not take effect as far as they were concerned—at least in its main operation—until the death of the granter, the mother. It appears to me therefore that on the failure of the onerous and irrevocable grant by the failure of children of the second marriage, the interest of the children of the first marriage remains at the end what it was at the beginning, a gratuitous and necessarily testamentary grant. And in that view the possession by the trustees and delivery to them was not intended to operate as an immediate denuding of the right, but was intended simply to preserve the onerous and irrevocable rights of the children of the second marriage.

I do not look upon this as a conditional grant. That is not the nature of it. It was not a conditional grant. It was a perfectly available and absolute provision in regard to both the sets of persons favoured by the deed, but with this difference, that in regard to the children of the second marriage, if they had ever existed, it could not be revocable, while in regard to the children of the first marriage it was subject to revocation, and although perfectly good and absolute enough so long as it remained unrevoked, I cannot think that the mother here intended to denude herself of this part of her property absolutely in favour of the children of the first marriage, there being no reason that can be assigned for her putting herself in the position of divesting herself to that extent.

I agree with Lord Young that the husband's *jus mariti* was excluded entirely—that in point of fact he took no interest, and could take none, in regard to the property of the fee by this trust-deed. On the whole matter, therefore, although I quite admit that the fact of its being a conveyance of specific subjects, and not a general settlement of the property of the granter, is material, and in some respects makes it an exceptional deed, I am not prepared to go the length of converting what was a testamentary grant into an absolute conveyance.

I therefore concur with the majority, and with the Lord Ordinary.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Campbell Smith—Nevay. Agent—William Officer, S.S.C.

Counsel for Defenders (Respondents)—Lord Advocate (Balfour, Q.C.)—Robertson—Jameson. Agents—J. & J. Ross, W.S.

Saturday, March 10.

FIRST DIVISION.

[Lord Lee, Ordinary.

CHISHOLM *v.* ROBERTSON.

Prescription, Triennial—Act 1579, *c.* 83.

Blank forms of orders for the hire of sacks, bearing reference to conditions prefixed, were issued by a contractor, and were returned filled in and signed by the hirer, who then got the use of the sacks. In an action by the contractor for payment of his account, brought more than three years after the date of the last item, *held* that the claim was founded on a written obligation within the meaning of the Statute 1579, c. 83, and therefore was not subject to the triennial prescription.

This was an action in which John Chisholm, sack contractor, Perth, sued John Robertson, grain merchant, Aberdeen, for the sum of £145, 7s. 3d., being the amount due by the defender for hire of the pursuer's sacks. The whole terms and conditions upon which the pursuer was in use to supply sacks on hire were contained in printed forms issued by him to grain merchants and others, and appended thereto was a printed form of order to be filled up by the person taking the sacks on hire, in the following terms—"J. Chisholm will please give the bearer sacks, which we hereby hire upon the above conditions, for grain, to be railed at* station for station.

"* If to be shipped, enter ship's name and destination."

The pursuer averred that several of these printed forms were filled in and signed, either by the defender himself or by some-one acting on his behalf; that he had had the use of the pursuer's sacks, and was therefore due the amount sued for, conform to account produced.

The defender pleaded, *inter alia*, that as the account ended on 26th October 1879, and this action was not raised until 22d November 1882, the account had undergone the triennial prescription.

The Act 1579, c. 83, provides—"That all actions of debt for house-maills, men's ordinaries, servants' fees, merchants' accounts, and others the like debt that are not founded upon written obligations, be pursued within three years, otherways the creditor shall have no action, except he either prove by writ or by oath of the party."

On 20th February 1883 the Lord Ordinary (Lee) pronounced this interlocutor—"Finds that the present action is founded on written obligations alleged to have been granted by or on behalf of the defender, in terms of the orders and relative printed conditions: Therefore repels the plea of prescription; allows to both parties a proof of their averments so far as not admitted, &c.

"*Opinion.*—The present action is for the hire of sacks conform to account produced. The hires are said to be instructed by the orders contained in the bundle No. 11 of process; and these orders bear reference to conditions prefixed, regulating the terms upon which the sacks were obtained. They are alleged to be in each case filled in and signed either by the defender himself, or by some-one acting on his behalf; and if this allegation is disputed, I apprehend that it may be established by proof of the signatures, and of the authority of the granter to act for the defender where the signature is not that of the defender himself.

"The defender pleads the triennial prescription, and as the account ends 26th October 1879, and it is not disputed that the alleged debt is of the kind to which the statute applies, the only question is whether the alleged debt is 'founded on written obligation' within the meaning of the statutory exception.

"It has long been settled that a mere order for goods is not sufficient to exclude the application

of the statute—*Ross* v. *Shaw*, M. 11,115; *Douglas* v. *Grierson*, M. 11,116. But it is contended that the documents founded on in this case are not mere orders for the furnishings alleged to have been supplied, but contain within themselves all the elements of an obligation, inasmuch as they bear not merely a request for the sacks, but also an agreement to hire them 'upon the above conditions.'

"I think that this is according to the true construction of the documents, and therefore that the case is not within the same class as the *North British Railway Company* v. *Sligo*, 1 R. 309. What was desiderated in that case was a document granted by the alleged hirers of the waggons, or anyone on their behalf, containing the terms of the alleged agreement under which the waggons were said to be hired (*p.* Lord Shand, Ordinary, p. 305), or, in the words of Lord Neaves, a document '*eo ipso* creating an obligation on the debtor afterwards sued.' It was not thought necessary in that case that the document should be sufficient in itself as a voucher of the amount of the debt. Lord Neaves said—'I am quite prepared to accede to the view that a claim may be founded on a written obligation, although it is not fully constituted by that written obligation—not fully evidenced by that written obligation.' This is plainly implied also in the opinion of the Lord Justice-Clerk, and the case of *Dickson*, referred to by him (M. 11,090), is an excellent illustration of the distinction between sustaining a writing as sufficient to create the obligation, and sustaining it as a complete voucher of the debt. It is not enough therefore to say that the writings alleged do not instruct the receipt of the sacks referred to in the several orders, or the length of time for which they were detained. That does not destroy them as written obligations for the hire or payment of the sacks if received according to the terms of the contract.

"I think that what was wanting in the case of the *North British Railway Company* v. *Sligo* is present here, and therefore that the plea of prescription is inapplicable to the case, in so far as founded on the hiring orders produced."

The defender reclaimed, and argued — The order was not *per se* sufficient to constitute an obligation, and that therefore the debt was not "founded on a written obligation"—Bell's Comm. i. (5th ed.) 349; *Ross* v. *Shaw*, M. 11,115; *Douglas* v. *Grierson*, M. 11,116; *Dickson* v. *M'Aulay*, M. 11,090; *Blackadder* v. *Milne*, March 4, 1851, 13 D. 820; *North British Railway Company* v. *Smith Sligo*, December 20, 1873, 1 R. 309; *Chalmers* v. *Walker*, November 19, 1878, 6 R. 199.

At advising—

Lord President—I think that the Lord Ordinary has taken a sound view of this question. The pursuer Chisholm issues to persons in certain trades printed forms of the conditions upon which he will supply sacks, and appended to the conditions there is a printed form of order in these terms—[*quotes as above.*] Apparently when the order is given there is a concluded contract between the parties, for Chisholm by issuing these forms puts it in the power of those persons to whom they are issued to bind him to deliver a certain number of sacks upon a certain date. I think this is analogous to a class of contracts with which we are familiar—I mean the compulsory taking of land by railway companies under an Act of Parliament. The Act gives the power to take the land, and the company gives notice that they will take a specific amount; that makes the contract complete; and for this reason, that the Act is held to be an offer to the company of the land, and the notice is held to be an acceptance. Just in the same way here, the issuing of these forms is an offer by Chisholm to supply any number of sacks, and when that offer is accepted by the order being filled up and returned, then the contract is complete. It was suggested that in this view it might be rather dangerous for Chisholm to issue these forms, as he thereby rendered himself liable to be overwhelmed with acceptances. That is a matter for his consideration. If he did not fulfil the obligations which he undertook he might be liable in damages, but that does not alter the nature of the transaction. The debt claimed is founded on a written obligation, and the statute therefore does not apply.

Lord Deas—All cases of this kind are of very great importance, and it is sometimes necessary to draw very nice distinctions. But on reading the document as given in the condescendence, I am of opinion that there is here a completed contract in writing, and that therefore the interlocutor of the Lord Ordinary is sound and in conformity with the cases that have been decided on this point.

Lord Mure—I am of the same opinion. There are in the authorities some nice and narrow distinctions, but it appears to me that the document here founded on is substantially a written obligation. The order which has been quoted by your Lordship is signed by the defender himself. It was said that there was no specification of the nature of the obligation undertaken, but I think it is clear that a contract was completed from the following passage in the printed conditions:—"The sacks may, however, be kept for longer periods, either before or after a sea voyage, or before or after a railway journey, for storing the same grain in, at one halfpenny per sack per week, or part of a week, payable monthly." That shows that a contract is completed by giving the order, and that if the party ordering the sacks keeps them for a longer period than is stipulated he must pay extra.

I think the judgment of the Lord Ordinary is quite sound.

Lord Shand—I am of the same opinion, and as I have already, in the case of the *North British Railway Company* v. *Smith Sligo*, reviewed the authorities on this point, I do not require to go over them again. Here there is the element which I thought wanting in *Sligo's* case, and therefore the statute does not apply.

The Court adhered.

Counsel for Defender (Reclaimer) — Rhind — Baxter. Agent—Arch. Menzies, S.S.C.

Counsel for Pursuer (Respondent) — J. P. B. Robertson—Pearson. Agents—J. & A. Peddie & Ivory, W.S.