Sheriff-Substitute's decision." There the Sheriff-Substitute had found as facts things which taken by themselves clearly pointed to his decision being right, and the mere circumstance that he also found other facts proven which pointed the other way just came to this, that considering the one set of facts along with the other he had come to a certain conclusion. It was not possible to say that he had no facts to go on, and the Court could therefore not interfere.

With regard to the Sheriff-Substitute's misdirection in law, I gather that he thinks the respondent's negligence under the statute must be flagrant or wilful. That seems to me to be a failure to distinguish between the elements entering into the question of a conviction and those entering into the question of sentence. It is quite clear that in this case imprisonment would have been out of the question, and a moderate fine would have been appropriate. The accident was simply due to the respondent's failure to realise that traffic in the circumstances might reasonably be expected at the time and place in question. I think it would be a serious thing for the public safety if it were thought that a motor driver was not subject to the operation of the Statute of 1903 unless it were proved that his conduct was consciously wilful.

The Court found that on the facts stated the Sheriff-Substitute was not entitled to acquit and sustained the appeal.

Counsel for the Appellant—Lord Advocate (Clyde, K.C.)—Wark. Agent—John Prosser, W.S.

Counsel for the Respondent—Jameson. Agents—Scott & Glover, W.S.

COURT OF SESSION.

Wednesday, November 12.

FIRST DIVISION.

[Lord Hunter, Ordinary.

STEWART *v.* MACLAREN AND ANOTHER.

Succession—Will—Revocation—Codicil Confirming Will and Codicil, and Omitting to Confirm Another Codicil.

A testatrix left a trust-disposition and settlement and three codicils of different dates. When she signed the second of those codicils she was in feeble health and her signature was nearly illegible, and the last codicil was executed notarially *ob majorem cautelam* in case the validity of the second was challenged. It specifically confirmed the settlement and first codicil, but omitted all mention of the second codicil. The settlement revoked all previous testamentary writings. The second codicil contained an appointment of a trustee, executor, and guardian to the testatrix's adopted son in addition to those appointed under the other testamentary writings. There was no reference to that appointment except in the second codicil, and under the other testamentary writings that appointment carried with it a legacy of £500 if the trustee accepted office and acted. In a reduction, *held* (1) that revocation of the second codicil so far as the appointment of trustee, executor, and guardian was concerned, was not to be implied merely from the express confirmation of the settlement and the first codicil; (2) that the question whether the second codicil formed part of the testamentary writings of the deceased was one of fact on which parole evidence was competent; and (3) (*dis.* Lord Cullen) that upon the evidence the testatrix intended the second codicil to form part of her testamentary writings.

Mellis v. *Mellis's Trustees*, 1898, 25 R. 720, 35 S.L.R. 552, *distinguished.*

Miss Jessie Stewart, as one of the testamentary trustees of Mrs Mary Stewart or Thompson of Pitmedden (her sister), and as one of the tutors and curators nominated by Mrs Thompson's trust-disposition and settlement to George Thompson, adopted son of Mrs Thompson, and as an individual, *pursuer*, brought an action against Duncan MacLaren, S.S.C., Edinburgh, and Alasdair Iain MacLaren, W.S., Edinburgh, his son, *defenders*, containing conclusions for the reduction of certain testamentary writings of Mrs Thompson, and also the following alternative conclusion—". . . It ought and should be found and declared by decree of our said Lords that the said codicil of 28th June was superseded and revoked by a codicil executed by the said Mrs Mary Stewart or Thompson dated the 10th day of July 1915, and that the defender Alasdair Iain MacLaren is not and never was a trustee and executor or a tutor and curator of the said George Thompson, under the testamentary writings of the said Mrs Mary Stewart or Thompson."

The *facts* of the case in so far as they relate to the subject of this report were—Mrs Thompson executed a trust-disposition and settlement on 12th June 1915 appointing the pursuer, Sir David Stewart (her sister and brother respectively), and the defender Duncan MacLaren to be her trustees and executors and tutors and curators to her adopted son. On 13th June 1915 Mrs Thompson executed a codicil making various bequests, which included a bequest of £500 "to each of my trustees who shall accept and take upon themselves the duties and responsibilities of executing" the trust. On 28th June 1915 Mrs Thompson executed another codicil, in which she appointed the defender Alasdair Iain MacLaren "to be a trustee and executor and a tutor and curator to my adopted son George Thompson under my trust-disposition and settlement." Difficulties arose as to the signature of that codicil, which was nearly illegible owing to the testatrix's feeble health at the time, and *ob majorem cautelam* on 10th July 1915 Mrs Thompson executed notarially another codicil, which repeated the terms of the codicil of 28th June, except that the appointment of Mr Alasdair Maclaren as trustee

and tutor and curator to George Thompson was omitted. It further provided—"And except in so far as altered by this codicil I hereby confirm the said trust-disposition and settlement and relative codicil thereto dated respectively twelfth and thirteenth June Nineteen hundred and fifteen."

The pursuer *pleaded, inter alia*—"2. Failing decree of reduction being pronounced in terms of head 3 of the first conclusion of the summons, the pursuer is entitled to declarator in terms of the alternative conclusion in respect the codicil of 28th June 1915 was revoked or cancelled by the codicil of 10th July 1915, and has no effect as part of Mrs Thompson's testamentary dispositions."

On 5th July 1918 the Lord Ordinary (HUNTER), after a proof, assoilzied the defenders from the conclusions of the summons.

Opinion (in so far as dealing with the subject of this report)—" . . . The pursuer has an alternative conclusion to the main crave for reduction of the will and codicils to the effect that it should be held that the codicil of 28th June was superseded and revoked by the codicil of 10th July 1915. The effect of this contention if sound would be that the pursuer and her brother, being a majority of the trustees, would be entitled to control the management of the trust. I cannot think that this result would be in the best interests of the boy George Thompson, who ultimately succeeds to the great bulk of the estate. The ground for maintaining this proposition is that the testatrix in the codicil of 10th July 1915 confirms her trust-disposition and settlement, and relative codicil thereto, dated respectively 12th and 13th June 1915, and makes no mention of her codicil of 28th June 1915.

"In *Mellis* v. *Mellis's Trustees*, 1898, 25 R. 720, 35 S.L.R. 552, a deceased person left (1) a trust-disposition and settlement dated 21st March 1879, containing a clause revoking all prior testamentary writings; (2) a codicil on a separate paper dated 3rd May 1879; (3) a trust-disposition and settlement dated 17th May 1879; (4) codicil appended thereto dated 22nd May 1879; and (5) a codicil dated 30th June 1881, written on the same paper as the trust-disposition and settlement of 21st March 1879. This last writing, after making certain alterations on the deed of 21st March 1879, homologated and approved of that deed in all other respects. It was held that the effect of the last codicil was to revive the settlement of 21st March 1879, but not the codicil of 3rd May 1879, and that the later deed and codicil were revoked absolutely.

"The pursuer relied upon this decision as an authority in favour of her contention. The case, however, appears to me to be quite different from the present. In *Mellis's* case at the date when the deed of 21st March 1879 was set up by the last codicil, it had been superseded by the later settlement. But for the deed reviving it it would have had no effect as an expression of the testator's intention. In the views of Lords Young and Trayner the deed was to be regarded as of the date when it was revived, with the result that the general clause of revocation in it revoked all testamentary deeds of a date earlier than that date. In the present case the settlement and codicil that were confirmed had never been recalled. The codicil of 10th July 1915 does not bear on its face to recal any previous deed, and there is nothing in its terms to prevent it being read along with the previous testamentary writings of the testatrix. The mere fact that no mention is made of the codicil of 28th June does not necessarily mean that the testatrix intended to recal it. On the evidence led I am satisfied that she had no such intention. As I have already indicated, the codicil of 28th June was validly executed, and I see no reason for refusing effect to its terms."

The pursuer reclaimed, and argued—The codicil of 10th July confirmed the will and the codicil of 13th June, but did not confirm the codicil of 28th June. The omission could not be explained on the footing that the testatrix had forgotten about the codicil of 28th June; the interval of time was too short, and the codicil of 10th July was executed notarially because there had been a difficulty about the signature of the codicil of 28th June. Consequently the omission must have been deliberate. If so, revocation of the codicil of 28th June must be inferred. The codicil of 10th July by confirming the will and codicil of 13th June had the effect of republishing them as at its date, *i.e.* 10th July. If so, the will, regarded as speaking from 10th July, contained a clause revoking all prior testamentary writings, and those included the codicil of 28th June. If not, the codicil of 28th June was part of the testamentary writings and yet was deliberately not confirmed, which was an absurd result—*Mellis* v. *Mellis's Trustee*, 1898, 25 R. 720, and *per* Lord Justice-Clerk Macdonald at p. 727, 35 S.L.R. 552. The appointment of the additional trustee was revoked by implication—*MacLeod's Trustees*, 1871, 9 Macph. 903, *per* Lord President Inglis at p. 908, 8 S.L.R. 597; *Scott's Trustees* v. *Duke*, 1916 S.C. 732, 53 S.L.R. 551, was distinguishable. In any event it was for the defenders to demonstrate that the codicil of 28th June was still in force. The *onus* upon them was heavy and they had not discharged it.

Argued for the defenders (respondents)—If *ex facie* writings are testamentary, the whole of them must be read and construed together even although they make double provisions—*Stoddart* v. *Grant*, 1851, 1 Macq. 163; *Gordon's Executor* v. *Macqueen*, 1907 S.C. 373, 44 S.L.R. 279; *Low's Executors*, 1873, 11 Macph. 744, and *per* Lord Cowan at p. 748, 10 S.L.R. 505. The last two cases showed that revocation if not express could only arise out of necessary implication, and there was no necessity here. The confirmation in the codicil of July operated *retro*, as the will was not null and void but merely reducible—*Gall* v. *Bird*, 1855, 17 D. 1027, *per* Lord Cowan at p. 1030. The question whether the second codicil formed part of the testatrix's testamentary writings was a question of the intention of the granter—*De La Saussaye*, (1873) L.R. 3 P. & D. 42; *Follett* v. *Pettman*, (1883) L.R., 23 Ch. D. 337. Parole evi-

dence was competent to show the intention in omitting the codicil in question from confirmation — Williams' Executors, 10th ed. p. 125; *Jenner* v. *Ffinch*, (1879) L.R., 5 P. D. 106, *per* Sir James Hannen at 109; *Colvin* v. *Hutchison*, 1885, 12 R. 947, *per* Lord M'Laren at p. 953, 22 S.L.R. 632. The evidence showed that the testatrix intended the codicil in question to have testamentary effect.

At advising—

LORD PRESIDENT—[*After dealing with the conclusions for reduction*]—On the assumption, however, that the pursuer's case failed on the evidence, it was urged that nevertheless she ought to have it declared that the codicil of 28th June was revoked by that of 10th July 1915. And with this declarator in her favour it was pointed out that her end in raising this action would be achieved, for then Mr MacLaren junior would be excluded from the trusteeship. It is certain, I consider, on the evidence, that this would be quite contrary to the wish of the testatrix, but nevertheless that may be the consequence of success on the question of law raised. The proposition in law which we were asked to affirm was that the express confirmation of the trust-disposition and settlement and relative codicils of 12th and 13th June 1915, no mention being made of the codicil of 28th June 1915, operated an implied revocation of the last-mentioned codicil. The authority cited in support of this proposition was the case of *Mellis* v. *Mellis's Trustees*, 25 R. 720, 35 S.L.R. 552. That case was, however, clearly distinguishable from the present, as the Lord Ordinary points out. It is really a question of evidence in each case, the *onus* being on the party who maintains that the codicil is revoked to prove that it is so—*Stoddart* v. *Grant*, 1 Macq. 163; *Gordon's Executor* v. *MacQueen*, 1907 S.C. 373, 44 S.L.R. 279; *Scott's Trustees* v. *Duke*, 1916 S.C. 732, 53 S.L.R. 551. In the present instance the evidence is clear and convincing that it was never intended to revoke the codicil of 28th June 1915 by that of 10th July 1915. . . . I propose that we should affirm the interlocutor of the Lord Ordinary.

LORD MACKENZIE—[*After dealing with the conclusions for reduction*]—A further argument was submitted to the Lord Ordinary and repeated in the Inner House relative to the declaratory conclusions of the summons. It was maintained on the authority of the case of *Mellis* (25 R. 720, 35 S.L.R. 552) that the effect of the codicil of 10th July 1915 was to republish the settlement of 12th June 1915 as at 10th July 1915, with the effect that the express clause of revocation in it speaks as from the later date and so revokes the codicil of 28th June 1915, which contains Alasdair MacLaren's appointment as trustee. The distinction between the present and the case of *Mellis* is that pointed out by the Lord Ordinary. Here the main settlement never was superseded; it remained alive. Another contention was put forward that on a construction of the codicil of 10th July 1915 the codicil of 28th June 1915 drops out as part of the testamentary scheme. I think the evidence in the case as to what was actually done is conclusive against this view being taken.

On the whole matter I agree with the conclusion of the Lord Ordinary.

LORD SKERRINGTON—[*After dealing with the conclusions for reduction*]—As regards the construction and effect of the codicil of 10th July 1915, I agree with your Lordships that it did not revoke the appointment of Mr MacLaren junior as a trustee and executor and tutor and curator.

LORD CULLEN — So far as the case relates to the appointment of the son of Mr Duncan MacLaren as a trustee, I agree with your Lordships in thinking that the codicil of 28th June 1915 was not revoked by that of 10th July following. But on the merits of the question relating to this appointment I differ from your Lordships in thinking that the *onus* on the side of the defence has not been discharged by the evidence. [*His Lordship then reviewed the evidence in detail.*]

The Court adhered.

Counsel for the Pursuer — Watt, K.C. — Graham Robertson. Agents—Alex. Morison & Company, W.S.

Counsel for the Defenders—Wilson, K.C. —W. T. Watson. Agents — Macpherson & Mackay, S.S.C.

Saturday, November 15.

SECOND DIVISION.

[Sheriff Court at Paisley.

MELVILLE *v.* RENFREWSHIRE COUNTY COUNCIL.

Reparation — Negligence — Safety of the Public Road—Dangerous Slope on Unfenced Private Road Leading off Highway—"Immediate Proximity."

A member of the public, in proceeding along a public road on a dark night, strayed on to a private road which, leading without a gate from the highroad, ran alongside it, was unfenced, and rose gradually to a higher level. At a point fifty feet from the entrance he fell over the slope, sustaining injuries from which he died. In an action by the deceased's representative against the owners of the private road, *held* that as the pursuer's averments showed that the place where the accident happened was not in immediate proximity to the highway the action was irrelevant.

Mrs Sarah Hume or Melville, *pursuer*, brought an action in the Sheriff Court at Paisley against the County Council of Renfrewshire, *defenders*, in which she claimed £750 as solatium for the death of her husband.

The pursuer averred, *inter alia*—"(Cond. 2) The defenders are proprietors of certain ground and property at the corner of Glasgow Road and Nitshill Road, Hurlet. (Cond.