after he had become the owner, show that they then entertained such a notion. But it does not appear that possession of the wreck was ever actually enjoyed by the tenants under these leases. On the contrary, it has been seen that, although both Mr James Baikie and Mr Laing did intimate a claim to the wreck in virtue of their charters, yet after these writings were examined, and their true nature was ascertained, such claims were not insisted in, and the Crown continued to exercise its legal rights.

The defender examined seven witnesses. One of them was his predecessor, Mrs James Baikie; and, as has been seen, his attempt to get possession of such wreck failed, and was defeated by the Crown within the years of prescription. And although these witnesses state that the tacksmen of lands in Eday did occasionally appropriate wreck, yet that possession was very far from being of the *exclusive* and *uninterrupted character* which is requisite to render it prescriptive; and was indeed very much of the same character as that of the peasants and general inhabitants, who are proved to have often lawlessly appropriated the articles which they found lying on the shore, as if these had been *res nullius*. And even these witnesses expressly state that a great proportion of the wrecked articles in that locality was carried off by the Custom House Officers, without there being the slightest indication of such articles having ever been returned to the owners or lessees of the Island of Eday. And one of them, George Davidson, who had been appointed Admiral-depute about the year 1845, swears that "when I first got my appointment I acted upon it, and continued to act till Mr Hepden's purchase" (which was in 1853). "During the time I acted, I claimed all the drift-timber for the Crown, and got it, and sold it, and *accounted for the proceeds.*"

On the whole, I am of opinion that the defender has failed to prove that he and his predecessors have enjoyed such an exclusive and uninterrupted possession of the wreck, waith, and ware, on and adjacent to the Island of Eday for a period of forty years prior to the institution of this action, as is requisite to establish that, by the operation of the prescription established by the Statute of 1617, the Crown has lost the right which, by law, belongs to it. I therefore think that decree ought to be pronounced in terms of the conclusions of the libel, subject to the qualification therein set forth.

The Lord President and Lord Deas concurred with Lord Ardmillan.

Agents for Pursuer—W. H. and W. J. Sands, W.S.
Agent for Defender—Thomas Ranken, S.S.C.

Friday, February 28.

EARL OF DALHOUSIE *v.* CROKAT.

Heir and Executor—Entailed Estate—Rents—Apportionment Act—Lease. Held that the Apportionment Act does not apply in the case of leases constituted merely by entries in the rental books of the estate followed by possession. *Observed* that such leases were not "instruments executed" in the sense of the Act. *Question*, whether they were verbal or written leases?

The late Lord Panmure died on 13th April 1852. By his last will and testament he appointed the defender, General Crokat, to be his sole executor. Upon Lord Panmure's death, certain rents out of entailed estates in his possession fell to be apportioned between the pursuer, the present Earl of Dalhousie, his heir, and General Crokat, his executor. The greater portion of these rents were apportioned, but a question arose as to the apportionment of the rents of certain farms on the entailed estates. The Apportionment Act, 4 and 5 Will. IV., c. 22, is made applicable to rents "made payable or coming due at fixed periods under any instrument that shall be executed after the passing of this Act."

The defender alleged (cond. 2) "The late Thomas Collier was, at the date of Lord Panmure's death, and had been for about thirty-five years previously, factor on the Panmure estates. When a farm was to be let, he was in use to make all the arrangements with regard to the letting of it. After Mr Collier had adjusted with the tenant the terms of the proposed lease, it was verbally reported by him to Lord Panmure, and if approved of by Lord Panmure, the essential conditions of it were inserted by Mr Collier in the rental book of the estate kept by him. In no cases were entries of leases inserted in the rental books until after the terms of the leases had been adjusted with the tenants and approved of by Lord Panmure. The entries in the rental books were made with the knowledge of the tenant as well as of the landlord, and were relied upon both by landlord and tenants as constituting a written lease. It was the custom of the estate to record the particulars of the leases for this purpose. In some cases formal and probative leases were also executed. In these rental books the subject let, the name of the tenant, the duration of the lease, and the amount of the rent, are specifically set forth in writing, and under and on the faith of the leases so recorded in the rental book the tenants possessed the subjects, and paid the rents, all as specified in the said rental book."

The Lord Ordinary (Ormidale) held that the Apportionment Act did not apply to rents payable under leases constituted in this way.

The defender reclaimed.

Solicitor-General (Millar) and Adam for reclaimer.

Clark and Rutherfurd for respondent.

At advising—

Lord President—The Lord Ordinary has found in this case that the Apportionment Act is not applicable as between the heir and the executor in regard to those leases current at the death of the late Lord Panmure, which rested for their establishment on entries in the rental books of the estate. It is necessary to ascertain more exactly than is expressed in this interlocutor the position of these leases. The condescendence for General Crokat states the thing precisely enough, and apparently with sufficient accuracy. [*Reads cond.* 2.] If it were necessary to determine whether the leases described in this article are verbal or written leases, I should consider the question to be one of some difficulty, but I think it is not necessary, for I think the words of the statute are so plain that it is impossible they can apply to leases of this kind, whether verbal or written. I do not think that every written lease comes under the Statute. A lease, to come under the statute, must be constituted by an instrument that shall be executed after the passing of this Act, and the rents to be apportioned must be made payable at fixed periods under

an instrument that shall be executed after the passing of the Act. I do not imagine that the terms used here are, like some of the other terms in the Act, technical terms of English law. They are, I think, applicable to every system of jurisprudence, and have a general, or, as it may be called, a cosmopolitan meaning. The execution of an instrument is an idea familiar to the mind of any lawyer, and the question is, whether there is here any instrument executed by the parties, or either of them, under which the rents are due or payable, or become due at fixed periods? I think the entry in the rental books is not an instrument, but certainly it is not executed by the parties, or either of them, and therefore I am clear that these rents do not fall to be apportioned under the Statute.

Lord Curriehill concurred.

Lord Deas—On the question whether the Apportionment Act applies, I come unwillingly to the same conclusion as your Lordship. Undoubtedly a great many leases in Scotland stand on documents of this kind, and it may be very inconvenient that, in questions of succession, one part of the succession should be regulated by one rule, and another part by another rule, simply in consequence of the different form in which the leases happen to stand. There is no doubt that there is here sufficient evidence to support a lease as between landlord and tenant. In the rental book you find the subject let, the rent, the name of the parties to the contract; and these things being so, and being followed by possession, there can be no doubt that the parties stand in the relation of landlord and tenant in the same way as if they had executed a regular and formal lease. The last case of that kind that came before us was the *Tobermory* case, and there are innumerable others to the same effect. But the question here is, not whether the writing constitutes a written instrument, but whether it has two qualities—one, that it is an instrument executed by the parties, and the other, that the rents are payable at fixed periods under that instrument. The greatest difficulty in applying the Statute is to hold that this is an instrument executed by the parties. And even if that were so, it is difficult to say that the rents are payable at fixed periods under it. Terms are not mentioned in the writing, and there is nothing on the face of the writing to show that it comes into effect after the date of the Act. This, I think, is the law of the case, and if a remedy is required, that must come from the Legislature, not from the Court.

Lord Ardmillan—If we were here trying a question between landlord and tenant, there is no doubt that the tenant would have here an equivalent to a lease. The writing in question would constitute an obligation in respect of which the landlord would be bound to grant a lease. It would be the tenant's proof of the lease. Supposing it to be a written instrument, it could not be said that the rent was payable under it at fixed periods. There is no obligation in it as to the rent at all, and the tenant's obligation to pay rent would not rest on this, but on his possession. There may be good reason why such writings should be included in the Apportionment Act, but as the law stands, I do not think they are included.

Agents for Pursuer—Gibson-Craig, Dalziel, & Brodies, W.S.

Agents for Defender—Adam, Kirk, & Robertson, W.S.

Friday, February 28.

BUCHANAN'S TRUSTEES *v.* DALZIEL'S TRUSTEES.

Legacy—Substitution—Clause of Return—Executor spes successionis. A testator appointed B his sole executor and universal legatee, under burden of paying to C, at the first term after the testator's death, a legacy of £4000; but if C died without lawful issue, then half of the "legacy was to return and belong to B," his heirs, &c., and C having the power to dispose of the other half as she chose. When C died she had got payment of the legacy from B, who predeceased her, and the of remainder from the trustees; and she left a will. Claim by B's trustees against C's trustees for £2000, founded on the provision, in the testator's will, of return to B, *repelled*, and *held* that, by payment of the legacy to C, the substitution in favour of B was evacuated. *Opinion* that even without actual payment to C, the substitution in B's favour would have been defeated by C's settlement.

Mrs Craig died in 1826, leaving a trust-disposition and settlement whereby she conveyed to her son Dr Craig Buchanan, his heirs, successors, or assignees whomsoever, heritably and irredeemably, all and sundry lands, heritages, tenements, and others as therein particularly set forth; and she thereby nominated and appointed him to be her sole executor and universal legator; but always with and under the burdens and conditions therein mentioned, and, *inter alia*, under a burden expressed in the following terms:—"As also under the burden of paying to my daughter, Jane Craig, and her heirs, the sum of £4000 sterling, at the first term of Whitsunday or Martinmas that shall happen after my death, with interest thereof from and after the said term of payment during the non-payment of the same, but declaring that if the said Jane Craig shall die without lawful issue, then the half of the said sum of £4000 shall return to and belong to the said George Craig Buchanan and his foresaids, but it shall be in the power of the said Jane Craig to dispose of the other half of said sum in any way she shall think proper."

Dr Buchanan died in 1842.

Miss Jane Craig Dalziel died in 1866 without leaving lawful issue. She left a general disposition and settlement, conveying to trustees the whole property which should belong to her at the time of her death. Previous to her death, the whole amount of the said legacy of £4000 had been paid to her by Dr Buchanan or by his trustees. Dr Buchanan's trustees now brought this action against Miss Dalziel's trustees, pleading that, in terms of the provisions in the settlement of the late Mrs Mary Craig, the sum of £2000 was payable on the death of Miss Jane Craig Dalziel by her representatives to the pursuers, and was due, with interest from her death.

The defender pleaded—(1) The pursuers have no title to sue; (2) no right in or to the £2000 sued for having vested in the late Dr Craig Buchanan during his life, no such right has been carried to the pursuers by his trust-disposition and settlement; (3) the whole sum of £4000 provided to the late Miss Craig Dalziel by her mother's settlement, having been paid to her during her life, formed part of her estate at her death, and is conveyed to