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.

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.

John Hay died at Edinburgh on 27th January 1904 survived by his widow and an only son, and leaving a trust-disposition and settlement and codicil, both dated 9th September 1901. By his settlement he conveyed to trustees his whole means, estate, and effects, heritable and moveable, for certain trust purposes, and, *inter alia*, he made certain provisions for his wife, including an annuity of £200, reduced by the codicil to one of £150, and the settlement further declared as follows:—"The above provisions in favour of my wife shall 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 my decease."

On the death of John Hay his widow elected to accept the provisions made for her by his settlement and codicil, but at the same time claimed the proceeds of the insurance policy to be hers, and that they formed no part of her husband's estate.

Questions having arisen between Mrs Hay and the trustees acting under deceased's trust-disposition and settlement as to which of them was entitled to the proceeds of the policy of insurance, a special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) Mr John Hay's trustees, and (2) Mrs Georgina Birrell or Hay, his widow.

The contentions of the parties as stated in the case were—"The first parties maintained that the second party never had an interest in the sums insured under the said policy, or alternatively, that the issuing of the said policy in the manner specified and the payment of the premiums thereon constituted a donation *inter virum et uxorem* revocable by the said John Hay at any time, and that the same was effectually revoked by him. Further, they maintained that the second party in any event was not entitled to the proceeds of the said policy, and at the same time to claim the provisions made for her in her husband's settlement.

"The second party, on the other hand, maintained that on the policy in question being effected in the terms quoted, the deceased John Hay had no beneficial interest in the proceeds thereof, unless in the event of his surviving the second party. The interest thereby created in favour of the second party was indefeasible at the instance of her husband. The policy thereafter was not subject to his control, and the interest created in favour of the second party was not revocable by him as a donation *inter virum et uxorem*, but was an irrevocable provision in her favour. The attempted cancellation of the docquet was therefore ineffectual to defeat the right of the second party, and the policy formed no part of the estate of the deceased John Hay at his death, but belonged to the second party. Otherwise, assuming the husband had power to cancel, the cancellation having thereafter been deleted, the interest of the second party in the policy revived. The second party further contended that she was not barred from claiming the proceeds of the policy by acceptance of the provisions in her favour under her husband's settlement."

The questions in the case were as follows:—"(1) In the circumstances, (*a*) Are the first parties, as the trustees and executors of the deceased, entitled to have the proceeds of the said policy paid to them as forming part of his estate? or (*b*) Is the second party entitled to have the proceeds of the said policy paid to her as her own property? (2) In the event of the second alternative of the first question being answered in the affirmative, is the second party entitled to take the proceeds of the said policy of insurance, and at the same time to claim her provisions under the settlement of the deceased?"

Argued for the first parties—The terms of the insurance policy itself conferred no right on the wife at all; the obligation on the insurance society was not to pay to the widow but to Mr Hay's executors. The memorandum on the policy formed a separate obligation, not of the society but of Mr Hay. If the wife did have a right under the policy, it had not all the requisites of an irrevocable provision, as there was no intention of the husband that it should act as a provision and not merely as a gift—*Anderson* v. *Anderson*, January 23, 1903, 5 F. 323, 40 S.L.R. 291; *Honeyman & Wilson* v. *Robertson*, December 7, 1886, 14 R. 163, 24 S.L.R. 152. The wife's right was revocable, and was in fact revoked. The mere deletion of the revocation did not invalidate it—*Pattison's Trustees* v. *University of Edinburgh*, November 9, 1888, 16 R. 73, *per* Lord M'Laren, at p. 76. Assuming the policy did give the wife an irrevocable provision, she could not at the same time accept the proceeds of the policy and claim the provisions made for her under her husband's settlement—*Bonhote* v. *Mitchell's Trustees*, May 27, 1885, 12 R. 984, 22 S.L.R. 648.

The second party was not called upon.

LORD YOUNG—We do not think it necessary to hear further argument in this case, which is a simple one. The parties are agreed that Mr Hay proposed to insure his life for the sum of £300 with profits payable at death with the Norwich Union Life Insurance Society, which has its head office in Norwich, but with, at the date of the proposal, a branch office in Edinburgh. The following clause—and this I consider important—was inserted in the proposal, namely, "Policy to be in favour of Georgina Birrell or Hay, wife of the assured, if she survive." Then it is stated in the case that this was done in accordance with an arrangement previously made between Hay and his wife that the insurance should be effected for her benefit should she survive him. Now, that was an arrangement between husband and wife admitted by the parties before us that he should enter into a contract with a specified insurance office whereby the insurance office should become debtors of his wife for the sum of £300 in the event of her surviving him. That proposal was arranged between the

parties, I have no doubt with the advice of a competent professional man, and was made to the Insurance Office. The result is the policy before us, whereby I think it not doubtful that the Insurance Office undertook obligation as debtors to the wife for the sum of £300 in the event of her surviving her husband. I am reading, of course, the memorandum, which is in accordance with the proposal, and which is above the signatures of the Insurance Company's officers, whose signatures make the contract. It may be called a provision, in which case it is certainly not revocable. Or call it a gift. It was an executed gift, that is to say, a document containing the obligation of the Insurance Office in favour of the wife was delivered. If it is a gift, it is an executed and delivered gift, making the wife the creditor of the Insurance Office upon her husband's death for the sum of £300. Assuming it to be a gift and revocable, was it revoked? The parties are not agreed that it was, and upon the documents in the case before us we have nothing which even suggests the idea of revocation. Because there is no revocation of this memorandum, which is in accordance, as I have pointed out, with the proposal made to the Insurance Office in terms agreed upon by the husband and wife. This memorandum has a pen score through it, but we have no evidence that that was done by anybody who was entitled to do it. Nobody could be entitled to do it except the creditor in the obligation to whom it was delivered. But if you assume that she was entitled, there is certainly not a suggestion that she did do it, and therefore I think we must read the policy with that memorandum undeleted. There is no evidence upon which we can come to the conclusion that it was ever properly deleted by anybody having the power to do so.

If, then, there is no revocation, what is the result? The wife is entitled to take the position of creditor of the Insurance Company for that sum of £300. And the only remaining question before us is, does she, if she gets payment accordingly, take any estate of her husband, it being a condition of her getting an annuity of £150 by his will that she should renounce all right to estate of her husband. I think that by getting this £300 from the debtor in the insurance policy she is not taking any estate of her husband.

On these grounds I am of opinion that the questions should be answered accordingly—that is to say, the first branch of the first question in the negative; the second branch of that question in the affirmative; and the second question also in the affirmative.

Lord Trayner—I concur, and think the questions before us should be answered as your Lordship has proposed. The proposal, as your Lordship has pointed out, for this insurance emanating from the late Mr Hay was a proposal that a policy should be issued in favour of his wife if she survived him, and in the event of her predeceasing him that the policy should then "revert" to his executors, administrators, or assigns. The object of the last part of the proposal was simply to save trouble and expense in enabling him or his representatives to realise the amount of the policy if his wife should predecease, but there can be no doubt, I think, that by the terms of the policy executed—and it was executed in terms of the proposal—he meant that the wife should become primary creditor in the policy and entitled to the amount insured on his life in the event of her surviving him. Now, whether that was a provision in her favour or a gift made by Mr Hay during his lifetime to his wife is a matter I need not consider, but I take it in the most favourable view for the first parties that it was a gift and not a provision. I also assume it was a gift he could revoke. He certainly had no right to delete the memorandum on the policy conferring right on his wife. That was part of the obligation of the Insurance Company, and therefore I look on the policy as having that memorandum still attached. Was the gift (as I assume it to be) revoked? I think not. When we look at the memorandum by which it is said to have been revoked, it bears that he thereby revoked and cancelled the "above bequest in my wife's favour. I have provided for her in my will." Accordingly when he wrote that memorandum revoking and cancelling the gift he had executed a will (according to his own statement) by which he made some provision for her. We do not know the date of that will, nor what the provision was, or anything about it, but it is his statement that he had made such a provision. That he gave as the reason for the revocation. But after that he had possession of the policy, which he had got from his wife, and subsequently delivered it to his agent. When so delivered to his agent this particular clause cancelling the bequest to his wife was deleted. There is, of course, no information as to who deleted it. But I think the irresistible inference is that at some time it was deleted by the deceased. It was in no other person's possession but his own, and nobody could do it unless he did it or somebody did it by his direction. But if he deleted that memorandum after he had made the provision by his will in his wife's favour the inference again arises that he deleted it *ex proposito* with the intention of leaving her the policy as well as the testamentary provision he had made in her favour. Accordingly I think the policy for £300 and all interest under it is the property of Mrs Hay.

On the second question as to whether she is entitled to take the amount of the policy and the provision under her husband's last will, I agree with your Lordship that she is entitled to both. The clause on which it is maintained for the first parties that the second party is put to her election is this—"and it is hereby declared that the above provisions in favour of my wife shall be accepted by her as in full satisfaction of *jus relictæ*, terce, or other claim of any kind, legal or conventional, competent to her through my decease."

I read these words as meaning that any right which is competent to the second party *qua* widow against the estate of her husband is to be departed from if she accepts the provision he has made for her. But I think we have here no case for election. The second party makes no claim against her husband's estate except for what he has provided to her. She retains the insurance money as her own estate. It was never part of her husband's estate.

LORD MONCREIFF—I agree with both your Lordships. I think there is no doubt that in terms of the policy as originally granted the wife was creditor. The policy was taken out originally as a provision for the wife, and it has all the qualities of an irrevocable provision. There had been no antenuptial marriage-contract. The provision was not to take effect till after the husband's death. The amount was reasonable. The husband was solvent at the date he took out the policy, he remained solvent during the remainder of his life, and lastly the policy was delivered to his wife and kept by her for some years. I think, therefore, that it was an irrevocable provision according to the rules which regulate these matters. But I am also disposed to agree with both your Lordships that even supposing it was revocable it was not revoked, because what took place was this — the husband required to borrow money, the wife lent him this document, and she was made a consenting party to the first loan, and her right was recognised. But then the husband paid up that debt, got back the policy, and apparently without her knowledge kept it, and afterwards received a second loan on it, and in that case without any mention of her at all. That loan also was repaid and the document delivered back to him, and therefore any subsequent manipulation of that policy must have been made presumably by Hay himself. The deletion of the memorandum might have had a serious effect on the wife's interest supposing that the husband had not remained solvent. The effect, if the deletion stood, would have been to throw this policy to the general body of his creditors. The wife evidently knew nothing about what had taken place, and I do not think that either the Insurance Company or the wife was affected or could be affected by what the husband chose to do. But supposing it was a gift, we find that the revocation —the so-called revocation of the gift which appears on the face of the document—is deleted, and I think the only reasonable inference is that the document never having been in the possession of the wife after the first loan the deletion which was made after making provision for the wife was made by the husband. The inference is, as your Lordship pointed out, that he repented of what he had done apparently in a fit of temper, and intended the provisions in the will to stand side by side with the separate provision under the policy.

On the question of election I agree with both your Lordships that what was meant by the clause in the will was that she was put to election in regard to any rights, legal or conventional, which she had against the husband. I do not think that this insurance policy was part of his estate. I think it was her estate.

On these grounds I concur that the questions should be answered as proposed.

The LORD JUSTICE-CLERK was absent.

The Court answered the first branch of the first question in the negative, the second branch of the first question in the affirmative, and the second question also in the affirmative.

Counsel for the First Parties — Dove Wilson. Agent—A. C. D. Vert, S.S.C.

Counsel for the Second Party—D. Anderson. Agent—J. A. B. Horn, S.S.C.

Thursday, July 14.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

WALLACE *v.* UNIVERSITY OF ST ANDREWS.

Church—Glebe — Designation—Excambion —Prescription—Possession.

In 1512 certain lands were conveyed to the University of St Andrews by a charter which was confirmed by the Crown in the same year and by Parliament in 1612. No infeftment followed on the charter, but it was followed by possession. In 1827, on the application of the minister of the parish of St Leonard, the Presbytery designed for him as a glebe a portion of the lands referred to. No possession followed on the designation, but from 1827 to 1854 the minister received from the University of St Andrews certain payments in money "for manse and glebe." In 1854 a contract of excambion was entered into between the minister of St Leonard's with the concurrence of the Presbytery, and the University, whereby, on the narrative of the designation of 1827, another part of the lands already referred to was conveyed to the minister as a glebe instead of the lands formerly designed. The contract of excambion was never recorded in the Register of Sasines, and the lands conveyed thereby remained in the occupation of the University. Annual payments were made to the minister by the University, and by other heritors "in lieu of manse and glebe" down to Martinmas 1902. In 1903 the minister of St Leonard's raised an action against the University of St Andrews, in which he sought to have it found and declared that the lands last referred to were the glebe of said parish, and to have the University ordained to remove there-