

Friday, May 25.

OUTER HOUSE.

[Lord Dundas.

TURNER'S TRUSTEES v. M'FADYEN
AND OTHERS.

*Succession — Will — Direction to Divide
Residue according to Verbal Instructions
—Nuncupative Legacy.*

A testatrix directed her trustees to divide the residue of her estate according to her wishes as expressed verbally to A. In an action of multiplepounding raised by the trustees, A averred that the testatrix had told her—"I wish £100 given to the poor of Inverary Parish and you will come and take the rest"—and claimed to be ranked and preferred to the whole of the residue with the exception of the said sum of £100. Held by the Lord Ordinary (Dundas) that it was incompetent to prove such verbal instructions by parole evidence or by reference to the oath of A, and that the residue of the estate had therefore fallen into intestacy, but that A and the Inspector of Poor of Inverary Parish, who was also a claimant, were entitled to lead proof by parole evidence of nuncupative legacies in their favour respectively of £8, 6s. 8d.

R. S. Corrigan, solicitor, Dunoon, and Mrs Margaret Smith or M'Fadyen, the trustees of a Miss Turner who died on 23rd October 1904, acting under her trust-disposition and settlement dated 4th April 1902 with relative codicils, brought an action of multiplepounding in which claims were lodged by (1) Mrs M'Fadyen, (2) the Inspector of Poor of Inverary Parish, (3) Mrs Elizabeth M'Kellar or Strathearn and others, the next-of-kin of the testatrix, and (4) the King's Remembrancer. The fund *in medio* was the residue of Miss Turner's estate, which Mrs M'Fadyen claimed, as did the next-of-kin and the King's Remembrancer, while the Inspector of Poor claimed £100 thereof.

The circumstances of the case and the authorities quoted in argument are set forth in the Lord Ordinary's opinion, which was as follows:—

Opinion.—"The testatrix Miss Turner died on 23rd October 1904. She left a formally executed trust-disposition and settlement dated 4th April 1902, and two codicils dated respectively 12th April 1902 and 14th February 1903. Her accepting and acting trustees and executors are Mr Corrigan, solicitor, Dunoon, and Mrs Margaret Smith or M'Fadyen, a first cousin of her own, and they are the pursuers and real raisers of the present action. The fund *in medio* is the residue of Miss Turner's estate, which apparently amounts to about £300. The question arises from the manner in which the third purpose of Miss Turner's trust settlement is expressed. It is in these terms—"With regard to the residue of my estate, failing my leaving special written

instructions to the contrary, my trustees shall divide the same according to my wishes as expressed verbally to the said Mrs Margaret Smith or M'Fadyen, or in any letter or informal writing which I may address to her." No letter or informal writing by the testatrix to Mrs M'Fadyen is produced or said to exist. But Mrs M'Fadyen has lodged a claim by which she seeks to be ranked and preferred as an individual to the whole fund *in medio* except such legacy as may be held to be due to the poor of the parish of Inverary. The averments contained in her condescendence require to be attended to, because the question at issue is whether or not they are competent and relevant to probation. Mrs M'Fadyen states, *inter alia*, that 'on 5th April 1902, the day after the execution of her will, Miss Turner entered into conversation with the claimant about the disposal of her means, in the course of which she stated to the claimant whatever means I do not "give away you are to come and take." Then it is averred that in the summer of 1903, when Mrs M'Fadyen was visiting Miss Turner, the latter lady remarked to her in conversation, and with reference to the codicil dated 14th April 1903—"I have given £100 away, and I am sure you will be pleased with what I have done;" and after giving her certain instructions as to specific moveable effects, added—"I wish £100 given to the poor of Inverary Parish, and you will come and take the rest." Throughout the whole course of the conversation she' (the testatrix) 'spoke to the claimant on the footing that she wished her to be and contemplated her as her residuary legatee.' These are the most specific of the averments which Mrs M'Fadyen desires to be allowed to prove. A claim is also lodged for the Inspector of Poor for the Parish of Inverary, in which, founding upon the alleged verbal instructions given by the testatrix to Mrs M'Fadyen, the claimant seeks to be ranked and preferred to the fund *in medio* to the extent of £100. Upon the other hand, the claimants Mrs Elizabeth M'Kellar or Strathearn and others, who assert that they are the nearest of kin and lawful heirs *in mobilibus* of the testatrix, maintain that the averments of Mrs M'Fadyen, assuming them to be correct in fact, are incompetent, or otherwise irrelevant to probation; that the claims of Mrs M'Fadyen and of the Inspector of Poor ought to be repelled; and that the next-of-kin ought to be ranked and preferred to the whole fund *in medio* upon the footing that the residue of Miss Turner's estate has fallen into intestacy.

"The question thus raised is, in my opinion, one of some nicety, and not expressly covered by any decision of which I am aware. I have come to the conclusion that the principal contention put forward by Mrs M'Fadyen, and in a subsidiary sense by the Inspector of Poor, is unsound. The main authorities which were referred to at the discussion in the procedure roll were Stair's Inst., iii, viii, 34, 35, 36; Ersk. Inst., iii, ix, 7; Bell's Prin., sec. 1869; *Phin & Others*, 1738, 5 Br. Supp. 203, M. 3337;

Rankine, February 7, 1849, 11 D. 543; *Nasmyth*, July 27, 1821, 1 Shaw App. 65; *Forsyth's Trustees*, January 18, 1854, 16 D. 343; *Baird v. Jaup*, July 15, 1856, 18 D. 1246; *Wilson's Trustees v. Stirling*, December 13, 1861, 24 D. 163; *Young's Trustees v. Ross*, November 3, 1864, 3 Macph. 10; *Fraser v. Forbes' Trustees*, January 3, 1899, 1 Fr. 513, 36 S.L.R. 469; *Campbell's Trustees v. Campbell*, January 30, 1903, 5 F. 366, 40 S.L.R. 335. Upon a careful consideration of the authorities I think that it must be held to be now settled law that a testator may by a formal testamentary disposition of his moveable estate prescribe the degree and manner of the solemnities (either in addition to or in diminution of what the law requires) which shall be necessary to confer testamentary effect upon writings by him either then existing or thereafter written by him, or, in other words, may appoint and declare the kind of written evidence by which his executors are to be guided in the distribution of his estate. The theory of the cases is, I apprehend, that the direction in the formal settlement communicates to the informal writings its own probative character. I am aware that a doubt has been authoritatively expressed (M'Laren's *Wills and Succession*, 3rd ed., pp. 290 and 293) as to the soundness of some of the decisions, and especially of *Wilson's Trustees* (*sup. cit.*). But accepting, as I apprehend I am bound to accept, the reported cases as being well decided, it appears to me that what I am asked by Mrs M'Fadyen's counsel to hold in this case is entirely beyond anything that has as yet been sanctioned in the law of Scotland. The question here is not as to informal or improbable writings, but as to the competency or the reverse of admitting to parole proof, or to a reference to Mrs M'Fadyen's oath, averments of alleged verbal instruction to that lady by the testatrix as to disposal of the residue of her estate. The old case of *Phin and Others* (*sup. cit.*) gives no support to Mrs M'Fadyen's contention. The decision there was plainly based upon the ground that the gentleman, the competency of whose oath was in question, was not merely executor but 'intromitter and general disponent,' and having 'right to the residue of the effects.' (See Lord Ivory's note to *Ersk. Inst.*, iii, 9, 7). Here Mrs M'Fadyen's connection with the estate, so far as appearing upon the face of the written settlement, is purely official, and not that of a beneficiary. In other words, Mr Guthrie's evidence in *Phin's* case was in the nature of an admission; but that of Mrs M'Fadyen, if admitted here, would be in support of a claim. To allow proof or reference to oath of the averments in question would, in my judgment, amount or come dangerously near to an infringement of the cardinal rule of our law that a will must be in writing. This view appears to me to be strongly supported by the case of *Forsyth's Trustees* (*sup. cit.*), and also by the opinion of Lord M'Laren (*Wills and Succession*, 3rd ed. p. 1058).

"I am therefore prepared to negative the principal contention put forward by Mrs

M'Fadyen and by the Inspector of Poor respectively. But I think that the authorities go to show that these claimants are entitled to prove if they can by parole evidence nuncupative legacies in their favour respectively of £8, 6s. 8d. To this extent I think that their averments are relevant and may be competently admitted to probaton, unless the parties are prepared to agree upon the facts without the necessity of a proof. Another matter which would require investigation, unless it can be arranged by parties, is as to the soundness of the claim by Mrs Strathearn and others to be the heirs *in mobilibus* of Miss Turner. All that I can do at this stage appears to be to pronounce findings in conformity with the opinion above expressed, and to appoint the cause to be enrolled for further procedure."

The Lord Ordinary pronounced this interlocutor:—"Finds (1) that it is not competent to prove by parole evidence nor to refer to the oath of the claimant, Mrs Margaret Smith or Fadyen, the verbal instructions alleged to have been given to her by the testatrix as to the disposal of the residue of her means and estate; and that the said residue is therefore undisposed of by the testatrix and has fallen into intestacy; but (2) that the averments made by the claimants Mrs M'Fadyen and Robert Fraser respectively are relevant, and may competently be proved to the extent and effect of establishing a verbal legacy of the amount of £8, 6s. 8d. by the testatrix to each of the said claimants respectively: With these findings, appoints the cause to be put to the roll for further procedure, and reserves meantime all questions of expenses."

Counsel for the Pursuers and Real Raisers, and for the Claimants Mrs M'Fadyen and the Inspector of Poor of Inverary Parish—J. R. Christie. Agent—George Stewart, S.S.C.

Counsel for Claimant, the King's and Lord Treasurer's Remembrancer—Howden. Agent—W. G. L. Winchester, W.S.

Counsel for Claimants Mrs Strathearn and Others—J. M. Irvine. Agent—J. D. Boswell.

Wednesday, June 27.

SECOND DIVISION.

M'KENNA v. THE UNITED COLLIERIES, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1 (4)—Expenses of Unsuccessful Trial at Common Law and under Employers' Liability Act Deducted from Compensation—Expenses after Verdict Applied Allowed to Neither Party—Process.

A workman brought an action at common law and under the Employers' Liability Act, but containing no reference to the Workmen's Com-