from the Monteath trust-estate, and intended their amount to be diminished if these arrears should turn out less than he anticipated.

It may be mentioned that the Lord Justice-Clerk took occasion to point out the advantage in point of despatch of the new form of procedure by Special Case. The testator died on 18th October 1868. The case, involving several difficult points of law, owing to the ambiguous terms of Sir T. Douglas's testamentary writings, was presented to the Court on 13th January 1869, and decided on the 5th February, three months and a-half after the opening of the succession. Under the old form, of a multiplepoinding, the case would probably have extended over several years.

Agents—A. Howie, W.S., J. Mylne, W.S., M'Ewen & Carment, W.S.

Tuesday, February 16.

FIRST DIVISION.

HANNAH *v.* HANNAH.

Heir-at-law—Essential Error—Reduction ex capite lecti—*Renunciation of Legal Rights—Proof—Law Agent.* An heir-at-law *held*, on a proof, not entitled to reduce, on the ground of essential error,—(1) a disposition; (2) a deed of renunciation of his right of succession engrossed on the disposition, and signed by him.

David Hannah senior died at Girvan on 13th March 1866, leaving a trust-disposition and settlement dated 9th March, whereby he disponed to his grandson David Hannah—eldest son of the pursuer, David Hannah junior, who was eldest son and heir-at-law of the testator—certain heritable subjects in or near Girvan. The testator directed payment of certain legacies, and appointed one-half of the residue to go to the pursuer. The pursuer, who at that time resided in England, arrived at Girvan a day or two after his father's death. After the funeral, the pursuer and the other relations met, along with Mr Murray, solicitor, Girvan.

The pursuer alleged—"Mr Murray told the pursuer that he had a will made by his father, which he wished to read. He did not read over the whole of it, but only such parts as he selected, and then produced a long paper which had previously been prepared by him, and which he proceeded to read to the pursuer. This document, which, so far as the pursuer recollects, purported to be a deed approving of his father's settlement, the pursuer was asked by Mr Murray to sign, but he refused to do so. He had never seen Mr Murray before this occasion, and this was the first intimation given to the pursuer that any one wished him to subscribe such a deed.

"(8) Thereupon Mr Murray, without consulting the pursuer, or obtaining his consent, wrote out another and shorter document on the back of the said trust-deed and settlement, and said that the pursuer would surely sign it, as it was for his good and for the good of all to do so. He also stated that the deceased was in his senses when he subscribed the will. The said defender, John Hannah, and other parties in the room, intervened, and said to the pursuer that Mr Murray was a very honest man, and that they were sure he would not ask the pursuer to sign anything but what was right. The pursuer, induced by the persuasions of the defenders, and on the faith of these representations, and being led by them to believe that it was a mere formal document, necessary on the death of a person leaving property, and that it was for his own interest to do so, signed the writing on the back of the will. He had no idea that by so doing he was giving up anything he was by law entitled to, and was not aware that the object of the document was to deprive him of the heritable estate in question; and if he had been aware of this he would not have signed the deed.

"(9) The said writing signed by the pursuer on the said 17th of March 1866, by which he now finds, upon inquiry, that he is supposed to have renounced his legal rights, runs as follows:—'I, David Hannah, eldest son of the within designed David Hannah, hereby ratify and approve of the within written trust-disposition and settlement in all particulars, and renounce my right of succession as heir-at-law to the heritable estate of my deceased father, David Hannah, on the ground of deathbed, or any other ground competent to me in law.—In witness whereof, this minute, written by William Murray, solicitor, Girvan, is subscribed by me at Girvan, upon the 17th day of March 1866 years, before these witnesses, the said William Murray and John Scott, farmer, Bridgehouse, Whitehorn.

(Signed) DAVID HANNAH.

(Signed) W. Murray, *witness.*

(Signed) John Scott, *witness.*'

"(10) This minute of ratification and renunciation was signed by the pursuer in ignorance of its true intent and legal consequences. He had no knowledge of the law of deathbed, and of his consequent legal rights. From his being long resident in England before his father's death, he had no one near at hand who could have informed him of his legal rights, before coming to Scotland. After he came, no time was given to him to consult any one on the subject, except Mr Murray, on the occasion above referred to, who, acting on the employment and in the interest of the defenders, advised and persuaded the pursuer to sign the document in question, and that without informing the pursuer of what his legal rights were, or what was the true nature and object of the document."

The pursuer now sought reduction of the trust-disposition and deed of renunciation on the head of deathbed, on the ground of essential error.

The defender alleged—"When the pursuer came to Girvan he was informed generally of the terms of the settlement which his father had made, and after the funeral the whole deed was read over to the pursuer by Mr Murray, and its nature and import fully explained. At the same time, Mr Murray informed the pursuer of his legal rights as heir-at-law, and that he would be entitled to set aside the deed on the ground of deathbed, if he thought proper to do so. The pursuer fully considered the whole circumstances, and expressed his approval of the deed, and his readiness to ratify the same, and to renounce all right of challenge competent to him. Accordingly, at the pursuer's request, and to carry out the pursuer's intention openly expressed before the whole family, Mr Murray wrote upon the deed itself the minute of ratification and renunciation which is quoted in article 9th of the pursuer's condescendence. It was read over to the pursuer, its terms and nature explained, and it was thereupon executed before witnesses in common form. Besides the formal ratification executed by the pursuer, there was also a minute signed, on the 17th March, by the whole members of the family, including the pursuer, agreeing to abide by the settlement of the deceased as the rule of succession to his heritable estate."

A proof was taken. The pursuer deponed—"After the funeral I went up to my brother John's house, and John Scott and James M'Kechnie came up and asked me to go down to my uncle Robert's house. This was in the afternoon, immediately after the funeral. I refused to go at first. I believe my brother also said something about not going, but I did not pay much attention to what he said. Scott and M'Kechnie came back again for me in a short time, and, after being pressed a little, I agreed to go with them to my uncle's house. When we got there, my sister Mary (Mrs M'Kechnie), my uncle Robert and his wife, and Mr Murray were there. My uncle and his wife left the room as soon as I and my brother and Scott and M'Kechnie went in. When we went in, Mr Murray said he had a will to read which my father had made, and he read a part it. He did not explain it at all; he just 'hummed and hawed' a bit. I could not tell very well what he was saying. The persons present were—myself, my brother John, John Scott, James M'Kechnie, Mrs M'Kechnie, and Mr Murray. After he had read that part of the deed, Mr Murray pulled a paper out of a bundle of papers, and read something out of it to me, but I could not understand it. He told me it was a paper that required to be signed about my father's will. I told him I did not understand it. He asked me to sign it and I refused. He then began to write out another. I think it was a deal shorter than the first one, at least he was not so long in reading it. He asked if I would sign that one, and I said I did not know. He said that a paper like that required to be signed about the will. He did not say much more about it, only that it required to be signed, and I said I did not understand it. I asked Mr Murray if my father's will could be broke. I said—'Is a will legal when a man makes it in his senses?' and he told me my father was in his senses when he made the will. I asked him if a will was legal when it was drawn by a lawyer and the man who made it was in his senses, and he said it was. He said that I could not break the will. He told me that I might challenge it. I asked him if I might consult a man of business, and my brother John said there was no use for that—that Mr Murray was a very honourable and a very decent man. Mr Murray also said there was no use for that—that my father's will was a just and equitable will. I could not say whether any other body said anything when I said I would like to see a man of business; I was sitting between these two. I then signed that document, because Mr Murray said it was for the good of all. I signed it on these persuasions by my brother and him. Mr Murray did not explain fully to me the nature of my father's will. I did not hear him make any explanation at all after the will was read. He read a bit of it about the legacies that were to be paid to my brother and sisters. He did not say out of what money these were to be paid. He described the nature of some of the properties that had been left by the will. He did not explain the nature of the ratification which I signed. I do not remember what was the first one that was read, but I know it was longer than the second one. When he read the first one, I told him I did not understand it. I did not ask him anything about the rents; but he told me I was to get all the rents of the property, and that I would be entitled to collect them. I understood by that that I was to get them for my own use."

The other evidence supported the statements of defender, and it appeared that the testator's reason for leaving the property to the pursuer's son instead of the pursuer was, that the pursuer was an undischarged bankrupt.

The Lord Ordinary (MURE) assoilzied the defender.

The pursuer reclaimed.

CRICHTON and DEAS for reclaimer.

GIFFORD and SHAND for respondents.

At advising—

LORD PRESIDENT.—This is a case which is not quite so clear as has been assumed in argument, and its decision depends on certain views of the evidence, particularly as compared with the reasons of reduction alleged on record. The pursuer came into Court alleging that he had been induced to sign the deed of ratification engrossed on the back of the trust-deed in ignorance of those legal rights which he thereby renounced. He averred—(*reads* Cond. 8, *ut supra*). He then sets out the writing which he signed, and says—(*reads* Cond. 10, *ut supra*). It appears to me that it is very important to apprehend exactly the state of mind in which the pursuer alleges he was at the time when he signed this deed of ratification, because the whole ground of reduction is essential error, and the state of his mind alleged is that he believed that he was signing a mere formal document, necessary to be signed on the death of any person leaving property, but not that he was thereby giving up anything which by law belonged to him, and if he had so believed he would not have signed the deed. There can be no doubt of the relevancy of these averments, particularly if the pursuer was left in that state of mind by persons who were present, and who knew better, especially when one of them was a legal practitioner who could have informed him of his legal rights. But that was not the state of his mind. In point of fact it was essentially different. The pursuer himself, in his evidence, does not say that was the state of the fact. In averment that is his case, but in evidence his case is different. Not that in my view his case is consistent with the truth, but as little is it consistent with his case on record. What he says in evidence is this,—(*reads pursuer's evidence, ut supra.*) That is the substance of the pursuer's evidence. Although it falls very far short of the allegations on record, still it is a case which perhaps is sufficient if corroborated, or if there is good reason to think it is the true state of the case. But if we look at the evidence, what do we find? It is not true that Mr Murray did not explain the import and effect of the settlement. All the witnesses say that he explained to the pursuer the effect of this writing having been executed on deathbed, and that, the writing having been executed within so short a time of his father's death, it could be set aside by him if he chose. That appears quite clearly, and also, that the reason the pursuer's father had taken the course he did was, because the pursuer was an undischarged bankrupt. And, according to the evidence of all, or nearly all the witnesses, the pursuer recognised that reason as a very good one. In these circumstances he was asked to forego his right to challenge his father's deed. I don't know what more the pursuer could expect to have explained to him than was explained, namely, that the deed, if he did not challenge it, would take effect, and that all he would get would be a share of the residue whatever that might be. All that was unquestionably explained to the pursuer, unless the whole witnesses except the pursuer are

stating what is not true. It was also explained that the writing in the will was for the purpose of giving effect to his assent to the settlement, and his renunciation of his right of challenge. It was not intended to have, and it could not have, any other effect, and therefore I think the evidence disproves the whole case of the pursuer on record.

But there are still two points remaining, and they are points of some delicacy. The first is, that Mr Murray, the only person of legal knowledge concerned with this affair, took from the pursuer this renunciation of his legal rights without giving him any opportunity of consulting with any new agent. As a general rule that is certainly not a right course, and it is not a course to which we must appear to give any countenance. It would have been much better if Mr Murray had refused to take this renunciation from the pursuer until he had an opportunity of consulting a man of business on his own account, and I think that if that had been done this deed would nevertheless have been executed, and in that case challenge would have been hopeless. As the case stands, it only lays a more severe burden on the persons holding the deed to show that it was executed by the pursuer when he knew his legal rights, and the question here is, whether that burden on the defender is discharged?

The second point is, whether there was not a misunderstanding as to the effect of the renunciation? If we believe the pursuer, he thought he was still to be entitled not merely to administer the property for his son, but to draw the rents for his own behoof. And some passages in the other evidence have been referred to for showing that that was the impression of the other witnesses also. But except John Hannah, I don't think any of the witnesses came up to this in their depositions. It is undoubtedly the case, that before the will was read at all, John Hannah, the defender, whose evidence in this matter is extremely candid, stated to the pursuer that he understood that, notwithstanding the settlement of the property on his son, the pursuer would be left in the beneficial enjoyment of the rents. But that was before the pursuer's rights were explained by Mr Murray, and it does not follow that the previous impression remained the same after the reading of the will and the explanations by Mr Murray. Taking the whole evidence together,—that of Mr Murray on the one side, who says he explained distinctly that the pursuer would be entitled to collect the rents for his son; and the evidence of the pursuer on the other hand, who says he was told he was to have the rents for his own behoof,—and looking to the independent evidence, I think the balance of probability is in favour of the defender against the statement of the pursuer. I think nothing was said to him calculated to convey the impression that he was to have these rents for his own behoof, and I do not believe that he did draw that inference, although he says he did. It is no doubt a hard thing to say that one disbelieves a statement so positively made, but, looking to his averments and his evidence, I cannot resist the conclusion that what he says as to his own understanding is not consistent with fact. I have no doubt that he knew perfectly well that the rents belonged to his son, and also knew with sufficient accuracy that while his son was a minor, and living with him, he would probably get the whole benefit of the rents. But that was not inconsistent with the rule of law, that, as administrator for his son, he was entitled to apply the rents for behoof of his son whom he boarded in his house. The notion that he could have been unaware of the arrangement of his father's succession is further disproved by the minute of meeting, which is dated 17th March, and signed by the pursuer. There is nothing technical in the language of that minute. It was impossible that it could have been misunderstood. When the pursuer signs that minute after Mr Murray's explanation, it is impossible to allow him to get behind the renunciation, which in law has no greater effect than this minute.

The other Judges concurred.

Agents for Pursuer—Duncan, Dewar, & Black, W.S.

Agent for Defender—L. M. Macara, W.S.

Tuesday, February 16.

ROSS *v.* MEIKLE.

Possessory Right—Interdict—Removal of Fence. Circumstances in which the Court held a party entitled to a possessory judgment.

This was a question between Sir Charles W. A. Ross of Balnagown, and John Meikle, printer, residing at Grantfield, near Tain, arising in a petition presented by Meikle in the Sheriff-court of Ross-shire. The petitioner alleged that he was proprietor of certain lands at Grantfield, in virtue of a charter from the magistrates of Tain to George Mackie, dated in 1800, and a disposition by Mackie to the petitioner's father in 1801, and that he and his father had had uninterrupted possession of the subjects from 1801 until recently, when Sir Charles Ross had claimed a part of the subjects and put up a paling on a part thereof. The petitioner craved interdict and removal of the paling.

The Sheriff-substitute (TAYLOR), after a proof, pronounced this interlocutor: "*Tain, 1st July* 1868.—The Sheriff-substitute having considered the proof led by the parties, with the documents produced by them, and the whole process: Finds as matter of fact, *first*, That the petitioner is proprietor of the lands of Grantfield, under a title which describes them as bounded by 'the road leading from Tain by the King's causeway to Balnagown, until it goes to the rivulet running from Logie to Pitmaduthie Moss, dividing the ground hereby feued from Balnagown's property at the west and south, with the parts, pendicles, and pertinents thereof;' *Secondly*, That the respondent, Sir Charles Ross, is proprietor of the estate of Balnagown, including the property referred to in the petitioner's title as divided by the rivulet therein mentioned from the petitioner's lands of Grantfield; *Thirdly*, That the respondents, on the day on which this petition was presented, erected a wire fence along the side of a channel in which a stream, known by the name of 'Durack,' formerly ran, but from which the water has been diverted; the fence being designed to exclude the petitioner from the land west and south of the channel, and to put the respondent, Robert Ross, in possession thereof as the tenant of the other respondent Sir Charles Ross; *Fourthly*, That the respondents have not proved their averment that the stream which formerly ran in the said channel was the rivulet mentioned in the petitioner's title as dividing the lands of Grantfield from the estate of Balnagown; and *Fifthly*, That the petitioner has, for a period exceeding seven years, had the exclusive possession, as part of his lands of Grantfield, of the pasture land west and