Wednesday, November 25.

SECOND DIVISION.

DALGLISH'S TRUSTEES AND OTHERS.

Testament—General Trust-Disposition and Settlement—Codicils—Principal Deed Re-written in Similar Terms and Re-executed—Revocation.

A testator executed a general trust-disposition and settlement upon 8th March, and two codicils upon 9th March and 14th March respectively. A doubt having arisen as to the validity of the execution of the principal deed, another deed was prepared in virtually the same terms and executed upon 9th April.

Held that the two codicils were not thereby revoked.

The late Miss Jane Dalglish, of Dunrowan, in Dumbartonshire, died on 27th April 1890, aged eighty-three years. She left personal estate amounting to about £13,000.

In March 1890 Mr John Roberts, S.S.C., Miss Dalglish's law-agent, prepared a trust-disposition and settlement for execution by her, in terms of instructions which Miss Dalglish had previously given to him. On the 8th of March Mr Roberts waited on her to have the trust-disposition and settlement signed, and by her instructions appended thereto a writing leaving legacies to two servants. The deed was then read over to Miss Dalglish, she approved thereof, and desired to sign the same. From bodily weakness, however, she was unable to subscribe the same satisfactorily, and after several ineffectual attempts the deed was again read over to her in presence of two witnesses, and was, at her request, subscribed by Mr Roberts notarially on her behalf. Mr Roberts explained to Miss Dalglish that it might be better, if she got stronger, to have the deed re-executed and signed by herself with her own signature, and arranged that in the event of her recovery she would send for him for that purpose. Accordingly the deed was re-extended and re-executed, with the differences that the deed as re-extended contained in its body the legacies to servants contained in the writing appended to the deed as executed on the 8th March 1890, and that it was executed by the testatrix herself in common form. In all other respects the two deeds were in identical terms. On 9th April 1890 Mr Roberts was telegraphed for, and went to Helensburgh, and the re-extended deed was read over and subscribed by Miss Dalglish.

Both deeds conveyed her whole estate to the trustees for the purposes of the trust. By each of these deeds, dated 8th March and 9th April respectively, a legacy of £600 was left to Miss Agnes Margaret Crum, daughter of John Crum, Elmpark, Helensburgh.

After 8th March 1890 Miss Dalglish expressed a strong desire to make an additional provision for Agnes Margaret Crum, and to regulate the distribution of her trinkets and jewellery. Accordingly, on 9th March 1890, being a Sunday, when Mr Roberts could not be sent for, Miss Dalglish had a codicil prepared and signed notarially for her by Mr Miller, writer in Glasgow and notary public, who resided in Helensburgh. By said codicil Miss Dalglish bequeathed a variety of specific articles to the persons mentioned in said codicil, including Agnes Margaret Crum, and subject to the foregoing alterations and additions she confirmed the trust-disposition and settlement of 8th March 1890.

On the 14th March 1890 Miss Dalglish again sent for Mr Miller, and had a second codicil prepared and signed for her in like manner by him. Miss Dalglish thereby, "in addition to the provisions in my trust-disposition and settlement in favour of the said Agnes Margaret Crum," made a provision of £500 in her favour, as set forth in said codicil.

A special case was presented to the Court of Session by the trustees nominated by Miss Dalglish's trust-disposition and settlement of the first part; Miss Agnes Margaret Crum with advice and concurrence of her father—she being a minor—of the second part; and the residuary legatees under the said trust-disposition and settlement of the third part, to have the following questions determined by the Court viz.—"1. Is Agnes Margaret Crum entitled to the legacy or provision of £500 bequeathed to her by the codicil executed on 14th March 1890, in addition to the legacy of £600 bequeathed to her under the said trust-dispositions and settlements?" 3. Is the codicil of 9th March 1890, in so far as it disposes of the jewels, trinkets, and other specific articles therein set forth, entitled to receive effect?"

Argued for the second party—(1) There was no express revocation of the codicils in the subsequent general trust-disposition, and revocation was not to be implied. The whole of a person's testamentary writings were to be read together as one settlement if that could be done, as here, without doing violence to any of them—*Forlong* v. *Taylor's Executors*, April 3, 1838, 3 Sh. & M'L. 177; *Grant* v. *Stoddart* (Whole Court) February 27, 1849, 11 D. 860, espec Lord Moncreiff's opinion, 872, *dissenting*, quoted with approval by House of Lords, which reversed the interlocutor—1 Macq. 163; *Sibbald's Trustees* v. *Greig, &c.*, January 13, 1871, 9 Macph. 399. (2) There was here simply re-execution or republication of a prior settlement, the validity of whose execution seems to have caused the law-agent some anxiety. No alteration whatever was made, no revocation of intervening codicils was intended. The case fell to be decided upon the principles laid down in *Wade* v. *Nazer*, 1848, 1 Robertson's Eccles. Cases, 627, approved of by Justice Gray in *Green* v. *Tribe*, 1878, L.R., 9 C.D. 231; see also the case of *Rawlings*, 1879, 41 L.T. 559 and 48 L.J. Prob. Div. 64. In *Wade's* case a clause of revocation

of prior settlements contained in the will re-executed was held not to revoke codicils executed subsequently to the will and before the re-execution. Further, ratification or republication drew back to the date of the original execution, and the codicils being subsequent to that date were effectual. (3) Special provisions, bequests, or destinations were not revoked by a subsequent general disposition—*Thomson* v. *Lyell*, Nov. 18, 1836, 15 S. 32; *Kenmore's Trustees*, May 18, 1869, 7 Macph. 771; *Glendonwyn* v. *Gordon*, July 20, 1870, 8 Macph. 1075, and May 19, 1873, 11 Macph. (H.L.) 33; *Walker's Executor* v. *Walker*, June 19 1878, 5 R. 965. (4) No doubt the codicil appended to the first will was incorporated into the body of the second one, and the two codicils in question were not. Probably this was merely because Mr Roberts did not know of their existence as they had been drawn by another agent.

Argued for the third parties—(1) The deed of 9th April was a general settlement of Miss Dalglish's whole estate and operated as a revocation of the prior codicils. The codicil appended to the deed of 8th March was incorporated, but the two codicils in question were ignored. (2) Assuming that the English law as to re-execution was as stated by the second parties, the facts did not amount to re-execution. Here a new will had been made and executed. (3) The law as to special provisions referred particularly to special destinations of heritable property and not to bequests of sums of money. *Kenmore's* case was not, if carefully examined, really an exception. It dealt with the title to bank stock. The case of *Campbell* v. *Campbell*, July 8, 1880, 7 R. (H.L.) 100, following upon *Thoms* v. *Thoms*, March 30, 1868, 6 Macph. 704, had greatly modified the law laid down in *Glendonwyn;* see also *Leitch* v. *Leitch's Trustees*, February 17, 1829, 3 W. & S. 366.

At advising—

LORD JUSTICE-CLERK — This case is a somewhat peculiar one. The late Miss Dalglish executed a trust-disposition and settlement on the 8th of March 1890. She herself endeavoured to execute it with her own hand, but owing to bodily weakness the exertion was too great for her, and by the time it came to appending the last signature or two they were practically, as we see from the deed itself, illegible, and so unsatisfactory as signatures that Mr Roberts, the gentleman who had drawn up the deed by her instructions, thought it would not be satisfactory to leave it in that state, and accordingly it was executed notarially, he signing as notary. There is this peculiarity about the deed, that it has a codicil appended to it. Apparently Miss Dalglish, on Mr Roberts coming with the document for signature, desired to put in one or two other legacies, with a view to having the whole matter done at once. He also, as we are informed by the special case, expressed his opinion that it would be desirable that if her strength should sufficiently rally at some future day the deed should be re-executed, and accordingly he drew out a deed in exactly the same terms as the former deed and codicil, the only difference being that as on this occasion he had his full instructions he omitted the codicil and inserted the two legacies which had been contained in the codicil of 8th March in the re-extended deed. The intention was to make more sure what had been done upon the 8th of March, and there was no alteration whatever on the deed except in that matter of form, that what formerly had been added as a codicil was now placed in the body of the deed itself. A few days after the 8th of March, and before Mr Roberts had the deed executed by Miss Dalglish herself, it occurred to her that she desired to make one or two more additions to the provisions of her will, and we are told in the case that she was not able to get Mr Roberts to come, but that Mr Miller, a writer in Glasgow, was sent for on these two occasions, one being the 9th and the other the 14th of March, when two codicils were drawn out, one making an additional provision in favour of Agnes Margaret Crum, by which £500 would be set apart for her education, the balance to go to her on her attaining the age of twenty-one years, or in the event of her dying before reaching majority, the balance to fall back into the residue. On the 9th of April, Miss Dalglish having sufficiently recovered to be able to execute the deed herself, Mr Roberts was telegraphed for, and he came with the deed extended, as I have already mentioned, and Miss Dalglish was able on that occasion to sign it efficiently herself. It appears that Mr Roberts knew nothing about the two codicils which had been signed notarially for Miss Dalglish by Mr Miller, and accordingly it was quite to be expected that he would not take any notice of these provisions at all. And the question which is now before us is this, whether the deed which is now the will of Miss Dalglish, being dated the 9th of April, it is to be held to cancel the codicils of 9th and 14th March.

Now, in regard to that question it is necessary to consider very carefully what really was done. The special case puts it plainly before us that it was the re-extending and the re-execution of the deed of March. It was to come in the place of the deed of March; it was a re-execution of the deed of March, and of course it could only bear the date on which it was signed, which certainly was subsequent to the codicil, but being a mere re-extending and re-execution of that deed, I am of opinion, after considering the authorities, that we are in a position to hold that the re-execution of the deed did not cancel the codicils—that the expression of Miss Dalglish's will as at 8th March was repeated by her trust-disposition and settlement of 9th April, but that that was a mere repetition, and had no effect in cancelling what she had done in codicils to that which she was repeating.

The question might have been a very difficult one to decide had it not been that we have some authority upon the

matter already, and I would only mention the case of *Wade*, referred to in the course of the argument, which was a case somewhat similar. In that case the testator had drawn up his will with his own hand and signed it, and he had afterwards granted certain codicils, but he was advised by a solicitor that it would be of importance that he should have certain words of style in the declaration of his will, and accordingly after the granting of the codicils he re-executed the will of a subsequent date to the granting of the codicils. Now, it was held in that case, and held quite distinctly, that the mere re-execution or re-attestation of the will which had been previously drawn out and signed had not the effect of wiping out the subsequent codicils; that it was quite consistent with the intention and meaning of the testator, and indeed quite inconsistent with any other view; that he meant that that which he had done by the codicils should remain. And therefore I have come to the conclusion that we should answer the first question in the affirmative. Then as regards the codicil as to the specific articles, that is practically answered by what I have said as to the answer to the first question, that that part of the codicil is entitled to receive effect. Accordingly the first question must be answered in the affirmative, and the third in the affirmative.

LORD YOUNG—I am of the same opinion' and I do not know that I can usefully add anything to what your Lordship has already said. What appeared to myself, and I think to all of us at first—possibly throughout—in the case was, whether we could, or how we should, reach a judicial view as to the state of the facts, for I do not think any of us for a moment doubted that if we were judicially satisfied by competent evidence or on satisfactory grounds that the deed of 9th April was simply a re-attestation or ratification of the deed of 8th March, it would not have any effect in recalling the codicils in question. The difficulty was in reaching that conclusion, that it was only a re-attestation or ratification of the first executed deed, because of a doubt as to the formality of its execution. Having overcome that difficulty, which I agree with your Lordship in thinking we satisfactorily and quite safely do upon the language of the case as stated to us by the parties, I have no hesitation whatever in acting upon the principle as equally valid and satisfactory in the law of Scotland, upon which the English Court proceeded in the case of *Wade* and some other cases that were referred to, and which was very distinctly expressed by Lord Hannan when he was President of the Probate Court, that a mere re-attestation of a deed because of some doubt cast upon the validity of the original attestation will have no operation whatever in recalling a codicil although it is of a date subsequent to the codicil, and so makes the deed which is thereby re-attested of a date subsequent to the codicil. I do not think it is an accurate use of language to speak of the re-executed deed as a new will or another will. The will was not changed; the will remained the same, although it might be written out upon and evidenced by another paper. Now, I think it is quite clear that the will, of which the re-executed deed of 9th April is the evidence before us, is the very will which is expressed in the deed of 8th March, and that the whole purpose was a re-attestation in the way which occurred, I think very naturally and properly, to the conveyancer, of the same will written upon the paper with the date of 8th March. And that being so, I cannot doubt that we should act unjustifiably and unwarrantably if we imputed to the testator the intention when she yielded to and followed the advice of her man of business on this matter, of recalling these codicils, and if she had no such intention, as plainly upon these facts she had not, we should be doing manifest injustice by holding that they were recalled.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The Court answered the first and third questions in the affirmative.

Counsel for the First and Third Parties—Lord Advocate Sir Charles Pearson, Q.C.—Kirkpatrick — Dickson. Agents — Irons, Roberts, & Company, S.S.C.

Counsel for the Second Party — D.-F. Balfour, Q.C.—Dundas. Agents—Bell & Bannerman, W.S.

Wednesday, November 25.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

YULE *v.* M'MEEKEN AND ANOTHER.

Diligence—Curator Bonis—Competency of Charge at Instance of Party Under Curatory.

Where a charge was given for payment to a *curator bonis* of a sum of money due to his ward, *held* that it was not a good objection to the charge that it proceeded at the instance of the ward.

On 26th April 1888 Charles Yule, accountant, Glasgow, in consideration of a sum of £500 which he had received from Ottho Adrian Clayton Alexander, *curator bonis* to George Russell Alexander, a person of unsound mind, granted a bond and assignation in security over certain heritable subjects, binding himself to repay the sum borrowed "to the said George Russell Alexander, his executors and assignees whomsoever."

On 23d January 1890 James M'Meeken, accountant, Glasgow, was appointed *curator bonis* to George Russell Alexander in place of Ottho Adrian Clayton Alexander.

On 10th October 1890 George M'Meeken, having recorded the bond and assignation above mentioned, charged Charles Yule to