property in the *solum* would exclude operations of that character. But upon that matter I desire to say nothing at present.

The Court refused the appeal and affirmed the judgment of the Dean of Guild.

Counsel for Petitioner — Pearson — Napier. Agents—J. A. Campbell & Lamond, C.S.

Counsel for Respondent, R. K. Inches—Asher, Q.C.—Graham Murray. Agents—Davidson & Syme, W.S.

Counsel for Respondents, Trustees of the New Club—Asher, Q.C.—Graham Murray. Agents—Russell & Dunlop, C.S.

Friday, January 14.

FIRST DIVISION.

TRUSTEES OF FREE CHURCH *v.* MAITLAND'S TRUSTEES AND OTHERS.

Succession—Legacy—Cumulative or Substitutional—Double Legacy—Construction of Will—Evidence as to Testator's Position at Date when Will was made.

In deciding whether, on the proper construction of a will and codicil, a legacy mentioned in the codicil was intended to be in addition to a legacy of the same amount given to the same legatee by the will—*held* that it was competent to take into account memoranda and states of figures made by the testator shortly before the will and codicil respectively, with the view of knowing what were the facts as to the amount of his estate according to his own estimate at each of those periods, but that it was *incompetent* to take into account similar writings subsequent to the codicil for the mere purpose of drawing an inference as to the testator's intention. *Held* further, on the consideration of the will and codicil taken along with the writings of the testator which could competently be looked at, that in the codicil the testator merely referred to the legacy in question as given by the will, and created a certain life interest in it, and did not intend to give an additional legacy of that amount, and therefore that the presumption for double legacy arising from its being bequeathed in both testamentary papers was overcome.

The late John Maitland, Accountant of the Court of Session, died in 1865. He was survived by his wife, who lived till February 1886. He had no children.

He left a trust-disposition and settlement dated in June 1862, with a holograph codicil dated in March 1864. By the former he provided for (1) debts and expenses, (2) delivery of his furniture, plate, &c., to his widow, (3) payment to her of a legacy of £1000, and to her two sisters of £500 each, and another legacy to a Mr Fraser, which lapsed by his predecease.

Fourthly, he provided to his widow a liferent of the residue of his estate. *Fifthly*, after the death of the survivor of himself and his wife, he directed his trustees to pay, free of legacy-duty, the following legacies to the parties after named, viz.—"To the said Frederick Charles Maitland, my brother, the sum of £4000; to Mrs Helen Maitland or Hog, my sister, widow of James Maitland Hog, Esquire, of Newliston, whom failing . . . the sum of £4000; to the said Sir Alexander Charles Gibson Maitland, Baronet, my nephew, and the heirs of his body, the sum of £2000; to the said George Ramsay Maitland, and the heirs of his body, the sum of £2000; to the said Keith Ramsay Maitland and the heirs of his body the sum of £2000; to my niece, Mrs Jean Hamilton Maitland or Bulwer . . . the sum of £2000—[*here followed four legacies of* £250 *each to other relatives*]; and to the General Trustees of the Free Church of Scotland, also free of legacy-duty—(*First*), the sum of £2000, to be placed to the Fund for Aged and Infirm Ministers of the Free Church of Scotland; (*Second*), the sum of £6000, to be employed by them towards the endowment of the Free Church College at Edinburgh, and the free annual proceeds" of which were to be applied by the General Trustees, subject to the directions of the Assembly, either to the librarian of the College, or for lectureships, or as supplementary endowment, with power to the Assembly to alter and vary the application, or add the funds to or merge them in the other endowments of the College, but always so that the money should be applied in connection with the Free Church College at Edinburgh.

In the sixth place he provided for division of the residue of his estate in equal shares to and among Sir A. C. Gibson Maitland, Bart., George Ramsay Maitland, W.S., and Keith Ramsay Maitland, his nephews, and their respective heirs and successors *per stirpes*.

The holograph codicil to the settlement which the testator executed as above mentioned was dated in 1864, and with reference to the settlement of 1862 directed the trustees therein named and designed, and those who might be thereafter named by the testator, or assumed by them, as therein mentioned, "and that, in addition to all sums therein bequeathed by me, and particularly in addition to the sum of £4000 therein bequeathed by me to my brother Frederick Charles Maitland, to pay to him the annual interest on the sum of £6000, and, if they see cause to do so, to set apart the said sum for his liferent use and behoof, but still so as to preserve the liferent thereof to my wife Mary Isabella Wood or Maitland in the event of her surviving my said brother; and at decease of both of these liferenters, namely, Frederick Charles Maitland, and, in the event of her survivance, my said wife also, I direct my said trustees, after the death of both these parties, or at my death in case I should survive both, to pay the said principal sum of £6000 to the General Trustees of the Free Church of Scotland for the benefit of the Free Church College in Edinburgh, to be applied in such manner as the General Assembly of the said Free Church may direct."

On this settlement and codicil a question arose after the death of Mrs Maitland as to the amount bequeathed to the Free Church Trustees. They maintained that they were entitled on a sound construction of the settlement and codicil (in addition to the £2000 legacy for aged and infirm ministers as to which there was no dispute) to (1)

a legacy of £6000, of which the free annual proceeds were to be applied to the Free Church College as directed by the settlement, and (2) a legacy of £6000 under the codicil, also for the benefit of the Free Church College, but to be applied as the Assembly might direct, and with no obligation to keep the capital intact, and not free of legacy-duty.

The residuary legatees maintained that the Free Church was only entitled (in addition to the £2000 legacy) to one legacy of £6000 for the Free Church College, and that the true meaning of the codicil was to subject the £6000 given by the settlement to the Free Church Trustees to a liferent in favour of the testator's brother Frederick Charles Maitland preferential to Mrs Maitland's existing liferent of the same sum, and that no additional legacy of £6000 was given by the codicil.

This Case was accordingly stated, the first parties being the General Trustees of the Free Church, the second parties being the residuary legatees, and the third parties being Mr Maitland's trustees.

This question was stated for the decision of the Court—"Are the first parties entitled under the said trust-disposition and settlement and codicil to two legacies of £6000 each, or only to one?"

Certain further circumstances were, at the desire of the second parties, stated as bearing upon the question. These circumstances were of two classes, one class bearing on the intention, and consisting of writings and memoranda subsequent to the execution of the will and codicil, from which it was contended that information could be obtained as to his probable intention. The other class consisted of facts relating to the circumstances in which the settlement and codicil were made. The testator had been in the habit of keeping a private cash-book and ledger, and making up a balance-sheet at 20th January in each year; according to that for January 1862, the year of the will, he estimated his estate then at the value of £41,431, 0s. 10d. He had also been in the habit from 1862, the year in which he made his will, of making up annual abstracts or memoranda as at 20th January in each year, which he entered in his ledger, and which contained an abstract of his settlement and of the legacies and other burdens imposed on his estate. This annual abstract for 1862 showed that there remained for residuary legatees £1931, 0s. 10d. The balance-sheet at 20th January 1864, the year of the codicil, showed that the testator estimated the value of his estate at £42,676, 3s. 2d., and the annual memorandum for that year showed that he estimated that there "would remain for residuary legatees £3176, 13s. 2d." That is to say, that amount of residue would remain on the footing that one legacy of £6000 was computed among the legacies. But if the codicil meant that there was to be a second legacy of £6000, this residue would necessarily be more than exhausted. The Case further stated, at the desire of the second parties, the balance-sheet and annual memorandum for 1865, the year after the codicil, but these, as appears *infra*, were held to belong to that class of circumstances which the Court could not competently receive as throwing light on the will.

The first parties argued—(1) Where two gifts were made of the same sum to the same person by separate documents, it was to be presumed that there was a double legacy—*Royal Infirmary* v. *Muir's Trustees*, December 16, 1881, 9 R. 352; *Horsburgh*, January 12, 1847, 9 D. 329. That was very applicable here, because the codicil specially referred to the settlement, showing that the provisions thereof were in the testator's mind. Further, the second bequest, though of the same sum, was different from the first. It was not free of duty, and did not contain the same careful provisions as to applying to the Free Church College only the annual proceeds of the legacy. The codicil was not a mere summary of the gift in the settlement. (2) The memoranda and other papers of the deceased could not be referred to to show intention. That was the province of his will alone. Surrounding circumstances might only be examined so that the Court could know with what state of knowledge of facts the testator made his will—*Campbell*, July 8, 1880, 7 R. (H. of L.) 100; *Wilson* v. *O'Leary*, March 7, 1872, L.R., 7 Ch. App. 448; *Scott* v. *Sceales*, February 5, 1864, 2 Macph. 613; Jarman on Wills, p. 425; *Charter*, L.R., 7 Eng. & Ir. App. 364 (Lord Cairns); *Livingston*, 3 Macph. 20; *Catton* v. *Mackenzie*, July 19, 1870, 8 Macph. 1049, and in H. of L. March 1, 1872, 10 Macph. 12.

The second parties argued—(1) The codicil merely referred to and summarised the gift in the settlement. The two must be read together. Slight evidence of a contrary intention would overcome any presumption for a double legacy—*Horsbrugh* v. *Horsbrugh*, 9 D. 239 (Lord Jeffrey, 387); *Whyte* v. *Whyte*, 1873, L.R., 17 Eq. 50; *Barclay* v. *Wainwright*, 1797, 3 Vesey, 461; *Moggridge* v. *Thackwell*, May 1792, 1 Vesey junior, 464; *Tatham* v. *Drummond*, 1864, 4 D. J. & S. 484; *Chancy* v. *Wootton*, 1725, 2 White & Tudor's Leading Cases, 356; *Hooley* v. *Hatton* and *Ridges* v. *Morrison*, 1 Brown's Chan. Cas. 389, 391; *Allan* v. *Callow*, 1796, 3 Vesey, 289; *Russell* v. *Dickson*, 1853, 4 Clark's House of Lords Cases, 293 (Lord Chancellor Cranworth, 304); *Kippen*, 1858, 3 Macq. (H. of L.) 203. (2) In construing the deeds the Court might look at all the facts and circumstances. The memoranda were admissible, not only to show that the testator had ascertained what the residue would be after fixing his legacies, but also that he had taken no account in his various balances and notes of the second £6000, if he ever at any time meant to bequeath it—Dickson on Evidence, i. 154, 166; Williams on Executors, i. 170; *Ritchie* v. *Whish*, November 19, 1880, 8 R. 101; *Smith* v. *Smith's Trustees*, November 26, 1884, 12 R. 186.

At advising—

Lord President—The question raised in this Special Case arises out of the settlement and codicil left by the late Mr John Maitland. The competing parties are one of the special legatees on the one hand, and the residuary legatees on the other, and the question for decision is, whether the special legatees, the first parties, are entitled under the operation of the settlement and codicil to one legacy of £6000 or to two legacies of that amount.

The special legatees maintain that the settlement gave them a legacy of £6000, and that the codicil gives them an additional legacy of the same amount.

In determining a question of this kind we have one general rule to guide us, namely, that where a settlement gives in express terms a legacy of any particular amount, and a subsequent codicil gives another to the same person of a like amount, without there being anything to shew a contrary intention, both legacies will be payable, and not one only. The question, therefore, comes to be, is that rule applicable in the present case, or is there anything to take it out of the general rule?

A variety of facts and circumstances have been submitted by the second parties under reference to which they seek that this settlement and codicil shall be construed. Some of these statements appear to me to be admissible in evidence, while others clearly are not. Anything in the nature of a declaration of intention, or any statement of the testator's from which an inference can be drawn, subsequent to the execution of his testamentary papers, appears to me to be quite inadmissible. On the other hand, we are entitled to inquire into the facts affecting the position of the testator at the time when he made his settlement, and also at the time when he made his codicil. We are entitled to know, for example, what was the amount of his estate at each period according to his own estimate, because considerable light may be thus obtained in ascertaining his intention as expressed in his testamentary writings under reference to the fact that his estate was of greater or less value at one period and at another.

To this extent, and to this extent only, I give effect to the statement which is set forth by the second parties.

By his principal settlement the testator makes provision for certain legacies, to be paid to his wife and her sisters, and for a liferent of the whole residue in favour of his widow. These small legacies which are first provided are to be paid immediately, and are not to be subject to the liferent. The legacies which are given under the fifth purpose are to be paid on the death of the survivor of the spouses. The objects of his benevolence under that purpose are, in the first place, certain of his relatives, and in the second place the trustees of the Free Church. He had a brother and a sister, to each of whom he bequeathed by this fifth purpose a sum of £4000, and four nephews and nieces, to whom he left £2000 a-piece. He then gives to the trustees of the Free Church a sum of £2000, for the fund for Aged and Infirm Ministers of the Free Church, and then a sum of £6000, to be employed towards the endowment of the Free Church College in Edinburgh. With regard to this latter sum he expresses his intention in the settlement at very considerable length as to how it is to be applied, although he leaves a good deal to the discretion of the General Assembly of the Church, but he makes it a fundamental condition of the gift that it is to be applied for the promotion of the influence and usefulness of the Free Church College. It is important to observe that the testator's directions as to the application of this bequest are very precise and full. As regards the residue of his estate, he leaves it to his three nephews, his apparent intention being to make up to them the difference between the amount of the legacies bequeathed to his brother and sister on the one hand, and to his nephews and niece on the other. So stands his settlement, and it is to be kept in mind that at the time when it was executed in 1862 the testator had left for his residuary legatees, according to his own estimate, and after providing for all the primary purposes of the trust, £1931. His estate was thus fully disposed of by the settlement, and we find that the residue was of small amount when compared with the sum which was bequeathed in special legacies.

We now come to the codicil, which is certainly expressed in terms which are, to say the least of it, ambiguous as regards the testator's purpose and intention. It may be naturally divided into two parts, the first of which has reference to the bequest to his brother Frederick Charles Maitland, and is in these terms—"I, John Maitland, . . . with reference to the trust-disposition and settlement executed by me, . . . do hereby direct my trustees, . . . in addition to all sums therein bequeathed by me, and particularly in addition to the sum of £4000 therein bequeathed by me to my brother, Frederick Charles Maitland, to pay to him the annual interest on the sum of £6000, and if they see cause to do so, to set apart the said sum for his liferent use and behoof, but still so as to preserve the liferent thereof to my wife, Mary Isabella Wood or Maitland, in the event of her surviving my said brother." I do not think that as regards the practical effect of these words there can be much difficulty. The testator's intention is that there shall be given to his brother Frederick Charles a liferent of a sum of £6000 preferential to the liferent of that sum which his widow would have enjoyed. At the same time he preserves his widow's right subject only to that preferential liferent. But there are certain words which have been founded on on both sides—I mean the words "in addition to all sums bequeathed by me." It seemed to be contended on the part of the first parties that these words expressed a leading idea in the testator's mind, operating not only as regarded the first, but also as regarded the latter half of the codicil. But I do not attach importance to them, because I think their meaning is satisfied when we find that an additional sum is given to Frederick Charles beyond what he received under the original settlement. Nothing more is meant than that the testator has a purpose and intention, which is otherwise clearly brought out, to give to Frederick Charles, in addition to the bequest made to him in the settlement, a liferent preferential to that given to his widow.

But there are other words which demand attention—I mean the words "the sum of £6000." If the testator had added after them the words "therein bequeathed to the trustees of the Free Church," all ambiguity would have been at an end. It is the omission of some such words as these which creates the ambiguity, and this too by way of contrast, because in speaking of the £4000 the testator calls it "the sum of £4000 therein bequeathed by me to my brother," but in speaking of the £6000 he uses no such words. But I think this may be accounted for by the fact that in the settlement there are two sums of £4000 and only one sum of £6000, and in speaking of the £4000 the testator naturally enough distinguishes it as the sum "therein bequeathed to my brother," while in speaking of the £6000 he did not require to apply any distinguishing terms, because there is only one such sum mentioned. So much for the language of the first part of the codicil, and it is to be observed that both it and

the latter part are expressed in the form of directions to pay. The words used are not properly words of bequest, and yet the first direction has all the force of a bequest.

The second part of the codicil is as follows:—"And at decease of both of these liferenters, namely, Frederick Charles Maitland, and in the event of her survivance, my said wife also, I direct my said trustees after the death of both of these parties, or at my death in case I should survive both, to pay the said principal sum of £6000 to the general trustees of the Free Church of Scotland for the benefit of the Free Church College in Edinburgh, to be applied in such manner as the General Assembly of the said Free Church may direct." If it was here intended by the testator to give an additional bequest of £6000 over and above the £6000 contained in his settlement, one cannot but feel that he has expressed himself ambiguously, for there can be no doubt that this part of the codicil is capable of two readings. It may mean that he gives an additional £6000 besides the £6000 bequeathed in his settlement; it may mean that he merely gave the direction for the purpose of making it clear that while the original £6000 was to be liferented by his brother, it was to go, as already provided upon the death of both liferenters, to the Free Church College. And this identity of the sums is supported in some degree by contrasting the very short way in which in the codicil he refers to the object to which that sum is to be applied with the very lengthy and special way in which he describes that object in the settlement. The former is in fact just a very short summary of the second part of the fifth purpose of the settlement. This does not perhaps go for very much, but it tends to increase the ambiguity and the difficulty of arriving at the testator's true intention in the matter.

The way in which this intention presents itself to my mind is not exactly the same as in many cases of double legacies. It is not whether the legacy is additional or substitutional; it is rather whether the testator meant by it to give a legacy at all, and whether he did not mean the legacy to stand as it was left in the settlement, with a direction, notwithstanding the alteration in the first part of the codicil, to carry out its application in the manner there described.

That being the nature of the question, we are entitled to consider the position of the testator at the date of the codicil as affecting the question of intention. I have mentioned that at the date of the settlement the residue of the testator's estate, according to his own estimate, was £1900. I see that at the date of the codicil it amounted to £3176, assuming that there was not a second legacy of £6000. If there was a second legacy of £6000 bequeathed by the codicil, then not only would there be no residue, but there would be a deficiency, which would require to be made up by a proportional abatement from the legacies in the settlement. Now, that is a fact affecting the position and purpose of the testator which we are well entitled to take into account. Is it probable that after making his nephews his residuary legatees, there being a small surplus over at the time of his original settlement, the testator should by the second part of his codicil not only wipe out the surplus, but actually create a deficiency, which could only be met by an abatement of all the legacies contained in the fifth purpose of the codicil? I think that this is a very improbable result, especially considering that as regards the testator's brother Frederick Charles, whom the codicil was certainly intended to benefit, the testator would there be giving with the one hand a liferent of £6000, and taking away with the other part of his original gift to him of £4000, to which he expressed his intention of making an addition. Assuming that the codicil is difficult to read, and that there is a plain ambiguity about it, I think this is a consideration sufficient to turn the balance, and to lead us to the conclusion that it was not the intention to give a second bequest of £6000, but that the second purpose of the codicil was truly a direction that the £6000, after the liferent in favour of the testator's brother, and the further liferent in favour of his widow, was to go to its original destination, namely, for the benefit of the Free Church College.

I am for answering the question in accordance with these views, and for finding the first parties entitled to only one legacy of £6000.

Lord Mure—I am of the same opinion, and your Lordship has given so full an exposition of the clauses of the settlement and codicil, and of the rules of construction applicable to them, that I have very little to add. As to the general rule by which the Court should be guided in such cases of double legacy, there can be no difficulty after the decision in the case of *Muir's Trustees*. The rule which was then adopted was that where two legacies identical in amount are made in two different writings, both may be claimed unless there are expressions to be found in the instrument or in some other surrounding circumstances which may competently be brought into consideration, which are sufficient to show that the testator did not intend to make two bequests. In the two short testamentary writings which we were called upon to construe in the case of *Muir's Trustees*, there was nothing to show that it was not the testator's intention to make a double legacy. In the present case there is not much more light to be got from the documents themselves than there was in the case of *Muir's Trustees*, but we are entitled to look at the surrounding circumstances, and the condition of things which would necessarily be present to the mind of the testator at the dates when he executed the respective deeds, and to judge from these whether the second £6000 was to be cumulative or in substitution of the first.

I agree with your Lordship in thinking that the position of the testator's estate, and the amount of it at the dates to which I have referred, has an important bearing upon the solution of the question raised in the present case. We have under the testator's own hand an account of the state of his funds from year to year, and it is plain that when he came to make the additional provision for his brother which is contained in the codicil, he had deliberately to consider, having regard to his general settlement, where it was to come from, and what the fund was to be out of which he was to give this additional provision. It is also clear that there was no sufficient amount of residue out of which he could make a second legacy of £6000. As your Lordship has explained, the result of making

a second bequest of such a sum, would, as at the date of the codicil, have been not only to produce a deficiency, but also to cause an abatement from all the legacies left under the settlement. This is not a likely thing for an experienced man of business, as Mr Maitland undoubtedly was, to have done. The two sums which he required to have chiefly in view in making the codicil were the £4000 bequeathed to his brother and the £6000 bequeathed to the Free Church. He designates the £4000 as the sum already destined to his brother, and he does this because there is another sum of £4000 bequeathed in the settlement, from which it was necessary to distinguish it. There is, however, but one sum of £6000 in the settlement, and consequently he did not require to identify it further than by mentioning it as the £6000 the interest on which was to be paid to his brother during his lifetime instead of to his own wife, so that his brother was to have a liferent of that sum preferential to the liferent of it which he had already given to his wife, while the principal of the same £6000 was, after the death of both liferenters, to go to the Free Church. This appears to me to produce a consistent reading of the two deeds, and in the surrounding circumstances I think that is the disposition of his property which the testator would naturally have made. I am therefore of opinion that the first parties are not entitled to two legacies of £6000, but that the sum of £6000 mentioned in the codicil is the same as that bequeathed by the settlement.

Lord Shand—The question in this case is one of considerable difficulty. It is this, whether under the codicil the testator gave an additional legacy to the trustees of the Free Church besides the £6000 bequeathed by his settlement, or whether the £6000 mentioned in the codicil was in substitution of the former legacy, or merely imported a reference to it? I do not think it has been argued that the case is one of substitution, and accordingly the point is narrowed to this, is the £6000 mentioned in the codicil a reference to the legacy given by the original settlement or is it a new legacy?

There is undoubtedly in both deeds a direction to pay the sum of £6000, and accordingly, *prima facie*, the rule applies which was laid down in the case of *Muir's Trustees* and previous cases, that where two legacies of the same amount are given to the same person by two different testamentary writings, both are effectual unless, looking to the terms of the writings themselves, taken with the surrounding circumstances, there is enough to show that the testator did not intend to give a double legacy. The question here is whether, notwithstanding the directions to pay which we find in the two deeds, it was really not intended that the two legacies should be given. I am of opinion that on a sound construction of the terms of the codicil a double legacy was not given.

A question has been raised as to how far the Court is entitled to take into consideration certain documents and memoranda which have been brought under our notice by the first parties. It appears that the testator was in the habit of making up an annual balance-sheet of his affairs, and of entering in his cash-book an annual estimate of his means. It has been contended that we may look at such facts as this, which appears in the estimate or memorandum dated 20th January 1865. There is an entry there to this effect—"Remains for residuary legatees, £6536, 16s. 4d." The codicil in question is dated 7th March 1864. And if a second legacy of £6000 were bequeathed by the codicil, it is clear that there would have remained for the residuary legatees only a sum of £536, and not the much larger sum mentioned in the entry. I am of opinion that the Court cannot look at this entry for the purpose of drawing any conclusion from it bearing on the controversy between the parties. The result of holding otherwise would be that a mere jotting in the handwriting of the deceased (having no claim to the character of a testamentary writing) would be allowed to control the effect of a regular testament or codicil. I think this document must be entirely laid aside, and for my part I place it entirely out of view or out of mind.

But while the Court is not entitled to look at these memoranda, I think that in judging of the testator's meaning in the disposal of his estate by the terms used by him, we are entitled to know what the pecuniary circumstances of the deceased were. We have very full information about this, because we know what was the state of the funds of the deceased, and how he was situated from time to time, from evidence under the testator's own hand. There are two circumstances of importance which may be noted before coming to the construction of the deeds themselves. The settlement is dated 12th June 1862. By it he gave a legacy of £6000, in addition, it appears, to a like sum which he had actually expended in assisting to build certain offices in Edinburgh for the Free Church. The codicil is dated one year and nine months later, and there was no substantial addition in the meantime to the testator's funds. He had not acquired any increase of means out of which he could have provided a second legacy of £6000, and there was no change in his circumstances such as would suggest the probability of such a bequest being made. There is another consideration which is even more material. If there were a second legacy under the codicil, the result would be that in order to meet it it would be necessary to encroach on all the other legacies. The testator was not in possession of funds to pay such a legacy at the time when the codicil was made without making an abatement from all his bequests.

Taking these circumstances into consideration in construing the two deeds, I think there is enough in the terms of the codicil itself to lead us to the conclusion that the testator had no intention to give a double legacy. It is plain that the reference to the £6000 in the early part of the codicil as an addition to the legacy in the settlement is limited to the giving to Frederick Charles Maitland a liferent of that sum in addition to his legacy. The words "in addition to all sums bequeathed by me" are inserted as a parenthesis in the first direction, and are applicable to it alone, and that direction was merely to enlarge the benefit to Frederick Charles Maitland by giving him the interest on the sum of £6000 in addition to his legacy of £4000. When we come to deal with the second direction regarding the payment to the trustees of the Free Church, the words I have quoted have no bearing upon that. There is no indication in the second direction, as in the first, that an addition is intended to be given, and the

absence of this, in contrast to what is said in the first direction, is very significant by way of contrast. Where the testator means to give an addition he says so. When, in a further and substantive direction, he refers to the previous legacy given he omits any reference to an addition. Then the language by which the application of the "said principal sum of £6000" is described is just a short summary of the much longer description of the legacy in the principal deed. It is no doubt true that there is a presumption in such a case as the present in favour of a double legacy, but very slight circumstances indeed may sometimes displace that presumption. I think the presumption is here displaced, and I am therefore of opinion that the first parties are not entitled to more than one legacy of £6000.

Lord Adam—I think this is a very difficult and a very narrow case. I quite approve and adopt the law as expressed by your Lordship in the case of *Muir's Trustees* to the following effect—"One rule at least is well settled, and that is, that when exactly the same amount is given twice in the same paper, the presumption is that it is a mere repetition arising from some mistake or forgetfulness, but where the same amount is bequeathed in two distinct testamentary papers, both equally formal, then both legacies are payable unless it can be shown from the settlement of the deceased, or by other competent evidence, that his intention was to give one legacy only." I think that is a distinct and accurate statement of the law.

We have heard an argument upon the competency of the evidence as to the testator's position and circumstances at the dates of the execution of the settlement and subsequent codicil, and I agree with Lord Shand in the opinion which he has expressed in regard to that matter. I think the rule of law applicable to it is accurately stated in the passage which has been quoted from Mr Jarman's book on Wills (i. 425-430), to the effect that evidence to prove intention as an independent fact is inadmissible. The Court is not entitled to look at contemporaneous jottings or other writings for the purpose of arriving at the testator's intention as expressed in his testamentary papers. These are not competent. But it is not only competent, but in the present case it is most material, to look at the memoranda which have been produced for the purpose of seeing the amount of the testator's estate at the two dates of the making the will and the codicil. In the latter document the testator tells us what addition he intended to make to the provisions under his settlement. The additions consisted of a liferent in favour of his brother of a sum of £6000. That is the only addition specified in the codicil. There is further a direction to pay the £6000 so liferented to the Free Church trustees after the death of the two liferenters, but this latter direction is not, as matter of construction, affected by the words contained in the first portion of the codicil as to its being "in addition." Yet if it were to be treated as an additional legacy, it would be a much greater addition than that which the testator has particularly specified. I think the contention that the second £6000 is the same as that previously conferred by the settlement must be given effect to.

The Court found that the first parties were entitled to only one legacy of £6000.

Counsel for First Parties—Balfour, Q.C.—Guthrie. Agents—Dalmahoy & Cowan, W.S.

Counsel for Second Parties—R. V. Campbell—Wood. Agents—Maitland & Lyon, W.S.

Counsel for Third Parties—R. V. Campbell. Agents—Maitland & Lyon, W.S.

Thursday, January 27.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

GOURLAY (MILLEN'S TRUSTEE) *v.* MACKIE.

Bankruptcy Act 1696, *cap.* 5—*Voluntary Assignation within Sixty Days of Bankruptcy—Illegal Preference—Security for Prior Debt.*

A debtor borrowed a sum on his promissory-note, handing at the same time to the lender a certificate for certain shares belonging to him, and a letter obliging himself during the currency of the note, if the creditor desired it, to execute in his favour a transfer of the shares. A month afterwards he became bankrupt, having prior to the sequestration, at the creditor's request, executed in his favour a transfer of the shares. *Held* (*rev.* judgment of Lord Kinnear) that the principle of *Moncreiff* v. *Union Bank*, 14 D. 200, applied to the circumstances, and that the trustee was entitled under the Act 1696, c. 5, to reduce the transfer on the ground that it was not made in respect of a *novum debitum*, and not a mere completion of what the debtor was under an unconditional obligation to grant, but a further security in the sense of the Act.

On 23d December 1885 Richard Mackie, Leith, lent to John Millen & Company the sum of £450. Millen & Company gave in exchange their promissory-note for £462, 10s. (the difference representing interest and exchange), payable four months after date, and a letter which was in the following terms—"In consideration of your having this day discounted for our sole benefit our acceptance, at four months from date, for (£462, 10s.) four hundred and sixty-two pounds ten shillings sterling, and handed us proceeds of same, we hereby hand over to you, as security for same, 100 shares for £6 paid in Holmes Oil Company, and bind ourselves to transfer same to you at any time during the currency of the bill if you desire it." On the same day the scrip or share certificate of the shares in the Holmes Oil Company was delivered to him, but no transfer was then executed. The shares belonged to John Millen, who acted for his firm.

The affairs of Millen & Company having become embarrassed, were on 14th January 1886 placed in the hands of a firm of chartered accountants, and intimation of the fact made by circular to their creditors. On 15th January Mackie obtained a transfer of the said shares. The transfer was dated 23d December 1885, the date of the letter. He intimated it to the company, who issued a new certificate of the shares in his name. On 28th January the estates of John Millen & Company were sequestrated. John Gourlay, C.A., was appointed trustee.

Mr Gourlay raised this action in order to reduce the transfer, and have the defender ordained to make over the certificate of the shares to him, as trustee, the ground of action being that the transfer was