man may equally well have been the father of the child." If the result of the evidence is that another may equally well have been the father, then it is plain that the defender has not been proved to be the father—in short, that the evidence is not such as to justify the finding in fact that he is the father.

On these grounds I concur in the opinions of Lords Low and Dundas that the judgments appealed against must be recalled and the defender assoilzied.

The Court recalled the interlocutors of the Sheriff and the Sheriff-Substitute and assoilzied the defender.

Counsel for the Pursuer (Respondent)—Jameson. Agents—Carmichael & Miller, W.S.

Counsel for the Defender (Appellant)—Anderson, K.C.—Dallas. Agents—Balfour & Manson, W.S.

HOUSE OF LORDS.

Friday, March 26.

(Before the Lord Chancellor (Loreburn), Lord Macnaghten, Lord James of Hereford, Lord Dunedin, and Lord Shaw of Dunfermline.)

LOWS *v.* GUTHRIE AND ANOTHER (LOW'S TRUSTEES).

(*Ante*, 44 S.L.R. 925, 1907 S.C. 1240.)

Writ — Attestation — Denial by Attesting Witness that Signature was Adhibited or Acknowledged in his Presence.

Observations per Lord Dunedin and Lord Shaw, the point having been abandoned by counsel, to the effect that "it is not enough to set aside a probative deed in Scotland that one instrumentary witness simply says that he did not hear the signature acknowledged."

Smith v. *Bank of Scotland*, June 4, 1824, 2 S. App. 265, *followed*, and Lord Mackenzie in *Cleland* v. *Cleland*, December 15, 1838, 1 D. 254, *approved*.

Will — Reduction — Agent and Client — Undue Influence—Person in Fiduciary Relationship Preparing and Benefitting under Will—Onus.

Observations upon the *onus* placed upon an agent or person in a fiduciary relationship who has prepared a will under which he benefits.

This case is reported *ante ut supra*.

The pursuers (respondents in the Inner House) appealed to the House of Lords.

At the conclusion of the appellants' argument, the respondents not being called upon—

Lord Chancellor — I should be very sorry if the rule adopted by Lord Cairns in *Fulton* v. *Andrew* (1875, L.R., 7 E. & I. App. 448) were used as a screen behind which one man was to be at liberty to charge another with fraud or dishonesty without assuming the responsibility of making that charge in plain terms.

This case is a very peculiar one. A man named Low was living in Brechin. He had been separated from his wife and family for upwards of 40 years. He made a disposition of his property with the assistance of Mr Guthrie. I am quite persuaded that Mr Guthrie was perfectly honest; he has been so found by the Lord Ordinary, and the Inner House has accepted that view, as I do. This gentleman made no profit for himself; he distributed the property according to the private trusts which had been orally conveyed to him, and after ten or eleven years the appellants, who were the sons of the testator, and who had never seen him or did not even know him, come back and commence this litigation against Mr Guthrie, bringing him up on veiled charges of dishonesty even to your Lordships' House. I think it is an unprincipled proceeding. In my opinion the case entirely fails. I will say nothing as to the claim to be made in regard to legitim, but I think that this appeal ought never to have been brought, and being brought, ought to be dismissed with all the costs here and below which your Lordships are empowered to give.

Lord Macnaghten—I quite agree.

Lord James of Hereford—It is really unnecessary to say anything more than that I entirely concur with the judgment of the noble Lord on the Woolsack, but I think it is perhaps satisfactory to the defender and those who represent him in this case to know that there is no dissent whatever from the judgment given by the Court of Session.

The judgment of your Lordships' House will in no way weaken that which is the basis of our law upon the subject of the making of a will by a person interested. That was laid down by Baron Parke in the case in the Privy Council, which has been referred to, and upon which judgment I think all other decisions have been based. That only requires that where a person is interested, vigilance shall be exercised in seeing that the case, if he has to meet one, of undue influence or the knowledge of the testator is fully proved. It does not go further than that. There is no disqualification in the making of a will through a person who takes an interest having made it. Therefore all you have to do in this case is to vigilantly look and see whether there is any evidence that can shake the fact that the will was made. I have nothing more to say upon the subject. I entirely agree with what was said by Lord Kinnear on that point—"Upon the whole evidence in the case I may say I am unable to see any shadow of evidence for charging Mr Guthrie with undue influence or, in other words, with fraud." I entirely agree with that view, that there is no shadow of evidence, and I am sure that your Lordships

will support the motion of my noble and learned friend.

LORD DUNEDIN—I agree with your Lordships. I think that Mr Guthrie in acting in preparing the will was called upon to make explanation, but I think he has made ample and full explanation of the most satisfactory kind, and that all allegations of fraud or anything like it have failed. I should like to add that although I concur with the Lord Chancellor in thinking that this case was scarcely one to bring to this House, I think the learned counsel for the appellants was quite right in the course which he took in abandoning the discussion upon the non-execution of the document, because I wish to say that I entirely agree with the judgment of the Inner House upon that point. It is not enough to set aside a probative deed in Scotland that one instrumentary witness simply says that he did not hear the signature acknowledged. That doctrine was upheld by your Lordships' House in the case of *Smith* v. *The Bank of Scotland* (June 4, 1824, 2 S. App. 265), but I think the *locus classicus* in Scotland —and it is an authority which I think ought to have the authority of this House superinduced to it—is the judgment of Lord Mackenzie in *Cleland* v. *Cleland* (December 15, 1838, 1 D. 254). There it is put in a single sentence by Lord Mackenzie where he says—"It is more important to observe that no intelligible account is given by them"—that is, the instrumentary witnesses—"why the fact which they now allege should be true." I think that is the law, and I think that the learned counsel for the appellants was quite right in abandoning that part of the case.

LORD SHAW—I express my entire concurrence upon the point of the execution of the will with the judgment just delivered by Lord Dunedin.

As to the other matter in the case which has been argued to us with such care by Mr Constable, I desire to say that in my opinion there seems to be no substantial difference in the result to be arrived at by the laws of England and Scotland respectively. In the language of Baron Parke in the case of *Barry* v. *Butlin* (2 Moore's Privy Council Reports 480) the whole hypothesis of fact upon which such a question can arise is stated thus—"If a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite suspicion of the Court." In this case, in my opinion, having gone through the evidence, I do not think it to be established in point of fact that Mr Guthrie has derived any benefit from this will. On the contrary, he was charged with responsible and irksome duties; and, in my judgment, he has discharged those duties fully, and there is no atmosphere of suspicion therefore brought into the case to enable the doctrines applicable to such a situation to be applied here. Were Mr Guthrie even to have obtained a fragmentary or doubtful advantage under this settlement, the whole question that would then arise is this—Does the will—the document signed by Low—express, or is it established to express, in the language of Baron Parke, the true will of the deceased? It is the same proposition in a more ample form put by Lord Barcaple in *Grieve* v. *Cunningham* (8 Macph. 317, 7 S.L.R. 196), namely—Was the document the free and uninfluenced act of the testator deliberately entertained and carried through with the entire knowledge of its effect? In my opinion those propositions, whether in the succinct or the ample form, are established in fact in this case. With regard to the situation of Mr Guthrie and the procedure in actions of this kind, I desire to express my entire concurrence with every word of the judgment which your Lordship has delivered from the Woolsack.

Their Lordships dismissed the appeal, but in respect that the appellants were appealing *in forma pauperis* did not award expenses.

Counsel for the Appellants—Constable, K.C.—Sanderson. Agents—Kinmont & Maxwell, W.S., Edinburgh—Townsend & Sharp, London.

Counsel for the Respondents—Clyde, K.C.—A. M. Hamilton. Agents—Sharpe & Young, W.S., Edinburgh—G. R. Thorne Robinson, London.

HIGH COURT OF JUSTICIARY.

Tuesday, March 16.

(Before Lord M'Laren, Lord Kinnear, and Lord Pearson.)

AGNEW *v.* MORLEY & ANDERSON.

Justiciary Cases—Complaint—Relevancy—Betting Act 1853 (16 *and* 17 *Vict. c.* 119), *secs.* 1, 3, *and* 7—*Betting Act* 1874 (37 *Vict. c.* 15), *sec.* 3—*Person Publishing Advertisement Inviting Public to Bet with Another Person resident Abroad.*

A was charged with a contravention of the Betting Acts 1853 and 1874 by publishing advertisements, in a street, inviting the public to bet on football matches with B, who was resident in Holland, and to whom any money staked by members of the public was to be sent by them by post. *Held*, on appeal, that under the statutes the publishing of advertisements inviting the public to bet, although done by persons other than the one with whom the bet was to be made, and to whom the money staked in respect thereof was to be paid, was an offence under the Acts, and, consequently, that the complaint set forth a relevant charge against A.