*Trustees.* It is evident that the point which is now raised was not considered in *Ferrier's Trustees;* it seems to have been omitted. Therefore the point is quite open, and there is nothing in *Ferrier's Trustees* which decides it one way or the other.

LORD SHAND concurred.

LORD ADAM—The Lord Ordinary says in his note—"The title under which the defender holds is a singular title. He might have made up a title to one-half of the lands in question as heir, and claimed an entry in that character. If he had done so, and registered his service, it would not have been open to the superior to object that the defender had also a title by conveyance;" and no one can doubt that that is good law. But then a little further on the Lord Ordinary goes on to say that the defender "made up his title as a singular successor, and took infeftment in that character, and it is a singular title which he now (by implication) presents to the superior for confirmation. I think the superior is entitled to take the title as presented to him, and to make the demand which that title infers;" and then "The defender by completing his title as he has done, has prevented himself from offering to enter as heir. There is nothing now to enter to, the fee is full."

I think the Lord Ordinary is there quite wrong in point of law, because the question is just whether or no if a vassal had prior to 1874 tendered such a title to the superior he would have been bound to enter him by charter or writ of confirmation, on payment of relief-duty only. I agree with your Lordships that it has been settled by the cases that the superior would have been so bound to confirm the vassal.

The case of *Mackenzie* v. *Mackenzie*, M. App. Superior and Vassal, No. 2, decided in 1777, is quite in point. There the last-entered vassal executed a new deed of entail, and called under it certain of the heirs of the existing investiture and also stranger heirs. The institute in the new entail, who was heir of the last-entered vassal, claimed to enter under the new disposition, that is to say, in respect of the new disposition in the entail, and the question arose whether he was entitled to an entry on payment of relief-duty only. It was said in that case that if the superior confirmed the entail, then strangers to the previous investiture might come to succeed, and compel an entry on payment of relief-duty only. But nevertheless the Court held that the heir was entitled to enter on paying relief-duty.

The case of the *Marquis of Hastings*, 21 D. 871, seems to me to raise precisely the same point. There the heir of entail in possession executed a new deed of entail calling the first two of the heirs under the existing investiture, and after them stranger heirs. The institute took as disponee under the new deed, and the Court held that he was entitled to an entry from the superior on payment of relief. This case is in my opinion *a fortiori* of the case of the *Marquis of Hastings*, because there the heir could not have made a title as heir, but was bound to take as disponee in order to comply with the terms of the deed of entail.

The state of the law therefore prior to 1874 was that the superior was bound to grant confirmation of such a title as we have here on payment of relief-duty. But though it was held prior to 1874 that a superior could not refuse to enter an heir in such a way, yet the superior was not obliged to grant a charter or writ which would prejudice his right to claim a casualty of composition when that right should emerge. Therefore in the two cases I have noticed there was inserted a reservation of the superior's right to claim a composition upon the entry of the first substitute under the new investiture who should not be the then existing heir under the former investiture. Except for this reservation it would have been pleaded against the superior's claim that by granting a charter of confirmation he had enfranchised the new investiture; and accordingly the Court in these cases said that the act of the superior was not to free those who would but for the new disposition have been strangers to the investiture, from any claim for composition that might be made against them. That was the reason of the reservation in the charter granted by the superior, and by it the question was left open. But that did not touch the question whether the heir of entail was entitled to enter under the disposition for payment of relief-duty only? On that point I think the cases are conclusive in favour of the heir. I am further agreed that the argument that the defender was only heir to one-half of the lands is really a subtlety, and makes no difference in the result.

The Court recalled the interlocutor of the Lord Ordinary, sustained the second plea-in-law for the defender, and remitted to the Lord Ordinary.

Counsel for Pursuer — Gloag — Kennedy. Agents—Gordon, Pringle, Dallas, & Co., W.S.

Counsel for Defender — Mackintosh — Low. Agents—Skene, Edwards, & Bilton, W.S.

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*Friday, March 5.*

## FIRST DIVISION.

### SCHUMANN *v.* SCOTTISH WIDOWS' FUND.

*Husband and Wife—Insurance—Life Insurance—Policy on Husband's Life for Wife's Separate Use—Surrender—Married Women's Policies of Assurance (Scotland) Act* 1880 (43 *and* 44 *Vict. cap.* 26), *sec.* 2.

*Held* that a policy of assurance effected by a husband on his own life for the separate use of his wife, under section 2 of the Married Women's Policies of Assurance (Scotland) Act 1880, was capable of being surrendered during the joint lives of the spouses.

Marcus Schumann, domiciled in Hamburg, obtained on 12th August 1882, from the Scottish Widows' Fund and Life Assurance Society, a policy of assurance on his life for £1000, for the benefit of his wife Mrs Clara Leon or Schumann, which bore to be in pursuance of the Married Women's Policies of Assurance (Scotland) Act 1880 (43 and 44 Vict. cap. 26).

The policy proceeded on the narrative that Mr Schumann desired to effect an assurance on his own life for the benefit of his wife, for her separate use in pursuance of the said statute, and

bore that in consideration of a single payment of £570, 13s. 4d. he had been duly admitted a member of the society, and that "he and his legal representatives, as trustee or trustees in terms of said Act for his said wife, for her separate use, and in the event of her predeceasing the said Marcus Schumann, he, his heirs, executors, or assignees shall be entitled to receive out of the funds thereof, at the end of three months after the decease of the said Marcus Schumann, the sum of One thousand pounds sterling." The policy also contained a clause which provided "that the Society shall have no concern, directly or indirectly, with the purposes or conditions of any trust under which this policy may at any time be held, whether by the terms of the policy itself or by the terms of any assignment or conveyance thereof; but that in all dealings with the society the act and deed of the party or parties in whom the said policy shall be vested for the time shall be good, valid, and effectual to the society, without reference to any such purpose or conditions, or to any obligations to third parties to which the holders may be liable."

By the Married Women's Policies of Assurance (Scotland) Act 1880 (43 and 44 Vict. cap. 26) it is provided—"Sec. 1. A married woman may effect a policy of aasurance on her own life or on the life of her husband for her separate use, and the same and all benefit thereof, if expressed to be for her separate use, shall, immediately on being so effected, vest in her, and shall be payable to her, and her heirs, executors, and assignees, excluding the *jus mariti* and right of administration of her husband, and shall be assignable by her either *inter vivos* or *mortis causa* without consent of her husband, and the contract in such policy shall be as valid and effectual as if made with an unmarried woman. Sec. 2. 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 on 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: And the receipt of such trustee for the sums secured by the policy, or for the value thereof, in whole or in part, shall be a sufficient and effectual discharge to the assurance office: Provided always that if it shall be proved that the policy was effected and premiums thereon paid with intent to defraud creditors, or if the person upon whose life the policy is effected shall be made bankrupt within two years from the date of such policy, it shall be competent to the creditors to claim repayment of the premiums so paid from the trustee of the policy out of the proceeds thereof."

This was a Special Case to which Mrs Schumann, and her husband as her administrator-in-law, and for his own right and interest, and also as trustee for his wife under the said policy of assurance, were the first parties; and the Scottish Widows' Fund and Life Assurance Society were the second parties. It was stated in the Case that Mrs Schumann desired to surrender the said policy of assurance, and that her husband, as trustee thereunder, and for any other interest he might have, concurred; but that the second parties had doubts whether the policy could legally be surrendered by the first parties, and that they declined to pay over the surrender value to the first parties jointly, or either of them, on their receipt.

On all ordinary policies of the Society surrender values are allowed.

The questions of law were—"Are the second parties bound to accept a surrender by the first parties, or either of them, of the said policy of assurance? Or, Is the said policy incapable of being surrendered so long as the first parties are both alive?"

Argued for the first parties—The second parties were put to show not only (1) that the policy of assurance and the terms of the statute constituted a trust; but also (2) that the trust came within the rule of the law laid down in *Menzies* v. *Murray*, March 5, 1875, 2 R. 507. But it was not constituted by an antenuptial marriage-contract, and the Court had never before protected a beneficiary under a trust that was not antenuptial—*Thornhill* v. *Macpherson*, January 20, 1841, 3 D 394, *per* Lord Jeffrey at p. 401. The series of cases beginning with *Young Anderson* v. *Buchanan*, June 2, 1837, 15 S. 1073, upon which the case of *Menzies* was decided, proceeded on the peculiar nature of an antenuptial marriage-contract. The principle which led to those decisions was inapplicable here—*Smitton* v. *Tod*, December 12, 1839. The words in section 2 of the Act "in whole or in part" must refer to surrender, and the receipt of the trustee was to be a sufficient discharge to the society. It was part of the agreement that Schumann would, after surrender, still be trustee for his wife as regarded the surrender value. Even supposing it would be a breach of trust on his part to surrender, the Court was not put to consider that. The Court would only take cognisance of a trust in a question between truster and trustee or truster and beneficiary, not in a question between the truster and the party with whom the contract was made. The wife was here consenting—*Standard Property Investment Company* v. *Lowe*, March 20, 1877, 4 R. 695. Besides, the Court was not concerned with the trusts of domiciled foreigners. The state of the law before the Married Women's Policies of Assurance Act was that if a husband effected a policy on his own life, payable to his wife, that would have been good as a provision—*Craig* v. *Galloway*, July 17, 1861, 4 Macq. 267; *Muirhead* v. *Muirhead's Factor*, December 6, 1867, 6 Macph. 95; *Pringle's Trustees* v. *Hamilton*, March 15, 1872, 18 Macph. 621; *Wight* v. *Brown*, January 27, 1849, 11 D. 460; *Smith* v. *Kerr and Others*, June 5, 1869, 7 Macph. 863; *Thomson's Trustees* v. *Thomson*, July 9, 1879, 6 R. 1227. The objects of secs. 1 and 2 of the Act was to enable married persons not only to make provisions but to establish a fund of credit. On the construction of the corresponding English Act (33 and 34 Vict. cap.

93). They referred to Thicknesse on Husband and Wife, 286.

Argued for the second parties — It was conceded that after the death of the wife there would be no objection to a surrender; the trust would fly off. But *stante matrimonio* the trust subsisted and could not be destroyed. The contemplation of the policy was that it should continue until the death of the husband. This was not an ordinary trust, but was a provision to the wife (1) to take effect after the husband's death; which was (2) fenced by a trust; and (3) in its nature irrevocable. To such a case the principle of *Menzies, supra cit.*, applied, and this was to be distinguished from such cases as the *Standard Property Investment Company, supra cit.*; *Ramsay* v. *Ramsay's Trustees*, Nov. 24, 1871, 10 Macph. 120; and *Newlands* v. *Miller*, July 14, 1882, 9 R. 1104. It was not of the essence of the decision in *Menzies'* case that the contract should be antenuptial. Here there was a provision which was by statute as effectual as if it was contained in an antenuptial marriage-contract, because by the statute creditors were excluded and the provision was made irrevocable.

At advising—

LORD PRESIDENT—Upon the 12th of August 1884 Mr Schumann, one of the parties to this Special Case, effected an insurance upon his own life with the Scottish Widows' Fund Society, and the narrative of the policy sets out that he desired to effect that insurance for the benefit of his wife, for her separate use, in pursuance of the Married Women's Policies of Assurance (Scotland) Act 1880. The sum assured was £1000, and there was one premium paid amounting altogether to £570, 13s. 4d. which made the policy free from all premiums for the future.

The proposal now on the part of Mrs Schumann and her husband is to surrender this policy at the surrender value, and the Insurance Society object to receive that surrender, being doubtful whether they are entitled to do so. And accordingly the parties have presented this Special Case for the purpose of obtaining an answer to these two questions:—"Are the second parties bound to accept a surrender by the first parties, or either of them, of the said policy of assurance? Or is the said policy incapable of being surrendered so long as the first parties are both alive?"

Now, under ordinary circumstances of course there could be nothing to prevent the party who effected an insurance from surrendering it, or the party for whose benefit it was made from surrendering it at any time. And therefore the difficulty of the Insurance Society must of course arise entirely from the terms of the statute referred to, the 43d and 44th of Vict. c. 26. There are two sections in that statute, by the first of which married women may effect policies of insurance themselves for their own separate use, and it has not been suggested that there would be any difficulty at all in the case of a married woman with her own funds purchasing a policy as this has been purchased, or effecting a policy and paying the annual premiums out of her own funds, surrendering that policy at any time whatever. There is nothing in that first section to suggest the slightest difficulty in that respect. But this policy was effected under the 2d section of the statute, and it provides that "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." Now, so far it appears to me that the language of the statute suggests no difficulty about the surrender of a policy so effected, because it gives the beneficial interest in the policy entirely to the wife. In the case of the policy being effected for the wife's behoof, it is to be a trust for her benefit, for her separate use, which I understand to mean that it becomes beneficially her property, and at her disposal. But then the enactment proceeds further:—"And such policy, immediately on 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." Now, the creation of this trust no doubt is an essential part of the enactment, but the trust is not necessarily to be in the husband. He is selected in the first place as being the most natural trustee for his wife, and failing him his legal representative may be made the trustee; or a trustee may be nominated in the policy itself—that trustee of course would be nominated by the husband who effects the policy; or a trustee may be appointed by a separate writing duly intimated to the insurance office. In short, the personality of the trustee has nothing to do with the purposes of the statute or with the object in view. It is a mere convenient arrangement. Then the clause proceeds further, that this trust is to be a trust as aforesaid, that is to say, for the separate use of the wife, "and shall not otherwise be subject to his (the husband's) 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." Now, that again shows how completely the husband is excluded from all beneficial interest in the policy, and that it is devoted exclusively to the benefit of the wife. But further it is provided that "the receipt of such trustee for the sums secured by the policy, or for the value thereof, in whole or in part, shall be a sufficient and effectual discharge to the assurance office." I shall have a word to say immediately upon the effect of that provision on the question immediately before us, but in the meantime I observe that there is a proviso at the end of this section that if the husband who has effected this policy shall become bankrupt within two years, then it shall be competent to his creditors to claim repayment of the premiums so paid out of the proceeds of the policy. Now, the question comes to be, whether there is anything in this clause to suggest that this policy, unlike any other effected at common law, and not under the provisions of this statute, is incapable of being surrendered? It seems to me, on the contrary, that everything contained in this section points to the opposite conclusion. I do not repeat what I have said already about the interest in the policy belonging exclusively to the wife for her separate use; but it is most important to observe that that provision that the receipt of the trustee for the sums secured by the policy, or for the value thereof, in whole or

in part, shall be a sufficient and effectual discharge to the assurance office, seems to contemplate that some transaction of this kind may take place; and if the trustee, acting within his power and according to his discretion, and with the consent of the party beneficially interested, chooses to grant a receipt to the assurance company for the value of the policy, or for a part of the value of the policy—for the words are expressly "in whole or in part,"—that is a sufficient discharge to the assurance company. Now, discharging a policy on the receipt of part of its value describes pretty accurately I think a surrender. I do not know any other kind of transaction that could answer these expressions. But apart from the very words of the section of the statute, when one comes to consider the thing on principle, it becomes I think abundantly clear. This section is intended to apply to policies effected upon various terms and conditions. This is a policy which is to be created by payment of a single premium, and accordingly a large sum was paid down at the time of receiving the policy from the company. But the more ordinary mode of effecting a policy is for the party effecting it to become bound to pay the premiums annually. Now, suppose that had been the case, the husband was not by this statute under any obligation to continue to pay the annual premiums; still less is the payment of the annual premiums secured in any way for the benefit of the wife. The policy will be good, and will ultimately be available to her if the husband continues to pay the annual premiums, or if the wife can pay them herself, or if somebody else interposes and pays them. But suppose neither of these things to be done, and that the husband either becomes unable from insolvency or unwilling to continue the payment of the annual premiums, what is to be done? The policy we shall suppose has subsisted for a number of years, and a corresponding number of annual premiums has been paid. The policy has therefore acquired a certain value. If the annual premiums do not continue to be paid the policy will lapse, and that value will be lost to the wife. Would it be unlawful in such circumstances to surrender this policy, or rather would it not, on the contrary, be the absolute duty of the husband as the wife's trustee to make a surrender, and not to allow the beneficiary under his trust to lose the value of the policy which she might by a surrender obtain? I can conceive only one answer to that question. It would certainly be the husband's duty, if he did not choose to continue, or was unable to continue, the payment of the annual premiums, to make the most of the policy for the benefit of his wife by surrendering it. Now, it does not appear to me that the circumstance of the premiums being all paid up in one single payment at the time of taking out the policy can make any difference, because even in that case circumstances may occur which would render it absolutely necessary for the interest of the wife that the policy should be surrendered. Supposing that the husband becomes bankrupt, and this policy, which, of course, even if it has lasted only for a few years, represents a much greater value than any policy with annual premiums could represent until it became a very old policy —suppose that the husband becomes bankrupt, and that there are no other means left for the support of the wife and family, are they to starve while they have this available fund which can be made real by a surrender of the policy? The husband may become not only bankrupt but incapacitated from doing anything for his family at all; he may become a lunatic; and is the wife not to be able to surrender the policy, or to go through the form of appointing a new trustee in place of the husband, and getting that new trustee to surrender it? I can hardly conceive that the statute should have intended any such thing, for that would be a most inexpedient and unjust result. And therefore in every way one can look at the thing, it seems to me that so far from this statute precluding the husband and wife from concurring in surrendering a policy of this description, not only the words of the statute but the principle upon which it seems to be founded are all in favour of answering the question which has been put to us, to the effect that this is a policy which may be surrendered, and in the circumstances of the case has been validly surrendered.

Lord Mure—I am of the same opinion. In all ordinary policies effected with this office surrender values are admittedly allowed. This is distinctly stated on the second page of the case; and the question is, whether policies effected (as the one in question was) under the powers given in the statute founded upon were intended to be excluded from that privilege? For the reasons which your Lordship has now given, I am of opinion that they are not, and I so entirely concur in the views expressed by your Lordship that I have really very little to add. It appears to me upon the construction of the second section of the statute, on which the question turns, that while it is distinctly framed upon the principle of mentioning the things that the holders of the policy are not to be entitled to do, there is no mention of or prohibition against surrender. There is a trust created, and if nothing more had been said the question would have had to be tried with a view to the common law rules about trusts being so created for the benefit of the wife and children. In the present case we have nothing to do with children. There is no family. The question arises only as to the wife. Now, the statute says, "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;" and there it stops. Now, if the Legislature had intended that the surrender value should be prohibited to be taken in all cases, there ought to have been a provision inserted in the clause after the word "insolvency." But in the clause which prohibits other things, such as the revocation of a policy on the ground of donation, or its being reducible on the ground of insolvency, there is nothing said to prohibit the surrender value being taken, and I am of opinion that we cannot extend that clause of the statute to the extent of saying that the surrender value cannot be allowed in such a case as this. The clause that immediately follows about the receipt of the trustee for the value of the policy in whole or in part can only have been inserted,

I think, with reference to the surrender value. Therefore I think we may gather from the words of the statute that it was intended that the surrender should be allowed, and there being no prohibition of that in the list of things prohibited, I think the statute does not enact what is contended for by the second party here.

Lord Shand—I am of the same opinion, and I concur in the observations which your Lordships have made. The statute authorises a husband to effect a policy with an insurance company for the benefit of his wife, and the obvious purpose of the enactments contained in the statute is, in the first place, where such a policy has been entered into, to protect the wife against the husband's own act, and in the next place, to protect her against any proceedings which might be taken by his creditors. The statute expressly declares that the policy once effected shall vest in the husband and his representatives—assuming it not to be taken in the name of other trustees—in trust, and that the trust shall be for the benefit of the wife for her separate use. It further goes on to provide that the policy shall not 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. It appears to me to be the result of these provisions that the policy once effected creates an immediate interest in the wife, held for her behoof by her husband as trustee; and secondly, that that interest is an indefeasible interest. In the ordinary case a policy is kept up by payments over a series of years. The husband effects such a policy, and either because he has not the means to go on paying the premiums or because he desires to cease paying any further premiums, he may stop making further payments. In such a case, unless the surrender value of the policy can be obtained, under the rules of many insurance companies, the money already paid would be lost. That certainly is a thing to be avoided, and I think the statute in effect enables parties to avoid it. The policy being about to lapse is yet of considerable value in respect of its surrender value, and in a case like this, where the whole premium has been paid at once, the surrender value is so much the greater. It appears to me that as that value is held for the separate benefit of the wife by a trustee for the wife, she is entitled to make it available as a right vested in her. In this case it so happens that the husband and wife—the trustee and the beneficiary—concur in saying that they desire to have this surrender value paid. I can see no answer to that claim under the statute. I think the expression which your Lordship referred to in the second clause, that the receipt of the trustee for the sums secured by the policy, or for the value thereof, in whole or in part, shall be a sufficient and effectual discharge to the insurance company, shows that the Legislature contemplated that payments of this kind might be made. I take the case as it is presented—as one in which the husband and wife concur in offering a discharge. But I am bound to say I should go further so far as I am concerned, and say that even if the wife had not been a concurring party here I do not see any danger that insurance companies could possibly incur with a clause which declares with reference to the trustee, whether he be the husband or anyone else, that the receipt of such trustee for the sums secured by the policy, or for the value thereof, in whole or in part, shall be a sufficient and effectual discharge to the insurance office. If an insurance company had notice of any proposed breach of the trust, of course it would be their duty to refrain from making payment, but in the absence of any such intimation, for my part I do not see any reason to doubt that the insurance company would be perfectly safe to pay to the trustee who gives a receipt, even supposing that the beneficiary was no party to the arrangement.

Lord Adam—This policy has been effected with reference to the second clause of the statute, and that clause declares that the policy of insurance and all benefit thereof shall be deemed to be a trust for the benefit of the wife. Now, that seems to me to indicate very clearly that the policy of insurance itself and the whole proceeds are held entirely for the beneficial interest of the wife. Now, that being so, I have seen no reason to think that she may not deal with the property—for it is a piece of property—in which she has the sole beneficial interest in any way that she may think proper. What they may do with the proceeds after they get them—whether it may be necessary to apply them for their immediate use I do not know, or whether the trustee may re-invest it for her benefit I do not know, for these questions are not here. But I see no reason why she should be disabled from dealing with this policy of insurance which the Act says is to be held entirely for her beneficial use, or words to that effect. I see no reason why she may not deal with it by surrender if she chooses. But I agree that in so far as it is necessary to answer the present question the words of the Act would perfectly secure the insurance company, for it says that the receipt of the trustee for the sums secured by the policy, or for the value thereof, in whole or in part, shall be a sufficient and effectual discharge to the insurance office. Now, what is it that is proposed to be given but a receipt by the trustee for the value of the policy. That is the thing to be given, and that is precisely what the Act says shall be deemed an effectual discharge to the insurance company. In my opinion that clause seems to have been introduced for the very purpose of protecting the insurance company in such a case as this. I am therefore of opinion that the first question should be answered in the affirmative, and the second in the negative.

The Court found and declared that the second parties were bound to accept a surrender of the policy of assurance by the first parties, and that the policy was not incapable of being surrendered during the joint lives of the parties.

Counsel for the First Parties—Graham Murray—Dundas. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for the Second Parties—D.-F. Mackintosh—Jameson. Agents—John Clerk Brodie & Sons, W.S.