

LORD SHAND—I am of the same opinion. The agreement upon which the present question arises deals with two matters which are perfectly distinct—first, as to an existing litigation which had reference to Largue's claim against Urquhart, while the second arises out of Largue's inhibition, which it was desirable to get out of the way in order to make a sale of the property possible. I hardly think that there was here a compromise in the ordinary sense of the word, for Mr Largue got all that he desired, his claim was admitted to be good, and as far as I can see there was no concession.

In order to facilitate the sale Mr Largue agreed to withdraw his inhibition, but in so doing he did not agree thereby to give up a valuable right acquired under it. He accordingly takes Adamson bound "that the proceeds were to be applied in payment of his debt after his own preferable claims were met." But these preferable claims arose only in his character as law-agent of Urquhart, for his position as factor entitled him to no preference. It is clear, I think, that Largue might have adjudged this properly without Adamson getting any of his expenses as factor. Therefore no claim could arise for factorial outlay, and it was not intended by this agreement to give him any such claim. There can be no doubt that cond. 3 has been somewhat loosely stated, but I do not see that it can in any way affect the terms of Mr Largue's letter.

Adamson in his letter writes as a law-agent, and there is no indication of the character of factor appearing from beginning to end of it. And further, when one looks to the character of the disbursements, they are in my opinion just such as a factor might make.

As regards the business account, I hope that it may not be thought necessary by the parties to incur the further expense of a remit to the Auditor.

LORD DEAS was not present at the debate.

The Court sustained the first four objections, the fifth in so far as relating to interest on sums involved in the first four objections, and repelled the sixth objection.

Counsel for Pursuer—Keir. Agent—Alexander Morison, S.S.C.

Counsel for Defender—Begg. Agents—Scott Moncrieff & Trail, W.S.

Thursday, July 19.

SECOND DIVISION.

(Before Seven Judges.)

SPECIAL CASE—SIMSON AND OTHERS.

Succession—Testament—Informal Writing—Conveyancing and Land Transfer (Scotland) Act 1874 (37 and 38 Vict. c. 94), sec. 39.

Terms of an informal writing signed by the grantor before witnesses, who appended their signatures, held to be valid as the testament of the grantor though written in pencil, and though capable of being read as merely tentative in its character.

Writ—Witness, Interest of, in Deed.

Held (by Seven Judges), following the cases of *Graham v. Marquis of Montrose*, M. 16,877, and *Ingram v. Stevenson*, M. "Writ" Appx. 2, that it is not a disqualification to an instrumentary witness to a settlement that he has a beneficial interest under the deed.

This was a Special Case between parties interested in the succession to Miss Agnes Christian Simson. The facts as stated in the Case were as follows:—Miss Simson died at Stuttgart, on 16th November 1880. At the date of her death she was a domiciled Scotchwoman, and her next-of-kin were her brothers George Sutherland Simson and Henry Bruce Simson, and her sisters Miss Frances Katherine Simson and Mrs Mary Simson or Hamilton.

In addition to a writing which the parties to this case were agreed was invalid according to Scotch law, Miss Simpson left a writing bearing to be a will. It was in the following terms:—"1. 500, Kitty; 500, John. 2. 500, Tiny—residuary legatee; 800, Mary Hamilton; 1300, F. K. S. Tiny, pearl brooch and earrings. I divide all equally. Will make new will. Is it not better to divide all between Henry, Kate, Mary, and if I get well I can alter it all, I have left it so late? I leave Tiny residuary legatee. I just divide the 'whole 8000' equally between Kate, Mary, Henry. Somebody must be residuary legatee for all my things; it is called 'things' I think—residuary legatee, Tiny. This is my meaning—to divide the money between Kate, Henry, Mary, and all rest to Tiny—residuary legatee for all left. Add, I leave £100 for funeral xs. This must be taken off the whole acct. before dividing. I leave £300 to Henry for paying debts that may occur. I leave £400 to F. K. Simson—all this to be deducted by Henry before dividing: that is all.—A. C. SIMSON. F. K. Simson, witness; Helen Boucher, lady's-maid, witness; H. R. Linton, witness (*scripsit*). Novber. 9th."

The date "9th Novber." was 9th November 1880, a few days before Miss Simson's death. At that date there were residing with the testatrix at Stuttgart (besides her maid Helen Boucher, who signed as a witness) her brother Henry Bruce Simson and her sister Frances Katherine Simson, who also signed as witnesses. The document was written on that date in pencil by Henry Bruce Simson at the request and to the dictation of the testatrix while she was lying in bed. The signatures of the testatrix and the witnesses were written in ink at the same time immediately after the testatrix had signed. The parties stated that they were satisfied that the writing was so subscribed by the testatrix and the three witnesses, and dispensed with any proof or declarator on the point.

The person designated in the body of the writing as "Henry" was the brother of Miss Agnes Christian Simson, Henry Bruce Simson, the writer thereof. The person designated as "Kate," and also as "F. K. Simson," was the sister of Miss Agnes Christian Simson, Frances Katherine Simson. The person designated as "Mary" was the other sister of Agnes Christian Simson, Mrs Mary Simson or Hamilton. The person designated as "Tiny" was Agnes Elizabeth Simson, a minor, youngest daughter of Henry Bruce Simson, and the niece and godchild of Agnes Christian Simson,

and who was called by her aunt and other members of the family by the name of "Tiny."

There being no executor-nominate, Frances Katherine Simson was decerned executrix *qua* one of the next-of-kin by the Sheriff of Fife on 13th January 1881. She thereafter gave up on oath an inventory of the personal estate, amounting to £8901, 6s. 5d., and was confirmed executrix. Miss Simson left no heritable estate.

Frances Katherine Simson, Henry Bruce Simson, and Agnes Elizabeth Simson, being the parties of the first and third parts, maintained that the writing was a valid testamentary writing, and entitled to receive effect as the last will and testament of Miss Agnes Christian Simson. Major George Sutherland Simson and Mrs Mary Simson or Hamilton, being the parties of the second part, on the other hand, maintained that it was invalid and ineffectual as a will or testamentary writing, in respect—1st, That the body of the writing was in pencil; 2d, that on the face of the writing it was not a completed act, but merely notes for a will, or an expression of intention to make a will; and 3d, that two of the witnesses Frances Katherine Simson and Henry Bruce Simson were beneficially interested as legatees under it, and therefore not competent witnesses.

The questions of law for the opinion and judgment of the Court were (so far as they need here be detailed)—“(1) Whether the said writing is invalid as the last will and testament of Miss Agnes Christian Simson, in respect that the body thereof is written in pencil, and only the signatures and date thereof in ink? (2) Whether, having regard to its terms, the said writing is a completed will or testamentary writing? (3) Whether the said writing is wholly or partly invalid as the last will and testament of Miss Agnes Christian Simson, in respect that two of the witnesses, Miss Frances Katherine Simson and Henry Bruce Simson, are beneficially interested therein as legatees? and if partly, to what extent and effect?”

After hearing counsel for the parties, the Second Division appointed it to be argued before themselves and three Judges of the First Division on the question of the effect on the validity of the writing of the instrumentary witnesses being legatees under it.

Argued for the parties of the first part—The overwhelming weight of authority was in favour of the view, that having an interest in, or taking benefit under, a deed was no disqualification to being an instrumentary witness to it. This had been decided in various aspects, and particularly in that presented in this case—that of the pecuniary interest of a legatee in a will—in one case where the interest was small—*Graham v. Marquis of Montrose*, 1685, M. 16,887—as well as in another where it was large—*Ingram v. Steenson*, 1801, M. “Writ,” Appx. 2—and the principle had been affirmed less distinctly in other cases—*Scott v. Caverhill*, 1786, M. 16,779; *Mac-lutchie v. Brand*, 1771, M. 16,776—*rev. H. of L. 2 Pat. App. 312*; *Mitchell v. Miller*, 1742, M. 16,900. The case of *Robertson v. Abercromby*, 1627, M. 16,879, in which the creditor in a bond had been held inadmissible as a witness to it, was different, for he was a direct party to the deed. In one case, indeed, interest of a witness as legatee had been held to invalidate a will *quoad* the

legacy of that witness, though remaining good otherwise, but it stood alone, and would lead to absurd results if worked out in practice—*Lord Innerleith v. B. of Glasgow*, 1613, M. 16,876. If not in the common law, this rule was not to be found in the statute law, for the only two Acts which dealt with the matter (1540, c. 117, 1681, c. 5) contained no such provision. Conveyancing authorities went no further than the recommendation that it was inexpedient that anyone having an interest in a deed should act as an instrumentary witness to it—*Duff's Feudal Conveyancing*, 15; *Bell on the Testing of Deeds*, 99. Nor was the doctrine to be found in any institutional writer, but the reverse—*Ross's Lect. i. 148*; *M'Laren on Trusts*, i. 96; *Dickson on Evidence*, secs. 690 and 1782. But assuming the second parties to make out that such a disqualification formerly existed, it was now removed by the Evidence Act (15 and 16 Vict. c. 27), for though this Act was directed mainly to evidence *in judicio*, it was applicable also to instrumentary witnesses—*Dickson*, secs. 1 and 5—and in either view it had swept away the reason for the former disqualification—*viz.*, personal interest—from the most important sphere of evidence, and it could not be construed as leaving it standing in the narrower one of instrumentary attestation. The English law was entirely statutory. By the Statute of Frauds (29 Car. II. c. 3) a legacy of £10 to a witness voided the whole will. This was relaxed by 25 Geo. II. c. 6, and now by 1 Vict. c. 26, the will is good, except as regards the witness's own legacy. By the earlier Roman law (*Gaius*, ii. 108) neither the heir nor a legatee, or any other beneficiary, could be a witness, but in Justinian's time the disqualification was limited to the heir only—*Just. ii. 10, 10*; *Dig. xxxiv. 5, De rebus dubiis*. The tendency of every law, and particularly the law of Scotland, had been to the removal of the disabilities of witnesses; to decide in favour of the contention of the other side now would be retrogression. This deed was therefore entitled to be admitted to probation (supplied here by agreement of parties) in order to obtain the privileges of section 39 of the Conveyancing Act of 1874.

Replied for the parties of the second and third parts—The cases of *Graham* and *Ingram* did not settle the rule conclusively. In the former the interest was too trifling to ground a rule upon, and the latter was special. A large interest like that here brought the case under the principle of *Robertson*. It was noteworthy that *Erskine* (iv. 2, 27) refers to it and ignores *Graham*, and quotes *Lord Innerleith*. These two cannot stand in principle with *Graham*, and approval of them involves rejection of it. The true reading is that the rule is the other way, and *Graham* and *Ingram* are exceptions. Neither does *Bell*, who deals separately with written evidence, notice *Graham*. That case and the case of *Ingram* had never been regarded as conclusive authorities; the *dicta* of Lord Pitmilley in *Earl Fife v. Earl Fife's Trustees*, 1817, 1 Mur. 128, were positive against them. Apart from *Ingram* alone there is a consensus of opinion that, though a trifling legacy will not disqualify, a considerable interest will do so, and void the deed—*Mont. Bell's Lect. pp. 51-2*; *Ross, supra*. English law was still in the second parties' favour to the extent of forfeiting the witness' own provision. Assum-

ing them right as to the invalidating effect of the witness' interest prior to the Evidence Act, was it altered by it? The Act expressly referred only to parole evidence. A witness' signature to a deed is evidence of an entirely different character from evidence *in judicio*—Bell's Prin. 229; Titles to Land Act 1868, sec. 139.

At advising—

LORD PRESIDENT—In this case, in which counsel were heard at the beginning of the session, the question which we have now to consider is the third of the Special Case—[*His Lordship here read the third question, and stated the facts of the case.*]

That this will was subscribed in presence of two, or rather of three, witnesses, who also subscribed, is a fact beyond all dispute, and therefore the deed—for I call it a deed—is entitled to the benefit of the 39th section of the Conveyancing (Scotland) Act 1874, and must be dealt with in the same manner, as regards the question now under consideration, as if it were a probative instrument within the meaning of the previous statutes regulating the execution of deeds. The question thus comes to be, whether this, which is undoubtedly the mind and will of the testatrix, according to the statements in the Special Case, and of the testatrix labouring under no incapacity, and subject to no undue practices, is to be declared invalid on the ground that two of the three instrumentary witnesses were interested in the deed or were benefited by it.

Now, I am not prepared to sustain this objection. I think in the circumstances of this case it must be considered as a technical objection, and therefore one would require some statutory reason for giving effect to it and declaring the will invalid.

The statutes which regulate the solemnities required for the execution of deeds, when they speak of witnesses to a deed, do not require these witnesses to have any particular qualification for the office which they undertake, nor is there any suggestion that any particular disqualification may attach to them. And this accordingly has been always understood, that instrumentary witnesses are not liable to any of the objections—which in former times were pretty numerous—that could be stated against witnesses who deponed to facts *in judicio*. As stated by Mr Erskine (iv. 2, 27)—“None of the objections derived from partial favour, undue influence, or the witnesses' immoral character, can be moved against instrumentary witnesses.” That, I apprehend, expresses the understanding and practice of Mr Erskine's time, and I am not aware that it has ever varied since.

That being so, I cannot say that the circumstance of an instrumentary witness or instrumentary witnesses having an interest in the deed operates as a disqualification in those persons who attest the deed. For if anybody may be an instrumentary witness, notwithstanding he has partial favour, undue influence, or bad moral character, it is very difficult to understand how we can say, as an abstract proposition, that the circumstance of a witness having an interest in a deed is to disqualify him. I can quite well understand that the circumstance of one or both instrumentary

witnesses having an interest in the deed itself, and having a benefit under it, may be a most material circumstance where the deed is challenged on other grounds. If there is any question as to the deed being the expression of the granter, or if it is suggested that the deed has been impetrated by undue influence, then I should think the question of the attesting witnesses being interested in maintaining the deed would be a most material circumstance in the consideration of the jury or judge in determining the question as to its validity. But beyond that I cannot go, and I feel myself fortified in that opinion by the fact that there is some authority for saying that this is a bad objection. The Court has refused to sustain it in two cases—the case of *Graham* and the case of *Ingram*—in one of which the interest of the instrumentary witness was small, while in the other it was considerable, and in both the Court refused to sustain the objection.

I have therefore come to the conclusion that wherever, as in this case, the objection resolves itself into a merely technical one, there is no ground for sustaining it.

LORD JUSTICE-CLERK—I had considerable difficulty at first in regard to this point, but I am now inclined to agree with your Lordship in all respects. I think the ground on which your Lordship proposes that we should decide this matter is well founded in principle. There is no authority to the effect that such an objection, pleaded merely technically, is fatal to a deed, that is, fatal to a testamentary deed. I think there is authority to the contrary; but the grounds on which your Lordship has based your opinion are so entirely satisfactory that I need say no more.

LORD MURE—I am of the same opinion, and concur in the reasons your Lordships have stated, and have therefore very little to add. I would only say that it appears to me to have been ruled by the case of the *Marquis of Montrose*, which your Lordships referred to, that the fact of a person being benefitted by such a document was no objection to the validity of his attestation as an instrumentary witness. That decision, so far as I understand, has never been seriously disputed, and the principle upon which it proceeded was given effect to in the more recent case of *Ingram*. In that case there was certainly but a trifling interest to be considered, but in the case of *Graham* the interest of the attesting witness in the deed was considerable, and notwithstanding that it was decided that his attestation was good. And having regard to the fact that at that time such an interest in the ordinary case was, if not conclusive against him, at all events sufficient to create a prejudice, it appears to me that the reason why the objection was not held to be a good one in the case of an instrumentary witness was that the latter not being called upon to speak to the import of the document, but only to a fact connected with its execution, nothing of that sort could colour the testimony he gave by his signature. What the instrumentary witness is called to say is this—that he saw the person put his name to the deed. He does not require to know what that deed was or whom it favoured, or anything about it. He is asked merely to

prove that he saw so-and-so sign the document on a particular date. That being so, I cannot see on what principle it should be held that the mere fact that the instrumentary witness has an interest and gets something under the deed—of which fact he was in ignorance when he saw it executed—should be an objection to his attestation, especially since it was ruled to the contrary in 1685. The rules of evidence have been very much relaxed since then, and I am not to go back on so old a decision, especially since it proceeded on sound principle.

LORD SHAND—I am also of opinion that the testamentary writing of 9th November 1880 is valid, notwithstanding the fact that two of the witnesses subscribing are beneficially interested to a material extent as legatees under the writing. The point has, I think, been expressly decided in the cases of *Graham* in 1685, and *Ingram* in 1801, both cited in the argument. These decisions were pronounced at a time when witnesses in a Court of Justice were disqualified from giving evidence on account of pecuniary interest in the subject of the litigation. Interest is no longer a disqualification, and indeed in a large proportion of cases the parties to the suit are themselves the leading witnesses. It would, in these circumstances, be a retrograde step in the law to hold that testamentary witnesses are disqualified because they take benefit under the deed. I can see no good reason for taking such a step, but, on the contrary, recognising the decisions as authoritative and binding, and as sound in themselves, I think recent legislation and modern views as to the admissibility of evidence very strongly support the conclusion that the objection to the witnesses in this case is not well founded.

LORD YOUNG—I am of the same opinion.

LORD CRAIGHILL—I also am of that opinion, and think with Lord Shand and others of your Lordships that I have good ground for holding that the decisions in the cases of *Graham* and *Ingram* should be adhered to. The first was decided so long ago as 1685, and the other in 1801, and the authority of neither, so far as I have been able to discover, has been shaken by any adverse decision or the opinion of the Judges or the criticism of any commentator. The point having been thus settled so long as two centuries ago, it would, I think, be something like a calamity if an adverse decision were pronounced now.

LORD RUTHERFURD CLARK concurred.

Thereafter at advising—

LORD JUSTICE-CLERK—As to the first question, we do not think that the fact that the will was written in pencil is a good objection. In regard to the second, we are of opinion that the writing is a complete will. The third has been decided by the Seven Judges, and the fourth does not now arise. That exhausts the case.

The Court pronounced the following interlocutor:—

“The Lords . . . are of opinion and find that the first question . . . falls to be answered in the negative, and that the second question

falls to be answered in the affirmative, and having advised with three Judges of the First Division . . . are, with the said Judges, of opinion and find that the third question falls to be answered in the negative, and that the fourth question is thus superseded, and decern.”

Counsel for Parties of First Part—Mackay. Agents—Lindsay, Howe, & Co., W.S.

Counsel for Parties of the Second Part—Moncreiff—Darling. Agents—Murray & Falconer, W.S.

Counsel for Parties of the Third Part—J. A. Reid. Agents—J. & A. F. Adam, W.S.

Thursday, July 19.

SECOND DIVISION.

SPECIAL CASE—PATON AND OTHERS.

Succession—Legacy—Cumulative or Substitutional—Universal Settlement.

A lady died leaving a general trust-disposition and settlement in which she directed her trustees, *inter alia*, to pay £500 to her niece. There were found in her repositories two other documents—1st, A writing on a half-sheet of paper, holograph of and signed by her, and dated prior to her trust-disposition. It contained a bequest of £500 to the same niece, and was enclosed in an envelope which was addressed to her brother, “to be given him by-and-bye.” This address was unsigned, and was dated subsequent to the settlement. 2d, There was also found a document dated prior to the trust-disposition, and in which also she gave £500 to her niece. *Held (dub.* Lord Rutherford Clark as to the first document mentioned) that the niece was not entitled to the legacies contained in these documents, or either of them, in addition to that contained in the settlement.

Mrs Smyth or Brander, who resided at Dumfries, died on July 2, 1882, leaving a trust-disposition and settlement dated 15th February 1881, by which she conveyed to the Rev. John Paton and others, as trustees, her whole estate, heritable and moveable, of whatever kind, which should belong or be addebted to her at the time of her decease.

By the second purpose of her said trust-disposition and settlement the truster directed her trustees to pay the following legacies out of her share of the trust-estates of her late father Christopher Smyth, and her late brother Thomas Robinson Smyth, viz.:(1) To her brother John Alexander Smyth, £500; (2) to his son Christopher Smyth, £500; (3) to Margaret Brander Anderson, daughter of her niece Lizzie Smyth or Anderson, whom failing to her said niece, £500; and (4) to her niece the said Lizzie Smyth or Anderson, £500. By the fourth purpose she directed her trustees to pay certain legacies, “and to divide the remainder of my jewellery along with my body-clothes as may be directed by any memorandum