

LOBDS DEAS and MURE concurred.

LORD SHAND—With regard to the appointment of curators, both to the children who were alive at the time of Mr Tennant's death and to the one born after that date, I should have been disposed to think it sufficient to nominate a tutor to the child born after the death, and allow the father to continue in his administration for the children. But as your Lordships have thought fit to do otherwise I do not feel inclined to differ.

The Court therefore appointed a curator *ad litem* to each of the first parties as were pupils and to the third party, the Lord President intimating that in such cases as the present the curators should be nominated by the Court itself.

Counsel for First Parties—Jameson. Agent  
—John Martin, W.S.

Counsel for Second Parties—Couper. Agent  
F. J. Martin, W.S.

Counsel for Third Party—Crawford. T. & R.  
B. Ranken, W.S.

Tuesday, November 20.

## SECOND DIVISION.

SPECIAL CASE—LOW AND OTHERS.

*Provisions to Wives and Children—Revocability of, where Postnuptial and no Children born.*

Three years after marriage a husband had executed and delivered a trust-deed for behoof of his wife and children, if any should be born of the marriage. Four years thereafter, when there were no children, the truster and his wife desired to terminate the trust, and have the proceeds realised—*held* that the trustees were not so entitled to pay the funds over to him on his and his wife's joint requisition although there was no issue of the marriage, and that the same rule applied as if the deed had been antenuptial.

*Question (per Lord Ormisdale) whether the decision would have been the same in a case where there was no likelihood of children of the marriage.*

Captain Low executed a trust-deed on 12th February 1875, by which he conveyed to himself, his wife, William Mitchell, S.S.C., and Charles Baxter, W.S., a sum of £400, and four insurance policies affecting his own life, in trust for the purposes therein stated. These purposes were the administration of the estate during the truster's life, and the distribution of it, in certain events, after his death among his wife and children, if he should have any. Captain Low delivered this trust-deed to Messrs Mitchell & Baxter, who, on behalf of themselves and the other trustees, and as agents for the trust, duly intimated the assignation of the insurance policies to the insurance companies, and invested the sum of £400 in certain securities specified in the deed. Mitchell & Baxter were agents of the trust, and held the securities in their hands, which were transferable by delivery. They paid the premiums of the insurance policies out of the interest of the £400.

The truster was born on 10th May 1845, and Mrs Low on 8th August 1849. They were married on 7th June 1873. Both thereafter being anxious to terminate the trust, desired the trustees to realise the securities and to pay the proceeds thereof and convey the policies to Captain Low. But Messrs Mitchell & Baxter, two of the trustees, were not satisfied that the trustees were legally entitled to accede to the request.

This Special Case was therefore presented, in which Captain and Mrs Low were the parties of the first part, and Messrs Mitchell & Baxter, as trustees, the parties of the second part. There had been no children of the marriage when the case was before the Court. The question submitted was—"Whether the trustees were entitled or bound to denude in favour of Mr Low upon the joint requisition of Mr and Mrs Low, and on receiving from them a full discharge of all their trust-actings and intrusions?"

Authorities cited—*Murison v. Dick*, February 10, 1854, 16 D. 529; *Anderson v. Buchanan*, June 3, 1837, 15 S. 1073; *Fletcher Menzies*, March 5, 1875, 2 R. 507; *Smitten v. Tod*, December 12, 1849, 2 D. 226; *Thornhill v. Macpherson*, January 20, 1841, 3 D. 394.

At advising—

LORD JUSTICE-CLERK—Very frequently there occur cases under this category of law of a very perplexing character, but I do not think that this is one of them—[*His Lordship narrated the facts*].

Now, this deed was executed three years after the marriage, and it purports to be one for behoof of the truster's wife and children. Apparently it is a trust substantially of a *mortis causa* character, but with the peculiarity of being delivered during the truster's lifetime. A postnuptial contract it is not, but it is a postnuptial provision for a wife and children in all respects of a reasonable character, and therefore I regard it as onerous. The question then comes to be, Whether Mr Low can revoke this deed with the consent of one of the parties in whose interest it was executed? No doubt at present there are not any children born of the marriage, still Mrs Low is only one of the parties to the deed, even supposing she were able herself to give an efficient consent to the revocation. The husband and wife in a case such as the present cannot by combining together frustrate the *jus quesitum* of children, whether born or unborn. There is not any authority exactly bearing on the question of unborn children, but the principle is clearly recognised.

On the whole, the case appears to be a clear one, and although it is quite true that in most cases such questions arise under an antenuptial contract of marriage, yet I do not see that any difference in principle can be made out where the deed is postnuptial. I am accordingly for answering the question proposed in the negative.

LORD ORMIDALE—I am of the same opinion, although I should wish to reserve any expression of my views in a case where the husband and wife were advanced in years and not likely to have any children; but that is not the case here at all. The provision made by Mr Low is a most rational one, and that disposes of one line of ob-

jection. It is quite true that hitherto upon this very point there has not been any precise decision, but the sooner there is a decision the better. It would rather seem to me that a postnuptial deed of this nature is, if possible, more indefeasible than an antenuptial one, for in the latter case the marriage may never come off, and then there are only two persons having a possible interest, whereas in the former case the marriage has already taken place and the position of parties is beyond recall. The trustees here could not have given up the funds without some authority, and they have therefore acted most prudently in coming to the Court to obtain its opinion and judgment. I do not think the wife's consent would empower them to pay over this money to Mr Low, and I am therefore of opinion with your Lordship in the chair that the question must be answered in the negative.

LORD GIFFORD—I concur in the opinions expressed by your Lordships. The question argued to the Court was, Whether this postnuptial deed was to have the same force as an antenuptial deed of the same nature would have possessed?

It was conceded (indeed upon the authorities it could scarcely have been denied) that an antenuptial deed could not in these circumstances have been revoked, and I think that all the considerations which weigh with the Court in refusing to allow a wife to defeat her own interests, weigh equally in the case of postnuptial and antenuptial provisions.

The Court therefore answered the question in the negative.

Counsel for First Parties—A. Gibson. Agents—Mitchell & Baxter, W.S.

Counsel for Second Parties—Taylor Innes.

Wednesday, November 21.

## FIRST DIVISION.

M'NEILL v. STARK.

*Expenses—Where an Appeal is Dismissed upon Joint Minute.*

Where an appeal is dismissed in terms of a joint minute for the parties after it has gone to the roll, the Court will modify the expenses at £4, 4s.

Counsel for Appellants—Goudie. Agents—Adam & Sang, W.S.

Counsel for Respondent—Lang. Agents—Dove & Lockhart, S.S.C.

Wednesday, November 21.

## FIRST DIVISION.

CARLBERG AND OTHERS v. BORJESSON AND MANDATORY.

*Diligence—Arrestment—Execution—Ship—Nature and Extent of the Powers of a Messenger-at-Arms under a Warrant to Arrest a Vessel.*

Arrestments were used upon a vessel lying in Glasgow harbour, for the purpose of founding jurisdiction. A messenger-at-arms who was employed to execute a second warrant of arrestment upon the dependance of the action, when he found that the vessel had in the meantime sailed from harbour, pursued her on board a tug-steamer with thirty men, overtook, seized, and brought her back to port when she was some way down the Clyde and fairly started on her voyage. *Held (dub. Lord Deas)* that as the mode of executing the second warrant of arrestment was clearly illegal, the arrestments fell to be recalled, and without caution.

*Observations (per Lords Mure and Shand)* on the limits of the powers of a messenger-at-arms in the execution of such a warrant.

This was a petition for recall of arrestments presented by August Carlberg, managing owner of the barque "Edgar Cecil" of Gothenburg, Gustaf Robert Andersson master of said vessel, and various other parties, who, along with the respondent Borjesson, were the whole owners of that vessel. All the petitioners were Swedes. The vessel in September and up to 5th October 1877 lay in the port of Glasgow. Borjesson, who was part-owner to the extent of 2/100th shares of the ship, made in September 1877 various claims in connection with the vessel against the petitioners. These were—(1) The sum of £200, being the amount alleged to have been advanced by him for disbursements; (2) the sum of £100 for wages alleged to be due to him, as having acted as master; and (3) the sum of £500, as his alleged share of her profits or earnings. He then raised letters of arrestment against the petitioners *ad fundandam jurisdictionem*, under which he arrested in the hands of Edmiston & Mitchell, brokers, Glasgow, a sum of £250 belonging to the petitioners, and he also on 3rd October 1877 arrested the vessel.

Thereupon Borjesson raised a Court of Session summons against the petitioners to have these claims enforced, which contained a warrant to arrest, and the summons was endorsed by the Lord Ordinary with his concurrence and authority for putting the arrestments into execution upon maritime subjects. Meantime the vessel had been chartered to proceed to New York to receive a cargo of grain, and on the 5th of October started on her voyage. She had sailed from Glasgow and passed Greenock at the time when the warrant to arrest her had reached that place, and the respondents' agents thereupon instructed a messenger-at-arms to follow her. He took with him a crew of thirty men on board a steam-tug, overtaking her "between Toward Point and Skelmorlie," on the river Clyde, at one o'clock on the 6th October. He exhibited the Court of Session warrant as his authority for arresting her,