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the authorities it could scarcely have been denied) that an antenuptial deed could not in these circumstances have been revoked, and I think that all the considerations which weigh with the Court in refusing to allow a wife to defeat her own interests, weigh equally in the case of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

ordered her to be put about, and took her back to Greenock harbour.

This petition was presented praying for the recall of the arrestments without caution, on the ground that this seizure was a grossly illegal act, the vessel being when she was arrested outside of the civil jurisdiction of the Courts of Scotland, and being on the high seas. It was further alleged that the arrestments were nimious and oppressive, as the respondents' claims were unfounded, and the proceedings had been taken in the knowledge that the vessel was chartered, and the petitioners as owners of the vessel were suffering loss and damage by her detention.

Answers were lodged by Borjesson, in which he alleged that he was owner to the extent of 10/100th shares of the ship, that the petitioner Carlberg had never accounted for his intromissions with her earnings, and that two of the owners, who were named as petitioners, had taken proceedings in Sweden to remove him from his position. He further averred that several of the persons named as petitioners were named without authority, and produced a mandate from the owners of 46/100th shares in his favour, granting him authority to detain the vessel and to protect their interests against Carlberg. Further, he averred that the petitioner Carlberg was insolvent, or, at all events, in embarrassed circumstances, and that he had kept the vessel away from Sweden with a view to prevent effectual proceedings from being taken against him. The statements as to the manner in which the warrant of arrestment was executed were substantially admitted, but in the circumstances the respondent asked that the arrestments should not be recalled except on full caution.

After some argument on the question of jurisdiction the Court intimated that there could be no dispute that the point at which the messenger boarded the vessel was in point of fact *ultra fauces terræ*, and therefore within the jurisdiction of the Court, and that the argument might be taken on that footing.

The petitioner then argued—That a warrant to arrest gave no authority to bring back a ship. It could only empower the messenger to detain it where it was—Stair iii. 1, 24; *Petersen* v. *Maclean & Hope and Hertz*, January 14, 1868, 6 Macph. 218. Such a proceeding as this was unprecedented either in practice or authority. On the question as to whether the arrestments were nimious and oppressive, it was argued that this being an attempt by one out of several owners to detain the vessel from earning freight, to the great loss of the other owners, and to abide the issue of an action which, it was quite possible, might be found to be incompetent in the Courts of this country, they should not be sustained.

The respondent argued—If it was incompetent to arrest a vessel in this way, it would be incompetent to stop a vessel moving in a roadstead from one point of it to another. Such a finding would suggest a method of eluding this diligence, for a vessel would only have to get under weigh, and if she was at the very mouth of the harbour she would escape. Arrestment in a roadstead had always been competent—*Kennedy* v. *M'Kinnon*, December 13, 1821, 12 S. 210; Darling on the Office of a Messenger, 98; Campbell on Citation, 158. These arrestments were not nimious or oppressive. Such a proceeding was not special or extraordinary—*Volthaker* v. *Northern Agricultural Implement Company*, December 20, 1862, 1 Macph. 211. The debt of a part-owner was a good ground for arresting—*M'Aulay* v. *Gault*, March 6, 1821, F.C. As to the question of the competency of bringing the action raised here in the Scotch Courts—*Parker* v. *Royal Exchange Assurance Company*, January 13, 1846, 8 D. 365.

At advising—

Lord President—The parties before the Court in connection with this petition are all foreigners of Swedish nationality, and the vessel in question is a Swedish vessel. In the beginning of October last she was lying in the harbour of Glasgow, and on the 3d of that months he was arrested, at the instance of the respondent Borjesson, and James Wright of Greenock, his mandatory, *ad fundandam jurisdictionem*, the object being to found jurisdiction in an action to be raised by them in this Court against August Carlberg, who is the managing owner of the vessel. That action was raised, and on the 5th October the respondent proceeded to arrest the vessel on the dependence of the action; it is with that latter arrestment that we have now to deal. The petitioner Carlberg, who, as far as we can see, represents the owners of the vessel, asks us to recall the arrestment without caution—not that the warrant is said to be incompetent, but that the arrestment as used was incompetent.

The warrant of arrestment contained in the summons is in the usual form, but on that warrant there is further indorsed by the Lord Ordinary on the Bills—"The Lord Ordinary grants concurrence and authority for putting the within warrant of arrestment into all due and legal execution, so far as regards maritime subjects; and grants warrant to dismantle arrested vessels if necessary." Armed with that authority the messenger went to the harbour of Glasgow for the purpose of executing this arrestment. He found that the vessel had sailed, and therefore he could not execute the arrestment in the ordinary way by going on board of her and fixing a copy of the warrant to her mainmast.

Now, in so far as the petitioner alleges that the vessel was sailing on the high seas when she was arrested, and was therefore outwith the jurisdiction of this Court, that is contradicted by his own statement that she was seized at a point "between Toward Point and Skelmorlie," which is undoubtedly not on the high seas, and not beyond the jurisdiction of this Court, but is within the river Clyde.

But it is quite a different matter that she had started on her voyage and was then prosecuting her voyage. That is the point that demands the consideration of your Lordships. As regards this point, I find that it is substantially admitted in the answers—"At the time said arrestment was used some repairs was being executed on said vessel; and after the arrestment had been used the repairs were pushed on as speedily as possible (the tradesmen being kept at the work night and day) in order to get the vessel away before an arrestment in security on the dependence of the action could be used. The said vessel passed Greenock on her outward voyage on the morning of 6th October, at which time the warrant to arrest her was at Greenock, in the hands of the

respondents' agents, but the vessel did not anchor at the Tail of the Bank, off Greenock, as is usual with vessels outward bound from Glasgow. The respondents' agents therefore instructed a messenger-at-arms to follow said vessel in a tug, which he did, and arrested her while off Skelmorlie, in the Clyde, and within the jurisdiction of your Lordships. No dismantling of the vessel took place until the vessel was safely harboured in Greenock, where she was brought under the order of the said messenger-at-arms." Now, the suggestion made in these answers, that the vessel sailed away in breach of the arrestment that had been used *ad fundandam jurisdictionem* while the vessel was lying in Glasgow, does not seem to me to be material. Such an arrestment is very different from an arrestment in security or an arrestment on the dependence of an action. Its effect is produced and its purpose served when the party against whom it is used finds caution *judicio sisti* or actually enters appearance without pleading any objection to the jurisdiction. But whether the vessel was right or wrong in setting sail does not seem to me to affect the question whether the arrestment was competently used or not. If the vessel was wrong, there may be a remedy for that wrong, although I give no opinion what that remedy is. But the question we have to consider is whether this warrant of arrestment, with the concurrence endorsed on it by the Lord Ordinary on the Bills, was sufficient to justify what the messenger did? From the passage I have read it is plain that it is not disputed that the vessel had sailed on her voyage—the voyage for which she had been chartered. She had proceeded a considerable distance on that voyage, and she was actually sailing when the so-called execution of the arrestment took place. In what did that arrestment consist? There can be but one answer to that, viz., in the capture of the vessel, for it cannot be described in any other way. She was brought into harbour—one almost feels inclined to say as prize—under the orders of the messenger-at-arms, and navigated by his direction. Can that be called an execution of arrestment? Such a proceeding is outrageously illegal, and I am therefore for recalling the arrestments without caution as incompetent.

Lord Deas—The ground on which your Lordship proposes to recall these arrestments involves a question of great difficulty. Without more discussion and consideration of it than we have had, I hesitate to go so far as your Lordship has gone. This vessel was arrested in Glasgow harbour. According to that arrestment she should be there still. The first ground stated in the petition for holding the second arrestment incompetent is altogether erroneous, for the vessel when arrested was not on the high seas at all, but in the river Clyde. Then, if it was incompetent to arrest her there, it would have been incompetent to arrest her at the mouth of Glasgow harbour. And if she was legally arrested there, the proper course surely was to take her back to Glasgow harbour. While I see these difficulties, I do not say that I hold an opinion contrary to your Lordship's; only I am not prepared to say that I have formed a confident opinion with your Lordship.

It seems to me that the safer ground on which to recall the arrestments would be that they were nimious and oppressive in the circumstances; but that if that were to be the ground for recalling them, it could only be done on caution being found.

Lord Mure—I do not see how we are to deal with this matter at all without dealing with the broad question whether these arrestments were competently used upon a ship proceeding on her voyage down the river Clyde? On that question I have come to the same conclusion as your Lordship in the chair. This vessel was proceeding on her voyage down the river. Now, although it is no doubt competent to arrest a vessel at anchor in a roadstead, even that, it appears, is a very delicate matter, as is plain from the case of *Kennedy* quoted to us (Dec. 13, 1821, 1 S. 210). In that particular case the messenger who did it got into a scrape, and an action of damages was afterwards raised against him, on the ground of his conduct in the execution of the arrestment. This is a much stronger case; the vessel was fairly out of harbour, no longer at anchor, but on her voyage down the Clyde. The warrant to arrest and detain a vessel where she is cannot be extended into an authority to stop her on an open river or on the sea. The power of dismantling the vessel which is included in the warrant shows that no such extension is intended. It is obvious that she cannot in such circumstances be dismantled where she is, and the whole theory of arrestment, which is a means of detaining, shows that in such circumstances it is incompetent.

I have come to this conclusion with considerable reluctance, for the vessel lay under arrestments *ad fundandam jurisdictionem* when she sailed, and was bound to stay where she was. The captain took the law into his own hands and went away, and therefore it is with reluctance that I say that it was incompetent to stop him; yet whatever may have been the proper means to adopt, I do not think that this was a competent course.

Lord Shand—I am of the opinion expressed by the majority of your Lordships. Although the question is as novel as it is important, I do not feel any of the doubts expressed by my brother Lord Deas.

It seems to me that although some of the claims made by Borjesson in his action against Carlberg may be insufficient to warrant the use of arrestments, there is one claim of such a nature, viz., that for wages, as to justify the use of arrestments, and therefore in my opinion they cannot be recalled as "nimious and oppressive." The question therefore as to the legality of the mode of execution is directly and necessarily raised. Now in considering that question I lay out of account the arrestments that have been used *ad fundandam jurisdictionem*, for I am clear with your Lordship in the chair that the warrant to arrest the vessel on the dependence of the action was no remedy for breach of the former arrestment. A warrant to seize and bring back the vessel on that ground might probably have been obtained from the Judge Ordinary, but in the case that occurred the messenger had no warrant to seize and bring back the vessel. The question in fact comes to be—Is the ordinary warrant for arrestment sufficient to authorise what was done in this case? If it were clear that such a warrant had for a long

course of practice received the interpretation that it contained authority to seize and bring back a vessel even on her voyage within the rivers or narrow seas, that, if the custom were shown to be inveterate and uniform, might be a sufficient ground for sustaining the powers which the respondent maintained that the messenger possessed. But the Court is now asked to sanction a new practice which has never been adopted before, and which is, I think, incompetent.

Arrestment of a vessel has this peculiarity, that it is a real diligence attacking the subject itself. Its effect is to arrest or fix the vessel where it is found, and for that end the messenger is entitled to dismantle the vessel to the extent he may consider necessary. That is not the nature of the proceeding adopted here. Can it be said that the messenger was entitled to order the vessel to drop anchor, or to dismantle her in any way, so as to fix her where she was? That is utterly out of the question. Then was he entitled to become a navigator in order to get her to a place where he might dismantle and detain her? If so, then the question would next arise—Into what port was he to take her? The suggestion of these questions is sufficient to show that this proceeding can not be held competent. This was truly seizure and not arrestment, and therefore I am of opinion that the arrestments should be recalled without caution.

The Court accordingly recalled the arrestments without caution.

Counsel for Petitioner — Balfour — Jameson. Agents—J. & J. Ross, W.S.

Counsel for Respondent—Trayner—Robertson. Agents—Mason & Smith, S.S.C.

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* *Wednesday, November* 21.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

M'ELROY & SONS *v.* THARSIS SULPHUR AND COPPER COMPANY (LIMITED).

Penalty—Where fixed in Written Contract—Delay on Employer's Part.

A clause in a building contract stipulating for payment of a fixed sum as liquidate penalty in case of delay in its execution cannot be enforced when part of the delay is caused by the employer, and his only remedy is by an action of damages at common law.

Obligation—Construction of Written Contract—Parole Proof—Acquiescence.

A building contract contained the following clause: —"*Twelfth*, The Company reserve power, during the progress of the work, to make any alterations, additions, or deductions, or to vary from or alter the plans or materials as they may consider advisable, without in any respect vitiating this contract. This shall only be done under a written order from the Company's engineer, and allowance will be made for such alterations at the rates in the schedule. The contractors shall not at their own hand, or without a written order from the Company's engineer, be entitled to make any such alterations or additions, and no allegation by the contractors of knowledge of or acquiescence in such alterations or additions on the part of the Company, their engineers or inspectors, shall be accepted or available as equivalent to the certificate of the engineer, or as in any way superseding the necessity of such certificate as the sole warrant for such alterations or additions."—*Held*, in a claim by the contractors for payment for extra work done by them, that allegations of verbal consent and acquiescence on the part of the employers or their servants were not relevant.

In a further claim for payment on account of greater weight of metal in certain iron girders than was specified in the contract, where consent and acquiescence on the part of the employers (defenders) and their engineer was held to be proved, and the extra weight of the girders was certified by the defenders' engineer in certificates (the legal effect of which was disputed) *held* (*revg.* the Lord Ordinary (Curriehill), *diss.* Lord Gifford) that the parole consent, however clearly proved, would not be sufficient to make the defenders liable, but that the engineer's written certificate of the weight of the girders, taken in connection with his and his employers' acquiescence, was equivalent to a written order in terms of article 12 of the contract above quoted, and that the defenders must be held liable for the expense caused by the greater weight.

In August 1872 the defenders in this action, the Tharsis Sulphur and Copper Company, contracted with M'Elroy & Sons, ironfounders in Glasgow, the pursuers, that the latter should execute the erection of a quantity of columns, girders, and other iron work in connection with an extensive range of works which the defenders were erecting at Cardiff, for the sum of £25,000. A contract was entered into between the parties, dated 2d and 9th May 1873, containing, *inter alia*, the following clauses:—"*Twelfth*, The Company reserve power, during the progress of the work, to make any alterations, additions, or deductions, or to vary from or alter the plans or materials as they may consider advisable, without in any respect vitiating this contract. This shall only be done under a written order from the Company's engineer, and allowance will be made for such alterations at the rates in the schedule. The contractors shall not at their own hand, or without a written order from the Company's engineer, be entitled to make any such alterations or additions, and no allegation by the contractors of knowledge of or acquiescence in such alterations or additions on the part of the Company, their engineers or inspectors, shall be accepted or available as equivalent to the certificate of the engineer, or as in any way superseding the necessity of such certificate as the sole warrant for such alterations or additions. . . . *Fourteenth*, The contractors shall be bound to complete and furnish the said castings and ironwork in terms of the contract and relative specification and drawings, as required by the progress of the buildings from time to time, so that the whole shall be delivered as aforesaid on or before the 9th day of March 1873, and that under a

* Decided 17th November.