*Thursday, July 6.*

## SECOND DIVISION.

(Before Lord Justice-Clerk Moncreiff, Lords Young and Rutherfurd Clark).

[Lord Lee, Ordinary.

### BANKES *v.* BANKES' TRUSTEES AND OTHERS.

*Succession—Testament—Codicil—Revocation.*

A testator possessed of large property, heritable and moveable, in England and Scotland, left two separate testamentary settlements, one of which was an English deed, and dealt exclusively with property real and personal in England, and the other a Scots deed dealing exclusively with property heritable and moveable in Scotland. Three of the seven trustees and executors in the Scots settlement were trustees and executors also in the English one, but the purposes of the two deeds were distinct. *Held*, on construction of the terms of a "codicil to the last will and testament" of the testator, that a revocation therein expressed of rights conferred on certain persons by the two preceding instruments applied to the whole rights, heritable and moveable, Scots and English, contained in both deeds

Meyrick Bankes, Esq. of Winstanley, Lancashire, and Letterewe and Gruinard in the county of Ross, died at Liverpool on 16th June 1881, survived by his wife, and by two sons and four daughters. Besides large heritable estates in England and Scotland, he was possessed of a considerable amount of moveable property in both countries. He left the following completed testamentary writings:—(1) A trust-disposition and settlement dated 18th June 1870; (2) a last will and testament in the English form dated the 17th February 1877; and (3) a holograph codicil dated 21st January 1880. The first-mentioned deed dealt only with his property, heritable and moveable, in Scotland. The second dealt exclusively with his English property, real and personal. By the former deed—which may be called the Scottish will—he conveyed his whole heritable property in Scotland to his wife and two other persons as trustees for certain purposes. In the same deed he also specially assigned to the trustees certain moveable property, more particularly specified under separate heads, showing a clear intention of separating not only heritage but moveable property situated or secured in Scotland from similar property situated or secured in England. The trustees were also nominated executors in so far as respected moveable property in Scotland. The first purpose of the trust in the Scottish will directed payment of debts due to all persons domiciled in Scotland, and the second made provision for his widow. The third made a special bequest of "a ball-room purse, with my coat-of-arms thereon, to Thomas Holme Bankes, my second son, or in case of his decease to the next heir of entail, in order that it might descend as an heirloom with the entailed estates of Letterewe." The fifth purpose was as follows:—"I direct my said trustees, as soon as convenient after my death, to execute a deed of entail conveying and settling the said estates before described, or any other lands in Scotland belonging to me at my death, to and in favour of the said Thomas Holme Bankes, my second son, and the heirs whatsoever of his body; whom failing, to Mrs Maria Ann Bankes or Macdonald, my second daughter, wife of Colonel William Charles Robertson Macdonald, and the heirs whatsoever of her body; whom failing, Mrs Ada Jane Bankes or Anderson, my third daughter, wife of the said Captain William Anderson, and the heirs whatsoever of her body; whom failing, Mrs Kate Gruinard Bankes or Anderton, my fourth daughter, and wife of the said James Anderton, and the heirs whatsoever of her body; whom failing, to my eldest son William Meyrick Bankes, and the heirs whatsoever of his body; whom failing, Mrs Eleanor Bankes or Murray, my eldest daughter, wife of the said William John Murray, and the heirs whatsoever of her body; whom failing, William Cooke Bankes, my third son, and the heirs whatsoever of his body;" whom failing to a further series of heirs. The deed of entail was to have all the clauses necessary for a strict entail. All former deeds of settlement relative to property, heritable or moveable, situated in Scotland were recalled, but neither the trust-disposition nor the revocation contained in it were to affect any deeds relative to property of either kind out of Scotland.

The English will dealt in a similar manner with his English estates, and with personal funds situated in England, and was declared not to relate to real and personal estates and effects in Scotland. Three of the trustees under the Scottish will, one of them being his son-in-law William Charles Macdonald after mentioned, were named trustees and executors under the English will. Otherwise the two deeds were entirely distinct in their contents and purposes. The devise of the English estates in the English will was as follows:—"To the use of my trustees for the term of seven years from my decease, if my daughter Eleanor Starkie Letterewe Murray, the wife of the said William John Murray, shall so long live, or the person shall so long continue a minor who for the time being after the death of my said daughter shall be entitled to the possession of my real estates under the limitations of this my will . . . with remainder to the use of her first and every other son successively, according to their respective seniorities, in tail-male, with remainder to the use of my son William Meyrick Bankes and his assigns during his life, with remainder to the use of his first and every other son successively according to their respective seniorities in tail-male; with remainder to the use of my daughter Maria Ann Macdonald (the wife of the said William Charles Robertson Macdonald) and her assigns during her life; with remainder to the use of her first and every other son successively according to their respective seniorities in tail-male; with remainder to" his daughters Mrs Anderson and Mrs Anderton and their sons respectively and successively in tail-male; "with remainder to the use of my son Thomas Holme Bankes and his assigns during his life; with remainder" to certain other devisees in tail-male. Kate Macdonald was thus excluded from any interest under the English will, and William Charles Macdonald had no interest except a trusteeship under the Scottish settlement.

The holograph codicil (third above enumerated) was as follows:—"This is a codicil to the last will and testament of me, Meyrick Bankes, of

Winstanley Hall, Wigan, Lancashire, and of Letterewe, Ross-shire, Scotland, and is made by me in the year of our Lord Eighteen hundred and eighty (A.D. 1880), Jan. 21st.—I hereby fully confirm my last will and testament made by me in the year of our Lord 1876" (76 being in pencil), "except as follows herein:—I revoke all legacies, bequests, trusteeships, rights of succession, or other mention of the name of my hitherto son-in-law William Chs. Robertson Macdonald, divorced from his wife, my daughter Maria Ann Bankes, and I appoint that all such legacies, bequests, trusteeships, rights of succession cease as tho he were dead, and accrue, belong to, and are vested in the next heir of entail in due order, as appointed by my will. Furthermore, and in like manner, I revoke all legacies, bequests, trusteeships, rights of succession, or other mention of the name of my son Thomas Holme Bankes, who being a confirmed drunkard is unfit to inherit any of my properties in England or Scotland, and I appoint that all such legacies, bequests, trusteeships, or other mention of his name in my will absolutely shall cease as tho he were dead, and the same shall accrue, follow in succession, belong to, and are vested in the next heir of entail in due order, or as appointed by my will: Furthermore, and in like manner, I revoke all legacies, bequests, rights of succession, or other mention of the name of Kate (or Catherine) Macdonald, daughter of the afore-mentioned son-in-law Wm. Chs. Robertson Macdonald and my daughter Maria Ann Macdonald, and I direct that herself, name, and prodigy [*sic*] be obliterated from my will as tho she were dead, and the same, as above, shall accrue, belong to, and are vested in the next heir in possession by entail in due order, as appointed in my last will and testament; I revoke all legacies, bequests, rights of succession, or other mention in my last will and testament of the name Jane Cooke, my daughter, now married to ; and I now will all such bequests, &c., as above, to my dghtr. Kate Cooke, *i.e.*, Jane's sister, to whom I have willed my five houses in Oxford St., L'pool, and furniture; I appoint my son Wm. Meyrick Bankes, at a salary of £500 per per annum, payable to him in two ½ yrly. payts. of £250 ea. out of my Winstanley rental, executor and administrator of my will, to administer it justly and faithfully to the best of his ability, according to my evident intents and wishes, as expressed in my last will and testament. I revoke, cancel, and annul the legacy or payment of £500 annually to Wm. John Murray, son-in-law—he having gone out of his mind, necessitating his confinement in a lunatic asylum.

"4 *Leeds St., Liverpool.*—This deed has this day and date been duly signed by Meyrick Bankes, Esquire, at his office, No. 4 Leeds St., Liverpool, in our presence, and we also in his presence, and in the presence of one another, have thereunto, same day and date (*i.e.*), 21st January 1880, affixed our signatures as witnesses thereof.

"Robert Taylor, *Witness*, "Jan. 21, 1880.
"Clerk in Office, No. 4 Leeds St. (Stamp 6d).
"Horatio A. Morris, *Witness*. "M. Bankes.
"Clerk in Office, No. 4 Leeds St."

Certain draft codicils and some correspondence between the deceased and his law-agent were produced and founded on by the defenders as indicating an intention on the part of the truster to leave the provisions originally made in their favour standing.

The present action was raised by the testator's daughter Maria Ann Bankes, then Mrs Liot Bankes, the first substitute heir in the projected entail, with the concurrence of her (second) husband, against the trustees in Meyrick Bankes' Scottish settlement, and also against her brother Thomas Holme Bankes and her daughter (of the first marriage) Catherine Macdonald, then Mrs Coningham, to have it declared that the trustees were bound to execute, and to have them ordained to execute, an entail in her favour as substitute, and the heirs whatsoever of her body, other than her daughter Mrs Coningham, whom failing the other heirs of entail in their order, in terms of the trust-disposition and codicil, and to pay over to her the residue of the moveable estate of the deceased in Scotland, or otherwise to include a conveyance of it in the entail—and pleaded in terms of these conclusions.

The trustees and Thomas Holme Bankes and Mrs Coningham defended the action. The trustees pleaded that the codicil was ineffectual to alter the provisions of the trust-disposition, and that in any view the pursuer was not entitled to payment of the moveable estate. Thomas Holme Bankes and Mrs Coningham pleaded that there was no revocation of the trust-disposition by the codicil to the effect of their exclusion from the entailed succession to the Scottish estates to which they were called by the trust-disposition.

The Lord Ordinary (Lee) found in terms of the declaratory conclusions of the summons, and ordained the trustees to execute and deliver to the pursuer a deed of entail in terms of her declaratory conclusions, appointed the case to be enrolled for hearing on the other conclusions, and granted leave to reclaim; adding the following note:—"The leading question in this case is, Whether the directions of the trust-disposition and settlement executed by the late Mr Bankes of Letterewe for the settlement of his estates in Scotland were revoked, in so far as they are in favour of the defenders Thomas Holme Bankes and Mrs Catherine Macdonald or Coningham, by a holograph codicil executed in Liverpool on 21st January 1880.

"The testamentary writings left by Mr Bankes in a completed form were (1) the said trust-disposition and settlement; (2) a last will and testament, executed 17th February 1877, with reference to his estates in England; and (3) the holograph codicil dated 21st January 1880.

"It clearly appears from the terms of the Scottish trust-disposition and settlement, as contrasted with the English will, that Mr Bankes wished to provide separately for the administration and settlement of his estates in England and in Scotland, and the chief difficulty—if not the only difficulty—in ascertaining the effect of the revoking clauses of the codicil arises from this circumstance.

"The pursuers maintain that on a sound construction of the whole testamentary writings the codicil revokes all provisions in favour of the defenders Thomas Holme Bankes and Mrs Coningham, and not merely all provisions in their favour contained in the last will and testament. It is contended for the defenders, on the other hand, that on a sound construction of the testamentary writings the codicil has no reference to

the trust-disposition and settlement, and does not affect the Scottish estates.

"In construing the codicil I am of opinion that a general proof of the defenders' allegations as to intention contained in the answers is inadmissible—*Robb's Trustees* v. *Robb*, 10 Macph. 692. But I think it well settled that in considering a testamentary writing which forms a part of the testator's settlements it is competent to consider also other circumstances not to be found on the face of the deed, and particularly the way in which the testator has dealt with his succession generally—*Gray* v. *Gray's Trustees*, 5 R. 820.

"I wish to add, however, that the question in this case appears to me to be somewhat different from that which presents itself where words of general disposition are referred to as including an estate which forms the subject of a special destination, and as operating implied revocation. The contention in this case is that the codicil of 21st January 1880 contains an express revocation, upon general grounds and of universal application, of all bequests and rights of succession conferred by the testator upon particular individuals named. It appears to me that if there be a clear and unambiguous revocation of this kind it cannot be explained away by extraneous evidence that it was intended to apply only to rights created by a particular deed. The fact that the testator had previously dealt with his estates in separate parcels, and has not in his codicil connected it distinctly with all of them, is of course a fact to be considered in construing the codicil. But if the codicil expresses a clear intention to revoke universally all rights conferred upon a certain person, that cannot be negatived, in my opinion, by evidence that the revocation was only intended to be partial.

"The instrument in question commences:—'This is a codicil to the last will and testament of me, Meyrick Bankes, of Winstanley Hall, Wigan, Lancashire, and of Letterewe, Ross-shire, Scotland.' It does not purport to be a codicil to the trust-disposition and settlement, and whatever the meaning and effect of it may be, I think it impossible to hold that that deed is expressly referred to. My reason for saying so is that although the date of the will referred to is left blank it is clear that only one instrument is mentioned, and that by a phrase which does not usually or naturally extend to such a deed as a disposition—*Thomas* v. *Tenant's Trustees*, Nov. 17, 1868, 7 Macph. 114.

"But it is not impossible that the purposes of a Scottish trust-disposition and settlement may be altered by an English instrument which does not expressly refer to it. There are well-known instances of this, *e.g.*, *Richmond's Trustees* v. *Winton*, 3 Macph. 95. The question is one of intention; and upon that point it is more important to notice what the codicil does than what it bears to be. It confirms the last will and testament, 'except as follows herein.' It does not confirm the trust-disposition and settlement, nor mention it. I think, however, that on referring to these two deeds a reason may be found for the testator thinking it necessary to refer specially to the will, and unnecessary to refer expressly to the trust-deed. The English will contains clauses empowering the testator to give legacies 'by codicil or codicils 'hereto,' and declaring 'this only to be my last will and testament.' The trust-disposition and settlement contains an express reservation of power to revoke and alter 'in whole or in part,' and a clause declaring that, in so far as not altered, it should be a valid deed though found undelivered. It was unnecessary that this deed should be confirmed or mentioned. The question whether it is altered in whole or in part is a question depending on the terms of the codicil. It is quite fixed in Scotland that in determining whether the purposes of a trust have been altered by a subsequent writing it is unnecessary that the writing should expressly refer to the trust-deed as its warrant. This was expressly held in the case of *Cameron* v. *Mackie*, 7 W. & Sh. 106, and in the case of *Richmond's Trustees* v. *Winton* the doctrine was applied to a trust which did not bear expressly to be for purposes which should be subsequently declared. It is not certain, however, that the testator could have effectually exercised any power of alteration competent to him under his English will without making it clear by direct reference to that instrument that he desired to do so (see opinion of Lord Chancellor in *Cameron* v. *Mackie*, 7 W. & Sh. 141).

"The question therefore is, whether the codicil, though not referring expressly to the trust-deed, declares in sufficient terms an intention to alter it in so far as regards the provisions in favour of the defenders Thomas Holme Bankes and Mrs Coningham?

"Upon this point I observe (1) that the revocation in the case of each of the persons named is universal in its terms:—'I revoke all legacies, bequests, trusteeships, rights of succession, or other mention of,' &c. I observe also (2) that a reason is given for the revocation in the case of Thomas Holme Bankes, which is expressly applicable not less to the Scottish estates than to the English. Further (3), in a case of Catherine Macdonald or Coningham, who takes no right of succession or legacy under the English will (which limits the remainder to 'sons') the revocation would have no effect at all unless it applies to the trust-deed, which calls her to the succession in the Scottish estates among the 'heirs whatsoever of the body' of Maria Ann Bankes or Macdonald, the pursuer. I observe (4thly) that the revocation is in each case appointed to take effect as though the person named were dead. Than this I can imagine no clearer indication of the universality of the testator's purpose.

"It may be said that the directions appended in each case to the revocation—that the name shall 'cease' or 'be obliterated,' and that the rights of succession shall accrue and belong to the next heir,—refer expressly to the 'will' as appointing the order of succession, and as being the instrument from which the name is to be deleted. But it appears to me that the revoking words are themselves independent of such reference, and are sufficiently clear and absolute in their expression to alter the directions of the trust-deed. No direction that the next heir should take the succession was in my opinion necessary as regards the Scottish deed.

"But it was contended that the correspondence of November 1876 and February 1877 shows that at the time Mr Bankes intended to make an alteration as regards Thomas Holme Bankes by a codicil referring expressly to his trust-disposition and settlement, and that this never having been

done in the form then intended must be presumed to have been left undone altogether. I do not think that the correspondence shows any conviction on the part of Mr Bankes that the desired alteration must be made in the form of a codicil expressly referring to the trust-disposition and settlement. On the contrary, it rather appears to me that the correspondence indicates a wish to obliterate the name of Thomas Holme Bankes in the simplest form, and with as little alteration as possible upon the trust-disposition of 1870. But however this may be, it must be observed that the correspondence is prior in date to the codicil, and even to the English will. There is no allegation that subsequently to the date of the codicil anything was done or written by the testator from which it could be inferred that the revocation was, in his view, limited to the English succession. The codicil expressly revokes all bequests or rights of succession in favour of the persons named, and I think that that expression of intention cannot be negatived, and would not be at all affected by evidence that the testator had at one time thought of putting it in a different form.

"On the whole, I am of opinion that the intention to revoke is sufficiently and clearly expressed, and that the pursuer is entitled to a judgment to that effect. As arranged at the debate, I have granted leave to reclaim against the interlocutor without in the meantime disposing of the other branch of the case, which relates to the personal estate of the deceased, and raises a question upon which the parties seem to have interests varying according to the result of the primary conclusions of the action."

Thomas Holme Bankes and Mrs Coningham reclaimed, and argued that the codicil was annexed only to the English will, and could not affect the standing destination to the Scotch estates in their favour—and referred to *Richmond's Trustees* v. *Winton (supra)*.

The Lords made avizandum, and at advising

The Lord Justice-Clerk read this opinion—Mr Bankes, whose settlements have given rise to this question, was possessed of considerable property both in England and Scotland, and both real and personal. In 1870 he executed a trust-disposition and settlement of his whole heritable and moveable estate in Scotland; and proceeding upon the narrative that he was desirous of settling his property in Scotland, whether heritable or moveable, presently belonging to him, or which might belong to him at the time of his death, he proceeds to dispone the Scotch estate, real and personal, to certain trustees therein named—his heritable estate in a certain order, and with a certain destination, reserving power by the deed to alter and revoke any of its provisions, but "declaring that the same, so far as not altered, shall be a valid deed though found lying in my repositories or in the hands of any other person at the time of my death, dispensing with the delivery hereof."

In 1877 he executed in the English form what is denominated a last will and testament of his effects, conveying his real and personal estate and effects in England, but not his real and personal estate in Scotland. Three years after the date of that English settlement he executed a holograph codicil, which is the subject of the present dispute; and the question that has arisen between the parties is, whether that codicil only affects the provisions of the English last will and testament, or whether it affects the whole of his testamentary writings?

The Lord Ordinary has found that notwithstanding some considerations to the contrary, it is in truth a codicil which affects the whole succession, and that such was the intention of Mr Bankes when he wrote it.

Of course that depends upon the construction of the document itself. The first remark I make on it is, that no question can arise upon any strictly legal ground, provided the intention of the testator be sufficiently clearly expressed. It has been held under a former state of the law, when certain *voces signatæ* were necessary in order to convey heritable estate, that even after a regular disposition to trustees for purposes named in a deed had been executed, an informal document substantially giving instructions as to the disposal of the property disponed to the trustees might be perfectly valid although having neither any dispositive words nor even a reference to a prior disposition. I need not go over the cases which bear upon this part of the subject. They are all well known, and are referred to in the Lord Ordinary's note. I simply refer to that matter for the purpose of saying that even under that state of the law such a document as this would be perfectly valid as an instruction to trustees under a general disposition and settlement.

As the thing stands, the only question we have to consider is, what is the effect of this instrument in regard to the succession of Mr Bankes? The Lord Ordinary has found that it extends to the whole succession—in other words, that it is a codicil to the first deed as well as to the second, or at least that the intention of Mr Bankes is sufficiently expressed in the codicil in regard to the matters contained in it, whether these fall under the Scotch or the English settlement of Mr Bankes' affairs.

Now, the first thing that the Lord Ordinary deals with is this. He says—The instrument commences: "This is a codicil to the last will and testament of me, Meyrick Bankes of Winstanley Hall, Wigan, Lancashire;" and the first question that arises is, what is that last will and testament? The Lord Ordinary holds that it is one special instrument—that he does not see his way to hold that it can extend to both the subjects in England and those in Scotland—in other words, that it does not include the last disposition and settlement of the Scottish estate. For he says—"It does not purport to be a codicil to the trust-disposition and settlement, and whatever the meaning and effect of it may be, I think it is impossible to hold that that deed is expressly referred to. My reason for saying so is, that although the date of the will referred to is left blank, it is clear that only one instrument is mentioned, and that by a phrase which does not usually or naturally extend to such a deed as a disposition."

Now, while I think it is unnecessary for the disposal of the case, or to explain the view I take of the case, that we should come to any conclusion absolutely on the point, yet I must say I am of opinion that it may be very fairly doubted whether the words "last will and testament" do not include the disposal of the Scottish personalty as well as the English personalty, because

the truth is that the two deeds together are the only last will and testament which Mr Bankes has left. If that were the only question, I think it deserves more consideration than the Lord Ordinary has altogether given it. But those words do not admit of construction, though if we find in the rest of the deed that there is a certain catholicity—a certain generic character—which is applicable both to the settlement of the Scottish estate and the settlement of the English estate, it would throw a reflex light back upon those expressions. But I do not think it necessary to give an opinion upon that. It will be observed that the codicil goes on—"I hereby fully confirm my last will and testament made by me in the year of our Lord 1876." That does not say "my said last will and testament," which if the preamble had referred solely to the English will it would. It clearly refers to the English will, because it confirms it, and I have not a doubt that the confirmation was intended to apply to the English will as well as to the Scottish will.

But passing from those things, the real question is, what is in substance that which is indicated to be the intention of the testator in this codicil? It is plain that his object in making the codicil was to exclude from his succession—whether a part or the whole of the succession is another matter—certain persons whom he had given it to. Those persons are three in number—the first is his son-in-law William Charles Robertson Macdonald, the second Thomas Holme Bankes, and the third Kate or Catherine Macdonald. In regard to those three persons he expresses himself in words the most unreserved. He says—"I revoke all legacies, bequests, trusteeships, rights of succession, or other mention of the name of my hitherto son-in-law William Charles Robertson Macdonald, divorced from his wife, my daughter, Maria Ann Bankes, and I appoint that all such legacies, bequests, trusteeships, rights of succession, cease as though he were dead, and accrue belong to, and are vested in the next heir of entail in due order as appointed by my will; Furthermore, and in like manner, I revoke all legacies, bequests, trusteeships, rights of succession, or other mention of the name of my son Thomas Holme Bankes, who being a confirmed drunkard is unfit to inherit any of my properties in England or Scotland, and I appoint that all such legacies, bequests, trusteeships, or other mention of his name in my will absolutely shall cease as though he were dead, and the same shall accrue, follow in succession, belong to, and are vested in the next heir of entail in due order, or as appointed by my will; furthermore, and in like manner, I revoke all legacies, bequests, rights of succession, or other mention of the name of Kate (or Catherine) Macdonald, daughter of the afore-mentioned son-in-law William Charles Robertson Macdonald and my daughter Maria Ann Macdonald, and I direct that herself, name, and prodigy [*sic*] be obliterated from my will as though she were dead." Now, those words are used in regard to a prior settlement, and I think we may conclude that if in regard to any one of the three there is a manifest reference to the Scottish settlement as well as to the English will, the testator did not intend that the Scottish succession should be given to him or her. If that were to be taken as the test here, I do not think that any doubt could be entertained. For Kate Macdonald has no part in the English settlement at all. The estates in England are settled in tail-male, and she does not succeed. Therefore when the testator here says in the codicil that her name shall be obliterated from any will as though she were dead, he refers to the will in which her name stands. Her name is contained in the Scottish settlement, and it seems to me that the contention that this deed refers solely to the English personal estates is a construction which the terms of the documents will not bear.

In the second place, Thomas Holme Bankes is cut off in terms that leave us really no doubt as to what the testator meant. He revokes all legacies, bequests, rights of succession, and every mention of his son Thomas Holme Bankes, "who being a confirmed drunkard is unfit to inherit any of my properties in England or Scotland." In short, he cuts him off from any possible right of succession, in the terms I read a minute ago; and I cannot see how there can be any doubt at all that this codicil having declared him unfit to succeed to anything in England or Scotland, was intended to carry out the declaration of intention thereby expressed.

I think that is quite enough for the decision of the case. It is quite true that the person first in order apparently has nothing to do with the Scottish estate; but in regard to the son of the testator and Kate Macdonald it seems quite clear that the terms of the codicil were intended to include the Scottish succession. Indeed, in regard to Kate Macdonald it is obvious that the provision of the codicil could have no meaning and no practical application upon any other view.

I hardly think it necessary to say any more about this. The *ratio* of the codicil and of the revocation of the rights conferred on these parties is so wide, and so entirely personal to themselves, that there cannot be supposed to be any reason whatever why the testator should have left them the Scottish settlement and deprived them of the English. One reason only is, I daresay, suggested, and that is the last thing I have to speak about. It is said that Mr Bankes had indicated his intention of making a will altering or qualifying the settlement to his Scottish estates, and correspondence was referred to which had taken place between Mr Bankes and his agent in Edinbur ghon that subject. Some draft deeds have also been produced having the same object in view. But I do not think the construction of this instrument is in any way aided by those proceedings. The English will was executed a considerable time after these communications began, and substantially after they had been concluded; and it was not until three years had elapsed that the codicil was made out. For my own part, I see that in the codicil itself, which leads me to conclude that the testator meant it to be a codicil to his last will and testament, consisting of the settlements to his English and Scottish estates, and that he had no intention, and had it not in contemplation, to execute any other deed whatever.

Upon these grounds I am for adhering to the interlocutor of the Lord Ordinary.

Lord Young—The Lord Ordinary at the commencement of his note says—"The leading question in this case is, whether the directions of the trust-dispositions and settlement executed by the late Mr Bankes of Letterewe for the settlement

of his estates in Scotland were revoked in so far as they are in favour of the defenders Thomas Holme Banks and Mrs Catherine Macdonald or Coningham, by a holograph codicil executed in Liverpool on 21st January 1880?" That is the only question which the Lord Ordinary has decided, or which was argued before us, and we are called upon to decide. The Lord Ordinary observes that the Scottish trust-deed is not named in the codicil of January 1880. That is obvious on inspection; it is not named in it, which is what his Lordship means by "not expressly referred to." On the question whether it is referred to or not I agree with his Lordship. If it is not referred to in it at all, it could not be revoked by it; it would in such a case have no reference to it, and so could not revoke it. Accordingly his Lordship says — "The question therefore is, whether the codicil, though not referring expressly to the trust-deed, declares in sufficient terms an intention to alter it so far as regards the provisions in favour of the defenders Thomas Holme Banks and Mrs Coningham?" And his Lordship is of opinion that the intention to revoke is sufficiently and clearly expressed—that is, that the codicil referring to the Scottish deed, and intended by the maker of this codicil to refer to the Scottish deed, clearly expresses the intention of the maker of the codicil to revoke the Scottish deed in the particulars referred to. The only criticism I would make upon that—and it is really hypercritical—is that the word "clearly" is superfluous—for, if the intention of the maker of the codicil to the effect in question sufficiently appears, the degree of clearness need not be inquired into. Now, I agree that it sufficiently appears from the terms of the codicil that the maker of it intended to exercise the power which he undoubtedly had of revoking the Scottish deed in the particulars in question, and that his intention so sufficiently and satisfactorily to the judicial mind expressed or indicated must have effect. I therefore concur in thinking that the interlocutor of the Lord Ordinary should be adhered to.

Lord Rutherfurd Clark read this opinion—I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

1. According to its letter, the codicil is a codicil to the last will and testament of the testator. These words, according to their natural meaning, do not refer to any single document, but to the document or documents which regulate his entire succession. The testator, no doubt, confirms a writing of a particular date, which he calls by the name it bears, viz., his last will and testament. But I think that it is referred to by its name and date for the purpose of identifying the document which is to be confirmed, and not as limiting the effect of the codicil, which, as I have said, is according to its terms an addition to his earlier settlement.

2. The cause of revoking the legacies in favour of the defender Thomas Holme Bankes is a cause which applies as well to the Scottish as to the English estates. The view of the testator is that he is unfit to participate in any part of his succession, whether in England or in Scotland.

3. If the codicil is to have any operation at all as to the legacies in favour of Catherine Macdonald, it must apply to the Scottish trust-disposition. I do not think that it can be so read as to deprive an express provision of all meaning, and if it applies in any part to the Scottish settlement, it must, I think, be held to apply to the entire settlement of the testator.

Lord Craighill was absent.

The Lords adhered.

Counsel for Pursuer (Respondent)—Trayner—Guthrie. Agents—Murray, Beith, & Murray, W.S.

Counsel for Defenders (Reclaimers) Thomas Holme Bankes and Mrs Coningham—Robertson—Jameson. Agents—C. & A. Douglas, W.S.

Counsel for Meyrick Bankes' Trustees—Pearson. Agents—Tods, Murray, & Jamieson, W.S.

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*Thursday, July 6.*

## FIRST DIVISION.

[Lord Kinnear, Ordinary.

## OWNERS OF S.S. "VULCAN" *v.* OWNERS OF S.S. "BERLIN."

*Ship—Salvage—Mode of Estimating Amount Due to Salving Vessel.*

A steam-ship in the prosecution of her ordinary voyage came upon another steam-ship in a disabled condition through the breaking of her propeller-shaft, and succeeded, without much risk or danger to herself, in successfully towing the disabled vessel into her port of destination; the Court *held* the services so rendered to be of the nature of salvage, and in estimating the amount of remuneration due to the salvor, took into consideration the amount of freight she would have been earning for her owners had she not been detained in rendering these services, and the actual labour of the master and crew.

The steamship "Vulcan" sailed from Middlesborough on the 28th September 1881, bound for Flensburg in Schleswig-Holstein. On the following morning, while on the North Sea, she fell in with the steamship "Berlin" in a disabled condition, with her propellor-shaft broken and with signals of distress flying. The "Vulcan" proceeded to the assistance of the "Berlin," and after considerable difficulty and trouble a tow rope was attached, and the disabled vessel was on the evening of the 29th September safely towed into Leith, the port of her destination. In addition to a miscellaneous cargo valued at about £11,000, the "Berlin" was carrying seventy-eight passengers in addition to her crew of twenty men.

The "Vulcan" thereafter resumed her course and proceeded on her voyage, and the present claim for £4000 in name of salvage, and as compensation for delay, and for services rendered, was made by the owners of the "Vulcan" against the owners of the "Berlin."

The defenders were willing to meet any claims against the cargo (which was consigned to various persons) competent to the pursuers, but maintained that the services rendered were of the nature of towage, and not of salvage; and