little importance, but it is one thing to set out a purpose and another to express a motive. The indication of a purpose would be—"I leave so much for the moral and religious instruction of the children of the Trades of Perth, and I direct my trustees, with a view to the execution of this purpose, to pay over said sum to the trustees of the school." Of course a general intention may be expressed in a form less definite than this, but I hardly think that the indication of a motive (as here) amounts to a dedication of these particular bonds to education generally in the event of the failure of the scheme prescribed. But what makes the solution of this question to my mind perfectly clear, is that the testator has introduced what I take to be a conditional institution into this charitable provision, because he declares that the sum is to be payable to the trustees of Stewart's Free School only on condition of their retaining the management in their own hands, and in the event of their declining to accept payment on this condition the amount thereof shall fall into and form part of the residue of his estate. Now, I am not prepared to give so wide an extension to the principle of approximation as to say that when a testator has specifically defined the mode in which his charity is to be applied, and has expressly contemplated the failure of that particular mode and has in that event given over the money to another party, the Court is to ignore the condition of the destination and to read the first primary provision as a provision in favour of charity generally. There is no authority that I know of for such a proposition, which I should take to be subversive of the established principles of the administration of wills, that nothing is to be done in violation of the testator's directions unless these be immoral or contrary to public policy. I therefore agree with your Lordship that the Lord Ordinary's interlocutor ought to be affirmed.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer—Rankine—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Counsel for the Defender — Graham Stewart. Agent—D. R. Grubb, Solicitor.

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*Saturday, June* 10.

## SECOND DIVISION.

[Lord Stormonth Darling.

## MADDAFORD *v.* DUNCAN.

*Trust for Creditors—Insurance Policy—Alleged Agreement between Trustee and Bankrupt for Purchase of Part of the Trust-Estate—Relevancy.*

A debtor having granted a trust-deed for creditors, negotiations followed for acquiring, on the debtor's behalf, a policy of assurance on his life, and it was finally arranged that the trustee should, on payment of a certain sum, convey the policy to S, a friend of the debtor, by assignation, qualified by right of redemption in favour of the debtor on repaying the purchase price and certain other sums of money due by him to S.

S withdrew from the transaction on account of difficulties between him and the debtor as to terms. The trustee proposed to expose the policy to public roup. The debtor sought interdict against him on the ground that the trustee had originally agreed to sell the policy to him, and that when the transaction with S broke down this agreement revived.

The Court *held* that this averment was irrelevant, and *refused* the note.

In February 1892 William Maddaford executed a trust-deed for behoof of his creditors in favour of Alexander Duncan, of all his estate and effects which he possessed at the time, and whatever might come to him during the subsistence of the trust. The trustee accepted the trust and took possession of Maddaford's whole estate and effects and proceeded to realise the same. Part of the estate was a policy of assurance dated 7th October 1873, effected on the life of the debtor with the Scottish Provident Institution for the sum of £500.

In November 1892 Maddaford brought a note of suspension and interdict in the Court of Session against Duncan as trustee, and John Stewart, spirit merchant, Edinburgh, and prayed the Court to interdict Duncan from assigning to John Stewart or any person named by him except the complainer, or from selling by public roup or private bargain, the said policy of assurance for £500.

The complainer averred that he "towards the end of May or beginning of June 1892, saw the respondent, when he agreed to sell to the complainer, and the complainer agreed to purchase, the said policy at the price of £50. The respondent, well knowing the complainer's circumstances, and that he was not in possession of ready cash to pay the said price, also agreed to give the complainer time to raise the funds to pay said purchase price."

He also averred, and the trustee admitted, that negotiations were entered into with, and the transaction was to take the form of a sale to Stewart, and that it was proposed that the policy should be conveyed to Stewart by an assignation qualified by a right of redemption in the complainer's favour on his repaying the said £50 and certain other sums of money due to Stewart. The trustee insisted that the assignation by him should be in simple terms without reference to any stipulations between the complainer and Stewart. As the complainer however failed to come to terms with Stewart, he resolved to dispense with his assistance, and made other arrangements for paying the purchase price of the policy, and on 22nd October 1892 he caused intimation to be made to Messrs Wishart & Mac-

naughton (the trustee's agents) to that effect, by a letter in the following terms from his own agent:—"22*nd October* 1892.—I have now seen Mr Maddaford, and he instructs me to say that in consequence of the position taken up by your client Mr Stewart he has decided to accept the intimation made in your letter of 5th inst., that the transaction as far as Mr Stewart is concerned cannot proceed. I therefore return the draft assignation in his favour, which will not now be required. I have also to say that Mr Maddaford is prepared to pay the purchase price to the trustee, and any advances he may have made in the way of premium and interest to the Scottish Provident, and to take over the policy. I understand the trust-deed did not contain a special assignation of the policy, and that Mr Duncan has merely intimated by letter to the Institution that he claims the policy. If that be so, I think that the purchase may be effected by a receipt for the price, and a letter addressed by the trustee withdrawing his intimation of claim to the Institution." Messrs Wishart & Macnaughton, in letters dated 25th and 26th October, intimated to the complainer's agent that the trustee disputed the sale of the policy to the complainer, and had instructed them to advertise and expose the policy to public sale.

The complainer pleaded—"(1) The respondent Mr Duncan having, as trustee foresaid, agreed to sell to the complainer at the price of £50 the life policy mentioned as condescended on, and the complainer being willing to pay said purchase price and accept an assignation free of all conditions, the respondent is not entitled to advertise and expose for sale, or to sell of new, the said policy by public roup or private bargain to any other person, and interdict should be granted as prayed for. (2) The said John Stewart not having been a party to the purchase of said policy, except as a lender to the complainer of the purchase price, and his assistance in that respect having been dispensed with by the complainer, has no right or title to receive or demand an assignation of the said policy, and interdict against his doing so ought to be granted as craved."

The respondent pleaded—"(2) No relevant case. (5) There having heen no agreement to sell the said policy to the complainer, suspension and interdict ought to be refused."

Upon 3rd February 1893 the Lord Ordinary (STORMONTH DARLING) pronounced this judgment—"Sustains the second plea-in-law for the respondent Alexander Duncan: Recals the interim interdict: Refuses the note of suspension and interdict, and decerns, &c.

"*Opinion.*—The complainer in February 1892 granted a trust-deed for behoof of his creditors in favour of the respondent, and negotiations followed for the purchase by the complainer, or on his behalf, of a policy of assurance on his life, which otherwise it would have been the duty of the respondent to make the most of for behoof of his creditors. It is said by the complainer that towards the end of May or beginning of June 1892, the respondent agreed to sell the policy to him, and he agreed to purchase it at the price of £50. He then goes on in statement 6 to aver that, he not having the necessary funds himself to pay the price, it was arranged that the transaction—that is, the transaction to which I have referred—should take the form of a sale to a certain Mr Stewart, and be conveyed to him by an assignation qualified by a right of redemption in favour of the complainer on his repaying the said £50, and certain other sums of money which seem to have been due by him to Mr Stewart. Now, it would plainly have been improper that any private arrangement between him and Mr Stewart should be embodied in a deed to be granted by the respondent, and accordingly the respondent took up, it seems to me, the perfectly reasonable position that the assignation to be granted by him should be in simple terms, without reference to any stipulations between the complainer and Mr Stewart. For reasons which do not appear on record, and with which I am not concerned, the complainer and Mr Stewart were unable to agree as to these stipulations, and accordingly the complainer's agent, on 22nd October 1892, wrote a letter to the respondent's agents, saying that he agreed that the transaction, so far as Mr Stewart was concerned, could not proceed. Well, the effect of that was that the transaction arranged in the summer of 1892, which, according to the complainer's own statement, was to take the form of a sale to Mr Stewart, entirely broke down; but he now brings this note of suspension and interdict to prevent the respondent from assigning or transferring the policy of insurance to Mr Stewart, or any person to be named by him other than the complainer, and further, or otherwise, from advertising the said policy or exposing it for sale, either by public roup or by private bargain. He attempts in argument to support that prayer by alleging that, although the transaction with Mr Stewart admittedly broke down, the effect was to revive the original agreement with himself, and accordingly that the respondent is now under legal obligation to convey the policy directly to him. I do not think that there is any relevant averment to that effect on this record. The only averment, as I read it, is that the respondent agreed to convey the policy for behoof of the complainer, but that the transaction was to take the form of an assignation to Mr Stewart, and no other form. Once, therefore, that particular transaction fell through there was an end of the matter, and accordingly the respondent was not only free, but it was his duty, as a trustee for creditors, to sell the policy for what it would fetch.

"I do not understand from the statements of the respondent that he intends still to carry into effect the arrangement with Mr Stewart. That, I think, would be contrary to his own averments in answer 9, and would be improper in face of the admitted fact that Mr Stewart was only to be

a trustee for the complainer, and that the complainer now does not desire that any assignation to Mr Stewart should be granted. The position which, as I understand, the respondent does take up is that it is his duty and intention to expose the policy to public roup, and although that may be unfortunate for the complainer and his family, I am afraid it is entirely within the respondent's rights, and certainly there is nothing in this record which would justify me in interdicting him from doing so. In these circumstances I see nothing for it but to refuse the note."

The complainer reclaimed, and argued—The Lord Ordinary should have allowed proof of the alleged bargain for the sale of the policy. A truster and trustee might bargain as to the sale of the trust property; if a fair price was paid for it, the creditors had no concern with the purchaser. When the policy had been handed to the debtor, the trustee would not be bound again to sell it for the benefit of the creditors, as he would be barred from again selling that which he had sold for a price. The same argument had been urged unsuccessfully in regard to the *jus mariti*—Stair, i. 4, 9; Robson's Bankruptcy Law (6th ed.) 619, note K; *Kitson* v. *Hardwick*, May 30, 1872, L.R., 7 C.P. 473; *ex parte Tinker*, July 24, 1874, L.R., 9 Ch. App. 716; *ex parte Caughey, re Caughey*, January 15, 1877, L.R., 4 Ch. Div. 533.

The respondent argued—The complainer had not relevantly averred any agreement. It was possible for a debtor who had granted a trust-deed to arrange with his friends that they should purchase part of his estate, and hold it for him in such a way that he might ultimately get the benefit of it, but that was not what the complainer averred. If he had really made a bargain with the trustee to have the policy assigned to himself, that could avail him nothing, because the trustee would be bound to recover it from the debtor, and sell it for the benefit of the trust-estate—Bell's Comm. 126.

At advising—

LORD TRAYNER—I agree with the Lord Ordinary, and think his judgment ought to be affirmed.

It is quite plain that the complainer cannot insist on a sale or conveyance of the policy in question to his friend Mr Stewart, who, it appears, had at one time intervened in the interest of the complainer, and entered into negotiations with the respondent in reference to the purchase of the policy. Mr Stewart has withdrawn, and declines to proceed with the transaction on account of differences between him and the complainer as to the terms in which the conveyance or assignation in Mr Stewart's favour shall be expressed. There is therefore no longer any question as to Mr Stewart's right to the policy, or the complainers' right through Mr Stewart. It is averred, however, by the pursuer that the defender agreed to sell to the complainer himself the policy in question at an agreed-on price, and the complainer asks that the respondent should be interdicted from dealing with the policy in any other way than by assigning it to him in terms of that agreement. Although the complainer avers the agreement between him and the respondent in the way in which I have just stated it, it is very evident from the context of that averment that any negotiations between the complainer and respondent as to the sale or purchase of the policy were had upon the footing that some friend would intervene on behalf of the complainer, pay the purchase price, and take an assignation in his own favour, although it might really be in trust for the complainer or his family. Apart from such intervention, it does not appear to me that the parties could lawfully or effectually enter into the agreement here alleged. The policy in question being part of the assets of the complainer, had to be realised by the respondent for behoof of the complainer's creditors. How could the complainer purchase the policy or any part of his assets from his trustee? If he had no money, he could not pay the contract price—that is, he could not purchase; if he had money, it belonged to the respondent as trustee, assigned to him by the trust-deed granted by the complainer in his favour, and was improperly withheld from him. I never heard of a bankrupt or insolvent under trust purchasing part of his assets. He may purchase back his whole estate on payment of a composition if his creditors and he can agree upon it. But I know of no other way in which a bankrupt can be re-invested in his estate or any part of it.

I think the respondent in offering the policy for sale is only fulfilling his duty to the creditors, with whose interests he is charged, and that no cause has been shown for interdicting him as craved.

The LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court adhered.

Counsel for the Reclaimer—Jameson—F. C. Cooper. Agent—R. Ainslie Brown, S.S.C.

Counsel for the Respondent—Ure—Guy. Agents—Wishart & Macnaughton, W.S.

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*Saturday, June* 10.

## FIRST DIVISION.

## LEIGH-BENNETT, PETITIONER.

*Public Record—Foreign—Authority to Exhibit Deed Recorded in Books of Council and Session in English Court*—31 *and* 32 *Vict. cap.* 34, *section* 1.

A domiciled Englishman died abroad leaving a will whereby he bequeathed his whole estate, subject to certain small legacies, to B, who was also a domiciled Englishman. The will made no reference to Scots estate, but having been transmitted after the testator's