APRIL 16, 1858.

PETER ANDERSON, *Appellant*, *v.* AGNES ANDERSON or GILL, *Respondent.*

Holograph Writing—Proof—Onus—Testament—Act of Sederunt, 10th July 1839, c. 7, §§ 32, 83—Witness, impeaching credit of—Res Noviter Veniens—Producing document.

HELD (affirming judgment), (1) *That where a party claiming in the Commissary Court to be decerned and confirmed executor nominate of a deceased, in respect of a will, alleged but denied to be holograph of the deceased, the* onus *of proving that it is holograph lies on the proponer of the document, and that the mere production of it in process is not enough to throw the* onus *on the objector to shew the contrary;* (2) *that where a writing in the power of a party was not produced in the Commissary Court, before the record was closed, nor in the Court of Session after advocation, it was incompetent thereafter as evidence in the cause; and* (3) *that where a witness had been examined* in initialibus, (*and afterwards* in causâ,) *and her admissibility was objected to on the ground of partiality for the party adducing the witness, of having received a consideration for giving evidence, and of being unworthy of credit generally, and where reprobatory proof was adduced to disqualify the witness, it was incompetent to ask the reprobatory witnesses whether the witness objected to had spoken, subsequent to being examined* in causâ, *as if influenced by malice, on the ground that it did not fall within the scope of the initial examination, and because the witness had not been examined upon such a matter.*

Judicature Act—Inferior Court—Finding facts—1 Geo. IV. c. 120, § 40. *When a cause is advocated to the Court of Session, the Court need only in the interlocutor find such facts proved as they give judgment upon and do not require to repeat all the other findings of fact.*[1]

The late Alexander Anderson, farmer at Auchmill, in Aberdeenshire, died on 24th November 1845. The appellant, a cousin of the deceased, having claimed to be confirmed to the deceased, as executor nominate, in respect of an alleged testamentary letter in his favour, the deceased's sisters objected, that the letter was not written by the deceased, but that it was a forgery, and raised an edict to have themselves decerned executors *qua* nearest of kin. The two processes having been conjoined, a proof was allowed.

The testamentary letter, which was written in a very tremulous hand, and irregular manner, was as follows:—

"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 sound 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 affectionly.

"ALEXR. ANDERSON."

It appeared, that the deceased had, from illness, been laid up for some weeks before his death, the disease being water in the chest; and that, for about a month previously, the claimant resided at Auchmill, and attended on him. The deceased was unaccustomed to writing, and, from extreme weakness, would have taken half an hour to copy the letter above quoted. There was no evidence, that he ever spoke of making a will; on the contrary, various witnesses deponed, that though they had often urged on him the propriety of doing so, he had always declined, on the ground that he expected to recover; and, in fact, it appeared that, though aware that he was in great danger, he did not anticipate a fatal result.

The appellant led evidence to shew, that the deceased was on bad terms with his sisters, having frequently used expressions to the effect, that he would leave them nothing, while he was fond of, and had particular confidence in, the claimant. Contradictory evidence on both these points was led by the respondents. Witnesses, more or less acquainted with the deceased's handwriting, were examined on both sides, as to the genuineness of the writing of the testamentary letter, and also, on the part of the objectors, an engraver and a writing master; and a great number of signatures and writs, admitted to be in the genuine writing of the deceased, were put in process.

[1] S. C. 3 Macq. Ap. 180: 30 Sc. Jur. 497.

It appeared that the testamentary letter was found in a bedroom press referred to by Barbara Sim, and the minute of parties at opening the repositories, drawn up by Mr. Grant, who had acted for the claimant at the sealing thereof, bore that, after opening and examining the papers in the parlour press—"the whole parties proceeded to open the small press in the bedroom where the deceased died, and there was found—A letter addressed to 'Mr. Peter Anderson, residing with me at Auchmill,' dated the 13th November current, bearing to be signed by the deceased, and purporting to be his last will and testament, and by which he appoints the said Peter Anderson his sole executor and residuary legatee; and a number of other papers and documents, apparently of no material consequence, were then put into a press in the room, and locked up: and the said William Grant, as agent for the said Peter Anderson, and as specially authorized by him, in presence of the whole friends, and the said James Rose, as justice of peace, took possession of the whole of the above vouchers, cash," &c.

Evidence was led by the claimant in replication of Barbara Sim's statement, that she had not been out of the deceased's presence for any considerable time on the 13th November. Reprobatory proof was also led against her; but certain questions on the part of the claimant were objected to, and the objection being sustained by the commissioner, (and subsequently by the commissary,) the answers were sealed up.

The commissary depute found it not proved, that the letter was holograph, and found that the signature was not in the handwriting of deceased.

This judgment having been adhered to, the claimant advocated.

After the record had been closed, and during the progress of the proof, the appellant tendered in evidence an alleged draft of a will, said to have been prepared by an agent in Banff on the suggestion of a friend of the deceased; and which, it was averred, had been used by the deceased as a model for the testamentary letter founded on. The draft, it was admitted, had been returned to the man of business who had prepared it; and who, though not the usual agent of the claimant, had advised him in the litigation; and it was in his hands at the time of proof being allowed. The Sheriff, as commissary, rejected the document.

When the witness Barbara Sim was adduced for the respondents, she was examined *in initialibus* by the appellant, who objected to her admissibility as a witness, on the ground of partiality for the respondents, of having been promised a consideration for giving her evidence (a suit of clothes), and also, generally, of being unworthy of credit; and the appellant further protested for reprobator. The witness was, however, received and examined *in causâ*, and, thereafter, the appellant adduced several witnesses in support of his reprobatory proof (which had been allowed by the Sheriff), in order to disqualify the witness. In examining a reprobatory witness, the appellant proposed to ask him, whether Sim had not, subsequent to her examination *in causâ*, been heard to express herself as if influenced by malice against the appellant; but this course of examination was objected to by the respondents, both because no questions to bring out malice had been put to the witness himself when examined, and because it did not fall within the scope of the initial examination; and that in this way the defender had had no notice of such a line of examination being intended to be followed. The Sheriff disallowed the examination, and his deliverance was affirmed by the Court of Session.

The Court pronounced the following interlocutor:—"The Lords 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."

The appellant appealed against the judgments of the Court of Session, maintaining in his *printed case* that they should be reversed.—"1. Because the judgments under review proceeded upon an error in point of law in holding, that the *onus probandi* lay upon him. 2. Because, by the judgments under review, the Court erroneously rejected parole testimony tendered for the appellant, to disqualify the witness Sim, which would have had an important influence on the result of the cause. 3. Because, by these judgments, the Court erroneously prevented the appellant from using an important writing in the course of leading his evidence."

The respondents in their *printed case* supported the judgments upon the following reasons:—"1. Because the judgment of the First Division has the force and effect of a special verdict, conclusively fixing that the testamentary letter founded on by the appellant is not the genuine handwriting of the deceased Alexander Anderson. The 40th section of the Judicature Act, 6 Geo. IV. c. 120, 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.' 2. Because the appellant is not entitled, on the facts found, to be decerned or confirmed executor of the deceased Alexander Anderson."

A. Mure, for the appellant.—The interlocutors of the Court below are erroneous. The interlocutor of the Inner House does not sufficiently state the points of fact and of law found as required by the 6 Geo. IV. c. 120, § 40. It is not stated on what grounds it proceeds, and there are no special findings, but a mere adhering to the prior interlocutor.—*Wemyss* v. *Wilson*, 6 Bell's Ap. 394; *Kilgour* v. *Brown*, 14 D. 441.

[LORD CRANWORTH.—We had two years ago a case of *Fleming* v. *Orr*, 2 Macq. Ap. 14; 27 Sc. Jur. 366; *ante*, p. 496. The facts were, it is true, not stated in the interlocutor of the Lord Ordinary, because that interlocutor stated—"Repeat the findings in the interlocutor of the Sheriff." So long as the facts found can be discovered *in* the interlocutor, it is thought to be enough. But here the fact is clearly stated, "find this is not the genuine writing," &c. It is not necessary to state all the facts, but only those that are material.]

The interlocutor is wrong in point of law, because the *onus* of proving the will was improperly thrown upon us. We produced a writing which we proved to be in the same handwriting, both as to the body and the signature. We were not called upon to do anything more, and it lay on those who alleged a forgery to prove it.

[LORD CHANCELLOR.—Do you contend that it is enough for you, by producing a document, and alleging it to be in one's handwriting, to have it held to be the holograph of the party, until it is proved to the contrary?]

Yes, that seems to be the result of the authorities in the law of Scotland. A holograph instrument requires no witnesses to prove it. It is a probative document, and it can only be set aside by a reduction improbation, or in some cases, forgery may be raised by way of exception, and then articles approbatory and improbatory are gone into. A document all in one handwriting is on the same footing as an attested deed.—1 Bell's Com. 324 (5th ed.), 52 (6th ed.).

[*Anderson* Q.C., for respondents.—Mr. Bell says, it is essential that there should be a clause, purporting that the document is in the hand of the granter.]

That is not an essential part of a holograph instrument. Ersk. iii. 2, 22, says, though such clause is wanting, the writing may be proved by comparing the handwriting of the various parts of the document.

[LORD CHANCELLOR.—No; *comparatio literarum* means comparing the handwriting of the disputed document with the handwriting of the documents already in evidence, and admitted to be genuine.]

There is an express authority, that of Lord Jeffrey in *Turnbull* v. *Doods*, 6 D. 896, who says, "When once the user of a writ by *primâ facie* proof makes out, that the body of the writing is the same with the signature, he has done enough to prove that it is holograph." That case is identical with this in its circumstances.

[LORD CHANCELLOR.—No; for there the body of the writing was admitted, or at least clearly proved to be in the testator's handwriting, and the only dispute was as to the signature; and Lord Jeffrey says at the outset, that the *onus* is on the user to prove it holograph.]

It seems to follow from Stair, 4, 42, 6, that a holograph instrument means merely what is written by one hand; and it is accordingly assumed in *Robertson* v. *Lord Ogilvy's Trustees*, 7 D. 236; *Reid* v. *Kedder*, 1 Rob. Ap. 184; *Yeat's Trustees*, 11 S. 915; *Waddell* v. *Waddell's Trustees*, 7 D. 605; that it is enough to produce such a document in order to throw the *onus* of reduction on the other party. The ordinary rule of law is, that the party who alleges forgery must prove it.

[LORD CHANCELLOR.—You proceed on the assumption, that here you have produced a holograph instrument of the deceased, whereas the utmost that can be said of it is, that it is holograph of somebody. All deeds and documents are generally holograph of somebody.]

Then the interlocutor is wrong, because the Judge rejected the evidence of the draft letter, which, the appellant was ready to prove, served as the model from which the testator copied the original, and which accounted for certain peculiarities in the handwriting. It was rejected because it had all along been in our custody and was not produced before the closing of the record. The Act of Sederunt, (Sheriff Court, 10th July 1839, § 51,) however, did not apply to circumstances like the present, where the necessity of the evidence arose out of what took place in course of the proof. It was a necessity we could not have foreseen, and justice and fair dealing required that this draft document should be admitted, even after the record was closed. It has been done in many cases not so strong.—*Hamilton* v. *Cuthill*, 7 S. 21; *A.* v. *B.* 6 S. 571; *Swinton* v. *Taylor*, 10 S. 298; *Irvine* v. *Davidson*, 19 D. 284.

[*Anderson*, contra, referred to *Wright* v. *Bell*, 15 S. 242.]

The Act of Sederunt did not in fact regulate the procedure of the Commissary Court, and it

ought not to stand in our way. The Sheriff Court and the Commissary Court are distinct. 4 Geo. IV. c. 97, § 1; 11 Geo. IV. c. 69, § 31.

[LORD CHANCELLOR.—This point was not raised in the Court below, and I think we cannot go into it.]

Then, lastly, the Court below was wrong in refusing reprobatory proof of Barbara Sim's partiality. A protest for reprobators is not confined, as the Court below held, to matters in which the witness was examined *in initialibus;* but even if it was, our protest against her credibility impliedly involved this objection. Here it was quite impossible she could have been examined *in initialibus*, for the ground arose out of what she stated subsequently to her giving evidence.—*King* v. *King*, 4 D. 124; Stair, 4, 43, 11; Ersk. 4, 2, 29; *Glass* v. *Christison*, 15th May 1819, F.C. On one or other of the above grounds the interl cutors should be reversed, and a new trial ordered.

Anderson Q.C., and *Mundell*, for the respondents, were not called upon.

LORD CHANCELLOR CHELMSFORD.—My Lords, this is an appeal against an interlocutor of the First Division of the Court of Session, finding 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 finding, "in point of law, that the said Peter Anderson is not entitled to be decerned or confirmed as executor of the said Alexander Anderson; and, therefore, refusing the prayer of the reclaiming note, and adhering to the interlocutor of the Lord Ordinary reclaimed against." An appeal has also been taken against the interlocutor of the Lord Ordinary and various interlocutors of the inferior Courts, which were adhered to by the Court of Session.

The proceedings in this case were commenced in the Commissary Court of Aberdeen, for the purpose of obtaining confirmation or probate of a letter, dated the 13th of November 1845, alleged to be the holograph will of Alexander Anderson, appointing the appellant sole executor and universal legatory, and bequeathing to him the whole of his moveable estate, under burden of the payment of debts. The respondents, the next of kin of Alexander Anderson, objected to the appellant being confirmed as the executor, on the ground that the letter was not the writing of the deceased, but was a forgery.

The pleas in the answer by Peter Anderson the appellant, were, that the testamentary writing produced by the claimant being holograph of the testator is a probative writ, and cannot be impugned by way of exception in this Court; and the claimant, as the sole executor and universal legatory of the defunct, in virtue of the document, is entitled to obtain confirmation of his estate.

The Commissary depute, by his interlocutor, "found it was not proved, that the testamentary letter or writing founded on by the claimant, Peter Anderson, is holograph of the deceased Alexander Anderson;" and he found also, "that the subscription (Alexander Anderson) thereat is not in the handwriting of the said deceased Alexander Anderson."

The appellant, upon this, presented a note of advocation to the Court of Session for review of this interlocutor, and the Lord Ordinary found 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*." And upon appeal to the Inner House, the First Division of the Court of Session "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."

The appellant's counsel admitted, that, in appealing against the interlocutors, he is precluded from questioning them so far as relates to the facts, by the 40th section of the 6 Geo. IV. chapter 120, "An act for the better regulating of the forms of process in the Courts of Law in Scotland." 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 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. With respect to the first objection, it appears to me to be a great deal too critical. If the Court of Session have found that the letter is not the genuine writing of deceased, 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 they 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.

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 Court's having laid the *onus probandi*, not on the respondents, but on the appellant; the second is founded upon the rejection of written evidence; and the third upon the rejection of parole 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 that he has thereby thrown upon the respondents the burden of shewing 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 Commissary, 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; but, on examining the passages of the institutional writers and authorities referred to in the argument, I see no ground for the conclusion, that the burden of proof was improperly thrown by the Judges upon the appellant in this case.

The appellant came before the Sheriff, as 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 shew, 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, for that would be scarcely half of the requisite proof. The essential part, without which all the rest is irrelevant, is to shew, that the document is in the handwriting of the deceased, whose hand it bears to be in, or, in the words of the appellant's own plea, "that it is holograph of the testator." That was the unanimous opinion of the Judges of the First Division, as well as 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 shew, by *primâ facie* evidence, 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 shew, 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 by the appellants in answer to a claim by the respondent to be appointed and confirmed executor *qua* nearest of kin. Notwithstanding that the writing was alleged to be holograph, the person propounding it gave a large amount of evidence to shew 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 this case.

The case of *Turnbull* v. *Doods*, is, in my mind, no authority for the position, that the party propounding a testamentary instrument has done enough by shewing it to be all in one handwriting, to throw upon the party opposing 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 shew, had been used as a model by the deceased in writing out this testamentary letter. The ground of rejection of that document was, that it had all along been in the possession of Peter Anderson, 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 be 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 was meant to apply in the way that is contended for by the appellant's counsel, viz., 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, 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 *Irvine* 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 cases which were cited on the part of the appellant.

But then the question arises, 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 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 by the respondents, that they proposed, amongst other things, to produce per inventory, several documents, some of which are probative in their form, (all bearing genuine signatures of the deceased,) that comparison might be instituted with the pretended signature attributed to the paper founded on by Peter Anderson, and with the body of that paper. Therefore, the claimant perfectly well knew that the question of comparison of handwriting was one which was not only likely to arise in the course of the cause, but that it was likely to be the question upon which the case might eventually turn. 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, I consider that it was inadmissible as evidence when produced subsequently, and therefore that the interlocutor rejecting it is perfectly correct.

There only remains, then, the consideration of the rejection of the evidence reprobatory of the testimony which was given by Barbara Sim. Now, as I understand the case, the appellant was permitted to give in reprobatory proof, and which proof was originally confined to the evidence which had been given by Barbara Sim; but that afterwards a replication was admitted, and upon that replication evidence was taken on the part of the appellant, and an attempt was made to destroy the testimony of Barbara Sim, by shewing that she was partial to the side of the objectors, (the respondents in this case,) which I, at the same time, may say entirely failed. What the appellant proposed to do was to shew, 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 had 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 shewing that the testimony of Barbara Sim was inadmissible upon the ground of 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 the authority of the Court to allow that evidence to be produced; and there being no such authority, I think there is no ground whatever to shew that that evidence was admissible under the circumstances of the case; and, therefore, I am clearly of opinion that the Judges came to a right conclusion in excluding the evidence. Therefore it appears to me that, upon the only three points of law which can be raised on the

part of the appellant, there is no reason for being dissatisfied with the judgment which has been pronounced; and I recommend your Lordships that the judgment should be affirmed.

LORD CRANWORTH.—My Lords, I have very little to add to what has been said by my noble and learned friend on the woolsack. This is one of those unfortunate cases, of which we have had unhappily too many coming from the north of the Tweed, in which enormous expense is incurred with very little object indeed. In this case, I regret to say that the burden, that is imposed by the litigation, is thrown upon innocent parties, because, if I understand the matter rightly, this is a pauper cause, and it is a matter of deep regret that by fruitless litigation of this kind, the parties, who are compelled to resist, 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 the burden of proof was improperly thrown upon the person who produced this testamentary letter. Now, my Lords, the proposition is very startling indeed, 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 it is not the writing of the testator, the burden of proof is to be transferred from those who are propounding the document to those who resist 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. I must say that, upon general principles, it would be the duty of this House, unless there be 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; namely, that, if a man produces an instrument, and says, "This is a will," which is to deprive the next of kin of that to which they would otherwise be entitled, and if that is disputed, you are to call upon him to prove that instrument. I have no hesitation in saying, that in the absence of express enactment or distinct authority, this 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 been; but, if it has not been their practice, I should say that, on general principles of common sense that would be applicable to the law, their practice has been wrong, and to that test of common sense, in my opinion, the practice ought to be brought.

That being so, 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 last few years, more than once to consider this point, and your Lordships thought in a case which was alluded to, (*Fleming* v. *Orr*,) that though the facts were not stated *singulatim* one after the other; yet if, looking at the record, you could see what the facts were which were considered as established, your Lordships would hold that to be perfectly sufficient. But here I do not think we have any necessity 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, "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 deceased Alexander Anderson." It seems to me that is the clearest finding that could possibly be suggested, that the person whose duty it was to establish that the document was a holograph writing of the deceased, in point of fact, had not established that fact, and that, in point of law, he was not, as such person proving the document, entitled to be confirmed as executor. It seems to me, that that is exactly what the statute meant and required to be done, and that that has been completely done.

But then there are two points which this party has grasped at as a sort of *tabula 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 shew, that there has been some evidence improperly rejected. The first is this—the claimant propounding the will propounded it, not as something which became necessary in consequence of the evidence afterwards offered, but propounded, in the first instance, another document—(I suppose of somewhat prior date, for we do not know what the document was)—in order to shew that, looking at that instrument, 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 a 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 this is something emanating from the 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, viz., the Sheriff in both.

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 Sheriff Court, the Commissary Court was one of those Sheriff 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 such a document as this. My Lords, that is the only part of the case upon which I have entertained any doubt. But although I do not think it so clear as the rest of the case, yet, I think, that upon technical points 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. She was tendered as a witness, and upon being tendered she was examined *in initialibus;* and the claimant objected to her admissibility as a witness upon the grounds of partiality for the adducers, and of having been promised a consideration sufficient to give her an interest in the case, (a suit of clothes, or something of that sort, I think it was,) 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 her 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 anything in the terms of his protest; but which, Mr. Mure 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 was a matter entirely out of the view of the protester at the time he made his protest; and that if he wanted to exhibit interrogatories improbatory 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 that, 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 think, therefore, that upon that ground your Lordships are not bound to interfere with the judgment of the Court below. 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.

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, which was pronounced on 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 decerned 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 that it is equally clear, that they were right in adhering to the interlocutor of the Lord Ordinary upon the secondary part of this case, which involve trifling matters as compared with the other.

With respect to the first question, there is a paper purporting upon the face of it to be holograph, propounded as the will of the testator. It is contended that, if any person sets up a case of forgery against an alleged holograph writing, he is bound to prove the 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 of England, it being laid down in several cases, and perfectly well established, that a person who propounds a will which is to take away an estate from the next of kin, or, if it is at common law, from the heir at law, must prove that it is an instrument properly 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, when it is disputed, to establish that fact; and if it becomes a question of doubt afterwards, and he does not establish the fact, he must fail in the proof of the will. This is laid down in the case of *Barry* v. *Butlin*, 2 Moore's Pr. C. R. 480; and in a very late decision in the Court of Common Pleas,[1] it was held, that the learned Judge was mistaken in directing the jury, that if the testator was not insane, it must be taken that the will was valid, because the burden of proving the sanity lay upon the person who propounded the will. 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

[1] His Lordship seemed to be referring to *Sutton* v. *Sadler*, 3 C.B. N.S. 87.

consideration, and if they were not satisfied that the will was the will of a perfectly free and capable testator, the heir at law must prevail, and the party claiming under the will must have a verdict against him; and I apprehend that is quite consistent with common sense and reason, and that it ought to be the law in Scotland, and I should feel rather surprised to learn that it is not the law of Scotland.

It is contended that, in this case, the plea of forgery ought to be proved on the part of the persons contending against the will, the respondents in this case. Now, that certainly is not so according to the case 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 it is the handwriting of the testator. That was the unanimous opinion of the Court of Session.

Then reliance was placed upon the judgment of Lord Jeffrey in *Turnbull* v. *Doods*. That is undoubtedly entitled to the greatest weight. Now, let us see whether the quotation from the judgment of Lord Jeffrey supports the argument which has been 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 shewing 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 that 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 shewing, 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 cannot, and 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 attested deeds, and subscribed by witnesses. Therefore 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 the will of the testator. I think upon that matter the Courts were perfectly right. We have nothing to do with their opinion upon the merits of the case; upon those their finding is conclusive. I think that they have put the *onus probandi* upon the proper party. The meaning of the *onus probandi* is this: that if the party upon whom the *onus probandi* is thrown does not disprove the plea of the other side, or prove the instrument which he pleads against the other side, the verdict must be against him. That is the effect of the *onus probandi* in all cases of this kind. It is different in the case of a plea of confession and avoidance. But, in the case of a will, unless evidence is given by the side on whom the *onus probandi* is thrown, the other party must prevail. Therefore, in this case, evidence must be given that this will was in the handwriting of the testator, or the party must fail.

I am of opinion, therefore, that, in this case, there is no ground of objection at all upon the main point, that the *onus probandi* was thrown upon the wrong party. With respect to the other two grounds of objection, I think a sufficient answer has been given. With respect to the first of them, I think 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 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 Court as to the Sheriff Court. The interlocutor, upon that part of the case, puts it on a perfectly distinct and 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 it 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 on that in the course of the proceedings.

Then, with regard to the third objection, I think it is hardly necessary to say anything more upon that subject. 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 objection. The appellant objected to the admissibility of the witnesses upon the grounds of partiality for the adducers, 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, and he offered to prove these objections, and protested for reprobator accordingly.

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 of the witness being generally unworthy of credit, for that does not allow you to give evidence as to particular instances of the witness having told falsehoods. It only allows you to give evidence as to the general character of the witness. It turns out upon the evidence 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. It seems to me, therefore, that the Judges were perfectly right in this case in considering that, as the record stood in the 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 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 as 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, because this will is not averred to be, upon the face of it, in the testator's own handwriting.

Interlocutors affirmed.

William Miller, S.S.C., *Appellant's Agent.* — Gibson-Craig, Dalziel, and Brodie, W.S., *Respondents' Agents.*

MAY 11, 1858.

THE MAGISTRATES and TOWN COUNCIL of DUNDEE, *Appellants*, *v.* JOHN MORRIS and Others, *Respondents.*

Testaments — Holograph — Charity — Presumption — Revocation — Vitiation — Deleted Words — Legacy void for uncertainty.

HELD (reversing judgment), *in reference to holograph writings found in the repositories of a deceased, expressive of his wishes to establish an hospital in Dundee for boys, that they were of a testamentary nature and effective to carry out his intentions, and that though the writings contained deletions apparently of an important nature as if recalling his wishes in regard to the hospital, such deletions had been made not* ex propositu, *but accidentally, and, accordingly, that they were to be disregarded, and effect given to the intentions as indicated by the writings, and a remit made to the Court of Session to frame a scheme for the establishment of the hospital.*