

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 claimant'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

Commercial Tribunal of Ostend, desiring that certain evidence be taken at Aberdeen in connection with the civil case of Jules Forbes, fish merchant at Aberdeen, against J. Bæls-Mauriex, fish merchant, Ostend: That the names and addresses of the witnesses desired to be examined are as follows:—Mr. W. H. Dodds, fish merchant, Aberdeen; Mr Robert Murchie, fish merchant, Aberdeen; Mr James Forbes, fish merchant, Aberdeen; Mr D. Crombie, of the Aberdeen Fish Manure and Oil Company, Limited, at Aberdeen: That in these circumstances it appears to the petitioner to be proper that he should make this application to your Lordships to obtain the examination of the said witnesses as desired by the Commercial Tribunal of Ostend and Belgian Minister on their behalf, and the petitioner respectfully suggests that, in view of the nature of the case, as disclosed in the said letter of request, your Lordships should appoint the Sheriff of Aberdeen, or his Substitute, as the person before whom the said witnesses shall be examined."

The prayer of the petition was in these terms:—"May it therefore please your Lordships to order the examination of the said W. H. Dodds, Robert Murchie, James Forbes, and D. Crombie, under the said letter of request and translation thereof, upon oath, before the Sheriff of Aberdeen or his Substitute, and to command the attendance of the said at such places and times as the said Sheriff or his Substitute may fix, upon giving the said witnesses forty-eight hours' previous notice of the day and hour fixed, to give evidence in relation to said civil cause of 'Jules Forbes against J. Bæls-Mauriex,' and also to bring with them, exhibit, and produce before the said Sheriff or his Substitute, upon oath, all such writings and documents as they may have in their hands, custody, or keeping, which they may be required so to exhibit and produce in evidence of any of the matters at issue, and to declare where and in whose hands, custody, or keeping all or any of such writings and documents are or may be: And to grant warrant to messengers-at-arms and other legal executors of your Lordships' warrants, and to sheriff-officers, to cite the said to attend at the said places and times for the purposes of the said examination: And to appoint that the depositions of the said so taken shall be transmitted to the Crown agent that the same may be conveyed through the proper channels to the Belgian Minister: And to do further or otherwise in the premises as to your Lordships shall seem proper."

As evidence of the fact (a) that the question in regard to which the application was made was a civil matter pending before a foreign tribunal, and (b) that the evidence was required, there were produced (1) the said letter of request, and (2) a letter from the Under Secretary of State for Foreign Affairs to the Under Secretary for Scotland.

Argued for petitioners—The Court had jurisdiction under the Act to make the

appointment craved, for the Act was general in its terms, and evidence was produced in terms of section 2. The appointment of the Sheriff or Sheriff-Substitute as commissioner lay entirely in the Court's discretion—the suggestion that he should be appointed being made in order to save a foreign Government trouble and expense, and as a matter of international comity. Prior to the case of *De Bildt*, July 4, 1905, 7 F. 899, 42 S.L.R. 690, it had been usual to appoint the Sheriff-Substitute—*Blair*, July 14, 1883, 10 R. 1223, 20 S.L.R. 810; *Reid*, May 23, 1890, 17 R. 790. The case of *De Bildt* was not in point, for the application in that case was by a private individual, whereas this was at the instance of the Lord Advocate as representing His Majesty's Government. In England it was usual to appoint the registrar.

LORD PRESIDENT—I think this application should be granted. I am not disposed to go back in any way on the case of *De Bildt*. I think that the decision in that case was sound. An examination of this kind does not take place before the Court, but before the commissioner. Consequently, the proposal to nominate the Sheriff-Substitute is nothing more than a suggestion, and is a suggestion which ought not to be given effect to at the instance of an ordinary applicant. We have in that case no right to saddle the Sheriff Ordinary of the bounds with duties not within his commission. But while I agree with the decision in *De Bildt's* case, it seems to me to make all the difference when the application is presented by the Lord Advocate, who in this matter acts for the King's Government. It practically comes to this, that we are told by the Government that they wish to take up this matter as an act of comity—to save trouble and expense to a foreign Government. In this case, therefore, we are not putting upon the Sheriff-Substitute anything we have no right to put upon him; we are merely asking him to carry out a request in the King's name. Accordingly I think that we ought to grant the prayer of the petition.

LORD M'LAREN—I concur.

LORD KINNEAR—I have no doubt the course your Lordship proposes is the right one.

LORD PEARSON—I agree.

The Court ordered the examination to take place before the Sheriff of Aberdeen or his Substitute, and granted commission accordingly.

Counsel for Petitioner—Munro, A.-D. Agent—The Crown Agent.