1858.
April 13th, 16th.

ANDERSON, ... APPELLANT.
GILL ET AL., ... RESPONDENTS.

Onus probandi.—The genuineness and authenticity of a document tendered for confirmation as the last will of a deceased person lies on the party who propounds it. As it purports to deprive the next of kin of a right which would otherwise belong to them, the tenderer or propounder of the document must show, not only that it is genuine and authentic, but that it constitutes the last will of a free and capable testator; p. 196.

To shift the *onus probandi*, and cast it on those who dispute the genuineness and authenticity of the document, it is not enough simply to show that it is a holograph instrument, meaning thereby an instrument all in one hand; p. 186.

It must be proved that the document is holograph of the deceased; p. 186.

Turnbull v. *Doods* explained; p. 186.

Judicature Act.—Under the Judicature Act, 1 Geo. 4. c. 120. s. 40., the Judges of the Court of Session, in reviewing the decisions of inferior Courts upon proofs, are not required to do more than to specify the facts which they find to be established, and to express how far their judgment goes on those facts, or on matter of law; p. 185.

Document kept back.—Where a document is, during the entire course of the proceedings, in the possession of a party or of his agent, he must found upon it before the proof has been completed; otherwise he cannot afterwards make use of it, except on special leave obtained from the Court; p. 189.

Res noviter veniens ad notitiam.—Where *res noviter veniens ad notitiam* arises after the proof has been completed, the Court should be applied to for leave to establish the new matter by proof. If such leave is not applied for and obtained, the *res noviter veniens* will be excluded; p. 191.

ON the death of Alexander Anderson the following document, in the Appellant's pleadings termed a "testamentary letter," was found in his repositories :—

Mr. Peter Anderson, residing with me at Auchmill.

Auchmill, 13th Nov. 1845.

Dear Cousin,—I am at present in a weak state of health, but of so[u]nd mind. You have been kind and attentive to me during my illness; and, in the event of my death, I do hereby appoint you my sole executor and universal legatory, leaving and bequeathing to you my whole moveable means and estate of every kind; farm stocking, and lease of my farm; but under the burden of paying all my just and lawful debts, with the whole powers competent in law to an executor nominate and universal legatory.

I am, dear Cousin, yours affectionately,

ALEX. ANDERSON.

The "Mr. Peter Anderson" to whom this document was addressed tendered it for confirmation or probate to the Commissary of Aberdeen.

The Respondents resisted the grant of confirmation, alleging that the document was a forgery.

Upon considering the evidence, the *Commissary* found it "not proved that the document was holograph of the deceased, and therefore sustained the objection to the confirmation, and decerned the office of executors to the Respondents as next of kin, and found the Appellant liable in expenses."

Upon advocation to the Court of Session, the Appellant put in the following pleas in law :—

1. The advocator having sufficiently established that the will founded on by him is holograph, the *onus* lay upon the objectors of proving that the same is a forgery.

2. The evidence adduced on the part of the objectors is quite insufficient to set aside the will as forged.

3. On a fair and just view of the whole evidence *in causa*, the will must be held as the genuine holograph writing of the deceased.

The Respondents, in like manner, put in the following plea in law :—

The document founded on not having been executed by the deceased Alexander Anderson, the judgment of the Commissary in the Court below should be adhered to with expenses.

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The *Lord Ordinary* (Lord Cuninghame), on the 16th January 1849, pronounced the following interlocutor:—

The Lord Ordinary having heard counsel in this advocation, and thereafter considered the record, proof adduced in the inferior Court, writs produced, and whole process, with regard to the preliminary pleas insisted on by the Advocator, Finds (1.) That the production offered by the Claimant and Advocator, Peter Anderson, in the course of proof (being the alleged draft from which the testamentary letter objected to is said to have been copied), cannot now be received, in respect that it was a document in *possession of the Claimant*, and not offered to be produced either before the record was first closed in the inferior Court, or afterwards in the stage of this advocation, pointed out by the Act of Sederunt for amending records in advocations, and thus having omitted productions admitted; and therefore approves of the interlocutor of the Sheriff Commissaries on that point. (2.) Adheres to the Interlocutor of the Sheriff Commissaries rejecting the proof offered in reprobation of Barbara Sims' evidence; and on the merits of the case, Finds, that the testamentary letter founded on by the Claimant, Peter Anderson, is not the genuine writ of the deceased, Alexander Anderson; and, therefore, on the whole cause, adheres to the Interlocutors of the inferior Court complained of, repels the reasons of Advocation, and remits the cause to the Sheriff Commissary *simpliciter*: Finds the Advocator liable in expenses as the same shall be taxed by the auditor, and decerns.

To this judgment his Lordship appended a note, to the effect that upon contrasting the document in question "and its subscription with the sheet of "acknowledged subscriptions and scraps of writing by "the deceased, admitted to be authentic, it is not "believed that any judge or jury could hesitate one "moment in declaring that the individual who con-"fessedly wrote the latter subscriptions and writings "connected with them neither *did* nor *could write* and "*subscribe* the letter produced as the will of Alexander "Anderson."

On a reclaiming note to the First Division of the Court of Session, their Lordships pronounced the following decision:—

25th June 1850.

The Lords having considered the Reclaiming Note, and having heard the Counsel for the parties; Find it proved, in point of fact,

that the testamentary letter founded on by the Claimant, Peter Anderson, is not the genuine writing of the deceased Alexander Anderson; and find, in point of law, that the said Peter Anderson is not entitled to be decerned or confirmed as executor of the said deceased, Alexander Anderson: Therefore refuse the prayer of the said Reclaiming Note, and adhere to the interlocutor of the Lord Ordinary reclaimed against. Find the said Peter Anderson, Reclaimer, liable in additional expenses.

In support of the Appeal to the House, Mr. *Andrew Muir* (*a*) contended that a document, if wholly in the handwriting of *any one individual*, was *primâ facie* a probative instrument, and on being propounded for confirmation had the effect of changing the *onus probandi* so as to compel those who challenged the authenticity of the document to disprove it by evidence. It was not necessary, according to the authorities of Scotch law, that the Appellant should establish this to be a document holograph *of the deceased.* The fact that it was holograph of some one, was enough to drive the other side to a reduction. The object of a *comparatio literarum* was not to ascertain whether the document was or was not holograph of the deceased, but whether it was all in one hand. In support of these positions, which Mr. *Muir* represented as familiar in Scotch law, he cited Bell's Commentaries, 6th edition, vol. i., p. 52, and the 5th edition of the same treatise, vol. i., p. 374; Stair, book iv. title 42. section 6; Erskine's Institutes, book iii. title 2. section 22. The onus therefore, Mr. *Muir* contended, lay on those who impugned this instrument, *Turnbull* v. *Doods*, 29th Feb. 1844 (*b*).

The other points urged by Mr. *Muir* were of a less startling character, and are fully gone into by the Lords in the opinions delivered.

(*a*) It was stated that the Lord Advocate (Mr. Inglis) was with Mr. Muir, but his Lordship did not appear. He signed the Appellant's case.

(*b*) 6 Second Ser. 896.

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At the close of Mr. *Muir's* address, the *Lord Chancellor* (*a*), without hearing the Respondents' Counsel (*b*), pronounced the following opinion :—

Lord Chancellor's opinion.

The LORD CHANCELLOR :

My Lords, the Appellant's Counsel admits that in appealing against these interlocutors he is precluded from questioning them so far as relates to the facts, by the 40th section of the 6th of George 4th, chapter 120. That section enacts, "that when in causes commenced in any of the Courts of the Sheriffs or of the Magistrates of Burghs, or other inferior Courts, matter of fact shall be disputed, and a proof shall be allowed and taken according to the present practice, the Court of Session shall, in reviewing the judgment proceeding on such proof, distinctly specify in their interlocutor the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found, or on matter of law, and the several points of law which they mean to decide ; and the judgment on the cause thus pronounced shall be subject to appeal to the House of Lords in so far only as the same depends on or is affected by matter of law, but shall in so far as relates to the facts, be held to have the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor."

Now it is contended on the part of the Appellant, that the interlocutor is defective, because, in the first place, it differs from the interlocutor of the Commissary in finding that the testamentary letter is not the genuine writing of the deceased, instead of

(*a*) Lord Chelmsford.

(*b*) The Respondents' Counsel were Mr. Anderson and Mr. Mundell.

finding merely that it was not proved that it was so; secondly, because it does not sufficiently state the facts found; and thirdly, because it does not distinctly state the several points of law, which they meant to decide.

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With respect to the first objection, it appears to me to be a great deal too critical. If the Court of Session has found that the letter is not the genuine writing of Alexander Anderson, they have inclusively found that it was not proved to be his.

With respect to the second objection, as to the supposed insufficiency of the finding of the facts, I am unable to understand the objection, as the interlocutor expressly finds it proved, in point of fact, that the testamentary letter founded on by the Claimant is not the genuine writing of the deceased Alexander Anderson.

And as to the objection founded on, the omission to state the points of law which they meant to decide, I need only observe that the Judges of the Court of Session are not required by the Act to do more, in reviewing the judgment of an inferior Court proceeding upon proof, than to specify the facts which they find to be established by the proof, and to "express how far their judgment proceeds on the matter of fact so found, or on matter of law," which I understand to mean matter of law arising upon the fact so found; and this would render it unnecessary to specify in the judgment any point arising with respect to the burden of proof, or the rejection of evidence.

Under the Judicature Act the Court of Session, when reviewing the decisions of inferior Courts upon proofs, are not required to do more than to specify the facts which they find to be established, and to express how far their judgment goes on those facts, or on matter of law.

The questions, then, before your Lordships are confined to the objections raised by the Appellant in point of law; and those are three. The first is in consequence of the Courts having shifted the *onus probandi* from the Respondents to the Appellant;

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the second is founded upon the rejection of written evidence; and the third, upon the rejection of parol evidence, which, it is contended, ought to have been admitted.

Now, upon the first objection, the Appellant contends that, having proved that the writing founded on was a holograph writing, he has done enough, and he has thereby thrown upon the Respondents the burthen of showing that it was not a genuine document, but a forgery; and it was insisted that this was not only established by authority, but that it was amongst the simplest elements of Scotch law. I could not help expressing my surprise that if this were so, not only the Commissaries, but the learned Judges of the First Division, appeared to be entirely unaware of this first principle of law, and to have decided in direct contravention of it. And on examining the passage of the institutional writers and authorities that were referred to in the argument, I see no ground for the conclusion that the burthen of proof was improperly thrown by the Judges upon the Appellant in this case.

To shift the onus probandi and cast it on those who dispute the genuineness and authenticity of the document, it is not enough to show that it is a holograph instrument, meaning thereby an instrument all in one hand.

It must be proved that the document is holograph of the deceased.

Turnbull *v.* Doods explained.

He came before the *Commissary* claiming to be confirmed executor upon an alleged testamentary letter of the deceased, upon which his title entirely depended. In order to establish his right to be the executor of Alexander Anderson, it was necessary for him to show that he had been so appointed by some testamentary writing of the deceased. This could not be done by merely producing a document all in one handwriting, and bearing the signature of Alexander Anderson; this is scarcely half of the requisite proof. The essential part, that without which all the rest is irrelevant, is to show that it is the handwriting of the deceased, whose name it bears, or in the words of the Appellant's own plea that it is "holograph of the testator." That was the unanimous opinion of the

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Judges of the First Division, as well as of the Judges of the inferior Court.

But it is supposed by the Appellant, that Lord *Jeffrey* in the case of *Turnbull* v. *Doods* laid down the doctrine, that all that was necessary to shift the onus of proof from the party propounding a testamentary writing, was for him to prove that it was holograph. Now, although the judgment of that very able and learned Judge is not expressed so guardedly as to prevent mistake, yet I think his meaning may be sufficiently collected to show that it is not in opposition to the opinion expressed by the Judges in this case. What he says must be taken with reference to the facts of the case. It was an alleged holograph will which was brought forward in answer to a claim to be appointed and confirmed executor *qua* nearest of kin. Notwithstanding that the writing was alleged to be holograph, the person propounding gave a large amount of evidence to show that it was genuine; the onus either having been thrown upon him, or having been assumed by him. I certainly collect from the report of that case, that the real dispute was as to the signature, which, if the body of the document were proved to be in the handwriting of the deceased, the whole document being proved to be in the same handwriting, necessarily made the document holograph of the alleged testator; and this I understand to be Lord *Jeffrey's* meaning in the words he uses, "If, therefore, the user of the writ once by *primâ facie* proof make out that the body of the writing is the same with the signature, he has done enough to prove that it is holograph." That gives an explanation to the judgment of Lord *Jeffrey*, which is perfectly consistent with the judgment in the case now before your Lordships.

The case of *Turnbull* v. *Doods*, therefore, is, in my mind, no authority for the position that the party propounding a testamentary instrument has done enough,

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by showing it to be all in one handwriting, to throw upon the party opposing it the onus of proving negatively that it is not the handwriting of the testator. This proposition appears to be so contrary to reason, that it would require a much clearer case to support such a proposition than that of *Turnbull* v. *Doods*, in order to convince me that the Judges of the First Division of the Court of Session were in error in forming an opposite opinion.

Now, with regard to the second question, that arises upon the rejection in evidence of a document which was proposed to be produced on the part of the Appellant. The document appears to have been the draft of a will prepared by a solicitor in Banff, on the suggestion of a friend of the deceased, and which there was evidence to show had been used as a model by the deceased in writing out this alleged testamentary letter. The ground of rejection of that document was that it had all along been in the possession of the Appellant himself, or of his agent in Banff, and that it ought to have been produced before the record was closed; and it was contended that the Act of Sederunt upon which this judgment was supposed to have been based merely applied to writings which were founded upon, and that this document was not a writing which had been founded upon, but it was only proposed to be produced for a particular purpose in the course of the inquiry, viz., in order to institute a comparison between that document and the document in question, and to explain the reason of the discrepancy in the writing.

Now, it is extremely probable that the Act of Sederunt does apply in the way that is contended for by the Appellant's Counsel, that it only applies to writings which are founded upon. There appears to be an exception in favour of evidence being admitted of writings which had not been originally produced,

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where evidence in the course of the cause arises for the first time, and which renders it necessary that an answer should be given to it, and that appears to me to have been the ground acted upon in the case which was cited of *Irving* v. *Davidson*. So again it appears that if the Judges themselves consider it necessary for the purposes of justice, although the party himself is precluded after the record is closed from bringing forward a writing which he has had in his possession, they may, for the sake of a full inquiry into the case, order such document to be produced. And that was the principle acted upon in the authorities which were cited on the part of the Appellant's Counsel.

But then the question arises here, whether the Appellant, who proposed to produce this writing in the course of the examination, should not have founded upon it, and whether, not having founded upon it, he is at liberty under the Act of Sederunt to give it in evidence at all. Now there is no doubt that this document was in the possession of the Claimant or the Claimant's agent, which is the same thing, from the earliest period; and there is no doubt also that the Claimant must have been aware that it was a document which might become of very great importance in consequence of the nature of the evidence which was likely to be produced, because at the earliest period he had notice from the objections which were put in on the part of the Respondents, that they proposed amongst other things to produce per inventory several documents, some of which are probative in their form, all bearing the genuine signature of the deceased, that comparison might be instituted with the pretended signature adhibited to the paper founded on by the said Peter Anderson and with the body of that paper. And, therefore, the Claimant perfectly well knew that the question of comparison of handwriting was one

Where a document is, during the entire course of the proceedings, in the possession of a party or his agent, he must found upon it before the proof has been completed: otherwise he cannot afterwards make use of it, except on special leave obtained from the Court.

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which was not only likely to arise in the course of the cause, but was likely to be the question upon which the cause might eventually turn, and having this document in his possession, and seeing, as he ought to have done, the importance of producing it as part of his case, it appears to me that he ought to have founded upon it, and having failed to do so, that it was inadmissible as evidence when produced subsequently, and therefore the interlocutor rejecting it is perfectly correct.

There only remains, then, the consideration of the rejection of the evidence, in reprobation of the testimony which was given in by Barbara Sim. Now, as I understand the case, the Appellant was permitted to give in reprobatory proof; that reprobatory proof was originally confined to the evidence which had been given by Barbara Sim, but afterwards a replication was admitted, and upon that replication, also in reprobatory proof, evidence was taken on the part of the Appellant,and an attempt was made to destroy the testimony of Barbara Sim, by showing that she was partial to the side of the Objectors, the Respondents in the case, which attempt I at the same time may say entirely failed. What the Appellant proposed to do was to show that after her examination she had made some declaration to four witnesses who were called on the part of the Appellant. What it was supposed she said does not appear anywhere, but that is perfectly immaterial, because the question is whether or not the Appellant was precluded by the judgment of the inferior Court, and afterwards by the Court of Session, from giving any evidence at all for the purpose of showing that the testimony of Barbara Sim was inadmissible upon the ground of her partiality.

Now, your Lordships can have no doubt at all that evidence of that kind, coming to the knowledge of a

party after the examination had been gone into, ought in some way or other, before the cause is concluded, to be produced to the Judges who are to decide it; but the question is,—how ought it to be brought forward? It appears to me that it being matter *noviter veniens ad notitiam*, there should have been an application for an interlocutor to allow that evidence to be produced, and there being no such interlocutor to found evidence of that kind, I think there is no authority whatever to show that that evidence was admissible under the circumstances of the case, and therefore upon that ground also I am clearly of opinion that the Judges came to a right conclusion in excluding the evidence.

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Where *res noviter veniens ad notitiam* arises after the proof has been completed, the Court should be applied to for leave to establish the new matter by proof. If such leave is not applied for and obtained, the *res noviter veniens* will be excluded.

On the whole, it appears to me that, upon the only three points of law which can be raised here on the part of the Appellant, there is no reason for being dissatisfied with the judgment which has been pronounced, and therefore I should recommend your Lordships that that judgment should be affirmed.

Lord CRANWORTH:

Lord Cranworth's opinion.

This is one of those unfortunate cases of which we have unhappily too many coming from the north of the Tweed, in which enormous expense is incurred for a very inadequate object; and I regret to say that the burden imposed is thrown upon innocent parties, because the Appellant sues as a pauper. It is matter of regret that by fruitless litigation, the parties who are resisting it are put to enormous expense, which I am afraid they have no means whatever of recovering.

The nature of the suit has been fully explained by my noble and learned friend. In truth there are but three points which have been made, the first is,—that

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the burden of proof was improperly thrown upon the person who produced this testamentary letter. Now, my Lords, the proposition is very startling, that if any person produces a paper as a testament, and if it is resisted by those who are interested in resisting it, and who say that it is not the writing of the testator, the burden of the proof is to be transferred from those who are propounding the document to those who dispute it. I can find nothing in any of the authorities that have been referred to, to warrant such a proposition, though undoubtedly there are some expressions that have a somewhat ambiguous aspect; but I must say that, upon general principles, it would be the duty of this House, unless there were an inflexible rule of law established, to bring back the practice (if there had been an opposite practice) to that which is consistent with common sense. I have no hesitation in saying, in the absense of express enactment or distinct authority, that the contrary is the law, and that it is the law which your Lordships ought to lay down as that which is to guide the Courts of Scotland for the future. I say for the future, not at all meaning to imply that that has not been the practice of those Courts in past times. I believe it has.

That being so, then the question is, whether the interlocutor is in the terms which are prescribed by the Statutes which regulate Scotch proceedings. It is said that it is not, because it does not find the facts proved. My Lords, we have had occasion in the course of the last few years to consider this point more than once, and your Lordships thought, in a case which was alluded to (*a*), that although the facts were not stated *singu-*

(*a*) *Fleeming* v. *Orr*, 2 Macq. 14.

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latim, one after the other, yet, looking at the record, you could see what the facts were which were considered as established, and that your Lordships held to be sufficient. But here I do not think we are obliged to look at anything except what is strictly to be found within the four corners of the interlocutor of the Court of Session. The Court say:—"Find it proved, in point of fact, that the testamentary letter founded on by the Claimant, Peter Anderson, is not the genuine writing of the deceased Alexander Anderson; and find, in point of law, that the said Peter Anderson is not entitled to be decerned or confirmed as executor of the said deceased Alexander Anderson." That is a clear finding, that the person whose duty it was to establish the document as the holograph writing of the deceased, had not established that fact, and that, in point of law, he was not, as the person propounding the document, entitled to be confirmed as executor. That is exactly what the Statute meant to require to be done, and that has been completely done.

But then there are two points which this party has grasped at as a sort of *tabulam in naufragio*, not for the purpose of obtaining eventually what he is seeking to obtain, but for the purpose of inducing your Lordships to send this matter back again, to have it litigated at the cost of the Respondents (the Appellant being a pauper), in the hope that he may hit upon something to show that there has been some evidence improperly rejected. Now, what are the two matters upon which he says evidence has been improperly rejected? The first is this:—the Claimant propounding the will propounded with it, not as something which became necessary in consequence of the evidence afterwards offered, but propounded with it, in the first

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instance, another document, I suppose of somewhat prior date (we do not know what the document was), in order to show that, looking at that other document, together with the instrument which he did propound as a will, the Court would say, or ought to say, that the instrument which he propounded was a genuine will. Now there is an Act of Sederunt made in conformity with the Procedure Act, passed in the first year of Her present Majesty, which says that any document which a Pursuer or Claimant is about to propound must be propounded before the record is closed, otherwise it shall not be admitted at all. I cannot listen to the argument that in this case the document is something emanating from a Commissary Court, and that an Act of Sederunt applies only to a Sheriff's Court. It is the same person who presides in the one and in the other Court. But if in terms the Act of Sederunt does not apply to the Commissary Court, it can only be that the Court considered that, although they made an Act of Sederunt which applied in terms to the Sheriffs' Courts, the Commissary Court was one of those Sheriffs' Courts acting under another name, and must be bound by the same practice, even though it should turn out that the language does not strictly apply to it. The *Commissary Depute*, the *Commissary*, the *Lord Ordinary*, and the Court of Session all clearly held the Act of Sederunt to be applicable to this document, and upon a technical point of practice, with respect to which the Courts have successively said that that is the construction to be put upon the Act of Sederunt, it would be to the last degree improper for your Lordships to interfere.

But then there is this notable point about the rejection of evidence relating to Barbara Sim. Barbara

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Sim upon being tendered as a witness, was examined *in initialibus*, and the claimant objected to her admissibility upon the grounds of partiality to the adducers, and of having been promised a consideration sufficient to give her an interest in the suit, and also on the ground that generally she was unworthy of credit. Having made this objection he obtained an interlocutor from the *Commissary* allowing him to give proof reprobatory, in terms of his protest, against the evidence *in initialibus*, and he proceeded to exhibit interrogatories accordingly. He then exhibited interrogatories relating to matters which had taken place subsequently to the examination of Barbara Sim, which could not therefore have been included in the terms of his protest, but which Mr. *Muir* very ably argued must be impliedly involved in it, because the result of it, if it was established to be so, would be one mode of arriving at the conclusion that she was not a person worthy of credit. Now, my Lords, it was considered that that was a matter entirely out of the view of the Protestor at the time he made his protest, and that if he wanted to exhibit interrogatories reprobatory upon that ground, he should have obtained a new interlocutor in order to have enabled him to exhibit interrogatories to examine the party in respect of a fact *noviter veniens ad notitiam*, and that he, not having done this, was not within the terms of the interlocutor, and that, therefore, that evidence ought not to have been received. I think that may be considered as being a very reasonable conclusion, and I entirely concur with my noble and learned friend on the woolsack that the interlocutors of the Court below ought to be affirmed, and I regret that we have no power to award costs (*a*).

(*a*) It being a pauper suit.

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Lord WENSLEYDALE:

My Lords, I entirely agree with my two noble and learned friends, who have delivered their opinions to your Lordships. From the first I never felt any doubt upon the principal point in this case which has caused this Appeal; nor do I feel the least doubt that the proceedings of the Court of Session have been perfectly regular, and in compliance with the Act of Parliament.

The interlocutor appealed against, of the 25th June 1850, finds it "proved, in point of fact, that the testamentary letter founded on by the Claimant, Peter Anderson, is not the genuine writing of the deceased Alexander Anderson; and finds, in point of law, that the said Peter Anderson is not entitled to be deemed or confirmed as executor of the said deceased Alexander Anderson." Now that is very plainly and clearly deciding the fact, and laying down the proposition of law which follows from that fact; and I think it is equally clear, that they were right in referring to the interlocutor of the *Lord Ordinary* upon the secondary parts of this case, which involve trifling matters as compared with the other.

The genuineness and authenticity of a document tendered for confirmation as the last will of a deceased person, lies on the party who propounds it. As it purports to deprive the next of kin of a right which would otherwise belong to them, the tenderer or propounder of the document must show, not only that it is genuine and authentic, but that it constitutes the last will of a free and capable testator.

With respect to the first question, here is a paper, purporting upon the face of it to be holograph, propounded as the will of the testator. It is contended by Mr. *Muir*, that if any person sets up a case of forgery, the whole of the paper appearing to be in the same handwriting, he is bound to prove the case of forgery. If that were so, it would certainly be an extraordinary circumstance in the law of Scotland, and entirely at variance with the well established law in England; it being laid down in several cases, and perfectly well settled, that a person who propounds a will which is to take away property from the next of kin must prove that it is an instrument properly

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executed, according to the law of the place where the testator was domiciled, and that it contains in it the free will of a capable testator. The burden of proof lies upon him to establish those facts; and if he does not establish those facts, he must fail. This is laid down in the case of *Barry* v. *Butlin* (*a*). And in a very late decision in the Court of Common Pleas, on a question as to the validity of a will of land, it was held, that the learned Judge was mistaken in directing the Jury that there was a presumption that a testator was sane till the contrary was proved, and if the party impugning the will did not prove the insanity, the will was established. The Court said that the rule was the same as in the case I have referred to before, and that the Jury must take all the circumstances into consideration, and if they were not satisfied that the will was the will of a free and capable testator, the heir-at-law must prevail. And I apprehend that that is quite consistent with common sense and reason, and I should feel rather surprised to learn that it is not the law of Scotland.

Mr. *Muir* contends that in this case the plea of forgery ought to be proved on the part of the Respondents in this case. That certainly is not so, according to the case he has cited. It is not enough to produce an instrument which appears to be holograph; it must be proved to be in the handwriting of the testator. You cannot begin by putting in a paper which may have been written by anybody, and which appears to be all in the same handwriting; but you must prove that that is the handwriting of the testator. That was the unanimous opinion of the Judges of the Court of Session.

Reliance was then placed upon the judgment of Lord *Jeffrey*, in *Turnbull* v. *Doods*. Any opinion

(*a*) 2 Moore's Privy Council Ca. 482.

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of that learned Judge is undoubtedly entitled to the greatest weight. Now let us see whether the quotation from the judgment of Lord *Jeffrey* supports the argument which Mr. *Muir* has raised upon it. Lord *Jeffrey* says, "If it had been a probative writing, (that is, a regular document, with witnesses to it,) then the whole *onus* of impugning its authenticity would have rested upon the other party (the Respondents). But *primâ facie* it is not probative, and therefore the *onus* of proving it holograph to the effect of making it probative lies on the user of it. But how far does that *onus* go? There is a presumption against the verity of his allegation that it is holograph, and it is not a very heavy *onus* upon him to remove that. An averment in the body of the deed, that it is written by the maker's own hand, is sufficient. The user is not bound to prove that it is not forged. If, therefore, the user of the writ once, by *primâ facie* proof, make out that the body of the writing is the same with the signature, he has done enough to prove that it is holograph." Therefore Lord *Jeffrey* admits that the party must begin by showing that the instrument is in the handwriting of the person whose will it purports to be. He says if there is an averment in the body of the deed, that it is written by the maker's own hand, that is sufficient to throw the *onus* on the other side. Whether that be so or not, it is not necessary to decide. But that seems to refer to some case which was quoted in the argument, and to what is said by Lord *Stair*, that such is the effect to be ascribed to a positive averment in the instrument, that it is in the handwriting of the testator. But there is no such averment here, in the sense that Lord *Stair* or Lord *Jeffrey* attributes to those words. And therefore that case, I think, when it comes to be fully considered, will be found

not to differ from the other cases which hold that the party propounding a will must establish the fact that it is the handwriting of the testator.

Then with regard to the plea of forgery. That is sufficiently sustained by showing, not that it has been forged criminally, but that it is not in the handwriting of the testator; and it is therefore a document which ought not to have any effect as a will. It must be in the handwriting of the testator, or if it is not holograph, it must be in form of words required for notarial deeds, and subscribed by witnesses. The plea of forgery in this case really amounts to nothing more than a denial of the fact of the will being holograph, and consequently, a denial of its being the will of the testator. I think, upon that matter the Court below are perfectly right. I think they have put the *onus probandi* upon the proper party. The meaning of the *onus probandi* is this,—that if the party upon whom it is thrown does not give any evidence, the verdict must be against him. So, when the evidence is given on both sides, if the weight is not in his favour, where there is a plea by way of confession and avoidance, the proof rests upon the party pleading that plea.

I am of opinion that in this case there is no ground of objection at all upon the main point, as to the *onus probandi*. With respect to the other two grounds of objection, I think a sufficient answer has been given. As to the first of them, it must now be considered that the Act of Sederunt applies equally to the Commissary Court, where the Sheriff acts as Commissary, as to the regular proceedings of the Sheriff's Court. That appears to have been so understood, and no doubt at all seems to have been entertained in any part of this proceeding as to the application equally of this rule to the Commissary

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Court as the Sheriff's Court. The interlocutor upon that part of the case puts it upon a perfectly distinct and a perfectly intelligible ground. This draft of the will was produced in the course of the inquiry—the inquiry being with respect to similarity of handwriting. There being some apparent discrepancy in the handwritings, the object was to explain, on the part of the Appellant, the particular shape of some of the letters, which could only be done by comparing the alleged will with a paper which it was admitted he had in his possession, being the draft of that will, in which certain letters were in a particular form. It was said that that was to account for the form of the letters in this document, because the testator looked at this paper, and copied the form of some of the letters. That I understand to be the object with which this instrument was offered. Now, it is perfectly clear that this instrument, which it is admitted was in the possession of the Appellant, ought to have been, according to the Act of Sederunt, put into the condescendence in the first instance; or if its materiality happened not to strike the Appellant at the time, an application should have been made to the Court before the record was made up. That was the opinion of the *Lord Ordinary* (Lord Cuninghame), and I do not see any reason for disputing the propriety of that opinion. Certainly, the Appellant from the first must have known that it was material to explain the different character of the letters from the ordinary writing of the testator. He had the means of explaining that in his hands, and he ought to have founded upon that in the course of these proceedings.

Then with regard to the third objection. It is perfectly clear that when permission to file reprobatory averments in the first instance was asked for, it was confined by the Appellant to three particular heads of

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objection. He objected to the admissibility of the witness upon the grounds of partiality for the adducers, and of having been promised a consideration sufficient to give her an interest in the suit, and also on the ground that generally she was unworthy of credit. Now, I think that according to the proper form of proceeding, the evidence must be confined to those three particular objections which he has made to the testimony of the witness. The evidence tendered by him does not fall under any of these. It does not fall under the only head under which it can possibly be alleged properly to fall, namely, that the witness was generally unworthy of credit; for under that objection you are not to be allowed to give evidence as to particular instances of the witness having told falsehoods. You are confined to giving evidence as to the general character of the witness. It turns out that she has said something in conversation, from which you might draw the inference that she was partial to those who opposed the will; but as it does not fall under either of the three heads of objection raised, it is not matter properly of replication reprobatory (if I may so call it). It is a new circumstance, which has been found out to the discredit of the witness. And therefore, I think there ought to have been an application to the Court to allow a further reprobatory averment against the evidence of the witness. It seems to me, therefore, that the Judges were perfectly right in this case in considering that as the record stood in the then shape of the proceedings, they had no authority at all to enter into the question of what Barbara Sim said after her examination in chief.

I am of opinion, therefore, upon these two entirely secondary points in the case, that the judgment ought to be against the Appellant, as I think it ought to be

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upon the main point in the case. I cannot entertain a doubt upon that part of the case. He who sets up a will must prove it to be a will executed with all the formalities required by the Scotch law, either as a holograph will or a will attested by witnesses. Perhaps in the case of a will attested by regular witnesses, it may be that the *onus* may lie upon the other side to impugn it; but unquestionably, in the case of a holograph will, the burden of proof of establishing it as the will of the testator, lies upon the party propounding the will. Whether exception is to be allowed upon the ground stated by Lord *Jeffrey* is another matter, which does not arise here, because this will is not averred to be upon the face of it in the testator's own handwriting.

Interlocutors appealed from affirmed

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