accomplish was, under the guise of a sale to give to Scott & Simson a security over goods retained in the possession of the bankrupts. It showed a somewhat strange ignorance of mercantile law to suppose that an effectual security could be thus constituted. But either they supposed this, or were willing to experiment in the matter. I entertain a very clear opinion that, when within sixty days of bankruptcy Scott & Simson asked and received delivery of the jute contained in these invoices, they were asking and receiving a security to which they then for the first time obtained legal right. There was no obligation to deliver the jute at that moment; indeed, the essence of the transaction was not delivery at any moment whatever. The utmost view which the parties could possibly have was, that through the fiction of a sale the goods might be claimed on bankruptcy by Scott & Simson as fictitious purchasers. Delivery in the course of the transactions was neither stipulated for nor intended. I feel it impossible to put this transaction on the footing of a specific security stipulated for at the time of the advance, and given in terms of that stipulation. The delivery of the jute was not implement of a *bona fide* agreement for security, then in operation. It was security without obligation given within the sixty days, and therefore falls under the statute.

I do not, in saying this, rest my opinion on the mere form of the transaction as a sale, and not a transference in security on its face. It is undoubtedly competent to constitute a security in the form of an absolute disposition. And if this ostensible sale had been completed by present delivery to Scott & Simson, the goods might probably have been retained as security for the advances if this had been truly stipulated. The flaw of the transaction lies in its substance, as a transaction under which no delivery was either made or stipulated for. The delivery within sixty days was therefore a delivery without obligation, and so is struck at by the statute.

The Lord Ordinary proceeds on the assumption that the transaction implied an obligation to deliver the jute to Scott and Simson at any time required by these gentlemen, and that therefore the delivery was not spontaneous, but in terms of previous stipulation, and so protected against the statute. I am not prepared to admit the Lord Ordinary's conclusion even if the transaction could be thus read. In my apprehension an obligation to give a security when required is not sufficient to cover a transaction within sixty days of bankruptcy. The obligation to give security which is protected against the statute is, I conceive, a specific obligation, prestable independently of after requirement. It is where the completion of the security follows in natural course on the original transaction. It is not where the requirement brings into effect, within the sixty days, a supervening element, without which no obligation arises. Anterior to the requirement no obligation lay; and so the obligation arose within the sixty days, not previously. An obligation to give security when required is, by force of the term, an obligation to give security within sixty days of bankruptcy equally as at any other time—nay, to give security after bankruptcy has occurred, for all is alike covered by the obligation. Such an obligation I consider wholly inoperative to elude the statute.

But I must now add that I cannot read the transaction in the present case as involving an obligation to give delivery when required. No such thing, I think, was in the contemplation of the parties. The very utmost of the obligation was to give delivery in the event of bankruptcy supervening, or of the circumstances of Paton, Gordon, & Co. becoming such as to threaten insolvency. Construed by the actings of the parties, the obligation cannot, at the utmost, be stretched further than to this effect. Suppose that on the face of the invoice all this was set forth in words—that is to say, that it was expressly declared that no sale was intended, but that under the cover of a sale Paton, Gordon, & Co. should deliver the jute to Scott & Simson for their security, in the event of their bankruptcy occurring or being threatened.—Surely this would be an obligation which the law never would regard as an obligation for security which excluded the operation of the Act 1696. In a question with the other creditors of Paton, Gordon, & Co. it would be no better than no obligation at all. The delivery within sixty days would be a transaction without legal obligation on which to rest, and therefore struck at by the statute.

With regard to the decisions, which were largely discussed before us, I think it unnecessary minutely to examine them. This has been sufficiently done by your Lordship. The decisions are not in all points reconcileable. But the present case has its own peculiarities, which I do not think occurred in any former one.

I would only say, in conclusion, that I think it would be much to be regretted did the Court feel bound to sanction this alleged security. For the result would be simply this, that the whole goods belonging to a mercantile house might be monopolised as security by a single creditor, whilst still retained in the possession of the debtor, and made a fund of credit all round; the single creditor being entitled to seize them for his own behoof whenever bankruptcy seemed inevitable, without any protection from the bankruptcy statutes to the general body. The Lord Ordinary perceived this result, though he thought he could not prevent it. But I think that the law is clear enough, and strong enough, to obviate the mischief.

The Court recalled the interlocutor of the Lord Ordinary; found that the deliveries and payment complained of were not made fraudulently to disappoint the rights of the just creditors of Paton, Gordon, & Co., and are not reducible at common law, but they found that, being made within sixty days of bankruptcy, they are challengeable under the Act 1696, c. 5; and therefore reduced in terms of the reductive conclusions of the summons, and remitted to the Lord Ordinary to dispose of the other conclusions; and allowed the pursuer expenses up to this date.

Agents for Pursuers—Leburn, Henderson & Wilson, S.S.C.

Agents for Defenders—Maclachlan & Rodger, W.S.

Friday, June 30.

NISBET'S TRUSTEES *v.* NISBET.

Insanity—Testament. Circumstances in which a trust-settlement, executed in a lunatic asylum by a person who for some years had been un-

doubtedly insane, was *held* a valid and effectual deed.

This was an action of declarator to have it found that the late Major Nisbet was of a sound disposing mind when he executed a trust-disposition in favour of the pursuers as trustees, dated 2d February 1870; and that the said deed was a valid and effectual deed. The heir-at-law of the deceased and his widow were called as defenders.

Defences were lodged for the heir-at-law.

The circumstances may be very shortly stated. Major Nisbet, on his return from India in the winter of 1861-62, showed symptoms of insanity. From this time to his death he was transferred from one lunatic asylum to another. Down to the end of the year 1869 there was no doubt that his insanity was of a very pronounced character. At this time he was an inmate of Whitehouse Asylum, Edinburgh, where he remained till his death, which took place on the 7th April 1870. About the beginning of 1870 Major Nisbet became very desirous of making a settlement of his affairs, and he accordingly composed and wrote with his own hand instructions for the preparation of a settlement. A trust-disposition and settlement was accordingly prepared by a man of business in terms of the instructions, and executed by Major Nisbet on the 2d February. The purposes of the trust were substantially to pay an alimentary annuity of £200 a-year to his widow, and to divide the residue of his estate equally between his two sons. His whole means consisted of the heritable estate of Mersington, which was heavily burdened, the free rental being about £700 a year. Had he died without a settlement his widow would have taken her terce, the eldest son the estate under burden of the debts and the terce, and the younger son nothing.

The sole question between the parties was whether at the date of executing the settlement Major Nisbet had so far recovered as to be of sound disposing mind? The nature of the evidence adduced will appear from Lord Ardmillan's opinion.

The Lord Ordinary (GIFFORD) found in terms of the conclusions of the summons. His Lordship, in a long note, examined the evidence, and referred to the following cases—*Hollyland*, 1805, 11 Vesey, p. 9; *Cartwright* v. *Cartwright*, 23d February 1793, 1 Phillimore's Cases, p. 90; *White* v. *Driver*, *ibid.*, p. 84; *Waring* v. *Waring*, 1848, 6 Moore's Privy Council Cases, 341; *Smith* v. *Tebbitts*, 1867; Law Reports, 1 Probate and Divorce, p. 398; *Morrison* v. *Maclean*, 27th February 1862, 24 D. 625.

The defender reclaimed.

WATSON and ASHER for him.

The SOLICITOR-GENERAL, BALFOUR, and ROBERTSON, for pursuers.

At advising—

LORD ARDMILLAN—This action is presented to us in a form rather unusual. The pursuers of the action seek declarator that Major Nisbet was "of sound disposing mind" when he executed the settlement of 2d February 1870, and that the settlement is accordingly valid and effectual. The defenders allege that Major Nisbet was not of sound disposing mind when he executed that settlement, but was incapacitated from disposing of his property.

The question which we have to consider is,—whether the settlement of Major Nisbet, which bears his signature duly tested, was executed by him when he was "of sound disposing mind." That question is certainly one of unusual delicacy and difficulty. It is partly a question of fact depending on evidence, and partly a question of law as applicable to the proven facts. In both aspects it requires and has received the most attentive and deliberate consideration.

There are two opposing presumptions which arise out of those facts in the case, which do not admit of dispute. It is right to keep these presumptions distinctly in view, in the outset of our consideration of the evidence. On the one hand, the testator, Major Nisbet, had been for years the inmate of successive lunatic asylums, admitted and detained on certificates that he was insane. The will challenged was made and signed by the testator within an asylum, and he never left the asylum after signing it, but died in the asylum within a few months. These facts are striking and certainly important, and I agree with Mr Watson in holding that, in respect of these facts, the ordinary presumption against insanity is to a great extent shifted, and that the pursuers of the action, supporting the deed and alleging the sanity of the testator, must under the circumstances overcome the presumption arising from the facts which I have mentioned.

On the other hand, the deed challenged must be considered. It is a will, and in a question of capacity a will is favoured by law. Then it cannot be doubted that this deed, to the terms of which I need not particularly advert, is a simple, intelligent, coherent, and rational document. Nay more, it cannot be denied that it is a just and equitable deed, such as the testator, if he thought fit, was fairly entitled to execute. The substance of the will is to create a trust, and to direct payment of an annuity to the testator's widow, and then, after some small legacies, distribution of his whole estate in favour of his two sons. The weight justly due to the rational and equitable character of the deed, in the question of its validity, may vary much, according to circumstances. Where a will has been framed by agents, and afterwards been approved by the testator after reading it or hearing it read, then the rational, equitable, and becoming character of the will cannot of itself be of great importance in considering the sanity or insanity of the testator, since his own mind had not been much applied to the subject, and he may only have accepted and subscribed what was presented to him. But where distinct and intelligible instructions for preparation of the will have been written and framed by the testator himself; where the will originated in his own mind, and was prepared according to his own instructions, and where there is no proof and no suggestion of any interference with the free exercise of his own mind, then the rational character of the will is of great importance —not indeed conclusive, but surely not to be overlooked in judging of the sanity of the testator.

The nature of the deed — its structure as simple or complicated—its character as rational or silly—its fitness as judicious or extravagant —must be taken into consideration when judging of the capacity of the testator. It is impossible to consider satisfactorily the question of capacity to make the will if we exclude an element so important as the rationality of the will itself. I do not at all mean to say that because a will is rational and equitable the question of the capacity of the testator is thereby either excluded or solved. By no means. But where the will, or the instruction for the will, has been written by the hand

and framed out of the thoughts of the testator himself, the rational character, and even the just and equitable and appropriate character of the will affords important evidence of capacity.

In this case the will was prepared by agents of the highest respectability from instructions written and framed by Major Nisbet himself. These instructions are clear, intelligent, and rational; and it can scarcely be denied that the will itself, prepared in accordance with these instructions, is not only reasonable, but is judicious and appropriate.

There is, in my opinion, no reason to doubt that the instructions to which I have referred were not only written by the testator, but originated with him, and were the unassisted product of his own thoughts. The act of framing and writing these instructions is, to use the words of Sir William Wynne in the case of *Cartwright* (Phillimore's Reports, page 90), "a rational act rationally done." On the challenge of such an act on the ground that it is the doing of an insane man, I am of opinion that the rationality of the act creates, at the outset, a presumption in favour of the sanity of the testator at the date of framing the instructions.

We thus enter on the consideration of the sanity or insanity of the testator with two counter presumptions at starting—the one presumption being against his sanity in respect of his previous unsoundness of mind, and of his actual residence as an inmate of the asylum at the date of the will; and the other presumption being in favour of his sanity, in respect of the rational and judicious character of the instructions for the will which, alone and without assistance, he framed and committed to writing.

The comparative force of these counter presumptions is materially affected by the fact that, whatever was the amount of Major Nisbet's mental disease, it was certainly aggravated, and, I think, was to a great extent caused, by habits of intemperance, of which the influence would be mitigated by long confinement and restraint. The reasonable probability of recovery, or of lucid interval, is in such a case increased.

I have carefully studied the proof in the case, and the letters of the testator; and I concur with the Lord Ordinary in the view which he has taken of that proof and of these letters. I shall not occupy your time by commenting in detail on the evidence, or on the letters. I think that there is no proof of any delusion in Major Nisbet of such a nature and character as to affect the whole mind, and lead to the result of incapacity to make a testament. The only specific delusion mentioned—that relating to the door of his bed-room, which he supposed to be speaking to him—may well have occurred during an attack of *delirium tremens*, and it is not said to have returned after 1863. There is no reason to suppose that he was under that delusion, or under any specific delusion, at the date of the will.

It is, I think, sufficiently proved that Major Nisbet was for several years subsequent to 1863, and up to near the close of 1869, labouring under some degree of mental disease. He was transferred from one lunatic asylum to another, and his disordered state of mind is proved by the evidence of several medical gentlemen. Of this I have no doubt. I think it also clear that to a great extent his unsoundness of mind was caused by the habits and the cravings of intemperance.

His letters, of which a great many are before us, have been strongly founded on as conclusive indications of insanity. When viewed in connection with the medical evidence of his state of mind previous to the close of the year 1869, these letters are certainly important. But the immediate question for consideration is, what was the capacity of Major Nisbet when he prepared and executed this will? On that question I cannot think that the letters before us, read with reference to the facts disclosed on the proof, are at all conclusive. The writer of these letters was evidently a very singular and eccentric man, strange, wayward, and flighty, with a curious under-current, sometimes of caustic humour, and sometimes of practical sagacity. But I am not satisfied that the letters prove him to have been entirely deprived of reason, or absolutely insane. He was not furious—he was not an idiot—he did not labour under any fixed specific delusion. Even if he had remained in the state in which he was in October 1869, it is by no means certain that he had not the capacity to make a simple and rational will. But we have important evidence applicable to his state of mind between October 1869 and the date of the will.

We have the very important evidence of Dr Thomas Thomson, the medical superintendent of Whitehouse Lunatic Asylum. He had the best possible opportunity of judging. He was well acquainted with Major Nisbet's previous state; he knew, also, to how great a degree his ailments were aggravated by drink, and mitigated by quiet and restraint in living. He had him under his charge, and he saw him from day to day. In 1867 he thought him insane and not likely to recover. Yet in October 1869 he began to observe symptoms of improvement, which continued during the two succeeding months; he then noticed the effect on his mind of the severe bodily disease, diabetes, of which he died, and he thought that while weakening his body it "had an effect in clearing his mind," a result which he had observed in former experience. He states his opinion decidedly, that in January 1870 Major Nisbet was sane. He adds—"I was perfectly decided on 28th January." This opinion is, in my estimation, most important. It is the deliberate opinion of a man of skill and experience, who was well acquainted with the patient—who had ample means of observation up to the last—and who was quite free from bias or prejudice.

Then we have the most important evidence in the clear and authoritative opinion of Dr Warburton Begbie. He was called in to visit Major Nisbet when he was suffering from severe diabetes on 27th November 1869. That was after the time when the improvement which Dr Thomson had observed commenced. He then thought him sane and intelligent, though peculiar. He afterwards visited him for the purpose of ascertaining his mental capacity on 28th January 1870; and, after particular observation and conversation, he arrived at the conclusion that Major Nisbet was "an eccentric man, but a sane man." That opinion he continued to entertain, and has expressed it clearly in his testimony. We have not only the benefit of Dr Begbie's opinion, which is of great value and great authority, but we have real evidence of the clear and firm character of that opinion in the fact that Dr Begbie signed the deed as an attesting witness on the 2d February 1870. He had had previous conversations with Major Nisbet on the

subject of the will. He had satisfied himself that Major Nisbet understood it, and he declares that when he signed the deed as a witness he had no doubt that Major Nisbet was of sound mind, and that he then executed a deed which he understood, and which expressed what was his will and intention.

Dr Thatcher is of the same opinion. He saw Major Nisbet in January 1870; and he has stated his opinion that he was "perfectly capable of understanding everything he was doing." Being asked if he considered him sane, he replies, "most decidedly." Dr Lawrence Thomson is of the same opinion; so also is Dr George Lawrie. I do not pause to allude to non-medical witnesses who formed the same opinion, though the testimony of some of these is important; but I cannot omit to notice the evidence of the Rev. Frederick Thomson. He had known Major Nisbet in former years. He was aware of his having been in asylums, and he visited him at Whitehouse after the date of his settlements, and not long before his death. He states that he considered him perfectly sane—that he found him calm, collected, and intelligent—that Major Nisbet spoke to him on the subject of the will which he had made—and that he thought him capable of understanding the meaning and effect of a will. But not only did this reverend gentleman, who saw him twice a-day from the 21st to the 24th of March, thus state that he was satisfied of Major Nisbet's sanity; he also, like Dr Begbie, has, by his conduct, afforded real evidence of his conviction on the subject. He treated Major Nisbet as a sane man, he read prayers with him, he conversed on religious subjects with him, he administered the sacrament to him—and he says he would not have done so if he had not been satisfied of his perfect sanity.

There is thus a body of evidence of great weight bearing on the question of capacity at the date of the deed. I concur with the Lord Ordinary in thinking that there is very strong evidence of Major Nisbet's mental recovery. Then the character of the deed itself, to which I have already adverted, comes powerfully in aid of this evidence of recovery. The deed itself, written and framed by the testator, is perfectly rational. It is such a will as a man of sound judgment and clear mind might well have executed. It tends to support the evidence of those who thought him sane in 1870; for, so far as it is possible to judge, it is not the product of an insane mind.

But the case has been presented to us in another aspect, to which I must briefly refer. It has been ably and earnestly argued, that if the mind of Major Nisbet was to any extent affected by mental disease then he must be pronounced incapable. It is said that the law does not recognise partial unsoundness of mind; but that the mind is one and indivisible, and that if it is disordered in any faculty, or labours under any delusion arising from such disorder, then, though its other faculties and functions remain undisturbed, the mind is unsound, and testamentary incapacity is the necessary consequence. In support of this argument we have been referred to the decisions in the cases of *Waring* v. *Waring* and *Smith* v. *Tebbit*, where the doctrine of entire incapacity, as the result of partial unsoundness of mind, is said to have been authoritatively laid down. These were clear cases; and I am not satisfied that Lord Brougham in the case of *Waring*, or Lord Penzance in the case of *Smith* v. *Tebbit*, really intended to lay down a doctrine so wide as that which has been contended for here. The subject is one of extreme delicacy. It is very difficult to estimate the effect on general capacity of mind of the unsoundness of one particular faculty.

It is not given to any of us to sound the depths of the inner consciousness of another man. We cannot penetrate the profound mysteries of the sentient and intellectual constitution of man, nor trace the recondite discords which distract thought, and mar the hidden harmonies of man's "noble and most sovereign reason." We can deal with such a question as is now before us only in so far as we have means of judging; and we ought not, if we can avoid it, to interfere with the undoubted right to dispose of property by will. It is a great step towards decision that the will is simple and rational, and not unjust. The ascertainment of capacity to make such a will is a task in which the judicial mind should not be too much disturbed by merely speculative difficulties. We must do our best to reach the truth of the matter.

For my part I cannot altogether accept the doctrine which we are told has been declared in the case of *Waring*, viz., that partial unsoundness of mind uniformly and necessarily involves as a consequence the testamentary incapacity of the party.

If we call to our aid, on the one hand, our own personal consciousness of the possession of distinct faculties and functions of mind, and, on the other hand, if we consider the instructive results of recent pathological investigation of mental disease, we must, as I humbly apprehend, come to the conclusion that in this question we cannot view the mind as one and indivisible, so as to be rendered entirely incapable of action by the disorder of any one faculty, but we must admit that partial mental disorder may co-exist with such an amount of capacity as can sustain a simple and rational act or writing. We must inquire into the nature and extent of any partial disorder which is discovered; and, if there be any mental delusion, we must ascertain its character, and see if it is calculated to affect the act or the writing which we are considering. We must not come hastily to the conclusion that, because of some partial disorder, the man must be altogether insane.

I need not here speak of the question of responsibility for crime. But the doctrine which has been argued to us would, if adopted to its full extent, lead to serious consequences, releasing from responsibility persons who are morally and legally accountable.

But, returning to the case of testamentary capacity, it is surely most important to ascertain whether any partial unsoundness or specific delusion is or is not connected with the will under consideration.

There are, indeed, some insane delusions which are necessarily serious, and which cannot fail to affect the whole mind. These must destroy testamentary capacity. We may take as an instance of such a form of insanity, a man's delusion in regard to his personal identity, or to his humanity. Such cases have occurred, and are well known. A man who believes himself to be made of glass, or to be a teapot, or to be not his father's son, or the Queen's subject, but the Emperor of China, or the man in the moon, is out of his mind. So also is a man who believes himself to be not a mere human being but the Divine Redeemer or the Lord Almighty. Such a man

cannot be considered to any effect sane. His reason is gone; it is not merely to some extent disturbed, but it is overthrown.

We have no such case here. No such case has been suggested, and it cannot stand on the evidence. Above all, it is to me quite clear that, taking the most unfavourable view which the evidence can support of Major Nisbet's capacity, he was not, in January 1870, affected by any unsoundness or any delusion of mind bearing on the preparation or execution of this will, or tending to pervert his judgment or his feelings in regard to his family.

The cases of *Waring* v. *Waring*, and *Smith* v. *Tebbits* were both cases of unquestionable insanity; and therefore the decision did not require to be supported by the announcement of the very wide doctrine which I have mentioned. There is a more recent decision to which I request your Lordships' attention. In the case of *Banks* against *Goodfellow*, decided in the Court of Queen's Bench on 6th July 1870, 22 Law Times, 2 B. 813, the authority of the observations made in the cases of *Waring* and of *Tebbits* was carefully considered, and an elaborate and most luminous judgment was delivered by Lord Chief-Justice Cockburn, (Justices Blackburn, Mellor, and Hannen concurring.) In that case Banks, the testator, laboured under certain specific delusions, and had been in a lunatic asylum; but as these did not indicate total loss of reason, and did not influence, and were not reasonably calculated to influence, the testator in making the will, his testamentary capacity was sustained. The rubric of the case is thus stated:—"Partial unsoundness of mind not affecting the general faculties, and not operating on the mind of the testator in regard to the particular testamentary disposition, is not sufficient to deprive him of the capacity to make a valid will." The Lord Chief Justice in his remarks expresses his opinion that the doctrine laid down in *Waring's* case, and in *Tebbits'* case, was not necessary to the decision of either case; and he plainly says that, in the doctrine so widely stated in these cases, he and the other judges in the Queen's Bench were "unable to concur." He then proceeds at length to explain the grounds on which he holds that where a will is rational then partial unsoundness of mind does not necessarily destroy testamentary capacity. After saying that the law recognises the right to dispose of property by will, he adds, "it must be borne in mind that the absolute and uncontrolled power conceded by the law is founded on the assumption that a rational will is a better disposition than any that can be made by the law itself. If, therefore, though mental disease may exist, yet if it presents itself in such degree and form as not to interfere with the capacity to make a rational disposition of property, why should it be held to take away the right?" After further most learned and interesting exposition, he proceeds thus to state the opinion of the Court:—"We are of opinion that the existence of a delusion, compatible with the retention of the general powers and faculties of the mind, will not be sufficient to overthrow the will, unless it was such as was calculated to influence the testator in making it." In that case of *Banks* v. *Goodfellow* the will was sustained. The standard of capacity there recognised is,—the testator must understand the meaning of the will he makes; must comprehend the amount of the property of which he disposes, and the claims of those whom he excludes.

This decision I consider to be extremely interesting and important, and in the present case very much to the point. It appears to me to qualify and correct the doctrine, or the construction put on the doctrine, stated in *Waring's* case, and to place the general principle governing this important question,—a question composite of psychology and of law,—on an intelligible and satisfactory footing. The clear and valuable exposition of our Scottish law given by your Lordship in the chair, in the case of *Morrison* v. *Maclean's Trustees*, 27th February 1862, is in entire accordance with the opinion of the Chief-Justice of England in the case of *Banks* v. *Goodfellow*. In the observations then made by your Lordship, and especially the observations in regard to the great importance of the rational character of a will framed by the testator himself, I entirely concur.

I have only now to express my opinion, that, on the evidence before us, and on the law applicable to that evidence, the interlocutor of the Lord Ordinary should be adhered to, and the will of Major Nisbet ought to be sustained.

Lord Kinloch—I have found considerable difficulty in the decision of this case. But the difficulty has lain rather in the facts than in the law. I think the case does not necessarily involve the discussion of any general principle. Were it called for, I should express it as my opinion, that wherever a man is thoroughly insane, although the insanity is only exhibited in a single point, the mind of that man must be held in a diseased or unsound condition, exclusive of capacity to execute an effectual deed. It can never, in such a case, be predicated with any certainty that the deed was dictated by nothing but a sane purpose, however rational it may appear in itself. But a delusion on a particular point must, to infer insanity, be in the strictest sense an insane delusion—not a mere eccentricity of view, nor a mere error, however marked, in opinion.

In the present case there can be no doubt that Major Nisbet was for many years insane, in the proper sense of the term. But his insanity, at all events during the later years, was not, I think, exhibited in any specific delusions of an insane character. It was a general insanity, consisting of a want of control over his mind, of incoherence in thought, and unrestrainable violence of feeling. Any delusions of the senses, such as the idea that the doors spoke to him, belonged to the first period of his malady, and were in all probability the temporary outbursts of *delirium tremens*. In order, therefore, to support the deed now under question, it is necessary to show that, prior to its execution, this general insanity had passed into undoubted saneness. In other words, Major Nisbet must be shown to have entirely thrown off his insanity, and to have become in all respects a sane man. I do not throw out of view the conceivable case of a lucid interval. There is nothing of the kind now in question; the condition of mind in which he executed the deed remained, whatever it was, the same down to his death. In regard to a lucid interval itself, it would be necessary, as I think, to prove, not merely that the symptoms had intermitted, but that the insanity had for the time been entirely removed.

The question, therefore, in the case is, Whether at the time of executing this deed Major Nisbet had his insanity entirely removed, and was in all respects a sane man? And it is here that the diffi-

culty arises in matter of fact. On the one hand is the circumstance that Major Nisbet was still the inmate of an asylum—no steps having been taken to procure his discharge. This, however, may be considered a mere precautionary measure, not necessarily inferring that he had not been thoroughly cured. Again, his very strange letters, extremely unlike the ordinary productions of a sane man of his social position, continued with no substantial variation down to a period very near that of the deed. At the same time, I think that somewhat too much stress has been laid on these letters. For a great deal of their strangeness is attributable to a bantering, rollicking disposition, which evidently characterised the man, and broke out in effusions hastily dashed off for little better than temporary amusement in the supposed astonishment of those to whom they were addressed. I have a strong impression that Major Nisbet's familiar letters, during his previous period of sanity, would be found not so different from these as might at first sight be expected.

On the other side, there is the strong, and by itself, almost conclusive testimony of those best acquainted with his condition, and fitted both by their experience and skill to form an accurate opinion concerning it. There is the important evidence of Dr Thomas Thomson, in whose asylum he had been continuously from October 1867; who had seen a decided improvement in his condition in October and November 1869, and says without any hesitation, "In January 1870 I came to the decided conclusion that he was perfectly sane." There is similar evidence given by Dr Laurence Murray Thomson, who visited him frequently, and says of him, as in January and February 1870, "In my opinion he had got into a sound state of mind." There is the strong evidence of that eminent physician, Dr Warburton Begbie, who visited Major Nisbet for the express purpose of testing his capacity to make a will, and was present at the execution of the deed; and who says, "I had no doubt that he was at that time of sound mind." Dr Thatcher, who saw him in January 1870, also for the purpose of judging of his mental condition — being asked, "Was he a man that you would describe as of sane mind?" answers "most decidedly." There is the evidence to the same effect of the attendants in the asylum. There is also the evidence, highly important in my view, of the Rev. Mr Thomson, who saw him seven times in March 1870 (his death being on 7th April thereafter); conversed with him on the most important of all subjects, and administered the sacrament to him; and who "thought him perfectly sane." There is nothing in the parole evidence which I consider of any weight to be set off against this.

But there is further the strong confirmation of this evidence afforded by two circumstances distinctly proved. The one is that for some time before his death Major Nisbet was physically prostrated by a malady which proved mortal. It is according to the experience, not merely of scientific men, but of everyday life, that this is a circumstance extremely likely to restore the sanity for the period anterior to dissolution. It is the familiar case of the lamp flashing up into brightness immediately before going out. The other circumstance lies in the extremely rational character of the deed which Major Nisbet executed; and his instructions for which, the evidence warrants us in thinking, were written by him spontaneously, and without assistance. It is true that the rationality of a deed will not support it if proved to flow from a man undoubtedly insane. But the rationality of the deed is a vitally important piece of evidence as to whether the man was sane at the time. Here the whole transaction was so rational as to force even on hostile witnesses the conviction that the man who wrote these instructions, if he wrote them of his own motion and unassisted, could not have at that time been insane.

On the whole matter, I think that the Lord Ordinary has arrived at the only safe and sound conclusion in the case, when sustaining the validity of this deed. It is impossible for us to say whether, if Major Nisbet had recovered from his bodily disorder, and again been exposed to danger from improper stimulants, his insanity would not have revived. But we must judge of the actual, not an imaginary case. And, though not without difficulty, I have reached an opinion satisfactory to my own mind, that the deed which Major Nisbet thus executed during his mortal sickness was the deed of a man who at that time was entirely relieved of his insanity.

The LORD PRESIDENT and LORD DEAS concurred.

The Court adhered.

Agents for Pursuers—J. & F. Anderson, W.S.
Agents for Defender—Morton, Whitehead & Greig, W.S.

Friday, June 30.

CRAIG *v.* JEX-BLAKE.

(*Vide ante*, p. 428.)

Reparation—Slander—Privilege—Proof—Veritas—Mitigation—Expenses. A member of the court of contributors to the Royal Infirmary, in addressing a meeting of that court, and referring to a certain memorial which had been presented to the managers by a large body of students at the University, and which memorial was of considerable importance to the subject under discussion, alluded to the conduct and character of an individual student. *Held* that she was not *privileged* in doing so; but that her privilege only extended to remarks upon the students generally, and their conduct or character as a body.

No counter issue of *veritas* having been taken,—*held* that the defender was not entitled to lead evidence which tended to prove, or was introductory to proving, the *veritas*, with a view of mitigating damages.

Though the jury assessed the damage at one farthing only, pursuer held entitled to his expenses, on the certificate required by 31 and 32 Vict. c. 100, § 40.

The pursuer in this action of damages for slander was Mr Edward Cunningham Craig, student of medicine in the University of Edinburgh, and class-assistant to Dr Christison, Professor of Materia Medica there. The defender, Miss Sophia Jex-Blake, was also a student of the University of Edinburgh, matriculated under a resolution of the University Court admitting women to the privileges of students of medicine. During the session of 1870–71, she was a student under Dr Handyside, Lecturer on Anatomy in the Royal College of Surgeons. She was also a member of