

TOAD'S DEATHBED GAMBIT

Stephen McAllister and Emily Grant[†]

INTRODUCTION

In Kenneth Grahame's *The Wind in the Willows*, Toad's actions regularly implicate legal issues. On the civil side, Toad may be the victim of false imprisonment; he himself commits fraud; and, with respect to Toad Hall, he likely has tort- and property-related claims against others, especially at the end of the book. Criminally, there is no doubt Toad puts himself in jeopardy by reckless driving, stealing a car and a horse, resisting arrest, "cheeking" law enforcement officers, and escaping from custody.

Toad's actions also evoke legal images not uncommon in literature and that his creator likely knew all too well — the deathbed will and subsequent disputes over inheritances. In Chapter VI, Toad feigns mortal illness, requesting that his lawyer be summoned to prepare a last will and testament. Toad, of course, is not dying, but uses this as a ruse to cause delay and stall for time to escape from his house and his friends.

The deathbed will scenario — and later inheritance disputes — were familiar topics to Kenneth Grahame. His wife, Elspeth, was a plaintiff in high-profile, publicized estate litigation involving her mother's deathbed will and the subsequent management of trust income by her stepfather. And her stepfather was no ordinary, literary evil stepparent; he was Lord Fletcher Moulton, an esteemed barrister and citizen of London who shortly after the litigation became a Lord Justice and later an important defense official in charge of explosives production for Britain during World War I.

The case included a trial between Lord Moulton as defendant and Elspeth and her sister as plaintiffs, an appeal, and finally a settlement of the matter. This was all going on in 1905-1906, while Grahame was married to Elspeth and before *The Wind in the Willows* was published in 1908. We tell the story of the case because it could have been Grahame's inspiration for Toad's "deathbed" gambit.

[†] Stephen McAllister is the J.B. Smith Distinguished Professor of Constitutional Law at the University of Kansas School of Law. Emily Grant is the Associate Dean for Academic Affairs and Professor of Law at Washburn University School of Law.

ELSPETH GRAHAME AND THE ORIGINS OF A FAMILY INHERITANCE DISPUTE

The key connection between the family litigation and *The Wind in the Willows* is Elspeth Grahame, Kenneth's wife, who was a plaintiff in the case. Elspeth was born in Edinburgh on January 3, 1862, the second of four children of Robert William Thomson and Clara Thomson (nee Hertz).¹ Her younger sister, Winifred ("Winnie"), and brother, Courtauld, were also part of the case.²

Elspeth's father died when she was about ten, and her mother Clara remarried a few years later, in 1874. Her new stepfather was an (at-the-time) penniless but brilliant mathematician, scientist, and aspiring barrister named John Fletcher Moulton. The family moved to London, originally living at 71 Onslow Square. After the marriage produced a son, H. Fletcher Moulton, the family purchased larger quarters at 57 Onslow Square in 1887. Before they moved in, however, Clara died, leaving a will that would lead to the court case her three youngest Thomson children would bring against their stepfather in 1905.

The will made provision for the Thomson children (the four from Clara's first marriage), three of whom, including Elspeth, were still living at home. Notably, the will left the income from Clara's substantial estate (much inherited from her first husband) in trust for the benefit of the Thomson children and Moulton in equal shares, with the widower Fletcher Moulton as sole trustee. Estimates are that each child's share was about £600 per year. Only many years later, as Elspeth's brother Courtauld prepared to bring suit against Moulton, did the children learn the will had been drafted on their mother's deathbed by none other than Moulton — "all of it in Fletcher Moulton's handwriting."³

After Clara's death, the household lived in reasonable harmony, with the two Thomson daughters and their younger brother continuing to live with Moulton. This, in fact, had been a wish expressed by Clara in the will — that the family should continue living together after her death. The daughters served as hostesses and supporters for their stepfather as the women of the household. But they received no direct income from their mother's trust,

¹ Peter Green, *Kenneth Grahame: A Biography* 202 (World Pub. Co. 1959) (hereinafter "Green"); see also Allison Prince, *Kenneth Grahame: An Innocent in the Wild Wood* 135 (Allison & Busby 1994) (hereinafter "Prince").

² Her older brother, Harold, long had been out of the picture. He had left home many years before and changed his name to Lyon, and he had no apparent connection to or involvement in the case. L.A.G. Strong, *Courtauld Thomson, A Memoir* 44-45 (limited edition of 100 copies printed privately in London in 1958 by Butler & Tanner, Ltd.) (hereinafter "Strong"). Harold apparently died many years later from pneumonia while "persisting in electioneering work for Winston Churchill." *Id.*

³ Strong at 47.

over which Moulton exercised complete control. (Moulton remarried much later, in 1901, to an American living in Italy, with whom he had a daughter, Sylvia, who is not part of this story.)

In 1902, the younger Thomson son, Courtauld, discovered that there was no written agreement directing the administration of the trust. When he asked his stepfather for an accounting of the money paid or owed to his sisters, Moulton refused. Courtauld brought a lawsuit against Moulton, seeking an accounting and recovery of any monies due his sisters. That lawsuit is the key part of this story. We will say more about it after providing some brief background on the defendant, Lord Fletcher Moulton.

LORD JOHN FLETCHER MOULTON: DISTINGUISHED LONDONER AND ENGLISHMAN

John Fletcher Moulton was trained in large part as a mathematician and scientist. He eventually pursued a career at the bar and rose to great heights,⁴ becoming a Lord Justice on the Court of Appeal in 1912,⁵ shortly after his stepchildren's case against him was resolved. He went on to serve many years in that role⁶ and to become an important government official during World War I, overseeing production of bombs and explosives for Great Britain.⁷

He started out, however, as a young barrister without clients or income.⁸ But then he married well, in a financial sense at least. Clara Thomson had substantial assets and income after inheriting from her first husband, a successful inventor. With a stable, well-funded household due to his wife, Moulton was then free to focus on his career without financial pressure.

By all accounts, Moulton was brilliant, especially with numbers, and over time he achieved success as a lawyer in a variety of commercial matters, eventually rising in prominence in the London bar.⁹ By the time Clara died, Moulton was likely earning a substantial income of his own from his law practice. That said, there can be little doubt that the magnificent houses on Onslow Square and many of the comforts the family enjoyed there were purchased with Clara's money, not Moulton's.

⁴ See generally H. Fletcher Moulton, *The Life of Lord Moulton* (Nisbet & Co., Ltd. London 1922) (hereinafter "Moulton").

⁵ The Court of Appeal was the appellate court at the top of the British civil law system at the time, deciding important questions of law. Its jurisdiction included hearing appeals from civil cases that originated in the Chancery Division of the High Court, the court in which the *Thomson et al. v. Moulton* lawsuit was brought. Moulton at 63-72.

⁶ Moulton at 69-72.

⁷ Moulton at 175-273.

⁸ Green at 203.

⁹ Moulton at 36-62.

When Clara was on her deathbed and sought to provide for her Thomson children, Moulton himself drafted her will, creating a trust for their benefit but giving himself complete control over the trust's income. This, of course, would be considered a clear conflict of interest today, and likely was considered the same in 1888.¹⁰

After his wife's death, Moulton's legal star continued to rise. He was on his way to appointment as a Lord Justice when his stepson, Courtauld, and his stepdaughters, Elspeth and Winifred, sued him in 1905 for an accounting of trust funds. There was significant public interest in the case, involving as it did a very prominent barrister and a potentially very unflattering family dispute.¹¹

THE LITIGATION BETWEEN THE THOMSON CHILDREN AND LORD MOULTON

Courtauld Thomson, Clara's youngest child and the force behind the lawsuit, was himself a very successful Englishman, ultimately becoming Baron Courtauld-Thomson and the owner of an estate called Dorneywood which long has been and still is a museum, after he gave it to Britain in the 1940s.¹² (Yes, this means the lawsuit was, practically if not literally, *Baron Thomson et al. v. Lord Moulton* — there were no impoverished Dickensian characters in this story.) Courtauld generally had a good relationship with his stepfather, who offered Courtauld career advice and sometimes financial support. But Courtauld left the household before his sisters and was independent of Moulton earlier than they were. Elspeth did not leave the household until 1899 when she married Kenneth Grahame. Winnie eventually joined Courtauld and, like Courtauld, never married. Instead, they ran Dorneywood together.

It was during the early years of the Elspeth and Kenneth marriage (before Grahame wrote *The Wind in the Willows*) that the litigation arose and was fought out, contentiously and publicly. It is hard to imagine that this case would not have weighed heavily on the minds of Elspeth and her husband while it was pending. Thus, it is not a stretch to surmise that the case and its facts could have inspired the scene where Toad, from his "deathbed," says to his friend Rat, "would you mind ... asking the lawyer to step up," to prepare his last will and testament.¹³

¹⁰ See *infra*, *English Law and Practice in 1905*, where we discuss applicable English law of this era.

¹¹ See, e.g., *Fletcher Moulton Case: Step-daughters' Appeal Allowed*, THE CIVIL & MILITARY GAZETTE, Apr. 13, 1906, at 6.

¹² <https://www.dorneywood.org>.

¹³ Others have suggested connections between other events of the era and scenes in the story. As Michael Dirda notes in his review of Seth Lerer's annotated edition, Chapter 3 "The Wild Wood"

Unfortunately, we have not located any actual court records or documents for the Moulton case. Courtauld himself certainly for many years had papers relating to it (his biographer appears to have had access to and used them), but those papers are not at Dorneywood (we've checked). So, the account of the case presented here is based largely on Courtauld Thomson's memoir and, to a lesser extent, biographies of Grahame.

Many of the basic facts do not seem in dispute, but some key ones are, and there is room for interpretation and argument on the question whether there is a villain in the story. Not surprisingly, Moulton's own son, H. Fletcher Moulton, in his biography of his father, gives the dispute short shrift — one paragraph of three rather vague sentences.¹⁴ Courtauld's biographer,¹⁵ who had access to actual court documents and Courtauld's personal papers and correspondence, not surprisingly tends to paint Moulton as the villain, likely a knowing and intentional wrongdoer. Grahame's biographers,¹⁶ with less access and perhaps less stake in the answer to the question, fall somewhere in between, although they (like Courtauld's biographer) give the case far more attention than does Moulton's son.

We begin with and focus most closely on the account given by Courtauld's biographer, L.A.G. Strong, even though Courtauld obviously had personal biases about the case, because it is the only account where we are sure the writer had access to actual court documents and family communications about the case. Further bolstering Strong's objectivity is that he was writing more than 50 years after the case ended, with none of the parties still living, and so he was under no direct personal pressure by any of the participants in the case to distort the record.

The Plaintiffs' Claims and Moulton's Defense

Courtauld sued Moulton on behalf of his sisters, seeking an accounting of the trust income.¹⁷ He believed Moulton had failed to comply with Clara's wishes and kept all the trust income for himself, paying virtually nothing to

evokes the Sherlock Holmes stories: Rat "dresses and acts like the great detective," while Mole assumes the role of the admiring Watson. Michael Dirda, *Messing About with "The Wind in the Willows"*, The New York Review of Books (Aug. 13, 2009), <https://www.nybooks.com/articles/2009/08/13/messing-about-with-the-wind-in-the-willows/>; Kenneth Grahame, *The Wind in the Willows: An Annotated Edition*, ed. Seth Lerer, Harvard University Press, 2009.

¹⁴ Moulton at 148-149.

¹⁵ L.A.G. Strong, Courtauld's biographer, was a well-known English writer of the first half of the 20th century, who apparently was commissioned by Courtauld's estate, Dorneywood, to write the book. He never met Courtauld, but spent time in Dorneywood, with Courtauld's papers, and spoke to some of Courtauld's friends and acquaintances.

¹⁶ Green and Prince, *supra* note 1.

¹⁷ Strong at 46-47.

Elsbeth and Winnie over the years. If correct, and assuming a flat income of £600-620 per year per sister, Moulton might have owed the sisters in the range of £25,000, a very substantial sum, though before filing the lawsuit Courtauld asked only for £3500 for Elsbeth and £2800 for Winifred.¹⁸

Moulton's defense was that he and Clara had entered an oral agreement (apparently on her deathbed, like her will) that any funds owed the children were subject to deductions for money he expended for their care. He argued that because the sisters lived with him for many years following their mother's death, he owed them nothing, or little, because he paid for all their living expenses, which equaled or exceeded the trust income otherwise due to them.¹⁹

Again, from a legal standpoint (and perhaps a moral one as well), it is notable that Moulton, a prominent lawyer soon to be a Lord Justice, was relying upon (1) a deathbed will he personally drafted,²⁰ which gave him sole control over the trust income, and which thus benefitted him personally and greatly, and (2) an alleged deathbed oral agreement with a long-deceased woman that also benefitted him personally and greatly. Hmmm.

The Trial

On over five days in April 1905, the case was heard by Sir Matthew Ingle Joyce (1839-1930), a Justice who served on the High Court (the trial bench) from 1890-1915, and was assigned to the Chancery Division (which dealt with estate matters) from 1900-1915.²¹

On the first day of the trial, Moulton's counsel admitted that his client had received the trust income and not provided an accounting. But he declared that the sisters had received from Moulton sums far in excess of their actual shares of the trust income. Moulton's lawyer "went on grandly, 'Money became less important to Mr. Moulton so he was quite willing to let his step-children have more than they were strictly entitled to.'"²²

Moulton himself testified. His story was that he called all the children together after their mother's death, told them about her will and what they

¹⁸ Strong at 47.

¹⁹ Strong at 46, 48.

²⁰ Moulton's role in drafting their mother's will was not known to her children until after Courtauld requested an accounting from Moulton, in the interim between Moulton's rejection of that request and Courtauld filing suit on behalf of his sisters. Strong at 47 ("Courtauld made an interesting discovery. His mother's will was all of it in Fletcher Moulton's handwriting.").

²¹ H.G. Hanbury & Hugh Mooney, *Joyce, Sir Matthew Ingle (1839-1930)*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (Sept. 23, 2004), <https://doi.org/10.1093/ref:odnb/34248>. H. G. Hanbury & Hugh Mooney, *Joyce, Sir Matthew Ingle (1839-1930)*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (Sept. 23, 2004), <https://doi.org/10.1093/ref:odnb/34248>.

²² Strong at 48.

were entitled to, and they all agreed to the arrangement, which included his oral agreement with their mother that he could deduct from their shares any monies he spent on their behalf. He further claimed that he had made expensive improvements to the house at 57 Onslow for his stepchildren's convenience. And he claimed that he went to great expense to send Winnie to Paris to study painting and to buy the sisters twelve pairs of gloves for "election purposes."²³

Elsbeth was the first of the children to testify. She agreed that, after her mother's death, Moulton had suggested things continue in the household largely as before, but she claimed no knowledge of actual financial arrangements. She also testified that after her marriage Moulton suggested he should continue taking care of her money from the trust. Further, and importantly, she denied that there ever was a family gathering after her mother's death where Moulton informed the children of his oral agreement with their mother. She also testified about the tasks she and her sister performed for Moulton, such as acting as hostesses, making calls on others, opening bazaars, serving his constituencies, and sometimes traveling long distances on his behalf.²⁴

Perhaps the only downsides for the plaintiffs in her testimony were that she had no explanation for why she had not sought an accounting until 1902 and that Moulton gave her £250 for furniture after her wedding, contrary to her claim that he did not support her marriage.²⁵

Winnie made only a brief appearance on the witness stand, with her counsel asserting that she was in poor health. She expressed gratitude for many things Moulton had given her over the years, though she acknowledged she did not realize that she was in fact paying for them out of her share of trust income.²⁶

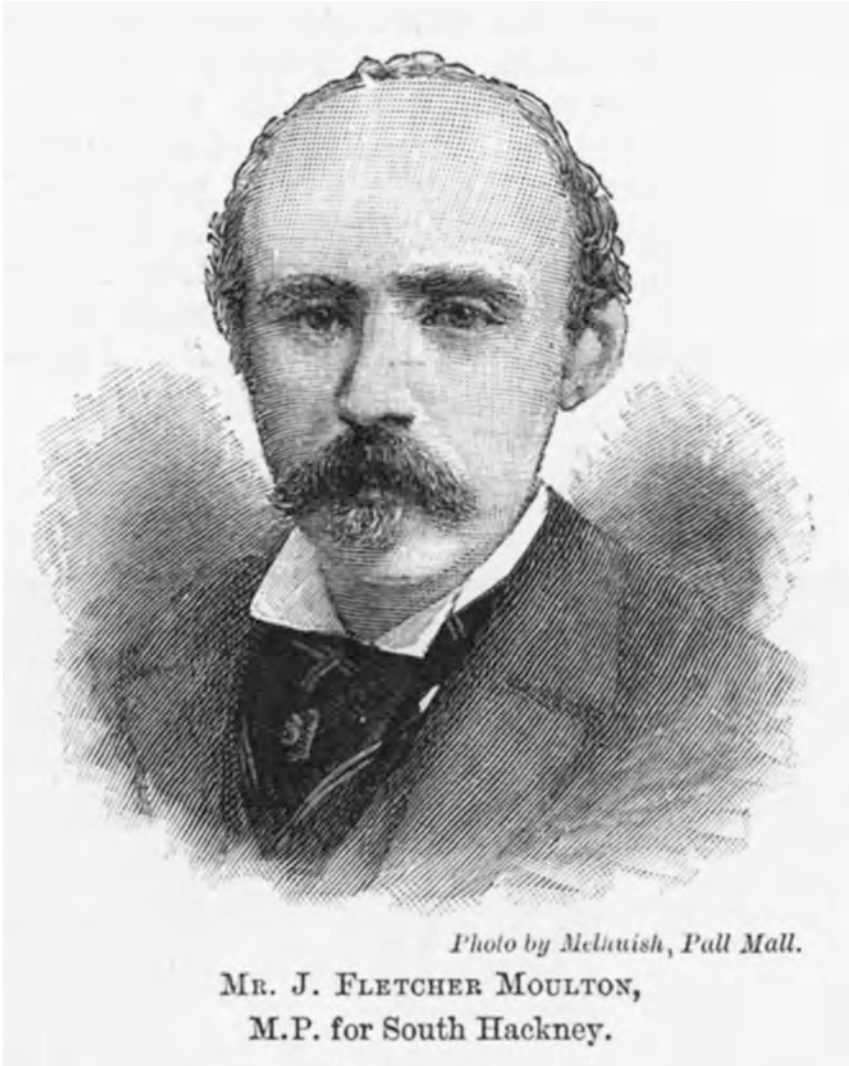
Courtauld was a strong witness for the plaintiffs. He testified that he did not learn until 1896 that Moulton was keeping the entirety of Courtauld's share of Clara's estate for Moulton's own use, at which time Courtauld agreed

²³ Strong at 48.

²⁴ Strong at 48-49. Moulton was a member of Parliament several times. He was first elected as a Liberal member for Clapham in 1885 but lost the next election. He lost an election to represent South Nottingham in 1893, and then was appointed in 1894 to fill a vacancy for South Hackney (see Illustration). He lost in the next election but was elected in 1899 to represent the Launceston Division of Cornwall in 1899 (after Elspeth had married and moved out), a position he held until taking the bench as a Lord Justice. Moulton 73-76.

²⁵ Strong at 49.

²⁶ Strong at 49-50.



Fletcher Moulton was a Member of Parliament several times. He was first elected as a Liberal member for Clapham in 1885 but lost the next election. He lost an election to represent South Nottingham in 1893, and then was appointed in 1894 to fill a vacancy for South Hackney (see Illustration). He lost in the next election but was elected in 1899 to represent the Launceston Division of Cornwall in 1899 (after Elspeth had married and moved out), a position he held until taking the bench as a Lord Justice. Moulton 73-76.

to pay Moulton £200 per year for supporting him and Courtauld received the remainder of his share. He also testified that he had no idea Moulton was keeping all the money due his sisters. Importantly, Courtauld agreed with his sisters that no family meeting took place after his mother's death in Moulton's library where Moulton told them anything about the alleged oral agreement.²⁷

An accountant also testified for the plaintiffs, calculating income due them and deducting for board and lodging paid by Moulton, reaching an end result of £10,456 total due from Moulton to Elspeth and Winnie (remember, Courtauld initially only asked for a total of £6300 to resolve the dispute before filing suit). At that point, the proceedings had lasted four days and Justice Joyce adjourned the trial for a few days in the hope the parties might meet and resolve their differences. But they did not.²⁸

When the trial resumed, Kenneth Grahame testified briefly, making clear that he was not responsible for any part of his wife's claim against Moulton. The solicitor responsible for Clara's trust testified that he had never discussed the trust or its operation with any of the children. Then the lawyers for both sides made closing arguments and the court adjourned for Easter recess.²⁹

Two months later, Justice Joyce rendered his decision. He opined that both sides were in the wrong in some respects, but (perhaps not surprisingly!) stated that he preferred Moulton's evidence about the oral agreement, although he did describe the oral agreement as "vague." He then ordered the parties to make an accounting to each other, with Moulton to receive credit for all sums he provided the sisters over the years as well as a proper amount to account for his maintenance of them.³⁰

Justice Joyce thus favored the prominent barrister over his female step-children. We have no evidence whether Joyce and Moulton were friends or had any professional interactions. But there can be little doubt Joyce would have been aware of Moulton's standing and high reputation in the legal community, not to mention that Moulton shortly was to become a Lord Justice who might sit in judgment over future decisions of Justice Joyce. In fact, after Joyce delivered judgment and while an appeal by the sisters was pending, Moulton was appointed a Lord Justice for the Court of Appeal. On the other hand, one of the claimants (Elspeth) was married to a prominent Bank of England official and successful author, whose connection to the case was known to the judge. Joyce must have known the case had drawn and would continue to draw public attention.

²⁷ Strong at 50.

²⁸ Strong at 50.

²⁹ Strong at 50.

³⁰ Strong at 50-51.

The Appeal

The plaintiffs' appeal of the Moulton case was allowed and heard by three justices: Lord Justice Richard Henn Collins, also Master of the Rolls³¹ at the time; Lord Justice Herbert Hardy Cozens-Hardy;³² and Lord Justice Robert Romer. All three were prominent jurists of their era, enough so that they all received caricatures in *Vanity Fair* magazine,³³ and at least one had appeared on a trading card.

Lord Justice Collins became a Lord Justice in 1897 and later a Lord Justice of Appeal, which permitted him to sit on the Privy Council.³⁴ He served in numerous other high government roles and had presided over the trial of the libel case brought by Oscar Wilde against the Marquess of Queensbury in 1895.³⁵ One of his sons later became a High Court judge.

Lord Justice Cozens-Hardy was a highly successful lawyer before taking the bench, including election as chairman of the General Council of the Bar by his peers.³⁶ He also served as an MP for North Norfolk.³⁷ Ironically, he had joined the High Court when Justice Romer was elevated to the Court of Appeal in 1899, although the Lord Chancellor's choice of Cozens-Hardy apparently was not without reservation: "Notwithstanding your abominable politics I think you are the fittest person to succeed Romer."³⁸ He then was appointed to the Court of Appeal in 1901 and sworn into the Privy Council. He followed Lord Justice Collins as Master of the Rolls on the Court of Appeal.³⁹

Lord Justice Romer served on the High Court for almost ten years before his appointment to the Court of Appeal. He resigned from that Court in

³¹ This was the title for the top civil appellate position on the Court of Appeal.

³² He became Master of the Rolls in 1907, after Lord Justice Collins.

³³ See the accompanying illustrations.

³⁴ Collins of Kensington, Richard Henn Collins, Baron, *ENCYCLOPÆDIA BRITANNICA*, vol. 30, at 722 (1922). "The Privy Council goes back to the earliest days of the Monarchy, when it comprised those appointed by the King or Queen to advise on matters of state. As the constitution developed into today's constitutional monarchy, under which The Sovereign acts on the advice of Ministers, so the Privy Council adapted." Privy Council Office, *The Privy Council*, <https://privycouncil.independent.gov.uk/the-privy-council/> (last visited Aug. 6, 2026). Collins of Kensington, Richard Henn Collins, Baron, *ENCYCLOPÆDIA BRITANNICA*, vol. 30, at 722 (1922).

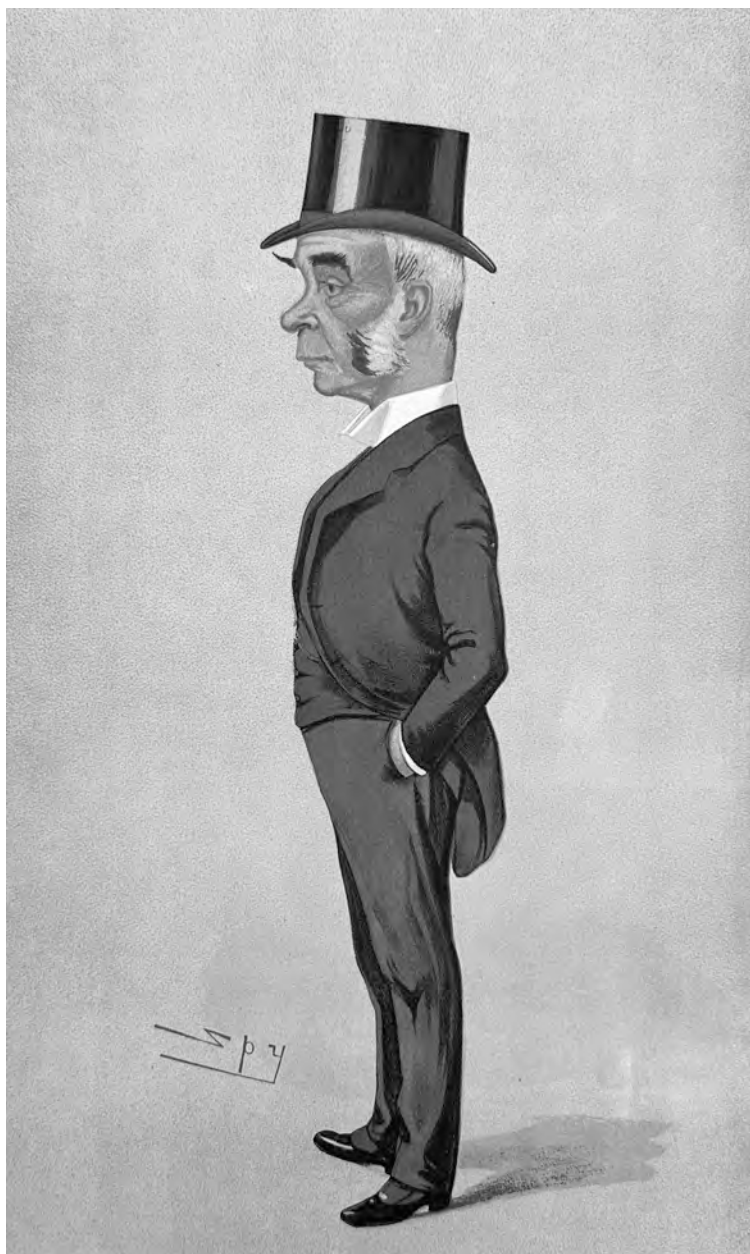
³⁵ H. MONTGOMERY HYDE, *THE TRIALS OF OSCAR WILDE* 97 (Dover Publ'ns 1962).

³⁶ The General Council of the Bar was formed in 1894 to provide a representative body for barristers and to codify and enforce professional etiquette and standards — functions that before then had largely been handled informally by the Inns of Court and the judiciary. General Council of the Bar, *About Us*, Bar Council, <https://www.barcouncil.org.uk/about/about-us.html> (last visited Aug. 6, 2026).

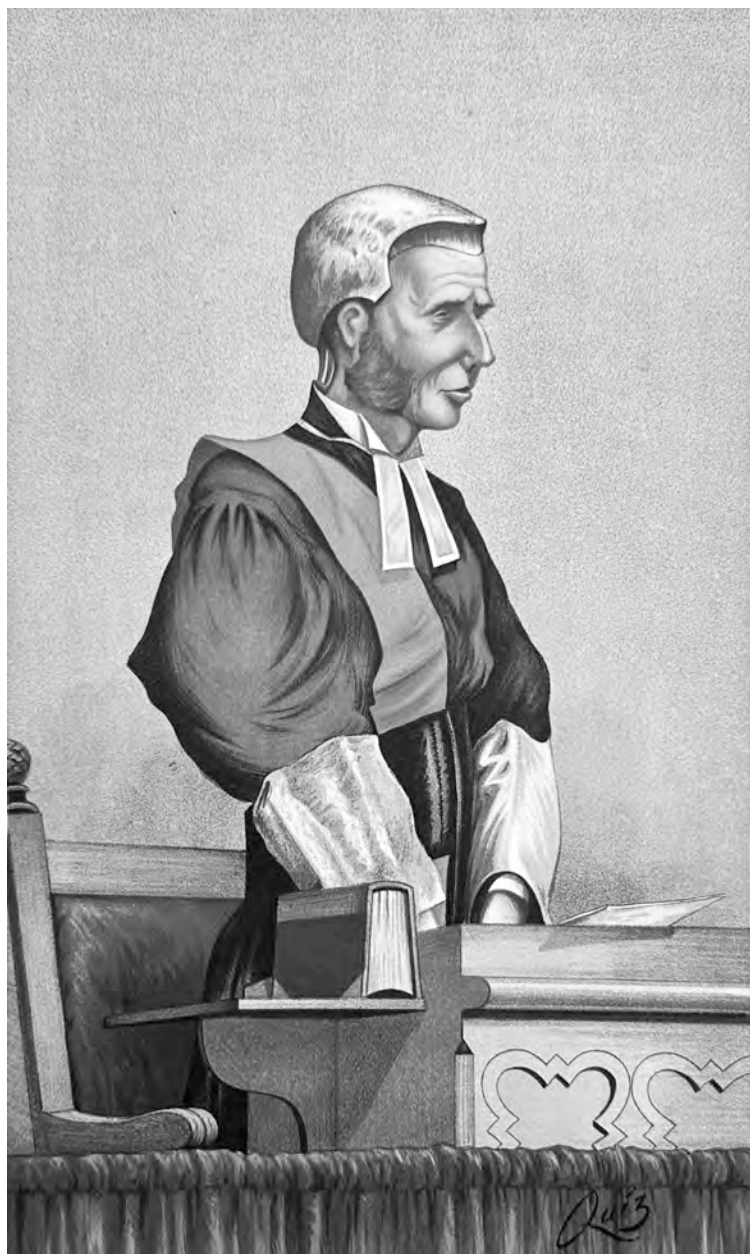
³⁷ Hardy, Herbert Hardy Cozens-, first Baron Cozens-Hardy (1838-1920), judge, *Oxford Dictionary of National Biography*, <https://www.oxforddnb.com/display/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-32605> (last visited Aug. 6, 2026).

³⁸ *Id.*

³⁹ *Id.*



Lord Justice Collins, in *Vanity Fair* (Jan. 14, 1893).



Lord Justice Cozens-Hardy, in *Vanity Fair* (Apr. 13, 1893).



Lord Justice Romer, in *Vanity Fair* (Dec. 12, 1891).

1906, the same year the Court decided the appeal in the Moulton case.⁴⁰ He had some interesting family connections, including marrying the daughter of the editor of *Punch* magazine, and having a grandson who also served as a Lord Justice of Appeal and a daughter who married a man who eventually became Lord Chancellor.⁴¹

This was an illustrious panel whose members would not have been awed by Moulton. And so perhaps it is not surprising that unlike Justice Joyce, they did not give Moulton the benefit of any doubt or arguably preferential treatment. Instead, the Court of Appeal reversed Justice Joyce's decision.

Writing with some diplomacy, the Court of Appeal stressed that key events had happened many years ago, making memories questionable, and thus it was not necessarily the case that any witness had been dishonest. But, nonetheless, the burden lay on Moulton in establishing his defense (the oral agreement) to prove "he had brought home to the minds of the plaintiffs that they were to pay for their keep, and that he had in fact failed to do."⁴² At first, Moulton reacted to this disappointing result by giving notice that he would appeal the decision to the House of Lords. But he later withdrew the appeal, settled with his stepchildren for £8,250, and resigned as trustee of Clara's trust.⁴³

The Court of Appeal's decision attracted the attention of British legal publications, provoking comments both sympathetic to and less forgiving of Lord Moulton. Opining that "the Master of the Rolls had been unduly severe in his criticism of Fletcher Moulton,"⁴⁴ *The Law Journal* was at pains to vindicate Fletcher Moulton, even if he 'did forget in his home life the precautions and full legal obligations of a trustee.'⁴⁵ *The Solicitors' Journal* was less generous, opining that the result demonstrated the impartiality of British justice and also expressing surprise that Moulton should be appointed to the Court of Appeal when it was known he was a litigant in a pending appeal.⁴⁶

The plaintiffs and Courtauld must have felt vindicated by the outcome. Plus, Courtauld's solicitor estimated the proceedings must have cost Moulton around £11,500 in legal fees,⁴⁷ meaning the whole affair may have cost him close to £20,000.

⁴⁰ Dictionary of National Biography, 1927 supplement, "Romer, Robert," Wikisource, https://en.wikisource.org/wiki/Dictionary_of_National_Biography,_1927_supplement/Romer,_Robert (last visited Aug. 6, 2026).

⁴¹ *Id.*

⁴² Strong at 52.

⁴³ Strong at 52.

⁴⁴ Strong at 52.

⁴⁵ Strong at 52.

⁴⁶ Strong at 52.

⁴⁷ Strong at 52.

ENGLISH LAW AND PRACTICE IN 1905

Although the Court of Appeal reversed in a narrow fashion — finding a failure of proof rather than any intentional misconduct — it is worth briefly considering English law that applied to the circumstances the case presented. For example, what did English law in 1888 (the year of Clara’s death) say about the right of a married woman to control and devise her property? Was it customary practice for a married woman to make her husband the sole trustee of a testamentary trust for the benefit of her children from a previous marriage? And what was the enforceability in general of oral agreements in situations like this?

In England at that time, the major controlling law regarding the rights of married women and their property was the Married Women’s Property Act of 1882.⁴⁸ That statute had made major changes in English law, essentially abolishing the doctrine of coverture that long existed.⁴⁹ Coverture was a common law doctrine that merged a wife’s legal identity with her husband’s upon marriage, giving the husband complete control over his wife’s property and income.⁵⁰ The 1882 statute, in its first provision, declared that “A married woman shall ... be capable of acquiring, holding and disposing by will or otherwise, of any real or personal property as her separate property ... without the intervention of a trustee.”⁵¹

Thus, when she made her deathbed will, Clara was entitled under English law to provide that her property should be maintained and used for the benefit of her four Thomson children. Clara and Moulton got married, however, several years before passage of the Act. So how did she maintain her first husband’s property as her own until after the Act took effect in 1882? Most likely, she used a device (common in the upper classes) called a “marriage settlement.” Such agreements were used by wealthy widows to protect their property when remarrying. There were three primary forms of such agreements — settlement by bond, strict settlement, and separate estate. The latter two were used by landed families or those with substantial inherited wealth (like Clara). The purpose was to hold such assets in trust during the marriage (for the couple’s beneficial use) and then after the wife’s death to devise the

⁴⁸ See <https://legislation.gov.uk/ukpga/vict/45-46/75/enacted>.

⁴⁹ See, e.g., Phillip Mallett, *The Victorian City: Women and the Law in Victorian England*, <http://victoriancity.wp.st-andrews.ac.uk>.

⁵⁰ Blackstone described it in his *Commentaries on the Laws of England* in the 1760s: “the husband and wife are one person in law: that is, the very being of legal existence of the woman is suspended during her marriage, or at least is incorporated or consolidated into that of her husband, under whose wing, protection and cover, she performs everything.”

⁵¹ See <https://legislation.gov.uk/ukpga/vict/45-46/75/enacted>.



In 1906, Fletcher Moulton (center) was appointed a Lord Justice of the Court of Appeal (the second-highest court in England). He served until 1912, when he became a Lord of Appeal in Ordinary (that is, one of the members of the House of Lords who performed the judicial functions of that body).

assets and income to her children of her previous marriage.⁵² It seems likely (we do not know for certain) that Clara and Moulton had such an arrangement prior to their marriage. He, after all, had little, and she had substantial assets and income. If they had not entered a “marriage settlement,” then the property Clara possessed prior to marrying Moulton would have merged

⁵² See generally, Amy Louise Erickson, *Women and Property in Early Modern England* (Routledge 1993); see also Amy Erickson, *Coverture and Capitalism*, 59 *History Workshop Journal* 1-16 (2005).

into marriage assets that could be controlled by Moulton under the then-existing common law doctrine of coverture.⁵³

Second, the practice of appointing a surviving husband as sole trustee over a deceased wife's trust for benefit of her children from a prior marriage was common, though it did not meet with approval in all quarters and some legal measures could be taken to lessen the chances of misfeasance by the surviving husband-trustee. For example, some lawyers might have included in the creation of such trusts the appointment of an additional trustee or trustees, so that the husband alone did not control the trust. Or they might have required the concurrence of a professional (such as a banker or lawyer) for major financial decisions affecting the trust. And they might have provided in the trust document limitations on the disbursement of assets other than for the benefit of the children or anti-alienation provisions.⁵⁴ Obviously, none of these precautions were taken here, as Moulton himself drafted the will for Clara. Even if he acted in complete good faith, it seems unlikely he would have thought it necessary to impose such additional constraints on himself.

Although trusteeship arrangements like the one Moulton alleged Clara had made for her children were common, they also not infrequently resulted in disputes and litigation, precisely for the reasons one would anticipate. There was always temptation for a sole trustee widower to direct the trust income to his own benefit, and once the children beneficiaries reached adulthood, they were far more likely to question the trustee's actions, as happened here. There are many Chancery decisions from this era that deal with precisely these types of arrangements. The Moulton case was not a rarity or an oddity, except perhaps for the fact that the defendant was a distinguished barrister and soon to be Lord Justice.

Finally, questions abound as to the enforceability of (even if we assume it existed) an oral agreement regarding Moulton's power to deduct household expenses from any funds owed to the children. Ordinarily trusts and trust terms need not be in writing; they can be declared into existence with a spoken word. With a few exceptions. Relevant here, testamentary trusts created in a will do need to be in writing⁵⁵ to comply with the formalities required for executing a will.⁵⁶

⁵³ *Id.*

⁵⁴ For discussion of the role of trustees in Moulton's era, see Chantal Stebbings, *The Private Trustee in Victorian England* (Cambridge U. Press 2009).

⁵⁵ Thomas Lewin, *A Practical Treatise on the Law of Trusts* *57 (Frederick Albert Lewin ed., 8th ed. 1888) (discussing the Statute of Frauds).

⁵⁶ *The Laws of England: Being a Complete Statement of the Whole Law of England* 547 ¶ 1082 (Earl of Halsbury ed., Butterworth & Co. 1914).

Courtauld's biographer, with access to various documents, including perhaps Clara's will, writes that "Clara's will left her income to Fletcher Moulton in trust, to pay equal shares to Courtauld, Elspeth, Winifred, and himself, each share being worth about [£]620." In the next paragraph, he notes that Courtauld "began to enquire into his sisters' income, and was concerned to find that no written arrangement existed as to what they were to get."⁵⁷

This "arrangement" appears to have meant to Courtauld any details about possible deductions Moulton might make from trust income shares otherwise due to Elspeth and Winnie: The will said nothing about any potential deductions Moulton might make, or offsets he might claim, or payment of any expenditures for the benefit of the Thomson children. Indeed, even Moulton acknowledged that his defense depended solely on the alleged oral agreement which was not itself part of the will he himself drafted for Clara. Such an "agreement" may have been unenforceable, but the Court of Appeal avoided that question by concluding Moulton had failed to prove he ever even made the children aware of such an agreement.

THE DEATHBED WILL AND PROBATE LITIGATION IN LITERATURE

The idea of deathbed wills and complicated, contentious probate litigation is no stranger to literature. There are many classic (not to mention modern) works that incorporate these scenarios. Perhaps most famous is Charles Dickens' *Bleak House*, with the never-ending *Jarndyce v. Jarndyce* case.

Several authors have invoked inheritance in a variety of ways, whether using the complications created by the inheritance rules of an era, or the effects of a large inheritance windfall, or as the reason for murder. Such themes and topics are found, for example in the Jane Austen and Emily Brontë novels,⁵⁸ and not surprisingly in the work of Agatha Christie.⁵⁹ Other authors to invoke

⁵⁷ Strong at 46.

⁵⁸ See Jane Austen, *Pride and Prejudice* (1813) (The plot is shaped by the entail on Mr. Bennet's estate, Longbourn, which prevents his daughters from inheriting the family property and directs it instead to the male heir, Mr. Collins, leaving the women financially vulnerable. This inheritance rule creates the economic urgency behind Mrs. Bennet's matchmaking.); Jane Austen, *Sense and Sensibility* (1811) (The Dashwood women are displaced because Norland passes to John Dashwood under the terms of inheritance, leaving his stepmother and half-sisters dependent on his goodwill and demonstrating the precariousness of women's financial security given the estate laws.); Emily Brontë, *Wuthering Heights* (1847) (Inheritance and property succession drive much of Heathcliff's revenge, as he manipulates marriage, debt, and control over heirs to acquire both Wuthering Heights and Thrushcross Grange.).

⁵⁹ Agatha Christie, "Motive v. Opportunity," in *The Thirteen Problems* (London: Collins Crime Club, 1932) (Christie's short story centers on a contested testamentary scheme, in which suspicion turns on who had both the incentive and the practical ability to benefit from a will. Dame Agatha uses

these concepts include Anthony Trollope,⁶⁰ Henry James,⁶¹ F. Scott Fitzgerald,⁶² Tennessee Williams,⁶³ and even arguably William Shakespeare.⁶⁴

Kenneth Grahame had both literary precedents and personal experience to suggest Toad's feigned deathbed scene.

CONCLUSION

We will never know definitively if Moulton was cheating his stepchildren and lying about the deathbed oral agreement with Clara. For our purposes, it does not really matter. Kenneth Grahame knew this litigation intimately, indeed was even a witness at the trial. He lived through the entirety of the case while married to Elspeth. It seems at least plausible to suggest that Grahame might have thought of his own experiences with deathbed wills as he wrote *The Wind in the Willows*.

inheritance expectations as a motive for deception, manipulation, and possible murder.).

⁶⁰ Anthony Trollope, *The Kellys and the O'Kellys* (1848) (Trollope's novel involves disputed family wealth, marriage prospects, and expectations surrounding succession in Anglo-Irish society.).

⁶¹ See Henry James, *The Portrait of a Lady* (1881) (Isabel Archer's inheritance gives her unusual independence, but it also makes her vulnerable to exploitation by those who see her fortune as an object to be captured.); Henry James, *The Spoils of Poynton* (1897) (The novel concerns a conflict over the ownership and disposition of a house's treasured contents after the death of the family patriarch.).

⁶² F. Scott Fitzgerald, *The Beautiful and Damned* (1922) (Anthony Patch's life is dominated by the expectation that he will inherit his grandfather's fortune, an anticipated windfall that encourages idleness and decay, invoking the theme that inheritance may be morally corrosive.).

⁶³ Tennessee Williams, *Cat on a Hot Tin Roof* (1955) (The play revolves around Big Daddy's estate and the question of who will inherit his wealth after his impending death. Family members maneuver around illness, fertility, marriage, and truth-telling because succession to the estate is both an economic prize and a measure of legitimacy.).

⁶⁴ William Shakespeare, *King Lear* (1608; rev. folio text 1623) (Lear's decision to divide his kingdom during his lifetime operates like a disastrous inter vivos transfer of his estate in exchange for declarations of filial loyalty. The tragedy exposes the dangers of surrendering control over property without secure obligations, testing the relationship between succession, power, dependence, and family duty.)