

to the conclusion that the argument maintained on the part of the teachers is well founded, and mainly on the following grounds:—

1. The Act is a remedial Act. Its object was to restore a right which had been injuriously affected by the operation of, or it may be the construction given to, the declaration in the 55th section of the Act of 1872, that the office was to be held "at the pleasure of the School Board." That being so, the Act must, as I apprehend, receive a broad and liberal interpretation, so as to carry out the object which it is to be presumed the Legislature had in view, and to give a full and complete remedy to the evil or inconvenience which had led to their interference. Now, the construction contended for on the part of the teachers will effect this. It will qualify all schoolmasters who occupy in virtue of their office a house and garden of the requisite yearly value as a property qualification, as the Reform Act did; while, on the other hand, the view contended for on the part of the objector will only qualify such schoolmasters as can be shown to occupy as "tenants" houses of a much higher yearly value than the ordinary property qualification, or, in other words, will still continue the evils the Act was intended to remedy, viz., the disfranchisement of a large proportion of the schoolmasters in Scotland.

2. If the Act of Parliament was so worded as to lead to this result, we should of course be bound to give effect to it. But there is nothing in the clause, as I read it, which leads necessarily to the conclusion that the Legislature meant by this enactment to create a new and different kind of qualification for schoolmasters from that conferred on them by the Reform Act. The words used do not do so expressly, nor is there, in my opinion, any such inference or implication deducible from the expression used. The word "tenant" is not used from beginning to end of the enactment, and I am unable to infer from the word "occupied" or from the words "rental" and "annual value" being used that occupation as tenant was what the Legislature must have had in view. These words are equally applicable to the occupation of a proprietor or a liferenter. They have reference to the fact and extent of the occupation, and are not, I conceive, intended to be descriptive of the character of the qualification, for very similar expressions are to be found in section 7 of the Reform Act, which deals with property qualifications alone.

3. The clause repeals, in so far as it can affect "the claims" of schoolmasters "to the franchise," the provision of the 55th section of the Education Act, as to the office being held "at the pleasure of the School Board;" and we are thus directed, in dealing with registration matters, to read the Acts as if no such provision had been made. The clause may, I think, in this view be very fairly regarded as if it had been added as a proviso at the end of the 55th section of the Act of 1872; and if it had been so inserted it appears to me to be pretty clear that the claims of schoolmasters to be enrolled after the passing of that Act would have fallen to be dealt with in the same manner as they were dealt with at the date of the Act.

The circumstance founded upon in the argument that under the Act of 1872 School Boards are not bound to give the teachers houses, while the heritors, under the Act of 1803, were obliged

to do so, does not appear to me materially to affect the question here raised. If a School Board does not give the teacher a house, but leaves him to provide one for himself, the question now under consideration could not of course arise. But when they do, as here, give him a house and garden as part of the emoluments of his office, he then comes within the provision of the statute; and I can see no good reason why the circumstance that this grant was not imperative upon them should deprive him, when he does get the house and garden, of the franchise they are sufficient to confer. The case of *Wardrop*, November 3, 1874, 2 R. 6, referred to at the discussion, appears to me to settle that point. There the question raised was as to the right of the master of a side-school, for whom the heritors, under the Act of 1803, were not bound to provide a residence, to be upon the register. But the heritors had there given him a house, and although the fact that they were not under any obligation to do so appears to have been pressed as an objection to the qualification, it was disregarded, and the claimant admitted to the roll.

Upon the whole, therefore, I have come to the conclusion that in the present case the claim ought to be sustained.

LORD CRAIGHILL concurred with LORD MURE.

The Court accordingly refused the appeal and sustained the Sheriff's decision.

Counsel for Appellant—Balfour—Young. Agents—Dundas & Wilson, C.S.

Counsel for Respondent—Solicitor-General (Macdonald)—J. P. B. Robertson. Agent—J. Gillespie, W.S.

COURT OF SESSION.

Saturday, November 9.

SECOND DIVISION.

SPECIAL CASE—DUNSMURE'S EXECUTORS AND OTHERS.

Succession—Informal Codicil—Writing found in Repositories after Death identical with Codicil of later date plus one Additional Bequest—Cumulative Legacies.

A testatrix stated in her will that any informal document afterwards executed by her if clearly expressive of her intention and holograph and signed by her, should receive effect. On March 16, 1878, she executed an informal codicil, leaving legacies to a number of persons, and delivered it to her agent. After her death there was found in her repositories a memorandum dated February 6, 1878, similar in its provisions to the codicil of March 16, except that it contained one legacy which was not contained in the latter. *Held* that the writing of February 6 was a writing of a testamentary nature, but superseded by the codicil of March 16 with respect to all its provisions except the one

legacy not mentioned in the later deed, which fell to be given effect to.

Miss Helen Dunsmure died on 7th May 1878, leaving a settlement, prepared according to her instructions by her agents, under which Mrs Jane Dunsmure or Tennent, the second party to this case, was appointed her residuary legatee. The deed contained this declaration—"But declaring always that these presents are granted under burden of all my just and lawful debts, deathbed and funeral expenses, and any legacies which I may leave by any codicil hereto, or by any writing under my hand, or by any memorandum or directions holograph of or signed by me, clearly expressive of my will and intention, however informal." The testatrix also reserved full power to alter, innovate, or revoke the deed in whole or in part at pleasure, and revoked all wills and writings of a testamentary nature previously executed by her.

Some months after the date of this settlement Miss Dunsmure delivered to her agent a codicil, dated 22d May 1877, in which she made a number of bequests which she desired should be free of legacy-duty. She subsequently sent her agent the following document, dated March 16, 1878:—

"Dunsmure Lodge, Corstorphine,
March 16th, 1878.

"In my former bequests the sums therein left to particular friends I now wish to increase as mentioned below. Therefore I leave and bequeath to—

"Mr James Dunsmure, . . . £1000
"H. Johnston, Esq., . . . 500
"Rev. R. K. D. Horne, . . . 500

"Mary Robertson and Mary Mackenzie, my two servants, £100 each; and I hereby revoke the legacies given in my codicil dated May 22d, 1877, to all these parties.

"In addition to these legacies I leave and bequeath to Miss Catherine Walker, daughter of the late Andrew Walker, Esqre., of Ceylon, £500.

"Mrs Baillie (my cousin), widow of W. R. Baillie, £1000.

"To William Chalmers Fowler, M.D., £200.

"To six cousins [named], £200 each.

"The Parish Corstorphine, £100 for necessitous poor.
"HELEN DUNSMURE."

The settlement, from the date of its execution, and the two codicils, from the dates of their delivery until Miss Dunsmure's death, were in her agent's custody.

After Miss Dunsmure's death her agent on searching her repositories found in her writing-desk, which was left open by her in her dining-room, a document holograph of her, dated February 6, 1878, in the following terms:—

"6th Feby. 1878.

"In my former bequests the sums I left to particular friends I wish now to be—

"Mr James Dunsmure, . . . £1000
"Mr Henry Johnston, . . . 500
"Rev. K. D. Horne, . . . 500
"Mary Robertson, } my servants . . . 100
"Mary M'Kenzie, } . . . 100

£2200

	Brought forward,	£1000
"To Katharine Walker,	£500	
"And her sister Mrs Conway Cooke,	500	1000
"Daughters of the late Andrew Walker, Esqre., of Ceylon,	1000	3200

"HELEN DUNSMURE."

"To parish of Corstorphine for necessitous poor, 1 hundred pounds.

"To William Chalmers Fowler, M.D., £200

"H. DUNSMURE."

This document formed the subject of the present case. The parties believed that it was not communicated by Miss Dunsmure to anyone in her lifetime, and they were agreed that no further evidence regarding it could be obtained. Miss Dunsmure left means and estate amply sufficient to pay the sums (free of legacy-duty) mentioned in the writings both of 6th February and 16th March 1878, assuming them to be cumulative legacies.

In these circumstances this Special Case was presented, the parties to which were (1) Miss Dunsmure's executors; (2) Mrs Tennent, her residuary legatee; and (3) the parties named in the writing of 6th February 1878. It was maintained by the party of the second part that it was not the intention of the testatrix that the writing of 6th February 1878 should have effect as a testamentary instrument; that it was a mere draft or memorandum made with a view to the preparation of a holograph codicil, and in particular that it contained no words of bequest, and that otherwise it was not "clearly expressive" of her will and intention. Further, it was maintained that by the terms and by the subsequent execution and delivery to her agent of the codicil of 16th March 1878 it might be inferred that the writing of 6th February 1878 was superseded or passed from as a record of Miss Dunsmure's testamentary intentions, or was revoked if it ever had any testamentary effect. It was in this view contended that as Miss Dunsmure expressly revoked in the codicil of 16th March 1878 the codicil of 22d May 1877 as regarded the parties named in it, to whom increased legacies were given by the codicil of 16th March 1878, she had viewed the writing of 6th February 1878 as superseded by that codicil, and so not calling for special notice, and did not intend both instruments to be operative.

The parties of the third part, being the parties named in the writing of 6th February 1878, maintained that the said writing was a testamentary instrument of Miss Dunsmure and operative, and that the respective individuals who were mentioned both in the writing of 6th February 1878 and in the codicil of 16th March 1878 were entitled to legacies of the amounts specified in the writing of 6th February 1878 in addition to the legacies to which they are entitled under the codicil of 16th March 1878. Mrs Conway Cooke, who was named only in the writing of 6th February 1878, claimed a legacy of £500 under that writing.

The questions of law submitted to the Court were—(1) Is the holograph writing of 6th February 1878 a subsisting testamentary instrument of the late Miss Dunsmure? (2) If so, are the

legacies mentioned in it, and the legacies to the same parties mentioned in the codicil of 16th March 1878, cumulative? (3) Are the said legacies payable free of legacy-duty? (4) Is Mrs Conway Cooke, who is named only in the writing of 6th February 1878, entitled to a legacy of £500 under that document? (5) If so, is she entitled to have it free of legacy-duty?"

At advising—

LORD JUSTICE-CLERK—The main question which we have to consider is, Whether the writing of 6th February 1878 ought to receive effect to the extent to which it differs from the subsequent writing of 16th March? I cannot say that this is by any means clear, but we are told that we have before us all the materials for deciding the question which can be obtained.

The difficulty lies in this, that there may be two explanations of the discrepancy between the informal writing of 6th February and the more formal, though also informal, writing of 16th March. Either in writing out with her own hand the later codicil the testatrix may have forgotten or omitted mention of Mrs Conway Cooke, or in the interval she may have altered her intention. I am inclined to think that this writing of 6th February was a testamentary writing, and having been found in the repositories of the testatrix at her death it must receive effect. It starts with testamentary words and is signed by the testatrix. We cannot treat it as a mere draft or jotting, unless there is something to take it out of the category of a testamentary writing. There is nothing but the fact that the other testamentary writings were lodged with her agents. This is an indication which might be important in connection with other circumstances, but of itself it is not conclusive.

If, then, the writing is to be regarded as testamentary in itself, we have to consider the effect upon it of the subsequent writing of 16th March, which was also informal, and which contains some provisions identical with those in the former writing and some different. In my apprehension it is not unlikely that the testatrix intended that the later writing should supersede the former, but I am of opinion that there are no materials from which we could with certainty or safety hold that the later writing was a revocation of the legacy to Mrs Conway Cooke.

It is important to notice that we are not dealing with a catholic and formal settlement supervening—both the writings of 6th February and 16th March are informal writings, codicils to a prior settlement. If the legatees under the two had been wholly distinct, I should have had no doubt that both must receive effect. On the whole I am disposed to sustain the claim of Mrs Conway Cooke to the legacy of £500.

In regard to the question of duplication, I think there is no case for that. I think the testatrix intended her last expression to be conclusive as to the amount of the legacies therein named.

LORD GIFFORD—I have come to the same conclusion.

There is certainly a delicacy in taking out of the writing of 6th February one bequest and giving effect to it, and holding the other bequests as superseded by the later writing. Still I do not think it safe to refuse to give effect to the legacy

to Mrs Conway Cooke on the mere conjecture that the testatrix intended to revoke it.

We start with a regularly tested deed of settlement, in which the testatrix contemplates that she may leave legacies by subsequent writings, and decides in a certain way what are to be the requisites of informal writings which are to receive effect. She says that legacies are to receive effect "which I may leave by any codicil hereto, or by any writing under my hand, or by any memorandum or directions holograph of or signed by me, clearly expressive of my will and intention, however informal." Now, I take it that if this lady had died leaving nothing but this writing of 6th February, it must have received effect, or if she had died leaving this writing and nothing else but the codicil of 22d May 1877, it must have received effect along with that codicil. It fulfils the conditions required by the settlement. It is holograph, it is signed, and it is clearly expressive of the intention of the testatrix. The meaning is—whereas by formal writings I left certain legacies to particular friends, I wish those sums not to be those formerly mentioned but what I now mention. I think the words used are quite sufficient testamentary words as expressing her intention at that date. Then come the legacies, certain legatees under the former codicil are to receive increased legacies, and then certain other legatees are mentioned, who are not mentioned in the former codicil. Mr M'Laren in his argument called the writing a memorandum, but that does not depreciate its effect. Memoranda signed by herself are just what the testatrix says in her settlement shall receive effect. Then comes the writing of 16th March 1878, in which she repeats all the legacies but one which are contained in the writing of 6th February, revokes the legacies given to the same legatees by the codicil of 22d May 1877, and gives a number of additional legacies to persons whose names do not appear in either of the former writings.

I think that all three writings must be taken as effectual testamentary memoranda. I cannot exclude any of them as forming no part of the testamentary deeds left by Miss Dunsmuir. If I could gather that the legacies which are repeated were intended to be cumulative, I should give effect to them as cumulative legacies. If, as I think is the case, they are mere repetitions of the same legacy, then the legatees will not be entitled to double payment. But when I find one person whose name is in the writing of 6th February and not in the last writing, I do not find sufficient reason for excluding her simply because her name does not so appear. Take it that the bequest to her was made in a separate memorandum—that she had a codicil to herself—I could not deny her right to have it. We see from other writings that the testatrix knew how to revoke when she wished to do so; she has not done so with regard to this legacy, and therefore I think we should answer this question to the effect of sustaining the legacy to Mrs Conway Cooke.

LORD YOUNG—(who sat in this Division in the absence of Lord Ormidale)—This is the shortest case in the world, but the point which arises is one of some difficulty. The first question which has been put to us is the material one. Now, in my opinion, it is always idle to consider whether any instrument ever was an effectual testamentary

instrument, unless in this sense—Was it ever capable of being one? But the question, Is any instrument testamentary or not? must be in every instance considered and determined as at the date of the testator's death. A testamentary instrument is always a manifestation of the testator's last will. Now, that this document was from its nature and terms capable of doing this, no one for a moment denies; it is holograph of the testator, it expresses her intention, and is quite clear in its terms. It is therefore quite capable of being a testamentary instrument, but it is a mere question whether it actually is or not, and this must be determined as at the date of the testator's death.

If she had written on the back of it "superseded" or any similar words, it would not have been a testamentary instrument to receive effect, or if any sufficient fact tending to that result and capable of being judicially established could have been ascertained, then we should have rejected it, and accordingly the question is narrowed to this, Whether the subsequent writing of 16th March caused the February writing to have no effect? Now, does the execution by her of the instrument of 16th March indicate this satisfactorily, viz., that the writing of February is not to be taken as expressive of her last will. I think with your Lordships that the later instrument is to be taken as superseding the instrument of February with respect to all the legacies mentioned in both. It is not revoking, but superseding, and that leads satisfactorily to the conclusion that the instrument of February was superseded by that of March with respect to all that is contained in that of March.

But then there is a legacy in the instrument of February which is not in that of March, and therefore the same argument does not hold; it is not superseded by a larger legacy. Is this legacy then cancelled and struck out of all the testator's testamentary writings, and are we to hold it so?

I agree with your Lordships that that is a conclusion which it would be unsafe to arrive at, and therefore I think that the instrument of February should receive effect so far as it has not been superseded by that of March.

Their Lordships therefore answered the questions as follows:—The first in the affirmative; the second in the negative; the third to the effect that her legatees who were not mentioned at all in the codicil having reference to legacy duty should have no benefit from it, and should therefore not get their legacies duty free, but that where increased legacies were given to people who were previously mentioned, their legacies were to be duty free; *quoad ultra* unnecessary to answer.

Counsel for First and Second Parties—M'Laren—Macfarlane. Agents—W. & J. Cook, W.S.

Counsel for Third Parties—Kinnear—Pearson. Agents—Myrne & Campbell, W.S.

Saturday, November 9.

SECOND DIVISION.

[Lord Curriehill, Ordinary.]

CLELAND v. MORRISON.

Agent and Client—Reduction by Heir of Entail of Deed granted by his Predecessor in favour of his Agent—Circumstances inferring Agency—Non-Disclosure of terms of Deed to Granter

An heir of entail in possession granted a feu-contract in favour of a law-agent, who three days after, in fulfilment of a previous arrangement, assigned half his interest in the feu to his partner S. It was held to be proved (1) that S acted in the transaction as agent for both parties, and that no independent advice was obtained on behalf of the granter, or sufficient information supplied to enable her to form a correct opinion of the value of the feu granted; (2) that at the time of granting the deed it was not disclosed to the granter that S had half the interest in the feu. *Held*, in an action of reduction of the deed at the instance of the next heir—(1) that he had a good title to sue, being in all matters connected with the entailed estate *eadem persona cum defuncto*; (2) that the agent not having disclosed that the conveyance was in his own favour, the deed fell to be reduced; (3) that even if disclosure were proved, the fact of the agent having taken a conveyance in his own favour without having obtained independent advice on behalf of his client, was of itself sufficient to justify reduction.

Entail—Result upon whole Deed, where Feu-Contract granted in terms of Entail contained one Provision contravening them.

A feu-contract granted in terms of a deed of entail conveyed a right to work stone upon a part of the estate in which feuing was prohibited. (*Opinion per cur.*) that though that provision was a contravention, and fell to be reduced, it did not vitiate the whole deed, the two parts of the grant being distinct and separable.

In this action Matthew Dick Cleland, heir of entail in possession of the entailed estate of Springfield, near Glasgow, sought to reduce and set aside a feu-contract entered into in October 1876 between Mrs Marion Cleland, then heir in possession of the estate, and Archibald M'Lean Morrison, writer in Glasgow, the defender, by which she feued upwards of 11 acres imperial of the entailed estate, with a perpetual right of quarrying stones free of charge from the Blackmount Quarry on the estate for building on the ground feued. The grounds of reduction were three—(1) That the feu-contract was *ultra vires* of the granter as heir of entail, or at least in so far as it conferred a right to quarry stones in Blackmount Quarry; (2) that assuming the granter was entitled to grant the feu, the feu-duty stipulated for was too small, being less than was authorised in the deed of entail; and (3) that the defender and his partner were at the time when the contract was executed law-agents of the granter, and acted for both