

and, second, that they contain a sufficient averment of malice to entitle him, if a case of privilege is made out at the trial, to meet that by proving malice. The former question is that which alone arises at this stage for immediate decision.

LORD ADAM concurred.

LORD M'LAREN—The first question of course is, whether on the pursuer's statements a case of privilege is disclosed, because if the action as laid discloses no case of privilege, we must grant an issue in the ordinary form. The defender will suffer no prejudice or injury in consequence of the case being sent to a jury in such a form, because at the trial if facts are established which bring the case within the region of privilege, the presiding Judge will direct the jury that they are not entitled to find for the pursuer unless malice is proved. Now, looking to the averments of the pursuer only, I fail to see that a case of privilege coming within any of the known categories is here raised. Everyone will admit that in carrying on the business of banking, confidential inquiries are necessary, especially with regard to the character and credit of customers applying for advances of money; in general, the answers to such inquiries will be privileged. But then the junior clerks of the banking establishment are not the persons who would naturally be consulted in connection with those delicate questions. It might be that there was a special reason for consulting a junior clerk, *e.g.*, that he personally knew the man whose credit was in question, or that he was acquainted with the signature of a party the authenticity of whose subscription was doubted, but no such special reasons are here disclosed, and the issue raised by the pursuer is the ordinary issue of defamation.

Then supposing that a case of privilege should arise at the trial—that is, if the facts be of the character averred by the defender, it is my opinion that the anticipatory averments made by the pursuer are sufficient to raise the counter case of malice. I am inclined to think that there is not really so much difference between the views expressed by Lord Rutherford Clark in the case of *M'Murphy*, and the opinion of the late Lord President in the case of *Ivory* as has been supposed. I do not understand the Lord President to say that even in a case of judicial slander it is necessary to aver antecedent facts from which the inference of a malicious motive may be drawn. I may say that it has always been a fixed idea in my mind that it is not enough to use the word "malice" or "maliciously" to make a relevant case of malicious slander, but that a circumstantial case of some kind must be set forth. But what would amount to a relevant averment in the present case is very different from what would be required in a case, say, of judicial slander. The kind of facts would vary with the circumstances of each case, the question being one of degree rather than one of a distinct and separate

principle or criterion of relevancy. The circumstances here detailed, and especially the absence of all precautions with a view to secrecy, the repetition of the offensive statements after an inquiry which might have tended to allay suspicion or at least to induce caution, and the broad and unqualified language in which these statements are said to have been expressed; these elements are in my opinion sufficient to satisfy the first part of the rule that in cases of privilege malice must be averred and proved.

LORD KINNEAR—I am of the same opinion.

The Court sustained the reclaiming-note, approved the four issues proposed by the pursuer, and remitted the case to the Lord Ordinary.

Counsel for Pursuer and Reclaimer—Strachan—M'Lennan. Agents Miller & Murray, S.S.C.

Counsel for Defender and Respondent—Comrie Thomson—A. S. D. Thomson. Agent—F. J. Martin, W.S.

Friday, June 9.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

RITCHIE (YOUNG'S TRUSTEE) v. THE DEACONS OF THE EIGHT INCORPORATED TRADES OF PERTH.

Trust—Charitable Purpose—Cy près—Destination-over.

A testator directed his trustees to transfer certain annuity bonds to the trustees of a particular school, who were to apply the proceeds in supplementing the salary of the teacher in said school, declaring that the said provision should be paid to and accepted by these trustees "only on condition of their undertaking to retain the management of said school in their own hands, and that in the event of their declining to accept payment of said provision on this condition the amount thereof shall fall into . . . the residue of my estate, it being my desire that the said provision shall be applied in providing moral and religious instruction for as many boys or girls" of a certain class "as the fund will admit." After the testator's death the bequest was paid over, and for fourteen years the proceeds were applied by the trustees of the school in the manner prescribed by the testator. At the end of that period, owing to the passing of the Free Education Act, the school became useless and was closed.

Held that the bequest was subject to the condition that the trustees should continue to carry on and manage the school, that as that condition

could no longer be fulfilled, the destination-over took effect, and the amount of the bequest fell into the residue of the testator's estate.

Alexander Young died on 21st October 1875 leaving a trust-disposition and settlement by which he conveyed his whole estate to trustees. The deed contained, *inter alia*, the following provisions:—"In the eighth place—I direct and appoint my trustees, at the first term of Whitsunday or Martinmas that shall happen six months after my death, to assign, transfer, and make over twenty-one City of Perth Annuity Bonds belonging to me . . . to and in favour of the Deacons of the Eight Incorporated Trades of Perth, as trustees of Stewart's Free School, to be held by them or the proceeds thereof in trust in all time coming for the purpose and under the obligation after mentioned, viz., that they shall apply the yearly interest or produce thereof in supplementing the salary of the teacher for the time being of said Stewart's Free School, declaring that the foresaid provision shall be paid to and accepted by the said trustees of Stewart's Free School only on condition of their undertaking to retain the management of said school in their own hands, and that in the event of their declining to accept payment of said provision on this condition, the amount thereof shall fall into and form part of the residue of my estate, it being my desire that the said provision shall be applied in providing moral and religious instruction for as many boys or girls, the children of members of the Eight Incorporated Trades of Perth, as the fund will admit; and I direct that before handing over said bequest my trustees will make such arrangements with the trustees of said Free School as may be necessary for giving effect to my intentions: In the ninth place—I appoint my trustees, at the first term of Whitsunday or Martinmas that shall happen six months after my death, to assign, transfer, and make over thirty City of Perth Annuity Bonds belonging to me . . . to and in favour of the School Board of the burgh of Perth, constituted under the 'Education (Scotland) Act 1872,' to be held by them or the proceeds thereof in trust in all time coming for the purpose and with and under the obligation after mentioned, viz., that they shall apply the yearly interest or produce thereof in supplementing the salaries or annual income of the teachers in the Perth Academy to whatever extent and in such proportions as the said School Board may think advisable, or apply the said yearly produce in whatever other way or manner may be thought most advisable for promoting the moral, religious, and intellectual training and upbringing of the young. . . . In the twelfth and last place, after all the foregoing purposes are satisfied and fulfilled or duly provided for, I appoint my trustees to assign, dispose, refer, and convey or pay and deliver the free residue and remainder of my said means, estate, and effects, heritable and moveable, real and personal, before conveyed, or the prices or

produce thereof as that shall be fixed by my trustees themselves on a final winding-up of the trust, to and in favour of the said David Playfair, Patrick Playfair, and Margaret Playfair, and survivors and survivor of them, and the respective heirs, executors, and representatives whomsoever of such survivors, whom I hereby constitute my residuary legatees."

After Alexander Young's death his testamentary trustees, in terms of the 8th purpose of the settlement, transferred the 21 City of Perth Annuity Bonds to the Deacons of the Incorporated Trades of Perth, who granted a discharge in which the conditions of the trust were expressed. Thereafter down to August 1891 the Deacons of the Incorporated Trades applied the interest as provided by the testator. By that time, however, owing to the passing of the Free Education Act, the attendance at Stewart's Free School had greatly diminished, and the school had been rendered practically useless for the objects for which it was carried on. In August 1891, accordingly, the school was closed in conformity with a resolution of the trustees. The school had originated in a charitable bequest made in 1810.

In May 1891 the present action was raised by James Ritchie, the sole surviving trustee under Alexander Young's settlement, with the concurrence of David Playfair, Patrick Playfair, and Margaret Playfair, the residuary legatees, against the Deacons of the Eight Incorporated Trades of Perth, for declarator that the legacy of twenty-one City of Perth Annuity Bonds, bequeathed by Alexander Young under the 8th purpose of his settlement, had lapsed, and now formed part of the residue of his estate, and that the defenders were bound to reconvey the said bonds or repay the amount of said legacy to the pursuer, together with the interest thereof, so far as not applied in terms of the trust, and for decree ordaining them to do so.

The defenders pleaded (1) that the bequest in their favour had not failed.

On 26th November 1892 the Lord Ordinary (KINCAIRNEY) pronounced this interlocutor:—"Finds (1) that the deceased Alexander Young directed his trustees to transfer certain City of Perth Annuity Bonds to the defenders as trustees for Stewart's Free School, Perth, to be used by them for the purpose of supplementing the salary of the schoolmaster of said school; (2) that he declared that the said provision should be paid to them only on condition of their undertaking to retain the management of the said school in their own hands, and that in the event of their declining to accept payment of the provision on that condition, the amount of it should form part of the residue of his estate; (3) that he directed that the residue of his estate should be paid to David Playfair, Patrick Playfair, and Margaret Playfair, and the survivor of them, and the respective heirs, executors, and representatives of such survivor; (4) that the defenders accepted said provision under said condition,

and that the fund bequeathed was transferred to them, and has been administered by them since the death of the truster in 1875; (5) that the said school has been discontinued by the defenders, and closed; and (6) that as the defenders have ceased to fulfil the condition of the said bequest, they have ceased to become entitled thereto, and that the right thereto has devolved on the pursuer, Mr Young's trustee, for behoof of his residuary legatees."

"*Opinion.*— . . . It is maintained, on the one hand, that the bequest is for the general object of promoting the education of the children of the members of the incorporated trades, and that as the mode of doing so selected by the truster has become impracticable, it belongs to the Court to adjust some other scheme by which that object can be effected. It is maintained, on the other hand, that the bequest has been given for a special purpose, to be administered in a particular way, and that if that cannot be done the gift fails; or rather they maintain that the circumstances have happened in which, according to the directions of the truster, the gift over to the residuary legatees is to take effect. The pursuers seem entitled to a judgment on that question without waiting for any application to the Court by the defenders.

"The bequest when scrutinised and analysed, presents somewhat remarkable features. It consists of several distinct parts which are not expressed in their most natural sequence. It mentions the motive which led the truster to make the bequest, viz., his desire to provide instruction for children of members of the incorporated trades. It confers the gift to the defenders. It states the primary object of the gift, viz., the increase of the salary of the teacher of Stewart's Free School. It annexes a condition to the gift, viz., that the defenders shall undertake to continue the management of the school, and foresees and provides for the event of the defenders declining to accede to the condition attached to the gift by providing that in that case the fund shall form part of the residue, which is, in my opinion, the same thing as a destination in favour of Patrick, David, and Margaret Playfair *nominatim*, who are the residuary legatees.

"Now, there are one or two points about this bequest which deserve special notice. In the first place, the ordinary rule applicable to charitable bequests that a sum once devoted to charity is so devoted in all events and can never be withdrawn or withheld from charity cannot apply to it, because the truster has expressly said that in certain events it should be withheld. In the second place, it cannot be affirmed that the truster has preferred charity to his residuary legatees, and he has preferred those residuary legatees to every other charity, and even, as I think, to the particular charitable object mentioned unless it is carried out in the manner which he has selected. In the third place, he has most distinctly put it in the power of the trustees to whom the gift is made to defeat the

trust, a somewhat remarkable peculiarity, because it seems to infringe on what is one of the most general rules applicable to charitable bequests, viz., that no such bequest shall fail for want of trustees. What appears to me to be the speciality of greatest consequence, however, is that the truster has conferred a positive right, exigible in certain circumstances, on his residuary legatees Patrick, David, and Margaret Playfair, so that in fact the bequest cannot lapse unless the residuary legatees shall fail. It is not a bequest to the defenders only—there is a destination-over. It is a bequest to them, whom failing to Patrick, David, and Margaret Playfair, and I think the effect would have been the same had the destination-over been in favour of someone who was not residuary legatee, or of some other charity. This is a very important speciality, and seems to interpose a great difficulty in the way of applying what is called the doctrine of *cy pres*. For plainly it cannot be applied if the application of it would defeat a right expressly given to another.

"In this connection it seems legitimate to remark that when the truster wished to confer a wide discretion on his trust legatees, and to secure that his charitable intention should not be defeated by the failure of his method of effecting it, he did so by express provision in the bequest to the school board.

"Suppose that the present state of matters had existed at the truster's death, or before the funds had been transferred, and that the defenders had then said we cannot continue the management of the school, nor apply the fund to supplement the schoolmaster's salary, for there is now no school or schoolmaster, but we are willing to apply the funds in purchasing bursaries for the benefit of the class of children whom the truster designed to favour, it seems to me that it would be impossible to deny that the very case had occurred in which the truster had called the residuary legatees. But for that provision there might, I think, have been room for the contention that the object of the bequest had not failed, but only the mode, but it appears to me that this express direction for disposal of the fund otherwise than in charity, in the events specified, makes all the difference. Suppose the fund had been destined to some other charity in the event of the defenders refusing to comply with the express conditions of the gift, there would have been no room for an application of the fund *cy pres*, it would go to the substituted charity however dissimilar to that first favoured. But I cannot see that such a case would be materially different from the present.

"In this case, however, there was at first no difficulty. The fund was handed over and duly administered, and the impossibility of exact compliance with the conditions of the trust has newly emerged. But I think it settled that that makes no difference, and that the right of the representatives of the truster will arise equally,

whether the object of the bequest fails before or after the death of the truster if the bequest be special and not a general bequest for charitable purposes—*Clark v. Taylor*, July 7, 1853, 1 Drewry, 642; *Walsh v. Secretary of State for India* (Clive's Trust), 10 H.L., 367; *Randall v. Dixon*, February 9, 1888, 38 Ch. Div. 213; Jarmyn on Wills, vol. i. p. 247.

"I think that none of the English decisions which were quoted support the claim of the defenders. The purport of the decisions appears to be that there is no room for application of a charitable bequest *cy près* unless there be an absolute dedication of the fund to the purposes of charity generally, express or implied, or unless it can be affirmed that the truster has preferred the general object of charity to his residuary legatees—*Fish v. Attorney-General*, July 1, 1867, L.R., 4 Eq. 521-8; *in re Ovey*, April 17, 1885, 29 Ch. Div. 560; *Whyte's Trust*, July 17, 1886, 33 Ch. Div. 449; *Mayor of Lyons v. Advocate-General of Bengal*, 1876, 1 App. Cases 91; *M'Laren on Wills*, 431; *Boyle on Charities*, 147.

"Neither of these characteristics of a proper charitable bequest appear in this case. The specialty of a destination-over on failure of the primary bequest, which appears to me to present so strong an obstacle to any proposal to an application of this fund *cy près*, did not occur in any of the cases.

"The defenders founded strongly on the case of *Grant v. Macqueen* May 23, 1877, 4 R. 734, and the sequel to it, reported under the name of *M'Dougal*, June 29, 1878, 5 R. 1014. That case certainly bears a considerable resemblance to the present; but there was not the specialty in it that the truster contemplated and provided for the failure of his bequest by making a destination-over. There the testator directed that the interest of a certain sum should be paid to the person officiating at the time as schoolmaster in connection with the Established Church in a particular parish. Some years after the truster's death there ceased to be such a schoolmaster. It was held in the circumstances that the bequest had not failed, and on an application being afterwards made to the Court a scheme was adjusted for employing the fund in the purchase of bursaries. I have a good deal of difficulty in understanding that case. The Lord President expressed the opinion that the question was whether the object of the charity had permanently failed, and he held that it had not, because there might in some future time come to be a schoolmaster who might answer the description in the trust-deed, the inference being, I think, that the trustees were bound to hold the fund in order to meet that contingency. But apparently that view was somewhat lost sight of when the case came before the Court again, when a scheme for the payment of bursaries was approved of.

"It is not suggested in this case that the fund is to be retained indefinitely on the chance that on some future occasion Stewart's Free School might be reopened,

and no offer has been made to resume the management of the school. I have dealt with the case on the footing that the school has been finally abandoned, and that the defenders are now in the position of declining or of being unable to undertake its management—that is to say, are declining to fulfil the condition on which, in my view, the bequest to them was bestowed.

"I should have had some difficulty in distinguishing this case from *Grant v. Macqueen* but for the fact that the truster foresaw and provided for the failure of his scheme. That is the important specialty which distinguishes this case from *Grant v. Macqueen*. Another specialty is to be found in the contrast between the bequest under consideration and that to the school board. On the whole I construe this bequest as expressing the truster's desire that his money should be spent in providing instruction for the class of children which he favoured, but not in every event or any way, but only in the particular way and manner which he pointed out, and his desire that if that could not be done his favoured legatees should take the fund."

The defenders reclaimed, and argued—The key to the intention of the testator in the 8th purpose of the settlement was to be found towards the end of the purpose, where he declared that his desire was to provide moral and religious instruction for the children of members of the incorporated trades. No doubt a particular mode was pointed out in which the bequest was to be applied to secure that end, but the failure of that mode did not void the bequest. Another mode would be found for giving effect to the testator's intention. The testator never intended to make the bequest conditional on the continuance of Stewart's Free School, but only to provide that so long as it existed that school must be kept by the trustees under their own management. Further, if the bequest was made subject to the condition that Stewart's Free School should be carried on by the trustees, that condition applied only to the time of acceptance, and had been fulfilled, for the bequest had for 20 years been applied in the prescribed way. The bequest therefore had not lapsed—*Walsh v. Secretary of State for India*, L.R., 10 H. of L. Cas. 367; *Grant v. Macqueen*, May 23, 1877, 4 R. 734.

Argued for the pursuer—The bequest was made subject to the resolute condition that the trustees should continue to carry on and manage Stewart's Free School. This condition had not been fulfilled, and accordingly the bequest fell into residue as the testator had directed. The clause relied on by the defenders towards the end of the purpose was merely introduced *narrative*, and could not be held to control and override the express condition on which the bequest was made. The doctrine of *cy près* was founded on the desire to carry out the testator's intentions—*M'Laren on Wills*, i. 431. Clearly, therefore, it did not apply where a bequest was

granted subject to a certain condition, and provision was made by the testator by a destination-over for the event of the condition not being complied with. The cases cited by the defenders had no application, as in neither of them was there any destination-over.

At advising—

LORD PRESIDENT—I think the Lord Ordinary has come to a right conclusion, and his note seems to me well reasoned. It is a point to be observed that the gift to the deacons of the incorporated trades, is to them as trustees of Stewart's Free School, and the gift is expressly conditioned—the words are very distinct—"the foresaid provision shall be paid to and accepted by the said trustees of Stewart's Free School only on condition of their undertaking to retain the management of said school in their own hands." This seems to me to be the first, and a very cogent consideration, in support of the Lord Ordinary's view. But in the second place there is here a gift over, the truster providing that "in the event of their (the trustees) declining to accept payment of said provision on this condition, the amount thereof shall fall into and form part of the residue of my estate." Now, this gentleman evidently had clear and very definite ideas, not merely as to his wishes, but as to the mode of effectuating them, and he pointedly says to his testamentary trustees, "This money is not to leave the residue of my estate except on the condition of those trustees undertaking to retain the management of the school in their own hands, but, what is more, if that cannot be done, then I prefer my residuary legatees. So standing the matter, it would be extremely clear that the pursuers must prevail; but it is said that the words following those I last quoted—"It being my desire that the said provision shall be applied in providing moral and religious instruction for as many boys and girls, the children of the Eight Incorporated Trades of Perth, as the fund will admit"—import a latitude into the bequest, entitling the defenders to maintain that these general words, expressive of wish, shall now be given effect to in a different mode from that pointed out by the testator. I cannot but hold that too much importance is now attached to the position which these words occupy in the sequence of the clause. Suppose that they came at the beginning of the clause, and the testator had said—"It being my desire that this provision shall be applied in providing moral and religious instruction," and so on, "I hereby direct that this shall be paid, but only on condition," just as it is in the deed, I should have thought that the narrative did not at all amplify the powers of the deed so as to entitle the persons to whom the money is bequeathed for definite purposes to take it and keep it after the definite purposes had, on their own showing, become impossible of fulfilment. Then the conclusion I arrive at seems to derive support from the contrast pointed out by the Lord Ordinary between this

clause, so precise and peremptory, and the purpose so well fenced, on the one hand, and the ninth clause, where after he has given a separate bequest to the School Board and appointed a definite purpose—supplementing the salaries—the testator attaches no conditions such as there are in the clause before, but goes on to say, "or apply the said yearly produce in whatever other way or manner may be thought most advisable for promoting the moral, religious, and intellectual training and upbringing of the young." That seems to show quite plainly that when the testator wanted to entrust a discretion to the objects of his munificence he expressed himself to that effect, and that derives greater significance when we find that here again the testator is actuated by the same consideration and wish for the moral and religious education of the young people whose future he was attending to.

I am satisfied therefore of the soundness of the Lord Ordinary's decision.

LORD ADAM concurred.

LORD M'LAREN—We have here a very instructive statement by the Lord Ordinary on the law and principles of construction which are applicable to charitable trusts, and in this particular decision I feel sure that we are in no way restricting the application of what has been described as the principle of benignant construction of charitable bequests. But it is necessary to take care, when we are disposed to be indulgent in favour of a charity, that we do not contravene the declared intentions of the testator. I would adopt the language of the Lord Ordinary in the paragraph where he describes the purport of the decisions as being, that unless there be an absolute dedication of the fund to the purposes of charity generally, or unless it can be affirmed that the truster has preferred the general object of charity to his residuary legatees, there is no room for the application of the principle of *cy près* or approximation. I understand by the "general object of charity" here referred to, not the mere word charity as denoting any beneficent purpose, but some definite general object at least. That would be quite sufficient. The indication of a definite general object, such as education or moral instruction, which could be carried out in another way, would be sufficient to let in the principle of approximation, and the question is, whether we have such a general object or intention expressed in the truster's will. Now, the words founded on, I think, are introduced parenthetically, after the testator has carefully pointed out the way in which these bonds are to be applied. After stating that they are to be paid to the trustees of Stewart's Free School for supplementing the teachers' salary, he adds—"It being my desire that the said provision shall be applied in providing moral and religious instruction for boys and girls," and so on. I agree with your Lordship that the mere position of these words in the sentence is of comparatively

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.

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-