'former tack then unexpired, and which former tack had been 'granted by the Duke at the same rent, and also for a sum or 'price received by him; and the said tack in question, therefore, 'having been granted partly in consideration of the rent re-'served thereby, and partly in consideration of a price or sum 'before paid to the said Duke himself, and of the renunciation 'of the said former tack; and find, therefore, that this tack of 'the 30th of December 1803 ought to be considered, in this 'question with Hislop, as let with diminution of rental, and not 'for the just avail: And it is further ordered that, with this 'finding, the cause be remitted back to the Court of Session in 'Scotland, to do therein as is just and consistent with this finding.'

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When the case returned to the Court of Session, Hislop offered to purge the irritancy in the mode proposed by the executors in the preceding case. The Court, however, sustained the reasons of reduction, and reduced the lease; and the House of Lords 'Ordered and adjudged that the appeal be dismissed, and 'the interlocutors complained of affirmed.'

Appellant's Authorities.—1. Ersk. 8. 14; 1. Stair, 13. 14; Stewart, Feb. 1. 1726, (7275); Gordon, July 13. 1748, (2336, and Elch. No. 33. Tailzie); Price, July 6. 1760, (not rep.); Rosses, Nov. 18. 1766, (7289); Hope's M. P. 403. 407. 408; 3. Ersk. 8. 29; Kilk. 445; Gilmour, Mar. 6. 1801, (No. 9. App. Tailzie.)

J. CHALMER,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No.* 38.)

No. 20.

Mrs. NASMYTH and Others, Appellants.—*Scarlett—Lushington.*
Dr. HARE and Others, Respondents.—*Romilly—Mackenzie.*

Testament.—Held (reversing the judgment of the Court of Session,) that a testament executed by a Scotchman who had long resided in India, and to which a seal had been attached, but which had been cut off, was revoked, although he was domiciled in Scotland, and the deed was holograph of, and subscribed by him.

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2D DIVISION.
Lord Craigie.

DR. JAMES NASMYTH, a native of Scotland, went early in life to India, where he remained till 1798. He then returned to Scotland, where he resided permanently at Hope Park near Edinburgh, but died in London, while on a visit, in 1813. His repositories at Hope Park were then opened, and the contents examined and inventoried, in virtue of a warrant of the Sheriff, in presence of the agent of the nearest of kin, of one of the assistants of the Sheriff Clerk, and other persons appointed by the Sheriff. In a

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closet which was locked, many valuable articles and papers were found; and, among others, it was stated, in a minute made at the time, that there was 'a paper entitled on the back 'Will of " James Nasmyth, 28th September 1803,' consisting of two pages ' and a half, and signed on the last page 'James Nasmyth,' and ' which paper has also a writing or memorandum written with pen- ' cil; and of which writing or memorandum, in case the same ' should be defaced, or become illegible from being handled, or ' otherwise, an exact transcript, verbatim et literatim, is just now ' made, and signed accordingly, by the parties present at this ' meeting: Also a separate unsigned memorandum, which is ' stated by Mr. Gordon to be holograph of the said deceased ' James Nasmyth, and apparently relates to the distribution of ' his property, and which it has accordingly been thought proper ' to be put up with the said paper.' All the papers (including those mentioned) were put into the custody of the agent of the nearest of kin, who carried them to his own house. The paper of the 28th September 1803 was in the following terms, several parts of it being interlined with pencil, and, in other words, struck out by the same means.*

' In the name of God. Amen. I constitute and appoint this ' to be my last will and testament, hereby revoking all others. ' To thee, O Lord God of my fathers, I resign my soul. In ' very truth and deed, I confess myself to be the chiefest of the ' chief of sinners. I cry to thee for mercy, in and with some ' hope of pardon, through and for the sake of the perfect right- ' eousness and blood of thine own Son Jesus Christ, whom thou ' lovest, and in whom thou art ever well pleased. I constitute ' and appoint my dear sister Mary Nasmyth, Mr. *John Gordon*,† ' W. S. of Edinburgh, Dr. James Hare, (of C——— Hall, ' senior,) *late from India*, Mr. James Mackay, now there, Mr. ' Samuel Williamson of *St. Andrew Square*, Edinburgh, and ' Mr. J. Carstairs of London, merchant, to be my executors. ' I give and bequeath to my old and faithful friend, the foresaid James Mackay, the sum of £1200 sterling. I give ' and bequeath to the said John Gordon £200 sterling. I ear- ' nestly request that Dr. Hare will accept of some token of what ' my heart feels for his generous and friendly conduct to me. ' Let my executors urge, and leave the kind to himself. I give

* The *interlineations* are pointed out by being included within parentheses, and the words *struck out* are printed in italics.

† The words 'John Gordon' were obliterated, so as to be scarcely legible.

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'and bequeath to the said Samuel Williamson £200 sterling, '*and remit what he owes to me.* I give to John Gunn, for his 'attention to my afflicted brother Robert, £20 sterling, with ex-'pectation that this will fix and increase his assiduity, rather than 'tend to lessen it. I give and bequeath to the poor of my native 'town Kirkcudbright £200 sterling, which must be distributed 'wisely and gradually by the Magistrates of that town. I give 'and bequeath to the children of Mrs. George Ross of London, 'extra jus mariti, £600, to be divided equally among—when—'and at the discretion of my executors alone. I give and bequeath 'to Robert Clark, the eldest natural son of the late James Clark '(of Calcutta,) £400 sterling; and I give and bequeath to the 'younger son, John Clark, £400 sterling. But these sums are 'to be managed, used, and applied, according to the prudence 'and sole determination of my executors. I give and bequeath 'to each of the children of the late Mrs. Christian Wright £60 'sterling, to be managed, used, and applied, according to the 'prudence and determination of my executors, and (extra) with-'out the interference of their father. I give and bequeath to 'the children of Sir James Nasmyth of Posso £400 sterling, 'to be shared equally among them. I give and bequeath to the 'London Missionary Society £100, and the same sum to (the) 'Edinburgh Missionary Society. I give and bequeath to the 'different charity schools and charitable societies (institutions) 'in Edinburgh £500 sterling, to be distributed and applied ac-'cording to the selection and determination of my executors. I 'give to the Rev. David Black, one of the Ministers of Edin-'burgh, £20 sterling. I request that a large, clear, and elegant 'edition of the Holy Bible be presented to my brother Dr. Thomas 'Nasmyth, with a brother's affectionate wishes that the moral in-'structions, and the practice of honourable conduct, may influence 'the parent,* to whose dear children I give and bequeath the 'sum of £500 sterling, to be equally divided among them, with 'an uncle's blessing. May he accept this as cordially as I, in 'the view of the Creator, offer it now. I give and bequeath 'to the said Mary Nasmyth, my beloved sister, the whole 'and all the remainder of my property (personal and real,) of 'whatever denomination, to be used and disposed of as she 'pleases. She will, I know, enjoy it for herself honourably and 'prudently, and distribute liberally. Lastly, of my bosom brother 'Robert, I feel that my fixed sentiments, and my gratitude for

* A foot-note was here made thus: 'The folio Bible containing the family names.'

July 27. 1821. 'his affectionate conduct and generous purposes towards me, cannot be expressed. Therefore, O merciful and all-powerful Lord God, I beseech thee to look down and bless (him) by restoring his understanding, so that he may have the renewed sense of thy pardon, reconciliation, and fatherly chastisement. Habitually did he worship thee....In testimony of this being my last will and testament, I hereto set my hand and seal, and declare it to be written upon three pages, and signed in my own handwriting, at Edinburgh, this 28th day of September 1803.—JAMES NASMYTH.'

This deed was thus titled on the back: 'Will of James Nasmyth, Sept. 28. 1803;' and the following memoranda were indorsed in pencil:

'See my several memoranda for a new disposition, to be done forthwith, for she has gone as far as she can; and I must use the remainder as well and usefully as I can, generally and to public beneficence, recollecting that is left is freely given by my God and benefactor.—*Jan.* 1810.

'Be sure to destroy this after writing the other.—*N. B.*

'*July* 1810.—To appoint William Kerr, Sec. to the Gen. P. O., instead of,' &c.

The separate memorandum alluded to in the minute was in these terms:

'J. N. directs that his third of the property of Whitehill and Craiglay be sold soon after his death, and the amount he gives and bequeaths to the magistrates of his native town, Kirkcudbright; the interest only to be applied (by them) to relieve the native poor of that place, prudently and judicious. (And) The principal sum to be placed at interest on the safest landed security.

'J. N. appoints as one of his executors Wm Kerr, Sec^y of the G. Post Office, with a legacy of one hundred guineas; w^c sum must also (be) given to Samuel Williamson, one of my executors.—*July* 1811.—J. N.

'J. N. gives and bequeaths to the only son of his late brother Thomas N. by (Mary) Sarah, or Sarah Mary Nasmyth, the sum of one hundred guineas,—regretting the insuperable prejudices against *me* (him) which he and his said wife have instilled into their mind, manifested by their behaviour to him. J. N.'

Dr. Hare and others having obtained themselves confirmed executors, Mrs. Nasmyth and others, the nearest of kin, brought, inter alia, an action of reduction of their nomination, and of the will and codicil, and also an action of count and reckoning. In support of the reduction they alleged, 1. That the will had been

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originally sealed, but that the seal had been cut off by Dr. Nasmyth, thereby indicating his intention to revoke, and that such an excision had been made was evident ex facie of the deed; and, 2. That this intention to revoke was confirmed by various circumstances, particularly by his subsequently succeeding to a large fortune, by entries in a memorandum-book that he had such an intention in contemplation, by the death of the residuary legatee in the mean while, and by the will having been found hung up on a peg along with other useless papers. To this it was answered, 1. That the will was holograph and duly signed by Dr. Nasmyth, and was therefore a complete valid deed by the law of Scotland; that nothing was said, in the minute made at opening the repositories, of there having either been a seal, or that it had been cut off, and that esto the seal had been cut off, this was not relevant to establish an intention to revoke; because, independent of the seal, the deed was perfectly good and complete; and, 2. That as there was no other will, and there was no written evidence of cancellation, the circumstances alleged were not sufficient to infer cancellation. Lord Craigie, in the reduction, 'sustained the defences, so far as they relate to the general validity 'of the latter will and testament of the late Dr. James Nasmyth, 'and the appointment of the defenders as executors; and to that 'extent assoilzies the defenders, and decerns: And in the action 'of count and reckoning finds, that though the defenders are 'obliged, from time to time, when required, to communicate to 'the pursuers or their agents distinct states of the funds, and of 'their administration as executors, they cannot be required in hoc 'statu to institute a formal count and reckoning in manner pro-'posed by the pursuers, nor to enter into the question, treated at 'great length in the pleadings for the pursuers, as to their right 'or title, as executors, to retain, in virtue of the enactment in '1617, a certain portion of the funds which belonged to Dr. Na-'smyth.' To this interlocutor the Court, on the 7th of June 1817, adhered.*

Mrs. Nasmyth and the other next of kin then appealed; and, in addition to the special circumstances, they contended that the excision of the seal must be held to have been made by Dr. Nasmyth animo revocandi, unless positive evidence were adduced to the contrary; and that this excision was of itself sufficient to establish his intention to revoke. In support of this, they pleaded

* Not reported.

July 27. 1821. that the principle by which such cases were governed was, not that a will remains valid, provided the original requisites to its validity, when first executed, continue in existence at the death of the testator, but that it is to be held as annulled and revoked wherever there appears upon it an act of cancellation whence the animus revocandi can be inferred:—that although sealing might not be essential to the *validity* of the deed by the law of Scotland, yet the excision of the seal was sufficient to establish the *intention to revoke;* and that the question was, therefore, reduced to the inquiry, quo animo the testator originally affixed his seal. This, they maintained, could have been with no other view than to give authority to the deed, which was confirmed by his long residence under the English law in India; and consequently that the removal of the seal showed that his intention was to destroy its authenticity, and thereby to revoke and cancel it.* To this it was answered, that as no mention was made in the judicial minute, at opening the repositories, of the excision, the presumption was, that the seal was then affixed; and therefore it was incumbent on the opposite party to establish the excision during the life of Dr. Nasmyth:—that, however, assuming that it had been made by him, no inference could thence be deduced affecting the validity of the will, because, by the law of Scotland, a seal is of no more value than a wafer, and is absolutely useless; and consequently its removal left the deed as effectual as if it had never been attached:—that as Dr. Nasmyth was a Scotchman, he must have been aware of this; and therefore it could not be inferred that, by doing an act which could not in law injure the validity of the deed, he intended to destroy it. The House of Lords 'Ordered and adjudged that the interlocutors 'complained of be reversed; and the Lords find that the instru-'ment, bearing date the 28th September 1803, produced as the 'last will and testament of Dr. James Nasmyth, was revoked and

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* It is stated in the case of the appellants, that 'the respondents, as asserted exe-'cutors, propounded these testamentary papers in the Prerogative Court in the year '1815, the deceased having left large personal property within the province of Can-'terbury. When the allegation propounding these papers was debated, the learned 'Judge (Sir J. Nicholls,) holding up the fac-simile of the will, immediately said, 'The "excision of the seal was primâ facie an act of cancellation, animo revocandi; that if "the executors meant to deny that the will was in this cancelled state at the de-"ceased's death, they must distinctly aver the fact, and prove it by evidence; that "argument and insinuation alone were inadmissible for such a purpose; that he must "presume that the papers were in the same plight and condition as found at the de-"ceased's death, until the contrary was proved.' The question before that Court, however, was superseded till the decision of the Court of Session should be ascertained, Dr. Nasmyth being a domiciled Scotchman.

'annulled by him; and that the several indorsements thereon, 'together with the paper produced and insisted upon as a codicil 'thereto, are of no avail or effect in law as testamentary dispositions: And it is further ordered, that, with this finding, the 'cause be remitted back to the Court of Session, to do therein as 'shall be consistent with such finding, and as shall be just.'

The Lord Chancellor, after mentioning the names of the parties, and the interlocutor of the Lord Ordinary, stated—My Lords, your Lordships observe the terms of this interlocutor are, to 'sustain the defences, so far as they relate to the general validity of the latter will 'and settlement of the late Dr. James Nasmyth, and the appointment 'of the defenders as executors.' I repeat the terms of this interlocutor, because it is difficult, in many parts of the proceedings, to be quite clear whether they contain a judicial determination, not only upon the validity of a former will, but likewise whether they are to be considered as containing a judicial determination upon all the papers which may be looked at as being of a testamentary nature. These words, 'the 'appointment of the defenders as executors,' incline me to suppose that the paper of 1811, which I shall have occasion presently to point out to your Lordships' attention, must have been considered by those who framed the present interlocutor, as part of the latter will and testament of James Nasmyth, because one of the defenders, Mr. William Kerr, is made an executor only by that paper, as your Lordships will observe by and by. 'And in the actions of count and reckoning finds, that 'though the defenders are obliged from time to time, when required, 'to communicate to the pursuers or their agent distinct states of the 'funds, and of their administration as executors, they cannot be required, in hoc statu, to institute a formal count and reckoning in 'manner proposed by the pursuers, nor to enter into the question, treated 'at great length in the pleading for the pursuers, as to their right or 'title, as executors, to retain, in virtue of the enactment in 1617, a 'certain portion of the funds which belonged to Dr. James Nasmyth.'

My Lords, with respect to this part of the interlocutor of the Lord Ordinary, it appears to me that there is no occasion to trouble your Lordships; for though it may be possibly a very material question, what is the true construction of the enactment in 1617, yet, in my view of the case, it will not be necessary for the present purpose to enter into that consideration. My Lords, without stating at length the subsequent interlocutors complained of, they all proceed as interlocutors affirming the statement that this Dr. James Nasmyth has made a valid will and testament; and the only question your Lordships have to decide is, Whether he has or has not, under the circumstances which I am about to represent, made a valid will and testament?

My Lords, I collect from these papers that it was (if I may take the liberty to mention it) the opinion of counsel, that he had made a valid

July 27, 1821. will and testament; and your Lordships are also in possession of the fact, that the Court were unanimously of the same opinion. These circumstances make it the duty of those who are bound to advise your Lordships, to consider the case with great attention, and I have not failed to endeavour to discharge that duty. But I am prepared to state to your Lordships, according to my humble opinion under the circumstances I am about to represent, that he has not made a valid will and testament.

My Lords, your Lordships will find that this gentleman, upon the 8th of September 1803, made a will, (for it certainly was a will,) in which he states himself thus. [His Lordship then recited the terms of the will.] Then, my Lords, he concludes his will thus; and I call your Lordships' particular attention to this, because I apprehend that, with respect to a will of personal estate, if there are any formalities observed beyond those which the law requires, the law is, that a man may prescribe to himself the forms which shall or shall not be attendant to his will. In this part of the island, your Lordships very well know, if a man makes a will of personal estate—if I were to begin, I John Lord Eldon do so and so, whether there was any signature or not, that would be a very good will. But I apprehend, if I thought proper to conclude that will by saying,—in testimony thereof to this my will, I do hereby set my hand and seal,—that it would be taken, according to our principles of law, to be a declaration of my intention as a testator, that the instrument so authenticated is to be a will, and to be taken to be a will, according to the forms which I myself have prescribed to observe. If, indeed, I were cut off in that moment by sudden disease, before I could annex my seal, or before I could annex my handwriting, the will would do; but if it was my professed intention, on the face of the will, to have certain forms and ceremonies as attesting my execution of the will, and my intention that the will shall not be perfect till I have observed these forms, then (unless my inability to do it is produced by some such circumstance) I apprehend the will would not be mine; though it would be mine, if I had not made any declaration as to such (for my purposes) necessary forms and ceremonies. Now, this testament concludes thus: 'In testimony of this being my last will and testament, I hereby set my 'hand and seal, and declare it to be written upon three pages, and 'signed in my own handwriting, at Edinburgh, this 28th day of Sep'tember 1803.' It is then signed 'James Nasmyth;' and it is insisted (and I confess, according to my conviction, it is perfectly true) that there was a seal annexed to this will.

My Lords, I do not know how to make myself intelligible to your Lordships, without holding up to you the paper itself, because I must admit that the seal is not so approximate to the handwriting as it usually is in such instruments. Here is James Nasmyth, (pointing to the paper.) Here, it is represented, was the seal. The paper forms a representation of the will itself, and if there was a seal—here it is—a seal

not taken off by tearing, but by excision, or cutting the part. Now, according to my humble judgment, if I am asked the question, whether there ever was a seal here or not, I cannot try it by any criterion that is better adapted, I think, as a rule by which you are to decide such a fact, than by taking notice of the circumstance, that the testator has expressly said, that as a testimony that this should be his will and testament, he does set his hand and seal to it. Then are we to suppose that, because the seal happens not to be quite so approximate as it is usually to the signature, that the testator did not do that which, upon the face of the instrument, he expresses his intention to do, and which in all probability he must have done.

My Lords, your Lordship's will permit me now to observe, though there is a great deal of dispute with respect to matter of fact between these parties, as to the nature of the custody in which this paper was found, that, at least in my judgment, it is not very material to decide these questions of fact in controversy, one way or the other. It is said, and the truth may be—but I desire it at least may be understood that I for one form no opinion upon that circumstance, as being or not being true—it is said this paper was found in a closet, hung upon a peg, and there is a representation in the instrument, with a view to show your Lordships what part of the paper touched the peg; and it is contended, on one hand, that his having so treated this paper as to suspend it on that peg, is evidence that he did not mean that this should be his will. My Lords, I think it right, in order to discuss this question upon the principles upon which, at least as it appears to me, it ought to be decided, to assume that this paper was in (what I see in the papers before us is called) a fast-locked place of the testator; and whether the paper was found in the bureau of the testator, or upon this peg, I do not trouble myself to examine. That it was found in a closet where the testator had his valuable papers, I think is a fact beyond all controversy; and with respect to the particular circumstances under which it was found in that closet, I do not enter further into the examination of them, because I think it must be admitted that it was found, somehow or other, in a fast-locked place of this testator; and I found on that for another reason, that I take it, according to all principle, that if a paper cancelled, and the seal cut off, or the name erased, is found in a fast-locked place of the testator, the primâ facie inference from that is —not that the testator meant it should continue to be his will—but that the testator was the person that did that act himself, which is found to be evidenced by the state of the paper found in his fast-locked closet.

My Lords, at some period—at what period I know not—the testator took up this paper, and with a pencil he struck out and introduced several words which occurred in the instrument when it was first formally executed; and I take notice of this circumstance now, because it appears to me, that when it was argued that by the law of Scotland signature alone would be sufficient, even if that is required to authenti-

July 27. 1821. cate a paper as his will, I desire to ask, to what part of the paper, as we now find it, is that signature affixed? Is it affixed to what was the original writing in the paper, or is the signature to be considered as also affixed to the introduced new contents of the paper? I apprehend that no man can rationally say that this signature is to be taken as a signature, which was to be by relation drawn down to the authenticating the introduced innovated contents of the paper, but that it was a signature which was originally affixed as part of those forms and ceremonies which, as his law with respect to making the will and testament, he had prescribed to himself.

Now, in the first place, your Lordships will recollect that the second person named as an executor was John Gordon. That is struck out with red ink. I was about to introduce an observation, thinking it had been in pencil, which it may be proper to make. I do not apprehend it would signify at all, if it was clear on the contents of the paper that the testator meant that the whole of them should operate as testamentary, if it was found that some were in ink and some in pencil. But, on the other hand, I take it to be a material fact, when you come to consider whether the testator meant to alter his will, and if he meant to make material alterations, even if signature were necessary, whether it is likely, if he meant it to be a perfect act, he should introduce those alterations in pencil or in ink. It is a circumstance of evidence as to what was his intention.

My Lords, after Dr. James Hare, he strikes out the words ' late from India,' and inserts the words ' of C——— Hall, sen.' After the words ' Mr. Samuel Williamson,' he strikes out the words ' St. Andrew ' square.' He continues to John Gordon the legacy of £200 sterling, though he struck out his name as an executor. He continues the bequest to Samuel Williamson of £200 sterling, and with pencil strikes out the words, ' and remit what he owes to me.' That might be, and is a material alteration; because, if the debt was a considerable debt, it was in truth a gift of the amount of the debt, and would operate as a legacy of what he owed him; and then, after the words ' James Clark' with a pencil, he strikes out the words ' of Calcutta.' After the words ' determination of my executors and,' he inserts the word ' extra;' and then, after the words ' the remainder of my property,' he inserts in pencil ' personal and real;'. and he puts at the bottom, in pencil, by way of describing the Bible, ' the folio Bible containing the family's ' names.' These interlineations he makes in pencil, and that in a paper which he professed to execute as a will, by affixing a signature and seal to it; and those interlineations appear in a paper from which the seal is abstracted by excision.

My Lords, this paper has on the back of it ' Will of James Na- ' smyth, September 1805'—a will which, I have before observed to your Lordships, certainly was, at the time, a complete will, to be consummated by the death of the testator. Then he says, in pencil

again, 'See my several memoranda for a new disposition to be done 'forthwith; for she has gone as far as she can, and I must use the 'remainder as well and usefully as I can, generally and to public 'beneficence, recollecting that is left is freely given by my God and 'benefactor.' And this is dated 'January 1810.' This proves that between 1803 and 1810 there had been several memoranda for a new disposition; and here it must be admitted, that a man's making memoranda for a new disposition is an act that he may do quite consistent with his intentions that the old will should remain a will, to operate in case he did not make a new disposition. But the question will always arise, whether the memoranda, and the acts which he does, and the change of circumstances, and so on, amount to evidence—not merely that he meant them as memoranda that he would make a new disposition—but that he had come to a determination that the old disposition should not operate; and while yet meditating a new disposition, the hand of death cuts him off from making a new disposition, and he dies intestate.

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My Lords, there is at the bottom of this these words, upon which stress, I see, has been laid—and much stress I have heard laid upon it—'Be sure to destroy this after writing the other, N. B.' And it has been contended upon this, that the old will was to remain in efficacy till the other was written; but the words are certainly open to another sense, because look at the word 'destroy.' A will may be revoked, a will may be cancelled, and yet the will may not be destroyed—that is, the visible existence of it may not be destroyed. As a will it may be destroyed, but the thing itself may not be destroyed; and when he speaks of several memoranda for a new disposition, and after the other is written, the question is, Did he preserve this as memoranda to himself or others to make a new disposition? or did he mean that the old will, together with or without the interpolated parts, and those memoranda, were to continue as instructions to enable a person to make a new will, and then to be destroyed, as putting an end to its existence after that will had been made?

My Lords, in July 1810 he writes, as I understand, he means to appoint 'William Kerr, secretary to the General P. O.'—which I suppose is post-office, or some such thing. Now, if you take that by itself, it is very difficult to know what the meaning of it was; but if you look back into the paper, and attend to the alterations that he had made in the paper, you will then find that the probability is, that he meant to appoint that William Kerr in the room of John Gordon. But the memorandum July 1810 to appoint William Kerr is not an appointment of William Kerr; and therefore striking out John Gordon, and making this memorandum to appoint William Kerr, certainly goes the length of showing that he did not mean that this former paper should operate as a will constituting John Gordon executor, although he does not proceed to execute his purpose to appoint William Kerr executor.

My Lords, this was in July 1810, and there comes another paper

July 27. 1821. in July 1811, which has been throughout this case called a codicil; and if the testator had thought proper to say that this was a codicil to his will, to be sure it would have been very strong as evidence to show that he thought he had a will. But there is no such thing as any denomination of that kind given by the testator to this thing called a codicil, and it seems to me to be extremely difficult to say that anybody can with propriety give it that denomination. This gentleman, who has spoken of memoranda, (those memoranda could not be alluded to by a paper written long before this paper,) says, 'J. N. directs that his third of the 'property of Whitehill and Craiglay be sold soon after his death, and 'the amount he gives and bequeaths to the Magistrates of his native 'town, Kirkcudbright.' Now, if this was real property, the testator could not possibly imagine that could be a complete will. 'The interest 'only to be applied by them to relieve the native poor of that place, 'prudently and judicious, and the principal sum to be placed at interest 'on the safest landed security.'—'J. N. appoints as one of his executors William Kerr, secretary of the General Post-Office, with a legacy 'of 100 guineas, which sum must also be given to Samuel Williamson.' My Lords, it is true that the words which follow Williamson, namely, 'one of my executors,' detract from the force of the observation in some degree which I am now about to submit to your Lordships; but I cannot think they detract sufficiently from the observation I am about to make, to induce your Lordships to think that the will signed by him September 1803 was a subsisting will for giving to Mr. Kerr a legacy of 100 guineas. He says, 'Which sum must also be given 'to Samuel Williamson, one of my executors.' The question is, whether he meant by this to say, that he had already appointed effectually, and by an appointment that was at that moment effectual, Samuel Williamson to be one of his executors; or whether he meant by this only to say, that Samuel Williamson should be one of his executors in a regular disposition? Now, when your Lordships turn back to the paper, he could not mean, when he here speaks of giving Samuel Williamson one hundred guineas, that the former paper was to be part of his will, when he had there given that same Samuel Williamson two hundred pounds, and remitted what he owed him. And here arises a question upon the simple contents of this paper alone, as they relate to Samuel Williamson—a question of very much the same nature as relates to the whole contents of the paper taken together; for if the original will is to stand, and this is also to stand—if, because he left the signature remaining, the original will is still to stand—I ask, then, was the signature affixed to this paper after he had struck out the words 'remit what he owes to him?' No man can say that the original signature was affixed to the paper after those words were struck out, because those words must have been struck out after the original signature was put to the paper. Then, is Samuel Williamson to have £200, £100, or is he to have the debt remitted or not? It seems to me that is

very strong to show that the testator was meditating a future will, and not acting on the will he had made. Then he says, 'J. N. gives and 'bequeaths to the only son of his late brother Thomas N. by Mary 'Sarah, or Sarah Mary Nasmyth, the sum of one hundred guineas, 'regretting the insuperable prejudices against him which he and his 'wife have instilled into their mind, manifested by their behaviour to 'him;' and he signs this with his initials. Now, without entering into the question, whether a testator, beginning his will with initials instead of his name at length, and concluding his last will with his initials, would or would not make a good will in the Scotch law, which I do not look to, you are to look to all the acts of the man together, to determine what he intended to do; and it seems to me the most improbable thing in the world, that this man, who had so formally executed the first will, should mean, by an instrument of this kind, to introduce alterations in that first will, and to introduce new bequests and new gifts with so little of formality as is contained in this paper.

My Lords, these are the instruments which this testator made—I mean which are found in this testator's repositories; and the question now arises, whether these papers, or any and which of them, are to be taken to be the testamentary disposition made by Dr. James Nasmyth? It should be mentioned to your Lordships, that some of the persons, one particularly, a favourite object with him of his bounty, as appears by his will, had died. It appears also that he had had a great accession of fortune; that therefore, both with respect to the objects of his bounty, and with respect to the quantum of bounty he could give, he was in a very different situation in the year 1811 from what he was in the year 1803. These have been called slight circumstances. I agree they are not conclusive circumstances; but I never can agree that they are to be considered as slight circumstances, when they are connected with the serious fact, and the substantial fact, of excision of a seal. They are circumstances then to be attended to.

Now, my Lords, it appears therefore to me, first, that a will had existed in a sealed state; secondly, that no seal was appended to the instrument when it was found. I am also satisfied that the seal was taken away by excision; and it appears to me also that this excision is primâ facie to be taken to be an excision by his own act, and that, according to the principles which you apply to cases of this sort, the circumstance that it was found in his own custody, and in a place of security, and with this excision, is to be taken as evidence that it was his own act. I have before said, that there is nothing in our law—I have not been able to find that there is any thing in the Scotch law—which requires the ceremony of sealing to make good a will of personal estate; but I do conceive it to be an universal principle in respect to wills of this sort, that any person may prescribe to himself terms and solemnities with respect to a will of personality beyond that which the law requires him to observe, and that it appears in the body of the instruments that he has

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required—that he has said—that in testimony that this shall be his will, or as testimonies that this shall be his will, he does seal as well as sign it. Signature alone will not do. He has prescribed a law for himself, and it never can be according to principle, that the person who primâ facie has in the first act prescribed to himself both those solemnities, can notwithstanding be considered as meaning, that if he takes away the evidence of one of these solemnities, although the other would be sufficient, if it had been originally the only solemnity, are you therefore to infer that what he meant originally he no longer intends, and that he has altered that intention without making a memorandum of it.

My Lords, if he might make a will for himself, I say that he has withdrawn the testimony which he had before prescribed, as a testimony which was to appear before it could be declared that he had a valid will. That is, in my judgment, his declaration that that instrument should have no longer that testamentary effect and character. My Lords, do not let it be understood from this that I mean to say, that excision excludes all evidence of the contrary; but I say this—excision is primâ facie evidence that he did not mean that this should operate as his will, and that it rests upon those, who are to maintain that it operates as his will, to show that, consistently with that fact, he meant it to operate as his will; and a very difficult thing it is indeed to state why, if he did mean this to operate as his will, he ever made that excision; for he would have left that as the testimony of the will being to operate which he had prescribed before, and there seems to be no reason that can be assigned why he should make that excision. Besides, when I look at the instrument itself, I see that excision—I see those alterations—I see the interlineations, innovated parts, with respect to which the signature cannot be said to apply;—and further, I see this last paper, which goes a long way to show that it could not be itself aptly denominated a codicil; and, on the other hand, it contains matter to show, that though this person meant this instrument should operate as a testament while he was writing that last paper, he did not mean to consider that it was an operative testament at that time.

Upon the whole, my humble opinion is, after very anxiously considering this case, that it was the intention of this testator to make a new will. I guard myself by saying, that it is not enough to show that he had an intention to make a new will; but the evidence that proves he had an intention to make a new will, proves also want of adhesion to his purpose that the original instrument should continue to operate as a will—that it was his intention to make a new will, in the making or construction of which the papers were preserved, not as testamentary instruments, to operate if he died before, but as papers to assist him or his man of business in making the will; and that he has disappointed his own purpose as well as the objects of his bounty, as men do in other cases, by not recollecting that they may be called out of the world before they execute the purpose they may have formed. Upon the whole, I

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cannot agree—(however diffidently I ought to conceive of my own opinion in a case circumstanced as this was)—I cannot honestly bring myself to say that this is a will; and therefore, under such circumstances, I must offer to your Lordships my opinion that the interlocutors should be reversed. If that should be your Lordships' opinion, then the proper judgment would be, to 'Reverse the interlocutors under their several 'dates, and to find that the instrument of the 28th September 1803, 'produced as the last will of James Nasmyth, was revoked and annul- 'led by him, and that the several indorsements thereon, together with 'the paper produced and insisted upon as a codicil thereto, are of no 'avail or effect in law as testamentary dispositions: And it is further 'ordered that, with this finding, the cause be remitted back to the Court 'of Session in Scotland, to do therein as shall be consistent with such 'finding, and as shall be just.'

Lord Redesdale.—My Lords, after what has fallen from the Noble Lord, I shall trouble your Lordships with a very few words. I wish to express my full concurrence with what has fallen from him. My Lords, the instrument that is dated in 1803, and which the Court below has conceived to be a testamentary paper, is unquestionably mutilated. My Lords, it is mutilated in two parts. It is mutilated by tearing off the seal; and it is mutilated by an obliteration of the name of John Gordon, which is evidently so obliterated, as to make it difficult to discover what the name originally was—intentionally obliterated, so that it should not appear what the name was; but that it was the name of John Gordon, is still apparent upon a close inspection of the instrument, and from observing that, in a subsequent part of the instrument, where a legacy of £200 is given, he is called the said John Gordon.

Now, my Lords, the Court below has conceived that the mutilation of the name of John Gordon has so far revoked the instrument, that he is no longer to be considered an executor. The alteration that has been made in the instrument, by tearing off the seal, has taken from the instrument one solemnity with which the testator himself had declared he intended to authenticate the instrument. That being the case, it is to be inferred that it was taken off for some purpose; and for what purpose it could be taken off, except for the purpose of cancellation, I think it is extremely difficult to discover. That unquestionably might be rebutted by other distinct evidence; but, on the contrary, the whole of the evidence that exists in this case tends to show that it was taken off with the intention of rendering the instrument inoperative. It is perfectly clear that the changes that had been produced in the circumstances of this testator, not only induced his mind to apply itself to the making of a different disposition, but that his mind was so applied. The first is a memorandum to which there is no date, but which apparently was written previously to another of March 1809. The first memorandum is the necessity of making another will after such unexpected changes—

July 27. 1821. who to be executors. It is evident, therefore, that, at the time that memorandum was made, the mind of the testator was doubting upon the important subject, who were to be the executors of his will. On the next page of the same book, where this memorandum is, and these memoranda are clearly referred to by the instrument of 1803, 'To make a 'note of a new will before going to London, March 1809.' Now, my Lords, it strikes me that these words, 'a note of a new will,' demonstrate clearly what he meant by all the different notes, that he did mean that they were to be notes for a new will, and not in themselves testamentary. He then, in a memorandum of the 29th January 1810, says, 'In pursuance of page 6th, to settle considerable sums on public 'institutions, whether to be more generally beneficial, or less individu-'ally?' Then he expresses an intention to give Whitehill and Craiglay to the Magistrates of Kirkcudbright. But the deed ought to be so accurately, legally, and distinctly drawn, that others shall not be able to touch it. He was aware, therefore, that that disposition could not have effect by a simple memorandum executed by himself without proper legal terms; and it is evident from another memorandum that he conceived it would require great care and attention in having an instrument properly framed that should dispose of that property; and that is material to consider with a view to that which is now called a codicil, and which begins with a disposition of the property of Whitehill and Craiglay, which, it is evident, Dr. Nasmyth himself knew could have no operation in the form in which it there appears.

My Lords, the indorsements which are contained upon the instrument of 1803 are also material to be attended to, because they strike my mind as showing, that he could not have conceived that the instrument upon which he made those indorsements was to be the instrument disposing of his property. He says, 'See my several memoranda for a 'new disposition (this is in pencil) to be done forthwith; for she has 'gone as far as she can, and I must use the remainder.' Then this is dated January 1810; therefore either written at the same time, or nearly at the same time, with the memorandum which is in another paper dated January 29. 1810. Now, that memorandum of the 29th of January 1810 relates to settling considerable sums on public institutions, and to the disposition of Whitehill and Craiglay to the Magistrates of Kirkcudbright. He adds, 'Be sure to destroy this after writing the 'other.' Now, by the word 'destroy,' did he mean cancellation, or did he mean something more? By the word 'destroy,' it seems to me that he cannot be taken to have simply meant *destroy*, so that it should not have effect as a will, though it should remain in existence; but, by the word *destroy*, he meant that it should cease to have existence—that it should not appear what the disposition was that he had made by this instrument.

Then, my Lords, it is perfectly consistent with the fact of his having previously cancelled the instrument, and it rather tends to confirm that,

by tearing off the seal, he meant to deprive the instrument of operation as a will; and that he meant, at a future time, to destroy it as a memorandum, that it should no longer be in existence to show what had been his intention at the previous time; and it may be extremely probable that things passed in his mind which would render him anxious that it should not exist, particularly with respect to what he says of his brother Dr. Thomas Nasmyth, for it is impossible to read that disposition in favour of Dr. Thomas Nasmyth of the Bible, without perceiving that that was written in great bitterness towards that brother.

My Lords, in July 1810, he puts this memorandum, 'to appoint 'William Kerr, Sec. to the General P. O. instead of,' &c. He did not, by this, express that he had appointed him, but that he meant to appoint him by some instrument to be subsequently executed. The whole evidence, therefore, that is before the House upon the substance of this instrument, tends to show that he had conceived a complete intention of substituting a new instrument instead of this instrument; and that this instrument should not operate, when that new instrument was completed, certainly cannot be doubted. But then, having done an act which amounted to a mutilation of the instrument, and showing his intention, that, if he completed a new instrument, this instrument should not have its operation, it seems to me to be clearly inferred that the mutilation was done with the intention of cancellation,—that is, that the instrument should have no effect as a disposition, that it should remain only as a note or memorandum of what he was to do when he thought fit to make a new testamentary disposition of his property.

My Lords, with respect to the instrument which bears date in July 1811, that, I think, can be taken only as notes for a will, and not as a testamentary disposition. If it had been found alone without the other, nobody seems to have contended that it would have been a testamentary disposition, or that it would have been other than a note. The first words which it contains are: 'J. N. directs that his third of the pro'perty of Whitehill and Craiglay be sold soon after his death, and the 'amount he gives and bequeaths to the Magistrates of his native town, 'Kirkcudbright.' Now, my Lords, he had a perfect knowledge that that could have no effect as a testamentary instrument; a perfect knowledge of that, as appears by the memorandum which he had previously made with respect to the necessity of a different mode of disposing of that property, which was real estate. In the interlineations that he had made in pencil in the original instrument of 1803, he has added real to personal in the residuary bequest. It is clear, from the memorandum he then made, that he was aware that the real property which he then had could not pass by that instrument. In the instrument of 1811, he says, 'J. N. appoints, as one of his executors, Wm Kerr, Sec^y^ 'of the G. Post-Office, with a legacy of one hundred guineas, which 'sum must also be given to Samuel Williamson.' Why, my Lords,

July 27, 1821. can it be supposed that he meant that this instrument should act as a codicil to the other, having, by the previous instrument, given to that very Samuel Williamson two hundred guineas, and this instrument apparently intending to intimate that Samuel Williamson was to have, by an instrument afterwards to be executed, the sum of one hundred guineas, and that the same legacy is the legacy given to Mr. Kerr? Whereas, if it is to be taken as a codicil, it would operate as an additional legacy to the legacy of two hundred guineas which had been given before.

My Lords, observations also may be made with respect to the disposition which is made in favour of the only son of his late brother Thomas Nasmyth, when it is recollected that he gives him the sum of a hundred guineas, and he gives it him regretting the prejudice against the testator, which his brother (I fancy) and his wife have instilled into the minds of their children.

My Lords, taking this altogether, therefore, it is clear that the instrument was mutilated; that it was mutilated effectually, even according to the opinion of the Court below, with respect to the appointment of Mr. Gordon as executor; it was mutilated by tearing off the seal, which the testator himself had declared to be one of the ceremonies which he imposed upon the instrument for the purpose of giving it validity. And I apprehend that, whether he tore off the seal, or whether he tore off the subscription, it was immaterial whichever it was; if it was a ceremony which he had stated to be a ceremony which he conceived fit to be annexed to it for the purpose of giving it validity, by removing that ceremony from it, he destroyed its validity. According to all principles on which cases of this description have been determined, (not simply in courts in one part of this kingdom, but universally,) where testamentary instruments require no particular ceremony to be observed, the person who makes such an instrument may impose upon himself, by the terms of the instrument, certain ceremonies to be observed. It would seem that there would have been no doubt in the Court below that the tearing off the signature (which, however, was not necessary) would have been considered to make it invalid. The instrument of 1811 cannot, in the form in which it is conceived, set up the instrument of 1803, amounting to a republication of that instrument. On the contrary, it seems to me that it is of itself an evidence that the instrument of 1803 was considered by the testator as cancelled, because, if he had not considered it as any longer operative, the words, as to the legacy of Mr. Williamson, would be, 'I give him a hundred guineas instead of 'the two hundred guineas which I have given him by the will.' If he had used those words, he would, by those words, have set up the will of 1803; but not using those words, and expressing himself in this memorandum as if no legacy had before been given to Mr. Williamson, the consequence, I conceive, must be, that it is a strong evidence, from which it may be inferred that he considered the instrument of 1803 as

at that time cancelled. My Lords, it comes before the Court in the shape of a mutilated instrument;—having the shape of a mutilated instrument, the question for consideration is, with what intent was that mutilation made? If it was made with an intention that the instrument should have no longer effect, then it must amount to cancellation; and, taking all the circumstances together, it does seem to be clear that it was the intent of the testator, that, by tearing off the seal from the instrument, that instrument should no longer have effect as a disposition of his property, because it no longer had that solemnity which he himself had imposed originally to it. I therefore concur in what has fallen from the Noble Lord.

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Shawe, Le Blanc, and Shawe,—J. Chalmer,—Solicitors.

(*Ap. Ca. No.* 38.)

No. 21.

W. and R. Russell and W. Moffat, Appellants.—*Copley—Pollock.*

Shannon, Stewart, and Company, Respondents.—*Clerk—Cuninghame.*

Shipmaster—Charter-Party—Implied Insurance.—Held (affirming the judgment of the Court of Session,) that where a shipmaster had altered the voyage of a vessel specified in a charter-party, at the request of the freighters, and where the vessel was lost in the course of the voyage so altered, the freighters were, in the circumstances of the case, not liable, as insurers, for the value of the ship; but this without prejudice as to the question of their liability for freight.

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1st Division.
Lord Gillies.

See Hol. 378-9

On the 3d September 1810, Russell and others of Kirkaldy entered into a charter-party with Shannon, Stewart, and Company of Greenock, by which the former chartered the vessel called the William on a voyage 'from the Frith of Forth to St. 'Johns, Newfoundland, and from thence with a cargo to either 'Lisbon, Cadiz, or Gibraltar, a safe port within the Straits as high 'as Alicant, or to either Greenock or Liverpool.' By the charter-party, Shannon, Stewart, and Co. were to pay the freight of two loadings of the vessel in the course of the voyage, namely, the freight of a cargo of coals from the Frith of Forth to Newfoundland, and of a cargo of fish from Newfoundland, either to a port on the west side of the Spanish Peninsula, not beyond Alicant, or to those ports of Britain above described. A few days after the execution of the charter-party, Russell and others enclosed a copy of it to Robert Graham, the master of the vessel, in a letter of