

query. I am clearly of the opinion expressed by your Lordship that the income derived by Mrs Hally from Miss Elizabeth Young's estate does not fall under the assignation by her to her marriage-contract trustees. It was a conveyance by her of capital only, and not of income; I also agree with your Lordship that the case of *Boyd's Trustees* determines this point.

Upon the first question I am not so clear. The true result of this trust-deed in my opinion is (and had I been trying the question alone I should have so decided it) that the last survivor of the three sisters could test only upon her own share of the joint estates, and as regards the power of revocation, I should be inclined to hold that it applied only to the individual shares of each of the sisters.

LORD ADAM—This deed by its fourth purpose directs that the residue of the first deceasing sister's share is to be divided and made over equally between the survivors. Now, it appears to me that these words "divide and make over" do not suggest any distinction between the original and the acquired shares; and then the deed goes on to say that on the death of the second sister the residue of her estate is to "belong" to the survivor. No words could, I think, be stronger to give an absolute right of property in the residue to the survivor. It is to my mind just as if the deed had said that the residue of the second deceasing sister's share was to be "part of the estate of the survivor." In this view of the matter it would be anomalous in the extreme if the surviving sister was not to be able to spend or use in any way she liked what was her absolute property. Nor do I think that this right of property in the surviving sister is in any way controlled by the clause of revocation, for I cannot see how it can control or contradict the clear language of the fourth purpose.

Upon the other point referred to by your Lordships I am equally clear, and I consider it settled by the case of *Boyd's Trustees*.

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

Counsel for First and Second Parties—A. J. Young. Agents—Myrne & Campbell, W.S.

Counsel for the Third Parties—Law. Agents—Myrne & Campbell, W.S.

Counsel for the Fourth Party—Shaw. Agents—Drummond & Reid, W.S.

Friday, May 22.

## OUTER HOUSE.

[Lord Fraser.

GRIEVE v. GRIEVE

*Proof—Husband and Wife—Divorce—Photograph—Identification.*

A photograph being merely secondary evidence cannot be used as a means of identifying a person who can be compelled to attend the trial. Where, therefore, the defender in an action of divorce has disobeyed a warrant to appear for identification, the

pursuer cannot proceed to use a photograph, but must move for a warrant to apprehend the defender and bring him up for identification.

This was an action for divorce on the ground of adultery. The pursuer was John Grieve, a flesher in Glasgow, and the defender was his wife Catherine Semple or Grieve. The parties were married in 1880, and lived together as husband and wife till 1883, when they separated. The woman afterwards gave birth to a child, of which her husband could not have been the father, and which she registered as illegitimate. This action was accordingly brought. No defences were lodged. On 14th May the Lord Ordinary found the libel relevant, and fixed a diet of proof, and granted an order ordaining the defender to appear at the proof for identification. This order was served, and the execution of the citation was put into process, but the defender did not appear at the proof. The registrar of births at Glasgow was called as a witness, and exhibited his register, wherein there was recorded an entry of the birth of a child marked "*illegitimate*," and which was said to be the child of the defender. The witness was asked by whom the direction to enter the child as illegitimate was given, and he stated it was by a woman. Whereupon the counsel for the pursuer proposed to prove by the exhibition of a photograph of the defender that she was the person who gave the information; and he referred to the execution of the order on the defender to make appearance for identification, which had not been obeyed.

LORD FRASER—I cannot admit this evidence. There seems to be very loose notions afloat as to how far photographs can be used, and this is a good illustration of them. A photograph is secondary evidence, and secondary evidence of the most unreliable character. Two photographs of the same person very often are very different from each other and even the most skilful individual may mistake the photograph of one person for another. It is only as a last resource, and where justice would otherwise be defeated, that the Courts admit this secondary evidence. Indeed, no secondary evidence is ever received if primary evidence can be obtained at reasonable cost and with available means. Wherever a defender or any other person can be compelled to come to Court for identification, the Court will not receive a photograph in place of the original. If a defender, as in this case, refuses to obey the order of the Court to appear for identification, then the course is to apply for a warrant to apprehend the person so failing to appear, and bring him or her to Court. I long ago printed the form of warrant in use in the Consistorial Courts of Scotland upon the matter (*Husband and Wife*, p. 1166), and such a warrant ought to have been applied for in the present case, and would at once have been granted by me. In cases where the person sought to be identified is outwith the jurisdiction of the Court, and where its warrants of apprehension cannot reach him, a photograph may then as a matter of necessity be used, and I have, when counsel, been allowed by Judges in such circumstances—but only in such circumstances of necessity—to use a photograph. The wife in the present case is in Glasgow,

and can be apprehended and brought to Court for identification, and if this case is to depend upon the identification of the woman who instructed the entry to be made in the register that the child was illegitimate, I must delay further procedure in it till that woman is brought here and confronted with the registrar.

Other evidence which did not require the defender's presence for identification being led, the Lord Ordinary gave decree of divorce.

Counsel for Pursuer—Steele. Agents—Smith & Mason, S. S. C.

Wednesday, May 27.

## SECOND DIVISION.

### BONHOTE v. MITCHELL'S TRUSTEES.

#### Provisions to Children—Marriage-Contract—Power of Appointment—Election.

By antenuptial marriage-contract a husband and the wife's father bound themselves respectively to pay to the marriage-contract trustees a sum of money to be held for behoof of the issue of the marriage, to be paid to such issue after the death of the survivor in such shares as might be appointed by him, or failing him by her. The wife predeceased without having made any appointment. The husband executed a trust settlement by which he directed his whole estate to be realised and divided into three equal portions, to be paid one share to his son, and the other two to the respective marriage-contract trustees of his two daughters. He also directed that in virtue of the power of appointment in his marriage-contract, the means derived from his wife should be divided into three equal parts, to be paid to the children in the same proportions, and under the same terms and conditions as the disposal of the residue of his own estate. A daughter claimed her share of her mother's estate as payable on her father's death to herself, and not to her marriage-contract trustees. *Held* that the father's direction that the mother's means should be paid to the daughters' marriage-contract trustees was a condition imposed upon her taking her share of her father's estate, and that she must elect to take the latter under that condition or renounce it on having her mother's money paid to herself instead of her marriage-contract trustees.

By antenuptial contract of marriage dated in 1841, between Joseph Mitchell, civil engineer, Inverness, and Miss Christian Dunsmore, Joseph Mitchell bound himself to make payment to his intended wife of *inter alia* a free yearly annuity of £150; and with the view of securing the said annuity he further bound himself to make payment to the trustees nominated and appointed in the marriage-contract, of the sum of £3000 at the first term of Whitsunday or Martinmas which should happen after his death; the trustees being directed to pay over the annual interest of the same to Mrs Mitchell if then alive, in satisfaction *pro tanto* of the annuity before mentioned;

and being further directed to hold the fee or capital of the said sum of £3000 for behoof of the issue of the marriage, and pay it over to them or their descendants at the first term of Whitsunday or Martinmas that should happen after the death of the survivor of the spouses, in such shares as might be appointed by Mr Mitchell, whom failing by Mrs Mitchell, or failing any appointment, then equally among the issue or their descendants.

It was likewise stipulated that the provisions therein should be in full satisfaction to the issue of the marriage of all claim for bairns' part of gear, legitim, portion natural, and executry, and in short, of everything they could demand through the decease of their father or mother.

For which causes, and for the other part, James Dunsmore, the father of Mrs Mitchell, bound himself, and his heirs and executors, to make payment of the sum of £2000 to the marriage-contract trustees, and further, so soon after the death of the survivor of himself and of his wife as the same could be realised, to make payment to the marriage-contract trustees of such additional share of his funds and property as with the said sum of £2000 should have the effect of placing Mrs Mitchell on an equal footing with his other daughters, and afford to each of them £1000 sterling more from his succession than each of his sons, but always upon the trusts set forth in the said marriage-contract. These provisions, it was declared, were accepted by Mrs Mitchell in full of everything she could claim through the demise of her father or mother, with certain exceptions specified in the deed. Mrs Mitchell assigned to the said trustees all estate, heritable and moveable, to which she might succeed during the subsistence of her marriage with Mr Mitchell.

The contract further contained the special declaration that the whole sums of money and property to be received by the trustees under the obligations therein undertaken by James Dunsmore or in respect of the conveyance by Mrs Mitchell, were to be held, *inter alia*, for the following purposes:—*First*, That the trustees might pay the free annual proceeds of the said whole property to Mr Mitchell during his life, and after his death to Mrs Mitchell during her life, independently of the annuity of £150 sterling. And *Second*, That the trustees should hold the capital of the whole property for behoof of the children of the marriage alive at the death of the survivor of Mr and Mrs Mitchell, or the lawful issue of such children, or of any predeceasing child or children, to be paid in the case of sons at majority, and of daughters at majority or marriage, but not before the death of the survivor of the spouses. The payments to children were to be made in such proportions as Mr Mitchell, whom failing Mrs Mitchell, should appoint by any writing under his or her hand, at any time during his or her life; and failing such appointment, the trustees were directed to divide the said trust property equally among the children of the marriage, the lawful issue of a predeceasing child being entitled to his or her parent's share.

Mrs Mitchell survived her father, but predeceased her husband intestate, and without having exercised any power of appointment competent to her under the said marriage-