want is that the sewer shall not be constructed at all, or rather that it shall not be constructed so as to pass under their line. But I think that in that branch of their argument, if I may so call it, they fail, because the Local Authority is entitled to make sewers crossing a railway line. Section 107 of the Public Health Act makes provisions for the case where a sewer "shall pass under or across or in any way affect any railway or canal." From the provisions of that section it is plain that a sewer may be constructed traversing the undertaking of a railway company, and as the railway cannot sell the land we are shut up to the conclusion that the use of the land may be taken for this limited purpose without purchase and sale, but on condition of making compensation for damage as required by section 164.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Complainers and Reclaimers—Dundas, K.C.—Deas. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondents—W. Campbell, K.C.—Sandeman. Agent—A. Elliot Keay, Solicitor.

Thursday, July 4.

SECOND DIVISION.

COULSON'S TRUSTEES *v.* COULSON.

Husband and Wife—Marriage-Contract—Insurance — Insurance by Husband on His Life Payable at His Death to Wife if Living — Married Womens Policies of Assurance Act 1880 (43 *and* 44 *Vict. c.* 26), *sec.* 2.

In an antenuptial contract of marriage the wife conveyed to trustees "the whole property and estate, heritable or moveable, now belonging or which shall pertain and belong to her during the subsistence of the marriage."

By policy of insurance on the husband's life, applied for by him in anticipation of his marriage, and dated two days before the date thereof, the insurers assured the husband's life, and on proof of his death, providing the policy was then in force, agreed to pay £1000 to the wife if living, and if not to the husband's executors, administrators, or assigns. The husband died survived by the wife.

Held that the sum due under the policy of insurance was not property which pertained or belonged to the wife during the subsistence of the marriage, and that consequently it did not fall within the conveyance by her to her marriage-contract trustees, but was payable to her absolutely for her own use and behoof.

By antenuptial contract of marriage dated 28th February and 1st, 2nd, 3rd, and 26th March 1898, between Hugh Niven Coulson and Mabel Ellen Taylor, with the special advice and consent of the persons therein mentioned, Mr Coulson's father disponed certain estate to the trustees and for the purposes therein mentioned and Miss Taylor disponed to them for the purposes therein mentioned certain estate specified, and also "all and sundry lands and heritages, goods and sums of money, and generally the whole property and estate, heritable and moveable, now belonging or which shall pertain and belong to her during the subsistence of the marriage" under exception of certain specified sums, and of monies in her bank account, current income, and legacies not exceeding £200. Certain other estate was disponed to the trustees on her behalf by other persons. The value of the estate put into the marriage trust by Mr Coulson's father was about £3816, and the value of the estate put into the marriage trust by and on behalf of Miss Taylor was about £16,939. By the marriage-contract the trustees were appointed tutors and curators to the child or children of the marriage. Mr Coulson and Miss Taylor were married on 12th May 1878.

In February 1898 Mr Coulson, in anticipation of his intended marriage to Miss Taylor, applied to the Equitable Life Assurance Society of the United States for a policy for £1000 on his life payable in the manner after-mentioned, and by policy of assurance dated 10th May 1898 for £1000 on the life of Mr Coulson, the said Assurance Society, on receipt of satisfactory proofs of the death of the assured, providing the policy was then in force, agreed to pay to the said Mabel Ellen Taylor if living, if not, then to Mr Coulson's executors, administrators, or assigns, subject to the right of the assured to change the beneficiary, the sum of £1000. Mr Coulson paid the first premium due upon the policy amounting to £22.

In January 1899 Mr Coulson applied to the said Life Assurance Society to change the description of the parties to whom the proceeds of the policy were payable by annulling the following part thereof, viz., "subject to the right of the assured to change the beneficiary." The object of this request was to make the direction to pay to his wife in the event of her surviving him absolute. The Assurance Society agreed to comply with this request, and accordingly they made a docquet bearing date 21st January 1899 on the policy in the following terms:—"In compliance with the written request of the assured duly acknowledged it is hereby declared that the amount due at the death of the assured shall be payable not as originally provided (other conditions and requirements remaining unchanged), but to Mabel Ellen Coulson, wife of the assured, if living, if not then to the assured's executors, administrators, or assigns."

On 22nd February 1899 and 22nd February 1900 Mrs Coulson paid out of her own separate means, from which her husband's *jus mariti* and right of administration were excluded by the contract of marriage, two annual premiums of £22 each, but she

made these payments because it was more convenient for her than for her husband to provide the money at the time, and not because of any understanding upon her part that the policy was her own. The policy itself was never handed over to Mrs Coulson.

Mr Coulson died on 11th January 1901 domiciled in Scotland, survived by his wife, and by one child, Ellen Stewart Coulson, born 16th March 1899. Mr Coulson left no testamentary deed.

After Mr Coulson's death a question arose as to the sum contained in the policy of insurance, and for the settlement of the point a special case was presented for the opinion and judgment of the Court.

The parties to the special case were, (1) the trustees under the marriage-contract, and (2) Mrs Coulson.

The questions of law were—"1. Is the said sum of £1000 payable to the first parties in terms of the marriage-contract? or (2) Is the said sum payable to the second party absolutely for her own use and behoof? or (3) Is the said sum intestate succession of the said deceased Hugh Niven Coulson?"

By section 2 of the Married Womens Policies of Assurance (Scotland) Act 1880 (43 and 44 Vict. c. 26) it is enacted—"A policy of assurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his children, or of his wife and children, shall, together with all benefit thereof, be deemed a trust for the benefit of his wife for her separate use or for the benefit of his children, or for the benefit of his wife and children, and such policy immediately upon its being so effected shall vest in him and his legal representatives in trust for the purpose or purposes so expressed, or in any trustee nominated in the policy or appointed by separate writing duly intimated to the assurance office, but in trust always as aforesaid, and shall not otherwise be subject to his control, or form part of his estate, or be liable to the diligence of his creditors, or be revocable as a donation, or reducible on any ground of excess or insolvency." . . .

Argued for the first parties—The sum contained in the policy fell under the *acquirenda* clause in the marriage-contract, and was therefore payable to them. Under the Act an indefeasible and irrevocable right was vested in the wife under the policy during the subsistence of the marriage. The wife's interest in the policy having thus vested in her during the marriage, her right under the policy fell under the conveyance to the first parties in the marriage-contract. Alternatively, the sum under the policy was intestate succession of Mr Coulson, and was payable to the first parties to the extent of two-thirds as tutors and curators of his only child.

Argued for the second party—A policy of insurance like the present was not within the *communio bonorum*, and did not fall within the definition of *acquirenda* during the subsistence of the marriage—*Smith* v. *Kerr*, June 5, 1869, 7 Macph. 863; *Thomson's Trustees* v. *Thomson*, July 9, 1879, 6 R. 1227. The right of the wife in the policy was only contingent, and could not be described as money or property pertaining or belonging to her during the marriage. She was therefore entitled to the sum due under the policy for her own absolute use and behoof.

At advising—

LORD JUSTICE-CLERK—The real question in this case is, whether a sum of £1000, the proceeds of a policy on the life of the late Hugh Niven Coulson, which he took out with the Equitable Life Assurance Society of the United States, is payable to his widow, or whether her marriage-contract trustees are entitled to insist that it shall be handed over to them to be dealt with as part of the marriage-contract fund. The policy made the sum in it payable on his death to the lady he was about to marry, and this destination was made absolute, on the application of the insured, by a docquet dated 21st January 1899. Accordingly, on his death the proceeds were handed over to his widow. This was plainly the intention of the husband, and this was admitted at the debate by the counsel for the trustees. But they base their claim upon the marriage-contract and the Act of 43 and 44 Vict. cap. 26. That that Act does not apply to this case seems to me to be clear. The purpose of that Act was to enable a married man to make a protected provision for his wife and family. Here this policy was not effected by a married man, and he expressly provided how it was to go on his death. Therefore, unless the first parties can bring this sum under the marriage-contract they cannot succeed. Under that contract the second party conveyed in trust all "lands and heritages, goods, and sums of money . . . which should pertain or belong to her during the subsistence of the marriage." This £1000 was not a sum of money belonging to her during the subsistence of the marriage. I therefore think the trustees have no claim to it, and it must go, as the holder of the policy plainly intended, as a gift to her.

I therefore think the second question should be answered in the affirmative.

LORD YOUNG concurred.

LORD TRAYNER—The money paid to the second party under the policy of insurance mentioned in the case was not, in my opinion, a sum of money which pertained or belonged to her during the subsistence of her marriage, and did not therefore fall within the conveyance by her to her marriage-contract trustees.

LORD MONCREIFF—I am of opinion that the sum in the policy is payable absolutely to the second party. I do not regard the interest which she had in that sum during the marriage as a sum of money or property which pertained or belonged to her during the subsistence of the marriage in the sense of the marriage-contract.

The destination in the policy was to "Mabel Ellen Coulson, wife of the assured

if living; if not, then to the assured's executors, administrators, or assigns." The wife's interest was of a very peculiar description—(1) The sum assured could not be reduced to possession *stante matrimonio;* (2) it was contingent on her surviving her husband; (3) the husband was not bound to keep up the policy; it was only good against him and his creditors if he kept it up; and (4) the wife's rights under the policy were not protected by a separate trust in terms of section 2 of 43 and 44 Vict. cap. 23.

Thus the second party only obtained an indefeasible right to the sum in the policy after the dissolution of the marriage. I therefore think that it did not pass to her marriage-contract trustees, and that she is now entitled to it absolutely.

The Court answered the second question in the affirmative, and found it unnecessary to answer the other questions.

Counsel for the First Parties—Cullen. Agents—T. & W. A. M'Laren, S.S.C.

Counsel for the Second Party—M'Clure. Agents—Baxter & Burnett, Solicitors.

Wednesday, July 3.

FIRST DIVISION.

SIM *v.* ROBERTSON.

Tutor and Pupil—Parent and Child—Appointment of Tutor Resident in England to Act Jointly with Mother—Guardianship of Infants Act 1886 (49 *and* 50 *Vict. cap.* 27), *sec.* 2.

A father died intestate, domiciled in Scotland, and survived by a widow and pupil children. The widow presented a petition for the appointment of a relative of her own who was resident in England to act jointly with her as tutor to her children. She had no relatives in Scotland, and the father's only relative was a married woman, who was resident in Scotland. The Court *granted* the petition, on condition of the person appointed granting a bond prorogating the jurisdiction of the Court of Session.

Patrick Sim died on 23rd November 1900, intestate and domiciled in Scotland, and was survived by a widow and three pupil children. His widow was decerned his executrix-dative, and his estate amounted to about £65,000.

By antenuptial contract of marriage between Mr and Mrs Sim, Mr Sim provided an annuity of £250, and certain small sums for mournings and aliment for his widow, which she accepted in full of all her legal rights. The antenuptial contract made no provision for children.

In contemplation of the possibility of making a claim for her *jus relictæ*, in which case her interest as an individual would be adverse to her pupil children, Mrs Sim presented a petition on 25th May 1901 for the appointment of a tutor to them in terms of the Guardianship of Infants Act 1886 (49 and 50 Vict. cap. 27), sec. 2.

The petitioner, who was described as residing in London, averred that Mr Sim's only surviving relative was his sister, a married woman, who lived in the north of Scotland, and that she herself had no relatives in Scotland. The petitioner craved the Court to appoint John Barnes, manager of the London and Provincial Bank, Limited, at Walthamstow, near London, and residing at 278 Hoe Street, Walthamstow, to act jointly with the petitioner as tutor to her pupil children. Mr Barnes was the petitioner's cousin.

Answers were lodged by Mr Sim's surviving sister, in which the facts averred in the petition were admitted.

Argued for the petitioner—A domiciled Englishman might be appointed in such a case if he was willing, as Mr Barnes was, to prorogate the jurisdiction of the Court of Session, and have an address in Scotland at which he might be cited—*Macdonald* v. *His Next-of-Kin*, June 11, 1864, 2 Macph. 1194; *Dalhousie*, February 22, 1698, 4 Br. Sup. 405. The proper course was to appoint the person nominated by the mother—*Martin* v. *Stewart*, December 1, 1888, 16 R. 185.

Argued for the respondent—The proposed tutor being a near relative of the mother, his appointment was undesirable, since there was to be a conflict of interest between the mother and her children. Not being resident in Scotland he was ineligible for the office. Even in choosing curators no-one beyond the jurisdiction of the Court could be chosen except in very peculiar circumstances — *Fergusson* v. *Dormer*, January 25, 1870, 8 Macph. 426; Thomson Factors, 43; *Robertson*, December 3, 1846, 9 D. 210.

LORD PRESIDENT—The proposal made in this petition that a person who is out of the jurisdiction of this Court should be appointed as co-tutor with the petitioner is somewhat unusual. But the circumstances are unusual, and in dealing with such a case our duty is to have regard primarily to the benefit of the pupil. The Guardianship of Infants Act 1886 provides that in a not very different matter the wishes of the mother should be considered.

The statement made by the petitioner is that there are no relatives in Scotland suitable for the office, the only relative of the father in Scotland being a married woman resident in Huntly. Under these circumstances the petitioner suggests that her cousin, a banker in England, should be appointed as tutor. The position which this gentleman holds is evidently one of trust and responsibility, and it is reasonable to suppose that his advice would be valuable as a tutor. Further, it is desirable to have someone who will act harmoniously with the petitioner, who seems to think that her cousin would do so—and there is no reason to suppose that he would not. Under these circumstances it seems to me that the proposed appointment would be