entirely agreed; therefore, upon that point, there will be no difficulty as to the judgment to be pronounced. At the same time, it is well, as my noble and learned friend said, that the learned counsel should give in a scheme on both sides. I entirely agree with my noble and learned friend, that our course here would not be difficult if it was a mere question of law; but we consider this to be a question on the construction of an instrument, which is to a certain degree a question of law, inasmuch as these questions are for the Court, not for the jury; nevertheless, it is in the nature of a question of fact so far, that it is for the purpose of discovering what the intentions of the parties are, that you undertake the examination of that instrument; and, therefore, on that ground it is that we have come to this opinion.

Interlocutors in process of declarator *in part affirmed and in part reversed, with a remit.*
Interlocutors in suspension *affirmed with costs.*

First Division.—Lord Ivory, *Ordinary.*—James Davidson, *Appellants' Solicitor.*—Dodds and Greig, *Respondents' Solicitors.*

JUNE 28, 1852.

MRS. MARTHA STODDART, *Appellant*, *v.* DR. JAMES GRANT and others, (Trustees of the late Mrs. Agnes Barclay or Bell and Misses Murray,) *Respondents.*

Testament—Intention, Implied—Presumption—Clause—Construction—Revocation—*A lady died leaving seven writings of a testamentary nature, in construing which the Court of Session held that three of them were to be taken as revoking the others, and exclusively regulating the succession.*

HELD (reversing judgment), *that there were not sufficient grounds for holding that the three revoked the others; and held that the whole seven were to be dealt with as forming the will of the testatrix; and remit accordingly made to the Court of Session to consider the effect to be given to the declarations contained in the various writings.*

The fact that a legacy of the same amount is given to the same person in a subsequent will raises no presumption that the prior legacy was revoked.[1]

Miss Stoddart appealed against the judgment of the Court, stating in her *printed case* the following reasons:—1. Because, where a deceased executes a variety of testamentary writings relative to his succession, all which are found in his repositories at his decease, they are all understood and presumed, according to the law of Scotland, to form one settlement, unless either revoked *per expressum*, or by necessary implication, as being contradictory and incompatible with each other. 2. Because in this case, where there is admittedly no express revocation, the four testamentary writings executed by Mrs. Bell prior to 1844, and found in her repositories at her death, cannot be presumed or taken to be revoked by the deeds executed by her in 1844 and 1845, inasmuch as these deeds, in their material operation, are nowise incompatible with the latter deeds, and the whole series may receive effect—the amount of the succession of the deceased being quite sufficient to satisfy all the existing legacies left by all the deeds in question, and still to leave a considerable amount of residue as intestate succession to the next of kin. 3. Because, in addition to the general presumption in favour of the existence and operative character of all the testamentary writings executed by Mrs. Bell, there are in this case a variety of circumstances tending to exclude the inference, that the later deeds of 1844 and 1845 were intended to revoke all the previous testamentary deeds, and to form in themselves the only settlement of the deceased. For, (1.) The deed of 1828 expressly reserves *a power to revoke.* But the deed of 1845 contains no revocation of that deed, or of any prior testamentary writings;—though such a clause is matter of usual style where a revocation is intended;—though the deed of 1845 was prepared by the same man of business who framed the deed of 1828, and who could not be ignorant of the existence of the deed which he had himself prepared. (2.) The deeds of 1844 and 1845 confessedly do not form a complete settlement or testamentary deed disposing of the whole estate and effects of the deceased. On the contrary, these deeds, taken by themselves, would dispose only of a small portion of that succession. And as they contain no nomination of residuary legatees, and no such legatees were ever appointed by Mrs. Bell, the result, according to the views maintained by the executors, would be, to leave Mrs. Bell intestate as to the great mass of her succession. But the presumption of law being against intestacy generally, a similar presumption holds against increasing the amount of intestate succession, which would be the result of disregarding or holding as revoked the writings executed by Mrs. Bell prior to 1844. If the deeds executed in

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[1] See previous report 11 D. 860; 21 Sc. Jur. 241. S. C. 1 Macq. Ap. 163: 24 Sc. Jur. 555.

1844 and 1845 had formed a complete testamentary disposition of the whole estate of the deceased, there might have been some ground for holding them as superseding prior deeds; but where it is undeniable that they form in any view but a partial settlement, there can be no room for the inference that they were intended to recall prior testaments. (3.) It is plain from the terms of the deed of 1837, executed by Mrs. Bell, that the deceased contemplated that her succession was to be ultimately regulated by a variety of writings, and that any deed subsequently executed by her, was not to be taken as revoking prior deeds, but as additional to these, and to receive effect along with them; because, by that deed, she provides, that "whatever other legacy, or whatever else I may afterwards name on this or any other piece of paper, the trustees will have the goodness to order to be paid." (4.) The opinions of some of the Judges in the Court below appeared to rest on the view, that the writings executed by Mrs. Bell formed "a succession of wills," each revoking its predecessor by implication. This was expressly stated by Lord Mackenzie as the ground on which he proceeded. But it is impossible so to regard them. For instance, the writing executed in 1842, though, like the rest, denominated her last will and testament, contains a mere bequest of furniture, and never can be taken to have revoked the deeds of 1828, 1837, and 1840. In like manner, the deed of 1844, which is limited to her dwelling-place in George's Place, and the furniture therein, cannot have been intended, and cannot reasonably be held to revoke the writings which had preceded it, so as to make the testatrix die intestate as to everything not disposed of by that deed. But if there was no revocation of prior deeds up to the time when the deed of 1845 was executed, the whole testamentary writings of Mrs. Bell must be regarded as a series of codicils to be taken together, and not as a succession of wills, each revoking its predecessor. (5.) By holding the deeds of 1844 and 1845 as constituting the settlement of Mrs. Bell to the exclusion of all the prior writings, various charitable bequests to charitable institutions, which it was the object of the testatrix to favour, would be evacuated—contrary to the rule of law, which never implies a revocation of such bequests without express words.

The *respondents* in their *printed case* stated the following grounds:—1. Because the loose and imperfect writings dated prior to 26th June 1844, and found in the repositories of Mrs. Bell, seem to have been intended to supersede each other, and to be a series of last wills which she made from time to time, and all of which were superseded by the posterior deeds or writings, which, it has been decided, must regulate his succession. 2. Because the three deeds which had been decided, by the interlocutor under appeal, to regulate Mrs. Bell's succession, were plainly intended by her to do so; and the other deeds above mentioned, dated anterior to June 1844, could not be combined with the subsequent writings without defeating the plain intentions and will of Mrs. Bell.

Kelly Q.C., and *Anderson* Q.C., for appellant.—The law of Scotland does not differ from that of England on this question. That law is, that if, on the death of a party, several testamentary instruments be found, each charged with legacies either to the same or different persons, all these instruments become effectual, and it is only when the last or the later revokes the prior or any portion thereof, that effect will not be given to such prior document in whole or part. Revocation is either express or implied. Each case obviously must stand on its own circumstances, and we say there is no revocation here.

[LORD BROUGHAM.—Do the words, "I hereby make my *last* will and testament," not imply revocation?]

These words are merely formal, and are not to be interpreted literally. Thus, in the present case we find these words prefixed to the paper in which the testatrix bequeaths her furniture only, and where there is no residuary legatee or executor named, or apparently meant to be named. It is only from some inconsistency in dealing with the matters disposed of by two instruments, that revocation results—Williams' Exec. 132; *Masterman* v. *Maberley*, 2 Hagg. 235; Swinburne, p. 7, § 11. The same rule exists in the law of Scotland as to the effect of inconsistencies.—*Horsbrugh's case*, 10 D. 824; *Thomson* v. *Lyell*, 15 S. 32; *Murray* v. *Smith*, 9 S. 378; *Straton's Trustees* v. *Cunningham*, 2 D. 820. V. C. Wigram explains the principle in *Lee* v. *Pain*, 4 Hare, 216. There is no case of revocation where both instruments can be executed completely when taken together. There are clauses reserving a power of revocation in three of the instruments here, which seems usual in Scotland, though quite superfluous. It is, however, material to notice, that the man of business who put these clauses into the subsequent deed, and knew that the former existed, did not expressly revoke the previous deeds. The only words in the deed (No. 6) out of which a revocation can be operated, are these—"I have now resolved to make a settlement of my personal estate in manner hereinafter written, &c." This amounts merely to an intention, which, we grant, may have existed at the time, to dispose of the whole of her estate, but she did not carry it out. By way of test, let us suppose she had gone no further than a single legacy, would that revoke the legacies to other persons in a previous well-executed instrument? There is also internal evidence from the table of her assets, which shews that, as her fortune accumulated, she drew out these additional instruments. Besides, she was a charitable lady; and the reasonable inference is, that she meant the legacies to be cumulative. Though

we do not say that a different rule applies to her bequests to charities, still the circumstance is not immaterial as reflecting a light on her intention, that if the last will be held to revoke the prior, many of these bequests will be made void, whereas a favourable intention towards a public charity is likely to be more steady than towards individuals. The effect of holding the three last papers as constituting her will, will be to make the testatrix intestate to a large amount, whereas the law does not favour intestacy.—1 Jarman, 155. The circumstance, that no residuary legatee was appointed, also favours the supposition, that the legacies were meant to be cumulative. Besides, there are ample funds to satisfy the legacies in all the instruments. The *onus*, however, lies on the respondents, to shew that the last instruments revoke the prior.

Bethell Q.C., and *Rolt* Q.C., for respondents.—The House here sits as a court of probate, and we may look at the adminicular proofs, that is, the circumstances in which the documents were found. We admit that the rules of evidence as to the *fact* of a will, are different from those as to the *construction*, and that, in the latter case, we look only at the four corners of the instrument, while in the former we may look at something more.

[LORD CHANCELLOR.—Is that "something more" evidence of intention?]

It tends to that, certainly. Perhaps if we minutely considered the facts of the early deeds being found much defaced, and abounding in blanks, and lying in a napery press, while the latter were more carefully deposited in a bandbox, we might gain a little; but we do not press this point,—yet it is competent always to take into consideration something beyond the mere documents: *Greenough* v. *Martin*, 2 Addams, 239. Thus in *Coot* v. *Boyd*, 2 Brown C.C. 521, where the second codicil was only a repetition of the former, parole evidence was admitted to shew the legacy was cumulative. The true rule is, that in questions between several testamentary instruments, whether the latter supersedes the prior, we must look to that instrument, which is represented as being the last, which bears that impress on its surface, and derive our conclusions, as to the intention of the testator, from what the instrument itself professes to do. The arguments on the other side are grounded on the result and effects of holding the last three documents as exclusively valid. What the effect may be, is totally irrelevant. Here the instrument (No. 6) bears on the face of it to be a settlement of her personal estate. The words "my personal estate," mean the *whole* personal estate, just as the words "my body," mean my whole body, including arms and legs. Whether the will *de facto* disposes of the whole or not, it revokes the preceding wills by necessary implication.

[LORD BROUGHAM.—Suppose A, by a will, leaves legacies to his family, but appoints no executors, and no residuary legatee, and that he then makes another, which he calls his *last*—at least let us assume it is his *last*—in which he says nothing about his family, but gives legacies to his servants, and appoints executors,—suppose nothing inconsistent between the two, Do you hold the latter revokes the former?]

Yes. One may make an officious will, and yet if he make afterwards another professedly his last, and dispose only of part of his personal estate, without expressly revoking the preceding, still it does in fact operate a revocation. This is clear from *Plenty* v. *West*, 1 Robertson, 264.

[LORD BROUGHAM.—According to that case, the appointment of executors was not relied on, but the word "last" was so.]

The doctrine of implied revocation is expounded in *Henfrey* v. *Henfrey*, 4 Moore P.C.C. 29, and 2 Curtis R. 468; and of express revocation, in 2 Roberts on Wills. The will (No. 6) here is in the ordinary form of a Scotch will, prepared by a professional man, and contains these words—"I reserve full power to name hereafter residuary legatees." To interpret such a passage, we must take the language and construe it without travelling out of the four corners of the instrument. The residue spoken of, therefore, must be correlative to the amount of legacies constituted by the instrument itself, and means, what remains after the bequests given by it are deducted.—*Earl of Hardwick* v. *Douglas*, 7 Cl. & F. 795. The testatrix also reserves power to appoint executors to execute her will—What will? Obviously the one she is thereby making. If the deed of 1828 (No. 1) is to stand, which also appoints executors, then there will be two appointments of executors: To whom, then, is the probate due?

[LORD BROUGHAM.—Is an incurable inconsistency a revocation? Would it operate to affect the executors?]

It is one of many tests of intention. It is clear from her use of the phrase in her last deed (No. 6), that she considered she had not previously named executors, though she had in fact done so twice before. The *rationes decidendi* given by Lord Moncreiff are three—1. That while the same lawyer prepared (No. 6), and the two preceding instruments, yet no clause of revocation is inserted in the last. This begs two things—1*st*, that the lawyer recollected the former will; and, 2*d*, that his skill would have prompted him to insert such a clause. This mode of deducing intention is destitute of principle.

[LORD CHANCELLOR.—But the subject of revocation must have been before the mind of this individual at the time.]

2. The next argument is drawn from the amount of her property; but we cannot look out of the will to such extraneous matters—there is no such rule of construction. 3. The third ground

is, that the power of revocation does not point to the antecedent instrument ; it was needless to do so. The other side say, though a testator declare the instrument to be his *last* will, but do not dispose of *all* the property, that the whole of the previous wills must be taken together. We say it is the last will alone which is good, subject to future modifications.—Williams' Ex. 132. *Horsbrugh's case* was not one of inconsistency between the instruments, but between particular legacies. *Thomson* v. *Lyell* and *Straton's Trustees* were merely questions as to cumulative legacies. We hold, that here there is a series of wills, and not of testamentary writings,—or rather the previous documents are merely drafts or rough memoranda for wills, which were intended afterwards to be embodied in regular instruments. In particular, we find that the last (No. 6) was intended to supersede the former ; for the testatrix, while she forgets no person who was formerly remembered by her, gives nothing, or next to nothing, to any new legatee. This shews she then took a review of all she had formerly done, and made an instrument which was substitutional.—*Thomas* v. *Evans*, 2 East, 489 ; *Methuen* v. *Methuen*, 2 Phillim. 416. Finally, as to the point of erasure in (No. 1), we deny this was written by the testatrix ; and, therefore, being *in substantialibus*, the whole instrument was thereby rescinded and annulled.—*Kedder* v. *Reid*, 1 Robins. Ap. 183. This deed is also open to another vice ; for it did not operate as a deed at all, inasmuch as she thereby only reduced into possession what was formerly a power, and mixed the fund with her other property. The moment that act was done, the disposing power was gone for ever.

Anderson in reply.— In question of probate, we admit the competency of going into extraneous evidence ; but the fact of all the writings being preserved as they were, coupled with the fact, that the testatrix's fortune was accumulating all the time, goes to support the appellant. It is a mere truism to say that no man can die leaving two wills ; that is begging the question, for we deny they are wills ; and hold them to be testamentary writings. The *onus* lies on the party disputing the effect of these writings, to prove that it was intended that any one in particular was not to have effect, since the mere fact of their being found uncancelled at death, is *primâ facie* evidence of their validity.—1 Jarman, 159. It is only in case of inconsistency, that a revocation will be operated. As to the objection of an erasure in (No. 1), we answer—1. That point is not before the House. It does not belong to a question of probate, but of construction, and was not urged in the Court below. 2. The erasure is in the testatrix's handwriting, and the instrument is therefore not vitiated.—*Robertson* v. *Ogilvy's Trustees*, 7 D. 236. It is now denied that the handwriting is that of the testatrix ; but the Judges below assume it to be so, and the respondents might have had an issue granted to try that fact at the proper time, if they had chosen to dispute it. 3. Even supposing it to be not in the testatrix's handwriting, the effect would be merely to vitiate the particular bequest, and leave the instrument *quoad ultra* intact.—Bell's Dict. *voce* "Vitiation." The word "five," therefore, would only require to be omitted, and we should then adopt the smallest sum compatible with the use of the word "hundred," which would be *one* hundred instead of the *five* hundred contended for. The other objection to the deed (No. 1) is, that the whole subject-matter of the will had been changed ; and the testatrix at the time being under coverture, could only exercise a power. This objection goes also to the construction, as it is in effect tantamount to saying there was an ademption ; and this, like a lapse or satisfaction, clearly does not come into play in a question of probate. It was so treated in the Court below. But looking to the merits of the objection itself, it is not even true in point of fact, that the testatrix had only a mere disposing power. She had two things—1. a disposing power ; 2. a right of property in the event of surviving her husband ; and, by executing that instrument, she meant to provide for both contingencies. Her subsequent change of position, by which what had formerly been an equitable right became a right of property, was neither an ademption, nor a lapse, nor a satisfaction.—*Dingwall* v. *Askew*, 1 Cox Ch. C. 427. As to the objections which apply to the whole of the first set of writings, it was said these writings were mere notes or memoranda. But this cannot apply to (No. 1), which was prepared by a professional man ; and if it was not originally a draft, the mere fact of an erasure being superinduced, which did not affect the context, could not make it so. Nor can this apply to (No. 2), which begins, "I hereby make my last will," &c., shewing the bequests were given substantively and presently. It was next said there was here a series of wills, each revoking the preceding. If so, why not carry this objection down to the last? Instead of that, the respondents stop at (No. 4), and refer to *Plenty* v. *West*. But what the Judge said there has been misunderstood, as appears from a subsequent case.—*Ex. p. Holt*, 6 Notes on Eccl. Cases, 93. As to the materiality of the words "last will," see *Thomas* v. *Evans*, 2 East, 489. The case of *Boys* v. *Williams*, 2 Russ. & M. 689, shews we may look at the state and nature of the testator's property at the time the respective testamentary writings were executed, even in a question of construction ;—much more may we do so in questions of probate. Great reliance is placed on the recital in (No. 6), where the words "personal estate" are said to mean "my whole personal estate." If that was the testatrix's meaning, why does she speak of having already bequeathed her "furniture and other articles" ? for these were part of her personal estate, and the words "personal estate" could not therefore include the *whole*.

The improbability of that interpretation being correct, is heightened when we consider that she only disposes of about £3000, while her whole personal estate amounted to about £20,000. As to the theory, that in (No. 6) testatrix made a review, and remembered everybody she had formerly benefited, there are no less than ten bequests in previous documents, where the legatees survived, but yet are not noticed in the last instrument. Besides, if it were true, it would amount to this, that consistency, and not inconsistency, is to be held a test of revocation. On the contrary, it has always been held that it is only where there is a violent inconsistency between two testamentary documents, that revocation results.—*In goods of Wm. Beatson*, 6 Notes on Eccl. Cases, 13. And if the legacy, given in a subsequent document to the same person, be less in amount than the former, the presumption is that it is cumulative—*per* V. C. Wigram in *Lee* v. *Pain*. It appears from that case also, that if there is anything not *ejusdem generis*, giving a character to the second legacy, which was absent from the former, the presumption is that it is cumulative. It is said there would have been an end of the case if, instead of reserving power to name residuary legatees, the testatrix had actually named them. We deny this. By the law of Scotland, a general bequest of the residue does not affect previous bequests made in particular instruments.—Ersk. 3, 9, 11; *Thomson* v. *Lyell*, *supra;* second case of *Horsbrugh*, 15 S. 32. Even in England there is a similar case—*Earl Hardwick* v. *Douglas*, *ante*, which was a question as to two residues.

LORD TRURO.—My Lords, the question in this case is, whether certain papers left by Mrs. Bell should be held to form her last will and testament. It is a question of that nature which is exceedingly unpleasant to decide upon, and it is one upon which, from its nature and circumstances, very different opinions may be formed. From several papers left by the same person,—an individual very illiterate, and in all probability not very nicely weighing the expressions which she adopted from time to time,—you have to collect what her will and intention was with regard to these several papers,—whether it was her intention that the one should supersede the other or others, or whether she intended that they should be all deemed to be her last will and testament, and that they should be executed, subject to alterations from time to time which she might express, leaving at the same time the matter in such a position as that it would be possible to execute these papers as her will, subject to such alterations as were made.

My Lords, the first of these instruments is dated 15th August 1828, by which this lady executed a power of appointment which she had over a certain sum which had been settled upon her upon her marriage. She was to have the interest during a certain period, and when her husband died, she became entitled to the principal, and the principal was accordingly transferred to her. My Lords, that instrument not only disposes of that property, but also gives several specific legacies. In consequence of the death of her husband, and the subsequent transfer of the property to her, it has been argued that the change in the position of the subject-matter of this will, the £8333, ought to be deemed to have the effect of revoking that will. That is the *first* instrument. It is further to be observed upon it, that it gives legacies to persons to whom the lady gives other legacies in subsequent documents. She there appoints trustees, and she appoints them executors, and reserves to herself, as she certainly seems to have done throughout these documents, the power of revocation,—not a necessary reservation on her part, but she always seems to have contemplated that which in point of fact happened, viz. a change in her intention from time to time;—though I cannot help saying, that she seems to have been actuated by the same general feeling, though there was a change in her feelings upon different occasions; she appears throughout to have been a benevolent person, and several of those documents contain bequests to charities. One of the circumstances which appears to me to be material is, that there are legacies given to charities in the later documents as well as in the earlier documents, which marks the continuance of that same benevolent feeling with reference to public charitable institutions from the beginning to the end,—it is one of the circumstances which impresses upon my mind, that it cannot properly be inferred from the later documents, that she intended to revoke the legacies which had been given to benevolent purposes in the earlier documents. The document I have now read is dated in 1828; I have stated to your Lordships the general effect of it.

The next document is dated July 1837. I do not know that I need particularly trouble your Lordships with the contents of that document; it gives several legacies,—and that she calls her will and testament. She nominates certain trustees "in the event of her death, or in the event of a state of distress whereby she might be unable to manage her affairs for herself, and also in the event of her marriage,"—thereby excluding any person whom she married from any of her property, or from interfering with her money or effects. There are legacies also given to the same persons to whom legacies had been given before. There is one part of this document which it is necessary to call to your Lordships' attention;—it is a bequest in reference to which subsequent variations seem to have furnished one of the several reasons which influenced the learned Judges in thinking that the later documents were intended to revoke the earlier ones—(reads last part of document).

Now, I cannot find any ground in this second document from which to infer, that it was intended to revoke the previous document of 1828, which I have read.

The *third* paper is dated 2d January 1840, and that likewise contains legacies to the same persons. Your Lordships will observe how distinctly she contemplated making a farther will in aid of this, because she expressly refers to that, and that she must have intended to fill up the blanks in these documents, or to supply the blanks by future documents. The *third* document, in 1840, only gives legacies to certain persons.

The *fourth* document is in 1842,—the lady calls it her last will and testament; and having in the former papers which I have read spoken of her furniture, and given it to (blank), it seems from the language of this document, that she contemplated giving it to some servant—(reads *fourth* document). The whole is in very bad spelling, and in equally bad writing, and it is not very distinct in its language.

The *fifth* document is prepared by a professional man, and it is one of the documents which the majority of the learned Judges below held to form part of this lady's will and testament. This document is dated 26th June 1844—(reads it).

Your Lordships will have observed, that in the previous document she gives to Janet Bryce absolutely the furniture in the house, except such as should have a mark upon it, and so much as was marked should go to the person represented by that mark. In this case she gives it in life-rent only, and gives it to those other persons in succession, and without taking any notice of any part she might have marked. There might have been a reason for that; those persons in favour of whom she had marked the furniture might have died in the mean time. Then she says, —"And I reserve my own life-rent of the whole premises, and full power to alter or revoke these presents." That is considered to be one of the testamentary documents.

The next document is also prepared by a professional man, and is dated 3d May 1845. It likewise begins—(reads beginning of document). Then she goes through the settlement, and gives several legacies,—there are a considerable number of legacies, many of them to the persons who are mentioned in the former documents; and she gives to the present appellant, Miss Martha Stoddart, an annuity of £30; then she gives a bequest to her servants, and concludes,—"I reserve full power to myself, at any time of my life, to revoke or alter these presents in whole or in part;"—it is in similar language to that which is found in the previous documents,—"as I shall think proper, and also full power to me to name residuary legatees, and to appoint executors for carrying my will into execution."

There is then a document—(reads codicil to *sixth* document). It is in truth of the same date as the former document. Your Lordships will observe, that by this she distinctly refers to some former paper in which she had given legacies to her servants, and I am inclined to think most of them give legacies to her servants from time to time.

Then there is one holograph paper left to this effect—(reads *seventh* document). The precise meaning of the last passage it is not very easy to understand, nor is it very material.

Now, my Lords, such are the documents. As I before mentioned to your Lordships, (and when you see the fac-similes you will be convinced of it,) they are documents signed, and some of them wholly prepared, by an extremely illiterate person. It is plain that this lady from time to time changed her views partially, and throughout these papers. The question is, whether or not those two last documents,—the *fifth*, dated in June 1844, and the *sixth*, dated in May 1845, together with the document which names the executors,—are to be held to constitute this lady's will.

My Lords, the learned Judges have not gone very minutely into the matter, and they do not all agree in the grounds of the opinion which they entertain. The Lord Justice Clerk is of the opinion, which he expresses very shortly—(reads Lord Justice Clerk's opinion). I should have been glad, undoubtedly, to have had rather more assistance from the opinion expressed by that very learned Judge, and it would have been desirable if he had gone more into detail, to bring the case within what I understand to be the correct rule of construction, both in Scotland and in England, with regard to the question, of whether subsequent testamentary documents are to be held to revoke or not previous documents. Lords Medwyn, Cockburn, Wood, and Cuninghame, content themselves with merely stating, that they concur in opinion with the Lord Justice Clerk;—whether they concur precisely on the same general grounds, (for your Lordships will observe that it is only a very general ground which is embodied in the opinion of the Lord Justice Clerk,) or whether they relied upon any other grounds, is not clear.

The opinion of Lord Robertson is also very shortly expressed. He refers to the fact, that the last documents were prepared by men of business, as the ground upon which he thinks that the lady intended that those alone should constitute her testament. He says in one place—"The instrument of 3d May 1845 embraced her whole personal estate." I do not quite understand the sense in which that expression is used, because it distinctly appears that the lady had left a very large sum undisposed of—there appears to have been something like £10,000. She professes to deal with her personal property, and embraces in it that sum; she says that she

intends to give it ;—whether she can be considered as doing it, because she professes to do it, is a different question. He proceeds—"That of 3d May 1845 embraced her whole personal estate —repeated a great number of the legacies formerly left." That is rather assuming the question to be considered :—I think the question is, whether those legacies are cumulative or substitutional. If you assume that they are substitutional, beyond all doubt it is a step in the argument of the intended revocation by her, that she substitutes one bequest for another, and from a multiplication of such instances you may infer the general intention of revocation. He proceeds—"That of 3d May 1845 embraced her whole personal estate, repeated a great number of the legacies formerly left, and reserved full power to revoke; and also, as the deed bears, 'full power to me hereafter to name residuary legatees, and to appoint executors for carrying my will into execution.' Executors were afterwards nominated; and although there was no nomination of residuary legatees, still the whole arrangement seems inconsistent with the subsistence of the former deeds, which, I think, were then superseded." My Lords, that is the question. If the whole is inconsistent, undoubtedly it operates as a revocation ; but if there is only a difference in this respect, that certain of the bequests in the later documents modify certain bequests in the earlier documents, and if it be possible that you can adhere to the substance of the several documents, and hold the whole to constitute one will capable of subsisting together and of being executed, a different opinion is to be formed.

Then Lord Ivory says that he is of the same opinion after more than one change of mind. He says—"Had the reserved 'power hereafter to name residuary legatees' been carried into execution, this view of the deeds and of the intention of the testatrix could hardly, I think, have been disputed. And the 'residuary legatees' would, in that case, have taken the residue, such as it would have existed after deducting only the provisions and bequests of those deeds." That, my Lords, I must again remark, is part of the question which is to be considered ; it remains to be considered, because it is perfectly well understood and established, I apprehend, that if a party, having given several legacies, shall by a subsequent document give the whole of the property, unless there be some words, beyond simply giving the property, which shall manifest a clear intention in his mind that not merely what shall be left after satisfying previous legacies, but that the entire property, to the exclusion of those legacies, shall be given—unless there be words to indicate that intention, the rule of construction is, to hold that such words imply giving the balance after satisfying the former legacies. Here, however, the view taken by the learned Judge is, that, looking at those last documents, if there had been residuary legatees named, they would have taken the residue, consisting of so much as should be left after paying the legacies given in the prior documents. I repeat I cannot assume that, because that is one of the circumstances to be considered, whether it be so or not, in forming an opinion whether it was her intention to revoke those previous documents. He says, however, that if residuary legatees had been appointed they would have taken all, "after deducting only the provisions and bequests of those deeds, and not such as it would have been, supposing the provisions and bequests in all or any of the anterior deeds or writings to have also received effect. But if so, the intent to exclude (or revoke) these earlier provisions would seem to form part of the necessary construction of the deeds in question." I have before said, that I rather think that it will be found in the text-books upon the subject, (and I am not aware of any case to the contrary,) that where a subsequent testamentary paper gives the whole property, the testator having given previous legacies, without some words to explain, that by giving the whole it was meant to revoke the previous legacies, it would not have that effect. He proceeds—"and to be not less implied in the reserved power to bestow the residue, as a residue whose amount was to be regulated and fixed only with reference to the provisions contained in those deeds themselves, than if the residuary legatees had actually been named." (That is the very question to be argued, whether it is so or not.) "The subsequent non-execution of the reserved power comes to be but an accident, as it were, in the case. The substance of the question is solved when it is made apparent what the testatrix intended the untested residue to consist of." No doubt that is so—(reads rest of opinion).

So that your Lordships have the opinions, very shortly expressed, of the Lord Justice Clerk and Lord Robertson, and a general concurrence of opinion expressed by the other Judges whose names I have mentioned, and Lord Ivory says he has changed his opinion, and he states here probably some, but not all, of the grounds which led him to the conclusion which had been adopted by the Lord Justice Clerk.

Then Lord Moncreiff delivers his opinion to the contrary effect—(reads opinion). And Lord Murray concurs in opinion with Lord Moncreiff.

My Lords, the general rule applicable to this case, as I before stated, is perfectly clear—I am not aware that there is any exception to be found anywhere—it is this, that all questions relating to wills should be decided by looking at the whole contents of the documents, with a view to discover what is fairly to be inferred as the intention of the testator. I will just call your Lordships' attention to various circumstances in this case which are relied upon on each side. In the first place, in support of the opinion that the will ought to be deemed to consist of the three

last documents, reliance is placed upon the words used, "the last will." Now, several of those documents do profess to be the last will, as of course they were; but those words, "last will," found in testamentary papers, have for a very long time been the subject of comment.

My Lords, these questions have more generally arisen, I should observe, with regard to real estate. Your Lordships are aware, that the question of what constitutes a will in this country, with regard to personalty, is decided by the Ecclesiastical Courts; but the question as to what constitutes a will with regard to real property, is decided by the courts of common law, but the same principles are applicable to each. In the case of *Thomas* v. *Evans* (2 East, 489), which related to real property, Lord Ellenborough states the facts of the case, and he says—"So circumstanced, he makes another will which he describes as his last will, on which stress is laid; and so, indeed, it was his last will with regard to his newly acquired property. But it is not enough to say, that by making this will in terms large enough to include all his property, he must therefore have meant to revoke the former will, unless it be shewn that he has made a disposition of the same property inconsistent with it—especially since the case of *Harwood* v. *Goodright*, and that of *Hutchins* v. *Basset*. It is said that he must have intended either to confirm or revoke the dispositions contained in the first will; but there is a third proposition—he might not have contemplated to do either, but to make a mere collateral disposition of other property; and that seems to have been the case." He then further remarks—"Here the devisor has concluded by declaring his intention to dispose of the rest of his real and personal estate by a codicil thereafter to be made:"—That seems equivalent to this lady's reservation of the nomination of residuary legatees:—"The plain sense of which is, that instead of having two distinct instruments, he meant to dispose of his personal property, the bequest of which had lapsed by the death of his mother—and also of his real property, which he had acquired subsequent to his first will; and by means of a codicil to connect the two instruments, and make it all one will." Lawrence J., also says—"The circumstances relied on to shew that the subsequent instrument was a revocation of the former, are, *first*, that the testator calls it his last will; to which the true answer was given at the bar—that that is merely a word of form; and he meant no more by it than that it was the last of those instruments which he had executed." My Lords, I do not apprehend that in reality those words ought to receive any weight whatever in deciding this question.

The next ground which is laid down by the learned Judges is, that the last of the papers which the majority of the Judges were of opinion should be deemed a testamentary paper, was prepared by a professional man. I own that it strikes me that that argument rather tells the other way. Mr. Gibson appears to have been this lady's adviser for a considerable period, as he prepared the deed of 1828, as well as that of 1845. It is perfectly well known among professional men, that when called in to prepare a will, it is proper to ascertain whether there be any former testamentary paper, and if there be, what is the intention of the testator, who is about to make a new will—whether he intends to revoke it, or to make this new will subsidiary and additional. And as this gentleman had prepared that deed in 1828, in which there was a power of revocation expressly reserved, it does strike me that the circumstance is very much in favour of these papers, this document being prepared by a professional man, and not containing any clause of revocation on the part of this lady, whose disposition for making wills might to a degree have been known to her professional adviser; but whether it was so or not, it was very likely, that in the length of time that had elapsed, this lady might have made testamentary papers. I cannot help thinking, therefore, that if it had been intended to revoke such papers, the professional man would have inserted such a clause; and supposing him to possess, as no doubt he did, ordinary intelligence, I can hardly imagine he would have omitted inquiring whether there were any former testamentary papers, and more particularly as he himself had prepared one in 1828. I should have supposed, with a professional man making a will, who had prepared a former paper which was to operate as a testament, as the deed of 1828 was, that it was more natural that such a person would have introduced a clause of revocation, if the testator had intended it, and that he would have taken care clearly to understand whether there was any previous testamentary paper which she desired to revoke. That is one of the circumstances that is put forward—it is one of those from which different men may draw different conclusions of equal authority—but those are not circumstances which the law permits to revoke a will. It is not upon speculation of expressions used in the will, or circumstances which are just as much open to the one conclusion as the other, that the Courts act. The object is to ascertain the intention of the testator. You find that she has left certain papers, which from their import are testamentary, having preserved them all subject to another circumstance which I shall mention; *primâ facie*, therefore, they are all to be taken as one will. Then, if you say a portion of them is not to be so taken, I think there should be something more than that upon which you may conjecture or may guess, for your guess and your conjecture may lead to the very opposite conclusion to that which a person of equal professional experience and equal common sense would draw. And, my Lords, it does not seem to me that the Courts in Scotland have ever sanctioned repudiation of papers as testamentary, upon that ground.

The next circumstance referred to is, that the will of 1845 refers to one paper only. That one paper, your Lordships will have observed, is the paper which disposes of the house in particular —that also had been prepared by Mr. Gibson, and he refers to that in very general terms. The paper says, "Having disposed of so and so by such a paper, I now propose to settle my personal estate." I own I cannot understand why, from the circumstance of that gentleman, when alluding to the disposition of a particular property, referring to a previous paper which had been prepared by himself, it should be supposed from a reference to that paper, and no reference to the others, that that was the only paper which was intended to be continued and confirmed by the subsequent documents. It strikes me that that is much too uncertain to form the ground of any such conclusion.

It is further observed, that the executors are named; but it is perfectly plain that there were yet important things to be done,—that is to say, there was a disposition of the residue. Now, it is very true that she did a very important act in naming executors. She had done so before, and she had done it before in cases where it appears to me there was nothing whatever upon the face of the document to import an intention to revoke the previous documents; nor can I draw any inference from that circumstance.

My Lords, there is another circumstance relied on which appears to me also rather to weigh against the conclusion which has been formed,—that is to say, that as to the earlier testamentary papers, some of them are altered by the lady—even erasures are made, and new matter is written upon the erasures. My Lords, that seems to me rather to imply that she altered it as far as she intended that it should be altered; and the leaving the paper with those alterations, rather imports an intention on her part that it should continue to operate as a testamentary paper subject to the alterations, and that there was no intention to destroy it by those means. And further than that, when the paper is preserved in the house with others—not, I believe, that they were stowed in the same places of deposit, but at least they were stowed in places of deposit equally calculated to keep them secure—I think that is a circumstance rather in favour of her intending them to operate, than the other way. But that is another instance of the danger of drawing conclusions from slight circumstances which are open to two constructions. I think that it would tend very much to diminish the power of testators over their property, if the rule were to be acted upon, that from any expressions which anybody can lay hold of, you may draw conclusions adverse to the continuance of the previous documents, and therefore hold that they might be revoked. I do not understand the law to be such;—as I understand the law, if you can execute the whole of the papers as one testament, you are bound so to do. It is said that the dispositions are inconsistent. I can hardly call them inconsistent. It is very true that in one case she gives the house and furniture absolutely, and she afterwards cuts down that interest to a life interest. She gives the household furniture, except such as shall be marked; and that which is marked, is to go to the person indicated by the mark. But has it ever been contended, that the mere circumstance of a subsequent testamentary paper cutting down and diminishing the interest which had been given by the previous one, was to be held to be an entire revocation of the will? I am not aware of any authority whatever for that proposition; and I do not see that in this case the subsequent bequests have any other effect than that of modifying the previous bequests.

The next remark is, that legacies are repeated to the same persons. What is the inference from that? Why, what happens constantly—viz. that the question arises, whether cumulative or substitutional legacies are intended to be given to the same persons by the previous and subsequent papers. But you do not hold that to be any evidence of an intention to revoke—it becomes a question with reference to the particular legacy, how you shall deal with it—whether you shall deal with it as revoked or not. But that this lady, whose property is said to have been growing from time to time, should give £30 to an object of her bounty in one case, and £200 to this person in another case, does not seem to me, the lady living and growing richer, inconsistent at all.

My Lords, I think I have adverted to all the circumstances which are relied on by the learned Judges who held the former papers to be revoked. I think I have mentioned them all—not that they all adopted the same grounds—some think the erasure important—others think it not important. It will be found that there are differences of opinion, and different inferences drawn from some of the circumstances, among the learned Judges who adopt the conclusion as to the revocation of the earlier instruments.

Having stated what appears to me to have been the foundation of the opinion of the learned Judges adverse to the continuance of the previous testaments, I will call your Lordships' attention to what is relied upon by those who hold the contrary opinion. They rely upon the very alterations in the uncancelled papers, which formed the subject of the opposite inference by the other learned Judges; and they also rely upon the papers being uncancelled; they also rely upon the continuance of the power, which the lady refers to, of revocation and alteration, because, in several papers, she says—"I reserve to myself to alter them in all or in part,"—shewing, therefore, the probability that an alteration might take place in her intention without her intending absolutely to revoke the whole document. That is to be found in three or four of the papers.

I have remarked upon the last papers being prepared by a professional man—and that is another of the circumstances from which the Judges draw opposite conclusions. One of the conclusions I draw from that is, that it rather tends to shew that revocation was not intended, when there is the omission of so necessary and so ordinary a provision, and one so likely to occur to a professional man; and I think the omission of that, where the document was drawn by a professional man, is much more favourable to the continuance of these former documents, than if it had been drawn by the lady herself. And more than that, when I see that this lady is animated by the same benevolent spirit for the period from 1828 to 1845, and that she is constantly giving legacies to charitable institutions, I can discover no reason to warrant the conclusion, that because she gave legacies to new institutions, or increased her legacies to the old institutions, she meant to revoke the former bequest. I think, on the contrary, it marks the continuance of the same feeling; and, considering that her property was accumulating, it is but an exercise of the same benevolent disposition, and which leads to any conclusion rather than that she was disposed to do less for these institutions instead of more.

I have explained to your Lordships what I consider to be the general rule—viz. that all these documents, being found under circumstances which entitle them to consideration, are *primâ facie* to be regarded as one will. They may be altered, and may be partially revoked, or they may be inconsistent, without the latter operating as an entire revocation of the former. The circumstance of a partial inconsistency, as it is called—that is to say, dispositions in two documents, both of which cannot be fulfilled—is held only to operate as a revocation *pro tanto*, and only to bear upon the particular legacy in which that inconsistency exists. And the general rule being, that the *onus* is upon those who seek to impeach those documents, the question is, whether your Lordships are satisfied with the reasons which are assigned by the very learned Judges below, which I have read to your Lordships? If those reasons satisfy your Lordships, then they form a proper judicial ground from which to infer this intention to revoke the previous papers. I own they appear to me to be in themselves but slight, and they appear to me, being slight in themselves, to be outweighed by the circumstances, which tend to the opposite conclusion. Therefore, my Lords, I do not think it necessary to trouble your Lordships by referring to the text-books for those principles, which are too well understood by the profession to render it at all necessary;—and particularly as I do not find that any of them are in any respect impeached by what has fallen from the learned Judges, who have pronounced an opinion which does not appear to me to be warranted by the principles which are admitted. I think that the principles are admitted, but that, in this case, there has been a misapplication of those principles to the particular case.

Your Lordships will have observed, that the question as to what part of this will may be revoked—as to what legacies may be cumulative, or what may be substitutional—is a matter not now before your Lordships. The interlocutor which I have read, your Lordships will have observed, is an interlocutor that the testament is to be deemed to consist of only three documents, to the exclusion of the previous four. Thus, therefore, if your Lordships shall take the view which occurs to me as the correct view to be taken—namely, that there is nothing to be found upon the face of those latter papers to warrant the conclusion that the former papers were intended to be revoked, the case must go back to the Court of Session to consider those papers, and to give effect to different parts of them, as by law they may. Where there is an inconsistency, it will operate as a partial revocation—where the inconsistency is only of such a nature as that the general intention can yet be executed, the general intention will prevail. I therefore respectfuly submit to your Lordships, that this interlocutor should be reversed, and the case remitted to the Court of Session.

LORD BROUGHAM.—My Lords, in this case, though I had not the advantage of hearing all the arguments, I certainly do agree with my noble and learned friend in the view he has taken of the case, as far as I have had an opportunity of hearing the arguments. I undoubtedly placed the greatest reliance at the time the case was argued—and further considering it, I have still more been of the opinion, that I am entitled to place great reliance—upon the arguments held in the Court below by the minority of the learned Judges. I particularly refer to the able and luminous argument of Lord Moncreiff, who appears to have ruled, as it were, the opinions of that minority. I therefore have no objection whatever to make to the motion of my noble and learned friend, which is to reverse the judgment of the Court below.

Mr. Anderson.—May I ask how your Lordships deal with the costs? I apprehend that your Lordships will deal with this case as you dealt with *Scott* v. *Scott*, 7 Bell's App. 143, and allow them to come out of the fund.

Mr. Bethell.—The particular fund, the residue, is the subject of the other appeal *Murray* v. *Grant*, *post*, p. 132; it is claimed specially—it is impossible to deal with it without consent.

LORD BROUGHAM.—We say nothing about the costs.

Mr. Anderson.—There will be a declaration in your Lordships' order, that the seven writings together constitute the will? [LORD TRURO.—Yes.]

Mr. Bethell.—My Lord, we cannot say the seven—we cannot tell what they are. As I under-

stand, your Lordships have merely decided this;—you have reversed the interlocutor under which the three documents only were admitted to probate as being the will, but your Lordships do not pronounce that all the documents are testamentary; that falls within the operation of the remit—that goes back to the Court below to determine. We have not at all had that issue raised, and your Lordships would be exercising original jurisdiction if you were to decide that. Your Lordships have had brought before you this simple proposition—Do these three instruments constitute the will? The Court below said, Yes; your Lordships say, No, they do not; but you consider that the other instruments are to be taken into account, and must be left entirely to be determined by the Court below.

Mr. Anderson.—There were two opinions below. The Lord President and the minority were of opinion that all the writings together formed the will; the other opinion that the Judges held was, that the two last documents only formed the will, to the exclusion of the first five documents. Your Lordships have adopted the opinion of the minority.

LORD TRURO.—The Court below held that the four earlier documents were revoked, and that the testament consisted of the three last documents. The House is of opinion, that neither of those four documents was revoked. If the House had thought that some of the documents were revoked and some were not, the question might fairly arise; but upon the case as it is now before the House, it appears to me that the House is called upon to say whether the conclusion is right, which was adopted below, that the four earlier documents, or any and which of them, were revoked. The House is of opinion that none of them was revoked.

Mr. Bethell.—Your Lordships will pardon me a moment. It was not the opinion of the minority that all the other documents remained unrevoked; some differed as to the number which should be admitted.

LORD TRURO.—Will you read me any part of the cases which bears that out, because it has escaped my attention. I think you will find that the effect of what the minority of the Judges say is, that none of the documents was revoked, but that they constituted the testament. I may be mistaken, but so I read it.

Mr. Bethell.—Then we must take it so; if that be so, it will be much better to have it so decided.

LORD TRURO.—It is desirable; for I see other questions that probably may find their way here under these wills—quite enough at all events; therefore I should be very unwilling that this same question should be again opened in addition to the other questions.

Interlocutor reversed.

First Division.—Lord Robertson, *Ordinary*.—Dunn and Dobie, *Appellant's Solicitors*.—Spottiswoode and Robertson, *Respondents' Solicitors*.

JUNE 28, 1852.

ANNE and MARY MURRAY, *Appellants*, *v.* DR. JAMES GRANT and others, (Trustees and Executors of Mrs. Agnes Barclay or Bell), *Respondents*.

Testament—Statute 1617, c. 14—Executor's share—Dead's Part—Legacy.

HELD (affirming judgment), *that the statute* 1617, *c.* 14, *is not in desuetude, and that executors are entitled to one-third of the free executry, if not otherwise disposed of, deducting therefrom their respective legacies; and that, notwithstanding that specific legacies are given to them by the will.*[1]

Misses Murray having appealed against the interlocutor of 29th November 1849, they contended that it ought to be reversed for the following reasons:—1. Because the act 1617, founded on by the respondents, was not intended to confer any benefit upon executors, but to restrict the claims which they could make at common law. 2. Because it was clear on the face of the deeds, that the testatrix never intended her executors to have any farther beneficial interest except to the extent of the £200 which she bequeathed to each of them expressly as executors.

The *respondents* in their *printed case* supported the judgment on the following grounds:—1. Because, as the question was exclusively to be determined by the law of Scotland, the right of executors, in circumstances similar to those in which the respondents are placed, is precisely what has been given effect to in the Court of Session. 2. The question as to the rights of executors in similar circumstances was determined by the case of *Nasmyth*, 17th February 1819, F.C.

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[1] See immediately preceding report. See previous reports, 12 D. 201; 22 Sc. Jur. 35. S. C. 1 Macq. Ap. 178: 24 Sc. Jur. 561.