

the principles of construction laid down by the House of Lords, affirming in both cases the decisions of our own Court.

I am, however, of opinion that in construing as we now do the words of this destination we do not run counter to the decision either of the *Largie* case, or of the case of *Lady Clinton*.

In the *Largie* case the destination was to "the heirs-male of the body of Elizabeth M'Donald and the heirs whatsoever of the bodies of the said heirs-male." The word "and," instead of "whom failing," is a peculiarity in the clause in the *Largie* case which does not occur here, and which some of the Judges thought important, but still more important are the words "heirs whatsoever of the bodies of the said heirs-male,"—not heirs whatsoever of the body of Elizabeth M'Donald. It was held, as I think, that the words "the said heirs-male" could not be construed collectively as denoting a class, but must be construed distributively, as denoting each individual in succession holding the character of heir-male. This appears to have been considered by Lord Mackenzie and Lord Fullerton as an important peculiarity of the clause, and if I do not misapprehend the remarks of Lord Cottenham he is of the same opinion. Not only did Lord Cottenham propose the affirmance of the judgment, but I think he expressly agreed with the view taken by Lord Mackenzie and Lord Fullerton.

Each heir-male is called *seriatim*, and each heir-male so called is a *stirps* in the case of *Largie*. He is, as the Solicitor-General well expressed it, a "composite stirps," comprehending the heirs whatsoever of his own body as within the destination, and I think that these heirs did, under the *Largie* entail, partake of the precedence of the *stirps* as heirs of whom they were called in succession.

In the case of *Lady Clinton*, again, the expression in the clause of destination is, if possible, even more clear. The destination is to the entailor and the heirs-male of his body, whom failing to Sir William Forbes and the heirs-male procreated of his marriage with the entailor's daughter, "whom failing to the heirs whatsoever of the bodies of such heirs-male respectively," whom failing "to the heirs-female of the marriage and the heirs whatsoever of their bodies respectively." In this clause I think the use of the word "respectively" is of special importance, as tending to support the view of Lord Fullerton in the *Largie* case, and as giving it additional force, so that the words, "such heirs-male respectively," must be construed distributively and not collectively, as denoting not the class, but the individuals who from time to time and in succession may answer the description.

I therefore come to the conclusion that, when these two decisions on the *Largie* Entail and the Fettercairn Entail are carefully considered, they do not supply any rule of construction contrary to that which the law and practice of Scotland has recognised as applicable to such a clause as this. The difference between the present case and the cases of *Largie* and *Clinton* is to my mind manifest. Therefore, I come to the conclusion that the words of destination in the present case are clear, and that we are not entitled to call in the aid of conjectural or presumed intention. The case of the defender rests on the words of destination. Accordingly I agree with your Lordship in the chair, and am for adhering to the Lord Ordinary's interlocutor.

Lord JERVISWOODS concurred.

The Court accordingly affirmed the interlocutor of the Lord Ordinary.

Counsel for the Pursuers—Asher and Adam. Agents—W. & J. Cook, W.S.

Counsel for the Defender—Solicitor-General (Clark) and Balfour. Agents—Gibson-Craig, Dalziel, and Brodies, W.S.

Friday, July 4.

## FIRST DIVISION.

[Lord Mackenzie, Ordinary.]

MORE v. MORE AND ARTHUR.

*Testamentary Writing—Burden of Proof.*

Where a party died leaving apparently no settlement, and his heirs-at-law took up the succession—held that the pursuers, who claimed under what purported to be a subsequently discovered holograph testament, were bound to satisfy the Court of its genuineness.

The facts of this case, which turned entirely upon the evidence, will be found in the Lord Ordinary's Note and Lord Ardmillan's opinion.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 6th March 1873.*—The Lord Ordinary having heard counsel, and considered the closed record, proof, and process,—Finds that the settlement or testamentary writing libelled on, dated 13th June 1869, and being No. 24 of process, is the genuine writing of the deceased Alexander More, of Monkrigg; and appoints the cause to be put to the roll, with a view to further procedure.

"*Note.*—The late Alexander More died at Monkrigg on 19th June 1869, after an illness which confined him to bed only four days. He had been suffering from chronic inflammation of the bladder for some time previously, and was regularly visited by his ordinary medical attendant from 3d June until his death. In consequence of his symptoms, Dr Warburton Begbie of Edinburgh was called in as consulting physician, and visited him at Monkrigg on Saturday 12th June. Dr Begbie considered his state to be anxious, and informed him that he was seriously ill. On that day he rose at a later hour than usual, went down stairs to the library where he usually sat, and remained there all day, retiring to rest at an earlier hour than usual. He did the same on Sunday and Monday. He rose, dressed and undressed himself, and walked up and down-stairs without assistance on these three days. On Tuesday he also, without assistance, dressed and undressed himself, and went to a room on the same floor with his bedroom, where he dined. On the evening of that day he became much worse, and went to bed at an early hour. After this he was confined to bed, and gradually got worse, until Saturday, 19th of June, when he died.

"After the funeral, search was made in Mr More's repositories, but no settlement was found. Monkrigg House was occupied for about a week after Mr More's death by his cousin, Miss Aitchison, and thereafter the defender, James More, took possession. The deceased John More, and his mother and sister, the pursuers, also resided for a short time after Mr More's death in Monkrigg House. Soon after Alexander More's death an

advertisement was inserted several times in the *Haddingtonshire Courier* by the Messrs Aitchison of No 77 Queen Street, Edinburgh, cousins on the mother's side, offering a reward of £100 for the discovery of Mr More's will, as it was supposed that he had not died intestate. But no settlement was found. The defender James More was confirmed executor-dative to Mr More on 18th November 1869, and the defender Thomas Arthur is the cautioner in the confirmation. The sum of the inventory amounts to £4724, 3s. 10d. The defender James More, and the said John More, both claimed to be heirs to Alexander More, and presented petitions to the Sheriff of Chancery, each of them claiming to be served heir to him. During the dependence of these petitions, an agreement was entered into on 17th March 1871, under which the defender James More paid to John More £12,000 in consideration of John More withdrawing his petition to be served heir, and all opposition to the service of James More. Mr William Wood, C.A., had been appointed judicial factor on Mr More's heritable estate, and he let Monkrigg House, with the furniture therein, as a furnished house to the witness Mr Scott, for three years from Whitsunday 1870.

"Mr Scott entered upon possession of Monkrigg House at Whitsunday 1870, and on 29th July 1872, that is, upwards of three years after Alexander More's death, two of Mr Scott's servants, the witnesses Johanna Williamson and Isabella Elder, when dusting the curtains of the bed in the yellow room in which Alexander More died, accidentally found under the valance which lies upon the bolster curtain (that is the piece of curtain nailed to the two upper bed posts), the settlement libelled on. It was pinned to the top of the bolster curtain about an inch or two from the right upper bed post, and was completely covered by the valance, the settlement being only 8½ inches long, while the valance at the place where it was found is 1 foot 9 inches deep. The settlement was immediately taken by the servants to Mrs Scott, who gave it to her husband, and he placed it in the hands of Mr Todrick, writer in Haddington, by whom intimation was sent to the various persons interested. At this time John More was dead, having died in March 1872, survived by the pursuers, his mother and sister, who are his executors-nominate under a disposition and settlement dated 1st March 1871.

"The settlement so discovered by Mr Scott's servants is in the following terms:—'*Monkrigg, 13th June 1869.*—This is to certify that I leave my whole property, and everything that I possess, to my late uncle Davie More's grandchildren, residing at 7 Pleasance, Edinburgh, with the exceptions of One hundred pounds to Miss Jamieson, and Fifty pounds to Ellen Shannon. ALEXR. MORE.'

"It is in these circumstances that the present action has been raised by the pursuer, Helen Gilchrist More, as the only surviving grandchild of the said David More, of No. 7 Pleasance, and by her mother, as along with her executor of her deceased brother John More, for the purpose of obtaining delivery and payment from the defender James More, and from Thomas Arthur as his cautioner in the confirmation, of the moveable estate of the late Alexander More, intromitted with in virtue of the confirmation. The pursuer's claim is rested upon the said settlement, which they allege to be holograph of and subscribed by

Alexander More. It is now admitted by the defenders that Helen Gilchrist More and her brother John More, who resided at No. 7 Pleasance, Edinburgh at the date of Alexander More's death, were then the only surviving grandchildren of his uncle, David More; but the defenders deny that the said settlement is holograph of [Alexander More. A long proof has been led by the parties; and the question now raised for decision upon that proof is, Whether the said settlement is the genuine writing of the deceased Alexander More?

"The Lord Ordinary has repeatedly considered the proof, and he has also carefully considered the writing of the settlement, and the writings and signatures in process admitted to have been written by Alexander More, and compared the one with the other. Seven witnesses were examined on each side, who were more or less acquainted with Alexander More's handwriting. Two engravers were also examined on each side. The Lord Ordinary has not attached any weight to the opinions of these engravers, and he has only used their evidence for the purpose of considering the peculiarities in the writing of the settlement which are founded on by the parties.

"After carefully considering the proof, the Lord Ordinary is of opinion that the weight of the evidence is in favour of the pursuers, and that it is established by the proof that the settlement is the genuine writing of Alexander More. Seven witnesses, besides the engravers, were examined on each side. The whole of the pursuer's witnesses are neutral parties, while the two leading witnesses for the defender, Mr Richardson, writer, Haddington, and Mr Alexander Gifford, S.S.C., are the agents of the defender James More in the present litigation. The Lord Ordinary does not think it necessary to allude in detail to the evidences of these witnesses. He considers that the witnesses for the pursuers are better qualified to give evidence as to the authenticity of the settlement than the witnesses for the defenders; that their evidence is of greater weight; and that it is supported by the genuine writings of Alexander More, which are produced in process. The position of Mr Richardson and of Mr Gifford, as the agents of the defender James More, materially affects, the Lord Ordinary thinks, the value of their evidence,—seeing that they are giving evidence on a matter of opinion, and by comparison of the writing of the settlement with the impression on their minds of the genuine writings which they received from Alexander More, or saw him write, or by comparison of the settlement with the genuine writings in process, or some of them, or by using both of these means.

"The Lord Ordinary is quite aware that the *onus* of proof rests upon the pursuers, and that the defenders do not require to prove that the settlement is a forgery. But in considering the question whether the settlement is Alexander More's genuine writing, he conceives that it may be examined to see whether there is any internal evidence of forgery. He has been unable to find any such evidence. There is no appearance of painting or of copying in the writing, and there are various peculiarities in it which would not have occurred if the settlement had been forged, either by one well acquainted with Mr More's handwriting or with specimens of it before him. The word 'Monkrigg' is not written in the way which Mr More wrote that word in his letters. But his correspondence shows that he occasionally formed the 'M' in the same

manner. The two letters 'g' at the end of the word, though not written as he usually wrote them in that word, or as the same letter is written in the body of the settlement, yet are in his style, and the long part of each of these letters, and particularly of the last one, is formed in the same manner as it is to be found occasionally in his genuine writings. The rest of the word appears to the Lord Ordinary to correspond with Mr More's genuine writings. The first letter of the word 'June' is not formed as he usually wrote it, but a capital 'J' of the same formation is to be found in the word 'John,' in the note dated 22d March 1867, No. 82 of process. The word 'my' occurs twice in the settlement. It is peculiarly written, the first part of the letter 'y' being wanting. This also is occasionally, though not often, found in his genuine writings. (See the notes Nos. 97 and 99 of process.) In writing double 's' he usually wrote them one long and the other short, but occasionally, though rarely, he wrote them both short, as he does in the settlement in the words 'possess' and 'Miss.' In writing the word 'Fifty' in the settlement, he omits the 't' and writes it 'Fify,' an omission which, it is thought, no forger would be likely to make. Mr More occasionally made similar omissions in writing. These peculiarities are of rare occurrence in his genuine writings, and not such as any forger would, either from memory or from a study of his writing, have been likely to imitate. It is difficult also to see how any one could have got access to a sufficient number of his writings as to be aware of these peculiarities.

"The defenders say that the capital letter 'P,' which occurs three times in the settlement, is formed in a way in which he never wrote that letter. That is no doubt true; but that objection tells both ways. No forger would, it is thought, have attempted any such variation. The three letters in question are all different the one from the other, but they bear marks of his general style, and the variation in their formation may be satisfactorily accounted for by the enfeebled state in which he was, of which there is other evidence in the writing of the settlement. The defender also objects that the letter 'H' of 'Hundred' is formed as Mr More never wrote that letter. That also is true, so far as appears from his genuine writings in process. But the letter bears evidence of his general style of writing, and the way in which the two straight parts of the letter are joined together is very similar to the loop which he occasionally makes at the end of the word 'self' in the books, Nos. 144 and 145 of process. The rest of the word appears to be in his handwriting.

"In writing letters Mr More subscribed his name 'A. More,' and it was only in regularly tested deeds, and in cheques and receipts, that he subscribed 'Alexr. More.' In the cheques and receipts in process the signature is written rapidly, and there is considerable variation in the signatures. The signatures are more carefully written in some of the probative deeds in process; but in none of these, except in one, does he form the letter 'r' of the word 'Alexr.' in his signature in the way in which it is written in the signature of the settlement. That deed is the tack, No. 184 of process. It is dated 1st April 1869, that is eighty days before his death. In two of the signatures on that deed, the letter 'r' at the end of the word 'Alexr.' is formed in the same peculiar way that it is written in

the settlement, that is, like the letter 'n.' No forger could, it is thought, have known of that recent peculiarity, as, in so far as the Lord Ordinary has been able to discover, it only occurs in one other signature, namely, that upon the cheque dated 25th March 1869 (No. 67 of process).

"It is objected that he never wrote the letter 'x' in the manner in which it is formed in his signature and in the body of the settlement. He varied very much in writing that letter in his signature, and he did so in signing the same deed. (See tacks Nos. 139, 140, 141, 142, 183, and 184 of process.) In the tacks Nos. 140 and 141 of process, the letter 'x' in the signature is formed in the same way as in the settlement.

"It is said that the settlement is not written in his usual mode. His letters, cheques, and cash-books in process show that when in health his writing varied very much, and that he wrote with ease and rapidity, and without bestowing more care upon his writing than is usually met with in such documents. The writing of the settlement is written with much more deliberation than he usually employed, and it bears, the Lord Ordinary thinks, traces of bodily weakness, and that it was written slowly and with an effort. But that is exactly what was to be expected. He had been suffering from disease for a considerable time, and was much enfeebled. His symptoms had become so grave that Dr Warburton Begbie was brought from Edinburgh to see him. He saw him on the day before the date of the settlement, and found him not only seriously ill, but in an anxious state. He was so weak that, although going up and down stairs without assistance, he was seen on the day after the settlement was written to pull himself up stairs by taking hold of the bannisters with both hands. These circumstances satisfactorily account for the shakiness and formality of the writing spoken to by some of the witnesses.

"The settlement was found in a very odd place, and it is not easy to explain why Mr More should have placed it where it was found, and not in his repositories in the library down stairs. Still, it was in a place within his reach, where he could have got it at once, although confined to bed, should he have desired to cancel or add to it, or to deliver it to any third person. It is proved that he was a shy reserved man, and he may not have wished that any of those about him should know its contents, which they might have done had he left it in his repositories down stairs, and sent for it after he was confined to bed. The defenders have attempted to show that he was incapacitated by weakness from placing the settlement where it was found. That place was quite within his reach, and no great effort was required to pin the settlement to the bolster curtain. It is proved that he dressed and undressed himself, and went up and down stairs without assistance on the Sunday and Monday. He dressed and undressed himself, and dined in another room on the same floor on the Tuesday. This shows that he had strength enough to do it. These facts, and the evidence of Dr Warburton Begbie, a skilled and impartial witness, are, the Lord Ordinary thinks, conclusive upon this point. Dr Begbie deposes that it was quite possible for Alexander More to stand upon his bed and pin a piece of paper below the valance at the head of his bed. After fully considering the whole evidence upon this part of the case, the Lord Or-

dinary is of opinion that Alexander More, if he desired it, could have pinned the settlement to the bolster curtain, where it was found.

"The defenders adduced three housemaids to show that the settlement could not have been pinned to the bolster curtain during the period between Martinmas 1869 and Whitsunday 1872, because they brushed or dusted, as they depone, below the valance which covered the top of the bolster curtain, and would have seen it if it had been there. The Lord Ordinary is not satisfied of this. Much would depend upon the way in which the brushing or dusting was done. Much brushing would not be required beneath the valance, as it is not a place in which dust, especially in a country house, could accumulate. Mrs Scott, in whose service two of these housemaids were, deposes that the bolster curtain could have been brushed underneath the valance without the settlement being noticed, unless the valance had been drawn out, and the housemaid had looked up. The valance, at the place where the settlement was found, is 21 inches deep, while the settlement is only 8½ inches long. The valance is arched, and is 17 inches deep in the centre.

"It is difficult also to see how anyone could have got access to the house after Alexander More's death, and placed the settlement where it was found. A reward was no doubt offered for the missing settlement, but the amount of that reward was not likely to induce anyone to forge the settlement who had the requisite materials and knowledge to do so. That reward was not offered by the pursuers, but by cousins of Alexander More on the mother's side, who, from their relationship and the kindly expressions in his letters to them, might naturally have expected to be favoured in any settlement which might exist. But they are not even mentioned in the settlement, which is entirely in favour of cousins by the father's side. It appears from the evidence that a convict on a ticket-of-leave from a five years' sentence of penal servitude was so fortunate as to obtain the place of tablemaid in Mr Scott's service, and that she remained in his service from the end of May to the end of August 1872. But she was a Glasgow thief, and her antecedents, the character and position of the pursuers, and the whole circumstances, preclude the idea that it was through her instrumentality that the settlement came to be placed where it was found.

"It is an important circumstance in favour of the authenticity of the settlement that Alexander More spoke to his agent, Mr Watson, of John More, the brother of the pursuer Helen Gilchrist More, as his heir. Miss More (a *pro indiviso* proprietor of Monkrigg with Alexander and his brother George More) also spoke to Mr Watson, in Alexander More's presence, of their heir. Mr John Martin deposes that George More, who died many years ago, said to him that if he and his brother and sister did not marry, all his property would go to his friends in the Pleasance, meaning his uncle David More's people. The pursuer Mrs More also deposes that her son John More told her, on returning from visiting Alexander More nine days before his death, that Alexander More had said to him that he was going to leave him everything he had, and that this had been the intention of his brother and sister. It is also proved that Ellen Shannon, the cook, to whom a legacy of £50 is left by the settlement, was a favourite servant of Mr

More and his sister, and that they had an affection for her as an old servant. Miss Jamieson, to whom a legacy of £100 is also left, had resided at Monkrigg since 1858, having gone there as a companion to Miss More, and having remained after Miss More's death looking after the house. It was also a natural act for Mr More to make his will after the intimation made to him as to his state by Dr Begbie on Saturday the 12th of June, seeing that the only settlement in existence was one executed by him in 1837, in favour of his brother and sister, who had predeceased him.

"After full consideration of the evidence in regard to the writing and subscription of the settlement, No. 24 of process, and of the whole facts and circumstances established by the proof, the Lord Ordinary is of opinion that the pursuers have proved that the said settlement is the genuine writing of the deceased Alexander More."

The defenders reclaimed.

At advising—

LORD ARDMILLAN—We are engaged in trying the question whether a certain writing, said to be a holograph will of Alexander More of Monkrigg, is genuine—in other words, whether the writing is truly holograph of Alexander More. Mr More died at Monkrigg, near Haddington, on 19th June 1869. He was 65 years of age. He suffered from a serious affection of chronic inflammation of the bladder, which was sometimes very painful. He was attended by Dr William Martin of Haddington, and was visited by Dr Warburton Begbie of Edinburgh as a consulting physician. Dr Begbie told him that he was seriously ill; and he states that he considered his case anxious and dangerous, though he did not exactly tell him so. This was on Saturday 12th June 1869. Mr More, though certainly very feeble, and sometimes in great suffering, was down stairs on the Saturday, Sunday, and Monday. He died on the next Saturday, being the 19th of June. He occupied a room at Monkrigg known as the yellow room, sleeping in a bed with chintz curtains and a high roof with a broad valance across the head of the bed. He had no very near relatives, and had expressed no very particular preference for any relative since the death of his sister Miss Agnes More. He had made a will—I think more than one will—before his sister's death, and he had done so by employing an agent. But that was destroyed. He is described as a shy reserved man, not eccentric or in any way peculiar; and there is no evidence to show that he was afraid of any one, or suspicious of those around him; nor is there any evidence to show that he was of a secretive disposition, inclining him to hide anything. He was a man of considerable intelligence; he expressed himself well, and wrote a particularly good hand, clear and round. He left a handsome fortune, partly in land and partly in money, amounting in all to about £30,000. So far as was ascertained on opening his repositories and searching his house, he left no will. His relations, of whom the nearest were the late John Stewart More and the pursuer Miss Helen Gilchrist More, on the one hand, and the defender James More, on the other hand, entered into an arrangement for dividing his means and estate on the footing of there being no will, Mr John Stewart More getting £12,000 as the pursuer's share. The two parties to this action represent two uncles of the late Alex-

ander More—John Stewart More, who is now dead, and Helen Gilchrist More, being at the date of Mr Alexander More's death the surviving grandchildren of the late David More, uncle of Alexander More, and they resided at No. 7 Pleasance, Edinburgh. James More, the defender, represented another uncle. It appears that Mr Aitchison, a relation of Mr More by the mother's side, offered a reward of £100 for the discovery of a will by Mr More. How far that reward has operated in the discovery of this alleged will I cannot say. That it had such an effect has been suggested. I am not prepared to give much weight to the suggestion. At least the fact cannot be lost sight of.

Three years after the death of Alexander More, and after this arrangement of his succession on the footing of there being no will, there was discovered in the yellow bedroom which Mr More had occupied, and in which he died, the writing which the pursuers allege to be the genuine holograph settlement of Alexander More. I need not again read its terms. It is alleged by the pursuers to be a will in their favour. It purports to be in favour of the grandchildren of the late David More, uncle of the deceased. John Stewart More and the pursuer Helen Gilchrist More were the only surviving grandchildren. Helen G. More is now the only survivor. It was found on 29th July 1872, and it bears date 13th June 1869. It was found by two housemaids of Mr and Mrs Scott, to whom the house at Monkrigg had been let furnished since Whitsunday 1870. These girls were engaged in cleaning and dusting the bed. It does not appear that they were giving to the bed or the curtains any unusual or extraordinary amount of dusting. They say, "It was not an extra cleaning." But behind the valance stretching across the head of the bed this writing was found pinned to the curtain so as not to be visible till the valance was lifted; but it was at once seen by both servants when in dusting the curtains they looked up to the head of the bed. They properly took it to Mrs Scott, and it now forms the subject of this very singular action.

The first question which naturally arises is—When and by whom was that writing pinned to the curtain of that bed? It is dated just six days before the death of Mr More, and unless he himself placed it or directed it to be placed where it was found, it is plain, and indeed I understand it to be admitted, that this cannot be his genuine writing. Yet, if he placed it there, he must have done so within the last few days of his life, and it must have remained there for three years without having been discovered. Now, why should Mr More have thus hidden this will? As I have already said, he was intelligent and not eccentric. He was not suspicious of those around him, or afraid of being detected, and, even if he had been in good health and strength, and physically able to place the document where it was found, we have no reason to suppose that he was, like the magpie in the "Gazza Ladra," given to concealing articles from a mere love of hiding. I cannot understand why he should have hid his will there; and no intelligible reason has been suggested.

Then, I think it very doubtful whether, in the state of health and strength in which he was, he could have accomplished the feat of pinning the writing to the curtain at a point considerably above his head if he had been standing up in the bed. His height is proved to have been about 5 ft. 6 in.,

and the writing was pinned at a point at least 6 feet above the standing-place which he must have occupied. For him, in his weak state, with the tendency to giddiness which has been proved, to have stood up in the bed, and on the feather-bed, and to have pinned the writing above his head, would have been a matter of great difficulty, even if there were any reason to suppose that he desired it. Dr Warburton Begbie thinks it not impossible. On any question of diagnosis or medical opinion, I am disposed to attach the greatest possible weight to the evidence of Dr Begbie. I would readily do so, even in a case where he was not the ordinary medical attendant, but a consulting physician. But on this point of the capability of Mr More on any day between the 12th and the 19th of June 1869 to have accomplished this operation, I must say that I do not view the medical opinion of my highly respected friend Dr Begbie as conclusive. Dr Martin, Mr More's ordinary medical attendant, had more frequent opportunities of judging, and he is decidedly of a different opinion. He thinks that Mr More could not have pinned the paper in the place where it was found. This opinion he states deliberately, and as the result of serious consideration. He says that Mr More was feeble, unsteady on his limbs, and subject to giddiness, unable to accomplish and unlikely even to attempt such an operation. Dr Martin is confirmed by Jane Simpson, who was in attendance up to the death, and was a ward of Mr More, and had lived with him for ten years, and is confirmed also by Marion Jamieson, who also knew him well, and who is a legatee under this alleged will. For my own part, seeing no reason why he should desire, and much reason why he could not perform, this work of hiding, I am quite unable to believe that Mr More placed that writing where it was found.

But then, if he did, it must have remained there for three years. The house was let furnished; and before the tenant entered a search had been made for a will but none was found, and all Mr More's papers and letters were removed. John Stewart More and his mother lived at Monkrigg for some weeks after the death and before the house was let. After that James lived there for a time; and then the tenant entered on possession. There was a full establishment of servants, and the house was kept clean and in good order. The yellow room was frequently occupied as a bedroom. The bed curtains and valance were frequently cleaned and dusted. We have the testimony of three different housemaids, who not only depone generally to cleaning the room and the bed and the curtains, but who state expressly that they dusted behind the valances of that bed and must have seen the paper if it had been there. The analysis now given by Lord Deas of the important testimony of these housemaids is so complete as to render any remarks of mine on that subject quite unnecessary. Robina Heriot, Jane Robertson, and Mary M'Kechnie speak to this with a clearness and firmness which shuts out all, or nearly all, possible doubt on the subject, unless perjury be imputed. But there is no reason to suspect the honesty of any of these girls—their wilful falsehood has not been suggested—and they have no possible interest to state anything but the truth. It remains therefore a fact, on this proof, that the very ordinary amount of cleaning and dusting which took place on 29th July 1872 led to the im-

mediate discovery of this writing in a place where, if the pursuers' allegations are true, it must have remained without discovery for three years, and in spite of many cleanings and dustings, sworn to by witnesses, and apparently more thorough than that in 1872.

In the end of May 1872 a new actor appears on the scene. A woman named Jessie Watson comes to Monkkrigg in the capacity of tablemaid to Mr Scott. She came a few weeks before, and she remained a short time after the finding of this writing. I am quite satisfied on the evidence that, till she came, this writing was not in the place where it was afterwards found. That woman has not been traced nor produced as a witness. But we know that she was a returned convict, and that Mr List, the Chief-constable of Haddingtonshire, on discovering that fact, communicated the fact to Mr Scott. She had a ticket of leave, having been sentenced to five years' penal servitude for theft. She remained at Monkkrigg till after the finding of the writing, and then she left the place of her own accord, suspected however of taking something with her. She was visited while at Monkkrigg by a woman who went under the name of Mrs Leek, who was called her sister, but believed not to be so. Neither of these two women have been traced. It is plain that Watson was a person very likely to be influenced by the promise of reward, and not disposed to be scrupulous in trying to obtain it; and she was also a fit and ready instrument for any evil work at Monkkrigg, and that this supposed sister had the means of communicating with her from without; and if any one, whether acting in concert with her, or using her as an instrument, had forged a writing purporting to be Mr More's will, the presence of that woman in the house afforded a facility for deposition of the writing.

Looking to the whole of the evidence on this part of the case, and before considering the writing itself, I am of opinion that there is no good reason for supposing that that writing was placed where it was found either by Mr More or by his directions. I think it proved that it was not in that place when he died,—not there when the room and the bed and curtains were cleaned and dusted on the several occasions spoken to prior to May 1872 when Jessie Watson came to the house; and the time and mode of its appearance there when discovered for the first time in July 1872 is strongly opposed to the contention of the pursuers, that it is the genuine will of Mr More.

I now proceed to consider the writing itself. It is quite settled law that a party producing such a document as this, and founding on it as a holograph will, must prove that the writing is holograph of the deceased. The burden of proof rests on the pursuers. In this case, where the writing was never seen or heard of for three years, and was then discovered under the circumstances which I have mentioned, the burden of proof is peculiarly heavy. This was not disputed by the Solicitor-General. He faced the difficulty, as he always does, fairly, boldly, and ably, but in this instance, not I think successfully.

Previous to 1868 heritable estate could not by Scottish law have been carried by words of bequest. By Act of Parliament in that year bequests of heritage, if clearly expressed, are rendered legal and effectual. It seems singular that Mr

More, not a lawyer, and not consulting a lawyer, should frame so soon after the Act a will conveying in the most apt and clear terms a bequest of his whole property, heritable and moveable. Again, this writing is on blue paper, and there is some evidence that Mr More used white paper, and that there was no blue paper in the house.

We have had a great deal of evidence of opinion in regard to the genuineness of this writing. I do not rely on the testimony of engravers, of whom we have two on each side, who, as men of skill, decide on the minute peculiarities which they consider to assimilate or distinguish writings. But we have the testimony of many witnesses who knew Mr More well, and knew his handwriting well, and their evidence is of far more weight. Such evidence in regard to handwriting is like the recognition of the countenance of a friend, and is not confined to the observation of minute and particular resemblances or coincidences.

It is not by minute observation that we know the face of a friend. It is not by the mere hue of complexion, or the outline of features, or the colour of hair or eyes, that we recognise the countenance of a friend who has been long absent. It is by the character and expression of the face,—the lights and shadows revealing thought or feeling, gladness, or grief,—which we well remember and at once detect. Thus it is, though in an inferior degree, with the true recognition of the handwriting of a friend. We know and recognise it as we know and recognise his face—not by minute resemblances, but by the character, and I may say the expressiveness, of the writing taken as a whole. The ascertainment of marked particular resemblances may tend to confirm our opinion, but that which satisfies and assures us in recognition is the general character of the writing. Keeping this in view, I have very carefully and anxiously considered the testimony of those witnesses on both sides who had good opportunity of knowing the man and knowing his writing, and who spoke from intimate personal knowledge of both. There is conflicting evidence on this subject. There are witnesses of great respectability and having good means of knowledge who consider this writing to be genuine. It is, however, right to notice that several of the pursuers' witnesses speak to the signature only, and decline to state positively their opinion that the whole writing is holograph. But unless the pursuers prove the writing to be holograph they cannot succeed, for it is not suggested that the signature can be his, if the writing is not.

On the other hand, we have the evidence of six witnesses, also of the highest character and respectability, who knew Mr More well, and were well acquainted with his handwriting, and these gentlemen swear distinctly to their opinion that this document is not written or signed by him. This opinion they give with great firmness.

It is a delicate and difficult duty to weigh in the balance the testimony of these opposing witnesses. I have endeavoured to do so, and I have read and re-read the proof with that view. It might be enough that the balance of conflicting testimony is such that the pursuers have not proved their averments. But I must say that in my opinion the evidence against the genuineness of this document preponderates; and then the facts in regard to the deposition and disco-

very of the writing come in aid of that preponderance, for if the writing was not deposited by Mr More it is not possible to believe it genuine; and if, as I think, it was not in 1870 and 1871 in the place where it was found, then it is not possible that it could have been deposited by Mr More.

It is, however, our duty to apply ourselves to the task of judging of the genuineness of this writing by our own careful observation. It is not without diffidence and misgiving that I venture to rely on my own observation in such a matter. But, so far as I can judge from repeated and anxious examination, I have formed the opinion on comparing this document with the many genuine writings of Mr More laid before us, that this writing is not genuine.

I am led to this result, first, by comparing its general character with that of the other writings; and, secondly, by observing some marked characteristic differences. The general character of this writing is, in my opinion, quite different from that of Mr More. I am satisfied that the word "Monkrigg" was not written by Mr More. We have the word often written by him, and never in the least like this. I think the date, both in the writing and in figures, differs from any writing or figures of his. The spacing, or division of lines and words, is different from his, and gives a different character to the writing. The angularity of the writing with the horizontal terminations is a peculiar feature of this document, and is in marked contrast to the free round hand of Mr More. The letter H in the word Hundred, and the letter P in three different words, are formed in a manner quite different from his. The word "Ellen Shannon" is spelt in a manner in which he was not wont to spell it, for we have the same name of the same person twice written "Helen" by himself in other writings. It were easy to point out other differences between this writing and the genuine writings of Mr More. But I forbear. Whether I look at the writing as a whole, or at the particular formation of the letters, the result to my mind is the same. I cannot think the writing genuine. We are told, however, that we must make great allowances for the extreme weakness of Mr More as tending to affect his writing and explaining the apparent difference. Now, in the first place, if his weakness caused a falling off in his writing, the handwriting would have got worse as it proceeded. But the worst part of this writing is at its commencement, a fact which does not support the pursuers' theory. Then the words most like the genuine writing are the signature and the word "More" in the middle of the writing, which is just what might be expected if a person forging the writing had only a genuine signature, or little more than a genuine signature, before him for imitation. But in suggesting the explanation of physical weakness the pursuers have another difficulty. When dealing with the question of the personal deposition of the writing, the pursuers say that Mr More was strong enough to stand up in the bed and pin the writing within the valance. But, when dealing with the question of handwriting they say that Mr More was so weak that his handwriting was materially altered. I cannot see any indication of much weakness of hand in this writing, and we have a genuine letter of Mr More written when he was in great weakness which does not resemble this.

But I have already occupied too much of your Lordships' time in explaining the grounds of an opinion, in regard to which, taking all the points together, I have not much doubt. The Solicitor-General pressed us strongly to treat the case as involving a charge of forgery. It cannot be denied that logically we must meet that point, and we must come to the conclusion that the writing is forged if it is not genuine. But we are not called on to decide, and we may not be able to say by whom it was, or may have been, forged; and it is better to refrain from any suggestions on that matter, which I do, merely adding that I agree in many of the remarks of Lord Deas. It is in law sufficient for this case that the pursuers have not discharged themselves of the burden of proving this writing to be genuine and holograph of Mr More. But I think it right to add that in my opinion it is proved that the writing is not genuine. Therefore, notwithstanding the very able and elaborate Note of the Lord Ordinary, I am of opinion that the defender is entitled to absolvitor.

The interlocutor of the Lord Ordinary reversed.

Counsel for Pursuers—Solicitor-General (Clark) Q.C., and Scott. Agents—Wotherspoon & Mack; S.S.C.

Counsel for Defender James More—Mackintosh and Watson. Agents—Gifford & Simpson, W.S.

Counsel for Thomas Arthur—Mackie. Agents Adamson & Gulland, W.S.

Wednesday, July 9.

## FIRST DIVISION.

WILLIAM STEVENS, PETITIONER.

*Inhibition—Titles Act* (1868), § 156.

*Held* that the Titles Act introduced no change in the form of letters of inhibition with respect to the necessity of alleging fully and explicitly the ground of debt upon which the diligence proceeds.

In this case the petitioner was indebted to Robert Campbell, iron merchant, Grassmarket, Edinburgh, in the amount of a bill at four months from 6th December 1872, and the bill fell due on 9th April 1873. The amount was £59, 10s. 9d.

At the time the bill became due it was arranged between the said Robert Campbell and the petitioner, that the petitioner should grant two new bills in lieu of the same, and the petitioner did so. The said two bills were for £25 and £35, 3s. respectively, and they fell to be due on, respectively, 31st May and 31st July, both 1873. The amount, in whole, of the said two bills was £60, 3s., and the difference, viz., 12s. 3d., between said amount and the amount foresaid of the old bill, viz., £59, 10s. 9d., was made up of a charge for interest, and of the expense of the stamps of the new two bills. On granting the said two bills the petitioner did not obtain possession from the said Robert Campbell of the old bill foresaid. On May 22, 1873, the petitioner advertised as for sale a part of his heritable property in West Calder, and on May 28, 1873, the said Robert Campbell raised and executed letters of inhibition against the petitioner, and recorded a notice of the same in the Register of Inhibitions.

The letters of inhibition proceeded upon the old bill foresaid for £59, 10s. 9d., the sole