Against these three interlocutors the defenders appealed to the House of Lords, but on 18th May 1893 their Lordships affirmed the interlocutors appealed against, dismissed the appeal, and ordered the defenders to pay to the pursuer the costs of the appeal.

The costs of the appeal and the expenses of the reclaiming-note decerned for by the Lord Ordinary's interlocutor of 28th May 1892 were paid to the pursuer by the defenders.

Thereafter the pursuer presented a petition to the Court, stating—"The said interlocutors of 23rd June 1891, 16th March 1892, and 28th May 1892 were not final, and did not exhaust the cause, which now falls to be remitted by your Lordships to the Lord Ordinary to proceed therein, as accords," and praying the Court "to apply the said judgment of the House of Lords; to find the respondents the Provost, Magistrates, and Councillors of Greenock liable in the expenses of this application and procedure to follow hereon; to remit to the Lord Ordinary to proceed further in the cause as may be just."

The defenders objected to their being found liable in the expenses of the application, and submitted that the petition was unnecessary.

At advising—

LORD YOUNG—My own opinion is that this petition is quite unnecessary. I do not say that it is incompetent, but I think it is unnecessary and superfluous. The proper course in a case like this—for it is the simplest and the least expensive—is for the party who has succeeded in the House of Lords to enrol the case before the Lord Ordinary to proceed. My opinion further is, that as this petition with its prayer for expenses against the respondents has been unnecessarily presented, the respondents, who have been forced to discuss the application, should be found entitled to expenses. It is a familiar rule that a party appearing to oppose an unnecessary application is found entitled to expenses.

LORD RUTHERFURD CLARK—I think the petition is unnecessary, but I am not prepared to award expenses to either party.

LORD TRAYNER—I agree with Lord Rutherfurd Clark.

The LORD JUSTICE-CLERK was absent.

The Court dismissed the petition without expenses to either party.

Counsel for Petitioner — M'Lennan. Agents—Miller & Murray, S.S.C.

Counsel for Respondents—Sym. Agents—Cumming & Duff, S.S.C.

Wednesday, July 19.

SECOND DIVISION.

TAYLOR'S TRUSTEES *v.* BARNETT.

Trust-Disposition — Construction — Meaning of "Predeceasing."

A testator directed his trustees to hold a share of his estate for behoof of his married daughter in liferent and her issue in fee, but declared that in the event of his daughter's husband "predeceasing" her, the trustees were to make payment to her of her share absolutely.

Held (*diss.* Lord Young) that the daughter on obtaining a decree of divorce against her husband did not thereby become entitled to payment of her share of her father's estate as if her husband had died before her.

William Taylor died on 24th February 1890, leaving a trust-disposition and settlement dated 7th December 1888.

By the said trust-disposition and settlement William Taylor conveyed his whole means and estate, heritable and moveable, to trustees for the purposes, in the first first place, of payment of his debts and the expenses of the trust; in the second and third places, for payment of certain allowances in name of mournings and interim aliment, and of one-third of his estate to his wife; and in the last place, to hold the remainder of his estate for behoof of his children, equally among them, and to pay their shares to them on their attaining majority, except in the case of his daughter Marion Kennedy Taylor or Barnett.

As regards the share of his said daughter Mrs Barnett, the testator directed his trustees to hold and invest it in their own names, "for behoof of my said daughter in liferent for her alimentary liferent use allenarly, and of her lawful issue, equally among them, share and share alike, in fee, payable said shares upon the youngest of the children of my said daughter attaining majority, until which time my said trustees shall, after the death of my said daughter, apply the income of said share or proportion of shares for behoof of her said children, equally among them. But notwithstanding the provisions hereinbefore made in favour of my said daughter Marion Kennedy Taylor or Barnett and her children, I hereby provide and declare that in the event of her husband Frank Nutter Barnett predeceasing my said daughter, the provisions of liferent and of fee hereinbefore made in favour of my said daughter and her children shall cease and determine, and I direct my trustees thereupon to make payment to her of her whole share and interest in my estate absolutely." The testator further declared that the provisions in favour of his wife and children were to be in full satisfaction of all claims, legal or conventional, and so far as they were in favour of or should descend upon females, that they should be exclusive of the *jus*

mariti right of administration or curatorial power of any husbands they might marry.

William Taylor was survived by his wife and by four children, viz., John Taylor, Jessie Kennedy Taylor or M'Laren, the said Marion Kennedy Taylor or Barnett, and Francis Henry Barnett.

Some time after their marriage on 27th December 1887 Mrs Barnett, the testator's daughter, and her husband went to live in London. One child was born of the marriage, a daughter named Jessie Kennedy Barnett, on 20th September 1888. On 4th July 1892 Mrs Barnett obtained decree of divorce in the High Court of Justice, London, against her husband, and the decree became absolute on 24th January 1893. Mrs Barnett was then twenty-four years of age.

The trustees realised the whole of the testator's estate, and distributed the same except Mrs Barnett's share, which amounted to £650. As they were in doubt whether they were bound in terms of the testator's settlement to hold it till the decease of Mr Barnett, or whether they were in safety to pay it to Mrs Barnett in respect of the decree of divorce she obtained against her husband, a special case was presented to the Court of Session by (1) William Taylor's trustees, and (2) Mrs Barnett.

The question of law was as follows—"Did the said Marion Kennedy Taylor or Barnett, on obtaining decree of divorce against her husband the said Frank Nutter Barnett, thereby become entitled to payment of the share of her father's trust-estate bequeathed to her under his trust-disposition and settlement as if her husband had predeceased her?"

Argued for first parties—The terms of the deed showed that the second party was not entitled to the fee till after the death of Mr Barnett.

Argued for second parties—The terms of the deed showed that what the testator had in his mind when he wrote the word "predeceasing" was the rights of the husband in the property of his wife coming to an end. This had been brought about by the divorce, and the second party was now entitled to the fee—Lush's Law of Husband and Wife, p. 79; *Johnston* v. *Beattie*, February 5, 1867, 5 Macph. 340; *Harvey* v. *Farquhar*, July 12, 1870, 8 Macph. 971.

At advising—

LORD YOUNG—The legal question in this case is, whether under her father's will the trustees are at liberty to pay the capital of her share of the estate to Mrs Barnett? It is plain from the words of the deed that the reason of Mrs Barnett being treated exceptionally was that the testator had a bad opinion of her husband, had no trust in him, and thought that the capital of her share would be unsafe in his hands. No other reason suggests itself. That being so, it is our duty to give effect to what appears on the face of it to be the intention of the testator, viz., that Mrs Barnett should be placed in the same position as other children on her husband ceasing to exist as such.

The only objection stated to our giving effect to that intention, and putting Mrs Barnett in the same position as the other children of the testator when the obstacle—that is, her husband—is removed is, that the word "predeceasing" is made use of by the testator, and that "predeceasing" means death, and it is submitted that as long as the man exists, although he may have ceased to exist as the husband, an obstacle remains which we cannot overthrow. I am not of that opinion.

I do not think that "predecease" is a technical term. No doubt it is often familiarly and figuratively employed to mean "to depart from life," just as in the same way "departed" is often used to mean "dead." But that is a figurative use of the term. The principal part of the word is "cease," and "cedere" or "decedere" was most familiarly applied in Latin to a government or some person in authority departing from office. We also have "decedere de jure" to depart from one's rights, "decedere de bonis" to give up one's goods, and so on. "Predecessor" is cognate to "predeceased," and that term is constantly used with reference to office as in Latin. Thus your Lordship might refer to your "predecessor" in the chair, although I am happy to say his Lordship who formerly so ably filled the chair in this Division is still alive.

There is thus not even an etymological difficulty to carrying out the plain intention of the testator. I think the words are capable of a construction which would carry out that intention, while the other construction sought to be put on them would lead to frustration and denial of the testator's wishes. What the testator had in his view was Mr Barnett's relation of husband to his daughter, and when Mr Barnett ceased to be her husband and to have any rights of *jus mariti* in her property, the obstacle in the mind of the testator was at once removed. My opinion is that we should apply the word "predeceasing" as meaning "ceasing to be the husband of," and answer the question of law in the affirmative.

LORD RUTHERFURD CLARK—The only question in the case is, whether the event on which the share of her father's estate was to become the absolute property of Mrs Barnett has occurred? It has only occurred if we hold the divorce equivalent to "Frank Nutter Barnett predeceasing my said daughter." I am very clear that the word "predeceasing" is not a technical word at all, but I think, reading it in this deed, that it can here have only one meaning, viz., "dying before my said daughter." I think this event was the only one contemplated by the testator, and we must give effect to his intention. I do not think the testator had in his mind the possibility of his daughter's husband committing adultery. I think we may fairly attribute to the testator, if he suspected Frank Barnett, the wish that his wife should not get the fee as long as that man was alive, and we would have had little hesitation in refusing Mrs Barnett's present claim if before bringing it she had remarried her divorced husband.

LORD TRAYNER—I think the question here put to us must be answered in the negative.

By her father's trust-settlement a right of liferent is conferred on Mrs Barnett in a certain share of the trust-estate, the fee thereof being destined to her children. But that right of liferent is to cease and be replaced by a right of fee in the event of Mrs Barnett being predeceased by her husband. That event has not happened, Mr Barnett being yet alive. Until that event does happen, Mrs Barnett has, and can only have, in my opinion, a right of liferent. It appears that Mrs Barnett divorced her husband last year, and it is maintained by her that the divorce of her husband is equivalent to his death. In some circumstances and to certain effects divorce is recognised in our law as equivalent to death. But I think Mrs Barnett cannot maintain her present contention on that ground. For the language of the trust-settlement does not appear to me to be open to construction, or to admit of the condition of "predecease" being fulfilled by any equivalent. The terms of the settlement are unambiguous. The predecease of Mrs Barnett's husband means, I think, only one thing—the death, namely, of Mr Barnett during his wife's lifetime. If that term were now to be read as meaning "divorce" or "termination of the marriage," which is what we are asked to do, we would not be giving effect to the expressed will of the truster, but making a different will for him. Where the language of the trust-settlement is plain and unambiguous we must give effect to its meaning as expressed; and where the truster has conferred a right conditionally, on the happening of a certain event, it is not permissible to hold that the right can be claimed in circumstances where the specified event has not, but something said to be equivalent to that event has happened.

The LORD JUSTICE-CLERK was absent.

The Court answered the question in the negative.

Counsel for First Parties—Lees. Agents—Ronald & Ritchie, S.S.C

Counsel for Second Party — Craigie. Agents—Ronald & Ritchie, S.S.C.

Wednesday, July 19.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

WEBSTER *v.* HARVEY.

Husband and Wife—Parent and Child—Divorce—Marriage-Contract Provisions—Casus improvisus—Vesting.

In their marriage-contract a husband and wife each conveyed certain funds to trustees, and provided that during their joint lives the annual proceeds should be paid to the husband for the maintenance of the family, and that on the dissolution of the marriage by the death of either spouse the trustees were to pay the annual proceeds of the whole trust funds to the surviving spouse, and after the death of such survivor the principal to the children of the marriage, equally among them. The marriage-contract further provided that on the dissolution of the marriage by the death of either of the spouses without issue, or leaving issue who should predecease the surviving spouse, the trustees should pay such survivor his or her own contribution to the marriage-contract funds, and on his or her death pay the fee of the deceased spouse's funds to his or her heirs and assignees.

A child was born of the marriage. Six years after the marriage the wife obtained decree of divorce against the husband. Thereafter the wife died, survived by her former husband and the child of the marriage. From the date of the divorce till the wife's death the trustees paid the annual proceeds of the marriage-contract funds to the wife.

Held (1) that the divorced husband was entitled to the liferent of the funds which he had contributed to the marriage trust; (2) that he had no interest in the funds contributed by the wife to the marriage trust, but that the income of these funds during the divorced husband's survivance had been undisposed of by the marriage-contract, and fell to be paid to the heirs and assignees of the wife; and (3) that no right with respect to the capital of the marriage-contract funds had vested in the issue of the marriage—*diss.* Lord Young to findings (2) and (3), he holding that on the death of the wife the child of the marriage became entitled to the capital of the share contributed by the wife to the marriage trust.

By contract of marriage dated 1st February 1842 between William Harvey and Rachel Hunter, William Harvey bound himself to pay to trustees, for the purposes therein expressed, the sum of £4000, and in security thereof assigned to them his right and interest under his father's trust-disposition and settlement, and the said Rachel Hunter, on the narrative that her father William Chambers Hunter had agreed to execute in favour of her and his other younger children (1) a bond of provision over his entailed estate, and (2) a bond for £4000 over his unentailed lands of Gateside, and that it had been agreed that such sums as might fall to her or her representatives under said bonds should be settled and secured by said contract of marriage, conveyed to the same trustees with consent of her said father, "the whole sums of money, subjects, and effects of every description, heritable as well as moveable, to which she may succeed or be entitled by virtue of the said bond of provision by her said father, or by virtue of any will, testament, or settlement made or to be made by him either anent the said