the pursuer's landed estate would be, to him, the most gratifying form which the bequest could assume, and that, in converting it into that form his own want of experience might be usefully supplied by that of his father and the two other trustees whom she conjoined with him in the trust. It is difficult to suppose, at all events, that her object was to interpose obstacles to the pursuer attaining the position in which he could deal with the capital of the bequest, in order to increase the chance of one or other of his sisters of coming into that position. Colonel Gordon obviously meant to exclude all and every one of his disponees, named and unnamed, from ever being in such a position, for he directed the execution of a strict entail. He contemplated a destination which the law of Scotland did not recognise at all, but which, if it had been legally effectual, would have made none of the disponees unlimited fiar; and that created one of the greatest difficulties in the case,—namely, whether the succession was not left open to the testator's heir-at-law. Here, on the contrary, the testatrix directed a destination which is quite recognised in our practice as effectual, but the effect of which is to place the estate entirely at the disposal of the first disponee. The law in such a case as this presumes that the testatrix knew the legal effect of the words which she used, and meant them to have that effect. The testatrix must therefore be presumed to have known that the effect of postponing the vesting of the fee would not be to create an effectually protected course of succession, but simply to exclude for an indefinite period, at the discretion of the trustees, the pursuer from being unlimited fiar, for the benefit of another who must necessarily come into that position, and for whom, it is perfectly clear, that she had nothing like the same favour. I cannot think that that was her object in directing the conversion of the money into land and the completion of titles in the person of the beneficiary, at the expense of the trust-estate. If that was not the object of her direction, there is nothing else suggested which could possibly suspend the vesting of the beneficial fee. The only suggestion thus made is, at the best, doubtful and inconclusive, while there are many cogent reasons against it. I am therefore of opinion that the beneficial fee has vested in the pursuer; and, if that be so, I am further of opinion that the principle governing the case of *Gordon* is *a fortiori* applicable here. Colonel Gordon meant nobody to be unlimited fiar. But in making or directing a destination like the present, the law holds that the testatrix meant somebody to be unlimited fiar, and if we were to interpose delay and obstacles to increase the chance of another than the pursuer coming into that position, we should just be adopting, in more difficult and hostile circumstances, the principle which weighed with the minority in *Gordon's* case but which was authoritatively overruled by the majority.

If I am right in these views, the interlocutor of the Lord Ordinary must be recalled, and decree pronounced in terms of the libel.

Thursday, November 11.

FIRST DIVISION.

[Lord Young.

GIBSON *v.* ADAMS AND ANOTHER.

Lease — Constitution — Proof — Parole — Writ or Oath.

A averred that by verbal agreement it was arranged that he was to get a lease of a house and garden for five years, and that, "in the meantime and until the lease for five years was formally completed, the said subjects were let to him, and he was to occupy and possess the same for a period of at least one year." He averred that he accordingly entered into possession, and proceeded to improve the garden and prepare the same for crop. *Held* that the proof of the constitution of the alleged contract for five years must be limited to the writ or oath of the lessor, but *quoad ultra* proof *prout de jure* allowed.

This was a suspension of a decree obtained in the Sheriff-court of Aberdeen, in an action of removing brought by Adams and his wife against Gibson. The Sheriff-court summons concluded that the defender Gibson should be decerned to "flit and remove . . . from the dwelling-house of Woodbine Cottage, steading, offices, garden ground and other premises at Ruthrieston, occupied by him as tenant thereof under the pursuers, and that at the 4th day of June next, 1875, at which date the defender's right to occupy said subjects expires." The pursuers had purchased the said subjects from a Mr Duthie in March 1875, and in their condescendence they averred that "previous to the date of said purchase they were informed by Mr Duthie that the subjects were let to the defender from the end of October 1874 until the 4th day of June 1875," and that after the purchase was completed they had given notice to the defender that he would be required to leave at 4th June.

The defender made the following statement:—

"The defender is tenant of said subjects under a verbal lease of five years from the 4th day of December last, at a rent of £40 sterling per annum, which lease was followed by possession, and also by *rei interventus* in the shape of improving and planting the garden (which is about an acre in extent) at a cost of upwards of the sum of £20 sterling, said improvements and planting, etc., having been performed with the consent, knowledge, and approval of the proprietor, the lessor, namely, Robert Duthie, shipowner, Aberdeen."

The defender pleaded *inter alia*—"The said lease is in the circumstances at least effectual for one year from said term of entry."

On 13th May 1875 the Sheriff-Substitute (Combie Thomson) pronounced an interlocutor finding that no relevant defence had been stated, and decerning in terms of the conclusions of the summons; and on appeal, the Sheriff (Guthrie Smith) affirmed this judgment.

The defender then brought this note of suspension, which was passed by the Lord Ordinary.

In the statement of facts annexed to the note of suspension the complainer, after setting forth

his former averment of a verbal lease for five years, introduced this new averment:—"In the meantime, and until the said lease for five years was formally completed, the complainer understood and believed, and in point of fact it was the case, that the said subjects were let to him and he was to occupy and possess the same for at least the period of one year from and after the said 4th of December 1874, and accordingly, on the footing and understanding foresaid, and in reliance with his arrangement and agreement with the said Robert Duthie, the complainer took possession of the said subjects, and at once proceeded to improve said garden and prepare the same for crop."

The Lord Ordinary pronounced this interlocutor:—

"15*th October* 1875.—The Lord Ordinary having heard the counsel for the parties, allows them a proof of their respective averments, so far as not admitted, the respondents to lead in the proof, &c."

The respondents reclaimed, and argued—It was not competent to take into consideration a material averment which appeared in the process of suspension for the first time, and was not made in the Court below. The use of the statement of facts and pleas in law annexed to suspensions of this kind was merely to accelerate the despatch of business. There was therefore here only one averment, viz., of the existence of a verbal lease for five years, followed by *rei interventus*. The proof therefore of the constitution of such a lease was limited to writ or oath of the lessor. An averment of a contract of lease for five years could not be used to prove a contract of one year.

The complainer argued—The reason for having a statement of facts and pleas in law annexed to a writ of suspension was to allow the insertion of extra pleas.

The action was brought against defender as tenant. The pursuers therefore admitted his tenancy, and the only question that remained was as to duration of said tenancy, which might competently be proved by parole.

Further, there was here an averment of acquiescence on the part of the landlord, and this raised an equitable plea of presumed contract for one year, which it was the part of the pursuers to disprove.

Authorities cited—*Walter* v. *Flint*, Feb. 20, 1873, 1 Macph. 417; *Fowlie* v. *Maclean*, Jan. 18, 1868, 6 Macph. 254; *A.* v. *B.*, M. 15,181; *Buchanan* v. *Baird*, M. 8478; 4 Br. Suppl. 831; Hunter, Landlord and Tenant, i. 351.

At advising—

Lord President—This is a suspension of a decree of removing pronounced by the Sheriff of Aberdeen and the Sheriff-Substitute, which bears to ordain the complainer to flit and remove from certain premises which he occupies as tenant thereof, at 4th June, at which term his right expires.

We have been informed that the 4th June is the Whitsunday term in Aberdeen, and the respondents say that the terms of the lease were for the complainer to occupy the subjects from October till June 4th. That is a very peculiar period of occupany. It is not an ordinary yearly period, nor even an unusual half-yearly period; but it is a period of half a year plus a broken bit. No doubt the complainer, even according to the respondents' view, was a tenant.

On the other hand, the complainer says that when he entered on possession the respondents' author promised and agreed to give him a lease of five years; but he also avers that in the meantime, till the lease should be made out, he was given a verbal lease for one year. Here there is an averment of two distinct agreements. *First*, that he should have a lease for five years; *Second*, that till that lease was given he should possess as a yearly tenant. The Lord Ordinary has not distinguished between them, but has pronounced an interlocutor allowing both parties a proof of their averments so far as denied—the respondents to lead in the proof. Now, I cannot agree to that procedure, because it would reverse the rule of law, that where a verbal contract of lease is averred for more than one year, followed by *rei interventus*, the constitution of the contract must be proved by the writ or oath of the lessor; and so we must recall the interlocutor so far, and find that in so far as the complainer avers a contract of lease for five years, he must be limited to the writ or oath of the lessor to prove the constitution of that contract; but *quoad ultra* we must allow parties a proof *prout de jure*. I am disposed to agree with the Lord Ordinary that the respondents should lead in the proof, because their averment here is a very peculiar one, inasmuch as they allege the complainer to be tenant for a very unusual period, namely, from October to June. The fixing of that period must have been the subject of an agreement, and it is incumbent on the respondents to prove it.

Lord Deas—This interlocutor allows, apparently, a proof by parole of a verbal five years' lease. That is a view which it is impossible to concur with. Your Lordships are familiar with the series of decisions by which it is fixed that a verbal lease for a period of more than one year can only be proved by writ or oath of the lessor. If that has been done, then *rei interventus* may be proved *prout de jure*; but it is quite clear that to lay the foundation we must have writ or oath. We cannot therefore adhere; but in this particular case I am disposed to agree with your Lordship that there is a sufficient averment of a lease for one year, which may competently be proved by parole. The statements of the respondents are extremely vague. They do not say how long the lease was for, but only "it terminated on 4th June." And, again, that "they were informed by Mr Duthie that the subjects were let till 4th June." There is really no averment about the lease in the condescendence in the inferior Court, That being the nature of the statements of the respondents, they cannot object to the vagueness of the statements of the complainer. When they come here they are a little better. I think there is enough to raise an averment of a lease for one year. Moreover, it is a lease of a garden as well as of a house; and when a man sows he must reap. There is not much reaped by the 4th of June. It is not reasonable to suppose that the lease would end then. This lays the burden on the respondents to prove that this lease (for they admit it is a lease) was one of such a peculiar term.

Lord Ardmillan—I rather think the Lord

Ordinary did not intend to allow a proof *prout de jure* of a verbal lease of five years. If he did I would agree with your Lordships that it would be incompetent. There is a second question—can a verbal lease for five years contain within it a lease for one year? and that also I must answer in the negative.

But it is now alleged that while considering the lease of five years the landlord gave him a lease for one year. That may be proved by parole, and looking to the circumstances and to the fact that there was a garden which he tilled under the eye of the landlord, I think the complainer should be allowed a proof of the bargain for one year.

I think that the clause appointing the respondents to lead in the proof a fair and equitable addition, because they aver that the lease was for this peculiar period, and bring their action as against a tenant.

Lord Mure—I am quite satisfied that on the record, as remodelled, there are averments of two leases—one for five years, and another an interim lease of one year; and therefore the proof must be restricted as your Lordship proposes.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the reclaiming note for Andrew Adams and Margaret Adams against Lord Young's interlocutor of 15th October 1875, recal the said interlocutor; find that the averment of the complainer, that Robert Duthie, when proprietor of the subjects now belonging to the respondents, promised and agreed to give the complainer a lease of the said subjects for five years from 4th December 1874, can be proved only by writing or by oath of party. *Quoad ultra* allow the parties a proof of their averments *prout de jure*, the respondents to lead in the proof, and the proof to proceed before Lord Deas on a day to be afterwards fixed by his Lordship; reserving all questions of expenses."

Counsel for Suspenders—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Counsel for Respondents and Reclaimers—Asher. Agent—Alexander Morrison, S.S.C.

Wednesday, November 10.

FIRST DIVISION.

[Lord Curriehill.

MACFARLANE *v.* SCHOOL BOARD OF MOCHRUM AND BOARD OF EDUCATION FOR SCOTLAND.

School—Teacher—Removal from Office—Education (Scotland) Act, 1872, *sec.* 60, *sub-sec.* 2—*Jurisdiction.*

Held (1) that the Court of Session has jurisdiction to entertain an action of reduction of a resolution of a School Board, confirmed by the Board of Education, removing a teacher from office, under sec. 60, sub-sec. 2, of the Education Act, 1872, where it is averred that the proceedings have not been in conformity with the statute; and (2) that a special report by an inspector of schools under the said section of the statute, upon which a teacher may be removed from office, must deal not only with the state of the school and the scholars, but with the qualifications of the teacher.

Opinions that a resolution of the School Board so confirmed by the Board of Education is final, and not subject to review on the merits.

Opinions that certain averments of malice and oppression on the part of the School Board were not relevant to support such an action.

This action was brought by Mr Macfarlane, schoolmaster of the parish of Mochrum, against the School Board for that parish and the Board of Education for Scotland, for reduction of (1) a resolution of the School Board of that parish, dated January 6, 1875, removing him from the office of teacher; and (2) a minute by the Board of Education, dated February 26, 1875, confirming that resolution.

The material averments of the pursuer were as follows:—"(Cond. 4.) In the month of March 1874 the School Board . . . instructed their clerk to write to the Department requesting that Her Majesty's inspector make a special report regarding the Mochrum public school and its teacher. The inspector subsequently visited the school on 14th April 1874, and made a favourable report, and a government certificate of competency was sent to the pursuer as the result of said inspection. The School Board took no action, however, on said inspection and report." (Cond. 5.) "On 3d June 1874 the School Board . . . resolved to ask for another special report on the Mochrum School and teacher, and they did so without coming to any resolution to the effect that the teacher was inefficient, as they were bound to do in terms of the 60th section of 'The Education (Scotland) Act, 1872,' and although not two months had elapsed since the last report. In consequence of said request Her Majesty's inspector made a second inspection of the school on 27th October 1874, and thereafter issued his report thereon: said report is in the following terms:—

'In accordance with my instructions to report on Mochrum public school under section 66, I visited it on the 14th April 1874. Taking into consideration that it was its first inspection, I was able to report that it made on the whole a fair appearance in elementary work. I was afterwards instructed to report on the school under section 60 (2), and accordingly I again visited it on the 27th October 1874.

'As on the occasion of my former visit, I found that the examination schedule was not filled up, and that there were no registers, no time table, and no pupil teachers, although two candidates had been admitted at the previous inspection.

'There were 70 scholars present, and of these 39 were presented for examination under standards I. II. III. and IV., the same standards under which the scholars present in April were examined. I had no means of determining whether the same scholars were examined under the same standards on both occasions. The following were the results of the examination:—

'Standard I.—13 scholars. Reading and penmanship, on the whole, fair. Spelling and arith-