"The pursuer in these circumstances claims that the widow and executrix shall pay the amount of the bank's debt, so as to free the policy and make the same available to the pursuer. The defender, on the other hand, maintains that the legacy was adeemed by the assignation, or otherwise that the policy must be held to have been bequeathed *cum onere*, and so to be ultimately, as well as primarily, liable for the charge upon it.

"Curiously enough, the point of law which is thus raised is one upon which there is no direct authority in the law of Scotland—at least none was cited, and I have found none.

"According to English law a specific legatee is entitled to have his legacy redeemed, at the expense of the testator's general estate, from charges created by the testator; and although the rule as regards bequests of real estate appears to be altered by the Act 17 and 18 Vict. cap. 113, I do not find that there has been any alteration by statute with regard to specific legacies of moveable subjects. As expressed by Lord Thurlow in the case of *Ashburnet*, 2 Brown's Chan. Rep. 113, 'If a testator gives a cup which is in pawn, it is a full gift, and the executor must redeem.'

"The rule seems to be the same in the civil law. At all events it seems to have been so settled by the time of Justinian, when the various forms of bequest (*per vindicationem*, *per damnationem*, *sinendi modo*, *per praeceptionem*) had been abolished

"But it rather appears to me that on this matter the law of Scotland has not followed either the civil law or the English law. It certainly holds—contrary to the English rule—that when a particular landed estate is disponed to a particular deponee, the latter takes it subject to any debts by which it is burdened, or with which it may be burdened by the testator. And while this is not perhaps necessarily conclusive as between a specific legatee in movables, and an executor or residuary legatee, I am not able to see that there is any distinction in principle. In the absence of authority, I think the analogy applicable to burdens on heritable estate must be followed, and therefore I am, on the whole, of opinion that the pursuer's claim must be repelled."

The pursuer reclaimed, but the case was settled before it was called in the Inner House.

Counsel for Pursuer and Reclaimer—Rhind — A. S. D. Thomson. Agent — William Officer, S.S.C.

Counsel for Defender and Respondent—Mackay. Agents—Mackenzie & Kermack, W.S.

Tuesday, March 8.

SECOND DIVISION.

DICKIE AND OTHERS (DICKIE'S TRUSTEES) *v.* DICKIE AND ANOTHER.

Succession—Policy of Assurance—Special Destination.

A special distination in a policy of assurance will be given effect to in a competition between the trustees named in the policy and the executor-dative of the assured, even although the policy was not intimated to the trustees and the assured died insolvent.

Assurance — Life Assurance — Husband and Wife—Married Women's Policies of Assurance Act 1880 (43 *and* 44 *Vict. cap.* 26), *sec.* 2 — *Destination Different from the terms of the Statute.*

The wife of a person who has effected a policy of life assurance will not be deprived of the benefit of the statute because the destination is in favour of "his children, whom failing his widow, whom all failing his own nearest heirs whomsoever," and contains a reserved power to regulate the terms of payment and vesting.

The Rev. Matthew Dickie on 16th December 1887 effected a policy of assurance for £400 on his own life with the Standard Life Assurance Company. The policy was made payable "to the said Rev. Matthew Dickie, Andrew Borland Dickie, and others, and the survivors and acceptors, and survivor and acceptor of them, as trustees and trustee for behoof of the widow of the said Rev. Matthew Dickie in liferent allenarly, and his children, or the survivors of them, whom failing his widow, whom all failing his own nearest heirs whomsoever in fee, subject to such regulations as to the terms of payment and vesting as the said Rev. Matthew Dickie may appoint by any separate writing under his hand." Mr Dickie died on 20th August 1890 intestate and without issue. The proceeds of the policy were claimed (1) by Mr Dickie's executor Andrew Borland Dickie, and (2) by his widow Mrs Mary Stewart Davidson or Dickie. The trustees named in the policy raised a multiplepoinding.

The executor pleaded—"(1) The claimant, as executor of the deceased Rev. Matthew Dickie, is entitled to the whole fund *in medio*, in respect the said policy did not constitute a provision to the widow at common law, nor constitute a trust for her benefit under the Married Women's Policies of Assurance (Scotland) Act 1880. (2) The deceased being insolvent at the date when he effected the insurance, and also at the date of his death, the policy in question is not available to the widow as a postnuptial provision, and it belongs to the claimant *qua* executor for behoof of the whole creditors of the deceased."

The widow pleaded—"(1) In respect that the sum payable under the said policy of

assurance was a provision in favour of the claimant, she is entitled to be ranked and preferred in terms of her claim. (2) By virtue of the Act 43 and 44 Vict. cap. 26, the claimant is entitled to the whole fund *in medio.*"

The averments and arguments appear sufficiently from the opinion of the Lord Ordinary (KINCAIRNEY). He pronounced the following interlocutors:—"*12th January.*—Finds that the fund *in medio* is the sum payable under the policy libelled: Finds that the said sum was duly paid to the trustees to whom it was destined by the policy, and that the claimant Mrs Mary Stewart Davidson or Dickie, widow of the deceased, is entitled to payment thereof: Finds that the executor-dative of the deceased has no right or title to the sum due under the said policy: Therefore repels his claim, and ranks and prefers the said Mrs Mary Stewart Davidson or Dickie on the fund *in medio*, in terms of her claim, and decerns," &c.

"*12th January.*—Finds the claimant Andrew Borland Dickie liable in expenses to the claimant Mrs Mary Stewart Davidson or Dickie," &c.

"*Opinion.*—The fund *in medio* in this multiplepoinding consists of the proceeds of a policy of insurance on the life of the late Rev. Matthew Dickie, United Presbyterian minister, Alva, who died intestate on 20th August 1890. The fund is claimed (1) by his executor-dative, and (2) by his widow. The policy was effected on 16th December 1887, and the sum insured was thereby stated to be payable to certain persons (who are the real raisers), 'as trustees and trustee for behoof of the widow of the said Rev. Matthew Dickie, in liferent allenarly, and his children or the survivors of them, whom failing his widow, whom all failing his own nearest heirs whomsoever in fee, subject to such declarations as to the terms of payment and vesting as the said Rev. Matthew Dickie may appoint by any separate writing under his hand.' There were no children of the marriage, and therefore the sum in the policy was made payable by the trustees to the widow, and she claims it in respect of the destination.

"The other claimant, the executor-dative of the deceased, avers that the deceased kept the policy in his own repositories, and did not intimate it to the trustees; and he further avers that Mr Dickie was insolvent when he effected the policy, continued to be so, and was insolvent when he died. I assume the truth of these averments.

"It was maintained for the widow that the trustees were in right of the fund in respect of the special destination without making up any title to it, and that they were bound to pay it to her, and that the executor-dative had no title to demand it. The claimant's pleas do not appear aptly framed to support that argument, but they may, I think, be stretched to cover it, and it appears to me to be well founded. Assuming that the sum in the policy was in *bonis* of the deceased at his death, still it was destined to trustees for a specified purpose, and it could not, I apprehend, be taken up by the executor-dative any more than the whole estate of a deceased who had conveyed it to trustees by a trust-deed could be. That the destination in favour of trustees must receive effect is clear from the cases of *Walker's Executor* v. *Walker*, January 19, 1878, 5 R. 965, and *Connell's Trustees* v. *Connell's Trustees*, July 16, 1886, 13 R. 1175. The trustees, again, have no other duty in regard to it except to fulfil their trust. Possibly the provision for the widow might not at common law prevail against the creditors of the deceased, and might be cut down by a sequestration of his estate. But the executor represents the deceased and not his creditors, and has no title to claim the fund on their account.

"The widow claims the sum in the policy on another ground, viz., in respect of the provisions of section 2 of the Married Women's Policies of Assurance (Scotland) Act 1880 (43 and 44 Vict. cap. 26). That section provides, in regard to a policy in favour of the wife of a person insured, that a policy of insurance effected by a married man on his life, and expressed to be for the benefit of his wife, shall be deemed a trust for her benefit, for her separate use, and shall immediately vest in him or in any trustee nominated in the policy in trust for the purpose expressed, and shall not be subject to his control or form part of his estate, or be liable to the diligence of his creditors, or be revocable as a donation or reducible on the ground of excess or insolvency, subject to the *proviso* in the statute.

"It is contended on behalf of the widow that the provision in her favour expressed in the policy in question is protected by the statute.

"The executor-dative on the other hand disputes the application of the statute. He avers that the deceased did not intend to effect a policy under the statute, and proposes to prove that averment by parole evidence. He further avers that the policy is in several particulars disconform to the policy contemplated by the statute, because the sum in the policy is made payable to the widow, not to the wife of the insured, because of the destination to the representatives of the deceased in the event of the predecease of his wife, and because of the reserved power to regulate the terms of payment and vesting. He maintains that these provisions have the effect of reserving to the husband a control over the policy, which is inconsistent with the provisions in the statute, vesting the sum insured absolutely in the wife. I doubt whether I ought to express any opinion on this plea, because my judgment is independent of it, and because I am not clear that the executor-dative is the proper contradictor of the widow on the question. But as the point was carefully argued, and as the parties somewhat anxiously desired a judgment on it, I may very shortly indicate the impression I have formed.

"I think that the policy must be judged by its terms, according to their sound construction, and that the proposed parole

proof is incompetent. I consider, further, that the question is, whether there is in the policy a provision to the widow of the insured which is protected by the statute. There is no question about provisions to children. I think that the policy, so far as it purports to make a provision for the widow, contains no more than a provision for her, and for the heirs of Mr Dickie in the event of her predecease. I consider that the clause as to the terms of payment and vesting refers to the provisions to children who did not come into existence. I do not think that the destination-over to the representatives of the deceased takes the case out of the statute. There was such a destination in the policies considered in *Schumann* v. *The Scottish Widows Fund Society*, March 5, 1886, 13 R. 678; *Holt* v. *Everall*, 1876, L.R., 2 Ch. Div. 266; *Seyton* v. *Salterthwaite*, 1887, L.R., 34 Ch. Div. 511, in all of which the application of the statute seems to have been taken for granted. Further, I think that the destination to the widow adequately indicates that the person provided for is the wife of the insured, and satisfies the requirement of the statute on that point.

"On the whole, I lean to the opinion that the plea of the widow is well founded, but I prefer to rest my judgment on the ground that her right is, in a competition with the executor-dative, constituted by the terms of the policy irrespective of the statute."

The executor reclaimed, but the Court adhered without pronouncing opinions.

Counsel for the Pursuers and Real Raisers and the Executor—A. S. D. Thomsom. Agent—D. Hill Murray, S.S.C.

Counsel for Widow — Ure. Agent — David Turnbull, W.S.

HOUSE OF LORDS.

Tuesday, May 31.

(Before the Lord Chancellor, Lord Watson, Lord Herschell, Lord Morris, and Lord Field.)

DARLING (PAUPER) *v.* GRAY AND SONS.

(*Ante*, vol. xxviii. p. 872, and 18 R. 1164.)

Reparation—Master and Servant—Injury to Workman resulting Fatally after Action brought — Solatium — Executor —Competency of New Action by Mother for Damages for same Injury.

A workman died during the progress of an action of damages which he had brought against his employers for injuries sustained in their service, and his mother, as his executrix, was sisted as pursuer in the action. The mother afterwards brought an action of damages as an individual against her son's employers for the loss caused to herself by the death of her son.

Held (*aff.* judgment of the Second Division) that this second action was incompetent.

This case is reported *ante*, vol. xxviii. p. 872, and 18 R. 1164.

The pursuer Mrs Jane Wood or Darling appealed.

At delivering judgment—

LORD WATSON—I am of opinion that the unanimous decision of the Second Division of the Court of Session in this case is in strict accordance with the existing law. The reasons assigned for it, which were delivered by Lord Young, are not fully expressed, but it sufficiently appears that the judgment of the Court proceeded upon the ground that the appellant's action was unknown to the law, and was therefore incompetent. The maxim *actio personalis moritur cum persona* has a very limited application in the law of Scotland, and in evidence of that proposition I need do no more than refer to the elaborate opinions of Lord Neaves and other Judges in *Auld* v. *Shairp*. It is in my opinion unnecessary for the purposes of this appeal to examine that case or to consider how far a bare claim in respect of personal injuries occasioned by the negligence of another constitutes a debt due to the party injured, which will pass upon his death without having brought an action to his personal representatives. The law has long been settled that when the deceased has instituted an action to enforce his claim, his executor can take up and insist in the process to the effect of recovering the pecuniary damages to which the deceased was entitled. The Court of Session, by a series of decisions which trench somewhat closely upon the province of the Legislature, has, subject to certain limitations, sustained actions at the instance of relatives of the deceased in their own rights, and not in a strictly representative capacity, against the parties whose negligence occasioned his death for the loss which they personally suffered through that event. Your Lordships had recent occasion in *Clarke* v. *Carfin Coal Company* to consider the class of persons to whom such a right of action has been given, and it was there held, in accordance with the rule adopted in the Courts below, that it only comprehended those persons between whom and the deceased there existed a reciprocal obligation of support in the event of either of them becoming indigent. The practical effect of your Lordships' decision was to limit the class to persons standing in the legitimate relation of husband, father, wife, mother, or child to the deceased. In *Eisten* v. *Eisten*, which is the leading authority upon this branch of the law, the Lord President (Inglis) observed—"As the existence of such claims in our common law is a peculiarity of our system, it is not desirable to extend this class of actions unless they can be justified on some principle which has been already established." In that observation, which has been repeatedly made in different terms by other Judges of the Court of