

in the negative, recalled the determination of the Sheriff-Substitute as arbitrator, and remitted to him to proceed as accords.

Counsel for Appellants—Horne, K.C.—Strain. Agents—W. & J. Burness, W.S.

Counsel for Respondent—Dean of Faculty (Scott Dickson, K.C.)—Moncrieff. Agents—Simpson & Marwick, W.S.

Friday, July 8.

FIRST DIVISION.

CRAWFORD'S TRUSTEES v. CRAWFORD AND OTHERS.

Succession—Trust-Disposition and Settlement—Construction—Supplying Omission by Implication.

By their trust-dispositions and settlements, couched in similar terms and executed on the same day, two sisters made four separate provisions, each of a sum of £1000, in favour of (1, 2) two brothers and (3) a sister and their children, and (4) the children of a deceased sister. The terms of the clauses dealing with all four provisions were, *mutatis mutandis*, the same, with the exception that whereas in three of them the destination of the fee was, that on the death of the last survivor of the brother's (or sister's) children "the said sum of one thousand pounds destined to be liferented as aforesaid shall be divided among his (her) surviving grandchildren and the lawful issue of such grandchildren as may have died leaving such issue, in equal shares *per stirpes*, and failing grandchildren or their lawful issue, then and in that case the said sum of one thousand pounds shall be divided into three parts or shares, and my trustees shall pay one-third to . . ." (then followed a gift to the three other beneficiaries and their heirs), the destination in the third was, that on the death of the last survivor of the sister's children "the said last-mentioned sum of one thousand pounds shall also be divided into three parts or shares, and my trustees shall pay one-third thereof to . . ." (then followed a gift to the three other beneficiaries and their heirs).

Held (diss. Lord Johnston) that there could not be read, by implication, into the destination of the fee of the third provision the words occurring in the destination of the fee of the other provisions but wanting in it.

Opinion (per Lord Kinnear) that to enable the Court to supply into a particular bequest words which are present in other bequests of the will, or of the class to which the particular bequest belongs, it must find in the will itself the expression of a general intention which will cover the particular bequest.

In re Redfern, 6 Ch. Div. 133, and

Mellor v. Daintree, 33 Ch. Div. 198, distinguished and approved.

On November 24th 1909 a Special Case was presented to the Court by John Anderson and another, the trustees acting under (1) the trust-disposition and settlement of Miss Jean Crawford, Harplaw, Largs, and (2) the trust-disposition and settlement of her sister Miss Margaret Crawford, Harplaw, Largs, *first parties*; Alexander Crawford and others, children or those in right of children of the deceased William Crawford, Daniel Crawford, and Elizabeth Crawford or Fraser, who were brothers and a sister of the testatrices, *second parties*; Mrs Elizabeth Aitkin or Morris, only child of the deceased Mary Ann Crawford Fleck or Aitkin, who was a daughter of the deceased Janet Crawford or Fleck, another sister of the testatrices, with advice and concurrence of her husband James Morris and the said James Morris for his own interest, *third parties*; Maggie Watson Fleck, daughter of the deceased James Fleck, who was a son of the above-mentioned deceased Janet Crawford or Fleck, *fourth party*; James Fleck junior, brother of the above-mentioned Maggie Watson Fleck, *fifth party*; and Elizabeth Fleck and Mary Annie Fleck, sisters of the above-mentioned Maggie Watson Fleck and James Fleck, *sixth parties*. The point at issue between the parties was whether there ought to be supplied by implication a destination with regard to the fee of a legacy in favour of Mrs Crawford or Fleck and her children which was present in the legacies, otherwise similar in terms, *mutatis mutandis*, in favour of Daniel Crawford and William Crawford and their children, and the children of the deceased Elizabeth Crawford or Fraser. The destination in the legacies in favour of Daniel Crawford, William Crawford, and the children of the deceased Elizabeth Crawford or Fraser, which was sought to be supplied by implication is printed in *italics* in the excerpt (*infra*) from the testatrices' trust-dispositions and settlements.

Miss Jean Crawford died on 11th January 1889 and Miss Margaret Crawford died on 3rd December 1891, both leaving trust-dispositions and settlements dated 7th September 1882. By both *settlements*, which throughout were expressed in precisely similar terms, it was provided that the surviving sister should enjoy a liferent of the estate of the predecessor. On the death of the survivor of the testatrices the settlements directed the trustees "to invest the following sums, and to pay the interest and capital thereof in manner after specified, vizt.—(*First*) the sum of one thousand pounds sterling and to pay the free annual interest and produce thereof to my brother the said Daniel Crawford during his life and after his death to pay the said free annual interest and produce to and among his children in equal shares during their respective lives or the life of the survivor of them and in the event of any of my said brother Daniel's children dying leaving lawful issue, such

issue shall receive the interest to which their parent would have been entitled and failing lawful issue the interest payable to a deceasing child shall be paid to the survivors or survivor till the death of the last survivor of my said brother Daniel's children and on that event occurring, the said sum of one thousand pounds destined to be liferented as aforesaid shall be divided among his surviving grandchildren and the lawful issue of such grandchildren as may have died leaving such issue in equal shares per stirpes and failing grandchildren or their lawful issue then and in that case the said sum of one thousand pounds shall be divided into three parts or shares and my trustees shall pay one third to my said brother William Crawford and his heirs and another one third to my sister Janet Crawford or Fleck and her heirs and the remaining one third to and among the children of my said deceased sister Elizabeth Crawford or Fraser equally or their respective heirs. (Second) The like sum of one thousand pounds and to pay the free annual interest and produce thereof to my brother the said William Crawford during his life and after his death to pay the said free annual interest and produce to and among his children in equal shares also during their respective lives or the life of the survivor of them and in the event of any of my said brother William's children dying leaving lawful issue such issue shall receive the interest to which their parents would have been entitled and failing lawful issue the interest payable to a deceasing child shall be paid to the survivors or survivor till the death of the last survivor of my said brother William's children and on that event occurring the said last-mentioned sum of one thousand pounds shall be divided among the grandchildren of my said brother William and the lawful issue of such grandchildren as may have died leaving such issue in equal shares per stirpes and failing grandchildren or their lawful issue then and in that case the said last-mentioned sum of one thousand pounds shall be divided into three parts or shares and my trustees shall pay one third thereof to my said brother Daniel Crawford and his heirs another one third thereof to my said sister Janet Crawford or Fleck and her heirs and the remaining one third to and among the children of my said deceased sister Elizabeth Crawford or Fraser equally or their respective heirs. (Third) The like sum of one thousand pounds and to pay the free annual interest and produce thereof to my sister the said Janet Crawford or Fleck during her lifetime and after her death to pay the said free annual interest and produce to and among her children in equal shares also during their respective lives or the life of the survivor of them, and in the event of any of my said sister Janet's children dying leaving lawful issue such issue shall receive the interest to which their parents would have been entitled and failing lawful issue the interest payable to a deceasing child shall be paid to the survivors or survivor till the death of the last

survivor of my said sister Janet's children and on that event occurring the said last mentioned sum of one thousand pounds shall also be divided into three parts or shares and my trustees shall pay one third thereof to my said brother Daniel Crawford and his heirs another one third to my said brother William Crawford and his heirs and the remaining one third to and among the children of my said deceased sister Elizabeth Crawford or Fraser equally and their respective heirs, and (Fourth) The like sum of one thousand pounds and to pay the free annual interest and produce thereof to and among the children of my said deceased sister Elizabeth Crawford or Fraser in equal shares during their respective lives or the life of the survivor of them and in the event of any of my said deceased sister Elizabeth's children dying leaving lawful issue such issue shall receive the interest to which their parents would have been entitled and failing lawful issue the interest payable to a deceasing child shall be paid to the survivors or survivor till the death of the last survivor of my said deceased sister Elizabeth's children, and on that event occurring the said last mentioned sum of one thousand pounds shall be divided among the grandchildren of my said deceased sister Elizabeth and the lawful issue of such grandchildren as may have died leaving such issue in equal shares per stirpes and failing grandchildren or their lawful issue, then and in that case the said last-mentioned sum of one thousand pounds shall also be divided into three parts or shares and my trustees shall pay one-third thereof to my said brother Daniel Crawford and his heirs, another one-third to my said brother William Crawford and his heirs and the remaining one-third to my said sister Janet Crawford or Fleck and her heirs."

The settlements further provided that in the event of there being any residue after satisfying the provisions therein contained the same should be divided in such manner as the testatrices might thereafter direct. By a codicil to her settlement, dated 1st June 1888, Miss Jean Crawford revoked the liferent provision of the free annual interest of £1000 after the death of Daniel Crawford given to his children and their issue, and also the provision as to the division of the principal sum among his grandchildren and their issue, and directed that the said principal sum should, on Daniel Crawford's death, form part of the residue of her estate.

Mrs Janet Crawford or Fleck survived Miss Jean Crawford, but predeceased Miss Margaret Crawford, leaving two children, viz., James Fleck, who died on 17th November 1906, and Mrs Mary Ann Crawford Fleck or Aitkin, who predeceased the testatrices. James Fleck had the following children (*parties 4, 5, 6*), viz., Maggie Watson Fleck, James Fleck junior, Elizabeth Fleck, and Mary Annie Fleck. Mrs Mary Ann Crawford Fleck or Aitkin had one child (*party 3*) Mrs Elizabeth Aitkin or Morris.

The case set forth, *inter alia*—"6. On the death of Margaret Crawford, the liferent-

trix under the settlement of the said Jean Crawford, the trustees acting under the said respective settlements invested two sums of £1000 each, out of the funds of the said respective trust estates, and from that date paid the free annual interest and produce thereof equally between the said James Fleck and Elizabeth Aitkin or Morris down to the date of death of the said James Fleck (the survivor of the children of the testatrices' sister, the said Mrs Janet Crawford or Fleck), which happened on the 17th day of November 1906. 9. Difficulties have arisen as to the meaning and effect of the third sub-head of the fourth purpose of the testatrices' trust dispositions and settlements before quoted so far as they deal with the disposal of the said sums of £1000, and this case has been brought to have the questions at issue judicially determined by the Court."

The first question of law was—"1. Are the second parties now entitled to payment of the fee of the said two sums of £1000 provided under the third sub-head of the fourth purpose of each of the said trust-dispositions and settlements?"

Argued for the third, fourth, fifth, and sixth parties—This was the case of a bungled will. The provisions in favour of Janet and her children in both wills were exactly the same as the provisions in favour of Daniel and William and their children and the children of Elizabeth, with the exception of the omission of the few lines by which the destination of the share on the event of the death of the last survivor of the brothers' and sister's children was provided for. If this clause were not supplied Janet's *stirpes* would be disinherited, and this was singular. Up to a certain point they were to be equally favoured with the issue of the other brothers and sister and were then arbitrarily to be cut off. The presence of the word "also" in the clause offered corroboration of the view that there had been by mistake an omission. There was no direct authority in Scotland for supplying such an omission, but in several cases in England the Courts had supplied similar omissions—*In re Redfern*, 6 Ch. Div. 133, approved and followed in *Mellor v. Daintree*, 33 Ch. Div. 198; compare also *Dolphin's Trustees v. Baxter*, June 12, 1888, 15 R. 733, and *Bate's Trustees v. Bate*, June 5, 1906, 8 F. 861, 43 S.L.R. 660. In *Burgh-Smeaton v. Burgh-Smeaton's Judicial Factor*, 1907 S.C. 1009, 44 S.L.R. 718, the Court had given a fee by implication to children under a marriage contract. If the second parties were right, then those children who might have been enjoying the interest for years would be summarily cut off by the death of the last surviving uncle or aunt.

Argued for the second parties—The clause was perfectly intelligible as it stood, and there was no authority for supplying a provision of this character in the absence of a clear indication in the will that it had been accidentally omitted. The mere fact that the provisions as they stood were not uniform, or were even arbitrary, was not

enough. *In re Redfern*, *cit. supra*, was not *in pari casu* with the present case, because there the will was absolutely unreasonable without the suggested omission. In the present case it was possible to carry out the clause as it stood by dividing the shares among the second parties *per stirpes*.

At advising—

LORD JOHNSTON—The Misses Jean and Margaret Crawford each left a trust-disposition and settlement couched in the same terms and executed on the same day, 7th September 1882. They each, after bequeathing certain identical legacies, directed their trustees to hold and invest the whole residue of their respective estates for the life of the other in the event of her surviving. And then each on the death of the other, or on her own death should the other predecease her, directed her trustees to invest four separate sums of £1000 each, and to dispose of the interest and the capital thereof in manner which was specified in great, and, as it has proved, dangerous detail. There are residue clauses. But there is an indication that the ladies did not expect that there would be substantial if any residue. Now they had two brothers, Daniel Crawford and William Crawford, and two sisters, Janet Crawford or Fleck and Elizabeth Crawford or Fraser, the latter of whom had predeceased the execution of their settlements leaving issue.

At first sight the general scheme of both these settlements would seem to be to give the free annual income of one of the sums of £1000 to each brother or sister surviving, and after his or her death, and immediately in the case of the deceased sister Elizabeth Crawford or Fraser, to divide this income equally among his or her children during their respective lives or the life of the survivor of them, with a substitution of issue to the share of income of any child dying leaving issue, and a destination-over to survivors of the share of income of any child dying without issue, and then on the death of the last survivor of the brother or sister's children, as the case might be, to divide the capital of his or her £1000 among his or her grandchildren, with cross remainders over failing them to the families of the other brothers or sisters. This general idea is carried out in both settlements in precisely the same terms, *mutatis mutandis*, in the case of the respective sums of £1000 bequeathed primarily to Daniel Crawford and his family, to William Crawford and his family, and to the family of the deceased Elizabeth Crawford or Fraser. But there is in both deeds the same variance from these three provisions in the direction for the disposal of the £1000 provided for the sister Janet Crawford or Fleck and her family. This variance consists in the omission of some five lines, which are inserted in their appropriate place in the case of the other three destinations, and the question is, Are we, as a court of construction, entitled to consider whether this omission is intentional or accidental, that is, attributable to an

error of the draughtsman or of the transcribing clerk, and if we are satisfied that it is accidental, to supply it, or are we bound to take the terms as they stand and construe and apply them as we find them written.

This is not precisely a case in which the testator has initially made clear a general intention, and has failed in subsequent detail consistently to carry out that general intention. The peculiar form of the deed and the elaboration of the four separate parallel provisions renders it impossible to regard it from that simple standpoint. Yet I think no one can read either of the deeds, much less both of them together, without seeing that, notwithstanding the severality of the provisions, the testators had in their minds a definite and uniform scheme which they endeavoured, but in the letter of their settlements have failed, to carry out in all the four several bequests. And on a view of the deeds as a whole, and in no way going outside the deeds, I am led without hesitation to conclude that there has been an accidental omission of an important passage in the destination of the legacy to Mrs Fleck and her family, which has occasioned that failure, and which it would be to disappoint the intention of the testators not to supply.

I come to this conclusion for these reasons:—

In the first place, what remains of the destination of Mrs Fleck's bequest is in absolutely identical terms with the corresponding parts of the destinations in the other three cases, and the suggested, and I think evident, omission is a definite and consecutive passage, of a little more than five lines in length, occurring in the same words in the other three cases.

In the second place, there is no reasonable explanation of the omission, in respect that up to a certain point equal favour is shown to the family of the testator's sister Mrs Fleck, and that at that point they are cut out in a manner wholly arbitrary. The arbitrariness is accentuated by the fact that while the grandchildren of Mrs Fleck are apparently cut off from participation in the fee of their own grandmother's portion, they are equally favoured with the grandchildren of their two uncles and their aunt in the cross remainders, which form part of the destinations of the other three bequests. This consideration has I think especial weight.

In the third place, it is unnecessary to introduce the suggested interpolation with any connecting words. Taken in the very words of either of the other three provisions, it passes without introduction, without modification, and without connecting link, either initial or final, naturally into its place in the Fleck family provision, and makes a consecutive and reasonable whole of that provision.

I think it worth while to examine this point more in detail. If either of the previous purposes in either of these ladies' settlements is put as a parallel passage alongside of this third purpose, it is at

once seen that there is a simple and patent reason for what has happened, viz., that the words alleged to have been dropped out are prefaced by "shall be divided" and are followed by "shall be divided," and that through someone's carelessness a jump has been made from one "shall" to the other "shall" and the word "also" added, as is done in the fourth purpose, omitting what ought to have come in between.

In the fourth place, the terms of the three other provisions are logical and can be applied without any hesitation as to the real intention. I do not delay your Lordships by quoting and analysing a specimen of these identical provisions. It is sufficient to say that "on that event happening," that is, on the death of the last survivor of the immediate children of the brother or sister of the testators, the interest of a predeceasing child's issue in income is at once converted into an interest in capital, and one sequence of thought runs through the whole provision, each sentence following naturally on the preceding, and making one uniform, logical, and consistent whole, with nothing to raise questions of construction in the reader's mind. On the other hand, the terms of the provision for Mrs Fleck and her family are not logical and cannot be applied without hesitation as to the real intention. In the case of this provision there is a break at the stage of "that event happening" which upsets the sequence of thought, which otherwise runs through the provision, and raises in the reader's mind the question whether the ostensible construction is the true construction. Without elaborating this consideration, I content myself with saying that if I am obliged to construe the provision in favour of Mrs Fleck and her family as it stands, a question in my opinion arises, whether the construction of the first half of the provision is the same as that of the identical portion of any of the other three provisions—whether the construction is the same where the passage which naturally follows "that event occurring" is omitted as when it is included.

And incidentally one cannot help being struck with the fact that the settlements as they stand, and construed as the second parties construe them, make the testators cut out from all interest in the division of capital, that is, from all further interest in the provision, issue to whom they have thought it proper to give an interest in current income during the indefinite period which might precede the division of capital. This consideration had much weight in the decision of the analogous case of *Redfern* (6 Ch. D. 133).

Lastly, the word "also" occurring as it does shakes one's confidence in the provision for Mrs Fleck's family as it stands conveying the whole of the testatrices' intention. They are made to say "on that event occurring" the £1000 "shall also be divided into three parts or shares." &c. This word "also" occurs at two other places, one in the provision for William

Crawford and his family and the other in that for Mrs Fraser's family. In each case it imports more than a mere copulative, and has the meaning of "similarly," and occurs in such connection as to lead the mind back as well as forward—to the circumstances which give rise to the situation, as well as to the way in which it is dealt with. In these two cases such use is appropriate. So it would be if there be a hiatus as assumed, and that hiatus is supplied as proposed. It is not appropriate, for the sequel is not similar, but dissimilar, if the passage be taken as it stands.

I therefore conclude without hesitation that there has been an accidental omission by draughtsman or engrossing clerk, probably the former, in these deeds, and that the omission can be supplied from the deed itself with certainty, and ought to be supplied, rather than that the manifest intention of the testator should be frustrated. To hold otherwise would in my opinion be to allow the mere letter to prevail over the plain sense of the instruments.

I am not deterred from this conclusion by the fact that no similar case has occurred in Scotland. With Hall, V.C., in *Sweeting v. Prideaux* (2 Ch. Div. 413) I am content to rest upon the principle enunciated by Lord Kingsdown in *Towns v. Wentworth* (11 Moore's P.C. at p. 543), where he says—"When the main purpose and intention of the testator are ascertained to the satisfaction of the Court . . . if the will shows that the testator must necessarily have intended an interest to be given, which there are no words in the will expressly to devise, the Court is to supply the defect by implication, and thus to mould the language of the testator so as to carry into effect as far as possible the intention which it is of opinion that the testator has on the whole will sufficiently declared."

The peculiarity of the present case is that the testators have themselves supplied the very words necessary to completely express their intention, for it is only necessary after the words "and on that event occurring the said last-mentioned sum of £1000 shall," to add the words, borrowed from any of the other three provisions, "be divided among the grandchildren of my said sister Janet and the lawful issue of such grandchildren as may have died leaving such issue, in equal shares *per stirpes*, and failing grandchildren, or their lawful issue, then and in that case the said last-mentioned sum of £1000 shall," and the thread would be at once taken up without break by the words which follow after the words "£1000 shall," viz., "also be divided into three parts or shares." And again, I repeat, the assumed hiatus occurs between the words "shall" and "also," and that the words necessary to supply the hiatus are taken from between the same words "shall" and "also" in the detail of the next provision of £1000 for Mrs Fraser's family.

As I have pointed out, the case of *Redfern* is not dissimilar to the present, and these

words of Bacon, V.C. (6 Ch. Div. at p. 138) are most appropriate to its decision—"I am not going to be deterred by any accidental omission from putting the true signification on the will, and I am not to substitute what some blundering attorney's clerk or law stationer has written in the will, and treat that blunder as if it were the intention of the testator."

LORD DUNDAS—It seems to me that the language of the third sub-head of the fourth purpose in each of the two trust settlements before us, taken by itself, is neither ambiguous nor uncertain, but, on the contrary, is susceptible, if so read, of only one interpretation, viz., that for which the second parties contend. I do not think any difficulty arises (as was suggested in argument) from the use of the word "also" towards the end of the clause. It simply refers to the similar tripartite division, prescribed by the immediately preceding sub-head, of the £1000 therein dealt with. The clause is, no doubt, open to the criticism that it is anomalous, in that the third party, who has, since the death of the testatrix, enjoyed the annual income of the £1000 as in right of her mother, who predeceased the testatrix, must cease to do so as from the date of the death of her uncle James Fleck in 1906; and the anomaly, if such it be, would have been even more marked if the children of Mrs Fleck had been more numerous; for in that event quite a number of persons or families might have been in the same position as the third party. But it seems impossible to affirm that the testatrix may not have intended to make her provision in this form as regards the grandchildren of her sister Mrs Fleck; and the provision, as it stands, is certainly neither contrary to law nor to public policy. Mr Murray, however, advanced a very able argument to the effect that this clause in the settlements was plainly bungled; and that, looking to the whole terms of the instruments, the Court must be constrained to introduce words conferring upon Mrs Fleck's grandchildren a right to have the fee of both sums of £1000 divided amongst them *per stirpes* as at the date of the death of Mr James Fleck. Mr Murray was not able to refer to any Scots authority in direct support of this (to my mind) rather startling proposition. He cited the cases of *Burgh-Smeaton* (1907 S.C. 1009), *Dolphin's Trs.* (15 R. 733), and *Bate's Trs.* (8 F. 861). These decisions do not, in my opinion, aid his contention at all. In all of them it was argued (and in two of them the contention was negatived) that an obligation must by clear implication be read into a deed although not expressly imposed in words. But the cases seem to me to make it plain, not only that such an implication must, in order to be effectual, be very clear indeed, but also that the language used must be such as to plainly indicate that the desired implication can and must be drawn from an expressed intention to benefit the person asserting it, and not merely (as in the case before us) from the

words of clauses in the deed affecting other persons somewhat similarly situated in interest or in proximity to the grantor, or from what is sometimes called the general scope and system of the deed. It may well be that it is within the power, and may become the duty, of the Court, in certain circumstances, to practically alter the language of an instrument, whether contractual or testamentary, by way either of the insertion or the deletion of words, where the Court is absolutely satisfied that such alteration is necessary in order to give effect to the meaning of the grantor or testator as gathered from the language of the instrument read as a whole. Thus, in the recent case of *Glen's Trustees* (8 F. 915), where a clause in a policy of insurance, taken literally as it stood, was absolutely meaningless, the Court, being clearly of opinion that the confusion was due to a grammatical error, held that they were entitled to correct it, and accordingly proceeded to read the clause as if the important word "not" was deleted from it. But such a power will, I apprehend, be sparingly exercised by the Court, and only where its use is plainly justified and indeed necessitated by the language of the instrument; and the present case does not, in judgment, come within that category.

But Mr Murray called our attention to, and strongly founded upon, the English cases of *in re Redfern* (1877, 6 Ch. Div. 133), and *Mellor v. Daintree* (1886, 33 Ch. Div. 198). I have studied these decisions and a number of others which have been given in England upon similar lines, and I have come to the conclusion that, assuming the law there laid down to be applicable in this country, they do not support the learned counsel's contention in this case. The English law of the matter seems to me to be very well stated in two passages in Jarman on Wills (5th ed., 1893). The first of these (p. 451) says—"It is established that where it is clear on the face of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied in order to effectuate the intention as collected from the context." I pause here to observe that it has been an important element in such cases that a contrary result would involve an intestacy of the testator; and this consideration (which is here absent) seems to have affected materially both of the decisions founded upon by Mr Murray. (See also *Hope v. Potter*, 1857, 3 K. & J. 206.) In the later passage which I propose to quote from Mr Jarman, the author, after a full analysis of the English decisions up to date, goes on to say (p. 460)—"But it is not to be inferred from any of the preceding cases that words may be inserted upon mere conjecture in order to equalise estates created by several distinct and independent devises in favour of persons with respect to whom the testator has expressed no uniformity of purpose, though it may reasonably be conjectured that he had the same intention as to all." Reverting now to the instru-

ments under consideration—they are really one instrument for the purposes of this case—if one were free to conjecture, one might readily accept the suggestion of "blunder." There is much to be said for it, and one may frankly concede that it seems not only plausible but probable; but that is not enough. I cannot affirm that I am judicially satisfied that it is absolutely clear that this is a case of mere blunder. A testator is not bound to make his will perfectly symmetrical in all its dispositions. The Court is not entitled to rewrite his will. The clause in question seems to me, as already said, to be quite clear and unambiguous if read by itself; and I see no sufficient reason—though the case may be a hard one for the disappointed parties—to adopt the drastic and very exceptional course of reading into its language the words proposed by Mr Murray's clients. I am therefore of opinion that the argument for the second parties must be given effect to.

LORD KINNEAR—I agree with the opinion of Lord Dundas. I only wish to add that I entirely accept the principle upon which the cases of *Redfern* and *Mellor v. Daintree* were decided. These decisions are not binding upon us, but they are decisions of very high authority upon a question on which, so far as I know, there is no difference between the laws of the two countries. If they were directly in point, therefore, I, for my part, should be prepared to follow them without hesitation. But then I think they are not in point, for the reasons explained by Lord Dundas. The doctrine upon which they proceed is that where it is clear from the language of a will taken as a whole that the testator has not accurately or completely expressed, with reference to a particular bequest, the intention which he has nevertheless expressed quite clearly as applicable to the whole bequests of the will or the whole bequests of the class to which the particular bequest belongs, the Court, on construction, may supply by inference words which have been omitted in order to make the plain intention of the testator prevail against the mere literal interpretation of particular words. But then it is the indispensable condition of the application of that doctrine that you should find in the will itself the expression of a general intention that will cover the particular case, and I must say, for myself, I can find no such expression of intention in this will. I think the principle of the English decisions is brought out very clearly in the judgment of Vice-Chancellor Bacon in the case of *Redfern*, because the point from which his reasoning starts is that the first and fundamental canon of construction is that the Court is to gather the meaning of the testator from the words in which he has expressed his will. And therefore in order to give effect to this canon of construction a particular bequest ought to be read with reference to the context, and if the Court is able to gather the intention of the testator from the words which he has used in his whole will,

it ought not to allow the mere letter of the particular clause to prevail over that intention. Now by the intention of the testator is meant an intention expressed in the will itself, and accordingly the learned Judge goes on to explain the ground of his construction of the particular will which he was considering. By that will the testator had directed an equal division of certain portions of his estate among his daughters for their separate use. Well, then, when the Vice-Chancellor found that one particular bequest appeared, when construed literally, to be repugnant to that plain intention, he had no difficulty in saying that that intention must prevail against the letter of that particular clause. The principle was explained in exactly the same way in the case of *Mellor v. Daintree*, and I do not think it can be stated more clearly than in the passage which was quoted from the opinion of Mr Pemberton Leigh, afterwards Lord Kingsdown, where he says that "when the main purpose and intention of the testator are ascertained to the satisfaction of the Court, if particular expressions are found in the will which are inconsistent with such intention, though not sufficient to control it, or which indicate an intention which the law will not permit to take effect, such expressions must be discarded or modified; and on the other hand, if the will shows that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to devise, the Court has to supply the defect by implication, and thus to mould the language of the testator so as to carry into effect as far as possible the intention which it is of opinion that the testator has on the whole will sufficiently declared."

Now I look in vain in this will for any declarator of intention whatsoever, except that which is to be inferred from a comparison of four separate and independent bequests. I think no inference can reasonably be drawn from such a comparison. It may very well be that when the effect of these bequests is considered one of them may appear somewhat capriciously to deny to certain persons a benefit which is given to persons in a similar position in the other bequests; but that is not a sufficient ground for inferring that the testatrix did not intend her plain words in that respect to receive effect. A testator is entitled to be arbitrary and capricious if he pleases; and the capriciousness is merely *apparent* capriciousness, for the Court does not know the reasons which may induce a testator to give a benefit to one part of a family and not to another. I do not find in the will an expression of general intention to which the bequest, literally construed, is found to be repugnant. It is impossible to infer uniformity of intention from a series of independent bequests when the only thing that creates the difficulty is that the bequests are not uniform. The assumption of a general intention to make an equal division appears to me to be without basis in fact, since all we know is

that the testatrix gives three bequests in one way and a fourth in another way.

I therefore come to the same conclusion as Lord Dundas, that there is no sufficient reason for overruling the clear expression of the testatrix. I assent to the view expressed by both Lord Johnston and Lord Dundas that there is some apparent hardship to the parties immediately concerned, but I do not think that is a matter which can be considered by the Court in construing the settlement; it is a consideration for the testator, but not for us.

The result therefore will be that we shall answer the first question in the affirmative, and that being so, I do not think the other questions arise, unless in form, and they are not pressed.

The LORD PRESIDENT and LORD SALVESEN were not present.

The Court answered the first question of law in the affirmative and found it unnecessary to answer the other questions.

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Counsel for the Second Parties—Blackburn, K.C.—Macmillan. Agents—R. Addison Smith & Company, W.S.

Counsel for the Third, Fourth, Fifth, and Sixth Parties—C. D. Murray, K.C.—Hon. Wm. Watson. Agents—Webster, Will, & Company, W.S.

HOUSE OF LORDS.

Thursday, July 21.

(Before the Lord Chancellor (Loreburn), Earl of Halsbury, Lord Kinnear, and Lord Shaw.)

HOULDSWORTH v. GORDON CUMMING.

Sale—Sale of Heritage—Subject—Extrinsic Evidence—Titles—Estate-Name—Proof—Admissibility of Parole and Other Extrinsic Evidence to Explain the Subject of a Completed Sale of Heritage.

All that passed, either oral or in writing, in the negotiations leading up to a completed contract of sale of heritable property is admissible in evidence to prove what was the subject of the sale, not to alter the contract, but to identify the subject.

Per Lord Kinnear—"The meaning of a descriptive name in a particular contract cannot be determined by a fixed rule of law without regard to the facts of the case. . . . I agree that a contract to sell the lands contained in a certain title is perfectly possible, and would give the purchaser right to everything which the seller and his predecessors had in fact possessed under that title. I would be disposed to concede further that if an estate is sold under a general