perty. The money was in no way in the control of the sellers. Accordingly, the occupation of the defender for ten months was without any return to the pursuers except the interest on the unpaid price. I think the Sheriff has arrived at the right result.

LORD YOUNG—I am of the same opinion, and I should not like to think that the law on the matter is doubtful. The law is laid down by the Sheriff in his note in these words—"The case is covered, as it seems to me, by the rule as stated in Ersk. iii. 3, 79. It is there said that 'in a sale of lands the purchaser is, by an Act of the law, bound to pay interest for the price from the term at which he enters into the possession, as long as he retains the price,' and that 'this obtains although the delay of payment should be owing to the seller who had not furnished the pursuer with a connected progress of title-deeds sufficient for his security.'" The defender here was impecunious, and depended upon borrowing the price or at least a part of it as a necessary condition of paying it, and she entered into an arrangement to borrow it. She entered into possession of the house at Whitsunday, but she did not get the titles at once, and she, while having all the advantages of a possessor of the house, says that not having the security ready the lender would not advance the money. But that bargain has nothing whatever to do with a question between the seller and the purchaser of the property, and has no bearing upon the question of her liability for interest upon the contract price from the time at which she had taken possession of the house.

LORD ADAM—If the consignation averred upon record had been in the names of the seller and the purchaser of the property, the seller could not have claimed the legal rate of interest on the unpaid price after its date, but the consignation here was not of that character. The money was lodged in bank in the names of the purchaser and the person from whom she was to borrow the money. Under such a consignation as that the money could have been removed at any moment, and was no security for the payment of the price.

LORD RUTHERFURD CLARK and LORD TRAYNER were absent.

The Court dismissed the appeal.

Counsel for the Pursuers—C. S. Dickson—A. O. M. Mackenzie. Agents—J. & J. Ross, W.S.

Counsel for the Defenders—Salvesen—Crabb Watt. Agents—Sturrock & Sturrock, S.S.C.

Saturday, June 22.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

ROONEY *v.* CORMACK.

Fraud—Facility—Undue Influence—Agent and Client—Reduction—Issue.

In an action for reduction of a testamentary trust-disposition and settlement the pursuer averred that the testator was subject to fits of depression, at times gave way to drink, and was at the date of the deed, three weeks before his death, weak and facile in mind and easily imposed upon; that the defender, who prepared the deed and was the sole trustee under it, was the testator's law-agent and confidential legal adviser, and as such had a strong influence over him, and that, taking advantage of his position, and of the testator's weakness and facility and inability to resist his influence, he had induced the testator to execute a settlement bequeathing to him a legacy of £500, and leaving the bulk of his estate to a pupil beneficiary, during whose pupilarity and minority the defender would receive large business advantages from the administration of the estate.

Held (*aff.* judgment of Lord Stormonth Darling, and *following M'Callum* v. *Graham*, May 30, 1894, 21 R. 824) that the pursuer was not entitled to an issue of undue influence, but only to an issue of facility and fraud or circumvention.

James Rae, Esquire, of Newton and Kirkpatrick, Dumfriesshire, died unmarried on 17th February 1894, leaving a trust-disposition and settlement dated 27th January 1894, under which his law-agent, J. F. Cormack, solicitor, Lockerbie, was sole trustee.

By said trust-disposition he left various legacies including an annuity of £200 to his sister, Mrs Mary Rae or Rooney, and £500 to the said J. F. Cormack, who was directed to hold the remainder and residue of the truster's means and estate, amounting to about £25,000, for behoof of James Mackie, described as a natural son of the truster, nine years old at the time of his death.

In February 1895 Mrs Mary Rae or Rooney, the sole next-of-kin of the said James Rae, and Janet Rae, his niece and heir-at-law, brought an action of reduction against the said J. F. Cormack and the said James Mackie (to whom a *curator ad litem* was subsequently appointed) for the purpose of having the said trust-disposition and settlement set aside.

The pursuers averred, *inter alia*, that the late James Rae was subject to fits of depression and at times gave way to drink, that his death was accelerated by his intemperate habits, that at the date when the said pretended trust-disposition and settlement was executed he was weak and facile in mind and easily imposed upon, and that the said

trust-disposition and settlement was impetrated from him by the defender Cormack by fraud and circumvention. They further averred—"The defender Cormack expected that, if a will were executed in favour of James Mackie, who was in minority at the time, and in the manner expressed in the said trust-disposition and settlement, he would derive large benefit from having the entire management of the estate in his own hands, at all events until the period prescribed in the will, when the said James Mackie, if he survived, was entitled to a conveyance thereof. The said defender Cormack was the law-agent and confidential legal adviser of the deceased James Rae, and as such possessed a strong influence over him. The said defender on the day of the execution of said trust-disposition and settlement took undue advantage of his position as law-agent and confidential adviser aforesaid, and of Mr Rae's weakness and facility and his inability to resist the undue influence brought to bear on him by the said defender, to impetrate from the said Mr Rae the said trust-disposition and settlement embodying, *inter alia*, a provision of £500 in his own favour and the other provisions which the defender believed would further his future business interests. The whole of the material provisions of the said trust-disposition and settlement were forced on the deceased by the said John Ford Cormack, and the signature to the said deed was procured by the said defender all by the exercise of the undue influence aforesaid and contrary to the true intentions and wishes of the deceased regarding the disposition of his estate after his death."

The pursuers pleaded, *inter alia*—"(1) The said pretended trust-disposition and settlement having been impetrated from the said deceased James Rae while he was weak and facile in mind and easily imposed on, by the said John Ford Cormack, by fraud and circumvention, and by taking advantage of the said weakness and facility, to the lesion of the said James Rae and the pursuers, the same should be reduced. (2) The said pretended trust-disposition and settlement having been obtained from the said James Rae through undue influence on the part of the defender John Ford Cormack, his legal adviser, ought to be reduced."

They submitted the following issues:—"1. Whether the pretended trust-disposition and settlement, dated 27th January 1894, No. 9 of process, is not the deed of the late James Rae? 2. Whether on or about 27th January 1894 the late James Rae was weak and facile in mind and easily imposed upon; and whether the defender John Ford Cormack, taking advantage of his said weakness and facility, did by fraud or circumvention impetrate from him the said trust-disposition and settlement, to the lesion of the said James Rae? 3. Whether on or about 27th January 1894 the defender John Ford Cormack was the law-agent and confidential legal adviser of the said James Rae; and whether the said John Ford Cormack, taking advantage of his position as such, did by undue influence procure the said trust disposition and settlement to his own benefit, and to the lesion of the said James Rae?"

Upon 7th June 1895 the Lord Ordinary (STORMONTH DARLING) allowed the 1st and 2nd issues and disallowed the 3rd.

The pursuers reclaimed, and argued—Although a separate issue of "undue influence" was not usually allowed, the relation of agent and client, which was the one here, made such an issue appropriate. A law-agent might use his position as agent so as to exercise undue influence, although he might not have had recourse to the arts of circumvention. A jury might affirm that he had abused his position, although unwilling to find fraud or circumvention—*Harris* v. *Robertson*, February 16, 1864, 2 Macph. 664, was in point. The recent case of *M'Callum* was not one of agent and client—See opinions in *Anstruther* v. *Wilkie*, January 31, 1856, 18 D. 405 (Lord Justice-Clerk, p. 416); *Munro* v. *Strain*, February 14, 1874, 1 R. 522; *Cleland* v. *Morrison*, November 9, 1878, 6 R. 156; *Gray* v. *Binny*, December 5, 1879, 7 R. 332. The pursuers were entitled to an issue which would enable them to bring in the rule of law that the *onus* lay upon a law agent, who took a deed in his favour from a client, of showing that he did not obtain it through his position of law-agent—*Grieve* v. *Cunningham*, December 17, 1869, 8 R. 317. If the deed was to be reduced in respect of the legacy to Cormack, it must be reduced *in toto*; there was no case in the books of partial reduction although that was known in England.

Argued for the defender, Cormack—There were no statements here justifying a separate issue of "undue influence." The case was merely one of alleged fraud or circumvention, and was ruled by *M'Callum* v. *Graham*, May 30, 1894, 21 R. 824. *Harris* was the only case which could be quoted in favour of the pursuer's contention, but it was quite different, being a case of contract.

Argued for the curator-*ad-litem*—Cormack was not Mackie's agent; therefore even if the will were set aside, it could only be *quoad* the legacy to him. It was not for Mackie's interest that an issue of "undue influence" should be allowed, as it might imperil the provisions in his favour.

At advising—

LORD PRESIDENT—The issues appropriate for the trial of this cause must be ascertained by what is the substance of the pursuers' record. It will not do merely to say that the alleged impetrator of this will was the testator's law-agent, that he gets £500 under the will, and that there are a number of cases and *dicta* going to show that undue influence on the part of a law-agent is a good ground for reducing a deed by which he benefits. All this seems to me to mix up matters entirely distinct, and to misapprehend the true nature of the averments actually made by these pursuers.

This is not a reduction of a deed solely or substantially in favour of the law-agent, who prepared it. It is a reduction of a will

the substantial interest in which is not with the law-agent, but with a third party. It is true that the pursuers' story is that the law-agent had a circuitous motive for wishing the testator to oust his heirs from the succession and to benefit the beneficiary named. But this will never turn the present case into one in which the law-agent is called on to give up a benefit which he has illegitimately obtained through the undue exercise of his influence as legal adviser. If it were such a case, the law which the pursuers have invoked would then be in point, although whether an issue of undue influence is the appropriate expression of that law is not so clear.

The pursuers' case, however, is quite different and much simpler. The condescendence presents an ordinary case of facility and circumvention; and the conclusion is for reduction, not of the incidental gift to the law-agent (which, standing the rest of the will, the pursuers have no title to challenge), but of the whole will. The testator is described, with circumstances and particulars, as having been in a very exhausted and weak condition of health and weak and facile in mind and easily imposed upon; and the usual and accustomed averments are made as to circumvention. The circumstance that Mr Cormack, the alleged impetrator, was the testator's law-agent is stated as supporting the averment that he had influence over the testator sufficient to supply the leverage requisite for successful circumvention. But this seems merely to supply another illustration of the variety of cases which are appropriately met by the general issue of facility and circumvention; and I think the decision in *M'Callum* v. *Graham* is in point.

I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers—Jameson—Salvesen. Agents — Fraser, Stodart, & Ballingall, W.S.

Counsel for the Defender Cormack—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Counsel for the Curator *ad litem*—Hunter. Agent—Alex. Wylie, S.S.C.

Wednesday, June 12.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

GLENGARNOCK IRON AND STEEL COMPANY, LIMITED *v.* COOPER AND COMPANY.

Sale—Delivery—Ship—Contract to Deliver Goods Free on Board—Expense of Loading.

The pursuers having contracted to supply the defenders with goods at a specified price "free on board" at a certain port, the defenders, who were charterers of the vessel in which the goods were shipped under a time charter, claimed the right to deduct from the price of the goods sums which they had paid as wages to labourers employed in transferring the goods from the quay to the ship. *Held* by the Lord Justice-Clerk, Lord Young, and Lord Trayner, that the duty and expense of loading the cargo lay upon the ship and fell to be borne by the defenders as charterers.

Proof—Omission to Lead Necessary Evidence—Motion for Leave to Lead Additional Proof.

The defenders being sued by the pursuers for a sum which they had deducted from the price of goods supplied to them by the pursuers, alleged that the sum sued for had been paid by them in connection with the delivery of the goods, and was an expense which fell to be borne by the pursuers under their contract with the defenders. At the proof the defenders omitted to prove that they had in fact paid the sum in question, and a day or two after parties had been heard upon the evidence they moved the Lord Ordinary for leave to lead additional evidence on this point. *Held* by the Lord Justice-Clerk, Lord Rutherfurd Clark, and Lord Trayner (*aff.* judgment of Lord Kincairney) that this motion was rightly refused.

On 30th December 1891 the Glengarnock Iron and Steel Company entered into a contract with Henry C. Cooper & Company, merchants, Glasgow, for the sale to the latter of their unsold make of basic slag for the year ending December 31st, 1892, at a specified price per ton free on board at Ardrossan.

The Glengarnock Company now sued Cooper & Company for the sum of £341, 1s. 11d., being the amount of various deductions made by the defenders from the price of parcels of slag delivered by the pursuers to the defenders under the contract. *Inter alia*, the defenders had deducted the sum of £74, 14s., which they alleged they had paid in wages to labourers for putting the cargoes of slag on board ship at Ardrossan.

The pursuers averred that, if these wages had been paid by the defenders, "they were paid by them in their capacity of