

Friday, February 5.

SECOND DIVISION.

LISMORE UNITED FREE CHURCH  
KIRK-SESSION v. M'CAIG'S  
TRUSTEES.

*Succession — Trust — Testament — Nature and Constitution—Public Policy.*

Attestatrix, who died leaving no known heir-at-law, by her trust-disposition and settlement disposed of her estate, subject to the payment of certain annuities, for charitable purposes. By a codicil she charged the income of the trust estate with the cost of the erection and maintenance in all time coming of eleven bronze statues to be placed in the windows of a tower situated on a hill. She directed that the statues should cost at least £1000 each, and be representations of her father and mother and the whole members of her family, including herself, and a brother who died in infancy, and that the interior of the tower should be railed off to prevent the access of the public.

*Held, following M'Caig v. University of Glasgow, 1907 S.C. 231, 44 S.L.R. 198, that the bequest was invalid on grounds of public policy.*

Alexander Duffus and others, the testamentary trustees of Miss Catherine M'Caig, Oban, *first parties*, and (1) the Kirk-Session of the United Free Church of the Island of Lismore, (2) the Provost, Magistrates, and Councillors of Oban, and (3) Bella M'Caig, Maggie M'Naughton, and Jessie M'Naughton, annuitants under Miss Catherine M'Caig's will, *second parties*, brought a Special Case for the opinion and judgment of the Court.

Miss Catherine M'Caig, Oban, who died on 1st July 1913, left a trust-disposition and settlement dated 18th April 1908, and a relative codicil dated 20th June 1910. By the *trust-disposition and settlement* she conveyed her whole estate to trustees, and directed them:—*First.* To pay her debts, death-bed and funeral expenses, including the cost of such memorial stone or tablet as her trustees might think suitable, and the expenses of executing the trust. *Second.* To take off a piece of ground in front of the property in Breadalbane Street, Oban, belonging to the truster, to lay out and keep it as an open space, and to erect thereon a statue of the truster's late brother Major Duncan M'Caig. *Third.* To hold the capital of her whole free heritable and moveable estate after allowing for the execution of purposes first and second, the rents of the heritage, and the income from the remainder of her estate, to be applied, in the first place, in payment of the cost of repairs to the heritable properties, and in disencumbering the properties of any heritable bonds affecting the same at the date of the truster's death, and in keeping in proper maintenance and order the said open space and statue, and the burying-place of her father, mother, brothers, and sisters. *Fourth.* After pro-

viding from the income of the estate for the objects specified in said purpose third, to apply the annual surplus income as it might be determined year by year as follows, viz. — (*Primo*) In supplementing the annual stipend of the minister of the United Free Church of the Island of Lismore to the extent of £20; (*secundo*) in paying to the Town Council of Oban £20 per annum for the purchase of coals for distribution among such deserving poor people in Oban as the said Town Council might think best; (*tertio*) for payment of £30 annually to Bella M'Caig, daughter of Malcolm M'Caig, crofter in Lismore, and £20 sterling annually to each of Maggie and Jessie M'Naughton, daughters of Donald M'Naughton, residing in George Street, Oban, during all the days of their respective lives, under the declaration that these separate bequests out of revenue should all rank *pari passu inter se* upon said surplus income, and should be preferred to the bequests out of income provided under the immediately following fifth purpose — (*fifth*) to divide the remaining income from the estate, after allowing for implement of purposes third and fourth, into three equal parts, whereof two equal parts should be applied in such proportions as the trustees might from time to time determine, (1) in the assistance of Gaelic-speaking male scholars or students of Presbyterian faith at Scottish schools, universities, or Church colleges, natives of Argyllshire to be always preferred; and (2) in providing for an annual lecture or course of lectures on subjects calculated to further and encourage the knowledge, use, and study of the Gaelic language, particularly amongst Presbyterian divinity students; the remaining third part to be retained and accumulated by the trustees for such period not exceeding twenty years as the trustees might consider necessary to enable them to erect and equip a building on the truster's said property in Breadalbane Street, Oban, to be named the 'M'Caig Memorial Institute,' and thereafter to apply the said third of income for all time coming in equipping and maintaining the said building as a museum, hall, library, or other similar institution for the benefit and use of the inhabitants of Oban. The truster declared that the said thirds of annual income should all rank *pari passu inter se*, and should be postponed to all the prior charges upon the income as detailed in the previous purposes of the trust-disposition and settlement.

By the *codicil* the truster appointed an additional executor and trustee, and made the following provisions:—"I do hereby further provide and declare that my trustees shall duly carry out purposes first and second of my foregoing trust-disposition and settlement, but that before proceeding to administer my trust estate as further directed by my said trust-disposition and settlement they shall in so far as may not have been done at the time of my death, (1) convert the M'Caig Tower on the Battery Hill, Oban, into a private enclosure by putting suitable railings in the apertures near the ground levels and erecting a suitable tower and gate; (2) clear all the ground within the

tower, level the same, and lay it out in such manner as may be found most protective and suitable; (3) erect statues made of bronze within the tower and on the inside of and around the wall thereof of my father and mother and all my brothers and sisters and also of myself; declaring that said statues shall be erected either upon a ledge or upon balustrades as my trustees shall determine, the said statues to be placed in the following order, in which order they shall also be erected from time to time as funds permit, viz., the statues of my father and mother in the centre facing the doorway, and those of my brothers and sisters on each side of them in the following order—on my father's right hand the statues of John, myself Catherine, Donald, and Anne, and on my mother's left hand Duncan, Jane, Dugald, and Margaret, and opposite to the statues of my father and mother a statue of Peter my brother, who died in infancy; and I declare it to be my instructions that all the statues are to cost not less than one thousand pounds each and to bear suitable inscriptions, and in the event of there being difficulty in getting a suitable likeness of my father I direct that his statue shall be made to bear a family likeness to my brother the late John Stuart M'Caig; and I further provide and declare that the cost of the above works at the M'Caig Tower and of the various statues shall be made a charge upon the free revenue only, and shall not be made charges against capital, and that when these works have been completed and all the statues hereinbefore provided for erected, the upkeep of the said tower and statues shall become a first charge upon the revenue of my trust estate, my trustees being bound to properly upkeep the M'Caig Tower and statues in all time coming out of the revenue of my trust estate; and I provide and declare that my trustees shall be bound to retain in all time coming and not to sell or dispose of the M'Caig Tower and statues; and I provide and declare that upon completion, but only upon completion, of the above works and statues, the other purposes detailed in my trust-disposition and settlement, commencing with purpose third, shall come into force and effect subject to the proper upkeep of the said M'Caig Tower and statues out of revenue; and I further provide and declare that upon the respective deaths of the within-named Bella M'Caig and Maggie and Jessie M'Naughton the revenue charges thereby set free will accrete for the benefit of the purposes detailed in purpose fifth of my said trust-disposition and settlement; and subject to this codicil I hereby confirm my foregoing trust-disposition and settlement."

The Case stated, *inter alia*—". . . 5. The trustee inherited the bulk of her heritable properties and other means and estate through her brother John Stuart M'Caig, who died unmarried on 29th June 1902. The said John Stuart M'Caig was survived by the said Miss Catherine M'Caig and by his brother the said Major Duncan M'Caig. He was predeceased by his father and mother and by all his other brothers and sisters, none of whom left issue. The said Duncan

M'Caig died on 22nd July 1902. The said John Stuart M'Caig left a holograph settlement dated 20th January 1900, and relative holograph codicil dated 18th February 1902, by which he appointed the Court of Session, whom failing the University of Glasgow, to be his trustees and executors for the purpose therein mentioned. These purposes were—*first*, for payments of debts, &c.; *second*, for payment of a sum of £300 per year to such of his brothers and sisters as might survive him as long as they lived; and *third*, that his heritable properties should not be sold but let to tenants, and that the revenue of his estate should be used for the purpose of erecting monuments for and statues of himself, his father and mother, and his four brothers and four sisters, on the said tower on the Battery Hill, Oban, the statues to be erected from time to time as funds should accumulate; and also for the purpose of erecting towers at places specially mentioned and on other prominent parts of Mr M'Caig's various estates. The Court of Session did not accept office, but the University of Glasgow consented to act as Mr M'Caig's trustees and took up the administration of his estate. Thereafter on 27th January 1905 the said Miss Catherine M'Caig instituted an action against the said University of Glasgow, as trustees foresaid, and others, concluding, *inter alia*, for declarator that the said settlement and codicil of the said John Stuart M'Caig were not valid and effectual to dispose of his estate after payment of his debts and deathbed expenses, except in so far as regarded the direction for payment to such of his brothers and sisters as should survive him of £300 per year during their lives, and that Miss M'Caig had succeeded to and was in right of the whole of said free estate and effects, and was entitled to have the same conveyed and made over to her. The said action was defended by the University of Glasgow. . . . The said action at Miss M'Caig's instance against the University of Glasgow is reported 1907, S.C. 231, 44 S.L.R. 198. 6. At the date of her death Miss M'Caig was possessed of heritable properties in and near Oban, yielding a gross rental of about £3799, in addition to moveable estate of the gross value of about £2000. The heritable properties were burdened with bonds to a total amount of £8350, and large sums are payable from the estate for Government duties on the death of the trustee, and also in respect of the deaths of each of her said brothers John Stuart M'Caig and Major Duncan M'Caig. The total nett value of the trust estate, after deducting debts, Government duties, and other burdens, is estimated at about £30,000. The free revenue of the estate, after deduction of interest on the bonds affecting the heritable properties, taxes, feu-duties, and other charges, is estimated to amount to about £2000. 7. The Battery Hill, Oban, is a rocky eminence close to the town of Oban, rising to a height of about 220 feet above sea level. In 1875 the said John Stuart M'Caig obtained from Mr George Grant Mackay of Strathkyle and Oban a feu consisting of (1) 2 acres of ground

on the top of the said Battery Hill, and (2) about 7½ acres of ground lying immediately to the east of said 2 acres, and separated therefrom by a road. The feu-duty for the said two pieces of ground was fixed at £22. Subsequently the said John Stuart M'Caig disposed by sale of the said 7½ acres, and took the disponee bound to relieve the said 2 acres of the whole feu-duty. On the said piece of ground, extending to about 2 acres, which he retained, the said John Stuart M'Caig in or about the year 1896 built the said erection known as the M'Caig Tower at a cost of £5000. The said tower is situated on the summit of the Battery Hill, and consists of a circular unroofed stone and lime wall of varying thickness, having a height varying according to the different levels of the ground in front from 30 to 47 feet, and a circumference of 210 yards. At heights varying from 6 feet to 20 feet from the ground the wall is pierced at intervals of 8 feet with two tiers, and in some parts with three tiers, of large arched window-shaped openings. The floor of the inside of the erection is in its natural unlevelled state."

The questions of law were—"1. Are the second parties bound to submit to the first parties postponing the term of commencing payment of the provisions made in the said trust-disposition and settlement in favour of the second parties, until the statutes and other works directed by said codicil have been erected and completed out of the free revenue of the trust estate, as well as until the payment provided for by the third purpose of the said trust-disposition and settlement have been made? Or 2. Are the second parties entitled to payment of the provisions in their favour contained in the said trust-disposition and settlement out of the free revenue of the trust estate, subject only to the implement of the first, second, and third purposes thereof?"

Argued for the first parties—The provisions of the codicil not being unlawful, nor void from uncertainty, nor contrary to public policy, should be sustained. Public policy should be determined by the Legislature rather than by the Court. *M'Caig v. University of Glasgow*, 1907 S.C. 231, 44 S.L.R. 198, was distinguishable. In that case it was held that the provisions there in question could not divest the heir-at-law of the testator, but in the present case there was no known heir, and the second parties were merely beneficiaries who objected to the postponement of the benefits conferred on them by the will. English law was not applicable to the case.

Argued for the second parties—The provisions of the codicil should be set aside in respect that (1) they did not constitute a valid bequest according to the law of Scotland, inasmuch as they were not conceived in favour of any beneficiary, for they did not benefit any person, nor any class of persons, nor the public—*M'Caig v. University of Glasgow*, *cit.*; *Morice v. Bishop of Durham*, 1804, 9 Ves. 399, *per* Grant, M.R., at 405; *In re Church Patronage Trust*, [1904] 2 Ch. 643, *per* Cozens-Hardy<sup>1</sup> L.J., at

654; *Murdoch v. Brass*, June 25, 1904, 6 F. 841, 41 S.L.R. 666; *Cowan v. Cowan*, March 19, 1887, 14 R. 670, *per* Lord President (Inglist), at 675, 24 S.L.R. 469, at 472; *Gardner v. Ogilvie*, November 25, 1857, 20 D. 105, *per* Lord Curriehill at 109; *Neilson v. Stewart*; February 3, 1860, 22 D. 646, *per* Lord Ordinary (Neaves) at 650 and 651; *M'Laren on Wills*, 3rd ed. vol. i, p. 350. *In re Dean*, 1889, 41 Ch. D. 552, was distinguishable, for in that case there were beneficiaries although they were incapable of suing, and in any event the decision in that case had been doubted—*Jarman on Wills*, 6th ed., vol i, p. 901. The same principles applied whether the person on whom the burden of the bequest fell was an heir-at-law or a testamentary heir—*M'Caig v. University of Glasgow*, *cit.*, *per* Lord Kyllachy at 1912 S.C. 242, 44 S.L.R. 205. (2) The provisions of the codicil were not a lawful exercise of the *testamenti factio*. The *testamenti factio* was not a right but the extension of a privilege, and it excluded provisions like those in question, which were contrary to public policy—*M'Caig v. University of Glasgow*, *cit.*, *per* Lord Kyllachy at 1912 S.C. 242 and 244, 44 S.L.R. 205 and 206; *Wilson v. Carnley*, [1908] 1 K.B. 729, *per* Vaughan Williams, L.J., at 737. According to English law bequests whose sole purpose was the gratification of the testator's vanity were invalid—*In re Rickard*, 1862, 31 Beav. 244; *In re Vaughan*, 1886, 33 Ch. D. 187; *Theobald on Wills*, 7th ed., p. 121.

At advising—

LORD SALVESEN—The late Miss Catherine M'Caig, who resided in Oban and was the last survivor of a family of nine, died on 1st July 1913 leaving a trust-disposition and settlement executed in 1908 and a relative codicil executed two years later. The parties to this Special Case are her trustees on the one hand and certain persons who are beneficiaries under the will on the other. No question is meantime raised as to the validity of the directions and bequests in the earlier of the two deeds, although one of them relates to the erection of a statue on a piece of ground in front of the property in Breadalbane Street, Oban, which belonged to the truster, which she directed to be laid out and kept as an open space.

By the first purpose of the same deed she directed that the trustees should provide for the cost of erection of a memorial stone or tablet to herself as the trustees might think proper. She further directed that the trustees should hold the capital and apply the income in the first place in payment of the cost of repairs of the whole of the heritable properties and in disencumbering them of any heritable bonds that might affect them at the date of her death, and likewise in keeping in proper order and maintaining the open space and statue above referred to, and the burying places of her father, mother, brothers, and sisters. The other purposes of the trust need not be referred to.

The matter on which the parties desire our opinion is the validity of the codicil which deals with a building known as the

“M'Caig Tower.” This structure, which was built by the truster's late brother John Stuart M'Caig about the year 1896 at a cost of £5000, is situated on two acres of ground belonging to the truster on the top of the Battery Hill, which is an elevation 230 feet above sea level close to the town of Oban. The building resembles somewhat the outer wall of a Spanish bull ring, consisting as it does of a circular stone and lime wall pierced with two and in some cases three tiers of large arched window-shaped openings. It has a circumference of 210 yards, and the height of the wall varies from 30 to 47 feet, according to the different levels of the ground, which, so far as enclosed within the wall, is in its natural unlevelled condition.

The directions to the trustees contained in the codicil are perfectly precise, and there is no doubt that if these are valid they can easily be given effect to by the trustees. Briefly their import is that the trustees shall convert the tower into a private enclosure by putting suitable railings across the openings on the ground level and erecting a suitable tower and gateway; “that they shall level all the ground within the tower and lay it out in such manner as may be found most protective and suitable;” and that they shall then erect statues made of bronze within the tower to her father and mother and the whole members of the family, including a brother (Peter) who died in infancy. Each of the statues is to cost not less than £1000, and the cost is to be made a charge on the free revenue only, and their upkeep a perpetual charge on the income of the trust estate, the trustees being taken bound not to sell or dispose of the M'Caig Tower and statues. It is estimated by the trustees that on the assumption that the minimum sum of £1000 is expended on each statue, of which there are to be eleven, the revenue will be absorbed for a period of about eight years. On the other hand, no limitation is imposed upon the trustees as to what they may expend, although it may be assumed that the professional gentlemen who were nominated by the truster would exercise a wise discretion in this matter if they are bound to carry out the truster's directions.

Not unnaturally the persons who but for the codicil would be entitled to immediate payment of certain annuities object to payment of these annuities being postponed for a minimum period of eight years, and for as much longer as the trustees may find it expedient to do so in order to give full effect to the truster's wishes; and the first question of law put to us is whether they are bound to submit to such postponement until the statues and the other works directed by the codicil have been erected and completed out of the free revenue of the trust estate. If the directions in the codicil are valid and must be carried into effect by the trustees the question falls to be answered in the affirmative, and accordingly the only question raised in the case is the validity of these directions.

It is noteworthy that no beneficial interests are created by this bequest in favour

of third parties. Even the public will have no right of access to the inside of the tower, for special provision is made for keeping them out by means of railings across the existing openings on the ground level, and the ground enclosed is expressly declared to be a private enclosure. The trustees alone would have the privilege of from time to time entering this museum of portrait statues of a relatively obscure family, and would no doubt require to do so from time to time to see that the enclosure was suitably maintained. There is, so far as I can see, no person who has a title to enforce the erection of the statues, and there are no descendants of any member of the family alive who might take pleasure in contemplating (if he were permitted to do so) the proposed representations of the forms and features of his relatives. The trustees indeed have been unable to trace the heir-at-law if any such person exists. These circumstances combined would apparently make the bequest void according to the law of England; but it is very unsafe to refer to the decisions of that country, where limitations of various kinds have been imposed on the power of testamentary disposal by statutes which have no application to Scotland. In England a bequest of a sum of money, the income of which is to be applied towards keeping a family tomb in repair, is bad, although a bequest for the purpose of maintaining the churchyard in which the tomb is situated will be supported. So also a bequest for the upkeep of a tablet or monument in a church is good, because it forms part of the church, although, if the monument were outside the church the bequest would be bad. These somewhat fine distinctions depend largely on English statutes, and would, I think, not be recognised in our law, which is not embarrassed by statutory limitations of this nature. For my own part I desire to say that I entirely concur in the view indicated by Lord Kyllachy in the previous case of *M'Caig*, 1907 S.C. 231, that there is nothing in our common law “against the validity of a testamentary disposition directed to the providing on a customary and rational scale of a burial place for a testator or a suitable monument to his memory,” and I should like to add of the provision of funds the income of which was to be applied by trustees in keeping them in proper order and repair. It cannot be said that any person has a beneficial interest in the erection or maintenance of a memorial stone to a testator, but public sentiment and custom alike favour the giving effect to such bequests, subject to the limitations expressed by Lord Kyllachy. Even the Crown, for the purpose of assessing inventory duty, allows a sum, suitable to the means or position of a deceased testator, to be deducted for the cost of a memorial stone as part of the reasonable funeral expenses. I desire also to express my entire concurrence with the same learned Judge when he says that there is not necessarily anything against the validity of a testamentary trust for the erection of statues or memorials to historical per-

sonages, provided that the public have access to them. I go further, and think that such memorials need not be limited to historical personages, but may include local celebrities who were unknown outside the district in which they lived. On this ground it is possible to support the provision in the will for the erection of a statue to Major M'Caig. This gentleman, we were informed, took a somewhat prominent part in connection with the volunteer movement, and as the site selected for the statue is in the neighbourhood of the Volunteer Drill Hall in Oban, and on ground which the trustor dedicates to the public, and directs to be laid out in an ornamental way, the citizens of Oban may derive some benefit from the bequest even although they might have preferred that the statue should have been one of a more distinguished or notable person.

The bequest, however, in this codicil cannot, in my opinion, be supported on any of these considerations. The expenditure of this large sum on statues, which was directed apparently from motives of personal and family vanity, will serve no purpose, all the less seeing that the family has virtually become extinct. It can be of no benefit to the public, because the enclosure in which the statues are to be erected is one to which they will have no right of access. But it is unnecessary to pursue the subject further, because the question appears to me to be decided by the unanimous decision of this Division in the previous case of *M'Caig*, 1907 S.C. 231. I am unable to find any substantial distinction between the bequests in the two cases. There are matters of detail with regard to which the testators differed, Mr M'Caig desiring the statues to be erected on the top of the M'Caig Tower, while Miss M'Caig preferred that they should be on the ground enclosed within its circular wall. There are no legal grounds of distinction, and accordingly our duty is to declare the bequest wholly void. With some of the reasons given by the learned Judges who decided the previous case I do not hold myself bound, but I entirely concur in the result at which they arrived. For myself I am prepared to hold that the bequest is contrary to public policy on more than one ground. In the first place, I think so because it involves a sheer waste of money, and not the less so that the expenditure would give employment to a number of sculptors and workmen, for it must be assumed that their labour could be usefully employed in other ways. I think, further, that it would be a dangerous thing to support a bequest of this kind which can only gratify the vanity of testators who have no claim to be immortalised, but who possess the means by which they can provide for more substantial monuments to themselves than many that are erected to famous persons by public subscription. A man may, of course, do with his money what he pleases while he is alive, but he is generally restrained from wasteful expenditure by a desire to enjoy his property or to accumulate it during his lifetime. The actings of the two M'Caigs form an excellent illustration

of this principle of human conduct. For many years they had apparently contemplated the erection of similar statues, but they could not bring themselves to part with the money during their own lifetime. Such considerations do not restrain extravagance or eccentricity in testamentary dispositions on which there is no check except by the courts of law. A testator may still leave his means to be expended in stone and lime which will form a monument to his memory, provided the bequest he makes serves some useful public purpose, and is not merely for his own glorification. The prospect of Scotland being dotted with monuments to obscure persons who happened to have amassed a sufficiency of means, and cumbered with trusts for the purpose of maintaining these monuments in all time coming appears to me to be little less than appalling. What a man does in his own lifetime with his own property may be removed by his successor, and no doubt will be so as soon as it has ceased to serve a useful purpose. But if a bequest such as that in Miss M'Caig's codicil were held good, money would require to be expended in perpetuity merely to gratify an absurd whim which has neither reason nor public sentiment in its favour. On these grounds I am for answering the first question in the negative.

**LORD GUTHRIE**—In this case no question arises about the settlement of the testatrix dated 18th April 1908. As to her codicil dated 20th June 1910, all its provisions are maintained by the second parties to be invalid except the nomination of an additional trustee and executor and the provision at the end of the codicil as to the disposal of the revenue available on the deaths of certain liferentices.

It was maintained by the second parties that this case was ruled by the case of *M'Caig v. University of Glasgow*, 1907 S.C. 231, an action in which the testatrix reduced the settlement of her brother Mr John M'Caig. The second parties said that the provisions of Mr M'Caig's will and those in the testatrix's codicil which are attacked were substantially identical, and that the principles on which the Court proceeded in reducing Mr M'Caig's will were equally applicable to the said provisions of the testatrix's codicil. I think these principles are applicable, but there were differences in the facts which prevent the application in terms to this case of some of the principles as they were there laid down.

In the first place, the contest there was between the heir, the testatrix in the present case, and the trustees, supporting the validity of certain bequests; in this case the contest is between certain beneficiaries, on the one hand, who complain of provisions in the codicil which would postpone the commencement of the benefits destined for them, and the trustees, on the other hand, maintaining the validity of these bequests. In the second place, the bequests under Mr John M'Caig's will were more contrary to good sense, more unnatural, more referable to a morbid desire

for self-glorification, and less referable to a natural and proper desire to perpetuate the memory of near relatives. In the third place, if Mr John M'Caig's bequests had been given effect to, they would by seriously injuring the appearance of the neighbourhood have been injurious to public amenity—an objection which cannot be urged against the statues ordered by the codicil in this case to be placed inside an existing building, invisible except to those who choose voluntarily to enter the building.

In considering the law applicable to this case I assume that the testatrix when she made the codicil in 1910 which is attacked, was as completely in the possession of a sound disposing mind as she was in 1908 when she made the will of 1908 which is not questioned. The suggestion that if the provisions in the codicil applicable directly and indirectly to the erection of statues can be successfully attacked, the provision in the will for the erection of a statue to the testator's brother Major Duncan M'Caig outside the Volunteer Hall, and the relative provision as to the acquisition and laying-out of certain ground, is open to the same objection, is unsound. The collocation of the words "Volunteer" and "Major" brings that bequest within Lord Kyllachy's definition in the previous case of bequests which are "customary and rational," or, as I should prefer to phrase it (in view of the *onus* on anyone benefiting by the act of a rational testator who questions the validity of other provisions of the same testamentary deed or deeds), which are not unnatural, not contrary to custom, nor unreasonable.

I also assume—if the contrary had been the fact it would have been the trustees' duty to state it—that, with the exception of John the banker and Major Duncan, none of the persons whose statues are proposed to be erected within the M'Caig Tower did anything in or for the town of Oban or county of Argyll to make it natural that their memory should be perpetuated for all time in a building which from its commanding situation and unusual design is the most conspicuous object in Oban. Indeed, it appears that some of these persons belonged to the island of Lismore and had no connection of any kind with Oban.

It is also necessary to have in view what had already been done, and what the testatrix by her antecedent settlement had already ordered to be done, to perpetuate the memory of the persons whose proposed statues are in question in this case. In the appropriate places for memorials to persons none of whom could be called public or historical, namely, the churchyards where they were buried, suitable monuments had been erected to them, which the testatrix in her settlement gave orders should be kept in proper order and maintenance. In the same document she ordered the erection of such a memorial stone or tablet to herself as her trustees might find suitable. Then (to take things outside the ordinary methods for commemorating respectable but undistinguished people) her brother John in 1898, at a cost of about £5000, had built what

is known as the "M'Caig Tower." As to her own settlement, she has two provisions in the same line which are not questioned—first, for the statue to her brother Major Duncan M'Caig, already referred to, and second, for the erection and equipment in Breadalbane Street, Oban, of the "M'Caig Memorial Institute," as well as the institution of permanent benefits for (1) a church in Lismore (from which the family came), (2) the deserving poor in Oban, (3) Gaelic-speaking male students, and (4) the encouragement of the knowledge of the Gaelic language, all of which would in one way or another be permanently associated with the M'Caig family name.

In these circumstances the testatrix ordered in the codicil the erection of eleven bronze statues, to cost not less than £1000 each, to her father and mother, herself and her five brothers and three sisters, to be placed on ledges or balustrades round the wall of the M'Caig Tower. If, as laid down in the case of *M'Caig*, the general principle in regard to testamentary bequests be against the validity of any bequest the performance of which there is no one to enforce, and if to that principle there be an exception in favour of memorials to the dead, whether the testator or testatrix, or as in this case near relatives, but so far only as these are customary or rational (or, as I have already put it, so far as these are not unnatural, not contrary to custom, and not unreasonable), then I am of opinion that the bequest in question is unnatural, contrary to custom, and unreasonable. I come to this conclusion because while the feeling of desire to record the virtues and perpetuate the memory of parents and brothers and sisters was in itself natural, customary, and reasonable, the proposed method of carrying out that desire was in this case unnatural, not customary, and unreasonable. The elements which influence me in thinking the provisions of the testatrix's codicil relative to statues in the M'Caig Tower unnatural, not customary, and unreasonable are—first, because so far as natural, customary, and reasonable the desire was or would be fully satisfied by the memorials already erected or which were to be erected under the provisions of the testatrix's settlement; second, because of the inappropriate place selected in relation to the people to be commemorated; third, because of the method of commemoration by bronze statues of people of whom it would be impossible to make non-ludicrous representations without abandoning likeness and without putting people into picturesque costumes which they never wore; fourth, because of the proposal to make statues of people in regard to two of whom—the testatrix's father and her infant brother Peter—there were no materials for making any individual representation; fifth, because of the proposal to make a statue (recumbent I presume) of Peter the infant to cost not less than £1000; sixth, because of the absence of limit of price, the trustees being entitled to spend thousands of pounds, say, by the employment of a leading London or Continental artist; and seventh, because the testament and codicil order the erection

within a short distance of each other of two statues to the same person, namely, Major Duncan M'Caig.

The question remains whether I am right in thinking sound the principle above stated which was applied in *M'Caig's* case, and in thinking the principle applicable to and decisive of the present case. As I have already said, the precise view which prevailed in *M'Caig's* case was dependent on the position of the "heir" claiming to be relieved of burdens on his estate, and is not in terms applicable to the case of beneficiaries claiming to be freed from conditions postponing the commencement of benefits accruing to them under a testament. It seems to me, however, that the reasoning applicable to both cases is the same. But in *M'Caig's* case it was conceded that an exception must be allowed in the case of customary and rational provisions by a testator or testatrix for the erection of a monument to himself or herself at the place where he or she is buried. I see no reason why the exception should not include the erection of a monument to an immediate relative—wife, children, brothers, or sisters—and I would not necessarily exclude the erection of a monument at an appropriate place, although not at the spot where the deceased was buried. There are cases, such as loss of life at sea, where this course would be unavoidable.

Each case must, it appears to me, be decided on its own circumstances, subject to the general rule and the exception stated in *M'Caig's* case. Clear cases may be suggested either way. Had Miss M'Caig ordered £1000 bronze statues of remote ancestors the case would have been clear in the one direction; on the other hand, had she ordered memorial tablets with bronze medallions of those among her father and mother and brothers and sisters, of whom materials remained for executing medallions, I should have hesitated to hold that persons who had accepted the trust were entitled to disregard such an order. I do not even decide that her bequest for the erection of statues within the M'Caig Tower would have been invalid had the statues been limited to those of her father and mother, with the price restricted to a certain reasonable amount. The question is one of degree, and it seems to me that the testatrix in this case has gone over the line. I do not found on the English cases quoted to us, because the Scots law does not recognise the rule against perpetuities, which is the foundation of these cases. Nor are some of the analogies used in argument helpful. Accumulation beyond twenty-one years is unlawful, but that is brought about by statute. The illustration of a testator ordering his trustees to throw his money into the sea involves destruction, not abnormal and unreasonable appropriation. It is no doubt the case that the function of the courts, civil and criminal, is to prevent illegal rather than unreasonable actings; but there is all the difference between what a man, uncognosed, may do at his own hand, and what the law will support under

the provisions of his will. If the law of mortmain is to be allowed at all it is not unreasonable to say that it must not result in a large measure of useless waste. Therefore, without being illegal in the sense of being contrary to any express rule of the common law or contrary to any statute, the principle of public policy will prevent such post-mortem expenditure. Whether the act is sufficiently contrary to public policy to warrant the Court's interference must depend on the degree to which it is against public policy. In this case it seems to me that to give effect to Miss M'Caig's codicil concerned with the erection of eleven statues, would be of no benefit to anyone except those connected with the carrying out of the work, for whose interest she expresses no concern. If anybody went to see the statues, supposing they represented fully the persons to be commemorated, it would not be to admire them but to laugh at them, and perhaps to philosophise on the length to which morbid family pride may drive an otherwise sensible person. These statues would not, in fact, achieve Miss M'Caig's object of perpetuating an honourable memory. They would turn a respectable and creditable family into a laughing stock to succeeding generations. On the other hand, the benefactions in Miss M'Caig's settlement which are not questioned will associate the family and their name in the future with useful objects.

I cannot distinguish the bequest in the codicil relative to the erection of statues from clauses one and two of the codicil. If there are to be no statues, the enclosure on Battery Hill may just as well remain freely accessible to the public without gates. In providing that the space should be made into a "private enclosure," and for the erection of a tower and gate, and for the laying out of the ground so as to be "protective," the testatrix clearly had the statues in view.

I would therefore propose to answer the first question in the negative and the second question in the affirmative.

LORD JUSTICE-CLERK—I am the only Judge of the present Bench who joined in the decision in the former case relating to the will of the brother of the testatrix in this case. It seems to me that while the objections to his will were stronger than those relating to the present will, the present will falls within the grounds stated in that case for setting the deed aside. The character of the directions given in the codicil which we are considering are so similar to those given by the late Mr M'Caig that the views expressed in the former case apply. Seeing no reason to modify the views which were there expressed, I feel that, applying that decision, the result must be that which your Lordships propose.

LORD DUNDAS was absent, being engaged in the Extra Division.

The Court answered the first question of law in the negative and the second question in the affirmative.

Counsel for the First Parties—Chree, K.C.  
—A. R. Brown. Agents—Alex. Morison &  
Co., W.S.

Counsel for the Second Parties—Dean of  
Faculty (Scott Dickson, K.C.)—Aitchison.  
Agents—Macpherson & Mackay, S.S.C.

Friday, February 5.

### FIRST DIVISION.

[Sheriff Court at Linlithgow.

#### NICOL v. YOUNG'S PARAFFIN LIGHT AND MINERAL OIL COMPANY, LIMITED.

*Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1)—“Arising out of and in the Course of the Employment”—Beginning of Employment.*

A workman who was employed as a fanman in the spirit recovery department of certain oilworks, and whose duties were exclusively confined to that department, was proceeding to his work by a path alongside a switchback lye belonging to the oilworks when he strayed on to the lye and was run over by a waggon and killed. On both sides of the path at the point where his body was found were refuse bings and sidings belonging to the works, but the nearest of the buildings belonging to the works was 80 yards further along the path, and the deceased's working-place was 330 yards away.

*Held (rev. decision of arbitrator) that the accident arose out of and in the course of the employment within the meaning of the Workmen's Compensation Act 1906.*

Margaret Harrison or Nicol, residing at Kirkhill Park, Broxburn, widow of David Nicol, fanman, (1) as an individual and (2) as tutrix for Agnes Nicol, a pupil child of her marriage with the said David Nicol (hereinafter called the deceased), and John Nicol and Margaret Nicol, minor children of the said marriage, *appellants*, claimed in the Sheriff Court at Linlithgow compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from Young's Paraffin Light and Mineral Oil Company, Limited, 7 West George Street, Glasgow, *respondents*, and being dissatisfied with the determination of the Sheriff-Substitute (MACLEOD) appealed by Stated Case.

The Case stated:—“The appellants and the respondents were agreed that if the appellants were entitled to an award the amount thereof should be £295, 7s. . . .

“IV. The following *facts* were admitted or proved:—1. The appellants are respectively the widow and children of the deceased, and at the time of his death they were all wholly dependent on the earnings of the deceased, with the exception of John Nicol, who was only partly so dependent.

“2. The deceased was a fanman for the spirit recovery department of the respon-

dents' oil works (hereinafter called 'the works'). In the works the respondents carry on the business of manufacturing oil and other products from shale. The works consist of a shale breaker (which is situated at the west end of the works), retorts, condensers, naphtha treating houses, fan engine house, and various erections for the spirit recovery department (which last-named department is situated at the east end of the works). Between the shale breaker at the west end of the works and the spirit recovery department at the east end of the works there is a distance of 250 yards.

“3. The duties of the deceased in the employment of the respondents were entirely limited to the spirit recovery department at the east end of the works, and his employment on any particular shift did not begin until he had reported himself to and taken over charge from the fellow-workman whom he was to relieve. It was the deceased's duty to report himself to his fellow-workman for this purpose at the hour when his shift began in the bothy within the said spirit recovery department.

“4. The works are bounded on the north by a very extensive spent shale bing, on the east by the fields of Loaninghill Farm, and on the south by the North British Railway (Bathgate section). The boundary of the works on the north-west (which is the part under special consideration) is not capable of such exact definition, but the environment of the works on their north-west side will be described in later paragraphs.

“5. From their respective homes the men employed by the respondents in the works journey thereto by various routes. Only three of these routes need be mentioned, viz.—(1) A route from Broxburn across the fields of Loaninghill Farm, which gives access to the works on their east side. This was the shortest route for the deceased (being about  $1\frac{1}{2}$  miles) from his house in Kirkhill to his working-place in the works, and he generally adopted it, using a hand-lamp to light him across the fields, but as the night libelled was wet and stormy he did not proceed to the works by this route, though he took his hand-lamp with him, unlighted, in case he might desire it for use across the fields on his way home in the darkness of the following morning. This route was quite free from any danger connected with the operations of the respondents till a workman had actually entered the works; (2) the public road from Uphall Village to Uphall Station. This is a very convenient route for the workmen who live at the west end of Uphall, but was somewhat circuitous for the deceased, who would have had to travel the whole length of the public road from Broxburn to Uphall, making his journey from his home to his working-place  $2\frac{1}{2}$  miles; whereas (3) a private road (herein called the 'Access Road') enabled the deceased, travelling along the public road from Broxburn towards Uphall, to leave the said public road at a point considerably short of Uphall Village and reach his working-place in the works by a journey which was somewhat less than 2 miles from his house (1 mile 58 chains to be exact), and