defences and decerns against the defenders conjunctly and severally in terms of the conclusions of the summons: Finds the pursuers entitled to expenses, &c.

"*Opinion.*—. . . . (1) The defenders do not found upon any written evidence of the pursuers' alleged accession to the private trust. Apart from the general averment that the pursuers acceded to the trust, nothing is averred on record except this—that the pursuers were aware of the settlement, and being satisfied with the security which they held did not claim or receive a dividend. These averments appear to me to be insufficient to infer accession by the pursuers—See *Athya*, 18 S.L.R. 287.

"(2) The plea of delegation is rested upon the following facts—[*His Lordship then referred to the disposition and assignation of 11th and 14th September* 1876 *and the pursuers' acknowledgment of intimation of 15th September* 1876]. So far there was nothing to infer delegation. The original debtors could not by any such transaction free themselves from liability; and further, by the terms of acknowledgment of notice the pursuers expressly reserved all their rights against the defenders—*University of Glasgow* v. *Yuill's Trustees*, 9 R. 463—[*His Lordship then referred to the provisions of the agreement of 14th December* 1875, *and of the affidavit and claim lodged by the pursuers in Thomas Wingate & Company's sequestration, and proceeded*] — Now, if these provisions, which are here very shortly stated, stood alone, they would go far to establish delegation, but the agreement contains the following clause, which I think makes it sufficiently clear that it was not the intention of the pursuers to substitute the new firm and its partners for the original debtors under the personal bond of 1875—'Second, the said Charles M'Lean, without hurt or prejudice to the foresaid bond for £55,000, but in corroboration thereof, hereby binds himself, and his heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, conjunctly and severally along with the obligants in said bond, to pay to the said Association the said sum due under said bond, at the terms, with interest and penalties, as therein provided.' . . .

"It seems to me that the meaning and effect of the transactions disclosed in these deeds and documents was simply that the pursuers stipulated for and obtained an additional obligant for the sums due under the personal bond of 14th December 1875, and in some respects the case is a stronger one than those referred to in the argument, in which it was held that there was no novation or delegation, viz., *Campbell* v. *Cruickshanks*, 7 D. 548; *Muir* v *Dickson*, 22 D. 1070; *Pollock* v. *Murray*, 22 Macph. 14. . . .

"I think it right to add that I gave the defenders an opportunity of amending their defences by adding any further averments of facts and circumstances inferring their discharge from liability, but as their counsel stated that they were not in a position to add to the averments on record I have disposed of the case as it stands. I do not think that there are any disputed averments relevant to be remitted to probation, and on the admitted facts of the case I think that the defenders have failed to establish that they have been freed from liability under the personal bond.

"The sum sued for is the sum certified by the pursuers' manager as the amount due under the personal bond as at 14th February 1890, and as that certificate is not relevantly impugned by the defenders I have no alternative but to pronounce decree for the sum sued for."

The defenders reclaimed to the First Division, but the Court adhered without pronouncing opinions.

Counsel for the Pursuers and Respondents—D.-F. Balfour, Q.C.—W. C. Smith. Agents—Murray, Beith, & Murray, W.S.

Counsel for the Defenders and Reclaimers—Kennedy. Agent—Alexander Campbell, S.S.C.

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*Thursday, December* 10, 1891.

## OUTER HOUSE.

## STEWART *v.* STEWART.

*Succession — Legacy — Special Legacy — Right in Security.*

*Held, per* Lord Kyllachy, (Ordinary), that the legatee of a specific moveable subject must take it subject to any burden with which it may have been affected by the testator subsequent to the date of the bequest.

The facts of this case appear sufficiently from the opinion of the Lord Ordinary (KYLLACHY). His interlocutor and opinion are as follows—"Finds that the policy was, subsequent to the date of the truster's settlement, assigned by the testator to the Town and County Bank in security of an overdraft due by him to the said bank: Finds in these circumstances that the pursuer is not entitled to the contents of the said policy, except subject to the claims of the bank, and that the defender, as executrix of the deceased, is not bound to free the policy from these claims out of the general estate: Therefore assoilzies the defender from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses, &c.

"*Opinion.*—The pursuer in this case is the mother of the late John Stewart, a farmer in Aberdeenshire, and the defender is the deceased's widow and executrix. By a mutual disposition and settlement, executed by the deceased and his wife some years before his death, he left to his mother, the pursuer, the contents of a certain policy of assurance upon his life. By assignation, dated within a few months of his death, he assigned this policy to his bankers in security of an overdraft, and at the time of his death the sum due to the bank exceeded the value both of the said policy and of another policy to which the bank also held an assignation.

"The pursuer in these circumstances claims that the widow and executrix shall pay the amount of the bank's debt, so as to free the policy and make the same available to the pursuer. The defender, on the other hand, maintains that the legacy was adeemed by the assignation, or otherwise that the policy must be held to have been bequeathed *cum onere*, and so to be ultimately, as well as primarily, liable for the charge upon it.

"Curiously enough, the point of law which is thus raised is one upon which there is no direct authority in the law of Scotland—at least none was cited, and I have found none.

"According to English law a specific legatee is entitled to have his legacy redeemed, at the expense of the testator's general estate, from charges created by the testator; and although the rule as regards bequests of real estate appears to be altered by the Act 17 and 18 Vict. cap. 113, I do not find that there has been any alteration by statute with regard to specific legacies of moveable subjects. As expressed by Lord Thurlow in the case of *Ashburnet*, 2 Brown's Chan. Rep. 113, 'If a testator gives a cup which is in pawn, it is a full gift, and the executor must redeem.'

"The rule seems to be the same in the civil law. At all events it seems to have been so settled by the time of Justinian, when the various forms of bequest (*per vindicationem*, *per damnationem*, *sinendi modo*, *per praeceptionem*) had been abolished

"But it rather appears to me that on this matter the law of Scotland has not followed either the civil law or the English law. It certainly holds—contrary to the English rule—that when a particular landed estate is disponed to a particular deponee, the latter takes it subject to any debts by which it is burdened, or with which it may be burdened by the testator. And while this is not perhaps necessarily conclusive as between a specific legatee in movables, and an executor or residuary legatee, I am not able to see that there is any distinction in principle. In the absence of authority, I think the analogy applicable to burdens on heritable estate must be followed, and therefore I am, on the whole, of opinion that the pursuer's claim must be repelled."

The pursuer reclaimed, but the case was settled before it was called in the Inner House.

Counsel for Pursuer and Reclaimer—Rhind — A. S. D. Thomson. Agent — William Officer, S.S.C.

Counsel for Defender and Respondent—Mackay. Agents—Mackenzie & Kermack, W.S.

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*Tuesday, March 8.*

## SECOND DIVISION.

## DICKIE AND OTHERS (DICKIE'S TRUSTEES) *v.* DICKIE AND ANOTHER.

*Succession—Policy of Assurance—Special Destination.*

A special distination in a policy of assurance will be given effect to in a competition between the trustees named in the policy and the executor-dative of the assured, even although the policy was not intimated to the trustees and the assured died insolvent.

*Assurance — Life Assurance — Husband and Wife—Married Women's Policies of Assurance Act* 1880 (43 *and* 44 *Vict. cap.* 26), *sec.* 2 — *Destination Different from the terms of the Statute.*

The wife of a person who has effected a policy of life assurance will not be deprived of the benefit of the statute because the destination is in favour of "his children, whom failing his widow, whom all failing his own nearest heirs whomsoever," and contains a reserved power to regulate the terms of payment and vesting.

The Rev. Matthew Dickie on 16th December 1887 effected a policy of assurance for £400 on his own life with the Standard Life Assurance Company. The policy was made payable "to the said Rev. Matthew Dickie, Andrew Borland Dickie, and others, and the survivors and acceptors, and survivor and acceptor of them, as trustees and trustee for behoof of the widow of the said Rev. Matthew Dickie in liferent allenarly, and his children, or the survivors of them, whom failing his widow, whom all failing his own nearest heirs whomsoever in fee, subject to such regulations as to the terms of payment and vesting as the said Rev. Matthew Dickie may appoint by any separate writing under his hand." Mr Dickie died on 20th August 1890 intestate and without issue. The proceeds of the policy were claimed (1) by Mr Dickie's executor Andrew Borland Dickie, and (2) by his widow Mrs Mary Stewart Davidson or Dickie. The trustees named in the policy raised a multiplepoinding.

The executor pleaded—"(1) The claimant, as executor of the deceased Rev. Matthew Dickie, is entitled to the whole fund *in medio*, in respect the said policy did not constitute a provision to the widow at common law, nor constitute a trust for her benefit under the Married Women's Policies of Assurance (Scotland) Act 1880. (2) The deceased being insolvent at the date when he effected the insurance, and also at the date of his death, the policy in question is not available to the widow as a postnuptial provision, and it belongs to the claimant *qua* executor for behoof of the whole creditors of the deceased."

The widow pleaded—"(1) In respect that the sum payable under the said policy of