pauper applicants for the benefit of the poor roll; the lists to be furnished to the senior principal Clerk of Session of each Division of the Court, and also to the Keeper of the Minute-book, in order to be printed and published on the meeting of the Court in January yearly, and headed 'List of Lawyers and Agents for the poor, 1843,' and so on yearly." Now, that arrangement was made with these bodies of practitioners after a careful consideration of the subject, in order to remedy an existing evil arising from the great laxity in the mode of admission to the poor roll. I had a good deal to do personally with the framing of that Act of Sederunt, and I know that it was the intention of the Court that nobody should be allowed to act as a reporter on the *probabilis causa* except the persons named by the Faculty of Advocates, the Writers to the Signet, and the Society of Solicitors. I should consequently be very slow indeed to resort to the remedy of remitting to persons not named by these bodies. The question therefore is, whether where there is an equal division of opinion among the gentlemen to whom alone this business is entrusted, the result ought to be to exclude or to admit the applicant to the benefit of the roll? On this point I have not much difficulty. If there is so much doubt in the particular case as to lead to two of the reporters to be in favour of admitting the applicant, I have little hesitation in following the case mentioned in Mr Mackay's book. I am for granting the application.

Lord Deas and Lord Mure concurred.

Lord Shand—I cannot agree with your Lordships that this Court has not power to remit to other persons than those appointed under the Act of Sederunt of 1842. It is true that the Act of Sederunt says that these gentlemen are "to act exclusively as reporters on the *probabilis causa*," but I cannot doubt notwithstanding this provision that the Court has the power to remit to any other person whenever it seems necessary to do so. I think therefore that we should have acceded to the motion of the respondents to remit to an independent third party.

As to whether a *probabilis causa* has in the present case been made out, if it is a decided point that an equality of division among the reporters is sufficient evidence of a *probabilis causa*, there is an end of the matter; but if the point is still an open one, then I must say that I differ from your Lordships. The *onus* upon the applicant is to show that he has probable cause of success, and I do not think that he has done so when the reporters are equally divided. It is not enough to show that he has a fair chance of success; I think he must have a preponderating chance. I therefore must be against admitting the applicant.

The Court admitted the applicant.

Counsel for Applicant — Sym. Agent — D. Cuthbert, S.S.C.

Counsel for Objectors — Dickson. Agent — Adam Johnstone, Solicitor.

Wednesday, July 13.

SECOND DIVISION.

[Lord Fraser, Ordinary.

WHYTE *v.* HAMILTON.

Succession — Testament — Holograph Writing — "Intended Settlement."

In the repositories of a person deceased was found a document holograph of the deceased, dated seven years previous to his death, and evidently written with much care. It was headed "Notes of intended settlement by" the deceased, and was signed by him. He had executed no other testament. *Held* that it was a valid testamentary document.

Walter Whyte of Bankhead, in the county of Renfrew, died at Bankhead on 16th September 1880. He was proprietor of the lands of Cuthill, in Linlithgowshire, as well as of Bankhead, and was also *pro indiviso* proprietor of half the lands of Kenmure, in Lanarkshire, half the lands of Shettleston, in the same county, and of certain house property in Glasgow. He left personal estate considerably exceeding £20,000 in value.

Mr Whyte was married in 1859. By antenuptial contract he undertook to provide his wife, should she survive him, in an annuity of £400 and the liferent of Bankhead mansion-house, besides a sum for mournings, and the absolute property of his household furniture and plenishing. Mrs Whyte on her part accepted these provisions as in full of her legal claims.

Mrs Whyte survived her husband. There was no child of the marriage. Mr Whyte's heirs-at-law were his sister Mrs Jane M'Nish Whyte or Hamilton and his nephew Mr J. F. Watson, son of another sister deceased. The former was decerned executrix-dative to him. After Mr Whyte's funeral a search was made in his repositories by Mr Walter Whyte Pollok, writer, his brother-in-law, Mr John A. Hamilton, writer, and Mr J. M. Hill, writer. The first-named of these gentlemen had prepared the marriage-contract of Mr and Mrs Whyte, and Mrs Whyte and he had been on intimate terms, but Mr Whyte had never spoken to him about making a will. On a search being made there were found in a bureau in the deceased's bedroom a cash-box containing money and some papers of small importance. This bureau was a chest of drawers with a desk on the top and a folding lid. It contained a secret drawer, in which were afterwards found some deposit-receipts for about £6000 and some certificates belonging to the deceased. In a room adjoining the bedroom was found a tin box, which contained the title-deeds of Bankhead, a water-commission bond for £2500, and a number of interest coupons, estate accounts, and business letters. In the parlour in which the deceased was accustomed to write his letters there was found a portable writing desk which he had had in daily use. In this desk were found a bank book, a cash book, and a number of vouchers and business letters. In this desk there was also found the following holograph document signed by the deceased:—"*Bankhead*, 19*th June* 1873. —Notes of intended settlement by Walter Whyte of Bankhead.—first, I liferent my wife Mrs Margaret Pollok or Whyte in my whole estate,

both heritable and moveable, burdened with an annuity of £300 sterling, three hundred pounds sterling, a-year to my sister Mrs Jane Macknish Whyte or Hamilton, widow of the late James Hamilton, writer in Glasgow, should my wife survive me—at the death of my wife said annuity to cease. In place thereof I leave to my said sister Mrs Jane Macknish Whyte or Hamilton, in liferent only, and to my nephew John Hamilton, writer in Glasgow, in fee, my *pro indiviso* half of the lands of Kenmuir, situated in the parish of Old Monkland and county of Lanark; likewise my *pro indiviso* half of the lands of Shettleston, situated in the Barony parish of Glasgow and said county of Lanark. To my nephew James Hamilton I leave my lands of Cuthill and Newmill of Breech, &c., situated in the parish of Whitburn and county of Linlithgow, subject to the liferent of his mother, the said Mrs Jane Macknish Whyte or Hamilton. I also leave to my nephew James Francis Watson, presently residing at Ardmore House, in the parish of Cardross, Dumbartonshire, my estate of Bankhead, situated in the parish of Rutherglen and county of Lanark; but I wish it expressly understood, that in the event of my said nephew James Francis Watson dieing without leaving any lawful mail heir of his body, then and in that event my said lands of Bankhead are to revert back to my said nephew John Hamilton; my moveable estate at the death of my said wife is to be equally divided between the families of my two sisters Mrs Frances Killian Whyte or Watson, now deceased, and the said Jane Macknish Whyte or Hamilton, excluding (excluding) the males in each of said families. I also exclude the *jus mariti* of their present or any future husbands; and as regards my two nieces Anna Maria Watson or Ewing and Margaret Buchanan Watson or Ellis, their respective shares are to be handed over to their marriage-contract trustees, to be invested by them for the sole behoof of my said two nieces Anna Maria Watson or Ewing and Margaret Buchanan Watson or Ellis, to be altogether quite exclusive of the *jus mariti* of their present or future husbands. I also leave a legacy of £500 stg., five hundred pounds stg., to my nephew Walter Whyte Hamilton, said legacy to be paid him by my said nephew John Hamilton from the lands of Kenmuir and Shettleston upon his succeeding to them at the death of his mother Mrs Jane Macknish Whyte or Hamilton. I likewise leave the sum of one hundred pounds sterling to the Royal Infirmary in Glasgow, to be paid free of legacy-duty." This document was lying flat and unfolded in the desk, almost at the bottom of one of the two compartments. The only property belonging to Mr Whyte to which it did not bear any reference was his share of certain house property in Crown Street, Glasgow. A part of that had belonged to him before the date of the document, and another part was acquired a few weeks before his death.

The liferent of the testator's whole estate bequeathed by the document above quoted, assuming it to be a valid testamentary document, being of much greater value than the provisions made for Mrs Whyte by the marriage-contract, the question arose between her and the heirs-at-law and next-of-kin of Mr Whyte whether the document in question was valid as the testament of Mr Whyte, and in December 1880 she raised this action to have it declared that the document was the last will and settlement of Mr Whyte, that she was entitled to a liferent of the whole estate burdened with an annuity of £300 to Mrs Hamilton, and to an accounting by Mrs Hamilton, as executrix, of her whole intromissions with the estate. The defenders called were the heirs-at-law of Mr Whyte, his next-of-kin as representing him in moveables, and the executrix.

The pursuer in addition to the averments relating to the finding of the document as above described, averred in the 5th article of her condescendence that the signature was appended thereto, not at the time at which it was written, but on a day in August 1880, or at least on a day subsequent to June 1873. Further, she averred that the deceased on various occasions, and to various persons, spoke as if his affairs were regulated by will.

The pursuer pleaded—"(1) The document or writing condescended on being of a testamentary character, must receive effect as the last will and settlement of the late Walter Whyte, and regulate his succession."

The defenders denied that the document of June 1873 was a valid testamentary writing. They also denied that the signature was appended to it at any other date than June 1873, and that the deceased ever spoke as if his affairs were regulated by will. They pleaded, *inter alia*, that the statements of the pursuer were irrelevant, and that the document in question was not a valid testamentary deed.

On 23d February 1881 the Lord Ordinary allowed a proof, appending this note to his interlocutor:—"The Lord Ordinary is not prepared to turn this action out of Court on the ground maintained by the defenders, viz., that there is enough set forth in the document founded on by the pursuers to indicate that it is not a will. Documents more indicative of inchoate intention than this one have not in other cases been so summarily dealt with. The Lord Ordinary is of opinion that inquiry ought to be made as to the averments contained in the 5th and 6th articles of the condescendence, and also as to the averments by the defenders in answer to the 3d article; and such inquiry is in accordance with the usual practice of the Court where informal documents are propounded as wills. Either the facts connected with the time of writing the paper and of signing it, the place where it was found, and the verbal declarations of the writer in regard to it, were all ascertained by proof, or by admissions in special cases presented for the opinion of the Court, or probation was renounced before judgment was given, and the facts connected with these matters were held to be relevant and material in judgment whether the document was to be considered as a will.

"Thus, in the leading case of *Munro* v. *Coutts*, 1 Dow, 437, correspondence between the testator and his agents was admitted for this purpose, and the House of Lords thought that the Court of Session should have gone further and admitted parole evidence. Lord Eldon expressed himself thus:—'The written correspondence on this subject had been admitted as evidence, and he thought properly admitted, as the paper was of a doubtful and ambiguous character and required explanation; but they should have gone farther. Upon what principle did they not let in such

parole testimony as that of M'Intosh and George Munro as to the conversation that took place?' In the case of *Scott* v. *Sceales*, Feb. 5, 1864, 2 Macph. 613, the Court *ex proprio motu* appointed an examination to be made of the testator's agent 'as to all matters of fact bearing on the question, What are the testamentary papers of the deceased?' In *Lowson* v. *Ford*, March 20, 1866, 4 Macph. 631, the parties adjusted a joint minute setting forth the facts which they thought material, and renounced further probation, but the Court were not satisfied with the information so given, and pronounced an interlocutor allowing proof of all facts bearing on the question, 'What are the testamentary papers of the testator?' The facts in the case of *Cunningham* v. *Murray's Trustees*, March 15, 1871, 9 Macph. 713, were set forth in a special case, as they were likewise in the case of *Forsyth* v. *Forsyth*, March 13, 1872, 10 Macph. 616.

"The practice thus established by these decisions is in accordance also with that followed in the Probate Court in England, and is well illustrated by a decision upon a document very similar in its terms to that founded upon in the present action. It began thus—'This is a memorandum of my intended will.' But said Sir John Nicholl—'It goes on throughout in dispositive terms; it appoints executors, is dated and signed by the deceased himself, and the character of the signature is different from that of the body of the instrument. Still the term, "Memorandum of my intended will," would raise a sufficient doubt to let in evidence of circumstances—whether it was finished in order to have effect, or only as a deliberative memorandum. Parole evidence then being let in, the history of the deceased and of this paper may give to his intentions a more decided character'—*Barwick* v. *Mullergs*, 2 Hagg. Eccl. Rep. 225. Other cases to the same effect, which begin with such words as these—'Heads of will,' 'A plan to be afterwards drawn out,' are mentioned and commented upon in Williams on Executors, vol. i. 360.

"The Lord Ordinary expresses no opinion at this stage of the case upon the merits, but looking to the opinions of the Lord President and Lord Kinloch in the case of *Forsyth*, the averment in the 5th article of the condescendence becomes very material. If the signature was appended at a date subsequent to the writing of the body of the document, this perhaps may be indicated by a difference in the character of the handwriting or of the ink. The document should be exhibited at the proof."

Proof was accordingly led, when the facts above narrated were elicited. It also appeared that Mr Whyte had on one occasion in 1877 said to his brother-in-law Mr Pollok that he supposed he could increase the annuity of his wife, but that he had never asked him to make out any deed. The only evidence in support of the averment that the signature had been appended to the document in dispute at another date than June 1873 was that of a niece who resided in the house, and who had seen him bring a paper like it down from his bedroom to the parlour in August 1880, on which paper he wrote something.

The document itself was exhibited at the proof and at the debate in the Inner House. The signature, so far as could be gathered from inspection of the document, was written with the same pen and at the same time as the rest of the deed.

The Lord Ordinary pronounced this interlocutor—"Finds that the writing dated 19th June 1873, and registered in the Books of Council and Session the 22d September 1880, entitled 'Notes of intended settlement by Walter Whyte of Bankhead,' is not the last will and settlement of the said deceased Walter Whyte, and cannot receive effect as such: Assoilzies the defenders from the whole conclusions of the action, and decerns."

He added this note—"It is with reluctance and somewhat with regret that the Lord Ordinary feels himself constrained to pronounce the foregoing inteolocutor. He is satisfied that Mr Whyte intended very largely to increase the provision in favour of his widow. But the dead hand has not in this case executed its purpose effectively. Mr Whyte was a landed proprietor who had no profession or business to occupy his attention. Like most people in Lanarkshire, he went to Glasgow on the Wednesdays without having any particular business to do. There he, upon each of these occasions (and this is important) saw his brother-in-law Mr Walter Pollok, a writer in Glasgow, to whom he never gave any instructions for the preparation of a will. In his own home he occupied himself with the management of his property. The proof discloses nothing about the rooms in his house, with the exception of three. He had in his bedroom a bureau, in which was found the money that he left at his death, and the deposit-receipts for money in bank. Off this room there was another, in which there was the charter-box containing his title-deeds and other valuable documents. There was, thirdly, a parlour in the lower storey, in which there was a writing desk, which usually rested upon the sideboard. In this parlour Mr Whyte wrote all his letters upon this desk, the key of which he carefully retained in his own possession.

"Upon the day of his funeral his brother-in-law Mr Pollok, his nephew Mr John A. Hamilton, and his friend Mr John M. Hill, examined his repositories. They found no writing in the bureau in the bedroom, nor in the charter-box, of a testamentary character. But in the desk they found the document which is now propounded as a will. It was lying flat in the bottom of a compartment in this desk amidst miscellaneous documents, and along with Mr Whyte's cash-books.

"The question now is, whether this document can be treated as a will? The Lord Ordinary is of opinion that it cannot. In its favour there are the following circumstances:—First, That it is proved that Mr Whyte intended to increase the provisions in favour of his widow; and he did so by the document in question, by giving to her the liferent of his whole estate, under the burdens therein mentioned. Secondly, That the language of the will is dispositive and absolute. Thirdly, It is carefully written out, and must have been copied from a draft which he had made, and this is indicated very strongly by the way in which he writes the word 'excluding.' Not being satisfied with it as first written, he attempts to correct the writing, and then repeats the word, indicating thereby his determination

to make the matter quite clear and distinct; and Fourthly, he signs this document.

"There can be no doubt whatever that if this document had stood alone, without its title, it would have been a perfectly valid will and settlement of Mr Whyte's estates. But the following are the grounds upon which the Lord Ordinary considers that it cannot be accepted as such:—First, The date of the document is 19th June 1873, and the title is, 'Notes of intended settlement by Walter Whyte of Bankhead.' These words indicate simply this, that they were merely jottings, put down by Mr Whyte as of a settlement which he intended to make. The Lord Ordinary has endeavoured to read the title in this way—'I intend my property to be disposed of as follows,' or, 'This is my intention about the settlement of my property.' But with every desire to give effect to an apparently rational settlement, he is unable to come to this conclusion. Because, secondly, in the year 1877 Mr Whyte asked his brother-in-law, Mr Pollok whether he could increase the annuity to his wife. Now, if he in the year 1873 had made a will of the whole liferent of his estate to his wife, this was a very odd question. It must be deduced from the fact of his putting such a question that he had forgot entirely what he had done in 1873, and that his 'Notes of an intended settlement' were never meant by him to be anything more than notes which he might carry into effect at some time or other when he had fully made up his mind upon the subject, by asking his brother-in-law or his nephew to prepare a settlement in accordance therewith, which he never did. Thirdly, this is not a case where the document is first written out and then after an interval the signature is appended. If this state of the facts existed, it might justly be concluded that what was first intention had been carried into act and had become a positive bequest. Some attempt to prove a case of this kind was made on behalf of the pursuer, but it was unsuccessful. On a day in the month of August 1880, one month before Mr Whyte died, it is proved by Miss Jamieson that Mr Whyte came down stairs with a sheet of paper in his hand similar to that now propounded as his will; that he took it to the sideboard on which his desk lay; that he wrote something upon that sheet of paper and put it into his desk, and that what he wrote would not occupy more time than would be necessary for his signature. It is suggested that he then and there brought the document in question from upstairs to the parlour, and then and there adhibited to it his signature in the parlour in 1880, the body of the document having been written in 1873. The Lord Ordinary entirely rejects this suggestion. The same pen which wrote the body of the document in 1873 wrote at the very same time the signature appended thereto; and it must have been some different document altogether upon which Miss Jamieson saw Mr Whyte write on the occasion to which she speaks. Lastly, the place in which the document was found cannot be overlooked as an element in the case. The alleged will professed to dispose of the whole of the estate; and one would naturally suppose that if it was intended to have this effect it would be found in the bureau in which he had put away the deposit-receipts, and where he kept his money, or in the charter-chest where he kept his titles and bonds. But it was not so. The paper is found in a desk, containing, no doubt, cash-books in daily use, but also the ordinary loose papers commonly seen in a man's writing-desk—drafts of letters, jottings, papers containing writing, papers without any, and envelopes; in short, the alleged will had very bad company, and its character must be judged of very much according to that of the company it had. The conversation with Mr Pollok about increasing his wife's annuity in the year 1877 in truth shows that Mr Whyte had forgotten altogether 'the notes of intended settlement' which was lying under a heap of miscellaneous papers in his writing-desk. The cases of *Forsyth* and *Cunningham*, referred to in the Lord Ordinary's note to the interlocutor of 23d February 1881, indicate that in circumstances such as occur in the present case the use of peremptory, absolute, and dispositive words, and the signing the name to notes and jottings, are unavailing against evidence that the writer did not intend these papers to be the expression of his final will; and there is such evidence here. The expenses of this process must be borne by the estate of Mr Whyte, he himself having caused a litigation on the subject by leaving such a document in his repositories."

The pursuer reclaimed, and argued—Admitting that the proof has failed to establish that the document in dispute was signed at another date than that at which the body of it was written, the proof at least put the Court in possession of all the facts in the case which were ascertainable. The document must be held to be the testator's last will. It was carefully written by one who from the appearance of the document was plainly not much used to writing. It looked, indeed, as if it had been written from a draft. Again, it was dated and signed, and in the words of Lord Benholme in *Lowson* v. *Ford*, 20th March 1866, 4 Macph. 631—"Does anyone who makes a mere memorandum date or sign it? Is it to remind him of his own handwriting or to record that on a particular day of a particular year he had such and such an inchoate purpose?" No doubt his Lordship was dissenting in that case, but the remark was quite applicable. The opinion of Sir John Nicholl in *Barwick's* case, 2 Hagg. Eccl. Rep. 225 (1829), that where you have the document signed it is *prima facie* a will, gives a canon which the reclaimer would readily accept—see also the previous case of *Mitchell* (1828), 2 Hagg. Eccl. Rep. 74. Besides, the document contained words of present disposition, and so far as it dealt with heritage a careful destination. Again, if this will be not given effect to, the result will be a decision in favour of intestacy—a conclusion which the Court is always slow to reach. The cases quoted on the other side are all cases in which the question lay between the disputed document and a formal will. Such a case was that of *Forsyth* v. *Forsyth*, 13th March 1872, 10 Macph. 616. There the only thing in favour of the "draft of codicil," as the testator called it, was that it was signed, while in this case there was really nothing but the words "Notes of intended" against the pursuer. These words are quite susceptible of the meaning that if the deceased made a formal settlement

these were to be the terms, but none the less was the document his will if the formal settlement was never made—*Hattatt* v. *Hattatt*, 4 Hagg. Eccl. Cases, 211. A settlement was always "intended" while the testator lived, and then became his settlement by his death without having altered it. Lastly, this was certainly not a case like *Monro* v. *Coutts*, 1 Dow 437, which was a case of a document intended only as an instruction to an agent.

Argued for respondents—Just because the Court will always try, if possible, to give effect to the will of the deceased, it is always necessary to be sure that what is propounded as a will is really the expression of completed and deliberate intention. "Notes" of an "intended" deed are certainly words not readily indicating that such intention has been arrived at. The heading is part of and controls the document—*Lindsay*, 2 L.R. Prob. and Div. 459. In the case of *Barwick*, *supra*, Sir John Nicholl required and proceeded on parole evidence as to the circumstances connected with the execution of the "Memorandum of my intended will." Now, here the parole evidence absolutely failed the pursuer—see Williams on Executors, i. 359, and cases there cited. In the case of *Mathews* there cited the Court pronounced for intestacy as against the document propounded as a will. The words of the heading there were—"Plan of a will proposed to be drawn as the last testament of William Mathews, and executors nominated to see this complied with"—see also *Hattatt*, *supra*, where the death was sudden, and *Coppin*, 4 Hagg. Eccl. Cases, 361, and the Scotch cases above cited. In one of these (*Forsyth's* case) the Lord President and Lord Kinloch both observed that some people sign even drafts. Again, there is a blank *in gremio* of the document, as if Mr Whyte had meant to put something in immediately after the heading. This paper might have been intended to be shown to an agent, and to be made the will of the deceased—*Cunningham* v. *Murray's Trustees*, 15th March 1871, 9 Macph. 713; *Stainton* v. *Stainton*, 17th Jan. 1828, 6 S. 363.

At advising—

LORD JUSTICE-CLERK—I think the Lord Ordinary was entirely right in allowing parties to lead evidence in regard to the circumstances bearing on the testamentary character of the writing in question, and I adopt the reasoning contained in his note to his interlocutor of the 23d February 1881. Such is now the established practice of our own Courts and of those of England, at least until the recent Wills Act, when writings more or less informal and ambiguous are propounded as containing the expressions of the testamentary instentions of a deceased.

The remaining question which we have now to decide is one not so much of legal construction as of fact or of inference from fact. Are we to infer from the writing founded on, and the surrounding circumstances, that the deceased Mr Whyte intended that it should regulate his succession, or was it merely a memorandum made for his own guidance, which he might or might not afterwards give effect to by a formally executed testament?

The document speaks for itself. The surrounding circumstances are very accurately and fairly summarised by the Lord Ordinary in his note, and I need not examine them at length.

It is not without hesitation that I differ from the Lord Ordinary on such a question, and it is one of difficulty as well as of interest. But I have come to a different conclusion. I think, on a balance of the elements of proof in this case, that Mr Whyte meant this writing to regulate the succession to his property after his death. I do so for the following reasons:—

1. The writing itself in its substance is a completed settlement. It is the work of a man with some knowledge of legal phraseology, is evidently carefully extended from a draft, written in a fair and distinct hand, very clearly expressed in appropriate language, and signed by the writer. The deceased plainly knew how to make an effectual testamentary writing, and as far as the framework of this instrument is concerned it leaves no room for criticism.

But, no doubt, it has a heading or superscription, in which it is entitled—"Notes of intended settlement by Walter Whyte of Bankhead." The question is, Whether this title reduces this very careful composition from an expression of present testamentary intention, which its terms import, to the level of a mere memorandum of what he thought he might possibly do at some future time?

Taking the writing and its title together and alone I cannot come to that conclusion. These might be notes of his testamentary intentions, in the sense that they should only operate if he did not embody them in a regular and extended deed. But the real question is, Were they notes, the expression of a testamentary intention, or merely notes to help him if he ever came to execute a testament? I cannot reconcile this last assumption with the careful terms and the signature of the instrument itself. *Prima facie*, at all events, the presumption is that a man who executes a settlement means it to take effect, and I do not think that the title of this paper overcomes this presumption. Had the terms of it been less precise, the signature of it might not have been conclusive, but the signature of a document expressive of a clear and deliberate testamentary intention in the body of it is what we should expect from its substance, and a very weighty element in this question.

2. The surrounding circumstances are few, but I think all of them lead to the same result. First, this man had made no other settlement. I think this important, both in itself and with reference to some of the other cases which were cited to us. If it were propounded as a mere codicil to a regular settlement, it might be inferred that the deceased would naturally execute one part of his testamentary writings as he had executed others. But he had made no other will, and it is hard to think he meant to die intestate. When he wrote this he certainly did not intend to do so. He died after a prolonged illness, but showed no anxiety about his affairs. Secondly, this will carries out what from his conversation with his law adviser we know was in his mind, and what for a childless husband was in all respects natural. He wished to increase the provision for his wife, and so Mr Pollok tells us. I

draw from the conversation in question an inference the reverse of that drawn by the Lord Ordinary. He thinks that it shows that the deceased had forgotten the writing in 1873. I think it shows that he remembered it very well, and merely wished to ascertain indirectly whether it was within his powers. There might be reasons in his own mind for not divulging his intentions to anyone—not even to his law adviser.

I give no weight to the "bad company" in which the Lord Ordinary says this writing was found. The place in which it was found was his private desk; it was lockfast; he kept the key himself; and where his cash-books were was sufficiently private I should think for his will.

Many cases of this class have occurred both with us and in England, but they are all cases of circumstances. This one I think the strongest in support of the writing which I have seen. That which comes nearest to it of those cited is the case of *Hattatt*, in 4 Haggart, in which the writing was sustained as a will although bearing a superscription not dissimilar from the present, and the views expressed by Sir John Nicoll in the case of *Barwick* tend in the same direction, although there was a subsequent attempt to make a different settlement. The document in the case of *Forsyth* was unfinished, and that in the case of *Cunningham* did not bear to be a testament. I can find no reason to suppose that Mr Whyte meant to die intestate, and on the whole I am satisfied that he all along relied on what he had done to prevent that result.

Lord Young—I concur, and I must own that I do so without any hesitancy. Indeed, from the time that I understood the case I did not regard it as attended with any material difficulty. The Lord Ordinary says, and says I think soundly, that there can be no doubt whatever that if this document had stood alone without its title it would have been a perfectly valid will and settlement of Mr Whyte's estates. But I agree with the Lord Ordinary and with your Lordship in thinking that its title raises or suggests sufficient room for doubt to admit of parole evidence as to the circumstances in which the document was found, including of course the place where it was found. But for the heading, which alone creates any doubt, but for which there would have been no doubt that this was a valid settlement, parole evidence would have been incompetent,—not admissible in the case at all—assuming always that the will was not impeached upon any ground valid in law. Evidence would have been inadmissible, as in the case of any other proper writing expressive of a man's intentions. But the heading just creates sufficient ambiguity to make parole evidence of the whole surrounding circumstances admissible. Now, I entirely agree with your Lordship that in that parole evidence there is nothing at all to confirm the doubt, but everything to dissipate it. To begin with, I think the doubt a very slender one. The heading here is—"Notes of intended settlement by Walter Whyte." If it had been "Notes of settlement by Walter Whyte," there would have been no doubt at all; or if it had been "Intended settlement by Walter Whyte," there would have been no doubt at all. Now the doubt is scarcely more than visible when you join these words together "Notes of intended settlement." The alternative here,—and I concur with your Lordship in thinking that that is important,—is not between this and some other document expressive of his will, but between this, which is the only expression of his will, and the legal rules of succession.

These operate as the presumed will of the deceased where he says nothing to the contrary. That is the theory of the matter. But this gentleman has left us notes of his intention to the contrary. We are to take note of that. That is really the meaning of it. He has left us notes for our guidance as to his will regarding the disposal of his estate after his death; and I do not at all read the word "intended" as expressive of an intention to do something in the future. It is what he means to be done with his estate after he ceases to be capable of doing anything. I do not read it as equivalent to this,—"I intend to make a settlement of my estate in the following terms." That would be almost ridiculous. A man does not note with a heading his intention to himself, "You take note that you intend to do so and so at a future time." That is not the meaning of it. It is a note of his intention for the information of others. Now, one is not put to ingenious conjectures,—of which there is no end, as to possible circumstances attending the place and the finding of this document, which might have induced us to throw it aside as not a satisfactory expression of the testator's will. It is sufficient to say that there is nothing here to induce us to do that. It is found in the desk of which he kept the key, and to which he was in the habit almost daily of resorting,—a very natural place for a document expressive of his intention to be found. I do not think it necessary to dwell further upon the matter. The evidence having been admitted—and I think properly admitted—the question truly in my view is one of fact. The law is exhausted when we say that the heading renders evidence admissible to see whether it dissipates or confirms the doubt assumed *prima facie* to exist. But the evidence being admitted, the question is one of fact, although as it has to be determined by the impression which is made upon a bench of judges, there is always more or less uncertainty about it; for different men will have different impressions as to such matters. But, in point of fact here, concurring with your Lordship, I think there is nothing in the evidence to confirm, but, on the contrary, that there is sufficient to dissipate, any little doubt that existed to begin with.

Lord Craighill—I am of the same opinion, and I concur with both your Lordships in all that you have said in explanation of the grounds of judgment. The case is one of interest, and as the Lord Ordinary has adopted a different view from that at which we have arrived, it cannot be regarded as a case free from difficulty. At the same time, the conclusion which I have reached is one that I have adopted in the end without any hesitation. There is no doubt whatever that the Lord Ordinary, when he allowed a proof of that which was set forth on record, acted with the greatest propriety, and according to precedent; because the writing as a whole did give such an indication of ambiguity as rendered it necessary,

or at least in the highest degree expedient, that recourse should be had to the surrounding circumstances for the purpose of obtaining—if it could be got,—additional information relative to matters which presumably would throw further light upon the intention of the supposed testator. That evidence having been taken, I agree with your Lordships in thinking that the result over all is that it is not only disproved that the testator did not intend that this paper should be an operative will, but that it is plain that he did intend that such should be taken to be its character. The paper itself was found in a place where certainly the will of the testator Mr Whyte might have been expected to be found; indeed, it was one of those depositories in which naturally his settlement might have been placed; for, to say the least of it, I think that a locked desk, the key of which was retained by himself, was as natural a place as any other in which any paper of this kind might be deposited. I do not say that this goes very far, because even if the document in question were to be regarded as having been written by himself, not as a final expression of his will, but as a paper that might afterwards come to be used in the course of the preparation of his will, it is not only conceivable, but it is extremely likely, that this place, or a similar place, would have been the depository in which it would have been placed. Now, what appears to me, considering everything which has been adduced, to be the conclusion in this case is this, that the testator, intending to make a will, made this writing as his will, by which he intended that the succession to his property should be regulated. There are but three things apparently, one or other of which this writing must be taken to be; it must be taken to be his will, meaning the will by which he intended his affairs to be regulated after his death, or it was a paper from which another will was to be copied, or, last of all, it was a paper of instructions to be communicated to someone by whom the will was to be prepared. Now, with reference to the second of these, it seems to me impossible to reconcile the language and the anxiety exhibited in the preparation of this will with the preparation of mere notes or the preparation of a mere copy which was afterwards to be used in the preparation of a more formal deed. A more formal deed could hardly, indeed, have been framed. And what is remarkable is this, that if we are to use the word "notes," as it is sometimes used, as a short expression for that which was afterwards to be set forth at greater length, it is not possible that that can be the signification here, because everything which is mentioned in the writing itself as of a testamentary character is absolutely expressed at full length. Nay more, when you come to the mention of sums, such is the anxiety exhibited by the writer of this instrument, that he is not content with specifying the sum in figures, but he writes out at full length the same sum in words. It is hardly conceivable that a paper which was prepared with such anxiety could be intended merely either as a short statement of that which was afterwards to be lengthened, or as instructions which were to be communicated to some one by whom another deed was to be prepared. And I think even this heading, from which the difficulty has originated, seems to suggest, at least, that he did not introduce it for the purpose of indicating that what he was about to do was simply to make notes or a synopsis of something that might be afterwards lengthened, or to set down instructions which might hereafter be communicated that someone else might prepare a deed. His description of it is "Notes of intended settlement by Walter Whyte." Now, that could not be for his own information; and I do not think it could have been put down for the information of anyone to whom instructions would have been communicated. That is not the way in which they would have been communicated. But I think these words, describing himself at full length, as he afterwards describes the intended beneficiaries at full length, show that this which he was performing was the preparation, as it was afterwards to be the completion, of the testamentary writing from which all in the end would learn who he was, what he intended to do, and who were the beneficiaries who, if his intentions were carried out, would be benefited. And so, coming to that conclusion upon the face of the instrument, and agreeing as I do with the observations that have been made, I do not think that this heading or this superscription suggests so great a difficulty as that which has been found to occur in other cases, because if he had said, "This is my intended settlement," that surely would not have been held to indicate that what he did was not to be operative, but that he intended it merely as a notandum of something that was to be done at a future time. I think that this is neither more nor less than simply the expression of an intention that what he then wrote was the will or settlement by which he intended that his affairs should be governed. It is quite true that it was unnecessary that that should have been stated. The statement of it, indeed, looking to the formality with which other parts of the deed are executed, could not have been expected; but after it was stated, it does not seem to me, fairly and reasonably interpreted, to derogate in the least from the effect which appears to me to be due to the other parts of the writing. The will is carefully prepared, the greatest possible anxiety is exhibited in the expression of the will, and, last of all, the will is signed, so that, so far as the maker of an instrument could accomplish it, he did all by which he could express his final resolution that his estate, while this paper remained unaltered, should be governed by this paper, that any testator could possibly accomplish. For these, and also for the reasons which your Lordships have explained, I quite concur with your Lordships in the judgment which has been pronounced.

The Court altered the judgment of the Lord Ordinary, found that the deed in question was the last will and settlement of the deceased, and remitted the cause to the Lord Ordinary for further procedure.

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