Friday, July 6.

FIRST DIVISION.

[Lord Dewar, Ordinary.

MONTGOMERY *v.* ZARIFI AND OTHERS.

Jurisdiction—Husband and Wife—Marriage Contract—Antenuptial Marriage Contract Stipulating for Construction and Regulation according to Law of England.

The antenuptial marriage contract, in English form with English trustees, of a man domiciled in Scotland and a woman domiciled in England contained this clause—"And it is hereby agreed and declared by all the parties hereto, and particularly by the husband, that these presents shall be construed and that the rights of all parties claiming hereunder shall be regulated according to the law of England, in the same manner as if the husband were now domiciled in England, and as if the husband and wife were to remain henceforth during their respective lives domiciled in England."

The husband obtained in the Scottish Courts a decree of divorce for adultery on a summons which did not deal with the parties' patrimonial rights, and the wife left Scotland not meaning to return. Subsequently the husband brought an action against his divorced wife, the marriage-contract trustees being called for any interest they might have, concluding for declarator (1) that the wife had forfeited all her legal rights and her conventional provisions under the marriage contract, (2) that the husband's obligation to provide a sum of £15,000 for the children of the marriage (there were none) was extinguished, and (3) that the wife's liferent of funds provided from her side had ceased as if she were naturally dead, and that he, the husband, was entitled to the liferent during his life as from the decree of divorce; alternatively that he was entitled to such an equitable modification of the provisions of the contract as he would have obtained by English law had the parties been domiciled and divorce been pronounced in England, that he was free of the obligation to provide the sum of £15,000, and that the wife was bound to settle or concur in the settling upon him such portion of the income of the fund provided from her side as might be determined to be in accordance with the law and practice of England, or as was just and equitable in the circumstances.

Held (*rev.* Lord Dewar, *dis.* Lord Mackenzie) that the jurisdiction of the Court was not excluded by the provision in the marriage contract.

Held, per the Lord President, Lord Johnston, and Lord Skerrington (*following Manderston* v. *Sutherland*, (1899) 1 F. 621, 36 S.L.R. 432), that jurisdiction was not lost through the wife having changed her domicile since the decree of divorce.

Held that the defender's plea of *forum non conveniens* fell to be repelled.

Held that the effect of the decree of divorce upon the provisions of the marriage contract must be decided exclusively by the law of England, but (*dis.* Lord Johnston) that inasmuch as the pursuer did not aver that by that law he was entitled to the benefits he sought his averments were irrelevant and the alternative conclusions fell to be dismissed.

Walter Basil Graham Montgomery, *pursuer*, brought an action against Fanny Zarifi, formerly Montgomery, formerly his wife, but who was divorced from him by decree of the Court of Session in an action at his instance dated 12th December 1914, and Peter Ralli and others, trustees acting under a trust deed indenture and settlement, dated 31st October 1912, in contemplation of the marriage between the pursuer and Fanny Zarifi, for any interest they might have, *defenders*, concluding for decree of declarator (1) that the defender Fanny Zarifi had since the date of the decree of divorce and in virtue of it forfeited all her legal rights and all the conventional provisions in her favour in the marriage contract, (2) that the pursuer's obligation under the marriage contract to pay a capital sum of £15,000 to the trustees as a provision for the child or children of the marriage had ceased and determined and the pursuer was discharged therefrom, and (3) that the defender's (Fanny Zarifi's) life interest in funds provided by her and called the wife's fortune in the marriage contract had ceased at the date of the decree of divorce as if she were naturally dead and the pursuer was entitled to the income thereof during his life: alternatively to the foregoing conclusions, (1) that under the marriage contract the pursuer was entitled to such equitable modification in his favour of the provisions in the marriage contract as he would have obtained according to the law of England if the spouses had been domiciled in England at the date of divorce and if he had obtained decree of divorce in the English Courts, (2) that the pursuer was free from the obligation to pay the sum of £15,000 to the trustees as a provision for the child or children of the marriage, and (3) that the defender Fanny Zarifi was bound to settle for the pursuer or pay over to him during his lifetime, or to concur in the trustees so settling or paying, such portion of the income of the wife's fortune as might be determined to be in accordance with the rule and practice of the English Courts, or as might be determined to be just and equitable in the circumstances.

Fanny Zarifi and the marriage-contract trustees both entered appearance, lodged defences, and were represented by the same counsel.

The *trust deed indenture and settlement* described the pursuer as "domiciled in Scotland"; in the introductory narrative stated—"And whereas it is the intention of the parties hereto that these presents

shall be construed and that the rights of all persons claiming hereunder shall be regulated by the law of England in the same manner as if the said Walter Basil Graham Montgomery were now domiciled in England and as if he and the said Fanny Zarifi were to remain henceforth during their respective lives domiciled in England"; and in the body of the deed contained the provision quoted *supra in the rubric.*

The operative provisions were summarised in the opinion of Lord Johnston as follows:—"The parties to it were the pursuer; the principal defender, then Miss Zarifi; Sir Basil Graham Montgomery, the pursuer's father; Mrs Zarifi, widow, the defender's mother; and the trustees of the settlement. The defender was interested in (1) the funds placed in settlement by her father by a deed of 18th October 1889 on the occasion of his marriage with her mother, (2) two-thirds of the residue of her father's estate under his will, and (3) the funds settled by her mother under a deed of 30th September 1889, also on the occasion of her marriage with the defender's father. In the first and second of these funds Mrs Zarifi was interested for her liferent, and the defender in the fee, and Mrs Zarifi's intervention in the marriage contract was that she might relinquish her liferent and make certain appointments to enable her daughter, becoming thus absolutely entitled to settle as 'the wife's fortune' the two first-mentioned funds, to transfer the same to the trustees upon the trusts of her own marriage contract. Any further property belonging to the defender, including her interest in the fund settled by her mother, was separately dealt with, and as the pursuer was excluded from any right in it, this fund need not be further mentioned. Of the 'wife's fortune' the trustees were directed to pay the income to the defender during her life for her separate use without power of anticipation, and after her death to the pursuer as her husband, if surviving, and his assignees during his life, and subject to such life interests to stand possessed for the children of the marriage. In consideration of the marriage and of this settlement of the wife's fortune, Sir Basil Graham Montgomery, the pursuer's father, undertook that he would pay to the pursuer during the latter's life an annuity of £500; and further, that in the event of the pursuer dying survived by the defender and a child or children of the marriage, he would continue to pay the said annuity of £500 to the trustees for the benefit of the defender during her widowhood, provided that in the event of her marrying again the said annuity should determine, and he still further undertook that in the event of the pursuer and defender predeceasing him, or in the event of the defender marrying again during his lifetime, he would pay to the trustees during his own life an annuity of £500 for the benefit of the children of the marriage. The pursuer himself undertook that after the ceasing of the last of the said annuities, *i.e.*, on his father Sir Basil's death, he would provide the capital sum of £15,000 as a provision for the children of the marriage. This £15,000 is denominated 'the husband's fortune.' As bearing upon these provisions upon the pursuer's part it may here be stated that there were no children of the marriage. Should there be no children of the intended marriage who should attain majority, it was provided that the trustees should, subject to the prior trusts, stand possessed of 'the husband's fortune' in trust for the husband, and of the wife's fortune in trust for the wife. With regard to the provisions above narrated, it was mutually declared that they were to be accepted as in full satisfaction of the spouses' respective legal rights."

The *facts* of the case were—The pursuer and Fanny Zarifi were married on 31st October 1912 after entering into the trust indenture and settlement. At that date the pursuer was domiciled in Scotland and remained domiciled there. Fanny Zarifi was then domiciled in England. There were no children of the marriage. On 12th December 1914 the pursuer obtained from the Scottish Courts decree of divorce for adultery against his wife. The summons of divorce contained no conclusions dealing with the patrimonial rights of the parties as affected by the decree. On 15th June 1915 the pursuer raised the present action.

The pursuer *averred*—"(Cond. 9) On the footing that the trust deed and indenture and settlement, on a just construction of it, excludes or varies the legal effect of a Scots decree of divorce, the pursuer maintains that he is entitled to such rights and remedies with regard to the marriage-contract funds as he would have had if he had been domiciled in England and obtained the decree of divorce in that country. According to the domestic rules of the law of England there is no common law forfeiture of conventional provisions attached to a decree of divorce pronounced by the English Courts and divorcing parties subject to the jurisdiction of the English Courts as to matter of divorce; but by statute the Courts have a right of varying the settlements in favour of the innocent spouse, and they invariably exercise said right in cases similar to the present. The rule of practice is to place the innocent spouse in the same position as far as possible as would have been the case if the marriage tie had not been broken, keeping in view the position of the parties. The joint income of the spouses in the present case arising from the funds settled by the marriage settlement amounted to about £4500, of which £500 came from the pursuer and about £4000 from 'the wife's fortune,' and the family establishment and expenditure were regulated during the subsistence of the marriage upon a scale to correspond to that joint income. In contemplation of and upon his marriage the pursuer rented on a long lease a large house in London, furnished the same on a scale suitable to the joint income, and carried on therein an establishment suitable to the joint income of the parties. In connection therewith he has incurred very heavy liabilities on the joint account of himself and the defender, for which he is responsible, and has had further

claims made against him in respect of liabilities incurred by the defender personally. The said house and the furniture therein now remain upon the pursuer's hands, there being about twenty years of the lease to run. In these circumstances it is averred that the English Courts would allow him a very substantial relief out of the funds under the settlement, in accordance with the foresaid rule of practice, that such relief would extend to giving the pursuer the liferent enjoyment of the income of the said 'the wife's fortune,' and it is submitted that this basis of adjustment and the said rule of practice fall to be applied accordingly in the present action, or otherwise that such relief should be afforded to the pursuer out of the said income as the Court may in its discretion think fair and reasonable. With reference to the answers for the defender Fanny Zarifi it is explained that as she left England before she was divorced, and has not, so far as the pursuer is aware, had any settled residence since, there is not so far as she is concerned any Court except the Scottish Court which has jurisdiction to try the present question. It is further explained that assuming that the English Courts have jurisdiction over the said defender, and are not bound to apply the rule of Scots law as to the legal consequence of a Scots decree of divorce upon the property rights of the spouses, it is doubtful whether the English Courts could competently exercise the statutory function of varying a marriage settlement in a case where the decree of divorce has not been pronounced, and could not have been competently pronounced, by themselves. The remedy now sought is not founded upon the statutory discretion which the English Courts alone can exercise, but upon the express stipulation of parties in the marriage settlement that their rights should be regulated in the same manner as if they had been domiciled in England. These contractual rights can be conveniently adjudicated on by any Court, with such proof of analogous English practice as may be thought necessary. If on the other hand it is held that on a sound construction of the stipulation in the marriage settlement it expressly invokes the statutory function of the English Courts, and the English Courts cannot exercise that function because they have not pronounced the decree of divorce, the result would be that the stipulation would be inept and inoperative, and the Scots decree of divorce would take effect in the ordinary way. If a case were raised in the English Courts it would necessitate a reference to and proof of Scots law, just as the present case may to some extent necessitate a reference to and proof of English law. In these circumstances, apart from the question of jurisdiction, there is no preponderating convenience in favour of the English forum. In any case it is proper and necessary that the general legal effects of the decree of divorce should be declared by the Court of Session. (Cond. 10) The pursuer has experienced difficulty in obtaining effect given to his rights as aforesaid, inasmuch as immediately after the action of divorce was served on the defender Fanny Zarifi, and before decree was pronounced therein, she went away with the co-defender, leaving no address, and in these circumstances the said trustees are unwilling to act except under decree of Court. The present action of declarator is therefore necessary. With reference to the answer for the defender Fanny Zarifi, it is explained that the defences lodged in her name contain no address. The pursuer is still without any information as to where she is living, though he believes that she is still furth of the United Kingdom. Those responsible for lodging the defences on her behalf are called on to produce their mandate to do so. They are also called upon to state where she is living. They are also called on to state where she claims to be domiciled and the grounds of her claim. *Quoad ultra* the statements in answer are denied. The said defender was domiciled in Scotland up to the date of her divorce, and the pursuer believes and avers that she still continues to be so."

The *answer* for the defender Fanny Zarifi was—"Denied that the present action of declarator is necessary. This defender is neither resident nor domiciled in Scotland."

In the Inner House the defender Fanny Zarifi asked leave to amend answer 10 by adding after the word "necessary" the following:—"This defender's domicile of origin was in England. Prior to the decree of divorce she had left Scotland *sine animo revertendi*, and on the dissolution of her marriage by said decree the Scots domicile which she had acquired through the said marriage was terminated and the domicile of origin revived."

The defender Fanny Zarifi *pleaded, inter alia*—"1. The Court of Session has no jurisdiction to entertain the action against this defender, and the action should accordingly be dismissed. 2. The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons. 3. The pursuer having agreed that the rights of parties under the said marriage settlement shall be determined according to the law of England, is barred from insisting on the first, second, and third conclusions of the summons. 4. The alternative conclusions of the summons other than (2) are incompetent, in respect that the Court has no power either by statute or at common law to vary the terms of the settlement. 5. *Forum non competens, et separatim non conveniens.*"

Similar pleas were stated for the trustees.

On 27th November 1915 the Lord Ordinary (DEWAR) sustained the first plea-in-law for defenders and dismissed the action.

Opinion.—[*After narrating the facts of the case*]—"Under the settlement the pursuer's father Sir Basil Montgomery undertook to pay to the pursuer £500 per annum during his life, and in the event of his death to continue to pay the said annuity to his trustees for behoof of the defender and any child or children of the marriage. And the pursuer undertook to pay at the termination of said annuity a capital

sum of £15,000, called 'the husband's fortune.' The defender provided certain funds, amounting to about £100,000, called 'the wife's fortune,' and the trustees were directed to pay the income from said funds to the defender during her life for her separate use, and after her death to the pursuer if surviving.

"The pursuer says that the income from these funds now falls to be paid over to him. He argued that as the matrimonial domicile was Scotch, and the decree of divorce was pronounced in Scotland, he is entitled upon the dissolution of the marriage to all the rights to which he would have been entitled if his wife had naturally died, and that he is accordingly discharged from all the obligations undertaken by him in said deed, and was entitled to the enjoyment of the income from the wife's fortune.

"The defence is, (*first*) no jurisdiction, and (*second*) *forum non competens et separatim non conveniens*. The defender and the trustees, who have also lodged defences, state that at the date of said marriage settlement it was the intention of the whole of the parties thereto, and was expressly agreed, that the rights of all parties claiming under said settlement should be regulated by the law of England, and that the jurisdiction of the Scottish Courts was excluded, and they found upon the following narrative and clause:—[*His Lordship narrated the clauses above quoted*].

"I am of opinion that the defence is well founded.

"It was conceded that in the absence of express agreement to the contrary it was for the Courts of the matrimonial domicile to determine the rights of parties arising in consequence of divorce. But I think there was an agreement here excluding the jurisdiction of the Scottish Courts which parties were quite entitled to make. A wife may stipulate that her matrimonial rights shall not be prejudiced by a change of domicile. 'The husband and wife may, in their marriage contract, covenant that the law of one country or another, as they may fix, shall be held as the law by which the contract, when it comes to be enforced, shall be construed, and that the rights under it shall be regulated by the law of that place without regard to the law of the place of celebration or the domicile of the parties'—Fraser, ii, p. 1334, and *Stair* v. *Head*, 6 D. 904. That I think is what parties did in this case. They invoked the law of England and excluded the jurisdiction of the Scottish Courts. The indenture was executed in England and is couched in the technical phraseology of English law, which the English Courts alone can interpret. The domicile of the trustees was English, and the estate was to be administered in England. Then the pursuer expressly agreed that the deed should be construed, and any right he might claim under it should be regulated by the law of England in the same manner as if he were domiciled in England, that is to say, as if he had no Scotch domicile. But if he had no Scotch domicile he could not pursue this action in this Court. It appears to me that the purpose and intention was to provide that the wife's very large matrimonial interests should not be prejudiced by the fact that the man she was about to marry was a domiciled Scotsman. She presumably did not know what her rights might be if they were regulated by Scots law and determined by the Scotch Courts, and she therefore stipulated, and the pursuer agreed, that if he should claim any right under the settlement he would not found upon his Scotch domicile but proceed in the English Court as if he were a domiciled Englishman. So far as I can see that is the only meaning which can be assigned to the words, 'In the same manner as if the husband were now domiciled in England, and as if the husband and wife were to remain henceforth during their respective lives domiciled in England.'

"The pursuer argued that no question of construction arose, and that he made no claim under the marriage contract. He said that all he asked was a declarator that the defender had forfeited her legal rights and conventional provisions in respect of the divorce, and that the income from her fortune now fell to be paid to him as if she were naturally dead. But if that claim does not arise under the marriage contract I do not think that it can arise at all. In the absence of a marriage contract no right accrues to a husband upon decree of divorce being pronounced in respect of the moveable property of the wife. That was decided in the case of *Eddington* v. *Robertson*, 22 R. 430, 32 S.L.R. 312, where it was stated that 'apart from the Married Women's Property (Scotland) Act, no such claim could have been put forward; and that statute does not support the claim for it confers right upon the husband only in the event of death, and not in the event of divorce of the wife.'

"If I am right in thinking that the jurisdiction of the Court of Session has been excluded, it is unnecessary to consider the questions raised by the pursuer under the alternative conclusions of the summons.

"I accordingly sustain the first plea-in-law for the defender and dismiss the action."

The pursuer reclaimed, and argued—The clauses in the indenture did not exclude the jurisdiction of the Scottish Courts. The jurisdiction of the Scottish Courts could only be excluded expressly, and that had not been done, for the clauses were limited in their application to construction of the indenture and to the regulation of the rights of the parties under it. That was a common and quite competent clause—Fraser, H. & W., vol. ii, p. 1334. The indenture did not deal at all with the rights of parties in the event of divorce, which was the only question in the present case. Further, the English Courts could not regulate the rights of parties in the present case, as their power to vary settlements in the event of divorce depended upon statute and had been held inapplicable where the decree of divorce was pronounced by a foreign court—*Moore* v. *Bull*, [1891] P. 279—so that the only Court competent to deal with the patrimonial consequences of the divorce was the Scottish Court. If juris-

diction was not excluded by the terms of the indenture, there was jurisdiction in the Scottish Courts, for at the date of divorce the defender was domiciled in Scotland and her averments in answer 10 as originally framed were irrelevant to instruct a change of domicile. The defender must in addition state where she was resident and what her domicile was—*Murdoch* v. *Young*, 1909, 2 S.L.T. 450; *Baird* v. *Baird*, 1914, 2 S.L.T. 260. If so, the Scottish Courts having jurisdiction to pronounce decree of divorce had jurisdiction to expiscate the patrimonial consequences of their own decree and were the only proper Courts to do so—*Manderson* v. *Sutherland*, 1899, 1 F. 621, *per* the Lord Justice-Clerk (Macdonald) at p. 624 and Lord Moncreiff at p. 629, 36 S.L.R. 432; *Cathcart* v. *Cathcart*, 1904, 12 S.L.T. 182. Further, those patrimonial consequences followed as a necessary result of the decree of divorce, and conclusions therefor could competently have been inserted in the action for divorce. It was immaterial that the trustees were domiciled in England; they were called merely for their interest, and if there was jurisdiction against the defender the fact that there was no jurisdiction against them and that they so pled did not exclude the jurisdiction of the Scottish Courts. The remedy sought was the proper one—*Johnstone-Beattie* v. *Johnstone*, 1867, 5 Macph. 340, 3 S.L.R. 203. Properly read the case of *Eddington* v. *Robertson*, 1895, 22 R. 430, 32 S.L.R. 312, was an authority for the pursuer as showing that he was not barred from suing for his patrimonial rights because he could have but did not choose to sue for them in the divorce action. Further, leave to amend should be refused as the proposed amendment was irrelevant, for it did not state when the defender abandoned her Scottish domicile nor that she was domiciled elsewhere. It was settled by *Manderson's* case and *Cathcart's* case that inherent in the jurisdiction to divorce was the jurisdiction to follow out the patrimonial consequences of the divorce, and that could be exercised *ex intervallo* despite the action of the divorced spouse.

Argued for the defenders—There was no jurisdiction against the defender, for the jurisdiction of the Scottish Courts was excluded by the indenture. It dealt with the patrimonial rights of the pursuer and defender, and under it the pursuer was to be treated as a domiciled Englishman, and consequently his rights as a divorcing husband could only be determined by the English Courts. The pursuer and defender were domiciled in different countries at the date of the marriage, and contracted that their marital rights were to be determined by the law of England, and their intention must be given effect to—*Hamlyn & Company* v. *Talisker Distillery*, 1894, 21 R. (H.L.) 21, 31 S.L.R. 642; *Greer* v. *Poole*, 1880, 5 Q.B.D. 272, *per* Lush, J., at p. 274. In such a case as this capacity in the Court to enforce its decree was an essential prerequisite of jurisdiction—*Fraser* v. *Fraser & Hibbert*, 1870, 8 Macph. 400, *per* Lord Ardmillan at p. 405, 7 S.L.R. 235. Here that pre-requisite did not exist, for this action was for a money claim, but the defender was beyond the jurisdiction of the Scottish Courts. The trustees were English and the trust funds were in England, and in such a case the English Courts alone had jurisdiction over the trustees—*Robertson's Trustees* v. *Nicholson*, 1888, 15 R. 914, *per* Lord President Inglis at p. 920, 25 S.L.R. 652. Accordingly in so far as the action contained conclusions against the trustees there was no jurisdiction. Further, there was no jurisdiction against the defender, for the only jurisdiction over her was in virtue of the marriage, and that ceased with divorce, or at least ceased at divorce, in respect that prior thereto the defender had abandoned her Scottish domicile—Dicey, Conflict of Laws, 2nd ed., p. 135. The wife's original domicile in England must be held to have revived at the date of divorce. *Cathcart's* case was in favour of the defender, for the Court did not sustain the jurisdiction. *Manderson's* case was not in point, for in it there was jurisdiction in the Scottish Courts on another ground. The ordinary rule applied, and the pursuer must follow the defender to the *forum* in the jurisdiction of which she was—*Tasker* v. *Grieve*, 1905, 8 F. 45, *per* Lord Kyllachy at p. 49, 43 S.L.R. 42. The amendment was relevant and should be allowed. If allowed the result was there was no jurisdiction in the Scottish Courts at all. The pursuer having sued for divorce without inserting patrimonial conclusions in his action, and having thereby *sua sponte* destroyed the jurisdiction he was now barred from suing—*Eddington* v. *Robertson* (*cit.*); *Redding* v. *Redding*, 1888, 15 R. 1102, 25 S.L.R. 459.

At advising, 1st November 1916—

LORD PRESIDENT — The sole question raised in this reclaiming note is—Has this Court jurisdiction to entertain the action? Differing from the Lord Ordinary, I am of opinion that it has.

The pursuer obtained decree of divorce against the defender in this Court in December 1914. The decree, which was extracted in the January following, is not challenged on any ground. In the present action the pursuer merely seeks to obtain the remedies which follow in law from the decree of divorce. Stated generally, the conclusions of the summons are for declarator that the defender has lost her legal rights as the pursuer's wife as well as her conventional provisions under an indenture dated 31st October 1912, that the pursuer is released from his obligations under that indenture, and is entitled to have as from the date of the decree of divorce the benefits conferred by the deed.

The defender pleads no jurisdiction, and rests her plea upon the following clause in the deed of indenture:—"It is hereby agreed and declared by all the parties hereto, and particularly by the husband, that these presents shall be construed and that the rights of all persons claiming hereunder shall be regulated according to the law of England, in the same manner as if the husband were now domiciled in England, and as if the husband and wife were to remain hence-

forth during their respective lives domiciled in England." The meaning of that clause appears to me to be plain. It signifies that the interpretation of the deed and the determination of the parties' rights thereunder are to be governed by the law of England. It is conceded that this would be so if the clause had stopped at the words "according to the law of England." But it is said that the words which follow make all the difference. I cannot think so. The meaning of the following words is, I think, exactly what they say — that when the question of the interpretation and determination of the rights of parties under the indenture come to be considered, then both parties are to be treated, wherever their domicile may be, exactly as if they were domiciled in England. There is no hint or suggestion that the jurisdiction of this Court is to be ousted. If it is desired to exclude the jurisdiction of the Court it is very easy to say so. So much for the grounds on which the Lord Ordinary sustained the plea of no jurisdiction.

It was, however, contended to us that this Court had no jurisdiction over the defender in respect that immediately the decree of divorce was pronounced she ceased to be a domiciled Scotswoman and her domicile of origin in England at once revived. This plea was not urged before the Lord Ordinary. On the contrary, "it was conceded" before him "that in the absence of express agreement to the contrary it was for the courts of the matrimonial domicile to determine the rights of parties arising in consequence of the divorce." At a late stage in the argument before us the concession was withdrawn, and a motion was made to amend the record by an addition to answer 10 of the following words:—"This defender's domicile of origin was in England. Prior to the decree of divorce she had left Scotland *sine animo revertendi*, and on the dissolution of her marriage by said decree the Scottish domicile which she had acquired through the said marriage was terminated and her domicile of origin revived."

I am of opinion that the motion for the amendment of the record ought to be refused, because in my judgment the amendment is irrelevant. If this Court has jurisdiction to grant decree of divorce it follows necessarily, I think, that it has jurisdiction to give all the remedies which divorce carries in its train. That appears to me to be an incontrovertible proposition, almost self-evident, but if authority were required in its support I think it is to be found in the case of *Manderson* v. *Sutherland*, (1899) 1 F. 621, 36 S.L.R. 432, where the divorced husband pleaded in an action at the instance of his wife containing conclusions similar to the present, that there was no jurisdiction because he was domiciled in the Isle of Man. The Court repelled the plea of no jurisdiction on the ground, I think, that the decree of divorce having been competently granted in this Court, this Court had jurisdiction to entertain questions arising out of the decree of divorce. Thus Lord Kyllachy observes that the "question is whether—the divorce being valid, and this Court having jurisdiction to pronounce it — this Court has not now also jurisdiction to pronounce the decree here sought, that decree being really no more than a corollary of the decree of divorce. I take it that that question must be considered as if this action had been brought simultaneously with or immediately after the action of divorce. . . . And accordingly what I have to consider is whether if — having pronounced decree of divorce — I had been asked to pronounce decree in terms of this summons, I could have refused on the ground that while I had jurisdiction to grant divorce I had no jurisdiction to grant the remedies which divorce involves. I do not think I could have refused. If this Court had jurisdiction to separate the parties and to free them from the conjugal relations, it had, and has, I apprehend, jurisdiction to grant the remedies which, according to our law, follow the disjunction of the conjugal relation."

The judgment of Lord Kyllachy was confirmed upon the same grounds, as will be found on an examination of the opinion of the Lord Justice-Clerk, and, in particular, of Lord Moncreiff. It is true that in that case the husband had heritable property in Scotland, and that might have been quite sufficient of itself to enable the Court to sustain its jurisdiction, but that was only mentioned by the way. The ground of judgment of the Inner House, affirming Lord Kyllachy's judgment, was the ground of judgment which I have just read from his Lordship's opinion. Accordingly I think that Lord Low, who followed the judgment in *Manderson* v. *Sutherland* in the case of *Cathcart* v. *Cathcart*, (1904) 12 S.L.T. 182, was well founded when he said—"It may be that Mrs Cathcart is now domiciled in England, but even if she is I do not think that that deprives this Court of jurisdiction to grant the remedies which the decree of divorce involves. That appears to me to be the result of the decision in *Manderson* v. *Sutherland*. I therefore do not think that the plea of no jurisdiction, in so far as it is founded upon the allegation that Mrs Cathcart is now domiciled in England, can be sustained."

On the assumption therefore that the defender in the case before us is domiciled in England I am still of opinion that this Court has jurisdiction to entertain the action. I am therefore for recalling the interlocutor of the Lord Ordinary and repelling the plea of no jurisdiction.

LORD JOHNSTON—The pursuer and the defender, whom he has since divorced, were married in 1912, and they entered into an antenuptial marriage contract in English form. The pursuer divorced his wife in December 1914, but the action was confined to the divorce proceedings, and did not touch the question of the rights of parties consequent on divorce. On 15th June 1915, within six months of the divorce taking effect, the pursuer raised the present action to have the rights of himself and his former wife, consequent on the divorce, ascertained and declared. He has called his former wife as defender, and the trustees under their marriage contract for their interest.

At the date of the marriage the defender was domiciled in England. The pursuer was a Scotsman by birth, and was domiciled at the time in Scotland. That is beyond dispute as it is stated in the forefront of the marriage contract. There is no suggestion that he changed his domicile during the marriage. And he continued a domiciled Scotsman. The matrimonial domicile was therefore Scots, and at the date when he commenced his proceedings for divorce the pursuer could have taken them in no other Courts than those of Scotland. The divorce was granted, and it stands unimpugned. But prior to the divorce proceedings the defender had left Scotland and, it is explained, gone abroad with the co-respondent, where she still remains, and with the avowed determination not to return to Scotland. She pleads no jurisdiction, and supports the plea on two grounds—first, that her matrimonial domicile having been ended by divorce, and by her abandoning Scotland as her residence *sine animo revertendi*, this Court has now no jurisdiction over her; and 2nd, that the jurisdiction of the Scottish Courts is excluded by the express terms of her marriage contract. The defenders called for their interests state the same plea in the same words, and support it on the same grounds. I think that the plea should be repelled, for it fails on both grounds.

The divorce having been properly granted in this Court, this Court had power to determine, and was the proper Court to determine, its patrimonial consequence, and the guilty spouse could not deprive it of this power or avoid the jurisdiction any more in the matter of such patrimonial consequences, than in the matter of the divorce itself, by flying the country either before the divorce or after it. For this the case of *Manderson* v. *Sutherland*, 1899, 1 F. 621, 36 S.L.R. 432, is sufficient authority, and I refer particularly to the judgment of Lord Moncreiff. The circumstances do not admit of any plea of bar by delay. It is unnecessary therefore to consider whether that plea could be competently stated. It was also maintained that the pursuer had lost his remedy in the Scottish Courts by taking a final decree of divorce without proceeding by ancillary conclusions in the same action to have the rights of the spouses consequent on divorce ascertained. This is negatived by the second answer given by this Division to the English Court, on case stated, in *Eddington* v. *Robertson*, 1895, 22 R. 430, 32 S.L.R. 312.

The second ground on which the defender bases her plea is founded on a special provision in the parties' marriage contract. The wife who was, as I have said, domiciled in England was possessed of a considerable fortune, and she and her advisers stipulated as follows:—"That these presents," that is, the contract of marriage, "shall be construed, and that the rights of all persons claiming hereunder shall be regulated, according to the law of England, in the same manner as if the husband were now domiciled in England and as if the husband and wife were to remain henceforth during their respective lives domiciled in England." That is a stipulation to which in any question affecting the rights of parties claiming under the marriage contract this Court, though it sustains its jurisdiction, will and can give every effect. But it does not oust that jurisdiction. The spouses have contracted that their rights shall be regulated by the law of England. But they have not bound themselves to resort exclusively to the Courts of England for the ascertainment and application of that law. It can be ascertained by this Court with the assistance of the Court of England if necessary, and can be applied by this Court. The Lord Ordinary has in some degree I think confused two things, jurisdiction or *forum competens* and *forum conveniens*, somewhat induced thereto by the way in which the defender pleaded her case. But the question of *forum conveniens* is a wholly different matter from that of jurisdiction. At first sight it may appear that this is not a very convenient *forum* in which to determine the rights of the parties in question. But there is evidently a matter in the background which makes the question of the *forum* of peculiar importance to the pursuer, and one which we cannot decide without full discussion. For this reason I have made no reference to the general provisions of the marriage contract and to the conclusions of the summons, and indicate no opinion on the question of the *forum conveniens*.

It may be proper to say a word as to the position of the compearing defenders, the marriage-contract trustees, who echo the plea of the defender to the jurisdiction. They are only called for their interest. That is often done, according to our practice, in order to give persons who may be supposed to be interested cognisance of the proceedings, so that they shall not have any excuse for afterwards alleging that anything has been done behind their back and without their knowledge, and at the same time to allow them to compear in the process if they think that be to their interest or that of those they represent. No jurisdiction is asserted against them, and no decree is asked against them. The plea to jurisdiction is therefore, in the mouth of the compearing defenders, not *hujus loci*, and does not call for further notice. It is sufficient to recal the Lord Ordinary's interlocutor, as it sustains the plea to jurisdiction of both defenders, to repel that plea as stated for the principal defender, and find it unnecessary to deal with it as stated for the compearing defenders.

LORD MACKENZIE—I agree with the conclusion reached by the Lord Ordinary. The main conclusions of the action show that the object of the pursuer is to invoke the law of Scotland in order that he may claim funds held by the trustees under his marriage settlement. The alternative conclusion puts forward a claim which it is said the pursuer could make in England. The Court here has in my opinion no jurisdiction, and that because I interpret the settlement as

meaning that it is the English Court alone that can entertain such an action. The clause of the settlement upon which I found my judgment is in these terms—"And it is hereby agreed and declared by all the parties hereto, and particularly by the husband, that these presents shall be construed, and that the rights of all persons claiming hereunder shall be regulated, according to the law of England." If the clause had stopped there it might have been held that the Court here had jurisdiction, though the ascertainment of the law regulating the rights of parties would have to have been ascertained in England. The opinion, however, of the Lord President in *Corbet* v. *Waddell*, (1879) 7 R. 200, 17 S.L.R. 106, would have founded an argument to the contrary. But the clause proceeds further, viz.—"In the same manner as if the husband were now domiciled in England and as if the husband and wife were to remain henceforth during their respective lives domiciled in England." The fair construction of these words is that the parties expressly agreed that the English Courts alone should have jurisdiction. There is nothing contrary to public policy in such a contract. The matter stands thus under the contract—the pursuer, the husband, is domiciled in England; his late wife, now divorced, is also domiciled in England; the funds brought into settlement are in the hands of trustees residing in England, none of whom are subject to the jurisdiction of this Court.

In these circumstances the first plea-in-law for the defender has in my opinion rightly been sustained by the Lord Ordinary.

LORD SKERRINGTON—I cannot concur with the Lord Ordinary in thinking that the clause in the marriage settlement is framed so as to exclude the jurisdiction of all courts except those of England. As I read the clause the parties agreed (1) that the construction of the settlement, and (2) that its effect on the substantive rights of parties claiming under it, should be regulated by the law of England. Nothing was said, and I think that nothing was implied, as to the courts in which these rights might be vindicated. It was further expressly agreed that in applying English law it should be assumed that the parties were and had always been domiciled in England. Some such provision was necessary in order to foreclose the contention that as the parties were actually domiciled in Scotland the law of England would invoke the law of Scotland for the purpose of determining the legal effect of the marriage settlement upon the patrimonial rights of the spouses.

At the debate before us it was proposed to amend the record by averring that the defender had on her divorce abandoned her acquired Scottish domicile and was consequently now domiciled in England, her domicile of origin. I am of opinion that that this averment is irrelevant and should not therefore be added to the record. If the conclusions of the present action had been inserted, as they might have been, in the summons of divorce, no question could have been raised as to our jurisdiction over the defender. It would, I think, be too technical to hold that our jurisdiction to regulate the patrimonial rights of the spouses consequent upon the divorce which we pronounced is excluded by the circumstance that the present action was not instituted until six months after the date of the decree of divorce.

The Court refused to allow the proposed amendment, recalled the interlocutor of the Lord Ordinary, and repelled the first plea-in-law for the defender Fanny Zarifi, and found it unnecessary to deal with the first plea-in-law for the other defenders.

The case was thereafter heard upon the plea of *forum non conveniens*.

Argued for the pursuer—The plea of *forum non conveniens* should be repelled. When a court had jurisdiction to try an action, that plea could not be sustained unless the party pleading it showed a large balance of convenience in favour of some other court—*Clements* v. *Macaulay*, 1866, 4 Macph. 583, 1 S.L.R. 218; *Sim* v. *Robinson*, 1892, 19 R. 665, 29 S.L.R. 585; *Longworth* v. *Hope*, 1865, 3 Macph. 1049. Here no such balance of convenience had been established. The trustees had no interest in the matter. Their duty was to pay to the person who a competent court found was entitled to the funds. Further, there was jurisdiction against them, for they had, though merely called for their interest, lodged defences on the merits. The defender herself was not in England. In England it was doubtful if the Courts would entertain the present action—*Moore* v. *Bull*, [1891] P. 279. The provisions of the contract were not in point, for they related solely to the construction of the contract and the rights of parties claiming under it. No question of construction arose, for the contract nowhere dealt with divorce, but contemplated only the dissolution of the marriage by death. The pursuer was not claiming under the contract. He was founding upon the forfeiture of conventional provisions which the law of Scotland attached as one of its effects to the decree of divorce. That was a claim arising *ex lege*, and was not under but against the contract—*Eddington* v. *Robertson*, 1895, 22 R. 430, 32 S.L.R. 312. No question of English law was raised except on the alternative conclusions. The sole question was whether the forfeiture attached by the law of Scotland to the decree of divorce had been excluded by the terms of the marriage contract. That was a pure question of Scots law. There were no technical terms of English law in the contract, and no averments that the contract had a technical meaning in the law of England. Were that question placed before the English Courts the result would be a remit to the Scottish Courts to determine what was the Scottish law of forfeiture upon divorce. *Anderson, Tulloch, & Company* v. *Field*, 1910, 1 S.L.T. 401, was not in point, for in it there was no legitimate reason at all for bringing the case in Scotland. *Gillon & Company* v. *Dunlop*, 1864, 2 Macph. 776, was also distinguished, for in that case the Scottish Courts had jurisdic-

tion over only one of two executors, and the case was sent to the Courts having jurisdiction over both.

Argued for the defenders — Apart from the contract the pursuer had no claim — *Eddington* v. *Robertson*. All his legal rights were excluded by the contract. Consequently the pursuer's only claim was under the contract. If so the contract provided expressly that the rights of parties were to be regulated by English law. The question was one of English law, and here a decree was sought against the trustees, who were all English, holding the marriage-contract funds in England. Consequently in the end of the day the assistance of the English Courts would be necessary if the pursuer succeeded. The balance of convenience was in favour of sending the case to England, for the English Courts were the proper *forum* for the construction of an English contract and to give a decree against the trustees—*Anderson's* case; *Gillon's* case.

At advising on 1st June 1917—

LORD PRESIDENT—We have already decided that this Court has jurisdiction to entertain this action. The reason upon which our judgment rests appears to me to be conclusive of the question whether this is the *forum conveniens* in which to try the case, for the sole question in controversy is —What are the legal effects which flow from a decree of divorce pronounced in this Court in an action between a domiciled Scotsman and a domiciled Scotswoman?

The pursuer contends that the effect of this decree is to bring into play the provisions of a certain trust-disposition dated 31st October 1912, and to give him the right, and to deprive the defender of the right, conferred by that deed. The defender maintains that this is not so, that the decree of divorce has no effect whatever upon the deed in question, and that it must take effect according to its terms. That, she says, is the contract of the parties.

If this be so, then it is certain not only that this Court has jurisdiction to try the question, but that this is the only Court which has jurisdiction to try the case. Therefore I am for repelling the fifth plea-in-law for the defender.

LORD JOHNSTON—We have at a previous stage of the present case sustained the jurisdiction of this Court over the defender Fanny Zarifi, formerly Montgomery, in the matter of this action, and consequently have repelled the first plea-in-law for her. The Court did not deal with the first plea-in-law for the compearing defenders, who are the trustees under the contract of marriage entered into by her and the pursuer Walter Basil Graham Montgomery, formerly her husband. They found it "unnecessary to deal with it." I am not sure whether the reason was stated, but it was clearly this—the plea taken is that this Court "has no jurisdiction to entertain the action against these defenders"—that is, the trustees—"and the action should accordingly be dismissed." This plea so entirely misapprehends the position that it was unnecessary to deal with it. As there is no action before us against these defenders there can be no question of the jurisdiction of this Court to entertain it, and no possibility of the Court dismissing it. The trustees and their advisers have apparently failed to recognise that no operative decree is asked against the trustees, and that they are only called "for any interest they may have." The conclusions of the action are directed against the lady who has the patrimonial interest in the question at issue. There are no conclusions directed against the trustees. Their presence in the process is not essential, and the action can proceed without them. But they have an interest in it, because its decision may affect their future action. They may require to take cognisance of what is decided, and though they owe no obedience to our jurisdiction directly yet the assistance of the English Court at the proper stage may require them to give that obedience indirectly. I may point out what their interest is. It is to see that their trust is administered, if necessary with judicial assistance, in such manner as will give them complete exoneration in a question with both of the former spouses. Their attitude hitherto has rather indicated that they conceived their duty to be to champion the guilty and to show a hostile front to the innocent spouse. Their duty I conceive to be to see to the administration of their trust in the circumstances which have arisen, giving due consideration to the rights and interests of both spouses and to their own ultimate acquittance. Calling the trustees for their interest has advised them of the procedure that was being taken, and had there been no appearance for the defender Fanny Zarifi it would have been open to them, if so advised, rather than allow decree in absence to be pronounced against her, to raise on their own behalf the questions which she has raised in her defences. She having appeared and stated defences, they have raised no new point, but have simply repeated her defences. And as they are represented by the same counsel and agents they are here simply making common cause with the principal defender and have added nothing to her defence.

We are now invited to entertain the pleas for both sets of defenders to the competency and convenience of this Court as the *forum* for the trial and decision of the questions raised by the pursuer, and to sustain that plea, and consequently to dismiss the action. So far as the plea goes to the competency of the *forum* we have already disposed of it in sustaining our jurisdiction. The question of the convenience of the *forum* is another matter. It may be that no decision complete and enforceable of the matter at issue between the parties can be given by the Courts either of Scotland or of England without assistance from the other, and in retaining the case which has been raised here, that it may proceed here, I would disclaim arrogating to this Court exclusive, or rather exhaustive, jurisdiction in the matter. But the pursuer was I think entitled to claim the assistance of the Court of his own domicile, which was also the

matrimonial domicile, in order to expiscate the consequences of the divorce which it and it alone had power to pronounce. Had he not done so, and had he raised his action in England, I think it is more than likely that he would have been met by the plea of no jurisdiction in the English Court, in respect that the lady had passed from her matrimonial domicile in Scotland to another in New Zealand, and therefore could not be sued in England. Having then brought his action to this Court, are its conclusions such that they cannot conveniently be disposed of here? Some of them may or may not be necessary for his protection in the future, but they certainly are concerned with matters which require reference to the law of Scotland. They all more or less involve the interpretation of his marriage contract with his former wife. That contract is by one of its terms to be construed, and the rights of all persons claiming under it to be regulated according to the law of England. No such difficulty in its construction has been suggested as would make it impossible that we should so construe it and so regulate the rights of the principal parties under it, except at one point. If difficulty does present itself on hearing the case on its merits, we can ask the assistance of the Courts of England.

The point to which I particularly advert is that the law of both countries provides, but in a different way, for the adjustment of the patrimonial rights of divorced spouses, and one, possibly the most important, conclusion in the action is an alternative appeal for an equitable modification of the provisions of the marriage contract, which the Courts of England have statutory power to make, but which is not competent to the Courts of Scotland. If the pursuer finds himself obliged to resort to this alternative conclusion a reference to the Courts of England will then be necessary, but it will be time enough to make that reference when it is determined that the pursuer must fall back upon that alternative conclusion. I am therefore for repelling the plea of *forum non conveniens* and proceeding with the case on its merits.

LORD MACKENZIE—The position in which the action stands at present is this—the individual defender Fanny Zarifi, formerly Montgomery, pleaded that the Court of Session has no jurisdiction, and the marriage-settlement trustees stated a similar plea. On the 1st November the interlocutor which was pronounced was one recalling the judgment of the Lord Ordinary, who had sustained both these pleas, and the operative part of the judgment was to "repel the first plea-in-law for the said defender"—that is Mrs Montgomery—"and find it unnecessary to deal with the first plea-in-law for the other defenders." Accordingly the position of the case at present is this, that there is a plea stated by the marriage-contract trustees against the jurisdiction which has not been disposed of.

In these circumstances I venture to express doubt whether the plea *forum non conveniens* really arises at all. But, on the assumption that it is the view of your Lordships that this Court has jurisdiction, then, of course, the plea of *forum non conveniens* does arise, and I am of opinion that that plea should not be sustained, because in order that the plea may be sustained we should require to be satisfied that there was some other tribunal having a competent jurisdiction in which the case may be tried more suitably in the interests of all parties and for the ends of justice. That seems to be the result of the cases of *Clements* v. *Macaulay*, 1866, 4 Macph. 583, 1 S.L.R, 218, and *Sim* v. *Robinow*, 1892, 19 R. 665, 29 S.L.R. 585.

So far as I was able to understand the points that it was said were to be maintained by the pursuer, it appears to me that those will arise on relevancy and will be disposed of upon the terms of the marriage contract. I therefore concur.

LORD SKERRINGTON—In order that the Court may dispose of the plea of *forum non conveniens* it must know what the question is which it is either convenient or inconvenient that it should decide. In the present case the senior counsel for the pursuer expressly disclaimed any intention of pleading that according to the law of Scotland it was illegal and incompetent for Scottish spouses to exclude by antenuptial contract of marriage the ordinary patrimonial consequences which according to our law flow from the dissolution of a marriage by divorce. On the contrary, he admitted that spouses may by antenuptial contract regulate the patrimonial consequences flowing from divorce as and how they choose. Accordingly he put it to us that the only question on the merits that had to be decided was whether on a sound construction of the antenuptial contract of marriage entered into between the pursuer and the defender the parties had made an agreement which excluded the ordinary patrimonial consequences flowing from the dissolution of a Scottish marriage by divorce.

That being the question on the merits, I am unable to understand why it is suggested that it is inconvenient that this Court should consider and decide what, on the face of it at least, seems a very simple question as to the construction of a contract expressed not in technical language but in plain everyday language. It seems to me that this contract might equally well be construed by an English Court or by a Scottish Court; and as, for reasons which were considered good and sufficient, the action has been instituted in Scotland, I think it is certainly convenient and proper that we should apply our minds to the question of construction. So far as I can see, no question of English law has been raised in the pleadings.

Accordingly I agree with your Lordships that the plea of *forum non conveniens* ought to be repelled.

The Court repelled the plea of *forum non conveniens*.

The case was thereafter heard upon the merits.

Argued for the pursuer—(1) The trust

deed and indenture referred to English law (*a*) questions of construction, and (*b*) the regulation of the rights of all parties claiming under the deed. No such question arose, for the pursuer was not claiming upon the indenture. His claim was for rights accruing to him *ex lege* upon divorce. The indenture nowhere contemplated divorce, and nowhere attempted to provide for its results or to exclude the legal consequences of divorce. If those had been intended to be excluded that should have been done expressly. The divorce *ex lege* operated a forfeiture of the rights of the guilty spouse, and entitled the innocent spouse to such rights as would have accrued to him on the death of the guilty spouse. That forfeiture was not under the marriage contract but in the teeth of it, and it was immaterial that third parties had provided the funds affected — *Johnstone-Beattie* v. *Johnstone*, 1867, 5 Macph. 340, *per* Lord Kinloch (Ordinary) at p. 343 and 344, *per* the Lord President (M'Neill) at p. 347 and Lord Deas at p. 350, 3 S.L.R. 203; *Harvey* v. *Farquhar*, 1872, 10 Macph. (H.L.) 26, *per* Lord Chancellor Hatherley at p. 28, Lord Chelmsford and Lord Westbury at p. 32, 9 S.L.R. 421; *Dawson* v. *Smart*, 1908, 5 F. (H.L.) 24, *per* Lord Chancellor Halsbury at p. 25 and Lord Robertson at p. 28, 40 S.L.R. 879; *The Lord Advocate* v. *Montgomery's Trustees*, 1914 S.C. 414, 51 S.L.R. 377. The pursuer was therefore entitled to decree. (2) In any event the pursuer was entitled to decree in terms of his alternative conclusions. That was on the assumption that the indenture applied. If so, then it had prescribed a mode in which the spouses had agreed that their rights should be adjusted, and that would be given effect to by ascertaining from the English Courts how their rights would have been dealt with on the assumption that the spouses had been domiciled (and therefore the decree of divorce had been pronounced) in England. *Moore* v. *Bull*, [1891] P. 279, was referred to.

Argued for the defenders — [*The Court intimated that they desired to hear argument only on the alternative conclusions.*] The pursuer was in reality asking the Scottish Courts to exercise a statutory power possessed by the English Courts. No such power was possessed by the Scottish Courts. Further, that power in the English Courts was not only statutory but also discretionary, so that it could not be exercised by any other court. Further, the third alternative conclusion was not an appeal to the law of England at all. There were no sufficient averments to warrant a remit under the British Law Ascertainment Act 1859 (22 and 23 Vict. cap. 63).

At advising on 6th July 1917—

LORD PRESIDENT—At the prior stage of this case I expressed an opinion that this Court, and this Court alone, had jurisdiction to determine the controversy disclosed in the pleadings.

The question at issue, and the sole question at issue, is—What is the legal effect on the rights of the parties under the indenture and settlement, dated 31st October 1912, of a decree of divorce between the parties pronounced by the Court of Session? The answer is that the legal effect of this Scottish decree of divorce upon the provisions of the deed must be regulated exclusively by the law of England exactly as if the parties were now and all along had been domiciled in England. That is the answer which the law of Scotland makes because the parties have so contracted, and the law of Scotland gives full effect to their contract.

The record discloses, so far as I can discover, no controversy between the parties as to what the law of England really is. For aught I know they may be at one on that question. Accordingly I consider that the action ought to be dismissed, and that no other course is now open to us.

At the close of the discussion, somewhat faintheartedly I think, our attention was directed by the pursuer's counsel to an alternative conclusion of the summons under which it was thought that by procedure, the nature of which I cannot fully grasp, the pursuer might have decree. That appears to me to be out of the question. There is more than one formidable difficulty in the way, but obviously a fatal objection to any decree under the alternative conclusion of the summons is this, that it might give the pursuer a remedy which *ex hypothesi* by the law of England he does not now possess; and accordingly if we were to give any decree under that conclusion we should, I think, be stultifying the opinion which we all hold—that the rights of parties under this deed of indenture must be regulated exclusively by the law of England.

LORD JOHNSTON—I regard this case with anxiety, because in it we are called on to do justice between two divorced spouses in the matter of their patrimonial interests following upon divorce in circumstances in which there is a conflict of jurisdiction. This conflict of jurisdiction places the injured husband, who is the pursuer, in a position of much difficulty, and the circumstances certainly justify me in saying that he deserves every consideration from the Court, consistent with law and practice, in his endeavour to ascertain and establish his rights. These circumstances are that the pursuer Walter Basil Graham Montgomery and the principal defender Fanny Zarifi were married in England in 1912, and that they had in view of the marriage entered into an antenuptial marriage contract under which certain provisions were made by and on behalf of the husband and the wife's fortune, which was substantial, was settled. At the date of the marriage the husband was a domiciled Scotsman, and Scotland therefore became and continued the matrimonial domicile. But the trustees of the marriage contract are domiciled in England, and the marriage contract itself contained a clause providing that the rights of parties thereunder should be regulated by the law of England as though the spouses were and continued to be domiciled in England. The pursuer divorced his wife for adultery in the end of 1914, and she then left Scotland and

did not return to England, but admittedly went to New Zealand, where she continues to reside.

As regards the patrimonial interests of the spouses on divorce, the Scots and the English law give widely differing remedies. And it is clear from what I have said that the rights of the parties can only be ascertained and regulated by the Courts of England and Scotland acting in conjunction. It is, I think, matter of little moment in the Court of which country procedure is initiated, provided it is so taken as to admit of the ends of justice being reached, and I do not think that the Courts of either country are likely to refuse remedy, if due, on mere technicalities. Personally, I think that the pursuer has been well advised to raise his action in Scotland, for had he gone first to England there would have been more than one obstacle in his way, which might have proved a fatal obstruction. Perhaps the most obvious is, that though the trustees are subject to the jurisdiction of the English Court the principal defender is not; whereas, on the other hand, she was properly subject to the jurisdiction of the Scottish Courts, and indeed to no other, in the matter of divorce, and, as we have already determined, is still subject to that jurisdiction in the present matter, which is one ancillary to the divorce suit. Had the pursuer gone first to the Courts of England direct, from the attitude which she has assumed throughout these proceedings I am left in no doubt that the defender would have met him with the case of *Moore* v. *Bull*, [1891] P. 279, which, if well decided—and I have no reason to suppose the contrary—would have caused him difficulty, I do not say insuperable, though for ought I know it may be so, but at any rate of a grave character. I think that he may quite possibly find his way relieved of this difficulty by having raised his action in this Court, though the assistance of the Courts of England may be required in the course of its progress. Any way he has elected to commence his proceedings here, and we have held that he was entitled to do so.

I think it necessary to the explanation of the course which I think we ought now to take, to advert here shortly to the difference between the law of the two countries applicable in the circumstances.

Though there have been many occasions for judicial consideration of the subject, I do not think that any decision has shaken the authority of Stair, i, 4, 20, who says that where marriage is "dissolved by divorce, either upon wilful non-adherence (or wilful desertion), or adultery, the party injurer loseth all benefit accruing through the marriage (as is expressly provided by the foresaid Act of Parliament 1573, cap. 55, concerning non-adherence), but the party injured hath the same benefit as by the other's natural death." It is true (1) that the Statute of 1573 applies only to the case of desertion, to which it extends the remedy of divorce; and (2) that in defining the consequences of divorce it confines these, so far as its literal terms go, to the offending spouse, who is "to tyne and lose their tocher and *donationes propter nuptias*," whereas Stair applies these consequences to the case also of divorce for adultery, and at the same time attaches the counterpart result that the injured spouse "hath the same benefit as by the other's natural death." It has been maintained that if Stair's extended application of the statute has any support in authority, then in both these points there has been a judge-made extension of the statutory enactment for which there is no justification in the statute. But, apart from the effect of the principle recognised in the interpretative extension of old Scots statutes of this class, Lord Hatherley, L.C., in the leading case of *Harvey* v. *Farquhar*, 1872, 10 Macph. (H.L.) 26, 9 S.L.R. 421, shows that the law has not so much been developed by the judicial extension of the statutory provision of 1573 to the analogous case of adultery, as by the legislative extension of the common law of divorce for adultery to the analogous case of desertion, and I have no doubt that Stair's implication that the injured spouse "hath the same benefit as by the other's natural death" has the same foundation in the common law of the period prior to 1573. That Stair's statement is not only fully supported, *inter alia*, by the case of *Harvey* v. *Farquhar* but is accepted at all hands, may be seen from the cases of *Thom* v. *Thom*, 14 D. 861; *Johnstone Beattie* v. *Johnstone*, 1867, 5 Macph. 340, 3 S.L.R. 293; *Dawes* v. *Somervell's Trustees*, 1903, 5 F. 1065, 40 S.L.R. 802; and *Dawson* v. *Smart*, 1901, 4 F. 278, 39 S.L.R. 173, and 1903, 5 F. (H.L.) 24, 40 S.L.R. 879.

So far for the Scots law. That of England is very different. The right of divorce itself is not the same nor has it the same origin. It has, indeed, only recently been modified, I might almost say introduced, and with much hesitation, by statute. The injured spouse has no common law right as regards the patrimonial consequences of divorce. There is nothing either by common law or statute of the nature of forfeiture of provisions in favour of the guilty spouse, or of acceleration of provisions in favour of the injured spouse on the legal fiction of divorce being equivalent to the death of the offending spouse. There is nothing but a right recently conferred to apply to the Court having jurisdiction in matrimonial causes for equitable relief. This is found in the Matrimonial Causes Act 1857 (20 and 21 Vict. cap. 85), section 45, which says—"In any case in which the Court shall prononnce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made clear to the Court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof, for the benefit of the innocent party and of the children of the marriage, or either or any of them." This was followed by an amendment contained in the Matrimonial Causes Act 1859 (22 and 23 Vict. cap. 61), section 5, which provides—"The Court" (meaning thereby the Court for divorce and

matrimonial causes), "after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of antenuptial or postnuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents, as to the Court shall seem fit." The first enactment confined the equitable interference of the Court to the case of divorce of the wife for adultery, and its application to her property in the interest of the husband and children. The subsequent enactment not only widened the remedy but extended it to both parties whose marriage is the subject of decree.

Hence the rights on divorcing his wife, which the pursuer as a domiciled Scotsman would have had but for the contract exclusion of the law of Scotland from its natural function in the regulation of the parties' rights under their marriage contract, would have been very different from the equitable relief, depending upon the discretion of the English Divorce Court, which alone he would have had if he had been in fact a domiciled Englishman. This part of the marriage contract, if it could be separately regarded, as of course it cannot, was undoubtedly onerous, but I reserve to deal later with the effect of the consideration.

It is necessary now to note briefly the provisions of the marriage settlement of the pursuer and the defender. [*His Lordship then gave the summary quoted supra.*]

By the present summons, in which he seeks to have ascertained the rights arising to him on his divorce of the defender, the pursuer craves declarator (firstly) that since the date of decree of divorce the defender has lost and omitted (*a*) all rights and claims *ex lege* competent to her as spouse or relict of the pursuer, and (*b*) all conventional provisions or rights competent to her and provided in her favour during the lifetime of the pursuer under the marriage contract entered into between them, all as if the defender were naturally dead as at the date of said decree of divorce, and that the defender is bound to pay over or to concur in the trustees of the settlement settling or paying over to him the provisions made and granted in favour of the defender during the lifetime of the pursuer in said marriage contract.

Now in respect that the defender by the express terms of the marriage contract has accepted the provisions thereof as in full satisfaction of any legal rights which might be competent to her as his wife or widow, and more especially now that she can never become his widow, that part of the above conclusion which I have labelled (*a*) appears to be quite unnecessary, though the declarator craved, if desired, can do the defender no harm. The matter of real interest is that which is intended to be covered by the portion of the conclusion which I have labelled (*b*), and which is set forth more fully in detail in the subsequent third conclusion. In the first place, the pursuer himself makes no settlement by the marriage contract upon his wife, and the deferred annuity which his father Sir Basil undertakes to pay to the defender is contingent upon the pursuer being survived both by the defender and by a child or children of the marriage, and as this contingency can now never be purified it would be futile to declare her forfeiture thereof, even if the pursuer had the title to sue, as, not having undertaken the obligation, I do not think he has. But, in the second place, this part of the conclusion aims in sufficiently apt terms at the practical point of establishing the pursuer's immediate right to the liferent of the "wife's fortune," which is settled upon him in remainder as from the date of the decree of the divorce, just as if the defender were naturally dead. In this respect the conclusion would be well founded and must receive effect if the law of Scotland, as the law of the matrimonial domicile, were to prevail. But the law of the matrimonial domicile is excluded in express terms by the marriage contract, which I think we may fairly claim to be able so far to construe without the necessity of resorting to the Courts of England. The pursuer's deferred and contingent right of liferent of the "wife's fortune" can only be claimed by the pursuer under or in terms of the marriage contract. If the law of Scotland is to regulate, that right opens to him on his divorcing his wife as if she were dead as at the date of divorce. But if the law of England is to regulate, then we are perfectly aware, and that without the necessity of consulting the Courts in England, that the law of England does not, like the law of Scotland, forfeit such rights of the offending spouse under a marriage contract so as to open to the injured spouse immediately a right which is contingent on the death of the offending spouse as if divorce were equivalent to death. And accordingly it is impossible to sustain this part of this conclusion. Except therefore for the small and innocuous portion which I have labelled (*a*) the defender must be assoilzied from this conclusion.

The pursuer then concludes (secondly) that his obligation under the marriage contract to make payment of a capital sum of £15,000 for the children of the marriage has ceased and determined, and that he is freed and discharged of the same. He is, I should say, sufficiently discharged *ipso facto* by there having been no children born of the marriage. But the defender can have no interest in opposing this conclusion if the pursuer desires it to be declared. The pursuer concludes (thirdly) that the life interest of the defender in the "wife's fortune" determined at the date of divorce, and fell thereafter to be paid to him, as if she were naturally dead. This is merely to express particularly what is already covered generally by the conclusion (firstly), and does not therefore require further notice.

The summons then passes to an alternative conclusion, which raises I think the only difficult question in the case, and one undeniably important to the pursuer.

In it he seeks to avail himself alternatively of the law of England, to which he has bound himself to submit as regards the regulation of his rights under the marriage contract, and he makes a very strong case in equity for the remedy which the English law would afford if he is entitled to invoke it. His case is set out in condescendence 9. He claims an equitable variation of the settlement in his favour as the innocent spouse, and he sets forth in detail the grounds on which he claims that equity. He says the joint income of the spouses after their marriage was £4500, of which £500 was his and £4000 his wife's—that in contemplation of the marriage he took a long lease of a house in London and furnished the same on a scale suitable to their joint income, and that he maintained there an establishment suitable to that joint income, that he has thus incurred heavy liabilities on the joint account of himself and the defender for which he is responsible, that he is left with the lease of the London house, having twenty years to run, on his hands, and further that claims are made against him in respect of liabilities incurred by the defender personally. In these circumstances he appeals for similar equitable relief to that which he would receive had he been domiciled in England and had divorce been granted him there, and he sets forth that that relief would be by an equitable variation of the settlements on the marriage in his favour as the innocent spouse.

The pursuer avers that the English Court would allow him a very substantial relief out of the funds under the settlement, in accordance with the rule of practice which they have adopted in exercising their statutory powers, and that such relief would extend to giving him the liferent enjoyment of the income of the said "the wife's fortune." In gauging this demand, which at first sight seems excessive, it must be remembered that the defender brought into settlement a third fund, the amount of which is not disclosed, which is not included in "the wife's fortune." The rule of practice which the pursuer alleges to have been adopted in England is "to place the innocent spouse in the same position, as far as possible, as would have been the case if the marriage tie had not been broken, keeping in view the position of the parties."

Assuming at least the reasonableness of the pursuer's plea, the question at once arises, how is he competently to obtain the relief which he asks? And it is necessary therefore to examine particularly the conclusions of his summons directed to this end. These are for declarator—(1) That under the terms of the marriage contract he is entitled to such equitable modification in his favour of its provisions as he would have obtained according to the law of England at the date of divorce had the divorce been pronounced by the English Courts. (I pass over (2) as already substantially dealt with). And (3) that the defender is bound to settle for behoof of the pursuer, or to pay over to him during his lifetime, or to concur in the trustees doing so, such portion of the income of "the wife's fortune" "as may be determined in the course of the proceedings to follow hereon to be in accordance with the rule and practice of the English Courts or as may be determined by this Court" to be just and equitable in the circumstances of the case.

At this point it is necessary to advert to the case of *Moore* v. *Bull* already referred to. In that case, though the marriage was an English one, the spouses had gone to reside in New Zealand, and divorce at the wife's instance had been pronounced by the Court of New Zealand. After the divorce the parties had returned to England, and the wife raised proceedings under the English Acts 1857 and 1859. The report of the case says that the husband did not oppose the motion, and that the trustees intimated their willingness to take the directions of the Court. But nevertheless the Court for divorce and matrimonial causes, apparently *ex proprio motu*, held that they had no power to intervene to give the lady the equitable relief which she asked, inasmuch as their statutory power was confined to cases in which divorce had been granted by the English Court. I think that I state the judgment correctly, though shortly, and I gather that it was a fact in the case that the New Zealand Courts have the same statutory power as the English.

Standing this judgment, it is not surprising that the pursuer should state that, assuming that the English Courts have jurisdiction over the defender, "it is doubtful whether the English Courts could competently exercise the statutory function of varying a marriage contract in a case where the decree of divorce has not been pronounced, and could not have been competently pronounced by themselves." I sympathise with that doubt. But it is not for this Court to decide that point if it must be decided for the adjustment of the rights of the parties here. It is necessary, however, to see how the defenders meet this averment.

The principal defender makes this answer —"Admitted that the pursuer is entitled to such rights and remedies with regard to the marriage settlement funds as he can obtain according to the law of England." Having regard to the attitude assumed by the defender in this Court, I should be disposed to think that a sinister meaning underlay the word "can," and that if the pursuer had attempted an appeal direct to the English Courts for divorce, &c., causes, the case of *Moore* v. *Bull* would have at once been pleaded to checkmate him. But after stating what considerations weigh with the English Courts in varying settlements under the above-mentioned Acts, the defender disposes entirely of my anticipation thus—"It is not the case, as stated by the pursuer, that the English Court will refuse to exercise the jurisdiction which it admittedly has until the foreign Court which has pronounced the decree of divorce has pronounced upon the legal incidents of such decree in the question of property rights in cases such as the present one, where parties have agreed that the said

questions shall be regulated by the law of England."

The compearing defenders, the trustees of the contract, again say—"Admitted that under the law of England the Court of that country has a statutory right to vary the effect of a marriage settlement in favour of the innocent spouse who has obtained a decree of divorce. Further admitted that the English Court does not hold its jurisdiction to be excluded in cases such as the present one, and averred that whereas in the present case parties have agreed by marriage contract that the right of property emerging thereunder shall be dealt with according to the principles of English law, the English Court will not refuse to exercise its jurisdiction until the foreign Court which has pronounced a decree of divorce has also pronounced upon the legal incidents of such decree in questions of property rights."

I take it that these admissions by both sets of defenders proceed upon a sound appreciation of the law underlying the situation, viz., that the principle of election common to the law of both countries precludes the defender who appeals to the law of England as the law of the conventional matrimonial domicile, in order to save her from the patrimonial consequences which would attach on being divorced by the law of the legal matrimonial domicile from then turning round and denying the pursuer the benefit of that law to which he is by the contract between them bound to submit, and to which he appeals for the adjustment of his rights on obtaining divorce.

Notwithstanding these admissions, which would preclude the defenders opposing an application by the pursuer to the Court for divorce, &c., proceedings in England, I cannot, standing the decision of that Court in the case of *Moore* v. *Bull*, assume that that Court would entertain the application if made to it. But I think that by contract the pursuer is entitled to be placed in the same position on divorce where beneficial to him as he would have been had he been a domiciled Englishman, just as he must accept the same position where detrimental to him, though it is at least a question whether the English Court for divorce, &c., proceedings, having only a special statutory jurisdiction, could hold their jurisdiction, as we say in Scotland, to be prorogated by the contract of parties. The matter partakes somewhat of a judicial reference, and it must be remembered that in *Moore's* case there was something very like the same thing. I think that the pursuer is correct in his pleading when he says—"The remedy now sought is not founded upon the statutory discretion which the English Courts alone can exercise, but upon the express stipulation of parties in the marriage settlement that their rights should be regulated in the same manner as if they had been domiciled in England." The problem before us is to ascertain how they would be regulated had the parties been in fact domiciled in England; and that we cannot determine for ourselves, but only by reference to the Courts of England.

Two courses are open to us in these circumstances. We might sist this action, after having disposed of the three primary conclusions, to allow the pursuer to test the question on which the parties differ as to whether the English Court for divorce and matrimonial causes would entertain the pursuer's application for varying settlements. But I think that, looking to the admissions of the defenders, the proper course for this Court to take in order to do justice to the parties is rather to state a case for opinion of the English Court on this question—"Whether the pursuer and defender, though their matrimonial domicile was *de facto* in Scotland, having agreed by antenuptial marriage contract that their rights under that deed should be regulated according to the law of England in the same manner as if they had both at the date of their marriage been and continued to be domiciled in England, and the pursuer having on 12th December 1914 obtained in the Court of Scotland decree of divorce for adultery against the defender, the Court for divorce and matrimonial proceedings in England has jurisdiction to entertain and dispose of an application by the pursuer to vary the marriage contract of the parties, or to give him other relief under the Acts 20 and 21 Vict. cap. 85, and 22 and 23 Vict. cap. 51?" I suggest the question in this form because I assume that a case sent to the English Court without limitation will be laid before the appropriate Court, and I have no assurance that that Court is the Court for divorce and matrimonial proceedings. My reason for the preference of this course over that of sisting the present action is that if the question is answered in the affirmative the way will then be clear to us to dismiss the alternative conclusions of this action, leaving the pursuer to make his application in England; while if it be answered in the negative the pursuer is not necessarily denied all remedy. It will not, I conceive, be impossible for this Court then to ascertain in some other way, with the assistance of the Courts of England, how the pursuer's rights would have been regulated by the law of England had he been domiciled there, and I cannot doubt that the Courts of England would then do what may be necessary to make our judgment effectual there.

While I prefer the course I have indicated, I should be content were your Lordships to sist the case to admit of the pursuer making application to the English Court for divorce and matrimonial causes. But I emphatically demur to the course which your Lordship proposes to take as regards the alternative conclusions of the summons of dismissing the action. I think in so doing your Lordship may unnecessarily prejudice the pursuer, as we cannot forecast the course which proceedings initiated in England may take, whereas no injustice will be done to the defenders by sisting this cause.

LORD MACKENZIE—I am of opinion that the pursuer's averments are not relevant.

Under the first conclusion of the summons the Court is asked to apply the law of Scot-

land to the rights of parties under the marriage settlement. This appears to me a hopeless contention in face of the express contract in the settlement that their rights are to be regulated according to the law of England, as if the spouses were domiciled in England. Under the alternative conclusions of the summons this Court is asked to exercise a discretionary jurisdiction that it does not possess. Nor is there any averment that in the circumstances there is any law or practice in England which gives the pursuer a claim for any specific amount. There is an averment that the Court in England has a discretionary power. That, however, can only be brought to the test by proceedings in England. It is not matter for proof in this Court, nor for a case for the opinion of the English Court, which can only be stated on a question of law.

I am therefore of opinion that the action must be dismissed.

LORD SKERRINGTON—I do not think that the parties could have used clearer language in order to express their intention that the meaning and effect of the marriage settlement should be determined according to the domestic rules of the law of England. In my judgment they excluded by anticipation the leading conclusions of the present action by which it is sought to subject the lady to a penalty peculiar to the law of Scotland and unknown to the law of England. Accordingly the defenders are entitled to absolvitor from these conclusions. I think it right, however, to note that the pursuer's counsel expressly admitted that the patrimonial forfeitures which the law of Scotland inflicts upon persons guilty of matrimonial misconduct leading to divorce may be effectually averted by antenuptial contract and that our judgment proceeds on that admission.

As regards the alternative conclusions, the pursuer has, in my opinion, failed to allege any matters of English law entitling him to have the law of England ascertained in this process either by a proof or by a remit. We shall do no injustice to the pursuer by dismissing these conclusions, because if there exists, according to English law, any remedy applicable to the circumstances of the case, he will certainly obtain it by applying to an English Court.

The Court assoilzied the defenders from the first three conclusions of the summons and dismissed the remaining conclusions.

Counsel for the Pursuer—Watson, K.C. (at the last hearing, Moncrieff, K.C.)—A. M. Mackay. Agents—John C. Brodie & Sons, W.S.

Counsel for the Defenders—Macphail, K.C.—R. C. Henderson. Agents—Tods, Murray, & Jamieson, W.S.

Friday, July 13.

SECOND DIVISION.

[Lord Hunter, Ordinary.

EDINBURGH PARISH COUNCIL *v.* SCHULZE.

Property — War — Valuation Roll — Rates and Assessments—Occupation of Premises by War Office—Defence of the Realm Regulations 1914, *Part I, sec.* 2 (*b*).

A factory was requisitioned by the War Office under the Defence of the Realm Regulations 1914, Part I, sec. 2 (*b*). The owner declined to pay rates and assessments in respect thereof, on the ground that he had not since the date of the requisition been in receipt of any rent or any benefit from the subjects, nor had he had any beneficial occupation. He further maintained that the letter whereby the authorities had notified their requisition constituted a contract of purchase of the property for a price to be afterwards fixed. His name still appeared in the valuation roll as owner. *Held* that as the letter could not be thus construed he was liable for payment of the owner's rates and assessments.

The Defence of the Realm Regulations 1914, sec. 2 (*b*), enacts—"2. It shall be lawful for the competent naval or military authority and any person duly authorised by him, where for the purpose of securing the public safety or the defence of the realm it is necessary so to do . ... (*b*) to take possession of any buildings or other property, including works for the supply of gas, electricity, or water, and of any sources of water supply. . . ."

The Parish Council of the City of Edinburgh, *pursuers*, brought an action against Charles William Schulze, Brunswickhill, Galashiels, *defender*, whereby they sought to recover from the defender the sum of £55, 4s. 5d., being the poor rates, school rates, and lunacy assessments for the years 1914-15 and 1915-16 levied by them upon the defender as owner of a factory at Portobello Road within their parish.

The *facts* were that the factory in question had been requisitioned by the War Office by letter dated 28th October 1914 in the following terms:—

"Coast Defences.

Secret. No. 28/10 Headquarters Scottish Coast Defences, Edinburgh, *28th October* 1914.

"Sir—I am to inform you that the building in the Portobello Road known as the Chocolate Factory, is required for defence purposes and occupation by troops. I am therefore to require you, under the Defence of the Realm Act 1914, Part I, paragraph 2 (*b*), to hand over this building to the officer appointed by me to take it over at 9 a.m. on 30th instant. Any claim for compensation will hereafter be considered by the War