

“ And it is further ordered, that the cause be re-
 “ mitted back to the Court of Session, to do there-
 “ upon as shall be just.”

July 12, 1813.

ENTAIL.

Agent for Appellant, MUNDELL.
 Agent for Respondent, BERRY.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

MUNRO and others—*Appellants*.

COURTS and others—*Respondents*.

TESTATOR executes a trust-deed of the whole of his property, and also a will in the English form, giving the whole of his property not situated in Scotland to the trustees, for the uses of the trust. The will proved in the English Ecclesiastical Court. Testator afterwards wishing to alter his settlement in regard to the personal or moveable property, writes and signs two papers, conceived in testamentary language, which he called his *codicil*; one of which he sends to his agent, with whom he was corresponding on the subject of the intended alteration, and lays up the other in his repositories. Testator dies before a more formal instrument is prepared, but no pretence that he was prevented by sudden death from executing it. The Court of Session decides that the paper sent to the agent was in itself testamentary; but this decision reversed on appeal.

July 3, 1813.

PAPER WRIT-
 TEN AND
 SIGNED BY
 TESTATOR,
 AND CON-
 CEIVED IN
 TESTAMENT-
 ARY LAN-
 GUAGE, HELD,
 UNDER THE
 CIRCUM-
 STANCES, NOT
 TO BE TESTA-
 MENTARY IN
 ITSELF.

SIR Hector Munro, of Novar, on the 30th Octo-
 ber, 1798, executed a deed of entail, and likewise
 a trust-deed of the same date, whereby he conveyed
 and made over the whole of his property, real and
 personal to the Respondents, (trustees,) in trust, to

Oct. 30, 1798.
 Settlement of
 Sir H. Munro,
 and will in
 English form,
 proved in the
 Ecclesiastical
 Court.

July 3, 1813.

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ITSELF.

1805. In-
tended altera-
tion in the
settlement.

complete the entail as therein pointed out, and to pay certain legacies to the Appellants, &c. Sir Hector also executed a will in the English form, of the same date, bearing reference to the trust deed, and bequeathing to the trustees, for the purposes of the trust, his whole property situated out of Scotland; and in 1798 and 1799, he made two codicils to his trust disposition. The will was proved by the trustees, or some of them, in the English Ecclesiastical Court.

In 1805 Sir Hector conceived the intention of making an alteration in his settlement, and wrote to his agent, who was then at Inverness, enclosing a paper stating the alterations he wished to be made, and which paper he called a codicil. A paper, called a duplicate of the paper in question, (though not in so perfect a state,) subscribed with Sir Hector's initials, was laid up by him in his repositories, with a memorandum referring to his settlement, then in the hands of his banker in London, and containing these words:—"Copy is sent to Charles M'Intosh, Esq." The paper sent to M'Intosh was subscribed with his name at full length. The chief question was, Whether this paper, sent to M'Intosh, was, or was not, under the circumstances, testamentary? To see distinctly the grounds on which the ultimate decision rested, it is necessary to have in view the paper itself, and the correspondence relating to it between Sir H. Munro and his agent.

Correspond-
ence between
Sir H. Munro
and his agent.

The letter, (21st Oct. 1805,) inclosing what was called the codicil, was as follows:—

“ As I do not find by your letter that it is certain
 “ you will be here, I send you the codicil I wish to
 “ be made to my last will and testament. The
 “ reason for my wishing as much land as possible
 “ to be purchased is, that I find the estate I can
 “ now leave is not sufficient to let the proprietor
 “ live as he should do, and keep up the place and
 “ improvements; and as to the alterations in the
 “ trustees, my worthy friend Provost M‘Intosh is
 “ now of such an advanced age, he would [not]
 “ long be one, and Mr. John Ogilvie has enough
 “ of his own affairs to mind, and could not attend
 “ much to mine, &c.”

July 8, 1813.

PAPER WRIT-
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 ITSELF.

Oct. 21, 1805.
 Sir Hector to
 Mr. M‘Intosh.

The paper was in these terms:—

“ *Novar House, 21st October, 1805.*

“ I wish a codicil to be made to my last will and
 “ settlement in the following manner:—

“ All the money I directed to be divided in differ-
 “ ent proportions, to such and such persons by
 “ name, after my debts were paid, and my be-
 “ queaths, &c. discharged; that is to say, whatever
 “ part of my personal estate was unappropriated,
 “ including whatever I might be entitled to receive
 “ from the Nabob of Arcot’s debt to me, I now re-
 “ voke, and make null and void by this codicil;
 “ and instead of applying such monies as above
 “ stated, it is now my will and pleasure, and I now
 “ direct, that what remains of my personal estate,
 “ together with the patrimony or portion I directed
 “ after my death to be given to my natural son
 “ Alexander Munro, who died in November, 1804,

Paper relied on
 by Respond-
 ents as testa-
 mentary.

July 3, 1813.

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“ at Bombay, shall be laid out by my trustees in
“ the purchase of lands as contiguous to any of my
“ estates of Novar, Culrain, or Muirtown, as pos-
“ sible, and entailed with the rest of my landed
“ property six months after the purchase is made,
“ and to be immediately afterwards put upon re-
“ cord; and if I have given, as a patrimony or
“ portion after my death, to my natural son Hugh
“ Munro more than 10,000*l.*, I revoke and recall
“ all the rest of the money, if any more is given to
“ him in my last will and settlement, and direct it
“ to be laid out in the purchase of lands, with the
“ rest of my unappropriated personal estate, as be-
“ fore mentioned, and to be entailed and put upon
“ the record in the same manner with the other
“ purchases to be made.

“ It is also my will and pleasure that the follow-
“ ing gentlemen shall be my trustees, and I desire
“ that such as were formerly named by me, and who
“ are not included in the following list, shall be left
“ out. Those now named by me are Thomas
“ Coutts, Esq., banker in the Strand, Edmund
“ Antrobus, Esq., Coutts Trotter, Esq., Edward
“ Majoribanks, Esq., partners of the banking-house
“ of Thomas Coutts, Esq., and Alexander Brodie,
“ Esq., of Arnhall; and that the directions I gave
“ to my former trustees may be followed by my
“ present ones in all respects, except as far as this
“ codicil may make any alteration necessary. It is
“ also my will and pleasure, that, if I have not
“ already, in my last will and settlement, left my
“ sister, Mrs. Ann Watson, 50*l.* sterling, yearly,
“ and 50*l.* sterling, yearly, to my sister, Betty

“ Munro, all the days of their life, including what
 “ they now receive from me; and the longest liver
 “ to have the 100*l.* sterling yearly all the days of
 “ her life. It is also my will and pleasure, that
 “ those who are my house servants at the time of
 “ my death may receive a year’s wages, exclusive of
 “ the year’s wages current and running; and if my
 “ own servant, Donald Aird, shall be in my service
 “ at the time of my death, it is also my will and
 “ pleasure that he shall have his yearly wages all
 “ the days of his life; and if my present grieve,
 “ Donald Allan, and my present gardener, George
 “ Munro, and my present house-carpenter, Hugh
 “ M’Lean, are in my service at the time of my
 “ death, I leave and bequeath to each of them 100*l.*
 “ sterling.

(Signed) “ HECTOR MUNRO.”

Before this letter and its enclosure arrived at In-
 verness, Mr. M’Intosh had set out on a visit to Sir
 Hector Munro. Upon his return to Inverness, he
 wrote Sir Hector the following letter, enclosing the
 scroll to which it referred :—

“ I sincerely wish this may find you better than
 “ when I left you yesterday morning. I, immedi-
 “ ately upon my arrival here, sat down to peruse
 “ your letter, and memorandum contained in it,
 “ which is so distinct and explicit, that it occurred
 “ to me that I might make out the scroll of your
 “ intended new deed, without waiting till I had an
 “ opportunity of perusing the scroll of the former

July 3, 1813.

PAPER WRIT-
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Oct. 24, 1805.
 Letter of Mr.
 M’Intosh to
 Sir Hector
 Munro.

July 3, 1818.

PAPER WRIT-
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“ after my return to Edinburgh; and I now send
“ you enclosed the new scroll, which I have just
“ finished. You will observe that it recalls and re-
“ vokes the former nomination of trustees, and all
“ the former legacies, and substitutes the new no-
“ mination and new legacies in their place; and
“ refers to the former deed as to the keeping up
“ your house and place of Novar, the annuity to
“ the heir, the purchase of lands, and as to all the
“ formal parts of the deed, which must still be pre-
“ served, as being the deed referred to in the
“ tailzie, and most material part of your family set-
“ tlement. If this scroll meets your approbation,
“ you may cause Mr. George Munro to copy it over
“ upon a sheet of paper, having a twenty-nine shil-
“ ling stamp.

“ The scroll now sent revokes all your former le-
“ gacies; and, from what you told me, I presume
“ this is your intention, so far as regards the lega-
“ cies left in money; but, although I cannot charge
“ my memory with particulars, yet I recollect that
“ your former deed contained some distribution of
“ your jewels, arms, watches, rings, &c.; now, if
“ you wish to leave any of those, or any other
“ trinket, as marks of remembrance to particular
“ friends, it may be done in your own plain, ex-
“ pressive words, without any formality, and copied
“ at the place marked X, after the words ‘ and
“ ‘ thirdly,’ upon the third page of the scroll.”

On the 26th of October, Sir Hector returned this scroll to Mr. M'Intosh in the following letter:

“ I wish to see the scroll of the first settlement
 “ and deed of entail I made, before you make a fair
 “ copy of the present one; as, in the first place, I
 “ do not wish Mr. George Munro, or any other
 “ person, to know my settlements, for many obvious
 “ reasons; and it may be proper that the names of
 “ those to whom the residue of my personal estate
 “ was to have been left to, in different proportions,
 “ ought to be named, as well as annulled and re-
 “ voked. My natural son Hugh was not an officer;
 “ but in the civil service of the Company, on the
 “ Bombay establishment. I have left my servant;
 “ Donald Aird, 20*l.* yearly for his life, if he is with
 “ me at the time of my death. What I give and
 “ bequeath to my sisters is including what they
 “ have now from me to make up the 100*l.* yearly.
 “ My trustees are to follow my former directions,
 “ except this last deed makes any necessary altera-
 “ tion. I do not mean to revoke or annul the an-
 “ nuity I left in my former deed to Hugh and Alex-
 “ ander’s mothers. I thank God I am not worse
 “ than I was when you was here; if any thing, I
 “ am rather better, and so Dr. Urquhart thinks.”

July 3, 1813.

PAPER WRIT-
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Oct. 26, 1805.
 Sir Hector to
 Mr. M’Intosh.

Mr. M’Intosh’s answer was as follows:—

“ It gave me great satisfaction to find, from your
 “ letter of yesterday’s date, that you was then better
 “ than when I saw you. I shall attend to the di-
 “ rections you give; but there are still one or two
 “ things that require explanation. In the first
 “ place, the gentlemen appointed trustees by the
 “ former deed (who are pretty numerous) were by

Oct. 27, 1805.
 Mr. M’In-
 tosh’s answer.

July 3, 1813.

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“ it entitled to 500*l.* each of them. Now is it your
“ intention that these legacies are to remain, al-
“ though their nomination as trustees is revoked?
“ or are you to give them to the new trustees, or to
“ both old and new? Secondly, if I recollect, the
“ most valuable part of your jewels were left to Mrs.
“ Ferguson. As she is dead, do you mean they
“ should go to her children? or how are they (as
“ well as the arms, watches, and other articles be-
“ queathed to your deceased son) to be disposed of?
“ Please to inform me of your intentions as to these or
“ any other particulars you wish to have noticed?”

To which Sir Hector replied :—

Oct. 29, 1805.
Sir Hector's
reply.

“ I do not mean that any trustees of mine should
“ receive any part of the 500*l.* but those who are
“ now mentioned in my codicil; viz. Mr. Coutts,
“ Mr. Antrobus, Mr. Coutts Trotter, Mr. Marjori-
“ banks, and Mr. Alexander Brodie, or such of
“ them as shall accept of being one of my trustees:
“ I could not think, if I desired it, that the others
“ would accept of any money when they did not
“ act, or were even mentioned in my last list of
“ trustees. I am sure one of them at least would
“ not. As to my jewels, I leave and bequeath to
“ my grand-daughter, Jane Ferguson, my large
“ single stone diamond ring; and to my grandson,
“ Robert Ferguson, my antique stone of a Parthian
“ King's head, made of a fine oriental stone, in a
“ ring; and I leave to my brother, Sir Alexander
“ Munro, my ring with my mother's hair in it, set
“ with large diamond sparks; and I now revoke

“ and annul the manner these three rings were dis-
 “ posed of in my former settlement. I leave it in
 “ my own power to give my ruby ring, set round
 “ with ruby sparks, and my ruby spinelle ring,
 “ that is, a ruby not come to perfection, or in its
 “ infancy, away in my life-time, or after my death,
 “ should they then be in my own possession. I
 “ have but one gold watch, which I leave to Mr.
 “ George Munro, writer in Dingwall, my factor;
 “ and arms, or any other trinkets, I leave as they
 “ are disposed of in my former settlements. And
 “ if I have left the Order of the Bath, set with
 “ jewels, my plate, books, pictures, household fur-
 “ niture of every sort, to any but my heir of entail,
 “ as also my horses, carriages, farming cattle, farm-
 “ ing implements, milk cows, sheep, and poultry,
 “ to any other but him, I revoke and annul the
 “ same; and I leave those articles and live-stock to
 “ my heir of entail; also all the liquors in my cel-
 “ lar in Novar House to him. I wish you a good
 “ journey south; and when you have finished my
 “ last codicil, or additional settlement, I request
 “ you will send it to me to be signed as soon as
 “ possible.”

July 3, 1813.

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This was the last letter written by Sir Hector on
 the subject of his settlements; and Mr. M'Intosh
 having returned to Edinburgh, wrote Sir Hector as
 follows:—

“ Upon my arrival at Edinburgh, I searched
 “ among my papers for the scrolls of your deeds of
 “ settlements; but the only ones in my possession

Nov. 20, 1805.
 Mr. M'Intosh
 to Sir Hector
 Munro.

July 3, 1813.

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“ are the scroll of your original tailzie and trust-
“ deed in 1792. Since that time many alterations
“ were made by other deeds ; and, in particular, I
“ find that the tailzie and trust-deed were com-
“ pletely new modelled, and wrote over again by me
“ in 1798 ; upon which occasion the deeds of the
“ year 1792 were most probably destroyed, and the
“ new deeds (1798) being wrote by me in the
“ country, I either did not make out a complete
“ scroll, or did not preserve it ; so that, unless you
“ think that a general deed (such as I sent you a
“ scroll of from Inverness) will be sufficient, we
“ must delay making out this new deed until you
“ have an opportunity of examining the present
“ subsisting deeds, which are in Mr. Coutts’ hands.
“ But if you incline it, the material alterations,
“ such as the change of trustees, &c. may be done
“ on a separate sheet of paper, without waiting for
“ the present deed ; and perhaps your late bargain
“ with Culcainn may induce you to make some
“ other alterations.”

When this letter arrived at Novar House, Sir Hector was too near his end to be able to answer it ; but a letter, of which the following is an extract, was written to Mr. M’Intosh by his factor, Mr. George Munro.

Nov. 25, 1805.

Mr. George
Munro (Sir
Hector’s fac-
tor) to Mr.
M’Intosh, Sir
Hector being
so poorly as
not to be able
to write.

“ Sir Hector has received your letter of the 20th ;
“ and I am exceeding sorry that he is under the
“ necessity of employing me to write you. He has
“ been for some days very poorly indeed, and
“ mostly confined to bed ; yet his faculties are per-

“fectly active, and he is transacting business, and
 “granting leases to his tenants; and desires me
 “to say, that what he wished you to make out for
 “him would be done on his going to London,
 “which is impossible, and quite contrary to every
 “appearance, as I do not suppose he will ever walk
 “down stairs; and if what he employed you to
 “draw up is material to himself or others, I should
 “beg leave to suggest the idea that you should
 “extend it, and send it to him to be executed.”

July 8, 1813.

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Sir Hector died a short time after the date of this letter, without carrying into effect the suggestion of Mr. Munro, or taking any farther steps towards the alteration of his settlements.

While the above correspondence was going on, Sir Hector commenced and concluded a treaty for the purchase of a neighbouring estate belonging to Mr. Munro, of Culcairn. The minute of sale, dated the 4th December, 1805, stipulated that the property should be conveyed to Sir Hector, and the heirs of entail succeeding him in the lands and estate of Novar.

Soon after Sir Hector's death, the Respondents brought their action against the Appellants, concluding for a declaratory decree, finding, “that the
 “writing of the 21st of October, 1805, is a valid
 “deed and an effectual part of Sir Hector Munro's
 “settlements, having the legal effect, in the first
 “place, of recalling the nomination of trustees ap-
 “pointed by the trust-deed of 1798, and of em-
 “powering the Pursuers (Respondents) to act in
 “their room; in the second place, that, by the

Respondents'
 action.

July 3, 1813.

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“ writing of the 21st of October, 1805, the convey-
“ ance of his residuary estate to Mrs. Ferguson,
“ Hugh and Alexander Munro, Sir Hector’s chil-
“ dren, is recalled; and that the trustees must
“ apply the residuary estate for the benefit of the
“ heir of entail, including the lands purchased from
“ Mr. Duncan Munro, of Culcairn, and any other
“ lands which Sir Hector may have purchased sub-
“ sequent to the trust-deed of 1798; and, lastly,
“ that the legacies mentioned, both in the writing
“ of the 21st of October, 1805, and in Sir Hector’s
“ Letter to Mr. M’Intosh of the 29th of the same
“ month, are effectual bequests, and ought to be
“ paid by the new trustees.”

The action came on before Lord Meadowbank, (Ordinary,) who made *avisandum* with the cause to the Court, and ordered informations, which the Court having advised, on the 20th of January, 1808, pronounced this interlocutor:—“ On report
“ of Lord Meadowbank, and having advised the
“ mutual informations for the parties and whole
“ cause, they sustain the codicil libelled on, exe-
“ cuted by Sir Hector Munro upon the 21st of Oc-
“ tober, 1805, as explanatory of, and modifying, his
“ latter will and testament, and remit to the Lord
“ Ordinary to hear parties farther on the other
“ points of the cause, &c.” A reclaiming petition was given in, but the Court adhered to the interlocutor; whereupon the Appellants appealed.

Mr. Adam and *Sir S. Romilly* (for Appellants) argued, that it was clear, from the whole of the correspondence, that the paper in question was ne-

ver understood, either by Sir Hector Munro or his agent, to be in itself testamentary, but that it was considered merely as a memorandum, or plan, from which a more formal instrument was to be made out; and to establish this as a will would be changing a paper of one description into a paper of another description different from what the testator himself intended. And they referred to the Scotch cases, *M'Farquhar v. Calder*, June 16, 1779.—*Douglas v. Earl Morton*, June 19, 1771, which was affirmed on appeal January 21, 1773.—*Dempster v. Wilson*, Nov. 15, 1799.—And cited Erskine, b. 3. t. 1. s. 3.—B. 3. t. 9. s. 7.—Voel's Commentaries on Pandects, b. 28. t. 1. s. 17.—It was settled by the law of England, which governed this case, that a paper designed to operate in itself as a will of personal property, however informally executed, would be testamentary; and even though there was an intention to execute a more formal instrument, if the party was prevented by sudden death from carrying that intention into execution, the paper would be established as testamentary. But unless it could be shewn that the party was so prevented, a paper, though dated and signed, which was merely a memorandum for a more formal instrument, would not be established. And they relied on the cases of *Griffin v. Griffin*, and *Mathews v. Warner*.

July 3, 1813.

PAPER WRITTEN AND SIGNED BY TESTATOR, AND CONCEIVED IN TESTAMENTARY LANGUAGE, HELD, UNDER THE CIRCUMSTANCES, NOT TO BE TESTAMENTARY IN ITSELF.

M'Farquhar v. Calder, 1779.—*Douglas v. Earl Morton*, 1771.—*Dempster v. Wilson*, 1799.

Griffin v. Griffin, 4 Ves. 197.—*Mathews v. Warner*, 4 Ves. 186—210.—5 Ves. 23.

Messrs. Leach and Horner (for Respondents) contended that this was not a paper of instructions, but, in itself, a settled testamentary paper. It was merely a question of construction of the instrument itself, from which its meaning was to be collected,

July 3, 1813.

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Erskine, b. 3.
l. 2. s. 22, 23.

and not from other sources. The law of England, and that of Scotland, were not the same on this subject, and the case ought not therefore to be governed by the rules and authorities of a foreign system. This, by the law of Scotland, was a perfect writing, holograph and signed. (Erskine, b. 3. t. 2. s. 22, 23.) The intention to execute, at a subsequent period, a more formal deed, could not destroy the validity of a complete codicil executed in the mean time. The Scotch cases cited on the other side had been in reality decided on principles favourable to the views of the Respondents. The fact that Sir Hector had purchased an estate which was intended to go to the heir of entail was also relied upon, as showing that the holograph codicil was considered by him as a complete testamentary paper.

The Lord Chancellor said, that the effect of the paper ought to have been first tried in the Ecclesiastical Court. It would be curious if that Court were to differ from the Court of Session and the House of Lords.

July 7, 1813.
Observations
and Judgment.

Lord Eldon (Chancellor.) This was an appeal calling in question a judicial declaration of the Court of Session, by which that Court, “*having advised the mutual informations for the parties and whole cause, sustained the codicil libelled on, executed by Sir H. Munro upon the 21st of October, 1805, as explanatory of, and modifying, his latter will and testament.*” The question was, Whether this paper, of the 21st of October, 1805,

was, or was not, to be taken as explanatory of, and modifying, the latter will and testament? The Court of Session considered it not as instructions, but as a paper in the nature of a testament, and affecting one regularly executed. Their Lordships would observe that the regular will had been proved in this country, and that the opinion of the Court of Session had been taken on these papers before their effect was tried in the Ecclesiastical Court, which was not the most regular mode of proceeding.

The words of the interlocutor gave the appellation of a codicil to the paper of the 21st of October, 1805, but said nothing as to the letter of the 29th of October, 1805; and yet, if the other was of a testamentary nature, their Lordships could not refuse to consider this as of the same character. Here, then, was a former will proved. The Court of Session had decided that the paper of the 21st of October was a codicil explanatory of, and modifying, the will, but had given no judgment as to the letter of the 29th of October, 1805, which altered the paper of the 21st. He mentioned this, as he wished to draw the attention of their Lordships to the circumstances, to see whether the judgment would affect any suit as to this matter in the Ecclesiastical Court. His opinion was, that it would not necessarily do so.

The written correspondence on this subject had been admitted as evidence, and he thought properly admitted, as the paper was of a doubtful and ambiguous character, and required explanation; but they should have gone farther. Upon what principle did

July 7, 1813.

PAPER WRITTEN AND SIGNED BY TESTATOR, AND CONCEIVED IN TESTAMENTARY LANGUAGE, HELD, UNDER THE CIRCUMSTANCES, NOT TO BE TESTAMENTARY IN ITSELF.

Court of Session said nothing as to the letter of the 29th October, 1805.

Correspondence properly admitted in evidence, but the Court below ought to have examined the agent and factor.

July 7, 1819.

PAPER WRIT-
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TO BE TESTA-
MENTARY IN
ITSELF.

If the paper
was not in it-
self testamen-
tary, its being
holograph and
signed did not
alter its na-
ture.

No sudden
death to pre-
vent the exe-
cution of a
formal instru-
ment.

they not let in such parole testimony as that of M'Intosh and George Munro, as to the conversation that took place?

He laid out of view the fact that it was the object of the testator to realize a part of his personal estate for the purchase of an estate in land to go to his heirs of entail, as it did not appear to him to bear upon the present question.

Here too he would observe in one short word upon the fact that the paper was holograph and signed. That holograph writing and signature gave faith in Scotland was true: but still the question occurred, What was this paper? If it was not a will, its being holograph and signed did not alter its nature.

He would also remark here, that it was admitted on all hands, that, if the paper was only instructions, there was no sudden death nor accident to prevent the regular execution of a codicil. The true question then was, Whether the paper of the 21st of October, 1805, was to be taken as instructions for a will, or in its own nature and effect testamentary? He agreed that there was much in the words used in the paper of the 21st of October, of the nature of testamentary language; but then, if it was meant that another should prepare the actual codicil, and this was intended as instructions, it was not surprising that the instructions should have been written in a language that should have much of the character of a will. The paper began, "*I wish a codicil to be made to my last will and testament in the following manner.*" Now this rather denoted that the instrument should be made

at a future time. He agreed, however, that they were capable of being understood in an immediate and present sense, consistent with the purpose of then framing an actual codicil. But the difference might depend upon this, whether a man sat down to write such a paper for himself, or with a view to send it to another, a man of business, whom he wished to do the act. But if the correspondence should be admitted as explanatory of the nature of the paper, then they were to look at the envelope, (letter of the 21st of October,) in which it was written, "I send you the codicil." It had been ably argued by *Mr. Leach*, that Sir Hector Munro called the paper "*the codicil*;" but the whole must be taken together, "I send you the codicil *I wish to be made*." He could not then mean that the codicil was ready-made to M'Intosh's hands: and though he used words in the correspondence which the agent would use in making the codicil, yet they might be intended merely as instructions. M'Intosh, after his return from his visit to Sir H. Munro, wrote the letter of the 24th of October, 1805, stating, "that he found the letter of the 21st, and memorandum contained in it, so distinct and explicit, that it occurred to him he might make out," (not a will or codicil, but) "the scroll of the intended deed; and that he sent the new scroll." He should be glad to know whether it was possible to conceive that, when the agent wrote this letter, either the employer or employed had any notion that the paper in question was meant to be a will. "The scroll now sent revokes all your former legacies." By this the writer

July 7, 1813.

PAPER WRITTEN AND SIGNED BY TESTATOR, AND CONCEIVED IN TESTAMENTARY LANGUAGE, HELD, UNDER THE CIRCUMSTANCES, NOT TO BE TESTAMENTARY IN ITSELF.

View of the nature and effect of the correspondence.

July 7, 1813.

PAPER WRIT-
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ARY LAN-
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ITSELF.

Testator's call-
ing the paper
a codicil signi-
fied nothing.
Question was,
Whether it
really was one?

meant, that the scroll when matured would revoke former legacies; but he spoke of it as present, in the same sense as Sir H. Munro did, though it was meant as future. This letter contained a paper deed of revocation, with which Sir Hector was not satisfied, and wrote upon it, "that he did not mean " that this last deed should revoke the yearly an-
" nuity, &c." The letter of Sir Hector of the 26th of October, and that of M'Intosh of the 27th in answer, also clearly referred to the transaction as unfinished. Then came the letter of the 29th of October, 1805, which was material for two reasons: 1st, Suppose the last passage to be excluded, it was impossible to take the former paper without this; and, 2d, If the last passage were included, it would go a great way to prove that neither the one nor the other was held to be final till something farther was done, which he considered as his last codicil or deed. It signified nothing his calling it a codicil, unless it really was one; nor his calling a scroll a deed, if it was no deed. Unless the paper in his repositories was to operate as a will in the mean time, he himself spoke of the other as incomplete:—
" *When you have finished my last codicil, or addi-
" tional settlement, I request you will send it to me
" to be signed as soon as possible.*" This was demonstrative that the last codicil was something which M'Intosh was to prepare or finish, and which Sir Hector was to complete by signing. M'Intosh accordingly, on the 20th of November, 1805, wrote for farther instructions; and George Munro (the factor) answered, by command of Sir Hector, stating, " that he was desired to say, that what Sir

“Hector wished M'Intosh to make out for him, “would be done on his going to London.” If this last letter should be taken as evidence, they had the declaration of Sir Hector in the letter of the 29th, that the codicil was not then finished, and in this last letter they had his declaration that he was resolved not to finish it till he went to London; and therefore, unless the paper mentioned in the interlocutor was to be considered as instructions which he was prevented by sudden death from carrying into effect, the codicil never was completed. Then the sole question was, Whether the paper of the 21st of October was merely a paper of instructions, or *sua vi* testamentary? It appeared to him, from the whole of the evidence, that it was merely a paper of instructions; and if it was so meant, the terms in which it was expressed made no difference. His opinion therefore was, that the interlocutor of the Court of Session, “sustaining the codicil libelled on, executed by Sir H. Munro on the 21st of October, 1805, as explanatory of, and modifying, his latter will and testament, ought to be reversed.”

Lord Redesdale. As the law at present stood, almost every case that occurred of writings of this description, left in repositories, induced a degree of litigation. He had often thought that the law in regard to the disposition of personal property by will ought to be placed on a more solid foundation. It was a curious circumstance that a million of money could in this manner be disposed of without any solemnity, when a single acre of land could not be so disposed of.

July 7, 1813.

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The paper merely a paper of instructions.

Law of wills as to personal property ought to be placed on a more solid foundation.

July 7, 1813.

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The paper of the 21st of October, which the Court of Session had sustained as testamentary, was not in the hands of Sir H. Munro, but in the hands of M'Intosh. That was an important circumstance with a view to the question, Whether it was, or was not, intended as a mere paper of instructions?

It appeared that in October, 1798, Sir Hector Munro had executed a deed of entail and a trust-disposition, and likewise a will in the English form, having reference to the trust, and bequeathing his property situated out of Scotland to trustees, for the purposes of the trust; and, in 1798 and 1799, it appeared that he had executed two codicils to his trust-disposition. In 1805 he conceived the intention of altering his settlement, and wrote a paper beginning with these words:—"I wish a codicil to be made to my last will and testament in the following manner." There were two papers of this description; one of which remained with Sir Hector Munro, and the other, which was more perfect, and which had been considered by the Court below as a codicil, had been given to M'Intosh. The paper was sent in a letter of the same date, in which Sir Hector gave his reasons for wishing to have certain alterations made in his settlement; and it had evidently been sent for the purpose of having a more formal instrument drawn. M'Intosh accordingly sent a scroll of a new instrument; but this not coinciding exactly with the ideas of Sir Hector, the latter wrote in reply to the former, in terms which amounted in effect to this, that M'Intosh had, to a certain extent, mistaken his meaning. This showed that the intention of the testator was

so imperfectly expressed in this paper, that M'Intosh did not know his meaning; and yet they were called upon to say that this was a complete will. When, in the course of the correspondence, Sir Hector spoke of his "*last deed*," it was evident that he meant the formal instrument which was to be prepared.

It had frequently happened, when instructions were left signed for bequeathing personal property, and the testator wishing to carry them into effect by a formal instrument, had been prevented by sudden death from so doing, that the instructions were sustained as themselves testamentary. M'Intosh appeared to refer to this in his letter of the 20th of November, 1805, when he said, "If you incline it, the material alterations, such as the change of trustees, may be done on a separate sheet of paper, without waiting for the present deed." Sir Hector's factor, G. Munro, wrote in answer to this, "that Sir Hector had been very poorly indeed for some days, and mostly confined to bed; but that his faculties were perfectly active, and that he was transacting business and granting leases to his tenants;" and then he stated that he was desired to countermand the instructions formerly given to M'Intosh, as Sir Hector wished to delay the execution of his purpose till he went to London. This clearly took the paper in question out of the range of those papers of instructions where sudden death prevented the execution of an intended more regular and formal instrument; and no step had been taken to get a more formal instrument signed, though suggested by Mr. G. Munro.

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Sir Hector ne-
ver made up
his mind on
the paper so
as to make it
in itself testa-
mentary.

All the arguments in support of this paper as testamentary proceeded on the assumption that it was what it really was not. Though he called it "*my codicil*," as if it had then been an actual codicil; yet he evidently referred to a future act—to a codicil to be made. It was clear that Sir Hector had never made up his mind on that paper, so as that it should in itself operate as a disposition of his property. He therefore concurred in opinion with his noble and learned friend, that the judgment ought to be *reversed*.

“ Ordered and adjudged, that the interlocutors
“ complained of be reversed, so far as they sustain
“ the paper libelled on (in the interlocutor of the
“ 20th of January, 1808, termed a codicil, and
“ therein expressed to have been executed by Sir
“ Hector Munro upon the 20th of October, 1805)
“ as explanatory of, and modifying, the last will and
“ testament of Sir Hector Munro. And it is further
“ ordered, that with this reversal the cause be re-
“ mitted back to the Court of Session, to proceed
“ therein as is just.”

Agent for the Appellants, CAMPBELL.

Agent for the Respondents, FRASER.