It is true that by Lloyd's regulations makers of iron plates are bound to stamp them with their names, and if this stamp had any relation to marketable quality it might have afforded some colour to the plea. But it is certain that the rule has no such object. It is introduced for an entirely different purpose—to give the means of tracing imperfect plates—and is in no respect a test of quality in the market.

The clause concerning strikes seems to have no bearing on this question. It was a clause in favour of either party, to take effect while their respective workmen might be on strike. The sellers were not to be obliged to provide themselves otherwise, if their workmen prevented them by a strike from manufacturing for themselves, nor were the buyers to be obliged to take delivery when the strike of their workmen suspended their power of turning the iron plates to profit. But if in such a case the buyers still elected to take delivery notwithstanding that their workmen were on strike, the sellers were not liberated from their obligation, and so here, although it is of course a loss to the sellers to provide themselves from without—and they are not bound to do so—the buyers remain under the contract, and are obliged to accept what is tendered in conformity with its terms.

The Court recalled the Lord Ordinary's interlocutor, and decerned in terms of the conclusions of the summons, with expenses.

Counsel for Pursuers—Solicitor-General (Balfour) — Jameson. Agents — Millar, Robson, & Innes, S.S.C.

Counsel for Defenders — Kinnear — Gillespie. Agents—J. & J. Ross, W.S.

Wednesday, July 7.

SECOND DIVISION.

WARDLAW'S TRUSTEES *v.* WARDLAW AND OTHERS.

Husband and Wife—Marriage-Contract Provisions—Liferent and Fee—Vesting in Children of Marriage.

In an antenuptial contract of marriage the funds provided by the wife were conveyed to trustees in trust for behoof of the spouses "in conjunct fee and liferent, and for the liferent use allenarly" of the husband, and for the use and behoof of the children to be procreated betwixt them in fee. A power of apportionment among the children was given to the father, and a power conferred upon the trustees to pay or make over to the wife "such part or portion of the said funds and estate, heritable and moveable, as they shall think fit, on application made by her to that effect, to be used and disposed of by her as her own proper funds and estate." The marriage was dissolved by the predecease of the husband. *Held* that the estate vested in the children of the marriage as at the date of the dissolution thereof, and that the representatives of a child who survived his father but predeceased his mother were entitled to participate in the division of the fund.

Succession—Heritable and Moveable—Conversion.

Held (*rev.* Lord Ordinary, and *diss.* Lord Gifford) that the vested right of the children as a *jus crediti* under the marriage-contract was personal and moveable, and that its character could not be affected, so as to determine the course of transmission of that right in the case of a child who predeceased the period of division intestate, by the nature of the estate actually found in the hands of the trustees at the period of vesting or of division.

By contract of marriage between William Wardlaw and Margaret Richardson, dated 11th November 1822 and recorded 23d September 1870, Mr Wardlaw bound himself, his heirs, executors, and successors, "to provide the one-half of the whole lands, heritages, sums of money, and other funds that he shall happen to conquest and acquire during the present intended marriage to the foresaid Margaret Richardson, his promised spouse, in liferent for her liferent use allenarly, in case she shall happen to survive him, and to the children, one or more, to be procreated of this marriage in fee, and that by vesting the same in the persons of the trustees after named, and in the terms and for the ends, uses, and purposes after specified; and for ascertaining the extent of the said conquest, it is hereby agreed that the same shall comprehend and extend to all and whatever estate, heritable and moveable, belonging or owing to the said William Wardlaw at the dissolution of the marriage, whether the same has accresced by purchase, donation, or succession, after deduction of the debts due by him." He also provided his household furniture to his intended spouse in case she should survive him, and that provision was accepted by her in full of her legal claims. Mrs Richardson on her part disponed, assigned, conveyed, and made over to and in favour of certain trustees, "but in trust for behoof of the said William Wardlaw and Margaret Richardson in conjunct fee and liferent, for the liferent use allenarly of the said William Wardlaw, and exclusive of the *jus mariti* or right of administration of the said William Wardlaw, and for the use and behoof of the children to be procreated betwixt the said William Wardlaw and Margaret Richardson in fee, and that in such proportions as the said William Wardlaw shall appoint by a writing under his hand, which failing, equally among them, the said children, share and share alike, all and sundry whatsoever lands, heritages, sums of money, and other funds or effects, heritable or moveable, presently owing and belonging, or which she the said Margaret Richardson may succeed to or acquire in any manner of way, and particularly, without prejudice to the said generality, the sum of £900 sterling presently owing and belonging to her in her own proper right, with the interest due thereon; and the said William Wardlaw hereby renounces his *jus mariti*, and all right or power of administration whatever competent to him in or to the said estate, funds, and succession in any way whatever; and it is hereby declared that it shall be in the power of the said trustees, or major number of them allenarly, and of no other person whatever, to pay or make over to the said Margaret Richardson such part or portion of the said funds and estate, heritable and moveable, as they shall think fit, on applica-

tion made by her to that effect, to be used and disposed of by her as her own proper funds and estate; and it is hereby declared that her receipt or discharge without the consent of the said William Wardlaw shall be a good and sufficient receipt and exoneration for the same; declaring further, that in regard the said Margaret Richardson has already made and concluded a bargain for the purchase of certain parts of that tenement in George Street lately erected by Alexander Broom, mason in Glasgow, but of which the titles have not yet been executed and delivered, it is specially understood that the said trustees are to vest and shall vest the foresaid sum of £900 sterling, specially hereinbefore assigned, in or towards payment of the said subjects so purchased by the said Margaret Richardson, and shall take the titles thereof in favour of themselves and their foresaids as trustees for behoof of the said Margaret Richardson and William Wardlaw, in conjunct fee and liferent, for the liferent use allenarly of the said William Wardlaw, in case he shall survive her, and exclusive of his *jus mariti* or administration as before expressed, and for behoof of the child or children to be procreated of the said intended marriage, in the terms aforesaid; whom failing, for and on behoof of Agnes Elizabeth Jane Anne and Carswella Richardson, sisters of the said Margaret Richardson, and the survivors or survivor of them, equally, share and share alike, in fee; and which titles of the subjects, parts of the tenement in George Street above mentioned, shall further provide that in the event of the said Agnes Elizabeth Jane Anne and Carswella Richardson, they or any of them, succeeding to the said subjects, they shall be bound to pay, and the said subjects shall be disponed and conveyed to them under the burden of paying, to the next in kin of the said William Wardlaw the sum of £360 sterling, being that part of the price of said subjects which the foresaid sum specially assigned falls short of paying such part of the said sum of £360 as shall have been paid by the said William Wardlaw, either during the existence of the present intended marriage or after the dissolution thereof; payable the said sum of £360, or such part thereof as shall have been paid by the said William Wardlaw as aforesaid, at the first term of Martinmas or Whitsunday which shall happen twelve months after the decease of the last liver of the said William Wardlaw and Margaret Richardson, with the lawful interest thereof from the said term of payment thereof until paid, together with one-fifth part further of said principal sum of penalty in case of failure: And it is hereby further provided that it shall be lawful to and in the power of the said trustees, when called on by the said Margaret Richardson, and after her death when called on by the said William Wardlaw, so to do, to sell and dispone and lend call up from time to time any part of the sums, subjects, or estate now or hereafter to be vested in them; but they, the said trustees and their foresaids, shall be bound and obliged again to lay out, invest, settle, and secure the same on the terms above expressed."

There were eight children of the marriage, which was dissolved by the death of Mr Wardlaw on 14th April 1863. He was survived by four of the children of the marriage, David Russell Wardlaw, Robert Richardson Wardlaw, Agnes Wardlaw, and Margaret Wardlaw. He left moveable estate to the value of £1327, 1s. 3d., and heritable estate, consisting in part of a share of a house in Glasgow, of which the other parts belonged to Mrs Wardlaw, to the value of £1809, 10s. 8d. He left a trust-disposition and settlement by which he conveyed his whole estate to trustees, directing them, *inter alia*, to implement the obligation in favour of his widow which he had undertaken in his marriage-contract, and to give his widow a liferent of his estate. He then directed them—"*Quarto*, I direct my said trustees, after the death of my said wife, to divide the whole free residue and remainder of my subjects and estate hereby conveyed, equally to and amongst my whole children surviving at the time of my death, and the issue of such of them as may have died leaving lawful issue surviving at the time of my death, such issue succeeding equally *per stirpes* in the room and place of their deceasing parent; and failing any of my said children by death without leaving lawful heirs of their own bodies, and without having drawn their proportion, or being of lawful age without having legally and competently assigned the same or settled the succession thereto, then the share of such deceaser shall go equally to the survivors or survivor of them, my said children, and the issue of any of such of them as may have died leaving lawful issue surviving at the time of my death, such issue succeeding *per stirpes* in the room and place of the deceasing parent; payable my said children's shares to them on the sons respectively attaining the age of twenty-five years complete, and to the daughters on their respectively attaining that age or being married, whichever of these events shall first happen."

David Russell Wardlaw, one of the surviving sons, died unmarried and intestate in 1870, and his sisters Agnes and Margaret were decerned executors-dative to him. The other son Robert Richardson Wardlaw died at Melbourne in 1873, leaving a widow and children. He left a last will and testament by which he gave his whole estate to trustees for the benefit of his widow and children.

Mrs Wardlaw died on 11th May 1879. The total amount of her estate falling under the contract was £6139, 18s. 2d. The whole amount in the trustees' hands was thus £9276, 10s. 1d.

On the death of Mrs Wardlaw the trustees raised this action of multiplepoinding and declaration for the purpose of having settled certain questions which had arisen as to the period of vesting of the provisions under the marriage-contract, and as to whether or not the share of heritable estate falling to David Russell Wardlaw was constructively converted under the marriage-contract and Mr Wardlaw's trust-deed or either of them.

The claimants who appeared were the children and the representatives of the children of Mr and Mrs Wardlaw, and their various claims depended on the period at which the funds should be held to have vested, and on the nature of the estate, *i.e.*, whether it should be heritable or moveable.

The nature of these questions and the pleas of parties are apparent from the note of the Lord Ordinary (CURRIEHILL) quoted below.

On 18th March 1880 the Lord Ordinary issued this interlocutor—"The Lord Ordinary having con-

sidered the cause, Finds (1) That according to the sound construction of the marriage-contract between Mr and Mrs Wardlaw, and of the trust-disposition and settlement and codicil by Mr Wardlaw, mentioned in the record, the provisions thereby made by Mr and Mrs Wardlaw, and each of them, in favour of the children of the marriage, did not vest in said children at birth, but vested at the death of Mr Wardlaw in each of the four children of the marriage then in life, viz., David Russell Wardlaw, Robert Richardson Wardlaw, Agnes Wardlaw, and Margaret Wardlaw in equal shares, and that the shares which so vested in David Russell Wardlaw and Robert Richardson Wardlaw, both of whom are now deceased, now belong to their respective representatives: Finds (2) That according to the sound construction of the said deeds, conversion of the heritable estates belonging to Mr and Mrs Wardlaw into cash for distribution was not directed or intended to be directed, and that such conversion was not in the circumstances necessary for the proper division of said estates: Finds (3) That the shares of the whole estates of both parents falling to the said children who survived their father consisted partly of moveable and partly of heritable estate: Finds (4) That the share of David Russell Wardlaw, who died intestate, belongs, in so far as consisting of moveable estate, to his next-of-kin, and in so far as consisting of heritable estate, to his heir-at-law: Finds (5) That the share of Robert Richardson Wardlaw was transmitted by his trust-settlement, and now belongs to his testamentary trustees."

His Lordship added this note:—

"*Note.*—The raisers of this action of multiplepoinding are the trustees under (1) antenuptial contract of marriage, dated 11th November 1822, entered into between William Wardlaw and Mrs Margaret Richardson or Wardlaw, his wife, both now deceased; and (2) trust-disposition and settlement by the said William Wardlaw, and codicil thereto, dated respectively 30th April 1849 and 9th March 1852. William Wardlaw died on 14th April 1863 and Mrs Wardlaw on 11th May 1879. Eight children were born of the marriage, of whom four predeceased Mr Wardlaw unmarried and without issue. Two, viz., David Russell Wardlaw and Robert Richardson Wardlaw, survived their father but predeceased their mother. David died unmarried and intestate; Robert left several children and a settlement in favour of trustees, conveying to them, *inter alia*, all his interest under the marriage-contract of his parents and under his father's trust-settlement. The two children of the marriage who still survive are the defenders Miss Agnes Wardlaw and Miss Margaret Wardlaw, both of whom are above the age of twenty-five years.

"No questions arise as to the rights of parties claiming under the settlement of William Wardlaw, which regulates the succession to the one-half of his estate not settled by the marriage-contract, and which directs the division to be in equal shares among his children surviving at the time of his death, and their issue *per stirpes*. The dispute relates to (1) the half of Mr Wardlaw's estate settled by the marriage-contract, and (2) the whole estate of Mrs Wardlaw, which also was settled by that deed.

[*His Lordship then quoted the clauses of the marriage-contract as above.*]

"As regards the provision of conquest made by Mr Wardlaw in his part of the contract, the representatives of the four children who predeceased their father maintain that a share of the estate vested in each child at birth. The representatives of the children who survived their father but predeceased their mother maintain that vesting took place at the dissolution of the marriage in 1863 by the death of Mr Wardlaw, while the children who still survive maintain that no vesting took place until the death of Mrs Wardlaw. It appears to me that according to the sound construction of this part of the contract no right to the conquest vested in any child who predeceased Mr Wardlaw, but that at the date of his death the provision vested in the four children then alive, none of the predeceasers having left issue. A provision of conquest in an antenuptial contract, the amount and indeed the very existence of which depends upon the state of the father's funds at his death, confers upon the children, not an immediate right of fee, but only a protected hope of succession during the father's life, and no right vests in any child of the marriage until the death of the father. (Ersk. iii, 8, sec. 43; *Seymour* v. *Lamb*, 8 Macph. 928; *Grant's Trustees*, 4 Macph. 336; and *Champion* v. *Duncan*, November 9, 1867, 6 Macph. 618.) And, accordingly, Mr Wardlaw by his trust-disposition and settlement, and in pursuance of his obligations in the marriage-contract to vest the conquest in the persons of the trustees who were to administer his wife's estate, and for the like purpose, conveyed to the trustees the *universitas* of his estate, to be held by them for payment of his debts and for implement of his marriage-contract obligations in favour of his wife, directing them 'after the death of my said wife to divide the whole free residue and remainder of my subjects and estate hereby conveyed equally to and amongst my whole children surviving at the time of my death, and the issue of such of them as may have died leaving lawful issue surviving at the time of my death, such issue succeeding equally *per stirpes* in the room and place of their deceasing parent, and failing any of my said children by death without leaving lawful heirs of their own bodies, and without having drawn their proportion or being of lawful age, without having legally and competently assigned the same or settled the succession thereto, then the share of such deceaser shall go equally to the survivors or survivor of them my said children, and the issue of any of such of them as may have died leaving lawful issue surviving at the time of my death, such issue succeeding *per stirpes* in the room and place of their deceasing parent.'

"Now, it is plain that Mr Wardlaw intended the *universitas* of his estate under his trust-disposition and settlement to be divided among his children, just as if the whole, in place of only the half, had been provided to them by the marriage-contract. The time which he fixes for the vesting of the interests under his trust-deed is his own death, and in doing so he has shown that he regarded, and I think rightly regarded, that period as the period of vesting under the contract.

"The next question is, Whether Mrs Wardlaw's estate vested in her children at the same time as the provision of conquest? I am inclined to answer that question in the affirmative.

"I think it was clearly the intention of the parties that the half of the husband's entire estate, and the whole of the wife's estate, with the exception of the £900 already referred to, should be settled by the contract in precisely the same manner. The whole was to be held by the same trustees and administered for behoof of the children, and although Mrs Wardlaw undoubtedly reserved right to call up from her trustees the whole or any part of the estate conveyed to them by the contract, I still think that, subject to that reserved power, all the children of the marriage alive at the dissolution of the marriage by the death of her husband were to take vested interests in the fee. It will be observed that the husband was to have the power of dividing his wife's means among the children in such proportions as he should think fit. This, I think, clearly shows that the spouses contemplated and intended that the father should have power to confer a portion of the estate upon each of the children who should survive himself, and that such children, and not merely those who should survive their mother, were the objects of the power. But for that power, however, I should have been of opinion that vesting would not have taken place until the death of Mrs Wardlaw, seeing that the trustees were directed to hold the property for her and her husband in conjunct fee and liferent for his liferent use allenarly—in other words, for Mrs Wardlaw herself in fee—and that she reserved power to remove the whole, or any part of it, from the control of the trustees.

"If I am right in the view thus expressed, it follows that David Russell Wardlaw and Robert Richardson Wardlaw, and their two sisters Agnes Wardlaw and Margaret Wardlaw, all of whom survived their father, each took at the dissolution of the marriage by the death of their father a vested interest in the estates of both parents, in virtue of the marriage-contract, and in their father's estate in virtue of his trust-disposition and settlement, and that the two surviving children and the representatives of those who have since died are therefore each entitled to one-fourth share of the fund *in medio*.

"In the case of Agnes Wardlaw and Margaret Wardlaw there is no doubt, and their claims, each to one-fourth in her own right, must be sustained. The representatives of their two brothers are also respectively entitled to the shares which had vested in their authors. David Russell Wardlaw having died unmarried and intestate, his sisters Agnes and Margaret Wardlaw claim his fourth share as his executors-dative, and their claim is well founded if the succession is to be regarded as moveable or personal estate in his person. His heir-at-law, however, maintains that to a considerable extent the succession must be regarded as heritable, and to that extent he claims it for himself. The question depends upon whether, according to the sound construction of the marriage-contract, or the trust-deed, or either of them, the conversion of the heritable estate into cash is expressly directed, or is at least matter of necessary implication.

"The estate of Mr Wardlaw at his death consisted of personal property of the value of £1327, and of house property in Glasgow of the free value of about £1800, and of a sum of £360 in the form of a real burden over Mrs Wardlaw's property. The house property consisted of a dwelling-house at Viewfield Terrace occupied by himself, and of the first flat and some cellars and offices in a tenement in West George Street, the remaining parts of which belonged to Mrs Wardlaw. Mrs Wardlaw's estate amounted to £6139, 18s. 2d., whereof £140 was moveable estate, and the heritable estate consisted of the property in West George Street other than those parts thereof which belonged to Mr Wardlaw. Now, as the bulk of the property both of Mr and Mrs Wardlaw was heritable, it must be held to be to that extent heritable *quoad* the succession of the children of the marriage, unless the parents gave express directions to convert it into moveable property, or unless conversion was necessary for the proper distribution of the estate. Now, there is no express direction to convert. The marriage-contract bound Mr Wardlaw to settle the half of his conquest in the names of the trustees for behoof of the children of the marriage. Mrs Wardlaw conveyed her estate to these trustees in trust for behoof of the children of the marriage in fee, in such proportions as the husband should appoint, and failing such appointment, equally. No general power of sale and conversion is conferred by the marriage-contract, although it is declared that 'it shall be lawful to and in the power of the said trustees, when called on by the said Margaret Richardson, and after her death when called on by the said William Wardlaw, so to do, to sell and dispone and lend call up from time to time any part of the sums, subjects, or estate now or hereafter to be vested in them; but they, the said trustees and their foresaids, shall be bound and obliged again to lay out, invest, settle, and secure the same on the terms above expressed.'

"The trust-disposition and settlement by William Wardlaw, on the other hand, directs the trustees, after the death of his wife, 'to divide the whole free residue and remainder of my subjects and estate hereby conveyed equally to and amongst my whole children surviving at the time of my death.' Power is given to the trustees to lend out the trust-funds in certain securities therein specified, and at any time they may think proper 'to sell and dispose of my estate, subjects, and effects, and that either by public roup or private bargain.'

"The decisions upon a question like the present are conflicting. The leading case is that of *Buchanan* v. *Angus*, as decided in the House of Lords, 4 Macq. App. 374, where, in the absence of direction to convert, it was held that the trust-estate so far as heritable should pass to the heirs of deceased beneficiaries, and so far as moveable to their next-of-kin. And in two recent cases, viz., *Auld* v. *Anderson*, 4 R. 211, and *Hogg* v. *Hamilton, &c.*, 4 R. 848, the First Division, following the case of *Buchanan* v. *Angus*, held that where the trust-estate consisted partly of heritage and partly of personal estate, it was not necessary to convert the heritage into cash although it consisted of house property not in its own nature divisible. The Court held that the division would be competently effected by conveying the heritable property in *pro indiviso* shares to the parties entitled thereto. On the other hand, the Second Division seems to have generally held that when the subjects consist of house property, conversion is necessary to secure proper division. See the cases of *Fotheringham*, 11

Macph. 848; *Nairn*, 5 Rettie, 128; *Boog*, 10 Macph. 872. It is not easy to see any good reason why the decisions of the two Divisions should thus differ. It is not necessary, however, or indeed possible, to lay down any general rule applicable to all cases. Each must depend upon its own circumstances. All I shall say is, that I can see no practical inconvenience in following the course adopted by the House of Lords and by the First Division in the cases referred to. In the present case it is clear that both in the marriage-contract and in the trust-deed division *in forma specifica* was contemplated by Mr and Mrs Wardlaw. The succession under both deeds was a mixed succession, and must, I think, be held to have retained that character notwithstanding the recent sale of the subjects by the trustees. The result of the whole matter is that the share of David Russell Wardlaw, so far as moveable, has passed to his next-of-kin, and so far as heritable to his heir-at-law. As regards the share of Robert Richardson Wardlaw, no such question arises, seeing that he left a settlement transmitting to his trustees all his provisions under the marriage-contract and under his father's trust-settlement, and as in my opinion he had a vested interest under each of these deeds to the extent of one-fourth of the whole of the residue of the estates both of his father and his mother, the claim of his trustees must be sustained, and the claims of his children which proceed upon the footing that no right had vested in him must be repelled. Findings have been pronounced in accordance with the views indicated in the foregoing note, and the cause is appointed to be enrolled that the claims may be disposed of in conformity therewith."

Thereafter on 20th March he issued an interlocutor ranking the claimants in terms of his previous findings.

The children of Robert Richardson Wardlaw reclaimed.

The Court directed the question of vesting of Mrs Wardlaw's estate to be first argued.

The surviving daughters argued—Vesting did not take place till the death of Mrs Wardlaw. She was fiar of her estate, undivested by the marriage-contract. A direction to hold her property for her and her husband in conjunct fee and liferent for his liferent use allenarly, and for the children of the marriage in fee, did not divest her of the fee. She further retained here a right to ask, and conferred on the trustees a discretion to give, back any portion of the trust funds. Ersk. iii., 8, 35; *Wilson* v. *Glen*, December 14, 1819, F.C., also in Ross L.C., Land Rights, iii. 716; *Forrest* v. *Forrest*, May 26, 1863, 1 Macph. 806. These were cases where there was no trust, but a trust would not make any difference. Its use is to prevent a father claiming the fee. (2) There is a destination-over to the wife's sisters of some of her estate. (3) A power of appointment given to the father cannot affect the vesting of the wife's estate. It has been held that power of appointment will not suspend vesting. It cannot therefore accelerate it. The question was, whether the conveyance in the marriage-contract was habile to divest the wife? no further divestiture was to be presumed than would satisfy the objects of the contract.

Argued for the respondents — The general rule is that the date of vesting is the date of dissolution of the marriage—*Grant's Trustees* v. *Anderson*, February 1, 1866, 4 Macph. 336; *Angus' Trustees*, March 19, 1880, 17 Scot. Law Rep. 536. The existence of a trust distinguishes this case from those quoted on the other side. The wife was not a fiar in any sense after the contract was entered into. She had therefore only a power to ask the trustees to pay over any part of the funds to her, and it was put entirely in their option to do so or not as they chose. The father's power of distribution among the children implied a vested right in them.

At advising—

Lord Justice-Clerk — This is a not unimportant and a somewhat difficult question, and if we were more doubtful we might take time to consider the views which the Lord Ordinary has so fully expressed. But for myself I have heard nothing which leads me to think that the conclusion of the Lord Ordinary on the question of vesting is erroneous. He has found, and I think truly, that the only consistent way of reading the power of apportionment given to the husband Mr Wardlaw is to hold that it was to take effect at his death if he predeceased, and I agree with the Dean of Faculty that in all these cases, both in marriage-contracts and in settlements, the presumption is for vesting at the dissolution of the marriage in the one case, and at the death of the testator in the other. In the present case the children's provisions are clearly enough expressed, but these might be defeated if vesting did not take place at their father's death, for if we were to hold that the wife had an uncontrolled power over this fund, there would be no security for the children, and I cannot hold that that was the intention of the parties. The power of apportionment given to Mr Wardlaw under circumstances when he is able to judge as to its exercise plainly enough implies that it is impossible that the vesting of the fund which was to be ascertained during his own life could be postponed to a period long after his death. The only reasonable view is that the power was intended to regulate rights which would vest at his death. That is the general view of the Lord Ordinary, and I think that it is sound. The difficulty arises from the fact that the trustees are bound to hold for the spouses in conjunct fee and liferent, and it was argued with force that the beneficial interest in the fee was necessarily in the wife, and that the fiduciary fee in the trustees was for her benefit. There is no doubt an inconsistency between the clause giving the power of apportionment to the husband and the words "conjunct fee and liferent for the husband's liferent allenarly," which indicate that the fee remained in the wife. I can only overcome that inconsistency by the view which the Lord Ordinary has expressed. Like the Lord Ordinary, I should have taken the view that the wife's estate vested in the beneficiaries only at her own death but for the clause of apportionment.

Lord Gifford—I concur. I think the Lord Ordinary is quite right in his view that the estate vested at the dissolution of the marriage. As to the husband's estate, hardly anybody would argue the contrary. It plainly vested at the dissolution of the marriage by his death. The only difficulty arises regarding the wife's estate, because the

clauses dealing with it are inconsistent, and lead to the question whether vesting in it took place at the dissolution of the marriage or was postponed till the date of her death. Her whole estate at the date of the contract and thereafter acquired during marriage is conveyed to trustees, to be held in trust for behoof of the husband and herself in conjunct fee and liferent, and for his liferent allenarly. That standing alone in an ordinary deed would give the fee to her, but in a marriage-contract it is open to construction, and you have to ascertain what the parties meant by their destination. As you go on in this deed the first thing you find on this point is that the husband gets a power of apportionment, and that power is to be exercised by him alone as long as he lives. That is a very striking thing if the wife is intended to retain the fee; if she was still to be fiar, it is very odd that the husband is to be entitled to divide the estate among the children. She might defeat them altogether and render the power of apportionment an absurdity, for a power would be absurd which was given regarding a thing which might never reach the objects for whose benefit it was conferred. That is a strong reason for agreeing with the Lord Ordinary. And I give even more weight to the clause of apportionment when I read it along with the subsequent clause that the wife is not to be entitled to dispose of any part of her estate unless on making special application to and getting the special leave of the trustees. There is undoubtedly a contradiction between the absolute terms of the words conjunct fee and liferent for the husband's liferent allenarly and this, but in construing such a deed the intention of parties is the main point, and not the legal meaning of individual words. This clause then says—"It shall be in the power of the trustees, or major number of them allenarly, and of no other person whatever, to pay or make over to the said Margaret Richardson such part or portion of the said funds and estate, heritable and moveable, as they shall think fit, on application made by her to that effect, to be used and disposed of by her as her own proper funds and estate." The true meaning of that is that if they do not give it to her it shall not be her own estate, and that is conclusive against a fee. We must read the deed as a whole, and the conclusion is that she is not a fiar. To read it otherwise would be to put out of effect the protection provided to children, for if she were fiar she could do what she liked with the estate, and her creditors could affect it. The very meaning of the marriage-contract was that the estate should be secured, and that the children's provisions should not be defeasible except upon the apportionment by the father and the limited right of recalling the funds from the hands of the trustees of the mother. On the question of vesting, therefore, I come to the same conclusion as the Lord Ordinary.

Lord Young—I am of the same opinion, and have very little indeed to add. I only notice that the property for which the parties are here in competition is in the hands of marriage-contract trustees, and to be administered by them according to the terms and provisions of an antenuptial marriage-contract. The purpose of an antenuptial marriage-contract is to regulate the rights of the spouses and the children to be procreated of the marriage. Such a deed has no other purposes at all. There is sometimes an ulterior destination in favour of others than the spouses and children, but such a destination is so much outwith the purpose of the deed itself that it does not partake of the onerous character of the deed otherwise and for its own proper purposes. Now, the spouses and children of the marriage are by this contract provided for by giving the spouses (I confine my observations to the wife's estate) a conjunct fee and liferent, and to the children the fee, whatever the fee means in these circumstances. Now, the spouses were, together while both survived, and the survivor on the death of the predeceaser, to enjoy the fruits of the wife's estate, and the estate itself was to be divided among the children of the marriage. Now, it is settled that the rule which prevails in such cases, unless where there is something conclusive to the contrary, is that you are to take the children as they existed at the dissolution of the marriage, and that is on the death of the first deceaser of the spouses. Now, here the children who survived the dissolution of the marriage say that they are entitled to the capital of the wife's estate, subject of course to her use and enjoyment while she survived—and she was the survivor—and what is the answer to that? None, except that the words "conjunct fee" are introduced into the trust directions whereby the life enjoyment during the life of the survivor is secured. Was anything else given? Could she take anything else under the trust, laying out of view the power of the trustees to hand over a portion if they thought fit? Plainly not. She could take nothing else except the fruits of her own estate—(I speak only of her estate)—unless she applied to the trustees, and they saw fit to put some of the capital in her power. She would take nothing whatever except that. But if she was the fiar, which was the argument used, she could take the fee at any time. Possibly she could not defeat her children's provisions gratuitously, but she could get into debt and her creditors could take it as her estate, and the children's rights would not be protected at all. If you take the other view, that the right of the children might be protected against creditors if creditors could not take it, and she could not will it away, that brings it round to this, that she took only the liferent, and the capital is secured to the children of the marriage. Who are they? The children who survive the dissolution of the marriage according to the decisions. So, without reference to the power of apportionment, although that is an element tending in the same direction, I should have held that by this deed, which is a marriage-contract governing rights of spouses and children, the surviving wife took no right whatever except the produce of the estate while she lived, and that neither she nor her creditors nor her voluntarily appointed heirs could interfere with the right provided to the children, and secured to them, by passing the estate into the hands of trustees. I therefore entirely concur with your Lordships in holding that the right vested in the children at the dissolution of the marriage.

On the question of conversion the executors of D. R. Wardlaw argued — The succession was moveable, because (1) there was a power of sale in the marriage-contract. (2) The nature

of the estate, which was a mixed estate, consisting, so far as it was heritable, of house property, which would not readily admit of division, was a circumstance in favour of conversion. (3) The phraseology is adapted to moveable estate. — *Boag* v. *Wallace*, June 27, 1872, 10 Macph. 872; *Fotheringham and Others*, July 2, 1873, 11 Macph. 848; *Nairn's Trustees*, Nov. 10, 1877, 5 R. 128.

Argued for R. R. Wardlaw and others—There could be no conversion unless it was expressly directed and was necessary to the fulfilment of the purposes of a deed.—*Buchanan* v. *Angus*, May 15, 1862, 4 Macq. 374; *Auld* v. *Anderson*, Dec. 8, 1876, 4 R. 211; *Hogg* v. *Hamilton*, June 7, 1877, 4 R. 848.

At advising—

Lord Young—With respect to the husband's estate, it is to be observed that there is no conveyance of it by the marriage-contract, but only an obligation to provide one-half of it to the wife in liferent and the children of the marriage in fee by vesting it in the marriage trustees "in the terms and to the ends, uses, and purposes after specified"—meaning, no doubt, those of the subsequent conveyance by the wife of her estate. This obligation was no otherwise fulfilled by the husband than by the execution of his trust-disposition of 30th April 1849, whereby he vested his whole estate in trustees for the use of his wife in liferent and his children in fee. If this deed, which I shall refer to as the will, contains any directions inconsistent with the marriage-contract obligation, these may of course be repudiated with respect to the one-half of the estate to which that obligation applies by the creditors in the obligation, provided they renounce the benefits in the other half which the will gives them. That they must take or reject the will in its entirety stands on the familiar doctrine of approbate and reprobate. I do not dwell on this topic, being of opinion that the will is consistent with the contract obligation and good fulfilment of it. The testator's whole property is thereby given to his children, not one of them being passed over, and the substitution of survivors to such as might die childless and intestate before the period of distribution is, in my opinion, unobjectionable, and would have been so had the will given no more to the children than the marriage-contract entitled them to—for it does not prejudice any child's right of enjoyment and disposal or exclude any child's issue, and the children themselves are the only creditors in the contract obligation—the onerosity not extending beyond them.

I am therefore of opinion that the husband's (Mr Wardlaw's) estate is divisible among his children who survived at the period of distribution, *i.e.*, the death of their mother, and the assignees of Robert, who predeceased. The result is that Agnes and Margaret will each have a third, the remaining third passing to the assignees of Robert under his will.

Had it been necessary to decide the question, which it is not, I should have held that Mr Wardlaw's heritage is converted by his will, and that his whole estate is divisible as personal property.

With respect to the wife's property, I am of opinion that it must be taken exactly as she left it at her death, there being no conversion of the heritage, which consists of a house in Glasgow. That house is, as it happens, now held by the marriage trustees in fee for the children of the marriage, and joining this to the judgment finding that the right of the children under the marriage-contract vested on the husband's death, the Lord Ordinary has concluded and decided that the beneficial fee of the house was vested in the children in their mother's lifetime—so that as regards it the right of a child who survived his father but predeceased his mother required as a heritable right to be taken up by service. I am unable to assent to this view. We did not decide that the beneficial fee of any specific subject or property under their mother's conveyance vested in the children on the dissolution of the marriage by their father's death, but only that their right or *jus crediti* under the marriage-contract then vested. But by that contract the wife's property was with respect to the form and quality of it entirely in her power while she lived—so that she was at liberty to direct the house to be sold and converted into money. Indeed, she might, with consent of the trustees, have spent the price. On the other hand, she might have converted her personal estate into heritage. But this is quite inconsistent with the notion that the beneficial fee of the house or of any heritage whatever vested in her children while she lived. The right under the contract obligation, taken according to its terms, vested, but not the fee of a house in Glasgow. What benefit the right might yield, and in what form, was necessarily uncertain and unknown till her death.

Therefore, although it now appears that had David survived his mother he would have taken a share of the house, I am not of opinion that the right which was vested in him at his death was of a heritable character and required to be taken up by service. He had nothing but a *jus crediti* under a contract which might yield much or little, land or money, or both, according to uncertain future events. It seems to me that it is unreasonable, and would be inconvenient, to hold that the quality of such a right will vary, and that retrospectively, according to the quality of the subjects which shall eventually be left for satisfying it. On David's death the question of his succession regarded his right and the passing of that, and not the then unknown subjects out of which it was to be satisfied. Now, I think the right was personal and not heritable estate, and that as such it passed to his heirs *in mobilibus*. I cannot hold that the law of heritable succession, *i.e.*, of primogeniture, governs the succession to such a right, or that it does so or not according as it shall appear—it may be after any elapse of any time you please to think of—that land or money is left to satisfy it.

So soon as the right attaches to a particular subject, the quality of the subject as heritable or moveable will be communicated to the right, so that on the subsequent death of a beneficiary therein it will pass to his heir or executor accordingly. But while the right is general, and it is necessarily uncertain to what it may eventually attach, I find it impossible to deal with it as of an unknown quality or of a shifting quality, according to subsequent events—for it may have to pass in the meantime (as it in fact did here) before these events are known; and on general

principle and considerations of convenience I am prepared to hold that, regarded simply as a general *jus crediti* for a child's portion provided by marriage-contract—the quality of estate that may be left to satisfy it being uncertain—it is of a personal character and so passes to executors.

The result is, that in my opinion the wife's estate, like the husband's, goes in equal shares to the surviving daughters and the assignees of the deceased son Robert.

Lord Gifford—The Court have already decided in this case, in conformity with the judgment of the Lord Ordinary, that according to the sound construction of the antenuptial contract of marriage between Mr and Mrs Wardlaw, and of the trust-disposition and settlement and codicil by Mr Wardlaw, the whole estates belonging to either of the spouses at the date of the dissolution of the marriage vested at the death of Mr Wardlaw on 14th April 1863 in the four children of the marriage who then survived, viz., David Russell Wardlaw, Robert Richardson Wardlaw, Agnes Wardlaw, and Margaret Wardlaw, in equal shares. This was the first question in the case, and its decision goes far to settle the rights of the parties interested in the present action.

The next question relates to the nature and character of the estate which we have held to have so vested in these four children of the marriage between Mr and Mrs Wardlaw as at 14th April 1863—Was it heritable or moveable, or partly heritable and partly moveable, and to whom do the shares which vested in David Russell Wardlaw and Robert Richardson Wardlaw, who have deceased, now belong? David Russell Wardlaw died unmarried and intestate on 21st September 1870, Robert Richardson Wardlaw died on 24th September 1873, leaving a widow and family, and also leaving a last will and testament dated 14th April 1872, by which he provided his whole estates to trustees for the purposes therein mentioned. This testamentary deed expressly conveys to Robert Richardson Wardlaw's trustees all estates, real or personal, to which he was entitled either under the marriage-contract between his father and mother or under his father's trust-disposition and settlement. Mr Robert Richardson Wardlaw's trust-deed is not in the Scotch form, and does not contain a *de presenti* conveyance, but it was not disputed that it is effectual to carry Scotch heritage in terms of the 20th section of The Titles to Land Consolidation (Scotland) Act 1868. There is no dispute therefore regarding the one-fourth of the whole estates of both spouses which vested in their son Robert Richardson Wardlaw. That fourth goes to his testamentary trustees for the purposes expressed in his testament. Neither is there any dispute as to the two-fourths of both spouses which vested in the two daughters who survived Mr Wardlaw, viz., the claimants Miss Agnes Wardlaw and Miss Margaret Wardlaw. Each of these ladies will take in her own right one-fourth of the whole estates.

The only questions which remain relate to the one-fourth of the estates of the spouses which vested in David Russell Wardlaw on his father's death on 14th April 1863, and which remained vested in him on his own death on 21st September 1870. So far as David Russell Wardlaw's fourth shall be held moveable, it passed to his next-of-kin and executors, including his mother Mrs Wardlaw, who survived him. Mrs Wardlaw the mother would take one-third, and his brother and two sisters would take the other two-thirds equally between them. In so far, again, as the one-fourth which vested in David Russell Wardlaw was heritable, it would go to his brother Robert Richardson Wardlaw, who survived him, provided he took it up by habile title, and provided that he did not claim a share in the moveable succession, which however he might do by collating the heritage. But then the brother Robert Richardson Wardlaw died on 24th September 1873, without serving to his brother, and without making up any title to his brother's heritage, and so David Russell Wardlaw's heritable estate will now pass directly to his present heir-at-law William Richardson Wardlaw, who is the eldest son of Robert Richardson Wardlaw, and who claims as heir-at-law of his uncle in his own right. By the Conveyancing Scotland Act 1874, sec. 9, service is no longer necessary to vest a personal right to heritable succession, and accordingly as at 1st October 1874 a personal right to David Russell Wardlaw's heritage vested without service in the claimant William Richardson Wardlaw.

The important question therefore is, What part of the one-fourth of the succession which vested in David Russell Wardlaw at his death on 21st September 1870 was heritable, and what part was moveable? and this raises the question, Whether under the terms of the marriage-contract, or under the terms of Mr Wardlaw's trust-disposition and settlement, conversion was operated so as to make the portion of the estates of the spouses, or of either of them, which consisted of heritable property moveable for the purposes of succession?

This is a question of some nicety, and the answer may possibly be different in regard to the estates falling under the marriage-contract alone, and in regard to the estates falling solely under William Wardlaw's trust-disposition and settlement.

I shall consider each deed separately.

First, then, as to the marriage-contract, which embraces the whole estates of Mrs Wardlaw and one-half of the estate of Mr Wardlaw, whether heritable or moveable?

Now, I am of opinion, concurring with the Lord Ordinary, that under the terms of the marriage-contract, and according to its sound construction, there was directed or effected no conversion of the heritable estate into moveable, and that such conversion was not necessary for the execution of the trust, or, in the language of Lord Fullarton, approved of by the House of Lords, that the sale of the heritage was not "an indispensable condition for the execution of the marriage-contract trust." The marriage-contract contains no direction to the marriage-contract trustees to sell any of the heritable subjects which may fall under the trust. On the contrary, there is not even a power of sale given to the marriage-contract trustees, except in one particular case, and that is in the event of their being called upon by Mrs Wardlaw, or after her death by her husband, to sell and dispone any part of the estate, in which event they were empowered to do so, and directed again to lay out, invest, settle, and secure the same in terms of the deed. But the event here contemplated never happened. The trustees were never called upon by either of the spouses

to sell the heritable property belonging to the trust, or any part thereof, and they have never done so. The whole has remained in the same heritable condition as it was when it fell under the trust, and it remains so still. It is held as heritage by the trustees *in forma specifica*, and I think it clear that it has not changed its character or become moveable by virtue of any words or directions expressed in the marriage-contract. The only ground, therefore, on which conversion can be maintained is that sale is absolutely indispensable for carrying out the purposes of the marriage-contract. But is this so? The purpose of the marriage-contract is to divide or hold for the four surviving children of the marriage in fee, and I do not think it can be said that wherever a division is directed into four, or an estate conveyed to be held for behoof of four parties—and this is all that the marriage-contract does—it becomes an "indispensable" condition of the trust that the whole estate must be sold. I do not think that this is the result of the deed, or that this can be held to be its legal effect. The leading authority on this point is the case of *Buchanan* v. *Angus* in the House of Lords, 4 Macq. 374. In that case the truster's direction was "to pay over the residue of his means and estate, or the prices and produce thereof, to his brother and sister equally between them, share and share alike." The House of Lords unanimously held that there was no conversion, but that the share of the whole estate so far as consisting of heritage remained heritable in the person of the brother and sister, and that the brother having died, his share of the heritage in the hands of the trustees remained heritable, and could only be taken up by service by his heir-at-law. No doubt in this case the division was only bipartite between a brother and sister, whereas in the present case the division is into four, between two brothers and two sisters; but I think the principles announced in the House of Lords are applicable to the present case as well as to those in *Buchanan* v. *Angus*, and I cannot lay down an arbitrary rule that there shall be no conversion when the beneficiaries are only two in number, but that there shall be held to be conversion when the beneficiaries are three or four in number. I think that the fact of there being four beneficiaries does not make it an "indispensable condition" or "absolutely necessary" that the heritage shall be sold, and that without any power of sale being conferred by the marriage-contract. Each case involves a question of circumstances, and the absolute necessity of a sale in each case must be shown where there is no absolute direction to sell. I think, therefore, that one fourth of the marriage-contract trust estate, so far as consisting of heritage, now belongs to the heir-at-law of David Russell Wardlaw — that is, to the claimant William Richardson Wardlaw.

It was contended that the *jus crediti* which vested in David Simpson Wardlaw under the marriage-contract, even although the heritage was not converted, was carried without service either to his brother Robert Richardson Wardlaw or to his brother and two surviving sisters; but the very opposite was decided in *Buchanan* v. *Angus*, and the necessity of service was affirmed. Lord Westbury explains in detail that the *jus crediti* is just a right to a share of heritage, and partook of the nature and quality of the subject itself, and service was indispensable prior to the Conveyancing Act of 1874. Accordingly, in *Buchanan* v. *Angus* the sister who survived her brother, but who died without service to him, was excluded from his whole share of the heritage, which went to her brother's more distant and collateral heir. The right to the heritage, therefore, which vested in David Russell Wardlaw never having been taken up by service by his brother Robert, who died in 1873, is now vested under the statute of 1874 in William Richardson Wardlaw.

But there may be room for distinction between the heritage falling under the marriage-contract and that which falls exclusively under the trust-disposition and settlement of William Wardlaw alone. On the question of conversion, however, I do not think there is any room for difference in result, although Mr Wardlaw's trust settlement contains an ample power of sale. There is no direction to sell. The question of sale is left entirely in the discretion of the trustees, and a mere power of sale without any direction does not operate conversion if sale be not necessary for the execution of the trust. But although there is no conversion operated by the terms of the trust-deed any more than by those of the marriage-contract, I think there is an operative destination in the trust-deed which does not apply to the marriage-contract property, and that is the provision in the trust-deed of William Wardlaw, that "failing any of my said children without leaving lawful heirs of their own bodies, and without having drawn their proportion, or being of lawful age without having legally and competently assigned the same or settled the succession thereto, then the share of such deceaser shall go equally to the survivors or survivor of them, my said children, and the issue of any of such of them as may have died leaving lawful issue surviving at the time of my death." It appears to me that David Russell Wardlaw having died without issue and intestate, and without having assigned his share or settled the succession thereto, this destination took effect and never was evacuated or altered, and so David Russell Wardlaw's fourth under his father's trust-deed went *destinatione* to his brother and sisters, one-third to each. This, I think, however, will only apply to one-half of William Wardlaw's estate, for he specially directs the provisions in the marriage-contract to be implemented, and indeed he was proper debtor in the implement of the marriage-contract, and it is only what is left after implementing the marriage-contract that falls under the residuary clause. This point does not seem to have been brought under the notice of the Lord Ordinary. The result is, that I am in favour of adhering to the interlocutor of the Lord Ordinary, excepting as to one-half of the free estate of William Wardlaw, as to which I think the claimant William Richardson Wardlaw has no right, being excluded by the destination in his grandfather's settlements, and the same being divided in thirds between Robert Richardson Wardlaw's executors and Agnes and Margaret Wardlaw.

The Lord Justice-Clerk concurred with Lord Young.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the parties on the reclaiming note for Robert Richardson Wardlaw and others against Lord Curriehill's interlocutor of 20th March 1880, Recal the said interlocutor, and also the interlocutor of 18th March 1880: Find that according to the sound construction of the marriage-contract between Mr and Mrs Wardlaw, and of the trust-disposition and settlement and codicil by Mrs Wardlaw mentioned in the record, a *jus crediti* in the provisions thereby made by Mr and Mrs Wardlaw and each of them in favour of the children of the marriage vested at the dissolution of the marriage, by the death of Mr Wardlaw in 1863, in each of the four children then in life, viz., David Russell Wardlaw, Robert Richardson Wardlaw, Agnes Wardlaw, and Margaret Wardlaw, in equal shares, and that no right vested in any of the children of the marriage who predeceased Mr Wardlaw: Find that upon the death of the said David Russell Wardlaw on 21st September 1870, unmarried and intestate, and without having drawn or disposed of his one-fourth share of his father's estate, of which the *jus crediti* had vested in him, the said one-fourth passed under his father's said trust-disposition and settlement in equal shares to his brother Robert Richardson Wardlaw and his sisters Agnes Wardlaw and Margaret Wardlaw, who survived him; and his one-fourth share of Mrs Wardlaw's estate, of which the *jus crediti* had vested in him under the contract of marriage, passed to his heirs *in mobilibus ab intestato:* Find that upon the death of Robert Richardson Wardlaw on 24th September 1873, the one-fourth of the whole estates under the said contract of marriage and trust-disposition and settlement, of which the *jus crediti* had vested in him, and one-third of the one-fourth of the whole estate of the said William Wardlaw which had accrued to the said Robert Richardson Wardlaw upon the death of the said David Russell Wardlaw, passed to the trustees and executors nominated and appointed by and acting under the said Robert Richardson Wardlaw's last will and testament dated 14th April 1872, and relative codicil dated 30th July 1873, for the purposes therein specified"—and ranked the claimants accordingly.

Counsel for Real Raisers—Pearson. Agents—Macandrew & Wright, W.S.

Counsel for Misses Wardlaw — Kinnear— G. Burnet. Agents—Macandrew & Wright, W.S.

Counsel for W. R. Wardlaw—Dean of Faculty (Fraser), Q.C. — Thomson. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for R. R. Wardlaw's Trustees—Trayner —Guthrie. Agent—H. B. Dewar, S.S.C.

Counsel for Mrs Bennett—Solicitor-General (Balfour), Q.C.—Moncreiff. Agent—H.B. Dewar, S.S.C.

NOTE.—*The terms of the marriage-contract which was under consideration in the foregoing case had been previously interpreted with reference to another point by the First Division of the Court on 8th January* 1879. *That was a Special Case between Mrs Wardlaw, one of the parties to the marriage-contract, and the marriage-contract trustees; and the following is a report of the case:—*

Husband and Wife—Contract of Marriage—Trust —Construction—Wife's Acquirenda *subsequent to Dissolution of Marriage.*

Held, on the construction of an antenuptial marriage-contract, that a sum of money to which a wife became entitled after the dissolution of the marriage, was not carried by a clause of general conveyance to trustees of "all and sundry whatsoever lands, heritages, and sums of money, and other sums and effects, heritable or moveable, presently owing and belonging or which she may succeed to or acquire in any manner of way."

In 1822 an antenuptial contract of marriage was entered into between William Wardlaw, merchant in Glasgow, and Margaret Richardson, daughter of Ebenezer Richardson, merchant there. The provisions of the contract have been fully quoted in the case reported above. The marriage was dissolved by Mr Wardlaw's death in 1863. In 1874 Mrs Wardlaw became entitled, as one of the next-of-kin of her brother Mr Robert Richardson, who died on 8th July in that year, to a share of his estate amounting in value to above £5000, of which the trustees under the marriage-contract of Mr and Mrs Wardlaw had received payment. Mrs Wardlaw, as the first party, and the trustees under her marriage-contract as the second parties, presented a Special Case to the Court for opinion and judgment on the following questions:—(1) Is the share of the estate of the said deceased Robert Richardson to which the first party succeeded on his death effectually conveyed by the said antenuptial contract of marriage to the second parties as trustees for the purposes of said contract? (2) Is the first party entitled to demand payment of the said share of estate from the second parties as her own absolute property unaffected by the terms of the said contract? (3) If it shall be found that the said share of the said estate falls within the provisions of the marriage-contract, are the second parties bound to make over the said funds to the first party as her absolute property? (4) Have the second parties, the said assumed trustees, the same power as was conferred on the trustees named in said contract to pay or convey to the first party such part of her funds or estate conveyed by said contract, whether arising from Mr Richardson's succession or otherwise, as she may require, if they shall think it fit to do so?

Mrs Wardlaw argued—(1) That the share of her brother's estate not having vested in her till after the dissolution of the marriage, was not carried by the conveyance by her in favour of the trustees in the marriage-contract, the purpose of which deed was to settle funds she might acquire during the subsistence of the marriage—See *Howell* v. *Howell*, 4 L.J., Ch. 242; *Dickinson* v. *Dillwyn*, 8 L.R., Eq. 546; *Carter* v. *Carter*, 8 L.R., Eq. 551; *Edwards*, 9 L.R., Ch. Ap. 97; *Diggins*, 1 L.R., Scotch Ap., and 5 Macph., H. of L. And (2) that even if the said share did fall within the terms of the marriage-contract, she was entitled to require the trustees to make over the

same to her, in respect they now held it exclusively for her use, in fee, or at least that they were entitled, if not bound, to make over the same to her in terms of the powers conferred upon them in said contract.

The trustees argued—(1) That the said share of Mr Richardson's estate was carried by the conveyance to them as trustees under the marriage-contract. The object of the trust was to protect the interests of the children after the marriage. That was the motive for the settlement of the wife's fortune in the manner adopted, and she must not now be allowed to defeat that end. (2) That the power to pay over to the first party such part of the trust-funds as they should think fit was limited to, and could only be competently exercised by, the trustees originally named. (3) That even if such a power could be competently exercised by them, it was entirely within their own discretion to do so or not.

At advising—

Lord President—This is a point of some importance, the more so that it has not, so far as I am aware, ever arisen for judgment before. The husband's part of the settlement here in the marriage-contract is "to provide one-half of the whole lands, heritages, sums of money, and other funds that he shall happen to conquest and acquire during the present intended marriage;" and it is also agreed "that the same shall comprehend and extend to all and whatever estate, heritable and moveable, belonging or owing to the said William Wardlaw at the dissolution of the marriage, whether the same has accresced by purchase, donation, or succession, after deduction of the debts due by him." There can be no ambiguity about the nature or extent of the provision thus made by the husband; it is to be taken as at the dissolution of the marriage, and one-half of the estate ascertained and valued at that time is to form the subject of the provision to the wife. On the other hand, Mrs Wardlaw proceeds on the usual plan in provisions by a wife in her marriage-contract to create a trust for behoof of the spouses in conjunct fee and liferent for the liferent use allenarly of the husband, "and exclusive of the *jus mariti* or right of administration of the said William Wardlaw, and for the use and behoof of the children to be procreated betwixt the said William Wardlaw and Margaret Richardson in fee, and that in such proportions as the said William Wardlaw shall appoint by a writing under his hand, which failing, equally among them,"—(then follows the description of the property that the wife conveys)—"All and sundry whatsoever lands, heritages, sums of money, and other funds or effects, heritable and moveable, presently owing and belonging, or which she the said Margaret Richardson may succeed to or acquire in any manner of way, with the whole rents, interest, and produce, and the writs, vouchers, and documents thereof," and without prejudice to said generality she conveys a particular sum of £900. Now, undoubtedly the words used here are so broad as to be capable of comprehending everything that this lady shall acquire during the whole course of her natural life. On the other hand, it cannot be disputed, I think, that they are susceptible of a different interpretation, and that it is not an unreasonable interpretation, to say the least of it, to hold that she was conveying as the consideration on her part of the provisions settled by the husband the acquisitions which she might make during the subsistence of the marriage in addition to what she already possessed, and the question is, which of these two interpretations is the more reasonable and more consistent with the rest of this marriage-contract. Now, in regard to the conveyance by the wife, it is to be observed that the settlement was made upon the spouses in conjunct fee and liferent, but with a very careful restriction of the husband's right to a bare liferent, and exclusive of his *jus mariti*, and the conveyancer is not satisfied with this, but he adds to this the form of a renunciation by the said William Wardlaw of his *jus mariti*, and all right or power of administration whatever competent to him in or to the said estate, funds, and succession in any way whatever. So that while in the case of the husband the period at which the estate is to be ascertained is clearly at the dissolution of the marriage, we have here, I think, what may be called a corresponding indication in the case of the provision by the wife that she was conveying property which but for this exclusion of the *jus mariti* would have fallen under the marital rights of the husband; and taking that in connection with the very general terms of the conveyance, it of itself would seem to me rather to favour the more limited interpretation that the estate intended to be conveyed was the lady's present estate, and what she might acquire during the subsistence of the marriage. And that impression is very much strengthened when one comes to consider the reasonableness of this construction as compared with the other. If the construction of the second parties were adopted it might lead to very startling conclusions in certain events. If a dissolution of the marriage took place within a year by the death of the husband, and after only one child of the marriage had been born, the consequence would be this, that this lady would be left a young widow with one child, and with no power in any subsequent marriage-contract to settle any part of her estate upon the husband and children of that second marriage. Whether that the law would interpose so far to relax the sternness of this provision as so interpreted, and hold that she would be entitled to make a reasonable and onerous provision in the subsequent marriage-contract, the same as in the case of a widower, I do not intend now to inquire, but the very possibility of her being left in such a position as to require such interposition shows, I think, that this is not a likely interpretation. It would be a very unreasonable burden to lay upon a young lady entering into a marriage-contract of this kind; and in the absence of any words necessitating such an interpretation, I think the true and fair meaning of this provision is, that she settled the estate which she had at the time, and all that she was to acquire during the subsistence of the marriage. This was the natural equivalent of the husband's provision, and I cannot believe that it was intended to go further.

I therefore answer the first question in the negative, and the second in the affirmative, and that disposes of the case.

Lord Deas—I do not by any means reject the reference to the English cases if it were neces-

sary to go to them; but I am very clearly of opinion that there is enough on the face of this deed to decide the case without the English authorities at all. If the words "during the marriage" had not occurred either in the destination by the husband or in that by the wife, I do not see that there could have been any difficulty in holding that what was disposed of on both sides was what should be acquired during the marriage. That being so, all that we require is to look to whether there is not an apparent reason for these words being used in the conveyance by the husband which does not apply to the conveyance by the wife. I think this is quite sufficiently accounted for by holding that the husband wanted to limit the estate dealt with by him—he wanted it not to be indefinite but to be fixed; and he stipulated therefore that it should be calculated as at the date of the dissolution of the marriage, so that he might spend what he liked during his life and the provision might only affect what was left at his death. That sufficiently accounts, I think, for the words which occur in the one conveyance and not in the other. All reasons of expediency are against the other construction—that the wife was to be restricted in such a way that everything, however valuable, which might come to her after the dissolution of the marriage was to be entirely tied up, so that, although she married again, she could not regulate or dispose of the means that had thus come to her. As the result of the whole matter, therefore, I agree with your Lordship. I have no doubt but that whatever has come to the wife after the marriage is dissolved is her own.

Lord Mure—I go entirely on the words of the contract, for it appears to me, without reference to the English authorities, that these words are sufficient of themselves to lead to the conclusion your Lordship has arrived at. The dissolution of the marriage is distinctly fixed as the period with reference to which the husband's obligations are to be ascertained; and when the wife comes to undertake her counter-obligations I see no reason to suppose that the same period would not be taken as regards the time up to which the wife's acquisitions were to be held to be conveyed over to the trustees. The presumption is that the same period would be fixed; and unless the words used are such as clearly extend the provision to acquisitions made by her after the dissolution of the marriage, I should not be disposed so to interpret them. But here the words used clearly admit of an opposite construction. One of the provisions is that the fund, whatever it may be, is to be divided as the husband shall direct; and this implies that Mr Wardlaw during his life was to be aware of the amount of the estate that was to be apportioned by him. Then there is the anxious exclusion of the *jus mariti* and right of administration as regards the property which was to come through the wife; and that is important as showing that the property coming through her which was to be made over to the trustees was the same estate as that from which the *jus mariti* was excluded, because that exclusion could only be necessary as regarded property acquired during the husband's life. So that if the husband is to divide the funds among the children—and these are the same funds as those from which his *jus mariti* has been excluded—the words cannot, I think, be held to apply to funds to which his wife has succeeded long after his death.

The Court answered the first question in the negative and the second in the affirmative.

Counsel for Mrs Wardlaw—Kinnear—G. Burnet. Agents—Macandrew & Wright, W.S.

Counsel for the Marriage-Contract Trustees—M'Laren. Agent—R. Ainslie Brown, Solicitor.

Wednesday, July 7.

SECOND DIVISION.

SPECIAL CASE—MITCHELL'S TRUSTEES AND OTHERS

Succession—Protected Succession—Fee and Liferent—Trust—Technical Words in Directions to Trustees.

Words used by a truster in directing his trustees to execute a certain destination of his estate are to be construed, not technically, but in accordance with the testator's intention, and the trustees are bound to execute the deeds in terms which will carry out that intention, although the words used by the testator would, if contained in a direct conveyance by him, be construed in a strictly technical manner.

A testator directed his trustees to hold his estate until the youngest of his children should attain majority. After a clause of survivorship the deed bore that "on the marriage of any of my daughters it is my wish that a sum not exceeding one-third of the estimated amount of their share of my estate shall be applied towards their outfit and establishment at the time, and that the remainder shall be settled upon themselves in liferent and the children of their marriage in fee, the *jus mariti* of their husbands being excluded therefrom." When the youngest child attained majority several of the daughters were unmarried, and one was a widow with several children. *Held* that the former were entitled to immediate and absolute payment of their shares, and that the latter was entitled to one-third of her share in fee, and that the remaining two-thirds fell to be settled on her in liferent allenarly and her children in fee.

James Mitchell of Auchinleck, in the county of Forfar, died on 31st October 1858, leaving a trust-disposition and settlement whereby he conveyed to trustees, for purposes therein mentioned, his whole means and estate, heritable and moveable. The settlement was duly recorded on 3d December 1858. The third purpose of this settlement was in those terms—"*Third*, in regard to the free residue of my estate, I hereby direct and appoint my said trustees to retain the same for behoof of the children lawfully procreated or to be procreated of my body, and that in such proportions as I may appoint by any writing under my hand at any time of my life, and failing any such appointment, then for behoof of my said children equally between and among them, share and share