profit derived from the use of the land from the profit derived from the mercantile undertaking carried on by means of the land or its produce, and therefore the two things are massed together and are assessed as a going concern. The supplementary part of No. III directs that the duty is to be charged on the person, corporation, &c. "carrying on the concern," and the Act 29 and 30 Vict. c. 36, sec. 8, directs that the assessment is to be made according to the rules prescribed by Schedule D of the principal Act. Now, if I am right in my conclusion that these slaughter-houses are not carried on with a view to profit, and that no profit in any true sense is made, the provisions of No. III Rule 3 are inapplicable. But it does not follow that the subject is to escape taxation, because the only result of excluding No. III and all its rules is to put the subject into the category of property in the natural occupation of its owner who is not using it as a profit-yielding investment, and it is thus chargeable according to the General Rule No. I of Schedule A upon the rent "at which the same are worth to be let by the year."

This is the principle of the decision of Mr Justice Walton in the case of the *Ystradyfodwg Sewage Board* (1906, 1 K.B. 308), where the learned Judge considered it to be perfectly clear that the mode of assessment prescribed by No III Rule 3 of Schedule A could not be applied to undertakings that were not established or carried on with a view to profit. The contrary contention seems to have been abandoned in the later stage of the case reported in 1907, 1 K.B. 490, and subsequently affirmed in the House of Lords (23 Times' L.R. 621), because, if I rightly follow the report, the only question raised was whether a main sewer was assessable under General Rule No. I or was not assessable at all.

A separate point was made as to the amount of the assessment. I see no reason to doubt that the Inland Revenue Department is entitled to found on the valuation made under the Lands Valuation Act, although that valuation is not necessarily binding on them. No other valuation consistent with General Rule No. I is suggested in the case. The assessable income for the year 1904–1905 accordingly, after making the deductions allowed under the Income-Tax Acts, is £1839, and in my opinion the appeal should be allowed, and it should be found that the subjects are assessable under No. I General Rule of Schedule A upon a net annual value of £1839.

LORD KINNEAR—I concur.

LORD PEARSON—I also am of opinion that the original assessment by the Surveyor was right, and that the appeal must be sustained. It would be a singular and, as I think, an unexpected result if the public slaughter-houses of the city were in the circumstances disclosed to us to be assessable to income-tax under the Rules of No. III of Schedule A. I do not say that in no circumstances could a slaughter-house be brought within the category of works specified in the Third Rule of No. III. But one thing is clear, that in all cases falling under that Rule the charge is to be on the amount of yearly profits, calculated either on the year preceding or on an average of a specified number of years. The undertakings, or "concerns" as the statute calls them, are regarded as going concerns, carried on for the purpose of earning profits. Of course it is always possible that even a concern to which the Rule undoubtedly applies may in any given year or period of years earn no profit, in which case there will be nothing to assess. But I am unable to see how the Rule can apply to a concern which not merely earns no profits but which is not run for the purpose of profit, and which, moreover, being created by statute, is expressly debarred by its statute from earning anything which can really be called profit. That is the position of the Edinburgh City Slaughter-houses. They were built at the expense of the common good of the city at a cost of £20,000, and a perpetual annuity of £1000 a-year is payable out of the slaughter-house returns to square the account. Beyond that, they are forbidden by statute to make a single penny of profit, and they are enjoined so to adjust their rates periodically as to secure this result. I cannot recognise such a concern as falling within No. III of Schedule A, and the alternative must be that the subjects are assessable under No. I General Rule of Schedule A, which provides for an assessment on the annual value of lands, tenements, and hereditaments generally. How that annual value is to be arrived at in the particular case is another matter, but the Commissioners fixed the net annual value of the premises at £1839, which I presume will be allowed to stand for the year of assessment.

The LORD PRESIDENT was absent.

The Court reversed the determination of the Commissioners, remitted to them to refuse the appeal and confirm the assessment, and decerned.

Counsel for the Appellant—Cullen, K.C. —A. J. Young. Agent—Solicitor of Inland Revenue (Philip J. Hamilton Grierson).

Counsel for the Respondents—Cooper, K.C. — Macmillan. Agent — Town Clerk (Thomas Hunter, W.S.)

Friday, July 19.

EXTRA DIVISION.

[Lord Johnston, Ordinary.

BROWNLEE'S EXECUTOR *v.* ROBB.

Assignation—Donation—Insurance—Evidence — Circumstances of Execution — Terms of Deed dealing with Life Assurance Policy which in the Circumstances was Held to Assign Jus Crediti.

The assured, in a policy of life assurance, executed before five witnesses and gave to his daughter, with a certified

copy of the policy, a deed in these terms — "I, A B, hand over my life policy to my daughter C D, now wife of E F, dairyman. . . ." The copy of the policy had been obtained from the assurance company on the ground that the policy itself had been lost, whereas it was in fact (and that, as alleged, to the knowledge of the assured) in the custody of his wife. The deed was written out by a police constable at the request of the assured, and the constable deponed that he had understood that a transfer of the granter's right in the sum contained in the policy was intended.

On the death of the assured, *held* (*diss.* Lord Ardwall and *rev.* Lord Ordinary Johnston) that the deed was a valid assignment of the assured's *jus crediti* in the policy.

Per Lord M'Laren—"The words used are capable of operating as an assignment provided they were used with this intention, but the intention must be evidenced by the deed itself taken in connection with the external circumstances in which it was prepared, executed, and delivered."

Per Lord Pearson—"The words used are not only capable of importing the transfer of the beneficial right, but they are apt words to do so according to their common colloquial use by ordinary Scotch people in that position in life. That to my mind is conclusive as to the sense in which it was intended by the granter and received by the grantee. . . . I think all the surrounding circumstances (assuming that it is competent to regard them) strongly support the view I have expressed."

Per Lord Ardwall (*dissenting*)—"I think it is as incompetent to refer to parole evidence in order to show what intentions the granter expressed to the donee or other people as it would be to refer to similar evidence for the purpose of construing a contract that had been reduced to writing. . . . (*The deed*) amounts to nothing more than this, that the deceased handed over the *corpus* of the policy to his daughter."

Assignation—Policy of Insurance—Intimation.

An assignation of a life assurance policy was not intimated to the insurance company which had issued the policy until after the death of the assured. *Held* that the proceeds of the policy belonged to the assignee, not to the representatives of the assured.

Writ—Attestation—Testament—Informality of Execution—Witness Subscribing ex intervallo, and after Death of Testator—Witness a Beneficiary under Testament.

A will was subscribed by the testator and by one witness. After the death of the testator his widow, who was a beneficiary under the will, and who had been present when it was signed, subscribed as a witness. *Opinions per* Lord M'Laren and *per* Lord Johnston, Ordinary, that the will was invalid. *Tener's Trustees* v. *Tener's Trustees*, June 28, 1879, 6 R. 1111, 16 S.L.R. 672, *doubted per* Lord M'Laren.

The Scottish Provident Institution, Edinburgh, as pursuers and nominal raisers, brought an action of multiplepoinding to decide the question who was entitled to a sum of £160, 6s., being the sum with bonuses contained in a life assurance policy on the life of Joseph Robb, flesher, Edinburgh, who had died on 8th March 1905.

George Brownlee, dairyman, Davidson's Mains, as executor of his deceased wife Elizabeth Scott Robb or Brownlee, the real raiser and defender, claimed in virtue of the following deed (hereafter called No. 7 of process):—

"*Bonnyfield, Barnton, near Cramond Brig,*
"*Monday*, 9 *December* 1901.

"I, Joseph Robb, hand over my life Policy to my Daughter Elizabeth Scott Robb, now wife of George Brownlee, Dairyman, Bonnyfield
Signed By JOSEPH ROBB
"*Witnessed by* Elizabeth S. R. Brownlee, Bonnyfield, Cramond Brig
" George Brownlee Bonnyfield, Cramond Brig
" George B. Johnstone, Roseneath St., Edinburgh Foreman Mason
" David Smith, Rose Street, Edinburgh, Barber
"*Witness* James Brooks, 41 Dean-St., Edinburgh, Butcher's Assistant."

Mary Scott or Robb, the deceased's widow, also claimed (*a*) *qua* executor of her husband, and (*b*) in virtue of an alleged will (hereafter called No. 16 of process) in the following terms:—"Gold watch and chain to John Scott Robb, and gold ring to Walter Scott Robb, and Two horses and two lorries and all the things in the stable under the name of Brownlee to go to Mary Scott Robb. Also insurance papers to go to Mary Scott Robb. JOSEPH ROBB.
"5 1.1904 1904 5/1/1904.
"*Witness* James Hay, *witness*, 6 Valleyfield Street, Edinburgh.
Mary Scott Robb, *witness*, 23 Spittal Street, Edinr. Edinburgh."

The *facts* are given (*cp.* also opinions of Lords M'Laren and Ardwall) in the opinion (*infra*) of the Lord Ordinary (JOHNSTON), who on 30th July 1906 pronounced this interlocutor:—"Finds that the alleged deed of gift, No. 7 of process, did not validly or effectually transfer the deceased Joseph Robb's policy of insurance with the Scottish Provident Institution to the deceased Elizabeth Scott Robb or Brownlee, wife of the claimant George Brownlee, either as an *inter vivos* or a *mortis causa* assignation or donation: . . . Finds that the alleged will of the late Joseph Robb, No. 16 of process, was improbative at the date of his death, and was not rendered probative by the signature of Mrs Robb, his widow, and substantially his universal legatory, after his death, and therefore that the said alleged will, No. 16 of process, is invalid and ineffectual: Finds that the proceeds

of said policy of insurance were intestate succession of the late Joseph Robb, and fall to be administered by the claimant Mrs Robb as his executrix-dative; therefore sustains the claim for her as executrix-dative. . . ."

Opinion.—". . . [*After narrating origin of action supra*] . . . The action, as things stand on the record, might be disposed of by determining the question merely of the validity of the alleged assignation in favour of Mrs Brownlee, as if that document is not effectual as an assignation Mrs Robb, as executrix, must take the fund for the purposes of administration. But the case is really intended to raise the whole question of the proper distribution of the proceeds of the policy, which in direct competition with Mrs Brownlee's executor are claimed by the widow under an alleged will of the deceased, No. 16 of process, and in which, in any view of the alleged assignation in favour of Mrs Brownlee, the widow claims her legal rights. Though the record is not well drawn to raise all the questions at issue, it is only fair to the parties interested in this small succession, to decide if possible all questions among them. And though the sum at stake is small, these questions present considerable difficulties both in fact and in law, and particularly in fact.

"I shall deal with the questions in fact first. Mr Robb, who had been a flesher in Edinburgh, and was apparently in his later years a small carting contractor, died on 8th March 1905. For some years he had been addicted to drink, which had led to periods of separation between himself and his wife and to disagreements between himself and other members of his family. So far as the facts can be ascertained from the loose statements of the witnesses, a serious quarrel between Mr and Mrs Robb took place in July 1899, which led to Mrs Robb going out to Davidson's Mains, where her daughter Elizabeth, who in 1895 had married George Brownlee, then resided. She was followed by her husband, and a scene there occurred which justifies my saying that it is no discredit to Mrs Robb or her daughter Josephine if their recollection of the events of the afternoon is indefinite and uncertain. But there occurs here one of the discrepancies between the claimants' witnesses for which it is very difficult to account. Mrs Jane Wallace and her son James, witnesses for the defender and real raiser, assert that when the deceased was struggling with some men who were trying to control him, Mrs Robb took from his pocket papers assumed to be his policy of insurance, gave them to her to keep for the night, and took them away next morning. On the other hand Mrs Robb and her daughter Josephine both assert that no such thing occurred, and that it could not have done so, as the policy was never out of a desk in her possession both before, during, and after the periods when her husband left her.

"As I gather, this episode in 1899 did not lead to an immediate separation between Mr and Mrs Robb. But his habits did induce such separation from about October 1901 to the middle of June 1902, and again from July 1904 till his death on 8th March 1905. During this first period of separation the deceased, on the allegation that he had lost the original of his policy of insurance, obtained on 3rd October 1901 a certified copy thereof from the Scottish Provident Institution. He then, while more or less living with his daughter Mrs Brownlee, on 9th December 1901 executed the alleged deed of gift, No. 7 of process. This is spoken to by James Girvan, police constable, Davidson's Mains, whose evidence is very clear and distinct. He speaks to its preparation and to its execution with greater formality than under the circumstances was to be expected, and he makes it quite clear that, whatever the intention of the deceased and the virtue of the document he executed, he was not, ostensibly at least, giving his daughter the custody only of the certified copy policy. He indicated that he was due her recompense for services and attention, and in handing the paper to Mrs Brownlee he said, 'That is yours, keep it, give it to no "one."' In this evidence Girvan is otherwise supported. With the document No. 7 of process the certified copy of the policy of insurance was also handed over to Mrs Brownlee and retained by her till after her father's death. She herself only survived him a few months. The document No. 7 of process bears—". . . [*quotes, supra*] . . ." It is not disputed that it was signed by the deceased and attested by Mrs Brownlee and her husband and three other persons.

"Mrs Robb's evidence is that her husband imposed upon the Scottish Provident Institution and obtained from them the certified copy of the policy knowing perfectly well not only that the policy was not lost but where it was all the time; that he admitted the imposition, and told her that what he had done would never avail the Brownlees.

"The last episode referred to in the proof was the execution of the deceased's will, No. 16 of process, on 5th January 1904. There is no doubt that it was written by the deceased's son Walter, then a lad of thirteen or fourteen, to his father's dictation, while his father was still in the house recovering from a bout of drinking; that it was signed by his father, and witnessed on the spot by James Hay, a young lad of about seventeen, a friend of young Walter Robb. No other witness signed at the time, or was present at the execution, but on the advice of her agent, Mrs Robb, who had been present at the execution, signed it as a second witness after her husband's death. The assertion of the two lads, James Hay and Walter Robb, that the document was witnessed by Mrs Robb shortly after its execution is contrary to that of Mrs Robb and her agent, and is quite inexplicable. But I cannot attribute to either of the lads concerted falsehood. On the contrary, their demeanour led me to think that their evidence was truthful to the best of their knowledge and apprehension. But it is proved that the impor-

tant words which terminate Mr Robb's alleged will, viz., 'Also insurance papers go to Mary Scott Robb,' were not the spontaneous dictation of the deceased, but were suggested by Mrs Robb, and though written before execution were written after a little interval. As, however, the will remained from the date of its execution in Mrs Robb's possession, though I believe the above to express the truth of the matter, it must always remain open to the suspicion that these words were written by young Robb, on his mother's suggestion, after the will was signed, if not after the deceased's death. And to this suspicion I admit that the writing itself, and the collocation of the words in question with the signature lend some support.

"I admit to having great difficulty in coming to a satisfactory conclusion as to the truth of the facts, bearing both on the alleged assignation and the alleged will. I did not at the time see cause, and I do not now, to suspect the truthful intention of any of the witnesses notwithstanding the apparent discrepancies, though I think that their observation and recollection are sometimes at fault, and I am satisfied that something is wanted, which can only be inferred, to explain the true state of matters.

"I was struck at the time of his examination with the appearance of George Brownlee in the witness box; I did not doubt the general truthfulness of his evidence, so far as it went, but I was distinctly impressed by his demeanour, and gauged him to be a dour, domineering, and grasping man. The following passage in Mrs Robb's evidence both conveys my *ab ante* impression, and at the same time gives, I am convinced, a clue to the inner history of the transactions with which we are concerned, viz.—'(Q.) How did he come to be talking to you about the insurance policy? (A) He was calling Brownlee everything that was bad, for he was a man he did not like, and he said, "Don't be frightened, old one, Brownlee will never get my insurance money."'

"I am convinced that the policy being the only asset that the deceased had, was during his lifetime a bone of contention among those connected with him, and at the same time a convenient and useful instrument in the old man's hands; that he found himself liable to fall between two stools—his wife on the one hand and his daughter and her husband Brownlee on the other; that he had no real quarrel with or animosity to his wife, who had borne him I think thirteen children, of whom six or seven were alive, and against whom there is no imputation except that in the end of the day she found his intemperate and violent habits past bearing; that he was under pretty rough pressure from Brownlee; and that he took the expedient to keep himself fair with Brownlee and his wife, on whom he was sometimes dependent, without, as he thought putting his one asset beyond his control or defeating his wife's legitimate claims, by pretending to the insurance association that he had lost his policy, and so getting a duplicate which he made the basis of a somewhat ostentatiously formal gift to Mrs Brownlee while knowing all the time that the policy was not really lost but was in his wife's keeping, and never intending to divest himself of the control of it. I may add that I have no belief in, though I cannot explain, the story of Mrs Robb having taken from her husband's pocket in 1899 the policy papers—I believe it to have been to her husband's knowledge in her custody throughout.

"In these circumstances the following questions arise:—

"*First*, What was the effect of the so-called deed of gift No. 7 of process in Mrs Brownlee's favour?

"It bears—'I, Joseph Robb, hand over my life policy.' In one view it has reference only to the actual document handed over *unico contextu*, which was not Joseph Robb's life policy but only a certified copy. In another it is an informal assignation of what by extrinsic evidence can be proved to have been his only life policy, and therefore the one intended to be transferred. In the view which I take of the evidence, and the inference which I draw from it, I accept the former interpretation, and therefore conclude that the so-called deed of gift was never meant to carry and did not carry the real policy or its contents. But it is right that I consider also the opposite view. Assuming that the deceased intended by 'life policy' to indicate his real interest under the insurance (and under the insurance it was 'his heirs, executors, administrators, and assignees' who were to be entitled to payment), what is the effect of the document? Was it an assignation? Was it an *inter vivos* or a *mortis causa* assignation? And was the transference completed by its delivery with a copy of the policy, and intimation made subsequently to the death of the assured?

"An assignation transfers 'the right to receive, and if necessary to raise action or suit for recovering from a third party a sum of money due on a bond' or other obligation—Bell's Lectures on Conveyancing, title II, chap. 1. Short forms are introduced by the Transference of Moveable Property Act 1862 (25 and 26 Vict. cap. 85), and a special form for the assignation of policies by the Policies of Insurance Act 1867 (30 and 31 Vict. cap. 144), from both of which it is clear that it is competent to assign the contents of a 'policy of assurance' by merely assigning the policy without saying anything about the sums due or to become due under it. It is also I think clear that the word 'assign' or other *vox signata* need not be used. 'The letter of the late Robert Strachan to her (Miss MacDougle) and the delivery of the policy I have no hesitation in considering to be equal to an assignation,' *per* Lord Balgray in *Strachan* v. *MacDougle*, 13 S. 954; but then the letter clearly disclosed the purpose of 'sending' the policy. And the same may be said of the letter in *Caledonian Insurance Company* v. *Beattie*, 1898, 5 S.L.T. 349, where the same words as

here, 'I hand you,' were used. And the question is, do the terms used in the present case, which in themselves have no defined significance, disclose a purpose of assignation or transfer of the right to receive the proceeds, and if they do not, can they be supplemented by parole evidence? The former they certainly do not. As to the latter, had the same thing been expressed verbally, no supplementary proof of intention would have raised the verbal expression into an effectual assignation, at least in Scotland—*Scottish Provident Institution* v. *Cohen & Co.*, 16 R. 112, and I do not think that the fact that the words which if spoken could not have been supplemented so as to make them effectual, when written would be any more effectual or could be permitted to be explained by extrinsic evidence. But even if I could admit extrinsic evidence, for the reasons already explained I do not think that the evidence led is sufficient to satisfy the onus on the party standing upon the alleged deed of gift to prove that assignation was intended. I come therefore to the conclusion that the document No. 7 of process cannot be regarded as an assignation. I am therefore relieved from determining the questions whether it was an *inter vivos* or *mortis causa* assignation, and whether the transference was completed.

"*Second*, It was maintained that even if the document No. 7 of process was a *mortis causa* assignation or donation it did not affect the legal rights of the widow and children; and

"*Third*, It was maintained, on the same assumption, that the *mortis causa* donation was revoked by the document No. 16 of process, whether that document was valid as a will or not.

"These questions also in the view which I take I do not need to consider.

"*Fourth*, There remains the question whether the document No. 16 of process is a valid will. I have come to the conclusion that it is not. At the date of Mr Robb's death the document in question bore the signature of only one witness, and was therefore improbative. After his death, on the advice of her agent, Mrs Robb signed as an additional witness. At one time it was held that women, particularly married women, were incapable of acting as instrumentary witnesses, and they were not in use to be accepted as such. But that view and practice has been departed from, and in the case of many deeds a wife may be a witness to her husband's signature, but it is another thing to accept her signature as attesting a deed where she herself is interested, and here she is substantially the universal legatory. I think that even had she signed as a witness at the time of execution, the validity of the attestation would have been more than doubtful, but I think that it is quite impossible to admit her signature as witness *ex post facto* as validating a deed entirely in her own favour which was left improbative by her husband at his death. I therefore think that the document No. 16 of process was invalid and ineffectual as a will.

"The result therefore is that the proceeds of the policy of insurance are intestate succession of the deceased Joseph Robb, which fell to be administered by Mrs Robb as his executrix for the benefit of his representatives—that is, of his widow and children. Mrs Robb will take her *jus relictæ*, and his children who survived him the legitim and dead's part."

The claimant George Brownlee reclaimed, and argued—The deed of December 1901 was an assignation in favour of the late Mrs Brownlee of the assurance policy—Policies of Assurance Act 1867 (30 and 31 Vict. c. 144), secs. 1 and 5, and Schedule; *Strachan* v. *M'Dougle*, June 19, 1835, 13 S. 954; *Carter* v. *M'Intosh*, March 19, 1862, 24 D. 925, *per* L.J.C. Inglis, at p. 933; *Caledonian Insurance Company* v. *Beattie*, March 5, 1898, 5 S.L.T. 349. The words "hand over" were words of alienation, being equivalent to "assign"—at least the words admitted of being read in that sense, and the parole evidence showed that the assured intended the deed to operate as a donation. It was immaterial that there had been no intimation during the lifetime of the assured. Intimation was not necessary to obtain a right which would be effectual against the cedent or his representatives, because such parties could not dispute the cedent's deed—Bell's Prin., sec. 1462; *Lillie's Trustees* v. *Gray and Others*, February 5, 1828. 6 S. 489.

Argued for the respondent—There was a strong presumption against donation, and the deed of December 1901 could not be held to be a deed of gift if the words reasonably admitted of another construction—Ersk. iii, 3, 92; Dickson on Evidence, sec. 158; *Jamieson* v. *M'Leod*, July 13, 1880, 7 R. 1131, 17 S.L.R. 757; *Sharp* v. *Paton*, June 21, 1883, 10 R. 1000, 20 S.L.R. 685; *Dawson* v. *Mackenzie*, December 8, 1891, 19 R. 261, 29 S.L.R. 226. Here the words "hand over" were quite consistent with the view that the granter merely desired to preserve evidence of the fact of the copy policy being handed over. (2) Parole evidence to show the deceased's intention was incompetent. But if admitted the evidence must be read as a whole and showed that donation was not intended. (3) If the deed were an assignation it had not been intimated until after the death of the assured, and his executrix was preferable to the assignee—*Strachan* v. *M'Dougle*, *cit. sup.*; *United Kingdom Life Assurance Company* v. *Dixon*, July 7, 1838, 16 S. 1277; Bell's Lect., bk. ii, tit. 2, cap. 1. (4) If the deed constituted a gift at all it was a *mortis causa* gift. A gift might be a *mortis causa* gift although there was no immediate apprehension of death—*Blythe* v. *Curle*, February 20, 1885, 12 R. 674, 22 S.L.R. 429. If the gift were *mortis causa* it was revoked by the will of 5th January 1905. The will was valid. It was not a good objection that one of the witnesses did not sign until after the granter's death—*Tener's Trustees* v. *Tener's Trustees*, June 28, 1879, 6 R. 1111, 16 S.L.R. 672; *Simsons* v. *Simsons*, July 19, 1883, 10 R. 1247, 20 S.L.R. 831; *Beattie* v. *Bain's Trustees*, January 12, 1899, 6 S.L.T. 277. Even if the will were

invalid on the ground of informality it was still an act expressive of an intention to revoke the *mortis causa* gift. The intention to revoke being clear, effect must be given to it. Cases like *Kirkpatrick's Trustees* v. *Kirkpatrick* (June 23, 1874, 1 R. (H.L.) 37, 11 S.L.R. 717) were distinguishable, the intention to revoke not being clear. (5) In any event a *mortis causa* donation, being revocable, could not exclude legitim and *jus relictæ*—*Morris* v. *Riddick*, July 16, 1867, 5 Macph. 1036, 4 S.L.R. 184.

At advising—

LORD M'LAREN—[*After narrating origin of action, supra*]—The Lord Ordinary has held that neither the alleged deed of gift nor the testamentary paper are valid or effectual to pass the policy of assurance, and has sustained the claim of Mrs Robb in the character of executrix-dative.

The first question for consideration, in logical order, is obviously the validity of the deed of gift, because if this were effectual as a transfer of the right to the policy of assurance in the lifetime of the assured, it is unnecessary for the purposes of the competition to consider whether the writing purporting to be a testamentary gift was effectual or capable of taking effect upon the sum assured.

The deed of gift is in these terms— . . . [*quotes supra*]. . . .

The writing is not holograph, but it is subscribed by the granter and five witnesses. Mrs Brownlee was a daughter of the granter. She and her husband were among the subscribing witnesses, and their attestation is open to the observation that they were interested parties. A third witness is said to have signed *ex intervallo*. As to the other two witnesses no objection is taken, and it is proved by their own statements, corroborated by other persons who were present, that they saw the granter subscribe, and were asked by him to witness his subscription. It is also proved that the deed of gift was delivered to Mrs Brownlee the grantee immediately after subscription, and that it remained in her possession during the remainder of her father's lifetime. It follows, in my opinion, that this must be taken to be a valid and a delivered deed, and the only question for consideration is, what is the import of the deed?

On behalf of Mr Brownlee it is urged that no formal words of assignment are necessary to transfer a moveable right or *jus crediti*, and that the expression "hand over" is equivalent to assign or make over. A modified statement of this proposition is that the words used are capable of operating as an assignment provided they were used with this intention, but the intention must be evidenced by the deed itself taken in connection with the external circumstances in which it was prepared, executed, and delivered.

On behalf of Mrs Robb, the executrix, it is contended that the expression "hand over," when used with reference to a policy of assurance, transfers nothing but the paper on which the policy is written, and that its only legal effect is to put the grantee into the position of custodier of the policy of assurance.

In my opinion the true principle of construction is that which I have indicated in the modified form of Mrs Brownlee's argument, because if no words of style are necessary to the assignment of a moveable right it follows that effect must be given to the words of gift according to the intention with which they were used. I therefore proceed to consider whether there are legal grounds for inferring, in relation to this deed, that the words "hand over" were used with the intention of transferring the *jus crediti* in the policy.

It is made clear by the terms of the Policies of Insurance Act 1867 (30 and 31 Vict. cap. 144), and relative schedule, that words purporting to assign the policy are sufficient for the purpose of assigning the right to the money assured. This removes one difficulty in the construction, but we have still to consider the meaning of the words "hand over." It is proved that on the morning of the day when the deed was executed Mr Robb called on the witness James Girvan, a police constable who was supposed by Mr Robb to have more knowledge of business than he himself possessed, and asked Girvan to write a paper in favour of his daughter. If Girvan is to be believed, and I do not think his testimony is in any way impeached, he understood that what Robb wanted him to write was a gift to his daughter. Not being a lawyer Girvan very sensibly confined himself to the business of an amanuensis, and wrote the paper in the terms dictated by Robb. Now if this were a question as to a will, *e.g.*, whether the paper in question was a will or a mere paper of instructions or mandate, I cannot doubt that it would be competent to interrogate the solicitor who prepared it as to the nature of the instrument which he was called in to prepare. We cannot have direct evidence of the granter's intention, *i.e.*, as to the meaning of the words to which he has put his signature; but under the head of what are called "surrounding circumstances" we may at least begin by inquiring what kind of deed or instrument the granter proposed to make. In the next place, we know that the granter meant some purpose which could only be carried into effect by a formal deed, because, instead of at once signing the paper which the constable had written for him, he made arrangements for executing it at a later hour of the day when witnesses should be present to attest his subscription. We have also the fact that, as Mr Robb was not in possession of the policy of assurance, he had previously obtained from the Scottish Provident Institution a certified copy of the policy which he thought would serve his purpose, and this certified copy together with the deed of gift was delivered to his daughter in presence of the witnesses. I cannot conceive that he would have taken all this trouble if his intention were to transfer to his daughter only a worthless piece of paper; but if his intention were to transfer the right to the

policy, the precautions taken were just what the law required, except that he might have done the business a little better if he had not employed a constable to do the work of a solicitor.

It is further proved that when Robb handed the deed and the copy of the policy to his daughter he said, "That is yours; keep it and give it up to no one," or words to this effect. I have some difficulty in acting on this evidence, because it comes very near to direct evidence of intention. But it is part of the *res gestæ*, and the words "That is yours" are entirely consistent with the notion that Robb believed he was giving something that was of value, and are quite inconsistent with the idea that he was making a gift of a piece of paper or handing the paper over for safe keeping. But I think the best evidence of the intention to make a gift is the deed itself, because unless we hold that "hand over" is equivalent to assign we deny effect to the deed altogether, and that is a conclusion which can never be reached if the words used admit of an intelligible and effective meaning. I have only further to add that by a well-known rule of construction which I give in the words of Lord Blackburn (*Fowkes* v. *Manchester and London Life Assurance and Loan Association*, 1863, 13 B. & S. 929)—"In all deeds and instruments the language used by one party is to be construed in the sense in which it would be reasonably understood by the other"—I think that the granter's daughter when she received this deed would in reason understand it to mean that she was assigned into the benefit of the policy.

This being premised, it follows in my opinion (1) that this was a transfer *inter vivos* and not a testamentary gift, because the deed was delivered to the transferee; (2) that no opinion which we may form as to the character, conduct, or motives of the granter of the deed can have any effect in controlling the right of the assignee, which is founded on written title followed by delivery of the writing.

Against the effect of the assignation it was argued that the transfer was incomplete, because it was not intimated to the Assurance Company in Mr Robb's lifetime, but I think this argument is founded on a misapprehension. Intimation is necessary to give a real right to the subject assigned. All the authorities who speak to the importance of intimation limit its effect in this way, and I can see no reason for doubting that an assignment of a policy of assurance, like any other deed purporting to give a contract right, is binding on the granter and his heirs. The law is so stated in Bell's Principles, s. 1462, and unless this were the law there never could be an effectual intimation, because intimation always presupposes a valid contract right which is to be notified to the debtor. It follows that the executrix, being under obligation to warrant the assignment, cannot set up her title in opposition to that of the assignee.

In the view I take of the case it is unnecessary to consider the question of the validity of the so-called will. It was signed by one witness at the time when the testator signed, and by another, the executrix, after her husband's death and months after the execution of the will. This is said to be a good subscription on the authority of the case of *Tener's Trustees*, 6 R. 1111. I am not quite clear as to the ground of decision in the case of *Tener's Trustees*, but if it supports the contention of the executrix in this case, I hope the question may be hereafter reconsidered by a larger Court, because I cannot admit that a witness who does not sign the deed is an instrumentary witness, or that the omission to sign is an informality of execution which can be corrected or supplied after the death of the maker of the deed.

I am of opinion that Mr Brownlee is entitled to be ranked and preferred in terms of his claim.

LORD PEARSON—The fund *in medio* is the sum due under a paid-up policy of insurance on the life of the late Joseph Robb, and the first and most important question is, whether the proceeds of that policy are *in bonis* of the deceased, or were effectually assigned by him to his eldest daughter Mrs Brownlee by the writing No. 7 of process, dated 9th December 1901. That writing bears —. . . [*quotes, sup.*] . . . The writing is attested, and it was delivered to Mrs duly Brownlee along with a certified copy of the policy, and remained in her possession until his death. The question is whether the terms of the writing import an assignation of the policy or are merely an expression of the fact that a copy of the policy was handed to Mrs Brownlee. Taking the question as one of the construction of the words used, I do not think it can be maintained that they are not capable of the larger construction. Nor do I think it aids the solution to say that they are capable of the narrower construction, unless it can be made out either that that is the sound construction in law, or that the words used are so ambiguous that it is impossible to say what they mean. The Lord Ordinary says the words have in themselves no defined significance, and it is true that they are not words of art such as lawyers would use. The writing was drafted and written out by the village constable, who repeated in the writing the language used to him by Mr Robb. Now, in my opinion the words used are not only capable of importing the transfer of the beneficial right but they are apt words to do so according to their common colloquial use by ordinary Scotch people in that position in life. I am convinced that a large majority of such people, on a perusal of the writing itself, would at once attribute that meaning to it. That to my mind is conclusive as to the sense in which it was intended by the granter and received by the grantee, unless perhaps it could be made out by competent evidence that there were surrounding circumstances which compelled a different construction. But so far is this from being the case that I think all the surrounding

circumstances (assuming that it is competent to regard them) strongly support the view I have expressed, but as your Lordship has fully treated that aspect of the case, I content myself with expressing my concurrence in what you have said, and also as to the alleged necessity for intimation. But, as I have said, I hold that according to the natural and ordinary construction of the words used, as these would be construed by the parties concerned, they are apt and sufficient to pass the beneficial right in the insurance policy. I am further of opinion that no case is made out for regarding the assignation as a gift *mortis causa*, or as being affected by the operation of the will if the will is to stand.

LORD ARDWALL—In this case I have the misfortune to differ from the views expressed by your Lordships. . . . [*Narrates origin of action and reads alleged assignation, v. sup.*] . . .

I may observe that in the print of documents the claimant Mr Brownlee thus titles this document, "Deed of Gift," but these words do not appear on the document itself, and are apt to be misleading as begging the question. I prefer to call it a deed of transfer, and the first and most important question in the case is, whether it operates as a valid assignment of the rights under the contract of insurance so as to defeat the rights of the deceased's legal representatives, who but for it would be entitled to the proceeds of the policy in terms of the destination contained in the policy itself.

The Lord Ordinary has repelled Mr Brownlee's claim and sustained Mrs Robb's, and I am of opinion that his judgment is well founded.

A proof at large before answer was allowed and led, but except for the purpose of laying before the Court the circumstances under which the said deed was made and delivered, I am of opinion that the parole proof, so far as regards the point now under consideration, is incompetent and irrelevant. It was pleaded for the claimant Brownlee that this was a donation, and that a donation could be proved by parole evidence, and the Court was referred to a number of cases regarding deposit-receipts in support of this view. Parole evidence undoubtedly is admissible for the purpose of showing whether a sum of money or a deposit-receipt, which is practically in the same legal position, has been handed by one person to another *animo donandi* or not, but when it is maintained that a donation has been constituted by a written deed I am of opinion that the question whether such donation was constituted or not depends on the construction of the deed. I think it is as incompetent to refer to parole evidence in order to show what intentions the grantor expressed to the donee or other people as it would be to refer to similar evidence for the purpose of construing a contract that had been reduced to writing, or of interpreting the will of a person deceased.

I shall now proceed to consider whether the deed of transfer on a sound construction thereof does or does not constitute a valid assignation of the policy in question.

It is common ground that according to the law of Scotland the execution and delivery of an assignation is the appropriate method of transferring a contract of assurance contained in a policy, and all sums of money due or to become due in respect thereof. The mere corporeal handing over of the paper on which the policy is engrossed, or a certified copy of it failing the principal, gives no right to the contract of assurance contained in a policy, or any sums of money due or to become due under that contract. This is trite law in Scotland, though apparently a different rule prevails in England. (*See Scottish Provident Institution* v. *Cohen*, 16 R. 112.)

What purports to be handed over in the deed of transfer is "my life policy." Now while I agree with the Lord Ordinary that having regard to the terms of the Transference of Moveable Property Act 1862 (25 and 26 Vict. cap. 85) and the form for assignation of policies introduced by the Policies of Insurance Act 1867 (30 and 31 Vict. cap. 144) it is competent to assign the contents of a policy without saying anything about the sums due or to become due under it, I must yet observe that the words "my life policy" would quite aptly describe the corporeal document on which the contract of assurance was written, and might apply to it as well as to the rights which the policy represented.

Coming to the alleged words of assignation, which are simply "hand over," the question arises whether these words in themselves are words of assignation and are to be held as equivalent to "make over" or "assign."

In the first place, it must be observed that the phrase "hand over" is capable of two meanings—the first is the primary, simple and literal meaning, and signifies simply to pass a thing from the hand of one person to that of another; it has also, however, undoubtedly come to have a secondary or figurative meaning, namely, to assign or transfer. This meaning most frequently attaches to the phrase when used as a merely colloquial one, as for instance, when we speak of a father handing over his estate or his business to his son. Now, *prima facie*, the simple and primary meaning of a phrase is to be accepted as its true interpretation unless there is something in the context or in the circumstances to show that it ought to bear its secondary meaning. So far, however, from that being so in the present case, it appears to me that a consideration of what actually was done at the time this alleged assignation was made and delivered is entirely in favour of the primary meaning being adopted as the true one, because what was done was this, that at the time the so-called deed of gift was delivered a certified copy of Joseph Robb's life policy was *de facto* handed over to his daughter. As we have seen, the words "my life policy" are quite appropriate to describe the document itself, and I therefore arrive

at the conclusion that this deed of transfer merely records in writing what was done at the time, namely, the handing over of his life policy by Joseph Robb to his daughter. Accordingly I am of opinion that in the deed under consideration the words "hand over" must receive their primary and literal meaning, there being nothing inconsistent with that meaning in the remainder of the deed, and there being everything consistent with it in what was actually done at the time. The cases of *Strachan* v. *M'Dougle*, 13 S. 954, and the *Caledonian Insurance Company* v. *Beattie*, 1896, 5 S.L.T. 349, where the word "hand" was used, were founded on by the claimant Brownlee, but an examination of these cases shows that the intention to make an assignation clearly appeared from the terms of the documents of transfer, from which it was apparent that nothing less than a transference of the policy and of the rights under it was meant.

Some difficulty, however, is presented by the fact that the deceased thought it necessary not only to hand over the policy, but at considerable trouble to record the fact in a carefully witnessed deed. It was argued that his having done so raises a presumption that he must have intended something more than a mere handing over of the *corpus* of the policy. I think that, on the assumption that Joseph Robb was acting honestly in the matter and not with intent to deceive his daughter or her husband as the Lord Ordinary holds, the answer to this difficulty is, that at the time he handed over the policy and executed the deed in question he really believed that in doing so he was transferring to his daughter not merely the policy but all the rights under it, and he therefore thought it sufficient to hand over the document and record the fact in his deed without any words which in law are sufficient to import an assignation. Obviously this does not aid the reclaimer's case, because although what Joseph Robb did may have been done with the intention of making an assignation in favour of his daughter, yet if what he did is not sufficient in law to effect such assignation, no valid transference of the right to the contract in the policy and the sums that might become due thereunder was completed.

I therefore arrive at the conclusion that, assuming the deed of transfer to represent an honest transaction, it amounts to nothing more than this, that the deceased handed over the *corpus* of the policy to his daughter, and that cannot give her or her executor a good title to the proceeds of the policy in competition with those who failing an assignation are described *in gremio* of the policy as the parties having right to it. In other words, the title to the incorporeal rights secured by the policy was not transferred from the deceased and his legal representatives to Mrs Brownlee by the delivery to her of the policy and a deed recording that fact.

But if I am mistaken in my opinion as to the admissibility or relevancy of parole evidence in this case, and if the evidence of the deceased's true intentions is to be gathered from evidence of what he is reported to have said in regard to his policy of insurance to police constable Girvan, the deceased Mrs Brownlee, and other people, I think it is plain that the whole parole evidence in the case, so far as bearing on the intentions of the deceased with reference to his life policy, must be examined. That evidence shows that the original policy was all along in the custody of Mrs Robb from the day she got it from the Insurance Company till she took it to the Insurance Company after her husband's death. It further appears that the deceased knew that the policy was in his own house and under his wife's control all along, and that he obtained the certified copy he got from the Insurance Office by telling them a falsehood. All this, while spoken to by Mrs Robb, is established by the actual facts of the case as to the custody of the policy. The story told by neighbours of the claimant Brownlee about the policy being taken from Mr Robb's pocket by Mrs Robb seems to me to be manufactured evidence. Then Mrs Robb says that her husband told her that he had given the paper he had got from the Insurance Company to Mrs Brownlee, but that he said that "they would never get the money for it was no use to them," the words used being, "Don't put yourself about, old one, they will never get the money."

She further says that when he signed the will he said that she was all right as to getting the insurance money. This last piece of evidence is corroborated by James Hay, who says that when Joseph Robb on his deathbed was asked by his wife what about the insurance he said, "Oh, you will be getting that," and she replied, "You had better put it down;" and thereupon the last words to that effect were added to his will. Walter Robb also corroborates this evidence, and says that his father told him to write down the words "also insurance papers go to Mary Scott or Robb." This last piece of evidence confirms the view I have already expressed to the effect that Mr Robb regarded the possession of the insurance papers as an important matter in claiming the insurance money, and thought that so long as his wife had the original policy she was quite safe, and that the handing over of the copy of the policy to his daughter did not matter.

I agree with the Lord Ordinary that the whole of the deceased Mr Robb's conduct with regard to the policy of assurance and Mrs Brownlee was attributable to the fact that he found it convenient during or after some of his drinking bouts to escape from his wife's supervision and reproaches by going to the Brownlees, and that he went through the solemn farce of executing a deed purporting to hand over his insurance policy to Mrs Brownlee merely for the purpose of ingratiating himself with her husband, who, according to the Lord Ordinary's opinion, was a sort of man who would not be likely to give anything for nothing. But all along he believed that the interests

of his wife and the rest of his family were secured by the former possessing the policy of assurance which at first had been issued to him by the Insurance Office.

I do not go further into the evidence, as I adopt entirely the Lord Ordinary's remarks upon it and upon the surrounding circumstances. The matter could not I think be better put than by the Lord Ordinary when he says that "Robb took the expedient to keep himself fair with Brownlee and his wife on whom he was sometimes dependent without as he thought putting his one asset beyond his control or defeating his wife's legitimate claims, by pretending to the Insurance Association that he had lost his policy, and so getting a duplicate which he made the basis of a somewhat ostentatious gift to Mrs Brownlee, while knowing all the time that the policy was not really lost but was in his wife's keeping, and never intending to divest himself of the control of it." Accordingly, on the assumption that parole evidence is competent in this case to explain the intentions of the deceased, I arrive at the same conclusion as I do on the deed itself, that Mr Brownlee's claim must be rejected.

With regard to the will, it is unnecessary to go into that matter, as counsel for Mrs Robb has intimated that he is satisfied with the Lord Ordinary's interlocutor and content to accept the policy as forming intestate succession of the deceased Joseph Robb, and that his client should administer it as his executrix-dative.

I accordingly am of opinion that the Lord Ordinary's decision was well founded.

The Court pronounced this interlocutor:—

"Recal the interlocutor of the Lord Ordinary dated 30th July 1906: Find that the deed No. 7 of process is a valid assignment of the deceased Joseph Robb's *jus crediti* in the policy of assurance (which he held from the Scottish Provident Institution) in favour of the claimant's wife Mrs Elizabeth Scott Robb or Brownlee, and that the same is now vested in the claimant George Brownlee: Therefore sustain the claim of George Brownlee and repel the claim of Mrs Robb."

Counsel for the Reclaimer—Cooper, K.C. —A. A. Fraser. Agents—Allan, Lowson, & Hood, S.S.C.

Counsel for the Respondent—Morison, K.C.—Dunbar. Agent—R. S. Rutherford, Solicitor.

Saturday, July 13.

EXTRA DIVISION.

[Sheriff Court at Kilmarnock.

WILLIAM MORTON & COMPANY *v.* MUIR BROTHERS & COMPANY.

Contract—Implied Condition—Condition Arising from Nature of Contract—Custom of Trade—Legality of Custom—Proof of Custom.

A & Company, a firm of lace manufacturers, placed a number of orders for lace curtains with B & Company, another firm of lace manufacturers in the same district. The designs for the curtains were supplied by and remained the property of A & Company. In order to make the curtains B & Company had to prepare a set of perforated pattern cards into which the designs were translated. The cards so made were the property of B & Company. The designs were not registered. When the curtains were put on the market the designs were so far published that any person in the trade who bought the curtains could derive the designs therefrom, but would incur considerable expense in doing so. The contracts between A & Company and B & Company contained no express stipulations as to the use which B & Company might make of the designs or the cards. The practice of the trade in the district was that the owners of such cards did not, without the express or implied consent of the owners of the designs, use the cards for any other purpose than to fulfil the orders of the owners of the designs. *Held* (1) that the restriction on the use of the cards, entailed by the local practice, was not contrary to law; and (2) that the restriction was a condition arising from the nature of the contract, established by the evidence as a custom of trade, and implied in the contract between A & Company and B & Company.

Proof establishing a custom of trade in the particular district.

Bankruptcy—Vesting of Estate in Trustee —Tantum et Tale—Moveable Estate—Moveable Estate Held subject to Restrictive Condition.

B & Company were sequestrated. They owned pattern cards for curtain manufacture made from the designs of A & Company, and subject by custom of trade to a restriction on use in favour of that company. *Held* that the cards vested in the trustee subject to the restriction on use.

Contract — Sale — Corporeal Moveable — Moveables Held by Seller under Contract Imposing Restriction as to Use—Notice to Purchaser of Restriction—Adoption by Purchaser of Contract Imposing Restriction.

B & Company's premises with their contents, which included pattern cards