M'Leod v. *Heritors of Morvern*, November 22, 1865, 38 Jur. 39; *Buchanan* v. *Gilmour*, October 29, 1883, 11 R. 59.

Counsel for the common agent maintained that he having all along contended that the real question at issue was one solely between the minister of Inverkeillor and the reclaimers, the common agent was not liable in the expenses of determining that question.

Counsel for the reclaimers maintained that they had been brought into the process by the interlocutor of the Lord Ordinary (June 21, 1901), and the minutel odged by them was a necessary act in defence of their benefices.

LORD PRESIDENT—This is a somewhat peculiar question. Apart from the Lord Ordinary's judgment I should have thought that the successful minister would have had a strong claim to at least a part of the expenses in the Outer House. But the Lord Ordinary, who has dealt with all the questions between the parties, and is fully conversant with all the facts, has found no expenses due to or by either party up to 16th July 1901. I should be slow to interfere with the decision of the Judge before whom the case in all its details has been examined upon a question of expenses. I therefore propose that we should not interfere with his Lordship's interlocutor in so far as it finds neither party entitled to expenses up to 16th July 1901; but I think we should give expenses to the successful minister since that date. Undoubtedly there has been a strong conflict between the parties since then, and I see no reason why the expenses of that conflict should not follow the result.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—I agree. I see no sufficient reason for interfering with the Lord Ordinary's decision as to expenses up to 16th July 1901. As to the expenses in this Court, the only possible question is that raised by Mr Clyde. The ministers were not only entitled but perhaps even bound to appear before the Lord Ordinary to defend their benefices, and so far their resistance may have been justified. But they were not bound to persist after the Lord Ordinary's judgment. Accordingly, though they may have been well advised to reclaim, they must do so upon the ordinary condition that they must pay expenses if they are unsuccessful.

The Court refused the reclaiming-note and found the reclaimers liable in expenses to the objector since the date of the Lord Ordinary's interlocutor,

Counsel for the Reclaimers—Clyde, K.C.—C. N. Johnston. Agents—Menzies, Black, & Menzies, W.S.

Counsel for the Respondent, the Minister of Inverkeillor—Crabb Watt—P. Balfour. Agent—William Porteous, Solicitor.

Counsel for the Respondent, the Common Agent—Cooper. Agent—John C. Couper, W.S.

COURT OF SESSION.

Friday, January 31.

OUTER HOUSE.

[Lord Kyllachy.

SIMPSON'S TRUSTEES *v.* MACHARG & SON.

Writ—Testamentary Disposition—Typewriting—Title to Heritage—Typewritten Instrument Forming Part of Title—Sale—Sale of Heritage—Objections to Title—Expenses—Act 1593, *c.* 179—*Act* 1681, *c.* 5—*Titles to Land Consolidation* (*Scotland*) *Act* 1868 (32 *and* 33 *Vict. c.* 116), *sec.* 149—*Conveyancing* (*Scotland*) *Act* 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 38—*Interpretation Act* 1889 (52 *and* 53 *Vict. c.* 63), *sec.* 20.

A truster left a trust-disposition and settlement duly subscribed by him and by the instrumentary witnesses, but wholly typewritten, and two codicils relative thereto, the earlier in date being typewritten and the later in date being written by hand, both referring *in gremio* to the settlement. The trustees acting thereunder having sold certain house property which formed part of the trust estate, the purchaser refused to accept the title to the property tendered by the trustees, on the ground that the trust-disposition and settlement forming part of the title was typewritten.

In an action by the trustees for implement of the sale, *held* (1) that, assuming the validity of the title depended upon sec. 149 of the Titles to Land Consolidation (Scotland) Act 1868, as modified by section 38 of the Conveyancing (Scotland) Act 1874, the trust settlement as a whole, including the two codicils —one of the codicils being written by hand—was a deed partly written and partly printed within the meaning of sec. 149; (2) that, irrespective of sec. 149 of the Act of 1868, the provisions of sec. 38 of the Conveyancing (Scotland) Act 1874 and of sec. 20 of the Interpretation Act 1889 had so modified the old Scots Acts 1593, c. 179, and 1681, c. 5, that all possible objections to deeds wholly or partially not written by hand, including typewritten deeds, had ceased to be of any force; and therefore (3) that the title tendered was valid, and decree *granted*, with expenses.

The Titles to Land Consolidation (Scotland) Act 1868 (32 and 33 Vict. cap. 116), sec. 149, enacts as follows—"All deeds and conveyances, and all documents whatever mentioned or not mentioned in this Act, and whether relating to land or not, having a testing clause, may be partly written and partly printed or engraved or lithographed: Provided always that in the testing clause . . . the name and designation of the writer of the written portions of the body of the deed or conveyance or document shall be expressed at length, and all such deeds, conveyances,

and documents shall be as valid and effectual as if they had been wholly in writing."

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. c. 94), sec. 38, enacts—"It shall be no objection to the probative character of a deed, instrument, or writing, whether relating to land or not, that the writer or printer is not named or designed . . . in the body of such deed, instrument, or writing, or in the testing clause thereof."

The Interpretation Act 1889 (52 and 53 Vict. c. 63), sec. 20, enacts as follows—"In this Act, and in every other Act, whether passed before or after the commencement of this Act, expressions referring to writing shall, unless the contrary intention appears, be construed as including references to printing, lithography, photography, and other modes of representing or reproducing words in a visible form."

John Percy Simpson, solicitor, London, and others, trustees acting under the trust-disposition and settlement dated 4th March 1899, and relative codicils dated the said 4th March 1899 and 17th February 1900, all registered in the Books of Council and Session 17th August 1900, executed by the late Pierce Adolphus Simpson, doctor of medicine and Emeritus Professor of Forensic Medicine in the University of Glasgow, brought an action against Macharg & Son, chartered accountants, 69 Buchanan Street, Glasgow, and the individual partners of said firm, concluding that the defenders should be decerned and ordained to implement their part of a minute of agreement and sale entered into between the pursuers and the defenders, dated 28th, 29th, and 31st August 1901, by accepting a valid disposition executed by the pursuers in their favour of certain subjects in West George Street, Glasgow, and by making payment to the pursuers of the sum of £5000, the agreed-on price of the said subjects.

By the said minute of agreement and sale of said subjects the defenders offered and the pursuers accepted the sum of £5000 as the price of the said subjects in West George Street, Glasgow, and the pursuers undertook, on payment of the said sum of £5000, to grant and deliver a valid disposition of the said subjects, and a valid title to the said subjects. The pursuers averred that they were and always had been prepared to implement their part of the said minute of agreement and sale, and to deliver a valid disposition of the said subjects, but that the defenders refused to implement their part of the agreement and to pay the stipulated price.

The defenders admitted that the pursuers had tendered a disposition of the property to the defenders and that the defenders declined, as matters stood, to make payment of the purchase price. They averred that their agents, having received from the pursuers' agents the titles of the property for examination and for preparation of the disposition of the titles, wrote to the pursuers' agents pointing out that the trust-disposition and settlement of the deceased Pierce Adolphus Simpson, in favour of the pursuers, which constituted the pursuers' title to the property, appeared from the extract exhibited to be entirely written with a typewriting machine, and that, if this was so, they did not see their way to accept it as a link in the title without either (1) the consent to the disposition of the heir at law of the testator, or (2) the authority of the Court.

The defenders further averred as follows:—"(Stat. 3) The defenders are willing and anxious to complete the purchase of the property in question upon getting a valid title thereto, but they feel they are not in safety to accept the title which has been tendered to them. The defenders believe and aver that the said title is invalid, or otherwise and at all events, that it is not a title *omni exceptione major* such as they are bound to accept without judicial sanction and approval. A deed forming a conveyance to land which is entirely written with a typewriting machine is an innovation in practice, and is, the defenders aver, not a valid probative deed. In any event, a deed in this form has never heretofore been decided by the Court to be a valid probative deed. . . . Moreover, typewriting by hand typewriting machines was not in vogue until long after said Act (1868) was passed. And it differs from ordinary printing in material respects. For example, any portion of a typewritten document may, with ease, be erased with indiarubber or otherwise effaced or removed, and the blank thus created may be filled in without leaving any trace of the erasure or alteration. There is a special kind of indiarubber for erasing typewritten matter. A typewritten deed is thus not protected against tampering with its contents in the same way as a deed which is either written or printed in the ordinary sense, or lithographed or engraved."

The averments made by the defenders in Stat. 3 were denied by the pursuers.

The trust-disposition and settlement of the deceased Pierce Adolphus Simpson, of date 4th March 1899, including the testing clause, and the codicil dated said 4th March 1899, were wholly typewritten. The codicil dated 17th February 1900 was written by hand.

The pursuers pleaded, *inter alia*—"(1) In respect of said minute of agreement and sale, the pursuers are entitled to decree. (3) No relevant defence."

The defenders pleaded, *inter alia*—"(2) The title tendered by the pursuers not being a valid and unexceptionable title such as the defenders are bound to accept under the minute of agreement between the parties, the defenders should be assoilzied. (3) The title tendered by the pursuers not being such as the defenders are bound to accept without a judicial affirmance of its validity, the defenders are, in any event, entitled to expenses."

The following authorities were cited at the debate, in addition to those referred to by the Lord Ordinary:—Act 1593, cap. 179, Act 1681, cap. 5; *Thomson* v. *M'Crummen's Trustees*, February 1, 1856, 18 D. 470; *aff.* March 24, 1859, 31 Jurist 425; *Simsons* v. *Simsons*, July 19, 1883, 10 R. 1247, 20 S.L.R. 831; *Whyte* v. *Watt*, November 27, 1893, 21 R. 165, 31 S.L.R. 127.

LORD KYLLACHY—This case arises upon an objection taken by the defenders, as the purchasers of a certain house property in Glasgow, which forms part of the trust estate of the late Dr P. A. Simpson, to the title offered by Dr Simpson's trustees. The objection is that the trust-disposition and settlement of Dr Simpson, which forms of course part of the title, is, although duly subscribed by the truster and by the instrumentary witnesses, yet, including the testing clause, wholly typewritten. The defenders contend that while a deed partly written and partly printed or typewritten may under the 149th section of the Conveyancing Act of 1868 be valid and probative, that section does not by itself, or in conjunction with the later Conveyancing Statutes validate deeds which, although otherwise probative, are wholly printed or wholly typewritten.

I have given full consideration to the argument by which this construction has been supported, and have done so having fully in view that the matter is one purely statutory, and that if the defenders' objection is well founded on the terms of the statutes, it is of no consequence that the result is unfortunate or even irrational. I quite acknowledge that if that should be so it is a matter for the Legislature and not for the Court.

I am glad, however, to say that I have come to the conclusion, and in the end without difficulty, that Dr Simpson's settlement is a valid and probative deed.

The question may perhaps first be considered on the assumption that the pursuers are in the position of requiring to appeal to the Act of 1868. That is, as I shall point out presently, an assumption which I do not myself accept. But as both parties appeared to accept it, I shall first take the case upon that footing.

The 149th section of the Act of 1868, striking out what relates to the then existing statutory solemnities which were subsequently abolished by the Act of 1874, and retaining only what still remains operative, reads thus—'All deeds may be partly written and partly printed, engraved, or lithographed, and all such deeds shall be valid and effectual in the same manner as if they had been wholly in writing.'

That is what remains operative of the section in question.

Now, upon these words the pursuers' first point was I think this. They said that a deed is partly written when the signatures of the granter and witnesses are written. I must say I cannot assent to that argument. It could not have been maintained on the section as it stood in 1868, for if so the condition expressed as to the insertion of the writer's name would have been plainly nugatory; and for purposes of construction the whole section, as it stands to the statute, has still to be considered. In any view, it is, I think, a rather extreme proposition that the requirement of some writing is satisfied by the mere existence of signatures, which must, of course, always be present and always be written.

Nor does it seem to me that the pursuers' second point is much better. It turns on the Interpretation Act of 1889, which provides as follows:—'In this Act and in every other Act, whether passed before or after the commencement of this Act, expressions referring to writing shall, unless the contrary intention appears, be construed as including references to printing, lithography, photography, and other modes of representing or reproducing words in a visible form." I am far from saying that this enactment may not have an important bearing on other parts of the argument. But I am afraid that if it is sought to be applied to the 149th section of the Act of 1868 it is not possible to say that an entire assimilation of printing and writing is otherwise than 'contrary to the intention' of an enactment like that of 1868, which expressly distinguishes between the two things.

The pursuers, however, have a third point, which is, I think, in a different position. They say that the assumed requirement of some writing, if not satisfied by the signatures, is yet in this case fully satisfied by the existence of the last codicil attached to the settlement — a codicil which is undoubtedly written, and which refers to the settlement, and which is in all respects an authentic writ. I did not hear, as I thought, any good answer to this argument, and it affords, as it seems to me, a quite good and sufficient ground of decision—that is to say, even assuming that the validity of the deed depends upon the applicability of the 149th section of the Act of 1868, I am of opinion that Dr Simpson's trust-settlement as a whole is a deed partly written and partly printed within the meaning of that enactment.

The question, however, of the validity of deeds wholly typewritten having been argued as one of general interest, it may perhaps be proper that I should state my view upon that question. And I may state in the first place what I consider to have been the effect and object of the enactment of 1868. As I understand, and have always understood, that enactment was an enabling and not a restrictive enactment. It was, moreover, an enactment which enacted nothing, but merely removed certain supposed doubts with respect to the law settled by certain early decisions—decisions relative to a particular class of deeds, viz., deeds partly printed and partly written, which had long been in extensive use, and were the only deeds known in practice in which printing was introduced. See on this point Menzies' Lectures (2nd ed.), p. 84; Bell's Lectures (2nd ed.), p. 62; *Stirling* v. *Earl of Glasgow*, 1711, 4 Brown's Suppl. 856, and Morison, 16,868, also *Allardyce*, Morison, 16,862.

Now, that being the case, it does not at all follow that because it may not be possible to bring a deed wholly typewritten within the terms of the 149th section of the Act of 1868, it is therefore impossible to support otherwise the validity of such deeds. It may be found on examination

that so soon as the old Scotch Statutes were, with respect particularly to the insertion in deeds of the writer's name, modified by the Conveyancing Act of 1874, all objections to deeds wholly or partially printed, or wholly or partially typewritten, ceased to have any force, and did so altogether irrespective of the Act of 1868.

The old Scotch Statutes, it must be observed, made no distinction been printing and writing. Mr Ross, no doubt (vol. i. 38) objects to the admission of deeds not entirely in writing. But Lord Stair states expressly (iv. 42, 3) that 'writ comprehends both *chirographum* and *typographum*,' and if any doubt as to this existed it was removed by the Interpretation Act of 1889, to which I have already referred. The difficulties, so far as there formerly were difficulties, in the way of printed deeds were of a practical character, and arose mainly in connection with the necessity of inserting in all deeds the writer's name as required by the Statute of 1593, c. 179. The word 'writer' might perhaps include 'printer,' and more easily 'typewriter.' But printed matter is not generally the production of one person, and although that might not apply to typewriting, yet while the writer required to be named and identified, it was perhaps open to doubt whether it was not also necessary that what he wrote should be of a distinctive character. All this, however, is now altered by the Act of 1874. The writer having no longer to be identified, there is no longer, as it seems to me, any difficulty in giving the same effect to print or typewriting as to ordinary handwriting. Nor is there any room for distinguishing between deeds wholly printed or wholly typewritten and deeds partially printed or typewritten. It appears to me that when the matter is examined and understood it does not admit of serious doubt, and therefore I repel the defences and grant decree, and having considered the question of expenses I think in this case expenses must follow the result.

His Lordship granted decree with expenses.

Counsel for the Pursuers—Salvesen, K.C. — Craigie. Agent — J. Gordon Mason, S.S.C.

Counsel for the Defenders — Cullen. Agents—Macandrew, Wright, & Murray, W.S.

Tuesday, March 18.

FIRST DIVISION.

[Lord Low, Ordinary.

GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY *v.* CALEDONIAN RAILWAY COMPANY.

Railway — Joint-Line — Statutory Regulation of Use—Accident Claims—Accident Due to Fault of Signalman — Claims Made against One Joint-Owner — Liability of Other Joint-Owner in Relief—Caledonian and Glasgow and South-Western Railways (Kilmarnock Joint-Line) Act 1869 (32 *and* 33 *Vict. c. xcvii.*), *sec.* 54 (20) *and* (22).

The Special Act regulating the use and management of a joint-line owned by two railway companies, who both used the line, enacted that if an action was brought against either of the two companies separately "for any act or default in relation to the joint-line committed or incurred wholly or in part by the two companies, . . . the company against which such action has been brought . . . shall be entitled to sue the other company for recovery of . . . a fair proportion of any damages . . . to which the company so sued shall have become liable by reason of any such action." . . .

Held that under this provision where one of the companies had paid compensation (which it was agreed should be treated as if paid upon decree) for injuries caused by an accident on the joint-line, due to the fault of a signalman in the employment of the joint-committee, which under the Act managed the joint-line, committed in the course of working the signals thereon, the other company was bound to contribute one-half of the amount paid as compensation, the fault of the signalman being an act or default in relation to the joint-line committed by the two companies jointly.

The Glasgow, Barrhead, and Kilmarnock Joint-Line is the joint property of the Caledonian and Glasgow and South-Western Railway Companies. It is owned and worked under the provisions of the Caledonian and Glasgow and South-Western Railways (Kilmarnock Joint-Line) Act 1869, and its affairs are managed by a Joint-Committee appointed equally by the directors of the two companies. The joint-committee maintain and work the joint-line, including the permanent way, signals, and all works connected therewith. Certain tolls fixed by the Act are payable by the companies for using the joint-line, and they participate equally through the joint-committee in the profits arising from their traffic both local and through.

The Caledonian and Glasgow and South-Western Railways (Kilmarnock Joint-Line) Act 1869 (32 and 33 Vict. c. xcvii.) enacts as follows:— Sec. 54, sub-sec. (20)—"All actions, suits, indictments, and other pro-