

The pursuer applied for his commission from the seller, and was refused, on the ground that although the negotiation had terminated in a sale, and both parties had received what they wanted, yet at one time the negotiation had been broken off because Captain Crockett thought and reported unfavourably of the vessel; and that it was only afterwards resumed when it was found that Mr Denny of Dumbarton thought favourably of it. I am at a loss to see what relevancy there is in this statement. That the negotiation was commenced, broken off, resumed, and carried to a conclusion between the same parties is certain. The grounds which induced the parties to alter their minds can be of no consequence. The only thing of importance is the result.

In this view the episode of Captain Bolton's mission and his communications with the defenders and Denny are immaterial. Bolton was only, as Matheson was, the representative of the original party to the negotiation, Jardine, Matheson & Company of Shanghai; and his part in the transaction only explains how it came that the negotiation which was broken off in October was resumed in January. It is said, perhaps truly, that when Bolton first met Munro and Denny at Dumbarton he knew nothing of the former proceedings in regard to this vessel. Munro certainly took care not to mention them; and what Bolton's own knowledge was we cannot tell, because he is not called, neither is his absence accounted for. But it seems of no moment if it be so, because the parties were precisely the same, the subject of negotiation the same, and the object of it the same; and when this was discovered, Munro and Jardine's house stood in relation to each other as regarded this transaction just as they had done in October previously.

All this seems irrelevant to the main question; and I should have thought it so even if the pursuer had taken no part in any of the negotiations for the purchase, which, as I have said, did not enter into the service by which his commission was earned. In point of fact he did much more—he employed Crockett to report on the vessel, and communicated the result to the defender. But these things he did at Matheson's desire, on account of Jardine's house. It was no part of his action as broker; and can have no more effect on his claim than if Jardine had done them himself. It is not of much consequence to the case, but it is plain that on the 7th of October Matheson's mandate was recalled or suspended, and that was probably not without its influence in stopping the negotiation with Munro at that time. But when Matheson heard from Bolton that he was again on the track of the "Europe," he did what any sensible man would have done in the circumstances, and sent Bolton at once to White, the broker. The pursuer accordingly took the matter up where he had left it three months before. He had all the information regarding the former inquiry, he had over eight meetings on the subject with Bolton, and at last it was resolved to have the vessel into a graving dock and have her thoroughly examined. The result of that inquiry was that Matheson of London wrote the final offer to purchase the vessel to Munro & Company. There was no bargain, nor was there the semblance of a bargain until then. Munro was as free to decline the offer as Matheson was to make it. Munro accepted it, and thus the ne-

gotiation terminated in a sale between Munro of Greenock and Jardine's house of Shanghai, of the vessel in regard to which the introduction which commenced the negotiation had been given. I think the pursuer has well earned his commission, and that Munro had no more reason for refusing it in January 1875 than he would have had in October 1874.

The Court pronounced this interlocutor:—

"Find, in point of fact, that the sale which was ultimately effected by the defenders and appellants of the steamship "Europe," was not a consequence of the introduction by the pursuer and respondent, or of anything done by him: Find that the pursuer's introduction and agency did not conduce to the ultimate sale as libelled by the pursuer: And find, in point of law, that the pursuer is not entitled to charge commission against the defenders: Therefore sustain the appeal, recall the judgment appealed against, and assolvie the defenders from the summons, and decern: Find the defenders entitled to expenses in both Courts, and remit to the Auditor to tax the same and to report."

Counsel for Pursuer (Respondent)—Balfour—Mackintosh. Agents—Ronald, Ritchie, & Ellis, W.S.

Counsel for Defenders (Appellants)—Dean of Faculty (Watson)—R. V. Campbell. Agents—Webster & Will, S.S.C.

Friday, July 14.

## FIRST DIVISION.

[Lord Young, Ordinary.]

### THE SCOTTISH WIDOWS' FUND v. BUIST AND OTHERS.

*Insurance—Warranty—Fraud—Assignee—Assignatus utitur—jure auctoris—Latent Conditions.*

In an action of reduction of a policy of insurance, brought by the Insurance Company against onerous assignees of the assured,—held that allegations of breach of warranty and fraud on the part of the assured were relevant against the assignees.

*Process—Jury—Proof.*

In an action of reduction of a policy of insurance, brought by an Insurance Company against onerous assignees of the assured, on the ground of breach of warranty and fraud of the latter—held that the most expedient way of trying the case was by proof before the Lord Ordinary without a jury, important legal principles being involved which it would be difficult for a jury to follow, and in regard to some of which there might be a natural prejudice in the minds of a jury.

On 5th August 1871 George Moir, cattle dealer, made a proposal to the Scottish Widows' Fund and Life Assurance Society for a policy of assurance on his own life for the sum of £1000. The proposal consisted of certain printed queries and answers thereto filled in by Mr Moir, and of

a relative declaration signed by him. The answers given by Mr Moir to the said queries, which related to his habits and state of health, represented him as of sober and temperate habits, and made no mention of any previous illness except a severe cold from which he had suffered two years previously, and for which Dr Watson had attended him. In answer to further queries put to him by the pursuers' medical officer, Moir stated that he had suffered from "an eruptive complaint two years ago, attended by Dr P. H. Watson, Charlotte Square;" and the only other statement of any weakness made by him was that he was deaf, and that the deafness had existed since scarlet fever in childhood. In reliance on the said declaration and statements made by Mr Moir as aforesaid, and on the faith of their being true, the pursuers issued to him a certificate or policy on his life, dated 16th August 1871, No. 33,469, for the sum of £1000. It was provided and declared by the said policy that in case it should thereafter appear that any untrue averment was contained in the said declaration as to the age, state of health, or description of the said George Moir, the certificate or policy should be void, and all claim to any benefit out of or interest in the funds of the Society in virtue of the policy should cease and determine, and all monies that might have been paid in consequence thereof should belong to the Society. By assignation, of date 21st March 1872, Mr Moir, in consideration of a sum of £112 paid to him, assigned the said policy to the defenders.

The assured, Mr Moir, died on 28th June 1875. It was averred by the pursuers that his death was the consequence of certain complaints from which he had suffered from time to time, and which he had concealed from them in effecting his insurance, and besides, that these complaints were aggravated by loose habits and drunkenness, of which the pursuers had been kept in ignorance. They therefore brought a reduction of the policy and the assignation thereof. Their averments were generally denied by the defenders, who averred that the said George Moir, with the exception of his deafness, was in unimpaired health, and sound in all his vital organs.

The Scottish Equitable Insurance Company and the General Life and Fire Assurance Company also brought reductions of policies granted by them to Moir, on similar grounds. Their policies had also been assigned to various assignees.

The Lord Ordinary pronounced the following interlocutor in all of these cases:—"The Lord Ordinary, in respect that this cause was sent to the Procedure Roll for the purpose of hearing and determining upon the prejudicial pleas in law for the defenders, and in respect that the defenders do not now insist in these pleas as an objection to leading proof, Finds the defenders liable in the expenses thereby occasioned, modifies the same at the sum of £3, 3s., and decerns; and, on the motion of the pursuers, allows the parties a proof of their respective averments, so far as not admitted; appoints the proof to take place before the Lord Ordinary within the Parliament House, Edinburgh, upon Wednesday the 12th day of July next, at ten o'clock forenoon, and grants diligence at the instance of each of the parties for citing witnesses and havers."

The defenders reclaimed, and asked that the case might be tried by a jury. It appeared, however, to the Court that before deciding this point it would be advisable to dispose of the following prejudicial pleas of the defender—"1. Any mis-statement or omission on the part of the assured, even if made, although it might have furnished a good objection against him, cannot affect the policy in the hands of onerous assignees. 2. The pursuers having held out their policies to the public as good and valid investments for purchase or loan, are barred from objecting to the claims of onerous assignees on the ground of omission or mis-statement by the assured. 5. The assured having given a reference to a medical man, from whom information might have been received, and the pursuers not having availed themselves of said reference, they cannot now object to the policy in the hands of onerous assignees. 8. The statements made by the pursuers are not relevant even against the assured, much less against onerous assignees, and the summons should be dismissed, with expenses."

It was also suggested by the Court that the pursuers should alter their first plea; it was therefore altered and read as follows—"The truth of the statements and answers made by Mr Moir as aforesaid having been warranted by him, and these statements and answers being untrue, the said policy and the assurance bearing to be thereby effected are void, in terms of the stipulations to that effect, and the same ought to be reduced, with all that has followed thereon."

The defenders accordingly argued in support of the 1st and 2d pleas—These pleas, no doubt, seem to controvert the maxim *assignatus utilitur jure cedentis*; but the origin of that maxim is in the fact that assignations were originally in the form of procuratories, and in that state of matters, the assignee being procurator of the cedent, was liable of course to all exceptions competent against his author. That rule was by Statute 1621, cap. 18, declared not to hold good in regard to heritable subjects, for in such a case the records may be relied on. The course of commerce demanded a similar relaxation of the rule in the case of moveables acquired for an onerous cause, and accordingly it is laid down both by Stair and Erskine that the rule does not apply there either. With regard to personal bonds and contracts, the rule had again been relaxed by the House of Lords in the case of *Redfearn*. It is so distinctly recognised in the present day that an assignee is no procurator for the cedent, but has a right in his own person, that the Court should be unwilling to apply the rule, especially where the assignee is an assignee for onerous causes. Between such an assignee and a singular successor, or one who acquires the right gratuitously, Bankton and our institutional writers draw a very broad distinction. The condition here as to the voiding of the policy is truly a latent condition. The insurance companies hold out their policies to the public as a safe investment, and make no disclosure to the assignees of the relative declarations and answers. The reasons that prompted the decision in *Redfearn's* case will apply strongly here, viz., the inconvenience and oppression of trade, which it would cause to hold the assignee liable

to such objections. The English decisions are not applicable, for till the passing of the Statute 30 and 31 Vict. cap. 144, no choice in action was assignable. That was an absolute rule not liable to any of the exceptions introduced with us by statute or custom.

In support of the 5th plea it was argued—An assignee is entitled to rely on the Insurance Company having taken due precautions and having made the necessary inquiries; this is part of the contract which they must fulfil. If they had known the facts they must have been liable. It is the same thing that they might have known them.

Authorities—Bankton, vol. ii. p. 191, No. 8; Pandects, rule 175; Kames' Elucidations, art. ii; Brodie's Stair, i. 10, 16, with Brodie's Note, p. 219; Stair, iii. 1, 2-3, and iv. 40, 21; More's Stair, p. 788; Erskine iii. 5, 10; *Somerville v. Redfean*, 1 Dow 5, and 6 Pat. App. 707; Bell's Com. vol. i. p. 302, note 5; Bunyan on Life Insurance, p. 36; Philips on Law of Insurance, vol. i. p. 507; Biglow on Estoppel, p. 526; *York Buildings Co., M. 10,466*; *Walch v. Etna Life Insurance Co.*, American Reports, vol. vi. p. 664; *Armstrong v. Turquand*, 9 Irish Common Law Reports, p. 32.

The pursuers argued against the 1st and 2d pleas.—(1) This is no exception to the general rule of *assignatus utitur jure auctoris*. There are to that rule only three classes of exceptions—1. in heritable rights; 2. in corporeal moveables; 3. in commercial documents which are negotiable by transference. The case of *Redfean* is not a condemnation but a confirmation of the rule. What was decided in that case was that a latent quality in the cedent, e.g., a trust, could not be transmitted so as to affect an onerous assignee. That all exceptions competent to the original debtor against the original creditor are competent against the assignee, was strongly set up by that case. It is not correct to say that it is because the assignee is viewed by our older institutional writers as a procurator that the rule is applied. "Assignee" means something quite different to Stair and Bankton. (2) The condition here was not latent but patent. It was the right and the duty of the assignee to see all the documents referred to in the policy, and even if he be free from objections which were latent, he cannot be free from objections which were patent on the face of the contract. Such an objection would be good even in the case of a bill. If the indorser writes on the bill "without recourse," that is good against any holder.

Against the 5th plea it was argued—The position of the onerous assignee is the same as that of the cedent, and it would be no plea on his behalf. The statement with reference to Dr Watson is not impeached, and therefore it is quite immaterial whether the Insurance Company went to him or not.

Authorities—Stair iv. 40, 21, last two paragraphs; Erskine and Bell's Com. as above; *Redfean's* case, as above; Bell's Prin. 1468; *Menzies on Conveyancing*, p. 264; *Muir v. Calder*, M. 831; *Forbes v. Edinburgh Life Assurance Co.*, 10 Shaw 451; *British Equitable Insurance Co. v. Great Western Railway*, 38 L. J. 133 and 134 (Chancery); *Scottish Amicable Insurance Co. v. Fuller*, 16 Weekly Reports, p. 274; *Dornsay v. Borradaile*,

10 Beavan 335; Bunyan on Life Insurance, p. 219; Philips on Insurance, p. 61.

At advising—

LORD PRESIDENT—This case was brought before us upon a reclaiming note, the object of which, as we understood it, was to determine in what manner this case ought to be tried—whether in the ordinary way by a jury, or before the Lord Ordinary and without a jury. But upon looking into the record with a view to determine that question, it appeared to the Court that there were several pleas stated for the defenders Buist and Mitchell which ought to be cleared away and disposed of before the consideration as to the mode of trial should be taken at all. Those pleas are the 1st, 2d, 5th, and 8th. Now, as regards the 3d plea, that has been abandoned by the defenders in the course of the discussion, because they think that a certain addition which has been made to the averments of the pursuers removes the ground of that plea. The 8th, which is a general plea of irrelevancy as against the case of the pursuers stated on record, is, I think, not seriously insisted in—at all events, it may be disposed of in a single word, because this is an action for reduction of a policy upon the ground, in the first place, that there has been a breach of warranty, and, in the second place, upon the ground of fraud as regards the representations made by the assurant concerning his own health and habits, and it would be very difficult indeed to understand how, if anything like distinct averments are made upon that subject, they could be open to the objection of irrelevancy. The only matters, therefore, which really require consideration now are the 1st and 5th pleas, and these two, I think, must be considered separately.

The first plea is as follows—[reads]. Now, that raises a very general question, but one that, in my opinion, is not attended with any difficulty. The contract which is contained in a policy of insurance is a mutual contract, by which the insurance company or insurance society on the one hand come under an obligation to pay a certain sum of money upon the death of the assurant, and the assurant on the other hand becomes bound to pay certain sums, either annually or otherwise, in the name of premium; and these obligations are counterparts of one another. But this particular policy of insurance, like most other policies of insurance, at least in modern times, contained certain conditions, the non-fulfilment of which is declared to be visited with the absolute invalidity of the contract. The provision is this—"In case the assured shall depart beyond the limits of Europe, or die upon the high seas, or shall enter into or engage in any military service except in Great Britain, or naval service whatsoever, or shall come by his death by suicide; or in case it shall hereafter appear that any untrue averment is contained in the declaration before recited as to the age, state of health, or description of the assured; or in case payment of the said contributions shall not be regularly made as aforesaid—then, and in every such case, this certificate shall be void." Now, the first ground of action in this case depends upon the view of this condition (that any untrue averment contained in the declaration shall void the policy) being a warranty upon the part of the assurant, and it is pleaded that the declaration contained

several very important false statements, and upon that ground the policy is, under the special provision of the contract, necessarily void. But the action is also laid upon a separate ground, and that is the ground of fraud. It is averred that the assurant, in making his proposal for the policy, and carrying through the transaction with this insurance society, made fraudulent representations in regard to his health and habits. Now, there is this distinction between these two grounds of action, that one of them is founded upon a clause in the contract and the other is not. The plea of the defenders is that neither of these grounds of action is available against an onerous assignee of this policy. It appears to me to be long ago settled in the law of Scotland—and I have never heard of any attempt to disturb the doctrine—that in a personal obligation, whether contained in unilateral deeds or in mutual contract, if the creditor's right is sold to an assignee for value, and the assignee purchases in good faith, he is nevertheless subject to all the exceptions and pleas pleadable against the original creditor. That is the doctrine laid down in all our Institutional writers, and it has been affirmed in many cases. But it seems to be said that this doctrine admits of some exceptions. Now, that I entirely dispute. The application of the maxim *assignatus utitur jure auctoris* may be subject to some exception, but I think the true view of the law is that these things that are called exceptions are classes of cases to which the doctrine does not apply. The doctrine does not apply to the transmission of heritable estate; the doctrine does not apply in the sale of corporeal moveables. But within the class of cases to which the doctrine is applicable—I mean the transmission to assignees of a creditor's right in a personal obligation—I know of no exception to the application of the doctrine. It is the merest mistake to suppose that the case of *Redfearn* introduced any exception to that doctrine, because the doctrine is this—that in a question between the debtor in a personal obligation and the assignee of the creditor, the assignee is open to all the objections that would have been pleadable against the cedent. Now, what is the case of *Redfearn*? It is not a case between the assignee and the original debtor at all, and therefore in the case of *Redfearn* the doctrine had no application. We find the ground of judgment in the House of Lords in both the reports we have of the case, viz., in Dow's report, and in that contained in Paton's more recent publication. Lord Redesdale, in stating his objections to the judgment of the Court below, cited the authorities in the law of Scotland for the purpose of shewing to what case the doctrine I am now speaking of was applicable. For example, he cited this passage in Stair—"The common rule of law is more rational, that the assignee *utitur jure auctoris*, and is in no better case than the cedent unless it be in the matter of probation, that the cedent's oath will not prove against him *nisi in jure litigioso*, and therefore *in personalibus* all exceptions against the cedent are competent against the assignee, even compensation itself;" and after citing other authorities his Lordship proceeded in the following terms:—"It was manifested that all this applied to the exceptions or counter-claims which the original debtor might have against his creditor, and not to another title

set up by a third party in competition with the claim of an assignee, which is the case here." So that the case then before the House of Lords was the case of a question between the assignee and a third party altogether, and to such a case the House of Lords determined that the doctrine did not apply, and that the Court here had been wrong in so applying it. But the doctrine itself, so far from being questioned by the noble and learned Lords who decided the case, is set up and commended. The Lord Chancellor in like manner says—"If the glass company was the debtor, the question here was not between the assignee and the debtor, but between the assignee and a person setting up a collateral claim under an alleged equity;" and further on—"The question was not between the debtor of Stewart and his assignee, but between the assignee and one possessing a secret equity. This disposes at once of the argument respecting an assignment by an executor."

I hold it therefore to be clearly established that in all cases of personal obligation, whether constituted by unilateral deeds or mutual contract, this doctrine is universally applicable; and it appears to me that that is a conclusive answer to this first plea in law.

With regard to the only remaining plea to which it is necessary to advert, (I mean the 5th) I confess I do sympathise a good deal with the difficulty which has been expressed in understanding what it precisely means. "The assurant had given a reference to a medical man from whom information might have been received, and the pursuers not having availed themselves of said reference, they cannot now object to the policy in the hands of onerous assignees." Assuming, as I now do, that the onerous assignee is liable to all the objections pleadable against his cedent, I must take this to mean that if the assurant gives a reference to a medical man, and the insurance company or society do not go to that medical man and take the information which he has to give them, they cannot afterwards reduce the policy, as in a question with the assurant, either upon breach of warranty or upon the assurant's fraud. Now, that to my mind is a very startling contention. I do not see upon what view of justice it is founded. A reference to a medical man may be asked and taken by the insurance company, but it is asked and taken by them only for their own benefit, not for the benefit of the assurant, and if they choose to depend upon the warranty of the assurant, instead of resorting to the medical man or to any other source of information, they are quite entitled to do so. I cannot imagine that under any circumstances a plea of that kind could be maintained. But more particularly is this plea untenable when viewed in reference to the facts stated upon record, and practically admitted by the pursuers, that Dr Watson, the medical man in question, was referred to only as a person who had attended the assurant two years previously for a violent cold and an eruptive complaint. I do not understand it to be questioned that it was the truth that Dr Watson had attended the assurant for such a complaint, and if it was true the company could have got no more from Dr Watson than we have now, viz., that he had attended the assurant for such a complaint. Would that have prevented them, or would the non-possession of

that knowledge now prevent them, from challenging this policy either on the ground of breach of warranty or on the ground of fraud? I must say I fail altogether to understand the principle upon which this plea is founded, and I am therefore compelled to say I think it utterly untenable as a defence against this action.

**LORD DEAS**—This question arises upon a mutual contract. The contract was that the insurance office upon the death of Moir should pay a certain sum to him, his heirs, executors, or assignees. But it was made an express condition of that contract, among other things, that in case "it should hereafter appear that any untrue averment is contained in the declaration before recited as to the age, state of health, or description of the said George Moir, this certificate shall be void, and all claim to any benefit out of or interest in the funds of said society in virtue of these presents shall cease and determine." Now, the assignee who purchased Moir's right under this contract of course saw beforehand that such were the terms of the contract. But then it is said that though these were the words of the contract there were various other writings, and, in particular, a declaration there referred to, necessary to be seen before the whole import and effect of the contract could be understood. It is said on behalf of the assignee that he had no means or opportunity of seeing those other writings. The answer to that, I think, is that there was nothing to prevent him from seeing all those writings if he got the authority of the party assured to see these documents, and communicated that authority to the insurance company. I think that the observation that the insurance company were not entitled, far less bound, to reveal things of that kind to anybody who chose to apply is quite sound; but then the reply to that is, that upon production of authority from the party assured the office were not only entitled but bound to let him see the documents. Well, then, this is a contract the whole of which either was or might have been before the party getting the assignation. It is not therefore a case in which there is any latent equity, in which there is any latent condition, or anything latent at all. The party taking the assignation was entitled to see everything, and if he did not choose to apply for it that was entirely his own fault. Now, as applicable to a case of that kind, I have no doubt at all that the plea of an onerous assignee, that he is not bound by the undertakings or by the fraud of the party from whom he purchased, cannot be supported. There was a good deal of force in many of the things that Mr Fraser said with reference to the history of our law and the authority of our institutional writers upon this matter of assignee and cedent, that down to a comparatively recent period the assignee was merely procurator or mandant of the cedent, and in that case the obligations pleadable against the cedent were necessarily pleadable against the assignee; and there is a good deal of force in the observation, as regards writers at that time, speaking of the law in its then state, that we ought to be cautious in deducing the doctrine that the assignee is not in any better situation than the cedent. I am not prepared to affirm that doctrine in the abstract form, and it is not the least necessary to this

case. There may be exceptions to that doctrine stated in a universal form. If there be any exception to it, I think it would be chiefly in a case of what are called latent equities, where there was some latent equity which was not open to be ascertained by the assignee, and yet may be open or known to the cedent. I do not inquire what would have been the law in that case; I think it is much better and safer not to do so here; but, be that as it may, there is here no latent equity,—nothing which was not equally open to the assignee as it was to the cedent. In that state of matters I cannot help thinking that the assignee is in no better position than the cedent. It may be very true, as Mr Fraser said with force, that this may put a restraint upon the use of life policies as a fund of credit upon which to go into the market and raise money. There is great force in that as producing a certain amount of inconvenience in that way, but I am afraid that far greater inconvenience and far greater injustice would arise if it were to be held that as soon as a party, however fraudulently and however falsely, has obtained a policy upon his life, he may then go into the market and sell it—it may be to a friend or a relation or to some one else for an onerous consideration,—or it may be that the assignee knows a great deal, as well as the party himself, though that cannot be brought out—I say I am afraid it would be a greater inconvenience and injustice if, the moment a party got his policy, by whatever fraud or whatever falsehood, he had only to hand it over to somebody else for a price, and then the insurance office must be liable for the whole sum insured. I think that is more startling upon the one side than any of the inconveniences Mr Fraser urges upon the other. The answer to all that is that there may be some hardship in such a thing, but the party who takes an assignation to a contract must take it as it is; and if he has the means of ascertaining everything about it, and does not do so, I am of opinion that in a case of that kind, whatever may be said of other and totally different cases, the assignee is in no better position than the cedent.

As regards the other plea or pleas, they seem to be directed entirely against the relevancy of the action. The argument seems to be, that as the insurance office did not apply to Dr Watson for something he could have told them, therefore all the rest of the allegations in this record must be held to be irrelevant. It can only be put in that way at this stage of the case. I cannot listen to that for a moment. I do not think that any of the objections here which resolve themselves into objections to relevancy are well-founded, and therefore, both upon the first plea and upon the objections taken to some of the other pleas, I entirely concur with the views and opinions arrived at by your Lordship.

**LORD MURE**—I agree in the result at which your Lordships have arrived. I do not think it necessary to go at any length into the question as to the precise extent to which the doctrine *assignatus utitur jure auctoris* can be carried, but I am satisfied that your Lordship in the chair has given a correct exposition of the bearing of the case of *Redfearn* upon that doctrine, and that the general doctrine, as laid down in the passages quoted to us from Stair and Erskine,

has not been set aside by the decision in that case, because that went expressly upon the ground that there was what the great English lawyers of that day called certain latent equities which had not been notified to the party holding the right assigned. But in this case there is no question of latent equity raised at all. On the face of this policy, which is the defenders' title, the right is declared to be defeated in certain specified events; and when the assignee takes that policy from the cedent, he takes it with that declaration upon the face of it, and knows that if breach of warranty or fraud can be substantiated the policy is void. That is on the face of the party's own title; and on that ground alone I hold that the first plea in law should be repelled. Upon the fifth plea I agree with the observations of his Lordship in the chair; I do not see the bearing of the plea.

LORD ARDMILLAN was absent.

LORD PRESIDENT—The question remains—In what manner is the case to be tried?

MR FRASER—I renew my motion that your Lordship should appoint parties to give in issues.

LORD PRESIDENT—I have looked very carefully into these cases for the purpose of determining in what way it is most expedient that they should be tried, and I have come to the conclusion that they ought to be tried before the Lord Ordinary without a jury. My reason is very much this, that I think there will necessarily arise some important legal principles which must be applied to the evidence, and some of those legal principles would be rather difficult for a jury to follow, and perhaps, as regards some of them, there might even be a natural prejudice in the minds of a jury. It is for those reasons that I think this is a case suited to be tried in the mode I have suggested. We had occasion to see an example not very long ago of the effect of trying a question of this kind without a jury, and the result was to my mind very satisfactory. I mean the case of *Foster v. The Life Association of Scotland*. That was a very delicate case, as the present may turn out to be for all we can see now, and it turned very much upon the question whether in point of fact, in the negotiations between the parties the insurer had knowingly undertaken a warranty. Whether that question may arise here I cannot tell, but for all I see it may occur, and that is a question which I think had better be determined by a Judge.

LORD DEAS concurred, on the ground stated by the Lord President. It may be an additional reason (he said) that there are three cases here, some points of which may be similar to each other, and some not. If they were to go to a jury it would be very inconvenient and expensive to have to try them separately, and if they were all tried together they would be very complicated. That is an inconvenience which is entirely obviated by the course your Lordship has suggested.

LORD MURE—Had it been a pure question of alleged fraudulent representation on the part of the assurant, that might have been a reason for

sending the case to a jury; but it is not such a case; and in the whole circumstances I concur that it is not a fitting case to be tried by a jury.

The Court pronounced this interlocutor:—

“The Lords having heard counsel on the reclaiming-note for Robert Buist and Hugh Mitchell against Lord Young's interlocutor of 23d June 1876, Recal the interlocutor except in so far as it ‘finds the defenders liable’ in expenses, ‘modifies the same at the sum of £3, 3s., and decerns;’ and having heard counsel on the first, third, fifth, eighth, and tenth pleas for the defenders, repel the said pleas, and decern: Remit to the Lord Ordinary of new to allow the parties a proof of their averments, and to proceed further in the cause as shall be just; reserving all questions of expenses.”

Counsel for the Scottish Widows Fund—Asher—Pearson. Agents—Gibson-Craig, Dalziels, & Brodies, W.S.

Counsel for the Scottish Equitable—Balfour—Pearson. Agents—Campbell & Lamond, C.S.

Counsel for the General Life and Fire Assurance Company—Dean of Faculty (Watson)—Strachan. Agent—James S. Mack, S.S.C.

Counsel for the Defenders and Reclaimers—Fraser—Scott—J. P. B. Robertson. Agent—James M'Call, S.S.C.

Saturday, July 15.

## FIRST DIVISION.

[Sheriff of Midlothian.

BATCHELOR *v.* MACKERSY AND PATTISON.

(*Ante*, p. 589.)

*Expenses—Act of Sederunt 19th Dec. 1835—Fees to Counsel.*

Circumstances in which *held* that the Auditor was entitled to allow fees to counsel although they had not been paid at the time.

*Observations* on the practice of declining fees except in the event of success.

The Auditor added the following note to his report on the accounts of expenses in this case:—“The appellant was neither present nor represented at the audit, but the Auditor had before him a letter from the appellant, with the copies of the accounts of the expenses of the respondents served upon him, on which he had noted his objections. These were considered by the Auditor. The agents of the respondents stated that the fees entered in both accounts as paid to counsel had in reality not been paid. The Act of Sederunt of 1835 provides that ‘a party shall not upon any account be allowed to pay or state higher or additional fees to counsel after he has been found entitled to expenses than were actually paid at the time. But this rule does not apply either to cases on the Poor's Roll, or to such as have been conducted gratuitously by the agent and counsel on account of the poverty of the party.’ The object of this provision, as understood by the Auditor, is to prevent