

was given? My answer is that there was not. The money was paid into Paul's account at the Stock Exchange, and no consideration was given for it at all. The argument submitted to us on behalf of Paul sought to bring up something like a valuable consideration. The Lord Ordinary states the defenders' first contention thus:—"The defenders admit that Paul was liable for the balance arising on all the transactions; but they say that in a question between him and Martin, the latter was the true debtor on the balance arising on the irregular transactions, that he discharged that debt, and that they have no concern with the source from which the money came, or the means by which it was obtained. They urge that they are in the same position as if Martin, had borrowed the money and had applied it in payment of his own debt." That argument is unsound, for Martin was not the debtor in the sums we find brought out against him in the Stock Exchange statement for the week; that clearly shows Paul's obligation. It may be that if parties had known what was going on Martin might have had to relieve Paul, but he was in no sense the debtor to the Stock Exchange. Another ground on which it is said that a valuable consideration was given is this:—"That now it appears that at that date Martin, having embezzled £9000, did by this payment discharge in part what was a debt due by him. But that was not the real nature of the transaction. Paul did not know he was creditor at all, and it is impossible by subsequent investigation to rear up a debt of this sort. On the whole matter I am of opinion that no valuable consideration was given, and that therefore we should adhere to the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for Pursuer—J. Guthrie Smith—Readerman. Agents—Ronald, Ritchie, & Ellis, W.S.

Counsel for Defenders—Burnet—Alison. Agents—J. W. & J. Mackenzie, W.S.

Saturday, March 10.

### FIRST DIVISION.

PETITION—WATT, PHILIP, & COMPANY.

Bankruptcy—Sequestration—Error in Notice—19 and 20 Vict. cap. 79.

The Sheriff awarding sequestration under the Bankruptcy Act, appointed a meeting of creditors to be held on a certain specified day for the purpose of electing a trustee and commissioners. The day fixed by the Sheriff, however, did not leave sufficient time to insert the statutory notice of meeting in the *Gazette*, and thereafter to allow the statutory interval to elapse before holding the meeting. On an application by the bankrupts and certain of their creditors, praying the Court to fix another day, the Court granted the prayer of the petition *periculo petentis*.

Counsel for Petitioners—Alison. Agents—Webster, Will, & Ritchie, S.S.C.

Saturday, March 10.

### SECOND DIVISION.

[Lord Rutherford Clark,  
Ordinary.

MACKENZIE v. KIRKPATRICK AND OTHERS.

GORDON AND OTHERS (SHARPE'S TRUSTEES)

v. MACKENZIE AND OTHERS.

Succession—Trust—Destination—Revocation—Deed of Restriction—Construction.

A proprietor who held an estate under an entail which had been declared ineffectual against alienations, disposed his estates to trustees in favour of his brother A. in liferent allanarly and the heirs whomsoever of his body in fee, whom failing to his brother W. in liferent and the heirs whomsoever of his body in fee, whom failing to the heirs whomsoever of the body of a deceased sister, whom failing to his sister G. and the heirs whomsoever of her body, whom failing to "my nearest heirs and assignees whomsoever, the eldest heir-female secluding heirs-portioners and succeeding always without division throughout the whole course of succession." The trustor subsequently executed a deed of restriction whereby he revoked, cancelled, and annulled "the said destination and order of succession in so far as regards the persons called and appointed to succeed after my brothers therein named, and the heirs of their bodies, declaring it to be my will and intention that the destination and order of succession in the said trust-disposition and settlement shall not take effect beyond my said brothers and the heirs of their bodies, and that the person or persons further called to the succession shall have no right or claim to the same, but shall be entirely excluded therefrom, and are hereby excluded accordingly; reserving to myself full power to call and appoint (or name) a new series of heirs to my said estates after my said brothers and the heirs of their bodies, by any writing under my hand, which shall have the same force and effect as if contained in the said trust-disposition and settlement: And I hereby declare that the foresaid trust-disposition and settlement, in so far as not hereby restricted, shall remain in full force and effect."—*Held*, upon the terms of the deed of restriction, and also in view of the circumstances under which it was executed, that the ultimate destination to "heirs and assignees whomsoever" was not recalled.

Succession—Property—Trust—Fee and Liferent.

M. conveyed his landed estates to trustees in favour of his brother A. in liferent allanarly and the heirs whomsoever of his body in fee. A. having died without issue—*held* (1) that M.'s trust-deed having contained no effectual disposition of the fee, the estates passed to his heir as at the date of his death; (2) that the conveyance in M.'s trust-deed to A. in liferent allanarly did not prevent A. from taking the estates as heir of M.; and (3) that the estates were effectually conveyed by A.'s *mortis causa* trust-deed.

These were four actions brought to determine certain questions in reference to the succession to the estates of Hoddom in Dumfriesshire, in the following circumstances:—

Matthew Sharpe of Hoddom in 1768 executed a disposition and deed of entail of the estate of Hoddom, in which he called to the succession, failing heirs of his own body, Mr Charles Kirkpatrick and his heirs-male. Matthew Sharpe died without heirs of his body, and was succeeded by Mr Kirkpatrick, who took the name of Sharpe and became Charles Sharpe of Hoddom. The said Mr Charles Sharpe had four sons, viz., Matthew (afterwards General Sharpe) Charles Kirkpatrick, Alexander Renton, and William, and five daughters. None of the sons ever married. Two of the daughters married, viz., Jane, who married Sir Thomas Kirkpatrick, Bart. of Closeburn, and Grace Campbell, who married the Reverend William Riland Bedford, rector of Sutton-Coldfield, in the county of Warwick.

Mr Charles Sharpe of Hoddom died in 1813, and his eldest son General Sharpe succeeded him. General Sharpe in 1832 brought an action in the Court of Session for the purpose of having it declared that the irritant clauses in the entail of the estates were defective, and insufficient to prevent the heir in possession from selling or otherwise disposing of the estate. In this action the Court of Session pronounced decree of declarator on 12th June 1835, which decree proceeded upon a judgment of the House of Lords, finding "that the disposition and deed of entail is not sufficient to prevent the said appellants and the other heirs of entail from selling or otherwise disposing or burdening with debt the said entailed estate, or from gratuitously alienating or disposing of the same;" and ordered and adjudged "that the several interlocutors complained of in the said appeal be, and the same are hereby, reversed;" and further ordered "that the said cause be remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment."

The Court of Session decree following thereon found "that the pursuer has full and undoubted right and power gratuitously to alienate and dispose of the foresaid lands and others contained in the said two dispositions and deeds of entail in any manner he may think proper, and to grant and execute all dispositions, conveyances, deeds, and writings whatsoever which may be requisite or necessary for effectually conveying the whole or any part or parts of the said lands and others to any person or persons whatsoever, and in any manner that he may think proper; and that the defenders or any of them have no claim or demand of any description against the pursuer, or against his heirs and representatives in the event of his death, for or in respect of such alienations or disposal of the said lands and others, or dispositions or other writings which may be granted or executed by the pursuer."

General Sharpe executed a trust-disposition and settlement, dated 25th December 1841, whereby he conveyed his whole estate to trustees, of whom at the date of this action John Ord Mackenzie of Dolphinton, W.S., was the sole survivor. General Sharpe directed his trustees to convey his estates according to the following destination contained in the eighth purpose of the trust:—"To and in favour of the said Alex-

ander Renton Sharpe in liferent for his liferent use alienarily, and the heirs whomsoever of his body in fee, whom failing to the said William John Sharpe in liferent for his liferent use alienarily, and the heirs whomsoever of his body in fee, whom failing to the heirs whomsoever of the body of my deceased sister Dame Jane Sharpe or Kirkpatrick, wife of the said Sir Thomas Kirkpatrick, whom failing to my sister Mrs Grace Campbell Sharpe or Bedford, wife of the Reverend William Riland Bedford, rector of Sutton-Coldfield, in the county of Warwick, and the heirs whomsoever of her body, whom failing to my nearest heirs and assignees whomsoever, heritably and irredeemably, the eldest heir-female secluding heirs-portioners and succeeding always without division throughout the whole course of succession."

On 6th September 1843 General Sharpe executed a deed of restriction whereby he revoked, cancelled, and annulled the "said destination and order of succession in so far as regards the persons called and appointed to succeed after my brothers therein named and the heirs of their bodies, declaring it to be my will and intention that the destination and order of succession in the said trust-disposition and settlement shall not take effect beyond my said brothers and the heirs of their bodies, and that the person or persons further called to the succession shall have no right or claim to the same, but shall be entirely excluded therefrom, and are hereby excluded accordingly; reserving to myself full power to call and appoint (or name) a new series of heirs to my said estates after my said brothers and the heirs of their bodies, by any writing under my hand, which shall have the same force and effect as if contained in the said trust-disposition and settlement: And I hereby declare that the foresaid trust-disposition and settlement, in so far as not hereby restricted, shall remain in full force and effect." General Sharpe died on 12th February 1845, survived by his three brothers; and on his death his trustees entered into possession of the estates. Charles Kirkpatrick Sharpe, the eldest of the three brothers, died on 17th March 1851, without leaving issue. Alexander Renton Sharpe, the next younger brother, died on 1st May 1860, without leaving issue, and without having obtained any conveyance of the estates in his favour from General Sharpe's trustees.

Upon the death of Alexander Renton, William Sharpe completed titles to the estates in the following manner:—A portion of the estate was held of the Crown, and the remaining portions of subject-superiors, and to the latter the trustees of the deceased Matthew Sharpe had made up titles by a conveyance from Charles Kirkpatrick Sharpe, who at their request obtained himself served heir in special, and in virtue thereof, and under precepts of *clare constat*, took infeftment in the said portions. In regard to these portions of the lands, William John Sharpe completed a title by special service to Charles Kirkpatrick Sharpe, as his heir of tailzie and provision, dated the 6th, and recorded in Chancery the 8th, and in the General Register of Sasines the 26th February 1861, and he also expedie a general service as heir of line to the said Charles Kirkpatrick Sharpe, dated the 5th February 1861. He further expedie a special service as nearest and lawful heir of tailzie