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

the defenders by her general disposition in their favour; and (4) assuming that Miss Craig Dalziel was precluded by the clause of return in her mother's settlement from disposing of one-half of the sum of £4000 provided to her, the said clause was a simple substitution in favour of Dr Craig Buchanan, which was evacuated by his predeceasing his sister.

The Lord Ordinary (ORMIDALE) pronounced this interlocutor:—

"Finds it is admitted that the late Dr Buchanan, whose testamentary trustees are the pursuers of this action, died on the 12th of April 1842, and that Miss Jane Craig, the party first entitled to payment, and who did receive payment of the legacy of £4000 in question, did not die for many years thereafter, viz., not till the 18th of July 1866: Finds, with reference to these facts, that no such right or claim as that now founded on, and sought to be enforced by the pursuers in the present action, ever vested or could have vested in the said Dr Buchanan, or has been transmitted from him to the pursuers as his trustees: Therefore sustains the defenders' two first pleas in law; and in respect thereof dismisses the action, and decerns: Finds the defenders entitled to expenses, &c.

"*Note.*—Whether the clause of return in question is to be considered of the nature of a simple substitution, which was evacuated by Dr Buchanan predeceasing his sister Miss Jane Craig, and was defeasible and defeated by her (3 Ersk. 8, 45, and cases of *Lowes* v. *Laurie*, 13th February 1736, 5 Brown's Suppl., p. 161; and *Mackay* v. *Campbell's Trustees*, 13th January 1835, 13 Sh. 246), or rather of the nature of a gift having a condition attached to it, which could not be defeated gratuitously, as seems to have been ruled in the case of *Johnstone* v. *Irvine*, 22d June 1824, F.C., need not be inquired into or determined in this process, if the Lord Ordinary be right in holding that, in no view of that matter, did any right under and in virtue of the clause of return vest in Dr Buchanan, or has been transmitted by him to his trustees, the pursuers of this action. If Miss Jane Craig had left lawful issue, and for anything that appears or is stated to the contrary, it was impossible to say that she might not, down to her death, it would have been clear that no right whatever could have accrued to Dr Buchanan, or any one else, under the clause of return in this case. Till the death, then, of Miss Craig without lawful issue, it appears to the Lord Ordinary that Dr Buchanan neither had nor could have had anything more, in the most favourable view of the case for the pursuers, than the hope of a right or *spes successionis*, and if so, it necessarily follows, that Dr Buchanan having died before Miss Craig, the alleged right now founded on and sought to be enforced by his testamentary trustees, never vested in or could have been transmitted by him to them—*Fotheringham* v. *Home*, 7th Feb. 1693, Mor. 5764.

The pursuers reclaimed.

COOK for them.

KINNEAR (CLARK with him) in reply.

LORD PRESIDENT—I do not think that in disposing of this case we have anything to do with the question of vesting, and therefore I do not see the application of that part of the Lord Ordinary's interlocutor which finds that there was no right vested in Dr Buchanan or transmitted by him to the pursuers, because, if the construction of the clause we are dealing with is that which is contended for by Mr Cook, it does not matter whether the right vested or not. There would be an absolute obligation to repay in the event which has occurred. But the question is, whether there is in the clause any thing partaking of the nature of a clause of return in the proper sense, or whether there is any thing that can have an effect different from a mere substitution in moveables?

It is necessary to keep in view that this clause occurs in a deed of settlement of the entire estate of Mrs Craig. She conveyed her whole estate to Dr Buchanan, and appointed him her sole executor and universal legatee, putting him, however, under certain burdens, and, amongst others, under burden of payment of this £4000 to her daughter, Miss Craig. It is said that this payment is directed to be made *sub modo*, under a condition that in a certain event one-half of it shall return. Now, as the legacy could not be paid until after the death of the testator, it could not return to her, and accordingly it is said that it is to return to her executor or universal disponee. I think I may say that there is no example of such a clause of return. The thing was never heard of before. It seems to me that whatever it may be called, and however much the word *return* may be used in clauses of this kind, it is impossible there can be a clause of return in such a position. If, in the event of a legatee dying without issue, a legacy is to go to a third party, that would be a substitution and nothing else. And if a sum of money left to a legatee is paid back to the executor, that too is nothing but a substitution. There is no distinction. In no case is it to be paid back to the granter, but to some one who is to get a part of the succession, and that is nothing but a substitution. The words of the provision bear out that view, for there is to be a payment to Miss Craig at the first term after the death of the testator of £4000, and then follow the words on which the argument turns [*reads clause*]. It will return to him no doubt in this sense, that his is the hand that has paid it as executor, but it will belong to him not as executor, but as substitute legatee.

All that is quite plain. But it is said that these words more strongly indicate an intention to make this repayment a condition of the legacy, "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." To my mind these words create no difficulty. They assume that what goes before is to have effect, *i.e.*, that one-half is to return and belong to Dr Buchanan. Suppose this money had not been paid, but Miss Craig had died without issue, one-half would have belonged to Dr Buchanan, and one-half would have gone by her will; and, therefore, when this substitution was to take effect, the whole provision would have taken effect. But what has happened? The legacy was paid to Miss Craig, and, being paid to her, was necessarily mixed up with her own funds, and it is trite law when such a legacy is paid, the substitution provided in the deed is at once evacuated. On these simple grounds I think the defenders ought to be assoilzied. But I am not satisfied with the grounds of judgment in the Lord Ordinary's interlocutor. I think these ought to be varied.

LORD CURRIEHILL—I think this is a very simple case. The provision is of the nature of an entail or destination. Miss Craig is the institute in this destination, and she is an institute with unrestricted powers. The position of Dr Buchanan is

that of a substitute to her, having a *spes successionis* but no *jus crediti*. The substitution is one which the institute may defeat either gratuitously or onerously. Mrs Craig died in 1826. After that, Dr Buchanan and Miss Craig stood in the position of debtor and creditor. Had Miss Craig never uplifted the money, or made a settlement, and died in Dr Buchanan's lifetime, he would have taken as substitute. But before Dr Buchanan's death nearly all the money had been paid. To that extent the substitution was evacuated. There remained about £150, but of this sum Miss Craig got payment after Dr Buchanan's death, and by so doing she defeated the substitution even as to this balance. Therefore the substitution had ended from that time. Even if it had not, she made a settlement carrying her right to other parties, which would of itself have defeated the substitution, if not defeated previously. On both of these grounds I hold that the substitution was at an end during Miss Craig's life, and I therefore think the interlocutor is well founded.

Lord Deas—I am of opinion, with your Lordship, that this is not a question of vesting or not vesting in Dr Buchanan, and, therefore, that the interlocutor of the Lord Ordinary cannot be adhered to on the ground on which it is put by his Lordship. But I farther think that the result at which he has arrived is sound. The right of Dr Buchanan, such as it was, vested at once. It was a conditional right to a certain sum in a certain event. I don't think that, after this money was paid in the way it was, and Miss Craig having made the setttlement she did, although Dr Buchanan had survived, he could have claimed it any more than his assignees can. I doubt if Dr Buchanan could have claimed it although it had not been paid at all, because the condition in the deed is that it is to be paid at the first term of Whitsunday or Martinmas after the testator's death. That is the time when it ought to have been paid, and according to a general rule of law, what ought to be done is held as being done. I am not able to see that the mere accident of the subject being paid would have made any difference. One construction might be put on the clause, that it was to be applicable only if Miss Craig died in the lifetime of the testator, and but for the word *return*, that might have been a natural enough construction. But taking it the other way, that it was to return to Buchanan if she died without issue, it is impossible to read in it any higher right than that if she died without disposing of it it was to go to Dr Buchanan. She had the power to spend it all if she chose, and it is impossible to construe the clause as preventing her from disposing of the money by testament.

Lord Ardmillan concurred.

Agents for Pursuers—Hill, Reid, & Drummond, W.S.
Agents for Defenders—A. & A. Campbell, W.S.

OUTER HOUSE.

(Before Lord Barcaple.)

THORBURN *v.* SHAW AND THOMSON.

Agreement—Sale—Concealment—Fraudulent Combination and Conspiracy to raise price—Representation by Broker—Disclosure of Principals—Relevancy—Issues. Question raised (but not decided, the case being settled out of Court) as to relevancy of defence in action on sale, that the seller had, by combination with others, raised the price of the article sold, and had induced the defender to buy by falsely representing that the price was a fair market price, and fraudulently concealing the existence of the combination.

The pursuer sued in the Sheriff-court of Lanarkshire on a contract for the sale, in three lots, of 11,000 tons of Scotch pig iron. Of that quantity, warrants for 6000 tons had been duly delivered to the defenders, and paid for by them, but before delivery of the remainder became due, the defenders wrote to the pursuer, demanding a disclosure of his principals, which demand was refused by him. The defenders again wrote to the pursuer that, in consequence of his refusal, they declared the contract cancelled, to which the pursuer replied, persisting in his refusal, and declining to hold the contract cancelled. This action was then raised.

The sum sued for, viz., £6691, 16s. 10d., was the difference between the price at which the iron had been bought by the defenders, and that at which, after they refused to implement the contract, it was sold by the pursuer in the market.

The defence was, that before the said 5000 tons of iron fell to be delivered the defenders ascertained that, prior to the pursuer making the contract with them, he and a number of others had entered into a secret, illegal, and fraudulent combination and conspiracy to raise the price of Scotch pig iron by publishing false representations, and making fictitious sales among its own members; that by these means the price of iron was so raised; and that, when this had been accomplished, the pursuer, while representing that he was a broker acting for *bona fide* ordinary sellers, but in reality acting on behalf of the combination and in furtherance of their purposes, made the contract in question with the defenders.

It was also pleaded in defence that the pursuer having refused to disclose his principals, the defenders were entitled, in the circumstances, to cancel the contract.

The Sheriff, after hearing parties, before further answer, allowed both parties a proof *pro ut de jure* of their respective averments.

The pursuer advocated.

The following issue and counter-issues were proposed:—

Issue proposed by pursuer:—

"Whether, on or about the 17th day of April 1866, the pursuer entered into a contract with the defenders, whereby the defenders purchased from the pursuer three several quantities of Scotch pig iron, known in the market as 'G. M. B., 3-5ths No. 1, and 2-5ths No 3.,' viz., 1000 tons, at the price of 80s. sterling per ton, payable in Glasgow on or before 20th April 1866; 5000 tons, at the price of 77s. 6d. sterling per ton, payable in Glasgow on or before 17th May 1866; and 5000 tons, at the price of 77s. 6d. sterling per ton, payable in Glasgow on the 22d May 1866—the said prices being payable to the pursuer in net cash against storekeeper's warrants for the iron: And whether, after the said contract had been in part implemented by delivery of storekeeper's warrants for the first two quantities of iron above-mentioned, and payment of the price thereof, the defenders, in breach of said contract, refused to take delivery of storekeeper's