of the letters. That I understand to be the object with which this instrument was offered. Now, it is perfectly clear, that this instrument, which it is admitted was in the possession of the appellant, ought to have been, according to the Act of Sederunt, put into the condescendence in the first instance; or, if its materiality happened not to strike the appellant at the time, an application should have been made to the Court before the record was made up. That was the opinion of the Lord Ordinary, Lord Cuninghame, and I do not see any reason for disputing the propriety of that opinion. Certainly, the appellant, from the first, must have known that it was material to explain the different character of the letters from the ordinary writing of the testator. He had the means of explaining that in his hands, and he ought to have founded on that in the course of the proceedings.

Then, with regard to the third objection, I think it is hardly necessary to say anything more upon that subject. It is perfectly clear that, when permission to file reprobatory averments, in the first instance, was asked for, it was confined by the appellant to three particular heads of objection. The appellant objected to the admissibility of the witnesses upon the grounds of partiality for the adducers, of having been promised a consideration sufficient to give her an interest in the suit; and also on the ground, that generally she was unworthy of credit, and he offered to prove these objections, and protested for reprobator accordingly.

Now, I think that, according to the proper form of proceeding, the evidence must be confined to those three particular objections which he has made to the testimony of the witness. The evidence tendered by him does not fall under any of these. It does not fall under the only head under which it can possibly be alleged properly to fall, namely, that of the witness being generally unworthy of credit, for that does not allow you to give evidence as to particular instances of the witness having told falsehoods. It only allows you to give evidence as to the general character of the witness. It turns out upon the evidence that she has said something in conversation from which you might draw the inference that she was partial to those who opposed the will. But, as it does not fall under either of the three heads of objection raised, it is not matter properly of replication reprobatory (if I may so call it). It is a new circumstance, which has been found out to the discredit of the witness. It seems to me, therefore, that the Judges were perfectly right in this case in considering that, as the record stood in the shape of the proceedings, they had no authority at all to enter into the question of what Barbara Sim said after her examination in chief.

I am of opinion, therefore, upon these two entirely secondary points in the case, that the judgment ought to be against the appellant, as I think it ought to be upon the main point in the case. I cannot entertain a doubt upon that part of the case. He who sets up a will must prove it to be a will, executed with all the formalities required by the Scotch law, either as a holograph will or as a will attested by witnesses. Perhaps, in the case of a will attested by regular witnesses, it may be, that the *onus* may lie upon the other side to impugn it; but, unquestionably, in the case of a holograph will, the burden of proof of establishing it, as the will of the testator, lies upon the party propounding the will. Whether exception is to be allowed upon the ground stated by Lord Jeffrey is another matter, which does not arise, because this will is not averred to be, upon the face of it, in the testator's own handwriting.

Interlocutors affirmed.

William Miller, S.S.C., *Appellant's Agent.* — Gibson-Craig, Dalziel, and Brodie, W.S., *Respondents' Agents.*

MAY 11, 1858.

THE MAGISTRATES and TOWN COUNCIL of DUNDEE, *Appellants*, *v.* JOHN MORRIS and Others, *Respondents.*

Testaments — Holograph — Charity — Presumption — Revocation — Vitiation — Deleted Words — Legacy void for uncertainty.

HELD (reversing judgment), *in reference to holograph writings found in the repositories of a deceased, expressive of his wishes to establish an hospital in Dundee for boys, that they were of a testamentary nature and effective to carry out his intentions, and that though the writings contained deletions apparently of an important nature as if recalling his wishes in regard to the hospital, such deletions had been made not* ex propositu, *but accidentally, and, accordingly, that they were to be disregarded, and effect given to the intentions as indicated by the writings, and a remit made to the Court of Session to frame a scheme for the establishment of the hospital.*

Where a testator has made various holograph wills, and deleted words, it is competent for a Court construing the will to look at the deleted words so as to understand what he at one time intended (*Per* LORDS CRANWORTH and WENSLEYDALE).[1]

The late John Morgan of Coates Crescent, Edinburgh, died on 25th August 1850, possessed of a very large fortune.

Upon 4th January 1836 he executed a holograph will, whereby he bequeathed to his sister Agnes Morgan "the liferent of all my property, whether real or personal;" and, with the view of having his testamentary intentions carried into effect, he requested the "Court of Session to nominate a judicial factor for the management of my property." In a codicil of the same date, he so far altered his will as to provide that the appointment of the judicial factor was not to take place until the death of his said sister Agnes Morgan. These writings, together with a subsequent codicil, of date 18th November 1840, were, however, revoked by a testamentary writing, dated 10th October 1842. This last writing, which is holograph of Mr. Morgan, is in the following terms:—"*Edinburgh, 10th October* 1842.—I hereby annul all hitherto written on the first, second, and third pages of this," (*i. e.* the testamentary writing already mentioned,) "and wish to establish in the town of Dundee, in the shire of Forfar, *an hospital strictly in size, the management of the interior of said hospital in every way as Heriot's Hospital in Edinburgh is conducted*[2]—the inhabitants born and educated in Dundee to have the preference of the towns of Forfar, Arbroath, and Montrose, but inhabitants of any other county or town are excluded.

(Signed) "JNO. MORGAN."

Thereafter the testator executed another holograph writing, of the following tenor:—"I hereby wish only one hundred boys to be admitted in the hospital at Dundee, *and the structure of the house to be less than that of Heriot's Hospital*[3] and to contain one hundred boys in place of one hundred and eighty boys.

"*Edinburgh, 20th October* 1842." (Signed) "JNO. MORGAN.

In both these documents the words deleted remained quite legible.

By subsequent writings, dated 22nd October 1842, 16th June 1843, and 25th August 1846, he made certain bequests of inconsiderable amount, which have, since his death, been paid to the legatees.

There was also found a testamentary memorandum, dated 6th September 1846. This document was in the handwriting of Agnes Morgan, his sister, but it had Mr Morgan's signature attached, and the date was also in his handwriting. It bore:—"I beg and request the Honourable Court of Session to nominate a judicial factor for the management of my property, whether real or personal, that is, by laying it out to the best advantage after my death, and my sister Agnes Morgan—to accumulate for ten years—to erect an hospital in Dundee to educate the poor children of the Nine Trades, the name of Morgan to be preferred, although they do not belong to Dundee. I wish that the hospital may not be very expensive, as it is for poor children. The judicial factor is not to take place until the death of my sister Agnes Morgan. If my sister's death was to take place before mine, I wish at my death my house in 17 Coates Crescent and furniture to be sold, likewise my house and grounds in Calcutta, the money to go to the fund for the hospital in Dundee, to educate the poor children of the Nine Trades of Dundee—the name of Morgan to be preferred," &c.

The present action was raised at the instance of the Magistrates and Town Council of Dundee, as representing the burgh and community of Dundee, and of the Convener and Boxmaster of the nine incorporated trades of that city, for behoof of, and as representing, the trades. It set forth the above quoted writings of Mr. Morgan, and called as defenders his executor-dative Mr. Donald Lindsay, and also his next of kin and representatives. The conclusions were as follows:—"Therefore it ought and should be found and declared, by decree of the Lords of our Council and Session, that the testamentary writings left by the said John Morgan, and mentioned in the said condescendence, contain a valid legacy and bequest of the whole of the residue of his moveable means and estate, after paying legacies, debts, and charges of administration, or at least of so much thereof as may be necessary for the purpose of erecting and establishing, in the town of Dundee, an hospital to accommodate 100 boys, and that the same are valid and effectual as testamentary deeds of the deceased to that effect: And it ought to be further found and declared, that the succession of the deceased is burdened with the said bequest, and that the defender, the said Donald Lindsay, as executor foresaid, or the party or parties who may be found entitled to succeed to the deceased's moveable estate, are bound to hold and retain the

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[1] See previous reports 19 D. 168, 918; 29 Sc. Jur. 87, 426. S. C. 3 Macq. Ap. 134; 34 Sc. Jur. 528.

[2] The words in *italics* are deleted in the original.

[3] Ibid.

residue of the said John Morgan's moveable means and estate, or at least so much thereof as may be necessary for the purpose of erecting and establishing, in the town of Dundee, an hospital to accommodate 100 boys, in fulfilment of the testamentary bequest and intention of the said deceased John Morgan, subject to the orders of the Court, in order to its application for the purpose of founding an hospital; or otherwise is or are bound to pay over the same to the pursuers, or to such person or persons as may be appointed by our said Lords, for the purpose of superintending the erection and establishment of the said hospital, or for carrying such testamentary purpose into effect," &c.

The Court of Session held that the deletion in the first writing must be held to have been deliberately made by the testator himself for the purpose of revoking the bequest, and that such writing having thus become inoperative, the subsequent writings being merely auxiliary, or ancillary, could not be read along with it to supply the deleted words, and so restore the annulled bequest.

The magistrates of Dundee appealed, maintaining in their case that the interlocutors of the Court of Session should be reversed, for the following reasons:—" 1. Because the writings founded on are testamentary. *Stoddart* v. *Grant*, 1 Macq. 163; 14 D. 585, and 1 Macq. 760. 2. Because in the testamentary writings constituting Mr. Morgan's settlement, there was the expression of a desire, by means of his moveable estate, to establish in the town of Dundee, an hospital to accommodate 100 boys. Stair's Inst. iv. 42, 19; Ersk. Inst. iii. 9, 14; *Morrison* v. *Nisbet*, 7 S. 810. 3. Because, inasmuch as the parts of Mr. Morgan's settlement, other than those containing the expression of a wish to establish an hospital, did not dispose of his whole estate and effects, the result, according to the views maintained by the respondents, would be to leave Mr. Morgan intestate as to the whole or greater part of his estate, whereas the presumption of law is always against intestacy generally. Stair's Inst. iv. 42, 21; Ersk. Inst. iii. 2, 23; *Grierson* v. *Miller*, 14 D. 939. 4. Because by rejecting the holograph writings founded on by the appellants, as constituting the settlement of Mr. Morgan, the charitable bequest in favour of the hospital at Dundee, which was the main object of the testator, would be defeated, contrary to the presumptions of law in favour of that class of bequests." *Macara* v. *Aberdeen College*, Mor. 15, 948; Jarman on Wills, 2nd ed. vol. i. p. 309; Williams on Executors, 5th ed. vol. ii. p. 950.

The respondents supported the judgments upon the following grounds:—" 1. Because, by the law of Scotland, the writings, on which the claim of the appellants was rested, were improbative, and unsusceptible of being judicially read; and being so, were null and void, and incapable of receiving effect. Balfour's Practics, p. 368; Stair, b. iv. t. 42, § 19; Ersk. b. iii. t. 2, § 20; Menzies' Lectures, p. 123; *Dundas* v. *Lowis*, M. App. *voce* 'Writ,' No. 6; *Ranken* v. *Reid*, 11 D. 543; *Pitillo* v. *Forrester*, Mor. 11,536; *Merry* v. *Howie*, Mor. App. *voce* 'Writ,' No. 3; *Gibson* v. *Walker*, 16th June 1809, F. C.; *Kirkwood* v. *Patrick*, 9 D. 1361; *M'Intyre* v. *Macfarlane's Trustees*, March 1, 1821, F. C. 2. Because, irrespectively of their improbativeness, the writings of 10th and 20th October 1842 did not create any valid bequest, and were not intended to subsist, nor were regarded by the deceased as writings of a testamentary nature; and even on the assumption that they had at one time been so, the deletions and obliterations which occur therein afford real and unequivocal evidence of an intention on the part of the deceased to cancel and destroy them. *Alexander, &c.* v. *Alexander*, 12 D. 348. 3. Because, even on the assumption that the writings relied on by the appellants could be regarded as testamentary writings, they were void, by reason of uncertainty. Jarman on Wills, p. 199, *et seq.*

Rolt Q.C., *Anderson* Q.C., and *Thoms* for the appellants.—The Court of Session decided that these writings were not testamentary, and gave no opinion as to whether the bequest was void for uncertainty. The appellants say they are testamentary in their character, and that the bequest is not void.

1. As to their testamentary character, the two writings of 1842 are admitted to be holograph. There are erasures and interlineations; but though erasures in a material part of the writing, and unauthenticated, make the whole of a deed void, it is not so with holograph instruments. Erasures in one part do not vitiate the parts unerased—Stair, 4, 42, 6; Ersk. 3, 2, 22; Menzies' Lectures; *Dunlop* v. *Dunlop*, 1 D. 912; *Wilson* v. *Smith*, Hume, 882; *Hoggan* v. *Ranken*, 1 Rob. Ap. C. 173; *Kedder* v. *Reid*, *ib.* 183; *Strathmore* v. *Paul*, *ib.* 189. Erasures unauthenticated in deeds are held fatal if material, because no one can tell who deleted the words; but it is otherwise as to holograph instruments—*Robertson* v. *Ogilvy's Trustees*, 7 D. 236, *per* Lord Mackenzie; *Ballantine* v. *Magistrates of Ayr*, 16 S. 325; *Dunlop* v. *Dunlop*, 1 D. 912.

[LORD WENSLEYDALE.—When a person alters his holograph instrument, must he re-sign the alteration?]

No, that is not necessary. The writings, therefore, as far as their form is concerned, are unexceptionable, and therefore are entitled to probate, provided they are final and not deliberative in their intention. In order to judge of this, we are entitled to look at the whole scheme of the writings, and also the deleted portions which are legible. The first instrument, dated 1836, was clearly final. In the first instrument, dated 1842, he says, "I hereby annul" the previous

instrument. That does not mean that the former is to be taken strictly as a nullity; for if so, the testator would have put it in the fire. The parts deleted must have been intended to be seen, by their being left legible. A prior instrument, though declared by a subsequent one to be annulled, may be looked at, in order to explain the language of the testator in other parts of the will—*L. Adv.* v. *Smith*, 24 Sc. Jur. 285.

[LORD CHANCELLOR.—I see no mystery in the word "annul," it is just "revoking."]

Lord Advocate.—We do not deny it.]

One of the learned Judges below placed much reliance on the word "annul;" but that point being now abandoned, it is competent, and it is important to see what the testator had been doing. It was a final expression of his intention in 1836; and in 1842 he says, "I hereby annul that;" the latter is also a final expression of intention. It is said "I wish" is too vague; but it is every day's practice in England to construe that word as a final purpose; and even the word "recommend" is often accepted.—See the cases, 1 Jarman, Wills, 334; also *Horsburgh* v. *Horsburgh*, 9 D. 324; *Stoddart* v. *Grant*, 1 Macq. Ap. 163; *ante*, p. 122. In the writing of 22d October 1842, he says, "I further wish;" those words confirm a prior instrument—*Macmillan* v. *Macmillan*, 13 D. 189. The writing of 10th October 1842 would, therefore, be final if it be not revoked by the word "hospital" appearing to be deleted. The Court below held the deletion of that word must have been *ex animo*, deliberate, and wilful; but on looking at the instrument itself, and the mode in which the stroke of the pen was made, it is obvious that that word was struck out by mistake. Why were the other words, "I wish to establish a—at Dundee," carefully retained, which are without sense unless the word hospital is retained?

[LORD WENSLEYDALE.—It is quite clear, he must have meant a something to be established at Dundee.]

And what that something was is shewn by the writing of "20th October," which refers to "the hospital at Dundee," thereby implying that he had mentioned the word hospital before. The Court will never scruple to supply or transpose a word in case of a palpable mistake or clerical error.—See the cases, 1 Jarman, Wills, 408 (last ed.), particularly *Kirkpatrick* v. *Kirkpatrick*, 13 Ves. 476; *Lang* v. *Pugh*, 1 Y. & C. 718; *Doe d. Leach* v. *Micklem*, 6 East, 486; *Doe* v. *Turner*, 2 D. & Ry. 398; *Castledons* v. *Turner*, 3 Atk. 256; *Wedderspoon* v. *Thompson's Trustees*, 3 S. 396; *Magistrates of Edinburgh* v. *Senatus Acad.*, 13 D. 1187: *Martins* v. *Gardner*, 8 Sim. 73; *Grant* v. *Shepherd*, 6 Bell's Ap. C. 153; Sugden's Law of Property, p. 367; *Ware* v. *L. Egmont*, 4 De G. M. & G. 473.

2. As to the construction of the instrument and the objection of uncertainty, the rules of construction are precisely the same in Scotland as in England—Stair, 4, 42, 19; Ersk. 3, 19, 14; Domat, 4, 2, 6. It is not necessary to resort to the doctrine of "cy-pres," which no doubt exists in Scotland as well as in England; at least there is no decision in Scotland to the contrary. In *Jack* v. *Burnet*, 5 Bell's Ap. C. 409, *per* Lord Cottenham; and *Hill* v. *Burns*, 2 W. S. 86, *per* Lord Gifford; and *Crichton* v. *Grierson*, 3 W. S. 329, *per* Lord Lyndhurst, it is said the law of Scotland is more favourable to charitable bequests than to other bequests, *i.e.*, where legacies would be held void if given to individuals, they will be held good if given to charities.—See also *Miller* v. *Black's Trustees*, 2 Sh. & M'L. 866; *Dundas* v. *Dundas*, 15 S. 427. The cases in England must of course be considered with reference to the Statute of Mortmain, which does not extend to Scotland; and it will be found, that many legacies are there held void, on the ground, not that no specific sum is given by the will, but because the Statute positively forbids any money to be so applied—*Attorney-General* v. *Hinxman*, 2 Jac. & W. 270; *Harrison* v. *Mayor of Southampton*, 23 L. J. 919, Ch.; *Mitford* v. *Reynolds*, 1 Phil. 185. Here there is certainty enough. The object is to establish an hospital for boys.

[LORD CRANWORTH.—What is the technical meaning of the word "hospital" in Scotland?]

It means a place of education and board for boys. It is a well known term. The boys are the sons of those who have resided in four towns. To "establish" an hospital must mean to provide also lodging for the boys, seeing that many may come from a distance—*Attorney-General* v. *Williams*, 2 Cox, 387. It also includes the erection of a suitable building—*Edwards* v. *Hall* 6 De G. M. & G. 74,—and an endowment. As to education, see *Clavering* v. *Ellison*, 8 De G. M. & G. 662. Therefore, the legacy is clear as to the objects, viz., the boys of parents born in Dundee, &c. It it clear in the subject matter, viz., an hospital; and it is clear in the place, viz., Dundee. These data suffice for the Court to say what sum will be required. Whatever sum is required is given by the will, and it may absorb either the whole or the greater part of the funds. At all events, the appellants' costs ought to come out of the fund.

Lord Advocate (Inglis), and *R. Palmer* Q.C., for the respondents.—We do not deny that, if these writings are good for anything, they are of a testamentary character. But they are deficient in the usual qualities of a will. There is no executor appointed; there is only a mere wish expressed that something should be done—and that something is left obscure—and there is no gift of the residue. We do not deny that the two writings of October 1842 are holograph, and that the maker of a holograph writing may alter it after the subscription without vitiating the writing. It is impossible, however, to spell out of the writings any definite purpose.

[LORD CRANWORTH.—You say that on a true construction the writings mean nothing.]
[LORD WENSLEYDALE.—Whatever they mean, if they are final in expressing the wish, then they are entitled to probate; and the circumstance, that they are signed by the testator, is of itself strong to shew they are final and not deliberative instruments. What the true construction is, is another matter.]

No intelligible meaning can be given to them at all, either final or deliberative. In looking at them we must not only look at the words which are left, but also at those which are struck out; and when the word "hospital" is struck out in the writing of 10th October 1842, it is impossible to give any meaning to what remains, for we are not supposed to know that that word was ever there.

[LORD CHANCELLOR.—I see that the Court below assume, that the word "hospital" was intentionally and deliberately deleted. Do you contend, that the mere deletion in fact is conclusive evidence, that the word was struck out deliberately?]

Yes, unless there is a distinct averment that the deletion was accidental, and also as to how it occurred.

[LORD CHANCELLOR.—If it is a matter of evidence, which it must be, then it is apparent to my mind, that the deletion of that word was not deliberate but accidental.]

The only evidence we can look to in order to discover what the intention was in deleting, is the instrument itself. We have no other means of knowledge. It is mere guess work at best to say, that the deletion was accidental; for, looking at the other obliterations, it seems to have been the testator's habit to strike out only the principal word or words, and leave the others remaining. The safest course, therefore, is to give effect to the obliteration. In *Nasmyth* v. *Hare*, 1 Sh. Ap. 65, such an effect was given to the mere cutting off of the seal of a will, which seal was in no way essential, but that circumstance was held to be a revocation of the will.

[LORD CHANCELLOR.—There the testator chose to attach great importance to the seal, and if a person chooses his own evidence, as it were, then the Court would take that as a test of the intention.]

The writing here, of September 1846, shews clearly, that though the testator once intended to dispose of his property in one way, he had afterwards altered his mind and disposed of it another way.

[LORD WENSLEYDALE.—That document of September 1846 is not probative, being neither holograph nor attested. It is, therefore, no more than any oral declaration of the testator would be. Can you give in evidence what the testator had said subsequently in conversation, to shew a change of intention on the part of the testator?]

No; perhaps not. The cases cited of *Wilson* v. *Smith*, Hume, 882; *Horsburgh* v. *Horsburgh*, 9 D. 324; *Macmillan* v. *Macmillan*, 13 D. 189; *Magistrates of Edinburgh* v. *Senatus Academicus*, 13 D. 1187; are all unimportant, for there there was a specific bequest, which is not the case here. The presumption is, that the obliteration of the word "hospital" took place after the date of all the documents—*Lushington* v. *Onslow*, 12 Eng. Jur. 465; 6 Notes of C. 183; and that being so, the principal word "hospital" being struck out, all the superstructure rising out of it falls to the ground.

The bequest is also void for uncertainty. The law of Scotland is not more favourable to charitable legacies than to individual legacies. Erskine merely says, "that wills are more liberally construed than deeds," which is a different proposition. There are dicta of Lord Gifford and Lord Cottenham to the effect that charities are favoured; but those dicta were unfounded. One element of the uncertainty is, that there is no executor or trustee who is to exercise any discretion, and that is a fatal defect—See *Dundas* v. *Dundas*, 15 S. 427.

[LORD CRANWORTH.—Surely it would be strange if a bequest failed, because there was no executor. No trust can be allowed to perish for want of a trustee.]

At all events, in all the cases cited, some individual had been selected in whom a discretion was vested. *Ewen* v. *Magistrates of Montrose*, 4 W. S. 346, was a much stronger case than the present. There, a certain hospital was directed to be established, and the persons for whose benefit it was designed were clearly designated. Power was given to enlarge the hospital after it was once established; but, because the testator left the amount to be spent upon it blank, the Court said, "We can't tell where to start from, and therefore the legacy is void for uncertainty." If that case is to be treated as law, the same, if not greater, uncertainty appears here, for we cannot approximate a conjecture what is to be the sum expended. All kinds of estimates might be formed, according as the boys are to have a high or a plain education—according as the boys are to be poor or sick—clothed out of the charity or not.—See the cases collected in Shelford on Mortmain, 526 *et seq.*; *Chapman* v. *Brown*, 6 Ves. 404; *Attorney-General* v. *Hinxman*, 2 Jac. & W. 276; *Cherry* v. *Mott*, 1 My. & Cr. 123; *Flint* v. *Warren*, 15 Sim. 626.

Rolt replied.—We have alleged that the word "hospital" was carelessly struck out, and the appearances of the obliteration on the instrument support that allegation. Assuming that that word is restored, the instrument is final in its intention, and is a good testamentary writing. As to the bequest being void for uncertainty, no substantial distinction has been shewn between the

law of England and Scotland, except only that the law of Mortmain puts a limit to the cases in England, which does not exist in Scotland. The only Scotch case cited by the other side is *Ewen* v. *Magistrates of Montrose*, which was a most erroneous decision.
[LORD CHANCELLOR.—I think, on looking at the words in that case, that the decision there will only be an authority for itself.]
[LORDS CRANWORTH and WENSLEYDALE assented.]
[LORD WENSLEYDALE.—The difficulty here is, that there is no statement as to what amount is to be expended, and no discretion vested in any one to say what the sum should be,—how is the Court to know what part of the estate to appropriate towards it?]

An hospital for 100 boys is a definite institution. In England, but for the Mortmain Act, a direction to build a church would be held good. Besides, the words "in lieu of 180 boys" in the subsequent writing enable us to look back to the writing where the 180 boys were mentioned, though the words are deleted; and when we do that, we find that it meant an institution like Heriot's Hospital—*Shaftesbury* v. *Duke of Marlborough*, 7 Sim. 237. The Courts in England find no difficulty in computing the arithmetical equivalent of equally vague expressions, such as, "a suitable church or chapel," &c.—See *Chapman* v. *Brown*, 6 Ves. 404; *Attorney-General* v. *Davies*, 2 Jac. & W. 277; *Attorney-General* v. *Hinxman*, *ibid.* 270; *Mitford* v *Reynolds*, 1 Phil. 185 and 706. If the House will not at once decide the case, seeing that the Court below had no opportunity of giving an opinion on the objection of uncertainty, then a remit ought to be made to the Court below to hear and determine that point.

Cur. adv. vult.

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

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

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

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

Of course, if your Lordships should be of opinion with the Lord Ordinary and the Court of Session, that the writings are invalid as testamentary instruments, it will be unnecessary to enter further into the case; but if you should think, that they are both probative and testamentary, then it will be necessary to consider, whether they constitute or contain an effectual legacy or bequest for the establishment of an hospital in the town of Dundee, upon the third plea in law of the defenders.

The circumstances under which the questions arose are few and simple. John Morgan, the alleged testator, died in Edinburgh on the 25th August 1850, unmarried and possessed of a considerable fortune. His sister, Agnes Morgan, resided with him until her death in January 1848. After the death of Miss Morgan there were found amongst her papers certain paper writings, consisting of a half sheet containing two writings both holograph of John Morgan, and dated 14th July 1836, and another paper, which was holograph of Miss Morgan, but bearing the signature of John Morgan, and having the date 6th September 1846 in his handwriting. This latter writing would have been the will of John Morgan if it had been properly authenticated; but wanting the formalities required by law in a will not holograph of a testator, it has not been founded upon by the appellants, and must be left out of the question.

Upon the death of Miss Morgan, Mr. Donald Lindsay was appointed *curator bonis*, and continued to discharge the duties of that office till John Morgan's death. Upon this event happening, a search was made amongst his papers, and the other half of the sheet of paper, which had been in Miss Morgan's repositories, was found amongst Morgan's papers. It contained writings of various dates, beginning with the 18th of November 1840, and ending with the 25th of August 1846. Facsimile copies of these writings have been printed with the appellant's case, and upon the character and effect of them the question arises.

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

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

On the 10th October 1842, after annulling all that he had previously written, he expressed a wish to establish in the town of Dundee "an hospital strictly in size, the management of the interior of the said hospital in every way as Heriot's Hospital in Edinburgh is conducted—the inhabitants born and educated in Dundee to have the preference of the towns of Forfar, Arbroath, and Montrose, but inhabitants of any other county or town are excluded." On the 20th of October (ten days afterwards) his intention appears to have undergone a change, and he purposes that the structure of the house should be less than that of Heriot's Hospital, and that it should contain 100 boys instead of 180 boys. And at some time, but when does not appear, he struck out from the writing of the 10th October 1842, the words "hospital strictly in size, the management of interior of said hospital every way as Heriot's Hospital in Edinburgh is conducted;" and the words in the writing of the 20th October 1842, "and the structure of the house to be less than that of Heriot's Hospital:" and the writings in this state were presented for judicial consideration.

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

It is unnecessary for your Lordships to consider the doctrine of the law of Scotland with respect to erasures, interlineations, and obliterations generally; or the passages from Stair and from Erskine, or the case of *Grant* v. *Shepherd*, 6 Bell's Ap. 153, which bear upon this subject, and which were cited in the course of the argument, because it is agreed on both sides, that any such alterations *in substantialibus* in an instrument not holograph, but written *in manu alienâ*, are fatal to it, on the ground that they are presumed to have been made after its execution.

It was also conceded, that there is a distinction with respect to holograph writings, that they are regarded as privileged, and that much of the doctrine as to erasures and interlineations is inapplicable to them; and this distinction is very well put by Lord Mackenzie, in the case of *Robertson* v. *Ogilvie's Trustees*, 7 D. 242.

It was, however, argued on the part of the respondents, that the principle applicable to holograph writings is to give effect to every word and syllable which is written, and that it follows from this principle that you must give equal effect to obliterations. There is, however, an obvious distinction between what is written and what is obliterated: that the former must have been an intentional act, the latter may have been accidental. I put the question in the course of the argument, whether it was to be assumed, that every deletion was deliberately made, and as I understood the answer, it was admitted to be a fact to be ascertained by evidence, which appears to me to be the more reasonable and correct view. If the mere existence of obliteration is not conclusive, then, upon the face of the writing of the 10th October 1842, there is strong ground for presuming, that the deletion of the words "an hospital" was purely accidental. Whatever opinion, however, may be formed upon this question, seems to me to be not very material, because, if your Lordships were to take the two writings of the 10th October and the 20th October together, and without the deleted words, you would probably think, that sufficient remains to indicate, without doubt, the intention of the testator. The bequest to be gathered from the two papers, reading them in the state in which they actually appear, is to establish in

the town of Dundee an hospital to contain 100 boys, the inhabitants born and educated in the town of Dundee to have the preference.

This being the form and nature of the bequest, the only remaining question which arises is, whether, according to the law of Scotland with respect to charities, it is a good and valid bequest ; or whether (as the respondents contend) it is void for uncertainty. From the view of the case which was taken by the learned Judges of the Court of Session, they considered it unnecessary to enter upon this question, and your Lordships are therefore deprived of the advantage of their judgment upon it. This would be the more to be regretted if there were a principle applicable to the construction of charitable bequests which was peculiar to Scotland. But, after attending carefully to the arguments of counsel, and examining the authorities which they have adduced, I cannot discover, that there is any great dissimilarity between the law of Scotland and the law of England, with respect to charities. Of course, the circumstance of the Mortmain Act, 9th George II. cap. 36, not extending to Scotland, must produce a difference in the decisions of the Courts of the two countries, where the bequest is affected by the operation of that act. In the case of *Hill* v. *Burns*, Lord Gifford stated, that the law of Scotland was more liberal in the interpretation of bequests for charitable purposes than other bequests, which is certainly true of the law of England ; and Lord Lyndhurst, in *Crichton* v. *Grierson*, 3 W.S. 339, said "that the law of England is more strict as to charitable purposes than the law of Scotland."

A case, however, was mentioned at the bar, of *Ewen* v. *Provost of Montrose*, in 4 W.S. 346, which was decided in this House, in which effect was refused to a charitable bequest in Scotland, which would clearly have been considered valid by the Courts of this country. That was a gift very similar in terms to the present, of a sum of £6000 to the magistrates and town council, and the ministers or clergymen of Montrose ; for the purpose of founding and establishing an hospital in that town, similar to Robert Gordon's hospital in Aberdeen, for the maintenance, clothing, and education of the youthful sons and grandsons of decayed and indigent burgesses of guild, and craftsmen burgesses of the said town of Montrose, so that, to use the language of the Lord Ordinary in that case, "The amount of the legacy to be paid by the trustees was clear and certain. The persons who were to reap the benefit were distinctly specified, and the nature and quality of the maintenance, clothing, education, and apprentice fees which they were to receive, was fixed by reference to another hospital, to which the new one was in all respects to be similar." But the settler having afterwards given the residue of his property, heritable and moveable, in the same way, and having directed the sum of £6000 and the residue to accumulate until the principal sums, with accumulated interest, should amount to the sum of sterling, and then be employed in the erecting and maintaining the hospital, and for the maintenance, clothing, and education of boys of the description above mentioned, Lord Wynford, who alone heard the appeal, and advised the House, expressed his opinion, that in consequence of the blank in the amount to which the sum was to accumulate, and also as to the number of the boys, the deed was void, on the ground that it was too uncertain to be carried into execution. There can be little doubt that a bequest of this character, in an English will, would have received a much more favourable construction ; and your Lordships will probably think, that *Ewen* v. *the Provost of Montrose*, can only be urged as an authority where the circumstances of the case to which it is sought to be applied, are precisely similar to the circumstances of that case.

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

But it is said, on the part of the respondents, that the mere wish to establish an hospital for a certain number of boys is so indefinite and uncertain, that it is impossible to carry it out without the danger of defeating instead of effectuating the testator's intention—that it is at the best but the indication of a mere floating desire, not of any formed and settled determination. But the expression of a wish by a testator, that his property should be applied to a particular object, amounts to a bequest for that object, and the language of this will appears to convey with sufficient certainty what the testator desired should be carried into effect. The mere words, "establish an hospital," must, I think, be taken to express an intention that a building should be provided; which seems to have been assumed as the meaning of the word "establish," in the case of the *Attorney-General* v. *Williams*, 2 Cox, 387.

But then it is said, that there is nothing to indicate the class of boys for which the hospital was to be provided, nor anything to lead to any conclusion as to whether they were to be merely educated, or to be also boarded and lodged. Now, as to the class of boys, they were described with sufficient precision by reference to the inhabitants born and educated in Dundee and the other three towns, by which, I understand, not the persons themselves who were residents and who had been born and educated there, but the sons of such persons—a qualification which, though it might embrace inhabitants of different stations and degrees in society, is yet sufficiently

definite to admit of a clear and certain application. Nor can I entertain any doubt of the intention of the testator, that the children should be maintained as well as educated, because they were not to be confined to the town of Dundee, but were expected by him to come from other and distant towns, and would require, therefore, to be lodged and fed in the intended hospital. There may be some doubt whether they were also meant to be clothed. But any uncertainty as to these minor details would not have the effect of defeating his main purpose, any more than his silence as to the description and character of the education which was to be provided for them.

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

Such was the case of *Chapman* v. *Brown*, 6 Ves. 404, which was a bequest of the rest and residue of the estate, and the effects of a testatrix, "for the purpose of building a chapel for the service of Almighty God," and if any surplus should remain from the purchasing or building the same, she requested it might go towards the support of a faithful gospel minister, not to exceed the sum of £20 a year; and if after that any further surplus should remain, she desired that the same might be laid out in such charitable uses as her executors should think proper." The bequest for purchasing the chapel was held to be void, as being within the Statute of Mortmain. Then it was contended, that the bequest of the residue, being dependent upon the former, must likewise fail. But the Master of the Rolls, Sir William Grant, said, that, standing by itself, a bequest of a residue to be employed in such charitable purposes as the executors shall think proper is a good bequest. But then, he held, that the bequest of the residue was void, "because it was impossible to ascertain how much would remain after taking out what was required for the chapel, the testatrix having given no grounds to ascertain what kind of chapel or what locality." And he added, "If the testatrix had even pointed out any particular place, that might have furnished some ground of inquiry as to what size would have been sufficient for the congregation to be expected there; but this is so entirely indefinite, that it is quite uncertain what the residue would have been, and therefore it is void for that uncertainty."

This case was followed by Sir Thomas Plomer in the *Attorney-General* v. *Hinxman*, in 2 J. & W. 270; but in the case of *Mitford* v. *Reynolds*, in 1 Philips 185, which was a similar case of a bequest of a residue, after directing the executors to purchase and prepare for the ultimate deposit of the testator's body, and for the removal and deposit of the remains of his parents and sister, the mount that is contiguous to the churchyard of Chipping-Ongar, in Essex, on the summit of which they were to cause the construction of a suitable and handsome, as well as durable, monument, it was contended, on the authority of the former cases, that the bequest of the residue was void, because the sum to be applied to construct the monument was impossible to be ascertained, as the testator had given no description of the sort of monument which he desired. But the Lord Chancellor, Lord Lyndhurst, said, "the difficulties which existed in the case of *Chapman* v. *Brown* have no existence, as it appears to me, in the present instance. The place is defined, the very spot is pointed out, and the extent required for the purchase. The monument is to contain the body of the testator and the bodies of his two parents and of his sister. The proper size of it, therefore, is easily ascertained."

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

I am therefore of opinion, that the writings, being probative and testamentary, they contain a good and effectual expression of a wish to establish in Dundee an hospital to accommodate 100 boys; and I must therefore recommend your Lordships to reverse the interlocutors appealed from, and to make a declaration in the terms of the summons of declarator, and to remit the case to the Court of Session to proceed in framing a scheme, upon which this hospital may be established.

LORD CRANWORTH.—My Lords, my noble and learned friend has gone through this case so

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

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

The learned Judges below proceeded evidently, at least the majority of them, upon the ground that these instruments were altogether of so loose and uncertain a character, that they did not amount to anything like a deed that could be acted upon as expressing the ultimate will of the testator. I observe the Lord Justice Clerk says—"I confess my notion of the whole case is, that these papers must be taken as mere scrolls or jottings, from which the deceased intended, at some time or another, to have a settlement made up; but I think there is no valid or effectual writing that the Court can recognize." And Lord Murray says—"For my part, I can see nothing more in these writings than a variety of jottings, shewing that various ideas had been passing through Mr. Morgan's head about an hospital—about the number of boys to be admitted into it, and so forth." That is, that it did not amount to any valid expression of concluded intention. Now, my Lords, if that were a correct view of the case, there would be no necessity for any further investigation; and that leads to the first important consideration, namely, whether that view taken by the learned Judges below was a correct view of the effect of the instruments.

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

Now that these instruments were intended to be the final expression of his intention, unless altered afterwards, appears to me, *ex facie* of the instruments, to be reasonably clear, amounting, I think, to demonstration. I infer that mainly, though not entirely, from what happened with reference to the very first of these instruments. I put out of the question those portions which are entirely erased. Whether the portions erased are to be regarded or not is immaterial, because he begins the instrument made on the 10th of October by annulling all that had been hitherto written. Therefore, with that we start as with a sort of *tabula rasa*. The language he uses is thus:—"*Edinburgh*, 10*th October* 1842.—I hereby annul all hitherto written on the first, second, and third pages of this, and wish to establish in the town of Dundee, in the shire of Forfar, (I read it without the erased words,) the inhabitants born and educated in Dundee to have the preference of the towns of Forfar, Arbroath, and Montrose; but inhabitants of any other town or county are excluded." Did he mean, that that was something to take effect, if he did not afterwards alter it, or merely as a memorandum of something that he would afterwards do? It appears to me, that that is put beyond all reasonable doubt by this fact,—that, in the second line, he had originally written, "I hereby annul all hitherto on the first, second, and third pages." He thought that was not sufficiently certain, and therefore he inserted the word "written" after the word "hitherto," so that it now reads, "all hitherto written on the first, second, or third pages." But that is not all—for he notices on the side, with his initials above and below it, that he had inserted the word "written" there. What could the object of that be, if this was merely to be what the learned Judges below called "jottings" or "scrolls" to remind himself hereafter of what he was to do? There was no use in his noticing, in the margin, that that interlineation had been made with his approbation. It seems to me to admit of no other construction, than that that was written for the purpose of shewing to those who might have to act upon this instrument that the word "written" had been inserted by him, although it appeared in the shape of an interlineation.

That seems to me so clearly to shew that these were intended to be final instruments, that I do not allude to a number of *indiciæ* of some little importance, which also appear to me to point to the same conclusion. I allude in part to the scratching out entirely the second paper, which evidently was done after his sister died. He had directed a gentleman, whom he named to be the judicial factor, but that was not to take effect during the life of his sister. Then his sister, as we know, having died afterwards, no doubt upon her death he scratched all that out. It was idle for him to do that as a mere memorandum for himself, because he, of course, knew perfectly well that the death of his sister had made that direction unnecessary.

An observation to the same effect occurs on the fourth paper, but I do not think it necessary to advert to it. Therefore I come clearly to the conclusion that these were intended to be final

instruments, expressive of his will, unless by some valid subsequent instrument he should otherwise express, or in any manner qualify it.

That being so, the only remaining question is, Whether, upon the face of this instrument, if you call it one, or these instruments, if you call them several instruments, you can collect a certain lawful intention as to the mode in which the property of this testator was to be disposed of. Now the first argument of the respondents was, that there was nothing to shew what it was that the testator wished to establish, because the words following the direction—"to establish"—in the first instrument have been struck out, so as to leave it uncertain what it was that was to be established. He expresses his wish "to establish in the town of Dundee, in the shire of Forfar, (I leave out the words erased,) the inhabitants born and educated in Dundee to have the preference of the towns of Forfar, Arbroath, and Montrose, but inhabitants of any other county or town are excluded." Then on the 20th October, he adds, "I hereby wish only 100 boys to be admitted in the hospital at Dundee." No doubt we cannot shut our eyes to that, that, in truth, the word that had been written had been the word "hospital;" and there are certain other directions assimilating this to Heriot's Hospital.

I do not think it necessary to go into the question, whether we are or are not at liberty to look at the erased words. My strong opinion is, that we should be at liberty, if it were necessary. But I give no opinion upon that subject, because, taking it in the most unfavourable way for the appellants, we certainly are at liberty to look at the whole of that which remains unerased in the third instrument. And taking the two together, it is manifest, that the word that must be supplied in the first is the word "hospital," because he directs something to be established in Dundee, and the inhabitants of that town are to have certain preferences. And then he says, that he wishes "only 100 boys to be admitted in the hospital at Dundee, and to contain 100 boys in place of 180 boys." It is perfectly obvious, that if there had been no erasure at all, if it had been written originally without the erased words, you must have supplied the word "hospital," connecting the first instrument with the third, because otherwise there would be no rational meaning to be collected from the instrument.

Therefore, I think that this is a valid expression of a wish, that there should be established at Dundee an hospital for 100 boys. Then I need not go over again the principle of law which my noble and learned friend has stated very clearly. If a testator expresses a wish for something to be done, which can be done out of his assets, it is, in truth, a direction that it shall be done. Whether it amounts to an actual gift to some persons who are trustees for doing it, or whether it is the expression of a wish which is binding upon those who, but for that expression, would have taken his property, is a mere matter of unimportance—it amounts in all respects to a bequest or direction that his assets shall be so applied.

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

Now is this a sufficiently definite direction to be carried into effect? I think it is. I do not say that I have not had doubts in my mind in the course of the argument, but I think we collect this—We collect the place where the hospital is to be erected. We collect the object of it—an education, coupled with maintenance during the time of education. And the class of persons—that is to a certain extent no doubt vague, but it must be a class from those three or four provincial towns, who would be reasonably supposed to seek the benefits of a gratuitous education. I think that is sufficiently certain. There has always been a latitude allowed to charitable bequests, that, when the general intention is pretty clearly indicated, the Court will find the means of carrying it in its details into operation.

Then that being so, it is to be established. What does that mean? It is clear that it means, that not only the building is to be founded, and the children are to come there, but that there

must be sufficient masters and instructors provided, and others to take care of the place, sufficient for the wants of that class of persons who would be likely to take the benefit of such an institution. That being so, the object is defined. And although the sum that is to be devoted to it is not mentioned, I think the Court must find out what the proper sum is, by seeing what it would cost to establish such an institution, with a reasonable remuneration to the instructors, and sufficient means for keeping it in operation; that is the sum which the testator means to be devoted to it. If that sum exhausts the whole of his assets, then I do not say that that would exclude the entire of the other legatees; it will then come in as a legacy with the other legacies. If it does not exhaust the whole, then the surplus is undisposed of. But it appears to me that you have now elements of certainty sufficient to enable this intention to be carried into effect; and, therefore, that the interlocutors which treat this either as impossible to be carried into effect, or as never having been indicated by reason of the want of any definite and decided declaration of the testator's intention, are wrong. Consequently, those interlocutors must be reversed, as has been suggested by my noble and learned friend; the case must be remitted to the Court of Session with a declaration that this is a valid bequest for this object; and I think we are not in a condition to do more than so to remit the case, because what the state of the assets may be, or what may be the amount that may be necessary for this object, are matters as to which we are uninformed; but I think that, with this declaration, the Court below can have no difficulty in carrying the testator's intention into operation.

I cannot say that I am very well satisfied with the conclusion to which we have arrived as to the result. I do not know whether the respondents are near relatives to the testator, but I am afraid that they will be in a great measure deprived of something that perhaps they have looked to. I hope, however, that this will be a very laudable and useful institution. At all events, that is a matter with which your Lordships, in your judicial capacity, have nothing to do. We have only to declare, and I have no hesitation in concurring with my noble and learned friend, in declaring, that this is a valid and final declaration of the testator's intention, that an establishment, such as is here indicated, should be made. And, consequently, with that declaration, the case must be remitted to the Court of Session.

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

That these two above mentioned papers were testamentary, in the sense that they were meant to operate only after death, was not disputed on either side on the argument at your Lordship's bar. Of that there can be no doubt.

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

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

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

As to the first alleged ground for holding the bequest not to be void, I may say, that there is little doubt, that the deceased intended by the two testamentary papers to dispose of the whole of his property after the death of his sister for the purpose of establishing an hospital, inasmuch as he revoked his previous bequests apparently extending to all his property, and directed one to be made which would cost probably and certainly, if made in imitation of Heriot's Hospital, his whole fortune. But the question is, as in all cases of the construction of written instruments, not what he intended to do, but what is the meaning of that which he has actually written, and suffered to remain unobliterated? It is in this sense only, that we can inquire what his intention was, and I think that there are no words to convey the whole of his estate. What is bequeathed is, in substance, what shall be sufficient to accomplish the objects stated in the testamentary

papers, after the parts obliterated are left out ; and the question is, whether there is a reasonable degree of certainty in the description so as to enable the Court to decide, how much money is to be applied in the absence of any provision giving the executor or judicial factor or any other person a discretion in the subject, for that would have cured the uncertainty.

I have had very considerable doubts, while making up my mind on this question. It depends wholly on the meaning of the words undeleted by him. Whatever has been purposely deleted is undoubtedly deprived of all testamentary effect ; and it is the opinion of some of the Judges of the Second Division—the Lord Justice Clerk, Lords Wood and Cowan—that the deletion of the word "hospital," in the first instrument of 10th October 1842, destroys the effect of that instrument altogether, for it leaves it quite uncertain what the building or institution to be established was, and that the testamentary instrument of the 20th October did not supply the defect. It seems by no means improbable, on inspecting the instrument of the 10th October, that the word "hospital" was obliterated by mistake. The perpendicular line seems to have gone further than the writer intended, and he has rubbed out the end of it ; and it seems very likely, that a similar mistake has been made at the commencement of the horizontal line, including the word "hospital." We do not know the time the deletions took place. If before he signed the paper, or on or after the 10th October, and before the 20th October, he had determined that no hospital should be established, one would think he would not have signed, or if already signed, he would have cancelled the instrument altogether, as he has done in the case of other instruments of the same date, for the provisions as to the establishment and the selection of objects depended entirely upon the erection of an hospital, and were perfectly useless if he had determined there should not be any hospital at all. These provisions he has left standing. The deletion of the word "hospital" was therefore very probably a mistake. If the alterations were made after the 20th October, it is singular that he should purposely have obliterated the word "hospital" in the first instrument—that of October 10th ; and retained it in the second—that of 20th October. I am inclined, therefore, to come to the conclusion, that this word was not purposely, but accidentally deleted, and therefore is still to be read as part of the will.

Be this as it may, it seems to me that the introduction of the words "the hospital" into the instrument of 20th October, written on the same sheet, supplies the defect ; and reading together the two instruments, the will of the deceased is abundantly clear that there should be established an "hospital" in Dundee for boys, the inhabitants of Dundee to have a preference over those of Forfar, Arbroath, and Montrose ; and that the hospital was to contain 100 boys. The word "hospital," according to the meaning of the word, (I believe in Scotland it has rather a mongrel meaning,) as given by Johnson, Webster, and Richardson, means a building for the reception of the sick and others who are poor. Poverty seems to be one of the conditions in the general understanding of the word. It is quite clear that this institution was not to be an hospital for the sick, for it is not stated to be for sick boys. If the boys were to be received there, it must be intended that they were to be instructed. It was not the mere instruction of boys, for (as both my noble and learned friends have observed) boys from distant places—Forfar, Arbroath, and Montrose—were to be received, who must necessarily be boarded and lodged. From the use of the word "hospital," which is certainly connected with the relief in some way of the poor, it may be collected that they were to be supplied with necessaries, clothing included. And finally, as this bequest was for the *establishment* of the hospital, there must not only be buildings but endowments.

I doubt whether any further effect can be given to what the testator has written and suffered to remain undeleted, by referring to the part deleted. Unquestionably that part cannot be referred to as having any testamentary operation ; but, on the other hand, it is equally certain, that it may be used to shew what the testator knew when he wrote it, and also what was his will at the time, though he has since revoked it. He knew then that there was an hospital called Heriot's Hospital, and he once intended that his hospital should be of the same size, and have its internal management exactly like it ; but he altered that intention as to the capacity of it, and this explains why he directed 100 boys to be received instead of 180, which Heriot's Hospital contained ; and it is highly probable that his intention was, that his hospital should be like Heriot's in other respects, not the same size, nor necessarily a less structure, but to include 100 boys only. But the true question is, What is the meaning of what he has actually written, and suffered to remain undeleted ? and I cannot come to the conclusion that he has written and left unaltered any more than that it should be an hospital established and endowed for the education and maintenance of 100 boys. The similarity to Heriot's Hospital in every respect he no longer directed, and he has not stated in what way it was to resemble it. Therefore the question is, Whether, so reading it, there is sufficient certainty in the bequest to make the legacy valid, and to ascertain the sum to be taken out of the succession. And the objection applies equally, as it seems to me, whether the object is charitable or not ; it is the uncertainty of the subject or *quantum* of the legacy which constitutes the objection ; and if the objection is well founded, it is not removed by the consideration, that the legacy is charitable. When the certainty of the sum is ascertained, as the bequest is charitable, the particular mode

of applying it must be determined on the principle which regulates the Court in the case of charitable bequests.

Many cases were cited of decisions of the English and Scotch Courts, of legacies void on this ground; and I believe the law on this subject in both countries, as to legacies to individuals, is identical, and it is so admitted by the respondents.

Where the subject is an indefinite quantity of an article or money, without any means of ascertaining it, the gift is void. Thus, in *Peck* v. *Halsey*, 2 P. Wms. 387, it was held, that the devise of some of the best of my linen was uncertain. The Master of the Rolls, Sir J. Jekyll, said, "The best of my linen is uncertain; some of the best of my linen is more uncertain still. If it were such or so much of my best linen as the legatees should choose, or as my executors should choose for them, this would be good, and by the choice of the legatees or executors is reducible to a certainty; but in this case, it is merely void for the uncertainty." So of a bequest of a "handsome" gratuity to his executors—*Jubber* v. *Jubber*, 9 Sim. 503, before the V. C. Shadwell, for there is no criterion for ascertaining what the amount of the gratuity should be.

But if the will furnishes a sufficient ground to estimate the amount bequeathed, the legacy is valid. Thus, if it is to be a compensation for services or trouble, though the sum is undefined, the service or trouble affords a criterion, and the bequest is good—as in *Jackson* v. *Hamilton*, 3 Jon. & Lat. 702, where the testator directed that the trustees should receive a reasonable sum of money to remunerate them for their trouble in carrying into effect the trusts of the will, and the amount was referred to the Master. So, in the case of *Broad* v. *Bevan*, 1 Russ. 511, a bequest of £5 per annum to his daughter Ann, with an order and direction to his son Joseph, to whom he left the residue of his estate, real and personal, and whom he made sole executor, to take care of and provide for his daughter during life. The Master of the Rolls, Sir T. Plomer, held, that this expression of his desire gave her a right to a provision, and he left the amount to be settled by the Master. From the observation of Lord Gifford on this case in *Abraham* v. *Alman*, 1 Russ. 516, it seems doubtful, whether his Lordship approved of this case, though he distinguished it from that under his consideration. In the case of *Folly* v. *Parry*, 5 Simon, 138, a direction to the devisee for life, of his estates, and to another to superintend and take care of the education of a person named, so as to fit him for *any* respectable profession or employment, was held to entitle that person to be educated and maintained, and the amount was left to be ascertained by the Master. The case of *Kilvington* v. *Gray*, 10 Simon, 293, was a similar case. It is difficult to say, that this direction is not as uncertain as the one now under consideration.

The case of *Ewen* v. *Magistrates of Montrose*, 4 W. S. 346, decided by the House of Lords, on appeal from the Court of Session, was relied upon on the part of the respondents. In that case the sum bequeathed was certain, viz., £6000, and the Court of Session sustained the bequest. Your Lordships, following the advice of Lord Wynford, reversed the decision of the Court of Session, because the legacy was not to be applied to the object—the establishment of an hospital at Montrose—until the sum amounted to £——; and it was thought, that as the sum was intended to be fixed by the testator, but never was fixed, the bequest was altogether uncertain and void. It seems to have been considered as a condition meant to be imposed by the testator before the legacy was to operate, that the sum was to be fixed, and the sum was never fixed. It is enough to say, that there is no such condition in this case, nor are we to say whether that decision was right or wrong.

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

LORD CHANCELLOR.—The interlocutors will be reversed, and the case must be remitted to the Court of Session, with a declaration, that the testamentary writings in question contain a valid legacy and bequest of so much of the personal estate of the testator as is necessary to found an hospital in the town of Dundee, to accommodate 100 boys. It may be necessary also to declare, that an inquiry should be instituted as to the amount of the estate of John Morgan, necessary for erecting and establishing in the town of Dundee an hospital to accommodate 100 boys, in fulfilment of the testamentary bequest and intention of the said John Morgan; and also, that a scheme for the application and disposal of the fund should be framed by the

authority of the Court of Session. And with these declarations the case must be remitted to the Court of Session.

Mr. Anderson.—Perhaps your Lordships will be good enough to allow us to see the draft of the judgment. It would be desirable that the declaration should be expressed very accurately, with the view of framing a scheme for carrying out the charitable bequests. And if the clerk of the parliament will issue the draft, both parties will see it.

LORD CHANCELLOR.—Yes.

Mr. Anderson.—I understand that the Court below ordered the appellants to pay the costs. We shall, of course, get back those costs from the respondents.

Lord Advocate.—I submit to your Lordships that the respondents ought to be allowed their costs of the appeal out of the estate.

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

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

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

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

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

LORD CHANCELLOR.—Yes, I think that is very reasonable.

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

LORD CHANCELLOR.—How were the costs below given?

Mr. Anderson.—They were given against the pursuers.

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

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

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

Lord Advocate.—I do not object to that course.

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

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

Mr. Anderson.—Except to repay the costs that we have already paid. We are to have those back.

LORD CHANCELLOR.—Yes, you are to have those back.

The *order of the House* was afterwards settled as follows:—"It is ordered and adjudged, by the Lords spiritual and temporal, in parliament assembled, that the said interlocutors, complained of in the said appeal, be, and the same are hereby reversed: And it is further ordered, that the said respondents do repay to the said appellants the expenses to which the said respondents were found entitled by the said interlocutors appealed from, if they shall have been paid by the said appellants: And it is further ordered, that the costs in respect of this appeal, incurred by the said appellants, and by such of the respondents as have answered the appeal, be paid out of the estate, the subject of this appeal, the amount of such costs to be certified by the clerk of the parliaments: And it is declared, that the testamentary writings left by the deceased John Morgan, and in the condescendence annexed to the summons mentioned, contain a valid legacy and bequest of so much of the personal estate of the said testator John Morgan as is necessary to found an hospital in the town of Dundee to accommodate 100 boys: And it is further ordered, that the Court of Session do make such interlocutors and orders, and give such directions, as shall be necessary for the purposes following, (that is to say,) for framing a scheme for establishing in the town of Dundee an hospital to contain 100 boys, and lodging, maintaining, and educating them therein, in fulfilment of the testamentary bequest and intention of the said testator, and for inquiring into and ascertaining the amount of the estate of the said testator

necessary for carrying into effect such scheme, and for applying the same accordingly; and also for adjudicating upon the expenses incurred in the Court below: And it is also further ordered, that the cause be, and is hereby, remitted back to the Court of Session in Scotland, to do and proceed further therein as shall be just and consistent with this declaration, and these directions and this judgment."

Lord Ordinary, Handyside.—*Act.* Patton, Thoms; John Rogers, S.S C. *Agent.*—*Alt.* Penney, Macfarlane; Webster and Renny, W.S. *Agents.*

MAY 21, 1858.

JAMES HILL KIPPEN and RICHARD KIPPEN, *Appellants*, *v.* GEORGE MARSHALL DARLEY and Others, Kippen's Trustees and others, *Respondents.*

Marriage Contract — Presumption — Legitim — Provisions to Children — Double Portions — Construction—*By an ante-nuptial contract, the children were provided by their parents in a sum of money to be divided equally among them, and it was declared to be in full of legitim and every other claim which, by law, might be competent to the children by the death of the father. Of the five daughters of the marriage, two of them were married, and in their marriage contracts the father bound himself to pay to each of them £5000, which was declared to be in full of legitim, &c. The father afterwards executed a trust settlement, in which he provided £4000 to each of the three unmarried daughters, and this provision was, in like manner, declared to be in full of legitim, &c. Thereafter, M. one of the three unmarried daughters being about to be married, the father, in her marriage contract, made her a provision of £5000, but there was not adjected to it any such declaration as was inserted in the other deeds, that the provision was to be in full of legitim and other claims competent to her by law in case of his death.*

HELD (affirming judgment), *That while the sum in the marriage contract of M. was intended to be given in satisfaction of the provision in the marriage contract of her parents, it was not intended to come in place and satisfaction of the provision in the trust settlement.*

There is no presumption in the law of Scotland against double portions, unless the first provision is ex obligatione: *Per* L. Chelmsford L. C. & L. Wensleydale (L. Cranworth *dissenting*).

Appeal—Costs—Lords Disagreeing—*There is no rule of practice, that when the Lords differ in opinion, and affirm a judgment, it will be affirmed without costs.*[1]

Messrs. Kippen (residuary legatees) appealed against the judgment of the Court of Session, maintaining in their case—"(1) That the provision contained in the marriage contract of the respondents must be held as in satisfaction, not only of the provision in the truster's marriage contract, but also of the bequest contained in the previously executed deed of settlement; and that the respondents cannot claim from the estate of the deceased more than the sum stipulated to be paid under their marriage contract. (2) The specialties in the case, when rightly viewed, do not exclude the operation of the general doctrine."

The respondents, in their case, supported the judgment on the following grounds:—"Because having regard to the terms of the trust settlement and marriage contract, and to the other deeds and writings executed by Mr. Kippen, the provision contained in the marriage contract was not intended to satisfy or extinguish the claim for the provision of £4000, and both sums remained exigible out of the estate of the deceased."

Rolt Q.C., and *Anderson* Q.C., for the appellant.—The question here is one of construction, viz., What is the intention of the testator Mr. Kippen as derived from the words of the deeds?—*Primâ facie*, a provision by way of tocher or portion to a daughter on her marriage, is a satisfaction of all other prior provisions made to that child; and that is a rule to commence with in endeavouring to discover the intention. Such is clearly the rule in England—*Hartop* v. *Whitmore*, 1 P. Wms. 680, and cases collected; *Chancey's case*, 2 Tudor's L. C. 303, *et seq.* It is immaterial that there is a slight difference between the limitations or destinations of the money as settled by the two deeds—*Wharton* v. *Lord Durham*, 3 Cl. & F. 146; Sugden's Law of Property, 126. So a legacy may be held to satisfy a portion—*Thynne* v. *Lord Glengall*, 2 H. L.

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[1] See previous reports 18 D. 1137; 28 Sc. Jur. 565. S. C. 3 Macq. Ap. 203: 30 Sc. Jur. 563.