1851.
25*th March.*
8*th*, 9*th, and*
15*th May.*
1852.
28*th June.*

MARTHA STODDART, . . APPELLANT.

GRANT AND OTHERS, . . RESPONDENTS (*a*).

Instruments appearing, *primâ facie*, to be testamentary, shall be deemed testamentary until the contrary is shown.

The Court will not, from doubtful or equivocal expressions found in a subsequent testamentary paper, infer the revocation of a previous one.

The onus of proving the revocation of prior, by subsequent, testamentary instruments, is on those who assert the revocation.

Where a legacy of the same amount is given to the same person, by a prior, and by a subsequent, testamentary instrument, the question will be not whether the first *instrument*, but whether the first *legacy* be revoked. In other words, whether the gift be cumulative or substitutional.

To say, in such a case, that the legacy is "repeated," is to assume that the gift is substitutional, which is the point for inquiry.

If a testamentary instrument contain no *express* revocation of former testamentary instruments, the circumstance of its having been prepared by a professional man furnishes an argument to show that revocation was *not* intended.

AGNES BELL, wife of Andrew Bell, Doctor of Divinity —by an instrument purporting to be a testamentary disposition, dated at Leith the 15th of August, 1828, reciting that in pursuance of a deed of separation between herself and her husband, executed in the English form, a sum of 8333*l.* 6*s.* 8*d.*, three per cent. consolidated annuities, had been invested upon trust as to one moiety thereof to be at her disposal notwithstanding her coverture; and further reciting that she was "desirous of settling the succession to the above-mentioned moiety in the event of her death;" gave and bequeathed divers legacies out of the said moiety, and, *inter alia*, a legacy to the Appellant, which was thus expressed, namely, "Five hundred pounds of the said three per cent. consolidated annuities to Miss Martha Stoddart;" the word "*five*" being on an erasure, but in the hand-writing of the testatrix.

It appeared that the testatrix's moiety of the stock had been transferred to her by the trustees of the deed of separation; and it was still standing in her name at the time of her decease.

In July, 1837, the testatrix, then the widow of the said Andrew Bell, by a holograph instrument purporting to be a testamentary disposition, bequeathed legacies to divers persons, and, *inter alia*, bequeathed a legacy to the Appellant in these terms:—"To Miss Martha Stoddart and her brother Richard Stoddart, I leave

(*a*) This case is reported in the Court of Session Reports, Second or New Series, vol. xi. p. 860.

STODDART v. GRANT AND OTHERS.

and bequeath the sum of 50*l.* sterling yearly, or to the longest liver of them." This instrument bore date July, 1837, and contained a nomination of trustees, who were to act in the event of the death or marriage of the testatrix, or in the event of "her falling into a state of distress, by which she might be disabled from managing her own affairs."

In January, 1840, the testatrix, by another holograph instrument, purporting to be a testamentary disposition, bequeathed legacies to divers persons, and, *inter alia*, bequeathed a legacy to the Appellant in these terms:— "I bequeath to Miss Martha Stoddart 20*l.* sterling, to be paid yearly." This instrument bore date "1840, January 2."

By another holograph instrument, bearing date 1842, and purporting to be a testamentary disposition, the testatrix expressed herself as follows: "This is my will and testament, 1842. I, Agnes Bell, widow, do hereby make my last will and testament, and I do hereby bequeath all the furniture in my dwelling house, and my wearing apparel, to my servant, Janet Swanston." This instrument contained no other gift.

By a formal instrument (not holograph of the testatrix, but attested by witnesses), purporting to be a testamentary disposition, dated 26th June, 1844, she expressed herself as follows: "I, Mrs. Agnes Bell, with a view to the settlement of my property hereinafter conveyed, in the event of my death, do hereby assign and dispose to Janet Swanston, all the days of her lifetime, in case of her being in my service at the time of my death, whom failing either by death or her leaving my service, to Miss Martha Stoddart, during all the days of her life, that dwelling-house presently occupied by me, and the household furniture," &c. This instrument contained no other gift, but this of the dwelling-house and household furniture.

By another formal instrument (not holograph of the testatrix, but attested by witnesses,) purporting to be a testamentary disposition, dated 3rd May, 1845, she commenced as follows: "I, Mrs. Agnes Bell, considering that I some time ago executed a settlement of my dwelling-house and furniture, and that I have now resolved to make a settlement of my personal estate, in manner hereinafter written, therefore I do hereby leave and bequeath," &c. Divers legacies here follow; among others, a legacy to the Appellant in these words: "and to Miss Martha Stoddart, during all the days of her lifetime, a free yearly annuity of thirty pounds." By this instrument, the testatrix reserved a power of revocation, a power of naming residuary legatees, and a power of appointing executors.

By an undated holograph instrument, purporting to be a codicil, the testatrix expressed herself in these terms: "I do hereby add this codicil to my will, and I do hereby nominate and appoint the following executors," (naming them, and including among others the Respondent, Grant), and then she concluded thus: "to each of the executors I leave two hundred pounds sterling. The money or the stock is only to be transferred into the name of the legatee."

None of these instruments contained words of *express* revocation; nor were the dispositions wholly inconsistent with each other; and, after payment of all the legacies, there would still have been a residue undisposed of; so that the question came to be whether the seven separate instruments, or any and which of them, should be regarded as expressing the intention of the testatrix, and as constituting jointly, or severally, her last will and testament.

The testatrix's property had been gradually increasing from the date of the first instrument to the date of her decease.

STODDART v. GRANT AND OTHERS.

The executors, to obtain the opinion of the Court of Session, instituted a suit for distribution of the testatrix's estate.

The Appellant claimed, 1st. 500*l.* under the instrument of 15th August, 1828. 2nd. 50*l.* a year under the instrument of July, 1837. 3rd. 20*l.* a year under the instrument of 2nd January, 1840. 4th. The house and furniture under the instrument of 26th June, 1844. 5th. 30*l.* a year under the instrument of 3rd May, 1845.

The case was reported by the *Lord Ordinary* (Lord *Robertson*) to the Lords of the First Division; who, after hearing counsel, were equally divided; the Lord President *Boyle* and Lord *Fullerton* holding that the will was made up of *all* the seven instruments. Whereas, Lords *Mackenzie* and *Jeffrey* were of opinion that, by the last three instruments, the instruments of earlier date were in effect revoked and superseded.

In this situation, the First Division ordered the papers in the cause to be submitted to the other nine Judges of the Court, who upon consideration were likewise divided, though not equally, in opinion. The *Lord Justice-Clerk* (*Hope*), and Lords *Medwyn, Cockburn, Wood, Cuninghame, Ivory,* and *Robertson,* holding that only the last three instruments were entitled to probate; while, on the other hand, Lords *Moncreiff* and *Murray* regarded all the papers as of the same unrevoked and testamentary character.

1849. *27th February.* The First Division, on the 27th of February, 1849, pronounced judgment, finding that, "In respect of the opinions of the majority of the consulted Judges, the succession of the testatrix was to be regulated exclusively by the three last writings mentioned in the summons, and that the other writings, of dates anterior, were not to be held to any extent subsisting testamentary writings."

Sir *Fitzroy Kelly* and Mr. *Anderson*, for the Appellant, cited *Horseburgh* v. *Horseburgh* (*a*), *Lee* v. *Pain* (*b*), *Thompson* v. *Lyall* (*c*), *Murray* v. *Gibson* (*d*), *Robertson* v. *Ogilvy's Trustees* (*e*), *Dingwell* v. *Askew* (*f*), *Methuen* v. *Methuen* (*g*), *Re Bowen* (*h*).

Mr. *Bethell* and Mr. *Rolt*, for the Respondents, cited *Plenty* v. *West* (*i*), *Henfrey* v. *Henfrey* (*k*), *Helyar* v. *Helyar* (*l*), *Nasmyth* v. *Hare* (*m*).

1852.
28*th June*.

Lord Truro's opinion.

Lord TRURO:

My Lords, in this case the House has to collect what was the intention of the Testatrix from the different instruments propounded; and the difficulty of decision is increased by the circumstance that she was evidently an illiterate person, in all probability not very nicely weighing her expressions.

I will begin by requesting your Lordships' attention to the observations made by the learned Judges in the Court below, when pronouncing the decision now under appeal.

It appears that in the Inner House the *Lord President* and Lord *Fullerton* were for admitting all the seven documents to probate; the *Lord President* remarking, that some of them on the death of the testatrix were found in a band-box, and some in a drawer; some in one description of cover and some in another. But then his Lordship adds that two of the papers were prepared by a professional man, and "so must be regarded as deliberate expositions of the will of the deceased; and the last instrument, which contains a nomination of executors, and is holograph

(*a*) 10 Second or New Ser. 824. (*b*) 4 Hare, 201.
(*c*) 15 Dun. B. & M. 32. (*d*) 9 Shaw & D. 378.
(*e*) 7 Dunlop, 236. (*f*) 1 Cox, 427. (*g*) 2 Phill. Ecc. Rep. 416.
(*h*) Millward's E. R. 609. (*i*) 1 Robertson's E. R. 264.
(*k*) 4 Moore's P. C. C. 29; and 2 Curtis, 468.
(*l*) Ca. Temp. Lee, 444. (*m*) 1 Sha. App. Ca. 64.

STODDART v. GRANT AND OTHERS.

Lord Truro's opinion.

of herself, must be given effect to." The learned Judge, however, is not satisfied that the other papers should be wholly set aside.

Lord *Mackenzie* and Lord *Jeffrey* held that only the three last instruments were entitled to probate. Those learned Judges did not attach importance to the place or the circumstances in which the documents were found at the death of the testatrix, but they held that the case was very special, such as they had never seen before, and which they did not expect ever to see again.

On turning to the opinions of the *consulted Judges*, your Lordships will find them somewhat wanting in explanation. They certainly have not entered very minutely into the matter. Says the *Lord Justice-Clerk*:—"After attentive consideration, I am of opinion that effect cannot be given to any of the writings of dates prior to the instruments of 26th June, 1844, and 3rd May, 1845. That the deceased intended to make at the date of that settlement of 3rd May, 1845, residuary bequests seems to be clear, as she also intended to name executors. She did appoint the latter, but did not name residuary legatees. But this does not destroy the proper legal effect of that settlement of her personal property completed by the appointment of executors, in superseding the former writings. To my mind it is clear that they were intended to be superseded, and that in point of law they were superseded."

My Lords, I should have been glad undoubtedly to have had rather more assistance from the opinion expressed by this very learned Judge; and it would have been desirable had he gone more into detail, so as to bring the case within the correct rule upon the question how far subsequent testamentary documents shall be held to revoke, or not to revoke, previous ones.

STODDART v. GRANT AND OTHERS.

Lord Truro's opinion.

Lord *Medwyn*, Lord *Cockburn*, Lord *Wood*, and Lord *Cuninghame* content themselves with merely stating that they concur with the *Lord Justice-Clerk*. Whether they do so precisely on the same general grounds, or whether they rely on any other reasoning, does not appear.

The opinion of Lord *Robertson* is also very shortly expressed. He relies upon the fact that the latter documents were prepared by a man of business. He also says that the instrument of the 3rd May, 1845, embraced the whole personal estate of the deceased, and that it "repeated" a great number of the legacies formerly bequeathed. But here he assumes the very question which was to be considered,—whether those legacies were "repeated;" in other words, whether they were cumulative or substitutional. If you assume that they are substitutional, beyond all doubt it will be a revocation, as regards the particular legacy; and from a multiplication of such instances, you might perhaps infer a general revocation. If the *whole* is inconsistent, a revocation may be inferred; but if there is only a difference in certain of the bequests—if the later documents only modify the gifts in the previous ones—in such case you are, if possible, to adhere to the substance of all the documents, and hold the whole to constitute one will capable of subsisting and of being executed together.

Lord *Ivory* too agreed with the *Lord Justice-Clerk*, though, as it appears, not till after more than one change of mind.

So that your Lordships have here the opinions, very briefly delivered, of the *Lord Justice-Clerk* and Lord *Robertson*; and you have also a general concurrence on the part of the other consulted Judges; one of them joining apparently with difficulty, and after much fluctuation.

STODDART *v.* GRANT AND OTHERS.

Lord Truro's opinion.

But then, my Lords, on the other side there is the opinion of Lord *Moncreiff*, adopted also by Lord *Murray*, representing it to be a well-established principle of the law of Scotland, that "where a person deceased has left various writings, probative in themselves, for disposing of his or her property, they are to be understood as constituting one testamentary settlement, in so far as they have not been revoked, and are not inconsistent with each other." Lord *Moncreiff* and Lord *Murray* therefore assent to the doctrine laid down by Mr. Justice *Williams* (*a*), "that the mere fact of making a subsequent will does not work a total revocation of a prior one; unless the latter expressly revoke the former, or the two be incapable of standing together; for though it be a maxim that no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be, so they be all testamentary, may be admitted to probate, as together containing the last will of the deceased; and that although one may be partially inconsistent with another of an earlier date, the latter instrument will revoke the former as to those parts only where they are inconsistent."—The same learned Judges further observe, that the "main thing to be looked to is the intention of the testatrix."

My Lords, the general rule applicable to cases of this description is perfectly clear, and not subject, so far as I am aware, to any exception. It is *this;* that questions relating to wills should be decided by looking to the whole contents of the documents, with a view to discover what is fairly to be inferred as the intention of the testator.

I will just call your Lordships' attention to various circumstances in the present case, which are relied

(*a*) 1 Williams on Executors, 116.

STODDART v. GRANT AND OTHERS.

Lord Truro's opinion.

upon on each side, and I will begin with those put forward by the Judges constituting the majority in the Court below. For example, it is stated that one of these documents—that of 1842—begins with the words "This is my last will and testament." But, my Lords, these words are not new to courts of justice. In *Thomas* v. *Evans* (*a*), Lord *Ellenborough* held that a testator, describing a document as his *last will*, must not be regarded as necessarily revoking a former testamentary instrument. And Mr. Justice *Lawrence*, in the same case, observed that the phrase *last will* was "merely one of form; meaning no more than that the instrument was the last of those instruments which the testator had executed." My Lords, I do not apprehend that in reality those words ought to receive any weight whatever in deciding this question.

The next point to which the Judges constituting the majority attached importance was, that the last of the papers was prepared by a professional man. To my mind that argument tells the other way. The gentleman who prepared the instrument of 1845 prepared also the instrument of 1828. It is perfectly well known to every professional man, that, when called in to prepare a will, his duty is to ascertain if there be any former testamentary paper, and if there be, he is to take the testator's instructions whether he intends to revoke it or to make the new will subsidiary and additional. Now as this gentleman had prepared the instrument of 1828, which expressly reserved a power of revocation, it does strike me that the circumstance is very much in favour of these previous papers being deemed still testamentary. This lady's passion for making wills was probably known to her professional adviser; and supposing him to have possessed ordinary intelligence, I cannot help thinking that, if it had been meant to

(*a*) 2 East, 448.

STODDART v. GRANT AND OTHERS.

Lord Truro's opinion.

revoke such papers, he would have inserted a clause for the purpose. In short, I should have supposed that he would have taken care clearly to understand, in the first place, whether there *was* any previous testamentary paper,—and, secondly, if there was, whether she meant to revoke or continue it.

My Lords, these are circumstances from which different minds may draw different conclusions, perhaps of equal authority. The law requires something more positive to work a revocation. The Courts do not act upon doubtful expressions, or upon circumstances as open to one construction as to another. *Primâ facie*, all these documents are to be taken as one will. Then if you say a portion of them is not to be so considered, I think to warrant the rejection of that portion there should be something more than guess and conjecture; for your guess and your conjecture may rest upon grounds which, to another person of equal professional experience and equal common sense, might suggest a quite opposite deduction.

My Lords, it does not seem to me that the Courts in Scotland have ever, upon such slender grounds, sanctioned the repudiation of documents appearing *primâ facie* to be testamentary.

Well, but then it is said that the instrument of 1845 refers to one paper only; the paper disposing of the house; and which had also been prepared by the same man of business. I own I cannot assent to this large conclusion, from so slight an indication. That there should be a reference to one paper and not to the others, is a circumstance much too uncertain to justify the strong inference that all those other instruments are revoked.

It was further observed, that "executors were named in the last instrument." But I cannot perceive how the mere nomination of executors necessarily imports

STODDART *v.* GRANT AND OTHERS.

Lord Truro's opinion.

an intention to revoke previous documents. The nomination of executors is, no doubt, a very important act; but in the very instrument referred to by the *Lord Justice-Clerk*, as containing that nomination, it is perfectly plain that there were other important things left undone;—there was the residue still undisposed of. And as regards the naming of executors, the testatrix had done so before, in a document, containing, as it appears to me, nothing whatever on the face of it importing any intention to revoke previous instruments.

Some stress was laid in the Court below on the alterations and erasures appearing on the face of these documents. New matter was written upon the erasures. But this would seem rather to imply that the testatrix intended that the paper so altered should continue to operate as a testamentary paper subject to the alterations; and that there was no intention to destroy it by those means. I say, my Lords, the circumstance tends more in favour of this conclusion than the contrary one. This, however, is but another instance of the danger of attaching too much importance to doubtful indications, which are open to different and even opposite constructions.

I think it would tend very much to diminish the power of testators over their property, if you were to hold that slight or equivocal expressions found in a subsequent instrument would justify the conclusion that previous documents, otherwise entitled to probate, were to be regarded as revoked.

In my apprehension, if you can execute the whole of the papers as one testament, you are bound to do so.

It is said in the present case that the dispositions are inconsistent. I can hardly call them so. It is true, that, by one paper, the testatrix gives the house and furniture absolutely, and that she afterwards cuts down

STODDART v. GRANT AND OTHERS.

Lord Truro's opinion.

that absolute gift to a life interest. She gives the household furniture, except such as shall be marked, and that which is so marked is to go to the person indicated by the mark. But, has it ever been contended in a court of justice, that the mere circumstance of a subsequent testamentary paper diminishing the interest which had been given by a previous one, was to be held to operate as an entire revocation of that previous instrument? I know of no authority whatever for such a proposition.

The next remark made in support of the argument of revocation is, that certain of the legacies are *repeated*. This raises the question whether they are cumulative or substitutional, but furnishes no evidence of any intention to take away the testamentary character of the documents containing them. It becomes a question with respect to the particular legacy, how you shall deal with it, whether as revoked or not; but that this lady, whose property was going on accumulating from time to time, should give 30*l.* to an object of her bounty at one time, and 200*l.* at another, does not seem to me (the lady growing richer and richer every day) inconsistent at all.

I may observe that the testatrix, in several of the papers, says, "I reserve to myself to alter them in whole *or in part*." This shows that she had in her view a partial alteration, without an absolute revocation of the whole document.

Again, I observe that this lady has given divers legacies to charitable institutions in Scotland; and she appears to have been animated by the same benevolent feeling from 1828 to 1845. But I can discover no reason for holding that, because, by a later instrument, she gave legacies to new institutions, or because she increased her benefactions to old ones, she therefore meant to revoke her former bequests. I think, on the

STODDART *v.* GRANT AND OTHERS.

Lord Truro's opinion.

contrary, the circumstance marks the continuance of the same disposition in the mind of the testatrix; and, remembering that her property was increasing, the fresh acts of bounty were but an exercise of the same liberal inclinations, leading, in my opinion, to any inference rather than that she was disposed to do less for these institutions, instead of more.

I repeat, my Lords, these documents, having been all found under circumstances entitling them to that consideration, are, *primâ facie*, to be regarded as one will. They may be altered. They may be partially revoked. They may be partially inconsistent with each other. And yet the latter of them may not operate as an entire revocation of the former.

The circumstance of a partial inconsistency, as it is called, that is to say, the circumstance of there being dispositions in two documents, both of which cannot be fulfilled, is held by the Courts to operate as a revocation *only pro tanto;* bearing upon the particular legacy, but not necessarily affecting the testamentary character of the document.

The general rule is, that the onus is upon those who impeach; and the question is, whether those who have asserted the revocation of the earlier documents in the present case have satisfied your Lordships that it really took place. I own it appears to me that the grounds upon which this conclusion has been drawn are but slight, and not merely slight, but outweighed and counterbalanced by the circumstances which tend to the opposite conclusion.

My Lords, I do not think it necessary to cite the authority of text-books for principles so well understood by the profession; particularly as I do not find that any of the established doctrines are challenged or thrown into doubt by the learned Judges who have pronounced an opinion in my mind not warranted by

STODDART v. GRANT AND OTHERS.

Lord Truro's opinion.

the principles which are admitted, but which I humbly think have been misapplied in the case now before your Lordships.

Before concluding, there is one point as to which I wish to say a word. What *parts* of this will may be revoked? What legacies may be cumulative? Or what substitutional? Those, my Lords, are questions not now before the House. The interlocutor complained of, finds that the testament of this lady consists of only three documents, to the exclusion of the previous four. If, therefore, your Lordships shall adopt the view which occurs to me as the right view to be taken, namely, that there is nothing to be found upon the face of the latter papers to warrant the conclusion that the previous papers were intended to be revoked,—the case must go back to the Court of Session to consider those papers, and to give such effect to the different parts of them as they may by law be entitled to receive. Where there is an inconsistency, it will operate as a partial revocation. Where the inconsistency is only of such a nature as that the general intention can yet be executed,—the general intention will prevail.

I, therefore, respectfully submit to your Lordships that this interlocutor should be reversed and that the cause should be remitted to the Court of Session, to do therein as may be just.

Lord BROUGHAM:

Lord Brougham's opinion.

My Lords, I had not the advantage, except for a part I think of one day, of hearing the learned counsel who addressed the House; but I certainly agree with my noble and learned friend in the view he has taken of this case. I place the greatest reliance on the grounds put forward in the Court below by the minority of the learned Judges. I particularly refer to the able and luminous argument of Lord

STODDART *v.* GRANT AND OTHERS.

Lord Truro's opinion.

Moncreiff. I, therefore, have no objection whatever to make to the motion of my noble and learned friend.

Interlocutor reversed, and Cause remitted with a Declaration:—

That the whole of the seven deeds or writings, mentioned in the said summons collectively, do form, and are to be considered and taken, as the last will of the said deceased Mrs. Bell: And it is further *ordered,* that the costs incurred by the said Appellant and Respondents, in respect of the said Appeal, be paid out of the fund *in medio:* And it is further *ordered,* that the cause be remitted back to the Court of Session in *Scotland,* to do therein as shall be consistent with this declaration and judgment, and as shall be just.

DUNN & DOBIE.—SPOTTISWOODE & ROBERTSON.