to seeing a rabbit go into it, and it is well known that rabbits will not frequent a wet place. The question therefore comes to be, was it not the defender's duty to examine his field from time to time and see that it was safe before taking in animals to graze. I am clearly of opinion that it was his duty to do so, and that his failure in this respect has resulted in this unfortunate occurrence. I am therefore for affirming the Sheriff's judgment.

Lord Mure—I quite agree with the Sheriff-Substitute that this case is a very narrow one, for it appears that the pursuer and defender both had previous knowledge of the field in which the occurrence took place. The pursuer knew that it was situated over mineral workings, and he seems the year before to have grazed his horse upon the defender's fields without injury.

In these circumstances it does seem rather hard that the defender should be called upon to pay for this unfortunate accident, which took place in a field which was almost selected by the defender himself. But the law as laid down by Mr Bell in his Commentaries is quite clear, and must rule all such cases. Having regard to the facts as they appear from the proof that was taken before the Sheriff-Substitute, and especially to the circumstance that the ground in question was situated above an old and worked-out mineral field, it was clearly the duty of anyone letting out such land for the purposes of grazing carefully to notice beforehand that no cavities were caused by the subsidence of the ground. This matter does not appear to have been sufficiently attended to, and hence no doubt the occurrence in question took place. In these circumstances I concur with your Lordship.

Lord Shand—I am also of opinion that the defender has failed to show any satisfactory reason why we should alter the decision arrived at both by the Sheriff-Substitute and the Sheriff. The question is one of fact whether the defender has exercised that reasonable care with reference to this horse which a prudent man would take of his own property.

The case is a very narrow one, and it appears to me that the parties might have come to an amicable settlement of it by each agreeing to pay a half of the loss, but that course does not appear to have commended itself to either party. As we have now therefore to decide the legal rights of parties, I confess I do not think the defender realised the responsibility which he was undertaking when he consented to receive this horse for grazing, nor can I see that he realises it even now. He never seems to have taken any care of the animal, as it appears to have been permitted to wander at large over the whole farm. The defender further maintains that he was ignorant of the existence of this hole; possibly he may not have been familiar with this portion of his farm; but if he did not know about it, others did, and he cannot now avoid the consequences of his ignorance. The hole should undoubtedly have been fenced as a dangerous spot, situated as it was in a field with mineral workings underneath, and subsidence of the ground all round.

The *onus* is in the first place upon the defender to account for the death of the horse, and I do not think that he has satisfactorily discharged that *onus*.

It may no doubt be said that the defender treated his own horses in a similar manner, but in so doing he was clearly incurring a great risk, and one to which he was not entitled to expose his neighbour's horses when he was to receive hire for their grazing.

Lord Deas was absent on Circuit.

The Court affirmed the judgment of the Sheriff.

Counsel for Pursuer — Darling — Kennedy. Agent—D. Lister Shand, W.S.

Counsel for Defender — Trayner — Strachan. Agents—Morton, Neilson, & Smart, W.S.

Thursday, June 28.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

NICOLSON (M'LEOD'S TRUSTEE) *v.* M'LEOD AND OTHERS.

Succession—Testamentary Writing—Words importing a Bequest of Heritage—Titles to Lands Consolidation Act 1868 (31 *and* 32 *Vict. c.* 101), *sec.* 20.

A testatrix by her settlement appointed A "to be my sole executor and trustee." After specifying certain legacies she directed "my trustee to sell the remainder of my property wherever situated." The moveable estate proved insufficient to meet the legacies, and A proceeded to sell the heritable estate to enable him to make payment of them. In an action of declarator and implement brought by him against certain purchasers of it who refused to implement the contracts of sale on the ground that he had no title under the settlement to the heritage—*held*, having regard to the nature of the property of the testatrix, and to the fact that the words "property wherever situated" imported that the testatrix intended to refer to heritage, that the heritage was validly conveyed by the settlement.

This case arose upon the construction of certain words in the settlement of the late Miss Anna M'Leod, residing at 50 Grange Loan, Edinburgh, who died upon the 1st April 1882. By her settlement she appointed David Nicolson to be her "sole executor and trustee." The purposes of the settlement were for payment, first, of the expense of putting up a handsome railing round the grave of Miss M'Leod's father; second, a payment of two annuities—one of £10 and one of £20; and thirdly, she gave a legacy of £20 and divided certain corporeal moveables among her relatives. The last provision of the deed was in these words—"I also direct my trustee to sell the remainder of my property wherever situated, and to divide it equally among all my grandnieces."

Mr Nicolson as trustee made up a title by notarial instrument.

The question between the parties was, Whether by this deed there was a valid conveyance of heritable property to Mr Nicolson, the "sole executor and trustee?"

The moveable property left by Miss M'Leod amounted, including cash in the house and an account-current with a bank, value of furniture, and proportion of rents of heritage accrued at her death, to £323, whereas her heritage was valued at £5280. In the realisation of the estate it appeared that the moveable property was inadequate to pay the debts, annuities, and the expenses of the executry, and accordingly Mr Nicolson, the executor and trustee, proceeded to dispose of the heritable property. He received an offer from George M'Luckie of £1100 for house No. 50 Grange Loan; of £1100 from Andrew Blues for the house No. 29 Minto Street; and of £2500 from William Gilmour for certain properties in Milne Square and in the North Bridge. He accepted these offers, and his agents in due course sent the title-deeds to the respective agents of the purchasers, but they took exception to the trustee's title, and maintained that Miss M'Leod's settlement did not validly convey the heritable property which belonged to her, and upon that ground they refused to implement the contracts of sale.

Nicolson thereupon raised the present action of declarator and implement against M'Luckie, Blues, and Gilmour, concluding for declarator that the settlement of Miss M'Leod was a valid and effectual conveyance not only of the moveable estate which belonged to her but of her whole heritable properties wherever situated which belonged to her at her death, and that the same were vested in the pursuer, and that he was entitled to sell them. There were also conclusions to have the defenders ordained to implement their respective contracts. William M'Leod, the heir-at-law of the testatrix was called for his interest. He lodged no defences, and decree in absence passed against him.

The other defenders pleaded--"(1) The testamentary documents founded on being invalid and insufficient in law, *et separatim*, the same not being a conveyance of the deceased's heritable estate to the pursuer, he has no title to sue. (2) The pursuer not having a valid title to the heritable properties in question, or to any of them, is not in a position to implement the various contracts founded on, and the defenders are therefore entitled to absolvitor, with expenses."

The Titles to Lands Consolidation (Scotland) Act 1868 (31 and 32 Vict., c. 10), by sec. 20 enacts (after providing that from and after its date an owner of lands may competently convey them by testamentary writings, and that no settlement shall be invalid by reason of the absence of the word "dispone" or other word of *de præsenti* conveyance) "and where such deed or writing . . . shall contain with reference to such lands any word or words which would, if used in a will or testament relating to moveables, be sufficient to confer upon the executor of the granter or upon the grantee or legatee of such moveables a right to claim and receive the same, such deed or writing, if duly executed in the manner required or permitted in the case of any testamentary writing by the law of Scotland, shall be deemed and taken to be equivalent to a general disposition of such lands within the meaning of sec. 19 hereof by the granter of such deed or writing in favour of the grantee thereof."

The Lord Ordinary pronounced the following interlocutor:—"Finds and declares and decerns against the defenders who have lodged defences, conform to the declaratory conclusion of the libel; and decerns and ordains against them conform to the remaining conclusions thereof."

"*Opinion.*—There is no question in this case as to the sufficiency of the testamentary writing as a will, nor as to its sufficiency to dispose completely of the estate, whatever that may be, which the testator intended to dispose of. The question is, whether, in the testator's intention deduced from the instrument, the will extends to estate heritable and moveable, or is confined in its operation to moveable estate? The decided cases upon the effect of the Statutes of 1868 and 1874 agree in recognising the principle that this is *quæstio voluntatis*. In applying these cases it must, however, be considered that the degrees of ambiguity in testamentary language are infinite—ranging by imperceptible differences from cases in which the intention to convey heritage is clear to cases where the intention is clear to convey nothing but moveable estate. At whatever point the line may be drawn, it is clear that there will be cases on opposite sides of the line which are separated only by very small elements of difference. I think therefore that the decisions are to be followed by applying these principles rather than by attempting to collate the expressions used in other wills with those which are used in the particular will under consideration. The form of this will is that of an appointment of an executor and trustee, with instructions to divide. If it had been an appointment of an executor only, it would be difficult to hold that such an appointment would carry heritable estate. The use of the word 'trustee' in subsequent parts of the will would not be conclusive, because it would without impropriety be interpreted in a sense synonymous with 'executor.' But here the testator begins by appointing the pursuer her executor and trustee—words which may (although they do not necessarily) import a power to administer heritable and moveable estate. They are words which, when used with reference to moveables, would give the trustee a right to administer or to apply to the commissary for an administrative title, and which would give to the legatees a right to claim and receive the share of succession which the trustee is directed to divide amongst them. It would seem therefore, according to the provision of the statute, that these words are capable of having a testamentary operation upon heritages provided it appears from other parts of the will that the testator was dealing with heritage.

"The next point for consideration is that the testator Miss Anna M'Leod had no moveable investments. The inventory of her estate consists of furniture, cash in house, and a small sum at the credit of her current account, together with the unrealised proportion of rents current, which, though moveable in law, are nevertheless an accessory of the heritable estate from which they are derived. The will was made shortly before her death, and there is nothing to suggest that the lady was contemplating future acquisition of property; she certainly was disposing of her property already acquired, which, as I have said, was heritable.

"In this state of things the testator proceeds to leave various small legacies, which more than exhaust the sum in the inventory, and then

directs her trustee 'to sell the remainder of my property wherever situated, and to divide it equally' amongst her grandnieces. Now, considering that the word 'trustee' is capable of importing a universal title of administration, and that the word 'property' is a universal appellative, adequate to pass heritable as well as moveable property, and that there are no limiting words in any part of the will which would impose a meaning on these words less extensive than the widest meaning which they will bear, I come to the conclusion that this is in legal effect as well as in intention a will disposing of the testator's whole estate. The direction to sell is a direction natural and appropriate where the subject of disposition is house property, and the division is to be among a class of persons. The words 'wherever situated' are more appropriate to heritable property than to personality, which has only one *situs;* and it is to be considered that this is the will of a heritable proprietor having only the minimum of personal property which every person possessed of means must keep for his or her immediate wants.

"While the case lies very near the critical line, I think there is sufficient evidence of an intention to dispose of heritage, and that the will should be so construed *ut res magis valeat.*"

The defenders reclaimed, and argued—The use of the word "property" did not necessarily involve that heritage would be carried; that depended upon the context. — Titles to Lands Act 1868 (30 and 31 Vict. cap. 101), sec. 20, and following recent cases—*Urquhart* v. *Dewar*, June 13, 1879, 6 R. 1026; *Aim's Trustees*, December 15, 1880, 8 R. 294; *Pitcairn*, February 25, 1870, 8 Macph. 604; *Hardy*, May 13, 1871, 9 Macph. 736; *Edmond*, January 30, 1873, 11 Macph. 348. The words of the deed were clearly insufficient to carry heritage. No doubt the word "trustee" was used, but it was, taken along with the context, synonymous with "executor," a term applicable only to an intromitter with moveables.

Additional authorities—*M'Leod's Trustees*, February 28, 1875, 2 R. 481; *Pringle*, November 14, 1877, 15 Scot. Law Rep. 89.

Argued for the respondent—The testatrix intended to convey heritage. The conveyance was a good conveyance of heritage having regard to sec. 20 of the Titles to Land Act 1868.

At advising—

Lord President—There have been a considerable number of cases upon the interpretation of the 20th section of the Act of 1868, but after the full examination which we have now had I think there are some rules to be deduced from the whole of them which will guide us to the decision of the present question. In the first place, there is no settled rule to the effect that any particular form of words is required to operate a conveyance of heritage. In the second place, it is also established that although there are no direct words of gift, yet if the deed, taken as a whole, clearly imports an intention to make a conveyance of the lands belonging to the testator, that is enough. The Court is not to divide the deed into portions, and taking for instance the dispositive clause, as Mr M'Kechnie put it, to say that because there are no words there operating a conveyance of heritage, therefore no such conveyance can be effectuated by the deed, if he can find a clear intention to the contrary in other portions of it. The intention, if it be only gathered from the whole terms of the document, is sufficient under the statute. Accordingly, it appears to me that the inquiry will always be, as it is here, whether, words sufficient to import a gift being used, they are so used in reference to land or to moveables.

The peculiarities of the present case are, first, that the testatrix begins by nominating Mr David Nicolson her "sole executor and trustee." When these words are used together, it is a fair enough inference that as trustee the person nominated is to have a different duty from what would fall upon him as executor. But that is not conclusive, because the word "trustee" might be used as mere surplusage or as merely demonstrative of the office of executor in regard to the moveable estate. It was so held in one case, where in the words of the appointment the office of "executor" only was named, and where the same person was afterwards called "trustee." That case did not raise the same implication as the present that the two offices mean separate and distinct things.

Looking to the provisions of the deed itself, the testatrix first gives a direction in regard to her father's grave in the Calton burying ground. She then gives an annuity of £10 to one person, and of £20 to another, and makes bequests of several articles of a moveable nature. She then gives another legacy of £20 and her clothes, and then follows this clause—"I also direct my trustee to sell the remainder of my property, wherever situated, and to divide it equally among my grandnieces." Here the direction is given, not to the executor, but to the trustee. If the words "executor and trustee" in the first part of the deed had meant "executor" only, it would have been natural to repeat these words in the later part of the deed, but that is not the form used. The testatrix addresses Mr Nicolson as trustee, distinguishing between what he is to do as trustee and what as executor. He is "to sell the remainder of my property," which is a term capable of embracing property of every description. The words are added "wherever situated," which are much more appropriate to heritable than to moveable property—*Mobilia non habent situm.* Without however going so far as to say that it was in view of the testatrix when she wrote this will that these words were inapplicable to moveable property, we may at least say this, that the fact that the situation is specified plainly points to the result that heritage was in her mind at the time. It is further to be noted that the provision is for equal division among all the grandnieces.

In aid of the construction thus suggested by the words themselves, we may appeal to the nature of the property which belonged to the testatrix. Her personalty or moveable property was a mere trifle. She had no investment of moveables, because a bank balance of £91 can hardly be called an investment. It is only such a sum as a lady like this would have with her bankers. The only other items of a similar kind are cash in the house and the rents of her heritable estate. There is nothing else except corporeal moveables, including furniture valued at £150. The total amount of the free moveable estate is £323, and that will be absorbed and swallowed up by the two annuities. So that the moveable

estate is disposed of altogether before the testatrix comes to give any directions to her trustee. To what then can these directions apply but to the heritable estate? Not only so, but the words used specifically refer to that part of the property which remains—which is the heritable property—and which it is directed shall be sold.

I entirely agree with the view which the Lord Ordinary has taken.

Lord Mure— I am of the same opinion. The clause in the Act of 1868 which rules the present case seems to me to contemplate two broad general questions — 1st, Whether the testamentary writing taken as a whole purports to convey heritage; and (2) whether it contains language with reference to lands which if used in a will or testament with reference to moveables would be sufficient to confer a title upon the executor. This will seems to contain both requisites, for I think it purports to be a settlement of everything which this lady possesses. She addresses it to a person who is to be her "executor and trustee." In the direction given to him in regard to her father's grave she is dealing with a heritable subject, and there is afterwards a distinct appointment to her trustee in reference to the disposal of the remainder of her property. I think the Lord Ordinary's interlocutor should be adhered to.

Lord Shand—I concur. The important, and to my mind the decisive words in this will are "I also direct my trustee to sell the remainder of my property," and "to divide it equally among all my grandnieces." In the case of *Urquhart* the word "estate" was used, where in the present case we have the word "property." I there said "I agree with Lord Mure in holding that where the general term 'estate' occurs in a testamentary writing, in such circumstances as show that it is not used in a limited sense, it ought to be read as meaning heritable as well as moveable estate. The word is broad enough in itself to include heritable as well as moveable property, and must be taken as including both in a settlement where it is not obviously used in a limited sense." Accordingly, taking the word "property" as equivalent to "estate," I am of opinion that unless it can be shown from other provisions of the will that the testatrix meant "property" to be used in a limited sense it must cover heritable estate.

But so far from finding anything in this will to indicate that the word is used in a limited sense, everything appears to me to point to a contrary result. The nomination by the testatrix is not only as executor, but also as trustee; the moveable estate is small, and the legacies more than swallow it up; and in explanation of the conveyance of "the remainder of my property" the words "wherever situated" are added, which seem to me to relate to heritage rather than to moveables. There is indeed nothing in this document which can be said to limit its application or to make it inappropriate to include a conveyance of heritage.

The Court adhered.

Counsel for Pursuer — Mackintosh — Boyd. Agents—Millar, Robson, & Innes, S.S.C.
Counsel for Defenders—M'Kechnie. Agents—Nisbet & Mathison, S.S.C.

Friday, June 29.

FIRST DIVISION.

FORSYTH, PETITIONER.

Bankruptcy—Sequestration, Failure to Publish Intimation of, in Gazette—Re-advertisement.

Where intimation of a sequestration and of an appointed meeting of creditors was omitted to be published in the gazette, the Court, upon the petition of a creditor more than eight months thereafter, *granted* authority to re-advertise the sequestration, and *appointed* it to proceed as if it had been then of new awarded.

On 14th October 1882, Lord Kinnear, Ordinary officiating on the Bills, in a petition at the instance of James Simson & Sons, brewers, St Mary's Brewery, Edinburgh, pronounced an interlocutor sequestrating the estates of James Ritchie & Company, wine and spirit merchants, 48 Nicolson Street, Edinburgh, and of James Ritchie and Thomas Ritchie, both wine and spirit merchants there, the individual partners of that company, as such partners and as individuals, and appointed their creditors to hold a meeting on Tuesday, 24th October 1882, at two o'clock afternoon, within Dowell's Rooms, No. 18 George Street, Edinburgh, to elect a trustee on the estates of the said company and individual partners, or separate trustees or trustees in succession, and commissioners, as directed by the statutes.

In this petition it was stated that intimation of said sequestration and of said meeting of creditors was never published in the *Edinburgh* and *London Gazettes;* and that the said James Simson & Sons having withdrawn from said process of sequestration, and having failed to follow forth the proceedings therein, David Forsyth, solicitor, Supreme Courts, Edinburgh, a creditor, was on June 26, 1883, sisted in their room and place, in terms of the Bankruptcy (Scotland) Act 1856, section 34.

In these circumstances it was necessary to appoint another meeting of creditors to be held for the appointment of a trustee and commissioners, and to have notice of same advertised in the said gazettes.

The Court was accordingly craved to grant authority to advertise and publish the said sequestration in the *Edinburgh* and *London Gazettes*, and of new to appoint the creditors to hold a meeting on Monday the 9th day of July 1883 to elect a trustee on the estates of the firm and individual partners of said firm, or separate trustees or trustees in succession, and commissioners, as directed by the statutes, and to appoint the sequestration to proceed as if it had been now of new awarded.

Authorities—*Fife*, Feb. 17, 1844, 6 D. 686; Bankruptcy Act 1856 (19 and 20 Vict. cap. 79), secs. 125, 128.

The Court granted the prayer of the petition.

Counsel for Petitioner — Rhind. Agent—D. Forsyth, S.S.C.