1858.
March 25th, 26th, 29th, 30th, May 1st.

THE MAGISTRATES OF DUNDEE, . APPELLANTS.
MORRIS ET AL., ... RESPONDENTS.

Will—Construction.—Case in which the Lord Chancellor, Lord Cranworth, and Lord Wensleydale (reversing the decision below) concurred in opinion that certain documents, though in several places erased and obliterated, were nevertheless not only probative and testamentary, but contained a good and effectual expression of an intention to establish in Dundee an hospital to accommodate 100 boys.

Charitable Bequests.—Per the Lord Chancellor: The construction of charitable bequests ought to be liberal and benignant; p. 155.

Per Lord Cranworth.—There has always been a latitude allowed to charitable bequests, so that when the general intention is pretty clearly indicated, the Court will work out the details; p. 166.

Per the Lord Chancellor.—In this respect there is not much difference between the law of Scotland and that of England; p. 154.

Wish.—Per the Lord Chancellor: The mere expression by the testator of a *wish* to establish an hospital, is equivalent to the expression of a *will* to establish an hospital; p. 156.

Ewan v. *Provost of Montrose*, decided by the House of Lords on the advice of Lord Wynford alone, characterized by the Lord Chancellor; p. 154.

Obliterations and Deletions in Testamentary Holograph Instruments.—Per the Lord Chancellor: Between what is written and what is obliterated, there is this distinction, namely, that what is written must have been intentional, while what is obliterated may have been accidental; p. 152.

Per Lord Wensleydale.—The question is not what the testator intended to do, but what is the meaning of that which he has actually written, and suffered to remain unobliterated ; p. 169.

Per Lord Wensleydale.—Whatever has been purposely deleted is undoubtedly deprived of all testamentary effect ; p. 169.

Per Lord Wensleydale.—Although such part of the instrument as is deleted cannot have any testamentary operation, it may be used to show what the testator knew when he wrote it, and also what was his will at the time, though he has since revoked it ; p. 171.

Per Lord Cranworth.—We are at liberty to look at the erased words ; by which I mean the words over which the pen has been drawn ; for they are left perfectly and easily legible. My strong opinion is that we may look at them for the purpose of seeing what the writer had at one time intended.

JOHN MORGAN died at Edinburgh on the 25th August 1850, leaving certain documents to regulate the disposition and application of his property.

The Appellants were the Municipal Magistrates of Dundee ; and they, conceiving that the deceased had intended the establishment of an hospital in their town, instituted an action of declarator before the Court of Session to have it found, and declared that this alleged charitable gift was valid. The documents or writings on which they relied, and of which they, in the language of English law, may be said to have claimed probate, were as follow :—

(*a*) "I John Morgan of Edinburgh do by these presents bequeath to my sister Agnes Morgan the liferent of all

(*a*) "Found in Miss Morgan's Repositories. 21st January 1848." So said the fac-simile copy produced.

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my property, whether real or personal, I beg and request the favour of the Honble Court of Session to nominate a judicial factor for the management of my property whether real or personal, that is by laying out this pe . . . . . intend . . . . . When the . . . . . the . . . . . East & . . . these . . . . . Scotland and that no part or portion of these . . . . who . . . . ever . . . . . to take th . . . . . Cou . . . . & have . . . I wish . . . . . but none of . . . . . property, ... property ; I have farther to request of my said sister Agnes Morgan & those who may succeed to this property to keep in good & sufficient repairs, my brother's tomb in the Grey-friars Church yard of Edinburgh & also my . . . tomb in the burial place of Dundee, when the tablets are anyways effaced to renew the inscriptions on both of these tombs, I hereby insert the . . . . and the . . . . . estate. The . . . . . the . . . . . My sister Agnes Morgan is to have all my silver and plated ware, wines, coaches, horses & harness with jewels of every kind, as her own property & that she may dispose of them, as she may think proper Witness my hand at Edinburgh the Fourth day of January One thousand, eight hundred & thirty-six years (~~1836~~).

JN° MORGAN.

"The judicial factor is not to take place, until the death of my said sister Agnes Morgan Witness my hand at Edinburgh the Fourth day of January One thousand, eight hundred and thirty-six years 1836.

JN° MORGAN.

(a) "~~George Morgan, who married B Cramond can only inherit this property by being the representative of the Cramonds, but not for the name of Morgan,~~ ~~he~~ ~~even should be nearest heir male to my said father~~ ~~Witness my hand at Edinburgh the eighteenth day of November One thousand eight hundred and forty years~~ (~~1840~~). ~~Jno. Morgan.~~

"Edinburgh 10 October 1842—I hereby annul all hitherto written on the first, second & third pages of this & wish to establish in the town of Dundee in the shire of Forfar, an ~~an Hospital strictly in size, the management of the interior of said Hospital in every way as Heriot's Hospital in Edinburgh is conducted,~~ —the inhabitants born & educated in Dundee to have the preference of the towns of Forfar, Arbroath & Montrose but inhabitants of any other county or town are excluded. JNº MORGAN.

J. M. written. J. M.

"~~The judicial factor is not to take place until the death of my said sister, Agnes Morgan & that she is to enjoy during her life the liferent of all my property, real & personal Witness my hand at Edinburgh the Tenth day of October One thousand, eight hundred & forty two years.~~ ~~Jno. Morgan.~~

"I hereby wish only one hundred boys to be admitted in the hospital at Dundee ~~& the structure~~

(a) "Found in Mr. Morgan's Repositories. 11th May 1848." So said the fac-simile copy produced.

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~~of the house to be less than that of Heriot's Hospital,~~ & to contain one hundred boys in place of one hundred & eighty boys. JN° MORGAN.

Edinburgh 20 October 1842.

"I farther wish Cap^{t} James Hay of Belton R.N. to receive from my property at my death fifteen hundred pounds sterling & to Agnes Morgan Hay, his daughter five hundred pounds sterling. Witness my hand at Edinburgh the Twenty-second day of October One thousand eight hundred & forty-two years.

JN° MORGAN.

Mr. James Hope Senior is dead. J. Morgan. Edinburgh 7 Dec^{r} 1842.

"I nominate Mr. James . . . . . to act in my affairs after my death in place of . . . . . Witness my hand at Edinburgh the Twenty-fourth day of October One thousand eight hundred & forty-two years. JN° MORGAN.

"I nominate Lord Fullarton to receive two hundred pounds sterling six months after my death, trusting his Lops/ will give my sister Agnes, after my death, his kind advice, should it be necessary on any occasion respecting my . . . . . settlement Edinburgh the Sixteenth of June One thousand eight hundred & forty-three years. JN° MORGAN.

"I hereby give to W^{m} Pringle three hundred pounds sterling & to Thomas Leckie one hundred & fifty pounds & to Elizabeth Duncan fifty pounds sterling being my servants. . . . . JN° MORGAN.

Winterfield 25 Aug^{t} 1846.

(a) "John Morgan 17 Coates Crescent Edinburgh 6 September 1846 do by this bequeth[a] to my sister Agnes Morgan the liferent of all my property whether real or personal—My sister Agnes Morgan is to have all my silver plate likewise all my furniture coach horses harness with jewels of every kind as her own property and that she may dispose of them as she may think proper Witness my hand I beg and request the Hon Court of Session to nominate a judicial factor for the management of my property whether real or personal that is by laying it out to the best advantage after my death and my sister Agnes Morgan—to accumulate for ten years—to erect an hospital in Dundee to educate the poor children of the nine trades the name of Morgan to be prefered altho they do not belong to Dundee—I wish that the hospital may not be very expensive as it is for poor children—the judicial factor is not to take place until the death of my sister Agnes Morgan—If may sisters death was to take place befor mine—I wish at my death my house in 17 Coats Crescent and furniture to be sold likewise my house and grounds in Calcutta the money to go to the fund for the hospital in Dundee to educate the poor children of the nine trades of Dundee the name of Morgan be prefered —John Morgan 17 Coates Crescent Edinburgh bequeaths to Captain Hay of Belton fifteen hundred pounds sterling and his daughter Agnes Morgan Hay five hundred pounds sterling—John Morgan 17 Coats Crescent bequeaths to William Pringal my servant three hundred pounds sterling I bequeath to my coachman Thomas Leckie ~~one~~ one hundred and fifty pounds sterling—to Elisbath Duncan my

(a) "Found in Miss Morgan's Repositories. 21st January 1848." So said the fac-simile copy produced.

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servant fifty pounds sterling the legacy duty to be paid for my servants. JN° MORGAN.

6 Sep^{r} 1846.

"John Morgan Coates Crescent 17 Edinburgh—wishes that John Hay of Leatham Grange Cap^{in} Hay of Belton to take charge of my property that it is disposed of as I wished—my money in England is envested in the funds it is the three and a quarter persents my agents are Coutts and Company my agents in Calcutta are Cockrel and Compay."

The Magistrates put in the following pleas in law :—

1. The said John Morgan having made a valid bequest of the whole of the residue of his moveable estate, or at least of so much thereof as might be necessary for the purpose of erecting, establishing, and endowing an hospital in Dundee to accommodate 100 boys, the same falls to be applied in the erection, establishment, and endowment of such hospital, in order to the fulfilment of that testamentary intention.

2. The Defenders (*a*), as the parties entitled and bound to administer the property of the deceased for behoof of the residuary and other legatees, must hold and retain the whole residue, or so much thereof as may be necessary for establishing the foresaid hospital, or otherwise must pay the said residuary or other legacy to the Pursuers, or one or other of them, or to a person or persons appointed by the Court, in order to the fulfilment of the testamentary bequest and intention of the said John Morgan.

(*a*) The Defenders (namely, the Respondents before the House) were "the executor dative and the next of kin and representatives" of the deceased.

3. The Court are entitled and in use to lay down and fix how the defunct's charitable intentions as regards the institution and endowment of an hospital, such as that established and endowed by Mr. Morgan, shall receive effect, and a scheme or schemes for the application and disposal of the funds mortified and bequeathed for the hospital shall be prepared under the Court's authority, in order to the fulfilment of the testamentary intentions of Mr. Morgan.

4. By the payment of the other legacies left by Mr. Morgan in his testamentary writings as above mentioned, the Defenders are barred from questioning the validity of the bequest in favour of the hospital, or the writings under which the Pursuers' claims arise.

The Respondents (the executor dative and the next of kin and representatives of the deceased), in defence, put in the following pleas in law :—

1. The Pursuers have no right, title, or legal interest to maintain this action.

2. The writing of 6th September 1846 not being holograph of John Morgan, and not being tested, is wholly invalid; and the writings of 10th and 20th October 1842 are not valid or effectual as testamentary instruments affecting his succession.

3. The writings libelled do not constitute or contain an effectual legacy or bequest, and at all events they do not constitute or contain the alleged legacy or bequest of the whole or of any part of Mr. Morgan's funds for the erection and establishment of an hospital in the town of Dundee, and none for the erection and establishment there of an hospital to accommodate 100 boys.

4. The alleged legacy or bequest is void from uncertainty; and it would not be competent for a court of law to supplement all that would be requisite

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to make operative the vague and undefined views which had or which may have been in Mr. Morgan's mind when writing the papers of 10th and 20th October 1842.

5. If any such legacy or bequest was ever contemplated by the deceased, it must, in the circumstances set forth on record, be held to have been cancelled and revoked.

On the 29th May 1857 the Lord Ordinary *Handyside* pronounced an Interlocutor sustaining the Respondents' second and third pleas in law, assoilzying them from the conclusions of the action, decerning accordingly, and finding the Appellants liable in expenses. In explanation of his Interlocutor his Lordship issued the following note:—

> The *Lord Ordinary* has been unable to discover any satisfactory legal ground on which he could recognize the writings founded on as containing a sufficient expression of the deceased's will, entitled to have effect given to them *as a will*, and this independently of objections to the contents of the writings as incapable of being acted on by reason of *uncertainty and indefiniteness* in the objects supposed to have been contemplated.
>
> The first of these writings, dated in January 1836, is not only so obliterated in all material passages which may have given it that character, so as to prevent its being referred to and used as the expression of purpose and will at the period of its execution, but this writing, with the memorandum attached, is expressly annulled by the writing of 10th October 1842. It is plain, therefore, that any writing preceding that last date must be cast aside altogether, and only it and those of subsequent dates are to be taken as expressive of the last will of the deceased. Then, as to the writing of 6th September 1846—the latest of all those found—as it is not holograph of the deceased, and is otherwise improbative, it cannot be available by reason of improbativeness, if the deceased have not by previous writings attempted to provide for its authenticity being supplied and ascertained by some marks fixed upon by himself, and which law would, with whatever difficulty, recognize as sufficient to obviate the general objection of improbativeness. But, there is no special provision in the earlier writings to dispense, as regards this last one, with the recognized rule of law. The

only writings, then, which can be put forward as being of a testamentary character are those holograph of the deceased, and bearing his signature unobliterated, of date 10th October 1842, and subsequent dates. Those founded on by the Pursuers as consituting the bequest, which they seek in the summons to be declared in their favour, are the writings of 10th and 20th October 1842. The question is, whether, singly or together, they constitute a valid bequest containing a sufficient expression of the deceased's will to be entitled to receive effect.

The writing of 10th October is first to be considered. It became the leading testamentary writing of the deceased, for it *annuls all* previously written by him on previous pages. Now, it is to be observed that this writing contains no words of conveyance or bequest either of the *universitas* of the estate, or of any portion thereof, or of any particular sum of money; nor is there any appointment of executors or of trustees, or a nomination of a legatee or beneficiary. The only thing is, after annulling all hitherto written on the preceding pages of the paper, the expression of—"I wish to establish in the town of Dundee," &c. How this wish is to be carried out, who are to do so, what fund is to be appropriated for it—none of these things are provided for, or mentioned. The whole of the writer's expression of his will or desire is contained in the words "I wish to establish." Throwing aside any consideration of the effect to be allowed to the word "*establish*"—a subject which falls under the objection of *uncertainty* raised against the terms of the bequest, the sufficiency of the word "*wish*," as expressing a bequest in terms apt and sufficient, is to be determined. Had there been a conveyance in trust by the deceased of his estate, it is conceived there could be no doubt that such an expression of wish as to an object would have been tantamount to express words of bequest or direction.—*Crichton* v. *Grierson*, July 1828, 3 W. & S., 331. Or if there had been a nomination of executors to take and administer the estate, such words would have been efficacious. Even if there were an omission to name executors, yet the next of kin confirming would have been bound to give effect to a legacy as sufficiently constituted under such an expression of desire in the deceased's will.—See per Lord Fullerton, in *Dundas* v. *Dundas*, January 27, 1837. The peculiarity, and thence the difficulty, perhaps, in this case is, that there is a bare wish unconnected with any words of disposal or appropriation of the estate of the writer, and that the accomplishment of the wish is to be inferred as having been intended to be fulfilled by appropriation out of the estate of what was necessary to attain the end. There is probably difficulty in thus applying the words which it may be supposed were in the writer's mind, namely, "with my whole estate," or "with what is requisite from my estate for the purpose," so as to give perfect intelligibility to the wish, as it is expressed. Still the Lord Ordinary is not prepared

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to hold that the word "wish" is in itself, and by the want of other words, so feeble and defective, that it is not entitled to be taken as an expression of will, and introductory to a bequest, if that otherwise be sufficiently explicit.—See Report by Lord Stair of *Nasymth* v. *Jaffray*, July 25, 1662; Mor., p. 5483.

It is on reaching the next step in this writing that the fatal defect in it appears. It does not bear *what it is* that the writer wished to establish in the town of Dundee. The writing must be taken and read with the deletions appearing on its face when found. It wants, then, the essential word, indeed sentence, to make it intelligible and effective. It is a perfect blank as to what is to be established. Without the deleted sentence the later and concluding one, which remains unobliterated, has no meaning whatever—it depends wholly on the expunged sentence for intelligible application. The Lord Ordinary is unable to see any mode by which this writing can be set up as an expression of will. It appears to him that it must be wholly discarded and laid aside as being *in essentialibus* imperfect.

The Pursuers represented the deletion as being intentional only as regarded the sentence following "hospital," and suggested that the word "hospital" had been deleted *per incuriam*. The Lord Ordinary cannot countenance such a suggestion as fitted for legal consideration. For the Court to reinstate the word which the deceased had struck out—which they would be doing by holding it to have been unintentionally deleted, of which there can be no evidence—would be wholly unwarrantable, and involve a stretch of power, under the guise of drawing inferences of the writer's mind and intention, contrary to the apparent fact shown by an act which speaks to the eye itself.

The Lord Ordinary thinks that the writing of 10th October must be taken exactly as it stands; and so the only operative part of it was annulling previous writings on the same sheet of paper, but which became of no moment, as the only unobliterated parts of such writings had reference to a life interest to his sister in his estate, but which was evacuated by her predeceasing him.

The second writing, of 20th October, is now to be considered. The Pursuers contend they are entitled to make use of it to supply the defect in the former writing by the deletion of the word "hospital," and taking both writings together, they argued that thereby the will of Mr. Morgan is sufficiently demonstrated, and his intention explained, so as to entitle the Pursuers to have Declarator pronounced as concluded for.

This second writing does undoubtedly imply the execution and existence of a former writing by which Mr. Morgan had made some provision or declaration, or expressed some wish, regarding an hospital in Dundee, which he describes as "the hospital at Dundee," and to which he had wished to be admitted 180 boys; and the change which he makes is by now expressing his wish

that only 100 boys be admitted into the hospital, and that it should contain 100 in place of 180. But where is this previous writing to be found? The former writing is a blank as to hospital, and equally a blank as to boys. Unless the deleted sentence, which is not so obliterated but its words may still be read, is by that circumstance to be reared up so as to be read, and what has legally become a blank by deletion is notwithstanding to be treated as something which may notwithstanding be judicially read, it is plain that the second writing expresses a wish to alter or change something which has gone before, but evidence of which is legally non-existent. The second writing, standing alone, is insufficient in its terms to form a bequest, and the contrary was not attempted to be maintained. It is dependent on the existence of a former valid writing constituting a bequest, and which is to be altered in one respect by this second writing. But if there be no former writing in regard to an hospital at Dundee, and to which reference is explicitly made by mentioning "*the* hospital at Dundee," the later writing becomes nugatory.

The Lord Ordinary conceives there is insuperable difficulty in connecting the one writing with the other. Reading the first, as according to the rules of law it must be read, by holding the part deleted as *pro non scripto*, it is radically defective, and so must be denied legal effect. Reading the second as referring to a prior writing—where is that prior writing regarding the *hospital* to be found? The two writings are not to be pieced together in order that a word or sentence in the one is to be transposed to the fitting place in the other, so as to make sense out of both when neither is intelligible in itself. But this is what the Pursuers would have to do; for without transposition, but adding merely the latter to the first, and combining the two in their order, the writings would not be intelligible as a whole.

Entertaining these views of the character of the two writings, the Lord Ordinary has felt no real hesitation in coming to the conclusion that they cannot be supported as valid testamentary writings. If this conclusion be correct, it is unnecessary to enter into consideration of the objection to the effectiveness of these writings on the ground of *uncertainty*. The Lord Ordinary has, accordingly, limited his ground of judgment to sustaining the second and third pleas of the Defenders, as being sufficient, in his opinion, for the disposal of the case.

The Magistrates submitted the interlocutor of Lord *Handyside* to the review of the Second Division of the Court of Session, and that Court on the 26th of June 1857, adhered to the interlocutor of Lord *Handyside*, and mulcted the Magistrates in costs.

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The Judges so reviewing the decision of Lord *Handyside* were the Lord Justice Clerk *Hope*, Lord *Murray*, Lord *Wood*, and Lord *Cowan*. Their Lordships having heard the Magistrates' Counsel were unanimously against them, and held the points to be too clear even to call for a reply from the other side.

The *Lord Justice Clerk* said: "My notion of the whole case is, that these papers must be taken as mere scrolls (*a*) or jottings from which the deceased intended at some time or another to have a settlement made up; but I think there is no valid or effectual writing that the Court can recognize."

Lord *Murray* "could see nothing more in these writings than a variety of jottings. They were almost all scratches,—the words left being *rari nantes in gurgite vasto*."

Lord *Wood*: "If the writing is read minus the deleted portion it is unintelligible."

Lord *Cowan* "thought it somewhat problematical whether there ever was anything in the testator's mind beyond a vague wish to make a settlement of the kind pointed at, but which he never carried into effect."

The Magistrates, however, not dismayed, appealed to the House.

For the Appellants, Mr. *Rolt* and Mr. *Anderson*. These writings are testamentary in their character. The bequest for the establishment of an hospital is clear. It is nowhere revoked. Where the general intent is plainly indicated the Court will make good the rest. There is no ground for treating the bequest as failing for uncertainty. The whole is capable of a rational construction, which the Court is bound to attribute to it, *Grant* v. *Shepherd* (*b*). The law of Scotland favours charities.

(*a*) A scroll in Scotland means a draft.
(*b*) 6 Bell app. ca. 153.

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For the Respondents, the *Lord Advocate* (*a*) and Mr. *Roundell Palmer*. No trustee or executor is appointed by these writings. There is no actual gift or bequest. Only a wish is expressed. Holograph writings are admitted to be privileged. But here the alterations are obliterations, and the obliterations are as holograph as the rest, and as much entitled to attention. There is no disposition of residue. It is impossible to collect what sum is to be raised for the establishment of the hospital. This objection of itself is fatal, *Ewen* v. *Magistrates of Montrose* (*b*).

The following were the opinions delivered by the Law Peers:—

Lord Chancellor's opinion.

The LORD CHANCELLOR (*c*):

My Lords, this was an appeal from an interlocutor of the *Lord Ordinary* and from a judgment of the Second Division of the Court of Session, adhering to the *Lord Ordinary's* interlocutor, on a summons of declarator, brought to have it found and declared that certain testamentary writings of John Morgan contain a valid legacy and bequest of the whole of the residue of his moveable means and estate, after paying legacies, debts, and charges of administration, or at least of so much thereof as may be necessary for the purpose of erecting and establishing in the town of Dundee an hospital to accommodate 100 boys, and that the same are valid and effectual as testamentary deeds of the deceased to that effect.

The validity of these writings as testamentary instruments was contested by the next of kin of John Morgan, and by their pleas they contend that

(*a*) Mr. Inglis. (*b*) 4 Wils. and Sh. 346.
(*c*) Lord Chelmsford. His Lordship's opinion was in writing.

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"The writing of the 6th September 1846, not being holograph of John Morgan, and not being tested, is wholly invalid, and the writings of the 10th and 20th October 1842 are not valid or effectual as testamentary instruments affecting his succession." That "the writings libelled do not constitute or contain an effectual legacy or bequest; and at all events they do not constitute or contain the alleged legacy or bequest of the whole or of any part of Mr. Morgan's funds for the erection and establishment of an hospital in the town of Dundee, and none for the erection and establishment there of an hospital to accommodate 100 boys." And then, in the 4th plea in law, they say, "The alleged legacy or bequest is void from uncertainty."

The *Lord Ordinary* sustained the second and third pleas in law for the Defenders. He considered that these second and third pleas were confined to the question of the validity of the writings as testamentary instruments; and coming to the conclusion that they could not be supported as valid testamentary writings, he considered it "unnecessary to enter into the consideration of the objection to the effectiveness of these writings on the ground of uncertainty." He accordingly limited his ground of judgment to sustaining the second and third pleas of the Defenders, as being sufficient in his opinion for the disposal of the case.

The Judges of the Court of Session adopted the same course; and, expressing their opinion that the writings were not valid as testamentary instruments, they entered into no question as to the construction of the alleged legacy or bequest.

Of course, if your Lordships should be of opinion with the *Lord Ordinary* and the Court of Session, that the writings are invalid as testamentary instru-

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ments, it will be unnecessary to enter further into the case; but if you should think that they are both probative and testamentary, then it will be necessary to consider whether they constitute or contain an effectual legacy or bequest for the establishment of an hospital in the town of Dundee upon the third plea in law of the Defenders.

The circumstances under which the questions arose are few and simple. John Morgan, the alleged testator, died in Edinburgh on the 25th August 1850 unmarried and possessed of a considerable fortune. His sister, Agnes Morgan, had resided with him till her death in January 1848.

After the death of Miss Morgan there were found amongst her papers certain paper writings, consisting of a half sheet of paper containing two writings, both holograph of John Morgan, and dated 4th January 1836 (*a*), and another paper which was holograph of Miss Morgan, but bearing the signature of John Morgan and having the date 6th September 1846 (*b*) in his handwriting. This latter writing would have been the will of John Morgan if it had been properly authenticated, but wanting the formalities required by law in a will not holograph of a testator, it has not been founded upon by the Appellants, and must be left out of the question.

Upon the death of Miss Morgan, Mr. Donald Lindsay was appointed *curator bonis*, and continued to discharge the duties of that office till John Morgan's death. Upon this event happening, a search was made amongst his papers, and the other half of the sheet of paper which had been in Miss Morgan's repositories was found amongst Morgan's papers. It contained

(*a*) See *suprà*, p. 135 bottom, and p. 136. (*b*) See *suprà*, p. 139.

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Lord Chancellor's opinion.

writings of various dates, beginning with the 18th November 1840, and ending with the 25th August 1846 (*a*).

Facsimile copies of these writings have been printed with the Appellant's case, and upon the character and effect of them the questions arise.

I think there can be no doubt that the two half sheets which were found, one with the sister's papers and one with John Morgan's, formed one entire sheet at the time when the writing of the 10th October 1842 was made, because Morgan writes, "I hereby annul all hitherto written on the 1st, 2nd, and 3rd pages of this."

Of the period when the sheet of paper was divided there is no evidence, nor when the portions of the writing of the 4th January 1836 were obliterated and it was brought into the state which it now exhibits. The half sheet which was kept by John Morgan was employed by him from time to time for the purpose of writing down his intentions with respect to his property.

On the 10th October 1842, after anulling all that he had previously written, he expresses a wish to establish in the town of Dundee "an hospital strictly in size, the management of the interior of said hospital in every way as Heriot's Hospital in Edinburgh is conducted, the inhabitants born aud educated in Dundee to have the preference of the towns of Forfar, Arbroath, and Montrose, but inhabitants of any other county or town are excluded." On the 20th October (ten days afterwards) his intention appears to have undergone a change, and he proposes that the structure of

(*a*) See *suprà*, p. 137. The documents found in the repositories of John Morgan begin at the top of p. 137, and close at the bottom of p. 138, *suprà*.

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the house should be less than that of Heriot's Hospital, and that it should contain 100 boys instead of 180 boys. And at some time, but when does not appear, he struck out from the writing of the 10th October 1842 the words "an hospital strictly in size, the management of the interior of said hospital in every way as Heriot's Hospital in Edinburgh is conducted," and the words in the writing of the 20th October 1842, "and the structure of the house to be less than that of Heriot's Hospital," and the writings in this state were presented for judicial consideration.

It seems to be conceded that the writings, if they had remained in their original condition, would have been probative and testamentary. But it was contended, on the part of the Respondents, that the writing of the 10th October 1842, having been purposely and deliberately deleted in a substantial part, it has become incapable of any intelligible meaning; that to restore the deleted expressions would be acting contrary to the intention of the testator, and that therefore the writing of the 10th October 1842, is to be read as if the words "an hospital" had never formed any part of it. And it was further contended that the writing of the 20th October 1842, even coupled with what is left of that of the 10th October, has no effect; because, although it implies that Morgan by a former writing had expressed some wish respecting an hospital at Dundee, no such former writing is to be found, the deletion leaving the writing of the 10th October a blank as to the hospital.

It is unnecessary for your Lordships to consider the doctrine of the law of Scotland with respect to erasures, interlineations, and obliterations generally, or the passages from Stair (*a*), from Erskine (*b*), and from

(*a*) B. 4, t. 42, s. 19. (*b*) B. 3, t. 2, s. 20.

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Menzies (*a*), or the case of *Grant and Shepherd* (*b*), which bear upon this subject, and which were cited in the course of the argument, because it is agreed on both sides that any such alterations *in substantialibus* in an instrument not holograph, but written *in manu aliena*, are fatal to it on the ground that they are presumed to have been made after its execution.

It was also conceded that there is a distinction with respect to holograph writings, that they are regarded as privileged, and that much of the doctrine as to erasures and interlineations is inapplicable to them. And this distinction is very well put by Lord *Mackenzie* in the case of *Robertson* v. *Ogilvie's Trustees* (*c*).

It was, however, argued, on the part of the Respondents, that the principle applicable to holograph writings is to give effect to every word and syllable which is written, and that it follows from this principle that you must give equal effect to obliterations. There is, however, an obvious distinction between what is written and what is obliterated, that the former must have been an intentional act, the latter may have been accidental (*d*). I put the question in the course of the argument, whether it was to be assumed that every

Between what is written and what is obliterated there is this distinction, namely, that what is written must have been intentional, while what is obliterated may have been accidental.

(*a*) Menzies' Lectures, pp. 123, 124.

(*b*) 6 Bell's App. Ca. 153.

(*c*) 7 New Ser. 242.

(*d*) Lord Mansfield, 1 Cowp. 52, says : " If a man were to throw the ink upon his will instead of the sand, though it might be a complete defacing of the instrument, it would be no cancelling ; or, suppose a man having two wills of different dates by him, should direct the former to be cancelled, and through mistake the person should cancel the latter, such an act would be no revocation of the last will ; or, suppose a man, having a will consisting of two parts, throws one unintentionally into the fire, where it is burnt, it would be no revocation of the devises contained in such part. It is the intention, therefore, that must govern." So, per Dr. Lushington, in *Brooke* v. *Kent*, 3 Moore's P.C.C. 349, " burning or tearing a will without intention could not revoke the instrument, or any part."

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deletion was deliberately made? and as I understood the answer, it was admitted to be a fact to be ascertained by evidence, which appears to me to be the more reasonable and correct view. If the mere existence of obliteration is not conclusive, then, upon the face of the writing of the 10th October 1842, there is strong ground for presuming that the deletion of the words "an hospital" was purely accidental (*a*).

Whatever opinion, however, may be formed upon this question seems to me to be not very material, because if your Lordships were to take the two writings of the 10th October and the 20th October together(*a*), and without the deleted words, you would probably think that sufficient remains to indicate without doubt the intention of the testator. The bequest to be gathered from the two papers, reading them in the state in which they actually appear, is to establish in the town of Dundee an hospital to contain 100 boys, the inhabitants born and educated in the town of Dundee to have the preference.

This being the form and nature of the bequest, the only remaining question which arises is, whether, according to the law of Scotland with respect to charities, it is a good and valid bequest, or whether (as the Respondents contend) it is void for uncertainty? From the view of the case which was taken by the learned Judges of the Court of Session, they considered it unnecessary to enter upon this question, and your Lordships are therefore deprived of the advantage of their judgment upon it. This would be the more to be regretted if there were a principle applicable to the construction of charitable bequests which was peculiar to Scotland. But, after attending carefully to the arguments of Counsel, and examining the authorities which they have adduced,

(*a*) See *suprà*, p. 137.

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I cannot discover that there is any great dissimilarity between the law of Scotland and the law of England with respect to charities. Of course, the circumstance of the Mortmain Act (*a*) not extending to Scotland, must produce a difference in the decisions of the Courts of the two countries where the bequest is affected by the operation of that Act.

In this respect there is not much difference between the law of Scotland and that of England.

In the case of *Hill* v. *Burns* (*b*), Lord *Gifford* stated that the law of Scotland was more liberal in the interpretation of bequests for charitable purposes than other bequests, which is certainly true of the law of England. And Lord *Lyndhurst*, in *Crichton* v. *Grierson* (*c*), said "that the law of England is more strict as to charitable purposes than the law of Scotland." A case, however, was mentioned at the bar of *Ewen* v. *Provost of Montrose* (*d*), which was decided in this House, in which effect was refused to a charitable bequest in Scotland which would clearly have been considered valid by the Courts of this country. That was a gift of a sum of 6,000*l.* to the magistrates and town council and the ministers or clergymen of Montrose, for the purpose of founding and establishing an hospital in that town, similar to Robert Gordon's Hospital in Aberdeen, for the maintenance, clothing, and education of the youthful sons and grandsons of decayed and indigent burgesses, if guild and craftsmen burgesses of the said town of Montrose; so that, to use the language of the *Lord Ordinary* in that case, "the amount of the legacy to be paid by the trustees was clear and certain; the persons who were to reap the benefit were distinctly specified; and the nature and quality of the maintenance, clothing, education, and apprentice fees which

***Ewen* v. *Provost of Montrose*, decided by the House of Lords on the advice of Lord Wynford alone, characterized by the Lord Chancellor.**

(*a*) 9 Geo. 2. c. 36.
(*b*) 2 Wils. & Shaw, 80,
(*c*) 3 Wils. & Shaw, 336.
(*d*) 4 Wils. & Shaw. 346.

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they were to receive were fixed by reference to another hospital to which the new one was in all respects to be similar." But the settlor having afterwards given the residue of his property, heritable and moveable, in the same way, and having directed the sum of 6,000*l.* and the residue to accumulate until the principal sums, with accumulated interest, should amount to the sum of sterling, and then to be employed in the erecting and maintaining the hospital, and for the maintenance, clothing, and education of boys of the description above mentioned, Lord *Wynford*, who alone heard the appeal, and advised the House, expressed his opinion that in consequence of the blank in the amount to which the sum was to accumulate, and also as to the number of the boys, the deed was void on the ground that it was too uncertain to be carried into execution. There can be little doubt that a bequest of this character in an English will would have received a much more favourable construction. And your Lordships will probably think that Ewen and the Provost of Montrose can only be urged as an authority where the circumstances of the case to which it is sought to be applied are precisely similar to the circumstances of that case.

The construction of charitable bequests ought to be liberal and benignant.

Taking, then, as our guide the principle of a benignant construction of charitable bequests, let us see whether there is to be found in the language of the testator an intention manifested with sufficient certainty to enable it to be carried into effect. Now, in the first place there can be no doubt that it was the testator's general intention to establish an hospital in the town of Dundee for 100 boys; the term "hospital" being a term in common use in Scotland for a school or place of education. So far, therefore, there is no uncertainty.

But it is said, on the part of the Respondents, that

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the mere *wish* to establish an hospital for a certain number of boys is so indefinite and uncertain that it is impossible to carry it out without the danger of defeating instead of effectuating the testator's intention. That it is at the best but the indication of a mere floating desire, not of any former and settled determination. But the expression of a wish by a testator that his property should be applied to a particular object amounts to a bequest for that object; and the language of this will appears to convey with sufficient certainty what the testator desired should be carried into effect. The words "establish an hospital" must, I think, be taken to express an intention that a building should be provided, which seems to have been assumed as the meaning of the word "establish" in the case of the *Attorney-General* v. *Williams* (*a*).

The mere expression by the testator of a *wish* to establish an hospital is equivalent to the expression of a *will* to establish an hospital.

But then it is said that there is nothing to indicate the class of boys for which the hospital was to be provided, nor anything to lead to any conclusion as to whether they were to be merely educated, or to be also boarded and lodged. Now, as to the class of boys, they were described with sufficient precision by reference to the inhabitants born and educated in Dundee and the other three towns, by which I understand, not the persons themselves who were residents, and who had been born and educated there, but the sons of such persons; a qualification which, though it might embrace inhabitants of different stations and degrees in society, is yet sufficiently definite to admit of a clear and certain application. Nor can I entertain any doubt of the intention of the testator that the children should be maintained as well as educated, because they were not to be confined to the town of

(*a*) 9 Cox, 387; 4 Bro. C. C. 526.

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Dundee, but were expected by him to come from other and distant towns, and would require therefore to be lodged and fed in the intended hospital. There may be some doubt whether they were also meant to be clothed. But any uncertainty as to these minor details would not have the effect of defeating his main purpose any more than his silence as to the description and character of the education which was to be provided for them.

But it was strongly urged upon your Lordships in the course of the argument, that the tèstator had not specified any certain sum, nor furnished any means for rendering certain how much was to be applied to the establishment of the hospital. Upon this subject your Lordships were pressed with the authority of cases where bequests to charities were held to be void on the ground of the amount of the fund to be appropriated to answer the bequest not having been specified by the testator, and not being ascertainable.

Such was the case of *Chapman* v. *Brown* (*a*), which was a bequest of the rest and residue of the estate and effects of a testator, "for the purpose of building or purchasing a chapel for the service of Almighty God; and if any surplus should remain from the purchasing or building the same, she requested that it might go towards the support of a faithful Gospel minister, not to exceed the sum of 20*l.* a year; and if after that any further overplus should remain, she desired that the same might be laid out in such charitable uses as her executors should think proper." The bequest for building or purchasing the chapel was held to be void, as being within the Statute of Mortmain. Then it was contended that the bequest of the residue, being dependent upon the former, must

(*a*) 6 Ves. 404.

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likewise fail; but the *Master of the Rolls* (Sir William Grant) said that, "Standing by itself, a bequest of a residue to be employed in such charitable purposes as the executor shall think proper is a good bequest." But then he held that the bequest of the residue was void, because it was impossible to ascertain how much would remain after taking out what was required for the chapel, the testatrix having given no grounds to ascertain what kind of chapel or what locality. And he added: "If she had even pointed out any particular place, that might have furnished some ground of inquiry as to what size would be sufficient for the congregation to be expected there; but this is so entirely indefinite that it is quite uncertain what the residue would have been, and therefore it is void for that uncertainty." This case was followed by Sir *Thomas Plumer*, in the *Attorney-General* v. *Hinxman* (*a*).

In the case of *Mitford* v. *Reynolds* (*b*), which was a similar case of a bequest of a residue, after directing the executors to purchase and prepare, for the ultimate deposit of the testator's body, and for the removal and deposit of the remains of his parents and sister, the mount that is contiguous to the churchyard of Chipping Ongar, in Essex, on the summit of which they were to cause the construction of a suitable and handsome as well as durable monument, it was contended, on the authority of the former cases, that the bequest of the residue was void, because the sum to be applied to construct the monument was impossible to be ascertained, as the testator had given no description of the sort of monument which he desired. But the *Lord Chancellor* (*c*) said: "The

(*a*) 2 Jac. & W. 270. (*b*) 1 Phil. 185.

(*c*) Lord Lyndhurst.

difficulties which existed in the case of *Chapman* v. *Brown* have no existence, as it appears to me, in the present instance. The place is defined, the very spot is pointed out, and the extent required for the purchase. The monument is to contain the body of the testator, and the bodies of his two parents, and of his sister. The proper size of it therefore is easily ascertained."

These observations of the *Lord Chancellor* seem to be closely applicable to this case. Here the place of the hospital is defined,—the town of Dundee. The size also of the hospital can be easily ascertained, as it is to be for 100 boys, and there would be no difficulty, therefore, in applying the testator's property, not to a mere vague and indefinite object, but to one expressed with sufficient certainty to be capable of being carried out. To this object it appears to me that it was the intention of the testator to devote the whole of his property, or such a competent part of it as might be sufficient for the purpose. He having then intimated his wish to devote his property to the establishing an hospital, every subsequent writing of the testator, upon the same half sheet of paper, is to a certain extent a confirmation of the previous charitable bequest. It amounts to a declaration that the fund which he had appropriated to that purpose is to be subject to a reduction to the amount of the legacies, and the first of them, after those which relate to the hospital, had an express reference to this appropriation of his property by its commencing with the words "I further wish."

I am therefore of opinion that the writings, being probative and testamentary, they contain a good and effectual expression of a wish to establish in Dundee an hospital to accommodate 100 boys, and I must therefore recommend your Lordships to reverse the

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interlocutors appealed from, and to make a declaration in the terms of the summons of declarator, and to remit the case to the Court of Session to proceed in framing a scheme upon which this hospital may be established.

Lord Cranworth's opinion.

Lord CRANWORTH:

My noble and learned friend has gone through this case so clearly and so fully that I do not know that I should feel myself bound to do more than to express my assent to the view which he has taken. But that it may not appear as if a case of such importance had not been duly attended to, I will add to what he has stated, the very clear and short process of reasoning by which I have arrived at the same result.

There are, in fact, two points which have to be decided; first of all, whether there is anything which can be described as a completed testamentary instrument of this testator; and, secondly, whether the directions, if any, contained in that instrument are sufficiently certain to be capable of being carried into effect.

The learned Judges below proceeded evidently, at least the majority of them, upon the ground that these instruments were altogether of so loose and uncertain a character, that they did not amount to anything like a deed that could be acted upon as expressing the ultimate will of the testator. I observe the *Lord Justice Clerk* says:—"I confess my notion of the whole case is, that these papers must be taken as mere scrolls or jottings, from which the deceased intended at some time or another to have a settlement made up, but I think there is no valid or effectual writing that the Court can recognize." Lord *Murray* says:—"For my part, I can see nothing more in

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these writings than a variety of jottings, showing that various ideas had been passing through Mr. Morgan's head about an hospital, about the number of boys to be admitted into it, and so forth." That is, that it did not amount to any valid expression of concluded intention.

My Lords, I take it that, whether an instrument is or is not to be regarded as a final declaration of the intention of the testator unless afterwards altered, is now, according to the law of Scotland, a question to be decided very much in the same way as the question would have had to be decided in this country before the passing of the Wills Act (*a*). And looking at these papers, what we are called upon to say is, whether or not we are satisfied that the testator intended them to be operative, unless he should afterwards, by some formal instrument, express an intention otherwise.

Now, that these instruments were intended to be the final expression of his intention, unless altered afterwards, appears to me, *ex facie* of the instruments, to be reasonably clear. I infer that, mainly though not entirely, from what happened with reference to the very first of these instruments (*b*). I put out of the question those portions which are entirely erased. Whether the portions erased are to be regarded or not is immaterial, because he begins the instrument made on the 10th of October by annulling all that had been hitherto written. Therefore with that we start as with a sort of *tabula rasa*. The language he uses is this:—"Edinburgh, 10th October 1842. I hereby annul all hitherto written on the first, second, and third pages

(*a*) 1 Vict. c. 26 (1837).

(*b*) His Lordship here refers to the writing of the 10th October 1842, *suprà*, p. 137.

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of this, and wish to establish in the town of Dundee, in the shire of Forfar" (I read it without the erased words), "the inhabitants born and educated in Dundee to have the preference of the towns of Forfar, Arbroath, and Montrose, but inhabitants of any other county or town are excluded." Did he mean that that was something that was to take effect if he did not afterwards alter it, or merely as a memorandum of something that he would afterwards do? It appears to me that this is put beyond all reasonable doubt by this fact, that in the second line he had originally written—"I hereby annul all hitherto on the first, second, and third pages." He thought that was not sufficiently certain, and therefore he inserted the word "written" after the word "hitherto," so that it now reads,—"all hitherto written on the first, second, and third pages." But that is not all, for he notices on the side, with his initials above and below it, that he had inserted the word "written" there. What could the object of that be, if this was merely to be "jottings" or "scrolls," to remind himself hereafter of what he was to do? There was no use in his noticing in the margin that that interlineation had been made with his approbation. It seems to me to admit of no other construction than that that was written for the purpose of showing to those who might have to act upon this instrument that the word "written" had been inserted by him, although it appeared in the shape of an interlineation.

That so clearly shows that these were intended to be final instruments, that I do not advert to a number of other *indicia* which also appear to me to point to the same conclusion. I allude in part to the scratching out entirely the second paper (*a*), which evidently was done after his sister had died. He

(*a*) *Suprà*, p. 137.

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had directed a gentleman, whom he named, to be the judicial factor. But that was not to take effect during the life of his sister. Then his sister having died afterwards, no doubt upon her death he scratched all that out. It was idle for him to do that as a mere memorandum for himself, because he, of course, knew perfectly well that the death of his sister had made that direction unnecessary. An observation to the same effect occurs on the fourth paper, but I do not think it necessary to advert to it.

Therefore I come clearly to the conclusion that these were intended to be final instruments, expressive of his will, unless by some valid subsequent instrument he should otherwise express or in any manner qualify it.

That being so, the only remaining question is, whether upon the face of this instrument, if you call it one, or these instruments, if you call them several instruments, you can collect a certain lawful intention as to the mode in which the property of this testator was to be disposed of? Now, the first argument of the Respondents was that there was nothing to show what it was that the testator wished to establish, because the words following the direction "to establish" in the first deed, or instrument (as we call it), have been struck out, so as to leave it uncertain what it was that was to be established. He expresses his "wish to establish in the town of Dundee, in the shire of Forfar," (I am leaving out the words that are struck out), "the inhabitants born and educated in Dundee to have the preference of the towns of Forfar, Arbroath, and Montrose, but inhabitants of any other county or town are excluded." Then on the 20th October he adds, "I hereby wish only one hundred boys to be admitted in the hospital of Dundee." No doubt we see, we cannot shut our eyes to that, that in truth the word that had been written had been the

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word "hospital," and here are certain other directions assimilating this to Heriot's Hospital.

I do not think it necessary to go into the question, whether we are or are not at liberty to look at the erased words? I should rather call them the words over which the pen has been drawn, for they are left perfectly and easily legible. My strong opinion is, that we should be at liberty, if it were necessary, to look at them, for the purpose of seeing what the writer had at one time intended. But I give no positive opinion on that subject, because, taking it in the most unfavourable way for the Appellants, we certainly are at liberty to look at the whole of that which remains unerased in the first instrument, coupled with that which remains unerased in the third instrument. And taking the two together, it is manifest that the word that must be supplied in the first is the word "hospital," because, in the first instrument, he directs something to be established in Dundee, not saying what, and the inhabitants of that town are to have certain preferences, and then, in the subsequent instrument, he says that he wishes "only 100 boys to be admitted in the hospital at Dundee, and to contain one hundred boys in place of one hundred and eighty boys." It is obvious that if there had been no erasure at all, if it had been written originally without the erased words, you must have supplied the word "hospital," connecting the first instrument with the third, because otherwise there would be no rational meaning to be collected from the two taken together.

Per Lord Cranworth:— We are at liberty to look at the erased words; by which I mean the words over which the pen has been drawn; for they are left perfectly and easily legible. My strong opinion is that we may look at them for the purpose of seeing what the writer had at one time intended.

Therefore I think that this is a valid expression of a wish that there should be established at Dundee an hospital for 100 boys. Then I need not go over again the principle of law, which my noble and learned friend has stated very clearly. If a testator expresses a wish for something to be done, which can be done

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out of his assets, it is in truth a direction that it shall be done. Whether it amounts to an actual gift to some persons who are trustees for doing it, or whether it is the expression of a wish which is binding upon those who but for that expression would have taken his property, is unimportant. It amounts in all respects to a bequest or direction that his assets shall be so applied.

Then, what does this testator direct to be done? It is as if he had said, I direct that an hospital shall be established at Dundee, to contain 100 boys, and inhabitants born and educated, and so on, are to have a certain preference. An hospital for boys certainly means a school at which boys are to be instructed. But it evidently means something more than that, as has been pointed out by my noble and learned friend. It must be intended that a building is to be erected or procured in which boys may be lodged, because boys are to be there educated, some of whom might come from distant towns, Forfar, Arbroath, and Montrose. What the distance of those towns from Dundee is I do not know. I am not sufficiently acquainted with the geography of that part of the country to be able to say. But it is obvious that the testator could not mean that those boys were to come to Dundee day by day, therefore they must be lodged there. And I should come to the same conclusion from the expression in the third instrument, which says that it is to contain 100 boys. It was obviously therefore to be a place in which the boys were to be lodged. But if they were to be lodged, they must be maintained. Children cannot come to a place and be lodged without being maintained, therefore it appears to me that this is a direction that an eleemosynary establishment should be made at Dundee for the education and maintenance of 100 boys, with a certain preference for the children

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of inhabitants born and educated in Dundee over those other towns, and if there should not be enough from any of those towns, then to that exent the charity would fail.

Now, is this a sufficiently definite direction to be carried into effect? My Lords, I think it is; I do not say that I have not had doubts arise in my mind in the course of the argument; but I think we collect the place where the hospital is to be erected; and we also collect the object of it, an education coupled with maintenance during the time of education. Then the class of persons. That is to a certain degree no doubt vague, but it must be a class from those three or four provincial towns who would be reasonably supposed to seek the benefits of a gratuitous education. I think that is sufficiently certain.

There has always been a latitude allowed to charitable bequests, so that when the general intention is indicated, the Court will find the means of carrying the details into operation.

There has always been a latitude allowed to chari table bequests, so that when the general intention is pretty clearly indicated, the Court will work out the details.

Then the hospital is to be "established." What does that mean? It means not only that the building is to be founded, and that the children are to come there, but that there must be sufficient masters and instructors provided, and others to take care of the institution, sufficient for the wants of that class of persons who would be likely to take the benefit of it. That being so, the object is defined. And although the sum to be devoted to it is not mentioned, I think the Court must find out what the proper sum is by seeing what it would cost to establish such an institution, with a reasonable remuneration to the instructors, and sufficient means for keeping it in operation. If that sum exhausts the whole of his assets, then I do not say that that would exclude the entire of the other legatees; it will then come in as a legacy with the

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other legacies. If it does not exhaust the whole, then the surplus is undisposed of. But it appears to me that you have now elements of certainty sufficient to enable this intention to be carried into effect, and therefore that the interlocutors which treat this either as impossible to be carried into effect, or as never having been indicated by reason of the want of any definite and decided declaration of the testator's intention, are wrong; consequently those interlocutors must be reversed; and, as has been suggested by my noble and learned friend, the case must be remitted to the Court of Session, with a declaration that this is a valid bequest for this object. I apprehend we are not in a condition to do more than so to remit the case, because what the state of the assets may be, or what may be the amount that may be necessary for this object, are matters as to which we are uninformed; but I think that with this declaration the Court below can have no difficulty in carrying the testator's intention into operation.

Lord Wensleydale's opinion.

Lord WENSLEYDALE:

My Lords, the question in this appeal, which was argued most ably on both sides a few days ago, is, whether certain papers signed by the alleged testator, John Morgan, one dated the 10th of October 1842, the other the 20th, were testamentary, and constituted a valid disposition of the whole or part of the property of the deceased? There appears to be no question as to the third paper, that of the 6th September 1846 which, as all the Judges properly held, is clearly improbative. It is equally clear that the prior papers were annulled by that of the 10th October 1842.

That these two above-mentioned papers were testamentary, in the sense that they were meant to operate only after death, was not disputed on either

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side, on the argument at your Lordships' bar. Of that there can be no doubt.

On the argument in the Court of Sessions, it seems to have been thought by some of the learned Judges that these papers expressed no completed intention on the part of the deceased, but were merely "scrawls" or "jottings," deliberative and not final, and so in that sense not testamentary. But that objection to giving effect to these papers was not urged on the part of the Respondents at the bar, indeed it could not be, for the papers bore the formal signature of the deceased, and appear clearly to contain the expression of a final purpose. Both these papers are holograph, written, every part, and signed, by the testator, and though they are in part deleted, it is not disputed that all that remains is probative.

But then it insisted, on the part of the Respondents, that the bequest contained in these two papers, as they now stand, is so uncertain, that it cannot be carried into effect; that it is not a valid or effectual disposition, as affecting the succession, and is therefore void, and this is the main argument on the part of the Respondents. The uncertainty is said to be in the subject of the bequest, it being impossible to say how much was thereby bequeathed.

On the part of the Appellants, it is contended that there is no such uncertainty as to invalidate the bequest; first, because the whole estate of the testator was intended to be bequeathed for the purpose therein mentioned; secondly, because so much, at least, as would be sufficient to build and establish a hospital for certain purposes was bequeathed, and that amount was capable of being ascertained with reasonable certainty, and therefore the bequest was valid.

As to the first alleged ground for holding the bequest not to be void, I may say that there is little

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doubt, that the deceased intended by the two testamentary papers, to dispose of the whole of his property, after the death of his sister, for the purpose of establishing an hospital, inasmuch as he revoked his previous bequests, apparently extending to all his property, and directed one to be made which would cost probably, and certainly if made in imitation of Heriot's Hospital, his whole fortune. But the question is, as in all cases of the construction of written instruments, not what he intended to do, but what is the meaning of that which he has actually written and suffered to remain unobliterated. It is in this sense only that we can inquire what his intention was, and I think that there are no words to convey the whole of his estate. What is bequeathed is, in substance, what shall be sufficient to accomplish the objects stated in the testamentary papers after the parts obliterated are left out, and the question is, whether there is a reasonable degree of certainty in the description, so as to enable the Court to decide how much money is to be applied, in the absence of any provision giving the executor or judicial factor, or any other person, a discretion on the subject, for that would have cured the uncertainty.

'The question is not what the testator intended to do, but what is the meaning of that which he has actually written, and suffered to remain unobliterated.

I have had very considerable doubt in making up my mind on this question. It depends wholly on the meaning of the words undeleted by him. Whatever has been purposely deleted is undoubtedly deprived of all testamentary effect, and it is the opinion of some of the Judges of the Second Division, the *Lord Justice Clerk*, Lord *Wood*, and Lord *Cowan*, that the deletion of the word "hospital," in the first instrument of the 10th of October 1842, destroys the effect of that instrument altogether, for it leaves it quite uncertain what the building or institution to be established was, and that the testamentary instrument of the 20th of

Whatever has been purposely deleted is undoubtedlydeprived of all testamentary effect.

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October did not supply the defect. It seems by no means improbable, on inspecting the instrument of the 10th of October, that the word "hospital" was obliterated by mistake. The perpendicular line (*a*) seems to have gone further than the writer had intended, and he has rubbed out the end of it, and it seems very likely that a similar mistake has been made at the commencement of the horizontal line, including the word "hospital." We do not know the time the deletions took place. If before he signed the paper, or on or after the 10th of October and before the 20th, he had determined that no hospital should be established, one should think he would not have signed, or if already signed, he would have cancelled the instrument altogether, as he has done in the case of other instruments of the same date, for the provisions as to the establishment and the selection of objects depended entirely upon the erection of a hospital, and were perfectly useless, if he had determined there should not be any hospital at all. These provisions he has left standing. The deletion of the word "hospital," on that supposition, was therefore very probably a mistake. If the alterations were made after the 20th of October, it is singular that he should purposely have obliterated the word "hospital" in the first instrument, that of October the 10th, and retained it in the second, that of October the 20th. I am inclined, therefore, to come to the conclusion that this word was not purposely, but accidentally deleted, and therefore is still to be read as part of the will.

Be this as it may, it seems to me that the introduction of the words "the hospital" into the instrument of the 20th of October, written on the same

(*a*) See *suprà*, p. 137.

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sheet, supplies the defect; and reading together the two instruments, the will of the deceased is abundantly clear that there should be *established* an "hospital" in Dundee for boys, the inhabitants of Dundee to have a preference over those of Forfar, Arbroath, and Montrose, and that the hospital was to contain 100 boys. The word "hospital," according to the meaning of the word (I believe in Scotland it has a more definite meaning), as given by Johnson, Webster, and Richardson, means a building for the reception of the sick and others, who are poor. Poverty seems to be one of the conditions in the general understanding of the word. It is quite clear that this institution was not to be an hospital for the sick, for it is not stated to be for sick boys. If the boys were to be received there, it must be intended that they were to be instructed. It was not the mere instruction of boys, for (or as both my learned and noble friends have observed) boys from distant places, Forfar, Arbroath, and Montrose, were to be received, who must necessarily be boarded and lodged. From the use of the word "hospital," which is certainly connected with the relief in some way of the poor, it may be collected that they were to be supplied with necessaries, clothing included; and finally, as this bequest was for the *establishment* of the hospital, there must not only be buildings, but an endowment.

I doubt whether any further effect can be given to what the testator has written, and suffered to remain undeleted, by referring to the part deleted. Unquestionably that part cannot be referred to, as having any testamentary operation; but, on the other hand, it is equally certain that it may be used to show, what the testator knew when he wrote it, and also what

Although such part of the instrument as is deleted cannot have any testamentary operation, it may be used to show what the testator knew when he wrote it, and also what was his will at the time, though he has since revoked it.

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was his will at the time, though he has since revoked it. He knew then that there was an hospital called "Heriot's Hospital," and he once intended that his hospital should be of the same size, and have its internal management exactly like it; but he altered that intention as to the capacity of it, and this explains why he directed 100 boys to be received instead of 180, which Heriot's Hospital contained; and it is highly probable that his intention was that his hospital should be like Heriot's in other respects, not the same size, nor necessarily a less structure, but to include 100 boys only. But the true question is, what is the meaning of what he has actually written and suffered to remain undeleted, and I cannot come to the conclusion, that he has written and left unaltered, any more than that it should be an hospital established and endowed for the education and maintenance of 100 boys. The similarity to Heriot's Hospital in every respect he no longer directed, and he has not stated in what it was to resemble it. Therefore the question is, whether, so reading it, there is sufficient certainty in the bequest to make the legacy valid, and to ascertain the sum to be taken out of the succession; and the objection applies equally, as it seems to me, whether the object is charitable or not; it is the uncertainty of the subject or *quantum* of the legacy which constitutes the objection; and if the objection is well founded, it is not removed by the consideration that the legacy is charitable. When the certainty of the sum is ascertained, as the bequest is charitable, the particular mode of applying it must be determined on the principle which regulates the Court in the case of charitable bequests.

Many cases were cited of decisions of the English and Scotch Courts of legacies void on this ground;

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and I believe the law on this subject in both countries as to legacies to individuals is identical, and it is so admitted in the Respondent's case (page 27).

Where the subject is an indefinite quantity of an article, or money without any means of ascertaining it, the gift is void. Thus, in *Peck* v. *Halsey* (*a*), it was held that the devise of "some of the best of my linen was uncertain." The *Master of the Rolls* (Sir Joseph Jekyll) said "the best of my linen is uncertain; *some* of the best of my linen is more uncertain still. If it were such, or so much of, my best linen as the legatees should choose, or as my executors should choose for them, this would be good, and by the choice of the legatees or executors is reducible to a certainty; but in this case it is merely void for the uncertainty."

So of a bequest of a "handsome" gratuity to the executors (*b*); for there is no criterion for ascertaining what the amount of the gratuity should be.

But if the will furnishes a sufficient ground to estimate the amount bequeathed, the legacy is valid. Thus, if it is to be a compensation for services or trouble, though the sum is undefined, the service or trouble affords a criterion, and the bequest is good, as in *Jackson* v. *Hamilton* (*c*), where the testator directed that the trustees should receive a reasonable sum of money to remunerate them for their trouble in carrying into effect the trusts of the will, and the amount was referred to the Master.

So in the case of *Broad* v. *Bevan* (*d*), the testator having made a bequest of 5*l.* per annum to his daughter Ann, with an order and direction to his son Joseph, to whom he left the residue of his estate,

(*a*) 2 Peere Wms. 387. (*b*) *Jubber* v. *Jubber*, 9 Sim. 503.
(*c*) 3 Jones & Lat. 702; cor. Lord St. Leonards.
(*d*) 1 Russ. 511.

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real and personal, and whom he made sole executor, to take care of and provide for his daughter during life, the *Master of the Rolls* (Sir T. Plumer) held that this expression of his desire gave her a right to provision, and he left the amount to be settled by the Master. From the observation of Lord *Gifford* on this case, in that of *Abraham* v. *Alman* (*a*), it seems doubtful whether his Lordship approved of this case, though he distinguished it from that under his consideration.

In the case of *Foley* v. *Parry* (*b*), a direction to the devisee for life of his estates, and to another, to superintend and take care of the education of a person named, so as to fit him for *any* respectable profession or employment, was held to entitle that person to be educated and maintained, and the amount was left to be ascertained by the Master.

The case of *Kelvington* v. *Gray* (*c*), was a similar case. It is difficult to say that this direction is not as uncertain as the one now under consideration.

The case of *Ewen* v. *Magistrates of Montrose* (*d*), decided by the House of Lords, on appeal from the Court of Session, was relied upon on the part of the Respondents. In that case the sum bequeathed was certain, namely 6,000*l*., and the Court of Session sustained the bequest. Your Lordships, following the advice of Lord *Wynford*, reversed the decision of the Court of Session, because the legacy was not to be applied to the object (the establishment of a hospital at Montrose) until the sum amounted to *l*., and it was thought that, as the sum was intended to be fixed by the testator, but never was fixed, the bequest was altogether uncertain and void. It seems to have been considered as a condition meant to be imposed

(*a*) 1 Russ. 516.
(*b*) 5 Sim. 138.
(*c*) 10 Sim. 293.
(*d*) 4 Wils. & Shaw, 346.

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by the testator, before the legacy was to operate that the sum was to be fixed, and the sum was never fixed. It is enough to say that there is no such condition in this case, nor are we to say whether that decision was right or not.

Upon the whole, I have, after much consideration of this case, arrived at the conclusion that, without the reference to Heriot's Hospital above noticed, the will furnishes a sufficient means of ascertaining the amount of the legacy. It is such a sum as will be reasonably sufficient to erect or buy a building, and establish an hospital, built in the common and ordinary manner of such buildings, for the maintenance and education of 100 boys, for the usual period that they are generally kept at schools, and with a reasonable provision for officers. The interlocutors therefore must be reversed, and it must be referred to the Court of Session to ascertain the amount necessary for carrying the charitable objects into effect, and having ascertained that amount, then they will know how to deal with the residue, if there is one. If it should turn out that the sum so ascertained will absorb nearly the whole of the succession, so as not to leave sufficient to answer the pecuniary legacies, the Court must give the proper directions as to the abatement of all the legacies, or if there is a surplus, then that will go to the next of kin. But it is necessary that the Court should first ascertain the amount that is proper to carry into effect that which we consider to be the clearly indicated intention of the testator.

The LORD CHANCELLOR: The interlocutors will be reversed, and the case must be remitted to the Court of Session, with a declaration that the testamentary writings in question contain a valid legacy and bequest of so much of the personal estate of the testator as is

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necessary to found an hospital in the town of Dundee to accommodate 100 boys. It may be necessary also to declare that an inquiry should be instituted as to the amount of the estate of John Morgan necessary for erecting and establishing in the town of Dundee an hospital to accommodate 100 boys, in fulfilment of the testamentary bequest and intention of the said John Morgan, and also that a scheme for the application and disposal of the fund should be framed by the authority of the Court of Session, and with these declarations the cause must be remitted to the Court of Session.

Mr. *Anderson*: Perhaps your Lordships will be good enough to allow us to see the draft of the judgment. It would be desirable that the declaration should be expressed very accurately, with the view of framing a scheme for carrying out the charitable bequest, and if the Clerk of the Parliaments will issue the draft, both the parties will see it.

The LORD CHANCELLOR: Yes.

Mr. *Anderson*: I understand that the Court below ordered the Appellants to pay the costs; we shall, of course, get back those costs from the Respondents.

The *Lord Advocate*: I submit to your Lordships that the Respondents ought to be allowed their costs of the appeal out of the estate.

Mr. *Anderson*: Perhaps your Lordships will reserve to the Court of Session to deal with the costs.

The LORD CHANCELLOR: I think the Respondents ought to have their costs. I do not see any reason why they should not have them.

Mr. *Anderson*: I submit that the best way will be for your Lordships to deal with the costs, and to allow both parties to have costs out of the estate.

Lord CRANWORTH: This is a case in which I think the testator is evidently the person who has caused all these costs.

Mr. *Anderson:* That rule applies as much to Scotch cases as to English. The question was before your Lordships two sessions ago, when all the authorities were considered, and your Lordships were of opinion that that principle should be applied.

Lord CRANWORTH: Certainly, that is a rational principle. If the testator leaves an instrument so loosely worded that the learned Judges below came to the opinion (though we do not concur with them in it) that it was not intended to express his final intention, it is quite reasonable that his estate should pay all the costs of the litigation.

The LORD CHANCELLOR: Yes, I think that is very reasonable.

Mr. *Anderson:* Then both parties will have their costs out of the estate, and our costs will be repaid.

The LORD CHANCELLOR: How were the costs below given?

Mr. *Anderson:* They were given against the Pursuers.

The *Lord Advocate:* It is not very difficult to explain that, because of the manner in which the Appellants have dealt with this case throughout. The estate was thrown into Court a great many years ago. The present Appellants were called upon to come forward and claim. They did not do so; they allowed a very serious litigation to go on between the parties claiming respectively as next of kin, and after all that litigation had occurred, they came forward at the eleventh hour.

Mr. *Anderson:* If it were at all material, I could give an answer to that statement.

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The LORD CHANCELLOR: I think they ought to have their costs back again.

The *Lord Advocate:* I do not object to that course.

Mr. *Anderson:* It will be necessary, in point of form, to ask for a reservation to the Court below to deal with all the costs below prior to the Appeal, because there is a question whether, unless there be such a reservation, the Court have any power to deal with the costs prior to the Appeal.

The LORD CHANCELLOR: With respect to the costs, we think that the costs here ought to be dealt with in this way,—that each party should have his costs here out of the estate. But with regard to the costs below, we think that they ought to be dealt with by the Court of Session.

Mr. *Anderson:* Except to repay the costs that we have already paid; we are to have those back.

Lord CRANWORTH: Yes, you are to have those back.

The formal Judgment of the House was in the following terms:

It is *Ordered* and *Adjudged*, That the Interlocutors, complained of in the said Appeal, be, and same are hereby reversed: And it is further *Ordered*, That the said Respondents do repay to the said Appellants the expenses to which the said Respondents were found entitled by the said Interlocutors appealed from, if they shall have been paid by the said Appellants: And it is further *Ordered*, That the costs in respect of this Appeal, incurred by the said Appellants, and by such of the Respondents as have answered the Appeal, be paid out of the estate the subject of this Appeal, the amount of such costs to be certified by the Clerk of the Parliaments: And it is *Declared*, That the testamentary writings left by the deceased John Morgan, and in the condescendence annexed to the summons mentioned, contain a valid legacy and bequest of so much of the personal estate of the said testator John Morgan as is necessary to found an hospital in the town of Dundee to accommodate one hundred boys: And it is further *Ordered*, That the Court of Session do make such Interlocutors and orders, and

give such directions as shall be necessary for the purposes following; (that is to say), for framing a scheme for establishing in the town of Dundee an hospital to contain one hundred boys, and lodging, maintaining, and educating them therein, in fulfilment of the testamentary bequest and intention of the said testator, and for inquiring into and ascertaining the amount of the estate of the said testator necessary for carrying into effect such scheme, and for applying the same accordingly, and also for adjudicating upon the expenses incurred in the Court below: And it is also further *Ordered*, That the cause be and is hereby remitted back to the Court of Session in Scotland, to do and proceed further therein as shall be just and consistent with this declaration and these directions and this judgment.

DODDS AND GREIG—RICHARDSON, LOCH, AND MCLAURIN.