statement of what is "in nearly all cases the practical question" and an exception to or extension of the general case. So far as the general case is concerned, the Lord Chancellor's statement appears to be in entire accord with the observations (already quoted) which his Lordship and the other noble and learned Lords made in the following year in *Hodgson's* case. So far as any exception is dealt with, I read the Lord Chancellor's words as referring to the particular circumstances of the case before him, or to other analogous circumstances which are not here present. The only other case to which the respondent's counsel referred was that of *Keeling*, [1911] 1 K.B. 250, a very recent decision by the Court of Appeal in England, the rubric of which bears that "in questions of dependency under the Workmen's Compensation Act 1906 *Hodgson* v. *West Stanley Colliery*, [1910] A.C. 229, in no way impeaches or affects *Coulthard* v. *Consett Iron Company*, [1905] 2 K.B. 869, and *Williams* v. *Ocean Coal Company*, [1907] 2 K.B. 422, as to the implied dependency of the wife on her husband, even when separated from him and not actually dependent upon his earnings." *Keeling's* case is not of course an authority binding upon us, though I need hardly say that I regard the decision and the opinions of the learned Judges with unfeigned respect. But it deals with what is, I think, a vexed question, and one upon which the Scots and English cases are not in harmony. I gather that the English Court of Appeal has laid it down, in a series of cases of which *Keeling* is the latest example, that there is a legal presumption in favour of the dependency of a wife on her husband which it is difficult to rebut, and which (in particular) is not rebutted by the fact that at the date of his death he was not contributing to her support, and that she was being supported by herself or others. A similar presumption is, I apprehend, held to exist in favour of a child's dependency on its father. In our Courts, on the other hand, I think it has been held by a series of decisions (*e.g.*, *Turners Limited*, 1904, 6 F. 822; *Moyes*, 1905, 7 F. 386; *Baird & Company, Limited*, 1906, 8 F. 438; *Lindsay*, 1908 S.C. 762) that dependency is in each case to be decided upon a broad view of the facts—Was the applicant in fact supported by the earnings of the deceased at the date of his death or from other sources?—and that if the facts disclose the latter state of matters the existence of a legal obligation of support by the deceased is irrelevant and does not establish the applicant's claim, there being no legal presumption (to be displaced in each case) arising from such obligation. The Scots cases are binding upon this Court, and must continue to be our guides until they are pronounced by the House of Lords to be erroneous; and I must therefore, with all respect, decline to follow *Keeling's* case in so far as it differs from the Scots decisions.

If, then, as I hold, this case must be decided upon a proper consideration of its own facts and the legal inferences to be drawn from them, I am clearly of opinion that the Sheriff-Substitute was wrong in deciding that the child was wholly dependent upon the earnings of her mother.

The respondent's argument in favour of partial dependency was of a somewhat perfunctory character, based solely (as I understood it) upon the fourth and fifth findings in the Stated Case, which are to my mind quite insufficient to support it. In my opinion, therefore, the second question as well as the first ought to be answered in the negative.

The LORD JUSTICE-CLERK and LORD ARDWALL concurred.

LORD SALVESEN was absent.

The Court answered the first and second questions of law in the negative.

Counsel for Appellant—Horne, K.C.—Mair. Agents—Macpherson & Mackay, S.S.C.

Counsel for Respondents—Crabb Watt, K.C.—J. A. T. Robertson. Agent—J. M'Kie Thomson, S.S.C.

Thursday, March 16.

FIRST DIVISION.

[Lord Cullen, Ordinary.

CHIENE *v.* TAIT'S TRUSTEES.

Succession — Writ — Testament — Codicil — Holograph Writing.

In the repositories of a deceased person there were found (1) a formal trust-disposition and settlement, dated 29th October 1910, signed by the deceased and formally attested, which bore to revoke all previous testamentary writings, (2) a draft of the trust-disposition and settlement, signed by the deceased and dated 27th October 1910, and (3) an informal writing, holograph of the deceased, consisting of a list of names with sums of money placed opposite to them and headed legacies, dated 28th October 1910, signed by the deceased and bearing the words "in terms of my last will of even date." No will of the deceased dated 28th October 1910 was found.

Circumstances in which *held*, after a proof, that the informal writing was a valid and operative testamentary writing of the deceased and a codicil to his trust-disposition and settlement.

On 8th August 1910 William Brown Dunlop, sometime residing at Seton Castle, Longniddry, and others, trustees of the late John Scott Tait, C.A., Edinburgh, acting under his trust-disposition and settlement dated 29th October 1909, brought an action of multiplepoinding and exoneration in order to have ascertained the rights of parties in the residue of the trust estate, which formed the fund *in medio*.

The following narrative is taken from the opinion of the Lord Ordinary—"Mr

John Scott Tait, C.A., Edinburgh, died on 5th April 1910.

"In his repositories there was found a bundle of papers tied up together. It included—(1) A formal tested trust-disposition and settlement, dated 29th October 1909. This deed was contained in a closed envelope on the back of which was written, in Mr Tait's handwriting, 'Last Will, 29th October 1909, J. S. T.' Under it the residue is given to the claimant Mr Hall Chiene, who is in business abroad, on condition of his relinquishing his business and returning to reside permanently in this country within one year after the testator's death; failing which, the testator directed that the residue should be disposed of as he might direct by a writing under his hand.

"(2) The draft of said settlement, which was prepared and adjusted with Mr Tait by his law agent Mr Ballingall, W.S. At the end of the draft there is a signed docquet written by Mr Tait in these terms—'I adopt what is contained on this and the ten preceding pages as my last will. John Scott Tait. 27th October 1909.' This docquet was written and signed by Mr Tait at the last meeting which he had for adjustment of the draft with Mr Ballingall, who then took away the draft to have it engrossed. The engrossment was sent by him to Mr Tait on the following day.

"(3) A skeleton form of codicil which Mr Ballingall had, at Mr Tait's request, supplied to him in order to guide him in making a holograph codicil.

"(4) An informal document holograph of Mr Tait in the terms set out in the record. This was found folded up inside the skeleton draft codicil.

"(5) Some sheets of engrossing paper which Mr Ballingall had supplied to Mr Tait at his request in order that any codicil he might make should be uniform in appearance with the formal settlement of 29th October.

"The present question is whether the said informal document of 28th October (which I shall call No. 8) is an operative testamentary writing of Mr Tait. It is proponed by those who claim under it as being of the nature of a codicil or addition to the settlement of 29th October.

"In said settlement the testator, after making provisions in favour of his sister and bequeathing certain annuities and certain legacies payable as soon as convenient after his death, with interest from the first term of Whitsunday or Martinmas occurring upwards of six months after his death, directs 'that my trustees shall, at the same time, and with interest as aforesaid, pay and deliver all further legacies or bequests which I may leave or bequeath by any writing or document clearly expressing my wish and signed by me, whether or not formally attested or executed.'

"The settlement contains the following clauses—'And I revoke and cancel all wills, testamentary writings, and bequests of every description made by me at any time heretofore; And I declare this along with any separate bequests by me of even date herewith, or to be hereafter executed by me, to be my last will and testament.' These clauses limit the general direction to the trustees first quoted to writings by the testator of even date with the settlement, or of subsequent date."

The informal document of 28th October, referred to in the said narrative, was in the following terms:—

"LEGACIES.

✓	Alice Bisset or Leishman, The Linga, Gullane	£500 – –
✓	Children of William Brown Dunlop, 7 Carlton Street, Edinr.	2000 – –
✓	Children of Thomas Drybrough, Brewer, residing at No. 14 Kingsburgh Road, Edibgh	2000 – –
✓	Emily Mary Drybrough wife of the said T.D	1000 – –
✓	Daughters of my ~~late~~ deceased Partner George Todd Chiene, C.A.	3000 – –
✓	Robert Stuart Bruce, No. Castle Terrace, Ednbgh	1000 – –
✓	Mary Scott, Daughter of Dr. Thomas Scott Musselburgh	1000 – –
✓	Harry Cheyne Junior, W.S., Moray Place, Ednbgh	1000 – –
✓	George Dalgleish Halden, care of Gow Wilson & Stanton Ltd 13 Rood Lane London EC	500 – –
✓	~~Alex~~ Children of Alexander James MD Randolph Crest Ednbgh	1000 – –
✓	Speirs Paton Sinclair, C.A Ednbgh	1000 – –
✓	Dr. Cormack Smith, Brunton Terrace Ednbgh	500 – –
✓	William Alexand. Paterson Civil Engineer,	1000 – –
✓	James Methuen, W.S	500 – –
✓	Children of William Charles Smith KC, 10 Doune Terrace Ednbgh	3000 – –
✓	John Robert Smith, my private Secretary	500 – –

W. Purves children
✓ Ethel Wood or Lovell
✓
Annuity £25. Isobella Lyon. Aithernie, Davidsons Mains
T. Liddle Union Bank Fund
poor relations (A M Small to distibte)
✓ W H Nicolson

£19500 – –
✓

28 October 1909
JOHN SCOTT TAIT.

in terms of my last Will
of even date"

Claims were lodged by (*First*) Mrs Alice Bisset or Leishman, wife of and residing with George Leishman at the Linga, Gullane, and others, being all the persons named in the said document, against whose names a sum of money was placed, or the legal representatives of these persons, who claimed "to be ranked and preferred on the fund *in medio* to the extent of the sums placed opposite their names." (*Second*) Miss Isobella Lyon, Aithernie, Davidson's Mains, Midlothian, who made the following claim:—"That the pursuers and real raisers should be ranked on and preferred to the fund *in medio* for such a sum, free of legacy duty, as on investment will yield a free income of £25 per annum, said sum to be invested by the pursuers and real raisers and the annual income thereof to be by them paid over to the claimant in equal portions at Whitsunday and Martinmas in each year, said annual payments commencing as from Whitsunday 1910, or alternatively, that the pursuers and real raisers should be ranked on and preferred to the fund *in medio* for such a sum free of legacy duty as will purchase a bond of annuity in their own name upon the life of the claimant for £25 per annum, the annual returns thereunder to be by them paid over to the claimant in equal portions at Whitsunday and Martinmas in each year, said payments commencing as from Whitsunday 1910." (*Third*) William Elgin, C.A., 3 Albyn Place, Edinburgh, *curator*

bonis for Miss Janet Tait, residing at Berryhall, Darnick, Melrose, who claimed "to be ranked and preferred to the whole amount of the fund *in medio*" as the sole heir of the deceased entitled to succeed to his intestate estate, heritable and moveable. (*Fourth*) Hall Campbell Chiene, C.A., Old Safe Block, 536 Hastings Street, West, Vancouver, British Columbia, who made the following claim:—"1. To be ranked and preferred to the whole fund *in medio*, or otherwise, alternatively, 2. On the final determination of the validity of said memorandum as a testamentary writing, and in the event of the claimant satisfying the conditions attached to the residuary bequest to him within the specified period of twelve months, or within a reasonable time to be fixed by the Court in this process, to be ranked and preferred to the whole fund *in medio*"; and (*Fifth*) The said William Brown Dunlop and others, as trustees foresaid, who made the following claim:—"The claimants in the event of its being determined that said memorandum is a valid testamentary writing claim to be ranked and preferred to (*a*) £2000, (*b*) 2000, and (*c*) £1000 to be held and applied by them for behoof of the minors entitled thereto in terms of the seventh purpose of the trust-disposition and settlement. They further claim, in the event of the claim by the claimant Miss Isobella Lyon being sustained, to be ranked and preferred to £410, or such other sum as is sufficient to provide an annuity of £25 to said claimant."

The claimant William Elgin, as *curator bonis* foresaid, pleaded *inter alia*—"4. The memorandum in question not being a valid testamentary writing, *et separatim* having been revoked by the said trust-disposition and settlement, it does not form part of the testamentary writings of the said John Scott Tait." And the claimant Hall Campbell Chiene pleaded, *inter alia*—"1. The memorandum in question not being a valid or effectual testamentary writing, *et separatim* having been revoked by the trust-disposition and settlement, it does not form part of the testamentary writings of the said John Scott Tait."

On 3rd January 1911 the Lord Ordinary (CULLEN) pronounced the following interlocutor:—"Finds that the holograph writing, dated 28th October 1909, set forth in the third article of the pursuers' condescendence, and of which No. 8 of process is a copy, is a valid and operative testamentary writing of the deceased John Scott Tait, and that in terms thereof the claimants Mrs Alice Bisset or Leishman and others are entitled to the legacies claimed by them respectively in their claim, and the claimant Mrs Isobella Lyon is entitled to the annuity claimed in her claim: Therefore repels the fourth plea-in-law for the claimant William Elgin, and the first plea-in-law for the claimant Hall Campbell Chiene, and decerns: *Quoad ultra* continues the cause for further procedure," &c.

Opinion.—". . . [*After the narrative, supra*] . . . —The settlement is dated 29th October 1909 and the document No. 8 is dated 28th October 1909. If regard were had only to these dates, No. 8, assuming it to be testamentary in character, would be revoked by the settlement. Mr Tait, however, while he wrote the date 28th October 1909 on No. 8, also wrote on it after his signature these words—'In terms of my last will of even date.' It is accordingly contended by those who claim under No. 8 that the last will so referred to was the settlement of 29th October, that being the only will which Mr Tait made at the period in question; that the words in question written on No. 8 sufficiently evince his intention that it should have the character of a writing of even date with the settlement, and that, on this footing, the discrepancy in the actual dating is not material. This discrepancy, they say, may be due to a mistake of recollection as to the day of the month, or to the possible fact that Mr Tait actually signed the settlement on the 28th, although he did not acknowledge his signatures to the attesting witnesses until the following day, or to his having used the words 'of even date' in a more free sense than they literally bear, that is to say, as referring to the will which he had finally adjusted on the preceding evening and the engrossment of which on the 28th he had actually in his hands for execution.

"The opposing view is that the 'last will of even date' was the signed draft of the 27th, and that both it and the document No. 8 as a codicil to it were revoked by the will of the 29th.

"The salient fact is that there is no will dated 28th October so as to be literally of even date with No. 8. The signed draft is dated the 27th and the executed engrossment of it the 29th. One must by fair inference find out what was the testator's meaning under these circumstances. Now the signed draft and the executed engrossment of it represented the same will. They were *partes ejusdem negotii*. They were just the two ordinary stages of the process of making a formal will. Mr Tait no doubt signed the draft in order to bridge the interval that might elapse until he should execute the engrossment of it. I do not think it necessary to inquire whether he thereby made it a duly authenticated instrument. I heard no argument on this question. It appears from Mr Ballingall's evidence that Mr Tait signed the draft just for what it might be worth, on the chance of its holding good as a will in the event of his suddenly dying before he had executed the engrossment of it. Now in these circumstances I cannot think that Mr Tait really looked upon the signed draft and the engrossment of it in the light of two separate wills, and that when on the 28th he wrote on No. 8 'in terms of my last will of even date' he intended to refer to the signed draft as distinguished from the engrossment of it which he actually had in his hands for execution on the 28th.

"I am accordingly of opinion that the words 'in terms of my last will of even date' written on No. 8 were intended by Mr Tait to bear reference to the settlement of 29th October 1909.

"On this footing, the question arising for

determination is whether No. 8 is testamentary in character, expressing a concluded intention on the part of the testator, or whether it is merely inchoate and of the nature of a series of reflections by him about the regulation of his succession committed to paper.

"There are several considerations affecting No. 8 to suggest the latter view. It is written in pencil upon a leaf of paper which has been apparently detached (along a line of perforation) from a jotting book of the kind commonly used by the testator in business. It contains no direct words of bequest, the purpose of testamentary disposition ascribed to it resting on the use of the word 'legacies' which appears at the head of the writing. The portion of it at the bottom of the page with a line round it is in a shape and in a condition of incompleteness difficult to reconcile with the view that the document was intended to embody a finished testamentary act. The document, moreover, was not found in company with the testator's last will, which was shut up in its envelope, docquetted by him as aforesaid, but was found folded up inside the skeleton draft codicil as if it represented material to be used by the testator in making a codicil. On an occasion subsequent to the execution of the settlement and not long before his death Mr Tait made a statement to Mr Ballingall to the effect that he had 'never done that codicil yet.' This statement probably referred to the making of the formal codicil for which Mr Ballingall supplied the skeleton draft and the paper whereon to write it. It is not inconsistent with Mr Tait's having intended that No. 8 should serve as a makeshift until the formal codicil was made.

"The foregoing circumstances are founded on as all pointing to No. 8 not having the character of a testamentary writing.

"But there remains the important fact that, informal and irregular as the document is, Mr Tait not only signed and dated it, but wrote after his signature the words 'in terms of my last will of even date.' Why did he do this? It is to be presumed that he did it with some defined purpose. On the best consideration I can give to the matter, there occurs to my mind no satisfactory explanation of his purpose save this, that he meant to stamp the document with the character of a writing to be acted on as a codicil or addition to the 'last will of even date' to which he made reference. The claimants of residue were unable to suggest any other explanation, and said in effect that Mr Tait acted in the matter without any particular purpose, and that the signature and date and the writing of the words above quoted were a meaningless form. I do not see my way to adopt this view. No. 8, as a mere memorandum or jotting did not in any way need Mr Tait's signature or the words which he appended to it. These were not required to recall to his subsequent recollection what the writing was about. To say that they were a meaningless form is to represent him as having acted in a way which people do not ordinarily act in serious matters of business. I think I am bound to hold that they were not a meaningless form, but that Mr Tait used them with a purpose, and that his purpose can only have been to stamp the document—originally a memorandum no doubt—with the character of an informal testamentary writing in the sense of the last will to which he made reference, to be acted on as such by his trustees.

"The fact that No. 8 was not found enclosed with the will of 29th October, but was found inside the skeleton draft codicil, may be explained by the fact that Mr Tait intended to make a more regular codicil following the form of that draft. It is, I think, a fair inference that he did not at the time intend to delay about this. The will expressly contemplates writings of even date with it as well as subsequent writings.

"It was argued for the claimants of residue that if No. 8 is to be accepted as a testamentary writing the result will be to so far diminish the residue conditionally bequeathed to Mr Hall Chiene under the settlement as to make the condition attached to that bequest an unsuitable one. Two statements have been put in relative to the value of the estate. No. 32 is a statement made up on Mr Tait's instructions by his partner Mr Elgin, C.A., as at 31st December 1908. It was made up in March 1909 and then handed to Mr Tait. It brings out a value of £54,608, 14s. No. 44 is a statement made up by Mr Elgin after Mr Tait's death, as at 29th October 1909. It brings out a value of £50,451, 14s. 2d. The difference between the values brought out in the two statements arises (1) from the statement No. 32 not taking account of a contingent liability under a bank guarantee amounting to £3150 and a liability to the bank of £489 on a 'special account,' the nature of which is not explained, and (2) to depreciation in the value of investments between 31st December 1908 and 29th October 1909.

"One cannot know with certainty what was the value of the estate which Mr Tait had before his mind in making his testamentary dispositions. The fairest view probably is to take the actual value of £50,451 as at 29th October 1909, shown in the statement, on the assumption that Mr Tait had then turned his attention to the state of his affairs. The effect of his testamentary dispositions would then be as follows:—

"Under the settlement and a separate declaration of trust Mr Tait gave his sister Miss Janet Tait the liferent of certain parts of his estate valued roundly at £16,000. The legacies and the annuities (valued actuarily) bequeathed by the settlement amount to £5538. The Government duties and expenses are estimated at £8500. The bequests under No. 8 (including the annuity to Miss Lyon after mentioned) may be taken at £20,000.

"The result of this is that if No. 8 is to be held a testamentary writing, and if Mr Hall Chiene were to accept the residuary

bequest in his favour he would only receive a small amount—estimated at about £450—by way of present payment from the trust estate. He would, however, have a vested right to the portions of the estate subject to Miss Janet Tait's liferent, valued at about £16,000. No valuation has been put on Miss Tait's liferent.

"Now this residiary bequest is a substantial one, and I do not think it is legitimate to go into conjectural views as to the amount of residue which Mr Tait had it in mind to bestow on Mr Chiene, derived from the condition attached to the bequest in his favour. Mr Tait not only was free to encroach on the amount of the residue emerging from the provisions of the settlement itself, but it is evident that he had it in purpose to do so, looking to the facts (1) that the settlement expressly contemplated an additional writing or writings of even date with it, and (2) that he had been supplied by Mr Ballingall with formal materials for carrying out this purpose. In these circumstances, I am unable to see that the fact of the bequests indicated in No. 8 encroaching so much as they do on the residue as it would stand under the settlement itself can be weighed against what seems to me to be the proper inference to be drawn from the terms of No. 8.

"On the footing that No. 8 was intended to have a testamentary operation, the claim of Miss Isobella Lyon becomes the subject of a special controversy. Miss Lyon is not one of the persons named in the upper part of the document, but appears in the part below which is shut off by a line. The claimants of residue argue that this part of the document is very incomplete by contrast with the upper part, and that this, and the fact of its being shut off by a line, indicate that the testator regarded it as holding a different position from the upper part, and intended to exclude it from sharing in the quality which he affixed to the upper part by his signature, &c. This mode of reasoning is not easy to reconcile with the position these claimants take up as to the absence of definite purpose and meaning in the signature and added words in relation to the document as a whole. I think, moreover, that the significance which they attach to the enclosing line is more than can fairly be extracted from it with any certainty. The document, if intended by Mr Tait to be operative, was probably meant to serve merely a temporary end, to bridge the interval that might elapse before he executed his formal codicil. The history of No. 8 probably was that it began by being a memorandum only, but that in the end Mr Tait gave it the character of a testamentary writing for this temporary purpose. Now, on this footing, if what Mr Tait intended was that the upper part only of the document should hold good, and that the lower part should be disregarded altogether, he would naturally have deleted the latter. Its incompleteness and irregularity of structure, if what I have suggested as to the history of the document be true, are no doubt accounted for by the fact of the document having been in the first instance a memorandum merely, which the testator considered and reconsidered without making up his mind finally about favouring some of those named in it, but which he ultimately, and for a temporary end, signed and docquetted in the way he did in order that, in so far as bequests were indicated in it, his trustees should give effect to it. I am accordingly of opinion that Miss Lyon is entitled to the annuity which she claims."

The claimant Hall Campbell Chiene reclaimed, and argued—The Lord Ordinary was wrong in holding the document of 28th October to be a valid and operative testamentary writing. The document was *ex facie* incomplete, and it was merely written in pencil on the leaf of a memorandum block. It was found in a bundle of papers along with a draft form for a codicil and not in the gummed down envelope which contained the completed will. Even if the document were complete, the reference to "my last will of even date" was incorrect, there being no such deed, and even if the document referred to the will of 29th October it was void from uncertainty, because it was not clear whether it was an exercise of the power given under the fifth or the power given under the last clause of the will, and therefore it was not clear whether the bequests contained in the document were conditional or not. If the document were given effect to the claimant's share would be unduly diminished, which the deceased could not have intended. The deceased had remarked to Mr Ballingall shortly before his death that he had not yet written out the codicil. The document must stand or fall as a whole, and parts of it at any rate were incomplete. Even if the document were valid, it had been revoked by the completed will of 29th October—*Forsyth's Trustees and Others*, March 13, 1872, 10 Macph. 616, 9 S.L.R. 367, *per* Lord President at p. 368; *Munro* v. *Coutts*, July 3, 1813, 1 Dow 437, *per* Lord Chancellor (Eldon) at p. 450; *Colvin* v. *Turner and Others*, May 20, 1885, 12 R. 947, 22 S.L.R. 632, *per* Lord President at p. 635; Maclaren, Wills and Succession, vol. i, 350.

Argued for the claimants Mrs Alice Bisset or Leishman and others—The Lord Ordinary was right in holding the document of 28th October to be a valid and operative testamentary writing. It was *ex facie* complete, and apart from its terms there was no defect which would exclude it from the category of testamentary instruments. It was sufficient if a testamentary intention could be extracted from it—*Colvin* v. *Turner and Others* (*supra*), *per* Lord President. The fact that it was written in pencil did not invalidate it—*Muir's Trustees and Others*, October 23, 1869, 8 Macph. 53, *per* Lord Cowan at p. 56, and Lord Benholm at p. 57, 7 S.L.R. 24. The Lord Ordinary was wrong in holding that the part of the document within the enclosing line was valid. The deceased intended to cut off that part by drawing the line,

which showed that he had applied his mind to the document and intended to validate the other part. There were double ticks placed against the names in the part of the document outside the enclosing line, which showed that the deceased had twice revised the names in this part of the document and intended these persons to receive legacies. Although the document was not found in the envelope containing the completed will, it was found along with another writ which was an effective *inter vivos* deed. The deceased's remark to Mr Ballingall may have indicated an intention to rewrite the document, but an intention to rewrite it did not invalidate it. The document contained no residue clause, because it did not belong to the category of documents which contemplate a disposal of residue. The draft will of 27th October, having been signed by the deceased, was itself a valid will. It was merely rewritten and was not revoked by the will of 29th October, and the document of 28th October must refer to either one or other of these deeds as there was no other will. Therefore even if the document were not a complete testamentary instrument in itself, it thus became part of a formal will—*Baird* v. *Jaap and Others*, July 15, 1856, 18 D. 1246; *Thomson* v. *Cunningham and Others* (*Clarkson's Trustees*), November 18, 1892, 20 R. 59, 30 S.L.R. 93; *Dalgleish Trustees and Others* v. *Dalgleish and Others*, November 25, 1891, 19 R. 170, 29 S.L.R. 149; Stair, iv, 426; Bell, Execution of Deeds, p. 42; Duff, Feudal Conveyancing, p. 19; Dickson, Evidence, section 718.

Argued for the claimant William Elgin, *curator bonis* for Miss Janet Tait—Whether or not it might be held that the rest of the document was effective, in any event the part within the ringed fence was not intended by the deceased to be operative.

Argued for the claimant Miss Isabella Lyon—The whole of the informal writing was operative. In a holograph codicil the signature was sufficient wherever it might be placed if it were obviously intended to cover the whole writ—*Gillespie* v. *Donaldson's Trustees*, December 22, 1831, 10 S. 174; *Speirs and Others* v. *Home Speirs and Others*, July 19, 1879, 6 R. 1359, 16 S.L.R. 784; *Pentland and Others* v. *Pentland's Trustees*, November 14, 1908, 46 S.L.R. 291; *Burnie's Trustees* v. *Lawrie*, July 17, 1894, 21 R. 1015, 31 S.L.R. 841; *Fraser* v. *Forbes' Trustees*, February 3, 1899, 1 F. 513, 36 S.L.R. 469; *Inglis and Others* v. *Harper*, October 18, 1831, 5 W. and S. 785; *Lowson and Others* v. *Ford and Others*, March 20, 1866, 4 Macph. 631, 1 S.L.R. 227; *Baird* v. *Jaap and Others*, *supra*.

LORD PRESIDENT — The question for decision arises in respect of the testamentary settlements of the late Mr John Scott Tait. It is another instance, not altogether unknown in the history of decision, where a man of strict business habits as regards the affairs of others has managed by inattention to leave his own in such a state as to involve the Court in the decision of a very difficult question.

The state of the documents which Mr Tait left behind him is succinctly and accurately described in the opinion of the Lord Ordinary, and I do not need to recapitulate them, There was a proof led here to enable the Court, as is proper, to be, so far as it could be, in the circumstances of the moment with regard to what was done. Now telling the story merely in an informal way, what it comes to is this, that Mr Tait had for some time been considering the matter of making his will, and had consulted his law agent Mr Ballingall upon the subject; that accordingly a regular will was drawn up for him in draft by Mr Ballingall; and that upon the 27th of October Mr Ballingall attended at Mr Tait's house in the evening at nine o'clock with the draft will, there having been previous colloquies upon various alterations upon it; and then I think Mr Ballingall himself gives a very clear description of what happened. He says—"We went very carefully over the whole draft will. Mr Scott Tait expressed approval of that draft will. He was quite satisfied with it, and he handed it to me and desired that it should be engrossed as quickly as possible, with a view to him signing it at once in case anything might happen. (Q) Did he sometimes have the view that life was very uncertain, and that it was very desirable to put things in order?—(A) Yes, I fancy he had that view, but he had not been very well while down at Gullane in September, and I think he was a little anxious about himself at that time. At that interview he asked me whether if he signed the draft it would serve the purpose in case he might die that night, or some expression of that kind. I said, 'Well, it is a very rough draft, but you can sign it for what it is worth.' He signed it in my presence, and I dictated to him a docquet at the end of the draft adopting it as his will, and he wrote and signed that. Now that being signed, Mr Ballingall went away, and as to what exactly happened upon the 28th we do not know, except that we know that Mr Ballingall, complying with Mr Tait's desire that the thing should be done as quickly as possible, did have the draft engrossed with the greatest promptitude, and sent it back to him upon the 28th. The next moment at which we actually see what happened is when on the morning of the 29th Mr Ballingall and his clerks come back, and Mr Scott Tait's signature, which had been adhibited by him before the party entered the room and saw the engrossed will, was acknowledged as his signature to the executed will. The document upon which the whole matter turns here is one of those which is set out by the Lord Ordinary, and that is the document here known as No. 8 of process. So far as the place of its recovery is concerned, it was found, not in the actual envelope in which his engrossed will was found, but it was found in the same bundle of papers, and it was found inside a skeleton form of codicil which at

Mr Tait's own request had been furnished to him by Mr Ballingall. It is of course quite obvious on reading the will itself that it contemplates—I think I may say more than as a possibility—I may almost say as a probability, that he should execute a codicil or informal document leaving legacies to certain persons.

Now this No. 8 of process is signed, and it is dated the 28th, and after the signature there are the words, "In terms of my last will of even date." I do not think there can be any question at all that this document is of a testamentary character. I do not think there can be any doubt upon that. The real difficulty in the case—and I confess I have found it a matter of great difficulty—I think, lies in the question whether, as this document is upon the face of it dated the 28th, it is not cut down by the clause in the executed deed, which in law must be considered as executed upon the 29th, because it is not till then that the signature of the tested deed was acknowledged—whether it is not cut down by the revocation clause in that deed, which is in most ample terms to cut down anything that went before it. But although I have found the matter of great difficulty, I have eventually come to the conclusion that the result arrived at by the Lord Ordinary is right.

I think, looking at the document, and taking the circumstances as we know them, one can easily bring before one's own imagination precisely what happened, although there is one little matter that must be left as matter of conjecture. It is quite clear from Mr Ballingall's graphic description of what happened that Mr Tait, when he did at last get his will, was, so to speak, in a great hurry to get it finished. He was anxious to get the will engrossed as soon as possible. He was so more than anxious that he consulted his law agent whether, as an interim arrangement, he should not sign the draft, and for what it was worth he did sign the draft. Then Mr Ballingall passes away from the scene, and we have no more direct testimony till the 29th. But I think, with the skeleton codicil in his hand, he sat down to consider what arrangement he should make for the drawing out of a codicil which should represent the skeleton codicil, and I have no doubt whatsoever that this document, as we have got it, in its inception was rather the material for the drawing out of a codicil than a codicil itself. In the first place the whole look of it; it is a piece of paper torn out of one of those notebooks which allow the leaves to be torn out one by one; then it does not commence with any preamble, but just the word "legacies"; then there is another fact which points clearly in the some direction—there are a set of ticks put all along at each item, and those ticks are on all occasions but two, which I shall have afterwards to talk about, what I may call cross-ticked. It is quite evident that the tick has first been made, and then a cross made over the tick afterwards. All that points to this, that while he was drawing this up he had some other writing or document before him, probably a rough draft of this very thing, and that he was comparing the one with the other. Now while it clearly began in that way as mere material, I think it is equally clear it ended by being a testamentary document. That I take from the date of signature and the docquet, "In terms of my last will of even date." I need scarcely say that in the cases it has again and again been pointed out that this solemn signing of the document makes all for a testamentary object, because no man needs to sign what is a mere memorandum for himself, and accordingly I have on this part of the case no doubt whatsoever that this document ended by being testamentary. Now looking to what one knew happened the night before, it would not be a stretch of imagination to suppose that just as he had signed the draft the night before in order to make an interim arrangement, so he signed this document in order to make an interim arrangement with the whole until what I have called the skeleton codicil was properly drawn out with the material inserted in it which this document provides. I say "drawn out," because I do not think there is any reason to suppose that he meant the codicil to be executed in the formal sense. On the contrary, the will anxiously provided that effect should be given to a document which was not formally executed, and I think from the fact that although Mr Tait was on terms of intimacy and indeed of great friendship with and trusted Mr Ballingall deeply, at the same time he did exercise towards Mr Ballingall more secretiveness than I think it is wise to exercise to one's law agent; but that is a feature that has been seen in other people than Mr Tait, and I think he meant to keep the drawing up of this codicil and the actual figures to himself and not show it to Mr Ballingall. Having done that as an interim arrangement—for I feel sure it was an interim arrangement—the whole real difficulty depends upon this question of the date, and if the date had absolutely stood alone, I do not know that we could have got over it, because when the will came to be executed next day it solemnly and in terms recalled everything that went before it; but I think the date must be taken along with the words "In terms of my last will of even date." Now if one was entitled to take conjecture alone, I think it is more than likely that he did sign the executed will upon the night of the 28th, when he got it from Mr Ballingall, and that he might very naturally have considered that the date of his will, although of course in law it cannot be taken as the date, because at that time the signature had not been acknowledged before witnesses.

But I do not put my judgment upon that, because I do not think it is safe to put a judgment of this sort upon what after all is a conjecture. What I do put my judgment upon is this, that inasmuch as the execution of the will was nothing more than a formal carrying-out of the draft which he had finally revised with Mr Ballingall on the 27th, and which he had signed, Mr Tait did not look on these two

documents as anything different. He looked on them as *idem negotium*, and I think, therefore, when he says it was "in terms of my last will of even date," he really has in contemplation, not the one document of the 27th, but both documents, and accordingly I do not think it is too much of a stretch to hold that the 28th October date is really explained by the docquet "in terms of my last will of even date," and that, so to speak, it is almost prophetic—that is to to say, this document is to be the document which is to go along with his will—a will which he knows has already been engrossed, and which is at the moment only waiting for his signature.

Accordingly I come, I think really by the same method as the Lord Ordinary, to the conclusion that this document ought to be given effect to.

Now there is one other minor question, and that is as to the annuity. I am sorry I cannot agree with the Lord Ordinary there. I think one cannot look at the document without seeing that that portion of it that is enclosed within the line is meant by Mr Tait to be in a different position from the rest of the document. It is shut off from the signature, and also—which of course is a very small matter, but where there is nothing else one must go by small indications—the tick to the annuity is not doubled ticked like those to the legacies. There is no doubt it must be and remain as a matter of impression, but on the whole I am not able to conclude for myself that when he signed that he wished to authenticate anything but the principal document, and I think that he meant to exclude everything beyond that excluding line which he has drawn.

The result will be to adhere to the Lord Ordinary's interlocutor, with a slight variation as to the claim to the annuity.

LORD JOHNSTON—I agree with the Lord Ordinary on the main question, and have much hesitation in adding anything to what he has said in support of his succinctly and clearly expressed judgment. But the case is one of difficulty and at the same time of importance to the parties, and it is therefore perhaps due to them that I state my own independent views on the question at issue.

Mr Tait left three documents *prima facie* at least of a testamentary nature—a signed draft of his general disposition dated 27th October, an informal document containing a list of legacies dated 28th October, and a formal settlement in terms of the draft of 27th October, dated 29th October 1909. There is no doubt that the settlement of 29th October was a re-execution or republication of the signed draft of 27th October, and, whatever may be thought of the validity of the latter, superseded it. There is grave doubt whether the document of 27th October, though docquetted thus by Mr Tait—"I adopt what is contained in this and the ten preceding pages as my last will," and signed "John Scott Tait, 27th Oct. 1909," would by itself have been effectual owing to the want of authentication of alterations and additions, and whether, had he not executed the engrossment of 29th October, he would not have died intestate, except so far as the document of 28th October could have stood alone. But I do not think that this, the validity or invalidity of the signed draft, is material, as there is nothing to indicate that Mr Tait thought that his adoption of the draft of his will on 27th October was really of no effect, though his agent Mr Ballingall, in answer to his proposal to sign it in order to bridge over the time betwixt and the execution of the formal engrossment, merely told him—"It is a very rough draft, but you may sign it for what it is worth."

The questions before us are whether the document of 28th October 1909, which I shall refer to as No. 8 of process, was testamentary, and if so, whether it remained at the date of Mr Tait's death unrevoked.

It must be regarded as consisting of two parts—the first being a list of legacies, distinct and unambiguous as regards legatees and sums legated, the amounts being carried out to a money column and added up, the total amounting to £19,500, and which bore below the summation

"28 October 1909
John Scott Tait
in terms of my last will
of even date"

the whole being unquestionably in Mr Tait's own handwriting; the second, a number of jottings, only one of them being definite and distinct, and the whole surrounded by a line of demarcation, segregating them from the list of legacies, and as I think excluding them from the benefit of the signature and relative docquet.

I may say at once that I do not agree with the Lord Ordinary as regards this second part of No. 8 of process, when he gives effect to the one definite and specific legacy contained within the ring fence or line of demarcation. Not only does the maxim *noscitur a sociis* apply, but I am satisfied, from inspection of the document itself, that the surrounding line was intended to exclude all within it from the benefit of the signature and docquet. What is within this line is of the nature of jottings merely for further consideration. What I have further to say relates, therefore, solely to the first part of No. 8 of process, already described.

First, then, was it also merely of the nature of a jotting for further consideration, or was it testamentary? I have no doubt that it was testamentary. It is headed "legacies." These legacies are so specific in object, subject, and amount that nothing more was wanted to instruct an executor as to the testator's wishes, and that any man of business into whose hands it came could, without further explanation or communication prior or subsequent, have sat down and framed a formal codicil bequeathing in more technical language the legacies intended, and it is signed as expressly "in terms of my last will of even date." It bears on the face of it to have been originally a list for consideration. It

bears on the face of it to have been carefully checked twice over. And the docquet appended to the signature shows that it had passed from the character of a jotting for consideration to that of a testamentary writing. In all these respects it can be distinguished from the writings in question in *Munro* v. *Coutts* (1 Dow 437). It satisfies the requirements so clearly expressed by Lord President Inglis in the analogous case of *Colvin* v. *Hutchison* (12 R. 947). I think that it was probably checked when made, and signed when checked, on the evening of 28th October 1909. But that is more or less of surmise. What is, I think, certain is that at most it did not exist for more than twenty-four hours, or from the evening of 27th at the earliest to the evening of the 28th at the latest, in its inchoate state and before it was signed (*Forsyth's Trustees*, 10 Macph. 616). That it was in pencil is not material, if the testamentary nature is otherwise clearly shown (*Muir's Trustees*, 8 Macph. 53).

But, second, assuming it testamentary in its inception, was it allowed to stand or was it revoked? And here the crucial difficulty arises from the fact that it bears the date 28th October 1909, and the docquet "in terms of my will of even date." Now 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.

In this ambiguity it is necessary to regard the surrounding circumstances and the terms of special clauses in Mr Tait's settlement with the utmost care.

Mr Tait had felt himself in failing health in September 1909. He was anxious on the subject, and as the sequel proved had good cause to be so, as his death ensued on 5th April 1910. But he did not apparently relax his attention to business, but continued at work, I think, to the last day of his life. After some prior correspondence he gave Mr Ballingall, his friend and agent, verbal instructions for preparation of his will. Mr Ballingall's draft reached the point of adjustment on 27th October. It was extended and executed formally on 29th October.

Now to the due appreciation of the few relevant surrounding circumstances it is, I think, necessary to know the terms of Mr Tait's settlement of 29th October. They were the same as those of the draft of 27th October, which was not clean copied, but engrossed as it stood. Mr Tait had several years before made provision by an *inter vivos* trust deed for his only sister. His settlement was in ordinary form in favour of trustees. It referred to his prior arrangements for his sister, and made provision for their increase. The effect of these provisions for Miss Tait was to set apart about £16,000 of Mr Tait's estate during his sister's life. On her death this sum reverted to residue. The settlement then directed certain annuities and legacies to be paid to servants, &c., and to his trustees, and added this direction:

"And I direct that my trustees shall at the same time, and with interest as aforesaid, pay and deliver all further legacies or bequests which I may leave or bequeath by any writing or document clearly expressing my wish and signed by me, whether or not formally attested or executed."

There then followed an important clause giving his former partner, Hall Campbell Chiene, indirectly right to re-enter the business if he chose to return to reside permanently in Scotland and give up the business which he had established abroad within one year of Mr Tait's death, and in the event of his fulfilling that condition, giving Mr Chiene, and failing him his children, the residue of Mr Tait's estate, "and failing the said Hall Campbell Chiene or any child or children becoming entitled to the residue of my estate, my trustees shall dispose of the same as I may direct by any writing aforesaid,"

I pause here to say that if No. 8 of process is testamentary, I think that it is clear that it expresses a series of legacies which were to be a burden on residue in Mr Chiene's hands, and not merely a *pro tanto* disposal of resulting residue on Mr Chiene's failure to take. I consider the argument to the contrary so untenable that any further consideration of it is unnecessary.

The settlement concludes—"And I revoke and cancel all wills, testamentary writings, and bequests of every description made by me at any time heretofore. And I declare this along with any separate bequests by me of even date herewith, or to be hereafter executed by me, to be my last will and testament."

When the docquet appended to No. 8 of process is considered with its date, along with this combined revocation and declaration, it becomes at once apparent that a situation of great difficulty is created. And I think I must add that if a literal interpretation be given to this clause of revocation and declaration, and if the expression "of even date" be read strictly with reference to the calendar, No. 8 of process cannot receive effect, being, even if testamentary in inception, revoked and expressly excluded from forming part of Mr Tait's last will and testament by the settlement executed on the following day, and containing this clause of revocation and declaration.

The surrounding circumstances, so far as relevant, are, I think, these—

(First) Mr Tait's estate, which was something over £50,000, was just enough, after allowing for what was required for Miss Tait's provisions, to pay Government duties and the settlement legacies, and also to pay the legacies enumerated in No. 8 of process, if payable, and leave an immediate residue of a few hundred pounds only for

Mr Chiene. Mr Chiene's residuary interest then was confined to an immediate residue of a few hundred pounds, more or less as the estate worked out, and a reversionary interest in the £16,000 required to secure Miss Tait's provisions.

(Second) Mr Tait had executed previous documents of a testamentary nature. Some of these were in his hands at his meeting of 27th October with Mr Ballingall, and were exhibited to the latter. Mr Tait took advice about retaining or destroying them, and was advised by Mr Ballingall that "it would be better that he should destroy them, and he said he would think about that. Then he said—'Be sure that the present will is quite distinct in the matter of revoking all these documents.' That is the will which he had gone over with me in draft. (Q) And which he had signed?—(A) I forget whether that remark occurred before or after he signed the draft, but it was at that time." These prior testamentary documents were not seen again, and were not found in any of Mr Tait's repositories after his death. No one knows when they were destroyed. But they certainly were not kept along with (1) the draft of 27th October; (2) the document No. 8 of process; (3) the formal settlement of 29th October; (4) a skeleton form of codicil to be afterwards mentioned; (5) relative correspondence; and (6) a copy of the trust deed securing Miss Tait's first provisions, which were all found tied up in one bundle.

(Third) Mr Tait was in the habit of taking work home with him to his house in the evening, and Mr Ballingall his agent usually saw him in regard to his private affairs at his own house after dinner. He called on 27th October about 9 p.m., went over and adjusted the draft of his settlement, which Mr Tait signed, as I have stated, and took it away to be extended. But at this meeting Mr Tait made it clear to Mr Ballingall that he meant himself to make a codicil, leaving legacies which he had in contemplation. Mr Tait was very secretive about his private affairs, and gave Mr Ballingall no information about the persons to be benefited, or the amounts which he intended to leave. But he discussed the circumstances of different hypothetical legatees, and the special provisions requisite to meet their respective circumstances, and got Mr Ballingall then and there to frame a skeleton codicil, each branch of which was adapted to the circumstances of some legatee he had in view, *e.g.*, an individual, the children of another, a married lady with a marriage contract, &c. This skeleton codicil Mr Ballingall left with Mr Tait on the evening of 27th October. When Mr Tait made his list of legatees, No. 8 of process, cannot be fixed, but it must have been, as I have already said, between the evening of 27th and the evening of 28th October, when it bears to have been signed, and there is nothing to contradict the holograph date.

(Fourth) The draft of 27th was extended on 28th and sent to Mr Tait that evening. He did not see Mr Ballingall again until the 29th, when the engrossment of his settlement was formally executed before two witnesses. But when Mr Ballingall came to him for this purpose the settlement was already signed, and the signature was merely acknowledged to the witnesses. It is not known whether it was actually signed by Mr Tait on 28th or 29th. He did not then or afterwards disclose to Mr Ballingall that he had made and signed No. 8 of process.

(Fifth) Mr Tait intended to make a formal codicil on the lines of the skeleton which Mr Ballingall had given him, and the document No. 8 of process was folded inside the skeleton codicil, along with some blank engrossing paper similar to that used for his settlement, and was thus tied up in the same bundle with his settlement and the other documents I have enumerated above. This bundle, along with current business papers with which he was engaged, was found in one of the bags which were in use to travel between his house and his office. He had still in his mind to make the formal codicil which he had contemplated, for he said on one occasion to Mr Ballingall, about six weeks before his death, "I have never done that codicil yet." He died without taking any further steps to complete his intention, though apparently carrying his testamentary papers backwards and forwards between his office and his house.

On this state of facts, and having regard to the terms both of Mr Tait's settlement and of the document No. 8 of process, I have come to the conclusion that the document No. 8 of process is a good and subsisting codicil to Mr Tait's will of 29th October, and must have effect as a burden on the residue. The specific facts which have led me to this conclusion are—(1) Mr Tait's having signed the draft of his settlement with the object of meeting eventualities before his formal settlement was extended and executed; (2) the signature in the same way of the document No. 8 of process, with special reference to his will "of even date"; (3) its retention in the company in which it was found; (4) the destruction of all other documents of a testamentary nature known to have been still in existence on 27th October; (5) the source or suggestion to him of the phrase "of even date." The settlement uses the phrase "I declare this along with any separate bequests by me *of even date* herewith," &c., "to be my last will and testament." The skeleton codicil commences, "I declare this a codicil to my will dated (or *of even date* herewith." This I think, shows that Mr Tait had in mind as probable and, if I may so put it, the first impression of his intention, that he would execute his private codicil at the same time as his formal settlement. Mr Tait's execution of the document No. 8 of process thus squares both with what he had done in the case of his draft will, and with the indication shown by the terms of his settlement and of the skeleton codicil of what he intended to do.

Finally, the literal discrepancy in the

dates does not affect my view of the transaction regarded as a whole. And here the essential consideration is that the will of 29th was not a new and different testamentary act from the assumed will of 27th. It was the republication on 29th of the assumed testamentary act of the 27th, none the less testamentary from the testator's point of view, that we may seriously doubt whether it would have been effectual, or even be satisfied that it would have been ineffectual. What Mr Tait did between the evening of 27th and the afternoon of 29th October 1909 was truly one act of testamentary disposition, and I am unable to hold that in using the phrase "of even date" in the document No. 8 of process he was binding himself to the particular twenty-four hours from midnight of 27th to midnight of 28th October, and did not mean merely *unico contextu*. I am satisfied that he relied on the document No. 8 of process as an effectual expression of his testamentary intention in relation to the will which he was in course of executing, sufficient to tide over the interval until he brought himself to reduce it to the form which had been prepared for him, or on reconsideration to substitute some other expression of his will. Like many another busy man, once having brought himself to attend to his own private affairs, he put off till too late recurring to the matter he had had in hand. But he had effectually provided for the contingency.

For the reasons stated I concur with the Lord Ordinary on the main question at issue, and hold that the document No. 8 of process, so far as not fenced off by the line of demarcation drawn by Mr Tait, is a valid and subsisting testamentary document, and must be taken, along with the settlement of 29th October 1909, as constituting Mr Tait's last will and settlement.

LORD SKERRINGTON—I concur with your Lordship.

LORDS KINNEAR and MACKENZIE were not present.

The Court recalled the interlocutor of the Lord Ordinary in so far as it found that the claimant Miss Isobella Lyon was entitled to the annuity claimed in her claim, repelled the said claim, and *quoad ultra* adhered to the said interlocutor.

Counsel for the Claimants Mrs Alice Bisset or Leishman and Others—Macphail, K.C.—Macmillan. Agents—Mackenzie & Kermack, W.S.

Counsel for the Claimant Miss Isobella Lyon—Constable, K.C.—Crurie Stewart. Agents—Mackenzie & Kermack, W.S.

Counsel for the Claimant William Elgin, *curator bonis* for Miss Janet Tait—Horne, K.C.—Jameson. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Claimant and Reclaimer Hall Campbell Chiene — Clyde, K.C. — Watson — Mair. Agents — Davidson & Syme, W.S.

Counsel for the Pursuers and Real Raisers and Claimants William Brown Dunlop and Others (Mr Tait's Trustees)— D.-F. Scott Dickson, K.C. — Chree. Agents — Fraser, Stodart, & Ballingall, W.S.

Thursday, March 16.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

TRAIN *v.* SCOTT AND ANOTHER. TRAIN *v.* LITTLE.

Process — Mandatary — Failure to Sist a Mandatary—Decree.

Where a pursuer fails to obtemper the order of the Court, and to sist a sufficient mandatory within the time ordered, the defender is entitled to decree of *absolvitor*.

These two actions, raising the same point, were heard together.

On 5th May 1910, Richard Train, residing at 430 West Twenty-Fifth Street, New York, *pursuer*, "and Neil Sinclair, clothier and outfitter, residing at 24 Battlefield Road, Langside, Glasgow, his mandatary, conform to mandate in his favour dated 11th April 1910," raised an action against John Scott, Barrhead, and another, *defenders*.

On 21st June 1910 the record was closed. Thereafter a minute was lodged for the defenders objecting to the sufficiency of the mandatary on the ground, *inter alia*, that he was insolvent, and had recently offered a composition to his creditors, and on 4th November 1910 the Lord Ordinary (SKERRINGTON) pronounced this interlocutor—". . . On the motion of counsel for pursuer, and of consent of counsel for defenders, appoints the pursuer (Richard Train) to sist a mandatary in place of the mandatary mentioned in the summons within four weeks."

Another mandatary was tendered to whom objection was taken on the ground that there was a decree of expenses in an action outstanding against him.

On 13th December 1910, the Lord Ordinary pronounced this interlocutor—". . . On the motion of counsel for defenders, and in respect the pursuer (Richard Train) has failed to sist a sufficient mandatary in terms of interlocutor of 4th ulto., assoilzies the defenders from the conclusions of the summons, and decerns. . . ."

On 9th September 1910, the same pursuer, putting forward the same mandatary, raised an action against Andrew Little, writer, Glasgow, *defender*. On 1st November 1910 the Lord Ordinary (CULLEN) remitted the process to Lord Skerrington to depend before him *ob contingentiam* of the above action.

On 15th November 1910 the Lord Ordinary (SKERRINGTON) "continued the adjustment of record until Tuesday, 6th December next, and ordained the pursuer to sist a mandatary before that date." On 6th