Saturday, June 25.

FIRST DIVISION.

PIRIE AND OTHERS *v.* PIRIE.

Husband and Wife—Provision or Onerous Transaction — Assignation of Policy of Assurance to First Wife during Marriage —Subsequent Assignation to Second Wife — "Sundry Onerous Causes and Considerations."

A policy of assurance on his life, payable at death, was assigned by the insured to his first wife during their marriage. After her death the insured married again, and during the marriage assigned the policy to the second wife, who survived him. The assignations were in identical terms and bore to proceed upon "sundry onerous causes and considerations," gave full power to the assignees to receive and discharge all sums due or that might become due, and bound the assured to obey the whole conditions of the policy and to pay the yearly premiums necessary to keep it up. The assignation to the first wife was delivered to her, and both assignations were intimated to the assurance company. The insured paid the premiums during his lifetime, and the assignations and policy remained throughout his life in the custody of his law agent. *Held* (1) that the assignation to the first wife imported no more than a postnuptial provision which was to take effect only in the event of her survivance, and (2) that the second wife was entitled to the proceeds of the policy.

Miss Sarah Pirie and others, the surviving daughters of the late Mrs Margaret Robertson or Pirie, the first wife of the late Alexander Pirie, hotelkeeper, Brechin, and the sole next-of-kin of the late George Pirie, son of Mrs Margaret Robertson or Pirie, *first parties*, and Mrs Mary Flett or Stuart or Pirie, widow of the late Alexander Pirie, *second party*, brought a Special Case for the opinion and judgment of the Court with regard to their rights in the proceeds of a policy of assurance on Alexander Pirie's life.

Alexander Pirie died on 11th April 1920. He was twice married. The said Mrs Margaret Robertson or Pirie, to whom he was married in 1861, died intestate on 27th July 1873. He married his second wife in 1877. George Pirie, the son of the first marriage, died intestate in 1901.

The Case stated, *inter alia*—"2. The said Alexander Pirie effected a whole life policy of assurance on his life with the Rock Life Assurance Company for the sum of £350, which was to become payable with profits at his death. The policy was dated 31st December 1858 and is numbered 10,310. Mr Pirie regularly paid the premiums of insurance due on said policy until his death. The amount payable under said policy of assurance, with the profits accrued thereon is £686, 6s., which has been paid by the insurance company on a discharge by all the parties to this case under reservation of all their legal rights and pleas. This sum has by arrangement between the parties been consigned in bank in the joint names of the agents of the parties pending a decision under this Special Case. 3. In 1866 the said Alexander Pirie executed and delivered to his then wife Mrs Margaret Robertson or Pirie an assignation of the said policy in the following terms, viz.—'. . . I, Alexander Pirie sometime of Market Street, Aberdeen, now of the Commercial Inn, Brechin, hotelkeeper, for sundry onerous causes and considerations, do hereby assign to Mrs Margaret Robertson or Pirie, my spouse, for her own separate use and exclusive of my *jus mariti* and right of administration, the certificate or policy of assurance granted by the Rock Life Assurance Company number Ten thousand three hundred and ten, dated the thirty-first day of December Eighteen hundred and fifty-eight . . . by which certificate or policy it is provided that . . . the funds and property of the said company should be liable . . . to pay and satisfy within three calendar months after satisfactory proof shall have been received at the office of the said company of my death and the cause thereof unto my executors, administrators, or assigns the sum of Three hundred and fifty pounds, and such further sum or sums as should under the regulations of the said company be appropriated as a bonus to the said policy —together with said sum of Three hundred and fifty pounds and all vested additions or bonuses already declared or accruing or that may be declared or accrue thereon, and the whole claims, advantages, and benefits which may arise from said certificate or policy—with full power to my said spouse to receive and discharge all sums due or that may become due thereunder—and I bind myself to obey the whole conditions of said policy and to pay the yearly premiums necessary for keeping up the same in full force and effect and I grant warrandice from my own fact and deed only and I consent to the registration hereof for preservation and execution. . . .' The said assignation was duly intimated to the insurance company. 4. No evidence is available at this date as to whether any, and if so, what consideration was given by the said Mrs Margaret Robertson or Pirie for the said assignation other than the statement which appears *ex facie* of the deed. Nor is any evidence available as to whether at the date of the assignation being granted the said Mrs Margaret Robertson or Pirie was possessed of any separate estate. No antenuptial contract of marriage had been entered into between the spouses. 5. In 1911 the said Alexander Pirie executed and delivered to his second wife Mrs Mary Flett or Stuart or Pirie an assignation of the said policy in the following terms, viz.—[With the exception of the wife's name the terms of this assignation were the same as those of the one quoted *supra*.] The said assignation was duly intimated to the insurance company. Mr Pirie paid the premiums on the policy during his lifetime, and both assignations thereof and the policy remained

throughout in the possession of Mr Pirie's law agent. No antenuptial contract of marriage had been entered into between Mr Pirie and the second party. 6. Questions have arisen between the parties to this Special Case as to their rights to the said sum of £686, 6s. which forms the proceeds of the said insurance policy."

The first parties maintained that the assignation in favour of the said Mrs Margaret Robertson or Pirie divested the said Alexander Pirie of all right to the said policy, and vested the same absolutely in the said Mrs Margaret Robertson or Pirie, and that upon her death intestate the right to the same vested in them and their deceased brother George Pirie.

The second party maintained that if the said Alexander Pirie intended to make a provision for his then wife under the assignation, dated 17th March 1866, the provision fell by her predecease of her said husband, and, alternatively, if the said assignation of said policy was intended as a gift to his first wife by the said Alexander Pirie it was validly revoked by the assignation granted by him in favour of the second party to this case, dated 27th October 1911, and she accordingly claimed the said sum of £686, 6s., being the whole proceeds of the said policy of assurance.

The *questions of law* were—"1. Whether in virtue of the assignation by the said Alexander Pirie in her favour the proceeds of said policy form intestate moveable estate of the deceased Mrs Margaret Robertson or Pirie? Or 2. Is the second party entitled to the proceeds of said policy under the assignation of said policy granted by the said Alexander Pirie in her favour?"

Argued for the first parties—The assignation to the first wife was an onerous transaction by which the policy became part of her estate. After delivery of the assignation she could have claimed delivery of the policy and dealt with it as her own property. The phrase "onerous causes and considerations" in its ordinary meaning meant more than the obligation to provide for a wife. It created a presumption that a legal obligation was satisfied—Fraser, Husband and Wife, p. 925; Ersk. Inst. i, 6, 30—which was not displaced by any of the facts in this case. If it did not mean that the transaction was properly onerous, then there was a presumption in favour of donation and not of provision—Walton, Husband and Wife, p. 134; *Halliburton* v. *Porteous*, 1664, M. 6136, 1 Brown's Sup. 499; *Gray* v. *Scott*, 1703, M. 12,602. The case of *Galloway* v. *Craig*, 1861, 4 Macq. 267, did not apply. It proceeded on the assumption that there was no consideration, and the question was between donation and provision.

Argued for the second party—The assignation to the first wife was no more than a postnuptial marriage provision. The policy therefore reverted to the husband on the first wife's death. The question was not one of donation but of marriage provision or onerous transaction in the sense of the fulfilment of a legal obligation. "Onerous causes and considerations" meant no more than the moral duty to provide for the wife. The absence of an antenuptial marriage-contract, the solvency of the husband at the time of granting, the fact that the assignation was not to take effect until the dissolution of the marriage, the retention of the deed in the possession of the husband and his continuing to pay the premiums, all indicated that the transaction was nothing more than a postnuptial provision. The case was ruled by the decisions in *Galloway* v. *Craig*, 1861, 4 Macq. 267, and in *Anderson* v. *Anderson*, 1903, 5 F. 323, 40 S.L.R. 291.

Lord President—The question in this Special Case relates to the proceeds of a policy of insurance, the competing claimants being (*a*) the representatives of the insured's first wife, and (*b*) his second wife. To each of these ladies the insured granted an assignation of the same policy in (word for word) the same terms. Each of the assignations proceeds upon the recital of "sundry onerous causes and considerations;" the policy is described in identical terms; full power is given to the assignee to receive and discharge all sums due or that may become due under the policy; and in each assignation the insured bound himself to obey the whole conditions of the policy and to pay the yearly premiums necessary to keep it in force. It appears from the Stated Case that the assignation in favour of the first wife was delivered to her, and that both assignations were duly intimated to the insurance company, also that the insured paid the premiums during his lifetime, and that the assignations, together with the policy, remained throughout his life in the custody of the husband's law agent.

The contention made on behalf of the representatives of the first wife is, I think, well founded to the effect that inasmuch as the assignation in her favour was delivered she was in a position to demand delivery of the policy itself. Indeed, so far as that matter has any effect upon the case, I think it must be taken as if the policy itself as well as the assignation in her favour was held by the husband's law agent on her behalf.

Now the question whether the first wife's representatives are entitled to the proceeds of this policy depends on their being able to make out some right in her under the assignation in her favour higher than that of a wife in whose favour a postnuptial provision is made. It is, in short, for them to show that she was an assignee who acquired right to the policy by some onerous transaction (other than marriage) with her husband. In the case of *Galloway* v. *Craig*, 4 Macq. 267 (read in the light of Lord Kinnear's commentary in *Anderson*, 5 F. 323, at p. 329), the question was as between donation and provision; and I think it follows from the judgments in that case that evidence conclusive in favour of provision as against donation may be found (1) in the circumstance that there is no antenuptial provision for the wife, and (2) in the consideration that the subject dealt with as between the husband and wife is one which

by its own nature supports the view that what was intended by the parties was a provision for the wife in the event of her survivance. In *Galloway* v. *Craig*, as in this case, the subject in question was a policy on the husband's life payable at the husband's death; and the natural object of assigning such a policy to the wife being to effect a provision for her in the event of the husband's decease, the presumption seems a powerful one, especially in the absence of an antenuptial contract, that the true character of the assignation was that of a postnuptial provision.

In the present case, however, the alternatives are not between provision and donation but between provision and onerous transaction. What evidence is there in favour of the latter as against the former? I think that much must turn on the actual words used in the assignation to describe the cause of granting. Indeed, these appear to be the only available evidence apart from the general considerations already mentioned—the only available source of evidence on which the onerous character of the transaction can be supported. The assignation recites "sundry onerous causes and considerations." What then is the significance of that? It appears to me that so long as such a recital can be satisfied by the duty and obligation which rest on a husband to provide for his wife, it is illegitimate to attribute to these words any wider meaning. It would be otherwise if there was mention of any specific consideration, for that might be enough to differentiate the assignation from donation and postnuptial provision alike. Dealing with deeds in favour of a wife, Erskine says in book i, tit. vi, sec. 30—"In a question therefore concerning the validity of such bond or obligation, the mention in the recital of any probable occasion by which he became his wife's debtor is sufficient to support it as onerous, and not revocable by the granter, if the fact be not disapproved by legal evidence." What is pointed to as decisive is the recital of precisely such a specific occasion or consideration as is conspicuous by its absence from the general description of "sundry onerous causes and considerations." I do not think I am entitled to attribute to these words—in the absence of any evidence in supplement of them—any higher meaning than that which is sufficient to fulfil them, viz., the natural obligation of the husband; and accordingly it seems to me that this assignation imports no more than a provision and does not amount to an onerous transaction.

It was pointed out that if the assignation was a delivered assignation (as I think it really was), and if in law we must regard the first wife as having been entitled to possession of the policy itself, she might have taken advantage of the situation either to sell the policy or to surrender it. The rights of parties would not have been altered at all if she had sold it, because if the policy was in her hands only as the subject of a provision in the event of her husband's predecease, the purchaser from her would have obtained no higher right to it than she had. And with regard to the suggested possibility of her surrendering the policy, I do not myself see how, if the policy was the subject-matter of a postnuptial provision between her and her husband, she could have effectually surrendered it without her husband's consent. Lastly, it was pointed out that in the assignation the husband expressly renounced his *jus mariti*, and it was said quite justly that this feature of the deed is not altogether consistent with its purpose, being one purely of provision. But while that is perfectly true, it is not in my opinion sufficient to overcome, or seriously to shake, the other and as I think conclusive *indicia* of the true nature of the assignation. Accordingly the questions put to us will have to be answered—No. 1 in the negative and No. 2 in the affirmative.

LORD MACKENZIE — I am of the same opinion. What was said in the case of *Galloway* v. *Craig*, 4 Macq. 267, would be exactly applicable to the present case but for the introduction of the expression "for sundry onerous causes and considerations." But that, in my opinion, cannot be construed as meaning that there was a legal debt due by the husband to the wife, and that what he was doing by the deed was discharging that legal debt, and when those words are construed in that way, then the decision in *Galloway* v. *Craig* exactly applies. What was here given was a provision which was to take effect only in the event of the wife surviving, and the wife predeceased.

The introduction of the clause "exclusive of my *jus mariti* and right of administration" is certainly inappropriate in a deed of this character, but I do not think it is sufficient to take off the effect of the rest of the deed when construed. It may have been introduced with the view of preventing the husband attempting to deal with the policy.

LORD CULLEN—I am of the same opinion. But for the inductive clause in the first assignation the case would be substantially the same as the case of *Galloway* v. *Craig*, 4 Macq. 267, the only difference being a difference in form. In the latter case the policy was taken in name of the wife, whereas here the policy was in name of the husband who assigned it.

The first parties found upon the fact that the assignation bears to proceed upon "sundry onerous causes and considerations." Now these are merely general words and disclose nothing about the actual nature of the cause of granting. No specific consideration is stated at all. The case therefore is not brought into the same class as those referred to by Mr Erskine in the passage which was referred to by your Lordship in the chair. The general words used do not state the matter any higher than one of a provision being made as in the case of *Galloway* v. *Craig*. When we add to that the evidence of the actings of the parties, including the payment by the husband of the premiums during his life, I think that the case for the first parties clearly fails. This conclusion

does not seem to me to be disturbed by the fact that the assignation excluded the husband's *jus mariti* and right of administration. On the view that a provision was being made the wife was intended to be given a *de præsenti* right, although the use to be made of it was contingent on her survivance, and it was therefore consistent with the intendment of the transaction that she should hold that right for her own separate interest, free of her husband's control.

LORD SKERRINGTON did not hear the case.

The Court answered the first question of law in the negative and the second in the affirmative.

Counsel for the First Parties—D. Jamieson. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Second Parties—Aitchison. Agent—James A. B. Horn, S.S.C.

Tuesday, June 28.

FIRST DIVISION.

AITKEN'S TRUSTEES *v.* AITKEN AND OTHERS.

Succession—Liferent or Fee—Direction to Hold and Apply for Children—Subsequent Direction to Hold and Apply for their Liferent Alimentary Use only and for their Issue in Fee—Death of Child without Issue.

An *inter vivos* disposition and assignation contained a direction that after the granter's death his trustees should hold and apply the fee of the whole fund and subjects conveyed for behoof of all his children, equally among them, share and share alike to each child, "and said trustees shall hold and apply each child's share for behoof of such child in liferent for his or her liferent alimentary use only and his or her lawful issue in fee." The deed contained directions regarding the shares of any of the children who might predecease the survivor of the truster and his wife, but made no provision for the event of a child surviving them and dying without issue. The truster also executed eleven years later a trust-disposition and settlement, in which he disposed of the residue of his estate. A son who survived the truster and his wife having died without issue, *held* (*diss.* Lord Mackenzie) that under the direction contained in the disposition and assignation he died vested in the fee of his share.

James Ballantyne and others, as trustees under a disposition and assignation by the late James Aitken, shipbroker, Helensburgh, *first parties*, the said James Ballantyne and others as trustees under the trust-disposition and settlement of the late James Aitken, *second parties*, James Hill Aitken, as executor of his deceased brother Arthur Haynes Aitken, *third party*, the said James Hill Aitken and Lionel George Aitken and Reginald Alexander Aitken, sons of the late James Aitken, who along with the said deceased Arthur Haynes Aitken survived him, *fourth parties*, Betty Florence Aitken and Natalie Aileen Aitken, children of the said James Hill Aitken, and Marjorie Aitken and the other children of the said Lionel George Aitken, *fifth parties*, Mrs Edith Louise Aitken or Colley, Mrs Florence Emily Aitken or Miles, and Mrs Violet Alice Aitken or Reynolds, the surviving daughters of the late James Aitken, *sixth parties*, Percy Harold Colley, son of the said Mrs Colley, and others, as trustees under the marriage settlement of the said Percy Harold Colley, *seventh parties*, Hugh Rupert Miles son of the said Mrs Miles and Olive Joyce Reynolds, daughter of the said Mrs Reynolds, *eighth parties*, brought a Special Case for the opinion and judgment of the Court as to their rights in the share of the truster's estate given to the deceased Arthur Haynes Aitken by the said disposition and assignation.

The late James Aitken died on 9th April 1900. He was twice married and was survived by his second wife Mrs Emily Hill or Aitken, who died in 1913, and by the said Mrs Colley, a child of his first marriage, and the said James Hill Aitken, Lionel George Aitken, Reginald Alexander Aitken, Arthur Haynes Aitken, Mrs Miles, and Mrs Reynolds, children of his second marriage. His estate was administered under two trusts. The first trust was constituted by a disposition and assignation and two deeds of assignation and declaration of trust increasing the trust estate, and the second by a trust-disposition and settlement dated 30th June 1899. Arthur Haynes Aitken died on 10th July 1918 without issue.

The Case stated, *inter alia*—"7. By the said disposition and assignation, dated 13th September and registered in the Books of Council and Session 4th October 1888, the truster, after directing, *inter alia*, the payment of the balance of the income to the said Emily Hill or Aitken during his lifetime, provided, *inter alia*, as follows:— . . . . (Sixth) The said trustees shall hold and apply the fee of the whole fund and subjects before conveyed for behoof of all my children including the said Edith Louise Aitken' (the child of the first marriage) 'equally among them, share and share alike to each child, and said trustees shall hold and apply each child's share for behoof of such child in liferent for his or her liferent alimentary use only, and his or her lawful issue in fee, in such proportions, payable at such time, and subject to such restrictions as the liferenter or liferentrix thereof (their parent) shall appoint by any writing under his or her hand, and in case of no such appointment for behoof of such lawful issue equally, share and share alike, declaring that in the event of any of my children predeceasing the survivor of my said wife and me, the lawful issue of such children so predeceasing shall take the share or shares which would have been liferented by their deceased parent or parents had he or she or they survived, but in the event of any of