April the Sheriff-Substitute (BARCLAY) pronounced an interlocutor disposing of the case, containing special findings referring to the various items in the account, and bringing out a balance due to the pursuer as the true balance on the account sued for. In this interlocutor the Sheriff-Substitute had, by a clerical error, written the word "repel" instead of the word "sustain." The error was palpably a clerical one upon the face of the interlocutor, and it did not affect the final and substantial finding of the amount due to the pursuer.

The defender appealed to the First Division of the Court of Session.

SCOTT, for him, objected that the action was incompetent under the Debts Recovery Act, inasmuch as, though apparently only concluding for a sum under £50 in amount, it yet brought really into dispute the whole items of a large and complicated account, a result which it was intended by the Legislature to exclude. He farther objected that the debt sued for did not come within the category of cases mentioned in the second section of the Debts Recovery Act; that that Act only applied to such cases as came under the Triennial Prescription; and that this was not one of them.

LORD PRESIDENT—The words of the Act 1579, c. 21, "That are not founded upon written obligations," are omitted in the Debts Recovery Act. That forms the distinction between the two.

STRACHAN for the respondent.

Before disposing of the case, the Court instructed the Clerk to write to Sheriff Barclay and ascertain whether or not there was a clerical error in his interlocutor, as this was disputed by the defender and appellant. Sheriff Barclay replied that there was a clerical error, as observed by their Lordships.

At advising—

LORD PRESIDENT—This action was brought in the Sheriff-court under the Debts Recovery Act, and looking simply to the conclusions of the summons as it was taken out by the pursuer, I do not think that there were any objections to its competency, for it merely concluded for "the sum of £47, 2s. 11d., being balance of account annexed." Now I am not prepared to say that a party cannot sue under the forms introduced by that Act for the balance of any account which comes under the category of accounts mentioned in the Act, but he does so under the express condition that he "shall in all cases be held to have passed from and abandoned any remaining portion of such debt beyond the sum actually concluded for in any such action." And then a party having once brought a Debts Recovery action can never sue for a shilling more under the same ground of debt or account.

It is the nature of the defences pleaded in this action which seem to me to raise the difficulty. The account annexed to the summons begins with the amount of an estimate or contract price as its first item, about which there is, and indeed could be, no dispute. The remainder of the account, to the amount of £72 odds, consists of items of extra work done and charged for over and above the estimate. The defender challenges every one of these items, and so his defence raises a question concerning a sum exceeding £50, the limit authorised to be sued for under this Act. The difficulty and objection to the competency is therefore raised by the nature of the defence putting in dispute a larger sum than that concluded for in the summons. Whether the objection now raised by the defender is a good one or not, I do not need to decide, and therefore I give no opinion. Even if it be a good objection, it is not one that arises *in initio litis;* when it does become possible, on proponing defences, the defender does not raise it; on the contrary, he joins issue and goes to proof. Now I am of opinion that such an objection may be waived, and has been waived in the Court below, and that the defender cannot now be allowed to raise it here.

As to the merits of the case there is little room for doubt. There are some expressions, certainly, in the Sheriff's interlocutor of the 21st April 1870 which are not very intelligible, and the interlocutor itself winds up by repelling the pursuer's objection to the second branch of the inspector's report. On the face of it this is inconsistent with the former part of the interlocutor, and on reading the interlocutor carefully, it is quite clear that the Sheriff meant to "sustain," and not "repel." There is therefore manifestly a clerical error, but it does not affect the figures of the final and substantial finding.

The other Judges concurred.

The Court therefore dismissed the appeal.

Agent for the Appellant—John Galletly, S.S.C.
Agent for the Respondent—David Milne, S.S.C.

Friday, December 16.

LOVE AND OTHERS *v.* MARSHALLS.

Issue — Alternative Issue — Fraud—Fear — Reduction. In the reduction of a *mortis causa* deed, executed by a very old man, where it was averred by the pursuers that he had become weak and facile of mind, and that he had lived latterly under the complete influence and control of the defenders, and that they had impetrated the deed under reduction from him by fraud and circumvention, taking advantage of his weakness and facility, and had prevailed upon him to sign it by threats of ill-usage and otherwise:—

Held (*diss.* Lord Deas), that the following was a good issue to try the cause. Whether, at the date in question, the said person "was in a weak and facile state of mind?" and whether the defenders, "taking advantage of his said weakness and facility, did, *by fraud or circumvention and intimidation,* impetrate and obtain" the said deed, &c.

Held (*diss* Lord Deas), that there was no proper alternative under the circumstances introduced by the word "intimidation" in conjunction with "fraud or circumvention." This would not have been the case even if the issue had been "*or* intimidation," instead of "*and* intimidation." But observed by Lords Ardmillan and Kinloch, and assented to by the Lord President, that "and" was preferable to "or."

Per the Lord President—It has not been the practice to admit proof of such intimidation as is here averred under the ordinary issue of weakness and facility and fraud or circumvention.

Per the Lord President — An alternative issue is objectionable where the alternative is a proper alternative, so as to make it doubtful upon what branch of the issue the jury go;

but not objectionable where, as here, there is really but one question put to the jury, and the alternatives are descriptive of the means employed only. The jury might agree as to the real question, though differing as the alternative means used.

Per Lord Ardmillan—A proper alternative issue consisted of two branches, each of which is inconsistent with the other.

Opinion by Lord Deas, that the addition of the word intimidation was the introduction of a proper alternative, and that it could only be proved under a proper issue of force and fear.

Per Lord Ardmillan—An issue of force and fear is applicable to the case of "a constant man," not to a case like the present.

Observations upon the case of *Marianski*, 1 Macq. 212.

This was an action of reduction of a trust-disposition and settlement, executed by the late James Carstairs of Kelmondhead, in the parish of Torphichen, on February 11th, 1869. It was brought at the instance of George Love, the only surviving and accepting trustee under a previous trust-disposition and settlement executed by the said James Carstairs in 1862, and Ann Berwick or Sunter and others, the beneficiaries under that deed; against James, Thomas, and Robert Marshalls, the trustees and beneficiaries under the deed of 1869. The summons concluded for reduction of the said trust-disposition and settlement of 1869, and for a count and reckoning of the defenders' intromissions, as acting under it.

The pursuers set forth the nature and purposes of the deed of 1862, and disclosed their various interests as trustees and beneficiaries. They then explained the provisions of the deed of 1869, and the circumstances under which it had been granted in favour of the defenders, and to the pursuers' prejudice. The grounds of reduction are contained in the following articles of the condescendence:—"Cond. 9. At the date when the said trust-deed was executed, and for a considerable period previous, the said James Carstairs was not of disposing mind. He was quite incapable of understanding the nature, meaning, or purport of the said deed, and was not, at the time of its execution, in a sound and disponing state of mind. He never became so after the date of said deed, but continued incapable of granting such deed till he died. The said pretended trust-disposition and settlement is not the deed of the said deceased James Carstairs. Cond. 10. At the time of the said pretended trust-disposition and settlement the said James Carstairs was, and had been for a considerable period previously, completely under the influence and control of the defenders James and Thomas Marshall, the former of whom was residing with him at the date when the alleged settlement was executed, and the latter of whom resided within a short distance of Kelmondhead House; and the alleged settlement was executed by him under undue and improper influence on the part of the said James and Thomas Marshall, to the prejudice of his relations, favoured by the deed of settlement under which the pursuers are interested. Cond. 11. At the date of the said pretended deed, and for two or three years preceding the death of the said James Carstairs, the said James Carstairs was in a weak and facile state of mind, and easily imposed upon. He was completely subject to the influence of the defenders, or of some of them, and he could easily be persuaded to do any thing or to grant any deed which the defenders wished. The defenders, taking advantage of the weakness and facility of the said James Carstairs, abused their influence over him, and by fraud and circumvention impetrated the deed now under reduction, to his hurt and prejudice, and to the hurt and prejudice of the pursuers. Cond. 12. The said James Carstairs was an old man, upwards of eighty years of age. The settlement of 1862 was made in favour of his relatives, for whom he had always great affection and regard, and with whom he was on a friendly footing. The defenders almost took possession of the said James Carstairs; exercised a constant watch and surveillance over him; prevented his friends from having any intercourse with him; and by threats of ill-usage and otherwise prevailed upon him to sign the deed now under reduction. Cond. 13. The said trust-disposition and settlement was also granted by the said James Carstairs without any just, necessary, or onerous cause; and he was impetrated and forced to execute the same for fear of bodily harm and other maltreatment being inflicted on him by the said James and Thomas Marshall."

The pursuers pleaded—"(1) The pretended trust-disposition of 1869, under reduction, not being the deed of the said James Carstairs, the same should be reduced and set aside as concluded for. (2) The said pretended trust-disposition having been impetrated from the said James Carstairs through weakness and facility on his part, and by fraud and circumvention on the part of the defenders, the same should be reduced as concluded for. (3) *Separatim*, the pursuers are entitled to reduction of the said trust-disposition, in respect the same was impetrated from the said James Carstairs through force and fear."

The defenders denied all these allegations of the pursuers, and pleaded that "the whole material averments of the pursuers being unfounded in fact, the defenders should be assoilzied from the conclusions of the summons."

The following issues for trying the case were adjusted and approved by the Lord Ordinary (GIFFORD).

"1. Whether the trust-disposition and settlement, No. 12 of process, is not the deed of the said James Carstairs.

"2. Whether, at the date of the said trust-disposition and settlement, the said James Carstairs was in a weak and facile state of mind, and easily imposed upon? and whether the defenders, James Marshall and Thomas Marshall, or either of them, taking advantage of his said weakness and facility, did, by fraud or circumvention, or intimidation, impetrate and obtain the said deed from the said James Carstairs, to his lesion?"

In approving these issues, the Lord Ordinary added the following note to his interlocutor:—

"*Note.*—The only question of nicety and difficulty arising in regard to the present issues is, whether the pursuers are entitled to have the words 'or intimidation' inserted as part of the second issue, or, whether, if they are to insist on intimidation at all as a ground of action, they are not bound to take the ordinary issue of force and fear. The word intimidation is not used upon record, but it was admitted that there is sufficient averment of the thing, and the pursuers intimated their readiness, if necessary, to make a correction on the statement and plea. The Lord Ordinary is prepared to allow any such correction which, in

his view, does not alter the nature of the case. Probably, without any amendment, the question sufficiently arises on the record as it stands.

"The only authority or precedent, so far as the Lord Ordinary is aware, for inserting in such an issue the words 'fraud or circumvention or intimidation' is the case of *Cairns* v. *Marianski*, 12th March 1850, 12 D. 920; 12 D. 1286, H. L., 1 Macq. 212, and 766. In this case, which was a very peculiar and complicated one, such an issue was given applicable to a great many separate deeds and writings. In the House of Lords observations were made on the impropriety of embracing alternatives in issues, and the danger that a jury taking different alternatives might agree upon a verdict, while entirely at variance as to the true facts or grounds thereof.

"The observations in *Marianski's* case have led to a good deal of discussion in later cases. In *Mann* v. *Smith*, 2d February 1861, 23 D. 435, it was contended in a case like the present, but without any allegation of intimidation, that the issue should ask whether the deed was impetrated by 'fraud and circumvention,' and not by 'fraud or circumvention.' The Court held that the words should be 'fraud or circumvention,' and this has been followed in many subsequent cases. In none of the cases, however, does there appear to have been an allegation of intimidation in addition to fraud and circumvention.

"The Lord Ordinary is of opinion that the pursuers, having averred intimidation as one of the means by which the weakness and facility of the testator was taken advantage of and the deed impetrated, are entitled to have intimidation inserted along with fraud and circumvention in the same issue. In the Lord Ordinary's view there is no real alternative in the substance of the question. The question is, whether the deed was impetrated from a weak and facile man, and this is a simple and categorical question, Fraud, circumvention, intimidation, do not raise three alternative issues, but only indicate three ways, by some or by all of which the impetration was accomplished. Now admittedly fraud or circumvention are to enter the issue, and reasonably so, because they run into each other, and may be more or less combined, although either by itself would be sufficient. In like manner, intimidation, though quite different from circumvention, may have been employed along with it, or from time to time, and alternately with fraud, to bring about the end in view. In principle, therefore, there is the same reason for allowing a pursuer to prove that intimidation was one of the means of impetration, as for allowing him to prove that the impetration was accomplished by fraud or circumvention.

"To compel the pursuers to take a separate issue on force or fear would be to put them to an unfair disadvantage, for they would fail unless they satisfied the jury that the deed was obtained by means of these alone, whereas they are surely entitled to succeed if they prove that the defenders, taking advantage of the testator's facility, impetrated the deed by fraud, circumvention, or intimidation, together or separately.

"The remarks in *Marianski's* case had reference chiefly to other parts of the issue, and not to the mere methods or instruments of impetration."

On a motion for the defenders to vary these issues by deleting the words "or intimidation" from the second issues:—

SHAND and MACKINTOSH, for them, pleaded—(1) That these words should be deleted, on the ground that they did not represent what is meant; (2) that if it were found that they did so, the pursuers were bound to take a separate issue on that point, the ordinary issue, that is to say, of force and fear, which are terms well known in the law of Scotland, while that of "intimidation" is not. An issue of "force and fear" was not only the usual but the appropriate issue to take in a case like this, for these words were always construed according to the mental condition of the party, so that under that issue the pursuers would get all the benefit they could wish of the testator's alleged weakness and facility. They referred to Stair i., 9, 8, and iv, 40, 25; Bell's Prin. § 12; and *Cassie* v. *Flemming*, M. 10,279, there quoted. The first issue sent to trial in the recent case of *Gelot* v. *Stewart*, March 4, 1870, 7 Law Rep. 372, was the proper one here if this question was to be raised. They farther objected to the combination in the same issue of intimidation with fraud and circumvention, as if they could be classed together. The result of such an alternative issue might be very unfairly to give the pursuer an advantage by enabling him to get a verdict when the jury were really divided, one part affirming fraud or circumvention and negativing intimidation, and the other part doing the opposite. The case of *Marianski*, referred to by the Lord Ordinary, is the only precedent for such an issue; but after the remarks made in the House of Lords it is rather a beacon to warn than an example to follow.

WATSON and STRACHAN, for the pursuers, admitted that there was a category of cases in the decisions of this Court where force and fear were put in issue, and another category where issues were framed on fraud or circumvention. But this does not prevent there being another class of cases still which came under neither of these categories, but in which, on the contrary, the threats or threatened violence or intimidation did not stand alone, but came in support of the fraud or deceit. In these cases, and the present was one of them, the intimidation would not have proved sufficient if alone used, but when combined with fraud or circumvention proved eminently successful.

LORD PRESIDENT—Should not your issue in that case have contained "and intimidation" instead of "or intimidation," in accordance with the remarks of the House of Lords already referred to. I think the sole difference between English and Scotch lawyers on this point is, that they use "and" where we use "or," but that the same thing is meant.

WATSON referred to the case of *Urquhart*, 5 Macph. 45, as illustrating the use of "or" and "and" in cases where the issue is not properly alternative. He farther argued the three things fraud, circumvention, and intimidation may have operated conjunctly to impetrate the deed.

LORD PRESIDENT—I agree so far that if half of the jury were to find on fraud, and the other half on circumvention, their verdict might stand. But suppose half find on fraud, and the other half on intimidation, that is not necessarily the same thing.

At advising—

LORD PRESIDENT—This case is before us upon a motion by the defenders to vary the issues as adjusted by Lord Gifford, and the variation asked for is the deletion of the words "or intimidation" from the second issue. This motion raises a question of very considerable delicacy and difficulty.

The action is for reduction of a trust-disposition and settlement executed by the late James Carstairs, and one of the grounds of reduction is that Mr Carstairs had not at the time of its execution a disponing mind at all. This forms the subject of the first issue—viz., "Whether the trust-disposition and settlement, No. 12 of process, is not the deed of the said James Carstairs?" About this there is no difficulty. The second issue is the ordinary one of fraud or circumvention, with the addition of the words "or intimidation." Now, the state of the record from which this issue is extracted is as follows. In Art. 10 of their condescendence the pursuers aver that at the time when he executed the said settlement Mr Carstairs was completely under the influence and control of two of the defenders, and that the said settlement was executed by him under undue and improper influence on their part. Again, they say in Art. 11 that at the date of the said execution the said James Carstairs was in a weak and facile state of mind; that he was completely under the influence of the defenders; and that, taking advantage of his weakness and facility, and abusing their influence over him, they, by *fraud and circmvention*, impetrated the deed now under reduction. In Art. 12 it is alleged that the defenders exercised a constant watch and surveillance of the said James Carstairs, and prevented his friends from having intercourse with him, and by *threats of ill-usage* and otherwise prevailed upon him to sign the deed now under reduction. And lastly, in Art. 13, that he was impetrated and forced to execute the same for fear of bodily harm and other maltreatment being inflicted on him by the said defenders. This 13th article, if it were to be made the foundation of an issue at all, would probably lead up to one of force and fear. But it is not proposed by the pursuers to take such an issue. I therefore think that in dealing with these issues we must leave out of consideration this 13th article altogether, and revert to the 12th, as containing all that the pursuers desire to put in issue under the words "or intimidation." Now, it has been contended that intimidation of the sort condescended upon might be proved under the second issue, under the words fraud or circumvention, did they stand alone without the addition of "or intimidation." If this was a usual course, there would be no objection to it that I can see either in reason or legal principle. But it is not the practice, so far as I am aware, to admit proof of circumstances of the sort averred under the ordinary issue of fraud or circumvention, and I do not know that it would be altogether expedient to sanction the commencement of such a practice. On the other hand, it would be very unfair to refuse the pursuer proof of the allegations he makes as to "threats of ill-usage and otherwise," and particularly in a case of this sort. One can easily understand that among other arts and machinations used to procure a deed of this sort, threats of ill-usage, &c., may be of very material assistance in procuring a person of weak and facile mind to do what is required of him. I therefore quite agree with the Lord Ordinary that intimidation should be laid before the jury as one of the means employed by the defenders to impetrate this deed.

But it has been suggested at the bar that by introducing these words "or intimidation" into the ordinary issue of fraud or circumvention, we should really be sending an alternative issue to the jury. I am not much moved by that argument as applied to the present instance. Some of the views which have been expressed as to alternative issues have not been very well understood. There are some alternatives, the introduction of which would be very improper, and would lead to much inconvenience, confusion, and probably expense. Such is the case where alternatives are introduced of such a nature that it is essential to know which alternative the jury go on, and yet one cannot be sure that one half the jury has not gone on one alternative, and one half on the other, the result being that the verdict would not be a good verdict in the case. But that is not the case here. The issue which we are considering puts two questions, each of which must be answered in the affirmative by the jury if they are to give a verdict for the pursuers. They must first find that the deceased was of weak and facile mind. And they must then find that the defenders, taking advantage of this, impetrated the deed from him. Everything else in the issue besides this is merely descriptive of the improper means used, and if the jury agree and are satisfied of the impetration of the deed under these circumstances, I cannot think the verdict a bad one, because they may differ as to the terms they would apply to the means used. Supposing that some think the proceedings should be characterised as fraud, while others think that circumvention would be a more accurate description, and a third party would apply the term intimidation—what would that matter? The result would be the same as to the real questions put to the jury, the jurors differing only in expression, and in reason and law the verdict would be a good one. Some of the jury may think that what is called by the others fraud may be better described by the word circumvention, and if so, they are entitled to say so, and their verdict is perfectly good. Now, in like manner, intimidation, in one view, is a species of circumvention; in an other view, it is a species of fraud, but it is distinguishable from other kinds of fraud and circumvention. Some of the jury may be of opinion that what was done by the defenders was much more like intimidation than false representation or wheedling artifices, and may therefore think that what was done would best be described by the use of the term intimidation, but I should not think the verdict bad on that account; and therefore, as far as I am personally concerned, I should be inclined to let the issue stand as it is. But I understand that some of your Lordships prefer the use of the word "and" before "intimidation" to that of the word "or," and I am perfectly willing to agree to that alteration, because I think that the case would be perfectly well tried under an issue so constructed. If the jury find a verdict for the pursuers on this issue they will then find that both fraud or circumvention, whichever they like to call it, and intimidation, have been used; that, in fact, two kinds of influence have been exercised. But it will be quite open to the jury to find one of the alternatives without the other. I am therefore quite ready to agree to this suggestion if your Lordships wish it.

Lord Deas—In the framing of issues there are two things of the greatest importance. First, that the issues be framed in such a way as to avoid any possibility of misunderstanding on the part of the jury. Second, that where there has been in practice a settled form of issue, this should be as far as possible adhered to, now, with regard to an issue grounded upon weakness and facility, taken

advantage of by fraud and circumvention, we have a well settled form, never varied so far as I am aware, except by the substitution occasionally of the word "and" for the word "or" between "fraud" and "circumvention." But this has never altered the uniform and understood meaning of the issue. It does not matter which of the two copulatives is used, because there is really no alternative introduced by the addition of "circumvention" to "fraud." We adopted these two words, not because they express different things, but because they express different shades of the same thing. We adopted the expressions from Lord Stair, who says (I. 9, 9) "circumvention signifieth the act of fraud, whereby a person is induced to a deed or obligation by deceit." That is the nature of the issue of "fraud or circumvention," and its terms have been long settled and are fully understood among us. Now to introduce another word into that issue is to my mind to unsettle the whole matter, and to introduce into the minds of the jury the idea that there is something else put in issue than mere fraud. What your Lordship thinks is, that under this issue, as it at present stands, we should try the allegation made in Art. 12 of the pursuers' condescendence. But I look upon Article 13 as a mere supplement to, if not a repetition of Art. 12. I do not see how it is to be left out of view. I do not see how Article 12 is to be put in issue and Article 13 left out. I look upon them as raising, in different forms of words, exactly the same question, and that a proper question of "force or fear." Now it is well known that the foundation of that issue is "fear," in whatever manner induced; and to mix up an issue of "fraud or circumvention," with one of "force or fear," is in my opinion the worst possible innovation that we could make upon established practice.

I cannot agree with the Lord Ordinary in his grounds for admitting this alternative issue. We have never done such a thing except in the well known case of *Marianski*, and that case was productive of so much misunderstanding, and expense both of time and money, that I consider it was well characterised at the bar as rather a beacon to avoid than an example to follow. I think, however, that the House of Lords was misinformed as to the Scotch practice in issues when they made those remarks upon that case which animadvert so strongly upon the practice of sending alternative issues to a jury. Though their Lordships' remarks may be very just, I do not think the practice has ever been ours. Now the issue proposed here is a mixture of the two things "fraud" and "fear," and in my opinion this is distinctly to be avoided. Just look for a moment at the ordinary issue of "force or fear." There are not very many cases of the sort in the books, but they all of them turn upon the question of intimidation, and consequently to mix up intimidation with fraud or circumvention in an issue is simply to combine in one two alternative ways of impetrating a deed.

Lord Stair says (I. 9, 8) "Extortion signifies the act of force, or other mean of fear, whereby a person is compelled to do that which of his proper inclination he would not have done. . . . Things so done are said to be done *vi majori* or *metus causa*, by force or fear." Then he goes on to say, "Extortion is more easily sustained in the deeds of weaker persons." He lays down that it is not necessary to put in that he is a weak and facile person. And so he says, in continuation, "Upon the like ground, extortion will be more easily presumed and sustained in the deeds of persons who are weak and infirm of judgment or courage, as said is, than of those who are knowing and confident." Then he says again (IV. 40, 25) "It is not any other fear which gives this exception, but such fear *quæ cadit in virum constantem*, as it is commonly described but too narrowly; for certainly that may be a just fear to a woman that will not be to a man; and to a weak person that will not be to a resolute." Then just consider what a description of the issue of "force or fear" this is (IV. 40, 26) "Just fear is inferred, not only by positive acts inferring constraint, but by restraint, as by long and unlawful imprisonment, or by hindering of necessary food, sleep, rest, clothing, or by affording only corrupt meat and drink, which the extremity of hunger would make the injured person take, though it were known to infer the hazard of life," and so on. These are all modes of producing the fear, and which the law holds to fall under the issue of "force or fear," and these are the very things that are contained in Articles 12 and 13 of the condescendence. In the very last case we had in the Court of Session on the subject, that of *Stewart*, the doctor in the Paraguayan service of Lopez, if I am not mistaken there was no force applied or averred to have been applied, except so far as threats of evil consequences, and the fear thereby induced can be held to come under that category. This case of *Stewart* entirely supports the remarks I have already made in the present case. I must, therefore, with great submission dissent from the introduction of this novel issue, for which I see no reason, and which can only introduce into our practice what may be material for future mistakes, misunderstandings, and miscarriage of justice. If this question is put in issue at all, I am of opinion that there ought to be a separate issue of force or fear in addition to that of fraud or circumvention; and if the issue is sent to the jury as it is, and they give a verdict for the pursuer, either general or on any one of the special alternatives, I cannot undertake to say now what the result of that verdict may be.

Lord Ardmillan—We have raised before us in this case a most important question in the framing of issues, in deciding which there is no little difficulty. There are two considerations which it is necessary to keep prominently in view. First, that the pursuer is entitled to establish the truth of his case as he has alleged it—that is to say, if his allegations are relevant and competent; and, consequently it is the duty of the Court to send such an issue or issues to the jury as will enable him fairly to do so if he can. Secondly, that no issue should be sent to a jury, with any alternative words in it, which might ultimately lead to difficulty in applying the verdict.

The question intended to be laid before the jury here is based upon an allegation of weakness and facility. The pursuer avers that the testator was, at the time of executing the deed, a very old man, and in a weak and facile state of mind. And to this person they aver that the defenders applied the influence of fraud or circumvention, and also the different influences of intimidation. But, in considering this question we cannot leave out of sight that all these means are said to have been applied to a person of weak and facile mind, in order to impetrate from him the deed under reduction; and that that is the foundation of the pursuer's case. Fraud or circumvention is one mode;

for they are both terms expressive of the same kind of influence, though they describe it from different points of view. The other mode is expressed by the word intimidation, which is alleged to have consisted of threats of different kinds, applied to a person of this nature. Therefore we have two modes of illegal influence alleged to have been applied to this person; and it is only just that the pursuer be allowed proof of both; and if he gets a verdict upon both, or either, I can see no reason why that verdict should not be a good one. But, at the same time, I think that we are bound to regard the remarks made by the House of Lords in the case of *Marianski*, already alluded to. I have considered them carefully in their bearing upon this question, and see no reason to alter my opinion. I think we must look always to the nature of the alternative proposed. Now, a proper alternative consists of two branches, each of them perfectly inconsistent with the other; and I think there would be great unfairness in placing before a jury an issue containing an alternative of that sort; and just as a general conviction upon an alternative criminal charge is bad, so I should consider a general verdict upon such an alternative, issue bad also. But the present is not the case of a proper alternative. The one branch is not inconsistent with, and does not shut out, the other. The intimidation alleged may be a part of the fraud or circumvention. The fraud or circumvention may be used to lead up to the intimidation, and insure its effect; or the intimidation may be used to prepare the victim for the fraud or circumvention. There is, therefore, no proper alternative; and I see no ground for excluding the word intimidation from the issue. At the same time, keeping in mind the remarks of your Lordships and of the House of Lords, I should prefer to see the word "and" substituted for the word "or" before intimidation. In that case, if the jury find a general verdict for the pursuers, that verdict will stand, because, as I have said, there is no proper alternative in the issue. If, on the other hand, they think that there was fraud or circumvention, but no intimidation, and choose to return a special verdict, I see no reason why such verdict should not be a good one; and, similarly, if they find intimidation proved but no fraud or circumvention.

I think that the ordinary issue of "force or fear" is more applicable where there is sufficient violence applied to move a constant person. I do not say that that rule is so inflexible as to exclude all proof of weakness and facility in the subject, though I doubt whether the utmost allowance in that way would meet this case. But where weakness and facility are distinctly averred, and it is not said that fear was the only method employed to impetrate the deed, but fraud or circumvention, combined with that degree of fear which is applicable to a weak person, then I think a proper issue of force or fear quite inapplicable; and if we were to exclude the word intimidation from the issue, we should shut out all proof of the kind of force and fear averred, which, in cases like this, would be an act of gross injustice to the pursuer. He would not be allowed to prove his averments under an ordinary issue of fraud or circumvention; nor do I think he would be allowed to establish them under the issue of "force or fear;" for I believe it is quite understood in practice that that issue does not apply to such a case of facility as is averred here. I am not at all unwilling that there should be two issues, provided it were possible so to draw them as to allow the pursuer to combine a case of weakness and facility with each—without which no issue would be a good one to try this case. But I agree with your Lordship in the chair, that the case of the pursuer may very well be met by the issue that is proposed, with the alteration of the single word "or" into "and;" but I do so on the distinct understanding that a special verdict would be the proper course, if the jury are not satisfied that both "fraud or circumvention" and "intimidation" are proved.

Lord Kinloch—The issue with whose terms we are now dealing is one peculiarly belonging to our law; and the precise scope of which is apt to be misapprehended by those educated in another system of jurisprudence. The case intended to be raised is not that of fraud, in the ordinary sense of the term; that is to say, not the case of a deed procured by a specific act of deception. Nor is the case one of force and fear, in the proper legal construction of these terms,—that is to say, it is not the case of a deed procured by a specific act of intimidation. The case intended to be raised is that of a person in a mental condition of weakness and facility, on whom a general influence has been used of an undue and improper character. This influence implies a course of deception rightly characterised by the word circumvention, which is fraud in grain, but not fraud perpetrated by a single specific act. Or it implies intimidation—meaning thereby not a specific act of violence, but a general course of threats and harshness, so operating on the mind as to bring the individual within entire control. From the very nature of the case, it may occur that both circumvention and intimidation have been successively practised on the individual, and the deed may have been produced by the combined operation of both acting on a weak and facile mind. I think that this is what in substance is averred in the present case, though the allegations are somewhat vaguely expressed. And I am of opinion that the pursuers are entitled to an issue embodying, cumulatively, the elements of circumvention and intimidation, as together going to make up that alleged system of practising on a weak mind, through the successful operation of which the deed is said to have been obtained.

But whilst the pursuers are entitled—and, indeed, according to their statements on record, in some sense bound—to take this issue, I consider it by no means to follow that they must fail of success if they do not establish that both circumvention and intimidation were employed. On the contrary, it is my opinion that to prove either as the means of impetrating the deeds, in combination with proof of weakness and facility, will be sufficient. In that case it will be only necessary for the jury to return a special verdict, stating on which ground they rest. For my own part, I would rather desire that the issue expressly put "fraud or circumvention and intimidation, or either of them;" a general answer to which issue would, according to our established practice, imply an affirmative to the cumulative proposition, leaving the jury to find specifically either one or other, if they did not find both. But I think the same result may be practically operated by a simply cumulative issue, such as first alluded to.

The Court accordingly pronounced an interlocutor, varying the second issue adjusted and ap-

proved of by the Lord Ordinary, by substituting the word "and" for the word "or" before the word "intimidation."

Agents for Pursuers—J. & R. Macandrew, W.S.
Agents for Defenders—Gifford & Simpson, W.S.

Friday, December 16.

GRAHAM'S EXECUTORS *v.* FLETCHER'S EXECUTORS.

Interest—Agent and Client—Indemnification. An agent having for twenty-seven years paid premiums on a policy on the life of a client, who had gone to Australia—the first two advances being unauthorised, but the subsequent ones continued under an instruction to raise money for the purpose, if possible—*Held* that his representatives were entitled to repayment of the advances, but (*diss.* Lord Ardmillan) with simple interest only at 5 per cent., and not compound; and that this, in the absence of stipulation or well-known practice, constituted full legal indemnification.

This was an action at the instance of the executors of the late Humphrey Graham, Writer to the Signet, Edinburgh, against the executors of Dr Dugald Fletcher, formerly of Dunkeld, and latterly of Port-Eliot, in South Australia; and concluded for payment of a sum of £2017, 8s. sterling, being the amount of annual and extra premiums on a policy of insurance upon the life of Dr Fletcher, advanced, as they became due, to the Standard Insurance Company by Mr Graham, on behalf of Dr Fletcher, with compound interest upon the said premiums, from the dates when the same were advanced to 4th May 1869. There was also a conclusion for £504, 10s. 4¾d., being the amount of certain business accounts alleged to have been incurred by Dr Fletcher to Mr Graham; but these accounts were held, by the Lord Ordinary (GIFFORD), to have undergone the triennial prescription, and the pursuers did not reclaim against that finding. The advances of premiums commenced in the following way:—Dr Fletcher had effected in 1832 a policy of assurance on his own life for the sum of £1000, with participation of profits, with the Standard Life Assurance Company; and the premiums thereon were duly paid until his departure to Australia in 1842. On 3d February 1843 Mr Graham, who acted as Dr Fletcher's agent in this country, received a notice to the effect that an extra premium, in consequence of residence abroad, was due on Dr Fletcher's life policy; and that if the sum of £5, 16s. 3d., the amount of said premium, were not immediately remitted, the policy would be cancelled. In order to prevent the forfeiture of the policy Mr Graham made the required advance, duly intimating to Dr Fletcher that he had done so; and thereafter, on 9th April 1843, he also paid the annual premium which was due on said policy, amounting to £33, 7s. 6d. On 19th April 1843 he wrote Dr Fletcher as follows:—

"*Edinburgh, 19th April* 1843.—My dear Sir,—I wrote you on 4th February. The other day I had another letter from the Perth agent of the Standard Company intimating that £33, 7s. 6d., being the annual premium on your policy with the Standard, was past due, and requiring payment. In order to prevent forfeiture of the policy, I have advanced that sum, and the receipt for it is in my hands. I hope you will remit me immediately these two sums of £33, 7s. 6d. and £5, 16s. 3d. which I have advanced to the Standard, as I cannot afford to lie out of such sums, more especially when other sums are due me, and I have considerable advances to make in the lawsuit with the Fishers regarding John Fisher's succession."

In reply to this letter Dr Fletcher wrote on 21st August 1843—

"*Murrendindy, 21st August* 1843.—My dear Sir,—I have just received your letters of the 24th of January and of 4th February 1843, and lose no time in thanking you most kindly for your *care* and attention to my interest at a time when it was so much required. I can in no way account for the silence of Mr Menzies, as I have not heard from him myself, unless illness be the cause. I shall, however, be very glad if you can continue my life insurance by raising money for that purpose, as I cannot, without manifest *disadvantage*, dispose of sheep for two years at least, as, with all my efforts, I can only make my income meet the heavy expenses of a sheep station at its commencement. If you cannot raise the sum, there is no alternative but for you and Mr Menzies between you, or either of you, as you think best, to dispose of the policy to the best advantage, he having the necessary papers, and transmit me the money through the Union Bank of Australia, Melbourne, Port Philip, the bank I do business with."

In consequence of this letter Mr Graham continued to pay the future premiums on the policy as they fell due until his death. After his death the pursuers, his executors, in order to keep up the policy, paid one more premium, being the only other premium that became due before Dr Fletcher's death in 1869.

Throughout a considerable portion of the time during which these advances were being made Mr Graham was engaged in conducting a lawsuit for Dr Fletcher, in which very considerable pecuniary interests were involved. Dr Fletcher's expectations were however disappointed, and he did not in the event receive any part of the fund in dispute.

The Lord Ordinary (GIFFORD), on 7th July 1870, on the grounds that the fund on which the claim was made had been created, or at all events preserved, by Mr Graham's advances, and that Mr Graham's representatives were therefore entitled to complete indemnification, pronounced an interlocutor in the following terms:—"Finds that the pursuers, as executors of the late Mr Humprey Graham, are entitled, out of the proceeds of the policy on the life of the late Dr Fletcher, to repayment of the premiums of assurance advanced by the late Mr Graham. Finds that the pursuers are also entitled to interest on the said premiums, at the rate of 5 per cent. per annum, and that they are entitled to accumulate the interest with the capital sums once a-year, and to charge interest on the accumulated sums at said rate; and appoints the cause to be enrolled, that the precise sum due to the pursuers may be ascertained, and the remaining points of the case disposed of."

Thereafter, on 12th July 1870, he pronounced another interlocutor decerning against the defenders for payment of the full sum included in the first conclusions of the summons, and finding the pursuers entitled to expenses, but modified the expenses to three-fourths of the taxed amount.

The defenders reclaimed against both these interlocutors.

WATSON and HALL, for them, contended that