

which—[after narrating the facts above stated]—proceeded—“And considering that I am desirous of being discharged from the trust constituted by the said trust-disposition, and that it is necessary that I should, in accordance with the said Bankruptcy Statutes, reserve to the said Society the full benefit of said security, and it has therefore been arranged that I shall renounce in favour of said Society any reversionary interest in or right of redemption of said subjects, and that I shall convey the same to them, which it is right and proper I should do: Therefore I, as trustee foresaid, do hereby for ever renounce and give up in favour of the said Society all my and the said James Yeaman's reversionary right and interest in said subjects, and all right of redemption thereof competent to me as trustee foresaid, or to the representatives of the said James Yeaman in virtue of the clause of redemption contained in the said bond and disposition in security or otherwise: And further, I as trustee foresaid do hereby dispose to the said Scottish Equitable Life Assurance Society, incorporated as aforesaid, and the assignees whomsoever of the said Society, heritably and irredeemably, All and Whole”—[a description of the security-subjects followed].

The Commissioners of Inland Revenue were of opinion that the property was conveyed to the said Society in consideration wholly of the debt to them, and that, in terms of section 57 of the Stamp Act 1891, the instrument was chargeable with *ad valorem* duty as a conveyance on sale, and that the sum to be deemed the consideration in respect of which it was so chargeable was the said sum of £9500, being as set forth in the instrument the value put by the said Society upon the property in their claim upon the estate of the said James Yeaman, and admitted by the trustee.

The Commissioners accordingly assessed the *ad valorem* conveyance on sale duty of £47, 10s. upon the instrument in respect of this sum of £9500.

At the request of the Scottish Equitable Life Assurance Society, who were dissatisfied with their determination, the Commissioners stated a case for the opinion of the Court upon the question “Whether the said instrument, in the circumstances above set forth, is liable to be assessed or charged with the said *ad valorem* conveyance on sale stamp duty in respect of the sum of £9500 in terms of the foresaid Act; or, if not, what other duty it is liable to be assessed and charged with?”

Argued for the appellant—Whatever it might be in form, the instrument was in substance not a conveyance on sale, but a renunciation of any right of redemption. The property had already been conveyed. The instrument merely reserved to the Society the full benefit of their security in terms of the Bankruptcy Act, and enabled the Society to

sell and realise their security. The £9500 was not a consideration paid. The deed was a conveyance of property chargeable only with a 10s. stamp duty.

Argued for the respondents—The Commissioners were right. Both in form and substance this was a conveyance of property upon payment of £9500. In consideration of remitting a debt of that amount the disponees obtained the conveyance of subjects of that value. That was a sale. Before they had only held a mortgage; now they got an absolute conveyance of property. If there were any doubt the terms of the 57th section were conclusive.

At advising—

LORD PRESIDENT—I am of opinion that the terms of section 57 apply to this conveyance, and that the determination of the Commissioners is right. By this instrument the property therein mentioned is conveyed to the appellant Society. This is so not merely in form but in substance, for the Society, although in virtue of their bond and disposition in security, they might have sold the property, could not themselves have bought it. The next question is, what was the consideration? It seems quite plain that what the trustee got was a discharge to the extent of £9500 of the debt due to the Society, and that it was in consideration of this amount of debt that the conveyance was granted. Accordingly, I cannot resist the conclusion that the instrument in question satisfies the description in the 57th section, and is chargeable accordingly.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court affirmed the determination of the Commissioners.

Counsel for Appellants—D. F. Sir Charles Pearson, Q.C.—Salvesen, Agents—J. A. Campbell & Lamond, C.S.

Counsel for Respondents—Lord Adv. Balfour, Q.C.—Sol. Gen. Shaw, Q.C.—A. J. Young, Agent—Solicitor of Inland Revenue.

Tuesday, November 27.

SECOND DIVISION.

[Lord Kincairney, Ordinary.]

WHITTAL v. CHRISTIE.

Jurisdiction — Arrestment — Arrestment jurisdictionis fundandæ causa—Insurance Policy.

By assignment dated in 1859, A, who was domiciled in England, assigned to his marriage-contract trustees, in security of an annuity of £100 provided by the marriage-contract to his wife in the event of her surviving him, a policy

of insurance on his life for £1000, which he had effected with a Scottish insurance company. The assignation was duly intimated to the insurance company.

In 1893 B raised an action against A in the Court of Session, after having used arrestments *ad fundandam jurisdictionem* in the hands of the insurance company. He averred that A had a large reversionary interest in the insurance policy. A pleaded no jurisdiction.

The Court (*aff. judgment* of Lord Kincairney) *sustained* this plea, on the ground that the obligation of the insurance company was to account to A's marriage-contract trustees, and that no funds belonging to A had been arrested in their hands.

By assignation dated 7th June 1859, James Christie, No. 33 Old Broad Street, London, assigned a policy of insurance on his life for £1000, which he had effected with the Scottish Provident Institution, to the trustees under his antenuptial contract of marriage in security of an annuity of £100 sterling, provided by the marriage-contract to his wife, in the event of her survivance during all the days of her life after his decease. The marriage-contract trustees were given full power to recover sums due or which might become due under the policy, and to discharge or convey the same. The grantor bound himself to keep up the policy, and the assignation bore that he had delivered up the policy to the trustees. The intimation of this assignation was acknowledged by the Scottish Provident Institution by minute dated 14th June 1859.

On 30th September 1893 James Christie granted a letter of charge to James Whittal, residing in London, wherein he acknowledged being indebted at that date to James Whittal in the sum of £513 sterling, and gave a charge over the above-mentioned policy of insurance to James Whittal in order to secure said sum of £513, and the costs and expenses to which James Whittal might be put in connection with the said letter of charge and the formal security for the assignment of the policy, and agreed to pay interest at the rate of £5 per cent. per annum on all sums due, and undertook to execute a formal assignment. No mention was made in the letter of the fact that the policy of insurance had been already assigned to Mr Christie's marriage-contract trustees. No formal assignment to Mr Whittal followed on the letter of charge.

Mr Whittal died in 1893, and his widow was appointed his executrix.

Thereafter Mrs Whittal used arrestments *ad fundandam jurisdictionem* against Mr Christie in the hands of the Scottish Provident Institution, and raised an action against him for the said sum of £513, with interest, and for the amount of costs and expenses incurred in connection with the charge given by the said letter of 30th September 1893.

The pursuer averred, *inter alia*—"Assuming that the policy of assurance is validly assigned in security of the annuity

referred to, a large reversionary interest in said policy belongs to, and is the property of the defender. Averred that a reversionary annuity in favour of defender's wife could be purchased for about £300, while bonuses to the extent of £559 have been declared on the policy, and its surrender value is over or about £900. Defender's interest, which is thus very valuable, is only burdened with the payment of £127, a sum which was advanced to the defender by the Scottish Provident Institution on the security of his interest in said policy."

The defender stated—"The pursuer in order to found jurisdiction, has used arrestments in the hands of the said Insurance Company. The said arrestments did not and could not attach any funds or estate belonging to the defender."

He pleaded—" (1) No jurisdiction."

On 20th July 1894 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor—"Sustains the first plea-in-law for the defender; dismisses the action and decerns: Finds the defender entitled to expenses, &c."

"*Opinion.*—The pursuer and defender in this case are both domiciled in England. The defender's liability is said to be established by a letter, but the record does not show how the debt arises, nor disclose the reason why the pursuer, an Englishwoman, sues an Englishman in the Courts in Scotland. It was said at the debate that there were considerations which made the Court in Scotland *forum conveniens*, but these were not explained.

"The pursuer has used arrestments in the hands of the Scottish Provident Institution to found jurisdiction, but the defender denies that any funds belonging or due to him have been thereby arrested. I have found the question to be one of great difficulty.

"The defender effected a policy on his life for £1000 with the Scottish Provident Institution, and by assignation dated 7th June 1859 he assigned the policy to the trustees under his contract of marriage, in security of an annuity provided by the marriage-contract to his wife, with full power to them to recover the sum which might become due under the policy, and to discharge or convey it. The grantor bound himself to keep up the policy, and the assignation bears that the policy had been delivered. The intimation of assignation was acknowledged by the Scottish Provident Institution by minute dated 14th June 1859.

"The defender's wife is still alive. The pursuer avers that the policy has greatly increased in value through lapse of time, and accruing bonuses; that its surrender value is £900; and that a reversionary annuity to the defender's wife of the amount provided might be purchased for £300, and that a large reversionary interest in the policy belongs to the defender.

"This is not admitted, but *prima facie* it is probable, and falls, I think, to be assumed in considering the validity of the arrestments.

"These being the circumstances, the question is whether an arrestment in the hands of the Insurance Company has attached the defender's remaining interest in the policy.

"The interest of a person insured in a policy held by him may be arrested in the hands of the Insurance Company by a creditor of the person insured, notwithstanding that the sum in the policy may not be due at the date of the arrestment, and although it may be uncertain whether it will ever become due. That was first decided in *Strachan v. M'Dougle*, June 19, 1835, 13 S. D. 934, in which case the question arose where the debtor died before a premium became due after the date of the arrestment.

"In *Bankhardt's Trustees v. Scottish Amicable Society*, January 21, 1871, 9 Macph. 443, it was held by Lord Gifford that an arrestment remained effectual after a new payment of the premium. His Lordship held further that the arrestment might be made effectual by the sale of the policy—a point which I would venture to think might be open to doubt—so that if there had been no assignation of this policy, I would have had no doubt as to the validity of the arrestment.

"On the other hand, if the assignation had been absolute, the arrestment would of course have been bad. The difficulty arises in this case from the fact that the assignation is in security. Still the policy has been assigned and delivered, and the assignees have been empowered to receive and discharge the sum insured; and the question appears to be, whether at the date of the arrestment the Insurance Company was under any obligation to pay or account to the defender, or whether they were then bound to account only to the marriage-contract trustees. It appears to me that, in the present circumstances, the obligation of the company is to account to the marriage-contract trustees, and on the defender's death, to pay the proceeds of the policy to them, when they would hold the amount subject to a liability to account to his representatives. There is at present no legal relation between the Insurance Company and the defender.

"If it could have been maintained that the marriage-contract trustees were identical with the defender, or that the assignation was a device to protect his own estate, the arrestments might have been sustained, following the cases of *Rigby v. Fletcher*, January 18, 1833, 1 S. D. 256; *Lindsay v. The London and North-Western Railway Company*, January 27, 1860, 22 D. 571. But no plea of that kind was stated or seems to be applicable.

"Circumstances may yet alter so as to affect the obligation of the Insurance Company. The defender's wife may die, or he may, by purchasing an annuity for her, satisfy the trustees that they are in safety to reconvey the policy. But at present I am unable to see that the Insurance Company are debtors to the defender at all, or are under any obligation to account to him, and I am therefore of opinion that

nothing has been attached by the arrestment, and that jurisdiction has not been founded."

The pursuer reclaimed, and argued—The money contained in the policy of insurance was more than sufficient to pay the marriage-contract obligations. A reversionary annuity in favour of the defender's wife could be purchased for about £300. The surrender value of the policy was at present between £800 and £900, and if the sum of £127, advanced to the defender by the Insurance Company, were deducted, that left about £400 as the amount of the defender's interest in the policy. As far as the defender's interest in the policy was concerned, the company held on behalf of the defender. The property of the *verus dominus* had therefore been attached in their hands—*Lindsay v. London & North-Western Railway Company*, January 27, 1860, 22 D. 571—*aff.* February 28, 1858, 3 Macq. 99; *Rigby v. Fletcher*, January 18, 1833, 1 S. D. 256; *Herries v. Brown*, March 9, 1838, 16 S. 948. It had been held enough to found jurisdiction if there was a liability to account on the part of the person in whose hands the arrestments were used—*Douglas v. Jones*, June 30, 1831, 9 S. 856. In this case there was an obligation on the part of the Insurance Company to account. The arrestments were validly used, and the first plea-in-law for the defender should be repelled.

Argued for the defender—The judgment of the Lord Ordinary was right. There was no reversion at present due to the defender. The trustees were entitled to payment of the whole sum in the policy, and if the defender died, and there was a competition between the marriage-contract trustees and the defender's representative, the former would be preferred to the whole sum in the policy. When the policy became payable there might not be enough to meet the claims of the trustees and satisfy the annuity of the widow. It was not in point to argue that an annuity could be purchased for the widow from an insurance office at a certain sum. The widow was not bound to accept such an annuity—*Wilson v. Beveridge*, January 31, 1833, 11 S. 343; and even if she was willing the trustees were not entitled to purchase such an annuity and denude themselves of the trust—*White's Trustees v. Whyte*, June 1, 1877, 4 R. 786. There was here an irrevocable assignation in favour of the trustees—irrevocable as if it had been inserted in the marriage-contract itself. The defender had no right to a single penny of the sum contained in the policy, and the arrestment had therefore attached nothing belonging to him. The cases of *Rigby* and *Lindsay* were different from the present, as in these cases the money in trust belonged to the debtor, and the Court practically said that the debtor was not entitled to protect funds belonging to him from his creditors by putting it into the hands of trustees.

At advising—

LORD JUSTICE-CLERK—I do not think there is any ground for interfering with the interlocutor of the Lord Ordinary so far as it sustains the first plea-in-law for the defender and dismisses the action. The arrestments have been used in the hands of the Insurance Company. The Insurance Company are in this position, that, if the sum in the policy came to be payable on the death of the defender, they would be bound to pay it to the marriage-contract trustees. I do not think that anyone else could successfully compete with the trustees for the sum which they hold in security of the annuity of £100 to be paid to the defender's widow. On the other hand, the trustees might be liable to account for any sum which was held to be part of the defender's estate in a competent process. This sum was arrested, not in the hands of the trustees, but of the Insurance Company, who have no right to pay any part of it to anyone but the trustees.

As regards the rest of the interlocutor, I am of opinion that a great deal is to be said for the view that the defender is not entitled to expenses in spite of the fact that his first plea-in-law has been sustained. I think it is quite plain on the face of the case that he did not make an honest disclosure of his position to the pursuer, but wilfully concealed it. I therefore think that he should not be awarded any expenses.

LORD YOUNG—I concur. This Court has no jurisdiction unless there has been a valid arrestment of property belonging to the defender. This fund which is in the hands of the Insurance Company, and which will become due at the defender's death, must in terms of the assignation be paid over to the marriage-contract trustees. We are not entitled to presume that there will be more than sufficient to meet the obligations of the trustees.

I am not able to consent to the argument that the widow is bound to take an annuity in place of her provisions. This Court, no doubt, when the ends of justice require it, may require a party to take something else than the mere letter of the obligation provides for if no injustice will be done to him by taking the equivalent. But the Court are always slow to make a party take something different from that which is due to him, and will only do so when it is safe for him to take it, and when it is necessary in order to do justice to another. There is no consideration of that kind in this case.

I agree also in the matter of expenses, as the defender acted with the greatest impropriety in misleading the pursuer as to the condition of the policy of insurance.

LORD RUTHERFURD CLARK—I have not been satisfied that any fund belonging to the defender has been arrested. I therefore agree. On the matter of expenses I also concur.

LORD TRAYNER—I think this arrestment was insufficient to attach any fund. On the question of expenses I have nothing to say.

The Court adhered to the Lord Ordinary's interlocutor except in so far as it found the defender entitled to expenses; therefore dismissed the action, and found no expenses due to either party.

Counsel for the Pursuers—A. S. D. Thomson—Hunter. Agent—R. J. Calver, S.S.C.

Counsel for the Defender—Salvesen—M'Lennan. Agents—Macpherson & McKay, S.S.C.

Saturday, November 24.

FIRST DIVISION.

[Sheriff Court at Aberdeen.]

SUTHERLAND v. MAGISTRATES OF ABERDEEN.

Reparation—Public Officer—Exercise of Statutory Authority—Statutory Protection against Claims of Damages—Public Health Act 1867 (30 and 31 Vict. c. 101), secs. 42 and 118.

Section 42 of the Public Health Act 1867 provides that, where a hospital exists within the district of a local authority, a magistrate may, on the application of the local authority, with the consent of the superintending body of such hospital, "by order on a certificate signed by a legally qualified medical practitioner," direct the removal to such hospital of any person suffering from an infectious disease and being without proper accommodation. Section 118 provides that the local authority shall not be liable in damages for any irregularity committed by their officers in the execution of the Act.

A child suffering from scarlet fever was removed to a hospital by the officers of a local authority. The removal was effected with the consent of the child's father, but without any warrant having been obtained. The child having died shortly after its admission to the hospital, the father brought an action of damages against the local authority, alleging that its death had been caused by the negligent manner in which its removal to the hospital had been conducted.

Held that, as the removal had not been effected under the powers conferred by the Public Health Act, the defenders were not protected by the provisions of section 118.

Process—Amendment of Record—Expenses.

In an action of damages the Sheriff-Substitute, being of opinion that the pursuer's averments were irrelevant, allowed him to lodge within six days a minute specifying what amendment, if any, he proposed to make