appeal: Find the appellants liable in the expenses of the appeal, and remit," &c.

Counsel for the Appellants—Campbell, K.C. — Hunter. Agents — Macpherson & Mackay, S.S.C.

Counsel for the Respondent—Clyde, K.C. —T. B. Morrison. Agent — Alexander Wylie, S.S.C.

Thursday, November 14.

FIRST DIVISION.

DAVIDSON *v.* DAVIDSON.

Succession — Legacy — Special Legacy — Ademption—Policy of Insurance—Policy Paid and Merged in General Estate.

D. took out a policy of insurance on the life of his wife, and executed a trust-disposition and settlement, by the fourth purpose of which he directed his trustees to keep up the policy, and on the death of his wife to divide the proceeds among all his children, sons and daughters; he further directed his trustees to divide the residue of his estate among his sons. The truster was predeceased by his wife, and shortly before her death he became insane, and a *curator bonis* was appointed to him. The proceeds of the policy referred to were received by the *curator bonis*, and administered by him along with the rest of his ward's estate, a portion of these proceeds being utilised towards meeting a balance of expenditure over income in the curatory, and the remainder being invested. The truster never recovered his mental capacity. After his death, *held* that the bequest of the proceeds of the policy of insurance was a special legacy and had been adeemed, the policy having been discharged and the proceeds merged in the testator's general estate during his lifetime, and that consequently the proceeds did not fall to be dealt with in terms of the fourth purpose of his trust-disposition and settlement, but formed part of the general residue of his estate.

Sir David Davidson died on 18th May 1900, leaving a trust-disposition and settlement, dated 7th November 1898, by which he conveyed his whole estate, heritable and moveable, to trustees, and provided, *inter alia*, as follows — "(*Fourth*) I direct my trustees out of the income of my estate to pay the premiums necessary in order to keep in force a policy of assurance for £4000, dated 27th November 1849, numbered N—5654, effected in my name on the life of my said wife with the North British Insurance Company, and upon the death of my said wife to divide the proceeds of the said policy of assurance equally among all my children then alive, the issue then alive of each of my children who may have died leaving such issue being entitled to the shares which their respective parents would have taken had they survived; and further, I direct my trustees to pay to my said wife during all the days of her life the whole remaining free yearly income arising from the residue and remainder of my means and estate." The truster further provided—"(*Fifth*) At the first term of Whitsunday or Martinmas happening after the death of the survivor of my wife and myself, I direct my trustees to make payment of" legacies of £1000 to one of his daughters and £200 each to two other daughters, and "thereafter to divide the whole residue and remainder of my means and estate into five equal parts, and to pay one-fifth to each of my four surviving sons, Thomas St Clair Davidson, David Albert Davidson, Charles Davidson, and William Davidson, and to set apart and invest the remaining one-fifth and pay the free yearly income thereof to the widow of my deceased son Henry Chisholm Davidson, so long as she remains unmarried, for her alimentary use, exclusive of the rights of creditors, and on her death or marriage to pay, convey, and make over the capital of said fifth to the issue of the said Henry Chisholm Davidson." The settlement contained no provision for daughters, other than the general bequest to children in the fourth purpose, and the legacies provided by the fifth purpose.

On 4th November 1899 a petition was presented for the appointment of a *curator bonis* to Sir David Davidson, who had become of unsound mind and incapable of managing his own affairs, and Mr George Dalziel, W.S., was appointed to that office.

Sir David Davidson's mental condition remained unchanged until his death. He was predeceased by his wife, who died on 12th November 1899, and the sum of £4000 payable under the policy on her life, mentioned in the fourth purpose of his trust-disposition and settlement, was received by his *curator bonis* on 14th December 1899, and was administered by him along with the rest of Sir David's estate.

During Sir David's curatory the total expenditure by his curator on the debts and maintenance of the ward, and the expenses of management, exceeded the total income, and the surplus expenditure was met out of the capital of the ward's estate, and to the extent of £698 out of the proceeds of the policy referred to. The balance of the proceeds was placed on deposit-receipt, and was uplifted on 30th May 1900 so far as necessary to pay for certain stocks which the curator had purchased immediately before his ward's death. In encroaching on capital and making payments out of the proceeds of the insurance policy the curator acted on his own responsibility.

Sir David Davidson was survived by four sons and five daughters, and by the widow and children of a predeceasing son.

After his death, questions having arisen with regard to the £4000 for the disposal of which he made provision in the fourth purpose of his settlement as quoted above, a special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) Sir David Davidson's trustees, (2) his surviving sons and the widow and children of his predeceasing son, and (3) his daughters.

The questions of law were—"(1) Does the said sum of £4000, being the proceeds of said policy of assurance, fall to be dealt with in terms of the said fourth purpose? or (2) Does it in the circumstances form part of the general residue of the truster's estate?"

The second parties maintained that the bequest of the proceeds of the policy on Lady Davidson's life contained in the fourth purpose of the truster's settlement had been adeemed in consequence of the predecease of his wife and the merging of the proceeds of the policy in his general estate during his life.

The third parties maintained that there had been no ademption, and that the sum of £4000, which formed the proceeds of the policy, fell to be dealt with in terms of the fourth purpose of the truster's settlement.

Argued for the second parties—The question was the same as if the testator had bequeathed the policy to persons named; and the proceeds having been properly uplifted during the testator's life, the bequest had been adeemed. The fact that the testator was incapax when the policy was paid made no difference. Ademption did not depend upon the intention of the testator but on the existence of the subject of the bequest at the time of his death—*Pagan* v. *Pagan*, Jan. 26, 1838, 16 S. 383, Lord Gillies, at p. 388; *Chalmers* v. *Chalmers*, Nov. 19, 1851, 14 D. 57; *Anderson* v. *Thomson*, July 17, 1877, 4 R. 1101, 14 S.L.R. 654; *Stanley* v. *Potter* (1789), 2 Cox Equity Cases 180, at p. 182; *Ashburner* v. *Macquire* (1786), 2 Brown's Chan. Rep. 108; *Barker* v. *Rayner* (1820), 5 Maddok 208, *affirmed* (1826), 2 Russell 122; *Jones* v. *Green* (1868), L.R., 5 Eq. 555; *Freer* v. *Freer* (1882), 22 Ch. D. 622. At the date of the testator's death there was nothing to which the fourth purpose of his settlement could apply—White & Tudor's Equity Cases (6th ed.), ii. 280; Williams on Executors (9th ed.), ii. 1183

Argued for the third parties—There was no ademption. In his testamentary capacity the testator died when he became insane, and at that time the policy was in existence. If the testator had so invested the proceeds of the policy as to mark them as such, there would have been no ademption—*Moore* v. *Moore* (1860), 29 Beavan 496; *Lee* v. *Lee* (1858), 27 L.J., Ch. 824; *Morgan* v. *Thomas* (1877), 6 Ch. D. 176. When the policy was paid up the testator was unable to express any intention by investing the proceeds so as to mark them, but his intention was clearly indicated by the fact that the only provision he made for his daughters generally was in the fourth purpose of his settlement. A *curator bonis* could not effect conversion unless by necessary administration, and there had been no necessity of administration in the present case—*Taylor* v. *Taylor* (1853), 10 Hare 475; *Jenkins* v. *Jones* (1866), L.R., 2 Eq. 323. At least, so far as the proceeds of the policy were traceable at the date of the testator's death, they fell to be dealt with according to the fourth purpose of his settlement. The cases quoted for the second parties did not apply.

At advising—

LORD ADAM—This case arises under the trust-disposition and settlement of the late Sir David Davidson, which is dated 7th November 1898.

Sir David died on the 18th May 1900. He was predeceased by his wife, who died on 12th November 1899. He was survived by four sons and the widow and children of a predeceasing son — they are the second parties to the case—he was also survived by five daughters. They are the third parties to the case.

On 23rd November 1899 Mr George Dalziel was appointed *curator bonis* to Sir David, who was then of unsound mind and incapable of managing his affairs. He remained in that state until his death.

By his trust-disposition and settlement Sir David left his whole means and estate to trustees, who are the first parties to the case, for the purposes therein mentioned.

By the fourth purpose he directed his trustees out of the income of his estate to pay the premium necessary in order to keep in force a policy of insurance for £4000 effected in his own name on the life of his wife with the North British Insurance Company, and he directed them "upon the death of my said wife to divide the proceeds of the said policy of assurance equally among all my children then alive, the issue then alive of each of my children who may have died leaving such issue being entitled to the shares which their respective parents would have taken had they survived;" and he further directed his trustees to pay to his wife during his life the remaining free yearly income of the residue of his estate.

By the fifth purpose of the settlement he directed his trustees at the first term of Whitsunday or Martinmas which should happen after the death of the survivor of himself and his wife, after making payment of certain legacies therein specified, "to divide the whole residue and remainder of my means and estate into five equal parts, and to pay one-fifth to each of my four surviving sons — Thomas Sinclair Davidson, David Albert Davidson, Charles Davidson, and William Davidson, and to set apart and invest the remaining fifth, and pay the free yearly income thereof to the widow of my deceased son Henry Chisholm Davidson, so long as she remains unmarried, for her alimentary use, exclusive of the rights of creditors, and on her death or marriage to pay, convey, and make over the capital of said fifth to the issue of the said Henry Chisholm Davidson."

The sum of £4000 due under the policy on Lady Davidson's life was received from the Insurance Company by the curator on 14th December 1899, and was administered by him along with the rest of Sir David's estate. In so administering the estate he expended a sum of £698, 11s. 11d. out of the proceeds of the policy, and invested the remainder as set forth in the case.

These are the facts of the case, and the questions of law which we are asked are, whether the sum of £4000, being the proceeds of the policy, falls to be dealt with under the fourth purpose of the trust, or whether it forms part of the general residue of the truster's estate.

It will be observed that in the former case daughters or their issue would receive an equal share with sons or their issue, whereas in the latter case daughters or their issue would be entirely excluded, hence the conflict of interest. I do not think it doubtful that the legacy contained in the fourth purpose of the trust is a special or specific legacy; it is not a legacy of a sum of £4000 payable out of the truster's estate generally, but a legacy of the proceeds of the policy of assurance therein mentioned, and of nothing else. But when upon the truster's death the settlement came to take effect there was neither policy nor proceeds on which it could take effect, the policy having been discharged and the proceeds merged in his general estate during his lifetime.

That the sum due under the policy was received by the curator and administered by him is of no materiality. It had become due and payable, and formed part of his ward's estate, and as such was properly received and administered by him.

It is clear that the truster under the fourth purpose of the trust provided only for the case of his own predecease of his wife, and that he did not contemplate or provide for the case, which has occurred, of her predeceasing him. He very possibly may have thought that it was unnecessary to do so, because in that event he would come into possession of the money, and would be in a position then to dispose of it as he might desire, and probably but for the unfortunate state of mental health in which he was that would have been done in this case.

I am accordingly of opinion that the said sum of £4000 formed part of the truster's residuary estate, and that the first question should be answered in the negative, and the second in the affirmative.

LORD KINNEAR concurred.

LORD ADAM intimated that LORD MONCREIFF, who was present at the hearing, also concurred.

The LORD PRESIDENT and LORD M'LAREN were not present at the hearing.

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

Counsel for the First Parties—Macphail. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Second Parties—Chree. Agents—John C. Brodie & Sons, W.S.

Counsel for the Third Parties—A. O. M. Mackenzie. Agents—E. A. & F. Hunter & Co., W.S.

Thursday, November 14.

FIRST DIVISION.

UNIVERSITY COURT OF ABERDEEN, PETITIONERS.

Process—Nobile Officium—Bill Chamber—Jurisdiction of Lord Ordinary on Bills during Vacation—Scheme under Educational Bequest.

In a petition for the settlement of a scheme under an educational bequest, intimation and advertisement were ordered by the Lord Ordinary on the Bills during vacation. The Court *ordered* intimation and advertisement to be made of new.

The University Court of the University of Aberdeen presented a petition in the Court of Session for the settlement of a scheme for the administration of a bequest made to them by the late Dr F. W. Lyon.

On 6th April 1901 an interlocutor ordering intimation and advertisement was pronounced by the Lord Ordinary on the Bills during vacation.

No answers were lodged.

On 14th May 1901 the First Division remitted to Mr J. H. Millar, Advocate, to report upon the facts and circumstances set forth in the petition, and the regularity of the procedure.

On November 13, 1901, Mr Millar lodged a report, from which the following is an excerpt:—"It is to be observed, however, that the aforesaid interlocutor ordering intimation and advertisement was pronounced by the Lord Ordinary on the Bills during vacation. By section 10 of the Distribution of Business Act 1857 the same powers are conferred upon the Lord Ordinary on the Bills during vacation, with respect to a certain class of petitions, as are by the same statute conferred upon the Junior Lord Ordinary. Again, section 16 of the Trusts (Scotland) Act 1867, enacts that the power of a Lord Ordinary, before whom a petition in terms of that Act is enrolled, may be exercised by the Lord Ordinary on the Bills during vacation. But the present application appears to fall under neither of these statutes. It is a petition invoking the *nobile officium* of the Court, and is presented in the Inner House. No ground of urgency is apparent to bring it within the limited class of cases in which, apart from statutory provisions, and according to custom and practice, the exercise of the *nobile officium* of the Court is held to be delegated to the Lord Ordinary on the Bills during vacation. The reporter has accordingly thought it right to direct your Lordships' attention to the question whether intimation and advertisement should not be ordered of new, and in this connection he begs respectfully to refer to the cases of *Steuart* v. *Chalmers*, June 14, 1864, 2 Macph. 1216, and *Greig*, July 20, 1866, 4 Macph. 1103."

The Court, without delivering opinions, ordered intimation and advertisement to be made of new.