asked if the truster's wishes were not to be entirely defeated by the estate being carried away by creditors. I am of opinion we should prevent that disaster by granting the prayer of this petition.

The Court granted the prayer of the petition.

Counsel for the Petitioners—Davidson. Agents—Auld & Stewart, S.S.C.

Tuesday, February 3, 1891.

FIRST DIVISION.

THE HERITABLE SECURITIES INVESTMENT ASSOCIATION, LIMITED *v.* WINGATES.

Bankruptcy—Trust-Deed—Accession—Circumstances Held Insufficient to Amount to Accession, so as to Bar a Creditor from Insisting on his Full Rights.

A mercantile firm granted heritable security for payment of a sum of money. It became bankrupt and granted a trust-deed for behoof of creditors, of which the heritable creditors were aware. Being satisfied with the security which they held they did not claim or receive a dividend. *Held* that they had not acceded to the trust to the effect of discharging the partners of the firm from liability for the debt.

Bankruptcy—Novation—Delegation—Discharge.

A mercantile firm and the partners thereof granted heritable security for a debt, and thereafter became bankrupt. A new firm was formed under the old name, which undertook to perform the whole obligations contained in the agreement between the old firm and the heritable creditors for repayment of the debt. The heritable creditors undertook to accept the new firm as tenants under a lease of the security-subjects which they had granted to the old firm. One of the partners of the new firm bound himself for the debt, but without hurt or prejudice to the old security, and in corroboration thereof. The new firm became bankrupt, and on an affidavit and claim lodged in its sequestration the heritable creditors stated that they held no other obligants bound for their claim except the firm, the partners thereof, and the partners of the old firm. Two of the partners of the old firm were not members of the new. *Held* that these facts were insufficient to infer delegation or novation, or to release the two partners of the old firm from their obligation for the debt.

By a personal bond for £55,000, dated 14th December 1875, the firm of Thomas Wingate & Company, engineers, shipbuilders, and founders at Whiteinch, near Glasgow, and the individual partners of said firm, bound themselves as a company, and also as individuals, conjunctly and severally, to repay to the Heritable Securities Investment Association, Limited, the sum of £55,000, with interest and penalties as set forth in the bond.

The sum borrowed was to be repaid in ten years, and it was provided—"Nothing herein contained shall be held to affect the right and power of the said Heritable Securities Investment Association, Limited (hereby conferred on and declared to belong to them) in the event of one full half-yearly instalment and interest remaining at any time unpaid, to take all proceedings against us or our successors competent by the law of Scotland by diligence or otherwise for enforcing payment of whatever sum, whether the whole or a balance, may at the time be due of said principal sum of £55,000 and interest then due and thereafter to become due thereon: And it is further hereby declared that the amount, whether the whole or a balance, then due and payable as aforesaid, shall for the purpose of such proceedings be competently ascertained by a certificate under the hand of the manager for the time being of said association, and we, the said Thomas Wingate & Company as a company, and we, the said Andrew Wingate, Wilson Wingate, and Paterson Wingate as partners thereof, and as individuals, accordingly bind and oblige ourselves as a company and as individuals, all conjunctly and severally and our respective foresaids to make payment to the said Heritable Securities Investment Association, Limited, or their foresaids, of whatever sum may appear by said certificate to be so due and payable, with the interest thereafter to become due thereon, and one-fifth part more of penalty in case of failure in payment thereof."

By disposition of the same date the borrowers conveyed to the pursuers certain subjects in Govan belonging to them *ex facie* absolutely, but really in security of the debt. The footing on which the conveyance was made was set forth in an agreement dated 14th and 16th September 1875, which contained, *inter alia*, the following provisions—"Third, while the foresaid subjects continue to be held by the said Heritable Securities Investment Association, Limited, the said association shall not be bound to expend money to any greater extent than they choose on any account, or for any purpose whatever in connection with the said subjects, and shall not be responsible for omissions or neglect in keeping the buildings insured against loss by fire (the manager of said association being, however, hereby empowered to insure the said subjects in his own name or that of the association for such sum as the manager shall think proper), or for omissions or neglect in any other way concerning the premises. Fourth, the said second parties shall be bound to implement, fulfil, and observe, and entirely to free, relieve, and skaithless keep the said association of and from the whole obligations, prestations, and conditions specified and contained in the title-deeds of said subjects, and of and from payment of all feu-duties, casualties, ground

annuals, cess annuity, and public and parochial burdens payable furth thereof... Sixth, the said Heritable Securities Investment Association, Limited, in the event of the said second parties failing at any time to implement the provisions and others of the said personal bond and those presents, shall, notwithstanding what is above written, have all the rights and powers of absolute proprietors in and over the said subjects, and shall have full power to enter into possession thereof without any process of law to that effect, and to grant tacks and leases of the same at such rents and for such periods of endurance as they may think proper; and the said association, in the event of their entering into possession of said subjects, shall not be liable for omissions, nor be bound to do exact diligence, but shall be liable for their actual intromissions only. . . . Seventh, Notwithstanding the foresaid security the said association shall have full and unqualified right to recover under the foresaid bond, or under any other obligations or securities it may hold, granted by or on behalf of the said second parties, or from any separate estate or effects belonging to them or either of them, any sum or sums of money whatever that may at any time be due by the second parties to the said Heritable Securities Investment Association Limited."

Of the same date with the agreement the pursuers let to the borrowers the subjects and machinery conveyed at a yearly rent of £4800, but by the agreement which has been referred to it was stipulated that the borrowers should be entitled to receive credit for all sums paid in name of rent under the lease as payments to account, or in satisfaction of the sums due under the personal bond and that agreement."

On 14th July 1876 the firm suspended payment, and the firm and the individual partners on 24th July conveyed their whole estates and effects to James Wink, C.A., as trustee for their creditors. The defenders averred that their creditors, including the pursuers, acceded to the said trust. By disposition and assignation dated 11th, and recorded 14th September 1876, the defenders and Wilson Wingate and their said trustee, on the narrative of the deeds which carried out the transaction with the pursuers, conveyed their said shipbuilding yard at Whiteinch to Charles Maclean in consideration of £87,000, £32,000 of which Charles Maclean was to pay to their creditors, the remaining £55,000, being the said loan, to continue on the subjects. The deed contained the following clause—"But the said Charles Maclean by acceptance thereof binds and obliges himself to free and relieve us and our said firm of the said personal bond and whole obligations therein contained, and to execute all deeds necessary for that purpose." The defenders averred that this conveyance was executed and carried out with the knowledge and approval of the pursuers. A composition of 12s. 6d. per £ was paid to the creditors. The firm was then dissolved, and the dissolution duly published in the *Edinburgh Gazette* of 19th September 1876. At that date the subjects held in security of said loan by pursuers were worth and would have realised considerably more than the amount of said loan. The pursuers being satisfied of their value, elected not to claim a dividend. The terms of the disposition were intimated to the pursuers, who acknowledged the intimation in these terms—"*Edinburgh, 15th September* 1876. —On behalf of the Heritable Securities Investment Association, Limited, I hereby acknowledge that a copy of the foregoing notice has this day been received by the said Association. In acknowledging receipt of the said notice I do so under reservation of the whole rights of the Association, and on the distinct understanding that this acknowledgment shall not be held to imply any recognition on the part of the Association of the validity or effect of the disposition and assignation referred to in the said notice to which the Association are no parties, and of the nature of which they have no knowledge. For Heritable Securities Investment Association, Limited, (signed) THOS. JENNETT TODD, Secretary." The pursuers denied that they acceded to the trust in favour of Wink.

The defenders averred—"(Stat. 5) The said Charles Maclean and Wilson Wingate then became partners, and carried on business at Whiteinch under the title of Thomas Wingate & Company. In or with this firm the defenders had no interest or concern. The defenders had ceased to be liable in respect of the said loan for £55,000, liability for which was taken over and adopted by the said new firm and its partners. The pursuers accepted the said new firm and its partners as tenants under the lease before mentioned, and dealt with and took them as their debtors in said loan in room of the defenders. No claim or intimation of a claim was made by pursuers against the present defenders until January 1888. The defenders believed and were advised, as the pursuers knew, that they had been effectually discharged of all liability in respect of the said loan."

The new firm of Thomas Wingate & Company borrowed £10,000 from the pursuers, for which they granted a bond dated 17th January 1877, and in security they conveyed the same subjects to the pursuers *ex facie* absolutely. They also entered into an agreement with the pursuers of the same date, which proceeds on the narrative of the transaction and agreement with the old firm of Thomas Wingate & Company, and in particular the personal bond for £55,000, the trust-deed in favour of Wink, and the conveyance to Charles Maclean. Under this agreement the new firm and its partners undertook—"First, That the said heritable subjects and machinery and others conveyed as aforesaid shall be held by the said Heritable Securities Investment Association, Limited, under the whole obligations and provisions and conditions contained in the said agreement in part before narrated, which conditions, provisions, and obligations are here referred to and held as repeated; and the said second parties [the firm and its partners] hereto bind and

oblige themselves, and their heirs, executors, and successors, to implement and perform the same as well as those contained in these presents: And the said subjects, machinery, and others shall be held by the said Association not only in security of the said advance of £55,000 and interest and penalties thereon, but also in security of the said additional advance of £10,000, and interest and penalties as due and payable under the personal bonds granted for said respective sums, and declaring that the heritable subjects, machinery, and others shall be redeemable by the said Charles Maclean on the terms and conditions provided for under the said agreement dated 14th and 16th December 1875 on payment being made to the said Association not only of all sums that shall be due to the said Association at the time of redemption under the foresaid two personal bonds, but also of all other sums of money that shall be due to the said Association in any manner of way by the said second parties or their heirs and successors or assignees, and the interest thereon, and all costs, charges, expenses, and disbursements of every kind incurred or to be incurred by the said Association in relation to the premises with the interest thereof, which costs, charges, expenses, and disbursements shall be sufficiently ascertained and vouched by a certificate under the hands of the manager of the said Association without the necessity of any other voucher. Second, the said Charles Maclean, without hurt or prejudice to the foresaid bond for £55,000, but in corroboration thereof, hereby binds himself and his heirs, executors, and representatives whomsoever without the necessity of discussing them in their order, conjunctly and severally, along with the obligations in said bond, to pay to the said Association the said sum due under said bond at the terms, with interest and penalties as therein provided. Third, the said first parties [the pursuers] hereby accept the said second parties as tenants under the lease entered into between the said Association and the former firm of Thomas Wingate & Company dated 14th and 16th December 1875; and the said second parties hereby bind themselves to perform the whole obligations incumbent on the tenants therein. And fourth, it is hereby agreed and declared that the whole stipulations, conditions, and provisions contained in the agreement in part before narrated shall remain in full force and effect, and shall be held to apply with equal force and effect to the said additional loan of £10,000 as to the said loan of £55,000; and the second parties bind themselves and their foresaids to conform to and observe and implement the same as well as those contained in these presents."

The defenders averred—"(Stat. 7) The estates of the new firm were sequestrated on 2nd July 1879, and William M'Kinnon, C.A., elected trustee thereon shortly thereafter. The pursuers endeavoured to sequestrate the moveable property on the said shipbuilding yard as proprietors under the lease and other deeds narrated in Stat. 2, but ultimately failed, on the ground that the said deeds did not confer on them any valid preference over the moveable property in a question with the general creditors. The pursuers subsequently exposed the yard to sale at £70,000, but did not effect a sale. They also lodged claims in the sequestration. Thereafter, in the end of 1881 or beginning of 1882, it is believed and averred that they entered into a compromise or agreement with the said trustee and commissioners on said estates by which the latter paid them a sum of money, and made over to them the whole plant, stock-in-trade, and moveables in the said yard, and they renounced and discharged all right or claim to rank against said estates. A dividend of 17s. 6d. per £ was paid to the creditors, the sequestration closed, and the said firm and its partners finally discharged. But the defenders were not parties to and had no notice or intimation of the pursuers' said acts and proceedings in said sequestration."

In the affidavit and claim lodged in the sequestration the pursuers stated that they held no other obligant bound for the debt, being arrears of rent under the lease above mentioned, than "the said Thomas Wingate & Company, Charles M'Lean, and Wilson Wingate and Andrew Wingate and Paterson Wingate (the defenders), late partners of the said firm of Thomas Wingate & Company."

The pursuers raised an action against Andrew Wingate and Paterson Wingate, who were partners of the old firm of Thomas Wingate & Company, but not of the new, for £73,226, being the amount due under the bond of £55,000 on 14th February 1890 as certified under the hand of their manager. It was not disputed that the sum claimed had not been paid, but it was pleaded for the defenders—"(1) That in 1876 the pursuers acceded to a private trust under which the old firm of Thomas Wingate & Company was wound up, and the defenders were discharged on composition; and (2) that by delegation the pursuers accepted as their debtors under the personal bond a new firm of Thomas Wingate & Company, the only partners of which were Charles M'Lean and Wilson Wingate."

The Lord Ordinary (WELLWOOD) on 21st October 1890 repelled the defences and pronounced the following interlocutor—"Finds that the defenders have not produced or founded on any express discharge by the pursuers of the defenders' liability under the personal bond for £55,000 sterling mentioned in the summons, dated 14th December 1875, granted by Thomas Wingate & Company, and the defenders and Wilson Wingate as partners of the said company and as individuals, in favour of the pursuers, and that they have not set forth on record facts and circumstances relevant to infer that they have been freed from liability under the said personal bond: Finds that the sum £73,266, 1s. 8d. sued for is the amount due to the pursuers by the defenders as at 14th February 1890 as certified by the pursuers' manager in terms of the said personal bond, and that the said sum is due and resting-owing to the pursuers: Therefore repels the

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

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

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

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

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

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

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

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

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

Thursday, December 10, 1891.

OUTER HOUSE.

STEWART *v.* STEWART.

Succession — Legacy — Special Legacy — Right in Security.

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

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

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