Saturday, December 6.

SECOND DIVISION.

PETTICREW'S TRUSTEES *v.* PETTIGREW AND OTHERS.

Writ—Testament—Informal Testamentary Writing—Holograph but Unsubscribed.

In a lady's repositories there was found after her death a formal trust-disposition and settlement which had been drawn by her law-agent and executed by her some years before she died. On the outside of the deed, or on the reverse side to the backing, the following words were written in pencil—"Residue of estate to be given to Jane Fraser, draper, and her sister, Helen Fraser, or surviver, Christian Porter or Rodger deleted, deleted also the names of Isabela Petticrew and Bessie Thom, Dauthers, Alex. Thom, Edinr." This writing was holograph of the testatrix, but was not signed or dated. *Held* that it did not form a part of her testamentary writing.

Miss Isabella Petticrew died at Redburn House, Prestonpans, on 21st May 1884. At the time of her death she had no relatives nearer than the children and grandchildren of first cousins. She also left some second cousins and their descendants. Her moveable estate at the time of her death amounted to £2100 or thereby, and she was possessed of heritage yielding a rental of about £124 per annum.

On 11th December 1878 she had executed a trust-disposition and settlement, which was a formal deed prepared by her law-agent, and was thereafter handed to her by him, and kept by her till her death. By this deed she made over her whole estate and effects, heritable and moveable, to four trustees, for the following purposes—In the first place, for payment of all her debts, deathbed and funeral expenses, and the expenses of executing the trust: In the second place, for payment of (1) four legacies of £50 to each of her four trustees and executors; (2) three legacies of £200 to each of Isabella Pettigrew, residing with her, Margaret Pettigrew or Mackintosh, and Janet Pettigrew, all daughters of John Pettigrew senior, mason, East Linton (second cousin of the testatrix); (3) two legacies of £100 each to Isabella Pettigrew Thom and Elizabeth or Bessie Thom, daughters of Alexander Thom, tailor, Edinburgh, and Mrs Lillias Rodger or Thom, his wife (who was a second cousin of the testatrix); and (4) she bequeathed her whole furniture and all her wearing apparel and jewellery to the said Isabella Pettigrew: In the third place, she directed her trustees to dispone and convey four separate heritable properties belonging to her, and situated in Prestonpans, to the following parties respectively, viz., the subjects therein first described to George Mackie (son of a first cousin) and his wife, or the survivor in liferent, and their son in fee; the subjects therein second described to James Pettigrew, mason, East Linton (son of the foresaid John Pettigrew senior), under the real burden of a yearly payment of £20 to Jane and Helen Fraser, drapers, Prestonpans (daughters of a first cousin), during their joint lives and to the survivor; the subjects therein third described to William Pettigrew (son of John Pettigrew senior); the subjects therein fourth described to John Pettigrew senior and his wife, and survivor in liferent; and a portion of certain subjects to John Pettigrew junior, mason, East Linton, in fee, and the remaining portion to James Pettigrew Sinclair, son of one of the trustees, Robert Sinclair (and grandson of John Pettigrew senior), in fee: In the fourth place, she directed her trustees to pay Government duties equally according to the proportion payable by her legatees or beneficiaries, so far as the residue would permit, and to pay the residue of her estate equally between Isabella Pettigrew and Christian Rodger or Porter (a second cousin), wife of John Porter, grocer, Prestonpans: And lastly, she made sundry declarations and provisions, and *inter alia* reserved full power to revoke the said deed in whole or in part.

On the morning after Miss Petticrew's death the settlement was found by her agent in a compartment of a locked desk which she always kept in her bedroom, and of which she kept the keys. The settlement was enclosed in an envelope, which was unsealed and unaddressed, and without any markings. On the outside of the deed, or on the reverse side to the backing, the following words were written in pencil:—"Residue of estate to be given to Jane Fraser, draper, and her sister, Helen Fraser, or surviver, Christian Porter or Rodger deleted, deleted also the names of Isabela Petticrew and Bessie Thom, Dauthers, Alex. Thom, Edinr." This pencil writing was holograph of the deceased, but was not signed nor dated. It was not known when the words were written by the deceased, but no such words were on the deed when it was executed by her and handed to her by her agent. She did not mention to anyone, so far as could be ascertained, that she had executed the writing, or that she intended making any alteration on her settlement.

This Special Case was adjusted to try the question whether this pencil writing formed one of her testamentary writings. Miss Petticrew's trustees were the first parties; Isabella Pettigrew the second party; Mrs Porter, Isabella Pettigrew Thom, Elizabeth or Bessie Thom, and Alexander Thom (their father), third parties; and Jane Fraser and Helen Fraser fourth parties.

The fourth parties maintained that the pencil writing formed one of the testamentary writings of the deceased, while the third parties maintained that it did not.

The questions of law were—"(1) Is the holograph pencil writing . . . part of the testamentary writings of the said deceased Miss Isabella Petticrew; and are the parties of the fourth part entitled, by virtue of said pencil writing, to the whole residue of the said deceased Miss Isabella Petticrew's estate, or to any and what part thereof? (2) In the event of the first part of the first query being answered in the affirmative, does the said pencil writing revoke all or any of the bequests of the shares of residue and the special legacies bequeathed to the second and third parties respectively by said trust-disposition and settlement, and if so, which of them?"

The Court desired that the argument might be

confined, in the first place, to the question of the validity of the writing.

Argued for the fourth parties—On the question of the validity of the pencil-writing.—The case was distinguishable from all previous cases of the kind in which unsigned holograph documents had been held to form uncompleted acts—*Skinner* v. *Forbes*, November 13, 1883, 11 R. 88; *Russell's Trustees* v. *Henderson*, December 11, 1883, 11 R. 283; *Brown* v. *Maxwell's Executors*, May 21, 1884, 11 R. 821; *Dunlop* v. *Dunlop*, June 11, 1834, 1 D. 912. It came under the exception in the *dictum* of Stair (iv. 42, 6). This document was written "on an authentic writ," and was therefore in itself probative. That it was in pencil did not affect its validity —*Simsons* v. *Simsons*, July 19, 1883, 10 R. 1247.

Argued for the third parties—A writing so informal had never of itself been sustained as part of a testament. There were no corroborating circumstances here, as in the cases relied on for the fourth parties. The jotting in question was not in such a favourable position as the marginal note in *Brown* v. *Maxwell's Executors*, which was rejected. The passage in Stair relied on referred to documents of debt *inter vivos*, and not to testamentary writings. This was clear from the words used, that they are not to be "resiled from," and from the case of *Wauchope* v. *Niddrie*, referred to by Lord Mackenzie in the case of *Dunlop*.

At advising—

Lord Justice-Clerk—It appears that Miss Petticrew, the testatrix in this case, executed a settlement, which was regularly prepared by a law-agent, and was afterwards retained by her in her own possession till her death. It was executed in 1878—six years before she died. But when her repositories were opened it was found that on the paper which contained her settlement she had written some words, which though faint are legible, and it is maintained by certain of the parties here that they were intended to refer to the contents of the deed on which they are written. These words are, as I have said, perfectly intelligible if they apply to the subject-matter of the testament. They are as follows—"Residue of estate to be given to Jane Fraser, draper, and her sister Helen Fraser, or surviver, Christian Porter or Rodger deleted, deleted also the names of Isabela Petticrew and Bessie Thom, Dauthers, Alex. Thom, Edinr." Now, there is no doubt that these words are holograph of the testatrix, and I do not suppose there is any question that they relate to the subject-matter of the instrument on which they are superinduced. I think these are the whole facts, because we have no facts stated in the Case as to the surrounding circumstances, and there is no evidence whatever as to the time when the writing was adhibited. It is a pencil-writing, but, as I said, it is quite legible, and the question is whether that writing, which is not subscribed, indicates a concluded testamentary intention.

I am very clearly of opinion that it does not, that relieves me from the necessity of considering any further question in regard to the meaning and effect of the document. The passage which was referred to from Lord Stair I do not think has any bearing at all on this question. In that passage Lord Stair says—"Holograph writs subscribed are unquestionably the strongest probation by writ, and least imitable. But if they be not subscribed they are understood to be incomplete acts from which the party hath resiled; yet if they be written in countbooks or upon authentic writs they are probative, and resiling is not presumed." Now, I do not understand Lord Stair in that passage to be speaking of ordinary testamentary deeds on which words are written, but of written documents which are of themselves good evidence of the facts which they state—such as accounts. And I am the more confirmed in this view by what he says regarding marginal additions. I think he is referring to merchants' accounts and documents of that kind.

I am therefore of opinion that this writing does not bear to be the indication or expression of a completed testamentary intention, and therefore that we should answer the first question in the negative, and find it unnecessary to answer the second question.

Lord Craighill—I am of opinion that the unsigned writing in question, though holograph, is not a part of the testamentary writings of Miss Isabella Petticrew, and that the fundamental question submitted to the Court ought accordingly to be answered in the negative. The writing referred to appears to me to be only a memorandum at the best. There is nothing in its appearance or expression which suggests that it is a finished testamentary writing. In the first place, it is written in pencil. This is not absolutely inconsistent with its being a completed instrument, but it seems to me not to be immaterial in determining whether along with other circumstances the writing is or is not to be a finished expression of will. The writer is nowhere mentioned, there is no signature, and the place where the writing is is not a place in which you would expect to find it if the testator had intended that it was to be taken as a part of her settlement. Such character as it has is only that of a memorandum to aid future recollection, or instructions to be afterwards communicated to her lawyer. In the second place, the expression of the writing does not suggest, if indeed it be not inconsistent with, finality of purpose. The language is more appropriate to something to be afterwards done than what was intended and believed to be by her writing accomplished. In the third place, the case of *Sir William Maxwell's Trustees* is not an authority for the opposite contention. The writing on the margin of Sir William's settlement was not held to be one by which the meaning of the deed could be interpreted. But even had it been taken to be an aid to interpretation, the case would not have been a precedent on the present occasion. There the writing did not revoke or add to legacies formerly bequeathed. If it did anything at all, what it did was to aid interpretation of the bequest opposite to which it was written. But here, if the writing in question is to have the effect of a testamentary writing, legacies are recalled, other legacies are created, and, in short, the settlement is to be thereby practically recast. Lord Stair's authority in the well-known passage (iv. 42, 6) was put forward as the basis for the opposite contention, but that appears to me to have no application to the present case. The reasonable reading of the words relied on by

the fourth parties seems only to be this, that where holograph writings are of a kind not usually authenticated by signature, such will be sustained though without such authentication.

Lord Rutherfurd Clark—I am of the same opinion.

Lord Young was absent.

The Court answered the first question in the negative, and found it unnecessary to answer the second question.

Counsel for First and Second Parties—Darling—MacWatt. Agents—Purves & Wakelin, S.S.C.

Counsel for Third Parties—Dickson—G. Wardlaw Burnet. Agents—Smith & Mason, S.S.C.

Counsel for Fourth Parties—Pearson. Agent—Sommerville Greig, W.S.

Saturday, December 6.

FIRST DIVISION.

[Sheriff of Renfrew and Bute.

SEWARD *v.* RATTER.

Ship — Seaman — Wages — Desertion — Absence from Ship without Leave—Merchant Shipping Act 1854 (17 *and* 18 *Vict. c.* 104), *secs.* 243, 249.

A seaman absented himself without leave from his ship at a foreign port, and took away a portion of his clothes. When on shore he was arrested, and the ship sailed without him In an action for recovery of wages, *held* that he was not in desertion, since the evidence showed that he was not, and was not treated by the captain as, a deserter until after he was prevented by his arrest from rejoining his ship.

The Merchant Shipping Act 1854 (17 and 18 Vict. cap. 104) provides by section 243—"Whenever any seaman who has been lawfully engaged . . . commit any of the following offences he shall be liable to be punished summarily as follows, that is to say (sub-section 1)—For desertion he shall be liable . . . to forfeit all or any part of the clothes and effects he leaves on board, and all or any part of the wages or emoluments which he has then earned." . . . . .

Sub-section 2 provides . . . "For absence at any time without leave, and without sufficient reason, from his ship or from his duty, not amounting to desertion, or not treated as such by the master, he shall be liable to imprisonment for any period not exceeding ten weeks with or without hard labour, and also at the discretion of the Court to forfeit out of his wages a sum not exceeding two days' pay, and in addition, for every twenty-four hours of absence either a sum not exceeding six days' pay, or any expenses which have been properly incurred in hiring a substitute."

Section 249—"In all cases of desertion from any ship in any place abroad, the master shall produce the entry of such desertion in the official log-book to the person or persons hereby required to endorse on the agreement a certificate of such desertion." . . . .

This action for the recovery of wages, and a sum said to be due for overtime work, was raised in the Sheriff Court at Greenock by Thomas Seward, assistant engineer on board the s.s. "Teddington," against John Ratter, as commander and part owner of the said ship. The pursuer also claimed £7, 10s. as the value of clothes left by him in the ship, and £10, 4s. for maintenance-money while he was at New York awaiting his ship's return. He alleged the balance due to him, after certain deductions, to be £63, 5s. 3d.

The pursuer had shipped at Tower Hill, London, on 19th November 1881, as "donkeyman" or assistant engineer on the "Teddington" at a monthly wage of £4, 10s.

After calling at various ports the vessel arrived at New York on 23d December 1882, and discharged her cargo. On the 30th December the ship sailed to Baltimore without the pursuer, he being at that time on shore in jail. The pursuer alleged that he was arrested on board ship on a false accusation, at the instance of a fellow seaman, that he was detained in jail while inquiries were being made, and that upon the charge being found to be untrue he was released, but by that time the ship had sailed, and that after awaiting her return for some time he ultimately worked his passage home.

The defender averred that on the ship's arrival at New York upon the 22nd December 1882 the pursuer had without leave left the vessel and absented himself from his work, that another man had to be engaged to do his work, as the vessel was discharging cargo and a man was required to attend to the steam-winch. He also alleged that the vessel proceeded from New York to Newport News on the 30th December, and remained there until the 6th January 1883, and that the pursuer had ample time to have rejoined her if he had felt inclined; that as the pursuer did not return to the ship, the defender had, in compliance with section 250 of the Merchant Shipping Act of 1854, entered his name both upon the 29th and 30th December as a deserter. He also alleged that the ship returned to New York about the 24th March 1883 and remained there for five days, but that the pursuer made no application to be taken on board.

The defender pleaded, that as the pursuer had deserted his ship, he had thus forfeited all claim to wages or other moneys, and that as the pursuer had removed his body-clothes from the ship he had no claim against the defender for their value.

The Sheriff-Substitute allowed the parties a proof, the import of which sufficiently appears from the interlocutor of the Sheriff-Substitute and passages quoted in the opinion of Lord Mure.

The following joint-minute was put in process —"The pursuer stated that he had no evidence to lead except his own; that he is at sea, and his witnesses being principally seafaring men are also at sea. In consideration thereof, the defender agrees to hold the statements of pursuer in his condescendence, *quantum valeat*, as the evidence he would give on oath if under examination."

On 17th January 1884 the Sheriff-Substitute (Smith) pronounced this interlocutor—"Finds in