cal period, had contributed to the accident. These were points quite separate which had to be considered in the preparation of the cases.

Accordingly, if the question is to be considered here upon its merits, I certainly think this is far from being a case in which we have three actions all raising exactly the same point.

LORD SKERRINGTON—I concur.

LORD CULLEN was absent.

The Court repelled the notes of objections in so far as they objected to the disallowance of fees to senior counsel for adjustment of issues, and *quoad ultra* in the cases of Binnie and Hulbert sustained the objections.

Counsel for the Pursuers — Fenton. Agents—Cowan & Stodart, W.S.

Counsel for the Defenders — Cooper. Agents—Macpherson & Mackay, S.S.C.

Saturday, July 3.

SECOND DIVISION.

ALLAN'S EXECUTRIX *v.* COCKBURN AND OTHERS.

Writ — Succession — Testamentary Writings—Deletions—Holograph Testament—Authenticity of Deletions.

A testamentary writing, holograph of a deceased blacksmith, was found in a locked repository where he kept his private papers, enclosed in an envelope marked with his own name and with the word "private." The deed contained certain provisions which had been deleted by a pen being drawn through them, but the deletions were not initialled or otherwise authenticated. The beneficiaries in whose favour the provisions so deleted were conceived had all with one exception predeceased the testator. *Held* that the deletions must be presumed to have been made by the testator with the intention of altering the deed, and that the provisions so deleted were validly cancelled.

Milne's Executor v. *Waugh*, 1913 S.C. 203, 50 S.L.R. 102, *considered.*

Question—Did the deletions have the effect of cancelling the whole deed?

Mrs Elizabeth Allan or Cockburn, widow and executrix-nominate of the deceased John Allan, Edinburgh, *first party*, the said Mrs Cockburn as an individual, *second party*, Thomas Allan and others, the heirs *in mobilibus* of the deceased, *third parties*, and the said Thomas Allan as heir in heritage of the deceased, *fourth party*, brought a Special Case to determine, *inter alia*, whether certain deletions in a testamentary writing ought to receive effect.

The *testamentary writing* was as follows:—"1. John Allan, residing at 17 Drumdryan Street, Edinburgh, do hereby leave and bequeath to my wife Jessie Borthwick Spence or Allan, all & whole of my estate real & personal heritable and moveable of what nature or kind soever absolutely, with the exception of, (1) watch and appendages to my nephew John Allan Cockburn residing at 3 Upper Gilmour Place Edinburgh. to my nephew (2) Writing desk with inscription ^ Thomas Allan Fans Berwickshire (3) *Writing desk without inscription to my nephew Alexander Spence residing at* 35 *Watson Crest. Edinburgh* (4) Ivory handel walking stick to my nephew John Allan Brockie residing at 44 Tempel Pk. Crest. Edinburgh (5) *Dark wood walking stick to my nephew George Lidster residing at* 14 *Fowler Terrace Edinburgh* whom failing, either before or after vesting to be equally divided among 1. *My brother James Allan residing at Bassendean Gordon Berwickshire* 2. Mrs Elizabeth Allan or Cockburn my sister residing at 3 Upper Gilmore Place Edinburgh 3. *My sister Mrs Euphemia Allan or Brockie residing at* 44 *Temple Pk. Crest. Edinburgh* 4. *My sister Mrs Agnes Allan or Lidster residing at* 14 *Fowler Terrace Edinburgh* 5. *To my brotherinlaw John Spence residing at* 35 *Watson Crescent Edinburgh* 6. *My sisterinlaw Margret Spence residing at* 2 *Drumsheugh Gardens Edinburgh.* 7. *My sisterinlaw Mrs Christena Spence or Thomson residing at* 13 *Hermann Terrace Edinburgh* Take *It is my wish that every thing be sold to realise the money, and that the participators thereof above mentioned shall have share & share alike And I appoint my wife the aforenamed Jessie Borthwick Spence or Allan to be my sole executrix.* After the disceace of the aforenamed, I appoint my sister Mrs Elizabeth Allan or Cockburn, *and my sisterinlaw Margret Spence* to be my executrix s And I dispense with the delivery hereof, and I consent to registration hereof for preservation. In Witness whereof these presents written by my own hand are subscribed by me at Edinburgh upon the Sixteenth day of September Eighteen hundred and nintynine. JOHN ALLAN."

[The clauses above in italics were deleted in the will.]

The Case stated—"1. John Allan, blacksmith, who carried on business at 41 Leven Street, Edinburgh, and resided at 17 Drumdryan Street there, died at Edinburgh domiciled there on 15th October 1919 leaving a testamentary writing dated 16th September 1919. 2. The said John Allan (hereinafter called 'the testator'), whose wife predeceased him, had since her death resided alone at 17 Drumdryan Street, Edinburgh. On Monday, 13th October 1919, he was seized with a shock of paralysis, and was removed to the Royal Infirmary. On the morning of Wednesday, 15th October, he expressed the desire that Mr Peter Weir, S.S.C., Edinburgh, should take charge of his business matters and papers. Mr Weir was sent for and went to the Royal Infirmary, but before Mr Weir's arrival the testator had become unconscious, and he died on the night of 15th October without having recovered consciousness. Mr Weir took possession of his keys and proceeded to 17 Drumdryan Street, where he searched the testator's repositories. He

then discovered the said testamentary writing in a locked writing-desk belonging to the testator among other papers, including the title to the testator's lair in Morningside Cemetery. The said writing was contained in an envelope of foolscap size, open at both ends, and marked 'John Allan, Private.' The original of the said writing and the envelope in which it was found will be made available to the Court at the hearing of the case. The said writing is holograph of the testator. 3. When found by Mr Weir as aforesaid the said holograph testamentary writing was in its present condition and contained the deletions which it bears. Apart from any inference which the Court may draw there is no evidence to show when or by whom these deletions were made. All the persons named in the provisions so deleted predeceased the testator with the exception of George Lidster, to whom he had bequeathed a specific legacy of a dark wood walking-stick. 4. The testator left moveable estate of the gross amount of £867, 14s. 1d. as given up in the inventory, together with a small dwelling-house on the top flat of the tenement 17 Drumdryan Street, Edinburgh, valued at £170 or thereby."

Amongst the *questions of law* was the following—"In the circumstances above set forth ought the deletions in the testamentary writing of the testator to receive effect as cancelling the provisions so deleted?"

Argued for the second party—The provisions which had been deleted were duly revoked. The envelope was found open and the deletions were such as might be expected. The presumption was that the alterations were made by the testator himself, were final and deliberate, for the purpose of altering the will, to keep his will up to date, and to cover the whole estate—*Milne's Executor* v. *Waugh*, 1913 S.C. 203, 50 S.L.R. 102, *per* Lord President (Dunedin) at 1913 S.C. 208, 50 S.L.R. 104; *Pattison's Trustees* v. *University of Edinburgh*, (1888) 16 R. 73, *per* Lord M'Laren at 16 R. 76; *Lamont* v. *Magistrates of Glasgow*, (1887) 14 R. 603, 24 S.L.R. 426; *Nasmyth* v. *Hare*, (1821) 1 Sh. App. 65, where the testator had laid down a code for himself—see opinion of Lord Chancellor at p. 73; M'Laren, Wills and Succession (3rd ed.), vol. i, p. 285. It was a question of evidence whether a deletion was good. No solemnity was required—*Crosbie* v. *Wilson*, 1865, 3 Macph. 870, *per* Lord Justice-Clerk (Inglis) at 877. The will was not vitiated *in essentialibus*—*Lamont* v. *Magistrates of Glasgow, cit.*; M'Laren, Wills and Succession (3rd ed.), vol. i, sec. 526 (4), p. 286.

Argued for the third and fourth parties—The provisions which had been deleted were not revoked. There was no direct evidence that it was the testator's hand that had made the alterations—*Walker* v. *Whitwell*, 1916 S.C. (H.L.) 75, 53 S.L.R. 129, *per* Earl Loreburn at 1916 S.C. (H.L.) 77, 53 S.L.R. 129; *Pattison's Trustees* v. *University of Edinburgh, cit.*, *per* Lord M'Laren at p. 76. The present case would have been covered by *Milne's Executor* v. *Waugh, cit.*, had there been evidence intrinsic of the document that subsequent to the deletions the testator's hand had been at work—*ibid. per* Lord President (Dunedin) at 1913 S.C. 208, 50 S.L.R. 104, but there was no such evidence. In *Nasmyth* v. *Hare, cit.*, alterations had been made in the deed in addition to the cutting off of the seal—see opinion of Lord Chancellor, *ibid.*, at p. 74. The deletion of the provisions was not made with the intention of keeping the will up to date as each beneficiary died, because the bequest to George Lidster had been deleted although he had survived the testator. The third and fourth parties disclaimed any contention that the whole deed was invalidated if the Court should hold that the deleted provisions were cancelled.

LORD DUNDAS—The question raised in this case is a very short one. I may say at once that in my opinion the present case is indistinguishable from that decided recently by the First Division (*Milne's Executors*, 1913 S.C. 203). *Ex facie* of the instrument which we have to examine, the deletions appear to me to be proper deletions in the circumstances detailed in the case. I think there is a presumption of fact that they were made by the testator, and I do not think that the distinctions upon that head which Mr Patrick ingeniously attempted to make had much substance in them. But it has been suggested that, assuming these deletions to have been made by the testator, *animo revocandi*, there may be room for doubt whether it is a valid and effectual mode of deleting a clause, a legacy, or other provision in a will merely to strike one's pen through it. That certainly seems to have been assumed rather than decided in *Milne's* case. I think, and I understand your lordships agree, that whatever degree of doubt may attach to the point I have mentioned, this would not be an appropriate case in which to reconsider it before a fuller bench. We must therefore, I think, follow *Milne's* case, and that being so, it seems to me that we must answer the first question in the affirmative, in which case the parties are agreed that no further question arises.

I may add that counsel for the third and fourth parties expressly disclaimed any argument to the effect that the whole will was invalidated if we held these provisions cancelled.

LORD SALVESEN—I agree with the opinion of Lord Dundas. I think there is evidence both extrinsic and intrinsic from which we may draw the inference of fact that the deletions in question were made by the hand of the testator with the intention of revoking the parts of the deed which are deleted. I need scarcely say that unless I could draw that inference without any doubt I should have hesitation in applying the case of *Milne;* but once reach the conclusion that the testator himself did put his pen through those parts of the deed with the intention of altering his will, I see no reason why we should not follow the rule laid down in

Milne's case. That has the effect of altering the original will, and the will as altered is the will which regulates the succession to the estate.

The extrinsic evidence upon which I proceed is that the deed was found in a locked repository of the testator where he kept his private papers, and in an envelope which was marked with his own name and with the word "private." The intrinsic evidence is that the parties in whose favour the will had originally been conceived, and whose provisions were affected by the deletions, were, with the exception of George Lidster, all dead, and therefore that seems to me a most excellent reason why the testator should bring his deed up to date by deleting the provisions which he must have known, owing to the predecease of the parties in question, could not receive effect.

It is also not to be left out of account that the testator, whose holograph deed this was, was a man of a comparatively humble position in life, with no great culture, and that the absence of his initials, which one would expect in the case of a person who was acquainted with the forms of law, is therefore not of so much moment as it might have been had the alterations been made by a professional man or by one who was accustomed to legal business.

For the reasons which I have stated I am prepared to follow the case of *Milne's Executors* in the present case, which I regard as quite indistinguishable; but I need scarcely say that it requires to be followed with great caution and not to be extended to a case where there can be any doubt as to the genuineness of the deletions made.

LORD ORMIDALE—Standing the case of *Milne's Executors* I can come to no other conclusion than that in this case the deletions in the testamentary writing of the testator ought to receive effect as cancelling the provisions so deleted. I concur in the opinion of Lord Dundas.

LORD JUSTICE-CLERK (SCOTT DICKSON)—In this case the only question we are disposing of is whether in the circumstances above set forth the deletions in the testamentary writing of the testator ought to receive effect as cancelling the provisions so deleted. We were informed that none of the parties desired to raise the point, and they did not raise the point, of what was the effect of these alterations on the deed as a whole. Accordingly the question of whether the deed should stand or not is not before us and does not enter into our decision.

I agree that the facts in this case suffice to justify us in drawing the inference that the deletions were made by the testator himself; and I think that the facts bring this case within the scope of *Milne's* case, as they are not distinguishable in material respects from the facts in that case. Accordingly I think the very limited question which we have to deal with here should be answered as your Lordships propose.

I desire to say quite distinctly that while we have not had such a full argument as would justify me in saying that I disagree with the judgment in *Milne's* case, yet I am of opinion that if a suitable case arises the decision in that case, and particularly whether it is of universal application, should be reconsidered. I am not prepared to assent to the view that that decision is to be accepted as laying down a rule of law to the effect that you can alter a will by mere deletions, however extensive. If that case is to be held as going that length, I think it requires more consideration than I have been able to give it in this case. But on the whole I do not dissent from the judgment which your Lordships propose.

The Court answered the question in the affirmative.

Counsel for the First and Second Parties—Wark. Agents—Warden, Weir, & Macgregor, S.S.C.

Counsel for the Third and Fourth Parties—Patrick. Agents—Ross & Ross, S.S.C.

Tuesday, July 6.

FIRST DIVISION.

[Sheriff Court at Dunfermline.

GORDON AND ANOTHER *v.* FIFE COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation—"Arising Out of and in the Course of"—Breach of Statutory Rule Fenced by Penalty—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *secs.* 1 (*b*) *and* 2 (*c*)—*Coal Mines Act* 1911 (1 *and* 2 *Geo. V, cap.* 50), *sec.* 86)—*General Regulations, dated* 10*th July* 1913 (4) *and* (9).

A miner searching for brattice-nails, which he required for his work, passed through a fence marked "No road," in breach of Regulation 9 of the General Regulations under the Act of 1911. The nails could have been obtained otherwise. While in the fenced-off area he was overcome by gas fumes, as the result of which he died. His dependants claimed compensation. *Held* that the accident arose out of and in the course of the employment.

Conway v. *Pumpherston Oil Company, Limited*, 1911 S.C. 660, 48 S.L.R. 632; and *Moore & Company* v. *Donnelly*, 1920, 57 S.L.R. 380, *followed.*

Bourton v *Beauchamp & Beauchamp*, 1920, 13 B.W.C.C. 70, *distinguished.*

Moore v. *Donnelly* (*cit.*), *per* Lord President (Strathclyde) at p. 383, *disapproved per* Lord President (Clyde).

The General Regulations under the Coal Mines Act 1911 (1 and 2 Geo. 5, cap. 50), sec. 86, Regulations 4 and 9, provide—"(4) Subject to any directions that may be given by any official of the mine, no workman shall, except so far as may be necessary for the purpose of getting to and from his work or in case of emergency or other justifiable cause necessarily connected with his employment, go into any part of