question. But, as I have said, I do not see how taking the date of execution could give rise to any inconvenience, for there cannot be any mistake about the date of the execution of a deed. But it is not uncommon to find difficulty about the date of the death of the maker of the deed.

Then the construction which takes the date of execution is more in accordance with the leading principle of the statute—which is, that no one is to be entitled after 1st August 1848 to impose fetters on a person then unborn. Now, surely in carrying into effect this principle it is much easier to say that a person is not to do this when he makes the deed than when he dies.

So I come to the conclusion that the petitioner here is entitled to disentail.

LORD DEAS—I agree with your Lordship in observing that we cannot look much to matters of convenience or inconvenience in construing a statute; and I would only remark on this point that the inconvenience pointed out by your Lordship as likely to arise if the date of the testator's death was taken, applies equally to the cases contemplated in the 28th section, where the statute provides that the date of the deed is the death of the granter.

The rule is, that *mortis causa* deeds do not come into operation until the death of the granter, and therefore in all questions—with few exceptions—as to the effect of such deeds, the date of the death of the granter, and not the date of execution of the deed, is taken.

There are some kinds of questions in which it is allowable to look at the date of execution—for example, in questions as to the meaning of the testator; but such cases are exceptions to the general rule, which is as I have stated. I do not think the 28th section influences this question, whether that section is looked upon as a particular provision to meet a particular case, or as indicating the reasonableness of taking the time when a deed comes into operation as the date of the deed. So the question is, whether, in construing this statute we are to hold that the expression "date of the deed" means the same thing when applied *inter vivos* and to *mortis causa* deeds. I am disposed to construe the words, "the date of the entail," as meaning the date when the deed becomes an entail, which it does not do until the death of the granter.

I have arrived at this conclusion with some hesitation and difficulty; but, on the whole, I must dissent from the opinion expressed by your Lordship.

LORD ARDMILLAN and LORD JERVISWOODE concurred with the Lord President.

The Court pronounced the following interlocutor:—

"Find that the tailzie of the estate of Muselie, of which the petitioner is the heir in possession, being contained in two deeds dated respectively 25th February 1836 and 1st July 1848, the said tailzie must be held, within the meaning of the 3d section of 11 and 12 Vict., c. 36, to be dated prior to the 1st day of August 1848, although the granter of the said two deeds did not die till the 11th December 1849; and remit to the Lord Ordinary to proceed further as shall be just and consistent with the above finding."

Counsel for Petitioner--Solicitor-General (Clark), Q.C., and Rankine. Agents—Paterson & Romanes, W.S.

Friday, February 13.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

LYON & M'INTOSH *v.* FORBES IRVINE.

Lease.

Circumstances in which certain articles and regulations were *held* to be incorporated in the lease.

Lease—Irritancy—Assignation—Factory.

In articles and regulations to be observed on an estate, and which were incorporated into the lease of a farm, it was provided "that creditors, or others acting in their names, or in that of the tenant, after insolvency, are specially excluded, and in all cases of bankruptcy of tenants the same shall operate as a violation, irritancy, and extinction of the lease, and the heritor shall be at liberty to raise an action of removing," &c.; "and the same action shall be competent to the heritor in the event of assigning or subletting." The tenant of the farm under the said lease granted a factory and commission in favour of a third party, conferring upon him all the management of the farm, and excluding himself from any share thereof, and declaring the said deed not to be revocable. *Held*—(1) that assigning or sub-letting operated an irritancy of the lease; (2) that the factory and commission amounted to an assignation; and (3) that the irritancy was not purgeable.

Process—Action of Removing—Competency.

A lease contained a provision that in certain events "the heritor should be at liberty to raise an action of removing and remove the tenant, alike in the same manner as if the lease were expired." One of the events contemplated having occurred, an action was brought on 25th February 1873, concluding for "immediate removal," while under the lease the earliest term of removal was the 1st of March—*Held* that the action as laid was incompetent under the lease.

This was a Note of Suspension of two decrees in the Sheriff-court of Aberdeenshire and Kincardineshire, for William Lyon junior, residing at Newton-of-Drum, Aberdeenshire, and for Daniel M'Intosh, farmer, Craiginches, Kincardineshire, against Alexander Forbes Irvine, of Drum, Aberdeenshire, in the following circumstances:—By contract of lease, dated the 7th day of April 1856, the respondent, Alexander Forbes Irvine of Drum, as factor and commissioner for his father, the deceased Alexander Forbes Irvine, who was then proprietor of the lands and estate of Drum, let to the now deceased William Lyon, whom failing to his youngest son David Lyon, and his heirs, whom also failing to his eldest son the complainer, William Lyon junior, and his heirs, the farm of Newton-of-Drum, including the Whinnyhill, for the space of nineteen years from the term of Whitsunday 1859. In a memorandum, dated the

28th day of July 1860, and annexed to the lease, it was set forth that William Lyon had also taken seven and one-fourth acres of ground from Mains Croft, at the yearly rent of £8, 10s. sterling.

By the contract of lease it was stipulated and declared, *inter alia*, as follows, viz.:—"The tenant shall be bound strictly to adhere to, implement, and perform, in the most ample and liberal manner, the whole articles and conditions incumbent on and prestable by the tenant, contained in the said general regulations, a copy of which he has subscribed of this date, as relative hereto."

By the articles and regulations of the estate of Drum thus referred to, and subscribed by the said William Lyon, it was, *inter alia*, provided as follows, viz.:—"Every tenant whatever must reside with his family on the farm, and always have a full stock upon it;" and also "creditors, or trustees for creditors, or others acting in their names, or in that of the tenant, after insolvency, are specially excluded, and in all cases of bankruptcy of tenants the same shall operate as a violation, irritancy, and extinction of the lease, and the heritors shall be at liberty to raise an action of removing before the Judge Ordinary, and remove the tenant, alike in the same manner as if the lease were expired; and the same action of removing shall be competent to the heritor in the event of assigning and sub-letting, in the event of a proper person not enacting himself as responsible manager for an heir in minority, in the event of a tenant's non-residence, and in every other instance where the regulations, articles, and conditions, or any of them, shall not be fully implemented on the part of the tenants."

The deceased William Lyon possessed the farm under this lease until his death on 9th March 1872. His youngest son, David Lyon, having predeceased him, the lease then devolved on the complainer William Lyon.

Prior to the death of William Lyon senior, he and the complainer, William Lyon junior, executed on 20th February 1871 the following factory and commission in favour of the complainer Daniel Mackintosh;—"We, William Lyon senior and William Lyon junior, residing at Newton of Drum, in the parish of Drumoak, and county of Aberdeen: Considering that Henry Sheriffs, residing at Unthank near Brechin, has undertaken certain obligations for us, and has agreed to make certain other advances to us on condition that we grant the factory and commission in favour of Daniel M'Intosh, residing at Craiginches, Nigg, in the county of Kincardine, in manner underwritten, therefore we, the said William Lyon senior and William Lyon junior, do hereby, jointly and severally, nominate, constitute, and appoint the said Daniel M'Intosh to be our factor and commissioner to the effect aftermentioned; that is to say, we hereby give, grant, and commit to the said Daniel M'Intosh full power, warrant, and commission for us, and in our names, to manage the farm of Newton of Drum, of which we are tenants, and that for the whole years and crops yet to run of the lease of the said farm held by us from the proprietor thereof, which lease expires at ; to purchase materials, manures, implements, stock, seeds, and all necessaries for the said farm, hire servants, sell and dispose of stock, victual, and others that are presently on the said farm, or that may be raised and grown thereon, all for such prices as he can obtain, and to call, sue for, and receive the said prices; and to adjust and pay all accounts, workmen's bills servants' wages, rents, taxes, and other debts which may be due by us; to labour, sow, and cultivate the said farm, and generally to do any and every operation, act, and thing necessary or contingent on the proper management and cultivation of the said farm; to carry through a displenish sale of the stocking, implements, and others on the farm at the expiry of said lease; to recover payment of the meliorations, valuations of dung, grass, fallow land, and others that are then payable, and the proceeds of the waygoing crop; to employ law agents or procurators when the same shall be required to sue and defend all actions at law that may be required in the premises; to borrow or advance any sums of money on our credit that may be necessary for carrying on the said farm, at legal interest, and to apply the same for that purpose, or for paying our lawful debts; and to grant bond or bill for the same to bind and oblige us and our heirs, executors, and successors in payment thereof: Declaring hereby, that all receipts, discharges, and conveyances, bonds or bills, granted by the said Daniel M'Intosh, to whatever person or persons, and all acts and deeds done or granted by him in execution of the premises, shall be equally valid and binding as if granted and done by us, or either of us: and declaring also that this factory and commission shall subsist in full force and effect during the currency of said lease, and until the whole settlements to be carried through at the expiry thereof are effected, and shall not be revocable by us, or either of us, and shall subsist in full force and effect, notwithstanding the death of us, or either of us, and shall be good, valid, and effectual against the heirs, executors, or successors of us, or either of us, after our death, during the foresaid space, any law or practice to the contrary notwithstanding: Further, we do hereby agree and bind ourselves, during the subsistence of this factory and commission, to abstain from all interference in the management of the said farm, or in the buying and selling of cattle for the same, or in any other manner of way, saving and excepting in so far as we may be specially employed for that purpose by the said Daniel M'Intosh; and providing and declaring that, in the event of us, or either of us, contravening this provision, we may be restrained from so contravening by interdict from the Sheriff, on the application of the said Daniel M'Intosh; but providing always that the said Daniel M'Intosh shall be bound and obliged, as by acceptation hereof he binds and obliges himself, his heirs, executors, and successors, on the expiry of the said lease, and on the whole valuations payable at the expiry thereof, and the proceeds of the waygoing crop being all realised, to hold just count and reckoning with us and our respective heirs, executors, and assignees for his intromissions, in virtue of this factory and commission, and to make payment to me or them of whatever balance shall be due by him, after deducting all necessary expenses and a reasonable gratification for his trouble; and we consent to registration hereof for preservation.—In witness whereof we have subscribed these presents, written on this and the preceding page of this sheet of stamped paper by James Brown Craven, writer in Aberdeen, at Newton of Drum, upon the 20th day of February 1871 years, before these witnesses, Gardiner Lawrence Smith and Peter Smith, both writers in Aberdeen. (Signed) Wil-

liam Lyon sen. William Lyon jun. (Signed) Gardiner L. Smith, witness; Peter Smith, witness."

The respondents averred that when the deed was granted William Lyon senior was in a state of insolvency, and that on his death M'Intosh entered into possession of the farm and continued to possess the same.

The complainers denied that M'Intosh possessed the farm, or claimed any right to it, although they admitted that he had laid down and reaped the crop of 1872, but only as executor of William Lyon senior.

In these circumstances, the respondents raised an action against the complainers in the Sheriff-Court of Aberdeen and Kincardine on the 25th February 1873, concluding for decree of instant removal from the farm.

Subsequently, on 9th September 1873, the complainers executed a deed recalling the factory and commission, with the express consent of the complainer Daniel M'Intosh.

On 4th July 1873 the Sheriff-Substitute (DOVE WILSON), having taken a proof, pronounced an interlocutor containing *inter alia* the following findings:—"Finds that it is provided by the lease between the pursuer and defender Lyon, that assignees are secluded, and that it shall be competent to the pursuer, in the event of the defender assigning, to raise an action of removing before the Judge Ordinary, and remove the tenant in the same manner as if the lease were expired: Finds that the defender Lyon has assigned the lease to the defender M'Intosh: Therefore decerns in the removing against the defenders, in terms of the conclusions of the libel."

On appeal, the Sheriff (GUTHRIE SMITH) affirmed the judgment of the Sheriff-Substitute, and Lyon and M'Intosh brought the present action of suspension of these decrees.

The complainer pleaded—"(1) The action of removing, in which were pronounced the interlocutors complained of, was not competent in the Sheriff-Court. (2) In respect of the irritancy alleged to have been incurred by the complainer William Lyon junior, was a penal one, the Sheriff had no jurisdiction. (3) Assuming that the Sheriff had jurisdiction, the action, if competent at all, was competent only under the Act of Sederunt of 14th December 1756; and that Act not being founded on, the summons should have been dismissed. (4) The lease of 7th April 1856 does not contain or infer any power to the landlord to remove the tenant in the event of his assigning. (5) The alleged general regulations founded on by the respondent are not valid in law, nor are they validly and effectually made a part of said lease in regard to any of the provisions said to be contained in them: but assuming the reverse, and on sound construction of the terms of said lease, the tenant did not consent to the alleged clause in said regulations giving power to the landlord to remove. (6) In any view, the power to remove is one only to be exercised in the same way as if the lease had come to an end, and the earliest term of removal being (assuming the alleged regulations to apply) the first of March, the action which, without warning, was raised on 25th February 1873, and concluded for immediate removal, should have been dismissed. (7) The respondent's averments in the said action are irrelevant, and are in all material respects unfounded in fact. (8) On a sound construction of the factory and commission of 20th February 1871, it should be held not to have amounted to an assignation of the lease. (9) The complainer Lyon not having contravened any of the obligations incumbent on him as the respondent's tenant, and the complainer M'Intosh not being in the occupation or possession of the farm in question, either as executor or as an individual, the prayer of the note should be granted. (10) In respect of the foresaid contract of lease and memorandum thereto annexed, the complainer William Lyon junior is entitled to the peaceable possession of the subjects in queston. (11) Assuming that an irritancy was incurred, the complainer Lyon was entitled to purge the same; and the alleged irritancy having now been purged, the interlocutors complained of should be suspended. (12) The interlocutors complained of being erroneous, and not well founded in fact or in law, they should be suspended. (13) In respect of the foresaid consignation of £160, the note should be passed without caution or further consignation. (14) The respondent should be found liable in expenses.

The respondent pleaded—"(1) Under the terms of the contract of lease and regulations incorporated therewith, the said contract was strictly personal to William Lyon and his sons, it being a condition of the continued subsistence of that contract that the subjects should not be assigned, sublet, or otherwise transferred to a stranger tenant. (2) The deed of factory and commission above set forth is in substance and effect an assignation and procuratory *in rem suam*, or a sub-lease in favour of the pretended mandatory M'Intosh, for himself, or for the granter's creditors, and accordingly the lease was determined by the granting of the said deed. (3) The said lease was otherwise determined by the insolvency of William Lyon senior and William Lyon junior—the deed of factory and commission being a device to prevent the forfeiture of the tenant's right by and through such insolvency. (4) The lease being determined, and the tenant's right therein forfeited in manner foresaid, the respondent was entitled to sue for and obtain decree of removing against the complainers, in terms of the conclusions of the summons of removing. (5) The said general articles and regulations are part of the contract of lease between the pursuer and William Lyon, and the objections thereto are obviated by the possession which was given on the faith of said articles and regulations forming part of the contract. (6) In the circumstances condescended on, the note should be refused, or, if passed, should be passed only on caution for expenses and violent profits, the sum consigned in the Inferior Court being no longer available as a security, in consequence of the withdrawal of the appeal with reference to which it was awarded."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 26th December* 1873.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, repels the reasons of suspension, finds the letters orderly proceeded, and decerns: Finds the respondent entitled to expenses; allows an account thereof to be lodged, and remits it when lodged to the auditor to tax and report.

"*Note.*—The pleas of the complainers in this case, although very numerous, do not appear to the Lord Ordinary to be attended with much difficulty. All of them, indeed, so far as of any importance,

are founded on considerations which have been authoritatively set at rest by previous decisions of this Court.

"1. It is objected that the action of removing was incompetent in the Sheriff-Court, and the complainers have therefore pleaded that the decree of the Sheriff complained of ought, for that reason, to be suspended. The complainers' first three pleas in law are to this effect, and, as the Lord Ordinary understood, these pleas were maintained on the ground—1st, that an action of removing founded on an alleged irritancy required that the irritancy should be first declared, and that any such declarator was competent in the Supreme Court alone; and 2d, that, at any rate, if the action of removing was competent at all in the Sheriff-court, it was so in virtue of the Act of Sederunt of 14th December 1756, but as that Act had not been expressly libelled on in the summons of removing the Sheriff ought not to have sustained the action.

"The Lord Ordinary considers it unnecessary to do more in reference to pleas so maintained than to refer to the cases of *Forbes* v. *Duncan*, 2d June 1812 (F.C., p. 662), *Hall* v. *Grant*, 19 May 1831 (9 Sh. 613), *Stewart* v. *Watson*, 20th July 1864 (2 Macph. 1414), and *Grainger* v. *Geils*, 19th July 1857 (19 D. 1010). In the first three of these cases the plea that an action of removing founded on an irritancy was incompetent before the Sheriff, in respect the irritancy required to be first declared, which could only be done in the Supreme Court, was, after full discussion, repelled; and the objection that the Act of Sederunt was not as in the present case expressly libelled on, supposing the Sheriff had not jurisdiction independently of that Act, a matter which the Lord Ordinary thinks need not be conceded, seeing it is one of the express conditions of the lease, or the regulations which form a part of it, that in the circumstances which have occurred an application for removing of the tenant may be made to the Judge Ordinary, is sufficiently met by the principle upon which the Court proceeded in deciding the last of the cases referred to. If an Act of Parliament, in virtue of which an action is brought, does not require to be expressly libelled, much less can that be necessary in reference to an Act of Sederunt. It has, besides, to be observed, in reference to all the complainers' technical objections to the competency of the action as brought in the Sheriff-court, that none of them were taken in that Court, but, on the contrary, issue was joined by the complainers with the respondents on the merits in dispute, as if there had been no room for such objections. The Lord Ordinary apprehends that they are now too late of being taken, even if there had been anything in them, which he does not think there is.

"2. The complainers' 4th, 5th, and 6th pleas proceed on the assumption that the general regulations referred to in the lease in question cannot be held to form part of the lease. But the Lord Ordinary cannot hold that there is any sufficient warrant for this assumption. By the lease No. 26 of process the tenant is expressly taken bound, 'strictly to adhere to, implement, and perform in the most ample and liberal manner, the whole articles and conditions incumbent on and prestable by the tenant contained in the said general regulations, a copy of which he has subscribed of this date, as relative hereto.' The Lord Ordinary thinks it clear, therefore, that the tenant who has possessed under the regulations (No. 27 of process), as well as what he calls the lease, is as much bound by these regulations as if they were incorporated in and formed part of the lease. Nor does the Lord Ordinary think that it is any good reason why this should not be held that the printed copy of the regulations is not a tested deed, seeing that it is sufficiently identified by the signature of the tenant as the 'copy' referred to in the lease, and that the possession of the tenant has been all along under and in virtue of these regulations, as forming part of his title. On this point, reference may be made to Hunter on Leases (vol. i, pp. 404–5), and the authorities cited by him, which are quite conclusive on the subject. The Lord Ordinary has only further, in relation to the identification of the printed copy regulations, No. 27 of process, with the principal lease, No. 26, to explain that the signature to the former was at the debate expressly admitted on the part of the complainers to be that of the tenant Lyon; and, besides, that the record, both in the Sheriff and this Court, appear to be made up on the footing that the identification of the regulations with, and as forming part of, the lease, was indisputable. Taking then the regulations to be part of the lease, there can be no question that the respondent was entitled to insist on a removing on the tenant assigning the lease, for by the first article of these regulations it is expressly stipulated that in certain events, and amongst others the tenant assigning or subletting, the respondent as landlord should 'be at liberty to raise an action of removing before the Judge Ordinary, and remove the tenant in the same manner as if the lease had expired.' If, then, there has been an assignation or subset of the lease, it follows that the complainers are, and have been, prior to the institution against them of the present proceedings in February 1873, and since, without any right or title, in possession of the farm or lands in question, and therefore that the summary removing which was instituted against them was well founded and unobjectionable. But,

"3. The complainers, by their 8th and 9th pleas, raise the question, whether there has been any contravention or irritancy of the lease by the tenant's assignation of it. Their contention is, that what the respondent founds on as an assignation to M'Intosh was nothing more than a commission or factory to manage the farm for the tenant. The Lord Ordinary is unable to adopt this view of the matter. He, on the contrary, thinks it very clear from the terms of the so called factory and commission (No. 31 of process) that it is nothing more or better than a device, a covert assignation. The reasoning of the learned Sheriffs in the notes to their interlocutors on this point appears to the Lord Ordinary to be quite satisfactory. He will only, in addition, refer to what Mr Hunter says on this subject, at pages 245 and 246 of his work, and to the authorities there cited by him, and to Professor Bell's remarks, and the authorities noted by him at page 81 of his Commentaries. The case, in particular, of *Munro* v. *Miller's Creditors* (Dec. 11, 1811, 4 Fac. Coll. 384) is very much in point. As to the assumption on which the complainer's 9th plea partly proceeds, viz., that the assignee or factor, M'Intosh, has never been in possession, the Lord Ordinary must hold it to be entirely ill founded. The complainers were allowed in the Sheriff Court an opportunity of proving the averment they made to that effect, but they did not

avail themselves of it. And the recall by the deed, No. 8 of process, of the factory and commission, as referred to in the 10th article of the complainers' statement of facts in the record in this Court, was a very idle proceeding if the factory and commission had never been acted upon. The recall necessarily implies that the factory and commission had been to some extent carried into effect.

"4. The only other point requiring notice is that referred to in the 11th plea of the complainers, to the effect that if an irritancy was incurred it was one which could be purged, and that it has been purged; but the Lord Ordinary holds it to have been conclusively settled in the case before referred to, of *Stewart* v. *Watson*, that a conventional irritancy, such as that in question, if once incurred cannot be purged.

"The result is, that on none of the numerous grounds upon which the present suspension is founded has the Lord Ordinary been able to sustain it. He has accordingly repelled the reasons of suspension, with expenses."

The complainer appealed, and argued—(1) The action was incompetent in the Sheriff-court; *Stewart* v. *Watson*, 20 July 1864, 2 Macph. 1414; *Grainger* v. *Geils*, 19 July 1857, 19 D. 1010. (2) The commission and factory was only to authorise M'Intosh to manage the farm for the tenant, and was not an assignation involving irritancy; *Hamilton* v. *Somerville*, 17 D. 344, 2 Hunter 136. (3) Even if the irritancy was incurred by the said factory and commission, it had been purged by the deed of recall. (4) The power to remove in the regulations is one only to be exercised in the same way as if the lease had come to an end; and the earliest term of removal being the 1st of March, the action which, without warning, was raised on 25th February 1873, and concluded for immediate removal, should have been dismissed.

At advising—

Lord President—The first contention of the complainers in this suspension is that the regulations upon which this conventional irritancy is founded are not incorporated in the lease, to the effect of making the irritancy a part of the contract. That seems to me to be a bad plea. The lease itself expressly refers to the regulations, and bears on its face that they are to be a part of the contract, and the tenant is taken bound to implement the whole articles contained in these general regulations; and accordingly a copy of the regulations is subscribed by the tenant. There can be no doubt that these regulations are part of the contract, just as if they had been written in the lease itself.

The part of these regulations on which the landlord founds provides—"Creditors, or trustees for creditors, or others acting in their name, or in that of the tenant after insolvency, are specially excluded, and in all cases of bankruptcy of tenants the same shall operate as a violation, irritancy, and extinction of the lease; and the heritor shall be at liberty to raise an action of removing before the Judge Ordinary, and remove the tenant, alike in the same manner as if the lease were expired; and the same action of removing shall be competent to the heritor in the event of assigning and subsetting," and in certain other events. It is certainly quite true that in regard to assigning and subsetting it is not said in so many words that assigning and subsetting shall operate as an irritancy of the lease, still there is the strongest possible implication that assigning and subsetting is to operate as much to cause an irritancy as bankruptcy or any of the other acts mentioned. I have no doubt that assigning and subsetting creates an irritancy of this lease. But it is further contended that there was no assignation here, that all that was done was to execute a factory in favour of M'Intosh to manage the farm, and that there was no possession under it, and no inconvenience or damage to the landlord. Inconvenience or damage is not to be considered here; what we have to consider is, is this act one which will irritate the lease? I think it is, for I cannot read this factory without holding that it is an assignation.

The tenant further maintained that this irritancy was purgeable and had been purged. It is answered, and correctly, that this is a conventional irritancy, and not purgeable. That I am satisfied is a good answer.

It is next pleaded that the action is not competent in the Sheriff-Court, because it should have been brought as an action of declarator of irritancy in this Court. Perhaps that may be necessary in the ordinary case, but it is quite competent for the parties to contract to change this rule, and here they have so contracted.

So far the pleas of the complainer are easily disposed of, but that is not the case as regards the 6th plea, which the Lord Ordinary seems to have overlooked. That plea is to the effect that, "In any view, the power to remove is one only to be exercised in the same way as if the lease had come to an end, and the earliest term of removal being (assuming the alleged regulations to apply) the 1st of March, the action which, without warning, was raised on 25th February 1873, and concluded for immediate removal, should have been dismissed." That plea is founded on the very terms of the regulations, which provide in the event of irritancy being incurred "the heritors shall be at liberty to raise an action of removing before the Lord Ordinary, and remove the tenant, alike in the same manner as if the lease were expired." Now the decree of removing sought to be suspended, and the charge threatened in that decree, as we see from the note of suspension, is "instantly to remove," and the question comes to be whether that decree is justified by the regulations, and whether the landlord was not bound to give notice, or in some other way to bring the case within an ordinary action of removing. I am sorry to say that though this plea is a technical one I am not able to get over it. We cannot touch the conclusions of the summons on which this decree proceeds, so as to make it conformable to the regulations, because we are here in a suspension of a decree, not in an appeal.

The regulations do not admit of instant removal, and I therefore think we must recall the Lord Ordinary's interlocuter, and sustain the 6th plea for the complainers, and suspend the decree.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming-note for William Lyon and Daniel M'Intosh, against Lord Ormidale's interlocutor of 26th December 1873, Recal the said interlocutor; sustain the complainers' sixth plea in law, and, in respect thereof, suspend

the decree and threatened charge, and decern; find the complainers entitled to expenses, and remit to the Auditor to tax the amount thereof and report."

Counsel for Complainers — Rhind. Agent—William Officer, S.S.C.

Counsel for Respondent—M'Laren. Agents—Tods, Murray, & Jamieson, W.S.

Saterday, February 14.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

PATERSON'S TRUSTEES *v.* STRAIN AND OTHERS.

Reduction—Fraud—Essential Error—Issues.

In an action of reduction of a trust-disposition and settlement of A, brought by the trustees under a previous deed of A, against the trustees under the deed sought to be reduced, and against the representatives of A, —*Held* that the pursuers were entitled to an issue (1) Whether the deed was the deed of A; (2) Whether it had been obtained from A by fraud on the part of B; (3) Whether it had been signed by A under essential error induced by the misrepresentations of B. But *held* that the pursuers were not entitled to an issue whether the deed had been obtained from A by undue influence on the part of B, his spiritual adviser.

This question arose in the adjustment of issues in the action at the instance of Alexander Munro, coachbuilder, Edinburgh, and others, trustees under a trust-disposition and settlement of the now deceased James Paterson, pawnbroker, Edinburgh, against the Right Rev. John Strain and others, trustees under a later trust-deed of the said James Paterson, and against his representatives.

The purpose of the action was the reduction of the trust-disposition and settlement under which the defenders were trustees, on the ground that it had been fraudulently obtained from the said James Paterson by the Rev. George Rigg, one of the clergy of St Mary's Roman Catholic Chapel in Edinburgh, whilst the said James Paterson was weak and facile in mind and easily imposed upon. It appears that Mr Paterson, who was possessed of property to the extent of £35,000, had in August 1872 executed a trust-disposition and settlement by which he disposed of his whole property. The trustees (of whom the defender Mr Rigg was one) were directed to pay an annuity of £500 to the truster's son, and a legacy of the same amount to each of his six grandchildren. The bulk of the property was then to be applied by the trustees to a purpose which the truster describes in the following terms:—"The chief object I have had during my life in earning and saving money being the foundation and endowment of an institution in Edinburgh or elsewhere in Scotland for the education of poor orphan females, between the ages of 10 and 18 years, of sound healthy constitution, and for their instruction and training in all kinds of domestic and household duties, with the view of fitting them properly to perform such duties in after life, and to teach others to do so, ... my said trustees shall" (after accumulation for ten years as mentioned in the deed) "apply the free proceeds of my whole means and estate in the foundation and endowment of the above mentioned institution." The pursuers alleged that "shortly after the execution of the trust-disposition and settlement of 31st August 1872, the defender Mr Rigg, following out his design of obtaining Mr Paterson's fortune for the benefit of the Roman Catholic Church, attempted to induce him to alter his settlement to the effect of making the institution which he proposed to found an institution limited beneficially to persons of the Roman Catholic faith, and formed the fraudulent design of procuring from the said now deceased James Paterson, by false representations, such a deed as would (if given effect to) frustrate Mr Paterson's intention, as expressed in said trust-disposition and settlement of 31st August 1872, and give persons of the Roman Catholic persuasion the benefit to a greater extent of his fortune, by permitting it to go to the children of his deceased son and daughter, which children, with the exception of the defender Edward Simpson, were and are Roman Catholics. Mr James Paterson had by this time, owing to ill health and otherwise (he had for long been ill of the disease of which he ultimately died), become weak in mind, and facile and easily imposed upon, especially by persons in whom he had confidence; and Mr Rigg, whose scheme was that the grandchildren should in effect receive the property, was afraid that if the deed (which he designed should be executed by Mr Paterson with the result of giving his property to them) was couched in such terms as to clearly make them his heirs, his suspicions might be aroused and he might refuse to sign it. He accordingly resolved to have prepared a deed, the terms of which (should he, against his desire be compelled to read it to Mr Paterson) would not be so likely, in his then weak state of health, to excite his attention or arouse his suspicion. Mr Paterson was an illiterate man, of little education. The said pretended deed is not the deed of the said now deceased James Paterson. It was not read over to him, and neither the agents who prepared it, or any one on their behalf, ever received instructions from Mr Paterson, or consulted him regarding it. When Mr Paterson signed it he was wholly unaware of its nature and effect, and did not know that it cancelled all previous deeds made by him, and in particular the said trust-disposition and settlement of 31st August 1872.

"Even on the assumption that when he subscribed the said pretended deed of 28th November 1872 the said now deceased James Patertson was not so totally bereft of reason as to make him wholly incapable of executing a settlement, he was so very facile from mental disease as to make him liable to circumvention, and incapable of resisting importunity, and the said pretended deed was procured from him, to his prejudice and lesion, by fraud and circumvention and undue influence, or one or other of them, on the part of the defender, the Rev. George Rigg, acting in pursuance of the fraudulent design conceived by him as aforesaid. Mr Rigg fraudulently represented to Mr Paterson that the only alteration which the said pretended deed would effect upon the trust-disposition and settlement of 31st August 1872 was to add Bishop Strain and the Rev. Mr Geddes as trustees, and to do away with the provision for accumulating his property during the ten years subsequent to his