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WINTER SESSION, 1923-1924.

## COURT OF SESSION.

*Thursday, October* 25, 1923.

### SECOND DIVISION.

[Lord Constable, Ordinary.

### WILSON *v.* HOVELL.

*Succession — Testament—Holograph Writing — Whether Deliberative or Final — Extrinsic Ambiguity — Competency of Extrinsic Evidence.*

*Evidence — Extrinsic Evidence — Competency—Holograph Will ex facie Valid—Ambiguity in Holograph Covering Letter.*

A lady sent a holograph document, dated October 1912, which *ex facie* was valid as a will, along with a covering letter, to her solicitor. The letter, which was dated 26th November 1916, stated, *inter alia*—"What I enclose along with this note is the substance of what I have twice written out on notepaper, once two years before Oct./12, and again about that date, and I wish the date Oct./12 to be retained. . . . I don't wish this will lengthened or stretched out in any way further than is absolutely necessary to make it legal." The solicitor, treating the document as notes, drafted a trust-disposition and settlement, which he forthwith sent her. The lady died in October 1921 without having done anything further. In an action of declarator that the document in question was not a valid testament a proof before answer was allowed and led. *Held* (1) that in respect that an ambiguity was created by the terms of the covering letter as to the deceased's testamentary intentions, extrinsic evidence was admissible to clear up that ambiguity; (2) that the covering letter as interpreted by the evidence adduced was sufficient to deprive the document in question of its *prima facie* testamentary character.

*Process — Reclaiming Note —Competency—Proof before Answer — Competency of Objecting to Allowance of Proof in Reclaiming Note against Final Interlocutor.*

In an action of declarator as to the validity of a will the Lord Ordinary allowed a proof before answer. After proof was led, and after the Lord Ordinary had granted decree as craved, the defender reclaimed and maintained that the proof allowed was incompetent.

*Opinion per* the Lord Justice-Clerk (Alness) that the defender was not barred by the fact that he had not reclaimed against the former interlocutor allowing proof before answer from stating his objection at the later stage.

Andrew Colville Wilson, doctor of medicine, Chesterfield, Derbyshire, *pursuer*, brought an action against (first) Flora Jane Hovell, Sydney, New South Wales, and (second) James Patterson Wilson, doctor of medicine, Sydney, New South Wales, for his interest, *defenders*, to have it found and declared that the deceased Mrs Christina Patterson or Wilson, who resided sometime at Redburn, Johnstone, and thereafter at Thorn House there, left no valid and effectual testamentary directions, and that her whole means and estate, heritable and moveable, fell accordingly to be divided according to the rules of intestate succession.

The first-named defender lodged defences.

The parties averred, *inter alia*—"(Cond. 3) On 26th November 1916 the deceased wrote to Mr John B. Stirling, solicitor, Johnstone (who had been law agent to her and her husband for twenty years), a holograph letter, enclosing a document which she described in the said covering letter as 'the substance of what I have twice written out on notepaper, once two years before Oct. 12, and again about that date,' and giving various directions for the preparation of a settlement. The enclosed document, which was holograph of the deceased, was in the following terms:—'Chesterfield,

Oct. 1912.—I, Christina Wilson, leave all the property heritable or personal I may possess, or that may in time be left to me, to my friend and companion, Flora Jane Hovell, for her lifetime. At her death all property to be sold and revert to and be equally divided between what family my second son may have. The selfish treatment I have from time to time received from my two sons, coupled with the preference my eldest son has for inferior women, has caused my decision. CHRISTINA WILSON.' The document and covering letter were sent by the deceased to Mr Stirling merely as instructions for the preparation of her will. The aspersions against the deceased's sons contained in them are entirely devoid of foundation. Further, in October 1912 her younger son was not married. He was not married until 15th April 1916, and there has been no issue of the marriage. The said Flora Jane Hovell had in October 1912 been out of the deceased's employment for nearly two years. (*Ans.* 3) The said holograph document and covering letter are referred to. Admitted that in October 1912 the younger son of deceased was not married, that he was married at or about the date mentioned, that there has been no issue of the marriage, and that this defender has been out of the deceased's employment for nearly two years prior to October 1912. Denied that said holograph document was merely instructions for a will. *Quoad ultra* not known and not admitted. (Cond. 4) Mr Stirling on receiving said letter and document understood that they were sent to him merely as instructions for the preparation of the deceased's will. On that understanding he prepared, and on 30th November 1916 forwarded to the deceased, a draft settlement in accordance with her foresaid instructions, but the settlement was never executed by her and no reply was received from her. On 10th August 1917 she called on Mr Stirling, and referring to her younger son's marriage stated that the draft would not now do. She did not, however, give definite instructions as to her altered wishes. The interview proceeded on the footing that the deceased had not then made a will. (*Ans.* 4) It is admitted that said draft, which is referred to, was never executed as a will by the deceased, and believed to be true that deceased did not reply to Mr Stirling. *Quoad ultra* not known and not admitted. So far as this defender is aware the deceased neither at said date of 10th August 1917 gave instructions for any alterations in her settlement, nor ever executed any testamentary deed subsequently to that referred to in article 3 of pursuer's condescendence. (Cond. 5) On 28th September 1921 the deceased approached Mr J. Greig Milne, of Messrs Anderson & Allan, writers, Glasgow, and a correspondence ensued in which she sought and received advice as to the extent to which she was free to dispose of her entire estate *inter vivos* or *mortis causa*. It proceeded on the footing that the deceased had not then made her will. (*Ans.* 5) Said correspondence is referred to."

The pursuer pleaded—"1. The holograph document, bearing to be dated October 1912, being intended by the deceased merely as a memorandum of instructions for the preparation of a will, and having no testamentary effect, decree should be pronounced in terms of the conclusions of the summons. 2. The deceased having left no testamentary writing, decree should be pronounced as concluded for."

The defender pleaded—"2. The said holograph document being truly subscribed by the deceased, and being the completed testamentary settlement of her estate, the pursuer's plea to the contrary should be repelled and the defenders assoilzied. 3. The said holograph document being habile to vest the defender in the liferent of the deceased's estate, she is entitled to absolvitor. 4. The said holograph document presenting, *ex facie*, no indication of being other than the valid will of the deceased, can only be impugned by a probative writing of the deceased of equal solemnity and of later date, and proof should be limited to the production of such a document."

On 23rd November 1922 the Lord Ordinary (CONSTABLE) allowed a proof before answer.

The *facts* of the case and the import of the evidence appear from the opinion of the Lord Ordinary, who on 8th March 1923 sustained the pleas-in-law stated for the pursuer, and found and declared in terms of the declaratory conclusions of the summons.

*Opinion.*—"The pursuer in this case concludes for declarator that his mother, Mrs Christina Wilson, left no valid and effectual testamentary directions, and that her estate falls to be divided according to the rules of intestate succession. Mrs Wilson died in 1921, survived by two sons, of whom the pursuer is the elder, and the purpose of the action is to impugn the testamentary validity of a document holograph of Mrs Wilson, purporting to leave her whole estate in liferent to Miss Flora Hovell, the compearing defender, who is a stranger in blood, and on her death to be divided equally between the family of Mrs Wilson's second son.

"The document is quoted in full in Condescendence 3. On 26th November 1916 it was enclosed by the deceased in the following letter to her solicitor:—

'4 Cross St.,
'Chesterfield, 26th Novr. 1916.

'Mr Stirling.

'Dear Sir,—What I enclose along with this note is the substance of what I have twice written out on notepaper, once two years before Oct./12, and again about that date, and I wish the date Oct./12 to be retained. I see no reason to change my mind. If it is absolutely necessary. If it is absolutely necessary that my two sons get a fourth part each of what money or shares I may have to make my will legal, then they must have it. But seeing that I am living in England, no matter how, I don't think it is necessary to give it them, but you can find out. This I want all made correct at the earliest date. You did not make much of Currie. Your letter was not a reply to mine. I did not want the quarter

interest returned. I wanted a fixed term for it to remain, and you give none. I don't wish this Will lengthened or stretched out in any way further than is absolutely necessary to make it legal. I give my reason for what I have done. I wish that retained in the *Will*, so that my two sons, if alive, may be reminded. If there is any further information you must have, then let me know at once and I will try to get it for you. I don't wish this *Will* lengthened or stretched out in any way further than is absolutely necessary to make it legal. I give my reason for what I have done. I wish that retained in the *Will* so that my two sons, if alive, may be reminded. I have repeated this to prevent mistake.—Yours faithfully, 'C. WILSON.'

"In the course of a discussion in the procedure roll it was maintained for the defender that the action should be dismissed *de plano* on the ground that the document was in itself unexceptionable and clearly expressive of completed testamentary intention; but it appeared to me that a doubt as to such intention was created by the accompanying letter above quoted, and I therefore allowed a proof before answer of various averments for the pursuer regarding the history of the document, the actings of Mrs Wilson, and her relations with her family. The result of the authorities seemed to me to be that where doubt as to completed testamentary intention arises on the face of a document, evidence of all kinds is admissible to clear it up—*Munro* v. *Coutts*, 1813, 1 Dow 437; *Scott* v. *Sceales*, 2 Macph. 613; *Lowson* v. *Ford*, 4 Macph. 631; *Forsyth's Trustees* v. *Forsyth*, 10 Macph. 616; *Robb's Trustees* v. *Robb*, 10 Macph. 692; *Hamilton* v. *White*, 8 R. 940, 9 R. (H.L.) 53; *Sprot's Trustees* v. *Sprot*, 1909 S.C. 272—and I thought that the same principle was applicable where the doubt was created by a holograph letter contemporaneous with the execution and delivery of the document. I had some doubts about the relevancy of the averments in Condescendence 5; but having regard to the authorities, I thought that I was not warranted in excluding them from the proof.

"The result of the proof, which was confined to evidence for the pursuer, was as follows:—The pursuer's father, who was resident in Johnstone, Renfrewshire, died in 1904, leaving his whole estate to his widow, and his two sons, who were both then qualified medical practitioners, made no claim on the estate. About 1905 the pursuer acquired a medical practice in Renton, Dumbartonshire, where his mother went to live with him. She paid the rent and he paid all other expenses. In the beginning of 1911 the pursuer purchased a house and medical practice in Chesterfield, Derbyshire, and his mother shortly thereafter went to live with him there and remained in his house till she died in 1921. During that time, including a period of four and a-half years when he was away on war service, the pursuer bore all the household expenses. His brother went to practise in Australia many years ago, and married there in 1916, but has no family. Mrs Wilson was always strongly opposed to her sons, and especially to the pursuer, being married, and she even went the length of objecting to his visiting professionally houses where there were marriageable ladies. This does not rest only on the evidence of the pursuer, but is confirmed by Mr Stirling, the family solicitor, who vainly remonstrated with Mrs Wilson on her unreasonable and selfish attitude. In point of fact the pursuer, who is forty-six, remained unmarried till his mother's death though he was then on the point of being married.

"The defender, Miss Hovell, was a servant with the pursuer and his mother for about two years before they left Renton, and she then went to Australia, where she is still resident.

"On 22nd July 1915 Mrs Wilson wrote to Mr Stirling, the family solicitor in Johnstone, saying that she wished to see him when she went to Johnstone, and remarking—'I wrote a letter a few years back stating my wishes, but I wish to make sure that it will stand law. I find now more reason to hold to my first wish than to change.' Mr Stirling wrote in answer suggesting that she might put her wishes in writing and send them to him, so that he might put them into appropriate shape; but she neither replied nor visited him that year. On 2nd August 1916, however, she called on him and discussed the making of a will. The entry in his ledger is—'Long conference with you on proposal for a settlement—1 hour.' She was specially interested to ascertain the extent of her sons' legal rights. Mr Stirling had difficulty in getting definite instructions from her, and when she left he asked her to note down in writing what she desired and send it to him, whereupon he would send her a draft will for her consideration. The next communication which he received from her was the letter of 26th November 1916 above quoted with the document now in question. Treating the document as the notes which he had expected, Mr Stirling drafted a trust-disposition and settlement, which he sent her with a letter, dated 30th November 1916. This draft she never returned to him, but he kept a copy of it in the form of a rough draft. In substance the draft gives effect to the bequest expressed in the document, but it adds a bequest to the sons of their legal shares of the testator's estate, a reference to the document for the reasons for the restriction of her sons' interests, and a nomination of trustees and executors. In the accompanying letter Mr Stirling explains that the bequest may be omitted, but he puts the nomination of trustees and executors as a necessity. Mrs Wilson did not reply to this letter, but on 10th August 1917 she again called for Mr Stirling with the draft in her hands and explained that it would not now do because Miss Hovell was in bad health and could no longer act as her companion, and also because her second son was married. She left without giving any further instructions on the footing that she would consider the matter further and write Mr Stirling with the

amendments which she desired. She never, however, referred to the matter again though she corresponded with Mr Stirling about other matters; nor did she ask for the document which remained in Mr Stirling's possession when she died. On 28th September 1921 Mrs Wilson opened a correspondence with another solicitor — Mr Milne, in Glasgow — the moving cause obviously being the pursuer's approaching marriage. On 3rd October 1921 she wrote to Mr Milne saying—'I want the little I have disposed of in such a way that the law would not step in afterwards and alter,' and after a short but comprehensive statement about her family and circumstances, she adds — 'As neither of my sons seem disposed to have the care of me if I live to require it, I wish to make some reward to whoever may stand by me. Will you please let me know what I can do, or what I might not do.' Mr Milne wrote a long answer on 19th October, but Mrs Wilson died without replying. The pursuer carefully searched her repositories after her death, but found nothing of a testamentary character.

"If the validity of the document had to be determined solely on a consideration of the writing itself and the letter which accompanied it, I think it would present a difficult question. On the one hand the document is *ex facie* unexceptionable as a will. The letter of 26th November 1916 refers to it as a will. It shows that the substance of the document had been long and carefully considered by the writer, and its terms suggest that but for a doubt as to the legality of excluding her sons from her succession the writer might not have applied to her solicitor at all. The letter is at least capable of being read as neither contemplating nor instructing the preparation of a formal will by the solicitor unless it was absolutely necessary to make a bequest to the sons, and the mere fact that the writer of a document in testamentary form contemplates that it may be insufficient and may have to be superseded is not inconsistent with its being treated as a proper testamentary document if no alteration is required—*Scott* v. *Sceales*, 2 Macph. 613. On the other hand I think it is evident that the document was written, notwithstanding the date on it, for the purpose of being sent to the solicitor. The writer says that it is 'the substance' of what she had already twice written out, and this I think implies that it was not itself one of the documents previously written out. In the next place, I think it is clear that the writer contemplates that her solicitor may make a will. After referring to her sons' rights she says—'This I want all made correct at the earliest date,' and after referring to her reasons for excluding her sons she says—'I wish that retained in my will,' and promises to obtain any further information which the solicitor may require. The mere fact that the accompanying letter refers to the document as 'this will' is not, I think, conclusive. A similar point occurred in *Munro* v. *Coutts*, 1 Dow 437. In these circumstances, if the question whether the document was meant to be treated as a will or merely as a memorandum of instructions to make a will depended on the document and accompanying letter alone, I think that there would be great force in the argument that the document was *ex facie* a will, that the accompanying letter did not clearly impress on it the character of mere instructions but simply raised a doubt, and that such doubt was insufficient to prevent the document from receiving effect according to its terms. The rule as to the burden of proof in such a case may well be different from that expressed by Lord Selborne in *Hamilton* v. *White* (9 R. (H.L.) 54) as applicable to a case where the doubt arises on the face of the document itself.

"But then I think that the history of the present document is of material assistance in ascertaining its true character. According to Mr Stirling's evidence the document was sent to him in pursuance of an arrangement between him and Mrs Wilson in the previous August that she should send him a written note of what she desired in order that he might prepare a draft will for her consideration, and he did prepare and send her a draft will accordingly with a letter explaining that it was not legally necessary to include an express bequest to her sons. If, as it was maintained for the defender, Mrs Wilson only intended her solicitor to make a will if an express bequest to her sons was necessary, she would naturally on receipt of Mr Stirling's explanation have said so, and referred to her own signed document as in that view sufficient for her purpose. But instead of doing so she retained the draft and brought it back with her for further discussion with her solicitor when she visited him the following year. Equally significant was her attitude on the occasion of the visit last referred to. She explained that for various reasons, one of which related to Miss Hovell, the draft would not do, and left with the expressed intention of further considering it. Now it must be kept in view that the substantive provisions of the draft were the same as those in the document, and the circumstances which in her view necessitated an alteration of the former would equally necessitate an alteration in the latter. But she neither asked for nor referred to the document. Nor did she do so during the next four years, though she was in communication with Mr Stirling about other matters. These facts appear to me to indicate that she attached no importance to the document. Finally, I think that her correspondence with Mr Milne in 1921, and particularly her letter of 3rd October 1921, is not consistent with a belief on her part that she had executed an operative will.

"Putting the evidence together I think it yields a fairly reliable conclusion that the document under consideration, though framed in terms which would have made it an operative will if it had been found in the writer's repositories, was in fact written and sent by her to her agent, and was treated by her, as it certainly was accepted and treated by her agent, as a memoran-

dum of instructions to make a will and nothing more. In some respects the case is like *Scott* v. *Sceales* (*cit. sup.*), where by a majority of three to two, including the Lord Ordinary, the Judges affirmed the testamentary character of the document; but there was nothing in *Scott* v. *Sceales* corresponding to the extrinsic evidence which in my opinion takes the present case within the class of authority illustrated by *Munro* v. *Coutts, Forsyth's Trustees* v. *Forsyth*, and *Sprot's Trustees* v. *Sprot* (*cit. sup.*).

"I shall therefore grant decree as craved."

The defender reclaimed, and argued—Proof should not have been allowed in the present case, and the defender was not precluded from contending now that proof should not have been admitted—Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 52; C.A.S., C, ii, 5; *Stewart* v. *Clark*, 1871, 9 Macph. 616, 8 S.L.R. 402; *Paterson* v. *Paterson*, 1897, 25 R. 144, *per* Lord Young at p. 159 and Lord Kincairney at p. 178, 35 S.L.R. 150; *Macvean* v. *Maclean*, 1873, 11 Macph. 506, 10 S.L.R. 312. The Lord Ordinary had only repelled the defender's fourth plea-in-law *in hoc statu*. The averments of the pursuer were irrelevant, and the Lord Ordinary ought to have dismissed the action. In the present case the defender founded on an unambiguous document which was clearly of a testamentary character. There was no qualifying heading attached to it, such as the word "draft" or "rough," which might lead to the inference that it was not intended as a will—*Forsyth's Trustees* v. *Forsyth*, 1872, 10 Macph. 616, 9 S.L.R. 367; *Lowson* v. *Ford*, 1866, 4 Macph. 631; *Sprot's Trustees* v. *Sprot*, 1909 S.C. 272, 46 S.L.R. 161. The covering letter did not necessarily infer that the will was sent merely as instructions. The presumption that it was a valid will could only be displaced by absolutely conclusive evidence that it was so sent, and this could not be done. The terms of the covering letter showed, not that it was not meant as a will, but that the testatrix had doubts whether it was legal, and that she wished it made so—*White* v. *Hamilton*, 1881, 8 R. 940, 18 S.L.R. 676, 9 R. (H.L.) 53, 19 S.L.R. 688; *Munro* v. *Coutts*, 1813, 1 Dow 437; *Scott* v. *Sceales*, 1864, 2 Macph. 613. There was not much difference between the laws of England and Scotland on the subject before the passing of the Wills Act—*Torre and Others* v. *Castle and Others*, 1836, 1 Curt. 303, 2 Moo. P.C.R. 133, at p. 154; *Barwick* v. *Mullings and Others*, 1829, 2 Hag. 225, at p. 226, *per* Sir John Nicholl; *Mitchell* v. *Mitchell*, 1828, 2 Hag. 74; *King's Proctor* v. *Daines*, 1830, 3 Hag. 18; *Philipps* v. *Thornton*, 1831, 3 Hag. 752. An indication of an intention to make a more formal will did not necessarily invalidate an informal one already made—*Gattward* v. *Knee*, [1901] P. 99. If the covering letter made it quite clear that the document was not intended to be a will, this might throw light on the will. When, however, the covering letter, as in the present case, was ambiguous, extrinsic evidence to elucidate the ambiguity was not admissible—*Ferguson-Davie* v. *Ferguson-Davie*, 1890, 15 P.D. 109; *Taylor's Executrices* v. *Thom*, 1914 S.C. 79, *per* Lord President Strathclyde at p. 84, 51 S.L.R. 55; *Robb's Trustees* v. *Robb*, 1872, 10 Macph. 692; *White* v. *Hamilton* (*cit. sup.*). The document in question was a duly executed will and should receive effect—*Stirling Stuart* v. *Stirling Crawfurd's Trustees and Executrix*, 1885, 12 R. 610, 22 S.L.R. 391. The document must be presumed to be of the date it bore—Conveyancing Act 1874 (37 and 38 Vict. cap. 94), sec. 40. In the present case the onus on the pursuer was so great as virtually to exclude extrinsic evidence, or at least to require conclusive proof. This, however, had not been adduced—*Chalmers* v. *Chalmers*, 1851, 14 D. 57, was also referred to.

Argued for the pursuer—The Lord Ordinary had finally decided the question of proof. Section 52 of the Court of Session Act 1868 was to be read subject to the provisions of sections 27 and 28 of the same Act. According to section 28 the matter was now finally concluded, and section 27 was now superseded by C.A.S., C, ii, 4—*Copeland* v. *Lord Wimborne*, 1912 S.C. 355, 49 S.L.R. 280. On the main question extrinsic evidence was not limited to cases where a doubt as to the *animus testandi* appeared *ex facie* of the deed. There were two classes of cases on the subject—(1) where the document was impugned on other grounds than the writing of the deceased; (2) where the source of the challenge was something written by the deceased. An illustration of the first class was an averment that the testator had instructed a document to be destroyed—*Chisholm* v. *Chisholm*, 1673, M. 12,320—or an averment that one of the beneficiaries had abstracted it when the testator had asked for it to consider it—*Buchanan* v. *Paterson*, 1704, M. 15,932, both cited in M'Laren on Wills (3rd ed.), vol. i, p. 410. Other illustrations were afforded by the cases of *Nichols* v. *Nichols*, 1814, 2 Phill. 180; *Lister* v. *Smith*, 1863, 3 Sw. and Tr. 282; *Robb's Trustees* v. *Robb*, 1872, 10 Macph. 692. The present case, however, belonged to the second class, where the source of the challenge was something under the hand of the deceased. The cases cited by the defender did not support his argument. It was not possible to distinguish between these cases and one like the present, where the doubt as to the *animus testandi* of the principal document was created by a second holograph document associated with the other and of later date than it. In cases such as the present, where the second holograph document of even or later date referred to the first in terms which raised a doubt as to whether the first was intended to be a testament, then proof of facts and circumstances ought to be admitted.

At advising—

LORD JUSTICE-CLERK (ALNESS)—This is an interesting case, and I shall be guiltless of over-statement if I say that it has been argued with adequacy. The pursuer sues the action in order to have it declared that his mother died intestate, and that her estate falls to be distributed according to the law of intestate succession.

It appears that on 26th November 1916

the deceased lady sent to her solicitor, Mr Stirling, a certain document with a covering letter. The question in the case is—Is the document a will or is it not? If it is, the action fails. If it is not, the action succeeds. I should add that the only compearing defender is a stranger in blood to the pursuer and to his mother; in point of fact, she was a former domestic servant of the latter, in whose favour the will, if will it be, is mainly conceived, for she receives under it a liferent of the estate of the deceased. The Lord Ordinary, after a procedure roll discussion, repelled the fourth plea-in-law for the defender and allowed a proof before answer. On a review of the evidence which was led he has pronounced decree as craved, and against that interlocutor this reclaiming note is taken. The defender, as I understood the argument, maintains two propositions, (first) that in the circumstances of this case extrinsic evidence is inadmissible, and accordingly, that the evidence led falls to be disregarded; (secondly) that even if regard be had to it, the case for the pursuer fails.

In answer to the first proposition the pursuer maintains, as a preliminary plea, that the contention was not timeously urged, and that inasmuch as no reclaiming note was taken againt the Lord Ordinary's interlocutor allowing a proof before answer, the defender is foreclosed from now submitting this argument. I am satisfied that neither statute nor judicial decision yields that result. Having regard to the fact that the plea repelled was of a very special character, and that the proof allowed was a proof before answer, I am not prepared to hold that omission on the part of the defender to reclaim at an earlier stage involves complete forfeiture of her right now to maintain either the incompetency or the irrelevancy of the evidence led. I therefore pass to consider whether the defender has made out that in this case extrinsic evidence was incompetent.

The defender's proposition, as I understood it, was that unless doubt or question is raised as to the testamentary character of a document on the face of it, extrinsic evidence is inadmissible. To this, as I regard it, narrow statement of the doctrine I am not prepared to subscribe. I think that Mr Cooper was well founded when he said that the defender seems to have confused an illustration of a rule with the rule itself, and has persuaded himself to regard a condition of matters which renders such evidence admissible as a requisite condition of its admission. There can be no doubt at all that where a doubt arises *ex facie* of the deed itself, parole evidence to explain it is competent. The language of the deed may suggest that it is merely inchoate or an informal document. A heading, or a marginal note, or an indorsement may suggest the same inference. In such circumstances parole evidence is undoubtediy competent. On this point both parties are agreed. But here they part company. The defender says that where a doubt is created by the terms of a second document, albeit it is holograph of the testator and intimately associated with the first, and even bearing a later date, a different rule applies. This the pursuer stoutly denies. For myself, I am unable to discover any principle or authority which supports the defender's contention. It involves that if the words "notes of settlement" or "rough," which occur in two of the cases cited, appear at the top of the paper on which the deed is written, extrinsic evidence is competent to explain them; but if they appear on an envelope in which the deed is enclosed, or on an accompanying sheet of notepaper, it is not. In my opinion, the argument sins against common sense. It is, I think, destitute of authoritative support, and I am prepared to reject it. I am of opinion that the Lord Ordinary is right in thinking that whether the doubt is created by the deed itself or by the terms of a holograph letter accompanying it, the same principle applies, namely, that extrinsic evidence is competent in order to clear up the doubt so created. Nor can I find after due search any support for the learned Vice-Dean's argument, that where the accompanying document is unambiguous such evidence is competent, but that where it is subject to construction the evidence is incompetent. The defender has therefore, in my judgment, failed to establish the first proposition which she set out to maintain.

The defender, however, further contends that even if the extrinsic evidence may be considered, the pursuer has failed to deprive the document of what she regards as its *prima facie* testamentary character. Now, I am disposed to agree with the Lord Ordinary in thinking that if one had regard to the letter alone the pursuer's case might be a difficult one. It would certainly be more difficult than it is when the whole evidence is regarded. But I am not prepared to say that even so the pursuer's case would fail. Having had the letter expounded by four skilled counsel, and having read and re-read it with care and anxiety, I am of opinion that Mr Stirling rightly interpreted it as a letter of instructions and as nothing else. It is not such a letter, in my judgment, as a lady, who thought she had already made her will, would have written. I do not detain your Lordships by analysing it phrase by phrase in order to demonstrate that proposition. I am well content with what the Lord Ordinary has said on this matter, and I will add that it is the less necessary to analyse the letter in view of what follows. [*His Lordship then proceeded to examine the evidence relating to the letter and the document, and reached the conclusion that the document had been sent by Mrs Wilson to her agent not as a will, but as a memorandum of instructions, and had been treated by both of them as such.*]

I will permit myself one further observation. Many cases were cited to us, English and Scottish, old and new. I should have thought that when one had extracted from these authorities the general principle upon which they were decided their usefulness was exhausted; for plainly in this province one case differing, as it necessarily must in

its circumstances from another, cannot possibly conclude the matter. As regards the English cases decided before the Wills Act, which were cited by Mr Taylor, I content myself by respectfully adopting as a true appraisement of their value what Lord M'Laren says in paragraph 516 of "The Law of Wills and Succession." After noticing that within extremes, examples of which he gives, extrinsic evidence has been liberally admitted, he says (3rd ed., vol. i, at p. 279)—"Lord Selborne in his judgment founds largely on the English probate cases of the period antecedent to the Wills Act; but while reluctant to express dissent from an authority so high, the writer ventures to add that it admits of easy demonstration that prior to the Wills Act wills were admitted to probate in England which could not possibly have been sustained by a Scottish Court."

In these circumstances I suggest to your Lordships that this reclaiming note should be refused and the judgment of the Lord Ordinary affirmed.

LORD ORMIDALE—It is not and cannot be disputed that the document is *ex facie* unexceptionable as a will, and, if it had been found by itself in the repositories of the deceased after her death, it would, I take it, have fallen to be treated as an operative instrument. But it was not so found. The deceased parted with it five years before her death, when she sent it, enclosed in a letter, to her law-agent, Mr Stirling. I am satisfied that at that date it was not, and was not intended to be, a testamentary instrument, but was regarded by the deceased, as is averred by the pursuer, along with the letter that accompanied it, merely as a note of instructions to enable Mr Stirling to prepare a will for her.

It may be that that conclusion cannot be arrived at on a consideration of the letter alone without reference to the other evidence that was led, but there can be no doubt, in my judgment, that even if no more than an ambiguity is disclosed by the contents of the letter, that is quite sufficient, on the authorities cited, to warrant the allowance of proof into the facts and circumstances relating to the real nature of the writing in question. It appears to me to make little difference that the ambiguity is to be found not on the writing itself, but in the letter of 26th November 1916. The two documents were truly inseparable. Some explanation of the why and wherefore of the document had to be given, or at any rate was given, and obviously, if the letter had stated in terms that what was enclosed was to be used merely as instructions for the preparation of a will of which the writer desired a draft, no further proof would have been required. But the letter, it is said, merely creates a surmise that that was the position. Be it so, then I think that further proof of facts and circumstances as to whether or not that surmise was well founded is amply warranted by the authorities that were cited to us; and I see no reason why we should not consider the whole proof. The result of the proof is in no sense neutral or inconclusive. The evidence, in my opinion, is clear that the deceased in sending the document to Mr Stirling was not presenting him with a testamentary instrument only to be superseded by a more formally executed will in the event of certain provisions as to the deceased's sons requiring imperatively to be introduced. I should have been very willing, and indeed was not disinclined, to accept that view, because I entirely assent to the contention so strongly maintained by Mr Taylor that a document, *ex facie* an unexceptionable will, is not lightly to be denied effect. But, on consideration, I cannot think that there is after all much ambiguity as to the meaning of the letter of 26th November. What is enclosed is described as not the deceased's will, but the substance of what she had twice written out on notepaper several years before—the second time about October 1912; and she wishes the date, October 1912, to be retained. That must mean in the will that Mr Stirling is to prepare for her. And I do not read the letter as anywhere referring to the document as the deceased's will. Where the word "Will" is mentioned it refers to the will *in futuro*, the will that is to be executed. [*His Lordship then referred to certain passages in the evidence which, in his opinion, negatived the idea that the document was intended by Mrs Wilson to be a testamentary settlement, and proceeded*]—I have not dealt with the point of procedure mentioned by your Lordship, because I understand the respondent did not seriously press it. As at present advised, I am inclined to agree in what your Lordship has said about it.

On the whole matter I agree with your Lordship that the reclaiming note should be refused.

LORD HUNTER—I am of the same opinion. The question between the parties was just this—Whether the document upon which the defender founded was to be held as containing an expression of the final testamentary intention of the deceased, or whether it was merely a note or memorandum of instructions as to the preparation of her will? The document itself was not found in the repositories of the deceased, but was in the hands of her law agent. I know of no authority and no ground of principle upon which under such circumstances proof can be refused at all events as to these two points—(first) with what object the document was handed to the law agent, in whose hands it was found; and (second) how the document was treated in the possession of the law agent.

In the present case I think proof was legitimate *a fortiori* upon the ground that when the document was sent to the law agent it was sent with a covering letter, which contains internal evidence creating, I think, more than a doubt as to whether the deceased herself intended the document to be a final expression of her intention at all. So far, therefore, as the Lord Ordinary's allowance of proof is concerned, I

think he was perfectly justified in taking the course he did, indeed I do not think he would have been entitled to take any other course looking to the averments made by the parties.

On the evidence as led before the Lord Ordinary, I have no difficulty in reaching the conclusion which he did, and I entirely concur in the reasoning by which he reached that conclusion.

LORD ANDERSON—The reclaimer's counsel challenged the interlocutor of 23rd November 1922, which repelled the fourth plea-in-law for the defender and allowed a proof before answer; and also the interlocutor of 8th March 1923, which disposed of the merits of the case. The respondent's counsel maintained that the former interlocutor could not now be attacked in respect of the provisions of the Court of Session Act of 1868, sections 27, 28, and 52, and the Codifying Act of Sederunt, C, ii, 4, and the case of *Copland*, 1912 S.C. 355. As, however, I have reached the conclusion that that topic was not fully argued, and was not very strenuously pressed by Mr Cooper, I do not propose to express any opinion upon it.

Assuming that the interlocutor of 23rd November 1922 is open to challenge, I am clearly of opinion that the attack upon it has failed. The Lord Ordinary, in my judgment, was plainly right on the authorities in repelling the fourth plea-in-law stated by the defender, which plea asserts that the document "can only be impugned by a probative writing of the deceased of equal solemnity and of later date." That plea was supported by no authority, and it is, in my opinion, an unsound legal proposition. I am also of opinion on the authorities to which we were referred that the Lord Ordinary was right in ordering inquiry. Mr Cooper divided the cases dealing with this matter into two classes—one class where doubt as to the purport of the document was created by something *ex facie* of the document itself, and the second class where the doubt was created by extrinsic circumstances. The cases, doubtless, can be so divided, but it seems to me that that is a purely arbitrary classification and does not appear to be warranted by any consideration of principle.

It appears to me that the general rule as to the allowance of proof in a case of this sort which is extractable from the authorities is this, that proof will be allowed where the efficacy of a document such as a will is relevantly challenged—that is, where facts and circumstances are specifically averred which, if proved, would lead to an inference that the document was not intended to take effect as a testament.

Now in the present case doubt as to the testamentary efficacy of the document has been created mainly by the letter of 26th November 1916, and in my opinion this is by far the most important adminicle of evidence which has been adduced by the pursuer. The letter is the writ of the deceased, holograph of her just as the document is, signed by her, and, like the document which accompanied it in the cover, dealing entirely with her testamentary intentions. In my view the one document is just as important as the other, and, with such a document as the basis of attack on the will, the Lord Ordinary in my opinion was bound to allow proof of the pursuer's averments and admit all other evidence, written or verbal, which tended to establish these averments.

With regard to the interlocutor dealing with the merits, I have reached the conclusion—and that without any difficulty—that the Lord Ordinary was right in the judgment he delivered. [*His Lordship then proceeded to examine the evidence.*]

The Court adhered.

Counsel for the Pursuer and Respondent—Chree, K.C.—Cooper. Agents—Macpherson & Mackay, W.S.

Counsel for the Defender and Reclaimer—Brown, K.C.—Taylor. Agents—Denholm Young & M'Vittie, W.S.

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*Thursday, March* 1.

## SECOND DIVISION.

[Sheriff Court at Hamilton.

## FALLENS *v.* WILLIAM DIXON, LIMITED.

*Workmen's Compensation Act* 1906 (6 *Edw. VII, cap*, 58), *First Schedule* (3) *and* (16)—*Review of Compensation—Fall in Wages—Partial Incapacity—Change of Occupation—General Fall in Wages in Industry in which Temporarily Employed—No Change in Rate of Wages in Former Employment in which Injuries Sustained.*

A miner sustained injuries owing to an accident in the course of his employment, and was awarded compensation in respect of partial incapacity. Being unable to continue his former work, he obtained employment as a clerk under an Education Authority. About a year later a reduction was made in the rate of wages payable to the officials of that Authority, but no change occurred in the rate of wages which he would have earned had he been able to remain in his former employment as a miner. In an application at his instance for review of the amount of compensation, *held* that the facts stated constituted a change of circumstances entitling the applicant to have the weekly payment reviewed.

Edward Fallens, miner, 237 Glasgow Road, Blantyre, *appellant*, being dissatisfied with a decision of the Sheriff-Substitute at Hamilton (HAY SHENNAN) in an arbitration under the Workmen's Compensation Act 1906 between him and William Dixon, Limited, *respondents*, appealed by way of Stated Case.

The Case stated, *inter alia*—"This is an arbitration on an application by the appellant presented on 4th December 1922 asking for an increase in the weekly rate of compensation payable to him. . . . I heard par-