And as regards the case of *Allan*, it distinguishes very clearly between such a case as we have at present and the case with which the Court were then dealing. It does so absolutely, and the decision in *Allan's* case in no way affects the decision of the First Division in the case of the *Athole Hydropathic*.

Mr Constable stated a very ingenious argument to the effect that if the decision to be given in this case was to be in accordance with the case of the *Athole Hydropathic*, certain logical consequences would follow in other cases. I do not know whether that is so or not, nor do I think it necessarily follows. But if it be true that certain logical consequences would follow, that is a matter for the Legislature to deal with and not for this Court. Therefore although the argument of Mr Constable was very ingenious we cannot go behind the case of the *Athole Hydropathic*.

LORD ARDWALL was not present.

The Court pronounced this interlocutor—

. . . "Find the sequestration at the instance of the reclaimers competent: Authorise them to proceed therewith, and decern," &c.

Counsel for the Compearers—G. Watt, K.C.—C. H. Brown. Agents—W. & T. P. Manuel, W.S.

Counsel for the Respondents—Constable. Agents—Davidson & Syme, W.S.

Saturday, October 26.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

THE ALLGEMEINE DEUTSCHE CREDIT ANSTALT AND ANOTHER *v.* THE SCOTTISH AMICABLE LIFE ASSURANCE SOCIETY AND OTHERS.

Process—Insurance—Declarator ab ante—Declarator of Title without Proper Contradictor—Competency—Right in Policy of Assurance not yet become a Claim.

Assignees of a policy of insurance on the life of A raised an action of declarator against the assurance company and also against former holders of the policy (who, however, were not subject to the jurisdiction of the Court), in which they sought declarator that they had right to the policy, that the defenders other than the company had no right in the policy, and that the company were bound on the sums becoming due and payable to make payment to them or those then in their right. At the date when the action was raised A was still alive. The company alone lodged defences.

Held that the action must be dismissed inasmuch as (1), so far as directed particularly against the assurance company it was a declarator *ab ante* which could not be entertained, and (2), so far as it was a declarator of title only, there was no proper contradictor present.

On 28th June 1906 the Allgemeine Deutsche Credit Anstalt and Erttel Freyberg & Company, bankers, Leipzig, raised an action against the Scottish Amicable Life Assurance Society, Oscar Philipp, merchant, London, the official receiver in bankruptcy as trustee on Philipp's bankrupt estate, Gustav von Portheim, merchant, Prague, and W. Schultz-Engelhard, Berlin, in which they sought to have it found and declared that they had right to the extent of one-half each to the policy of assurance No. 34,186, dated 22nd August 1884, granted by the defenders the Assurance Society on the life of Philipp, that the defenders other than the Assurance Society had no right or title in the policy, and that the defenders the Assurance Society "are bound, on the sums contained in the said policy becoming due and payable, to make payment thereof to the pursuers or to any person or persons who may have derived right from them in and to the said certificate, policy, contents, and proceeds thereof."

The policy in question narrated that Oscar Philipp had become a contributor of the Assurance Society, that he undertook to pay the premiums mentioned, and on that being done "then Gustav von Portheim, merchant, Prague, Austria, his executors, administrators, or assignees, shall be entitled to receive out of the stock and funds of the said society after the death of the said contributor, on proof of said death being made to the satisfaction of the ordinary committee of management of the said society, the sum of two thousand pounds sterling."

The pursuers averred that after a series of assignments, which were set forth, the interest in the policy was now vested in them.

The only defenders who compeared were the Assurance Society. They admitted the receipt of many notices with regard to the policy, stated that they had declined, and did decline, to go into the question of the validity of the pursuers' title, and pleaded, *inter alia*—"(4) The action as laid is incompetent in respect that the pursuers have no right to demand a declarator in the circumstances condescended on. (5) The action as laid is premature. (6) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons in respect that they do not disclose any right in the pursuers to maintain this action against these defenders in respect of a policy which has not yet become a claim."

On 2nd February 1907 the Lord Ordinary (ARDWALL) pronounced this interlocutor:—"Sustains the 4th, 5th, and 6th pleas-in-law stated for the defenders: Dismisses the action so far as the same is directed against the defenders the Scottish Amicable Life Assurance Society, and decerns."

Opinion.— . . . [*After narrating the nature of the action, supra*] . . .

"Since the policy was entered into it has had a somewhat complicated history, as will be seen from the notices set forth in the defences. A glance at these notices shows that questions of very considerable difficulty, and among these possibly questions as to the law of foreign countries, would require to be investigated if the defenders the Assurance Society were to determine now who is in right of the policy, and accordingly when the purusers wrote them in 1904 asking that they should admit that the pursuers were the persons in right of the policy, the Society wrote the letter of 17th March 1904 in which they say that they can express no opinion as to the effect or validity of the pursuers' title until they were called on to make a payment under the policy, when the whole title would require to be examined and reported on by the Society's solicitors. The Society having thus refused to pronounce any judgment on the question of title, the present action was brought for the purpose of having the pursuers' title to the policy declared, and the question to be determined now is whether the pursuers were entitled to make the request they did, and whether the present is a competent action against the Assurance Society. No further notice need be taken of the other defenders; two of them have put in consents to decree in terms of the declaratory conclusions of the summons, but none of them are subject to the jurisdiction of this Court, and therefore I propose to consider this action as one directed solely against the Scottish Amicable Life Assurance Society. It appears to me that upon the contract embodied in the policy of assurance, and having regard to the law and customs regarding such contracts, the present action is incompetent as directed against the Assurance Society. What they contract to do is to pay a certain sum on proof of death of the contributor, and they are compelled by Act of Parliament to record all notices of assignations and other documents of change of title to the policy of which notice may be given to them. This they have regularly done. But there is nothing in the contract entitling any person who may acquire right to the policy to come to the Society before the sums in the policy fall due and demand from them an acknowledgment of the validity of the title. The onerous nature of the demand thus made upon the defenders is obvious. The pursuers make no secret in the correspondence or on the record that the object of obtaining an acknowledgment or certificate of validity from the defenders is in order that they may realise or otherwise deal with the policy. Now supposing the defenders to grant an acknowledgment of the validity of the pursuers' title, if the pursuers were thereafter to sell or assign the policy on the faith of that acknowledgment, the purchaser from them would be in a position at the death of the contributor to come forward and demand the proceeds of the policy, and the defenders would be barred from refusing to pay by their acknowledgment, even supposing it ultimately turned out that some one else had somehow or other got a better title. But it was suggested that when the action was raised the defenders ought to have allowed decree to go out against them in absence; but if they had done so I think they would have been in very much the same position as if they had granted an acknowledgment, for it might be said when the time for payment arrived that by allowing decree in absence to go out against them they had misled some person or persons into purchasing the policy, and, on the other hand, if they defend the action and have a decree go out against them notwithstanding their defence, it might afterwards be pleaded against them when the policy came to be paid that they did not put forward a proper defence. In short, whatever way the matter is looked at it comes to this, that what the pursuers demanded from the defenders by letter and now demand by action amounts to little less than a guarantee of the validity of their title. Now, I think a contract binding an insurance company at any time to give such a guarantee would need to be in very precise terms, and the fact that the Legislature imposes on them a duty of recording notices and of giving to the persons making the notices an acknowledgment in writing that such notices have been received, seems to imply that they have nothing to do with the validity or invalidity of the notices sent in for registration. (See 30 and 31 Vict. cap. 144, sections 1, 3, and 6.)

"But when the last conclusion which I have above alluded to is looked at I think it will be seen at once that this action is quite incompetent under the policy, because the obligation in the policy is to pay the sum insured to Gustav von Portheim and his assignees, whereas the present summons concludes for declarator that the Society shall be bound to make payment of these sums to the pursuers or any person who may derive right from them, thus really substituting a new contract for that contained in the policy. I therefore am of opinion that the action is incompetent and premature.

"An ingenious argument was, however, submitted to me for the pursuers upon the authorities, to the effect that the right to this policy being, on the pursuers' averments, vested in them, they are entitled now to have that right declared, it being of importance to them that that should be done in order to enable them to realise the policy. Now, undoubtedly in the case of *Mackenzie*, 8 D. 964, and *Provan*, 2 D. 298, similar actions were entertained, but as I read these and other cases in the light of the opinion of Lord Justice-Clerk Inglis in the case of *Harvey* v. *Harvey's Trustees*, 22 D. 1310, it is evident that such actions can only be allowed where the Court can be certiorated that all the persons who have or can have an interest in the fund in question are made parties to the action, so that they will be bound by the decree in it, and further it is necessary that in such actions the persons against whom they are brought are proper contradictors of the

declarator concluded for. In the present case both these elements are wanting. In the first place, it is impossible to say who may turn up when the policy falls due to claim the proceeds. The original contributor Oscar Philipp, or his trustee in bankruptcy, may have more rights in it either by way of reversion or if there are flaws in transmissions of it, and it is quite uncertain who, at the time when the sum becomes payable, will be the holder of the policy. Further, it may happen that the whole of the present proceedings may be rendered nugatory by the policy lapsing on account of some breach of the conditions, or in consequence of non-payment of the premiums, but above all, there is not here a proper contradictor, if the defenders against whom there is no jurisdiction are excepted. The Scottish Amicable Society have no pecuniary interest in the question as to whom the proceeds of the policy shall be paid. When the time comes when they have to make such payment they will then have to determine on the best advice they can get, and after thorough investigation of the title, to whom payment should be made; or if there are competing claims they may, as is the usual course, lay the proceeds of the policy on the table of the Court, and let those who have the real interest in the question of the title dispute their rights *inter se*."

The pursuers reclaimed, and argued—The reclaimers had a vested right to the policy, and they were entitled to have that right declared. It was of importance to them to have the declarator craved, as they would then be in a position (which they were not at present) to realise the policy, or to use it as a fund of credit, or to surrender it. The insurance company had appeared, and there was therefore a proper contradictor before the Court. Moreover, the pursuers had called all possible contradictors. In these circumstances a declarator *ab ante* was competent—*Mackenzie's Trustees* v. *Mackenzie's Tutors*, July 1, 1846, 8 D. 964; *Earl of Mansfield* v. *Stewart*, July 3, 1846, 5 Bell's App. 139, *per* Lord Brougham, at p. 160; *Harveys* v. *Harvey's Trustees*, June 28, 1860, 22 D. 1310; *Chaplins' Trustees* v. *Hoile*, October 30, 1890, 18 R. 27, 28 S.L.R. 51; *Cairns' Trustees* v. *Cairns*, November 29, 1906, 1907 S.C. 117, 44 S.L.R. 96. Reference was also made to the Policies of Assurance Act 1867 (30 and 31 Vict. cap. 144), section 1.

Counsel for respondents were not called on.

LORD PRESIDENT—In this case I think the judgment of the Lord Ordinary is clearly right. The matter arises in this way. A policy of insurance was taken out with the Scottish Amicable Life Assurance Society in favour of a certain gentleman called Oscar Philipp. The pursuers, who are bankers in Germany, raised an action in which they called certain persons who have at different times, according to them, been in right of the policy; and they also called the Scottish Amicable Life Assurance Society. They asked for declarator that the pursuers have good and undoubted right and title to the extent of one-half each—for there are two pursuers—in the policy; and they put in the conclusion that the defenders the Scottish Amicable Life Assurance Society are bound, on the sums contained in the said policy becoming due and payable, to make payment thereof to the pursuers or to any person or persons who may have derived right from them. They base that demand upon a statement in which they set forth a large number of transferences to different people, with a certain amount of bankruptcy proceedings as part of the story, and they say they are now the persons in right of the policy.

Now, the only contradictors the pursuers can get are either the original persons to whom the policy belonged or some of the people in the chain of transmissions which is set forth. The Insurance company, of course, have no interest in the matter as to whom the policy belongs. Their interest is this, that if the policy matures and becomes a claim then they will have to pay the proper person. If the pursuers had left out the conclusion which is directed against the Scottish Amicable Life Assurance Society, then, of course, the Scottish Amicable Life Assurance Society would not, I take it, have entered appearance in the action, because no decree that would have been pronounced could possibly have bound them, there being no reference to them in the only conclusion which would then have remained. Whether the action would have gone on or not would have depended upon whether any of those who are called would have come forward, for if they did not there would have been decree in absence against them; if they did it would have been upon such grounds of defence as they set forth. But the Insurance company would not have been here. When the pursuers put in their claim against the Insurance company they put in something which in my judgment they were not entitled to ask, because no one can tell whether the Scottish Amicable Life Assurance Society will ever be bound to make payment to the pursuers. No one knows who will be the claimants when the time comes for the policy to mature, or when it has been turned into a claim by means of a surrender. Therefore to entertain a declarator *ab ante* against the Insurance company seems out of the question. A very good test of the competency is this—could the Insurance company have raised an action of multiplepoinding at this time upon such a question? Clearly they could not.

Counsel for the pursuers here have said that they would be quite content if decree was not given in terms of that conclusion. But that simply turns out their action upon another ground, because then it is perfectly clear that the Scottish Amicable Life Assurance Society ought not to be here at all, and they are entitled to have the action dismissed as against them.

To these observations I only add that I am perfectly satisfied with the manner in

which the Lord Ordinary has expressed his opinion. I have never known, and counsel have been unable to produce to us, any action of declarator where the Court gave a declarator as to a right without there being a proper contradictor present. It seems to me that the whole argument we have listened to this morning was vitiated by an assumption as to who the contradictor in this case is. The Insurance Company is not the contradictor as in the question of whom the insurance policy belongs to. The contradictor must be found among the ranks of the parties to whom at various times the policy belonged, and depends upon the question of whether these various steps or links of the chain of title are or are not correct. The Insurance Company have no interest whatever except simply to pay the policy when it becomes a proper claim. Therefore it seems to me that the whole of the cases where declarators have been obtained have really no application to the case before us. I propose to your Lordships that we adhere.

LORD KINNEAR—I am of the same opinion, and I only add that my reasons are stated very clearly by the Lord Ordinary in the last paragraph of his opinion, and I agree in all that his Lordship has said.

LORD DUNDAS—I agree with the Lord Ordinary, and with your Lordships. I confess that I think the case a very clear one. There is no proper contradictor here, and no actual *lis*. As your Lordship has pointed out, it is clear that a multiplepoinding cannot at this time be competently raised, and that, I think, is a conclusive test of the situation.

LORD M'LAREN and LORD PEARSON were not present.

The Court adhered.

Counsel for the Pursuers (Reclaimers)—Morison, K.C.—J. G. Jameson. Agent—F. J. Martin, W.S.

Counsel for the Defenders (Respondents)—Dean of Faculty (Campbell, K.C.)—Spens. Agents—Thomson, Dickson, & Shaw, W.S.

Tuesday, October 29.

FIRST DIVISION.

DENHOLM'S TRUSTEES *v.* DENHOLM.

Succession—Will—Construction—"Horses and Carriages"—Motor Cars.

A testator directed his trustees, after providing certain gifts to a brother, to make over to his wife "my whole other furniture and plenishing including books, plate, pictures, jewellery, ornaments, and bed and table linen, and also my horses and carriages, live stock, plants, and garden and stable implements." He also bequeathed to her his landed estate of X.

At the date when he executed his will he owned horses, a brougham, and a waggonette, but these he subsequently sold and bought two motor cars, which he had at the time of his death.

Held that the bequest carried the motor cars.

By his trust-disposition and settlement dated 22nd October 1890, and recorded in the Books of Council and Session 9th January 1907, the late John Denholm, The Mains, Eastwood, Renfrewshire, assigned and disponed to trustees therein mentioned his whole estate, heritable and moveable, for the following purposes, viz.—"(*First*) For payment of all my just and lawful debts and sickbed and funeral expenses . . . (*thirdly*) I direct my trustees to deliver to my brother Thomas my gold watch, breech loading gun, and all my body clothing, together with all articles of every description belonging to me that are at Greenhill at the time of my decease; (*fourthly*) I direct my trustees to make over to my said wife Kate Gillies or Denholm my whole other furniture and plenishing, including books, plate, pictures, jewellery, ornaments, and bed and table linen, and also my horses and carriages, live stock, plants, and garden and stable implements; (*fifthly*) I direct my trustees to make over to my said wife Kate Gillies or Denholm my lands and estate of Eastwoodmains . . .; and (*lastly*) with regard to the residue of the means and estate hereby conveyed I direct my trustees to divide the same into two equal portions and to pay or convey one portion thereof to my said wife Kate Gillies or Denholm and to pay or convey the other portion thereof equally among my brother Thomas, my sister Janet, and the children of my deceased sister Elizabeth *per stirpes*. . . ."

A question having arisen as to whether the bequest of "my horses and carriages" carried motor cars, a special case was presented, the parties to which were (1) the testamentary trustees, *first parties;* (2) Mrs Denholm, the widow, *second party;* and (3) the residuary legatees, *third parties.*

The case stated—"Mr Denholm resided at The Mains, a small residential estate near Giffnock, about five miles south of Glasgow on the Kilmarnock Road. That estate adjoins and is surrounded on three sides by his estate of Eastwoodmains. He left estate amounting to about £53,000. For many years Mr Denholm kept a brougham and a waggonette and one carriage horse, and occasionally a riding horse, but about four years ago he bought a 10 H.P. Argyll open motor car, and got his coachman trained to drive it. Shortly thereafter he sold his waggonette and horses but retained his brougham, for which he occasionally got a horse on hire. About a year before his death he bought another motor car—a 16 H.P. Argyll brougham motor car—and he then sold his brougham. These motor cars were in his possession at his death, and they are valued for Government duty purposes at £75 and £450 respectively."