

Saturday, November 21.

EXTRA DIVISION.

(Before Lord M'Laren, Lord Pearson, and Lord Dundas).

SPROT'S TRUSTEES v. SPROT AND OTHERS.

Succession—Testament—Holograph Writing—Validity—Holograph Codicil Headed "Rough," and Inconsistent with Other Testamentary Writings Admittedly Valid—Intention.

A testator left a trust-disposition and settlement and five codicils, all admittedly valid, which were in the custody of his law agents. Shortly after his death a holograph writing duly signed by him, but headed with the word "Rough," dated subsequent to the settlement but prior to the five codicils, was found in his repositories in a sealed envelope addressed to his agent, and tied up with a copy of the trust settlement. The writing in question was inconsistent both with the trust settlement and the first of the subsequent codicils, in none of which was there any mention of it, nor was its existence ever communicated by the testator to anyone. It was the testator's habit to make and keep drafts of all documents proposed to be written by him. These drafts were usually signed, and differed from the principals only in containing corrections and in being headed "draft," or "rough," or "rough draft." The testator was also in the habit of sealing all letters, however unimportant, before despatching them.

Held, in the circumstances, that the holograph writing was merely a draft of the testator's intention which he had subsequently departed from, and was not entitled to receive effect as a valid testamentary writing.

Mrs Charlotte Gertrude Cole or Sprot, widow of Lieutenant-General John Sprot, of Riddell, in the county of Roxburgh, and others, General Sprot's trustees (*first parties*); the said Mrs Charlotte Sprot as an individual (*second party*); Edward Walter Hearl Sprot and others, General Sprot's children by his third marriage (*third parties*); John Mark Francis Sprot, Esquire of Riddell, General Sprot's eldest son (*fourth party*); and Mrs Cecilia Sprot or Keith Murray, a daughter of General Sprot, and wife of Patrick Keith Murray, W.S., Edinburgh (*fifth party*), brought a Special Case to determine the validity of a holograph testamentary writing found in General Sprot's repositories.

General Sprot died on 19th March 1907 leaving a trust-disposition and settlement dated 4th January 1905, having five codicils annexed thereto, dated respectively 6th March 1905, 1st October, 8th November, and 18th December 1906, and 7th March 1907. The trust-disposition and codicils were all formally executed. They were prepared by

his law agents, Messrs Blair & Cadell, on his instructions, and immediately after execution were entrusted by him to them for safe keeping, and were retained by them till his death. By the last purpose of his trust-disposition and settlement, the testator appointed his eldest son John Mark Francis Sprot his residuary legatee, and by the 8th and 9th purposes he made over to him his whole furniture, horses, carriages, farm stocking, and implements. By the first of the five validly executed codicils dated 6th March 1905 the testator provided as follows:—"I direct my trustees to set aside a sum of £2000, and to hold the same for behoof of my wife Mrs Charlotte Gertrude Cole or Sprot, and the children of the marriage between her and me, in the same way and manner, and subject to the same conditions in all respects, as are provided with reference to the sum of £13,000 directed to be set aside for their behoof by the fifth purpose of my said trust-disposition and settlement."

On 28th March 1907, a few days after General Sprot's death, there was found in a drawer of a safe in the library of Riddell House a holograph writing by the testator in the following terms:—

5th February 1905,
Riddell, Lilliesleaf,
Roxburghshire.

"Rough"

As I now find that my son John Mark Francis has taken his business entirely out of Mr Patrick Blair's hands without having first let me know, and has placed his affairs in other hands, I deem it right to cancel his being my residuary legatee, and I hereby appoint my wife Charlotte Gertrude my residuary legatee in his stead, and I leave to her all those articles of furniture carriages horses &c. &c. detailed in the 8th and 9th purposes of my last will*. I also cancel all legacies to my married daughter Mrs Keith Murray.

* The residue to be placed in the hands of my trustees and ultimately to be divided between her three children in the same manner as detailed in my will for other money I have left them.
J. SPROT,

Lt. Genl.

The writing was contained in a sealed envelope addressed to Mr Patrick Blair, of Messrs Blair & Cadell, W.S., the member of the firm with whom General Sprot usually did business. It lay tied up with a copy of the trust settlement of 4th January 1905, which had been sent to the testator by his law agents on 7th January 1905. In the same drawer there were also found some correspondence (after referred to) between the testator and the fourth party, states of his agents' intromissions with his funds, a sum in cash, and a bundle of recent letters having no bearing on the case. None of the parties to the case, nor, so far as they were aware, any other person, was ever informed by the testator of the existence of the writing in question. His law agents had no knowledge of it. Nor did the testator ever refer to it when consulting them with

regard to the preparation of the five subsequent codicils annexed to the trust-disposition and settlement.

The case stated, *inter alia*—"4. In the event of the holograph writing of 5th February 1905 . . . not being held to be a valid testamentary writing of the testator, the fourth party will take benefit under the testator's testamentary documents . . . to the extent of the furniture, &c. in the mansion-house of Riddell, and the residue of testator's estate, which may ultimately amount to upwards of £10,000. . . .

"9. With reference to the opening statement in the said holograph writing of 5th February 1905, the parties hereto make the following explanation for the information of the Court. In or about the year 1882, the fourth party's grandfather disentailed a certain property, and in connection therewith a sum of £30,426 became payable to the fourth party as one of the next heirs of entail. This sum yields an income of £1500 or thereby to the fourth party. Previous to the fourth party coming of age on 12th November 1902, the testator had employed Messrs Blair & Cadell to take charge of the management and investment of this sum belonging to the fourth party. The testator had never spoken to the fourth party about his (the fourth party's) affairs previously, and the only difference made after the fourth party came of age was that the fourth party himself received his income personally, through Messrs Blair & Cadell, up to the time he transferred his business from them, as after mentioned. The fourth party, however, on 5th October 1904 wrote a letter to Messrs Blair & Cadell, informing them that, with a view to assisting his brother-in-law, Mr Patrick Keith Murray, W.S., the husband of his sister, the fifth party, he desired to arrange for the transfer of his business to Messrs Hope, Todd, & Kirk, W.S., of which firm Mr Patrick Keith Murray was then about to become, and is now, a partner. The fourth party's whole legal business consisted in the management and investment of his said separate capital. The fourth party's papers and business were accordingly transferred to Messrs Hope, Todd, & Kirk on 17th January 1905. The fourth party had not previously consulted the testator with regard to this matter, as the testator had not taken any concern with the independent means of the fourth party after he came of age, and the fourth party had not been in the habit of consulting with the testator regarding the same. The fourth party was never informed by the testator that he had been displeased by the transfer of the fourth party's business, nor was the matter ever referred to between them.

"10. The relations subsisting between the testator and the fourth party were throughout of an affectionate and cordial character, with the exception of certain disagreements which arose between them on a few occasions with regard to what the fourth party regarded as the undue favour shown to the children of the third marriage in comparison with the children of the testa-

tor's previous marriages, and which the fourth party in the letter after mentioned attributed to the influence of the second party. Some correspondence passed between the testator and the fourth party on this subject, and a part of this correspondence was found in the bundle of letters discovered in the safe. In consequence of a letter addressed by the fourth party to the testator on this subject in July 1904, the testator wrote out and executed a holograph will at North Berwick, dated 21st July 1904, whereby he left his whole estate to the second party and her children to the exclusion of the whole children of his two previous marriages. The testator did not inform his law agents or anyone else of the existence of this will, which was found by the second party after his death enclosed in a sealed envelope in a black box which the testator used to take with him when travelling. The envelope was addressed to 'Mrs Sprot, Riddell, Lilliesleaf, N.B.,' with the words 'North Berwick' on the left hand corner at the foot. An explanatory statement was written on this will to the effect that he had made the same as a precaution merely until he had cleared matters. The parties hereto are agreed that this will, if ever intended to be operative, was revoked by the testator's trust-disposition and settlement of 4th January 1905.

"11. Any disagreement which arose from time to time between the testator and the fourth party with regard to the matter referred to in the preceding article was of a temporary nature, and friendly relations were re-established. In particular, after the execution of the said holograph will of 21st July 1904, the fourth party was invited by the testator to stay with him at Riddell House in the following October, and he remained there on the best of terms for the rest of his leave from his regiment. During the year 1905, and after the execution of the said holograph writing of 5th February 1905, the fourth party resided at intervals at Riddell House with the testator when not on duty with his regiment, and during that time, and until the testator's death, they were on affectionate terms. During a considerable part of the summer of 1906, the fourth party had a company of his regiment, the Scots Greys, encamped at Riddell, and he himself and a brother-officer resided with the testator, who took the greatest interest in the manœuvres, and was very proud of the fourth party's position in the regiment. The testator also frequently discussed matters of family and estate business with the fourth party, and treated him in general as heir to his name and property. . . .

"12. Shortly before the death of the testator he caused the fourth party to be telegraphed for, and the latter, after his arrival at Riddell House, telegraphed for the other absent members of the family. The testator first called the fourth party to his deathbed and took an affectionate farewell of him, and thereafter the other members of the family in turn were called in individually.

"13. The said holograph writing of 5th February 1905, if effectual, would deprive his daughter, the fifth party, of the legacy of £2000 left to her by the testator in his said trust-disposition and settlement of 4th January 1905. The testator was always on the most affectionate terms with the fifth party, who frequently visited him and was welcomed as a daughter. The testator never expressed himself as in any way displeased with the fifth party, and he made an allowance of £150 a-year to her during his life, in terms of her marriage contract. The testator on several occasions stated to the fifth party that on his death she might expect to possess an income of not less than what she enjoyed during his life. The said provision of £2000, together with other sums falling to the fifth party in terms of her father's marriage contract, would place the fifth party in approximately the same position as before her father's death, but without it she would be in a decidedly worse position. The fifth party was at Riddell House at the time of the testator's death, and he then took leave of her most affectionately. . . .

"14. The testator was in the habit of making drafts of all letters and documents proposed to be written by him. He did not keep a letter-book, and was in the habit of keeping the drafts prepared by him. These drafts were usually signed, and differed only from the principals in containing deletions or corrections, or by being headed with the words 'draft,' or 'rough,' or 'rough draft.' Large numbers of these drafts were found after the testator's death locked away in his business room and elsewhere, tied up and docketed. He rarely destroyed any papers of any kind, and great quantities of letters, drafts of letters and documents, circulars, and valueless written and printed matter were found in his repositories after his death. The testator was also in the habit of sealing all letters, however unimportant, before despatching them. All his repositories were kept locked, and important and private letters were found there on his death mixed with valueless matter."

The second and third parties maintained that the holograph writing of 5th February 1905 was a valid testamentary writing. The fourth and fifth parties maintained that it was merely a draft, and not intended by the testator to take testamentary effect.

The question of law for the opinion of the Court was—"Is the said holograph writing of 5th February 1905 a valid testamentary writing of the testator?"

Argued for the fourth and fifth parties—The facts were unfavourable to the validity of this document. It was headed with the word "rough," which pointed to its being a mere draft, and was found mixed up with quite unimportant documents. It was inconsistent with the general settlement of the testator, and especially so with the provisions of the codicil of 6th March 1905. The fair inference from the facts was that it was merely deliberative and not final. In the case of *Forsyth's Trustees v. Forsyth*

March 13, 1872, 10 Macph. 616, 9 S.L.R. 367, a writing was held inoperative in circumstances more favourable to validity than here.

Argued for the second and third parties—The fair inference from the facts pointed to validity of the writing. The word "rough" was not sufficient to displace the presumption of final intention raised by the signature—*Lowson v. Ford*, March 20, 1866, 4 Macph. 631, per Lord Benholme, p. 640, 1 S.L.R. 227. Mere inconsistency with the general settlement was not enough to invalidate the writing as a testamentary document. The case of *Forsyth v. Forsyth* (*supra*) was overruled by *Whyte v. Hamilton*, July 13, 1881, 8 R. 940, 18 S.L.R. 676, aff. June 15, 1882, 9 R. (H.L.) 53, 19 S.L.R. 688. In *Scott v. Seales and Others*, February 5, 1864, 2 Macph. 613, a much more doubtful writing was held valid.

At advising—

LORD M'LAREN—The question put to us under this Special Case is whether a certain holograph writing under the hand of Lieut.-General Sprot of Riddell is "a valid testamentary writing of the testator?" The writing in question is dated 5th February 1905; it is printed in facsimile in the appendix to the case, and it is admitted to be holograph and to bear the signature of General Sprot.

According to the decision of the House of Lords in *Munro v. Coutts*, 1 Dow, 437, the question whether a particular writing is to be taken as "instructions" or as a paper in the nature of a testament, is a question of fact as to which parole evidence as well as written correspondence is admissible. In the present case we do not have parole evidence, but we have what is equivalent, the statements in the case of all the facts which were within the knowledge of the family of the deceased gentleman, and we have also the correspondence between General Sprot and his man of business, Mr Patrick Blair, W.S. We have therefore all the information before us which is necessary to enable us to arrive at a decision on the question in the case. Before I leave the case of *Munro v. Coutts* (which in some of its features bears a certain resemblance to the present case) I must call attention to two points in Lord Eldon's opinion which bear on the present case. Observing on the fact that Sir Hector Munro's paper was holograph and signed, his Lordship proceeded to say "that holograph writing and signature gave faith in Scotland was true, but still the question occurred, what was this paper? If it was not a will, its being holograph and signed did not alter its nature."

The other point, which is the subject of observation by Lord Eldon and also by Lord Redesdale, is, that in the case they were deciding, if the paper was only instructions, there was no sudden death nor accident to prevent the regular execution of a codicil. I may also notice that Lord Eldon, in commenting on the correspondence between Sir Hector and his solicitor regarding the holograph writing, uses this language—"It

signified nothing his calling it a codicil unless it really was one, nor his calling a scroll a deed if it was no deed."

Coming to the facts of the present case, we find that General Sprot left a regular trust-disposition and settlement, dated 4th January 1905, just a month preceding the date of the writing in dispute, and five codicils which are all subsequent in date to the writing in dispute.

The trust-settlement and five codicils were left by the testator with his agents for safe keeping and were produced by them after his death; as regards the writing in dispute (5th February 1905) its existence was not known to anyone, until it was discovered casually in a safe in the library at Riddell House a few days after General Sprot's death. It was contained in a sealed envelope addressed to his agents, and tied up with a copy of the trust settlement which we are told was sent to the testator on 7th January, three days after the execution of the principal deed. The drawer of the safe where this was found also contained miscellaneous correspondence and states of his agents' cash transactions and some money.

The next important fact regarding the writing of 5th February 1905 is that it is prefaced by the word "rough," which is written in a direction at right angles to the direction of the writing on the paper, the word "rough" being enclosed between an overline and an underline.

To explain the significance of this the parties have agreed on the statement in article 14, which I shall read at length, because every word of it is important to the question in issue—[*His Lordship read art 14, supra.*]

I now come to the contents of the writing of 5th February 1905. The substance of it is that, having found that his son had taken his business out of Mr Blair's hands without informing the writer, he deems it right to cancel his appointment as residuary legatee, and to appoint his wife residuary legatee in his stead. He also cancels all legacies to his married daughter Mrs Keith Murray. Then follows a further destination of the residue.

Viewed in the light of the admitted facts of the case, I interpret this act as meaning that General Sprot under a momentary feeling of irritation at what he conceived to be an unhandsome proceeding on the part of his son, had entertained the idea of depriving him of the benefit of his residuary estate, but that his sense of justice led him to mark this proposition with the word "rough," a word by which he was accustomed to denote that the paper was only a draft, or at least not a complete and final expression of his wishes.

Now what had really happened was that his son had given his law business to his sister's husband, a very natural thing in the circumstances, and I can hardly doubt that this was all cleared up to the father's satisfaction, because we are told in the case (art. 11) that any disagreement between father and son with regard to this matter "was of a temporary nature, and that

friendly relations were re-established." A will, if it be a will, speaks from the last moment of life; but then we must take it on the statement of the parties that this paper does not express the feelings of General Sprot towards his son in the later years of his life, and that these up to the time of his death were of the friendly and affectionate character which would mark the relations of a good father to a good son. In the absence of evidence to the contrary I should therefore conclude either that General Sprot after receiving his son's explanations thought no more about the paper in his safe, or that if he ever thought of it, he knew that he had marked it as a draft, and assumed that it would not be acted on. In either case the writing would not be effective as a will.

But we are not without evidence of the General's intentions at a period subsequent to the writing of 5th February 1905. By his first codicil, dated 6th March 1905, he directs his trustees to set aside a further sum of £2000 and to hold the same for behoof of his wife and the children of their marriage in the same way and manner, &c., as are provided with reference to the sum of £13,000 directed to be set aside for them by the fifth purpose of his trust settlement.

Now this gift of £2000 is absolutely inconsistent with the continued subsistence of the writing of 5th February, because by the terms of that writing his wife was appointed residuary legatee, and there could be no meaning in giving her £2000 out of what the lady already had. The gift of £2000 was just a month later in date than the writing of 5th February. It is, I think, conclusive evidence that the testator did not regard the writing of 5th February as an effective instrument. If we were at liberty to speculate as to his reasons, I should be inclined to think that he had then made up his mind not to have the writing of 5th February executed, but that not wishing to deprive his wife altogether of the additional benefit which he had contemplated, he made this addition of £2000 to her provision. The other codicils (which were all written by his agents and regularly attested) contain no reference to the writing of 5th February, which, as I have already observed, was never made known by the writer to anyone. For these reasons I am of opinion that the writing in question was only a draft or paper of instructions which was never acted on, and that the question in the case ought to be answered in the negative.

LORD PEARSON—I agree in all your Lordship has said.

LORD DUNDAS—I agree with what your Lordship has said, and if I add some words of my own it is only because I found the case an interesting one, and we had a full and satisfactory argument upon it. The fact that the holograph writing of 5th February 1905 bears on its face the word "Rough" (which we are told was commonly used by General Sprot as equivalent to "draft") is in itself sufficient to suggest

a question whether it was truly intended to be a testamentary writing. We must therefore consider the document not only on its own apparent merits, but also in such light as may be derived from surrounding facts and circumstances; and the statements in the Special Case are equivalent to the result of a concluded proof in regard to these matters. There are to my mind features in the case tending in favour of, as well as against, the validity of the document. It is holograph, dated, and signed, and was found after General Sprot's death in his locked safe, in a sealed envelope addressed to his law agent Mr Blair, and tied up within the fold of a copy of the testator's trust-disposition and settlement of 4th January 1905, which Mr Blair had sent him on the 7th of that month. These are by themselves important considerations, but I think their weight is far outbalanced by considerations pointing in the opposite direction. The writing in question is not the sole, nor the latest, testamentary effort of General Sprot; it is not a universal settlement; it bears merely to make certain alterations upon the formal universal disposition of his affairs made about a month before, and is succeeded by a series of codicils of greater or less importance. The settlement and the codicils I have referred to were all formally executed in close collaboration with his trusted law agent, and kept in that gentleman's custody. The existence of the writing of 5th February 1905 was never disclosed to Mr Blair, and the suggestion (somewhat faintly made) that this reticence may have arisen from some motive of delicacy appears to me to be inadequate. Further—and this I think is the most striking fact of all—the codicil of 6th March 1905, executed after anxious communication with Mr Blair, would be, to say the least, rendered meaningless if the writing of 5th February, only a month earlier in date, were to be held valid. Then the idea that General Sprot intended it to be effectual seems out of harmony with what is admitted as to his subsequent relations both with his son and his daughter Mrs Keith Murray. One must also bear in mind what we know from the Special Case of peculiarities in this testator's habits—his great favour for making and preserving all sorts of signed "drafts," his reluctance to destroy any papers, his practice of using a seal, and so forth. And one is struck by the fact that a holograph will dated 21st July 1904, though admittedly revoked, was never destroyed by General Sprot, but was found after his death in a box which he used to take with him when travelling, contained in a sealed envelope addressed to his wife. Other facts and features in the case might be adverted to, but those I have mentioned appear to me sufficient to warrant the conclusion at which I, in common with your Lordships, have arrived. I agree without difficulty in holding that the question put to us should be answered in the negative.

The Court answered the question of law in the negative.

Counsel for the First, Second, and Third Parties—Fleming, K.C.—Chree. Agents—Blair & Cadell, W.S.

Counsel for the Fourth and Fifth Parties—Blackburn, K.C.—Macmillan. Agents—Hope, Todd, & Kirk, W.S.

Wednesday, November 25.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

MOON v. MOON'S TRUSTEES.

Succession—Legitim—Discharge—Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. cap. 21), sec. 7.

In his settlement a testator, who died in 1876, declared that the provisions therein made for his children, and which were payable on the death of his widow, "shall be accepted of by them, and the same are hereby declared to be, in full of all legitim, portion natural, bairns' part of gear, executry, and all others whatsoever, which they or any of them can ask or demand by or through my decease, or by and through the death of their mother, or in any other manner of way." The widow having died domiciled in Scotland in 1907, a son who had accepted his provision under his father's settlement, claimed also, under the Married Women's Property Act 1881, legitim from his mother's estate which she had disposed of by will.

Held that the son's claim to legitim was not excluded by the above clause in his father's settlement.

Dunbar's Trustees v. Dunbar, December 4, 1902, 5 F. 191, 40 S.L.R. 146; *aff.* April 11, 1905, 7 F. (H.L.), 92, 42 S.L.R. 553, distinguished.

The Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. cap. 21), enacts, sec. 7—"After the passing of this Act, the children of any woman who may die domiciled in Scotland shall have the same right of legitim in regard to her moveable estate which they have according to the law and practice of Scotland in regard to the moveable estate of their deceased father, subject always to the same rules of law in relation to the character and extent of the said right, and to the exclusion, discharge, or satisfaction thereof, as the case may be."

On 28th January 1908, John W. Moon, 8 Abbotsford Park, Edinburgh, brought an action against Mrs Margaret Robertson Moon or Anderson, Edenfield, Fifeshire, and others, the trustees of the late Mrs Ann Moorhouse Stocks or Moon, widow of William Moon, Esq., of Edenfield aforesaid, for declarator that he was entitled to legitim out of the estate of his mother, the said Mrs Ann Moorhouse Stocks or Moon.

The following narrative is taken from the opinion of the Lord Ordinary (MACKENZIE)—"This is an action at the instance of John William Moon against his mother's