

all that is necessary to convert the printed form into a deed is in the handwriting of the granter. For these reasons, I think it is very much to be desired that this convenient mode of making a simple will such as this is—a mode which affords perfect security against fraud—should be recognised. I find nothing in writers of authority against the reception of such an instrument, and therefore if the matter were to depend upon my opinion I should hold this to be a good writing at common law, and not falling under the statutes regarding the authentication of deeds.

LORD KINNEAR—I agree with the majority. If this were a question of intention merely, there would be a great deal to be said in support of the will. But we are not looking at this instrument as a court of construction for the purpose of ascertaining what the writer intended to effect. The preliminary question with which alone we are concerned is, whether it satisfies the conditions prescribed by law for the authentication of written instruments? These conditions are prescribed by statute, and if the statutes are applicable, the only question we have to consider is, whether the statutory conditions have been fulfilled or not? But then it has been held from the earliest time, since the statutes regulating the authentication of written instruments were passed, that properly construed they do not apply to holograph writings, which means and can only mean, instruments written entirely by one hand, and that the hand of the subscriber. No doubt that definition requires to be enlarged by admitting that instruments may in certain cases be considered holograph although they may contain other writing than that of the subscriber, but then that has been allowed only in cases in which those additional words, which are not in the hand of the subscriber of the document, are purely formal or superfluous, so that if they were struck out or disregarded you would still have a complete expression of the writer's intention. It appears to me therefore that the question whether a document can receive effect as holograph is a mere question of fact, and I am unable to entertain any doubt that a document which is partly written and partly printed cannot by any possibility be holograph if the printed parts are of any importance at all, because that contradicts the very definition of the word "holograph." It is of no consequence whether these parts of a document which are not autograph of the subscriber are written by somebody else, or whether any are printed or lithographed. It is not holograph in the one case any more than in the other.

But a question has been raised which requires consideration—whether the statute of 1681, which regulates the attestation of instruments that are not holograph, applies at all to instruments like that in question which are partly written and partly printed. Now, it would appear to me that if it did not, the conclusion would be that such an instrument ought to be sustained, not

merely where important parts of it or certain parts of it are in the handwriting of the subscriber, but where the whole instrument is printed, provided it be subscribed, because upon that hypothesis there is no statutory solemnity applicable to such instruments. But I do not think it is necessary that we should consider the effect of the Act of 1681 upon that question as if it stood alone, because whether it applies to such instruments or not, it is at all events quite certain that the Act of 1868 applies to them, and that Act regulates in very clear and positive terms the conditions upon which such instruments are to receive effect. It provides that all documents may be partly written and partly printed, engraved, or lithographed, provided always that certain conditions are satisfied as to the character of the testing clause. Now, that appears to me to be a statute which regulates the attestation of such a document as this, and I am unable to see any ground upon which we could refuse to apply that enactment unless we were to hold that the document in question did not really fall within its terms, because it was not in a reasonable sense a document partly printed, but was in a reasonable sense holograph.

I entirely agree with the observations which your Lordship and Lord Adam have made with reference to cases of adoption, which do not appear to me to be applicable to the question at all.

Counsel for the First Party—Sol. Gen. Pearson—C. K. Mackenzie. Robert Strathern, W.S.

Counsel for the Second Party—Asher—M'Lennan. Agents—Auld & Macdonald, W.S.

Friday, November 14.

FIRST DIVISION.

COLVIN v. JOHNSTONE

Reparation—Breach of Promise of Marriage—Whether Action Barred by Mora.

A having promised to marry B in 1879, married another woman in 1889. B then brought an action of damages for breach of promise against A, who pleaded that her claim was barred by *mora*. The case was sent to trial before a jury, when these facts appeared—In 1885 the defender having begun to court the woman whom he afterwards married, the pursuer intimated that she did not intend to release him from his engagement to herself, and again in 1889, shortly before the defender's marriage, a similar intimation was sent to him by the pursuer's agent. The jury returned a verdict for the pursuer. The defender having applied for a new trial, on the ground that the verdict was contrary to evidence, the Court declined to set aside the verdict, Lord Trayner holding that the jury had come to a right decision; the Lord

President, Lord Adam, and Lord Kinross holding that the question whether or not the pursuer had forfeited her claim was one of fact, and that the verdict should not be set aside, as it was approved of by the Judge who presided at the trial, and was supported by some of the evidence in the case; Lord M'Laren *dissenting* from the view that the question whether the pursuer had forfeited her claim was entirely one of fact, and being of opinion that actions for breach of promise must be brought within a reasonable time, and that the present action had not been so brought—but concurring in the decision of the Court, on the ground that the case was not before the Court in a form which enabled them to deal with the legal question involved.

In 1879 William Johnstone, an apprentice saddler in Sanquhar, promised to marry Elizabeth Colvin, daughter of a farmer at Castlemains, near Sanquhar. He had begun to court her in 1873, being then a lad between fifteen and sixteen years of age. She was nine years older than he was. In 1889 he married another woman.

Miss Colvin thereafter raised an action of breach of promise of marriage against Johnstone.

The defender, besides averring that he had been on more than one occasion expressly released by the pursuer from his promise—a ground of defence to which it is unnecessary further to allude—pleaded (1) “The pursuer’s claim is barred by *mora* and acquiescence.”

The case was tried at the Summer Sittings of 1890 before Lord Trayner and a jury on the following issue:—“Whether in or about the month of June 1879 the defender promised and engaged to marry the pursuer? and whether the defender wrongfully failed to implement his said promise and engagement, to the loss, injury, and damage of the pursuer?”

The evidence material to the question of acquiescence was as follows—Shortly after he had engaged himself to the pursuer, the defender left Sanquhar for Port Ellen, in Islay. He returned to Sanquhar in 1881. In January 1880, when he was on a visit to Sanquhar, the pursuer observed that his manner towards her had changed. Of his manner towards her after his return to Sanquhar in 1881 she gave the following account—“After his return he never came to see me. When he met me he has spoken just in passing. I never asked the reason of his coolness, and he never gave me any.” In 1885 the defender began to court the woman whom he afterwards married, and this having come to the pursuer’s knowledge, she wrote to this woman intimating that she had “marriage lines” of the defender, and did not intend to release him from his engagement to her. In consequence of this letter the defender called on the pursuer and asked her to burn his letters. The pursuer’s evidence was that she refused to do so; the defender’s, that she agreed to do so. Further evidence as to this interview was given by three wit-

nesses who had been standing together at a short distance from the house when the interview was going on. One of these witnesses said that he heard the defender ask the pursuer to burn his letters, but did not hear the reply. The other two witnesses deponed that they did not hear the defender say anything, but heard the pursuer say that she would give the defender back his letters, and he would be free of her. In 1889, shortly before the defender’s marriage, the pursuer’s agent wrote to him reminding him of his engagement to the pursuer, and informing him that she did not release him from his engagement.

The jury returned a verdict for the pursuer, assessing the damage at £70.

The defender applied for a rule, *inter alia*, on the ground that the verdict was contrary to evidence. The rule was granted.

Argued for the pursuer—The pursuer had never abandoned her claim, as was shown by the letters from her and her agent in 1885 and 1889. There was quite enough evidence to justify the verdict of the jury.

Argued for the defender—Claims of this sort could not be hung up for an indefinite time. The pursuer’s long delay in attempting to enforce her claim was the strongest evidence that she had abandoned it, especially in view of the defender’s manner towards her. The letters of 1885 and 1889 were not enough to keep the pursuer’s claim alive. The verdict of the jury therefore was quite against the weight of the evidence—*Cook v. North British Railway Company*, March 1, 1872, 10 Macph. 513.

At advising—

LORD TRAYNER—[*After dealing with the question whether the defender had ever been expressly released by the pursuer*]—The only other point in the case that remains then is the question whether the pursuer has lost any right to her remedy by her delay in bringing the action. I think that raises a question of very considerable delicacy. If a woman in the position of this pursuer intends to enforce an engagement of marriage, I think she is bound to do so timeously. At all events she is not entitled, after a coolness has arisen and all courting or communication has ceased, to let the defender go on for years under the impression that the matter is at an end. In such circumstances I think a pursuer is bound to make it plain to a defender that she holds him to his engagement. This case, however, presents a peculiarity which I think takes it out of any general rule of that kind. Although the coldness between these parties commenced in 1881, and action was not raised till 1890, yet during these nine years the defender was not without warning that the pursuer meant to insist upon her claim. In 1885, when the pursuer heard that the defender was courting another lady, she wrote to her intimating distinctly that she had a claim which she meant to insist on. And again, when she heard that the marriage was imminent, in the end of 1889 her agent wrote to the defender insisting on fulfilment of his engagement. If the pursuer had allowed the

estrangement to proceed from 1881 to 1889 without any intimation of her intention to hold the defender to his engagement I should have had no difficulty in holding that she had forfeited her claim to damages. But her intimations were made at those periods when she might be expected to make a claim if she intended to do so at all. The first time was when the defender was courting another lady. I think that was the first occasion on which she could possibly be held bound to intimate her claim. And then when the marriage became imminent she made a distinct protest against it, and gave intimation of her claim upon the defender by her lawyer's letter. I think it impossible to hold, looking to these two protests, that she acquiesced in the defender's conduct or abandoned her claim to damages. I therefore think the defence has failed, and I am of opinion the rule ought to be discharged.

LORD ADAM—[After considering the point whether the defender had been expressly released by the pursuer]—The other question remains, whether the defender was discharged by *mora* and acquiescence. The delay which the defender relies on is the delay which took place between 1881, when he returned to Sanquhar, till 1889, when the action was raised—a delay of eight years. I do not think there is any law in this question. There is no prescription of marriage obligations or marriage promises. This question therefore must depend upon the acts of the parties during that time, and is therefore a question of fact. If I had been upon the jury I should have been disposed to have given a verdict the other way, but it is not the province of the Court thus to review the jury; and when I find that the jury, considering questions of fact, have come to a certain verdict, and that the Judge who tried the case agrees with the jury, I have come to the conclusion that this is not one of those extreme cases where we can upset the verdict.

LORD M'LAREN—I understand your Lordships are all of opinion that the rule should be discharged, but I am anxious, so far as my opinion goes, to make it clear that I am not disposed to consent to the proposition that claims of this character may be indefinitely hung up, or may not be discharged by lapse of time. As there is no period of prescription of action for breach of promise of marriage, it follows, I think, that they must be brought within a reasonable time. In the absence of express limitation the law requires actions to be brought within a reasonable time, and if that be so, I am not sure that a party may enlarge the time by intimating his claim without taking steps to follow up such intimation. Now, as the period which has elapsed between the breach of promise and the action is a great deal longer than I consider to be a reasonable time it would seem to follow that in my opinion the verdict must be disturbed, but it seems to me to be a sufficient reason for concurring in the decision of the Court that the case is not before us

in a shape in which we can deal with the legal question involved. The defender might first of all have objected to the case going to trial, and I should have quite sympathised with him if he had. In the next place, he might have proposed a separate issue of implied discharge, and the attention of the jury would have been specially directed to that question. Again, he might have asked the presiding Judge specially to direct the jury that the claim had been impliedly discharged, and if the direction was not given he might have brought the question before us by way of exception. I am not sure that the jury had this question of implied discharge clearly before them, but we must assume that the presiding Judge put the law correctly before them, because no exception was taken to his charge.

In all the circumstances, considering the manner in which the question is put before us, I think we must look upon it as a question of fact, though I cannot help feeling that the result at which the jury has arrived is inconsistent with good sense and the justice of the case.

LORD KINNEAR—I agree with Lord Adam. I think the question between the parties in this case is a question of fact which appears to me to be sufficiently raised by the issue sent to the jury. The question in the issue was whether the defender had wrongfully failed to perform his promise, and as the promise was admitted, and the non-performance was admitted, I agree with Lord Adam that the defender had to satisfy the jury that the breach was not wrongful. But upon the question of fact I must say, that judging of the evidence for myself, I should not have been able to reach the conclusion at which the jury have arrived. But then I think it was a proper question for the jury. I do not think it can be said that their verdict cannot be justified by any reasonable view of the evidence, and since their verdict has been given upon a question which it was proper for them to decide, and since it has the approval of the Judge who tried the case, I agree with Lord Adam that we ought not to disturb it.

LORD PRESIDENT—There is no doubt that the defender promised to marry the pursuer in 1879, and in 1889 married another woman. That, however, is not in the least degree conclusive of the case. He might be perfectly able to justify his conduct notwithstanding these two facts, and accordingly the issue put to the jury was whether he acted wrongfully in not fulfilling his promise. Of course it was for the pursuer to make out that he did act wrongfully, and for the defender to make out in answer that circumstances justified him in acting as he did. The question to be decided was one of fact, and therefore one would be very slow in disturbing the unanimous verdict of the jury, and a verdict which has the entire approval of the Judge who tried the case. The result is that I entirely accept the views expressed by Lord Adam and Lord Kinnear, and have nothing to add.

The Court discharged the rule.

Counsel for the Pursuer—Salvesen—Dewar. Agent—Thomas M'Naught, S.S.C.
Counsel for the Defender—C. S. Dickson—G. W. Burnet. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Saturday, November 15.

SECOND DIVISION.

[Lord Trayner, Ordinary.]

FERGUSON v. BUCHANAN AND OTHERS.

Process—Jurisdiction—Domicile—Forum non conveniens—Lis alibi pendens.

A Scotsman who had lived since 1874 in England died leaving a will made in English form, in which he declared his domicile to be England. His executor obtained probate in England, and raised an administration suit there, in which a receiver was appointed and inquiry was directed, *inter alia*, as to the deceased's domicile. Shortly afterwards a daughter of the deceased brought an action in the Court of Session for declarator that the deceased's domicile was Scotland. The Court dismissed the action, holding that *prima facie* the Chancery suit was the proper and competent procedure in the circumstances.

Thomas Buchanan was the son of Scottish parents, and was born in 1829 at Killearn, where he was brought up and educated. He was engaged in business in Scotland from 1849 until 1866, when he went to Belfast, where he carried on business for some years. In 1873 his wife obtained decree of divorce against him on the ground of desertion. In 1874 he went to Manchester, and he lived in lodgings there until shortly before his death, which occurred in Glasgow in September 1889. He was survived by a daughter—Jane Forsyth Buchanan or Ferguson—who was born in 1866. While in Manchester he was agent for his brothers' firm of John Buchanan & Brothers. Upon 14th May 1889 Thomas Buchanan executed a will in the English form, by which he bequeathed various sums to his brothers and nephews, and the residue of about £5000 to the children of his brother Alexander. The will and testament contained the following clause—"I have, as will be observed, omitted to leave my daughter Jane any legacy, share of residue, or other interest under this my will. This I have done purposely, as it is my intention and wish that she shall not receive any benefit under the same. And I declare my domicile to be England, and that I have no intention of abandoning such domicile."

The testator's brother Robert Buchanan, as executor, obtained probate in England, and was proceeding to administer the estate there when the deceased's

daughter obtained interdict in the Sheriff Court at Glasgow against the distribution of the estate. The executor accordingly raised an administration suit in the Chancery Division of the High Court of Justice in England, in which on 16th December 1889 Mr Justice Chitty ordered, *inter alia*—" (6) An inquiry whether the testator was at the time of his decease domiciled in England, and if it shall be found that the testator was not domiciled in England, where was his domicile. And in the event of its being found that the testator was domiciled in Scotland, (7) an inquiry whether the personal estate of the testator is subject to payment of any and what portion thereof to any child or children of the testator living at the time of his death notwithstanding the provisions of his said will."

Upon 23d December 1889 the deceased's daughter brought an action of reduction of her father's will, and declarator that at the date of his death he was a domiciled Scotsman, and that the pursuer as his lawful child was entitled to claim at least her legitim out of the moveable estate belonging to him at the time of his death.

The defenders pleaded—(1) *Forum non conveniens*. (2) *Lis alibi pendens*.

Issues were adjusted by the Lord Ordinary for the trial of the cause, two of which related to the reductive conclusions of the summons, and the third to the question of domicile.

Upon 17th October 1889 the pursuer abandoned by minute the reductive conclusions of the summons on the ground that a will prior to that of 14th May 1889 had been discovered which prevented her taking any benefit even if that will was reduced, and the case was remitted to the Outer House.

Upon 5th November 1890 the Lord Ordinary (TRAYNER) repelled the first and second pleas-in-law for the defenders, and allowed a proof as to the domicile of the late Thomas Buchanan.

The defenders reclaimed.

At advising—

LORD JUSTICE-CLERK—It appears that before this action was raised proceedings had been taken in the Chancery Court in England to have the estate of the deceased administered there. Then the pursuer raised an action of reduction of the deceased's will in the Court of Session, but she afterwards abandoned it because a previous will of the late Mr Buchanan was discovered which would have prevented her taking any benefit even if she had succeeded in reducing the deed which she impugned. Now, in this position of affairs the proceedings went on in England, and an order for a receiver was made. Notwithstanding that, we are asked to allow this action to go on upon the conclusions other than the reductive ones, which have been abandoned. I think that that would be a very inconvenient course to pursue, and I do not think that there is any injustice in the matter, because I do not doubt that the pursuer would be en-