In that state of matters, the fact upon which the Lord Ordinary would have rested this second ground of judgment fails. It is said in the minute for the marriage-contract trustees that although these gentlemen did not accept of the trust, two of them were aware of its existence. That is disputed, but however that may be, it cannot affect the decision of the case. In the first place, I understand that two of the trustees knew of the existence of the marriage-contract in which they were named as trustees, but that in no way shows that they may not have declined to have anything to do with the trust; and, secondly, it is a material circumstance that would require to be averred and proved, that not only were they aware of the trust under the contract of marriage, but that the deed assigned *acquirenda*. Upon this second part of the case I think therefore the respondents also fail.

Lord Adam—This has all along appeared to me to be a case of two competing assignations to the same fund, and that it must be carried by the first intimated deed—that is, that of the claimant Mrs Whyte. That being so, the case falls within the decision in *Todd* v. *Wilson*, to which your Lordship has referred. In my opinion that case is quite in accordance with the principles of the law of Scotland, and I therefore agree with your Lordships in the conclusion arrived at, that the interlocutor of the Lord Ordinary should be recalled.

Lord Deas was absent.

Lord Mure was absent on Circuit during the discussion, and delivered no opinion.

The Court pronounced the following interlocutor:—

"Recal the said interlocutor; sustain the claim for Mrs Isabella Philp Whyte or Fraser; rank and prefer her to the income of the fund *in medio* in terms of the bond and assignation in favour of Mrs Ann Morris or Whyte, but subject to a liability to account to the other claimants for any balance of the income to be received by her after payment of the sums contained in the said bond and assignation, with interest; and decern," &c.

Counsel for Mrs Whyte—Mackintosh—Dickson. Agents—Henry & Scott, S.S.C.

Counsel for Campbell's Marriage-Contract Trustees—Trayner—Graham Murray. Agents—Smith & Mason, S.S.C.

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*Saturday, July* 12.

## SECOND DIVISION.

[Lord Fraser, Ordinary.

## LECKIE AND OTHERS *v.* LECKIE AND OTHERS.

*Process—Proving the Tenor—Absence of Adminicles.*

In an action for proving the tenor of a will, said to have been designedly destroyed after the testator's death, no written adminicles were alleged to exist, but it was averred that the draft and a memorandum from which it was drawn up had been destroyed as waste paper some time before the testator's death. The Court allowed a proof, at which the *casus omissionis* libelled was proved, and it was also proved that the draft and memorandum which would have constituted written adminicles were destroyed as condescended on. The tenor of the deed was proved by parole, and the Court *granted* decree of proving the tenor as concluded for.

This was an action of proving the tenor of the general disposition and settlement of Alexander Leckie senior, slater, Bonnyrigg, at the instance of Mary M'Credie or Leckie, relict of the said Alexander Leckie, John Stewart, Alexander Stewart, eldest son and heir-at-law of the deceased Daniel Stewart, and Alexander Leckie, the adopted son of Alexander Leckie senior, against James Leckie and others, the heir-at-law and next-of-kin of Alexander Leckie senior.

Alexander Leckie senior died on the 25th June 1883, and the pursuers averred that he left a general disposition and settlement in the following terms, or in other terms to the like effect:—"I, Alexander Leckie, slater, Bonnyrigg, being resolved to settle my affairs so as to prevent all disputes after my death, do hereby give, grant, assign, and dispone to and in favour of my wife Mary M'Credie or Leckie in liferent, and Daniel Stewart and John Stewart, residing in London, nephews of my said wife, equally, and their respective heirs and assignees whomsoever, in fee, heritably and irredeemably, All and Whole my whole heritable estate wheresoever situated, presently belonging to me, or which shall belong to me at the time of my death, with the whole writs, titles, and securities of the same, and my whole right, title, and interest present and future therein, and further, I do hereby give, grant, assign, and dispone to and in favour of the said Mary M'Credie or Leckie, my wife, in liferent, and Alexander Leckie, our adopted son, presently residing in family with us, and his heirs and assignees whomsoever, my whole stock-in-trade, book-debts, household furniture, cash, and, in general my whole moveable estate wheresoever situated, presently addebted and belonging to me, or which shall belong and be addebted to me at the time of my death, with the whole vouchers and instructions thereof, and all that has followed or is competent to follow thereupon: But these presents are granted in favour of the said Alexander Leckie under burden of payment of my debts and funeral expenses in the event of my surviving my said wife, and of the succession to my said moveable estate opening to him at my death, declaring that the said Mary M'Credie or Leckie shall have power, in the event of her being in necessitous circumstances and unable to provide for herself, to sell and dispose of the whole or of such part of my said estate as she may think proper for her maintenance and support: And I hereby nominate and appoint the said Mary M'Credie or Leckie, whom failing the said Alexander Leckie, to be my sole executor; and I reserve power to alter or revoke these presents; and I dispense with the delivery hereof; and I reserve my liferent right; and I consent to registration hereof for preservation. — In witness whereof, I have subscribed these presents,

written by Peter Forbes, residing at Bonnyrigg, upon the 24th day of October 1874, before these witnesses, the said Peter Forbes and Gavin Dickson, joiner, Bonnyrigg. (Signed) ALEXANDER LECKIE. (Signed) Peter Forbes, *witness.* (Signed) Gavin Dickson, *witness,*"—or in other terms to the same effect.

The pursuer further averred—"The estate of the testator at the date of his death consisted of heritable subjects valued at £520, and moveable property amounting to £365. (Cond. 2) The said general disposition and settlement was prepared, on the instructions of the said deceased Alexander Leckie senior, by Mr Peter Forbes, collector, Bonnyrigg, and was duly executed by Mr Leckie on or about 24th October 1874 at Bonnyrigg, in presence of the said Peter Forbes and of Gavin Dickson, joiner, Bonnyrigg. A draft of the said disposition and settlement was prepared by the said Peter Forbes, from a copy disposition and settlement in the possession of the late Thomas Steven, Bonnyrigg. The draft of Mr Leckie's disposition and settlement was burned by the said Peter Forbes as a useless paper, along with some other old papers, when he removed to his present dwelling-house in 1882. The said Alexander Leckie a day or two before his death sent for Mr Forbes, and told him he wished to make a small alteration on his settlement, which was then brought to him by Mrs Leckie, but a visitor came in, and the settlement was put away at Mr Leckie's request, and no alteration was made upon it. The proposed alteration was to leave a small bequest to the Free Church in Bonnyrigg, of which Mr Leckie was a member." The *casus omissionis* was thus libelled:—"(Cond. 3) The said general disposition and settlement remained in the possession of the said deceased Alexander Leckie till the date of his death, and was seen and read by Mrs Leckie, his wife, by Alexander Leckie jr., his adopted son, by John Stewart, his wife's nephew, and by Mrs Elizabeth Pettie, Bonnyrigg, a neighbour of the testator. (Cond. 4) After the said Alexander Leckie's death, but before the funeral, his wife Mary M'Credie or Leckie took the said general disposition and settlement from a drawer in a chest of drawers in a room of the house where the same was kept, along with the titles of heritable subjects in Bonnyrigg belonging to the said Alexander Leckie, and brought the deed to the kitchen for the purpose of perusing it. Alexander Leckie jr. and Mrs Elizabeth Pettie were in the kitchen at the time. Mrs Leckie on entering the kitchen handed the deed to Alexander Leckie jr., who opened and read it. Mrs Pettie drew his attention to a provision of the will conveying the heritable property in Bonnyrigg to Mrs Leckie's nephews Daniel Stewart and John Stewart, burdened with a liferent in her favour, and remarked that they did'nt require anything, as they had got by far too much already, and that the will ought to be burned. Alexander Leckie thereupon said he would warm his hands over it, and immediately put the settlement in the fire, when it was burned. The present action has therefore been rendered necessary."

Defences were lodged for the heir-at-law and next-of-kin. The defenders stated that there existed "no testamentary writing or document purporting to be a *mortis causa* settlement of the late Mr Leckie's affairs," and explained:—"The defenders understand that about the year 1874 Mr Peter Forbes, collector, Bonnyrigg, prepared a settlement for Mr Leckie; but it is also known that Mr Leckie subsequently contemplated cancelling or altering this settlement, but the defenders are unable to say whether or not he carried this intention into effect. No written adminicles of any kind are produced or founded on by the pursuers for instructing the terms of the pretended general disposition and settlement, and the defenders aver that its terms cannot be established to any extent. The settlement prepared by Mr Forbes was never seen by him after its preparation in 1874, and Gavin Dickson, alleged to have been a witness to the execution thereof, has been dead for many years. Even on the assumption that the deed, of which the *casus amissionis* is set forth in article 4, was a valid settlement of the deceased, and was the deed prepared by Mr Forbes in 1874, and that the *casus amissionis* took place as alleged, all of which averments are denied by the defenders,—the pursuers, Mrs Leckie and Alexander Leckie, having voluntarily destroyed said deed, are barred *personali exceptione* from insisting in this action. The other pursuers would have only a *spes successionis* to the said Mrs Leckie under the deed set forth on the summons, and have neither title nor interest to insist in this action."

They pleaded—"(2) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons. (3) The action is incompetent as laid; or otherwise, no written adminicles being libelled on for proving the tenor of the alleged settlement, the action should be dismissed. (4) The pursuers Mrs Mary M'Credie or Leckie, and Alexander Leckie, are barred *personali exceptione* from insisting in the action."

The Court before answer allowed the pursuers a proof of their averments.

From the proof (which was led before Lord Craighill) it appeared that Mr Forbes, who was inspector of poor of Bonnyrigg, and a friend of Leckie's, and had had experience of legal documents, had prepared his settlement after having had furnished to him by Leckie a note of what he wished its provisions to be. A draft had also been prepared by Forbes and revised by Leckie. The deed was prepared on the model of one of a similar nature to which Forbes had had access, but which was lost at the date of this action, and he also used a form in a "Pocket Lawyer." Two years before the death of Leckie, Forbes, when destroying waste papers previous to changing his house, burned both Leckie's memorandum, which he had kept within the draft, and the draft itself, as being no longer useful. He saw the settlement in Leckie's house a few days before his death, at which time he contemplated an alteration, which, however, was never made. He (Forbes) did not then look over its contents. When the present question arose, he told the agent in the case the contents of the will, of which he had a clear recollection from memory, and after the agent had written them down he went over them with the assistance of the Pocket Lawyer he had used in drawing the will. In this manner the copy of the deed as libelled in the summons was made up, and it was correct according to his belief, except

that Daniel and John Stewart, as well as Alexander Leckie jr., were appointed executors by the original deed.

Mrs Forbes, who had compared the draft with the will along with her husband at the time it was executed, remembered generally that its provisions were those contained in the deed libelled, and deponed to the destruction of the memorandum and draft.

Leckie's widow also deponed to the deed libelled being a correct reproduction of the will.

It appeared that before he died Leckie had transferred to his wife's name his money lying in a bank at Bonnyrigg.

The *casus amissionis* was proved to be that when Leckie's widow, the woman named Pettie mentioned in the condescendence, who was present in the house, and Alexander Leckie jr., were talking about the will between the death and the funeral, and were examining its contents, a remark was made that it was a pity for other people to get the use of the property, since Alexander was the adopted son, whereupon he snatched the will from the hands of Mrs Pettie, who was reading it, and burnt it.

The Court then heard argument as to the import of the proof.

Pursuers' authorities—*Lillie* v. *Lillie,* Dec. 4, 1832, 11 S. 160.

Argued for the defenders—The tenor of the will was not proved. Even if it were proved, it was not proved to be the ruling settlement at the testator's death, nor that the document destroyed was the settlement of 1874.

Defenders' authorities—*Graham* v. *Graham*, Nov. 12, 1847, 10 D. 45.

At advising—

Lord Justice-Clerk—I am quite satisfied with what I understand to be Lord Craighill's impression of the evidence in this case; and I wish to make only one remark, that the case has some importance and also some novelty in the fact that there are no adminicles of any kind or description. In that state of the facts we have to see whether upon the parole testimony above we can pronounce this decree of proving of the tenor. I do not think there is any incompetency here, especially in a case of this kind where the destruction of the missing instrument was a malicious act, and one for the purpose of preventing it coming into operation and having effect. In such circumstances a great presumption arises, and great favour should be shown to the party who seeks to redress that manifest act of injustice. Therefore I should read the testimony with a desire, if there were sufficient ground for it, to find that the tenor of the deed so destroyed was reasonably proved. I think in this case there is sufficient to prove what was the general tenor of the instrument. I do not know that every clause in it is absolutely instructed; I do not think it would be a reasonable thing to expect that; but the general lines of the testator's intention have been sufficiently established.

On the question of law I think the case of *Lillie* is a sufficient precedent for us to follow. It was rather a stronger case, because the challenge was instantaneous. But all we need to say in regard to it is, that it certainly establishes the proposition that the adminicles need not be written adminicles in every case in which the tenor of the deed which has been destroyed is attempted to be set up. In short, I think the proof is quite competent, and I think it quite conclusive.

Lord Craighill—I concur in the result at which your Lordship has arrived. The case is important both as regards the law and as regards the evidence on which the result depends. The peculiarity that exists—it is not absolutely unprecedented—is that there are no written adminicles for the purpose of setting up the tenor of the instrument said to have been destroyed. That is a very great want, and although it is hardly possible to conceive circumstances in which such a want is absolutely insuperable, yet it creates a very great difficulty in the way of setting up the deed. But the law would be very unreasonable if it did not make provision for the case in which an attempt is made to destroy rights created by a will so that persons provided for by the will would be deprived of succession to which they would be entitled, because they were in the circumstances unable to produce any writing showing what the tenor of the instrument was. That would have been playing into the hands of the very persons by whom maliciously the deed had been destroyed. We have here, however, an explanation of how it comes to pass that adminicles that might have been expected to exist are not in existence. At one time there could have been produced a memorandum, said to have been in the handwriting of Alexander Leckie, with regard to the instructions he gave for the preparation of his will—nay, more, a scroll deed, afterwards made, but subsequently destroyed; but there is also a reasonable explanation of how it came to pass that those writings are not now available. Two years ago Mr Forbes, by whom the deed was prepared, changed his residence, and before he went from the one house to the other all his superfluous papers were destroyed. That fact being established makes Mr Forbes' evidence all-important. The first question that has to be considered—whether there was a will prepared by Mr Forbes—is unattended with difficulty, for nobody questions the fact. The next question is, Is the will in the summons the same as that which he prepared for the testator? It is, I think, clear that all the witnesses do not concur in everything that is said to have been part of the will; but, on the other hand, I think it as plain that with regard to everything essential there is practical unanimity; that it is proved that by the testator's will his widow was to have a liferent, that the Stewarts were to get the fee of the heritage, and that Alexander Leckie was to have what remained of the goodwill and the moveables. And these are the things that exclude the rights of the heir-at-law and the next-of-kin, who are here defenders. It was said that uncertainties in regard to the instrumentary clauses gave rise to the question whether there might not be an interest created in the deed in favour of the heirs-at-law. I do not, think, however, that any suggestion is to be found anywhere in the proof that the deed at any time did contain provisions in favour of the heir-at-law No question was put to anyone on that point; and I do not think we can entertain any suggestion of that kind now. I have therefore no

hesitation in concurring with your Lordship on the main question—that the tenor of the deed has been proved.

The next point is this, Was this deed which was made in 1874 an existing deed in 1883 when the testator died? The suggestion is made that it may have been a new deed or a codicil; but there is no trace of any such deed. No question was put in regard to that; and I think it as plain as anything can be that the deed made in 1874 remained until the end as the instrument by which the testator's affairs were to be regulated. On the whole matter I entirely agree that decree should be given in terms of the conclusion of the summons.

Lord Rutherfurd Clark—I am of the same opinion.

Lord Young was absent.

The Court found the tenor proved in terms of the conclusions of the summons.

Counsel for Pursuers—Rhind—M'Neil. Agent—Thomas Sturrock, S.S.C.

Counsel for Defenders—Pearson—M'Lennan. Agent for Defenders—Liddle & Lawson, S.S.C.

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*Tuesday, July* 15.

## FIRST DIVISION.

[Exchequer Cause.

## NISBET (SURVEYOR OF TAXES) *v.* M'INNES, MACKENZIE, & LOCHHEAD.

*Revenue—Inhabited House-Duty—Separate Tenements—Act* 48 *Geo. III. c.* 55, *Sched. B, Rule* 6—*Act* 41 *and* 42 *Vict. c.* 15, *sec.* 13, *sub-sec.* 1.

A building which was the *pro indiviso* property of the individual members of a firm of writers was let as follows:—The ground floor was occupied partly by a bank as a branch office and partly by a bookseller as his shop. The first floor was occupied by the firm as writing chambers, and the second floor and attics were let to the bank along with the office on the ground floor at a *cumulo* rent. By an arrangement between the bank and one of the partners of the firm, the latter became occupant of the second floor and attics. Access was obtained to the first and second floors by a vestibule and stair. There was no internal communication between the writing chambers and the dwelling-house. *Held* (following *Corke* v. *Brims*, July 7, 1883 10 R. 1128) that the dwelling-house was in the sense of the Inhabited House-Duty Acts a different tenement from the rest of the building.

At a meeting of the Commissioners for Income Tax and Inhabited House-Duty for the Upper Ward of Renfrew, held at Paisley on 2d April 1884, Messrs M'Innes, Mackenzie, & Lochhead, writers in Paisley, appealed against an assessment for 1883-84 of £4, 13s. 9d. made upon them for Inhabited House-Duty at the rate of 9d. per £1 on £125, the annual value of the premises No 7 Gilmour Street, Paisley, occupied partly by the appellants as writing chambers.

The building forming Nos 6 and 7 Gilmour Street consisted of three stories and attics, and belonged *pro indiviso* to the individual members of the appellants' firm. The ground floor was occupied partly by the Commercial Bank of Scotland, Limited, as a branch office, and partly by a bookseller as a retail shop, both entering directly from the street by separate doors. These business premises were not embraced in the assessment. The first flat or floor was occupied by the appellants as writing chambers, and was entered in the valuation roll at a yearly rent or value of £80, and the second flat or floor and attics were occupied as a dwelling-house, and were let by the proprietors (the appellants) to the Commercial Bank of Scotland, Limited, along with the branch office on the ground floor, at a *cumulo* rent of £200, conform to a regular lease for ten years, commencing Whitsunday 1877. By an arrangement between Mr Ross, the bank's agent, and Mr Lochhead (a partner of the appellants' firm), to which the appellants were no parties, Mr Lochhead became the occupant of the second flat and attics at Whitsunday 1881 at a yearly rent of £45. Access to the first and second floors was obtained by a lobby or vestibule on the ground floor and a stair. The writing chambers were shut in by a glass door on the first floor, which was locked at night, and the dwelling-house was shut in by a door at the top of the stair. The stair to the attics was within the dwelling-house. There was no internal communication between the writing chambers and the dwelling-house. At the threshold of the lobby or vestibule, on the ground floor, there was an outer or street door, which enclosed the first and second floors. It was locked at night, and the street bell was connected with the dwelling-house above.

The appellants claimed relief to the extent of the duty charged on the writing chambers.

They contended that the dwelling-house and writing chambers were clearly separate and different tenements, and were not only capable of being let, but were let and occupied, as such, and that the writing chambers being occupied solely for business or professional purposes, were exempt from Inhabited House-Duty, under The Customs and Inland Revenue Act 1878 (41 and 42 Vict. c. 15), sec. 13. sub-sec 1; they founded on the case of *Corke* v. *Brims*, July 7, 1883, 10 R. 1128.

The surveyor of taxes contended that the premises assessed were in reality one tenement or dwelling-house, and being occupied in part by the proprietors, were not "let in different tenements," so as to come under 48 Geo. III. c. 55, Sched. B, rule 6, or the exemption contained in 41 and 42 Vict. c. 15, sec. 13, sub-sec. 1.

By 48 Geo. III. c. 53, Sched. B, rule 6, it is enacted that "Where any house shall be let in different stories, tenements, lodgings, or landings, and shall be inhabited by two or more persons or families, the same shall nevertheless be subject to, and shall in like manner be charged to, the said duties as if such house or tenement was inhabited by one person or family only, and the landlord or owner shall be deemed the occupier of such dwelling-house, and shall be charged to said duties, provided," &c.

By the 41 and 42 Vict. c. 15 (The Customs and Inland Revenue Act 1878), sec. 13, sub-sec. 1, it