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

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

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

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

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

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

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

The Court adhered.

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

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

Thursday, March 1.

SECOND DIVISION.

[Sheriff Court at Hamilton.

FALLENS *v.* WILLIAM DIXON, LIMITED.

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

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

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

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

ties on 19th December 1922, when the following *facts* were admitted :—1. On 19th May 1920 the appellant sustained injuries by accident arising out of and in the course of his employment as a miner in the respondents' No. 4 Dixon's Colliery. The respondents admitted liability and satisfied his claim for compensation to 15th August 1921. 2. Thereafter the parties disagreed on the question whether in the circumstances the appellant was for the time being entitled to any compensation in respect of partial incapacity, and on 30th March 1922 arbitration proceedings were initiated before me. The appellant besides working as a miner had acted as part-time deputy check-weigher. I held that these were concurrent contracts of service, and on 29th May 1922 I issued my award finding the appellant entitled to compensation of 2s. per week in respect of partial incapacity. I found (1) that his average weekly earnings prior to the accident were £3, 10s. 4d. ; (2) that if he had completely recovered from his accident on 15th August 1921 he could have earned at his two former occupations about £2, 12s. during the period between August 1921 and May 1922, although in May 1922 the amount would have been slightly smaller ; and (3) that during that period he was actually earning £2, 8s. per week as clerk under the Blantyre School Management Committee of the Education Authority for the County of Lanark. 3. On 16th June 1922 there came into force a general reduction in the rate of wages paid by the said Education Authority to officials such as the appellant, and his weekly remuneration was reduced to £2, 3s., and has since remained at that figure. From June 1922 to December 1922 there was no change in the rate of wages payable to a man who worked as the appellant had done before his accident, viz., as miner and part-time deputy check-weigher, the rate being between £2, 10s. and £2, 12s. per week. 4. The only change in circumstances since the award of 29th May 1922 has been the lowering of the appellant's weekly income through the reduction of wages which affected generally the officials of the Lanarkshire Education Authority. The reduction in the appellant's earnings as an official of the Education Authority was not due to any cause personal to himself. His efficiency remained the same as before."

The Case further stated—"The appellant claimed that he was entitled to an increase in the weekly rate of his compensation because of his decreased remuneration as clerk to the Education Authority. He argued that this was a special form of employment, and that his compensation should be assessed on the footing that he was fit only for light surface work at a mine, the rate for which is about 25s. per week. On 27th December 1922 I issued my award dismissing the application for review on the ground that the appellant had not set forth relevant grounds for asking that the rate of his weekly compensation should be reviewed. I found that the work at which he is engaged is the 'suitable employment or business' with reference to which the rate of compensation in respect of his partial incapacity falls to be assessed, and that the general fall of wages in that employment is not in itself a good ground for demanding review of compensation, there having been no change of circumstances personal to him."

The *question of law* for the opinion of the Court was—"On the foregoing averments and admissions was the appellant entitled to ask for review of the weekly rate of compensation payable to him?"

The arbitrator appended the following *note* to his award :—". . . The only change in circumstances that is averred is that his [the applicant's] salary as clerk has been reduced to £2, 3s. per week. It was admitted at the debate that this reduction was one which affected him in common with all the similar officials of the County Education Authority. His wage was not reduced because of anything personal to himself.

"The argument was that I ought to assess the workman's compensation on the footing that if he had remained in work connected with a mine he would have been able to earn only £1, 5s. per week, that it was a merely adventitious circumstance that he had secured the position of clerk to the Blantyre Management Committee, and that as soon as his wages as clerk were reduced he was entitled to be treated as if he were a miner fit for light work. But the statute does not warrant this argument. What it refers to is 'some suitable employment or business.' It contemplates that a man may change his employment, and in fact cases have occurred in which an injured man was able to earn in a new occupation much higher wages than before the accident. Fallens is a man of more than usual intelligence and capacity, as was indicated by the fact that when he was a miner he also acted as deputy check-weigher. His qualifications fitted him for a better-paid job than surface labouring, and thus his 'suitable employment' provided him with a better wage. If he was thrown out of this job and could not secure one as well paid, the opinion of the Judges in the House of Lords in *M'Alinden* v. *James Nimmo & Company, Limited* (1919 S.C. (H.L.) 84) would have effect. It would be a case where more light had been thrown on his capacity to obtain suitable employment. But here the occupation remains the same. The only change is that there has been a general reduction in the rate of wages paid to such officials as Fallens.

"I appreciate his grievance. Through no fault of his own his weekly income is reduced by 5s. If his earnings in May had been £2, 3s. he would have received a substantially larger award of compensation then. But in my opinion the Act does not contemplate review of compensation in every case where the workman's position is worsened by a general fall in wages. If review is competent in this case the consequences are far-reaching. Suppose the rate of miner plus check-weigher's wages fell to £2, 3s., would the employers be entitled to ask that the workman's compensation be suspended? Suppose Fallens' wage had

been increased, would the employers be entitled to ask for review. An endless vista of litigation seems to be opened up if the claimant is right. After all it is impossible to be meticulously accurate in assessing compensation. All that can be done is to make a fair estimate according to the circumstances of the moment, and I think the trend of judicial opinion is towards holding that an award can be reviewed only where there is some change of circumstances personal to the workman."

Argued for the appellant—The arbitrator was in error in failing to keep in view the fact that the appellant was a clerk only because he was an injured man. The comparison fell to be made, not between the appellant's wages as a clerk and those earned by other clerks, but between what he was actually earning as a clerk and what he might have earned but for the accident as a miner. The workman's title to compensation was found in section 1 of the Workmen's Compensation Act 1906, and the amount of that compensation was determined by reference to the provisions contained in the First Schedule to that Act. The schedule provided that a weekly payment not exceeding 50 per cent. of the average weekly earnings, nor £1 in all, might be awarded. The amount, however, could not exceed the difference between the pre-accident and the post-accident earnings. Counsel referred to *Ball* v. *Hunt*, 1912 S.C. (H.L.) 77, 49 S.L.R. 711; *Duris* v. *Wilsons and Clyde Coal Company, Limited*, 1912 S.C. (H.L.) 74, 49 S.L.R. 708; *M'Neill* v. *Woodilee Coal and Coke Company*, 1918 S.C. (H.L.) 1, 55 S.L.R. 15; *Bevan* v. *Energlyn Colliery Company*, [1912] 1 K.B. 63. The case of *Tarr* v. *Cory Brothers & Company*, [1917] 2 K.B. 774, established the proposition that where there was a change, whether increase or decrease, in the wages the workman was earning after the accident, that change in circumstances entitled either party to ask for a review—see judgment of Swinfen Eady, L.J., at p. 777. Here there had been such a change since the date when the weekly payment was fixed, and accordingly the appellant was entitled to a review—*Radcliffe* v. *Pacific Steam Navigation Company*, [1910] 1 K.B. 685, *per* Fletcher Moulton, L.J., at p. 690; *Murray* v. *Portland Colliery Company, Limited*, 60 S.L.R. 56; *John Watson, Limited* v. *Quinn*, 1922, 60 S.L.R. 1; *Quilter* v. *Kepplehill Coal Company*, 1921 S.C. 905, 58 S.L.R. 588; *M'Alinden* v. *James Nimmo & Company*, 1919 S.C. (H.L.) 84, 56 S.L.R. 522.

Argued for the respondents—The arbitrator had found that the appellant's total loss of wages (9s.) was due partly to his injury (this he assessed at 4s., of which he awarded him 2s.) and partly to economic circumstances with which he as arbitrator was not concerned. Consequently the appellant must lose the 5s. attributable to the latter—*Murray* v. *Forfar Coal Company*, 1922 S.L.T. 620; *Gaffney* v. *Chorley Colliery Company*, [1922] 15 Butterworth 158, *per* Sterndale, M.R., at p. 163. These cases recognised that a workman's incapacity might be due to two different causes, and the arbitrator was perfectly justified in splitting up the total loss of 9s., and taking into account only that part which was due to the accident. It was not relevant in asking for a review of weekly payments to aver a change of economic circumstances—*Quilter* v. *Kepplehill Coal Company* (*cit. sup.*). Accordingly the appellant had failed to state a relevant case, and the question of law should be answered in the negative.

At advising—

LORD JUSTICE-CLERK (ALNESS)—I do not think it necessary to hear further argument in this case inasmuch as, so far as I am concerned (and I believe I speak for my brethren as well), I have formed a clear opinion that the judgment of the learned arbitrator is wrong.

An application was made by a workman for review of an arbitrator's award pronounced under the Workmen's Compensation Act. The award, which was dated 23rd May 1922, was an award in the course of which the arbitrator held that the workman, if he were a fit man, would at that time have been earning £2, 12s. a-week as a miner; that in point of fact he was earning £2, 8s. a-week as a clerk; and the learned arbitrator awarded compensation at the rate of 2s. a-week as at that date. Now the sum of £2, 8s. which the appellant was earning was earned by him as an employee of the Educational Authority of Lanarkshire. His salary as such employee has since been reduced to £2, 3s. a-week, following upon an all-round reduction of salaries affecting all the officials of that Authority. In these circumstances ths appellant re-approached the arbitrator and asked for a review of the award which he had already made on 23rd May and asked him to award him 9s. a-week. He maintained that a change of circumstances had occurred, and that his diminished earnings were due to the injury which he had sustained in the employment of the respondents. In that contention I think that the appellant was right.

The present position is that there has, in the meantime, been no diminution in the wages of the miners. They remain the same as they were before. As an uninjured miner the appellant would be earning at the present moment £2, 12s. a-week. As an injured man he can now only earn as a clerk £2, 3s. a week as compared with £2, 8s. a-week when the case was formerly before the arbitrator. That change of circumstances occurred in June 1922. Why should the learned arbitrator not have regard to that obvious change of circumstances? *Prima facie* it appears to be a material change, and in that view I am fortified by the opinion, to which Mr Fenton referred, of Lord Dunedin in *M'Neill's* case (1918 S.C. (H.L.) 1, [1918] A.C. 43) where his Lordship said (at p. 4)—"Supposing there had been no provisions as to cutting down by prescribing the maximum, the compensation would obviously have been a payment which should make up to the man for the fact that he is an injured man instead of a whole man, and when you put into money what is the difference

between an injured man and a whole man you say, 'As a whole man he would have been able to earn so much at this moment; as an injured man he can only earn so much'; and the difference is the compensation." And to the same effect is the passage quoted to us from Lord Justice Swinfen Eady in the case of *Cory Brothers & Company* v. *Tarr* (1917, 10 B.W.C.C. 590) where he says (at p. 593)—"In my opinion what is contemplated by the statute is that the arbitrator shall be entitled to make from time to time such an award as if the circumstances at the date when the previous award had been made had been the same as at the time of the application of review. In other words—that an award has to be made from time to time in accordance with the circumstances as they exist at the date of" such an award.

These passages *prima facie* would appear to be conclusive in favour of the appellant's argument. But the learned arbitrator has proceeded upon the view that he was precluded from considering the new situation. And why? "Because," he says, "the change in circumstances which affects the appellant has affected the other clerks also in the employment of the Education Authority. There has been a general fall in the wages of the clerks of that Authority, and therefore I am disabled from taking that into account inasmuch as it is due to economic circumstances and not to the original accident which the appellant suffered." That view, in my judgment, would be conclusive if the appellant in this case had always been a clerk. The case of *Quilter* (1921 S.C. 905) and the case of *Quinn* (1923 S.C. 6) appear to be direct authorities to that effect. And the reason why these decisions were pronounced was, I apprehend, that in the circumstances with which they dealt the workman's worsened position was due to economic causes and not to incapacity resulting from the accident. The arbitrator in this case has treated the appellant as if he had always been a clerk, and—as I think Mr Fenton truly said—failed to remember that the appellant is only a clerk because he is an injured man. In other words, the learned arbitrator has omitted to pay any heed to the history of the appellant as a miner, and that fallacy, in my humble judgment, vitiates the opinion he has pronounced.

In this case I think it is unnecessary to await the new light which might be shed upon the situation if the appellant unhappily lost his job, as happened in the case of *M'Alinden* v. *James Nimmo & Company* (1919 S.C. (H.L.) 84, [1920] A.C. 39), to which the arbitrator refers in his note. A new light is shed on the situation here by the change of circumstance to which I have referred. Finally, I would add that the learned arbitrator says—"If" the appellant's "earnings in May had been £2, 3s. he would have received a substantially larger award of compensation then." In saying that, in my view, the learned arbitrator concedes the appellant's case.

I therefore suggest that the case should be remitted back to the learned arbitrator to assess the amount of compensation due to the appellant on the footing that he is not disabled from considering the new circumstances under which the later application was presented to him.

LORD ORMIDALE—I concur.

LORD HUNTER—I also agree. The learned arbitrator in this case has held that he was precluded from entertaining an application to review an award of compensation made in favour of the appellant. That was an award made in respect of partial incapacity. In dealing with the question of partial incapacity, the points that the learned arbitrator has to keep in view are, roughly speaking, these—What was the injured workman actually earning before the accident, and what he would have earned if he had not been incapacitated. Then he has to consider what the workman is able to earn in his state of incapacity. Making a proper deduction, he has to give him an award that does not exceed £1, and does not bring up his present earnings combined with the award made to a figure in excess of what in fact he was earning prior to the accident. At the date when application was made for an award—I mean the original application—the state of matters was this—The appellant if he had not been injured would have been in a position to earn £2, 12s. per week. His actual earnings before the accident had been in excess of £3, but economic conditions had brought down the general wages of miners, so that he would have been in a position of earning only £2, 12s. He was not able, however, to undertake the work of a miner, and he was employed as a clerk by the Education Authority. In that position he in fact earned £2, 8s., a difference of 4s., and the learned arbitrator gave him an award of 2s. per week. When the application for review came up the situation was this—So far as the conditions of the mining industry were concerned, the appellant if he had not been incapacitated would still have been able to earn £2, 12s. a-week, but in his position as a clerk he was earning only £2, 3s. I should have thought *prima facie* therefore, applying the general considerations to which I have referred, that a case had been made out whereby the arbitrator was bound to consider whether an increase ought not to be made in his award. The arbitrator, however, held that he could not do so, because he said that the alteration in the amount that the appellant was earning arose from some circumstance that was not personal to him, and therefore (as I understand the reasoning) not attributable to the accident. There had been a general reduction in the wages of all employees of the Education Authority. So far as I can see, that had nothing to do with the question that the arbitrator had to deal with. He had to deal with the question of the incapacity of a miner. It is an accident that this incapacitated miner was enabled to get the employment which in fact he did. It all in a sense redounded to the interests of the employers, because the award that

could be made under the statute was thereby substantially diminished.

The argument presented to us on behalf of the respondents was an argument founded on *Black* v. *Merry & Cuninghame*, 1909 S.C. 1150, and the later case of *Quilter*, 1921 S.C. 905. These two cases are cases illustrative of this principle — and I do not think the principle is really a matter on which there can be doubt or dispute—that if a man is incapacitated and gets an award, and then there is a general slump in the industry in which he was employed, he cannot go before the arbitrator and ask for an increase of the compensation payable to him in consequence of a diminution in his earning capacity not brought about by the accident but brought about by economic causes. These two cases are in my opinion in no way affected by the decision we are giving here to-day. In fact it is because of the proper application of these two decisions that the appellant's earning capacity at the date when the first application came to be made was treated as an earning capacity of £2, 12s. and not an earning capacity in excess of £3. But it seems to me it would be a very peculiar result if because of some alteration in the economic conditions in an industry to which the appellant was not really bred and brought up but in which he accidentally found certain employment, that was held to be a circumstance that the arbitrator was entitled to say did not matter and did not affect the question of compensation one way or the other.

In the present case the decision we are giving is no doubt against the employers, but I think if they had succeeded in this case a logical application of the decision we would have had to give would tell against them in a great number of other cases.

I have no doubt that the arbitrator here reached a wrong conclusion, and that the matter should be remitted back to him as your Lordship proposes.

LORD ANDERSON—I also agree. The case seems to me to be ruled by the recent decision in this Division in the case of *Quinn*, 1923 S.C. 6. In *Quinn* it was pointed out in what respects the two cases relied on by the respondents *Black* (1909 S.C. 1150) and *Quilter* (1921 S.C. 905) are distinguishable from a case like the present, and on that point I content myself by referring to what was there laid down.

In dismissing the application for review as irrelevant I am of opinion that the arbitrator misdirected himself in law. His mistake was that he confined himself to contrasting the present earning capacity of the appellant with that of other clerks in similar employment. But the appellant is a miner and not a clerk. The comparison which the arbitrator ought to have made was between the present earning capacity of the appellant and his former earnings as a miner. The arbitrator has left out of account one essential factor in the comparison he is bound to make, to wit, £2, 12s., being the weekly sum which a miner could and can earn. The appellant if he had not been injured could as a miner have now earned £2, 12s. a-week. It is with that fact that his present position must be contrasted. Instead of earning this sum of £2, 12s. he is earning only £2, 3s., and this latter sum is 5s. a-week less than what was being paid when the amount of compensation was last considered. The appellant has therefore stated a relevant case for review of the amount of compensation.

It is to be noted that the arbitrator refuses to do now what he did when he awarded compensation in May 1922. He then, as appears from the first sentence in his note appended to the Stated Case, determined the amount of compensation by taking into account the said sum of £2, 12s. and contrasting it with the then earning capacity of the appellant of £2, 8s. per week. In this process of review the arbitrator in my opinion is bound to proceed on the same considerations as fell to be taken into account in making the original award of compensation.

The question of law ought therefore to be answered in the affirmative.

The Court answered the question of law in the affirmative.

Counsel for Appellant—Solicitor-General (D. P. Fleming, K.C.)—Fenton. Agents—Simpson & Marwick, W.S.

Counsel for Respondents — MacRobert, K.C.—Marshall. Agents—W. & J. Burness, W.S.

HIGH COURT OF JUSTICIARY.

Monday, May 21.

(Before the Lord Justice-Clerk and a Jury.)

H.M. ADVOCATE *v.* SAVAGE.

Justiciary Cases—Murder—Culpable Homicide — Drunkenness — Mental Unsoundness not Amounting to Insanity—Degree of Responsibility.

In a trial on a charge of murder, *direction* to the Jury by the Lord Justice-Clerk (Alness) that aberration or weakness of mind at the time of the alleged crime, not amounting to insanity but sufficient to diminish the prisoner's responsibility from full to partial responsibility, and to render him only partially accountable for his actions, was sufficient, if established by the evidence, to reduce the quality of his act from murder to culpable homicide.

At a sitting of the High Court at Edinburgh on 21st May 1923, John Henry Savage was charged at the instance of H.M. Advocate on an indictment which set forth that "on 14th March 1923, in the dwelling-house at 25 Bridge Street, Leith, occupied by Richard Tillett, engineman, you did assault Jemima Grierson, then residing there, did cut her throat with a razor or other sharp instrument, and did murder her, and you have been previously convicted of crime inferring personal violence." In the course