

this section showed that what is "laid" must be in its nature obstructive, otherwise the offence would be constantly committed by people putting down anything, however trivial, on the highway.

LORD ADAM and LORD KINNEAR concurred.

The Court quashed the conviction.

Counsel for the Appellant—Salvesen—W. Thomson. Agents—Steele & Johnstone, W.S.

Counsel for the Respondent—James Clark. Agents—W. & J. L. Officer, W.S.

COURT OF SESSION.

Friday, March 3.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

CURRIE v. M'LENNAN.

Succession—Revocation—Implied Revocation—General Disposition and Special Destination—Construction of Testamentary Writings—Admissibility of Extrinsic Evidence.

The purchaser of certain heritable subjects took the destination in the disposition thereof in favour of himself and his wife in conjunct fee and liferent for her liferent use only, whom failing his children born or to be born and the children of his wife by a previous marriage equally *per capita*. The purchaser died predeceased by his wife and survived by three sons and by four stepsons, his wife's children by her previous marriage, and leaving a general trust-disposition and settlement whereby he directed his trustees (1) to give a legacy of £200 to each of three of his stepsons *nominatim*; (2), on the narrative that he had already provided for one of his stepsons by granting him a lease of certain subjects (in which he carried on business as a publican), and that he was desirous of giving him a further lease of these subjects, upon the testator's decease to grant such a further lease to this stepson; and (3) to carry and make over the whole residue of his trust estate to his sons. In an action at the instance of the sons against the stepsons for declarator that the special destination above mentioned had been evacuated by the general settlement, the pursuers averred that when the subject in question had been acquired by the testator the sum paid by him therefor was all that he had; that by a general settlement, since cancelled and no longer existing, he had given certain heritable property to his stepsons and had given the subjects embraced under the special destination to his sons; that latterly his stepsons, whom he had educated and set out in life, had not been living with him, and

were at his death supporting themselves; that one of them had disappeared and had not been heard of for many years; that his sons had lived with him and assisted him in his business, which was carried on in the subjects embraced under the special destination; that the legacies of £200 given to three of the stepsons were equivalent to what had been given them under the cancelled settlement; that the stepson who was to get the lease was amply provided for thereby, the rent demanded being less than the real value; that the result of giving effect to the special destination was that the stepsons collectively would get more from the estate than the testator's own sons, the stepson who got the lease getting individually more than any one of the sons. *Held (aff. Lord Kyllachy, Ordinary)* that there was nothing in the terms of the general settlement or in the facts and circumstances averred to prevent the application of the general rule that a special destination is not evacuated by a subsequent general settlement made by the same person, and that the defenders were consequently entitled to decree of absolvitor—*diss.* Lord Moncreiff, who held that a proof before answer should be allowed.

Question—Whether the terms of the cancelled settlement could be considered in determining the question of intention.

Opinion (per the Lord Justice-Clerk) that it could not.

Opinion reserved (per Lord Trayner) as to what kind of proof is competent to establish that a testator intended by his general settlement to derogate from or alter a special destination.

This was an action at the instance of William Currie, John Currie, and James Currie, sons of the late John Currie senior, spirit merchant, Portobello, against William M'Lennan, John M'Lennan, Andrew M'Lennan, and George M'Lennan, the sons of John Currie senior's wife by her previous marriage with John M'Lennan, publican, Leith.

The question in the case was whether John Currie senior by his trust-disposition and settlement executed in 1893 had revoked or evacuated a special destination contained in the title taken by him to a property in Portobello which he had acquired in 1867.

By a feu-disposition dated 14th May 1867, and duly recorded, the trustees of the deceased James Baxter, in consideration of the sum of £815 instantly paid, and of the feu-duties therein stipulated, disposed "to and in favour of the said John Currie (*i.e.*, John Currie senior) and Margaret Anderson or Currie his wife, in conjunct fee and liferent for her liferent use only, whom failing to the children of the said John Currie born or to be born of his present or any future marriage and the children of the said Margaret Anderson or Currie by her marriage with the late John M'Lennan, publican, Leith, equally among all such children, *per capita*."

By trust-disposition and settlement dated 27th February 1893 John Currie senior disposed, assigned, and conveyed his "whole estate, property, and effects, heritable and moveable, real and personal, of every kind and wherever situated," then belonging to him or that should belong to him or be subject to his disposal at the time of his death, to the trustees and for the trust purposes therein mentioned. After providing (1) for payment of deathbed and funeral expenses, and expenses of management, (2) for payment of debts, and (3) for payment of legacies and bequests made by codicils or other writings, the deed proceeded as follows:—"Fourthly, I leave and bequeath to each of my stepsons John M'Lennan, George M'Lennan, and Andrew M'Lennan, the sum of £200 free of legacy duty, and to be payable at the first term of Whitsunday or Martinmas after my death, with interest at 5 per cent. from that date during the non-payment; Fifthly, Whereas I have already provided for my stepson William M'Lennan by granting in his favour a lease, dated 12th June and 7th July 1891, of my premises, 43 and 45 Junction Street, Leith, for a period of fourteen years from Whitsunday 1891, at the rent therein mentioned, and whereas I am desirous, in addition thereto, to give him a further lease of the said premises, therefore I do hereby direct and empower my trustees, as soon as may be after my death, and upon his renouncing the said lease if it shall be then current, to grant in his favour, in the event of his surviving me, a lease of my said premises, 43 and 45 Junction Street, Leith, for the period during which the said existing lease may have still to run at the date of my death, and for a further period of ten years from the term of expiry of the said existing lease, or if the latter has expired prior to my death, then for a period of ten years from the date of my death, and that at the same rate as is payable under the said existing lease so far as regards the period thereof unexpired at the time of my death, and at the rent of £50 for the further period of ten years above referred to . . . and Lastly, Subject to the foregoing purposes, I direct my trustees, as soon as may be convenient after my death, to pay, convey, and make over the whole residue and remainder of my trust estate (including the said premises in Junction Street, Leith, but subject to the lease thereof above referred to) to my sons William Currie, John Currie, and James Currie, equally among them, share and share alike." The testator further provided and declared as follows:—"The provisions hereby granted by me to or in favour or for behoof of my said sons are intended to be and shall be accepted by them as in lieu and in full satisfaction of all legal claims which they or any of them might have upon my estate in name of legitim, executry, or on any other ground whatever." The testator gave his trustees power "at the request or with the consent of his said three sons, or the survivors or survivor of them, to sell, realise, and convert into money the whole or any part of

the trust estate and effects, and to grant dispositions, and that either by public roup or private bargain."

John Currie senior died on 22nd June 1897 predeceased by his wife, to whom he had been married in 1863, and survived by three sons, William, John, and James, the pursuers in the present action, and also by three stepsons, the children of his wife by her previous marriage with John M'Lennan, viz., William, John, and Andrew. Another stepson, George, went abroad in 1880 and had not been heard of since 1883.

After John Currie senior's death his trustees completed a title by notarial instrument to the subjects conveyed by the feu-disposition of 1867, and then disposed them to John Currie senior's sons. Thereafter an offer for the purchase of this property was made and accepted, but the purchasers objected to the title of the sons, the sellers, on account of the destination in the feu-disposition of 1867. The sons endeavoured to get the consent of the stepsons, the M'Lennans, to the sale, but this was refused.

In these circumstances the three sons raised the present action, in which they called the four stepsons as defenders, and concluded for declarator (1) that under the feu-disposition dated 14th May 1867 John Currie senior was vested in the fee of the subjects thereby conveyed, and (2) that by the trust-disposition and settlement of 1893 the substitution of heirs contained in the feu-disposition of 1867 was entirely evacuated, and that the succession on the death of John Currie senior to the subjects in question fell to be regulated by the trust-disposition and settlement of 1893 and the destination therein contained, and that the same now belonged heritably to the pursuers in virtue of that destination and the disposition in their favour granted by the trustees of John Currie senior.

The pursuers averred that the deceased John Currie (senior) had formerly executed a trust-disposition and settlement dated 13th January 1880, whereby he disposed, assigned, and conveyed his whole estate, property, and effects, heritable and moveable, to the trustees and for the purposes therein mentioned. They averred that by this settlement the testator directed his trustees, *in the first place*, to dispose his heritable properties in the City of Edinburgh to his stepsons; *in the second place*, to dispose part of his heritable properties in Portobello, consisting of a shop and court, and a house, with the furniture, implements, and utensils, linen, china, glass, shop-fittings, wines and liquors (including those in bond), stock-in-trade, and other effects in or about the dwelling-house or shop or in any way connected with the business then carried on by the testator, and the whole right to the goodwill of that business, to his sons William and John, and to dispose his remaining heritable properties in Portobello to his son James; and *in the third place*, to convey and make over the residue of his means and estate to his three sons.

The subjects in the second place above

mentioned were alleged by the pursuers to be the whole subjects embraced under the feu-disposition of 1867.

It was averred that by the fourth purpose of this last-mentioned trust-disposition and settlement the trustees were directed, in case at the time of the truster's death his youngest or only surviving son should not have attained the age of 25, to carry on the testator's business or cause it to be carried on until the youngest or only surviving son attained that age, and for that purpose the trustees were authorised to appoint a manager and directed to offer this situation in the first place to his stepson William M'Lennan at a salary of £2 a-week with £20 a-year for a house. The pursuers explained that the testator's said business was carried on in the subjects at Portobello which he had acquired in 1867.

A copy of this last-mentioned trust-disposition was produced, but it was admitted that the original was no longer extant, having been cancelled at the time of the execution of the settlement of 1893.

The pursuers also averred as follows—(Cond. 1) (With regard to the sum of £815 mentioned in the feu-disposition of 1867) "It is believed and averred that the said sum of £815 (less £400 or thereby borrowed by him at the time on the security of the subjects) was all that the said John Currie was then possessed of. (Cond. 4) (With reference to the provisions of the settlement of 1893) . . . It is averred that the legacies to the M'Lennan family (other than William M'Lennan's lease) were practically equivalent in value to the heritable properties in Edinburgh left them by the settlement of 1880. The whole M'Lennan family were alimented, educated, and started in life at Mr Currie's expense. It is explained that William M'Lennan had been at one time the truster's assistant in his Portobello business, and that at Whitsunday 1885 Mr Currie purchased for £620 the premises in Junction Street, Leith, above referred to. The rent at which these subjects was let by Mr Currie to William M'Lennan was considerably below their real value. The business has been more than sufficient to maintain William M'Lennan comfortably. John M'Lennan was repeatedly helped by Mr Currie. In 1893 he was in Melvin's brewery, when his wages were sufficient to support him. Andrew M'Lennan in 1893 held an appointment as a custom-house official, and was in receipt of about £200 a-year. He now occupies the position of examining officer of customs. In 1883 Mr Currie sent George M'Lennan, who was then abroad, a remittance, but no acknowledgment was ever received. For a considerable number of years prior to Mr Currie's death they were not living in family with him; on the other hand, up to the time of his death, his own sons John and James lived in family with him on the Portobello property, assisting him in his business. (Cond. 5) The funds and estate left by Mr Currie consisted of—(1) property in Portobello consisting of the premises in which he carried on his business, and a house (in which latterly he and two of his

sons lived, the eldest being married) and some other shop and house property, valued for Inland Revenue purposes at £2892, but for which an offer was recently made of £10,250. (2) The shop in Junction Street, Leith, of which he had granted the lease to William M'Lennan, dated 12th June and 7th July 1891, herewith produced, for fourteen years, from Whitsunday 1891, before referred to. The effect of the above bequest was to give Mr William M'Lennan a lease of eighteen years, from Whitsunday 1897. This property was valued at £702 (subject to the lease). (3) Two flats, 29 Thistle Street, Edinburgh, purchased for £600, valued at £437, 10s. (4) Another flat in 3 Dalrymple Place, Edinburgh, which he purchased for £285, valued at £206. He also left personal property of the value of about £1500. (Cond. 7) . . . The defenders' agent intimated by letter, dated 25th February 1898, herewith produced, that they claimed right to a share of the Portobello property under the destination in the feu-disposition of 1867. The result of giving effect to this contention would be that the M'Lennan family would collectively, and as regards William would individually, have larger shares in the truster's whole estate than his own sons. . . . The pursuers aver that under the destination in the feu-disposition of 1867 the fee of the Portobello property was vested in the said John Currie; that his trust-disposition and settlement was habile to carry, and that he intended it should carry, the said subjects, and that they have now the only right thereto."

The pursuers lodged a state showing the amount and distribution of the estate on the assumption that the destination in the feu-disposition was to receive effect.

This state showed the following results:—

Residue falling to the pursuers	£1686
Their shares (three-sevenths) of Portobello property as valued by house-agent at £2892	1239
	<u>£2925</u>

On the other hand, the shares falling to the stepson were as under:—

(1) Four-sevenths of Portobello property	1652
(2) Legacies of £200	600
(3) Value of lease to William M'Lennan	3500
Total to stepsons,	<u>£5752</u>

Note.—William M'Lennan bought the property to be leased to him from the trustees for £800. He sold it and the goodwill for £4500 (£1000 for property, £3500 for goodwill and licence).

Taking the Portobello property at £10,250, the sum recently offered for it, the results were—Sons' share . . . £5971
Stepsons' share . . . £9815

William M'Lennan's share would amount to £4928, while the highest share falling to each of the Curries would be less than £2000.

This state was prepared upon the assumption, but not the admission, that the goodwill of the business passed with the property in Portobello.

The pursuers pleaded—“(1) On a sound construction of the destination in the said feu-disposition of 1867, the fee of the subjects was vested in the late John Currie, and was subject to his disposal. (2) The substitution of heirs in the said feu-disposition having been validly evacuated by the trust-disposition and settlement of 1893, and the pursuers being entitled as beneficiaries under the said settlement to the subjects in question, they are entitled to decree as craved. (3) The intention of the testator having been to evacuate the substitution of heirs in the said feu-disposition by his said trust-disposition and settlement, the pursuers are entitled to decree as craved.”

The defenders pleaded—“(1) The pursuers' averments are neither relevant nor sufficient to support the conclusions of the summons. (2) On a sound construction of said feu-disposition, and trust-disposition and settlement, the defenders being each entitled to a *pro indiviso* share of the subjects contained in said feu-disposition, the present action should be dismissed with expenses.

On 12th November 1898 the Lord Ordinary (KYLACHY), after hearing counsel in the procedure roll, assoilzied the defenders.

Opinion.— . . . “The special destination was to the deceased and his wife (who predeceased him) in conjunct fee and liferent for her liferent use only, whom failing to the children of the deceased and the children of his wife by a former marriage equally amongst them *per capita*. On the other hand, the trust-disposition and settlement conveyed the whole estate of the deceased in general terms; and its effect, speaking generally, was to give certain pecuniary legacies to the wife's children, and the residue of the estate to the deceased's own sons. There was also a provision for the extension of a lease of a shop in Leith which the deceased had granted to one of the stepchildren. But the deed contained no reference whatever to the property in Portobello.

“The first point to be considered is whether the special destination is to be read as made by Mr Currie himself. I am of opinion that this is not doubtful. Nor can I doubt that it was a destination made for the purpose of regulating the succession to the Portobello property in the event of his death. The cases of *Walker*, 5 R. 965, *Lang's Trustees*, 12 R. 1270, and *Connell's Trustees*, 13 R. 1175, sufficiently illustrate the legal principle, which is by no means new. The pursuers referred to the recent case of *Brydon's Curator*, 25 R. 708, but that case, I think, is quite special.

“The next question is, whether any doubt has been thrown by recent decisions on the long-established doctrine that a general conveyance does not presumably derogate from a prior special destination by the same party. As to this, I am of opinion in the negative. The only doubt which exists or may be thought to exist is whether such evidence of intention as is admitted to control the effect of a general settlement as against a special destination by a different party may not also be admitted to control the effect of a special destination as

against a general settlement by the same party. As to this I am prepared for present purposes to assume the affirmative, and to assume also that the contrary intention may be established in both cases by the same kind of evidence. In other words, I assume the rule to be as expressed by Lord Deas in the case of *Gray v. Gray*, 5 R. 820, where he says, ‘A general disposition does not derogate from a prior special destination unless it be made clear that it is intended to do so.’ And as to the kind of evidence admissible, I do not know that anything has to be added to what was expressed in this Court and in the House of Lords in the cases of *Glendonwyn v. Gordon*, 11 Macph. (H.L.) 40, and *Campbell v. Campbell*, 6 R. 310, 7 R. (H.L.) 100.

“The third and only remaining point is as to the sufficiency, as evidence of intention, of the documents, facts, and circumstances which the pursuers set out on record. As to this, all I need say is, that supposing everything alleged by the pursuers to be true, there is not, in my opinion, enough to make it clear that the truster Mr Currie intended to displace the destination of the Portobello property contained in the deed of 1867. In saying so I do not ignore the terms of the cancelled will of 1880. It is not of much consequence whether the defenders' reference to that will is held to raise a question of competency or a question of sufficiency. It is perhaps most correct to say that the terms of a cancelled or revoked will cannot be looked at to the effect of construing a different and later will which regulates the succession. But, whichever view is taken, that the will of 1880 cannot be looked at, or that being looked at it proves nothing as to the truster's intention in 1893, the result is, I apprehend, the same. On the whole matter I find that the special destination rules, unless a contrary intention is clearly proved, and that the pursuers have set forth no matter relevant to be remitted to probation, tending to instruct a contrary intention.”

The pursuers reclaimed, and argued—In this case the special destination had been evacuated by the general settlement—See *Minto's Trustees v. Minto*, November 9, 1898, 36 S.L.R. 50. (1) From the deeds produced alone it appeared that this was the intention of the testator. He could not have intended to do what would necessarily result in the sale of the property in which he meant his sons to carry on business. If he had intended the stepsons to get a share in the Portobello property he would not have given them special legacies. If he meant William M'Lennan to get a share in that property he could not have inserted the clause “whereas I have already provided for my stepson William M'Lennan by granting in his favour a lease of the premises in Leith.” The terms of the power of sale granted to the trustees showed that the testator intended the Portobello property to go to his sons. The expression “legal claim” in the clause “lastly” included “legal claims” under the special destination, and showed that that destination had been revoked. In this case there

was the specialty that there was here not merely a general settlement and a special destination. The testator had undoubtedly at one time evacuated the special destination by the settlement of 1880, and the defender's claim amounted to this, that he had restored it by the settlement of 1893. There was nothing to show that this was the intention of the last-mentioned deed, and much to show the reverse. The deed of 1880 might at least be looked at to show what the testator knew when he executed it, and what was his intention at that time—*Magistrates of Dundee v. Morris*, May 1, 1858, 3 Macq. 134, per Lord Wensleydale at p. 171. (2) Apart from the deeds produced, however, the case should not be disposed of without inquiry into the facts and circumstances alleged on record. Such facts as those averred were "fair elements for consideration in dealing with the question of intention," and might be proved by parole evidence with a view to showing what the testator's intention was—*Gray v. Gray's Trustees*, May 24, 1878, 5 R. 820, per Lord President Inglis at pp. 824 and 825; *Lang's Trustees v. Lang*, July 14, 1885, 12 R. 1265, at p. 1270. The Court was entitled to look at the will of 1880 to see what was the testator's intention—*Magistrates of Dundee, cit., ut supra*. If he then intended to evacuate the special destination as it was plain he did, then surely it could not be assumed in the face of such averments as the pursuers had made here, that he intended to restore it in 1893. The result of the defenders' contention was that the stepsons got more than the sons. The facts which the pursuers desired, and were entitled to be allowed, to prove, were (1) the will of 1880; (2) the amount of the testator's means at various periods from 1867, and at his death; (3) his relations with his stepsons and his sons; (4) the fact that one of the stepsons had disappeared and had not been heard of for ten years at the date of the general settlement—a fact which made it extremely improbable he should have been intended to get a share of the Portobello property; and (5) the circumstances under which the settlement was prepared. See *Farquhar v. Farquhar's Executors*, November 3, 1875, 3 R. 71. These facts if proved would show conclusively that it was the testator's intention to deal with the Portobello property under the general settlement and to evacuate the prior special destination.

Argued for the defenders and respondents—The general rule was that, apart from clearly expressed intention to the contrary, a general settlement did not evacuate a special destination made by the same person. There was nothing in the present case to prevent the application of the general rule—(1) As regards the terms of the settlement itself—(a) the introductory part of the clause referring to the lease in favour of William M'Lennan did not show an intention on the part of the testator to give him nothing more than his original lease, for the deed immediately thereafter proceeded to direct that he was to get a lease for a further period; (b) the claim

under the destination was not a legal claim, and (c) the power of sale did not apply to the Portobello property if the settlement itself did not. (2) The will of 1880 could not be looked at as evidence of the testator's intention when framing the will of 1893—*Moubray's Trustees v. Moubray*, June 26, 1895, 22 R. 801, per Lord Rutherford Clark at p. 809. In *Magistrates of Dundee v. Morris, cit.*, the deleted part of the will was not held to be competent evidence to show what the testator meant by what he had left undeleted. Here it was proposed to set up a prior will, which had been destroyed, as evidence of what the testator intended to do by a subsequent will. That was not competent. But even if the prior will was taken into account, it did not support the pursuer's contention, for if one thing was plain upon a comparison of the two deeds, it was that in 1893 the testator intended to alter the will of 1880 as regards the disposal of his heritable property. (3) The admission of parole evidence to prove the intention of the testator was incompetent—*Johnstone v. Haviland*, February 17, 1896, 23 R. (H.L.) 6, at p. 9 (22 R. 396); *Johanson v. Johanson's Trustees*, December 9, 1898, 36 S.L.R. 169. (4) As to the surrounding facts and circumstances which the pursuers desired to prove, the fact that the stepsons got as much as the sons did not show that such was not the intention of the testator, and the great increase in the value of the Portobello subjects was not said to have been known to the testator. In *Gray v. Gray's Trustees, cit.*, the *ratio decidendi* was that unless the special destination was evacuated, the general settlement could not receive any effect at all.

At advising—

LORD JUSTICE-CLERK—The late Mr John Currie left a general trust-disposition and settlement, and the question in this case is, whether he thereby evacuated a special destination contained in the title taken by him to a property in Portobello. There is in the settlement no reference to this property. The principle which rules such a case is that a general disposition does not take away effect from an existing special destination unless the intention to do so is made clear. I am unable to see that there is in this case any such manifest intention to be gathered from what is put forward by the pursuers, on the assumption that all that is set forth could be established by evidence. Apart from the cancelled deed of 1880, I can see nothing which could, if proved, show that the testator had the intention alleged. And I am very clearly of opinion that no such intention could be spelled out of the deed made in 1880 to affect the view to be taken of a deed made in 1893, even if I thought it was competent to look at that deed at all, which, on the contrary, I hold very distinctly that it is not.

I would move your Lordships to adhere to the interlocutor of the Lord Ordinary.

LORD TRAYNER—I agree with the Lord Ordinary in thinking that the destination in the disposition by Baxter's trustees in favour of Mr Currie dated in 1867 must be

taken to be a destination made by Mr Currie himself, and that that destination must prevail over the destination in Mr Currie's general conveyance executed in 1893, unless it appears that it was the intention of Mr Currie by his general conveyance to derogate from or alter the special destination.

By what kind of proof that intention may be established is a matter perhaps upon which there is not unanimity of opinion, and I abstain from giving any opinion upon it. I agree, however, with the Lord Ordinary that the pursuers have not made any averments which, if proved, would establish an intention on the part of Mr Currie to alter the destination in the disposition of 1867.

I more than doubt the competency of looking at the terms of the settlement made by Mr Currie in 1880 for the purpose of proving an intention on his part to alter the specific destination. That deed (as we were informed) was deliberately destroyed by Mr Currie when he made his settlement in 1893. It is therefore the same as if it had never existed. But if its terms are looked at, they appear to me to be at least as much against the pursuers as in their favour. The deed of 1880 dealt with the property in question; the deed of 1893 does not. It may reasonably be inferred that Mr Currie had in 1893 changed the views he held in 1880, and of purpose left the Portobello property to be disposed of as destined in 1867.

I think the interlocutor reclaimed against should be affirmed.

LORD MONCREIFF—There is no dispute as to the law applicable to this case. The leading rule is that general words of disposition in a *mortis causa* deed are, in the absence of proof of any contrary intention, sufficient to pass heritable property vested at the date of the deed in the disponent with a special destination to heirs-substitute. But the operation of general words may be limited by proof of contrary intention. If the granter of the general disposition has himself disposed by special destination of particular subjects, though retaining during his lifetime the full right of fee, general words of disposition will not be held to evacuate the destination unless an intention to do so is clearly shown. The reason is, that in such a case it is held that both instruments express the will of the same person and may stand together, the general disposition being read as if the disponent, though *ex facie* of the deed disposing of his whole property, is really dealing only with the remainder of his estate.—See opinion of Lord Chancellor Selborne in *Campbell v. Campbell*, 7 R. (H.L.) 100.

It is not material to consider whether the case last put is to be regarded as an exception from the general rule or simply as an illustration of what will *prima facie* be held as sufficient evidence of contrary intention. In either view the *onus*, such as it is, is shifted; but an intention to evacuate the destination may be inferred either from the terms of the general dis-

position or from facts and circumstances or both. The matters relevant to establish such intention are thus stated by Lord President Inglis in *Gray v. Gray's Trustees*, 5 R. 820, at p. 824, viz.—“The relation which the granter of the deed bears to the estate in question, the condition of the parties interested in the previous settlement of the estate, and their relation to the granter of the deed, and above all, the mode in which the granter of the deed has dealt with the estate which is said to be conveyed in other deeds and transactions regarding that estate, and also the way in which she has dealt with her succession generally, if the general disposition is a disposition intended to settle the affairs of the truster.”

Now, there has been no proof in this case; the Lord Ordinary has assoilzied the defenders practically on the ground that the pursuers have not set forth any relevant case for inquiry, and I understand that your Lordships are prepared to affirm his interlocutor. While I am not prepared *de plano* to decide in favour of the pursuers, I am not prepared to decide against them without fuller information on certain points which are not admitted by the defenders. The deed of 1893 taken by itself is not conclusive. Many of the clauses founded on by the pursuers are clauses of style which are inserted in every general settlement. At the same time the deed bears the stamp of an exhaustive settlement of the truster's whole affairs. The truster makes anxious provision by name for each of his own sons, and also for each of his stepsons. In particular, the provisions made in the fifth purpose for William M'Lennan are expressed in language which I think is inconsistent with the idea that he was to receive or succeed to any more of the truster's property. But as I have said the terms of the deed are not in themselves, and apart from the light which may be thrown upon them by proof of circumstances, sufficient. But the pursuers make certain averments which, if proved, might be sufficient to supplement the evidence of intention to be found in the deed. I refer particularly to the statements in condescendence 4. I think the pursuer should have an opportunity of producing evidence as to the position of the stepsons John, George, and Andrew M'Lennan, as to the sums expended for their behoof by the truster, and whether at the date of his will they were self-supporting. What is of still greater importance is that we should be informed whether at the date of the deed and the date of the death of the truster, the truster's sons were living with him in the Portobello property and assisting him in the business, and whether they had any other trade or profession or means of livelihood. Because if the defender's contention is sustained the Portobello property and business must (contrary I should suppose to the truster's presumed intention) be sold and broken up, and the proceeds divided among the two families; or if the pursuers desire to retain the property and the business (which is said to be now

worth £10,000) they will have to pay the defenders £5000 or £6000.

Again, it is not immaterial that if the defenders are right the provisions in their favour exceed those in favour of the trustor's own sons.

I leave out of view the cancelled deed of 1880; it is at least doubtful whether it can be looked at.

I am therefore not prepared to concur in the judgment proposed. I think the facts should be ascertained by a proof before answer if parties cannot agree upon a joint-minute of admissions.

LORD YOUNG was absent.

The Court adhered, with additional expenses.

Counsel for the Pursuer—Dundas, Q.C.—C. K. Mackenzie. Agents—Dundas & Wilson, C.S.

Counsel for the Defenders—Balfour, Q.C.—Craigie. Agent—William Duncan, S.S.C.

Friday, March 3.

FIRST DIVISION.

[Lord Pearson, Ordinary.]

LORD MONCREIFF AND OTHERS (MONCREIFF'S TRUSTEES) v. HALLEY.

Judicial Factor—Bankruptcy—Sequestration—Casus improvisus—Nobile Officium.

On the death of the trustee on a sequestrated estate fifty years after the date of the sequestration, a sum of money belonging to the estate was in his possession, but it was impossible to discover the creditors who were entitled to it. The Court, upon the application of the trustee's executors, ordered a meeting of the bankrupt's creditors to be called with a view to electing a trustee on the estate; and thereafter, the meeting having proved abortive by reason of no creditors appearing thereat, appointed a judicial factor on the bankrupt's estate.

On 26th May 1845 the late Mr William Moncreiff, C.A., was confirmed as trustee on the sequestrated estates of James Pedie, W.S., then deceased.

The bankrupt's creditors were mainly heritable creditors who held bonds over his heritable estate to the amount of about £12,257, but by arrangement with them Mr Moncreiff managed the bankrupt's heritable properties and accounted to them for the rents. The heritable properties were sold in 1850, and the proceeds were paid over or accounted for to the heritable creditors, though they were not sufficient to pay their debts in full.

Part of the sequestrated estate consisted of an annual feu-duty of £5, 5s., believed to be payable from subjects situated in Stockbridge. As it could not be ascertained at the time of the distribution of the heritable

estate under which of the securities this feu-duty was included, it was left over for investigation by the trustee's law-agent, who, however, died without clearing up the matter. The feu-duty continued to be paid to the trustee, and at his death on 31st August 1895 the accumulations amounted to £275, 7s. 4d.

Claims were lodged in the sequestration by ordinary creditors to the amount of £211, but no funds being available to meet them no dividend was declared thereon.

In these circumstances Mr Moncreiff's trustees and executors presented a petition to the Court in which they set forth the foregoing facts, and averred that both Mr Moncreiff and they had been unable to discover any of the creditors, whether heritable or ordinary, or their representatives. They therefore craved the Court to appoint a judicial factor on the bankrupt's sequestrated estates, or otherwise to pronounce such other orders or direct such other procedure to be taken as might seem proper to the Court with a view to the appointment of a trustee upon the said estates.

Answers were lodged by Mrs Halley, one of the children and executrix-dative *quâ* next-of-kin of the bankrupt, who averred that there were no claims outstanding against the bankrupt's estate. The heritable bonds had been discharged, or had prescribed, and the ordinary creditors had never been ranked by the trustee for the amounts of their respective claims. Mrs Halley accordingly claimed that the funds in the hands of the petitioners were payable to her as executrix-dative of her father, and as such entitled to take up the bankrupt's estate after payment or satisfaction of any claims thereon.

On 3rd December 1898 the Court pronounced the following interlocutor:—
“Order and direct that in future the proceedings in the process of sequestration of the estates of the late James Pedie, W.S., shall, from and after this date, be regulated by the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79) and Acts explaining and amending the same; further, remit to the Lord Ordinary officiating on the Bills to appoint a meeting of the creditors of the said deceased James Pedie to be held at such time and place as his Lordship may fix, to elect a trustee or trustees in succession on the said sequestrated estates, with the whole powers conferred by the said statutes, and to appoint said meeting to be advertised in the *Edinburgh Gazette*, with power to remit to the Sheriff of the Lothians and Peebles at Edinburgh to proceed further in said sequestration in manner mentioned in the statutes.”

In terms of this remit the Lord Ordinary appointed a meeting to be advertised and held. The meeting, which took place on 21st December, was attended by the petitioners' and respondent's agents, and the sederunt-book and the claims of the ordinary creditors in the sequestration were, *inter alia*, produced. After delaying for half-an-hour beyond the hour at which the meeting was called, no creditors or representatives of creditors of Mr Pedie appeared,