not to perils of the sea; as, *e.g.*, where the cargo became heated or subject to decomposition from internal defect, or consisted of goods which could not be landed at the port of destination because of a prohibition by the government of the place. The case of *Luturge* v. *Grey and Others*, 1732, Elchies, *voce* Mutual Contract, No. 3, Mor. Dict. 10,111, and on appeal 17,341, 1 Paton's Appeals, 119, was founded on as a direct authority in favour of the pursuer's claim. That case is however to be distinguished from the present in this respect, that the tobacco landed at Youghal, the intermediate port of distress, was damaged only, and was not a total loss. The quantity forwarded to Bristol after the owners, or insurers on their behalf, intervened and took delivery was all in this position. As to the remainder forwarded to Glasgow, it is true some of it 'was damnified and burnt there,' and yet freight *pro rata itineris* was found due on the whole. The ground of this appears to me to have been that the quantity taken as a whole was damaged only. The shipper accepted it as damaged—not lost or destroyed by the sea—and so far as appears from the reports, there was no separate argument maintained that the particular part of the goods which was burned at Glasgow being totally lost was free from freight. The case, in short, does not appear to me to have raised the question now presented for decision.

"I have only to add that no claim for freight *pro rata itineris* can be made here, because the voyage from Falmouth to Brisbane is practically the same as that from Liverpool. The case is the same as if the vessel had put back to Liverpool in place of Falmouth. But, further, no contract to pay such freight can be implied from the actings of the parties when the goods were landed or received by the defender.'

This judgment was acquiesced in.

Counsel for Pursuer — Trayner. Agents—Webster & Will, S.S.C.

Counsel for Defender—Mackintosh. Agent—Alexander Morison, S.S.C.

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*Tuesday, March 9.*

## OUTER HOUSE.

[Lord Shand.

### PARKER *v.* MATHESON & OTHERS.

*Testament—Cancellation of Deed—Revocation—Unsigned Codicil.*

A testator deleted from his settlement certain provisions which he had made in favour of the family of one of his sons, but the deletions left the original wording still visible and legible. He afterwards prepared a codicil, in which he made certain other provisions for his sons, but this codicil was left unsigned by him at the time of his death.—*Held*, in an action of multiplepoinding brought to establish the rights of various parties interested in his succession—(1) that the settlement continued a valid deed notwithstanding the clauses which had been deleted, as the deletions could only have the effect of a partial revocation; (2) that no effect could be given to the unsigned codicil; but (3) that as the deletion of part of the deed and the making of the codicil must be regarded as one continuous act for one object, and as the testator had failed to complete the act by making an effectual codicil, the act as a whole had failed, and the settlement must receive effect in the same way as if no part had been deleted.

This was an action of multiplepoinding, brought for the purpose of settling certain disputes relating to the succession of the late Angus Matheson. The pursuer and real raiser was Mr Parker, the judicial factor upon the deceased's estate.

The case came before Lord Shand, (Ordinary) who, after a proof had been taken, issued the following interlocutor and note, in which the details of the case are very fully stated:—

"*Edinburgh, 9th March* 1875.—Having considered the cause, Finds that the trust-disposition and settlement, dated 27th January 1868, by the deceased Angus Matheson, No. 8 of process, is the sole effectual testamentary deed or writing left by him to regulate the disposal of his estate and effects: Finds that the deletion in said deed by the testator of the names and designations of Robert White, John M'Allister, and John Campbell, therein mentioned, who had been nominated as trustees therein, was effectual as a revocation of the appointment of these gentlemen as trustees: Finds that the deletion by the testator of the words and passages in the said deed relating to the provisions in favour of the late Colin Matheson and his children, was ineffectual as a cancellation or revocation of these provisions, and that the deed must receive effect as regards these provisions in the terms in which it was originally written, and in the same way as if no part thereof had been deleted; and with these findings appoints the cause to be put to the roll that effect may be given thereto with reference to the claims of parties; reserves in the meantime all questions of expenses, and grants leave to any of the parties interested to reclaim against this judgment.

"*Note.*—This case raises questions of much importance. Besides heritable estate, the late Mr Matheson left personal means to an amount exceeding £20,000, and the questions to be decided are important, not merely because of the amount of property at stake, but because of the general principles in regard to the testing and cancellation of testamentary writings which are involved.

"Mr Matheson died on 16th November 1872, survived by his wife and a son and daughter. There were four children of the marriage, John Campbell Matheson, Mrs Eliza Matheson or Stewart, Colin Matheson, and Marion Matheson. The two first named survived their father. Colin Matheson, who had settled in Australia, died there about seven months before his father, leaving a widow and six children. Marion had predeceased her father some years before 1868, in minority and unmarried. On 30th August 1874, after the present action was raised, Mrs Stewart died, leaving a family of several children, who are claimants in the process.

"In February 1855 Mr Matheson, with con-

sent of his wife, executed a trust-disposition and settlement, the existence of which was unknown to the parties until after the record in the present action had been closed. This deed contains provisions less favourable to his wife and children than the deed to be immediately noticed, which he afterwards executed, for the annuity or income thereby provided to his wife is of comparatively small amount, and he thereby provided to his children a liferent only of their shares of his estate, giving the fee to his grandchildren. The facts disclosed on the proof appear to show that the testator at his death certainly did not intend that this deed should regulate the division of his estate, and, indeed, that its existence had probably escaped his recollection.

"On 27th January 1868 Mr Matheson executed another trust-disposition and settlement containing a new distribution of his estate. This deed contains no special clause of revocation of prior settlements, but its provisions are by necessary implication a revocation the previous deed. His daughter Marion Matheson had died between the dates of the execution of the two deeds; and by the deed of 1868, after nominating trustees and providing for payment of his debts, and for the payment of legacies in the terms afterwards to be referred to, he directed his trustees and executors to hold the residue of his estate, heritable and moveable, for behoof of his wife in liferent, for her liferent use allenarly, so long as she should survive him, and upon the death of the survivor of himself and his wife he appointed his trustees and executors to convey to his son John Campbell Matheson the dwelling-house, garden, and garden ground attached thereto, called Torbal House, belonging to him, situated at Eastfield Dyeworks; to deliver to his daughter Eliza Matheson his household furniture, &c., plate, and jewellery, and to convey to them his burial place in the Glasgow Necropolis. The residue of his estate he appointed to be divided into three equal shares, one of these to be paid to his son John Campbell Matheson, another to be secured to his daughter Eliza Matheson in liferent, for her liferent use only, exclusive of the *jus mariti* of any person she might marry, and to her children, and failing children to her heirs or assignees in fee. And in regard to the remaining part of the residue or balance of his estate, he appointed his trustees to hold the same for the use of his son Colin Matheson (who, however, predeceased him as already mentioned) in liferent, for his liferent use only, the fee being given to his children equally among them, and failing children to his son John Campbell Matheson and his heirs to the extent of one-half, and to his daughter Eliza Matheson to the extent of the other half in liferent, and her children in fee. The deed farther contains a power to the trustees to restrict Colin Matheson's interest to an annuity of smaller amount than the return from his share of the residue, in which case the trustees were directed to accumulate the surplus revenue for behoof of his children, whom failing for behoof of his brother John Campbell Matheson, and of his sister Eliza Matheson in liferent and her children in fee. The testator farther provided that the trustees must apply such part of the revenue, and even of the capital of the share set apart for Colin Matheson and his children, in maintaining, clothing, and educating his child or children in such manner as the trustees might think proper, and an appointment on the death of Colin Matheson to distribute among his children the share set apart and held by them for Colin Matheson, and the accumulations thereof.

"The only other writing which certain of the parties maintain to be an effectual testamentary writing by Mr Matheson is a document titled "Codicil, October 12, 1872," which was written by Mr Matheson in his own hand, in the circumstances to be afterwards noticed, but which was not signed by him.

"Colin Matheson died abroad about May 1872. His father, in the manner explained by Mrs Matheson in her evidence, became aware a few days before the 12th of October 1872 that his son's widow and children had been baptised and brought up in the Roman Catholic faith. He entertained a strong dislike to that form of the Christian religion, and this circumstance evidently caused him great displeasure, and led him to resolve without delay to make a material alteration on his settlement of 1868, and to deprive his grandchildren of almost the whole benefit which he had intended to give them by that deed. He, accordingly, in his wife's presence, and with his own hand, deleted from that deed every passage in which his son's name occurred, or in which any benefits were conferred either on him or his family; and on the afternoon of the same day he wrote the document already mentioned titled codicil, and dated 12th October 1872.

"The settlement of 1868 and unsigned codicil were found in his repositories at the time of his death. In addition to the passages deleted for the reason just mentioned, the testator also struck out of the deed at the same time the names of three of the trustees therein appointed, viz., Mr White, Mr M'Allister, and Mr Campbell, leaving still as trustees, however, Mr Matheson, his wife, his son John Campbell Matheson, and his nephew John Matheson junior. In two instances interlineations occur in the deed. The word "three," describing the number of shares into which his estate was to be divided, was struck out by the testator in two places, and above it the word "two" has been written, apparently with the purpose of substituting that word for "three" in the deed, so as to make the residue divisible into two parts.

"The effect of the deletions in the deed of 1868, assuming them to be a cancellation of the passages scored through, would be to deprive the children of Colin Matheson of any share whatever of their grandfather's estate under that deed.

"It is maintained by the children of the late Mrs Stewart, who claim in their own right as legatees, that the deed of 1868 is ineffectual, having been revoked or destroyed by the obliterations on its face, that the paper titled "codicil" above referred to is also ineffectual, being unsigned, and that thus the only effectual deed of settlement left by the testator was the deed of 1855. Mrs Matheson and Mr John Campbell Matheson maintain that the deed of 1868 is effectual, excepting as regards those passages which have been deleted, and that this deed, omitting the deleted passages as a partial revocation of the deed, forms the sole operative testamentary writing of the deceased, the codicil being inoperative and ineffectual for the reasons mentioned. Alternatively

they maintain that the deed of 1868, omitting the deleted passages, and the codicil are the only effectual and operative testamentary writings.

"The children of Colin Matheson maintain that the deed of 1868 alone ought to receive effect as originally written, and without regard to the deletions which they maintain were not effectual as a revocation of the provisions in their favour, and alternatively, that the deed of 1868 and the codicil are both ineffectual, and that the deed of 1855 must regulate the distribution of the deceased's estate, or otherwise that the codicil must be held to be effectual.

"I. The first question to be determined is whether the deed of 1868 exists to any effect, or has been destroyed as an operative deed by the extensive obliterations which it contains. If that deed subsists, either on the footing that the deletions are to be disregarded or are to receive effect, it disposes of the whole of the testator's estate, and the deed of 1855 must be held as revoked. It is maintained that the deed of 1868 has been so affected by the extent of the passages deleted and the superinduction of the word "two" in two places, that it is no longer a probative writing entitled to receive any legal effect. I am, however, of opinion that this contention is not well founded, and that, after assuming that the deletions should be held to be effectual as a completed act of cancellation by the testator, the result would be not to the total destruction or revocation of the provisions in favour of Colin Matheson's family.

"(1) It is to be observed that the deletions have been so made that all of the words through which the pen has been drawn are still distinctly visible. It would be more correct to say that the words have been scored through than to say they have been obliterated, for the line drawn through each word leaves the word scored quite visible. To this extent only is there deletion.

"(2) During the lifetime of the testator the deed from the time it was executed was kept in his own custody in a locked drawer, to which he alone had access, and in which it was found at his death. The presumption in these circumstances, even although no other evidence could be obtained to show how the obliterations occurred, is that these alterations were made by the testator himself. *Naysmith* v. *Hare* (*per* Lord Eldon), 28th July 1821, 1 Shaw's App. 73; *Winchester* v. *Raffer or Smith*, 1 Macph. 685; and *Crosbie* v. *Wilson*, 3 Macph. 870. It is not suggested by any party to the cause that the alterations were made by any other than the testator. He has himself recorded under his own hand in the "codicil" already referred to that the deletions were his own act; and although the codicil may not be entitled to effect as an operative deed because it is unsigned, it is certainly evidence under the testator's hand of the statement it contains. But apart from this, the evidence proves not only that the testator made the alteration, but the particular occasion on which this was done.

"(3) The clauses of the deed in which the deletions occur are distinct and independent of other clauses in the deed, and their omission or deletion does not necessarily render any other clause in the deed either unintelligible or nugatory. This is obvious as regards the deletion of the names of three of the six trustees nominated, but the observation equally applies to the deletion of the other passages, which all relate to the beneficial interests conferred on Colin Matheson and his children. The deed as executed gave them a third part or share of the residue of the testator's estate. It might have given special pecuniary legacies of different amounts to the different members of the family; and if the testator had deleted the provision giving these legacies or certain of them, the result would have been merely that the legatees whose bequests had been so deleted would have been disappointed, and the residuary legatee benefited to a corresponding extent. The effect is the same in the present instance. The provisions in favour of one of three residuary legatees being cancelled, the whole residue is thereby destined to the other two.

"It has been settled by a number of cases that where a deed of settlement has been regularly executed as a duly tested deed, alterations made on it by deletions by the granter of the deed are not *in substantialibus* to the effect of destroying the deed as a probative writing if they relate to distinct, independent, and separable matters, and do not relate to such clauses or provisions as are necessary to the integrity of the deed as a whole. Such alterations will receive effect as a partial revocation even though unauthenticated. The leading authorities on this point appear to be *Keir* v. *Vardeviver*, 1797, M. 17,062; *Kemp*, 1802, M. 16,949; *Traqair* v. *Henderson*, 26 June 1822, 1 S. 527. The case of *Abernethy* v. *Forbes*, 16 Jan. 1835, 13 S. 262, contrasted with *Reid* v. *Kedder*, House of Lords, 1 Rob. Apps. 183, and *Grants* v. *Shepherd*, 6 D. 464, House of Lords, 6 Bell's Apps. 153; and the cases of *Robertson* v. *Ogilvie's Trs.* 20 Dec. 1844, 7 D. 236; *Magistrates of Dundee* v. *Morris*, 11 May 1858, 20 D. (H. of Lords) 9; *Peddie* v. *Doig's Trs.*, 12 June 1857, 19 D. 820; and *Royal Infirmary* v. *Lord Advocate*, 28 Jan. 1861, 23 D. 1213.

The cases of *Abernethy* v. *Forbes* and *Robertson* v. *Ogilvie's Trs.* are direct authorities for holding that an unauthenticated deletion of names of trustees in the body of a settlement will not effect the validity of the deed. In the case of *Peddie* v. *Doig's Trs.*, which related to the validity of a codicil in which thirty-one words, forming a complete clause, were written on an erasure, the principle or rule to be deduced from the authorities is stated by Lord Ardmillan, 19 D. 824—"Where the clauses of the deed are independent, an erasure in one clause, even though it be of many words, is not fatal to other clauses where there is no erasure, unless the clause in which the erasure occurs is essential to the entire deed. There may be a deed so indivisible in expression, so entirely a *unum quid*, that any encroachment on its totality must be fatal to it. There may be an erasure in a clause so essential to the deed that the nullity of the clause involves the nullity of the deed." He adds—"In the present case the deed is obviously divisible and separable into clauses; neither the words written on erasure nor the clause in which the erasure occurs are indispensable to the codicil, and the nullity of the whole clause, even including the clause immediately preceding and immediately following, would not involve the nullity of the whole codicil;" and the view thus stated, and to which effect was given, was stated in somewhat similar terms by the other Judges. The same view had been ex-

pressed by Lord Lyndhurst in the case of *Grant* v. *Shepherd's Trs.*, where his Lordship said, with reference to erasures unauthenticated and not noticed in the testing-clause,—"There is no doubt that the deed may be good in part and bad in part. Where there are two independent provisions, the one may be vitiated by erasure, and the other may prevail, as in the case of a deed giving a legacy to 'A' and another to 'B.' If the legacy to A be vitiated by erasure, yet the legacy to B may remain good. So, also, where there is a grant of an estate with a series of substitutions, and one of the later substitutions fail by reason of an erasure, that would not affect the previous estates. This view was decided in the *Balbeithan* case, and, as it would seem, on the ground of these estates not being dependent on the subsequent defective limitation—6 Bell's App. 172.

"The views of the learned Judges in these cases were delivered in reference to questions regarding the effect to be given to words written on erasure. The circumstances are more favourable for the application of the rule in a case like the present, for the deletions in the deed in question have all been so made as to show distinctly what the words deleted are; while in the case of erasures it is often left to mere conjecture to ascertain what words originally had formed part of the deed, and there is ground for the suspicion of fraud.

"In the present case no doubt the deletions are considerable, but the purpose and effect of all of them are at once seen, for they refer to one distinct and separable matter not involving any other part of the deed. It seems to be clear that the special provisions of a liferent of the whole estate in favour of Mrs Matheson, of the heritable property to John Campbell Matheson and the furniture to his sister, are not affected by the deletion of later passages in the deed, and as regards these passages, while it is true the effect of striking them out must be to increase the shares of residue left to Mr Matheson's other two children, and so to give them more than the deed originally gave, yet, as already noticed, the same effect would have followed if any independent special legacy of a considerable sum originally contained in the deed had been struck out by obliteration. On these grounds, and on the authorities now referred to, I am of opinion that the deed of 1868 continues to be effectual notwithstanding the clauses which have been deleted, and that the deletions must receive effect unless it can be shown that, for the special reasons to be immediately adverted to, they must be disregarded. I think it unnecessary to decide whether the superinduced words 'two,' being unauthenticated, are effectual, though I am rather of opinion that they are so, as I think there is sufficient proof to show they are holograph, for the intention of the testator is quite clear, even omitting these words altogether.

"II. The next question relates to the validity of the unsigned writing titled 'Codicil,' October 12, 1872. It was maintained that this codicil is effectual even though unsigned—(1) because it is holograph of the testator; (2) because of the provisions contained in the deed of 1868 as to legacies. The trustees are thereby directed to make payment of 'such legacies as I shall bequeath to any person by any codicil hereto, or any memorandum clearly expressive of my will, although not formally executed.'

"The general rule is undoubted, that a settlement or codicil, though holograph, is ineffectual if not signed, for the signature is required to give the writing the character of a complete act. Unless, therefore, the codicil can be sustained by the effect to be given to the clause just quoted from the deed of 1868, it must be regarded as incomplete and ineffectual. That clause does not, I think, dispense with the execution by the testator of writings giving legacies so as to render them valid without his signature. It does not contain the words frequently used in such clauses, declaring that memoranda, jottings, or writings, giving legacies shall be effectual, however informal, if under the testator's hand, though not bearing his name or signature—*Crosbie* v. *Wilson*, 2d June 1865, 3 Macph. 870, and *Baird* v. *Japp*, 13th July 1856, 18 D. 1246. In the present case the words used relate to writings clearly expressive of the testator's will, 'though not formally executed.' These words seem to me to leave execution or signature still necessary to the validity of any testamentary writing, and to dispense only with the formalities of execution by the attestation of witnesses, or the addition of a testing clause, and I think the Court should be careful not to extend the effect of a clause dispensing with the usual legal formalities beyond what it clearly expresses. If the writing in question were to be sustained as a codicil, I see no good reason for stopping short there and holding that a codicil in the handwriting of a third party, but not signed by the testator, would be good. If signature has not been dispensed with, a holograph deed must be signed like any other to be effectual. The case of *Gillespie* v. *Donaldson's Trs.*, 22d December 1831, 10 S. 174, was cited in validity of the codicil in the present case. This case does not happen to have received very full consideration, and Lord Craigie agreed with Lord Corehouse, (the Lord Ordinary in the cause) in thinking the writing was invalid as wanting the testator's subscription, while the other three learned Judges appear to have regarded the testators' name in his own hand occurring at the beginning of the writing as equivalent to his signature. In the present case the testator's name does not occur in the writing, and I think the case of *Gillespie*, therefore, does not apply; but it is further to be observed that the decision in that case cannot be regarded as of authority in the light of the observations made on it in the later case of *Dunlop*, 11th June 1839, 1 D. 912. I am, therefore, of opinion that the codicil in question, not having been signed by the testator, is ineffective.

"III. The question, remains, whether, seeing that the codicil is ineffectual, the provisions of the deed of 1868 in favour of the children of Colin Matheson have been effectually revoked by the deletion by the testator of the part of the deed containing these provisions? On this question I am of opinion that it is proved that the testator, in proceeding to draw his pen through the parts of his deed containing the provisions in question did not intend to leave his son John's children entirely without a right to any share of his estate, but that his purpose was to diminish, to a serious extent no doubt, but still only to diminish, the benefits they were to derive from him as his legatees. He did not mean entirely to cut them off at once at the death of the longest liver of himself or his wife, but intended that in

lieu of one-third of the residue of his estate they should still receive a sum of £300. This was the purpose of the codicil, which was written immediately after he had deleted the provisions in their favour in his deed, and had the codicil been signed his purpose would have been effected. I am of opinion it is proved that the act of deletion and the writing of the codicil were together intended to operate as a partial revocation of his settlement by the testator, a revocation by which he meant greatly to diminish, but not to extinguish the interest of Colin Matheson's children in his estate; that the deletion of part of the deed and the making of the codicil must be regarded as one continuous act for this object; and that, as the testator has failed to complete the act by making an effectual codicil, the act as a whole has failed, and the attempted revocation is ineffectual. If it be the fact that the deletion of the part of the deed and the writing of the codicil were substantially each part of one confirmed act, the codicil being intended to give a substituted provision of smaller amount for that which had been provided by the deed, as the testator has by an omission on his part failed to complete the codicil so as to give the diminished or substituted provision, it would be obviously unjust, and must, I think, be held to be contrary to the testator's intention, that the deletions in the deed should be effectual in depriving the legatees of all right to any part of his estate. The case is, I think, one of attempted but ineffectual revocation, and the deed of 1868, which was the only completed act of the testator, must therefore receive effect as regards the provisions in favour of the children of Colin Matheson as it was originally written.

"It has been often observed that cancellation or obliteration of deeds or writings are acts of an equivocal nature, and that in order to operate as a revocation they must be done with the intention to revoke. The presumption is that such acts were done *animo revocandi*, but evidence is always admissible to show the circumstances in which the act of cancellation took place, and that the intention to revoke did not exist. A deed may be obliterated or cancelled in whole or in part by accident or mistake, as where one deed is cancelled in place of another, or the cancellation may have taken place by a third party without authority, or with a limited authority only. In this class of cases, accordingly, parole evidence has been always admitted to throw light on the question—With what intention, on the part of the maker of the deed, did the cancellation take place? In the case of *Cunningham* v. *Mowatt's Trustees*, 17th July 1851, 13 D. 1376; *Winchester* v. *Smith, &c.*, 20th March 1863, 1 Macph. 685; and *Crosbie* v. *Wilson*, 2d June 1865, already cited, 3 Macph. 870, amongst others, such proof was received, and made the ground of judgment. And in England parole evidence has been invariably admitted, including evidence of statements made by the testator himself in order to ascertain *quo animo* the act of alleged revocation took place. In the case of *Munro* v. *Coutts*, Lord Eldon (1 Dow's Apps., 451-52) adverted to the importance of such evidence in a similar question.

"In England, 'This principle, that the effect of the obliteration, cancelling, &c., depends upon the mind with which it was done, having been pursued in all its consequences, has introduced the doctrine of dependent relative revocations, in which the act of cancelling, &c., being done with reference to another act meant to be an effectual disposition, will be a revocation or not according as the relative be efficacious or not.'—Williams on Executors (1st ed.) vol. i. p. 140.

"The authorities cited by the author clearly support the proposition as stated, and shew that in England it has been frequently held by Judges of great eminence, and was indeed settled before the English statute of 1 Vict. cap. 26, for the amendment of the laws with respect to wills, that if the act of cancellation be not a self-substituting independent act, 'but done to accompany, or in way of affirmation' of another will, it was not operative as a revocation unless the will proposed to be substituted shall be effectual. So, in several cases in which a testator had cancelled a will immediately on the execution of another, and in reliance on that other being effectual, it was held that as the second will proved ineffectual from defective execution or otherwise, the revocation by cancellation did not take effect—*Onions* v. *Tyrer* (Lord Cowper) 1 Peere Williams, 345; *Burtinshaw* v. *Gilbert* (Lord Mansfield) Cowper, 52; *Short* v. *Smith*, 4 East. 419; and *Kirke* v. *Kirke*, 4 Russell's Chancery Cases, 435. A minute of other cases, varying in circumstances, but giving effect to the general principle, will be found on a reference to Mr William's work on Executors. The case of *Kirke* v. *Kirke*, last noticed, is in its general features very similar to the present. The testator there obliterated certain words in his deed of settlement, substituting for these other words, which were, however, unauthenticated, and afterwards made and signed a codicil giving effect to these alterations. The codicil was ineffectual from want of due execution, and the result was, that the deed, as originally executed, and disregarding the obliterations, received effect. The Master of the Rolls (Sir John Leach) thus stated the grounds of his judgment:—'The making of the codicil manifests that the testator did not consider his purpose of diminishing the legacies to be effected by the alterations in his will, but that he meant to accomplish that purpose by the codicil, which he has failed to do by reason of the imperfection of that instrument. The obliterations in the will in such a case express only the testator's intention to reduce by another instrument the provisions which he had made for his younger sons and daughters, and not having made another effectual instrument for that purpose, his original will must prevail. This course of reasoning is supported not only by the case of *Onions* v. *Tyrer*, which was cited in the argument, but also by the case of *Hyde* v. *Hyde*, 3 Cha. Rep. 155.

"I am not aware of any case in Scotland in which a question like the present has arisen, but the principle which has so often affected in England is, I think, founded on sound reason, and ought to receive effect.

"It should be noticed that under the English Wills Act, already referred to, secs. 20 and 24, the obliteration of part of the will without authentication or adoption in some other deed is ineffectual in England since the statute came into operation.

"In the present case it appears to me to be clear on the evidence that the deletion of part of the deed by the testator, excepting as regards

the nomination of trustees, was not intended as a self-subsisting independent act, but had distinct relation to the making of the codicil. Immediately after scoring out the words in his deed of 1868, the testator, on the afternoon of the same day (12th October 1872), recorded in the writing which he intended to be operative as a codicil the reason for the change which he had made on his will, and at the same time added provisions shewing that it was not his intention to deprive his grandchildren of all benefit under his settlements, and in language importing a present act of gift he made another bequest in their favour. The terms of the codicil are, I think, sufficient to shew that he regarded it as an operative deed or writing, and that he meant it to control and modify the effect of his deed of settlement, and if other proof were necessary the evidence given by Mrs Matheson strongly supports this view. It is to be observed that the proof allowed by the interlocutor of 3d November 1874, before the discussion took place in the case, was of a more limited nature than it probably should have been, for the parties were not allowed any proof as to the intention of the testator in the obliteration of part of his deed. There is, however, enough, I think, under his own hand, and separately in the evidence which has been adduced, to warrant the conclusion at which I have arrived.

"Cases in which obliterations have occured in deeds have usually been presented in the form of actions of proving of the tenor, and I observe that in the case of *Dow* v. *Dow*, 30th June 1848, 10 D. 1465 (Lord Cockburn dissenting), the Court required an action in that form to be raised. In the present case, however, I think such an action is unnecessary, because, in the first place, all the parties interested are in Court, and desire to have the questions between them tried in this process, and there does not appear to be any difficulty to prevent this being done, and in the next, because, notwithstanding the deletions, the words originally written may still be ascertained with certainty on the face of the deed itself."

This judgment was acquiesced in.

Counsel for the various Parties—Burnet—Strachan—M'Laren—and J. C. Smith. Agents—J. W. & J. Mackenzie, W.S.—G. & H. Cairns, W.S.—Thomas M'Laren, S.S.C.—Walls & Sutherland, S.S.C.

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*Friday, January* 14.

## FIRST DIVISION.

[Lord Young.

### VISCOUNT FINCASTLE *v.* LORD DUNMORE AND OTHERS.

*Entail—Disentail—Entail Amendment Act* (11 *and* 12 *Vict. cap.* 36)—16 *and* 17 *Vict. cap.* 94, *sec.* 24.

D, who was heir of entail in possession of an estate held under an entail dated in 1841, presented a petition in 1864 for authority to disentail. After the usual procedure, and the three next heirs having lodged deeds of consent, the Lord Ordinary granted the petition. No pecuniary consideration was given for the consents, on the understanding that the disentailed lands were to be sold and the proceeds applied in the purchase of other lands to be entailed on the same institute and series of heirs and under the same conditions as in the previous entail. For that purpose D executed a trust-disposition in favour of trustees, who were duly infeft. In 1869 D presented a petition for authority to acquire the said estate in fee-simple, and called as respondents (1) the then three next heirs of entail, and (2) the trustees under the trust-disposition. No answers were lodged, but deeds of consent were granted by the three heirs, and in 1870 the Lord Ordinary interponed authority to the transaction, and authorised D to acquire the estate in fee-simple. In 1871 an heir-apparent was born to D, who meanwhile had borrowed on the security of the disentailed lands as fee-simple proprietor.—*Held* (1) that under sec. 1 of the Entail Amendment Act (11 and 12 Vict. cap. 36) the petitioner could not disentail without the consent of an heir-apparent, and that there being no such heir, he was not entitled to do so; but (2)—*diss.* Lord President—that under 16 and 17 Vict. cap. 94, sec. 24, the heritable securities remained good to the creditor, who had *bona fide* acted upon a "judgment and decree" which was as regards them "no longer reducible on any ground of irregularity or non-compliance" with the provisions of the statute.

The Earl of Dunmore was heir of entail in possession of the lands and estate of Harris, under a deed of entail in favour of heirs-male dated in 1841, when in 1864 he presented a petition under the Acts 11 and 12 Vict. cap. 36, and 16 and 17 Vict. cap. 94, for disentail of a portion of the lands. After the requisite consents, those viz. of the three nearest heirs, had been obtained, and the other steps of procedure had been complied with, the instrument of disentail was executed. No pecuniary consideration was given for the consents, on the understanding that the disentailed lands were to be sold, and the proceeds were to be applied in the purchase of other lands, to be entailed on the same institute and series of heirs, and under the same conditions as in the previous deed.

In conformity with that object and understanding, Lord Dunmore, on 21st June 1864, executed a trust-disposition in favour of the Countess Dowager of Dunmore and John Tait, as trustees for the above amongst other purposes, and they were duly infeft, and exercised the powers and directions given to them under the deed.

In 1869 Lord Dunmore presented to the Court a petition for authority to acquire in fee-simple the property he had previously conveyed in the trust-disposition of 1864, and called as respondents (1) the then three next heirs of entail, his uncle and two cousins, and (2) the two trustees under the trust-disposition. At that time Lord Dunmore had no heir-apparent. No answers