prove that he saw so-and-so sign the document on a particular date. That being so, I cannot see on what principle it should be held that the mere fact that the instrumentary witness has an interest and gets something under the deed—of which fact he was in ignorance when he saw it executed—should be an objection to his attestation, especially since it was ruled to the contrary in 1685. The rules of evidence have been very much relaxed since then, and I am not to go back on so old a decision, especially since it proceeded on sound principle.

Lord Shand—I am also of opinion that the testamentary writing of 9th November 1880 is valid, notwithstanding the fact that two of the witnesses subscribing are beneficially interested to a material extent as legatees under the writing. The point has, I think, been expressly decided in the cases of *Graham* in 1685, and *Ingram* in 1801, both cited in the argument. These decisions were pronounced at a time when witnesses in a Court of Justice were disqualified from giving evidence on account of pecuniary interest in the subject of the litigation. Interest is no longer a disqualification, and indeed in a large proportion of cases the parties to the suit are themselves the leading witnesses. It would, in these circumstances, be a retrograde step in the law to hold that testamentary witnesses are disqualified because they take benefit under the deed. I can see no good reason for taking such a step, but, on the contrary, recognising the decisions as authoritative and binding, and as sound in themselves, I think recent legislation and modern views as to the admissibility of evidence very strongly support the conclusion that the objection to the witnesses in this case is not well founded.

Lord Young—I am of the same opinion.

Lord Craighill—I also am of that opinion, and think with Lord Shand and others of your Lordships that I have good ground for holding that the decisions in the cases of *Graham* and *Ingram* should be adhered to. The first was decided so long ago as 1685, and the other in 1801, and the authority of neither, so far as I have been able to discover, has been shaken by any adverse decision or the opinion of the Judges or the criticism of any commentator. The point having been thus settled so long as two centuries ago, it would, I think, be something like a calamity if an adverse decision were pronounced now.

Lord Rutherfurd Clark concurred.

Thereafter at advising—

Lord Justice-Clerk—As to the first question, we do not think that the fact that the will was written in pencil is a good objection. In regard to the second, we are of opinion that the writing is a complete will. The third has been decided by the Seven Judges, and the fourth does not now arise. That exhausts the case.

The Court pronounced the following interlocutor:—

> "The Lords . . . are of opinion and find that the first question . . falls to be answered in the negative, and that the second question falls to be answered in the affirmative, and having advised with three Judges of the First Division . . . are, with the said Judges, of opinion and find that the third question falls to be answered in the negative, and that the fourth question is thus superseded, and decern."

Counsel for Parties of First Part—Mackay. Agents—Lindsay, Howe, & Co., W.S.

Counsel for Parties of the Second Part—Moncreiff—Darling. Agents—Murray & Falconer, W.S.

Counsel for Parties of the Third Part—J. A. Reid. Agents—J. & A. F. Adam, W.S.

Thursday, July 19.

SECOND DIVISION.

SPECIAL CASE—PATON AND OTHERS.

Succession — Legacy — Cumulative or Substitutional—Universal Settlement.

A lady died leaving a general trust-disposition and settlement in which she directed her trustees, *inter alia*, to pay £500 to her niece. There were found in her repositories two other documents — 1st, A writing on a half-sheet of paper, holograph of and signed by her, and dated prior to her trust-disposition. It contained a bequest of £500 to the same niece, and was enclosed in an envelope which was addressed to her brother, "to be given him by-and-bye." This address was unsigned, and was dated subsequent to the settlement. 2d, There was also found a document dated prior to the trust-disposition, and in which also she gave £500 to her niece. *Held* (*dub.* Lord Rutherfurd Clark as to the first document mentioned) that the niece was not entitled to the legacies contained in these documents, or either of them, in addition to that contained in the settlement.

Mrs Smyth or Brander, who resided at Dumfries, died on July 2, 1882, leaving a trust-disposition and settlement dated 15th February 1881, by which she conveyed to the Rev. John Paton and others, as trustees, her whole estate, heritable and moveable, of whatever kind, which should belong or be addebted to her at the time of her decease.

By the second purpose of her said trust-disposition and settlement the truster directed her trustees to pay the following legacies out of her share of the trust-estates of her late father Christopher Smyth, and her late brother Thomas Robinson Smyth, viz.:—(1) To her brother John Alexander Smyth, £500; (2) to his son Christopher Smyth, £500; (3) to Margaret Brander Anderson, daughter of her niece Lizzie Smyth or Anderson, whom failing to her said niece, £500; and (4) to her niece the said Lizzie Smyth or Anderson, £500. By the fourth purpose she directed her trustees to pay certain legacies, "and to divide the remainder of my jewellery along with my body-clothes as may be directed by any memorandum

to be left by me, or failing such, as they may think proper, among my friends and acquaintances." The trust-disposition and settlement was placed by Mrs Brander in the hands of her law-agent Mr M'Gowan (one of her trustees), who retained the custody thereof until her death.

At a meeting of relatives and trustees of the truster, held after her funeral on 6th July 1882, her only surviving brother, the said Mr John A. Smyth, stated that shortly before her death she had informed him that she had left a testamentary document in her own handwriting addressed to him. In consequence of this statement a search was made in her repositories, and two documents were found in a chest of drawers containing her clothes and trinkets. One of the documents thus found was a holograph writing on the face of a half-sheet of note-paper, signed by the deceased, and dated 24th October 1880. It was in these terms:—"My best gold watch and *chain* to my name-child Maggie Brander Anderson, also my large coral beads & 2 of my best brooches, my India gold bracelets, which belonged to my dear husband's mother, to go to Maggie Brander Anderson; also to Mary Anderson, my niece, any pieces of jewellry that may be suitable for her; also £500 to my dear niece Lizzie (Mrs Anderson). — MARGARET BRANDER.—24*th Octr.* 1880." This piece of paper was folded, and was addressed on the back thus—"Mr J. A. Smyth or my trustees. *I declare* this is my wish.—M. BRANDER." It was enclosed in an envelope fastened with gum, and addressed on the outside—"John A. Smyth, Esq. To be given him by & bye. 7th March 1881"—the address being also holograph of the deceased. The other document found was a holograph writing on a sheet of note-paper, signed by the deceased and two witnesses, and dated 24th November 1880. She thereby appointed new trustees to her then existing will (a settlement executed in April 1880, and subsequently cancelled by that of 1881), which was in the hands of Mr M'Gowan, and added the following bequest:—"I also desire that my niece Lizzie Anderson should have £500 out of the funds that my brother J. A. Smyth has in his hands belonging to the trust-estate of my late father Chr. Smyth." This document was folded and enclosed in an unfastened envelope, addressed thus on the outside in the handwriting of the deceased:—"To my dear brother John, and the trustees, Revd. Mr Paton and Mr J. H. M'Gowan, 3d Novr. 1880." The earlier will of 1880 just referred to was similar in structure, and, with a few exceptions, identical in its terms with that of 15th February 1881, the only difference material to the present question being in the legacies left by the testatrix out of her share of the trust-estates of her father and brother. The settlement of 1880 contained only three legacies so payable, viz.:—(1) £500 John Alexander Smyth; (2) £500 to Christopher Smyth; and (3) £500 to Margaret Brander Anderson, whom failing to Lizzie Smyth or Anderson. The corresponding clause in the settlement of 1881, as originally engrossed, was in exactly the same terms, but the words "and to my niece, the said Lizzie Smyth or Anderson, the sum of £500," which were afterwards added to the later deed, were added on the margin at the time of execution, and referred to as being so added in the testing clause thereof.

Christopher Smyth, the father of the testatrix, died on or about 23d April 1843, and John A. Smyth was the only accepting and surviving trustee under his trust-settlement. Thomas Robinson Smyth died on or about 20th April 1860, and John A. Smyth and John Symons, writer, Dumfries, were the accepting and surviving trustees under his trust-settlement. Mrs Brander was a beneficiary under both settlements. No final division of the father's estate had yet taken place.

In these circumstances questions arose as to the construction and effect of Mrs Brander's trust-disposition and settlement, and of the holograph writings, and the whole parties interested concurred in stating this Special Case for the opinion and judgment of the Court. These parties were (1) Mrs Brander's trustees, (2) Mrs Lizzie Smyth or Anderson and her husband, and (3) the residuary legatees under Mrs Brander's final settlement of 15th February 1881. The first and third parties maintained that the holograph writings, dated 24th October and 24th November 1880 respectively, were revoked by the execution of the trust-disposition and settlement on 15th February 1881; or at all events that the various bequests in favour of Mrs Anderson were not cumulative but substitutional. They therefore maintained that she was entitled only to a single legacy of £500. On the other hand, the second parties maintained that the said holograph writings were subsisting and operative testamentary writings of the deceased, and that Mrs Anderson was entitled to a legacy of £500 under each of them, or at least under one or other of them, in addition to the legacy of that amount bequeathed by the trust-disposition and settlement.

The questions of law for the opinion of the Court were as follows:—"(1) Whether Mrs Anderson was entitled to the bequest of £500 out of the estates of the testatrix's father, contained in the holograph writing of November 1880, in addition to the legacy of £500 out of the estates of the testatrix's father and brother contained in the settlement of February 1881? (2) Whether she was entitled to the bequest of £500 contained in the holograph writing of October 1880 (enclosed in the envelope dated 7th March 1881), in addition to the legacy or legacies above mentioned? (3) In the event of the last question being answered in the affirmative—Whether the first legacy therein referred to was payable out of the general estate of the testatrix or out of the share falling to the testatrix of her father's estate?"

Argued for first and third parties—The holograph writings of 24th October and 24th November 1880 were revoked by the trust-deed of 15th February 1881. Mrs Anderson, then, was only entitled to a single legacy of £500—*Sibbald's Trustees* v. *Greig, &c.*, Jan. 13, 1871, 9 Macph. 399. The case of *Arres' Trustees* was inapplicable. In it it was suggested that the later document might be regarded as a universal settlement, and if so, there could have been no question.

Argued for second parties—When a testator bequeathed the same sums in two or more separate testamentary writings to the same legatees, the legacies must be regarded as cumulative, unless there was something to show that a different construction was necessary, and that

the later legacies were substitutional. Mrs Anderson, then, was entitled to £500 under each of the writings, or at least under one or other of them, in addition to the legacy of that amount in the trust-deed. Though the document first in date was prior in date to the trust-disposition and settlement, yet the fact that it was contained in an envelope dated posterior to the trust-settlement showed that it was Mrs Brander's intention to increase the bequest in her trust-settlement.

Authorities—*Horsbrugh and Others* v. *Horsbrugh*, May 4, 1865, 9 D. 324; *Tennent, &c.*, v. *Dunsmure, &c.*, Nov. 8, 1878, 6 R. 150; *Arres' Trustees* v. *Mather, &c.*, Nov. 10, 1881, 9 R. 107; *Royal Infirmary of Edinburgh, &c.* v. *Muir's Trustees*, Dec. 16, 1881, 9 R. 352; *Tuckey* v. *Henderson*, July 22, 1863, 33 Beaven's Rep. 174; *Wilson* v. *O'Leary*, Feb. 26, 1872, L.R., 7 Ch. App. 448.

At advising—

LORD YOUNG—The question is whether Mrs Anderson is entitled to a legacy of £500 under each or under either of the documents of 24th October and 24th November 1880—it being thus that anything she may be entitled to under both or either is in addition to the legacy given to her by the will of February 1881. Now this will of February 1881 being a universal settlement of the estate of the testatrix, leaving nothing whatever to pass under any prior settlement, impliedly revokes all prior settlements. The testatrix was of course at liberty to revoke or alter it to any extent, but its terms signify clearly that when she made it she meant it to regulate her whole succession. For it in fact disposes of her whole succession, leaving nothing for anyone to take by any other instrument. It would therefore be extravagant to contend that when the testator made her universal will she meant it as an addition to the documents of October and November 1880—which obviously could not have effect without displacing the distribution by the latter and universal will to the prejudice of the beneficiaries under it. I do not refer to the division of "the remainder of my jewellery along with my body-clothes," for which the universal will refers to "any memorandum to be left by me."

The condition therefore of Mrs Anderson taking a legacy of £500 under the document of October 1880 is that we shall be satisfied that the testatrix has sufficiently signified an intention to alter her will of February 1881 to that extent—for of course Mrs Anderson can only have it by displacing to that extent the distribution by that will. The two facts relied on to satisfy us of this are, first, the preservation of the document, and second, the writing on the envelope in which it was enclosed, dated 7th March 1881. The first or mere preservation of the document is, I think, clearly insufficient, for it was revoked by the subsequent universal will. Nor is the unsigned writing on the envelope, together with the date, sufficient in my opinion to alter the will to the extent of changing the distribution of residue by introducing another legatee with a legacy of £500, or to any extent. The testatrix's conduct in the matter is, I think, sufficiently explained by taking the document as a memorandum about the division of her jewellery such as her will contemplates—signifies her intention to leave for the guidance of her executors. I cannot hold that a revoked testamentary document is restored to testamentary sufficiency by an unsigned memorandum on the envelope such as that which occurs here. I think it was not so intended. With respect to the document of November 1880, it is in my opinion sufficient to say that it was revoked by the subsequent will, and that nothing whatever was done to restore it and render it operative as an alteration of the will.

I do not regard the question as one of cumulative or substitutional legacies, but of prior and partial testamentary writings revoked by a subsequent universal will.

LORD RUTHERFURD CLARK—I have entertained a good deal of doubt as to whether Mrs Anderson is not entitled to two legacies—one under the general settlement of 1881, and the other under the codicil of October 1880 as set up by the later writing; but though I entertain these doubts, I do not desire to differ from your Lordship.

The LORD JUSTICE-CLERK concurred with LORD YOUNG.

LORD CRAIGHILL was absent.

The Court answered the two first questions in the negative, and found it unnecessary to answer the third.

Counsel for First and Third Parties—Guthrie—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Counsel for Second Parties—Mackintosh—Pearson. Agents—Carment, Wedderburn, & Watson, W.S.

Thursday, July 19.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

FARQUHARSON *v.* FARQUHARSON.

Succession—Words importing a Bequest of Heritage—Mutual Settlement—Special Destinations of Subjects acquired subsequent to Date of Settlement.

A husband and wife, neither of whom was at the time possessed of heritage, conveyed in each other's favour by mutual settlement "all and sundry goods, gear, debts, effects, sums of money, heritable and moveable, household plenishing and furniture, and others whatsoever," that should pertain to either at death. The husband afterwards acquired heritage, taking the title to part of it to himself and his wife in conjunct fee and liferent, for her liferent use allenarly, and to his heirs and assignees whomsoever, and the title to the remainder to himself and his heirs and assignees whomsoever. The husband having predeceased the wife, she claimed to be entitled, in virtue of the mutual settlement, to the whole heritable property left by him. *Held* (1) (*aff.* judgment of Lord Kinnear—*dub.* Lord Young) that the terms of the mutual settlement were not habile to carry heritage; (2) (by Lord Justice-Clerk and Lord Young) that assuming that the mutual settlement was habile to carry heritage, it was evacuated by the terms in which the husband had taken the titles to the heritage acquired by him.