall accrue to his or her surviving brothers and sisters: And it is hereby provided that after the death of the longest liver of the said spouses the interest or other yearly profits of any presumptive share which shall not at the death of such longest liver have become payable shall be applied by the said trustees for behoof of the child who, if the term of payment had arrived, would be entitled to receive such share: And farther that it shall be in the power of the said trustees (with consent of the said spouses or the survivor of them while they or the survivor are in life) to advance to any child a portion of his or her presumptive share for any purpose which shall be deemed by them to be for the permanent advantage of such child, but any such advance shall be entirely in the discretion of the said trustees and the said spouses or the survivor of them while the spouses or the survivor of them are in life. . . . (*Fifth*) In the event of the said intended marriage being dissolved by the death of the said Janet Jane Jameson Torrie without leaving issue, or if the issue of the marriage shall all die during the lifetime of their father before attaining majority if a son or sons, or before attaining majority or being married if a daughter or daughters, that the said trustees shall after the death of the said Claud Muirhead pay over and convey the trust funds and property or the residue thereof held by them to such person or persons as the said Janet Jane Jameson Torrie shall by any testamentary writing or other deed or instrument executed by her have directed and appointed, and failing such direction and appointment then to her heirs and executors whomsoever."

Mrs Muirhead predeceased her husband, dying on 27th February 1874 without leaving any testamentary writing or deed of direction and appointment. She was survived by a daughter, Janet Catherine Mary Muirhead, the only child of the marriage, who died in infancy on 13th February 1875. Dr Muirhead died on 22nd June 1910, leaving a trust-disposition and settlement whereby he conveyed his estate to trustees.

A claim to the fund *in medio* was lodged by the testamentary trustees of Dr Muirhead.

They pleaded—"The fee of the marriage funds contributed by Mrs Muirhead, not having been disposed of by testamentary writing or appointment, vested on her death in her only child, and the claimants

as in her right are entitled to be ranked and preferred in terms of their claim."

A claim was also lodged by Robert Jameson Torrie and Thomas Jameson Torrie, the sole surviving brothers of Mrs Muirhead, as individuals and also as trustees and universal disponees of their brother Colonel Lawrence Jameson Torrie, who died on 18th January 1909. Their claim was "to be ranked and preferred to the whole fund *in medio* in the following shares, namely, one-third to the claimant Robert Jameson Torrie as an individual, one-third to the claimant Thomas Jameson Torrie as an individual, and one-third to the said Robert Jameson Torrie and Thomas Jameson Torrie as trustees under the trust-disposition and settlement of the deceased Colonel Lawrence Jameson Torrie, or otherwise the claimants Robert Jameson Torrie and Thomas Jameson Torrie as individuals, claim to be ranked and preferred each to one-third share of the fund *in medio*."

They pleaded—"(1) On a sound construction of the said marriage contract the claimants are entitled to be ranked and preferred in terms of one or other alternative of their claim. (2) The said Robert Jameson Torrie, Thomas Jameson Torrie, and the deceased Colonel Lawrence Jameson Torrie, being the heirs and executors of Mrs Muirhead, to whom her estate was destined in the said marriage contract failing issue of the marriage, the claimants should be ranked and preferred to the whole fund *in medio* in terms of the first alternative of their claim. (3) The fund *in medio* having vested on the death of the said Janet Catherine Mary Muirhead in Mrs Muirhead's heirs and executors as at that date, the claimants should be ranked and preferred as craved, in terms of the first alternative of their claim. (4) *Separatim*, the claimants Robert Jameson Torrie and Thomas Jameson Torrie, as individuals, being each entitled to one-third share of the fund *in medio*, ought to be ranked and preferred in terms of the second alternative of their claim."

A separate claim was subsequently lodged for Captain Claud Jameson Torrie and others, the children of the deceased Colonel Lawrence Jameson Torrie. They claimed to be ranked and preferred on the fund *in medio* to the extent of one-third thereof.

On 14th November 1911 the Lord Ordinary (SKERRINGTON) sustained the claim for Dr Muirhead's testamentary trustees.

*Opinion*—"The question in this action of multiplepoinding and exoneration is as to the meaning and effect of a trust purpose or stipulation contained in the antenuptial contract of marriage, dated April 1893, entered into between the late Dr Claud Muirhead and Miss Jameson Torrie afterwards Mrs Muirhead. There is nothing unusual either in the language of the contract or in its substantial provisions. The words to be construed occur in the fifth of the trust purposes relating to the property put in trust by Mrs Muirhead. These funds are said to be wholly moveable and to be now worth about £5600. In the events which have admittedly happened the trustees are now bound to pay and convey the wife's trust funds "to her heirs and executors whomsoever." The various events the concurrence of which brings this direction into force are—(1) The death of Mrs Muirhead before her husband, and his subsequent death. She died in February 1874 and he died in June 1910. (2) The death of the whole issue of the marriage during their father's lifetime before attaining majority or marrying. The only child of the marriage, a daughter, died in infancy in 1875. (3) The failure of Mrs Muirhead to appoint "by any testamentary writing or other deed or instrument executed by her" some person or persons to whom the trust funds should be conveyed. She executed no such writing either *mortis causa* or *inter vivos*. If Mrs Muirhead's "heirs and executors whomsoever" are to be sought for at the time of her death, the beneficial fee of the trust fund vested in her daughter as Mrs Muirhead's heir *in mobilibus*. On the child's death the fee vested in Dr Muirhead as heir *in mobilibus ab intestato* to his daughter, and it now belongs to the claimants George Muirhead and others as Dr Muirhead's testamentary trustees. On the other hand, if the expression "heirs and executors whomsoever" means the persons who would have been entitled to succeed to Mrs Muirhead as her heirs *in mobilibus ab intestato* if she had survived her child, then the parties designated must be sought for either immediately after the child's death in 1875 or alternatively as at the date of distribution in 1910. In either of these latter views the fund would belong to Mrs Muirhead's brothers, the claimants Robert Jameson Torrie and another. These two claimants are Mrs Muirhead's sole surviving brothers, and they also represent a third brother who died in 1909.

"The argument presented by the counsel for the Messrs Torrie was a very able one, but it proceeded upon what seems to me to be a fallacious assumption, viz., that the destination in favour of Mrs Muirhead's "heirs and executors whomsoever" being merely testamentary must be construed in the same way as if it had occurred in an ordinary will. The clause in question is undoubtedly testamentary in respect that it confers no contractual *jus quæsitum* upon the "heirs and executors" (whatever that expression may mean) enforceable by them against the settlor Mrs Muirhead. It is also testamentary in respect that the "heirs and executors" might probably be entitled to confirmation in terms of section 3 of the Executors (Scotland) Act 1900 as executors-nominate *qua* universal disponees of Mrs Muirhead. But the clause is primarily contractual. It forms part of a contract, one term of which compelled Mrs Muirhead to divest herself of the legal estate, possession and control of her whole fortune, both present and future, in favour of trustees. Accordingly it was proper and natural that she should expressly stipulate as to the events on the occurrence of which she or her representatives should be entitled to a retrocession.

"I do not propose either to quote or to state in my own words the purport of the five trust purposes applicable to Mrs Muirhead's fortune. It is enough to say that in my opinion these purposes read as a whole and together show that the children of the marriage were not intended to acquire by contract any vested right to their mother's fortune except conditionally on their surviving both parents and also attaining majority or marrying. If I am right so far, it follows that, notwithstanding the birth of a child of the marriage, Mrs Muirhead retained a vested right to the beneficial fee of her fortune under burden of her husband's contingent liferent and subject to divestiture in the event of a child of the marriage acquiring under the contract a vested right of fee. According to my reading of the marriage contract Mrs Muirhead stipulated by purpose 5 that this vested right should pass to her assignees *inter vivos*, whom failing to her assignees *mortis causa*, whom failing to the persons who would have been entitled to succeed to her if she had died intestate. Such a stipulation seems to me very natural and also germane to a contract of the kind under consideration. It is, in my opinion, irrelevant to say that in the absence of express stipulation the law would have accomplished the same results. Mrs Muirhead was entitled to make her own bargain and to state it in express language. Further, if purposes 4 and 5 had been left to implication it might have been argued that in the events which happened, viz. the birth and survivance of only a single child, purpose 3 conferred upon that child a vested right as at birth subject to defeasance in favour of its own issue, if any.

"For these reasons I do not think that this contract falls to be construed exactly in the same way as if it had been a will, nor do I see any unlikelihood in Mrs Muirhead making a stipulation in favour of her heirs *in mobilibus*. Even, however, if one were to write a will as much as possible on the lines of the contract I am not satisfied that there is any inconsistency between (1) a testamentary gift subject to a suspensive condition in favour of the children of the marriage who might attain majority or marry and survive both parents, and in favour of the issue of predeceasers, on the one hand, and (2) an immediate testamentary gift in favour of the whole children of the marriage who might survive Mrs Muirhead, but subject to a resolutive condition or defeasance in the event of the former gift coming into operation.

"I am of opinion, without reference to authorities, that Dr Muirhead's trustees fall to be preferred. There is, however, authority for the view that expressions such as "heirs and executors" refer *prima facie* to persons answering this description at the date of the death of the *de cujus*. In the present case there is at best conjecture available to impose a secondary meaning upon technical legal language.

"For these reasons, I sustain the claim for Dr Muirhead's trustees, and repel the claim for the Messrs Torrie."

The claimants Robert Jameson Torrie and Thomas Jameson Torrie reclaimed, and argued—Mrs Muirhead's heirs fell to be ascertained as at the death of Dr Muirhead. There was no vesting until that date, and the heirs could not be ascertained until the date of vesting—*Baillie's Trustees* v. *Whiting*, 1910 S.C. 891, at foot of p. 893, 47 S.L.R. 684, at p. 687. Where there were no words of gift except a direction to convey at a certain date, vesting was postponed until that date, and the beneficiary took no vested right unless he survived that date—*Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142, 18 S.L.R. 103, *per* Lord President. In the present case there were no words of gift apart from the direction to "pay over and convey" after the death of Dr Muirhead, and so vesting was postponed until that time. Further, there could be no vesting in the heirs while there was alive a person with a preferable right—*Gardner* v. *Hamblin*, February 28, 1900, 2 F. 679, *per* Lord M'Laren at p. 685, 37 S.L.R. 486, at p. 489. Accordingly there could be no vesting in the child Janet *qua* heir while she was alive, for while she was alive she had a preferable right *qua* child of marriage. Janet therefore never took a vested right *qua* heir, nor did she ever take a right *qua* child of marriage, since she died in infancy before the period of payment. A bequest to heirs could only mean to the persons who existed and possessed the character of heirs at the period of vesting, *i.e.*, when the gift took effect, which in the present case was at Dr Muirhead's death—*Thompson's Trustees* v. *Jamieson*, January 26, 1900, 2 F. 470, *per* Lord Kyllachy, at p. 484, 37 S.L.R. 346, at p. 354. There was no presumption to be founded on any supposed primary meaning of the word "heirs" as the persons bearing that character at the testator's death, as there was none to be founded on any supposed primary meaning of the expression "next-of-kin"—*Johnston's Trustees* v. *Dewar*, 1911 S.C. 722, 48 S.L.R. 582. In no case had funds ever gone to the heirs of a testator where there had not been vesting *a morte testatoris*. It made no difference that the question in the present case arose on the construction of a marriage contract and not of a will—*Barclay's Trustees* v. *Watson*, June 10, 1903, 5 F. 926, *per* Lord M'Laren at p. 931, 40 S.L.R. 693, at 696.

Argued for the claimants Dr Muirhead's testamentary trustees—The funds here were *in bonis* of Mrs Muirhead, and would have been carried by her will if she had left one—*Montgomery's Trustees* v. *Montgomery*, June 27, 1895, 22 R. 824, 32 S.L.R. 628. Under her marriage contract the funds were destined to her heirs, and these heirs must be sought for as at the time of her death. A person's heirs were *prima facie* and in the absence of expressions indicating a different intention those persons whom the law designated as such at the time of his death—*Haldane's Trustees*

v. *Murphy*, December 15, 1881, 9 R. 269, *per* Lord President Inglis, at p. 280, 19 S.L.R. 217, at p. 224; *Gregory's Trustees* v. *Alison*, April 8, 1889, 16 R. (H.L.) 10, *per* Lord Watson, 26 S.L.R. 787; *M'Donald's Trustees* v. *M'Donald*, 1907 S.C. 65, 44 S.L.R. 49. Mrs Muirhead therefore must be understood to refer to the period of her own death for the selection of her heirs, since there was nothing in the terms of the marriage contract to indicate a different intention. At her mother's death the fund *in medio* vested in Janet. She had a double right—(*a*) a contractual right not yet purified, and (*b*) a testamentary right. The cases of *Baillie's Trustees* v. *Whiting* (*cit.*) and *Johnston's Trustees* v. *Dewar* (*cit.*) were distinguishable. In *Baillie's Trustees* there were several destinations over to persons called by designation, and in *Johnston's Trustees* the words used were "next-of-kin" and not "heirs." The present case was very similar to the case of *Gregory's Trustees* v. *Alison* (*cit.*). Reference was also made to the case of *Nimmo* v. *Murray's Trustees*, June 3, 1864, 2 Macph. 1144.

At advising—

LORD KINNEAR—The question in this case depends upon the construction of a clause in the antenuptial contract of marriage between the late Dr Claud Muirhead and Miss Janet Torrie, who became his wife. I must regard it as a question of difficulty, since I have the misfortune to differ from the Lord Ordinary; but having considered it with the anxiety which that difference of opinion produces, I have come for myself to the conclusion that the clause in dispute expresses a perfectly simple and intelligible purpose in sufficiently plain language.

The Lord Ordinary has observed that it is material to consider that this question arises upon the construction of a marriage contract and not of a will. But I do not know that that makes any material difference in the present case. I so far agree with his Lordship—although I do not draw the same inference as he does—that every passage which requires construction must be interpreted with due reference, not merely to its immediate context, but also to the main scope and purpose of the instrument in which it occurs. Now if that be a sound view, the only observation which arises at the outset with reference to the purposes of the deed in question is that the scheme was that each of the spouses should settle funds by antenuptial contract of marriage for the benefit of themselves and of the children of the marriage, and that on the failure of these purposes the funds settled by each should go to the settler, or his or her heirs or representatives, and not to the other spouse and the representatives of that other spouse. That seems to me to be the general scheme; but then I think that does not go very far, and we must determine the true meaning of the actual words used by Mrs Muirhead.

The facts to which we are to apply the provisions of the settlement in question are that the spouses married in 1873, and that the wife died in 1874, survived by the only child of the marriage, who died in infancy on the 13th February 1875. Therefore the wife died, leaving a child, who died in infancy. The husband survived until 1910, and during the period of his survivance the income of the funds settled by his wife was paid to him, according to the provisions of the marriage contract. The question arises now between the testamentary trustees of Dr Muirhead, on the one hand, and the nearest heirs *in mobilibus* of Mrs Muirhead as at the date when Dr Muirhead died, on the other, as to which of these two competing parties is entitled to the funds settled by Mrs Muirhead.

Now I think that depends upon the fourth and fifth purposes of that portion of the marriage contract which contains Mrs Muirhead's settlement, and the true effect of these purposes is to be ascertained by interpreting the words used according to their ordinary and natural meaning. We must therefore consider the meaning of the provisions in the first place, apart from any perplexities which beset the legal conceptions of vesting and the rules of construction which may have been established by previous decisions regarding other deeds.

The first question, and I think the last, is, What do the words in question mean? Now by the third purpose the trustees are directed on the death of the longest liver of the spouses to "pay or convey the said trust funds and property to the child or children to be procreated of the said intended marriage if they shall have attained majority if a son or sons, or attained majority or be married if a daughter or daughters; and, if not, then upon their respectively attaining majority if a son or sons or attaining majority or being married if a daughter or daughters." Now I apprehend that that is quite clearly a conditional gift to the children. There is no direct gift to the children at all, but there is a direction to pay to them in a certain event, and in a certain event only; —if they attain majority or, in the case of daughters, marriage—then the trustees are to pay to them, and so far there is no other gift in their favour at all. Then by the fourth purpose it is declared that in case the marriage should be dissolved by "the death of the said Claud Muirhead without leaving issue, or if the issue of the marriage shall all die during the lifetime of their mother before attaining majority if a son or sons, or before attaining majority or being married if a daughter or daughters, that the said trustees shall pay over and convey the said trust funds and property or the residue thereof held by them to the said Janet Jane Jameson Torrie." After that event the whole money settled by her is to go back to her. Then comes the clause which is applicable to the event which has happened, namely—"In the event of the said intended marriage being dissolved by the death of the said Janet Jane Jameson Torrie without leaving issue, or if the issue

of the marriage shall all die during the lifetime of their father before attaining majority if a son or sons or before attaining majority or being married if a daughter or daughters, that the said trustees shall, after the death of the said Claud Muirhead, pay over and convey the trust funds and property or the residue thereof held by them to such person or persons as the said Janet Jane Jameson Torrie shall by any testamentary writing or other deed or instrument executed by her have directed and appointed, and failing such direction and appointment then to her heirs and executors whomsoever."

Now the whole question is, How are the trustees to carry out that perfectly explicit direction? If the children had survived and attained majority the trustees would have been in a position to convey to them. The children having failed to acquire any interest under the settlement by the death of the only child in infancy, then they are directed on the death of Dr Muirhead to pay over the funds to the heirs and executors of Mrs Muirhead unless she has otherwise disposed of these funds by a last will and testament. The Lord Ordinary has held that under that provision no right under the contract of marriage vested in the children, and I entirely agree with him. I take it to be settled, as the late Lord President said in the case of *Bryson's Trs.* v. *Clark* (8 R. 142), that when nothing is expressed in favour of a beneficiary except a direction to trustees to convey to him on the occurrence of a certain event and not otherwise, and, failing to him, to other persons as conditional institutes, then if he does not survive the period he takes no right under the settlement. But while I refer to the authority of that statement, at the same time I desire rather in this case to consider what, according to the ordinary meaning of language, this provision actually means, and I think it plain enough that it means that the children are to get nothing unless they survive their parents and attain majority, and in case they do not the trustees on Dr Muirhead's death are to pay the funds to the wife's heirs and executors.

But the Lord Ordinary has held that, notwithstanding the marriage contract gives nothing to the children, Dr Muirhead took a right upon his child's death as her heir *in mobilibus*, and that the right which he so took is carried by his testamentary settlement to his trustees. The question therefore is whether the wife meant that in the event which has happened the money was to go to the child's heirs, *i.e.*, to Dr Muirhead and his relatives, or whether it was to go to her own heirs, who must be different persons altogether. Now I take it that upon a plain construction of the words she did not intend that in the event described her money should go to the children's heirs, who would be quite different persons from hers and who would be in no way related to her, because in the event supposed the children's heirs must be the father or other heirs *in mobilibus* claiming through him. I think that such a disposition of the fund was necessarily what Mrs Muirhead intended to prevent, and she directs the trustees, therefore, in that event to pay the fund not to the children but to "my nearest heirs and executors."

It is said—and said quite truly—that in strict language nobody can have more than one heir or one body of heirs, and that is the person or class of persons to whom the succession opens after the death of the deceased. In strict language there is no other heir than that, and therefore it is said that you must inquire only who according to the law of moveable succession would have taken Mrs Muirhead's moveable estate as her heir *in mobilibus*. And the answer is that that must have been the child who died in infancy. But then although that is a perfectly correct statement of law, the word "heirs," as we know in a great variety of cases, is not necessarily so strictly interpreted. I do not think there is any exposition in the institutional writers or by any of the lecturers on conveyancing explaining what is meant by the term "heirs" which does not begin by saying that it is a flexible term and that it means different things according to different circumstances. And therefore I should have no difficulty derived from the strict interpretation of the word to which I have adverted in holding that when the settler in this case spoke of her nearest heirs and executors she meant the persons who might stand in the relation of heirs and executors to her at a particular period, to wit, the period of her husband's death.

I do not think it is necessary to go further for authority for that interpretation than the case of *Gregory* v. *Alison* (16 R. (H.L.) 10), upon which the respondents mainly based their argument, because in that case Lord Watson, in the passage to which our attention was specially directed by the respondents, laid down the canon of construction exactly in accordance with the view which I have indicated. He says, after examining two English cases decided in the House of Lords, that these were not Scotch cases, "but in neither did the judgment of the House proceed upon any speciality of English law, and the canon of construction which they recognise appears to me to be applicable to the language of a Scotch deed which has not acquired technical significance, and falls to be construed according to the intention of the maker." Now the provision that his Lordship was engaged in construing was a direction that in a certain special event the whole funds and estate settled by the husband should "fall to and become the property of his own (*i.e.* the husband's) nearest of kin." Lord Watson says these are not words which have acquired any technical significance, and therefore they must be construed according to the intention of the maker; and then he proceeds to state more specifically what the rule of construction is. He says it "is simply this, that in cases where a testator or settler, in order to define the persons to whom he is making

a gift, employs language commonly descriptive of a class ascertainable at the time of his own death, he must *prima facie*, and in the absence of expressions indicating a different intention, be understood to refer to that period for the selection of the persons whom he means to favour. In my opinion the rule has no other effect than to attribute to the words used their natural and primary meaning, unless that meaning is displaced by the context."

Accordingly we have to consider whether in the clause under construction what Lord Watson has called the primary meaning of the words is or is not displaced by the context. I think, in the first place, we have to consider this—that there is, as I have said, no direct gift to anyone. The gift is made in the form of an express direction to the trustees to pay and make over. Well, they are told to make over to the children if they survive, if not, to the nearest heirs and executors of the wife. I think that is a plain direction to pay to persons alive and capable of taking at the time it is carried out. It cannot mean that the trustees are to pay to the children. The children are dead. And there is no previous gift to the children which would enable the words to be construed as covering a gift to their heirs. The trustees are not told to pay to the heirs of the child. They are told to pay to the heirs and executors of the wife, and I take it that that expression, in the position in which it occurs in the deed, means someone other than the children and the heirs of the children. If you pay to the heirs of the children, then I apprehend the plain purpose of the provision is defeated, the provision being intended to give the money to the wife's relations and not to the relations of the children. I therefore come to the conclusion that the true interpretation of the direction to the trustees is that they are to pay to the persons who at the time when the gift takes effect are the persons who stand in the relation of heirs *in mobilibus* to Mrs Muirhead, and these are the surviving brothers and the children of a deceased brother.

The case of *Gregory* v. *Alison* was, in effect, decided in the opposite way from that in which I consider that this question should be decided; but then that was because the question of construction arose in a different way. In the first place, the conveyance to be construed in that case—a conveyance of the funds and estate belonging to Dr William Gregory—was to be found in a post-nuptial contract of marriage, and the words of conveyance involved a direct gift to children already born and not children *nascituris*. There was a direct conveyance of the estate in liferent to the surviving spouse and in fee to the children of the marriage—and there were children in existence and capable of taking at the time when the contract was executed. Then there followed certain declarations upon which the question in dispute really arose. In the first place, there was a reservation of power to the spouses severally to dispose of their own estate by testamentary writing; and, in the second place, there was a provision that in the event of there being no children alive at the death of "the predeceasing spouse, or dying in the lifetime of the survivor," the estates belonging to the said William Gregory should fall and become the property of his own nearest of kin. Two questions were raised. One was whether the vesting in the children of the marriage, which had undoubtedly taken place, was subject to defeasance owing to the first of these two declarations; and the second was whether it was actually defeated by the second declaration, which provided that in the event therein mentioned the estate should go to the nearest of kin of Dr Gregory. The House of Lords held that it was defeated by neither, but, upon this ground, that there was undoubtedly vesting of the fee in the children, and that there was nothing in either of these clauses inconsistent with that vested right remaining undefeated. The only question which has any bearing upon that which we have to consider in the present case was whether the ultimate gift to the nearest of kin of Dr Gregory was consistent with the idea of vesting having already taken place and still subsisting in the child who was his sole nearest or one of the nearest of kin, and the House of Lords held that it was not. On this point Lord Watson observes—"I can find nothing adverse to that interpretation of the deed (*i.e.*, the interpretation of the deed according to the primary meaning of its language) unless it be the suggestion that it is improbable the spouses should have intended to make a direct conveyance to their children and also to include them in the destination to their 'nearest of kin.' That is a kind of probability which has frequently been put forward without success in cases of this description; and wherever it is, as here, unsupported by the context, it can only afford material for conjecture." But the ground for our construction of the present instrument is of a totally different character. It is not that it is improbable that Mrs Muirhead should have intended to include in the destination of her estate to her nearest "heirs and executors" children to whom she had already given birth. That is not the question. The question is whether she by these words intended to make a new gift to the children, to whom nothing had yet been given in the event which had occurred, and to defeat the gift which she had given to persons expressly in consequence of the failure of such children to survive the period at which they could take. The question is, did she mean when she said, "Pay to the children of the marriage if they survive to attain majority or marriage and not otherwise, and if they do not survive to attain majority or marriage, then pay to my nearest heirs and executors," did she mean by that, "Pay to my children as my heirs and executors just as if they had survived and attained majority," or did she mean, "Pay to the persons who then stand in the relation of

my heirs and executors?" I think that she meant her direction to be understood in the latter sense, and while I agree that the question is one of considerable difficulty, I think this conclusion is the only one which is consistent with the expressed intention of the deed.

I am not, however, able to follow the Lord Ordinary's argument, which is that although there was no vesting in the children under the contract of marriage, the father's trustees nevertheless take through them. His Lordship seems to hold that, although there was nothing given to the children, their heirs *in mobilibus* may nevertheless take in the same way as if the funds had vested in them and been carried by succession to their heirs, because he holds that the right to the fee of Mrs Muirhead's fortune still remained in herself subject to divestiture only in the event of the children of the marriage acquiring a vested right to the fee under the contract. Accordingly he sustains the claim of the respondents based on the view that Mrs Muirhead's estate remained vested in her as if she had executed no marriage contract at all and passed by the ordinary laws of succession on her death. I cannot assent to that view of the case. Of course if it were possible to say that all the trust purposes had lapsed because of there being no one to take under the provisions of the marriage contract, then the radical right of Mrs Muirhead would, no doubt, have survived. But there is no lapsed trust so long as there is any effective direction to the trustees for the benefit of someone other than the truster. Here the truster quite plainly directs her trustees to give to her children in a certain event, and in case that event does not occur then to give to certain other people. The only question, then, that seems to me to arise is, what did she mean by that conditional institution of others? If it is a gift in favour of ascertained or ascertainable persons, then it is a gift which takes effect by her own deed. She divested herself in favour of trustees for the benefit of ascertainable persons; and I cannot see, therefore, that there is any room for the theory that the estate is to be treated as intestate succession of Mrs Muirhead at her death.

I am very sensible of the inconvenience which may be occasioned — and always must be occasioned—by holding, as I do, that the vesting of a right settled by will or by marriage contract is suspended for an indefinite period. But I do not think we have anything to do with the consideration of that question. I do not think that we can ascribe to the settler an intention to make a complete and logical scheme which will in all probable events result in the most convenient disposition of her estate. In my opinion we can only ascribe to her the intention to do what she did, namely, to provide for a certain event in terms which are clear or become clear when the deed is construed; and if there be no difficulty in the application of her language to the event which has occurred, we have no concern with the questions which might have been raised in other events which do not come within the meaning of the words.

On the whole matter, I am prepared to uphold the claim of the Messrs Torrie, but I think the record will require to be amended. It follows from what I have said that I think the persons favoured are the nearest heirs *in mobilibus* of Mrs Muirhead at the time when the direction in their favour takes effect; and therefore I rather imagine there will be no practical difficulty or difference in the working out of that view, because the children of Colonel Lawrence Torrie will take under the law of moveable succession and not under their father's settlement, as would be the case if the heirs were ascertained at an earlier date.

LORD JOHNSTON—I also have experienced great difficulty in coming to a decision in this case, and having had the advantage of reading and considering the opinion to be delivered by my brother Lord Mackenzie, in which your Lordship in the chair intimated to me your concurrence; and fully recognising the weight of the argument on which that opinion proceeds, I should have been prepared to accept your Lordship's judgment. But in respect that that judgment is a reversal of the Lord Ordinary, I feel bound to say that had I been sitting alone I should have come to the same conclusion as his Lordship has done, though perhaps on somewhat different grounds, and that I still have considerable doubt as to the propriety of reversing his decision.

I do not propose to enter in these circumstances at length upon the case. I think that the result of the five heads of Mrs Muirhead's side of the marriage contract is, as stated by the Lord Ordinary, that the children of the marriage took no *jus quæsitum* under the contract in their mother's estate unless they attained majority or, if daughters, married, and unless they survived their last surviving parent. But in the event of that not happening, Mrs Muirhead reserved a right to dispose of her own estate at will, and failing her executing any dispositive deed left it to go to her heirs and executors whomsoever. It may be said that the law of intestacy is not left to operate *ipso jure*, but that it is invoked. But the reclaimers have to maintain something different and perhaps more difficult, viz., not that the law of intestacy is invoked but that there is a substitution, not of the lady's heirs and executors whomsoever, but of those who would have been her heirs and executors had she survived the date of her own death by the space of, as it so happened, thirty-six years. Lord Watson has said in *Gregory's* case (16 R. (H.L.) at p. 14) that it is an accepted rule "That in cases where a testator or settlor in order to define the persons to whom he is making a gift, employs language commonly descriptive of a class ascertainable at the time of his own death, he must *prima facie*, and in the absence of expressions indicating a different

intention, be understood to refer to that period for the selection of the persons whom he means to favour." I doubt extremely whether any such expressions can be found here. Personally I am not aware of any case, though, having regard to Lord Watson's language, I assume they must have occurred, in which, not being concerned with a destination of heritage, they have been found. One case indeed was referred to—*Lord Hawke's* case—*Thomson's Trustees* v. *Jamieson* (2 F. 470)—which, so far as the minority opinion goes, is an exception. But though I think I should myself have concurred in the very weighty opinion of Lord Kyllachy, concurred in by Lord Adam and by your Lordship in the chair, the result—and it must not be forgotten that it is the conclusion of a minority of the Court—is arrived at on consideration of a set of provisions wholly different from the present. And the contrast appears to me to support the view I am inclined to hold in the present case rather than the reverse. I feel that to extract indications of "a different intention" from Mrs Muirhead's provisions goes perilously near making a will for her, merely because the natural result of what she has said is, we are all agreed, not what she would most probably have desired had the present situation of matters been fully before her mind, though I can imagine another set of circumstances in which, could she have been appealed to, she would have greatly regretted that such a conclusion must perforce—for different circumstances raising the same question would not justify a different judgment—have been reached. Had the circumstances been that Miss Muirhead, instead of dying as an infant, survived and married, but though reaching say, even the age of thirty-five, had died childless survived by her husband and father, she would have been debarred on your Lordship's judgment from settling anything on her husband—can we be sure that that result would have been what Mrs Muirhead really intended? My doubts are indeed strengthened by the consideration that the same judgment must, as I have said, fit all circumstances which might have occurred. Here are another set. Mrs Muirhead might have left no child, and her husband have survived her for the same thirty-six years. Her heirs and executors of 1874 presumably would not be, and in fact were not, those she would have left had she survived till 1910. Could it then have been contended that Mrs Muirhead intended by a provision expressed as that in question the disherison of her heirs and executors in the natural acceptation of the term, and the holding up of her estate for the benefit of those who would have been her heirs had she lived as long as her husband. I desiderate expressions which clearly indicate an intention to give a non-natural and unusual meaning to the words used, and not finding them I prefer the natural and usual.

I do not enter into a consideration of the authorities beyond saying that in my opinion the case is wholly distinguishable from *Lord Hawke's* case (*supra*), but that the decision in *Gregory's* case (16 R. (H.L.) 10), which I read somewhat differently from your Lordship in the chair, is much more nearly in point.

It is for these reasons that I entertain the grave doubts which I have ventured to express.

LORD MACKENZIE—The decision of this case depends upon the construction to be put upon the fifth purpose of the marriage contract. The reclaimers say that Mrs Muirhead's heirs and executors whomsoever are to be found as at the date when the marriage-contract trustees are directed to pay over the trust funds. The respondents maintain that the heirs and executors are to be ascertained as at the date of her death.

The view of the Lord Ordinary is that the fifth purpose as it occurs in a contract is not to be construed in the same way as if it had been in a will. In my opinion the duty of the Court in either case is to find out what was meant by the language used. After having made careful provision in the preceding purposes for the issue of the marriage in the events therein contemplated, the fifth purpose provides for the events which did happen, viz.—(1) the dissolution of the marriage by the death of the wife, and (2) the death during the lifetime of the father of the issue of the marriage before attaining majority or being married. It was in contemplation of these events, which have happened, that the further provisions of the fifth purpose were made. These were obviously intended to provide for a situation which had not previously been dealt with. It was on the occurrence of these events that the trustees who held the funds were directed, after the death of the husband, to pay over the trust funds in accordance with the instructions which follow—that is to say, either to such person or persons as the wife should by any testamentary writing or other deed or instrument executed by her have directed and appointed, and failing such directions and appointment then to her heirs and executors whomsoever. We were referred to the case of *Gregory's Trustees*, 16 R. (H.L.) 10, as an authority for the proposition contended for by the respondents, that *prima facie* the term heirs and executors is descriptive of a class to be ascertained on the death of the wife. Lord Watson, however, points out that the general rule applies only in the absence of expressions indicating a different intention. It was argued by the respondents' counsel that to interpret the term heirs and executors as referring to any other period than the death of the wife was to give the words a non-natural meaning. I do not think so. The direction is to pay, after the death of the husband, to the heirs and executors of the wife. The natural meaning of this direction as used in the marriage contract appears to me to be that the word "heirs" means the heirs of the wife at the date when the payment is to

be made. It was argued that the last words of the fifth purpose indicate no intention on the part of the wife other than this, that if the whole of the preceding purposes fail she wished her funds to go as the law directs, *i.e.*, to her heirs *in mobilibus ab intestato*. This is really to ascribe to the words no meaning at all, because without them the same thing would have happened. According to the argument submitted on behalf of the reclaimers, the last words operate as a clause of return to Mrs Muirhead's own family. This I think was what was intended, and I think the language of the clause is sufficient to give effect to the intention. It is not probable that after making careful provision for the various contingencies in relation to the issue of the marriage under which vesting was postponed, it was intended by the last words of the fifth purpose to vest the fee in the issue of the marriage on their mother's death. If the fee of the wife's funds did so vest, then Dr Muirhead would have been entitled immediately on the death of his daughter to have demanded a conveyance of the trust funds and to have terminated the trust. This is contrary to the main provisions of the contract. No doubt Mrs Muirhead might have executed a testamentary writing by which she could have given a vested right to her daughter, but this does not tell against the construction of the clause according to which it was contemplated that the appointment by will should be to some person or persons other than the issue of the marriage. If this is not the true construction it is difficult to see why the power of appointment by will should be expressed to be contingent upon the predecease of the issue of the marriage. There have no doubt been cases in which it has been held that there was vesting in the child of the marriage by virtue of an ulterior destination to the father's next-of-kin. *Gregory's Trustees* was such a case. In that case, however, the postnuptial marriage contract was in different terms. There was no conveyance to trustees, but a direct destination to those entitled to take. The provision there as regarded the whole funds and estate belonging to the husband was that they "shall fall to and become the property of his own next-of-kin. That case, therefore, is not inconsistent with the view I take of the true meaning of the contract here.

As is pointed out by Lord Kyllachy in *Thompson's Trustees* (2 F. 484), there is not any legal anomaly in ascertaining the heirs of a deceased person otherwise than at the time of his death. In such cases as the present the question is not technical, but simply one of intention. I am accordingly unable to agree in the view taken by the Lord Ordinary, and am of opinion that the claim for Robert Jameson Torrie and Thomas Jameson Torrie, which, however, requires amendment, should be sustained. One-third will go to the family of Colonel Lawrence Jameson Torrie as representing their father and thus being heirs *in mobilibus*. They do not take under their father's settlement, as he died in 1909, and therefore predeceased Dr Muirhead, who died in 1910.

The LORD PRESIDENT was absent.

The Court recalled the interlocutor of the Lord Ordinary, repelled the claim for Dr Muirhead's testamentary trustees, and sustained in the second alternative the claim (as amended) for Robert Jameson Torrie and Thomas Jameson Torrie, and also sustained the claim for Captain Claud Jameson Torrie and others.

Counsel for the Pursuers and Real Raisers and for the Claimants (Reclaimers), Robert Jameson Torrie and Others — Macphail, K.C.—R. C. Henderson. Agents—Melville & Lindesay, W.S.

Counsel for the Claimants (Respondents). Dr Muirhead's Testamentary Trustees—Chree, K.C. — Cowan. Agents — Wallace & Guthrie, W.S.

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## HIGH COURT OF JUSTICIARY.

*Thursday, November* 21.

(Before the Lord Justice-Clerk, Lord Dundas and Lord Guthrie.)

### M'INTYRE *v.* M'PHERSON.

*Justiciary Cases — Statutory Offences—Complaint — Relevancy — Glasgow Corporation Tramways Acts—Bye-laws and Regulations Made by Corporation under Powers Conferred by Statute.*

The bye-laws and regulations made by the Lord Provost, Magistrates, and Town Council of Glasgow under the powers conferred by the Glasgow Corporation Tramways Acts 1870 to 1893 provide—"(3) Every passenger shall, upon demand, pay to the conductor, or other duly authorised officer of the Corporation, the legal fare for the journey, as specified in the table of fares exhibited in the car, and a ticket corresponding thereto shall be delivered to such passenger by the conductor, and such passenger shall accept such ticket. . . . (4) (*a*) Every passenger shall show his ticket to any duly authorised officer of the Corporation when required by him so to do. (*b*) Any passenger failing or refusing to accept or to show his ticket as aforesaid shall be required to pay the fare from the place whence the car by which such passenger is conveyed started to the end of his journey, and in default of payment of such fare shall be liable to the penalty prescribed by these bye-laws. (*c*) Any person travelling, or having travelled, in any car, who evades or attempts to evade payment of his fare, or any person who, having paid his fare for a certain distance, knowingly proceeds in any such car beyond that distance without pay-