was drawn to the third section of the same Act of Parliament, which runs as follows—"This Act shall not apply to any action, prosecution, or other proceeding for any act done in pursuance or execution or intended execution of any Act of Parliament, or in respect of any alleged neglect or default in the execution of any Act of Parliament, or on account of any act done in any case instituted under an Act of Parliament, when that Act of Parliament applies to Scotland only, and contains a limitation of the time and other conditions for the action, prosecution, or proceeding." This section seems to me to apply in terms to the present case and precludes the applicability of the Statute of 1893.

The case of *Eadie* v. *Glasgow Corporation*, 1916 S.C. 163, 53 S.L.R. 139, was cited as an authority to the contrary effect, but in that case, as appears from the report, the third section of the statute was not quoted; and we have the assurance of the Judges of the Second Division that their attention was not drawn to that section, and that if it had been the result would have been different—although I may say in passing that the case of *Eadie* was not, as finally presented to the Court, rested upon the 14th section of the Glasgow Corporation Act of 1909.

Our attention ought to have been, but was not, directed by counsel to the case of *Montgomery* v. *Magistrates of Haddington*, 1908 S.C. 207, 45 S.L.R. 73. That case seems to be an authority directly in point in this case.

I should add that we have consulted with the Judges of the Second Division on the question raised in regard to the expenses in this case, and that they agree with the view I have just expressed.

LORD MACKENZIE—I concur.

LORD SKERRINGTON—I concur.

LORD CULLEN—I concur.

The Court refused the appeal and found the defenders entitled to expenses.

Counsel for the Pursuer (Appellant)—Moncrieff, K.C.—Macquisten. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for the Defenders—Lord Advocate (Clyde, K.C.)—M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Tuesday, November 19.

FIRST DIVISION.

[Lord Sands, Ordinary.

FERGUSON *v.* LONDON MISSIONARY SOCIETY AND OTHERS.

Succession—Testament—Revocation—Competency of Extrinsic Evidence.

A testator executed a will in 1878 and a codicil thereto in 1883. In 1885 he executed a will in which he expressly revoked all former settlements made and executed by him. At his death the will of 1885 could not be found, and it was admitted that he had destroyed it *animo revocandi*. After the testator's death the will of 1878 was found in the possession of his law agents. An action was brought for declarator that the will and codicil of 1878 and 1883 respectively were not operative testamentary writings and for reduction of those deeds, and declarator that the testator died intestate. The pursuer averred that the testator died intestate, and that he had stated in writing, and that it was his intention, to revoke the will of 1878. Proof before answer *allowed* of those averments.

Mrs Mary Anne Russell or Ferguson, widow, sister and sole next-of-kin of the late James Muirhead Russell, *pursuer*, brought an action against (1) James Lyon Guild and another, the trustees acting under a pretended trust-disposition and settlement and codicil dated respectively 10th April 1878 and 14th March 1883 of James Muirhead Russell, (2) the London Missionary Society and others, beneficiaries under the trust-disposition and settlement, and (3) Henry Hay and another, the sole representatives of the universallegatee and executor appointed by a disposition and settlement executed by James Muirhead Russell on 2nd June 1885, *defenders*, concluding for decree "(*first*) that the trust-disposition and settlement and codicil of James Muirhead Russell, dated respectively 10th April 1878 and 14th March 1883, are not operative as testamentary writings of James Muirhead Russell, and are not effectual to convey or dispose of the estate belonging to the said James Muirhead Russell at the date of his death or any part thereof, or to regulate the succession thereto on the death of the said James Muirhead Russell; (*second*) that a disposition and settlement executed by the said James Muirhead Russell, dated 2nd June 1885, is not operative as a testamentary writing of the said James Muirhead Russell, and is not effectual to convey or dispose of the estate or any part thereof belonging to him at the date of his death, or to regulate the succession thereto on his death; (*third*) that the said James Muirhead Russell died intestate on 18th December 1916, and that the whole of the means and estate which belonged to him at the date of his death devolved upon and now belongs to the pursuer as his sole heir in heritage and moveables. And the

defenders [first called] ought and should be decerned and ordained, by decree foresaid, to exhibit and produce the pretended trust-disposition and settlement and codicil, dated respectively 10th April 1878 and 14th March 1883, executed by the said James Muirhead Russell, and the same ought and should be reduced by decree of our said Lords, and the pursuer reponed and restored thereagainst *in integrum*."

The pursuer *averred, inter alia*—"(Cond. 3) The said trust-disposition and settlement [of 10th April 1878] was prepared by Messrs Duncan & Black, W.S., Edinburgh. By a letter, dated 21st October 1884, addressed to the late Mr J. Barker Duncan, W.S., a partner of that firm, Mr Russell requested that the said deed should be sent to him as he intended to alter it almost entirely. In the said letter Mr Russell indicates that he no longer wishes to benefit the religious bodies mentioned in the trust-disposition and settlement [called as defenders], but intends to alter it in favour of a friend who had shown him very great kindness, and that he would revise the list of trustees. The trust-disposition and settlement was accordingly sent to Mr Russell on or about 22nd October 1884, and was retained by him till it was returned by him to Messrs Duncan & Black along with holograph memoranda for a new will, dated 9th April 1885. The said memoranda contain the following statement:—'I wish to alter my will, recalling legacies to missions and leaving any money which may be left, after paying my debts, to Alexander Hay, merchant, of the firm of Hay & Harper, 96 Constitution Street, Leith, who at present resides at 10 Brandon Street, Edinburgh. The legacies to Alexander Dick and Joseph Macintyre to remain as at present.' There is also set forth in the memoranda the names of the trustees to be appointed to administer the estate. A disposition and settlement was drawn up, and was duly signed by Mr Russell before witnesses on 2nd June 1885. By this deed as drawn up and signed Mr Russell assigned and disponed his whole estate, not to Alexander Hay, merchant, Leith, as was his intention from the memoranda above referred to, but to the said Alexander Hay, and to his heirs, executors, and assignees. Mr Hay was appointed his sole executor. The deed (the draft of which is extant) also revoked 'all former settlements made and executed by me.' (Cond. 4) When the last-mentioned deed was signed it was arranged between Mr Russell and the said Mr Barker Duncan that on the completion of the testing clause it should be sent to Mr Russell as he desired to keep it himself. Mr Barker Duncan accordingly sent him the said disposition and settlement on 3rd June 1885. At the same time Mr Barker Duncan sent at Mr Russell's request a form of letter leaving legacies in case the latter should desire at any time to do so. After the death of Mr Russell the revoked trust-disposition and settlement of 10th April 1878, on which there appear certain alterations which had been marked on it when the terms of the later deed were being adjusted, was found to have been retained by Messrs Duncan & Black. No instructions were given by Mr Russell to Mr Barker Duncan to retain the former deed, nor did Mr Barker Duncan intimate to Mr Russell that he was doing so. The earlier deed was returned by Mr Russell to Mr Barker Duncan merely for the purpose of the preparation of the new settlement, and Mr Russell was, as the pursuer believes and avers, ignorant that the settlement of 1878 was retained by Mr Barker Duncan, or was in existence after the execution of the settlement of 1885. Mr Russell, on the contrary, believed that the said trust-disposition and settlement of 10th April 1878 and relative codicil had been destroyed. (Cond. 5) On 24th September 1885 Mr Russell's estate was sequestrated. In the same year he quitted the farm of Greendykes, and after residing for some time in Edinburgh and its neighbourhood he removed to Uckfield, Sussex, where he remained until his death. After his sequestration Mr Russell had no means of subsistence except a small alimentary allowance, and accordingly an annual payment for his support was made to him by the pursuer and by the curator of his only brother Mr John Russell until the year 1895, when Mr John Russell died. In the year 1892 a curator was appointed to Mr Russell on the ground of his mental weakness, and the curatory subsisted till his death. Mr Russell's estate amounted at his death to between seven and eight thousand pounds, and consisted of funds and property of his said brother Mr John Russell, to which he had succeeded on the latter's death. (Cond. 6) On the death of Mr Russell the said disposition and settlement executed by him in the year 1885 and retained by him in his own possession was not forthcoming, nor was it among the papers in the possession of his *curator bonis* during the time of his appointment, and the pursuer believes and avers that it was destroyed by him with the intention of revoking it. In these circumstances the pursuer believes and avers that Mr Russell died intestate. During his residence at Uckfield he made statements *to Mr Basil Johnson, his secretary*, to the effect that he had left no will, and that his property would devolve on the pursuer or her son. The pursuer further believes and avers that from and after the execution of the disposition and settlement of 1885 Mr Russell was not aware that his earlier trust-disposition and settlement was in existence, and that he destroyed the said disposition and settlement of 1885 in the belief that he was thereby annulling the only deed which regulated the succession to his property at his death, and with the purpose and intention that his said property should pass according to the law of intestate succession. The defenders the said James Lyon Guild and William Harper, however, maintain that the said trust-disposition and settlement of 1878 is still operative, and have presented an application in the Commissary Court at Edinburgh for confirmation as executors of the deceased, and accordingly the pursuer has found it necessary to institute this action."

The words printed in italics were added by amendment in the Outer House.

Defences were lodged by the defenders second called.

The pursuer *pleaded*—"1. The said James Muirhead Russell having left no operative testamentary deed, the pursuer as his sole heir is entitled to succeed to his whole estate. 2. The said trust-disposition and settlement and codicil of 10th April 1878 and 14th March 1883 having been revoked by the said James Muirhead Russell, the pursuer is entitled to decree in terms of the first and third conclusions of the summons, and also to decree of reduction as craved."

The defenders pleaded, *inter alia*—"(1) The second head of the declaratory conclusions being unopposed should be granted *de plano*, or otherwise should be dismissed as unnecessary. (2) The averments of the pursuer being irrelevant and insufficient in law to sustain the remaining conclusions of the summons, the defenders should be assoilzied from the conclusions, other than as aforesaid. 3. The said trust-disposition and settlement of 10th April 1878 being *ex facie* a valid and probative settlement of the affairs of the deceased James Muirhead Russell after his death, and having been found in the custody of his law agents at his death, and there being no averments relevant to infer its reduction, the defenders should be assoilzied from the reductive conclusion, and from the first and third heads of the declaratory conclusion of the summons, with expenses. 4. The averments of the pursuer in condescendences 3, 4, 5, and 6, except in so far as they bear that the 1885 will was destroyed for purposes of revocation, are irrelevant, and should not be admitted to probation. 5. The averments of revocation of the deed of 1878 being only proveable by holograph or tested writ of the testator, the defenders should be assoilzied on the failure of pursuers to produce such writ."

On 5th November 1918 the Lord Ordinary (SANDS), before answer, allowed both parties a proof, *habili modo*, of their averments and to the pursuer a conjunct probation.

To his interlocutor was appended the following *opinion*.—"This case raises a question in which the authority in the law of Scotland is very scanty, and the authority in the law of England fairly voluminous, though there the matter has now been settled by statute. It appears that the law of England has boxed the compass. It appears to have been at one time held that if there was an extant will it was no objection to it that there had been a subsequent will revoking it which had been cancelled. The ground assigned for this rule was that a will speaks only from the date of death and that the revocation never became operative. Subsequently, however, it appears to have been held that it is a question of circumstances in each case, the last pronouncement before statute intervened being that there is absolutely no presumption either way. Finally statute (Wills Act, 1827, sec. 22) provided that destruction of the revoking will does not set up the will revoked. I apprehend that in England it is competent under this rule to prove *prout de jure* that there was a revoking will. Such a rule would be very foreign to the genius of our law on account both of the reverence of our law for an extant probative deed and its jealousy of any interference with the operation of such a deed by parole evidence.

"In my view of the law of Scotland, if a deceased person left in his repositories a probative will, it would be irrelevant to aver that subsequent to its execution he had executed another will revoking it which he had subsequently cancelled or destroyed. Great, however, as is the respect of the law of Scotland for a probative will, the rule that it is to be treated as the will of the deceased if there be no later will revoking or superseding it is not absolute. It is competent to prove that the deceased did not intend it as his will. If, for example, it were proved *habili modo* that on executing a second will the testator had instructed his law agent to destroy the first will, and the law agent, unknown to the deceased, had neglected to obtemper the instructions, the document would not be treated as the deceased's will, even though the revoking will had been cancelled or destroyed. Similarly, if a testator had given a cancelled will to an autograph-hunting friend because some great celebrity was one of the instrumentary witnesses.

"The averments in the present case do not come up to either of the two cases figured, and the question of relevancy is a narrow one. I understand that pursuers are prepared to amend article 6 of their condescendence by giving particulars of the averment in the third sentence, and I proceed upon that footing.

"The estate is considerable, the authority is meagre, the proof would not, so far as one can judge, be very extensive. In these circumstances I think it would be well to have the facts before the case goes further. I propose, therefore, before answer, to allow a proof *habili modo*."

The defenders second called reclaimed, and argued—The pursuer's averments were irrelevant and should not be remitted to probation even before answer. It was common ground that the will of 1885 had been destroyed *animo revocandi*. There was no averment that the deceased had instructed the will of 1878 to be destroyed. Without such an averment it was not competent to prove that the testator had given his mandate or authority for the destruction of that will—*Bonthrone* v. *Ireland*, 1883, 10 R. 779, *per* Lord Craighill at p. 786, 20 S.L.R. 516; *Robb's Trustees* v. *Robb*, 1872, 10 Macph. 692, *per* Lord President Inglis at p. 697 and Lord Deas at p. 697; *Millar* v. *Birrell*, 1876, 4 R. 87, *per* Lord Gifford at p. 93, 14 S.L.R. 58. The pursuer's averment in condescendence 4 that there were certain alterations marked on the will of 1878 should be ignored, for those markings were only in pencil and did not infer cancellation—*Sprot* v. *Pennycook*, 1855, 17 D. 840; *Crosbie* v. *Wilson*, 1865, 3 Macph. 870, was referred to. If, however, those markings were founded on as inferring cancellation, that should have been averred. The fact that the will of 1885 revoked all former settlements had not the effect of revoking

the will of 1878, for the will of 1885 had been admittedly revoked by the testator while the will of 1878 was extant at the date of his death and there was no averment that he had instructed or authorised its revocation. Testamentary writings only became operative at the date of the testator's death. The will of 1885 having been revoked prior thereto never became operative and could not revoke the will of 1878. The correct inference from the revocation of the will of 1885 was that the testator had intended to revoke the whole of it including the clause in it revoking prior settlements, and therefore that he intended the will of 1878 to remain effective. The only Scots case in point was *Howden* v. *Crichton*, July 8, 1815, F.C., in which no decision on the point was given, but the opinions were all in favour of the defenders. M'Laren on Wills and Succession, vol. i, p. 411, was to the same effect. The present case was distinguishable from *Whyte* v. *Hamilton*, 1881, 8 R. 940, 18 S.L.R. 676, *affd.* 1882, 9 R. (H.L.) 53, 19 S.L.R. 688, and *Colvin* v. *Hutchison*, 1885, 12 R. 947, 22 S.L.R. 632, where the question was whether looking to the nature of the deed, *e.g.*, a list of names and figures, it was testamentary or not, *i.e.*, of what did the testator's will consist, and in those cases a full proof was competent. It was not competent to prove by parole what the testator's statements "wishes" and "beliefs" were with regard to the will of 1878 while it stood unrevoked—*Hannay's Trustees* v. *Keith*, 1913, S.C. 482, 50 S.L.R. 386; *Chalmers* v. *Chalmers*, 1851, 14 D. 57, *per* Lord Justice-Clerk Hope at p. 61; *Gray* v. *Gray's Trustees*, 1878, 5 R. 820, 15 S.L.R. 571; *Robb's Trustees* (*cit.*), *Bankes* v. *Bankes' Trustees*, 1882, 9 R. 1046, 19 S.L.R 785, and *Pattison's Trustees* v. *University of Edinburgh*, 1888 (O.H.), 16 R. 73, were referred to. The English law as to the effect of the revocation of the revoking will as not setting up the will revoked was the result of a special enactment—The Wills Act 1837 (1 Vict. cap. 26), section 22. *Keen* v. *Keen*, 1873, L.R. 3 P. & D. 105, was distinguishable, for it was admitted in the present case that the later will was destroyed *animo revocandi*. Jarman on Wills, vol. i, p. 143, *et seq.*, was referred to.

Counsel for the pursuer were not called on.

LORD PRESIDENT—I am of opinion that in the circumstances of this case the Lord Ordinary has taken the safer and better course. None of the decisions cited to us is directly in point, and before embarking upon the large field of law which has been so fully opened up by Mr Wilson, I think it is desirable that we should be in possession of the facts of the case. I therefore propose to your Lordships that we adhere to the Lord Ordinary's interlocutor.

LORD MACKENZIE—I concur.

LORD SKERRINGTON—I also concur.

LORD CULLEN—I agree.

The Court adhered.

Counsel for the Pursuer (Respondent)—Chree, K.C.—R. C. Henderson. Agent—R. W. Cockburn, W.S.

Counsel for the Defenders (Reclaimers)—Wilson, K.C.—A. M. Mackay. Agents—Coutts & Palfrey, S.S.C.—Charles T. Nightingale.

Saturday, November 23.

SECOND DIVISION.

[Lord Hunter, Ordinary.

TH. FRONSDAL & COMPANY *v.* WILLIAM ALEXANDER & SONS.

Ship — Charter-Party — Demurrage — Lay-Days — Exceptions — "Provided Steamer can Discharge."

The terms of a charter-party provided that the charterers of a ship were to unload its cargo of timber at the rate of one hundred standards per day "always provided steamer can . . . discharge at this rate." Owing to shortage of labour at the port of discharge the ship was detained beyond the stipulated number of lay-days. *Held* (1) that as there was no fault on the part of the shipowners the charterers were liable to pay the demurrage, and (2) that the words quoted did not relieve the charterers, as they referred to the structural capacity and fittings of the vessel and not to the supply of labour.

Messrs Th. Fronsdal & Company, Bergen, owners of the s.s. "Hansa," *pursuers*, raised an action against Messrs William Alexander & Sons, timber merchants, Ayr, *defenders*, for payment of the sum of £490, being the amount of demurrage incurred through the detention of the "Hansa" at the port of Ayr beyond the stipulated number of lay-days.

The defenders pleaded, *inter alia*—"3. Any delay in discharging having been caused by the failure of the steamer to give delivery at the rate provided for in the charter-party, the defenders should be assoilzied."

The *facts* of the case appear from the opinion of the Lord Ordinary (HUNTER), who on 7th February 1918, after a proof, decerned against the defenders for the sum sued for.

Opinion.—"In this action the owners of the s.s. 'Hansa' sue the charterers of that vessel for payment of £490 as demurrage for the detention of the ship at the port of Ayr for seven days beyond the lay-days allowed for discharge of the cargo.

"Under a charter-party between the pursuers and the defenders, dated 5th October 1915, it was, *inter alia*, agreed that the 'Hansa' should proceed to Archangel, there load a cargo of wood, and thereafter proceed to Ayr and deliver the same.

"In terms of the charter-party it was provided that the cargo was to be discharged 'at the rate of not less than 100 stds. per day counting from steamer's arrival at the respective ports, and notice of readiness