

the pursuers, but no such demand was made, and now only the claims against the new bank can be transferred. I therefore hold, under every view of the case, that the defenders are bound under their policy to pay in terms of the indemnity contained therein. I am fortified in this opinion by the decision in the case of *Dane*. The only distinction suggested is that there the claim against the company was made before the completion of the compromise, but the reasoning of Lord Esher was independent of this circumstance, which did not affect the substance of the decision. I adopt the reasoning in that case, and the principles which guided the Court that in such obligations where a variation is made in the terms of the principal obligation by the effect of legislation the accessory obligation of indemnity is not discharged. In the case of *Rouquette* the question turned upon the obligation contained in a bill of exchange. There an Act of the French Government during a period of disturbance had extended the time of currency of bills of exchange. The acceptor, who lived in France, had received an extension of time for payment by virtue of this general law, and it was held that the extension of time did not deprive the holder of his remedy against the drawer, because the obligation was that all the parties were liable in a certain order, and because the principle by which a co-obligant is liberated by an extension of time being granted does not apply, where this is caused not by the act of the creditor but by legislation supervening. Therefore both with reference to the circumstances of the case and on the authorities, I am of opinion that the Lord Ordinary is right.

LORD ADAM—I am of the same opinion, and see no ground for doubting that the Lord Ordinary is right. There seems no doubt that the debtors "made default." These words mean nothing more nor less than that they failed to pay, and therefore according to the terms of their policy the Insurance Company were bound to pay the trustees. But, it is said, the reason for the debtors failing to pay was that they went into liquidation and that the terms of the original obligation were altered by the formation of a new bank. I agree with the Lord Ordinary and Lord M'Laren that the assured have nothing to do with that. The case would be different if they had been unable to fulfil any of the conditions in the policy, but the only failure on their part to do so averred is that the Insurance Company are entitled to a transference of their rights against the debtors. Now, so far as I have seen, the trustees are ready and willing to make over all their rights as they now stand, and that is all they can be called upon to do. That these rights are altered from their original ones is no fault of theirs.

The LORD PRESIDENT concurred.

LORD KINNEAR was absent.

The Court adhered.

Counsel for the Pursuer—H. Johnston—C.

N. Johnston. Agents—Wallace & Pennell, W.S.

Counsel for the Defenders—Lorimer—C. S. Dickson. Agents—Hamilton, Kinnear, & Beatson, W.S.

Tuesday, February 12.

## FIRST DIVISION.

### WOTHERSPOON AND OTHERS.

*Process—Proving the Tenor—Will Destroyed by Testator while Insane.*

In an action brought to prove the tenor of a will, the Court being satisfied on the evidence that the deceased had executed the will, of which a draft was produced, when of sound mind, that he had subsequently destroyed it while insane, and that he had never afterwards recovered his sanity, granted decree of proving the tenor.

This was an action brought by Miss Wotherspoon and others to prove the tenor of the will of the deceased Dr Archibald Logan, under which they were the principal beneficiaries.

The pursuers were maternal aunts or cousins of the deceased. Certain cousins were called as defenders. There were no nearer relatives in existence, and the only other parties called as defenders were the Hon. F. J. Moncreiff, who had been appointed judicial factor on the deceased's estate, and the Lord Advocate as *ultimus heres*.

Defences were lodged by the judicial factor, but he did not further oppose decree being granted.

The pursuers averred, *inter alia*—" (Cond. 5) Towards the end of February 1894 the said Dr Archibald Logan took ill and was laid up with a severe bilious attack. He had been drinking heavily shortly before that. By the middle of March he had recovered from the bilious attack, although he had not yet left his bed and was still physically weak, when he expressed his intention of making a will. On 20th March 1894, in pursuance of his previously expressed intention, the said Dr Archibald Logan executed a settlement or testament in the terms set forth in the summons. He himself dictated the terms of the said settlement to his cousin, the pursuer John Nimmo, who is an accountant in the Commercial Bank of Scotland at Wishaw, and is also a notary-public. The said John Nimmo wrote a pencil draft of the said settlement to the dictation of the said Dr Archibald Logan and engrossed the same in ink, and the principal deed was then executed by the said Dr Archibald Logan. He thereafter acknowledged his signature to the said settlement to two neighbours, Mr Archibald Cameron, spirit merchant, and Mr John M'Hardy junior, provision merchant, both in Dumbarton Road, Glasgow, who were immediately called into the

deceased's house for the purpose of attesting the execution of the settlement, and who did duly attest the same. The draft settlement which is produced is a copy of the said pencil draft which was written by the said John Nimmo to the said Dr Archibald Logan's dictation, and it sets forth the precise terms of the said settlement as executed by the deceased. At the time when the said Dr Archibald Logan executed the said settlement he was in full possession of his faculties, was perfectly sane and sensible, and was of sound disposing mind. . . . (Cond. 6) In the latter half of April the deceased, although still physically weak, was able to leave the house. He then, however, once more took to drinking heavily, and for several days was almost continually in a state of intoxication. The result was that he got into a worse condition than ever, and he then showed signs of mental weakness. Contrary to all entreaties and efforts and to the advice of his medical attendant, he persisted in indulging in drink, with the result that by the end of April or beginning of May he had become insane. He was frequently delirious and violent, and his conduct became so outrageous that Dr Wright was under the necessity of advising that he should be removed to Gartnavel Asylum. His aunt, however, the pursuer Miss Jane Wotherspoon, was most anxious that her nephew should not be sent to an asylum, and at great danger to herself she remained with him in his house till his death. From the end of April down to the date of his death the deceased suffered from insane delusions of the most painful kind. In particular, he had insane delusions to the effect that his said aunt, who was most devoted to him, and for whom, prior to his insanity, he had the greatest affection, had stolen or made away with his papers and securities and money. There was absolutely no foundation for these delusions, but nothing could be done to convince the deceased that his suspicions were unfounded. Later he also laboured under similar delusions with regard to his cousin the pursuer John Nimmo. . . . Whilst the deceased was under the influence of one of these insane delusions, and in consequence thereof, in or about the first week of May 1894, he burned the said settlement dated 20th March 1894. At the time he destroyed the said deed he was in a state of insanity, and he did not destroy it with the object of revoking its terms, but only as the result of an insane impulse and an insane delusion. The said Archibald Logan thereafter continued to be of unsound mind and to suffer from the said insane delusions from the time he burned the said settlement until the date of his death, which occurred as before mentioned on 28th June 1894."

The result of the proof appears sufficiently from the opinions of the Judges, and, shortly stated, the evidence established the pursuers' averments.

At advising—

**LORD M'LAREN**—This case raises a rather

more delicate question than we have usually to deal with in actions of this description. It is necessary of course that everything in an action of proving the tenor should be proved, and we have had a very full and careful statement of the evidence from Mr Wilson. The case made by the pursuer, who is one of the residuary legatees, is that a will was executed by Dr Logan some three months before his death, when he was not in bodily health but of sound mind, that it was destroyed by him some time in the month of May, the month immediately preceding his death, under an insane delusion or impulse, and that its contents are to be ascertained from the document that has been produced. Now, there are three points to be considered in relation to the evidence—first, the facts relating to the making of the will; secondly, those relating to the revocation of the will, and then an inquiry as to the testator's mental condition, which of course alone is given as the basis of this action of proving the tenor. It seems to me to be very satisfactorily shown that on 20th March Dr Logan executed a will of some kind, which was written to his dictation by Mr Nimmo. In addition to the statement of Mr Nimmo himself, which of course requires to be carefully scrutinised, we have the evidence of the two instrumentary witnesses, M'Hardy and Cameron, who do not seem to be in any way connected with the parties in this case, and who said they were called in as witnesses to the execution of the will. They were both men who knew him a little and conversed with him at the time, and were perfectly satisfied that it was the will they tested, and that the testator was just in the usual condition in which they had known him for a long time previous. He was confined to bed by illness; that was the only thing about his condition calling for remark. Then his aunt Miss Wotherspoon, who lived in the house with him, was also aware of the circumstances, though she was not actually present and did not see the document signed. And the instrumentary witnesses say that the will was written on a single sheet of long paper—I suppose foolscap—and that exactly corresponds with the description which Mr Nimmo has given of it, and with the appearance of the paper which we have seen, and which is a single page of paper. Then the next point is the tenor of the will, and the evidence on that point stands thus: Mr Nimmo, the writer of the will, who was an intimate friend and relative of the deceased, was asked by him to make a will. He was not a writer by profession, but had some sort of a legal education, and was a bank accountant. He lived in Wishaw, and the testator lived in Glasgow, and on the morning of the day when the will was written Nimmo called on a friend, a writer in Wishaw, and asked his advice as to what he should do in the circumstances. Mr Smith rather advised that he should be allowed to prepare the will, as he thought it undesirable that a man who was a relative, and might be a legatee, should be

draughtsman, but apparently Mr Nimmo seems to have stood in some awe of his relative, and did not choose to take upon him to bring in another as writer, and so he went to Glasgow, and his story is that, understanding that in the first place he was only to take instructions, he wrote down the substance of what we now have to the testator's dictation in pencil, using contractions which he was accustomed to use when writing drafts in his business. After this was done the testator was perfectly satisfied with what he had taken to his dictation, and did not desire that anything more extended should be made out, and accordingly the engrossment was then written out on a fair sheet of paper exactly in the terms taken down in pencil, and it was then executed and signed, as I have already said. Then Mr Nimmo proceeds to say that, being probably aware of the custom of writers to keep drafts of the documents they prepare, he wrote out a fair draft of what he had taken in pencil notes, and then destroyed or did not preserve the pencil notes. If that be true, there is certainly nothing suspicious in destroying the pencil notes, because a fair copy free from contractions was more legible and useful than the draft. Now, the fair copy is in evidence, but the fact that it is a draft or copy of the will does not depend entirely on Nimmo's evidence, because there are three witnesses, one of whom, John Wishart, says that he saw it during the testator's lifetime, and certainly before the time when the will was destroyed. The other did not see the document we have, but saw the pencil draft—that is, Mr Thomas Smith, a writer, and he speaks in general terms to its identity with the document which we have. I think the evidence of Mr Smith on this matter, though not technically proving the truth of the adminicle, is of very considerable importance, first, because Mr Smith was a writer by profession, and therefore likely to speak accurately, and with full recollection of any matter of professional form; secondly, because he had been consulted by Mr Nimmo in anticipation as to what should be done, and had given him certain advice, and then, of course, he is a person in no way connected by relationship with the pursuer, and says, under the sanction and habits of professional responsibility, that in the pencil writing shown to him Mr Nimmo was residuary legatee, and that he remarked on that circumstance at the time. If Wishart's evidence is to be believed—and there is really no reason for suggesting any doubt as to his testimony—he states that the document was shown to him in the testator's lifetime as the draft of his will. It may seem rather curious that Nimmo should have gone about showing his draft to friends, but one must remember that he was not a lawyer, and perhaps was not accustomed to attach so much importance to strict secrecy as lawyers do in professional matters.

Then as to the state of Dr Logan's mind at the time when he made the will, I think no serious question can be raised. He had been

ill for some weeks before, and attended by his usual medical attendant, because he had himself retired from practice a year before, and Dr Wright says that up to that time the habit of drinking to excess in which Dr Logan indulged had not affected his mind; that he had not the opportunity of taking much drink during the time he lay in this illness, and that his mind was then unclouded; and various friends who came to see him during his illness give evidence to the same effect.

Now, the next point is the proof of the fact of the revocation of the will which is the *casus amissionis*, and therefore a necessary part of the case, and the best evidence on that subject is the passage which was read by Mr Wilson at the end of his speech from the evidence of Miss Wotherspoon, the testator's aunt and housekeeper. She begins by giving a very alarming picture of the state of agitation induced by sleeplessness and drink into which the doctor had been thrown on a certain day of May—she cannot give the exact date—when he was in such a state of mind that she had not been able to leave him for the whole day till the afternoon. But her sister came in to see her in the afternoon, and after a time she found him putting a paper on the fire, and he said it was “that damned will.” She was naturally concerned, and asked him why he had burned the will, and he said he had put the will in the fire to disappoint John Nimmo. It seems he had told his medical attendant and told others that he had destroyed his will, and there seems to be no doubt of the fact that the will was destroyed, for a most careful search was made for it after the testator's death, and it was not found. When we come to the question of the testator's mental condition, which is also connected with reasons for the destruction of the will, it appears that some weeks before the testator's death, certainly during May—he died on 28th June—the testator was in a state, when he was able to go about, of great mental aberration through drink, and I think the evidence goes further and shows that there was something more than a mere temporary aberration resulting from indulgence in drink, and that his brain was permanently affected, and that in particular he was suffering from delusions. The circumstantial account given by his relatives, especially his aunt Miss Wotherspoon and his cousin, in regard to the last part of his life, shows that he began to cherish suspicions in regard to Miss Wotherspoon, and accused her of taking his money. It seems that the testator was a shrewd business man, and from his interest in his investments it was not unnatural that his notions should turn on money. That explanation is suggested on the evidence. But he seems to have become suspicious of Miss Wotherspoon, and accused John Nimmo of taking his money, and stealing his securities from his desk. Circumstantial accounts are given of his statements to this effect. They seem to have varied from day to day, but one noticeable circumstance is, that instead of

taking any action upon his statements as any rational man would have done if he believed them to be true, he was content with incessantly repeating the charges many times in the course of the same day. Then he was very violent and suffered from insomnia. There seems to have been a physical weakness, with effects bearing on his mental state. His medical attendant, Dr Wright, had no doubt that the habit of indulging in spirits had affected Dr Logan's brain, and had induced a permanent, though possibly curable, form of mental infirmity, and Dr Clouston, who is a high authority in mental diseases, and Dr Littlejohn—who heard all the evidence—gave evidence clearly to the same effect. But professional evidence is always of greater value, I think, if the opinions given are not opinions formed for the first time when the case is considered, but were acted on with reference to the person whose mental condition is in question, and therefore I think it is a fact of very great importance in this case that Dr Wright, a week or two before the testator's death, and when his death was not anticipated, was so concerned about his mental condition that he considered he should be taken to an asylum and proposed to his relatives that they should call in Dr Yellowlees of the asylum at Glasgow to get a consultation with the view to Dr Logan being removed there; and that would have been done but for the natural hesitation of Miss Wotherspoon, who wished personally to take care of her nephew. Now, I do not think there can be any doubt that the fact that that proposition was made shows that, at all events in regard to Dr Wright, this was not a notion formed in regard to Dr Logan after his death, but was the deliberate opinion which he had formed as to the testator's mental condition and on which he was prepared to act.

Now, if we come to the conclusion that Dr Logan was insane at the time that he put this will in the fire, that he was treated as such, and especially that he entertained delusions regarding his residuary legatee before he actually destroyed the will, I apprehend there can be no doubt that that is not a good revocation or cancellation of the will, because in order that a document may be cancelled or destroyed it must be done *animo revocandi*, and by a man of sound disposing mind. The result of my opinion is that the testator was not of sound disposing mind when he threw the will on the fire, and that the will though thus physically destroyed still remains an effective testamentary deed and is capable of being set up by an action in this form, and that we ought to give decree of proving the tenor.

LORD ADAM—It certainly is not satisfactory to dispose of a case on hearing one side only, but that is our duty in this particular class of case. We have had a very full statement of the evidence in this case from Mr Wilson, and Lord M'Laren, who heard the proof in the case, is satisfied that decree ought to be given, and that agrees with

my own opinion. At the same time I may remark that the Crown have appeared in this case and were present when the proof was led. If the Crown—to whom, I understand, if this deed was not set up, the money would go—were not satisfied that it was a clear case in which they need not further appear by counsel, I have no doubt they would have done so. In the whole circumstances I concur.

LORD KINNEAR—I am of the same opinion. I think it is quite clearly proved that the will was executed, and that it was destroyed by the testator himself while he was under the influence of an insane delusion. Such destruction will not amount to revocation of the will, and therefore, if its terms can be ascertained, we must still regard it as quite valid, being the last testamentary expression of the testator while he still remained in a sound state of mind. The only remaining question is whether the terms of the will so executed have been proved to our satisfaction, and the difficulty on that point arises from the circumstance that the principal witness upon whose testimony the whole question really comes to depend was the writer of the will and a legatee taking benefit under it. It thus becomes a case of credibility. If he was an honest witness, then I do not think there can be any doubt that all the facts necessary for our judgment are proved. Now, Lord M'Laren, who heard the witnesses, is satisfied that this witness and those who corroborated him were telling the truth, and counsel for the Crown, who have the only adverse interest, are not dissatisfied, and therefore it appears to me with Lord M'Laren that we need have no hesitation in holding the tenor proved.

The LORD PRESIDENT concurred.

The Court pronounced the following interlocutor:—

“Sustain the sufficiency of the adminicles and proof adduced and the *casus amissionis* of the settlement or testament libelled of the deceased Archibald Logan, doctor of medicine, formerly residing at 3 Corunna Street, Glasgow, dated 20th March 1894, set forth in the summons and the tenor thereof as libelled proven, and decern and declare accordingly in terms of the conclusions of the summons.”

Counsel for the Pursuers—Wilson, Agents—Patrick & James, S.S.C.

Counsel for the Defender, the Judicial Factor—W. Campbell, Agents—Murray, Beith, & Murray, W.S.