them as are married consenting and concurring; and there is a curator *ad litem* appointed by the Court to one at least of those children.

The first matter we have to consider is, whether the import and effect of the two deeds I have mentioned were irrevocably to divest the truster of his whole estate, *inter vivos*, or whether the deeds were truly testamentary in character. I entertain no doubt that the latter is the true view. [*His Lordship then proceeded to deal with the first three questions in the case, which are not here reported.*]

The fourth question presents to us three alternatives for solution. The first branch (*a*) asks—Is the second party entitled to a liferent of three-fifths of the undivided trust estate to the effect of postponing any payment of legitim out of the said three-fifths until her death? I am for answering that question in the negative. Mr Jameson referred us to some authority to show that a reasonable provision to a widow may exclude legitim *pro tanto* if in the form of a disposition *inter vivos*. But that cannot be properly affirmed of the instrument here, and I think it sufficient to say that I am not aware of any case, and none has been cited, where the Court have affirmed the doctrine relied upon in relation to a deed which was regarded by the Court as of a purely testamentary character.

Then we come to branch (*b*), and I think it must be also answered in the negative, because I do not see how the trustees can properly encroach, as the question would have us authorise them to do, upon the capital for the benefit of the widow, seeing that until her death no one can tell who that capital belongs to, or who will form the *stirpes* who will then be entitled to it. It follows, therefore, that the third branch (*c*) ought to be answered in the affirmative, namely, that the question must be postponed until the death of the widow.

LORD MACKENZIE and LORD CULLEN concurred.

The Court answered branches (*a*) and (*b*) in the negative, and branch (*c*) in the affirmative.

Counsel for the First Parties—Candlish Henderson. Agents—Scott & Glover, W.S.

Counsel for the Second Party—Jameson. Agents—Hore & Allardyce, W.S.

Counsel for the Third Parties—Mackenzie Stuart. Agent—T. M. Pole, Solicitor.

Friday, July 17.

SECOND DIVISION.

WESTERGAARD *v.* WESTERGAARD.

Jurisdiction—Husband and Wife—Parent and Child—Foreign—Divorce—Petition for Access.

Under a decree of divorce obtained in Denmark, following on a mutual separation of the spouses for three years in virtue of a deed of separation, the husband obtained the custody of the pupil son, and the wife the pupil daughter, of the marriage. Both parties having come temporarily to Scotland, the wife presented a petition for access to her son. *Held* that the Court had no jurisdiction to entertain the petition.

Opinions that where such an application was presented in the interests of the child, the Court would have jurisdiction to intervene if adequate cause were shown.

Mrs Elisabeth Margrethe Friis or Westergaard, residing at 3 Albyn Terrace, Aberdeen, *petitioner*, presented a petition for access to Reginald Westergaard, a pupil child of the marriage between her and Reginald L. A. E. Westergaard, residing at Liberton, Mid-Lothian, *respondent*, for whom answers were lodged.

The following narrative of the *facts* of the case is taken from the opinion of Lord Salvesen:—"The parties to this case are Danes, and although the respondent has been for many years resident in this country, it is not disputed that he retains his domicile of origin. They were married in 1900, and two children, a girl and a boy, were born of the marriage. On 13th September 1909 the parties entered into a deed of separation, which was obviously intended to be the preliminary to a divorce of consent. Under the deed the parties agreed that the petitioner should have the custody of the daughter, and the respondent that of the son; and the respondent agreed to pay her a yearly aliment for herself and daughter. After the lapse of three years without the parties having become reconciled, it is according to Danish law that either may obtain a dissolution of the marriage. Such an application was duly made, and, notwithstanding a protest at the instance of the petitioner, in which, *inter alia*, she urged that as a condition of her husband obtaining divorce she should have access to the boy in his custody, a royal warrant or authority was issued on 4th October 1912 dissolving the marriage. Under this document, which has the effect of a decree of a competent court, the custody of the female child was awarded to the petitioner, and that of the male child to the respondent, in terms of their prior agreement to that effect. It is matter of admission that the rights of parties in the matter of custody and access to the said children are thereby regulated so far as the law of their domicile is concerned, and that neither can obtain access to the child in the other's custody without consent of the parent to whom the

custody was awarded. Whether the courts in Denmark would entertain an application such as the present without an allegation of a change of circumstances we do not know, but it may be assumed that the petitioner does not have much hope of inducing them to do so. The petitioner herself, for the most part, resides in Denmark, but for some six or eight months she has been living in Aberdeen, where, we are told, she is studying for a degree. While in this country she naturally desires to have access to her boy, and before the petition was brought, a long correspondence had taken place between her agent and those of the respondent with the view of her obtaining access under an amicable arrangement. In the end the respondent intimated that he was not prepared in the meantime to allow any access; and while his reasons are not stated, we are not at liberty to assume that they do not appear to him to be adequate."

Argued for the respondent—There was no jurisdiction to intervene. Jurisdiction in questions of custody and access was founded on domicile, and mere residence would not suffice. If there was jurisdiction the plea of *forum non conveniens* applied, and the discretion of the Court should not be exercised in the circumstances of the case. The Court would not review a final judgment of divorce—*Beedie* v. *Beedie*, March 20, 1889, 16 R. 648, 26 S.L.R. 443. The Court might alter it in the interest of the child, if there had been a change of circumstances from the point of view of parent and child. This, however, did not entitle them to interfere in the interests of the mother in a question between husband and wife. The present question was ruled by the case of *Barkworth* v. *Barkworth*, 1913 S.C. 759, 50 S.L.R. 504. The Danish agreement could not be regarded as *contra bonos mores* or repugnant to Scots law. The Guardianship of Infants Act (49 and 50 Vict. cap. 27), founded on by the petitioner, did not apply where the Court was not a Court of competent jurisdiction, and in any event left open the question of discretion.

Argued for the petitioner—The Danish law was absolutely repugnant to Scots law on the question raised in the petition, and where it was so repugnant the Scots Courts would not regard it. In this respect Scots law was the same as English law—*Vansittart* v. *Vansittart*, 1858, 4 K. & J. 62; Addison on Contracts (11th ed.), p. 77. The parties here were virtually in the position of having agreed never to see their children, and this was a contract the Court would not enforce—*Hamilton* v. *Hector*, L.R., 6 Ch. 701; *De Manneville* v. *De Manneville*, 1804, 10 Vesey 52, at p. 58, *per* L.C. (Lord Eldon); *Johnstone* v. *Beattie*, 1843, 10 Cl. & Fin. 42; *Stuart* v. *Marquis of Bute*, 1861, 9 H.L.C. 440; *M'Iver* v. *M'Iver*, July 2, 1859, 21 D. 1103. The *onus* was on the respondent to show that the Court was entitled to refuse the application, and there was no authority to show that the Court would not regulate the relations of foreigners who came to this country even temporarily—Dicey, Conflict of Laws (2nd ed.), rule 131. The fact that the Danish decree barred the petitioner from getting a remedy in Denmark did not bar her from getting a remedy here. The inalienable right of the mother, recognised by Scots law, and supported by the fact that the petitioner in the present case was not in any respect in fault, was also supported by the interest of the child, which would not be consulted by refusal of all access — Guardianship of Infants Act 1886 (*cit.*), preamble, and secs. 5 and 9, *cit. sup.* This Act was not limited by considerations of domicile or nationality, but was based on residence. In the case of *Barkworth* v. *Barkworth*, founded on by the respondent, that Act was not cited, and no other authority was quoted.

LORD JUSTICE-CLERK—The petitioner and the respondent in the present proceedings are Danes, and their relations are at present regulated by a judgment given by the King of Denmark under advice of his Minister of Justice, and this judgment is equivalent in its authority to a judgment of the Supreme Court in the case of Scottish litigants. The parties having disagreed, they separated under a deed of separation and remained separate for three years. No reconciliation being effected, and the respondent desiring divorce, his claim under Danish law to obtain it was effectual, and accordingly judgment of divorce was given.

The deed of separation contained the following clause regarding the two children of the marriage—"We have settled that of our two common children, Elizabeth Westergaard and Reginald Erik Westergaard, the mother shall keep the daughter and the father the son, and that the parents' power over the daughter shall belong to the mother and the father shall have the parents' power over the son." This clause was imported into the decree of divorce, a proposal by the petitioner for a modification of its terms having been refused. Accordingly the position of the parties as regards the children is as expressed in the above quotation.

The petitioner now desires that this Court should, contrary to the terms of the Danish decree, pronounce a finding in this petition giving her free access to her son at such times as this Court may consider reasonable. I am of opinion that we cannot do what the petitioner asks. We have no power to review or alter what has been judicially done in Denmark. As long as no action is taken by the respondent which is contrary to that judgment we have no jurisdiction to interfere. We may be called on to assist to make the decree of a foreign court effectual against a party resident in this country, but we cannot be called upon to review it, or to give to any person authority to do what is contrary to its terms. In other words, we can aid the enforcement of the foreign decree, but we cannot set it aside or authorise anyone who is under its order to act contrary to it. If, for example, a person in the position of the respondent here were to take his daughter from the custody of the mother, who has that custody by lawful judgment obtained in Denmark, I do not doubt that we would have the

power to interpose and give aid to the carrying out of the Danish judgment, following on the agreement of parties.

The position of the matter is either that the judgment in Denmark is not final, in which case the Danish tribunal would be the proper place in which to apply for an order altering it, or that the judgment is final, in which case no foreign court can have any right to interfere. It is of course certain that if a judgment in any court of another country violates the moral code that obtains in this country, the Court here might refuse to assist in making it effectual. But whatever duty the Court may have in such a case when it arises, it is certain that there is no such case here. The divorce law in Denmark may be different from our own as regards what is necessary to justify divorce, and its consequences as regards custody of and access to children, but it cannot be said that there is anything in it which can, in the legal sense, be declared *contra bonos mores* and be treated in our Courts as a nullity.

I would only add that the opinion I have expressed does not involve the exclusion of the jurisdiction of this Court if an application were brought before it based on some special ground relating to the way in which the child was being treated by the spouse in whose custody it was. The Court might in such a case be entitled to intervene to prevent injury, physical or moral, to the child, but there is no such case here, for the petitioner does not allege anything against the conduct of the respondent in regard to the child.

On these grounds I am of opinion that this petition cannot be entertained, and would move your Lordships accordingly.

LORD SALVESEN—[*After the foregoing narrative of the facts of the case*]—The respondent asked us to dismiss the application on the ground that the Court has no jurisdiction to entertain it, and he referred to the case of *Barkworth*, 1913, S.C. 739. I do not think that in that case it was held that the jurisdiction of this Court is absolutely excluded with regard to a parent's custody of or access to a child where the application is presented in the interest of the child. This Court, I apprehend, has the power to protect the children of foreign parents who are resident here, and no doubt will intervene if adequate cause be shown. The present application is, however, presented primarily in the interests of the mother, and it is only remotely, if at all, that the interests of the child are affected. He was only three years of age when by agreement between the parties the respondent became his exclusive custodier, and it may be assumed he has no recollection of the petitioner or of his own sister, neither of whom he has seen for five years.

The petitioner's desire to see her son is natural and legitimate, but in the circumstances of this case I am afraid we cannot give effect to it. In the case of *Barkworth*, although the marriage had not been dissolved but where the spouses were living apart, the Court declined to entertain a petition at the instance of the wife for access to her children, who were living with their father in Scotland, where he had a permanent residence. The reason of the decision was that he was a domiciled Englishman; and that just as the Courts in England were alone competent to decree separation or divorce, so they were the proper forum in which to adjudicate on matters of custody and access to the children of the marriage. Lord Dunedin indicated that this Court would lend its aid to executing the decree of an English Court by which custody or access was regulated, and I apprehend it follows that if a Court in England had given the sole custody of a child to one parent without right of access to the other, we would not interfere or examine the grounds upon which the order had been pronounced. The present case appears to me to be *a fortiori*. The parties here have obtained a divorce in Denmark, which, although granted upon grounds which are not recognised in our jurisprudence, we are bound to treat as valid. How then can we refuse to give effect to the order which, incidentally to the dissolution of the marriage, has settled the rights of the spouses in the children of the marriage? It is true that where no moral fault can be imputed to either parent, our Courts are not in the habit of giving the custody of the child to the one without allowing access to the other, as we consider that in the general case the interests of the child require that it shall know both its parents. This does not appear to be the view upon which the Danish Courts act, although it may be assumed that the interests of the children, as well as those of the parents, are considered by them in any order for custody which they pronounce. It is open to question whether the interests of a child whose parents have been divorced, especially when one of them has remarried, are best served by constantly keeping before its mind the fact that it has two parents who have now become permanently estranged. Be this as it may, it appears to me out of the question for us to add to the rights which the petitioner has obtained from the Courts of her own domicile certain rights derived from our own law which were abandoned by her in the very contract on which the dissolution of her marriage proceeded. The civil rights of the spouses have been adjudicated on in the country to which they owe allegiance, and by the Courts which alone were competent to regulate their status. I am therefore of opinion, with your Lordship, that we must refuse the petition.

LORD GUTHRIE—I concur. Even if we had been willing to entertain this petition on its merits it would not have been possible without inquiry to determine the merits of the unfortunate dispute between Dr Westergaard and Mrs Westergaard as to the access desired by Mrs Westergaard to her son, now in his father's custody. But I am free to say that in deciding against Mrs Westergaard's petition on grounds not involving the merits of the dispute between her and Dr Westergaard, I am by no means

unsympathetic with her natural desire to keep in touch with her son, and to secure the maintenance of affectionate relations between the two children of the now dissolved marriage. At the same time I do not ignore the fact that Dr Westergaard, as appears from the correspondence laid before us, while he denies Mrs Westergaard's legal right to obtain access to her son, does not fail to recognise his obligation, if not from the point of view of morals at least from that of humanity and good feeling, to afford such access. In such circumstances it is regrettable that the parties should not have left the adjustment of terms of access in the hands of some mutual friend. I have a strong impression that if Dr Westergaard could now see his way to accept the offer made by the petitioner at the bar, namely, to leave the adjustment of terms and conditions to the senior counsel of the parties, such adjustments to embrace what raises the same question, Dr Westergaard's access to his daughter, all occasion for further friction would be happily ended.

The respondent pointed out that no averment is made by the petitioner against him as a fit custodier of her son. In her petition she claims that "access ought to be granted to her in respect of her natural rights as his mother." It was not disputed that, if it were relevantly averred that the interests of the child demanded either a change of custody or an arrangement for access, the Court would have power to interfere in order thus to safeguard and secure the child's interests. I think the respondent is right in his contention that no relevant case is averred for interference in order to preserve the child's interests. But Mr Constable maintained that by the law of Scotland the only case in which an innocent parent, whether native or foreign, if resident in Scotland, will be refused access to his or her legitimate pupil child is where it is proved, to the satisfaction of the Court, by the other parent or other interested person, that such refusal is necessary in the interests of the child. As a general proposition this was not disputed. But the circumstances here are so special as to make the ordinary rule inapplicable. It appears to me, as the result of the whole papers in the proceedings in the Danish Courts, that the parties agreed to abide by the decision of the Danish Courts not only in the matter of divorce but in all questions incident thereto, including questions of custody and access. It is noticeable that in the protest lodged by the petitioner in the Danish Court the question of access was raised for decision by that Court, although even according to that protest the terms of access were left to be adjusted by the parties without any provision as to what was to happen if the parties failed to agree. Now it appears that the Danish Court will give effect to such an arrangement and will not decree access in such a case to the innocent spouse. It was argued that such an arrangement would not be held binding in Scotland. It does not appear to me that any of the cases quoted establish the petitioner's contention on this point. They were cases in which the marriage stood undissolved, and in which, moreover, there was nothing of the nature of a mutual arrangement relating to more than one child. I may add that, in my view, no question of a private agreement between spouses, or of a decree of Court following on such an agreement, involving an arrangement which is *contra bonos mores*, arises in this case. Our law may not countenance such arrangements or even allow them, but I see nothing in its nature immoral in spouses agreeing that in the event of separation, temporary or final, the husband shall obtain exclusive charge of the boys and the wife exclusive charge of the girls of the marriage.

LORD DUNDAS was sitting in the Extra Division.

The Court dismissed the petition.

Counsel for the Petitioner—Constable, K.C.—Wilton. Agents—Davidson & Syme, W.S.

Counsel for the Respondent—C. D. Murray, K.C.—A. M. Mackay. Agents—J. & R. A. Robertson, W.S.

Saturday, July 18.

SECOND DIVISION.

[Lord Skerrington, Ordinary.

MANSFIELD *v.* PARKER AND ANOTHER.

Fishings—Salmon Fishings—White Fishing—Fixed Nets in Solway—Paidle Nets without Covers.

Circumstances in which *held* (*rev.* judgment of Lord Skerrington, Ordinary), in an action of interdict by the proprietors of salmon fishings against certain members of the public engaged in white fishing in the Solway, that paidle nets though uncovered were so placed and of such a description as to be fitted to catch salmon, not as a mere incident of white fishing, but as a substantial and valuable portion of the total catch, and that it was not necessary for the complainers to prove direct injury to their salmon fishings, and interdict *granted* against the use of such nets.

The Earl of Mansfield and William Dalziel Mackenzie of Newbie in the county of Dumfries, *complainers*, brought a note of suspension and interdict against John Fisher, Craigwood, Glencaple, James Parker, Bankend, and Joseph Douglas, Wardlawmains, Dumfriesshire, *respondents*, in which they craved the Court to "interdict, prohibit, and discharge the said respondents from erecting and using stake nets, paidle nets, or other fixed engines for the purpose of capturing salmon or fish of the salmon kind, or fitted to capture salmon or fish of the salmon kind, or of such size and construction, or in such situations, or used in such manner and at such times as to pre-