LORD MACKENZIE—I agree with your Lordships that the issue of the coupon by the Insurance Company was an offer; that the request for registration was an acceptance by the deceased Mr Hunter of that offer, and that thereby the contract was constituted. The contract provided that in the event of such an accident as the deceased met with, the claim was to be made within twelve months of registration. For the reasons explained by your Lordship in the chair, I am of opinion that the date of registration must be held to be the 3rd of January 1906; that when this claim was made on the 2nd of January 1907 it was made in due time; and that therefore the executrix is entitled to recover.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court adhered.

Counsel for Pursuer (Respondent)—Dean of Faculty (Scott Dickson, K.C.) — W. Thomson. Agents—Steele & Johnstone, W.S.

Counsel for Defenders (Reclaimers) — Solicitor-General (Ure, K.C.) — Constable, K.C.—Orr Deas. Agents—Bonar, Hunter, & Johnstone, W.S.

Thursday, November 26.

SECOND DIVISION.

[Lord Dundas, Ordinary.

HARVEY *v.* M'LACHLAN'S TRUSTEES.

Succession — Testament — Construction — Bequest of Whole Estate to "My Spouse and My Heirs and Assignees"—"And" Equivalent to "Whom Failing"—Error in Use of Printed Form—Marginal Notes on Printed Form.

A will executed by A on a printed form, in which blanks were left to be filled in by any testator who might use it, bequeathed his whole estate, heritable and moveable, to "*my spouse* . . . and *my* heirs and assignees"—the words in italics being in writing and those in ordinary lettering being printed. A further nominated his wife, who survived him, to be sole executor, and imposed upon her "the burden of the payment of my whole just and lawful debts and sickbed and funeral charges."

Held that the wife was entitled to the whole estate—*per* the Lord Justice-Clerk and Lord Dundas, on the ground that that was the intention of the testator, and that an error had been made in filling in the printed form by inserting the word "my" for "her" before the words "heirs and assignees"; *per* Lord Low and Lord Ardwall, on the ground that the word "and" occurring in the clause "and my heirs and assignees" did not import a disposition to the wife and the heirs and assignees of the testator jointly, but must in the circumstances of the case be read as meaning "whom failing," and as intending to introduce a conditional institution of the testator's heirs.

Observed that marginal printed directions for filling up the printed form, appearing on the document, must for the purposes of the case be regarded as *pro non scripto.*

Francis Wood Clark and another, trustees acting under the trust-disposition and settlement of the deceased Mrs Margaret Scotland or M'Lachlan, who resided at 89 Lochleven Road, Glasgow, widow of the late Donald M'Lachlan, venetian blind manufacturer, Glasgow, brought an action of multiplepoinding and exoneration, the fund *in medio* being one-half of the said Donald M'Lachlan's estate. Claims to the whole fund *in medio* were lodged (1) by the said trustees, and (2) by Mrs Catherine Mullen or Harvey, wife of James Harvey, residing at Providence, Rhode Island, U.S.A., and others, who claimed to be the next-of-kin and heirs in moveables of the said Donald M'Lachlan.

Donald M'Lachlan died on 27th April 1902, leaving a testamentary deed dated 4th June 1877 (recorded 1st May 1902), consisting of a printed form of general style with blanks in the form filled in in writing. This deed was, so far as material, as follows, the written portions being in italics—"I, *Donald M'Lachlan, Venetian Blind Manufacturer,* residing in *Twenty-two Clarendon Street, New City Road, Glasgow* (a), being desirous of settling the succession to my Means and Estate so as to prevent disputes after my decease, Do therefore Give, Grant, Assign, Dispone, Devise, Legate and Bequeath to and in favour of *Margaret Scotland or M'Lachlan, my spouse,* residing in *Twenty-two Clarendon Street, Glasgow* (b), and *my* (c) heirs and assignees, heritably and irredeemably All and Sundry" . . . [testator's whole estate] . . . : "And I hereby Nominate and Appoint the said *Margaret Scotland or M'Lachlan, my spouse,* to be my sole executor and universal intromitter with my moveable means and estate: But these presents are granted and shall be accepted by the said *Margaret Scotland or M'Lachlan, my spouse,* and the foresaid lands and other heritages hereby conveyed are disponed with and under the burden of the payment of my whole just and lawful debts, and sickbed and funeral charges, and of the payment of the following legacies, viz., (d) *None*

And I reserve my own liferent use and enjoyment of the premises and full power and authority to me, at any time of my life, and even on deathbed, to cancel or alter these presents at pleasure: And I dispense with delivery hereof: And I consent to registration for preservation. In witness whereof I have subscribed these pre-

sents, written (in so far as not printed) by (e) *Edward Buckle Bruce, Accountant*, . . ."

The following marginal notes were on the printed form, referring, as indicated, to the blanks in the forms, viz.—"(a) Insert between the commas the full name, occupation, and residence of disponer. (b) Insert full name, occupation, and residence of disponee. (c) 'His' or 'her' as the case may be. (d) If no legacies are to be given, write the word 'None' and draw the pen down through the blank space in the form of a cross thus X. (e) Insert full name, occupation, and residence of person who filled up deed."

On 11th January 1908 the Lord Ordinary (DUNDAS) pronounced an interlocutor ranking and preferring Mrs M'Lachlan's trustees to the whole fund *in medio* in terms of their claim.

Opinion.—"The late Donald M'Lachlan, venetian blind maker in Glasgow, died on 27th April 1902. He left a testamentary document, dated 4th June 1877, by which he gave, granted, assigned, disponed, devised, legated, and bequeathed to and in favour of Mrs Margaret Scotland or M'Lachlan, his spouse, and his heirs and assignees, all and sundry the whole estate, heritable and moveable, real and personal, which should be belonging and owing to him at his decease, and appointed his said spouse to be his sole executor and universal intromitter with his moveable means and estate. Mrs M'Lachlan survived her husband, obtained confirmation as his executrix, and had transferred to her own name the whole estate left by him. She died on 3rd January 1906, leaving a trust-disposition and settlement and codicil dated respectively 19th February and 21st April 1903, whereby she assigned and disponed to trustees named (of whom the pursuers and real raisers of this action are the survivors acting and accepting) the whole means and estate of every description which should belong to her at the time of her decease, including therein all means and estate over which she should have the power of disposal.

"The fund *in medio* in this multiplepoinding is 'one-half part or share of the estate and effects which belonged to the said deceased Donald M'Lachlan, so far as the same was recovered by the said Mrs Margaret Scotland or M'Lachlan as executrix of the late Donald M'Lachlan, and is now in' the possession of Mrs M'Lachlan's trustees. The claimants in the competition are (1) Mrs M'Lachlan's trustees, who claim to retain the whole fund *in medio* to be held and administered by them in trust for the purposes mentioned in her said trust-disposition and settlement, and (2) various persons who claim to represent Mr M'Lachlan's heir.

"In my opinion the first-mentioned claim ought to be sustained and the other claims repelled. The case is not, in my judgment, attended with any serious doubt or difficulty. The question depends upon the proper construction to be put upon Mr M'Lachlan's testamentary document. The document appears upon its face to be a printed form of general style, filled in in writing by an accountant in Glasgow whose aid Mr M'Lachlan seems to have invoked, instead of having recourse to a law-agent or filling it up himself. I have not seen the document itself, which is recorded in the Books of Council and Session; but at my request I have been furnished with a reproduction of it which has been prepared or checked by the agents for the parties, and shows its contents as printed and written respectively. The name and designation of the testator's spouse are, of course, filled in in writing. The immediately succeeding words 'and heirs and assignees' form part of the printed matter; and the word 'my' has been introduced by the writer to fill up a space left blank in the printed style for the pronoun 'his' or 'her,' as the case might be, which should appropriately relate to the heirs and assignees of the disponee, and not of the testator. It is difficult to avoid the inference that the latter had no thought of conjoining his own heirs, or anyone else, with his wife in the general diposition of his estate; and that the friendly accountant made a mistake in putting in the word 'my' instead of 'her,' from a conscientious desire to fill up blank spaces, without a sufficiently clear apprehension of the purpose and intention with which this particular space had been left blank in the printed form. If this inference is correct, there would seem to be an end of all dispute in the case, for a disposition of the estate to Mrs M'Lachlan and her heirs and assignees would, beyond all doubt, confer upon that lady a full fee and right of disposal thereof. But however this may be, I find it impossible to hold, as matter of construction and intention, that Mr M'Lachlan's testamentary document imports a joint and equal disposition of his estate to and between his wife on the one hand, and his heirs and assignees on the other. The introduction of the word 'assignees' appears to me to be absolutely meaningless in such a connection. Again, if the testator intended his 'heirs' only (apart from assignees) to be joint disponees along with his wife it would have been easy for him to say so in plain language. But he did not do this; and the fact that by the subsequent clause (which is part of the printed matter) he throws the whole burden of the payment of debts and legacies upon his wife alone lends strong support to the view that he intended her to be his sole disponee. I heard some argument and citation of authority with regard to the use of the word 'and' in relation to its import as a substitution, or as a conditional institution, of heirs and assignees. I do not think that any such point arises in the present case. The question, in my judgment, is whether there is a general disposition to Mrs M'Lachlan alone, or a joint disposition to her and her husband's heirs and assignees; and, for the reasons stated, I think the disposition was to the wife alone. I am therefore of opinion that Mrs M'Lachlan's trustees are entitled to be ranked and preferred to the

whole fund *in medio* in terms of their administrative claim, and that the competing claims must be repelled."

The claimant Mrs Harvey reclaimed, and argued—The document was not open to criticism on the ground of its being partly printed—Titles to Land Consolidation Act, 1868 (32 and 33 Vict. c. 101), sec. 149. Its meaning was clear and obvious, and there being no *ex facie* ambiguity in the words used, they must be read according to their ordinary meaning. It must be taken that the word "my" had been used advisedly in the will, and if that were so it was not competent to substitute the word "her" for 'my.' On the assumption that "my" was to stand, it followed that the word "and" imported not a substitution but a joint disposition to the wife along with the "heirs and assignees" of the husband. The word "and" could only be read as meaning "whom failing" where it conjoined the name of a disponee and his or her own heirs. *Lockhart* v. *Macdonald*, January 24, 1840, 2 D. 377; *Thompson's Trustees* v. *Jamieson*, January 26, 1900, 2 F. 470, at p. 496, *per* Lord Low, 37 S.L.R. 346; M'Laren on Wills and Succession, i. p. 440. It was incompetent to look at the printed notes of direction on the margin of the will. The use of the word "assignees" need not create any difficulty. It was a superfluous word of style, and might be disregarded altogether.

Argued for the respondent—The Lord Ordinary was right. The important consideration was the testator's intention, and all the circumstances pointed to the insertion of the word "my" instead of "her" being a mistake. Joint disposition was not a reasonable reading of the deed in view of the clause burdening the wife with payment of the whole debts, legacies, &c. The word "assignees" was intelligible in conjunction with "her," but had no reasonable meaning if "my" were to stand. It was quite a relevant consideration here that a printed form had been used. Even if it were held that the word "my" should stand, it was reasonable to read "and" as meaning "whom failing," thus importing a conditional institution of testator's own heirs,

LORD JUSTICE-CLERK—I think it is very unfortunate that the testator took a printed form for the purpose of making his will, and enlisted the aid of an accountant instead of a lawyer. I do not mean to say that lawyers always avoid making mistakes in such matters, but I cannot imagine any worse way for a man to set about making his will than to make use of a printed form and to fill it in without competent legal advice.

In judging of the true meaning of this document, which is very badly expressed, we cannot look at the notes or directions printed on the margin, which we must regard for the purposes of this case as *pro non scripto*.

The whole difficulty here arises from the words "my heirs and assignees" in the document. The word "my" certainly creates a difficulty, and the Lord Ordinary has come to the conclusion that the use of that word instead of the word "her" was a mistake on the part of the accountant who assisted the testator in the preparation of the document. I think the Lord Ordinary is right, and if necessary, and if there were no further indications in the deed of the testator's true intention, I would go the length of holding that the word "my" here was really intended to be "her." But I think it is made quite plain by a subsequent clause that this was his intention, because we find that he throws the whole burden of payment of debts and legacies on his wife, and I cannot read that without coming to the conclusion that it was the testator's intention that she should pay the whole of these charges, because she got the whole of the estate which he dealt with in the document.

LORD LOW—I am of the same opinion. I do not think it is possible to find any interpretation which would give full effect to all the language used in this will. In any view something must be added to or taken from the words used. If on the one hand you adopt the construction contended for by Mr Craigie and hold that the testator disponed his estate to his wife and his heirs and assignees jointly, you give no meaning to the word "assignees," because in that connection it is absolutely meaningless. On the other hand, if you read the will in accordance with the construction which the Lord Ordinary has adopted, you must read the word "and" as equivalent to "whom failing." I have no doubt that the latter alternative is the one which we should adopt. I agree with your Lordship that we cannot look at the printed notes on the margin of the settlement. But I think that we are entitled to have regard to the fact that the will was partly printed and partly written, because it shows that the testator had obtained a printed form suitable for his purpose, and obviously his intention must be presumed to have been to fill up the blanks which were left in the form in a way which was consistent with the printed matter. What kind of will the form was intended for is clear. It was intended in the first place that the testator's whole estate should be disponed to a person *nominatim*, and that person's heirs and assignees. That being so, it is plain that the word "and" as used in the form meant "whom failing," because if you dispone an estate to A and his heirs and assignees, the word "and" necessarily means "whom failing," because A's heirs cannot be ascertained until his death. The question therefore is whether, in consequence of the testator having inserted the word "my" in the blank space left in the printed form after the word "and," the latter word must be construed as having a meaning different from that which it was intended to bear in the form? If that question were answered in the affirmative the result would be to change the whole scheme of the will, because the testator, instead of leaving his whole estate to his wife, would have left it to her jointly with

his heirs, whatever their number might be, and would nevertheless have provided that she should still be burdened with his whole debts and funeral expenses. I think that that is a construction which only the strongest reasons would justify the Court in adopting. I do not take the view which was suggested that the word "my" was inserted by mistake for the word "her." I think that we must take the word "my" to have been inserted intentionally instead of the word "her." And this explanation appears to me to be obvious. The testator preferred his own heirs to his wife's heirs, and desired if she predeceased him that his heirs should take. I think that to that extent he must be held to have intended to depart from the printed form, but the inference seems to me to be that he did not intend to depart from it to any greater extent. But if that view be sound, it is necessary, and I think legitimate, to read the word "and" in the sense in which it was used in the printed form, that is, as being equivalent to "whom failing." The result is, that in my judgment the wife's trustees are entitled to the whole fund.

LORD ARDWALL—I agree with the opinion which has been delivered by Lord Low. I think it is very clear that in the printed form which was used for this will "and" was intended to signify "whom failing," and introduced and was intended to introduce a conditional institution. Therefore, although there is no doubt that in the usual case the word "and" as was laid down in *Lockhart* v. *Macdonald*, January 24, 1840, 2 D. 377, has not this meaning when occurring in a destination to two or more persons, I think that in this case, owing to the form of the deed itself, the rule falls to be disregarded.

LORD DUNDAS—I have listened to the argument of the reclaimer's counsel with every endeavour to keep my mind open and unbiassed, but I confess I have heard nothing to make me doubt the soundness of the conclusion I reached when the case was argued before me in the Outer House; and I need hardly say that the opinions your Lordships have just delivered strongly confirm me in that view. I would only add, that while I referred in my opinion to the marginal note on No. 22 of process as apparently affording a strong ground for inferring that the word "my" was in fact inserted by mistake instead of "her," my judgment was grounded upon a construction of the testator's will as he has expressed it.

The Court adhered.

Counsel for the Claimant and Reclaimer (Mrs Harvey) — Craigie, K.C. — Ingram. Agents—Langlands & Mackay, W.S.

Counsel for the Pursuers (Real Raisers and Respondents)—Hunter, K.C.—Mercer. Agents—Gray & Handyside, S.S.C.

Counsel for the Claimants and Respondents (Donald M'Kinnon and Another)—Fenton. Agent—Arthur W. Russell, W.S.

Friday, November 27.

FIRST DIVISION.

(SINGLE BILLS.)

LORD ADVOCATE, PETITIONER.

Process — Proof — Commission — Evidence for Foreign Tribunal—Appointment of Commissioner—Foreign Tribunals Evidence Act 1856 (19 *and* 20 *Vict. c.* 113), *sec.* 1.

An application by the Lord Advocate for an order for the examination of certain witnesses under the Foreign Tribunals Evidence Act 1856, suggested as Commissioner the Sheriff or Sheriff-Substitute of the county in which the witnesses resided.

Held that, as the application was made by the Lord Advocate acting for the Government, the suggestion made was in order, and ought to be granted.

Baron de Bildt, Petitioner, July 4, 1905, 7 F. 899, 42 S.L.R. 690, *distinguished.*

The Foreign Tribunals Evidence Act 1856 (19 and 20 Vict. c. 113), sec. 1, enacts—"Where, upon an application for this purpose, it is made to appear to any court or judge having authority under this Act that any court or tribunal of competent jurisdiction in a foreign country, before which any civil or commercial matter is pending, is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction of such first-mentioned court, or of the court to which such judge belongs, or of such judge, it shall be lawful for such court or judge to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses accordingly. . . ."

Section 2—"A certificate under the hand of the ambassador, minister, or other diplomatic agent of any foreign power, received as such by Her Majesty . . . that any matter in relation to which an application is made under this Act is a civil or commercial matter pending before a court or tribunal in the country of which he is the diplomatic agent . . . and that such court or tribunal is desirous of obtaining the testimony of the witness or witnesses to whom the application relates, shall be evidence of the matters so certified. . . ."

By the 6th section the Court of Session is declared to be a Court having authority under the Act.

On 27th November 1907 the Right Honourable Thomas Shaw, His Majesty's Advocate, presented a petition to the First Division for an order for the examination of certain witnesses under the Foreign Tribunals Evidence Act, 1856, in which he set forth, *inter alia*—"That upon 14th October 1908 a note was addressed by the Belgian Minister to the Right Honourable Sir Edward Grey, Bart., M.P., His Majesty's Secretary of State for Foreign Affairs, enclosing a letter of request issued by the