

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.

Saturday, February 14.

SECOND DIVISION.

[Lord Ormisdale, 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 Paterson 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

(Mr Paterson's) death. Assuming that he was capable of understanding to any extent what he did when he subscribed the said pretended deed, the said deceased James Paterson signed it under essential error as to its nature and effect, induced by the said fraudulent misrepresentation in regard to or fraudulent concealment of its true meaning on the part of the defender Mr Rigg, and it was signed by him in the belief, induced as aforesaid by the misrepresentation of the said Mr Rigg, that excepting in the matter of appointing new trustees, and accelerating the period when the beneficial interests in his property should arise, the said pretended deed did not in any way alter or infringe upon or affect the said trust-disposition and settlement of 31st August 1872."

This second deed the pursuers now sought to reduce, and proposed the following four issues as the issues suitable for trying the cause:—“(1) Whether the trust-disposition and settlement of 28th November 1872, of which reduction is sought, is not the deed of the said deceased James Paterson? (2) Whether, on or about the 28th November 1872, the said deceased James Paterson was weak and facile in mind, and easily imposed upon; and whether the defender, George Rigg, taking advantage of the said weakness and facility, did by fraud or circumvention obtain and procure from the said James Paterson the said trust-disposition and settlement, to the lesion of the said James Paterson? (3) Whether the said trust-disposition and settlement was obtained from the said deceased James Paterson through undue influence on the part of the defender George Rigg, his spiritual adviser? (4) Whether the said trust-disposition and settlement was executed by the said James Paterson under essential error as to its nature and effect, induced by the misrepresentations of the said George Rigg?”

On adjustment before the Lord Ordinary his Lordship disallowed the third issue in the following interlocutor:—

“24th January 1874.—The Lord Ordinary having heard counsel for the parties—Approves of the first, second, and fourth issues for the pursuers in No. 11 of the Process; disallows the third of said issues; and appoints the issues now approved of to be the issues for the trial of the cause.

“Note.—The Lord Ordinary has approved of the first, second, and fourth issues proposed by the pursuers, with the alterations thereon as in the paper, No. 11 of Process; and he has disallowed entirely the third issue, as asked for by the pursuer in that paper.

“In regard to the first and second issues as now allowed, it is enough to say that they were not objected to; and, at any rate, that they are in the usual terms, and appear to be sufficiently supported by the pursuers' allegations on record, and particularly their allegations in articles 10 and 11 of their condescendence.

“The fourth issue, as now allowed, was objected to by the defenders on the grounds—1st. that the pursuers have not made allegations sufficient to support it; and 2dly, that their case, in so far as it could be said to be founded on alleged error at all, was covered by the second issue as now allowed. It appears, however, to the Lord Ordinary that the pursuers' allegations in articles 10, 11, and 12 of their condescendence are sufficient to support the fourth as well as the second issue; and that, while under the latter fraud or circumvention on the

part of the defender Mr Rigg requires to be made out, it will be enough under the fourth issue that essential error on the part of the grantor of the deed in question as to its nature and effect, induced by the misrepresentations of Mr Rigg, whether fraudulent or not, is proved. This distinction appears to have been given practical effect to in the issue settled for trial in the case of *Harris v. Robertson*, 16th February 1864, 2 Macph. 664, as indicated in the report of the case, and as the Lord Ordinary has verified by an examination of the session papers. In the case, also, of *M'Conochy v. M'Indoe*, 23d December 1853 (16 D. 315), a separate issue was allowed, founded upon essential error as to the nature and effect of the deed sought to be reduced, without the addition ‘induced by misrepresentations of the defender.’ In *Couston v. Miller*, 26th February 1862 (24 D. 607), besides an issue on fraud or circumvention, a separate one was allowed on essential error as to the substance and effect of the deed sought to be reduced, caused by misrepresentation on the part of the defender. And in *Hogg and Others v. Campbell and Others*, 12th March 1864 (2 Macph. 848), a separate issue—besides one of fraudulent impetration—was allowed on essential error caused in the particular way there stated.

“The Lord Ordinary is not aware of any precedent, and was referred to none, in support of the third issue, which he has disallowed. Nor does he think it can be supported on principle. He cannot, indeed, very well understand what is meant in the present case by the expression ‘undue influence’ as used in the issue and in article 11 of the pursuers' condescendence, unless it is ‘fraud or circumvention,’ but if it means the same thing as ‘fraud or circumvention,’ then the pursuers will have the benefit of it under their second issue, which has been allowed. If the present had been the case—which the Lord Ordinary cannot hold it to be—of a man's legal, or medical, or spiritual adviser obtaining from him a gratuitous deed in his own favour, the pursuer might perhaps have been entitled to an issue founded on undue influence, as well as one upon fraud or circumvention, as in the above case of *Harris v. Robertson*, but even in such a case the issue would require to be differently expressed—as it was in the case of *Harris v. Robertson*, and the other cases before referred to—from what it is in that now asked for by the pursuers.”

The defenders reclaimed, and argued:—The Lord Ordinary is wrong in allowing the 4th issue at all. The 1st and 2d issues are enough to exhaust the whole case on record. There is no substantial difference between the case stated in Art. 12 from that in Art. 11. But assuming that there is a third alternative on record in Art. 12, we are entitled to have the word “fraudulently” introduced into the issue on the principle of the case of *Dempsters v. Rae*, 11 Macph. 848.

Argued for respondents:—The Lord Ordinary is right in allowing issues 1, 2, and 4. There are three cases on record, and there should be an issue applicable to each, but he should have allowed the 3d issue also, undue influence by a person in the position of a spiritual adviser being of itself a relevant ground of reduction.

At advising—

LORD JUSTICE-CLERK—In this case certain issues have been proposed for the pursuers, four in

all. Of the four the Lord Ordinary has allowed three, but has disallowed one, the third, "Whether the said trust-disposition and settlement was obtained from the deceased James Paterson through undue influence on the part of the defender George Rigg, his spiritual adviser?" Any question as to this issue it is unnecessary to take up, as we declined to hear argument upon it.

No doubt the circumstances of a case may sometimes afford good grounds to make this a relevant issue. Clergymen, medical men, and lawyers are of necessity in a position to acquire great influence over their clients, patients, or parishioners, but they are not entitled to carry those relations into such matters as we have before us. When a party is in full possession of his bodily and mental health the law no doubt leaves him to protect himself; but unquestionably if, for purposes of their own, persons in those relations use the influence so acquired in order to accomplish those purposes, and overcome the will of the client, or parishioner, or patient, such acts will be viewed with great jealousy, and although the law of deathbed is no longer the law of this country, and we have not the law of Mortmain, I am not in the least disposed to say that undue importunity by a clergyman to a sick, or a feeble, or a dying person, may not be a ground for setting aside a settlement. But that question does not arise here. If there be anything clear as to the statement of undue influence, it is, that if used it was entirely unsuccessful. The testator was never overcome, but, on the contrary, "he resisted the desires of the defender," and was only induced to sign this deed in ignorance of its contents. It is impossible to allow a party to take an issue which assumes the very opposite to the matters of fact that he sets forth upon his record. I therefore think that the Lord Ordinary has rightly disallowed this 3d issue.

As to the 1st and 2d issues no question has been raised, and the more important and interesting question is whether the 4th issue should be allowed. As to the 4th issue, the objections taken to it are two-fold; on the one hand, it is objected that the statements upon record are not such as to render an issue of essential error relevant, and, on the other hand, the pursuer maintains that he is entitled to the issue without the introduction of the alleged misrepresentation by George Rigg. I am of opinion that the record does contain statements sufficiently relevant to entitle the pursuer to an issue of essential error induced by misrepresentation.

The general law in regard to essential error I take to be this, as applicable to contracts, that in the first place an error in law in the ordinary case is not a ground for avoiding a contract. That is not the same case, however, as the cases that have occurred about homologation or discharge, when a knowledge of the legal right is essential to the thing done. A party is rightly held not to homologate if he is in ignorance of his legal rights, but that is quite a different thing from the objection that a man who makes a contract is entitled to avoid it on the ground that he did not know the legal effect of the contract when he made it.

In the second place, even an error in point of fact will not be sufficient if the fact be within the reasonable knowledge of the party who made the contract; and, thirdly, the error to annul the

contract must be an error that is essential to the very essence of the contract, and in regard to a fact without which there could be no contract.

In regard to settlements, not contracts, the question arises more favourably for the challenger. I do not mean by any means to say that an essential error on the part of the maker of a settlement, where the party is in such a position that you must infer that he made due inquiry and knew what he was doing, that in such a case a mere averment of error, or a mistake on his part, would be at all sufficient for the challenge of a probative deed. Indeed the very privilege of a probative deed necessarily implies the reverse, and the signature before witnesses according to our law does imply that the man who executed the settlement did know what he was doing and meant what the settlement imports—an implication which cannot in the ordinary case be repudiated by parole testimony. But it is quite another matter when the surrounding circumstances give colour and force to the allegation; and we must look at this case in the light of the statements that are made upon record. Of course we can only take them as true since we have them here, but these statements are to this effect, that the testator had uniformly refused to execute such a deed, and that Rigg, without authority from him, obtained this deed, gave instructions for its being prepared, did not have it read over to him when it was signed, and made a statement to him whilst he was unquestionably in bad health (at least that is which is said) and it is said of facile disposition,—made a statement inconsistent with the true nature of the deed. I think that is a case in which an issue of essential error is unquestionably deducible, and relevantly deducible, from the facts. The case of *Campbell* referred to was not so strong a case by any means as this. It was a case of contract, and it was a case where both parties had a full opportunity of ascertaining their rights. But there the issue of essential error was given on the allegations contained in that record. But then, it is said on the part of the pursuer that he is entitled to have the issue without the introduction of the statement which is said to have induced the essential error. I cannot at all acquiesce in that. It seems to me that the inductive cause of the essential error is quite necessary to this issue or ground of challenge, and that all the more that there is only one inducing cause stated in the record by which this error was induced, and that is what is stated in the 12th article of the condescendence. No doubt the pursuer must be limited by his record, but that is always an inconvenient position at the trial, and it is better that the question put to the jury in a case of this kind should be very clearly before them, and that the statement or misrepresentation which is said to have induced the error should be specified in the issue as it was in the case of *Campbell*.

It was maintained on the other side that even if that issue were to be granted the word "fraudulent" should be put in as qualifying the statement which Mr Rigg is said to have made. I think not, because if these other facts are proved and the mode of procedure which is there alleged by which the error was induced, it does not appear to me—I do not express any opinion on it—but it does not appear to me doubtful that that would be a very serious case to take to the jury. In the case of *Campbell* that very question was largely

discussed, and the opinions of the Judges are very full on that subject.

But there they gave the issue without the introduction of the word "fraudulent," though fraud had been stated on the record in the strongest possible way. On the whole matter, what I propose as the issue of essential error is the following:—"Whether the defender, the Rev. George Rigg, represented to the deceased James Paterson that the said pretended trust-disposition and settlement did not in any way affect the trust-disposition and settlement of 31st August 1872, except in the matter of appointing new trustees, and accelerating the period of distribution, such not being the nature and import of the said deed; and whether the said deceased James Paterson executed the said deed under essential error as to its true nature and import, induced by the said misrepresentation."

LORD BENHOLME—I am quite agreeable to the conclusion at which your Lordship has arrived, and I am very glad indeed that we have altered the finding of the Lord Ordinary, as to introduce that special statement of the one essential misrepresentation which is stated in record, and which I think was necessary to prevent the issue from being too vague, and by possibility including something that was not set out, and set out very distinctly, on the record.

LORD NEAVES—I am of the same opinion with reference to our disallowing the issue of influence. I should have been inclined, even if the record had been different in some aspects, to say that the words "undue influence" are rather too vague in a matter of that particular kind, but I quite agree with your Lordship that the idea of influence is excluded by either the one statement or the other. Because, if the testator was not of a disposing mind at all there is no need of any influence. If he was facile and was circumvented that is another view, or if there was essential error. But undue influence seems to import the existence of a mind that could be influenced and was led. But I cannot see that there is any such case in this record, and therefore I think that issue should be disallowed. With reference to essential error, I quite concur with your Lordship. I think essential error is a substantive and special objection. It must be essential error giving rise to the contract or the will. In regard to contracts, it must be traced to something that takes place. The allegation here is that the deed was not read over to him, and that he took his understanding of it from the mouth of the defender Rigg. That is the statement, and at present we have nothing to do with its truth.

On the whole, I think we are granting a relevant issue, and I think we are guarding it with these specific statements, which are to protect it from a wrong impression or prejudice that might arise if the Jury were not clearly told what is the point that they have to consider.

The Court pronounced the following interlocutor:—

"Approve of the issues as adjusted by the Lord Ordinary, with the exception of the third issue, and in lieu thereof appoint the following issue to be substituted:—'Whether the defender George Rigg represented to the said deceased James Paterson that the said pretended trust-disposition and settlement did

not in any way affect the trust-disposition and settlement of 31st August 1872, in the matter of appointing new trustees, and accelerating the period of distribution, such not being the nature and import of the said deed; and whether the said deceased James Paterson executed the said deed under essential error as to its true nature and import, induced by the said misrepresentation.' And appoint the issues as now amended to be the issues for the trial of the cause, and remit to the Lord Ordinary, reserving all questions of expenses."

Counsel for Pursuers—Fraser and Rhind.
Agent—Robert Menzies, S.S.C.

Counsel for Trustees—The Solicitor-General (Clark) and Robertson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Next of Kin—Guthrie Smith.
Agents—Douglas & Smith, W.S.

TEIND COURT.

Monday, February 9.

TRUSTEES OF OLD CHURCH *v.* LORD PROVOST, MAGISTRATES, AND COUNCIL OF EDINBURGH.

Erection—Act 7 and 8 Vict., c. 44, sec. 8—23 and 24 Vict., c. 50—33 and 34 Vict., c. 87.

Petition by the Trustees and Endowment Committee of the Old Church, Edinburgh, with concurrence of the Ecclesiastical Commissioners, for erection of the Old Church into a parish church, and for the erection of a district to be attached thereto, *Refused*, on the ground (1) of inexpediency; (2) that the petitioners were not in the position of showing a clear title to the property to be erected.

This was a petition by the trustees and the Endowment Committee of the Old Church, Edinburgh, and parish *quoad sacra*, with the concurrence of the Ecclesiastical Commissioners, craving the erection of the Old Church into a parish Church in connection with the Church of Scotland, and for the erection of a district to be attached thereto into a parish *quoad sacra*, connected with the Church of Scotland. The application was opposed by the Lord Provost, Magistrates, and Town Council of Edinburgh.

At advising—

LORD JUSTICE-GENERAL, in giving the opinion of the Court, said the case was one attended with peculiar circumstances, and had raised some very embarrassing considerations, from which the Court had thought it necessary to take time to consider the propriety of granting this application. The Old Church parish of Edinburgh had a singular history. The church of the parish, at least for a good many years, had been a portion of the ancient Cathedral Church of St Giles, but it was not situated within the parish of which it was the church, but at some distance from it. Notwithstanding, it had been undoubtedly recognised and known as one of the parish churches of Edinburgh, and legally constituted as such. But two Acts of Parliament had been passed for the purpose of abolishing the annuity-tax of Edinburgh, the one in 1860, and the other in 1870, the effect of which it was