part of the cause of the injury. That is quite enough for the decision of the case. But I am disposed to go further and to say that the import of the evidence is that these things were not only not the cause of the damage, but that the real cause was that there was too much water in the stream for the channel to carry it off, at a place higher up where the ground sloped on each side, and that quite irrespective of the change made on the road in 1884. Higher up than the breastwork the channel did not exceed six feet in breadth, and it is not improbable that when such an extraordinary rainfall as this proved to be took place, the stream should overflow its banks, but that was not attributable to the defender's operations. Therefore I should hold that the damage done was not attributable to the operations of the defender in building the breastwork. On the whole matter I have come to the conclusion that the judgment of the Sheriff-Substitute must be reversed.

Lord Craighill—I concur and think that the interlocutor of the Sheriff-Substitute must be reversed, first, because the facts alleged by the pursuer have not been proved, and second, because that there was no obligation on the defenders to pay for the damage done. I have listened to all the arguments that have been adduced on both sides, and considered the proof, but at this moment I am not able to say that the real cause of the damage was this breastwork. As far as the proof goes, there is no connection established between this breastwork and the overflow of the stream, and I am not satisfied that the overflow of the water might not have taken place even if there had been no breakwater erected. That being so, I think the defenders ought to be assoilzied. The Sheriff-Substitute finds that the damage was the result of the defenders' operations, and that they are responsible. I am of a different opinion, but I think it sufficient for the decision of this cause to come to the conclusion that the pursuer has not proved that the overflow was the fault of the defender. Even if a connection had been established between the erection of the breastwork and the overflow of the stream, I should hesitate to find the defender liable for the damage so caused. The breastwork was erected in the course of fair administration of the defenders' property, and all that was done was for the improvement of the road which was on the defenders' property. If it could be said that the necessary or probable result of the operations on the road was injury to their neighbour's property further down the stream, the defenders may not have been entitled to perform these operations. But I am of opinion, first, that the defenders had, by keeping back the water by this breastwork, no intention to injure their neighbour's property and secondly, that they had no reasonable cause to conclude that there would be risk to anyone. If that was so, then I am of opinion that even if that had occurred, but which I think has not been proved to have occurred, the defenders would not have been liable.

Lord Rutherfurd Clark—I am of the same opinion, and think that the case has failed as regards proof of the facts. I cannot conceive that the operations of the defender for making the bed of the stream level for some twelve feet could have had any appreciable effect, but the theory of the pursuer is that this level part of the bed of the stream gradually formed a bank of sand or gravel which silted up to the westward and made the water flow on the pursuer's land. I do not think that any bed of gravel was so made. I think the obstruction occurred higher up the stream, and was not due to the breastwork. I think the pursuer has failed in the proof. With respect to the question of law, I should prefer to reserve my opinion and to say nothing on the matter.

The Court pronounced this interlocutor:—

"Find that the overflow of the burn mentioned on the record, and the damage thereby caused to the property of the pursuer, are not attributable to any act or operation of the defenders: Therefore sustain the appeal, recal the judgment of the Sheriff-Substitute appealed against, assoilzie the defenders from the conclusion of the action: Find them entitled to expenses," &c.

Counsel for Pursuer—Pearson—Ure. Agents—Adamson & Gulland, W.S.

Counsel for Defenders—D.-F. Mackintosh, Q.C. — Dickson — Chisholm. Agents—J. A. Campbell & Lamond, C.S.

Thursday, March 10.

FIRST DIVISION.

CRUICKSHANK'S TRUSTEES *v.* MAGISTRATES OF GLASGOW.

Succession—Will—Cancellation—Pencil Cancellations.

A testator in his trust-disposition and settlement directed his trustees to pay any legacies and fulfil any directions in any codicil or separate writing under his hand or signed by him from which they should be satisfied as to his intention, notwithstanding the same might be defective in the solemnities required by law. By a holograph codicil, written in ink and signed, he, *inter alia*, made a charitable bequest of £10,000. It was found at his death that he had drawn a number of pencil lines through this bequest, and in a separate pencil writing, not signed or dated, he referred to the bequest as one which "I have in the meantime cancelled in consequence of losses on investments," while in another unsigned and undated pencil writing, consisting of a list of legacies corresponding to his settlement and codicil, he had not entered the bequest of £10,000. *Held* that the bequest of £10,000 was not a valid and subsisting legacy.

James Cruickshank, a retired builder and valuator in Glasgow, died at Harrogate on 9th October 1884. He had executed a trust-disposition and settlement in 1874. The second purpose of it was—"In the second place, I

direct and enjoin my trustees to pay and deliver any legacies or bequests, and fulfil all such directions or instructions respectively, as may be contained in any codicil hereto, or separate writing under my hand, or signed by me, from which my trustees may be satisfied as to my wishes and intentions, notwithstanding the same may be defective in the solemnities required by law." By a separate holograph codicil, dated in October 1878 and November 1879, he made certain additions to his settlement, whereby he increased the legacies and made charitable bequests, and gave, *inter alia*, a bequest of £10,000 for charitable purposes, which need not be here detailed, to the Magistrates of Glasgow. He provided in a later part of the same writing that, as some of his stocks had depreciated since he made his will in 1874, his trustees might, if they thought they would improve, hold them for a time, and if ample funds were thus not available at his decease, pay the bequest of £10,000 to the Magistrates in three yearly instalments if necessary.

In April 1884 Mr Cruickshank called upon his agents Messrs Moncrieff, Barr, Paterson, & Company, writers, Glasgow, who had prepared the settlement, and had the custody of it and of the codicil, and informed them that in consequence of certain unfortunate investments he had lost a considerable sum of money, and that he wished to alter his settlement. Upon that occasion Mr Cruickshank took away with him his holograph codicil. In July 1884 Mr Cruickshank again called upon his agents, referred to his losses, and to the necessity for making alterations on the settlement in consequence thereof, and on this occasion took away with him his trust-deed. Both these documents, when they were handed to the testator, were free from all deletions or other markings.

After Mr Cruickshank's death there were found in a drawer in which he kept business papers (1) the trust-disposition and settlement; (2) the separate holograph codicil or letter, dated 9th October 1878 and 27th November 1879; (3) holograph document written in pencil, headed Notes as to Settlement and Alterations, unsigned and undated; (4) holograph document written in pencil containing a list of charitable institutions, &c., with certain sums set opposite their names, unsigned and undated.

It was found that Mr Cruickshank had made a series of alterations on the trust-disposition and settlement exclusively in pencil, and on the separate holograph codicil partly in pencil and partly in ink. Among others, the two passages in the separate holograph codicil as to the gift of £10,000 to the Magistrates of Glasgow had pencil lines drawn through them, perpendicularly or in a slanting direction, and the provision bequeathing the £10,000 was also marked on the margin with a bracket or circumflex in ink. The text of the bequest had also been altered in different places in ink.

The pencil writing unsigned and undated, which was headed "Notes as to Settlement and Alterations," contained the following clause:—"As regards my oldest son, his share is to be retained in trust, and only the interest paid him. In the event of his decease his share to be divided amongst his children when the youngest comes of age, should he have any. If there is none, then his share will go to my other sons, with the exception of £10,000, which I have arranged to leave to the Magistrates of Glasgow for benevolent purposes, as stated in the manuscript which I handed you, but have now meantime cancelled owing to losses on investments."

The other pencil holograph writing, also unsigned and undated, contained a list of charitable and other institutions, and of persons with certain sums set opposite their names. These names and sums, with few exceptions, corresponded with the legacies provided by the deceased under his trust-disposition and settlement, and separate holograph codicil, if all the alterations by way of addition, interlineation, and deletion in ink and pencil with which the documents were ultimately found, and which they now bore, were taken into account. The £10,000 legacy to the Magistrates of Glasgow was not included in this list.

This Special Case was presented by James Lamont and others, as trustees of Mr Cruickshank, first parties, and by the Lord Provost and Magistrates of Glasgow, second parties, for a decision of the question—"Are the parties of the second part entitled to demand, and are the parties of the first part bound to make, payment of the said legacy of £10,000 as a valid and subsisting legacy?"

The first parties argued — The legacy had been cancelled. The intention to revoke was clear, and although the deletion was only in pencil, yet the facts of the case showed clearly that the cancelling was not merely deliberative but final. The testator had intimated to his agents that he was going to make certain alterations; he had assigned a reason for making them, and in the holograph paper of "Notes" he stated that he had made the cancellation. A reference to the other holograph writing showed that while he gave effect to certain other legacies to charitable institutions, he omitted the legacy in question from this document. Cancellation had only one meaning, and that was revocation. If he had made up his losses he might have restored this legacy, but it stood cancelled, and he died before it was replaced, if he ever intended to do it.

Authorities—*Colvin* v. *Hutchison*, May 20, 1885, 12 R. 947; *Whyte* v. *Hamilton*, July 13, 1881, 8 R. 940, and 9 R. (H. of L.) 55; *Wilsone's Trustees* v. *Stirling*, December 13, 1861, 24 D. 163, 8 R. 940, and 9 R. (H. of L.) 55; *Baird* v. *Jaap*, July 15, 1856, 18 D. 1246; *Young's Trustees* v. *Ross*, November 3, 1864, 3 Macph. 60; *Crosbie* v. *Wilson*, June 2, 1865, 3 Macph. 870.

The second parties argued—The legacy was not revoked. The testator had not completed his intention; it was deliberative merely and not final, as appeared from some of the alterations being in pencil and some in ink; the former were deliberative, the latter were final. The legacy in question was cancelled by pencil only, and the "Notes" to which so much importance was attached by the first parties were really directions to his agents with reference to certain alterations which he proposed at some future time to carry out. The words "under my hand or signed" in the second purpose of the settlement (above quoted) were not to be read as alternatives; all that the testator desired was that he might be free at any time to write a codicil himself. These holograph

writings could not be treated as testamentary. They were not such as at common law could receive effect as controlling the settlement.

Authorities—*Lowson* v. *Ford*, March 20, 1866, 4 Macph. 631; *Dunlop* v. *Baird*, June 11, 1839, 1 D. 912; *Munro* v. *Coutts*, 1 Dow 437.

At advising—

LORD PRESIDENT—The testator, the late Mr Cruickshank, had evidently during his lifetime accumulated a large fortune, and he had executed a settlement of his affairs by means of a trust-disposition dated in 1874. We find that from that time onwards his property rapidly increased, because we see that in 1879 he executed a separate holograph codicil by which he made a considerable addition to the legacies which he had already bequeathed. These two writings lay in the hands of his law-agents until 1884, but in the month of April of that year the testator called upon them and stated that owing to serious losses which he had sustained through unfortunate investments, he wished to make some alterations upon his settlement. He accordingly in the month of April received from his agents the holograph codicil of October 1878 and November 1879.

On the 2d of July 1884 the testator again called upon his law-agents and again referred to his losses, and upon that occasion he took away with him his trust-disposition and settlement. We know that shortly thereafter the testator went to Harrogate, though we have not the exact date when he arrived there, and the next thing that we know about him is that he died at Harrogate on or about the 9th October 1884.

We find that between the time the testator received the two deeds from the hands of his law-agents and the date of his death he had made extensive alterations upon them. What effect is to be given to these alterations is the question which we have now to determine, limiting our inquiry to one legacy only, that of £10,000 to the Magistrates of Glasgow.

The alterations which the testator had made upon the deeds had been made in pencil, and that being so, there was a good deal of force in the argument for the second parties that in the case of pencil alterations upon a document executed in ink, there is a presumption that the alterations are deliberative and not final; that in fact in such circumstances the testator is considering whether or not he will make the alteration contemplated, and that the *onus* lies upon the party supporting these pencil alterations to show that they are not merely deliberative but final. In the present case we have in addition to the documents to which I have just referred, two other holograph writings left by the testator, both of which are written in pencil. The first of these is headed "Notes as to Settlement and Alterations," while the second is a list of legacies, and both of these writings are of the greatest importance in the present case. As to the first of them, the "Notes as to Settlement and Alterations," it may be a question whether it is not in itself a testamentary paper, because in the trust-deed of 1874 there is a direction by the testator enjoining his trustees "to pay and deliver any legacies or bequests, and fulfil all such directions or instructions respectively as may be contained in any codicil hereto or separate writing under my hand or signed by me from which my trustees may be satisfied as to my wishes and intentions notwithstanding the same may be defective in the solemnities required by law"—a form of words which I do not think I ever observed before.

From the language of the trust-deed, then, it is quite possible that this document may be a separate testamentary writing, or it may be merely a paper of instructions for his own use or for that of his agents upon some future occasion, for what his trustees are to give effect to are any separate writings under the hand of the testator, or any separate writings which are signed by him. It is not necessary, however, in order to determine the question now before us that we should decide this point, so I abstain from expressing any opinion upon it. Upon one point there can be no doubt and that is, that the writing headed "Notes as to Settlement and Alterations" is a paper expressive of the testator's understanding of something which he has already done. The words of that writing which bear upon the present question are these:—"As regards my oldest son, his share is to be retained in trust and only the interest paid him. In the event of his decease his share is to be divided amongst his children when the youngest comes of age, should he have any. If there is none, then his share will go to my other sons, with the exception of £10,000 which I had arranged to leave to the Magistrates of Glasgow for benevolent purposes as stated in the manuscript which I handed you, but have now meantime cancelled owing to losses on investments."

What the effect of such a clause would be if this writing should be held to be a testamentary paper I do not attempt to decide. All that we have at present to do with is the expression which cancels the legacy of £10,000. The words which he uses are "but have now meantime cancelled," and the mode in which the cancellation was accomplished was by his drawing his pencil through that portion of the codicil by which the legacy was bequeathed. The testator had cancelled the legacy in the way I have mentioned, and he means by this sentence in his "Notes" to give expression to what he had done.

The other document to which I have already referred, is also of considerable importance. It is an amended list of the charities which the testator intends to benefit, but throughout it there is no mention of or reference to the legacy of £10,000 now in question.

I come to the conclusion, therefore, that the testator did intend to cancel this legacy, and by drawing his pencil through that portion of his codicil I am of opinion that he did in this way effectually cancel it.

I am therefore for answering the question in the negative.

LORD MURE—I am of the same opinion. If the testator had contented himself with simply drawing his pencil through that part of his codicil which contained the bequest of £10,000, a question might have arisen whether sufficient had been done to have rendered it an effectual cancellation, but from the terms of the settlement, and especially from the clause which your Lordship has read, we are warranted in looking at the various other writings left by the testator in order to arrive at his inten-

tion, and from an examination of them it is quite clear what he intended to do. We are warranted from this clause in the trust-deed in looking at any writs under the testator's hand in order to get at his wishes. The words he uses are very broad indeed—"Any separate writing under my hand or signed by me;" and we can look at these writings without requiring to determine whether they are testamentary writs or not. Taking, then, this clause along with the paragraph in the "Notes" to which your Lordship referred, and in which the testator distinctly states that he has cancelled this legacy, I have no hesitation in arriving at the same conclusion as your Lordship, that the testator intended to cancel, and has validly cancelled, this legacy of £10,000.

Lord Shand—The parties are agreed that this codicil of October 1878 and November 1879 is an expression of the testator's intention, and the question therefore comes to be, whether that intention is to receive effect as it was originally expressed, or whether effect is to be given to the alterations which were subsequently made upon it. In considering such a question we are entitled to look at whatever will aid us in determining whether these deletions were intended by the testator to be deliberative merely or final. If we had merely these two documents, the trust-deed and the codicil along with the pencil deletions, I should have felt very great difficulty in deciding what effect was to be given to these pencil scorings, and should have felt that further information was necessary. But a great deal of light is thrown upon these documents by the "Notes" and other holograph writs which have been referred to, which show clearly, I think, that the intention of the testator with regard to these cancellations was final and not deliberative. I take these "Notes" as a record of the testator's purpose in making the pencil alterations, and I think that the words made use of in the passage in the "Notes" to which your Lordship referred point distinctly to a past act of cancellation. If what is contained in that passage was intended merely as instructions for the future, I think the words would have been "will cancel," instead of which they are "have now cancelled." Looking, then, to the wording of this portion of the "Notes," I think it is quite clear that the testator was referring to an act of cancellation which was completed, and which was therefore not deliberative but final.

Lord Adam—We have here a testamentary writing containing a bequest of a legacy, but through this bequest we now find that certain lines have been drawn with a pencil, and the question comes to be, whether the pencil markings have the effect of cancelling the legacy. Had these markings been made with ink they would have been sufficient to cancel the bequest, but being made in pencil have they that effect?

If we had had nothing in the present case but the deed itself and the pencil marking, I for my part should not have been prepared to have held them as sufficient, for I agree with what Williams says (Williams on Executors, p. 112)—"When the question is whether the testator intended the paper as a final declaration of his mind and as testamentary, or whether it was merely preparatory to a more formal disposition, the material with which it is written becomes a most important circumstance." But then it is admitted that we can look at evidence both parole and documentary which throws any light upon the deletions with a view of getting at the testator's intentions regarding them, and the document which aids the inquiry is the testator's "Notes as to Settlement and Alterations." This is a holograph writing referring back to the circumstances under which he had made the alterations, and I can attach no other meaning to it than that it is a statement by himself that he had at the time when he wrote it cancelled the legacy which we are now dealing with—[*His Lordship here read the passage in the "Notes" quoted above*]. I can only read this as an explanation by the testator of what he has already done.

The Court answered the question in the negative, and found that the second parties were not entitled to demand, nor were the first parties bound to make payment of the said legacy of £10,000.

Counsel for First Parties—D.-F. Mackintosh, Q.C. — Goudy. Agents — Fraser, Stodart, & Ballingall, W.S.

Counsel for Second Parties—Balfour, Q.C.—G. W. Burnet. Agents — Fodd, Simpson, & Marwick, W.S.

Friday, March 11.

SECOND DIVISION.

[Lord Fraser, Ordinary.

WATSON'S TRUSTEES *v.* GLASGOW FEUING AND BUILDING COMPANY, *et e contra.*

Deed—Mutual Error—Error in Plan referred to in Deed—Effect on bona fide *Third Party—Register of Sasines.*

In endorsing on a feu-contract as relative thereto a plan of the property feued, a mistake was made as to the roads which the superior had undertaken to make, the plan being so coloured as to make it appear that he had undertaken an obligation much greater than it was really intended by the parties that he should undertake, or than they intended that the plan should show. The feu-contract was signed and recorded without the mistake being discovered, and the property came into the hands of a purchaser from the original feuar. The question was raised between him and the superior whether the latter was bound to make the roads shown on the plan It was proved that the purchaser did not when he purchased know of the obligation apparently created by the feu-contract and plan, and that in the sale to him—the error not having been yet discovered—no such obligation was in contemplation of either party. *Held* that notwithstanding the deed was recorded, the superior was entitled to redress against the error, and was entitled to have the feu-contract reduced in so far as it imported an obligation on him to make the roads in question.