Watson means is that such partial possession is good as against the granter, but his own statement clearly shows that he did not mean to say that it was of any avail for the purpose of establishing an adverse right against a stranger to the grant, founding upon a competing title.

On the whole matter, therefore, I agree with your Lordships that the interlocutor of the Lord Ordinary must be recalled and the defender assoilzied.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defender from the conclusions of the summons.

Counsel for Pursuer and Respondent—M'Lennan, K.C.—T. E. Robertson. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defender and Reclaimer—Macphail, K.C.—A. M. Hamilton. Agents—Lindsay, Howe, & Company, W.S.

Wednesday, January 15.

SECOND DIVISION.

HANNAY'S TRUSTEES *v.* KEITH.

Succession—Testamentary Writings—Revocation—Extrinsic Evidence.

A testatrix left a trust-disposition and settlement by which she revoked all previous testamentary writings and, *inter alia*, directed her trustees to pay £1500 "in the manner to be afterwards directed by me in any writing or writings to be hereafter executed by me." She left no writing subsequent to the date of the settlement, but in her repositories after her death a holograph document was found dated prior to the settlement and disposing of the sum of £1500. *Held* that extrinsic evidence was incompetent to prove that she intended the holograph document to receive effect.

Tait's Trustees v. *Chiene*, 1911 S.C. 743, 48 S.L.R. 609, *explained* and *distinguished*.

Succession — Testament — Re-execution of Prior Testament—Intervening Codicil.

A testatrix left a trust-disposition and settlement which in its main terms was a re-execution of an earlier settlement, but which, along with certain other alterations, directed her trustees to pay a sum of £1500 "in the manner to be afterwards directed by me in any writing or writings to be hereafter executed by me." She also left a holograph document dated subsequent to the earlier but prior to the later settlement, disposing of the sum of £1500. Both settlements contained a clause of revocation of previous testamentary writings. *Held* that the later settlement was not a re-attestation of the earlier, and that therefore it revoked the intervening holograph document.

Dalglish's Trustees v. *Crum*, November 25, 1891, 19 R. 170, 29 S.L.R. 149, *distinguished*.

A Special Case was presented for the opinion and judgment of the Court by David M. M. Milligan, advocate, Aberdeen, and another, the trustees acting under the trust-disposition and settlement, dated 13th January 1904, of the deceased Mrs Eliza Farquharson Milne or Hannay, Southville, Dollar, who died on 26th October 1904, *first parties;* Mrs Laura Esther Parker or Keith, Christchurch, New Zealand, widow of William Keith, formerly of Ceylon, and his children, *second parties;* Miss Jemima Graham, 15 Alva Street, Edinburgh, the executrix acting under the settlement of Miss Elizabeth Harriet Caroline Hannay, the testatrix' only daughter, who died unmarried on 12th January 1911, *third party;* Peter Hannay, the only son of the testatrix, *fourth party;* John H. P. Hannay, Bayup Brook, Bridgtown, West Australia, and others, the whole children of Peter Hannay, *fifth parties*.

By the fourth purpose of her settlement the testatrix provided as follows—"(*Fourth*) I direct my trustees, as soon as convenient after my death, to set aside and invest in their own names the sum of five thousand pounds sterling, and to pay to my daughter, the said Elizabeth Harriet Caroline Hannay, during her lifetime, the free annual income thereof for her alimentary support, declaring, however, that my daughter shall have no vested right in the fee of said five thousand pounds . . . and in the event of my daughter dying unmarried . . . then I direct my trustees on my daughter's death, and out of said sum of five thousand pounds, to pay a sum of five hundred pounds thereof, as representing the amount of a legacy which I received from my great-grandfather, the Reverend Robert Farquharson of Allargue, to my granddaughter Millicent Isabel Bruce Hannay absolutely, and to pay a further sum of one thousand five hundred pounds thereof, in the manner to be afterwards directed by me in any writing or writings to be hereafter executed by me, and that too, however informal said writings may be, so long as they are admittedly under my hand, and the remainder of said sum of five thousand pounds, *videlicet*, three thousand pounds, I direct my trustees to pay to the children of my son Peter equally among them if on my daughter's death they have attained the age of twenty-one years complete, or if females have attained that age or been married, and if not, then on their respectively attaining that age, or if females, being married before they attain that age."

The settlement further contained the following clause—"And I revoke all previous testamentary writings."

Mrs Hannay did not leave any writing dated after the date of execution of her settlement dealing with the above-mentioned sum of £1500. She left, however, a holograph writing in pencil, dated 21st December 1903, in the following terms—"In the event of my daughter's leaving no

descendant, £1500 (fifteen hundred pounds sterling) I bequeath to the family of the late William Keith of Ceylon, £200 of which would be for his widow Mrs Laura Keith.—E. F. HANNAY, Southville, Dollar, Scotland, December 21st, 1903."

The Case stated—"A draft of Mrs Hannay's trust-disposition and settlement was prepared by her law agents in July 1903, and was then sent to her for consideration and approval. After correspondence as to its terms, an engrossment of the draft as then adjusted was executed by Mrs Hannay on 16th December 1903, being five days before the date of the last-mentioned holograph writing. In returning the signed engrossment to her agents on 16th December 1903 Mrs Hannay expressed her desire to make certain alterations on the settlement, and requested her agents to prepare a codicil for the purpose of giving effect to these. One of the alterations desired by her was a reservation of right to her to bequeath £1500 out of the sum of £5000 mentioned in the fourth purpose otherwise than to her son or his family. Mrs Hannay's agents advised her that it would be preferable that the settlement should be altered to give effect to her wishes and be re-executed by her. Said advice was given prior to 21st December 1903, but final instructions to the agents for a new settlement embodying said alterations were not given till 29th December 1903, and the settlement as so altered was executed by her on 13th January 1904. The trust-disposition and settlement as executed by Mrs Hannay on 16th December 1903 is not now available for production, having been either destroyed or mislaid, but the agents who prepared it are able to state that it contained a clause of revocation in the same terms as that quoted *supra*."

In an appendix annexed to the Case and held as forming part thereof there were printed certain letters passing between Mrs Hannay and her agents, Messrs Davidson & Garden, advocates, Aberdeen, between the dates 4th December 1903 and 14th January 1904. The correspondence so printed contained, *inter alia*, the following passages:—"*Southville, Dollar, December 16th*, 1903.

"Gentlemen— . . . One point also I should like added to the will, viz., that in the event of my daughter's dying leaving no descendant, I leave £1500, the sum of fifteen hundred pounds, free of legacy duty, otherwise than to my son and his heirs; and I should like these two points clear within the will itself—not simply in a holograph supplement—their omission might be in certain contingencies misleading. I think you could kindly take your own way of making such codicil to the present document, and oblige, Gentlemen, yours faithfully, E. F. HANNAY."

"*Aberdeen, 17th December* 1903.

"Dear Mrs Hannay— . . . With regard to the provision that in the event of the death of your daughter without descendants, a sum of £1500, free of duty, shall be excluded from the sums given to your son, we shall be glad to know the purposes to which the £1500 are to be devoted, in order that we may make the necessary amendment to your will.—Yours faithfully,

"DAVIDSON & GARDEN."

"*Southville, Dollar, December 17th*, 1903.

"Gentlemen— . . . I would beg to suggest that I be allowed to add a holograph page or sheet to the will as it now stands, in which I could set forth . . . the statement of probability, under certain contingencies, of bequeathing £1500 (fifteen hundred pounds) to others than my son's family. . . .—Yours faithfully,

"E. F. HANNAY."

"*Aberdeen, 19th December* 1903.

"Dear Mrs Hannay— . . . The more I consider the three changes which you would like to make in your will, the more I think that the will should be rewritten. . . . When you have told me how you want the £1500 disposed of, I shall have the will rewritten and returned to you for signature. . . .—Yours faithfully,

"DAVID M. M. MILLIGAN."

"*Southville, Dollar, December 29th*, 1903.

"Gentlemen— . . . In event of my daughter's leaving no direct heirs, I might not leave the whole of the £5000—five thousand pounds to go to my son or family. I reserve the right of bequest, otherwise, for a portion—and without in the meantime specifying amount or direction. . . . —Yours faithfully, E. F. HANNAY."

From the correspondence it further appeared that the later settlement differed from the earlier (*a*) in extending the gift of a fee of a share of residue to the children of the present marriage of Peter Hannay to his lawful children, and (*b*) in providing that certain annuities given by the earlier settlement should only be held by the annuitants if they were unmarried and not otherwise provided with "ample means."

After Mrs Hannay's death there were also discovered in her repositories certain holograph documents. Among these documents were the two following:—"28. 5. 1904—Of funds absolutely mine, I leave the sum of fifty pounds stg., £50 to Eliza Keith, Ceylon, whom failing to her mother Mrs Laura Keith, widow of Mr William Keith—as also £250—the sum of two hundred and fifty pounds to said Mrs Laura Keith. E. F. HANNAY."

"*Southville, Dollar, December 5th*, 1903.

"D. M. M. Milligan, Esquire,
&c., &c., &c., of Aberdeen.

"Dear Sir— . . . It is late this Saturday, and I do not expect to dispatch this until Monday, but it has come irresistibly on my mind that in the event of my daughter's remaining unmarried, or married leaving no family, I would leave £1500—fifteen hundred pounds—to Mrs Laura Keith's family, Ceylon, *i.e.*, herself, for benefit of her family. You will kindly observe from which part of the funds I am entitled to make this bequest.—Yours faithfully,

"E. F. HANNAY.

"Not sent. I intend adding as a private codicil, to be read after my death.' E. F. H."

The Case further stated—"10. The question has now arisen whether the said holograph writing by Mrs Hannay, dated 21st December 1903, and quoted above, is operative and effectual to dispose of the sum of £1500 mentioned in it as therein specified. . . . 12. The first, third, fourth, and fifth parties *contend* (1) that the said holograph writing by Mrs Hannay, dated 21st December 1903, was revoked by her said trust-disposition and settlement, and (2) that it does not constitute an operative direction as to the disposal of the said sum of £1500 in the sense of the fourth purpose thereof. The second parties contend that the said holograph writing, dated 21st December 1903, was not, in the circumstances, revoked by Mrs Hannay's said trust-disposition and settlement, and that it is operative and effectual as a testamentary writing of Mrs Hannay, and that it does constitute a direction to pay the said sum of £1500 in the manner expressed in the said holograph writing, and that in the sense of the fourth purpose of the said trust-disposition and settlement."

The following *question of law* was, *inter alia*, submitted for the opinion and judgment of the Court—"1. Is the holograph writing of the testatrix, dated 21st December 1903, operative and effectual as a part of her final testamentary writings?"

Argued for the second parties — The holograph writing of 21st December 1903 was valid and effectual. (1) The extrinsic evidence tendered could be competently admitted to establish its validity. The object of admitting extrinsic evidence in such cases was to determine what was the actual will of the testator, and the Scottish Courts in admitting such evidence exercised functions similar to those of probate in England and quite distinguishable from those which they exercised in construing the language of the deed. It was clear from the unsent letter of 5th December 1903 that the testatrix intended the writing of 21st December 1903 to receive effect, and the settlement was incomplete without it. The writing in question together with the will constituted a continuous act of testamentary activity on the part of the testatrix. Where a series of documents of a testamentary character had been left by a testator which were capable of being regarded as *idem negotium*, the Court was entitled to look at the facts surrounding their execution to see whether a revocation of former wills in one of them was to be read literally or in relation to the facts liberally. The authorities established that if the documents could be read as *idem negotium* they were to be read as if they were one document of even date—Dickson on Evidence, section 1067; *Forlong* v. *Taylor's Executors*, April 3, 1838, 3 S. & M'L. 177, *per* L.C. Cottenham at p. 210; *Lowson* v. *Ford*, March 20, 1866, 4 Macph. 631, *per* Lord Cowan at p. 637, 1 S.L.R. 227; *Greenough* v. *Martin*, 1824, 2 Add. Eccl. 239, *per* Sir John Nicholl at p. 243; *Dalglish's Trustees* v. *Crum*, November 25, 1891, 19 R. 170, 29 S.L.R. 149; *Tait's Trustees* v. *Chiene*, 1911 S.C. 743, 48 S.L.R. 609; *Sprot's Trustees* v. *Sprot*, 1909 S.C. 272, 46 S.L.R. 161; *Scott* v. *Sceales*, February 5, 1864, 2 Macph. 613, *per* L.J.C. Inglis at p. 619; *Forsyth's Trustees* v. *Forsyth*, March 13, 1872, 10 Macph. 616, 9 S.L.R. 367; *Whyte* v. *Hamilton*, July 13, 1881, 8 R. 940, 18 S.L.R. 676. (2) If the holograph writing and the will could not be regarded as *idem negotium*, the latter was, at any rate, simply a re-attestation of the earlier will of 16th December 1903. Under English law intervening codicils were regarded as *addenda* to the original will, and the re-attestation of the latter affirmed also the former. There was evidence that there was a clause of revocation in the earlier will also, and the probability was that it was only a clause of style—Williams on Executors, 10th ed., pp. 140, 147; *Wade* v. *Nazer*, 1847, 1 Rob. Eccl. 627; *Green* v. *Tribe*, 1878, 9 Ch. D. 231; *Upfill* v. *Marshall*, 1843, 3 Curt. 636. The English law of re-attestation had been adopted in Scotland in *Dalglish's Trustees* v. *Crum* (*cit. sup.*), and affirmed in *Tait's Trustees* v. *Chiene* (*cit. sup.*), and it was not necessary that the re-attesting will be in identical terms with the earlier one— *Wade* v. *Nazer* (*cit. sup.*), and *Dalglish's Trustees* v. *Crum* (*cit. sup.*)—so long as they were practically the same as in the present case.

Argued for the first, third, fourth, and fifth parties—The writing of 21st December 1903 was revoked by the subsequent settlement, which contained *in gremio* two passages which were inherently incompatible with the former document, viz., (1) the clause of revocation, and (2) its reference to writings "to be hereafter executed." These passages were unambiguous, and extrinsic evidence was therefore incompetent—Jarman on Wills, 6th ed., p. 2209; Dickson on Evidence, secs. 1052-1055; *Pattison's Trustees* v. *University of Edinburgh*, August 11, 1888, 16 R. 73. There was no dispute in the present case as to the testamentary character of the writings in question. The sole question was as to the effect of the clause of revocation, and that was clear. In *Allan* v. *Glasgow*, August 14, 1846, 5 Bell's App. 379, there was a limited clause of revocation, and therefore the earlier will was to that limited extent sustained. In *Tait's Trustees* v. *Chiene*, *cit. sup.*, there was a real though latent ambiguity. In *Greenough* v. *Martin*, *cit. sup.*, the clause of revocation was ambiguous in its application to a series of codicils. The other cases founded on by the second parties either belonged to a different class or contained some ambiguity in the deeds founded on. On the assumption that the evidence was competent, it was insufficient to contradict the unambiguous terms of the second will, which was a substantially different will from the first. The English doctrine of re-attestation had not been adopted in its entirety in Scots law. *Dalglish's Trustees* v. *Crum*, *cit. sup.*, was the only case in Scotland in which it had been given effect to, and in that case it proceeded on the ground that there was complete identity of the two deeds, and that there was no revocation of prior deeds in the later

of them. In certain circumstances in Scots law there might be implied revocation—*Turnbull's Trustees* v. *Robertson*, 1911 S.C. 1288, 48 S.L.R. 1033. Even in England the doctrine of re-attestation was not a rule of universal applicability, but depended on the circumstances of the case—*In re Rawlins*, 1879, 48 L.J. P.D. 64, *per* Lord Hannen at p. 65. Assuming, therefore, that Scots law accepted the doctrine, it must be accepted *secundum subjectam materiam*, and it was impossible in the present case to say that the testatrix had confirmed the codicil dealing with the £1500 by dealing with it in a different way in the will. *Tait's Trustees* v. *Chiene*, *cit. sup.*, was not an authority on re-attestation, but on the construction of the ambiguous words "of even date" in the deed.

At advising—

LORD DUNDAS—[*After a narrative of the facts*]—A question of considerable interest and importance is thus raised as to the extent to which extrinsic evidence is competent to set up as effectual a testamentary document which (like the writing of 21st December) must otherwise, being prior in date to the settlement, admittedly be held to be ineffectual. Mr Mackay for the second parties maintained two points with ability and vigour—(1) that the settlement of 13th January 1904 was in fact and effect a mere re-attestation of that of December 1903, and the intermediate writing of 21st December therefore remained good and effectual; (2) that the extrinsic evidence was competent and sufficient to establish Mrs Hannay's intention that the writing of 21st December should receive effect, notwithstanding its actual date prior to the settlement of January 1904.

The first of these points was based largely upon the case of *Dalglish's Trustees* v. *Crum* (1891, 19 R. 170), decided by this Division. The rubric bears that "a lady left (1) a trust-disposition and settlement, partly signed by her and also executed notarially of date 8th March; (2) a codicil executed notarially on 14th March; and (3) a trust-disposition and settlement executed on 9th April in the ordinary way, all in the year 1890. (1) and (3) were both universal settlements, and were practically identical. There was no express revocation of prior settlements in (3). The codicil bequeathed a legacy to a person to whom a legacy was bequeathed in the first trust-disposition, and again in identical terms in the second trust-disposition, the codicil bearing that its provision was 'in addition to the provisions in my trust-disposition and settlement in favour of the' legatee. In a Special Case brought to determine whether the codicil was or was not recalled by the second trust-disposition, it was stated that the first trust-disposition of the 8th of March was executed notarially because from bodily weakness the testator had not been able to complete the execution of it in her own hand; that her man of business had explained to her that if she recovered strength 'it might be better to have the deed re-executed and signed by herself'; that accordingly, she having recovered, it was so 're-extended and re-executed,' this deed being the trust-disposition of 9th April, and that the notary who prepared and executed the codicil was not the same person who prepared the two trust-dispositions and took charge of their execution. *Held* that the codicil was not recalled, the trust-disposition of 9th April being merely a re-attestation of the will of 8th March." The Lord Justice-Clerk said the "question would be a very difficult one but for the authorities that have been cited to us"; these were English cases—*Wade* v. *Nazer*, 1847, 1 Rob. Eccl. Rep. 627; *Green* v. *Tribe*, 1878, 9 Ch. Div. 231; and *Rawlins*, 1879, 48 L.J., P. & D. 64—and on the strength of these decisions his Lordship stated that the settlement of 9th April "being a mere re-execution or re-attestation, we are, I think, in a position to hold that it did not cancel the codicils. The expression of the will of Miss Dalglish on the 8th March was repeated on the 9th April, and as a mere repetition it had no effect as a cancellation of the codicils. They are not affected by it." Lord Young, the only other Judge who delivered an opinion, observed that the difficulty lay in reaching the fact that the deed of 9th April was only a re-attestation or re-execution of the deed of 8th March. Having overcome that difficulty his Lordship said he had "no hesitation in acting on the principle of the case of *Wade*. That principle was very distinctly expressed by Lord Hannen in a subsequent case when he was President of the Probate Court. The principle is that a mere re-attestation of a deed, though that re-attestation be subsequent to a codicil, will have no effect in recalling that codicil. Indeed, it is an inaccurate use of language to speak of a re-attested will as a new will. The will remains the same though evidenced by writing on a new piece of paper. The will of 9th April is the very will of 8th March." Lord Rutherfurd Clark and Lord Trayner concurred. *Dalglish's* case is, I think, the only Scots decision in which the "principle" of re-attestation is affirmed, for I do not consider that the judgment in *Tait's Trustees* truly proceeded upon that ground. But, accepting *Dalglish's Trustees* as a sound decision, I do not think we could apply it to the present case without materially enlarging the scope and effect of the "principle" it affirms, which I am not disposed to do. The case before us does not comply with the postulates of Lord Young's opinion. Mrs Hannay's will of 13th January cannot be said to be "the very will" of 16th December. The two settlements were not identical (see M'Laren on Wills and Succession, 3rd ed., p. 413, note 2). We have not before us the settlement of 16th December, but we were informed that by its terms £4500 out of the sum of £5000 was destined to Peter Hannay and his children. By the settlement of 13th January only £3000 is so destined, the other £1500 being reserved for future disposal of the testatrix, as the deed bears. Other material alterations were intention-

ally and deliberately made by Mrs Hannay on the former settlement when she executed the later one. I am therefore of opinion that the principle of re-attestation affirmed in *Dalglish's Trustees* does not govern the present case. The first branch of Mr Mackay's argument accordingly, in my judgment, fails.

The other branch must also, I think, be rejected. It is important to bear in mind in a question of this sort that the Court of Session in Scotland has to perform two separate and distinct functions which in some other countries are entrusted to separate branches of the Court (see *per* L.J.-C. Inglis in *Scott* v. *Sceales*, 1864, 2 Macph. 613). We have in the first place to ascertain and determine what are the testamentary writings of the deceased of which, in English phrase, probate should be granted as constituting his will. For this purpose extrinsic evidence may be necessary, and in this case the few facts necessary to establish the testamentary character of the writing of 21st December are admitted. The next function of the Court is to determine, as matter of construction, the true meaning and effect of the testamentary writings of the deceased. Here again extrinsic evidence may be necessary, but the limits within which it can competently be resorted to are somewhat jealously guarded. The testator's intention must of course always be gathered from the language he has used, and no extrinsic proof is admissible to contradict or modify the plain meaning of that language. But the Court is entitled, in construing a testamentary (like any other) instrument, to have information as to the circumstances which surrounded the testator when he subscribed it. And extrinsic evidence may be resorted to, *e.g.*, to explain words or phrases occurring in a will which are technical, scientific, or otherwise outside the range of common parlance, or when it is necessary for the identification of a particular legatee, or the subject of a legacy or the like, or even where ambiguity arises from a reference in the instrument under construction to some fact beyond the scope of its immediate expression. Counsel for the second parties strenuously maintained that extrinsic evidence is here admissible (and available) to prove that the words in Mrs Hannay's will, "afterwards directed by me in any writing or writings to be hereafter executed by me," were intended by her to refer to and include the testamentary writing of 21st December, prior in date to the will, notwithstanding the clear and unambiguous import of the words themselves, and the express clause of revocation of "all previous testamentary writings." I cannot accept the contention. It was urged that the recent case of *Tait's Trustees* (1911 S.C. 743) is a direct authority in favour of the second parties upon the point. I do not think it is so. *Tait's* case was, as appears from the opinions delivered, one of exceptional difficulty and of great specialty. A proof was then led "to enable the Court" (as Lord Dunedin put it) "as is proper, to be, so far as it could be, in possession of the circumstances of the moment with regard to what was done." The question was as to the validity or the reverse of Mr Tait's holograph list of legacies, which was dated 28th October 1909 and signed by him "in terms of my last will of even date." The evidence satisfied the Court that this document was a testamentary writing of the testator. But the difficulty of the case arose from the words quoted; for, as Lord Johnston expressed it (at p. 758), "there was no will of 'even date,' if 'even date' meant 28th October 1909. There was a possible will of 27th, and an undoubted will of 29th. There was a possible will of yesterday, an actual will of to-morrow, but, literally at least, none of to-day. Yet to one or other of these two documents the docquet must refer. If it referred to the former, then as the will of 27th October, so far as it can be regarded as a will, was revoked by that of 29th October, No. 8 of process went with it; if to the latter, it may be sustained. Literally and expressly it referred to neither." The learned Judges pointed out that if the date 28th October were to be regarded alone and by itself, the list of legacies must necessarily be held to be invalid, seeing that Mr Tait's final settlement was only executed on the 29th. But they sustained its validity; and the Lord President expressed his ground of judgment (p. 755) to be that Mr Tait did not look on the two documents of 27th and 29th October as different things. "He looked on them as *idem negotium*, and I think, therefore, when he says 'in terms of my last will of even date' he really has in contemplation not the one document of the 27th but both documents." I think Lord Johnston proceeded on precisely the same ground. He uses the word "republication" more than once in the course of his opinion; but the basis of his decision (p. 761) was that "what Mr Tait did between the evening of 27th and the afternoon of 29th October 1909 was truly one act of testamentary disposition." In these circumstances the case of *Tait's Trustees* does not appear to me to afford a sufficient basis for the contention of the second parties. It would, I think, be a strong thing to extend the doctrine of *idem negotium*, applied in *Tait's* case with difficulty to a period of hours rather than of days, to a period of weeks, as we are here asked to do. It is not easy to see where such an extension might lead to; it might be prayed in aid to cover a period of months or of years, the continuity and identity of the "*negotium*" or "act of testamentary disposition" being sought to be established by correspondence or other extraneous evidence during the period. I am not prepared to strain a theory which was held to suit the facts in *Tait's* case so as to make it cover the quite different and much less favourable state of circumstances now before us. In my judgment we ought not to admit the correspondence in evidence. It is not, I consider, competent to contradict by extrinsic proof the express and unambiguous terms of Mrs Hannay's final settle-

ment, and that, I think, is in effect what we are here asked to do. The writing of 21st December is therefore in my judgment inoperative and ineffectual, and I am for answering the first question put to us in the negative.

I should like, however, to add that the conclusion I have reached as matter of law does not, in my opinion, result in any miscarriage of justice; for if the extrinsic evidence could competently be regarded, it would not, in my opinion, be relevant or sufficient to show an intention on Mrs Hannay's part other than that to which effect will be given, if your Lordships agree with my conclusion. The draft of Mrs Hannay's settlement was sent to her on 4th December. Next day she wrote a letter addressed to her agents which shows that she had it in her mind to leave the £1500 to the Keith family if her daughter died unmarried. But this letter was never sent; it was docqueted and retained by Mrs Hannay. She executed her settlement on 16th December; it contained no such provision as she had contemplated for the Keith family, but in returning it to her agents she says she would like added to the will a codicil to the effect that if her daughter died childless she left the £1500 otherwise than to her son and his heirs; and on 17th December she refers to the "probability under certain contingencies of bequeathing £1500 to others than my son's family." The agents on 17th and 19th December advised that instead of a codicil or codicils the settlement should be rewritten. On 21st December Mrs Hannay put on paper the writing in question, reverting apparently to her idea of a codicil. But on the 29th, eight days later, she writes to her agents—"In the event of my daughter's leaving no direct heirs, I might not leave the whole of the £5000 five thousand pounds to go to my son or family. I reserve the right of bequest otherwise for a portion and without meantime specifying amount or direction." It is exceedingly difficult to reconcile this passage with the view that Mrs Hannay believed and intended when she wrote it that she had already validly bequeathed the £1500 to the Keiths. When the new settlement was sent to her, containing the colourless clause already quoted, she executed it without comment on 13th January. In these circumstances I confess I see no reason to suppose that Mrs Hannay regarded the writing of 21st December as a valid and subsisting provision; and the contrary view is further supported by the fact that on 28th May 1912 she made a bequest to the Keith family, as to the validity of which no doubt is suggested. [*His Lordship then proceeded to deal with questions in the case with which this report is not concerned.*]

The LORD JUSTICE-CLERK, LORD SALVESEN and LORD GUTHRIE concurred.

The Court answered the question of law in the negative.

Counsel for the First and Fifth Parties—R. Scott Brown. Agents—Martin, Milligan, & Macdonald, W.S.

Counsel for the Second Parties—A. M. Mackay. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for the Third Party—C. H. Brown. Agents—Mackintosh & Boyd, W.S.

Counsel for the Fourth Party—A. R. Brown. Agents—Cowan & Dalmahoy, W.S.

Tuesday, January 21.

FIRST DIVISION.

GRAHAM *v.* BARR & THORNTON.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident Arising Out of and in Course of the Employment—Miner Returning Home from Pit.*

A workman who was employed as haulage man in a coal mine, and whose duties were entirely underground, had finished his work for the day, and was returning homewards by a track alongside of a branch railway belonging to the colliery, when, at a place about 400 yards from the shaft mouth and 280 yards from the colliery office, he was knocked down and killed by a passing engine.

Held that the accident did not arise out of and in the course of his employment within the meaning of the Workmen's Compensation Act 1906.

Mary Robertson or Graham, residing at East Benhar, Fauldhouse, Linlithgowshire, widow of John Tennant Graham, coal miner, *appellant*, claimed, in the Sheriff Court at Linlithgow, compensation (1) as an individual, and (2) as tutrix for two pupil children of her marriage with the said John Tennant Graham (hereafter called the deceased), under the Workmen's Compensation Act 1906, from Barr & Thornton, coalmasters, Cultrig Colliery, Fauldhouse, *respondents*, and being dissatisfied with the determination of the Sheriff-Substitute (MACLEOD), appealed by Stated Case.

The Case stated—"Parties were agreed that if the appellant was entitled to an award the amount thereof ought to be £234, 0s. 10d.

"The following *facts* were admitted or proved to my satisfaction—1. The deceased was a haulage man in the employment of the respondents, who are coalmasters at Fauldhouse, at their No. 1 Cultrig Pit. 2. There are no boundaries to mark the extent of surface occupied by the respondents, but in the immediate vicinity of the mouth of the shaft of the said pit the respondents had the usual surface colliery properties. The respondents had a colliery office about 120 yards to the west of the shaft mouth, and a private branch railway line (also the respondents' property) took the traffic westwards from the sidings at the mouth of the shaft to another private branch railway line in the joint occupation of the respondents and of the United Collieries, Limited, and thence to a branch