

Counsel for the First Party—Solicitor-General Dickson, Q.C.—Cooper. Agent—David Turnbull, W.S.

Counsel for the Second Party—Salvesen. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Wednesday, December 2.

### FIRST DIVISION.

#### WADDELL'S TRUSTEES v. WADDELL.

*Succession—Testamentary Writings—Holograph Notes.*

In the repositories of a person who died leaving a formal trust-disposition and relative codicil there were found two holograph writings. The first was in the following terms:—"August 27th 1888.—Annuit for life Mrs Wood Waddell, 30 Queens Crescent, for £100, £3000 codicil to my will for Alexina Waddell, my late nephew W. Wood Waddell, daughter Alexina Waddell." It was signed in the left-hand bottom corner with the name and address of the writer. The second document was written in pencil in the following terms:—"May 14th 1894.—Moses Adamson the sum of £100, hundred pounds, 14th May 1894. The sum of one hundred pounds Peter Waddell." There was added in ink, "May 14th 1894." There was written in ink at the back of the paper, "May 14th, 1894, pay to Moses Addimson one hundred pounds stg." The trust-disposition contained a clause by which the trustees were directed to pay any legacy contained in any "memorandum or writing by me, clearly expressive of my will, though not formally executed."

*Held* that the documents were not testamentary.

*Succession—Conditio si sine liberis—Bequest to Nephew.*

Where a bequest is made by an uncle, without children of his own, to a nephew, the *conditio si sine liberis decesserit* applies, unless it appears from the will itself that the motive of the bequest was personal favour to the legatee rather than relationship.

A testator directed his trustees to pay to his sister the sum of £6000, to the "son of my late brother £5000," and to "the only surviving daughter of my said brother £5000." These three legatees were the only surviving near relations of the testator. In the same clause there were legacies ranging from £500 to £4000 bequeathed by the testator to distant relations, strangers in blood, and charities, the legacies amounting in all to £40,000. The residue of his estate was bequeathed to charities.

*Held* (*dub.* Lord Adam) that the *conditio si sine liberis* applied to the bequest to the testator's nephew.

*Bogie's Trustees v. Christie*, January 26, 1882, 9 R. 453, *approved*.

Mr Peter Waddell, 5 Claremont Park, Leith, died without issue on 18th June 1895, leaving a trust-disposition and settlement and codicil dated 18th June 1886 and 24th October 1888 respectively. The testator's father had four children, of whom he was the survivor. Only one of them was married and had issue, viz., Mr Andrew Waddell. One of his children, Mrs Mary Waddell or Wilson, survived the testator; and another, William Wood Waddell, who predeceased him, left a child, Miss Alexina Waddell, who is in pupilarity. Andrew Waddell's third child, Elizabeth, died in 1880 unmarried. The testator was thus survived by a niece and a grand-niece, who were his nearest relations.

By the third purpose of his trust-disposition Mr Peter Waddell directed his trustees to pay the legacies therein mentioned, and *inter alia*, "to the said Elizabeth Waddell the sum of £6000 sterling; to William Wood Waddell, presently residing in No. 6 Mansfield Place, Edinburgh, son of my late brother Andrew Waddell, the sum of £5000 sterling; to Mrs Mary Waddell or Wilson, only surviving daughter of my said brother Andrew Waddell, the sum of £5000 sterling." The further legacies contained in the clause, which were very numerous, amounting in all to about £40,000, and ranging in amount from £500 to £4000, were to distant relations, strangers in blood, and charities.

By the fourth purpose the trustees were ordered to deliver a certain picture to William Wood Waddell.

The fifth purpose provided—"That my trustees shall pay and deliver all such legacies, gifts, or provisions, and implement all such instructions as shall be contained in any codicil or any memorandum or writing by me clearly expressive of my will, though not formally executed, declaring that the same, whether formal or informal, shall be held and taken to be part and parcel of these presents."

By the sixth purpose the residue, which amounted to about £100,000, was disposed to certain charitable institutions.

By the second purpose of the codicil the trustees were directed to deliver to the National Gallery the picture bequeathed to William Wood Waddell, "the bequest thereof in the fourth purpose of the said trust-disposition and settlement . . . having lapsed by the predecease of the said William Wood Waddell; and I revoke and alter the preceding trust-disposition and settlement in so far as is necessary to give effect to these presents, but no further or otherwise."

The testator had on 27th August 1888 instructed his agent to prepare a codicil, and the draft contained a direction to pay "to my grandniece Alexina Waddell, daughter of my late nephew William Wood Waddell, . . . the sum of £1000." This clause was deleted on the execution of the codicil on 24th October.

Subsequent to the testator's death a holograph writing by him in the following terms was found in his repositories:—"August 27, 1888.—Annuit for life Mrs

Wood Waddell, 30 Queen's Crescent, for £100, £3000 codicil to my will for Alexina Waddell, my late nephew W. Wood Waddell, daughter Alexina Waddell, Peter Waddell, 5 Claremont Park, Links, Leith." The testator on 29th August 1888 instructed the said John T. Mowbray to purchase an annuity of £100 on the life of Mrs Wood Waddell, and subsequently on 31st August 1888 he instructed Mr Mowbray to increase the amount of the annuity to £150. On 6th September 1888 an annuity of £150 on Mrs Waddell's life was purchased by Mr J. T. Mowbray.

Moses Adamson acted for some time as the personal attendant of the testator, but left his employment in May 1894. After the death of the testator there was found in his repositories a pencil holograph writing in the following terms:—"May 14th, 1894.—Moses Adamson, the sum of £100 hundred pounds, 14th May 1894. The sum of one hundred pounds, Peter Waddell." There is added in ink "May 14, '89." There is written on the back of the paper in ink, "May 14th 1849, pay to Moses Addimson one hundred pounds stg." The testator drew from the Bank of Scotland, Leith, monthly, certain sums to enable him to meet the house bills, &c. On 14th May 1894 he signed a cheque for £100 on the said bank in favour of Moses Adamson. That cheque was afterwards cancelled, and on the same date he signed another cheque for the same amount, also in favour of Moses Adamson, who drew the money from the bank and handed it to the testator.

A special case was presented to the Court by (1) Mr Peter Waddell's trustees; (2) Alexina Waddell, and her mother as her tutor or guardian; (3) Mrs Wood Waddell as an individual; and (4) Moses Adamson.

The questions submitted for the consideration of the Court were—" (1) Are the second parties entitled to the legacy of £5000 bequeathed to the said William Wood Waddell? (2) Are the second and third parties respectively entitled to the sum of £3000 and to the annuity of £100 mentioned in the holograph writing of 27th August 1888? (3) Is the party of the fourth part entitled to the sum of £100 mentioned in the holograph writing of 14th May 1894?"

Argued for the first parties—1. The writing of 27th August 1888 was clearly intended only as a memorandum for the use of the writer in his consultation with his agent. There was no indication on the face of it of any testamentary intention. Neither the use of the word "annuity," nor of the word "codicil," in the positions in which they were, created any such presumption. The directions as to informal documents contained in the fifth purpose of the will applied only to such documents as were clearly of a testamentary nature, but had some merely technical defect, e.g., such as were unsigned, but to which effect might be given in accordance with the decision in *Lowson v. Ford*, March 20, 1866, 4 Macph. 631; *Munro v. Coultis*, July 3, 1813, 1 Dow 437; *Hamilton v. White*, June 25, 1882, 9 R. (H. of L.) 53. 2. The second argument applied *a fortiori* to the writing of May 14th

1894, which was merely practice for signing a cheque. 3. The Court would not readily extend the *conditio* beyond descendants. Thus it was held in the case of *Hall v. Hall*, March 17, 1891, 18 R. 691, at 698, that it did not apply to brothers. In the case of nephews the testator must clearly have placed himself *in loco parentis*—*Bogie's Trustees v. Christie*, January 26, 1882, 9 R. 453, at 456. There was no case where it had been held that this relation was established, unless the will was of the nature of a family settlement. That was characteristic both of *Bryce's Trustees* and *Forrester's Trustees* (quoted *infra*). But here, on the contrary, there was a special bequest to an individual nephew contained in a clause which consisted of a list of legacies to different individuals, to all of whom the testator must be held to have been *in loco parentis* if the doctrine were to be applied. There was no case where the doctrine had been extended to such a bequest—*Allan v. Thomson's Trustees*, May 30, 1893, 20 R. 733; *Douglas' Executors*, February 5, 1869, 7 Macph. 504; *Blair's Executors v. Taylor*, January 18, 1876, 3 R. 362.

Argued for second and third parties—1. The *onus* of disputing the testamentary character of the document of 27th August lay on the first parties. It was *prima facie* testamentary, being signed and dated, and containing words which indicated that it was not merely a memorandum. Moreover, there was an express provision in the will dealing with informal documents of this kind. 2. The *conditio* did apply to a bequest to nephews and nieces unless it could be shown that there was a special *delectus personæ*. There were here only three near relatives at the time of making the will, and the testator did not pick and choose, but provided substantially for them all. The fact that the sums bequeathed were small compared with the *corpus* of the estate did not exclude the application—*Bryce's Trustees*, March 2, 1878, 5 R. 722. Nor was there any distinction between a bequest of a share of residue and a general provision such as this—*Forrester's Trustees v. Forrester*, July 12, 1894, 21 R. 971. 3. If the writing of 27th August were held to confer a right to £3000 on Alexina Waddell, that would not preclude the application of the *conditio*, there being no reference to the lapse of the pecuniary legacy—*Bryce's Trustees, supra*.

Argued for fourth party—The document of 14th May fell under the description of informal documents to which validity was to be given under the 5th purpose of the deed. There was on the back a specific direction to pay, which though not *in gremio* of the document might be treated as such as explaining its contents.

At advising—

LORD M'LAREN—The testator Peter Waddell died in June 1895 leaving a considerable fortune. He disposed of more than £40,000 in legacies, and the residue, estimated at over £100,000, is destined to charitable uses. The first question in the case relates to the effect of a legacy of

£5000 to a nephew; the second and third questions depend on the validity of two memoranda which are said by the persons named in them to be testamentary writings, the trustees of Mr Waddell maintaining the contrary.

We intimated to the parties that the questions would be considered in a different order, because it is necessary first to consider what are the writings constituting the will of the testator before we can proceed to determine what is the true legal construction and effect of these writings.

The points really raised by the second and third questions are, whether the writings bearing date 27th August 1888 and 14th May 1894, or either of them, are codicils or testamentary instruments, and I shall so consider the questions.

In considering such a writing as that of 27th August, we have to begin with the elementary question, what are the essentials of a testamentary gift. We see from the decisions that testamentary effect has been given to writings which were apparently in their inception mere drafts or memoranda intended to be used in the preparation of a will or codicil, on the principle that if a testator puts up the writing or memorandum with the principal will, it may be assumed that he is willing that his testamentary intention should stand on the words there used. But the Court has never gone so far as to hold that a mere specification of names and sums of money without words of gift would amount to a will. The contrary has been distinctly affirmed by both Divisions of the Court. I refer specially to Lord Cowan's opinion in *Louson v. Ford*, 4 Macph. 636, and that of the Lord President in *Colvin v. Hutchison*, 12 R. 954.

The paper in question begins (after the date) with the words "Annuity for life, Mrs Wood Waddell, 30 Queen's Crescent, for £100." Now, one may infer from these words that the deceased was in some way concerned with obtaining an annuity for life for Mrs Wood Waddell. But whether he was to purchase this annuity for the lady out of her own funds, or to make her a present of it, and in the latter case whether by gift *inter vivos* or by bequest, is wholly uncertain. As a matter of fact, only two days after the date of the memorandum Mr Waddell instructed his agent to purchase an annuity of £100 for the lady, which he afterwards increased to £150. This makes it perfectly clear that so far as Mrs Wood Waddell's name is concerned the memorandum was not expressive of a testamentary intention; but I should come to the same conclusion independently of the extrinsic facts, important though they be. The writer might change his mind and never purchase an annuity, and does it follow that his estate is to be put under an obligation to do so? Such a conclusion is altogether inadmissible. I think that in the absence of words of gift or direction it must be taken that there is no present testamentary intention, and an intention to give, if not expressed, is what no court of law can supply.

I come to the same conclusion with respect to the other entry in the paper beginning, "£3000 codicil to my will for Alexina Waddell." The words convey no meaning to the ordinary reader, though doubtless the writer knew what he meant. It would be a mere guess to say that the note was written to remind the writer to cause a codicil to his will to be prepared in favour of Alexina. It appears that such a codicil was prepared, but the lady took no benefit under it, because Mr Waddell, for reasons known to himself, struck the bequest in her favour out of the draft.

With regard to the supposed bequest of £100 to Moses Adamson, I can only repeat that a will or testamentary intention is not expressed by merely writing the name of a person and a sum of money against the name. It appears that Mr Waddell was in use to draw cheques made payable to Moses Adamson, his servant, and it is conjectured that at a time when he was suffering from physical weakness he wrote these words on a scrap of paper to try his hand before filling up a cheque. Whatever may be the true explanation, I am of opinion that the writing of 14th May 1894 is not a bequest in favour of anyone.

I pass to the consideration of the first of the questions of law in the special case. By his trust-disposition Mr Waddell made a bequest of £5000 in favour of William Wood Waddell, designed "son of my late brother Andrew Waddell." Now, William Wood Waddell died in the testator's lifetime, about two years after the execution of his trust-deed or will, and the question is whether his daughter Alexina is entitled to claim this legacy under the *conditio si sine liberis decesserit*.

In considering this question I shall leave out of view the circumstance already alluded to, that a draft exists in which this lady's name appears as a legatee for the sum of £1000, because, according to the best opinion I can form, this is not a circumstance relevant to the present inquiry. According to the judgment of the Court in the case of *Bogie's Trustees*, the question whether a testator has put himself *in loco parentis* towards a nephew or niece is independent of extrinsic facts and circumstances, and is to be determined by the will itself. Now, if the scheme of the will is such as would affix the character of a parental provision to the particular bequest, it is consistent with sound principle to hold that this character can only be taken away, and the provision transformed into an ordinary legacy by a subsequent testamentary act, or at least by evidence in writing that the testator did not intend that the issue of his nominee should come into the parent's place.

Passing from this specialty, I would observe that while the decisions are certainly adverse to the extension of the *conditio* to collaterals, there has been a disposition to admit it liberally within the degree of relationship in which it is properly applicable. It is certainly not limited to the case of a gift of a share of residue, though where a share of residue is given to a

nephew or niece (subject to the *conditio*) this is sufficient to exclude the *conditio* from any pecuniary legacy which may be given to the same person, the legacy being deemed a personal gift. But again, if we are to be guided by the Lord President's views as developed in the case of *Bogie*, it is not a necessary ingredient of a parental provision that all the testator's nephews and nieces are treated alike, or even that every member of the class should receive something. If I rightly follow the judgment, as a father may leave a child out of his will because he is wealthy and does not need to be provided for, or because he is undeserving, so also a childless uncle may, for reasons known to himself, exclude a brother's child from his will, and still be a parent in the sense of the *conditio* to those nephews or nieces and their descendants for whom he undertakes or purposes to provide. It is easy to see that when so understood the phrase *in loco parentis* ceases to be a limitation, and expresses only the reason of the extension of the *conditio* to nephews and nieces. I confess that this consequence does not alarm me. I think it is much better that, the relationship being defined, the principle of implied conditional institution should be liberally applied than that its application should be determined according to the impression which a judge may form as to the assumption by a testator of a character which probably never entered his mind at all.

In the present case I understand that all the testator's nearest relations who were living at the date of the will are included, and I see that each of them receives a substantial sum. The sister receives £6000, and each of his brother's children £5000, so that the element of personal prepossession does not enter largely, if at all, into the case. It is true that legacies of smaller amount, chiefly sums of £1000, but in two instances sums of £4000, are given to strangers in blood or persons who are only distantly related to the testator, while the residue goes to charity. But this is not necessarily inconsistent with the supposition that the ties and duties of relationship were in the view of the testator in providing for his nephew and niece. The moral duty cannot reasonably be stretched further than the extent of a reasonable provision sufficient to keep the legatee from want. The circumstance that the testator has not dealt as liberally with his brother's children as he might have done, or as they might reasonably expect, does not seem to me to constitute a sound argument for depriving their issue of the benefit of the implied conditional institution which it is admitted would be a rightful claim if the bulk of the succession had been divided between the parents.

I have not thought it necessary to discuss the numerous decisions upon this principle of the law of wills, though I have examined them carefully, because I think that this case is not precisely ruled by any of the previous decisions. The *in loco parentis* doctrine is a somewhat artificial rule at

best; its application is nowhere subjected to any definite test, and it does not seem capable of more precise definition than such as is given in the case to which I have referred. I cannot help thinking that the true rule, and the only workable rule, is that in the case of a testator who has no children of his own, the benefit of the *conditio* will be given to the issue of his legatees, being nephews or nieces, or their descendants, unless it appear from the will itself that the motive of the bequest was personal favour rather than relationship. I am therefore of opinion that the first question ought to be answered in the affirmative.

LORD ADAM—I agree that clearly the first question to determine is, what are the testamentary writings of the deceased. No doubt his trust-disposition and settlement is one, and his codicil of 24th October 1888 is another; but there is a question in the first place with regard to the holograph writing of 27th August 1888, viz., whether that is a testamentary writing, or merely a memorandum intended by Mr Waddell to refresh his memory.

Now, this case comes before us in the form of a special case, and to my mind that precludes us from ascertaining a very significant fact, viz., where this holograph writing was found. If, as has happened in previous cases, it had been found tied up in a bundle with other documents undoubtedly testamentary, that fact might give it a testamentary character, while if it were found separate in a chest of drawers, or what are vaguely described as "repositories," that would put a different aspect on the question. Now we are entitled to assume that this writing was not tied up with testamentary writings, for otherwise it should have been judicially brought to our notice. Coming then to the writing itself, as Lord McLaren has remarked, there are no words of gift or expressing any desire or intention to give. The words used are—[*here his Lordship quoted the terms of the writing*]. Now there is mention of a codicil, but that is equally vague; and accordingly the mere fact of his mentioning it is quite consistent with the writing being only a memorandum by which Mr Waddell wished to refresh his memory when visiting his agents. It is true that it is signed, but it is noticeable that the signature is not found where one would expect to find it in a testamentary writing, but down in the left-hand corner of the paper, away from the writing. Accordingly I agree that this is not a testamentary writing; and I am also clearly of the same opinion with regard to the second document before us.

Now, it appears to me that our decision on these documents is a very fortunate one for Alexina Waddell in the consideration whether the *conditio si sine liberis* applies, for if we had concluded that there was a special legacy to her of £3000, that would have precluded the application of the *conditio*. I must confess that I have great difficulty with reference to this question.

In cases where an uncle makes a bequest to nephews and nieces, the rule, as laid down in *Bogie's Trustees*, is whether the testator has put himself *in loco parentis*. Now, that is a very vague expression, and it is very difficult to say what its exact meaning is. I could have understood, if it were competent to go outside the deed and examine the facts to see how the testator had provided for the legatees in his lifetime, but it is not relevant to do this, and accordingly the test laid down in *Bogie's* case is, whether the testator "in his settlement has placed himself in a position like that of a parent towards the legatees, *i.e.*, has made a settlement in their favour similar to what a parent might have been presumed to make." I confess that I see great difficulty in applying that test. Parents have various dispositions and children various characters, and it is hard to decide according to the circumstances of each case; and with reference to the special provisions here it is difficult to conclude that if Mr Waddell had been dealing with his own children he would have left such a testament, and on these grounds I find a difficulty in concurring. But the test is so vague, that as your Lordships are of opinion that this deed does fulfil its requirements, I am unwilling to differ from you, and accordingly I agree.

LORD KINNEAR—I agree with all that has been said by your Lordships as to the order in which the question should be considered by us, and also in holding that the two holograph writings are not testamentary. On the second question, as to the application of the *conditio si sine liberis*, I originally shared Lord Adam's difficulty, but on consideration I have come to concur with Lord M'Laren, for the reasons stated by him, and chiefly on the ground that I find nothing in the testament to show that the testator was moved by any other considerations in selecting his nephews and nieces as the objects of his bounty than that of their relationship to him. I cannot find in previous decisions any definite or distinct limitation of the condition which is said to qualify the application of the general rule that the testator must have placed himself *in loco parentis* to the legatees, except that the person claiming the benefit of the *conditio* must show that the testator made the bequest in consideration of relationship, and not for any more special reason applicable exclusively to the individual legatee. I agree with Lord M'Laren that we must adopt the former of these alternative views.

The LORD PRESIDENT concurred.

The Court answered the first question in the affirmative, and the second and third in the negative.

Counsel for the First Parties—Rankine—Pitman. Agent—Patrick C. Jackson, W.S.  
—Counsel for the Second and Third Parties—D.-F. Asher, Q.C.—W. Campbell. Agents—Carmichael & Miller, W.S.

Counsel for the Fourth Party—Craigie—A. M. Anderson. Agents—Miller & Murray, S.S.C.

Monday, July 27.

OUTER HOUSE.

[Lord Kincairney.

TURNBULL & COMPANY v. SCOTTISH PROVIDENT INSTITUTION.

*Insurance—Life Insurance—Insurable Interest—Policy on Life of Agent.*

A firm of merchants made proposals to an insurance company for a policy on the life of their agent in Iceland, through whose means, as they averred, they carried on a lucrative business. The contract of agency (which was disclosed to the company) was terminable by either party on the 1st March of each year on giving three months' notice. The proposals were accepted, and a policy was issued, containing a note that as the insured had stated that they had an insurable interest in the life of the agent "no further proof of their interest will be required when this policy becomes a claim." After the proposals were made, but before the policy was issued, the agent gave notice that he proposed to terminate his contract on 1st March of the ensuing year. This notice was not communicated to the company. On the death of the agent, the company refused payment of the policy, on two grounds (1) want of insurable interest at the date of the policy, and (2) non-disclosure of the resignation of the agent. *Held* (1) that as the contract of agency was not actually terminated at the date of the policy, the insured had an interest, the sufficiency of which the company was precluded from denying; and (2) that as the resignation of the agent in no way affected the risk, failure to disclose it did not vitiate the policy.

The facts of the case appear fully in the opinion of the Lord Ordinary.

On 27th July 1896 the following interlocutor was pronounced:—"Finds (1) that the defenders are not in a position to dispute the insurable interest of the pursuers in the life of Thorbjorn Jonasson, whose life was insured: . . . Therefore repels the defenders' pleas-in-law, and decerns against them for payment to the pursuers in terms of the conclusions of the summons: Finds the pursuers entitled to expenses." &c.

*Opinion.*—"In this action the pursuers George Vair Turnbull & Company, merchants in Leith, sue the Scottish Provident Institution for payment of £2000 as the sum due under a policy of insurance, dated 24th December 1894, taken out by them on the life of Thorbjorn Jonasson (a merchant in Iceland, who was their agent in the disposal of merchandise sent by them to Iceland), and which became payable on the death of Jonasson on 9th April 1895.

"The claim is resisted on two grounds—(1) want of interest in the life of Jonasson; and (2) fraudulent misstatements in the proposal and declaration on the faith of which the policy was issued.