the Railway Assesssor might do for this railway—though not specially authorised—what he does under the Light Railways Act. I cannot say he is bound to do it; but, on the other hand, I do not think he would exceed his power if he valued this railway according to the mode of valuation prescribed in the Valuation Act, and put that on the roll, with an alternative entry that the land when taken for the purpose of the railway was of a certain value in the different parishes through which it extends. I am therefore of opinion that we should adhere to the interlocutor of the Lord Ordinary, except in so far as he allowed a proof, which I think can be of no practical value.

LORD MONCREIFF was absent.

The Court adhered to the interlocutor reclaimed against, with the exception of allowance therein of a proof, and *quoad ultra* dismissed the action.

Counsel for the Pursuers and Respondents—Ure, K.C.—Cooper. Agent—James Watson, S.S.C.

Counsel for the Defenders and Reclaimers—Clyde, K.C.—Lyon Mackenzie. Agents—Fletcher & Baillie, W.S.

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*Friday, July* 8.

## FIRST DIVISION.

[Lord Kyllachy, Ordinary.

## DUKE OF BEDFORD *v.* EARL OF GALLOWAY'S EXECUTOR.

*Entail—Lease by Heir of Entail in Possession—Fishings—Claim of Warrandice in Lease—Reduction of Lease by Succeeding Heir of Entail—Terms of Clause of Warrandice Held Ineffectual to Bind the Executor of Granter of Lease.*

An heir of entail in possession granted to certain persons a lease of the salmon-fishings on the estate for twenty-one years. The lease bore that its object was to improve the fishings on the estate, and its provisions were conceived in the interest of the granter and the succeeding heirs of entail in the estate. The lease contained a clause of warrandice by which the granter bound and obliged himself "and his foresaids" (*i.e.*, his successors in the entailed estate) to warrant the lease to the lessees at all hands. The granter of the lease died within a year after granting the lease, and subsequently in an action of reduction brought by the succeeding heir of entail the lease was found to be null and void.

The lessees brought an action against the trustee and executor of the deceased granter of the lease, as trustee and executor and as an individual, averring the reduction of the lease at the instance of the succeeding heir of enta and founding on the clause of warrandice in the lease, concluding for payment of certain sums in respect of outlays and expenses incurred by them and for declarator that the defender was bound to relieve them of their liability for future rents.

*Held* that the clause of warrandice was ineffectual to bind the executor of the granter of the lease, and the defender assoilzied.

The Duke of Bedford and others brought this action against Colonel the Hon. Walter John Stewart, Mire House, Keswick, Cumberland, as trustee and executor of the deceased Right Hon. Alan Plantagenet, Earl of Galloway, and also as an individual, concluding for payment of £646, 16s. 5d., and for declarator that the defender, as trustee and executor foresaid, or otherwise as an individual, was bound to free and relieve the pursuers of all claims made or which might be made against them for the rents of the fishings of Machermore and Carsewilloch amounting to £1485, or any part thereof, and for interdict against the defender, as trustee and executor foresaid, from paying away any portion of the said trust estate in his hands without retaining an amount sufficient to meet the said claims.

By lease last dated 12th April 1900, entered into between the deceased Earl of Galloway, then heir of entail in possession of the entailed lands and estate of Galloway, Baldoon, and Newton-Stewart, in the county of Wigtown and stewartry of Kirkcudbright, on the one part, and the pursuers on the other part, the said deceased Earl of Galloway let to the pursuers the salmon and other fishings, both net and rod, in the rivers Cree and Minnick, and in the burns of Trool and Penkiln, in so far as forming part of the said entailed estates, subject to certain exceptions and reservations. The endurance of the lease was to be for twenty-one years or fishing seasons, beginning with the fishing season for 1900. The rent was £350. The lease narrated that its purpose was to improve the fishings in the river Cree and other rivers, and that in furtherance thereof the said Earl had negotiated leases from various other riparian proprietors on the said river Cree possessing rights of salmon and other fishing therein, and had arranged that the said leases should be granted to and in favour of the pursuers, subject to the terms and conditions as to the manner in which the said rights of fishing therein were to be exercised, which were contained in the said several leases. By the lease the said Earl let to the pursuers and their heirs, expressly excluding assignees, whether legal or voluntary, unless with the express consent in writing of the said Earl or his successors in the said entailed lands and estates of Galloway, Baldoon, and others, all and whole the salmon and other fishings (both net and rod fishings) before referred to. Among the conditions of the lease was the following—*Third*, "The rights of fishing hereby granted to the said second parties shall

as regards" certain portions of the rivers specified "cease and determine on the 31st day of July in each year or fishing season, and the said first party shall be entitled, either by himself or his foresaids (*i.e.*, his successors in the entail) to enter into possession of, occupy, and use the said fishings in the said" portions of the rivers before specified, "or to let the same to one or more tenants for the remainder of each fishing season, and that in the same manner, and to the same effect as if this lease had not been granted."

The lease also contained the following clause—"Which lease, with and under the conditions, provisions, reservations, and declarations before and after written, the said Earl of Galloway binds and obliges himself and his foresaids to warrant to the second parties (the pursuers) and their foresaids at all hands;" and a further clause—"And both parties bind and oblige themselves and their foresaids to implement and perform their respective parts of the premises to each other under the penalty of £500 sterling, to be paid by the party failing to the party observing or willing to observe his or their part thereof, over and above performance."

The pursuers averred that they purchased from the outgoing tenants of the net-fishings their nets and plant, it being part of the bargain that they should do so. Since the granting of said lease the pursuers have expended large sums upon, and given much personal attention to, the improvement of the fishings. The late Earl of Galloway died on 7th February 1901, and was succeeded in said entailed lands and others by the present Earl of Galloway. Shortly after his succession the present Earl raised an action for the reduction of said lease on the ground, *inter alia*, that the late Earl as heir of entail in possession had no power without the authority of the Court to bind the succeeding heirs of entail by the said lease, and after sundry procedure their Lordships of the First Division reduced said lease, and found the said Earl entitled to the expenses of the action (reported 4 F. 851, 39 S.L.R. 692).

The pursuers pleaded, *inter alia*—"(1) The said lease to the pursuers having been reduced, and the said late Earl of Galloway having bound himself to warrant the same, the pursuers are entitled to repayment out of his estate of the expenses and outlays to which they have been put, and to be relieved of their liability for future rents. (2) Upon a sound construction of said lease and the clause of warrandice founded on, the defender, as executor foresaid, is liable for the sum sued for."

The defender pleaded, *inter alia*—"(3) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons against the defender; *et separatim*, against the defender as an individual. (4) Upon a sound construction of the said lease, and in particular of the clause of warrandice founded on, the defender is not liable to the pursuers in the sum sued for, and decree of absolvitor ought to be pronounced, with expenses. (5) The late Earl of Galloway not having bound his personal representatives or estate in warrandice under the said lease, and having granted the same only *qua* heir of entail, the defender should be assoilzied, with expenses."

On 5th February 1904 the Lord Ordinary (KYLLACHY) assoilzied the defender from the conclusions of the action and found him entitled to expenses.

*Opinion*—"This case is the sequel of a recent action in which a lease of salmon and other fishings made between the late Earl of Galloway and the present pursuers was set aside as being in contravention of the Galloway entail. The ground of reduction was, as will be found explained in 4 F. 851, that the lease in question was not an act of ordinary administration, but was, speaking generally, an anomalous and highly complex agreement for the management and development of certain fisheries—fisheries partly belonging to the lessor and partly to other persons—in which the lessor and lessees were jointly interested. The lease being reduced, the pursuers now bring the present action against the executor of the late Earl concluding for repayment of certain expenditure which they incurred in connection with and on the faith of the lease, and they make this claim in virtue of the clause of warrandice contained in the lease by which the lessor bound himself and his 'foresaids,' that is to say, 'his successors in the said entailed lands and estate of Galloway and others,' to warrant the lease to the second parties (the pursuers) at all hands.

"The executor maintains various defences; but in the first place he contends that by the above-quoted clause his liability as executor is not covered, but is in fact excluded. In other words, he contends that, on the just construction of the clause, the pursuers recognised, or must be held to have recognised, the special character of the lease; and to have therefore accepted an expressly limited warrandice, which, while securing as against the heirs of entail, while the lease stood, such recourse as might arise in the case, for instance, of partial evictions, yet treated the power of the lessor as heir of entail to make the lease as a matter upon which the lessees were satisfied, or took their risk.

"I am, I confess, glad that I do not require to determine what would have been the implied warrandice under this lease if there had been no warrandice expressed. I think that, having regard to the specialties to which I have adverted, that might have been rather a difficult question. On other hand, it may perhaps be conceded that if (there being a warrandice clause) it had been expressed according to the usual style—viz., as an obligation by the lessor binding 'himself and his heirs and successors to warrant at all hands and against all mortals,'—the defenders case' would, on the authori-

ties, have been somewhat difficult. For the words 'heirs and successors' would, I think, have been held (in the event of the lease failing for want of power in the lessor) to include not only the lessor's heirs and successors in the subject let, but his heirs and successors generally—*i.e.*, his general representatives. That, I think, is the result of the decisions in the *Queensberry* and other cases. And the result would, I apprehend, have been the same, and would have been so perhaps *a fortiori* if the clause had simply borne that the lessor granted absolute warrandice, or warrandice at all hands and against all mortals.

"In the present case, however, it appears to me that the matter is not left to implication or to the construction of elastic terms. The clause here deals expressly with the liability after the granter's death; and the liability which it enacts is not a liability against heirs and successors generally, but a liability expressly limited to the lessor's successors in the entailed estate. Now, I can find no ground for putting on a clause thus limited any other than the natural construction. I can find no authority for doing so either in the judgments or opinions in the *Queensberry* cases, or in the discussions weth respect to the different kinds and effects of warrandice in the feu and leasehold which took place, for instance, in the case of *Macallum* v. *Duke of Montrose*, 6 Macph. 382; 8 Macph. (H.L.) 1. It may be true that in the case of eviction for want of power in the lessor the obligation as now construed operates nothing, and that it becomes simply one of the lessor's obligations under the lease — obligations which, had the lease been within his powers, would of course have been binding on succeeding heirs of entail, but which as matters stand are simply inoperative. But then that is just the defender's case. His case is that the clause of warrandice is inapplicable — inapplicable, and not meant to be applicable, to the event which has happened; his suggestion being, as I have already said, that the pursuers, having the eutail in view, were either satisfied on the question of power, or being doubtful about it took their risk.

"The question therefore really is, whether the above is not the fair conclusion from the language used. And on the whole, having given the matter my best consideration, I am of opinion in the affirmative. It is not necessary to go further into detail; but, in a word, I do not see my way to read the clause as if it had run 'which lease the said Earl of Galloway binds and obliges himself and his foresaids (and also in the event of the lease being found to be beyond his powers as heir of entail, his heirs, executors, and representatives whomsoever) to warrant to the said second parties at all hands.'"

The pursuers reclaimed, and argued —The lessees having been evicted by a defect in the title of the lessor to grant the lease were entitled under the clause of warrandice to claim relief from any estate or property held by the executor of the deceased lessor. The lease having turned out inoperative the lessees were entitled to have relief from their obligations and the outlays undertaken by them on the faith of the lease from the lessor and his personal representatives — *Symington* v. *Duke of Queensberry's Executors*, January 29, 1823, 2 S. 162; *Hyslop* v. *Duke of Queensberry's Executors*, November 13, 1822, 2 S. 8; *Downie* v. *Campbell*, January 31, 1815, F.C. The granting of the lease was a representation that the granter had a title to grant, and on that ground his executor was liable. Under the lease as construed by the Court in the action of reduction, the lessees had no recourse against the succeeding heir of entail, and therefore the clause of warrandice would be quite ineffectual unless it were construed as giving recourse against the personal representatives of the granter of the lease. If, then, there was ambiguity in the terms of the clause of warrandice, it should be construed so as to render it of some effect rather than to make it totally ineffective.

Argued for the defender and respondent —The whole provisions of the lease as well as the terms of the clause of warrandice showed that the intention of the parties was merely to limit the late Earl of Galloway during his life, and his successors in the entailed estates after his death. The lease was very special in its character and provisions, and the limitation of the warrandice to an obligation by the heir of entail in possession and his successors in the entail was in accordance with the scope and intention of the lease, which had for its purpose the improvement of the fishings of the entailed estates and the benefit of succeeding heirs of entail. The want of power on the part of the granter of the lease to grant it was a matter which the parties had not provided against, and the clause of warrandice was inapplicable and not meant to be applicable to the event which happened. The cases cited by the pursuers were quite distinguishable. There was here no eviction, but merely a refusal to renew a lease—*Stewart* v. *M'Callum*, February 14, 1868, 6 Macph. 382, February 17, 1870, 8 Macph. (H.L.) 1, 5 S.L.R. 256, 7 S.L.R. 308.

LORD ADAM—This is an action by the Duke of Bedford and others against the trustee and executor of the deceased Right Honourable Alan Plantagenet, Earl of Galloway, and the foundation of the action is that a certain deed which is called a lease was entered into between the pursuers and the late Earl of Galloway and has been reduced by this Court. That deed was found to be null and void, and that being so, the present claim is raised upon the clause of warrandice by which the late Earl found himself "and his foresaids" to warrant the second parties, the pursuers, and their foresaids at all hands. It is said the pursuers expended certain moneys on the faith of this being a good lease, and incurred expenses, and otherwise have suffered damages in consequence

of this lease having been found to be null and ineffectual. That is the nature of the case. Now, this document, which perhaps cannot strictly be called a lease, but is strictly a contract, is a very curious document. It was entered into between the pursuer and the late Earl of Galloway, and the principal purpose of it is set forth therein as being, "improving the fishings in said rivers and streams, and increasing the stock of salmon and other fish therein." That was the leading object of the lease, to improve the fishings in these rivers. The fishings were mainly on the entailed estate belonging to the Earl of Galloway as heir of entail, but the lease also, although that does not appear on the face of it, I understand includes fishings on certain other lands which belonged to the late Earl in fee-simple.

Now, that was the object of the lease, and so far as I see no benefit would accrue from its provisions to anybody but the heir of entail in possession of the entailed estate for the time being, whoever he might be. The lease, as it is called, is said to have let certain fishings therein specified as belonging to the Earl for the space of "twenty-one years or fishing seasons," beginning with the year or fishing season 1900. But the peculiarity is that it is not a lease at all for twenty-one years. It is a contract by which the Earl of Galloway bound himself and his successors to grant leases, not of the net-fishing but of the rod-fishing in these rivers—for the fishing season of six months—for twenty-one years. It is expressly said that on 31st July in each year the lease was to determine and come to an end as to the greater part of the fishings, and that the Earl of Galloway and his heirs and successors should then be entitled to resume possession on 31st July as if this document had never been granted, and proceed to fish with fly as much as they chose. That is the nature of this curious document. It is in fact an obligation on the heirs of entail to grant for twenty-one successive years successive leases of the fishings in these rivers belonging to the Earl. That is the material part of this lease so far as I can see, and nobody but the Earl and the succeeding heirs of entail in the estate take any benefit under it. Of course the Earl during his life would put the rent into his pocket, but after his death nobody would take benefit from the lease except the heir of entail in possession of the lands at the time. That is the nature of the lease.

Now, as presented to us, if there had been no express clause of warrandice, one would naturally say the persons bound after the Earl himself would be his successors in the entail and not his personal representatives. This lease would have been carried on as it was without objection during the life of the Earl. It might not have been objected to by the next heir of entail who succeeded to him. He might not have objected because the rents would go into his pocket, but not into the pocket of the heir or the executor of the Earl.

But, happily I think for the decision of this case, there is an express clause of warrandice, and the question is what is the true construction of that clause of warrandice. On the proper construction of that clause, who after the Earl's death was to be bound by the clause of warrandice? Now, by the clause the Earl "binds and obliges himself and his foresaids to warrant the lease to the said second parties and their foresaids at all hands." Now, the first thing is to find out who the Earl's "foresaids" are. And the only foresaids mentioned throughout the deed are "his successors in the said entailed lands and estates of Galloway, Baldoon, and others." So by the clause of warrandice he binds himself and his successors in the entailed estate. That is the clause of warrandice we have to consider; we can only consider that clause and find out what the parties intended on the footing that it was considered by the parties to be good and binding. Parties do not contract on the footing that what they are doing is to turn out invalid and of no use, and accordingly, to my mind, even if it be the case that this obligation binding the successors in the entailed lands is of no effect, that would not alter my view on the construction of the clause, because when we come to ask what was the intention of the parties? the intention of the parties was to insert a clause which would be binding, assuming the contract to be a good contract. Well, if that is so, I think it is quite clear that the meaning of the clause is this—that during the Earl's life he himself would have been responsible, because he binds himself to warrant the lease—and if a claim had been made during his life, it may be that his heirs and successors would have been liable because the Earl was liable, but after his death they were not bound—and the parties to be bound are his successors in the entailed estate. But the pursuers are not content with that; they want to insert "his heirs and executors" and also "his heirs in other lands." I see no provision that any other person is to be bound except those specified in the clause, namely, the Earl himself during his life, and after his death his successors in the entailed estates—that is to say, the parties who would succeed him in the entailed lands and alone derive benefit from the provisions of this contract.

On these grounds I think the interlocutor of the Lord Ordinary is perfectly right, and should be adhered to.

LORD M'LAREN—I think it does not admit of dispute that the obligation of warrandice or warranty on which this action is founded includes warranty of the granter's title. If a granter only warrants the grant against his own facts and deeds, that is not a warranty of title; but if he warrants, as Lord Galloway did, against all mortals, that, according to the settled law of heritable rights, includes a warranty of his own title to make the grant. Now, it cannot be said that this warranty was altogether useless or had no operation, because it was at all events a perfectly good warranty against Lord Galloway himself,

and if an action had been brought in his lifetime by any of the heirs-substitute either calling for an irritancy or for reduction of the lease, it would have put on the granter of the warrandice an obligation to defend his tenants, and in the case of an eviction to make compensation. That I should think is quite elementary, and the question only arises as to Lord Galloway's right to bind the heirs of entail. Now, what he does is to bind himself and his "foresaids." It may be that the parties who assisted in the preparation of the deed had not given full consideration to what was included in the general word "foresaids"; but now that we look at the deed we see that "foresaids" means only heirs and successors in the entailed estates. As it happens, the obligation is perfectly unavailing, because the heirs of entail do not represent the debtor in the obligation. On the other hand, the present heir has successfully maintained his right to reduce the lease as being an alienation. I ought to say also that it is not very easy to see in what cases the succeeding heir could be bound by the warranty if the lease is *ultra vires* of the granter, because whatever the state of facts might be his answer would always be the same—"I do not represent the granter of this obligation, and he had no power to bind me." But I do not go so far as to say that because the present heir is not bound the obligation must be taken to be an obligation against the granter and his heirs and executors. I think that is not a sound construction, because the intention was to burden the heirs of entail and to exonerate the general representatives. The true explanation is, as stated by Lord Adam, that parties when they enter into a contract generally believe that they have a power to enter into that contract. In this case nobody had seriously questioned the right of the proprietor to grant a lease in these terms, and it was assumed that he had authority to bind the heirs of entail to the lease, and consequently that he had authority to bind them to maintain the lessee in his possession. I therefore agree with Lord Adam and the Lord Ordinary, and think that the interlocutor should be adhered to.

LORD KINNEAR — I concur with your Lordship. I think the Lord Ordinary is absolutely right when he points out that it is unnecessary to determine what would have been the effect of an implied warrandice under this lease, because the only question before the Court is, what is the true meaning of a clause of wrrrandice expressed in plain terms. That, I think, is a perfectly just observation with which the Lord Ordinary begins his opinion, and I agree with him that the clause as expressed admits of only one interpretation. I do not think it is disputed that throughout every other part of the lease, when the granter speaks of himself and his "foresaids," he means himself and his successors in the entailed lands and estate of Galloway and others, and I can see no reason for putting a different meaning on the same words when they occur in the warrandice clause. It is as clear as if he had repeated the words throughout the deed and again in the warrandice clause, and said—"I bind myself and my successors in the entailed lands of Galloway and others," and that is the only obligation he has undertaken for himself or any successors.

I rather think that the whole argument, or at all events the main argument, for the reclaimers was based upon a confusion between two entirely different things—the true effect and meaning of a written instrument according to its terms and its legal efficacy. Mr Mackenzie said, and Mr Pitman also made the same point, that we must interpret an ambiguous clause so as to make it effective rather than to make it totally ineffective. I think, in the first place, that there is no ambiguity whatever in the clause, because the words used have only one meaning, but in the second place, I do not think the general rule relied on is applicable at all, because the inefficacy of the clause does not arise from any failure on the part of the framer of the deed to express his intention in clear words, but arises from his want of power to do legally and effectually what he certainly intended to do. The clause of warrandice falls with all the other clauses of the deed, because the granter attempted to impose on heirs of entail obligations which the law does not allow him to impose. On this point there is no question of construction. There can be no dispute that the late Earl intended to bind the heirs of entail in warrandice, because he says so in plain words, and there is just as little doubt that he had no legal right or power to do anything of the kind. The clause is therefore ineffectual. But it is altogether beyond the scope of any rule of construction to supplement the inefficacy of a clause which has failed for want of power by inserting a new and additional obligation which would not have failed because the granter would have had power to impose it effectually if he had imposed it at all. The answer is, that he never thought of imposing it. He has not in fact undertaken to bind his personal representatives by the warrandice clause any more than by the other clauses of a deed in which they have no interest whatever. I agree with your Lordships that throughout the whole deed the meaning of the parties is clearly to put certain obligations upon the late Earl of Galloway during his life and upon the heirs of entail succeeding him after his death, and to impose no obligations at all on any other representatives of the late Earl. That the deed turned out ineffectual seems to me to be an irrelevant consideration altogether. I have, with Lord Adam, no doubt that we must assume that the parties believed this deed to be a good and valid instrument, and accordingly I have no doubt they supposed that the clause of warrandice would be quite as good and effectual as any other part of the deed, and Mr Mackenzie has shown us that if that were the assumption on which they proceeded they were just accepting the ordinary form of a

clause of warrandice which is generally inserted in leases by heirs of entail when they are good leases and within their powers. If the lessees had any doubt as to the validity of the deed as granted by the heir of entail in possession, and in particular any doubt as to the force of the warrandice clause, their position was very clear. They must have seen that they must either be content to accept the warrandice as it is given, or else that they must stipulate with the granter that he should give an additional warrandice and bind his heirs and successors whomsoever, as well as his successors in the entailed estate. It is of no consequence whether they asked for such an obligation and did not receive it, or whether they failed to ask for it. The result is the same—they have accepted a lease which is found to be in contravention of the entail, and they have accepted this warrandice, which bound nobody but the Earl and the heirs of entail succeeding to him.

I therefore agree that we must adhere to the Lord Ordinary's interlocutor.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuers and Reclaimers —C. K. Mackenzie, K.C.—Pitman. Agents —J. & F. Anderson, W.S.

Counsel for the Defender and Respondent —Rankine, K.C.—Blackburn. Agents— Russell & Dunlop, W.S.

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*Friday, July 8.*

## SECOND DIVISION.

## HAY'S TRUSTEES *v.* HAY.

*Succession — Policy of Insurance — Donation or Provision—Revocation—Election.*

A effected a policy of insurance on his life, the policy having on it a memorandum signed by the secretary of the insurance society, whereby it was stated that it was taken in favour of his wife should she survive him. The policy was delivered to A's wife, but subsequently handed back to him. He deleted the memorandum, and wrote on the policy a revocation of the bequest in his wife's favour. This revocation was also deleted. He died and was survived by his widow and an only child. By trust-disposition and settlement he made provision for his widow, but declaring that these provisions should be accepted by her as in full satisfaction of all *jus relictæ*, terce, or other claim of any kind, legal or conventional, competent to her through his decease. The widow elected to accept these provisions, but claimed at the same time the proceeds of the policy of insurance. *Held* that the widow was the primary creditor under the policy, and that its proceeds formed no part of the husband's estate, and that she was entitled to take them as well as the provisions made for her in her husband's settlement.

By written proposal, dated 4th October 1879, John Hay, baker and confectioner, Edinburgh, proposed to insure his life with the Norwich Union Life Insurance Society, which had a branch office in Edinburgh, for the sum of £300 with profits, payable at death. The following clause by arrangement between Mr Hay and Georgina Birrell or Hay, his wife, was inserted in the proposal, viz.—"Policy to be in favour of Georgina Birrell or Hay, wife of the assured, for her behoof if she survive." Thereafter the Society issued to John Hay a policy of insurance for £300 on his life, dated 20th October 1879, wherein, *inter alia*, it was provided that the funds and property of the Society should be subject and liable to the payment unto the executors, administrators, or assigns of the said John Hay, within three calendar months after satisfactory proof of his death, of the sum of £300, and such further sum or sums as should at any time or times thereafter be appropriated as a bonus upon the insurance. When the policy was issued by the Society to John Hay there was written by the person who filled up the policy, below the testing-clause thereof, and alongside of the signatures of the directors of the Society, a memorandum in the following terms:—"Memorandum. — The amount insured by this policy to be in favour of Mrs Georgina Birrell or Hay, wife of the assured Mr John Hay, should she survive him, but in the event of her predeceasing him, then the policy to revert to his execrs., administrators, or assigns. (Sgd.) T. MUIR GRANT, Secretary, Norwich Union Life Office. October 20th 1879."

At the date when the policy was issued John Hay was solvent, and he remained solvent from that date to the day of his death. The policy was handed to Mrs Hay, who, however, handed it back to her husband in 1884, and never thereafter received possession of it.

Subsequent to 10th December 1886 and prior to 18th July 1893 John Hay deleted or caused to be deleted the said memorandum, and thereafter wrote at the foot of the policy the following:—"I hereby revoke and cancel the above bequest in my wife's favour. I have provided for her in my will."—(Sgd.) J. HAY." This memorandum is undated. It was also deleted, but by whom or when was unknown.

The policy of insurance was assigned by John Hay, with the consent and concurrence of his wife, in part security of the personal obligation contained in a bond and disposition and assignation in security, dated February 1884, granted by him and discharged in December 1886. The policy was again assigned by John Hay in part security of the personal obligation contained in a bond and disposition and assignation in security dated 18th July 1893 and discharged 11th May 1895. Mrs Hay was not a party to this latter assignation.