

whatever in connection with the tramways. On the contrary, they would have been compelled to expend a large sum directly in connection with them, and due solely to their existence, and to make this expenditure by means of a payment to the respondents, who were to keep them free from all such expenses.

The conclusion at which I have arrived appears to me in complete harmony with the general scheme of the lease and the other provisions contained in it. I do not think it would be giving its true effect to the contract between the parties to hold that, though the respondents would be bound to pay to the appellants all expenditure they had incurred in connection with the tramways, the respondents could claim to be repaid by the appellants expenditure they had themselves made in connection with the tramways.

LORD SHAND—I am also of the same opinion.

The case raises no matter of general interest, but involves merely a question of construction—a question as to what is the meaning of the particular terms used in the lease between the parties. I agree in thinking that on the grounds stated by your Lordships, taking the provisions of that lease as a whole, and having regard to the special clause as to expenses, the result is that the appellants are not liable for the sums sued for. I think the word “expense” would have been a better term to be used than “expenses,” but that the effect of the word “expenses” results in the judgment which your Lordships are now about to pronounce.

Ordered that, in so far as they relate to the first conclusion of the summons, the interlocutors of 2nd December 1896 and 14th March 1897 be reversed, and the Corporation assolizied from that conclusion, and that the interlocutors of the 14th March and 20th March 1897, in so far as they relate to the expenses of process, be reversed, and that the appellant Corporation have the expenses incurred by them before the Court of Session, and their costs of this appeal.

Counsel for the Appellants—Haldane, Q.C. — Cripps, Q.C. Agents — Martin & Leslie, for Simpson & Marwick, W.S.

Counsel for the Respondents—Balfour, Q.C.—W. Campbell. Agents—Grahames, Currey, & Spens, for Webster, Will, & Ritchie, S.S.C.

Thursday, July 28.

(Before Lord Watson (in the Chair) and Lords Shand and Davey.)

HOPE v. HOPE'S TRUSTEES.

(Ante, February 19, 1896, 33 S.L.R. 352, and 23 R. 513.)

*Insanity—Succession—Testamentary Capacity—Sufficiency of Averments of Insane Delusion.*

A testator who died at the age of 86, and who during his life carried on a successful business as a Writer to the Signet, and took an active part in municipal affairs, left his estate for certain charitable purposes, and in particular for the promotion of teetotalism and the prevention of the spread of the doctrines of the Church of Rome, objects to which he had largely devoted his time and means during his life.

The pursuer in an action of reduction of the will on the ground of insanity admitted these facts, but averred that “upon both the said topics he (that is, the testator) was subject to insane delusions. He believed that he had a special and imperative duty to further the cause of total abstinence and to oppose the Church of Rome by devoting his pecuniary resources to these objects, in consequence of commands which he conceived he had received from the Deity by direct communication upon various occasions; these insane delusions dominated his mind and overmastered his judgment to such an extent as to render him incapable of making a reasonable and proper settlement of his means and estate, or of taking a rational view of the matters to be considered in making a will.”

Held (rev. the judgment of the First Division—*diss.* Lord Davey) that these averments were relevant, and that the pursuer was entitled to a proof.

*Process—Summons—Pleading—Relevancy.*

Observed (by Lord Watson and Lord Shand) that where there is an alternative averment of fact, relevancy must depend on the weaker alternative.

Observed, further, that in Scotch cases of relevancy the technical rules of construction which were sometimes applied by the law courts in England in cases on demurrer are not to be followed, but the primary and ordinary meaning is to be given to the words.

The case is reported *ante ut supra*.

The pursuers appealed to the House of Lords.

At delivering judgment—

LORD WATSON—Whether the averments made by the pursuers in support of their action would, if proved or admitted, be sufficient to entitle them to decree is the only question raised in this appeal.

The action is brought by the heir-at-law and next of kin of a gentleman deceased,

for the purpose of setting aside three deeds—one of them *inter vivos* and the others testamentary—by which he conveyed the bulk of his large estate, heritable and moveable, to trustees, to be held by them for the promotion of certain charitable and benevolent objects. Shortly stated, these objects were—total abstinence from the use of alcoholic or fermented liquors, or of tobacco or opium, the dissemination of the true doctrines of the Protestant religion, the inculcation of the danger arising to civil and religious liberty from the doctrines of the Church of Rome, the promotion of Sabbath observance, of Church and State connection, and of the union of all Christian churches on the basis of a United Established Church.

One main peculiarity of the case presented by the pursuers in their condescendence and in their answers to the separate statement of facts for the defenders consists in this, that whilst alleging that the deceased was eccentric, they do not dispute that during his life, which was prolonged until the age of 86, he carried on a successful business as a Writer to the Signet, took for many years an active part in municipal affairs, and for forty years before his death freely spent both his time and his money in promoting those objects to which he has directed that his estate shall be applied.

The material averments relating to the alleged incapacity of the deceased to execute the deeds under challenge are to be found in the eighth article of the condescendence. With reference to "matters connected with temperance and total abstinence, and with the Church of Rome," it is there stated that "upon both the said topics he" (that is, the testator) "was subject to insane delusions. He believed that he had a special and imperative duty to further the cause of total abstinence and to oppose the Church of Rome by devoting his pecuniary resources to these objects, in consequence of commands which he conceived he had received from the Deity by direct communication upon various occasions; these insane delusions dominated his mind, and overmastered his judgment to such an extent as to render him incapable of making a reasonable and proper settlement of his means and estate, or of taking a rational view of the matters to be considered in making a will."

I do not think that any lawyer would dispute the proposition that a testamentary disposition cannot receive effect if it be shown that its provisions were prompted by an insane delusion or delusions existing in the mind of the testator. In my opinion the late very able and learned head of the Court of Session stated the law with perfect accuracy in the case of *Morrison v. Maclean's Trustees* (which is reported in the 24th volume of Dunlop at page 633), where he directed the jury thus—"Sometimes a writing of this kind" (referring to a testament), "although expressed in perfectly intelligible language, although it may express apparently a rational and even laudable purpose, and although the writer may understand its legal consequences and effects, may still be the pro-

duction of insanity, and may appear upon its very face to be so. Supposing that he were to set out upon the face of this testament that he does make this disposition of his property because he believes something to be the case which no sane man could believe; suppose he were to tell you that he makes this disposition of his property because he has received a direct revelation from heaven that it is his duty to do it, it would be quite a different case. Then upon the face of the deed itself there would be enough to condemn it. But certainly, in so far as this writing is concerned, there is no delusion apparent in the deed, and the man who wrote it—it being his own act unaided by anybody else, so far as I can see—must be held to have been mentally capable of conceiving the purpose, of expressing it in distinct language, and of foreseeing and understanding its legal consequences and effects. But gentlemen, still further, although the deed itself may be of this character, and may prove his mental capacity so far, and may not disclose any insane belief or delusion as the spring of his action or the motive of his conduct, such may nevertheless exist; and if the pursuer has proved to your satisfaction that the testator was suffering under delusions which led him to execute this deed to the detriment of his own relatives, and so to cut off his natural succession, he may still prevail; because a man may be labouring under the most insane delusion, and yet have mental capacity to do what shall upon the face of it appear to be a perfectly sane thing actuated thereto by the insane delusion." The words which I have already quoted from article 8 of the condescendence appear to me to contain a substantial averment that the deceased believed that he had on various occasions received a direct command from heaven to devote his means to the furtherance of total abstinence and exposing the errors of the Church of Rome. I think that is the true meaning of the words used, according to their primary and natural significance, and that they cannot, without resorting to a strained and figurative construction, be read as merely conveying the allegation that the deceased believed that according to the dictates of his conscience, it was his duty to devote his means to these objects. Had the averments amounted to no more than that which I have last expressed, they would not in my opinion have been relevant. I do not think—and I protest against the assumption—that in Scotch cases of relevancy the extremely technical rules of construction which were sometimes applied by the Law Courts of England in cases on demurrer ought to be followed. I concede that in cases where there is an alternative averment of fact, relevancy must depend upon the weaker alternative, the only one which the pursuer absolutely offers to prove; but in my opinion averments which are not alternative are sufficient for relevancy if according to their primary meaning they are sufficient to support the conclusions of the action. In that view I think the aver-

ments of article 8 are sufficient to entitle the pursuers to inquiry, and it is not inconsistent with that opinion that Lord President Inglis employed substantially the same language for the purpose of explaining to a jury what was sufficient to constitute an insane delusion.

I move that the interlocutor appealed from be reversed, and that the case be remitted to the Court of Session to proceed further therein; that the appellants have their costs of this appeal; and that the expenses hitherto incurred in the Court of Session do abide the issue of the cause.

LORD SHAND—I do not think that this case can be represented as being free from difficulty, but after consideration I remain of the opinion which I held at the close of the discussion, that the pursuers have made a relevant statement which entitles them to have inquiry.

When the case was before the Lord Ordinary, Lord Kincairney, I think his Lordship had no alternative but to dismiss it. I agree with his Lordship in thinking that the case, as presented to him, was not relevant, and I entirely adopt what I venture to call the admirable judgment which his Lordship delivered. The record as it then stood in article 8, which really gives the statement on which the relevancy must be tested, contained only an averment that "for many years of his life" Mr Hope, the testator, had been "subject to hallucinations," that "his speech, his writings, his actions, were unreasonable and extravagant, and that his mind, in relation to" the subjects which are there mentioned, "was disordered and unhinged." The statement went on to say "that upon both the said topics he was subject to delusions to such an extent as to render him incapable of making a reasonable and proper settlement of his means and estate, or of taking a rational view of the things to be considered in making a will." The article, no doubt, went on to say that the "deeds and codicils were not the deeds of the said John Hope." But from the beginning to the end of the whole statement there was no averment of insanity, and while in a sense a statement may be regarded as relevant which alleges that the deeds are not the deeds of the testator, implying (it may be) insanity, I agree in thinking that such a bald averment only is quite insufficient. It may be said to be sufficient because in stating that the deed is not the deed of the testator it is thereby meant that the testator had not the capacity to execute it, but it would not be relevant in the sense in which a pursuer is bound to state his case in respect of specification.

I think the record failed in two points—first, because there was no averment of insanity, and secondly, because there was not a statement or even a hint given to the defenders who were to support the will, of the grounds upon which it was to be maintained that insanity existed. Lord Kincairney has very fully explained his view upon that subject, and, as I have said, I agree with him.

When the case went to review before the First Division of the Court of Session, the record, after discussion, was altered and amended. It was altered and amended in two particulars, to some extent following the suggestions which Lord Kincairney had made. In the first place, the delusions were no longer left simply as delusions, but they were characterised as "insane delusions," and in addition to that, these words were added, that the testator "believed that he had a special and imperative duty to further the cause of total abstinence and to oppose the Church of Rome by devoting his pecuniary resources to these objects in consequence of commands which he conceived he had received from the Deity by direct communication upon various occasions. These insane delusions dominated his mind and overmastered his judgment to such an extent as to make him incapable of taking a rational view of the matters to be considered in making a will." The amendment therefore added the averment of insanity, and it gave the particulars, as it appears to me, of what that insanity consisted in. I confess that I have difficulty in understanding the view which was stated by the First Division of the Court in the passage of the opinion of the learned Lord President in which he says—"The amendment of the record seems to me, therefore, to weaken and not to strengthen it." How the record could be weakened by adding an averment of insanity I have difficulty in understanding, or how it could be weakened by adding, in addition to the averment of insanity, the particular point or ground upon which it was said that the testator's mind was unhinged and unsound.

His Lordship goes on to say that the averment "amounted to no more than this, that Mr Hope believed that in promoting the two objects in question he was obeying God's will as made manifest by God to his conscience." If I read the record as their Lordships in the First Division have done, as so explained, I should agree with them in the result at which they arrived, but I cannot read this record which avers insanity, and which avers, as I read it, that there was a direct communication from the Deity prescribing the making of this will, prescribing the way in which this testator was to give his means, in promoting teetotalism and in efforts to destroy the Roman Catholic religion. I say I cannot read that as an averment the proof of which should not be allowed in order to test whether this was or was not a deed of the testator.

I do not doubt that in construing a record there must be a certain measure of strictness applied, as my noble and learned friend on the woolsack has now said. If, for example, you have two alternatives stated as the ground of action, one of which would form a good ground of action, and the other of which would not, you must test the record by taking the weaker alternative, and in that case I should hold the averment not relevant. On the other hand, I think, as my noble and learned friend has said, that you must take the words as you

find them in the record according to their fair, ordinary, and primary meaning, and not according to any figurative meaning. If the language here be so taken, I find myself quite unable to reach the result I have read from the opinion of the Lord President, that there is nothing more here alleged than that the testator was obeying God's will as made manifest by God to his conscience.

If the averment which is here made, and which I have now read, were admitted by the defenders to be a true averment, I can scarcely suppose that it could be contended that the deeds sought to be set aside should nevertheless stand. I do not say that the test of a defender admitting what is stated on the record is necessarily conclusive as to relevancy. If the whole averment here had been that the testator was insane, an admission of that, no doubt, would have destroyed the deed, but I think the defenders in such a case would be entitled to say, the averment is not relevant, not because in a sense you have not stated that which would set aside the deed, but because we, the defenders, are entitled to specification of particulars. In this case, I think, if you take the averment of insanity, followed by the particulars which are given, which, I understand to mean what my noble and learned friend has already said, then I cannot doubt that this is relevant. I do not think that the statement here is merely that the testator was acting according to the dictates of his conscience, but I think it amounts to this, that there was a special communication to him from the Deity directly bearing upon his duty in making this bequest, and that the bequest and the purposes of the bequest were the result of that special communication.

There are two matters which appear to have weighed with the Court in their judgment, upon which I must say a word. I see that the Lord President says—"Taking the record of the pursuers as a whole, including the admissions, the general statement of unsoundness of mind is to be read as relative to the will which it is said to invalidate," and I rather think that the considerations which I see are stated in the respondents' case pressed considerably on the minds of the Judges in dealing with this case on the question of relevancy. I see it is there stated—"It is submitted that the deeds themselves demonstrate that the trustor was a man with many interests, and that . . . he had resolved to concentrate his efforts and devote his means chiefly" to two objects which he had promoted. "In the next place," it goes on to say—"It is submitted that the admissions made by the appellants are altogether irreconcilable with their main contention, in respect they concede among other points the following"—Then what is mainly founded on is that the testator had been actively engaged in business as a Writer to the Signet, that he was an Edinburgh town councillor, and had fulfilled a number of public duties. It seems to me with deference that these are considerations proper to the next stage of this case, and not to

the question of relevancy. Both parties, I observe, seem to indicate that the deeds in themselves favour their case. The pursuers say that anyone reading these deeds would infer from them that they were the deeds of a man, not only of great peculiarities, but of such peculiarities as would favour the view that there was insanity in his case. The defenders, on the other hand, say, on the contrary, that these deeds are such as many people would very highly approve of. Again, it is said that the testator was a man of business, and took an interest not only in professional matters but in matters of general interest. I can very well see and believe that that circumstance must create certain difficulties in the way of the pursuers, and I can appreciate that these difficulties may have much weight in the ultimate decision of the case. But, on the question of relevancy, it humbly appears to me that they are out of place. However good a man of business the testator may have been, however well he may have understood his professional affairs, however much he may have been interested in public matters, he may have been acting under delusions such as the late learned Lord President referred to in the case of *Morrison v. Maclean's Trustees*. If so, I agree with the view that the Lord President stated that the deed would fail because of the insanity of the testator.

On these grounds I am of opinion with my noble and learned friend on the woolsack that the interlocutors should be reversed, and that the case should be sent back to the Court of Session for inquiry.

LORD DAVEY—I feel some diffidence in disagreeing from your Lordships, who have had so great experience in questions of this kind arising in Scotland. But I do not see my way to differ from the Court of Session in this case.

I do not differ from my noble and learned friends as to the principles which should be applied on questions of relevancy of averment in Scotch pleading, and I think it would be unfortunate if the technical rules formerly applied to demurrers in the English Courts were introduced into Scotch procedure. But the question which I put to myself is whether, if these sentences which your Lordship has read from the condescendence were proved, they would amount to a finding of insanity and support the action. I answer they might or they might not. They do not aver the belief in revelations visible or audible, or in any material mode of communication of the Divine will. They are quite susceptible of the meaning, and, in my opinion, it is the more natural meaning, that the testator conceived that in the philanthropic and religious ends which he aimed at in his lifetime, and in the disposal of his property, he was prompted by the direct command of the Almighty working upon his conscience. I think that the words "insane delusions" must be interpreted by the sentence which follows, and not that sentence by the word "insane." Or (in other words) the words may mean—and I repeat

that I think it is the more probable meaning—that he believed that the Divine Spirit spoke to him through his conscience, and his action was directed by what he conceived to be the command of the Almighty so conveyed. You may call this an insane delusion if you will, but it is a delusion (if it be one) which has been shared by some of the greatest benefactors of the human race, who, in obedience to such a call or command (as they have believed), have devoted their lives to mitigating the misery of the world and endeavouring to raise mankind to a higher life and a better conception of their duties on earth.

I assume that the words which have been introduced by amendment are the utmost which the pursuers can aver with any hope of being able to prove them at the trial, and I am unable to read the words as necessarily amounting to, or a relevant averment of, insanity.

*Ordered* that the cause be remitted to the Court of Session to proceed further therein, that the appellants have the costs of this appeal, and that the expenses of process hitherto incurred in the Court of Session do abide the issue of the cause.

Counsel for the Appellant—The Lord Advocate, Graham Murray, Q.C.—Ure, Q.C.—Sym. Agents—Loch & Co., for Dundas & Wilson, C.S.

Counsel for the Respondents—The Solicitor-General for Scotland, C. S. Dickson, Q.C.—Guthrie, Q.C.—Danckwerts—John Wilson. Agents—R. S. Taylor, Son, & Humbert, for Macpherson & Mackay, S.S.C.

Monday, August 1.

(Before the Lord Chancellor (Halsbury) and Lords Watson, Shand, and Davey.)

HICKLING AND OTHERS v. FAIR AND OTHERS.

(*Ante*, March 12, 1896, 33 S.L.R. p. 465, and 23 R. 598).

*Succession—Vesting—Objects of Gift—Contingent Bequest—Destination to Issue of Liferentrix Conditioned on Liferentrix Leaving Issue.*

A testator by his trust-disposition and settlement directed his trustees to pay the interest of a certain sum to his daughters equally. The deed then proceeded—“And on the death of my said daughters respectively leaving lawful issue, I hereby direct my trustees to divide equally amongst the issue of each of my said daughters” the sum life-rented by their mother. One of the daughters had four children, two of whom survived both the testator and their mother, and two survived the testator but predeceased their mother without issue. *Held* (by a majority of the House of Lords—*rev.* the judgment of the Second Division) that the two pre-

deceasing children were entitled to share in the bequest to “issue” of the life-rentrix, the condition that the life-rentrix should “leave lawful issue” not having the effect of confining the gift to those of her issue who survived her, although making the gift to the class contingent on that event

*Boulton v. Beard*, 3 De G., M. & G. 608; and *Selby v. Whittaker*, L.R., 6 Ch. Div. 239, commented on.

*Succession—Conditio si sine liberis decesserit.*

*Observed* (per Lord Watson) that the condition *si institutus sine liberis decesserit* has no application where the parent is not instituted, but is given merely a life-rent of the provision.

This case is reported *ante ut supra*.

The fifth and sixth parties appealed.

At delivering judgment—

LORD WATSON—By his trust-disposition and settlement, dated the 5th September 1862, the late Thomas Fair, whose family at that time consisted of four sons and three married daughters, directed his trustees to convey certain heritable subjects to his sons, whom he also appointed to take the residue of the trust-estate. By the fifth purpose of the trust he directed his trustees, within five years from the time of his death, to invest £30,000 upon good security, and to pay the interest or annual profits thereof equally to each of his daughters, Margaret Fair or Spence, Harriot Fair or Macaulay, and Mary Jane Fair or Thomas during their respective lives. An annuity of £200 was directed to be paid to each of these beneficiaries from the time of the testator's death until the investment of the £30,000.

With regard to the capital sum to be life-rented by his daughters, the testator by the fifth purpose of his trust-deed directed as follows:—“On the death of my said daughters respectively leaving lawful issue, I hereby direct my trustees to divide equally amongst the issue of each of my said daughters the sum of ten thousand pounds sterling, being one-third of the sum directed to be invested as aforesaid, and should any of my said daughters die before the succession to the foresaid provision opens up to them without leaving lawful issue, the share of the interest or annual profits of the said sum of thirty thousand pounds sterling directed to be invested as aforesaid to which my daughter so dying would have been entitled had she survived, shall be divided equally, share and share alike, between my surviving daughters, or paid to the last surviving daughter, during all the days of their lives or of her life altogether, and the share of the said capital sum of thirty thousand pounds sterling, which would have fallen to be divided amongst the issue (if any) of my daughter so dying, shall be divided equally between the issue of my surviving daughters, or should there be only one surviving daughter having issue, to be paid equally to such issue.”