

pronounce, and for the reasons explained by Lord Mackenzie. I am unable to agree with the view of the Lord Ordinary that the evidence justifies the conclusion that this young man acquired a domicile of choice in Scotland. It appears, however, that he acquired a derivative domicile from his mother when she returned to her native country after she became a widow, and it is not proved that he ever abandoned that domicile. Accordingly when he became a lunatic his domicile was in Scotland.

The Court adhered.

Counsel for the Defenders and Claimants (Reclaimers)—Macphail, K.C.—C.H. Brown. Agents—Mackenzie & Kermack, W.S.

Counsel for the Claimants Mrs Mahon and Others (Respondents)—Christie, K.C.—Garson. Agents—Balfour & Manson, S.S.C.

Counsel for the Pursuer and Real Raiser—Inglis. Agents—Robson & Maclean, W.S.

Saturday, March 16.

FIRST DIVISION.

LOTHIAN'S TRUSTEES v. MACEWEN AND ANOTHER.

Succession — Testamentary Writings — Revocation — Restoration by Subsequent Codicil of Bequest Expressly Revoked by Prior Codicil.

A testator having left a legacy of £5000 to a legatee in his will, revoked that legacy in a codicil and gave that sum to another legatee. By another and later codicil the testator bequeathed £2000 to the original legatee, and stated "This is in addition to any legacy mentioned in my will and codicils." At the time of writing that codicil the testator was not in possession of his will and the earlier codicils, and the legatee to whom the revoked legacy had been given was alive. *Held* that the original legacy of £5000 had not been restored by the subsequent codicil making the bequest of £2000.

Best v. University of Edinburgh, 1880, 8 R. 66, 18 S.L.R. 45, distinguished.

Philip Francis Wood, K.C., and another, the testamentary trustees of the late Maurice John Lothian, *first parties*, Brigadier-General Maurice Lilburn MacEwen, C.B., *second party*, and Alfred Henry Back, M.D., *third party*, brought a Special Case for the determination of questions arising out of the testamentary writings of Maurice John Lothian, who died on 15th January 1917, leaving a trust-disposition and settlement dated 9th December 1898 and various codicils.

The *trust-disposition and settlement* conveyed the testator's whole estates to the first parties for various purposes, including the payment of debts, expenses, and legacies to his trustees and certain of his servants, and after giving the *liferent* of the whole residue of his estate to his mother (who

predeceased him) provided as follows:—“(Fourth) That my trustees shall, at the first term of Whitsunday or Martinmas that shall occur three months after the death of my said mother should she survive me, or at the first term of Whitsunday or Martinmas that shall occur three months after my death should my said mother have predeceased me, pay, free of legacy duty or other Government duty, the following legacies to the persons and institutions after mentioned, viz. To Doctor Alfred Henry Back of Reepham, Norfolk, the sum of five thousand pounds. . . .”

A *codicil dated 9th September 1901* provided—“I, Maurice John Lothian, before designed, hereby recal the legacy of five thousand pounds hereinbefore bequeathed to Doctor Alfred Henry Back of Reepham, Norfolk: And I hereby bequeath the sum of five thousand pounds, free of legacy duty or other Government duty, to my cousin John William Macfie of Rowton Hall, Chester, or his heirs, payable at the first term of Whitsunday or Martinmas that shall occur three months after my death.”

A *codicil dated 11th November 1907* provided—“I bequeath the sum of two thousand pounds sterling, free of legacy duty, to Doctor Alfred H. Back, residing at Acle, Norfolk. This is in addition to any legacy mentioned in my will and codicils.”

The Case set forth—“1. [The trust-disposition and settlement and various codicils, including the codicil of 9th September 1901] were prepared by [the testator's] agents, Messrs Fraser, Stodart, & Ballingall, W.S., and remained in their custody from the date of their execution, and were at no time in the possession of the testator. The [other] codicils are holograph of the testator. At an interview which the testator had at his house on the day of his death with his agent Mr Ballingall, W.S., he gave Mr Ballingall to understand that there were certain codicils to his trust-disposition and settlement in the safe in his dressing-room which he desired Mr Ballingall to look at, and as desired by him Mr Ballingall went to the safe and found in a drawer in it the two [holograph] codicils [dated 7th October 1911]. The testator inquired if these codicils were in order, and Mr Ballingall informed him that they were, and by deceased's desire he took possession of them. The [other holograph] codicils were found after the testator's death in another compartment of the said safe tied up with certain other documents. Each of the holograph codicils was written on a separate sheet of the testator's private notepaper. The testator left about £120,000. 2. . . . By the fifth purpose of his trust-disposition and settlement the testator directed his trustees to make over the whole free residue and remainder of his means and estate to [the second party], whom he nominated as his residuary legatee, whom failing to his heirs. . . . 3. [The] codicil of date 9th September 1901 was one of the testamentary writings which remained in the custody of [the testator's] agents. [The] codicil dated 11th November 1907 was one of the holograph writings found in [the testator's] safe after his death. No

will other than the said trust-disposition and settlement was executed by the testator, and no other codicil has been found containing any legacy to [the third party]. 4. There were also found in the testator's repositories after his death a series of unsigned rough holograph jottings by the testator, partly in ink and partly in pencil, consisting of, *inter alia*, notes of his testamentary dispositions, the amount of his estate, and the Government duties chargeable thereon. They are somewhat confused in form and contain many revisals consisting of deletions, alterations, and additions corresponding in most but not in all cases with alterations effected on his testamentary writings by the various codicils above referred to. In these jottings the legacy of £5000 to [the third party] occurs twice. In both instances the entry is deleted in ink, and this note is added 'Cancelled 9th Sept. 1901.' In one instance one of the deletion marks also runs through the cancellation note. The jottings also contain in four places a note of a legacy of £1000 to [the third party], one of these notes being deleted. No bequest to [the third party] of £1000 is contained in any of the testamentary writings before referred to, and it is not known whether there was extant at any time a codicil containing a bequest to [the third party] of that sum. The jottings also contain a note of the legacy of £2000 to [the third party], which is not deleted. Owing to the confused form of these jottings it is impracticable to reproduce them in print, but they have been lodged in process, and are referred to by the parties as forming part of this case."

The first parties offered no contention.

The second party contended—"That the said legacy of £5000 bequeathed to the third party in the said trust-disposition and settlement having been revoked by the codicil of 9th September 1901, the third party is not entitled to claim payment of that legacy; and that as no legacy is given to him in any of the other existing testamentary writings of the testator except the legacy of £2000 bequeathed in the codicil of 11th November 1907, he is entitled only to that legacy of £2000."

The third party contended—"That the said legacy of £5000 falls to be paid to him in addition to the legacy of £2000. In writing the codicil of 11th November 1907 the testator had in view that his will and codicils mentioned a legacy in favour of this party which legacy he desired should be paid. That legacy was the legacy which still appears in his trust-disposition and settlement of 1898. On a sound construction of the said codicil of 11th November 1907 it reinstated the third party to the benefit of the legacy of £5000 mentioned in the trust-disposition and settlement and annulled the revocation thereof contained in the codicil of 9th September 1901."

The question of law was—"Is the third party entitled to the legacy of £5000 bequeathed to him in the said trust-disposition and settlement in addition to the legacy of £2000 bequeathed to him in the said codicil of 11th November 1907?"

Counsel for the second party referred to the following:—*In the Goods of Steele*, 1868, L.R., 6 P. & D. 575, per Sir J. P. Wittle at p. 579; *Best v. University of Edinburgh*, 1880, 8 R. 66, 18 S.L.R. 45.

Counsel for the third party referred to the following additional authorities:—*Jordan v. Fortescue*, 1847, 10 Beavan 259; *in re Rowe*, [1898] 1 Ch. 153; *M'Leod v. M'Nab*, [1891] A.C. 471, per Lord Hannen at p. 475; *in the Goods of Chilcott*, [1897] P. 223, per Gorell Barnes, J.

LORD PRESIDENT—This case is, I think, clearly distinguishable from the case of *Best v. University of Edinburgh*, 1880, 8 R. 66, 18 S.L.R. 45, which has been quoted to us as a direct authority in favour of the third party. I do not for a moment doubt that there might have been in the codicil before us such reference to the legacy to Dr Back provided by the testator in the fourth purpose of his settlement as would have had the effect of reviving that bequest, which had been recalled by the codicil of 9th September 1901. But the codicil of 11th November 1907 in express terms bequeaths only £2000 to Dr Back. We are asked to interpret it as conferring a legacy of £7000 because the words are added "This bequest is in addition to any legacy mentioned in my will and codicils." Now there is no subsisting legacy mentioned in the will and codicils, and therefore there is nothing to add to the £2000, and the £2000 therefore alone remains. The natural and obvious meaning of the words I have just read is "if there be any legacy in the will and codicil"—and the testator may well have forgotten whether there was or not—"it is not to affect this legacy of £2000, and the £2000 is not to be regarded as a substitute therefor." If that be the obvious meaning, as I think it is, I see no ground for the claim of the third party, and I propose to your Lordships that we should answer the question in the negative.

LORD JOHNSTON—There are two extraneous or surrounding circumstances in this case, and two only, which I think it is competent for the Court to look at. The first of them is that in 1907, the date when the testator wrote the codicil in question, he was not, and it is admitted had never been, in possession of his original will and the earlier codicils which had been prepared for him by his solicitors and retained by them after execution. That circumstance, I think, explains his use, in a later codicil written by himself, of the somewhat indefinite term "any legacy mentioned in," indicating that he was not perfectly certain what he had done in his previous formal deeds.

The second is this, that the gentleman whose name is John William Macfie, of Rowton Hall, Chester, was in 1907, and still is, alive. I think that that is important for this reason, that one must keep in mind the terms of the intermediate codicil, namely, that of 1901, written nearly three years after the date of the settlement itself, because that intermediate codicil is not merely a revocation, it is a transfer of the legacy to

somebody else. Therefore, as John William Macfie was alive in 1907 and was alive at the date of the testator's death, the result of resurrecting the bequest to Dr Back recalled in the codicil of 1901 would be quite different from the result of resurrecting it if the codicil of 1901 had been a mere revocation and nothing else, because it would be left in doubt whether the whole of the codicil of 1901 was to be revoked or only that part of it which was itself a revocation.

Looking, then, at the codicil of 1907 itself, I think that one gets a perfectly simple explanation of its intention from the words used. The testator says—"I bequeath the sum of £2000 . . . in addition to any legacies mentioned in my will and codicils." If he had intended to do anything more than merely give the £2000 I think he would not have used the simple word "mentioned." If he had said "bequeathed," it would have been different. I think that the explanation of the word "mentioned" is this, that writing as a layman he wanted to make it quite clear that this new legacy of £2000 was something quite different from and independent of anything that he had already given in his testamentary writings, and that he was not in the least thinking, by these words, of making any alteration in what he had done before. It was unnecessary, as we know; but it was probably not unnecessary from his point of view. He may have desired to make it quite clear that this £2000 was not to fall under any revocation, that it was not mixed up with anything he had done before, but that it was a new legacy.

Under these circumstances I have no difficulty in holding that it is a good legacy by itself, but that the codicil does nothing to alter any other testamentary direction which the testator had given.

LORD MACKENZIE—I am of the same opinion. I do not think that the terms of the codicil of 11th November 1907 are sufficient to revive the legacy of £5000 to Dr Back in the original settlement dated 9th December 1898, which legacy had been revoked by the codicil of 9th September 1901.

LORD SKERRINGTON—I am unable to discover in the codicil of 1907 any words which indicate an intention to bequeath a legacy of £5000 in addition to the legacy of £2000 therein mentioned. I accordingly agree with your Lordships.

The Court answered the question of law in the negative.

Counsel for the First Parties—R. C. Henderson. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for the Second Party—Moncrieff, K.C.—Leadbetter. Agents—Macpherson & Mackay, W.S.

Counsel for the Third Party—Constable, K.C.—Ingram. Agent—Daniel Tudhope, Solicitor.

Thursday, March 28.

FIRST DIVISION.

[Lord Salvesen, for Lord Dewar, Ordinary.]

RICKINSON, SONS, & COMPANY
(MANAGING OWNERS OF S.S.
"ARACHNE") v. **SCOTTISH CO-
OPERATIVE WHOLESALE SOCIETY,
LIMITED.**

*Ship — Affreightment — Bill of Lading —
Demurrage — Construction — Delivery as
Fast as Vessel can Deliver, any Custom of
the Port notwithstanding — Delay from
Causes beyond Receiver's Control.*

Bills of lading, dated 9th November 1915, provided—"Cargo to be received at destination as fast as vessel can deliver during ordinary working hours, any custom of the port to the contrary notwithstanding." The discharge of the grain cargo carried by the ship was delayed beyond the period in which, so far as the circumstances existing at the time and place affected the ship, discharge should have been completed. The delay was due to shortage of labour, a circumstance over which the receivers, who were the charterers and holders of the bills of lading, had no control. At the time the receivers had other grain cargoes in the port which they were discharging, which discharge absorbed some of the labour then available in the port. In an action by the ship for demurrage, *held* (rev. Lord Salvesen, *dis.* Lord Johnston) (1) that the obligation upon the receivers to take delivery was not absolute and measurable solely by the ship's ability to deliver, but that under the clause in question the circumstances existing at the time and place, in so far as they affected the receivers of the cargo, fell to be taken into consideration; (2) that under the circumstances the receivers had done their utmost to take delivery as fast as possible; (3) that the receivers were not liable in demurrage for the delay, as it was caused by circumstances beyond their control both in so far as it was caused by shortage of labour and by the fact that other grain cargoes for the receivers had arrived and were being discharged when the ship in question was in a position to discharge: *defenders assolizied.*

Rickinson, Sons, & Company, managing owners of the s.s. "Arachne," *pursuers*, brought an action against the Scottish Co-operative Wholesale Society, Limited, *defenders*, concluding for decree for £2625 in name of demurrage.

The *pursuers pleaded, inter alia*—"1. The defenders as charterers of the said vessel, *et separatim* as holders and endorsees of the said bills of lading, having failed to take delivery of the cargo in terms of the said charter-party and bills of lading as fast