

Rankine, February 7, 1849, 11 D. 543; *Nasmyth*, July 27, 1821, 1 Shaw App. 65; *Forsyth's Trustees*, January 18, 1854, 16 D. 343; *Baird v. Jaup*, July 15, 1856, 18 D. 1246; *Wilson's Trustees v. Stirling*, December 13, 1861, 24 D. 163; *Young's Trustees v. Ross*, November 3, 1864, 3 Macph. 10; *Fraser v. Forbes' Trustees*, January 3, 1899, 1 Fr. 513, 36 S.L.R. 469; *Campbell's Trustees v. Campbell*, January 30, 1903, 5 F. 366, 40 S.L.R. 335. Upon a careful consideration of the authorities I think that it must be held to be now settled law that a testator may by a formal testamentary disposition of his moveable estate prescribe the degree and manner of the solemnities (either in addition to or in diminution of what the law requires) which shall be necessary to confer testamentary effect upon writings by him either then existing or thereafter written by him, or, in other words, may appoint and declare the kind of written evidence by which his executors are to be guided in the distribution of his estate. The theory of the cases is, I apprehend, that the direction in the formal settlement communicates to the informal writings its own probative character. I am aware that a doubt has been authoritatively expressed (M'Laren's Wills and Succession, 3rd ed., pp. 290 and 293) as to the soundness of some of the decisions, and especially of *Wilson's Trustees* (*sup. cit.*). But accepting, as I apprehend I am bound to accept, the reported cases as being well decided, it appears to me that what I am asked by Mrs M'Fadyen's counsel to hold in this case is entirely beyond anything that has as yet been sanctioned in the law of Scotland. The question here is not as to informal or improbable writings, but as to the competency or the reverse of admitting to parole proof, or to a reference to Mrs M'Fadyen's oath, averments of alleged verbal instruction to that lady by the testatrix as to disposal of the residue of her estate. The old case of *Phin and Others* (*sup. cit.*) gives no support to Mrs M'Fadyen's contention. The decision there was plainly based upon the ground that the gentleman, the competency of whose oath was in question, was not merely executor but 'intrormitter and general disponee,' and having 'right to the residue of the effects.' (See Lord Ivory's note to *Ersk. Inst.*, iii, 9, 7). Here Mrs M'Fadyen's connection with the estate, so far as appearing upon the face of the written settlement, is purely official, and not that of a beneficiary. In other words, Mr Guthrie's evidence in *Phin's* case was in the nature of an admission; but that of Mrs M'Fadyen, if admitted here, would be in support of a claim. To allow proof or reference to oath of the averments in question would, in my judgment, amount or come dangerously near to an infringement of the cardinal rule of our law that a will must be in writing. This view appears to me to be strongly supported by the case of *Forsyth's Trustees* (*sup. cit.*), and also by the opinion of Lord M'Laren (Wills and Succession, 3rd ed. p. 1058).

"I am therefore prepared to negative the principal contention put forward by Mrs

M'Fadyen and by the Inspector of Poor respectively. But I think that the authorities go to show that these claimants are entitled to prove if they can by parole evidence nuncupative legacies in their favour respectively of £8, 6s. 8d. To this extent I think that their averments are relevant and may be competently admitted to probaton, unless the parties are prepared to agree upon the facts without the necessity of a proof. Another matter which would require investigation, unless it can be arranged by parties, is as to the soundness of the claim by Mrs Strathearn and others to be the heirs *in mobilibus* of Miss Turner. All that I can do at this stage appears to be to pronounce findings in conformity with the opinion above expressed, and to appoint the cause to be enrolled for further procedure."

The Lord Ordinary pronounced this interlocutor:—"Finds (1) that it is not competent to prove by parole evidence nor to refer to the oath of the claimant, Mrs Margaret Smith or Fadyen, the verbal instructions alleged to have been given to her by the testatrix as to the disposal of the residue of her means and estate; and that the said residue is therefore undisposed of by the testatrix and has fallen into intestacy; but (2) that the averments made by the claimants Mrs M'Fadyen and Robert Fraser respectively are relevant, and may competently be proved to the extent and effect of establishing a verbal legacy of the amount of £8, 6s. 8d. by the testatrix to each of the said claimants respectively: With these findings, appoints the cause to be put to the roll for further procedure, and reserves meantime all questions of expenses."

Counsel for the Pursuers and Real Raisers, and for the Claimants Mrs M'Fadyen and the Inspector of Poor of Inverary Parish—J. R. Christie. Agent—George Stewart, S.S.C.

Counsel for Claimant, the King's and Lord Treasurer's Remembrancer—Howden. Agent—W. G. L. Winchester, W.S.

Counsel for Claimants Mrs Strathearn and Others—J. M. Irvine. Agent—J. D. Boswell.

Wednesday, June 27.

SECOND DIVISION.

M'KENNA v. THE UNITED COLLIERIES, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1 (4)—Expenses of Unsuccessful Trial at Common Law and under Employers' Liability Act Deducted from Compensation—Expenses after Verdict Applied Allowed to Neither Party—Process.

A workman brought an action at common law and under the Employers' Liability Act, but containing no reference to the Workmen's Com-

compensation Act 1897, to recover damages from his employers for injuries sustained when in their employment. A jury returned a verdict for the defenders, whereupon the pursuer moved the Court to assess compensation under the Workmen's Compensation Act 1897. The motion was postponed, and renewed when the case was in the roll to apply the verdict. The defenders admitting liability, the Court applied the verdict, found the defenders entitled to expenses, and of consent found them liable in compensation under the Workmen's Compensation Act, but there being no evidence on which to assess the compensation, allowed a proof as to the amount. Thereafter parties having agreed as to the amount of compensation due, the defenders moved, under sec. 1 (4) of the Workmen's Compensation Act, to deduct from this their taxed expenses down to the date when the verdict was applied. The pursuer opposed this, and moved for his expenses since that date.

Held that the defenders were entitled to deduct from the award of compensation their expenses as taxed down to the date when the verdict was applied, and thereafter that no expenses were due to or by either party.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), section 1, (4), enacts—“If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act. . . .”

James M'Kenna, a bogieman, brought an action in the Sheriff Court of Lanarkshire at Hamilton against the United Collieries, Limited, his employers, to recover damages at common law or under the Employers' Liability Act 1880 for injuries sustained by him while in their employment. No reference was made in the record to any claim under the Workmen's Compensation Act 1897. The case was appealed for trial by jury, issues were allowed, and the case having been tried, a verdict was returned for the defenders. Thereupon the pursuer moved the Court under sec. 1 (4) of the Workmen's Compensation Act 1897 to assess compensation under that Act. The motion was postponed, and when the defenders enrolled the case to apply the verdict the pursuer again made the motion. The defenders while admitting liability under the Workmen's Compensation Act maintained that no evidence had been led

to enable the Court to assess the amount of compensation. The Court, holding that this was so, applied the verdict, dismissed the action, found the defenders entitled to expenses; further, of consent found that the injury to the pursuer was one for which the defenders were liable to pay compensation to the pursuer under the Workmen's Compensation Act, and allowed the pursuer a proof as to the amount of compensation. The defenders lodged an account of their expenses down to the date when the verdict was applied, and these were taxed at £187, 12s. 11d., for which sum decree in their favour was pronounced. Thereafter parties having agreed that the amount of compensation due was 12s. per week lodged minutes to that effect, and the case having been enrolled to give effect to this agreement, the defenders moved under sec. 1 (4) of the Workmen's Compensation Act to be allowed to deduct from the award of compensation their whole taxed expenses down to the date when the verdict was applied. The pursuer opposed and also moved for his own expenses since the date when the verdict was applied.

Argued for the defenders—None of the expenses of the jury trial were incurred in respect of any claim under the Workmen's Compensation Act, of which no mention was made on record. There had been no question fought which could only arise under that Act. The deduction should therefore be allowed—*Cattermole v. Atlantic Transport Company, Limited*, [1902] 1 K.B. 204.

Argued for the pursuer—The defenders should have admitted liability under the Workmen's Compensation Act before the expense of the trial had been incurred. The effect of deducting the taxed expenses of the defenders from the compensation would practically nullify the award of compensation. The words of sec. 1 (4) of the Act were permissive, and the Court should not at any rate deduct the whole of defenders' expenses—*Hoddinott v. Newton Chambers & Company, Limited*, [1901] A.C. 49, at 74; and *Cattermole (sup. cit.)* In any event pursuer should get expenses since the verdict was applied.

LORD JUSTICE-CLERK—As I tried this case I think it right to say that I considered then that the action was wholly uncalled for, and that there was no ground whatever for the proceedings taken by the pursuer for jury trial. He would have been much better advised if at the beginning he had been content to take his remedy under the Workmen's Compensation Act. It is a matter of discretion for the Court whether the expenses of an unsuccessful trial are to be deducted from a subsequent award of compensation. That is a wise provision of the Legislature, because there might be cases in which no such deduction should be made. But I do not think the Court should take a course which would result in this, that every workman in such cases would be able first to have an expensive jury trial, and then, if unsuccessful in that, to get an award of compensation without

being liable in any of the costs of the trial. If we decide this case in the way proposed by Mr Moncrieff it would just be to establish such a principle. I can see no ground whatever for not deducting from the compensation the expenses which have been caused by the pursuer bringing this action instead of proceeding under the Act.

As to the expenses incurred since the trial, this is a novel question, and the discussion which has taken place has been necessary in order that the point might be cleared up. On the other hand the pursuer did not lead any evidence at the trial in support of his claim under the Workmen's Compensation Act as he might have done. I think the proper course will be to deduct from the award of compensation the expenses to which the defenders have been found entitled down to the date when the verdict was applied, and to allow no expenses to either party since that date.

LORD KYLLACHY—I entirely agree.

LORD LOW—I am of the same opinion. The Legislature in the Workmen's Compensation Act conferred on workmen who were injured a very valuable right in the way of giving them compensation, and if a workman who is injured chooses not to take compensation to which he is entitled under that Act, but brings an action at common law with the object of obtaining a larger sum, it seems reasonable he should do so at his own risk.

It would be intolerable if the defenders had both to bear the expenses of successfully defending an action, and also had to pay large sums in compensation under the Workmen's Compensation Act. It seems to me that is just the kind of case which the provisions of section 1, sub-section 4, of the Act were designed to meet. I entirely agree with your Lordships.

LORD STORMONTH DARLING was absent.

The Court pronounced this interlocutor:—

“ . . . Decern against the defenders for payment to the pursuer of compensation at the rate of twelve shillings per week from 31st December 1904, in terms of the Workmen's Compensation Act 1897, under deduction of the sum of One hundred and eighty-seven pounds twelve shillings and eleven pence decerned for by interlocutor of 20th March 1906: *Quoad ultra* find no expenses due to or by either party.”

Counsel for Pursuer—M'Clure, K.C.—A. Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for Defenders—G. Watt, K.C.—Horne. Agents—W. & J. Burness, W.S.

Wednesday, June 27.

SECOND DIVISION.

[Sheriff Court at Glasgow.

COCHRAN & SON v.
LECKIE'S TRUSTEE.

Contract—Bankruptcy—Ranking—Preference—Invoice—Receipt Note—Goods in Custody of Bankrupt—Clause Printed in Invoice or Receipt Note that “All Goods Held in Trust Covered by Insurance against Fire”—Claim on Sum Recovered by Trustee in Bankruptcy from Insurance Company.

A miller who was insured against fire received hay to be cut, and sent in return receipt notes or invoices with the following clause printed on them:—“All goods held in trust covered by insurance against fire.” A fire having occurred, hay belonging to a customer was destroyed, and, the miller having become insolvent, the trustee on his sequestrated estate recovered from the insurance company the estimated loss by the fire.

Held (1) that the miller had undertaken to cover by insurance the risk which his customers ran of their goods being destroyed by fire while in his possession, and (2) that whether his customers' risks were or were not covered by the policies, the insurance company having paid, the customer was entitled to a ranking on the money recovered preferable to the general creditors.

Insurance—Fire Insurance—Goods in Custody of Insured—Policy Covering Property Held by Insured “in Trust or on Commission, for which he is Responsible.”

A miller who received from customers hay to be cut, was insured against fire by policies “on stock-in-trade the property of the insured, or held by him in trust or on commission for which he is responsible.”

Opinion per Lord Kyllachy that the policies might “quite well be read as constituting an insurance by the bankrupt, for himself and all others concerned, of the whole goods in his premises.”

This was an appeal from the Sheriff Court at Glasgow brought by Alexander Mitchell, C.A., Glasgow, the trustee on the sequestrated estate of Malcolm John Knox Leckie, who carried on business as a grain crusher and miller at 69 Finnieston Street, Glasgow.

Leckie's chief business consisted of crushing grain of various kinds and chopping hay belonging to customers. James Cochran & Son, grain merchants, Glasgow, were his customers, and occasionally sent hay to him for the purpose of cutting. Each invoice or receipt note received by them from Leckie bore the words “All goods held in trust covered by insurance against fire.” In form the invoices or receipt notes were similar to the following:—