

I am of opinion that under the settlement Martha Cattanach's share of the mixed funds vested in her at her father's death. I should add that in my opinion the two-thirds of the proportion of the unappointed fund which I hold vested in her father, to which she is entitled as legitim and dead's part, will just fall to be divided as part of the mixed funds falling under Alexander Cattanach's settlement.

While I cannot answer the questions exactly as your Lordships propose, the difference in the result is infinitesimal.

LORD JUSTICE-CLERK—I have had the opportunity of reading Lord Trayner's opinion, in which I entirely concur.

LORD YOUNG was absent.

The Court pronounced this interlocutor—

“Answer the first and second questions of law therein stated in the negative: Answer the fourth question of law therein stated by declaring that her share of Alexander Cattanach's testamentary trust estate vested in Martha Moffat Cattanach at the date of the death of her father William Cattanach, and that such share is now payable: Answer the fifth question therein stated in the affirmative: In answer to the seventh question therein stated, Find that the second parties are not barred from calling in question the validity of the provisions regarding the marriage-contract funds contained in the fifth purpose of Alexander Cattanach's trust disposition and settlement, but that Martha Moffat Cattanach is entitled to have any loss occasioned to her by their doing so made up out of the second parties' shares of Alexander Cattanach's estate: Answer the eighth question therein stated in the affirmative: Find it unnecessary to give any answer to the third and sixth questions therein stated: Find and declare accordingly, and decern.”

Counsel for the First and Second Parties
—Dove Wilson. Agents—Mackenzie & Kermack, W.S.

Counsel for the Third Parties—C. N. Johnston. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for the Fourth Party—Jameson, K.C.—A. O. M. Mackenzie. Agents—J. & J. Ross, W.S.

Counsel for the Fifth Party—Spens. Agents—J. & J. Ross, W.S.

Thursday, November 28.

SECOND DIVISION.

HAMILTON'S TRUSTEES v. HAMILTON.

Succession—Testament—Construction of Testamentary Writings—Bequest or mere Expression of Wish.

In 1901 a testator died survived by two daughters, one married and the other unmarried, and leaving a trust-disposition and settlement, dated in 1877, by which he bequeathed the residue of his estate to his daughters and their children. He also left a holograph letter, dated in 1883, addressed to his trustees, in the following terms:—
“Should a daughter marry, the single one to have at least £600 a year, and balance to go to the married sister. In the event of both being married, then my capital to be equally divided between them. I wish, however, that £200 be paid to Mrs G. S. (the testator's sister-in-law) annually during her lifetime, in consideration of her great kindness to me and for her care of my dear children. I do not think they will object to this.”
The testator also left a codicil, dated in 1897, in which he bequeathed a legacy of £100 to Mrs G. S., “as a small mark of my affection for her, and in grateful recognition of her unflinching kindness and assistance in the upbringing of my daughters.”

Held that there was no valid bequest by the testator of an annuity of £200 in favour of Mrs G. S., nor any burden of such an annuity imposed on the shares of the daughters, but only the expression of a wish on his part that Mrs G. S. should receive such an annuity.

Succession—Testament—Construction of Testamentary Writings—Direction too Vague to Receive Effect.

A testator died leaving a trust-disposition and settlement and other testamentary writings by which, with the exception of certain legacies, he divided his estate among his two daughters and their children. In one of these testamentary writings, a holograph letter, to his trustees, dated eighteen years before his death, when his daughters were children and his sister-in-law, Mrs G. S., lived in family with him, the testator wrote—“In the event of my dying before Mrs G. S., my very dear sister-in-law, I solemnly request that you, my trustees, will see that my house at Row is carried on as in my lifetime. . . . P.S.—I have no wish to compel Mrs S. or my children to live at Row if they wish to go elsewhere.” No provision was made in any of the testamentary writings for the upkeep of the house at Row after the testator's death. The testator died survived by his two daughters, one of whom was married, and by Mrs G. S.

Held that the direction in the letter as to carrying on the house at Row was too vague to receive effect.

Succession — Testament — Unsubscribed Holograph Memorandum — How Far Holograph Writings may be Imported into a Settlement.

In a trust-disposition and settlement the second purpose of the trust was for payment and fulfilment of all such legacies and bequests as the testator might leave or bequeath by any codicil "or by any writing under my hand (however informally executed or defective) showing my wishes and intentions."

Held that this included only writings subscribed by the testator and did not include an unsigned and undated memorandum holograph of the testator dividing various articles of furniture, for the most part between his two daughters, which had been handed by the testator personally to his law-agents to put up with his settlement, and which remained in their possession till the date of his death.

George William Hamilton died on 3rd February 1901 leaving a trust-disposition and settlement, dated 16th January 1877, by which he assigned and disposed his whole estate, heritable and moveable, to trustees, for the purposes therein mentioned. He directed the trustees, after payment of certain legacies, to hold the residue of his estate in trust for the use and behoof of his daughters Maud Mary Hamilton and Amy Helen Hamilton, and any other children to be born to him, and the survivors and survivor, equally among them, the shares falling to the daughters to be held for their liferent alimentary use and for behoof of their children in fee. The second purpose of the trust was in the following terms:—"In the second place, for payment and fulfilment of all such legacies or bequests, instructions or directions, as I may leave, bequeath, or give by any codicil hereto, or by any writing under my hand (however informally executed or defective), showing my wishes and intentions."

About 24th February 1883 the truster handed a small envelope, addressed in the truster's handwriting "To my Trustees—To be handed to them by Mrs G. Smith in the event of my death," to his sister-in-law, Mrs Helen Cathcart Hamilton or Smith, widow of George Smith, who for twenty years prior to the truster's death lived in family with him and brought up his daughters. This envelope was handed by Mrs Smith to the trustees upon the truster's death with the seal unbroken. It contained a holograph letter in the following terms:—

"Row, 24th Feby. 1883.

"To my Trustees.

"Dear Friends—In the event of my dying before Mrs George Smith, my very dear sister-in-law, I solemnly request that you, my trustees, will see that my house at Row is carried on as in my lifetime, and that Thomas, my faithful butler, be retained, provided he behaves himself, as he has done for seventeen years. Should a daughter marry, the single one to have at least (£600) six hundred a year, and balance to go to

the married sister. In the event of both being married, then my capital to be equally divided between them. I wish, however, that two hundred (£200) be paid to Mrs G. Smith annually during her lifetime, in consideration of her great kindness to me and for her care of my dear children. I do not think they will object to this. . . .

"G. W. HAMILTON.

"Witness, Thomas Patterson.

"Witness, H. Boyce.

"P.S.—I have no wish to compel Mrs S. or my children to live at Row if they would wish to go elsewhere."

The truster also left a number of codicils. By the last of these, dated 27th May 1897, he, *inter alia*, bequeathed free of legacy-duty a legacy of £100 to Mrs George Smith, "as a small mark of my affection for her, and in grateful recognition of her unflinching kindness and assistance in the upbringing of my daughters."

The following unsigned and undated memorandum, holograph of Mr Hamilton, was handed by him personally to his law-agents on or about 29th September 1897, to put up with his settlement, and remained in their possession until the date of his death:—

"Viewpark,

"Row, Helensburgh, N.B.

"At my death

Helen and Amy may remain on at Viewpark—if not, let it be sold and the sum obtained go to my two girls between them, less £1000, which belongs to Helen Smith.

"Dining-Room.

My likeness to go to Maud.

Silver and plated ware

All to go to Amy except

Plated lamp

Silver Claret jug } for Maud.

1 plated tureen }

Mantelpiece clock, &c., for Maud.

"Drawing-Room.

Box of china counters to Maud.

My wife's likeness to do

Mrs W. Hamilton's photo to Maud.

All my clothes to Henry.

"Wine and Stores.

To Helen and Amy.

Kitchen utensils to do

"Pantry.

Glass and dinner and dessert services and china ornaments to Amy.

Silver ornaments in drawing-room and boudoir to Maud, and seals and her mother's marriage-ring.

"Books.

To be divided between Maud and Amy.

Large Bible, 1600, to Amy.

Harry Hamilton's Bible to Amy.

My twin oak cellaret to John Cowan.

'House of Hamilton,' Maud.

'Glasgow Old Families,' Maud.

"Napery.

To Helen and Amy for dinner and bedrooms.

"Cutlery.

To Helen and Amy.

Jewellery.

2 rings, 5 or 6 pins, 5 or 6 sets of links, buttons, and studs to Colin and Archie Donald.

3 pictures in smoking-room to Colin Donald.

Campaign of Waterloo to Archie Donald.

Photos.

All to Amy.

My watch and chain to Amy.

My father's watch to Maud.

Furniture.

To Helen and Amy, if they leave Viewpark, they may take what they require, and the remaining to Maud, or sold if not wanted by her."

No provision was made in any testamentary writing for the upkeep of Viewpark, the truster's house at Row, after his death.

The truster was survived by his two daughters—(1) Maud Mary Hamilton or Cowan, who in 1898 had married John Marshall Cowan, M.B., and by her antenuptial contract of marriage conveyed all her estate, which then belonged to her or to which she might succeed during the marriage, to trustees; and (2) Amy Helen Hamilton, who was unmarried. He was also survived by his sister-in-law Mrs Helen Cathcart Hamilton or Smith. At the date of the truster's death the income from the truster's own funds, exclusive of funds belonging to his marriage-contract trust, which were not dealt with in the trust-disposition and settlement or other testamentary writings of the truster, was about £459.

Certain questions having arisen as to the truster's testamentary writings, a special case for their settlement was presented for the opinion and judgment of the Court.

The first parties were not concerned with the questions considered in the present report. The other parties to the special case were (2) the testamentary trustees, (3) Amy Helen Hamilton, (4) Mr and Mrs Cowan's marriage-contract trustees, (5) Mr and Mrs Cowan, and (6) Mrs Helen Cathcart Hamilton or Smith.

The questions of law dealt with in this report were—“(4) Did the testator validly bequeath an annuity of £200 to the sixth party, or otherwise are the portions of the testator's means bequeathed to his daughters effectually burdened with the payment of an annuity of £200 to the sixth party? (7) Is the memorandum of 1897 one of the operative testamentary writings of the deceased? (8) Has the testator validly directed his trustees to maintain the testator's house and establishment at Row out of the general funds of the estate for the benefit of the third and sixth parties and the survivor, and if so does the bequest lapse should the third party survive the sixth party and marry?”

Argued for the fourth and fifth parties—*On Question 4*—The letter of 24th February 1883 did not constitute a valid legacy in favour of the sixth party, but the words amounted only to a request or the state-

ment of a desire of the truster, and were not obligatory on his trustees without the consent of the truster's daughters. *On Question 7*—The memorandum of 1897 was an operative testamentary writing of the truster. It was a writing under the truster's hand, and came under the second purpose of the trust-deed. If the writing was holograph, subscription was not a necessary formality; it was merely evidence of completed intention. Here there was evidence of completed intention without the necessity of subscription—*Russell's Trustees v. Henderson*, December 11, 1883, 11 R. 283, 21 S.L.R. 204; *Crosbie v. Wilson*, June 2, 1865, 3 Macph. 870; *Burnie's Trustees v. Lawrie*, July 17, 1844, 21 R. 1015, 31 S.L.R. 841. Further, the truster had directed this holograph memorandum to be put up with his trust-disposition, and it should on this account be read into it—*Spiers v. Home Speirs*, July 19, 1879, 6 R. 1359, 16 S.L.R. 784.

Argued for the second parties—*On Question 7*—The memorandum of 1897 being unsigned was not operative as a testamentary writing of the truster. It was not initialed as in *Baird v. Jaap*, July 15, 1856, 18 D. 1246, nor was it written on a part of the trust-settlement, as in *Burnie's Trustees, supra*. It was merely an incomplete jotting. *On Question 8*—The direction to carry on the house at Row after the truster's death was too vague to be given effect to. No funds had been allocated by the truster for that purpose.

Argued for the third party—*On Question 7*—She concurred with the fourth and fifth parties. *On Question 8*—The letter of 24th February contained a valid direction to the trustees to maintain and uphold the truster's house at Row as it had been maintained in his lifetime for the benefit of the third and sixth parties or the survivor of them—Mrs Cowan having permanently left the house on her marriage—so long as they or the survivor should choose to live there, the expenses of maintaining the establishment being a general charge on the income of the truster's estate.

Argued for the sixth party—*On the Fourth Question*—She was entitled under the letter of 24th February 1883 to an annuity of £200 payable by the second parties, or alternatively by the truster's daughters as a burden on their inheritance, as from the date of the truster's death. *On the Seventh Question*—She concurred with the third, fourth, and fifth parties. *On the Eighth Question*—She concurred with the third party.

At advising—

LORD JUSTICE-CLERK—[*After considering questions not dealt with in this report*]—As regards the annuity of £200 to Mrs Smith, the words used by the testator are such as in my view to imply only an expression of personal wish, which he does not doubt that his daughters, if they succeed to the capital of his money, will be willing to give effect to. They do not, as I read them, import a gift by him to her.

and I would answer the fourth question throughout in the negative.

Upon the seventh question, I hold it to be clear that the memorandum cannot receive any effect, it being in no way authenticated as being the expression of the final will of the testator on the matters referred to in it. It is quite intelligible that when considering how he might dispose of specific articles belonging to him he might make out such a jotting, and although not then himself prepared to sign it as a final expression of his wishes, might desire to have it preserved as a draft forming a basis for final consideration at some future time, saving him from going over the whole details again. I cannot hold that by handing it to the custodian of his settlement to be put up with it he constituted it a part of his final expression of testamentary intention. To do so would be going beyond anything that has ever been done in the upholding of informal papers as testamentary documents. I would therefore propose to answer the seventh question in the negative.

The last question I have found somewhat difficult to answer satisfactorily, but giving it the best consideration I can, the conclusion I come to is, that the direction regarding the house at Row is so indefinite that it cannot be held to be effectual to entitle the trustees to apply the general funds of the estate to carrying it out, and therefore that the eighth question must be answered in the negative.

LORD TRAYNER—[After considering questions not dealt with in this report]—I think there was no valid bequest of an annuity of £200 in favour of Mrs Smith, nor any burden of such an annuity imposed on the shares of the daughters. There is the expression only of a wish that Mrs Smith should receive such an annuity. I do not of course base my opinion only on the form of expression used, because "I wish" may in many cases be equivalent to "I leave" or "I bequeath." But I proceed on two considerations which appear to me to show that in this case it was a wish merely on the part of Mr Hamilton, and not a direction or bequest. The first of these is the statement by Mr Hamilton that he did not think his daughters would "object" to this annuity being given, which implies a right to object on the part of the daughters, which if insisted in would be effectual. Now no such objection could have been offered if Mr Hamilton had made a bequest out of his own funds. But in the second place—and this is perhaps of more weight than what I have just stated—Mr Hamilton had left nothing out of which such an annuity could be provided. He had divided both the capital and income of his estate between his daughters, and therefore he left it to his daughters to say whether out of what he had bestowed on them they could or would give an annuity to Mrs Smith. The fourth question should therefore I think be answered in the negative.

The seventh question I would also negative. I know of no case where an unsigned memorandum like this by a testator has

been held to be good as a testamentary writing. That it was sent to his law-agent to be put up with his settlement only shows that he wanted it preserved in the meantime—it may be for further consideration. But it was never completed, and the informal writings which he desired by his settlement to be taken into account as expressing his testamentary intention were informal writings under his hand, which I take to mean subscribed by him, which this writing was not. What he desired to dispense with was formality of execution. But that will not cover non-execution.

The eighth question presents more difficulty to my mind than any of the others. Mr Hamilton had some wish apparently that his house and establishment should be maintained on some footing after his decease, but for whose benefit is not so clear. To some extent, no doubt, for the benefit of Mrs Smith, and also of an old servant. So far as words go the daughters (then both unmarried) were not considered, and no provision was made as to what should be done under a change of circumstances, such as would arise on the marriage of one or both of the daughters. On the whole, I consider this part of Mr Hamilton's letter to be too vague to be of any practical effect, and therefore I think the eighth question should also be negated.

LORD MONCREIFF—I agree in the way in which your Lordships have found the questions should be answered, and the reasons assigned for doing so. I find it unnecessary to add anything.

LORD YOUNG was absent.

The Court answered the fourth, seventh, and eighth questions in the negative.

Counsel for the Second, Fourth, and Fifth Parties—W. C. Smith. Agents—Forrester & Davidson, W.S.

Counsel for the Third and Sixth Parties—W. Campbell, K.C.—Tait. Agents—Fraser, Stodart, & Ballingall, W.S.

Friday, November 22.

SECOND DIVISION.

[Sheriff-Substitute at Fort-William.]

M'INTYRE v. THE LOCHABER DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF INVERNESS.

Reparation—Negligence—Road—Precautions for Safety of Public—Bridge with Insufficient Parapet—Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. c. 51), schedule (C), sec. 94—General Turnpike Act (1 and 2 Will. IV. c. 43), sec. 94.

The General Turnpike Act, section 94 (Roads and Bridges (Scotland) Act 1878, Schedule (C)) enacts that "the trustees of every turnpike road shall erect sufficient