

"heirs and assignees whomsoever," which was the only destination which the father by himself could have written, a destination to Mrs Wightman and her children as the son's assignees. But this in a *mortis causa* provision by a young man then unmarried was plainly just a mode of making the son's testament. It was a testamentary provision by the son, and like all such testamentary provisions it must be ambulatory during the son's life. When the son came to be married three years afterwards—in January 1874—could he not have revoked this testamentary provision in favour of Mrs Wightman either in his own marriage contract or in any other deed? I think he could. Mrs Wightman had no *jus quæsitum* in the succession; she had no onerous right to the reversion of the money; she was nothing but a gratuitous legatee whose interest was dependent, and dependent solely, on the *ultima voluntas* of the true testator.

It was strongly urged that although Mrs Wightman was no party to any of the deeds—and for aught that appears was not cognisant of their terms in any way—yet a *jus quæsitum tertio* emerged in her favour the moment the declaration of trust was executed, or at least the moment it was delivered to the trustees. I think this is a mistake. *Jus quæsitum tertio* only arises to a stranger or third party when one of the contracting parties or parties to the deed stipulates or contracts on behalf of the stranger. Now, it cannot be said that there was any contract between the father and son relative to Mrs Wightman or for her behoof. The declaration of trust is not a contract at all, but a mere carrying out the reserved power contained in the deed of agreement. There is no place for *jus quæsitum tertio*, for no person whatever was making any contract or stipulation on Mrs Wightman's behalf, and the insertion of her name was merely the gratuitous and, as I think, the testamentary act of her nephew, the said John Costine junior, who at that time was unmarried, and apparently had then no nearer relative.

Nor can I ascribe any finality in Mrs Wightman's favour to the circumstance that the declaration of trust was delivered to the trustees. This was necessary to give effect to the restriction of John Costine junior's right to a life interest, but the mere delivery of such a deed or of a marriage contract or of any similar deed for interim purposes does not alter the testamentary nature and character of any testamentary provisions which it may contain. The declaration of trust was not recorded till after the death of John Costine junior. But this would have made no difference either.

On the whole, then, and while not disguising that the case is attended with nicety, I am of opinion that the interlocutor of the Lord Ordinary should be recalled, that the claimant Mrs Catherine Hay Crichton or Costine, the widow of the late John Costine junior, as assignee of her late husband, should be preferred to the whole fund *in medio*—that is, to the said sum of £3000, and that the claims of the other claimants should be repelled.

Interlocutor reversed, and second party held entitled to fund *in medio*.

Counsel for Trustees—J. G. Maitland; and

for Second Party (Reclaimer)—Balfour—J. P. B. Robertson. Agent—James Somerville, S.S.C.

Counsel for Third Parties (Respondents)—Scott—Strachan. Agent—John Walls, S.S.C.

Tuesday, March 19.

FIRST DIVISION.

[Lord Adam, Ordinary.

BEATTIE (INSPECTOR OF BARONY PARISH, GLASGOW) *v.* NISH (INSPECTOR OF PARISH OF OLD LUCE).

Pauper—Birth Settlement—Register of Baptisms.

In a question as to the birth parish of a foundling, evidence held (after an interval of forty-seven years) insufficient to establish that it was born in a particular parish, in spite of an entry to that effect in the register of baptisms of a neighbouring parish, where it was found and baptised—*dis.* Lord Shand, who was of opinion with the Lord Ordinary (Adam) that the evidence was sufficient for the purpose of the case, although not such as would be necessary in a question of succession.

This was an action brought by the Inspector of the Barony parish, Glasgow, against the Inspector of the parish of Old Luce, in Wigtonshire, claiming to be reimbursed for certain payments made in relief of Mrs Mackenzie and her three pupil children. The inspector of the Barony parish claimed that he should be repaid these sums, because the settlement of the paupers, in respect of the birth of their husband and father John Mackenzie in the parish of Old Luce, was in that parish.

The question that arose was this—Was John Mackenzie born in that parish? It appeared from a proof led before the Lord Ordinary that John Mackenzie was found in 1831 in a wood in the parish of Portpatrick by the daughters of the Rev. Dr Mackenzie, minister of that parish, was taken home by them, brought up in the manse, and maintained and educated as one of the minister's family. His mother was a woman named Margaret Hamilton, who was tried at Wigton on 19th October 1831 for the exposure and desertion of this child, and received sentence of a month's imprisonment. The evidence as to the residence of this woman at the time of the birth of the child was not very distinct. It will be found recapitulated in the opinion of the Lord President. She seems to have been wandering from place to place, and from parish to parish, at the time of the birth, both immediately before it and immediately after it. She was apprehended in Glenluce, which was in the parish of Old Luce.

There was an entry in the register of baptisms of the parish of Portpatrick, where the child was found, of its baptism, which bore that it had been born at Glenluce; there was also an entry in Dr Mackenzie's family Bible of its baptism on that day, but no mention of the place of birth. Upon this it was contended by the pursuer, the entry in the register must have been made with Dr Mackenzie's knowledge,

although he was at this time a very old man and incapacitated for parish work, for an incident like this must have excited great interest in his family. If not made with his knowledge, it must be presumed that it was made after full inquiry, and with such means of knowledge as we have not now at command, and must, on the authority of the cases of *Hay v. Murdoch*, 16 D. 364, and *Inspector of Lady v. Inspector of St Cuthbert's*, November 20, 1873, 11 Scot. Law Rep. 78, be taken, after this lapse of time, as very nearly conclusive evidence. The entry in the Bible shows that the date of this entry in the register is correct. The defender answered—There is no likelihood that the registrar had any better reason for assigning Glenluce as the child's birthplace than that the mother was arrested there. If Dr Mackenzie had known it, it would have found a place in the Bible also. Besides, an entry in a parish register may be binding on that parish in whose register it is found, but cannot bind another. And this entry was, be it observed, an entry of baptism, not of birth.

From the evidence it appeared that there had been rumours (which had been communicated to John Mackenzie during his life), that his mother was Miss Helen Mackenzie, one of Dr Mackenzie's daughters.

The pursuer also founded upon one of two pieces of evidence taken from the matriculation book and the library book of the University of Glasgow. They are quoted by the Lord President in his opinion. The defender used one of these entries, which was manifestly false, to overthrow any credit that the other might have been entitled to, and maintained besides that any statements by Mackenzie were worthless.

At advising—

LORD PRESIDENT—The pauper in this case became an object of parochial relief in the Barony parish of Glasgow, and was relieved by that parish, and that parish now seeks to have recourse against the parish of Old Luoc, in Wigtonshire, on the ground that that was the birth parish of the deceased husband of this pauper. The question now to be determined is—Whether it is proved as a matter of fact that her husband was born there? Now, one might say it is pretty clear that this man was born in the county of Wigton, and therefore he was a Scotchman, and therefore he must have a birth parish if it can be found. But it is too hastily assumed that the parish which finally becomes liable is entitled to be relieved by the parish most likely to have been the birth parish of the pauper. That is a mistake. It must be proved as a matter of fact that the parish against which the claim is preferred is the parish where the pauper—or as in this case the pauper's husband—was born. We can have little direct evidence in this case. Our decision must depend upon a balance of probabilities; but that is often very good evidence, and often results in a very convincing proof.

There are a good many items of evidence here, and they are all deserving of consideration. John Mackenzie was a foundling. He was found in the parish of Portpatrick, in a wood called Dinvin Wood. It was subsequently established that his mother was a woman called Margaret Hamilton, who was tried and convicted of deserting her child before the Sheriff on 19th October

1831. These are the ascertained facts in the case. Where she was delivered of this child is not conclusively proved. There is no direct evidence on that point, but I find in the evidence various statements as to the whereabouts of this woman about this time. Her own parish appears to have been the parish of Lesswalt, which is immediately to the north of the parish of Portpatrick. Her brother lived there, and she appears to have been in service there. A witness named Margaret M'Dowall says—"I knew Margaret Hamilton. I remember hearing of her having a child and exposing it in a wood. She had a sister who was married to a man of the name of Middleton. I did not know him till he lived at Lesswalt. I knew Margaret Hamilton before she had the child. I understood that she had been in service at Fintloch, near New Galloway. I knew that by being acquainted with the people at New Galloway. There was a family named M'Dowall, at Highlands, in the parish of Lesswalt. One of them took the farm of Pentlach, and the family went there. Margaret Hamilton went to service with them. I cannot say how long that was before the child was born. I do not know when she left Pentlach." It was apparently some time before the time we are dealing with that she was in service in Lesswalt. There are other witnesses who say that it was the parish of her birth, and that her brother lived there. Then there is another parish—the parish of Kirkcolm, which is immediately to the north again—and we hear something about it from another witness also called M'Dowall. She was a niece of Margaret Hamilton, and the evidence she gives is, I think, important. She says—"I am the wife of James M'Dowall, carter, Stranraer. Margaret Hamilton was my aunt. My father was her brother. My father lived at Cairnbrock, in the parish of Kirkcolm, quite close to Lesswalt. He had some land there when I was a little girl. I remember seeing Margaret Hamilton at our house. That was before she was taken up for exposing her child. I cannot say how long before. I cannot say where she had been last in service before I saw here. I remember my mother giving her meat and some clothes for the baby when it was born. She was hurrying away before my father came in. (Q) Did you hear your mother say that Margaret Hamilton was about to have a child?—(A) I heard my mother scolding her. I do not know where she had come from that day; my mother did not tell me, so far as I remember." And in cross-examination she says—"She would not be more than half-an-hour in my mother's house on the occasion of which I have spoken. She appeared as if she had been wandering about and was ill off." This is an appearance of Margaret Hamilton very soon before the birth of her child, and this place, be it observed, is to the north of Portpatrick and to the north of Lesswalt, on the borders of Kirkcolm and Lesswalt, and certainly at no great distance from the parish of Portpatrick, where the child was found. The next stage in her proceedings of which we have any evidence I take to be her appearance at Port-o'-Spittal. John M'Cracken says—"I am a fisherman at Morroch, in the parish of Stoneykirk. I have been there nearly fifty years. I was at one time working for Mr M'Rae at Port-o'-Spittal. John M'Lellan was oversman. There was a

farm-servant there of the name of Middleton, who was the odd man." That is the same Middleton that was married to Margaret Hamilton's sister. "His house was 40 or 50 yards from M'Lellan's, and was in the parish of Stoneykirk." Stoneykirk is the parish immediately to the south of Portpatrick. "Isabella Hamilton was the name of Robert Middleton's wife. Her brother Thomas lived at Lesswalt. I remember on one occasion when I was threshing ryegrass seed in the barn in the beginning of August, or latter end of July 1831, I saw the woman Margaret Hamilton at the end of Middleton's house." It may be kept in view that the child is supposed to have been born on the 4th of August. "I asked M'Lellan's wife what she was doing there. She said Margaret Hamilton had had a wean. Next day M'Lellan returned after having been away with the ryegrass seed, and said to his wife that he had met Margaret Hamilton that morning at Murdoch's Bridge. Mrs M'Lellan said, 'She surely never was there, and the wean only two or three days old.' M'Lellan said that when he met Margaret Hamilton that morning he never had a greater mind to horsewhip anybody, and send her home. Mrs M'Lellan said she had been told that the Miss Mackenzies had found the child and taken it to the manse." Then she says—"When I heard Mrs M'Lellan speaking about the wean I did not ask what wean it was. She did not tell me where Margaret Hamilton had given birth to the wean; but it was the whole talk of the place that she had it in Middleton's house." That is in her brother-in-law's house, and that being in the parish of Stoneykirk, the parish immediately to the south of Portpatrick, it cannot be at any great distance from Portpatrick. The inference upon the evidence so far is, that Margaret Hamilton was wandering about these three parishes of Lesswalt, Portpatrick, and Stoneykirk, and had gone from that house of her sister-in-law in Kirkcolm to Stoneykirk, and either there or at some place between the two given birth to her child. The parish where the child was exposed—viz., Portpatrick—was at no great distance. She was seen going to it, not by the direct road, to be sure, but by a road over the hills; but that is not very remarkable conduct for a woman who was going to commit this criminal act, and then flee from justice. The next thing is her apprehension. She was apprehended in the parish of Old Luce, and it seems to have been inferred from that that she belonged to that parish. The inference I make is directly the opposite. A woman who has committed a crime will not fly to her home, but away from it, and the place she is found will not probably be the place of her home. Well, then, she is served with a criminal libel, and it is said that one of the witnesses who is brought to give evidence against her on her trial is Dr M'Clymont from Glenluce, and I suppose the inference we are intended to draw is, that Dr M'Clymont superintended the birth of John M'Kenzie, and at all events, that he knew something of her residence in Old Luce. But could he not have been brought to depone to some other matter of fact than that he had been present at the delivery of this woman? It is highly probable that she would be subjected to a medical examination the moment she was apprehended, and it may be it was with reference to that that

he was to be examined. Like anybody else, Dr M'Clymont may be brought to speak to things that did not occur in his own parish. He is not tied to Glenluce, and the inferences as to what he was intended to prove are all conjectural.

Now, in this criminal libel she is charged with having brought the child from the village of Lochans. Now, where is Lochans? It is partly in the parish of Inch, and partly in the parish of Portpatrick. I find that from the *Gazeteer of the World*, and *Fullarton's Gazeteer of Scotland*, they both say it is a village of about 200 inhabitants. That is no great distance from Portpatrick. In short, all these parishes—Lesswalt, Kirkcolm, Stoneykirk, and Inch—surround Portpatrick in a kind of semicircle. Glenluce, which is the part of the parish of Old Luce selected as the birth-place of this child, is 18 miles by one road and 14 by another from Portpatrick. Now, that is the evidence in this case so far, and upon that I do not think you could have fixed upon any parish in the county of Wigton that has less claim to have been the birth-parish of this foundling than the parish of Old Luce. But we have what is called written evidence. It is said there is an entry in the register of baptisms in the parish of Portpatrick which proves that John Mackenzie was born in the parish of Old Luce. The entry is in these terms:—"John Mackenzie was born the fourth August 1800 and thirty-one years in Glenluce, and baptised the thirty-first day of January one thousand eight hundred and thirty-two years in Portpatrick." Now, be it observed, that is an extract from the register of baptisms, and therefore it is very good evidence of the fact that John Mackenzie was baptised, and baptised in Portpatrick, and baptised on 31st January 1832; but I am not aware that the register of baptisms is good evidence of anything else. It might no doubt, as a general rule, be presumed from the terms of an entry in such a register that the child baptised was born in the parish, because it is usual to enter children as born of such and such parents, who are designed as resident in the parish, and thus it may fairly be presumed that the child was born in that parish. But in this case the child was baptised in the parish in which it was found, and the question is—Whether we are to presume that the keeper of the register had any knowledge as to the parish in which that child was born? It is worth while to consider what is said by the present keeper of the register. He says—"In the case of registering an illegitimate child, it is usual to state the mother's name. That is not done in this case." There was a very good reason for that, for the child's mother was not forthcoming. Then he goes on—"Sometimes the place of birth is stated. (Q) Is it not very unusual?—(A) I have found them stated. (Q) The residence of the parents is often stated, but do you often find the place of birth stated in the register of baptism?—(A) Yes; in the parish of Lesswalt, if the child was baptised in the parish, the place of birth was stated. (Q) Is it the place of birth or the place of residence?—(A) The place of birth generally. (Q) How do you think that the place of birth of this foundling could be stated if they did not know the mother's name; how could they know where the child was born if they did not know who the mother was?—(A) I cannot say; but perhaps they had in-

formation at the time. (Q) According to the usage of registration, if the mother had been giving information, would not her name have been entered in the case of an illegitimate birth?—(A) I think so. (Q) Is it the fair inference from the mother's name being absent in this case that it was not known?—(A) I cannot say; the registers were kept differently then from now. (Q) And so you don't know upon what system they were kept in 1831, or upon what information such entries were made?—(A) No, except that they were made by the session-clerk. Under the Act the mother's name must be stated in the case of an illegitimate child. I believe it was also the general practice prior to the Act." There is nothing then to support the notion that when a child is born out of the parish in which it is baptised it is usual or necessary to state the parish of birth in the register of baptisms. If this child had been baptised in the parish where it was supposed to have been born, and entered on the register as born there, and the Barony parish had gone against that parish and had said—"There is evidence of your liability from your own register that the child was born in your parish"—then it would have been quite fair to presume that the keeper of the register had made the entry with some cognisance of the matter, or had access to good information on the subject. But there is no reason here to suppose that the keeper of the register had access to any means of knowledge. He took the place where the mother was apprehended. It is not surprising that he should have done so, seeing learned counsel have taken the same impression. I think there is no probability that that was the place of birth, but the registers of Portpatrick may have been misled, as learned counsel have been.

But it is said that Dr Mackenzie must have given the information—that he must have superintended this entry, or at least have been aware of it. But the entry in Dr Mackenzie's Bible says nothing as to the birth-place of the child, and for this very good reason, that it was not known. The fact that he made that entry in his Bible leads to the inference that he knew nothing of the entry in the parish register at all. Besides, he was by this time a very old man, and did no parish work at all except baptising children, which his assistant was not entitled to do, not being ordained. These considerations, in my opinion, deprive this entry of all weight.

Then there is one more item of evidence, viz., the entry in the Matriculation Book of Glasgow College. John Mackenzie entered himself there as a native of Glenluce; but that is no more than a repetition of the entry in the register of baptisms. And then it is said, and fairly said, that any entry made on the authority of John Mackenzie is liable to suspicion, when you consider the entry in the library book of the University, also made on his authority. That entry is—"Joannes Mackenzie fil. nat. quint. Joannis Verbi Dei Ministri in paroch. de Port-Patrick." Now, Dr Mackenzie had only two other sons, and if you read the entry, as you may, as meaning "fifth child," you are met by this difficulty, that Dr Mackenzie had ten children. Either way you look at it, this entry is false. Now, as it is false, that detracts from the authority of any other entry made by John Mackenzie's authority.

There is no evidence, then, that this child was

born in the parish of Old Luce. I might go further, and say that there is a strong probability that he was born in one or other of two other parishes in the county, but that is not necessary. I am therefore for assolzierung the parish of Old Luce.

LORD DEAS concurred.

LORD MURE—I am of the same opinion. The only difficulty I have is, that the Lord Ordinary, for whose opinion I have the greatest respect, has come to the conclusion that the evidence is sufficient to make the parish of Old Luce liable. He has proceeded on the authority of *Hay v. Murdoch*.

In that case the parish was found liable to support the pauper in respect of an entry in its own register. But I do not understand that that entry was held to be sufficient of itself to fix it with liability. From the Judges' opinions I find that they rather go on the other evidence in the case, viz., the deliberate and consistent statements made by a deceased person that the parish of Huntly, the parish sought to be made liable, was the parish of his birth. Then there was, besides that, the evidence of parties who spoke to certain persons coming from that neighbourhood—i.e., Huntly to Fochabers—where they remained. Even with these additional items of evidence, the Court had difficulty in coming to the conclusion that the parish of Huntly was liable. Lord Cockburn says—"The only repugnance I have to doing so"—i.e., to holding Huntly to be liable—"is fear of the misuse which might be made of the idea that such evidence would be received in other cases; but I maintain no such thing. The entry is to be given effect to only for this particular case." They accordingly gave effect to the entry in the parish register against the parish in whose register it was. Now, we have no entry in the register of Old Luce at all. The entry is in the parish register of Portpatrick, and we are asked to hold that that is evidence against another parish whose register is silent on the subject. That, it seems to me, is the very misuse of precedent against which Lord Cockburn guards. Now, that would be so even if this entry had been made in the most regular manner. But there is no evidence that this entry was made with any authority from any person having knowledge. The entry in Dr M'Kenzie's Bible, which was made, as his daughter tells us, with his knowledge, says nothing of the place of birth of this child. We have really no evidence that tends to support the notion that Old Luce was his birth parish.

M'Kenzie's own statements are not consistent, like those of Thomson in that case of *Hay v. Murdoch*. He seems to have been groping about all his life to find out who his parents were. I set one statement of his against the other, and, on the whole, I think there is no evidence against Old Luce save that his mother was found there.

LORD SHAND—I do not suppose that any of your Lordships differ from me in thinking that the Court should discourage prolonged litigation in questions as to the settlement of paupers, especially where the question raised is a mere question of facts, as it is here.

I regret the decision your Lordships propose, for I agree with the Lord Ordinary, and all the more because I feel assured that the reversal of this judgment may lead in other cases to protracted litigations, and the funds of the poor may be spent in that way, while, besides that, the time of four Judges of the Supreme Court may be taken up in finding their way through evidence of this kind, which might be better bestowed on something else.

Before going into the evidence I shall refer to two cases reported in the books, which had, as I thought, settled two points which are now, I fear, to be disturbed by your Lordships' decision. These points are—(1) You cannot expect that complete and full proof in cases of this kind that is to be expected in cases of succession or the like; (2) in cases of this kind, where there has been a considerable lapse of time, the Court will give very full weight to any entries in registers that may be laid before them, and also to the deliberate statements made by the parties whose settlement is in question. The cases I refer to are, first, that of *Hay v. Murdoch*. The rubric there very fairly states the nature of the case that was established—"Held, in a question as to the birth settlement of a pauper, that an entry in a parochial register, made in the handwriting of a session-clerk not appointed till twenty-one years after the date the entry bore, was sufficient evidence in the special circumstances of the case to establish the parish of his birth." And the special circumstances really come to this, that in addition to that entry, which in itself was not without objection—for part of it was deleted—there were certain statements made by the deceased pauper as to the place of his birth. In the other case—that of the *Inspector of Lady v. The Inspector of St Cuthbert's*—the evidence was even less satisfactory, and yet the Second Division again sustained the birth settlement, as it was made out by certain statements of the pauper himself. From these cases then I deduce this rule, that you are to take such evidence as these statements and the records of the parish, and allow these to settle such questions.

I have considered the evidence in this case, and that is the conclusion I have come to. If I were to allow myself to analyse the evidence of witness after witness, I do not say that I could satisfy myself that the evidence establishes that the child was born in Old Luce. But that is not the method I should ever adopt. By travelling through all this evidence you could not expect ever to come to a satisfactory conclusion on the matter. You find the minister of the parish and his daughters taking such an interest in this child that they adopted it as one of the family. Then in the parish register of baptisms you find this entry—"John Mackenzie was born the fourth August 1800 and thirty-one years in Glencuce, and baptized the thirty-first day of January one thousand eight hundred and thirty-two years in Portpatrick." Now, when you are diving into a matter forty-seven years old, I think that an entry made by the session-clerk of the day of the baptism of the adopted son of the minister must be presumed to have been made with the full knowledge of the minister. I find that there is an entry in the minister's Bible made the same day by his daughter. It is true that I find nothing there as to the birthplace, but I do not suppose

that it would have made any difference in your Lordships' views if I had. Then, when the young man goes to Glasgow College, you have these records written by himself, the second element in the cases I have referred to. I do not dwell on the entries in the Procurator-Fiscal's books; it certainly appears from them that the mother had some close connection with Glencuce. They are not of any importance in themselves, but if any corroboration were needed they supply it. Accordingly, I am of opinion that this case is ruled by authority, and that the evidence here is sufficient. I cannot take the view that if the entry here in the parish register had been found in the register of that parish against which the claim was made the case would have been different. I do not think that session-clerks in making up their registers can be said to be making their entries with a view to ultimate liability for the persons entered there as paupers. These registers are not to be treated like business books, where if I find an entry admitting liability, the party cannot afterwards be heard to dispute it.

On the whole matter, I think that the Lord Ordinary has given due weight to the decided cases, and has come to a sound conclusion, and his judgment should be sustained.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming note for the Inspector of Old Luce against Lord Adam's interlocutor of 12th July 1877, Recall the interlocutor: Sustain the defences. Assolzie the defender, and decern: Find the defender entitled to expenses, and remit to the Auditor to tax the account thereof, and report."

Counsel for Pursuer—Burnet—Low. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Defender—Balfour—J. P. B. Robertson. Agents—Mason & Smith, S.S.C.

Wednesday, March 20.

FIRST DIVISION

[Sheriff of Dumfries.

HISLOP v. THOMSON.

Process—Expenses—Stamp.

Where one party to an action produces an unstamped document and founds on it, paying the stamp duty and the penalty, he is not entitled to recover half of that expense from the opposite party, although the document be a mutual contract, the Court having held it to be of no effect, and the opposite party not having founded on it.

This was an action raised for payment of a sum of £127, 6s. 8d. by Hislop, a draper in Thornhill, against Thomson, who had formerly been a draper there. Hislop had been for some time a tenant of Thomson, and had while tenant made certain additions to the premises, the cost of which, by an agreement of parties drawn up and signed at the beginning of the lease, Thomson was to re-