

make it right that the pursuer should have an opportunity of submitting the letter to a jury and putting the question to them whether in the whole circumstances these words convey a calumnious meaning or not. Of course the pursuer will require to put malice in the issue, as the letter complained of was admittedly a privileged communication.

LORD JUSTICE-CLERK—I concur in what your Lordships have said. I think it must be kept in view that when you read the words of the letter contained in the schedule they must be treated as if they were in the body of the issue. It is merely for convenience that the letter is put into the schedule, and therefore in reading the issue you must read it as containing the whole of the letter, and in particular the words, “I was greatly pained to find that a manager who had always been well treated was causing me loss by his inattention and lack of interest, and I was reluctantly compelled in the interests of my business to dismiss him.” Now taking it at the best for the defender, the fact that he sent this letter to his managers can only be explained by his having considered the conduct of the pursuer so serious that he must issue a warning to a large number of persons in the same position as the pursuer that they would be similarly treated if they were found acting as the pursuer was said to have done. I think that is a case that ought to be investigated and cannot be set aside on the ground of relevancy. I therefore think the pursuer must have an issue, and that it should read thus—“Whether on or about 8th April 1908 the defender wrote or caused to be written to the managers of the shops in the United Kingdom belonging to him a letter in the terms contained in the schedule hereto annexed; and whether the said letter or part thereof was of and concerning the pursuer, and falsely, calumniously, and maliciously represented that the pursuer had been guilty of such inattention and neglect of defender’s interests, as manager of the defender’s shop in Glasgow, that the defender had been compelled to dismiss him—to the pursuer’s loss, injury, and damage?”

LORD DUNDAS was absent.

The Court recalled the interlocutor of the Lord Ordinary, and approved the following issue:—“Whether on or about 8th April 1908 the defender wrote or caused to be written to the managers of the shops in the United Kingdom belonging to him a letter in the terms contained in the schedule hereto annexed; and whether the said letter or part thereof was of and concerning the pursuer, and falsely, calumniously, and maliciously represented that the pursuer had been guilty of such inattention and neglect of defender’s interests as manager of the defender’s shop in Glasgow that the defender had been compelled to dismiss him—to the pursuer’s loss, injury, and damage?”

Counsel for Pursuer (Reclaimer)—G. Watt, K.C.—Munro. Agents—Alex. Morison & Co., W.S.

Counsel for Defender (Respondent)—Morison, K.C.—Horne. Agents—J. & J. Ross, W.S.

Friday, June 4.

FIRST DIVISION.

CARMICHAEL’S EXECUTORS v.
CARMICHAELS.

Writ — Testament — Holograph — Will Partly Printed, Partly Holograph — Validity.

After the death of A there was found a document signed by him but not adopted as holograph, which was partly printed and partly holograph. In it he appointed executors and purported to deal with his estate after his death. The holograph portion, taken by itself, and leaving out all printed matter, was intelligible.

Held that the holograph portion of the document was a valid testamentary writing.

Macdonald v. Cuthbertson, November 14, 1890, 18 R. 101, 28 S.L.R. 92, *applied*.

Succession—Bequest—Validity—Construction—Holograph Writings—Liferent or Fee.

In a holograph testamentary writing which named executors, following the name of the testator’s widow, but without a governing verb, there came these words—“so long as she remains a faithful and dutiful wife, all my houses, lands, all money . . . musical instruments, except the piano, which is to become the property of I. my daughter. I desire, after the decease of my wife and myself, that the whole of the estate be divided as follows . . .” There followed a list of different amounts, or shares of remainder, “to be invested for” his six children. “My house . . . to be the equal property of all the six children . . . anyone may sell his or her share only to a brother or sister, and only by consent of the other members of the family . . . In the event of any one dying without issue, their money and property which they may receive from my estate must return and be equally divided amongst the brothers and sisters or the children of their families.”

Held (1) that a trust had been constituted to be administered by the executors; (2) that a liferent of the estate had been given to the widow, which liferent was not to be forfeited on re-marriage; and (3) that the rights and interests of the children vested *a morte testatoris*, the restrictions on the sale of the shares of the house, and the provision as to the return of the

shares of the estate of any children dying without issue, being ineffectual.

Robert Carmichael, of Rosybank, in the county of Berwick, and Robert Archibald Carmichael, residing at Eaglesheugh, Coldstream, executors-nominate of George Carmichael, sometime of Eaglesheugh, appointed by and acting under his last will and testament, dated 19th May 1907 (*first parties*); Miss Isabella Carmichael, the said Robert Archibald Carmichael, and George Laws Carmichael, being the three eldest children of the said deceased George Carmichael (*second parties*); Mrs Jane Clark or Carmichael, widow of the said George Carmichael (*third party*); Arthur John Carmichael, Alexander Carmichael, and Helen Carmichael, being the children of George Carmichael other than the second parties (*fourth parties*), presented a Special Case for the opinion and judgment of the Court on certain questions which had arisen among them as to the validity and interpretation of a will left by the said George Carmichael.

George Carmichael, sometime merchant in Coldstream, died there on 11th June 1908, possessed of both heritable and moveable estate to a considerable amount, including a house known as Eaglesheugh in which he resided. He was survived by his second wife, Mrs Jane Clark or Carmichael, and by six children, viz, Isabella, Robert Archibald, George Laws, and Arthur John, issue of his first marriage, and Alexander and Helen, issue of his second marriage. Isabella and Robert were at the date of this case of full age; the others were in minority. He left a will, partly printed and partly holograph (the printed words are in italics), in the following terms:—

"This is the last will and testament of me, George Carmichael, of Eaglesheugh, Coldstream, in the county of Berwickshire, 19th day of May in the year of our Lord 1907.

"I hereby revoke all wills and codicils heretofore made by me. I appoint Robert Carmichael (my brother), of Rosybank, in the county of Berwickshire, and Robert Archibald Carmichael (my son), of Eaglesheugh, in the county of Berwickshire, to be executors of this my will. I direct that all my debts, funeral and testamentary expenses, shall be paid as soon as conveniently may be after my decease.

"I give, devise, and bequeath unto Jane Carmichael (née Clark), as long as she remains a faithful and dutiful wife, all my houses, lands, all money that is or may become mine, also all stocks and shares, also all household furniture, wearing apparel, bed and table linen, printed books, plate in present use, china, glass, looking-glasses, jewels, clocks, watches, trinkets, prints, paintings, drawings, musical instruments, except the piano, which is to become the property of Isabella, my daughter. I desire at the decease of my wife and myself that the whole of the estate be divided as follows:—

"£1000 to be invested some home railway stock for Isabella Carmichael.

"£3000 to be invested in some home railway stock for Helen Carmichael.
"and the remainder be divided, all to be invested for them in some home railway stock.

"My house Eaglesheugh to be equal property of all the six children, the value of house and furniture being £1800; anyone may sell his or her share only to a brother or sister, and only by consent of the other members of the family. I appoint Robert Carmichael, my brother, to be my executor, along with Robert A. Carmichael, my son, and each of my sons on reaching 21 years to be added as executors; when my son Alexander reaches the age of 21 years my brother shall then cease to be my executor, but my four sons shall then be my only executors.

"(Signed) GEORGE CARMICHAEL.

"In the event of anyone of my children dying without issue, their money and property which they may receive from my estate must return and be equally divided amongst the brothers and sisters or the children of their families.

"(Signed) GEORGE CARMICHAEL."

The first parties maintained that the said document was a valid and effectual settlement of the deceased's whole estate, and that a trust had been constituted in their persons to hold and administer the same for the purposes of the said settlement as the same might be declared by the Court.

The second parties maintained that the said document was invalid in respect that it was neither holograph nor tested and could not receive effect, and that accordingly the said George Carmichael died intestate. They maintained, *separatim*, that the only interest conferred on the third party by said will was a liferent of the property specifically mentioned in the bequest to her, said right being terminable on the re-marriage or death of the third party, whichever should first happen, and that the fee of the estate vested *a morte testatoris* in the second and fourth parties according to the respective extents specified in the will. They further maintained that the restrictions sought to be put on the beneficiaries' power of sale of their interest in Eaglesheugh and the furniture therein were invalid and of no effect, as also that the provision for the return of a beneficiary's share in the event of his or her death without issue was invalid and of no effect.

The third party maintained that the said will was valid and effectual and that it gave to her absolutely the whole means and estate of her deceased husband. Alternatively she maintained that she was entitled to have delivered to her the whole corporeal moveables, other than household furniture, enumerated in the will, and *quoad ultra* to enjoy the liferent of the whole trust estate.

The fourth parties maintained that the said settlement was valid, and that the effect thereof was to give a liferent of the testator's whole estate to the third party so long as she should remain his widow, and that subject to the said liferent the

said estate had vested in them absolutely a *morte testatoris* in the shares and proportions specified in the said settlement.

The whole parties were agreed that the raising and determining of the questions appended to this Special Case should not affect or prejudice any right competent to any of them to reject their provisions under the will of the said deceased George Carmichael, and claim their legal rights in his estate. In the event of the Court answering the fourth question in the affirmative, the third party was willing, notwithstanding the express conveyance in her favour in the said last will and testament, that the first parties should be authorised to hold and stand possessed of the whole of the trust estate and administer the same for the purposes of the settlement.

The *questions of law* for the opinion and judgment of the Court were—“1. Is the said last will and testament a valid settlement of the whole estate of the said George Carmichael? 2. In the event of the first question being answered in the affirmative, has a trust been constituted in favour of the first parties to hold and administer the estate in terms of the said settlement? or, Is their duty confined to realising and ingathering the estate and distributing the same? 3. Is the third party entitled absolutely to either (a) the whole estate of the deceased George Carmichael, or (b) the corporeal moveables other than household furniture as enumerated in the will? or 4. Is she merely entitled to a liferent of the said estate terminable (a) on her death, or (b) on her re-marriage or death, whichever shall first happen? 5. Have the respective rights and interests of the second and fourth parties in the estate of the said deceased George Carmichael vested in them a *morte testatoris*? or 6. Is vesting postponed till (a) the death of the third party, or (b) her re-marriage or death, whichever shall first happen? 7. Are (a) the restrictions on the sale of the shares of Eaglesheugh and the furniture therein, or (b) the provision as to the return of capital on a child's death without issue, valid and effectual?”

Argued for the third party—(1) The will was valid and effectual. The essential parts were written, and there was a written appointment of executors—Bell's Prin., sec. 20—and this distinguished the case from *Macdonald v. Cuthbertson*, November 14, 1890, 18 R. 101, Lord Adam at p. 106, Lord Kinnear at p. 108, 28 S.L.R. 92. (2) Assuming the will was valid there was an absolute gift to the wife. Actual words of gift were not necessary. In any case she was entitled to a liferent.

Argued for the second parties—(1) They did not dispute the law as stated in Bell's Prin., section 20. No doubt the writing was testamentary, but they maintained that striking out the printed words the will was unintelligible, and if so *Macdonald v. Cuthbertson* (*cit.*) applied, and it must be held invalid. (2) Even assuming the will were valid the gift to the widow was restricted to a liferent—*Jamieson's Trustees v.*

Jamieson, December 7, 1899, 2 F. 258, 37 S.L.R. 194—and that terminable on re-marriage. “So long as she remains a faithful and dutiful wife” would otherwise have no effect.

Argued for the fourth parties—There was a valid will at any rate from the words “I desire.”

LORD PRESIDENT—The questions put here to your Lordships arise out of a document left by the late George Carmichael, which is partly printed and partly written in his own handwriting, and signed by his name in his handwriting. The first question of course is whether the document is of a testamentary character. As to that I do not think there can be any doubt. Indeed, nothing more would be needed for that than the fact that it contains an appointment of executors. The document being partly printed and not having been attested, it is only to be accepted as holograph in so far as the writing is holograph, because I take it that your Lordships are bound by and agree with the case of *Macdonald* (18 R. 101) decided in this Division. But cutting out the words which are here in print, I think there is still enough to make a perfectly good and intelligible will. There is no question that so far as the bequest of property to the children is concerned there is even a grammatical will, because he says, “I desire at the decease of my wife and myself that the whole of the estate be divided as follows.” He then describes the way in which it is to be divided, and then he appoints executors, and that is enough. Now, besides that we have the mention of the wife's name, and then without actual words of bequest—that is to say, without any verb which governs the substantives—comes an enumeration of all his property with the one exception of a piano, which is to become the property of “Isabella my daughter,” and then follows the phrase, “I desire at the decease of my wife and myself that the whole of the estate be divided as follows.” That seems to me just to be in the same category as the class of bequest which we have often given effect to, where a person leaves a document which is obviously testamentary, and leaves a set of names with figures of money opposite them. Reading the whole document here, I have no doubt that there is a perfectly good bequest in favour of the wife. Well, the next question is, What is the bequest to the wife? I think there can be no doubt that the bequest is a liferent, because this enumeration of the articles which she is to have, which is his whole property, is immediately followed by a distribution of his estate at the decease of his wife and himself, and when he comes to deal with the executors there is an obvious provision for a continuance of the executy during a more or less prolonged period. Accordingly, I think the wife here takes a liferent and a liferent only. “So long as she remains a faithful and dutiful wife” has been argued to us by one party as meaning that she is to forfeit her liferent if she marries.

I do not think the words will bear that meaning. Accordingly I think the questions ought to be answered as follows:—The first in the affirmative; the second in the affirmative of the first branch and the negative of the second; the third in the negative; the fourth to the effect that the widow is entitled to a liferent of the estate, not to be forfeited by re-marriage; the fifth in the affirmative; the sixth in the negative; and the seventh in the negative.

LORD KINNEAR—I agree upon all the points.

LORD GUTHRIE—I also concur. This case seems to show, as previous cases of the same kind have shown, that when such forms are used they should either be attested or should be written over so as to be entirely holograph, or they should be adopted as holograph.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court answered the first question in the affirmative; the second question in its first branch in the affirmative and in the second branch in the negative; the third question in the negative; the fourth question to the effect that the widow took a liferent not to be forfeited on re-marriage; the fifth question in the affirmative; and the sixth and seventh questions in the negative.

Counsel for the First and Fourth Parties—Macphail. Agents—H. & H. Tod, W.S.

Counsel for the Second Parties—Hon. Wm. Watson. Agents—J. & J. Turnbull, W.S.

Counsel for the Third Party—Carnegie. Agents—Tods, Murray, & Jamieson, W.S.

Friday, June 11.

SECOND DIVISION.

[Lord Skerrington, Ordinary.]

RAMSAY v. SPENCE.

Prescription—Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 34—“Ex facie Valid Irredeemable Title”—“Appropriate Register”—Disposition of Burgage Subjects in Form Applicable to Feudal Subjects Recorded in Particular Register of Sasines for County.

A disposition of heritage, in form applicable to feudal subjects, was recorded in 1866 in the Particular Register of Sasines for the County, and possession followed thereon.

Held in 1909 that the disposition was an *ex facie* valid irredeemable title habile to found prescription, and that any inquiry whether prior to the disposition the subjects were held burgage, and whether the disposition ought not therefore to have been recorded in the burgh register, was excluded by section 34 of the Conveyancing (Scotland) Act 1874.

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), enacts—Section 34—“Any *ex facie* valid irredeemable title to an estate in land recorded in the appropriate Register of Sasines shall be sufficient foundation for prescription. . . .”

In December 1907 George Ramsay, heritable proprietor of Blackness Inn, Linlithgowshire, raised an action in the Sheriff Court at Linlithgow against Edward Spence, concluding for declarator that a piece of ground occupied by the pursuer as a stable and yard, and adjoining Blackness Inn, belonged to him as part and pertinent of Blackness Inn.

The pursuer averred that he was infett in the subjects known as Blackness Inn, conform to disposition in his favour by Andrew Gilmour, dated 23rd May, and recorded in the General Register of Sasines applicable to the county of Linlithgow on 3rd June 1907; that the subjects were acquired by Andrew Gilmour from Alexander Kirkwood, conform to disposition dated 11th, and recorded in the New Particular Register of Sasines, &c., for the sheriffdoms of Edinburgh, &c., on the 19th, both days of December 1866; that the fore-said piece of ground was included as part and pertinent of Blackness Inn, and that it had been possessed by him and his authors as such part and pertinent for more than twenty years.

The defender averred that prior to 1866 the subjects known as Blackness Inn formed part of the common property of the royal burgh of Linlithgow; that the tenure was free burgage; that the property was acquired by the said Alexander Kirkwood from William Wood, trustee on the sequestrated estates of the royal burgh of Linlithgow, conform to disposition (following on sale by public roup) dated 12th, and recorded in the Particular Register of Sasines for Edinburgh, &c., 21st November 1866; that the disposition was a conveyance of lands held burgage and falling to be recorded in the Burgh Register of Sasines for Linlithgow in terms of the Act 1681, cap. 13 (11), and subsequent statutes, and that not having been so recorded the said disposition and writs following thereon were not valid titles on which to found prescriptive possession. The defender also denied the pursuer's prescriptive possession.

The disposition in favour of Alexander Kirkwood was in these terms—[*After narrating the sale by public roup*]—“Therefore I, the said William Wood, as trustee fore-said . . . do hereby dispone to and in favour of the said Alexander Kirkwood and his heirs and assignees whomsoever, heritably and irredeemably, all and whole the tenement of houses called and known by the name of the Blackness Hotel, with the garden ground on the south side thereof, and the vacant ground on the north side thereof so far as I as trustee foresaid have right thereto, with the pertinents of the said subjects and others, and my whole right, title, and interest, present and future, therein: And which lands are situated in the village of Blackness in the parish of Carriden and county of Linlithgow: But