

regulated by law and not by contract or by testament. If it is to have any other meaning it must be by special direction given.

The question in this case is, do the terms of the deed cause the words "heirs *in mobilibus*" to mean a different class of heirs from those who are heirs *in mobilibus* by law. The facts are these—George Sharp was one of the persons favoured by Mr Haldane's will. He died after receiving the benefit of his share in the discretion of the trustees, and there remained in their hands at his death a sum of about £830. He left a settlement disposing of his estate, and there is now a competition between his legal heirs and those to whom he has left his estate for the sum in the hands of Haldane's trustees.

My opinion is, that Mr Haldane having expressly and effectually excluded vesting in Mr Sharp, and debarred him from testing, the sum in question is disposed of by the destination in Mr Haldane's settlement, and that Mr Sharp had no power to dispose of it. Accordingly it must go to those who according to the construction to be given to the words heirs *in mobilibus* in Haldane's settlement are entitled to succeed to it. These words as here used are in my opinion to be read in their ordinary sense as meaning those heirs who would succeed by law to Mr Sharp's moveables, unless these moveables were removed from the operation of law competently. Mr Sharp had no power so to remove the moveables which Mr Haldane left for his benefit, and therefore it is to Mr Sharp's heirs *at intestato* that this fund must go under the destination in Haldane's settlement.

I would therefore move your Lordships to answer the first and third questions in the negative, and the second in the affirmative.

LORD LEE—By the terms of the settlement Mr Haldane's trustees were directed "to hold and retain, or pay, invest, or apply in manner after mentioned" for behoof of the whole brothers and sisters of his mother, equally among them, the residue of his estate. But this direction was subject to a declaration that no right should be held to have vested in them or any of them, "so as to give such residuary legatee power to assign his or her share under these presents, nor shall the same be assignable or arrestable or affectable by diligence," &c. . . . "the said provisions being intended by me as purely alimentary, and not alienable by the legatee's acts or deeds." Further, the trustees are given the most absolute discretion as to the disposal of the shares for behoof of the residuary legatees, and the mode of applying both income and capital, and it was provided that "in the event of any residue or portion of the capital or of the income arising therefrom of the share of any of my residuary legatees remaining in my trustees' hands at the period of the death of the recipients thereof, then my trustees shall be bound to account for and pay over the same to such deceased legatee's heirs *in mobilibus*."

George Sharp, one of the brothers who

survived Mr Haldane, died in 1886, and there was then in the hands of the trustees a residue of his share amounting, with interest, to £831, 2s. 4d. He died unmarried and without issue, but leaving a settlement, and the question is, whether this unexpended balance is carried by his settlement to his trustees, or is carried by the above destination to his heirs *in mobilibus* according to the law of intestate succession?

My opinion is, that vesting being expressly excluded, the heirs *in mobilibus* of George Sharp must take under Mr Haldane's destination, and that these heirs, according to a sound construction of the term as used in this deed, are the heirs provided by the law of intestate succession, and not the heirs named or appointed by George Sharp.

It is unnecessary to go over the authorities. The cases which I think rule this are *Graham v. Hope*, M. App. Legacy, No. 3; *Bell v. Cheape*, 7 D. 614; *Maxwell*, 3 Macph. 318; and *Cockburn's Trustees*, 2 Macph. 1185.

The case of *Manson*, 1 R. 371, is plainly distinguishable as the case of a marriage-contract provision held by the spouses in conjunct fee and liferent.

How the case would have stood if the destination had been to "heirs and representatives whatsoever" it is unnecessary to consider. The expression is "heirs *in mobilibus*," and there is no authority for construing that as including in a case where no right had vested executors-nominate.

LORD KYLLACHY—I have had an opportunity of reading Lord Lee's opinion, and I concur in the judgment proposed.

The Court pronounced this interlocutor:—

"Answer the first and third of the questions therein stated in the negative, and the second in the affirmative: Find and declare accordingly, and decern."

Counsel for the First Party—J. A. Reid—Craigie. Agents—Philip, Laing, & Company, S.S.C.

Counsel for the Second Party—Dewar. Agent—William White, S.S.C.

Saturday, January 11.

FIRST DIVISION.

[Commissariat of Edinburgh.

CRANSTON AND ANOTHER,
PETITIONERS.

Process — Commissary Court — Executor Nominate — Confirmation — Holograph Writ.

There was found in the repositories of a deceased a holograph settlement extending to nine pages written on three sheets of paper bookwise, and unstitched, but expressly bearing to be written by the grantor. The document was duly dated, but was signed upon the last page only. Held, following the

established practice, and in the absence of any competition, that the executors-nominate were entitled to confirmation *de plano* upon production of the holograph writ, and an interlocutor of the Sheriff Commissary allowing proof recalled.

Observations (per the Lord President) upon the practice in cases where confirmation is opposed.

John Adair, hotel-keeper, died at Edinburgh on 12th November 1889. In the deceased's repositories a closed envelope was found docketted in the deceased's handwriting, "Will, Trust-Disposition, and Settlement by John Adair in favour of Robert Cranston junr., and David Lewis, trustees and executors, October 1873 years." On the said envelope being opened there was found a holograph settlement of nine pages written on three sheets of paper bookwise, and unstitched, all in deceased's handwriting, and bearing to be "written upon this and the eight preceding pages by my own hand, are subscribed by me at Edinburgh upon the fourteenth of October One thousand eight hundred and seventy-three years." The said settlement was signed only on the last page. Besides being appointed trustees the said Robert Cranston and David Lewis were nominated by the deceased his sole executors. There were also found in the deceased's repositories two codicils holograph of and signed by the deceased, dated respectively 1st April 1875 and 24th October 1876, both of which referred to the trust-disposition and settlement, and gave directions to his trustees as to the division of his estate.

The said Robert Cranston and David Lewis presented a petition in the Commissary Court at Edinburgh praying for confirmation as executors-nominate of the deceased John Adair.

The petitioners prepared an inventory of the personal estate of the deceased with relative oath, which they produced along with the settlement and relative codicils, and they averred that the validity of the settlement, as signed on the last page only, fell to be determined by the rules applicable by the law of Scotland to holograph writings.

On 2nd December 1889 the Sheriff-Substitute (RUTHERFURD) before answer allowed the petitioners a proof of their averments.

The petitioners appealed to the Court of Session, and argued—The proof ordered by the Commissary was unnecessary, and it was in opposition to the practice of the Commissary Court in similar cases. The deed bore to be holograph, and in such cases it was unnecessary to prove the handwriting. It was *prima facie* valid and good, and it proved itself unless it was cut down—*Gill v. Anderson*, July 20, 1858, 20 D. 1326. There the deed did not bear to be holograph; in the present case it did—*Roths*, 1636, M. 12,605; Ersk. iii. 2, 25. Confirmation was granted in the case of probative deeds, but a holograph deed was viewed as probative, therefore confirmation should be granted in the present case.

If a deed bore to be holograph, it was presumed to be genuine. The Commissary was bound to grant confirmation where there was no contradictor. The circumstance that the deed was only signed on the last page did not invalidate it—*M'Laren v. Menzies*, July 20, 1876, 3 R. 1151; *Gillespie v. Donaldson's Trustees*, December 21, 1831, 10 S. 174; *Spicers v. Home Spicers*, July 19, 1879, 6 R. 1359.

At advising—

LORD PRESIDENT—The appellants presented this petition to the Commissary Court praying that warrant should be granted to the Commissary Clerk to issue confirmation in their favour as executors-nominate of the deceased John Adair.

The nomination of executors was contained in a will which is thus described in the concordance appended to the petition—"In the deceased's repositories a closed envelope was found docketted in the deceased's handwriting, 'Will, Trust-Disposition, and Settlement by John Adair in favour of Robert Cranston junior, and David Lewis, trustees and executors, October 1873 years.' On the said envelope being opened there was found a holograph settlement of nine pages, written on three sheets of paper bookwise, and unstitched, all in deceased's handwriting, and bearing to be written upon this and the eight preceding pages by my own hand, are subscribed by me at Edinburgh upon the fourteenth of October one thousand eight hundred and seventy-three years." This settlement was signed only on the last page, and upon the eighth page the two petitioners who in an earlier part of the deed had been named trustees were appointed sole executors. There were also found in the deceased's repositories two codicils, holograph of and signed by the deceased, dated respectively 1st April 1875 and 24th October 1876, both of which referred to the settlement, and gave directions to the trustees as to the division of his estate.

On these statements and on the production of these writings the petitioners contend that they are entitled *de plano* to be confirmed executors of the deceased, and as I understand, and I have no doubt that it is so, the Commissary would have at once confirmed them but for the peculiarity that the settlement is, as stated, written on three separate sheets of paper extending to nine pages, and that the signature of the deceased is to be found only on the last page. It was in this state of matters that the Sheriff-Substitute allowed the petitioners before answer a proof of their averments, and it is against his interlocutor that this appeal has been taken.

Now, if it were to be held as proved or to be presumed that the document founded on is the veritable and genuine writing of the deceased, then I confess I should have no difficulty as regards the point which seems to have occurred to the Sheriff-Substitute, because I think it would be difficult, since the cases of *Speirs*, *M'Laren*, and others of that class, to doubt

that the three sheets of paper, although not stitched together, and signed only upon the last page by the testator, would receive effect if proved to be his genuine writ.

But the point remains, whether, supposing the difficulty of the Sheriff-Substitute to be got over, this allowance of proof is to be recalled. It is urged that it should be because of the inveterate practice in the Commissary Court to grant confirmation on the mere production of what bears to be the holograph will of the deceased. The presumption upon which the practice is founded is thus stated by Erskine (iii., 2, 22)—“Holograph writings ought regularly to mention that they are written by the granter, in which case they are presumed holograph unless the contrary be proved.” Now, that is a very broad and unqualified statement, and it appears from the authority which Erskine quotes in support of it, and which is a judgment pronounced in the seventeenth century, that it must have been the recognised doctrine, and must have been in practice long before his time. It is also a practice which has the authority of some writers upon the practice of the Commissary Court of considerable weight, and is sanctioned by Professor Montgomery Bell in his Lectures, and by Mr Dickson in his book upon the Law of Evidence. If, then, the practice be established and be inveterate, it is not to be lightly disturbed.

At the same time, it must be kept in view that in contested questions it will not be sufficient for the person seeking to be appointed executor to produce a document which is apparently all in one handwriting and which bears the signature of the writer. It is essential that it should be proved to be entirely in the handwriting of the testator. This is an established doctrine as appears from the judgment of the Lord Chancellor in the case of *Gill v. Anderson*. To shift the *onus probandi*, and cast it on those who dispute the genuineness and authenticity of the document, it is not enough to show that it is a holograph instrument, meaning thereby an instrument all written in one hand. It must be proved that the document is holograph of the deceased. Now, if I thought the existing practice were inconsistent with this doctrine, I should hesitate to allow it to continue. But if I rightly understand the practice it only amounts to this, that where a document of the kind is produced and there is no challenge on the part of anyone comparing to oppose confirmation, the mention in the deed that it is written by the granter himself creates a presumption which is sufficient to entitle the Commissary to grant confirmation. In the case of *Anderson v. Gill* there was a competition. The deed in that case bore to be in favour of a stranger and the next-of-kin asked to be confirmed, and challenged the genuineness of the document, and in the end it was reduced on the ground of forgery. There can be no doubt that a party appearing to oppose confirmation in opposition to the executor-nominate is entitled to challenge, and if he does so then the doctrine of

Anderson v. Gill will apply. But in the absence of such challenge the practice is that there is a presumption in favour of the genuineness of the document from the circumstances that the writer says that it is written in his own hand, which is sufficient to justify the Commissary in granting confirmation without proof.

In these circumstances I am not inclined to interfere with the existing practice. Whether it is logically consistent with the doctrine established as to the necessity of proving the genuineness of such an instrument, it is doubtful. If I were establishing a rule for the first time I should perhaps not sanction the practice as it at present exists. The rules applicable to such a document will remain undisturbed where a contradictor appears and challenges its authenticity. It may be said that the rule is not a very safe one, because executors-nominate are entitled to enter on possession of the estate without finding caution. But, on the other hand, it must be kept in mind that where there is a nomination of executors there are always possible contradictors (unless the executors-nominate are also next-of-kin), and they may always appear and protect themselves against a rash and sudden confirmation by lodging a *caveat*.

On the whole matter, I am inclined to think that we should allow the existing practice to remain undisturbed; and the result is that we must recal the allowance of proof, which is unnecessary for the purpose for which it was granted, and which is not in accordance with the practice which I have stated.

LORD SHAND—I agree in thinking that the Court ought to alter the judgment of the Sheriff-Substitute and grant decree of confirmation as craved. I also entirely agree with your Lordship's observations, which result, I think, in this, that while there are no doubt considerations which suggest a serious question whether the practice which has been for so long a period followed of granting confirmations in respect of writings bearing to be holograph of the testator without any evidence that they really are so ought ever to have been introduced, yet looking to the length of time during which the practice has existed, it ought not to be lightly disturbed.

If the Court were, by Act of Sederunt or otherwise, about to introduce a practice for the first time, or to sanction a comparatively recent practice, I think it would be well worthy of consideration whether, even if the deed should bear to be written by the party signing it, some extrinsic evidence should not be required with the view of showing that the deed is truly in the handwriting of the testator. I agree, however, that looking to the long period during which the practice has existed of treating such writings as being *prima facie* holograph, so as to be sufficient ground for confirmation, as well as to the fact that no mischief seems to have resulted from the practice, it is not desirable to refuse to sanction it.

Of course there is this distinction in the

case of confirmation granted in respect of a holograph writing, or a writing bearing to be holograph, and one complying with all the solemnities of the law, that the latter class of writings are to all effects probative by statutory enactment. In their execution there has been an observance of all the solemnities required by the law to give a deed the character of a probative document. Deeds of that character are in all respects effectual, and will be enforced and acted on in courts of justice until set aside by reduction as false in the narration of the solemnities observed, or challenged on the ground of forgery. Now, take the case, in the first instance, of a writing not bearing to be holograph of the writer—I think that before such a document can be held to be entitled to effect in any question of title or of transfer of property it is clear that some evidence is necessary to instruct that it was truly the deed of the alleged grantor—that is, that it is in his handwriting. It is not enough merely to show that the document is all in one handwriting, for, though it be so, there can be no presumption that the handwriting is that of the alleged grantor. There was an extraordinary contention to that effect maintained in the case of *Anderson v. Gill*, but the contention was there treated as quite untenable. Your Lordship has referred to the doctrine which is laid down by the Lord Chancellor in that case. It is to the effect that the mere presentation in Court of a deed as holograph of the alleged grantor because it is all in one handwriting will not entitle it to be *de plano* accepted as holograph. Lord Wensleydale says in the end of his opinion, with reference to the presentment of a will for confirmation, equivalent to probate in England—“He who sets up a will must prove it to be a will executed with all the formalities required by the Scots law either as a holograph will or a will attested by witnesses. Perhaps in the case of a will attested by regular witnesses it may be that the *onus* may lie upon the other side to impugn it; but unquestionably in the case of a holograph will the burden of proof of establishing it as the will of the testator lies upon the party proposing the will.” Now, undoubtedly this *dictum* applies to a will which does not expressly bear *in gremio* to be in the handwriting of the deceased, and, as I have said, it appears to me that according to sound principle proof that the writing is that of the deceased should be required in such cases before confirmation is granted.

There is undoubtedly a difference, according to the authorities, in cases where the deed bears on its face to be written by the testator. But as to such cases it is an obvious remark that nothing can be easier than for a person who makes a writing all under his own hand, intending it to pass as the holograph writing of another, to insert in the writ “all written by myself,” or “all written with my own hand.” It is not easy, I think, to find a good reason for holding that such a statement *in gremio* of the writing should at once create the presumption that the deed is not only all in one

handwriting (which, indeed, may appear clearly enough *ex facie* of the document itself), but also that the document was written by the person who bears to be the grantor. I concur in the observations on this point of Mr Dickson, who states the law thus at section 759 of his treatise on the Law of Evidence—“The general rule of law is that a party who founds on a deed as holograph must prove that it is so. If it set forth its holograph character it is received as probative (or *prima facie* proof) of that fact, which the challenger must bear the burden of disproving. Much reliance is not, however, to be placed on such a statement, which would probably be introduced into a fabricated writing.” It seems to me to be rather *prima facie* proof (if proof it can properly be called) than probative of the fact. The utmost that can be said is that the statement may be held to create a presumption, but cannot give to the writing all the force of a deed which is to all effects probative, as in the case of a writing which complies with all the solemnities required by statute. I should say that while a writing all in one handwriting, and bearing by a statement *in gremio* to be under the hand of the deceased, may be accepted *prima facie* for the purpose of confirmation to be the deed of the deceased, I should demur to saying that that mere circumstance alone would suffice to make the writing to all effects probative if it was challenged by persons denying its authenticity. The Lord Chancellor in *Anderson v. Gill* says, with reference to the claim to the office of executor—“In order to establish his right to be the executor of Alexander Anderson it was necessary for him to show that he had been so appointed by some testamentary writing of the deceased. This could not be done by merely producing a document all in one handwriting, and bearing the signature of Alexander Anderson; this is scarcely half of the required proof; the essential part, that without which all the rest is irrelevant, is to show that it is the handwriting of the deceased, whose name it bears, or, in the words of the appellants’ own plea, that it is ‘holograph of the testator.’” That was the unanimous opinion of the Judges of the First Division as well as of the Judge of the Inferior Court; and if the question were open there is much room for saying that the same observation would apply to a writing not only “all in one handwriting, and as bearing the signature” of the alleged grantor, but also containing *in gremio* a statement that it was written by the grantor himself.

As regards the circumstances which induced the Sheriff-Substitute to order proof, it is right to say a few words. I understand that in ordinary case confirmation would have been granted, but here the document had nine unstitched pages, these were not paged, and it was only signed by the testator on the last page.

There may be cases of detached documents not necessarily showing themselves to be parts of one writing, and therefore not necessarily authenticated by the signature at the end. In such cases I should re-

quire proof that they formed one writing, including evidence, it may be, as to when the document or its alleged different parts were formed, as bearing on the question whether the detached parts did form one whole. Here, however, proof is not required, for looking at the documents they will be found to contain inherent evidence that they form one consecutive deed by their external appearance and the continuity of the sentences at the end of each sheet or the beginning of the next. They are all in the same handwriting, and no doubt it was for that reason that the testator only signed them on the last page.

LORD ADAM—I am of opinion that the rule of the law of Scotland, to be found set forth not only in the institutional writers of books of practice, but also in decided cases, is that where a document such as the present bears *in gremio* to be written by the subscriber or grantor, it is to be taken as probative without further proof. The document is, in short, to be received as if it were a regularly tested deed. That I take to be the rule of the law of Scotland on the matter in all cases, and not merely in the Commissary Court.

What the effect may be as to the *onus* of proof if the genuineness of the deed be challenged I do not think it necessary to inquire, because the question does not arise here. With reference to what has been said as to altering the practice in the Commissary Court, the practice of holding deeds like the present to be probative has been in existence in these Courts for fully three hundred years, and as it has not been shown or suggested that any evil has arisen from the practice, I should be slow to alter it. I can see that if the practice of requiring proof of such a document was introduced in any case, a great deal of additional expense would be occasioned in numerous cases, and so far as I can see without any necessity.

On the whole matter, I think we ought to be slow to alter a rule from the adoption of which it is not said that any harm has arisen.

LORD M'LAREN—The rule which we have had under consideration seems to be one peculiar to the Commissary Courts, and judging from the expressions of opinion which we have heard, I should imagine that it has not many friends outside that ancient jurisdiction. It being a rule, however, which has prevailed for a very long period, we do not see our way to alter it. For my part I do not think that the rule is either consistent with the principles of the law of Scotland or with logic and common sense. It is inconsistent with our law, because by our law a holograph deed is not probative. At a jury trial or a proof you may put in a tested deed, without any proof whatever, and the deed is then evidence for the party putting it in. Holograph writings must be proved before they can be made evidence, and I do not think it would make any difference in regard to the necessity for

proof that the writing stated *in gremio* that it was "written with my own hand." I should not hold that the decision we are going to pronounce has any application, except as regards the non-contentious business of the Commissary, because in all contentious cases the rule of law that a holograph writing is not probative remains intact in accordance with the judgment in *Anderson v. Gill*. As regards the reason of the rule, it is only necessary to state it to make its inconsistency apparent. It comes to this, that if the holograph deed contains no attestation clause, but concludes with a signature, it is necessary to prove that it is the deed of the alleged maker, but if the deed contains a statement that it is "written with my own hand," this is to be taken as a statement by the maker that he wrote and subscribed the deed. I think that this is an example of the familiar "question-begging" fallacy, and the fallacy consists in the assumption that the statement that the deed is holograph is the statement of the person whose handwriting has not been proved.

I agree, however, in thinking that it is impossible to alter this rule of practice, and that in the present case where there is no competition the existing practice should be adhered to, and that the judgment of the Sheriff-Substitute should be recalled and the case remitted for confirmation.

The Court recalled the interlocutor of the Sheriff-Substitute and remitted the case to him to grant confirmation as craved.

Counsel for the Petitioner—Low. Agent—Hugh Martin, S.S.C.

Friday, January 24.

SECOND DIVISION.

[Lord Trayner, Ordinary.

MACNAB *v.* MUNRO FERGUSON AND ANOTHER.

Servitude—Constitution—Well—Drawing Water—Continuous Use.

A well upon a farm was used by the inhabitants of an adjoining farm not continuously but only in dry summers when there was scarcity of water; the use was not made as a right, but on the toleration of the proprietor of the well.

Held that no valid servitude of drawing water for domestic purposes from the well had been acquired by the proprietor of the adjoining farm.

Opinion (per Lord Young) that such a servitude must originate in a grant, and cannot be constituted by use, although where the memory of the origin of the grant has been lost, the only evidence of its existence may be the conduct of parties for a sufficient period prior to the assertion of right.

This was an action by John Macnab, of Kinglassie, Fifeshire, against Ronald Crau-