

prietor, *pro indiviso*, of certain lands at Hoswick in Zetland; (2) that on 14th September 1888 a shoal of 'caaing' whales were driven towards the shore *ex adverso* of the said lands, and there killed in shallow water by inhabitants of the district, who are represented by the defenders as a committee of their number appointed at a meeting held on 17th September 1888; (3) that the said whales, after being killed as aforesaid, were by the said persons drawn on to the foreshore between high and low water mark and there flensed, and that the blubber and other marketable produce was then sold by public auction on 17th September 1888; (4) that the pursuer claims as a pertinent of his said lands, and conformably, as he alleges, to the laws, usages, and rights of the islands of Zetland, the sum of £69, 7s. 3d., as being his share of one-third of the proceeds of the said sale; (5) that it is established by the evidence that there has been a custom on the part of the proprietors of land in Zetland to demand a share, generally one-third, of the price or value of whales killed *ex adverso* of their lands in the manner aforesaid, and that the said demands have usually been complied with, though in some cases payment has been refused and not enforced; (6) that the said payments have usually been made not with the willing consent of the persons from whom they were demanded, but unwillingly, and frequently under threats on the part of the proprietors, which the said persons were not in a position to resist; (7) that no consideration was given by the pursuer for the sum claimed by him as aforesaid, and that it is not established that any consideration was given by the proprietors in respect of the sums which they demanded and received as aforesaid; (8) that the said custom is not just or reasonable, and that it has not the force of law: Therefore dismiss the appeal: Of new assoltzie the defenders from the conclusions of the action: Find them entitled to expenses in this Court . . . and decern."

Counsel for Pursuer and Appellant—
Low—Dundas. Agents—R. C. Bell & J.
Scott, W.S.

Counsel for Defenders and Respondents—
D.-F. Balfour, Q.C.—Cosens. Agent—
Thomas M. Horsburgh, S.S.C.

Friday, June 20.

SECOND DIVISION.

SPARKS AND ANOTHER (BURNETT'S
TRUSTEES).

Insurance Policy—Right to Bonus Addition—Marriage-Contract.

By an antenuptial contract of marriage the trustees were directed to effect a policy of insurance for the sum of £2000 upon the joint-lives of the wife and her husband, the premiums to be paid out of moneys conveyed to the trustees by the wife for that among other purposes; and with respect to the division of "the said sum" to be derived from said policies on the death of the longest liver of the spouses, it was agreed that the sum should be invested on proper security, and the rights thereof taken to the children of the marriage in fee. The wife conveyed all her other estate including *acquirenda* to her husband. The wife survived the husband, and on her death the policy was worth with bonus additions upwards of £3183.

Held, inter alia, in a special case presented by the general donee of the husband and the children of the marriage, that the children's right was not limited to the sum of £2000 contained in the policy, but they were entitled as well to the bonus additions, and that these did not pass under the general conveyance of the wife's estate including *acquirenda* to her husband.

By antenuptial contract of marriage, dated 11th July 1837, entered into between the late Sir James Horn Burnett of Leys, Bart., and his then intended wife, Mrs Lauderdale Ramsay or Duncan, the said Mrs Duncan disposed to trustees an annuity of £400 to which she was entitled under her contract of marriage with a former husband for, *inter alia*, the following purposes. "That the said trustees or trustee acting for the time may effect a policy of assurance on the joint lives of the said James Horn Burnett and Lauderdale Ramsay or Duncan, payable on the death of the survivor of the said James Horn Burnett and Lauderdale Ramsay or Duncan, with any respectable assurance company in Scotland, for the sum of £2000 sterling, and may, out of the said annuity or jointure, pay annually to such assurance company with which they may think it best to effect such policy the premium of assurance due thereon . . . and with respect to the division of the said sum to be derived at the death of the longest liver of the said James Horn Burnett and Lauderdale Ramsay or Duncan from the said policy, it is hereby agreed that the same shall be invested on proper heritable or moveable security, at the sight of the said trustees or their foresaids, and the rights thereof taken to the children of the said intended marriage in fee . . . and after payment of the annual premium of assurance on the said policy of assurance

to be effected on the joint lives of the said James Horn Burnett and Lauderdale Ramsay or Duncan, the said trustees shall pay over to the said Lauderdale Ramsay or Duncan the balance of the foresaid annuity or jointure." Further, the said Mrs Duncan by the said contract of marriage disposed, conveyed, and made over to and in favour of the said James Horn Burnett, her promised spouse, and his heirs and assignees whomsoever, her whole other means and estate, heritable and moveable, and all debts and sums of money whatsoever presently pertaining and belonging to her, or which she might thereafter acquire.

Three children were born of the marriage, two sons and a daughter, all of whom survived their father, who died on 16th September 1876.

Lady Burnett died on 4th November 1888, survived by her two sons, and predeceased by her daughter leaving issue.

At that date the said policy of insurance was worth £3183, 5s., that being the amount to which the £2000 had increased by virtue of bonus additions.

A special case was presented by (1) the said marriage-contract trustees, (2) Sir Robert Burnett, Bart., the son of Sir James' former marriage, and his general donee, and (3) the two surviving sons of the said marriage and the children of the daughter deceased, to have the following questions of law determined, viz.—“(1) Is the party hereto of the second part entitled to the said sum of £3183, 5s. sterling, or any part thereof? (2) Are the parties hereto of the third part, or any and which of them, entitled to the said sum of £3183, 5s., or any part thereof; and if so, to what part thereof?”

Two points were discussed by the parties, viz., (1) whether the testamentary writings of Sir James Horn Burnett were so framed as to preclude the parties of the third part from taking the whole provisions in their favour under those writings in addition to what was provided for them in the said marriage-contract, and (2) whether the bonus additions went with the principal sum in the policy to the children of the marriage, or fell to be treated as a part of the estate of Lady Burnett not specially disposed of, and so passed under the general conveyance of *acquisita et acquirenda* to her husband, and thus became the property of his general donee. The Court had no difficulty in holding that the parties of the third part were, on a sound construction of the various deeds (whatever Sir James Horn Burnett's intentions might have been), entitled to the whole provisions both in the marriage-contract and his testamentary writings.

On the second point it was argued for Sir Robert Burnett—What was secured to the children of the marriage under the marriage-contract trust was a policy “for the sum of £2000. The clause of the deed quoted above provided for “the division of the said sum,” which could refer to nothing but the £2000, the only sum previously mentioned. The bonus additions constituted part of Lady Burnett's estate, and not being specially

disposed of, fell, under the general conveyance of her estate *acquisita et acquirenda*, to Sir James, and now belonged to the second party as Sir James' general donee.

Argued for the children of the marriage—It was the policy of insurance for £2000 and not a specific sum which was secured to them by the marriage-contract. If the insurance company had been unable to pay £2000 they would have no claim against the second party for the deficit. If they were liable to suffer loss, they were entitled to benefit by any gain, *e.g.*, bonus additions *accessorium sequitur principale*. A bonus was a part and pertinent of a policy, and was carried along with it—*Parkes v. Bott*, November 23, 1838, 9 Simon, 388; *Gilley v. Burley*, July 15, 1856, 22 Beavan, 619.

At advising—

LORD YOUNG—The questions in this case regard the proceeds of a policy of insurance which was effected so long ago as 1837 upon the occasion of the marriage of the late Sir James Burnett and his second wife. That policy was effected by the marriage-contract trustees under the antenuptial contract of marriage between Sir James and his then future wife. By that contract the intending wife conveyed to the marriage-contract trustees an annuity of £400, which had been provided to her by her former husband. To state the purposes of the trust shortly, the trustees were to effect a policy of insurance on the lives of her husband and herself “for the sum of £2000,” and were, out of said annuity or jointure, to pay the premium on said policy, and the words of the marriage-contract with respect to the disposal of the proceeds of the policy are these—“And with respect to the division of the said sum to be derived at the death of the longest liver of the said James Horn Burnett and Lauderdale Ramsay or Duncan from the said policy, it is hereby agreed that the same shall be invested on proper heritable or moveable security at the sight of the said trustees or their fore-saids, and the rights thereof taken to the children of the said intended marriage in fee.”

But another question was raised, and I must say I was much impressed by the argument, namely, whether the children's rights under the marriage-contract are not satisfied by giving them right to the policy to the extent only of £2000, although the policy has now come through bonus additions to be worth upwards of £3000. The trustees were directed to take out a policy “for the sum of £2000,” and with regard to the disposal of the proceeds it was “the said sum” which was provided for. I think the argument for limiting the right of the children to £2000 was very strong—indeed my own judgment goes along with it. The result would be that the amount of the bonuses would be undisposed of residue belonging to Lady Burnett's estate, and as such passing under the general conveyance of all her property not otherwise disposed of to her husband, and so to his

general donee. I own that I was perhaps in forming this opinion under the influence of the consideration that the children in getting the £2000 even out of this policy of insurance, which they are strictly entitled to in my judgment, are getting just so much more than their father intended them to get, but I thought, notwithstanding that, that I could not deny them what the marriage-contract undoubtedly gave them. I was inclined, however, to limit their right strictly to the sum of £2000, so that their father's intention might receive some effect. That was my inclination, but I do not hold a very strong opinion in that direction, and should not care to insist upon it if the contrary is the prevailing opinion of your Lordships, and no doubt a great deal is to be said for this view that there was no obligation in the wife's part of the marriage-contract to provide £2000 for the children, but only a direction to the trustees to create an insurance estate by means of a £2000 policy, and if that policy had proved to be worth less than £2000 there would have been no claim at the instance of the children to have had the deficit made up. As a fact the policy amounts to considerably more by the addition of bonuses. Perhaps as they would have suffered if there had been a loss, the children are entitled to profit by the increase. In that view the children will be entitled to all provided by the marriage-contract not modified in any way by testamentary deeds of Sir James, to the policy not only to the extent of £2000, but to the policy and the bonuses which have accrued on it.

LORD RUTHERFURD CLARK—I have no doubt that the children are entitled to the provisions in the marriage-contract in their favour both by their father and their mother. Upon the question whether they are entitled to the whole proceeds of the policy or only to £2000, I am clearly of opinion that they are entitled to the whole. I look upon the language of the marriage-contract not as settling a definite sum, but as providing for a policy of insurance and the entire proceeds payable under it.

LORD LEE—I have come to the same conclusion. Upon the question of the bonuses I agree with Lord Rutherford Clark that the proceeds must follow the policy. If the value of the policy had fallen below £2000 the children would have had no claim for more than they could actually get under the policy, and if that is so, there is strong reason for saying that the thing provided by the marriage-contract was not the sum of £2000, but the policy with all its accessories.

The **LORD JUSTICE-CLERK** concurred.

The Court answered the first question in the negative, and the second question to the effect that the parties of the third part were entitled to the entire sum of £3183, 5s. in the proportions of one-third to each of the two surviving sons of the marriage, and

one-third equally among the children of the deceased daughter.

Counsel for the First and Third Parties—**Sir C. Pearson**—**W. C. Smith**. Agents—**Baxter & Burnett, W.S.**

Counsel for the Second Party—**Comrie Thomson**—**Macfarlane**. Agents—**Carment, Wedderburn, & Watson, W.S.**

Friday, June 20.

FIRST DIVISION.

[Lord Wellwood, Ordinary.]

**HOWARD & WYNDHAM v. DICK-
CLELAND AND OTHERS (RICH-
MOND'S MARRIAGE-CONTRACT
TRUSTEES).**

Right in Security—Sale by Heritable Creditor—Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101)—Premonition—Advertisement—Title—Expenses.

The Titles to Land Consolidation (Scotland) Act 1868 provides in section 119, with reference to the right of the heritable creditor to sell under the powers in his bond and disposition in security, that if the debtor in the bond fails to pay the sum due within three months after a demand has been made upon him, the creditor may without further intimation sell the lands by public roup "on previous advertisement stating the time and place of sale, and published once weekly for at least six weeks subsequent to the expiry of the said three months . . . and also that in carrying such sale or sales into execution it should be lawful to the grantee to prorogate and adjourn the day of sale from time to time as he should think proper, previous advertisement of such adjourned day of sale being given in the newspapers above mentioned once weekly for at least three weeks."

In March 1882 a heritable creditor served formal notice calling up the bond, and in August, after six weeks' advertisement, exposed the subjects for sale. The sale was adjourned, and the subjects were subsequently exposed on nine other occasions between 30th August 1882 and 31st October 1888, when the subjects were sold. A little over three years elapsed between the ninth and tenth exposures. Sales were effected upon the fourth and sixth exposures, but each of these proved abortive. Previous to each exposure after the first, advertisements were made for three successive weeks, except in the cases of the fifth and seventh exposures, on which occasions six weeks' advertisement was made. One of the titles offered by the sellers proved to be a disposition by a trustee in favour of himself and another.