

requirement, and the suggested fence would serve no practical purpose, while it would put the proprietor to considerable expense.

On the question whether the space would be a "court" I agree with your Lordships, and have nothing to add.

The Court pronounced this interlocutor:—

"Sustain the appeal, and recal the said interlocutor [of 22nd Feb. 1906] appealed against: Find (1) that the court proposed to be formed by the petitioner is not a court for which the petitioner requires to submit plans for the approval of the Dean of Guild Court; (2) that the presently existing house at No. 34 Tower Street is not a tenement, and that accordingly in determining the open space required to be attached thereto the petitioner is entitled to take into account the open space left in front thereof, and is not restricted to open space left at the back thereof; and (3) that the petitioner is not called on to erect a fence in continuation of the side wall of 34 Tower Street: Remit to the said Dean of Guild to grant the lining craved."

Counsel for Petitioner (Appellant)—A. M. Anderson—J. A. Christie. Agents—Balfour & Manson, S.S.C.

Counsel for Respondents—M'Clure, K.C.—Kemp. Agent—Thomas Hunter, W.S.

Wednesday, June 27.

FIRST DIVISION.

A v. B.

Expenses—Husband and Wife—Petition by Wife for Custody of Children—Wife's Expenses—Whether Wife Entitled to Expenses as between Party and Party or as between Agent and Client—"Necessary" Expenses.

Held that as the expenses incurred by a wife in a successful petition for custody of children were not "necessary" expenses which a husband was bound to pay, the petitioner was only entitled to expenses in ordinary form.

Question (*per* Lord Kinnear) as to the rule observed in awarding a wife expenses in a consistorial cause, "whether the principle on which the rule was originally based, namely, that since a wife has no means her justifiable expenses must be paid by her husband, should be applicable to the case of a wife having a considerable separate estate."

A, wife of B, presented a petition for the custody of the pupil children of the marriage between her and B, under section 5 of the Guardianship of Infants Act 1886, and at common law. Answers were lodged by the respondent, and these were followed

by certain steps of procedure, but before a proof, which had been ordered, had been taken the respondent lodged a minute consenting to the prayer of the petition being granted with expenses.

On the minute appearing in the Single Bills, counsel for the petitioner moved for expenses as between agent and client. The respondent, while consenting to an award of expenses in ordinary form being pronounced against him, opposed the motion. It was admitted that the petitioner was liferented in about £50,000 of separate estate, and that the respondent was a man of ample means.

At advising—

LORD PRESIDENT—The facts here are that this is a petition by a lady for the custody of certain children, in which she makes some very strong averments against the character of the respondent. At first the respondent resisted the crave of the petition, but afterwards he lodged a minute consenting to the prayer being granted, and the sole question now before us is whether the expenses of the petitioner should be given her as ordinary expenses or as expenses as between party and agent. The only other fact in this case that it is necessary to mention is that the respondent is a man of ample means, and that the petitioner, though not possessed of such ample means as the respondent, yet is the possessor of a separate estate.

I have looked into the authorities, and it appears to me that the only ground in this class of case for awarding expenses as between party and agent instead of in the ordinary way, is for the purpose of avoiding circuitry, and by circuitry I mean that a wife, having recovered expenses awarded to her in the ordinary way, should thereafter claim and receive from her husband, as a debt due to her, the difference between the expenses awarded to her as between party and party and the expenses incurred by her as between party and agent. To avoid this circuitry the Court will give expenses as between party and agent. The test in all such cases therefore is this—were the expenses "necessary" expenses of the wife. Now, it has been settled that expenses incurred by a wife in a petition for custody of children are not "necessary" expenses (*Fraser, Husband and Wife, i. 646*), so I think that the only expenses to which the petitioner is entitled here are expenses taxed on the ordinary scale.

LORD M'LAREN—I agree. The only class of cases where a wife gets expenses as between agent and client, instead of on the more moderate scale, are such as were originally consistorial causes. Now an application for custody of children is not a consistorial cause, but is an appeal to the *nobile officium* of the Court, and the proof of this is that the case does not originate in the Outer House, as consistorial causes do, but in the Inner House. This then is not a case to which either the principle or the practice of awarding expenses in consistorial causes can be applied.

LORD KINNEAR—I am of the same opinion, and agree with your Lordship's exposition of the principles on which expenses as between agent and client are generally allowed in consistorial cases. The case cited by Lord Fraser—*M'Alister v. Her Husband* (1762), M. 4036; Fraser, Husband and Wife, vol. i, 614—as the foundation of the whole practice was that of an action brought, not by the wife, but by the wife's law-agent to recover the difference between the expenses which he had already recovered as taxed between party and party, and the balance of expenses as between agent and client still due by the wife. It was held that expenses incurred by the wife in defending her honour or safety were necessities for which the husband was bound to provide, and so the claim of the law-agent was sustained, and as your Lordship has pointed out the Court has thought it expedient in such cases to avoid this circuitous method by giving decree for expenses as between party and agent in the first instance. But it has never been held that petitions for the custody of children are necessities for which the husband is bound to pay, and Lord Fraser points out that the contrary has been decided in Ireland. I do not see, therefore, that the rule hitherto followed in consistorial cases is applicable to the present. Whether the principle on which the rule was originally based, namely, that since a wife has no means her justifiable expenses must be paid by her husband should be applicable to the case of a wife having a considerable separate estate is a different question which it is not necessary to decide.

LORD PEARSON—I concur.

The Court awarded the petitioner expenses in ordinary form.

Counsel for the Petitioner—Dean of Faculty (Campbell, K.C.)—Hunter, K.C.—J. G. Jameson. Agents—J. & J. Ross, W.S.

Counsel for the Respondent—Lord Advocate (Shaw, K.C.)—R. S. Horne. Agents—Carmichael & Miller, W.S.

Thursday, July 5.

SECOND DIVISION.

[Lord Ardwall, Ordinary.]

CRAWFORD AND ANOTHER
(OWNERS OF THE S.S. "WAR-
SAW") v. GRANITE CITY STEAM-
SHIP COMPANY, LIMITED
(OWNERS OF THE S.S. "LINN
O' DEE").

*Ship—Collision—Fog—Rules to be Observed
by Vessels Navigating in Fog—Regulations
for Preventing Collisions at Sea—
Relation of Article 16 to Articles 19, 21, 23.*

The Regulations for Preventing Collisions at Sea provide:—By article 16—That a steamer in a fog hearing another

vessel's fog-signal forward of her beam shall stop her engines and then navigate with caution. By article 19—That when two steamers are crossing with risk of collision the vessel which has the other on her starboard side shall keep out of the other's way. By article 23—That every steam vessel directed to keep out of another vessel's way shall on approaching, if necessary, stop and reverse.

The steamer "Linn o' Dee," navigating in a fog, heard forward of her beam and upon her starboard side the fog-signal of an unseen steamer. The sound seemed gradually to "broaden," which indicated a possibility that the vessel from which it proceeded was crossing the course of the "Linn o' Dee" from starboard to port. The "Linn o' Dee" stopped her engines in conformity with article 16. A collision took place. *Held* that she had acted rightly, and was not bound to have acted upon article 23 and reversed her engines.

Opinions that while all the articles are to be read together so far as practicable, article 16 contains all the obligatory directions with reference to speed in fog, and is imperative so long as the position of the other vessel has not been ascertained with certainty.

The Regulations for Preventing Collisions at Sea provide as follows:—"Article 16—Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over."

Article 19—"When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

Article 21—"Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed. *Note.*—When in consequence of thick weather or other causes such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone she also shall take such action as will best aid to avert collision. (See articles 27 and 29.)"

Article 23—"Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop and reverse."

In the present action John Wood Crawford and Duncan M'Intyre, shipowners, Leith, registered owners of the steamship "Warsaw," sued the Granite City Steamship Company, Limited, registered owners of the steamship "Linn o' Dee," for £300 as damages sustained by the "Warsaw" in a collision with the "Linn o' Dee." A cross action at the instance of the owners of the "Linn o' Dee" against the owners of the