might have found for the complainer, and imposed a fine or something of that sort instead of awarding damages. That is quite true, for under the Act in a complaint of this sort there are five different courses open to the Judge trying the case. In the first place, the Judge may impose the penalty by abatement of wages, or, in the second place, he may require security with an alternative of imprisonment, or he may annul the contract and apportion the wages, or he may inflict a fine, or, in the last place, find the party liable in damages. So every complaint has all these alternatives embodied in it, just as if each was separately concluded for. Now, in this complaint the breach of contract was not proved, and the Sheriff granted decree of absolvitor, and the complainer can therefore get none of the remedies competent under the Act, and competent under this complaint, although it only concluded for damages. Now, I think that judgment is plainly pleadable against an action brought to obtain damages for the same complaint. So I think the Sheriff was right to sustain the plea of *res judicata*. The section 18 of the Act of 1867 provides that nothing shall prevent employer or employed from enforcing their rights in the ordinary Courts "in any case where proceedings are not instituted under this Act.' That provision clearly shews that where proceedings are instituted under the Act an action in the ordinary Court shall not be competent.

As to the second action, the Sheriff has dismissed it because it is supplementary to a principal action which had been disposed of. The object of this supplementary action is to bring a new defender into the Court, and I do not think that a supplementary summons to call a new party into Court can be maintained as a substantive and separate action, but it must stand or fall with the principal action. This case is different from the case of *Roy* v. *Hamilton*, for in that case the supplementary action was supplementary in a different sense, being an action brought, not to introduce a new party to the case, but to bring a new claim against the same party. It is clear that might have been made the subject of a new action, and was not properly a supplementary action at all. I should be sorry to extend the doctrine laid down in the case of *Roy* to the ordinary case of supplementary actions, and I am therefore of opinion that the Sheriff is right.

The other Judges concurred.

Appeal dismissed.

Counsel for the Pursuer—Scott. Agent—D. F. Bridgeford, S.S.C.

Counsel for the Defender—Watson and Mackechnie. Agent—W. Scott Stuart, S.S.C.

Thursday, June 18.

SECOND DIVISION.

MUNRO AND OTHERS *v.* STRAIN AND OTHERS.

(*Ante*, p. 254.)

Jury Trial—Issue—Fraud and Circumvention—Motion for a New Trial.

On a motion for a new trial, where a jury had affirmed the following issue:—"Whether on or about 23th November 1872, the said deceased A was weak and facile in mind and easily imposed upon, and whether the defender B, taking advantage of the said weakness and facility, did, by fraud or circumvention, obtain or procure from the said A the said trust-disposition and settlement, to the lesion of the said A?"—New trial *refused*, and rule discharged.

Expenses.

A deed was set aside on the ground of its having been impetrated by fraud or circumvention.

Two sets of defenders appeared in the action of reduction, namely, the trustees and certain beneficiaries under the deed set aside. The Court allowed payment of the account of the expenses for the trial out of the trust-estate to these defenders.

This suit was raised by certain of the trustees appointed by the deceased James Paterson, Edinburgh, under a will, dated the 31st August 1872, for the purpose of setting aside and reducing a subsequent settlement of Paterson, dated 28th November 1872. By the first deed Paterson left the residue of his estate (estimated at about £30,000), after payment of his debts and certain legacies to his son and grandchildren, for the establishment and endowment of a training institution for servant girls; and by the second deed he put his whole estate in trust for certain purposes, to be afterwards declared, and revoked his former will. Paterson died on 8th February 1872, without having declared any purposes of any kind, and thus, having died intestate, his estate (assuming the validity of this deed) fell, not to the founding of the institution just mentioned, but to his natural and nearest heirs—viz., his grandchildren—his son having died shortly before the execution of the second deed. Some of the trustees under the first deed, however, challenged the validity of the second deed, and on this challenge the case was tried by a jury, under the direction of the Lord Justice-Clerk. At the trial the pursuers submitted three issues for the determination of the jury—(1) Whether, at the date of the execution of the first deed, Paterson was of unsound mind? (2) (and this was the issue on which the case ultimately turned, his Lordship having declared that the pursuers had failed on the other two issues), "whether, on or about the 28th day of November 1872, the said deceased James Paterson was weak and facile in mind and easily imposed on; 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? and (3) whether the deed had been obtained from Paterson by Mr Rigg representing the deed to be other than it really was?" On the second issue the jury ultimately found unanimously for the pursuers. The defenders at the trial were the trustees under the second deed, and the grandchildren, and after the verdict these latter asked the Court for a new trial, on the ground that the verdict was disconform to evidence, there being especially no proof of facility on the part of the testator. The Court granted a rule on the pursuers to shew cause why a new trial should not be granted.

Authorities cited—*Marianski*, 12 D. 1206, 15 D. 268; *Jaffray*, 12 S. 241, 1 M'Queen, 212; White & Tudor's Leading Cases, ii. 569 (4th ed.).

At advising—

Lord Justice-Clerk—Your Lordships have now to dispose of the rule which was granted in this case to show cause why the verdict of the jury should not be set aside on the ground that it is contrary to the evidence adduced. The jury found a verdict for the pursuer upon the second of the three issues that were sent for trial, viz. on that founded upon facility and fraud or circumvention. The first issue therefore, and the last, are now out of the case; and your Lordships have to decide whether upon the notes of evidence that have been furnished the verdict which was returned for the pursuer upon the second issue was or was not contrary to the evidence which was led. This issue is in the ordinary form, and of course divides itself into two parts, one being the question of the weakness or facility of the granter of this deed, and the other the question of the fraud or circumvention used by George Rigg, whereby the deed is said to have been obtained. My Lords, I tried this case, and I must say I found it in some respects attended with considerable difficulty, and in all respects a painful case. No doubt an allegation of this kind, such as is contained in the second issue, made against a person in the position and of the character of Mr Rigg, is necessarily a very serious one. I said at the trial, and I gladly repeat what I said, that I have no reason whatever to doubt that Mr Rigg in the course that he followed was endeavouring to promote objects that he believed to be for the advantage both of the testator and those who were to come after him. I have no doubt at all that he most honestly thought that the testator's plan for an orphanage was a foolish scheme, a piece of vanity, which it would be better for himself to abandon; and no doubt he also thought that it was a more reasonable thing for Mr Paterson,—more creditable to his character and memory, and better for his family, that the money should be left to his orphan grandchildren. But that being said, it carries us a very little way indeed to the solution of the question which has been raised under this issue. If Mr Rigg chose to interfere in the testamentary arrangements of Mr Paterson, with which individually he had nothing whatever to do, and did so without taking the ordinary and indeed proper precautions under such circumstances to see not only that the testator was perfectly aware of what he was doing, but also that reasonable testimony should be preserved of what was done, he cannot complain if inferences are drawn which more care, more circumspection, and a more accurate estimate of the relations between himself and Mr Paterson would probably have prevented.

The story upon which this issue depends may be very shortly stated. James Paterson was a man who had risen from the lowest ranks of society; he had by a long life of industry, energy, and parsimony amassed the, for him, most remarkable sum of £36,000. He had a family, but it is undoubtedly proved that the object which he had had in life, and the object for which he spared himself luxuries and comforts, was that of founding an orphanage for young destitute girls. Whether that was a wise or an unwise object really is a matter with which we have no concern. But that undoubtedly was the object which he had set before himself; so much so, that while he had made provision for his family to a certain extent, he actually took some pains for the purpose of geting his eldest son to renounce any legal rights which he had. This went on down to August 1872, when a regular deed of settlement was prepared by his agent Mr Menzies, by which this orphanage was finally established,—there had been a previous deed,—and disposing of the whole of his estate in the way contemplated. The Rev. Mr Rigg was a gentleman who was greatly in the confidence of Mr Paterson; but there was one subject on which it was plain they did not agree. Mr Rigg was entirely opposed to this plan of the orphanage; he wanted it to be surrendered altogether, but if it was to be instituted he was exceedingly desirous that it should be confined to persons of the Catholic persuasion. But on both these matters Mr Paterson apparently was entirely inexorable. Mr Rigg was present at the time the deed of August was ultimately adjusted and signed; he endeavoured to dissuade Mr Paterson from his intention, but in vain, and the deed accordingly was executed notwithstanding his remonstrances. In the month of October, about two months afterwards, an event occurred which throws a great deal of light upon the matter. Mr Rigg had a conversation with Paterson, and he came to Mr Menzies somewhere about the first week of October to say that Mr Paterson had changed his mind, and now wished to limit the institution to Catholic children, and Mr Menzies accordingly wrote to Paterson on the 16th October to say that he understood that he had changed his intention upon that matter. The result was an interview between Paterson and Menzies, when Paterson said that, so far from having changed his mind on that matter, no priest or lawyer should induce him on any consideration to do it—that was before his son's death. His son died in the end of October, and there is evidence undoubtedly that Mr Paterson intended to make some alteration on the deed which he had executed. What that alteration was is a question that we must consider, but it is clear that by the death of his son he required at all events to have a new nomination of trustees in order to supply the deficiency made by his son's death. I think it also proved that he contemplated employing some other agent than Mr Menzies, for what reason we have no means of judging. I don't think it proved that he had lost confidence in Mr Menzies, but he was penurious, and perhaps he thought he might get it more cheaply done and more simply done in another way; and accordingly there is some evidence that he sent for Mr Smith, who was employed as the agent of the representatives of the son, in order according to the witness Young,—to whom I did not give unbounded credit,—that he might make a new will. Smith would not come, and the next we see in the matter is this, that on the 23d of November, being about three weeks after the death of the son, Mr Rigg goes to Mr Jamieson of Tods, Murray and Jamieson, and asks him on the part of Paterson, to prepare the draft of a new settlement. He gives him instructions, and the substance of these instructions is simply this;—in the first place, he gives him a list of trustees who are to be inserted in the new deed; and in the second place, the deed is still to be for the foundation of the orphanage, but under circumstances which would necessarily lead to the result of its being an exclusively Catholic institution. Mr Jamieson says quite distinctly that such were the instructions he received from Mr Rigg, and that

he understood that Mr Paterson had altered his mind on that subject. The old settlement was put into the hands of Mr Jamieson as the foundation of what he was to do. Now, my Lords, there is a very important element which arises here. The case on the part of the defenders is this, that these were the instructions which Mr Paterson had given to Mr Rigg; whereas it is perfectly certain from the evidence of Mr Rigg himself, that beyond the matter of nominating new trustees, he had no instructions from Mr Paterson, and that is made quite certain by the fact that Mr Rigg, when he was asked upon the subject, expressly states that he had no conversation whatever with Mr Paterson upon the subject of his orphanage after the time when he had spoken to him before his son's death, and before he went to Mr Menzies in October 1872. He was asked—"Did he continue after that to be indifferent as to whether they were Catholics or not.—(A.) No. He told me he saw it would be quite right that they should be instructed as Catholics. (Q.) When did he do that?—(A.) Before I called upon Mr Menzies, previous to the death of his son. He never renewed the subject with me after that, and I never renewed it with him." Now, my Lords, if that be true, it is perfectly clear that when Mr Rigg told Mr Jamieson to draw that first draft, he was not acting on any instructions that Mr Paterson had given him as far as the constitution of the orphanage is concerned. He does not say that he did. He was simply instructing him to make the draft as he wished it to be, on the chance that Mr Paterson might ultimately ratify and execute the deed. I think it most unfortunate that Mr Rigg did not go to Mr Menzies at once when he was applied to by Mr Paterson. Probably he did not look upon that matter in the same aspect in which it would have occurred to a professional man. I think it also excessively unfortunate that Mr Rigg ever undertook to be the medium of communication between the testator and his agent, without taking care that the agent and the testator should be brought into contact; and I also think it unfortunate that the agent himself should have permitted the execution of these settlements without taking his instructions and authority direct from the testator. If any of these safeguards had been adopted, no question of this kind ever would have arisen. But we start in regard to this first draft on the 23d of November with these two most important matters, first, that it is quite certain that Mr Paterson never gave instructions for the alterations upon the orphanage which were contained in the first draft; and second, that his instructions applied solely—for that is the substance of Mr Rigg's evidence—to the nominations of new trustees, and to nothing else whatever. This draft was accordingly made out and Mr Rigg took it to Mr Paterson. We have only Mr Rigg's evidence as to what Mr Paterson said to him; and Mr Rigg says that he simply said the deed was too long. It was most natural that he should say that. If he wished nothing but a nomination of trustees it was a great deal too long. But one cannot help surmising that Paterson remained precisely of the mind in which he had been two months before, and that he refused to have anything to do with Rigg's alterations in regard to the orphanage. This, however, we do know, that he refused to sign the deed. And then comes the second act in this matter, which I must own filled me at the time, and does still, with the greatest surprise. The case of the defenders is this, that because the new draft was too long, because Mr Paterson who had remained up to that time in the full intention, as Mr Rigg says, of instituting this Orphanage—because this deed was not to his mind, which was to have been a nomination for new trustees, he immediately resolved to cancel all that he had ever done—to revoke his settlement out and out, and to leave himself in the position of intestacy, in the full knowledge that such would be the effect of the deed which was afterwards executed,—that, in fact, having been quite clearly of the mind that he had always been in on the 23d of October, on the 25th of October he resolved, all at once to leave himself in the position of intestacy, and that for the purpose of benefiting his grand-children. That was a very strange course to take. If he had wished to leave himself intestate, he had only to put the first deed in the fire in order to effect that object. If he had wished to benefit his grand-children, he had only to execute a deed with that object, and if he was uncertain what to do, I think the conclusion from that would be that his mind was certainly very much altered from what it had been. I doubt, however, in the sequel whether it will turn out that such is the true interpretation of what happened. Mr Rigg goes back on the 25th of October to Mr Jamieson, and he gives him a totally different set of instructions, which are, to make out a deed nominating the same trustees for purposes to be afterwards declared, and revoking all former settlements. In other words, the deed which he directed him to prepare, as upon Mr Paterson's instructions, is a revocation and nothing else. I could have understood why Mr Jamieson, in the first instance, with the old settlement in his possession, thought it unnecessary that he should wait upon Mr Paterson, seeing that his mind generally was clearly evinced by the former deed, and the alterations might be thought not to be material; but I own I think Mr Jamieson carried his confidence in Mr Rigg, the third party, greatly too far when he allowed such a deed to be extended without taking care that it was explained and read over to the testator himself, and, indeed, without personal communication with the testator in order to be certain that he truly meant to leave himself intestate. However, my Lords, that is done; but it now appears that Mr Rigg cannot say—and it is creditable to his candour that he does not say—that Mr Paterson ever gave him instructions to insert that clause of revocation in the deed. He wanted a shorter deed, and the purposes might be declared, he said, afterwards, which was quite consistent with his wishing a nomination of trustees for his own settlement, reserving to himself to alter that in regard to the Orphanage if he should afterwards come to agree with Mr Rigg, which at that time he did not do. No draft was sent to Mr Paterson, but a draft was preserved, and it contains a clause which seems to me to throw only too much light upon the real nature of the proceeding. It is a clause providing that in the event of no purposes being declared, the trust is to be held for uses and purposes already declared to the said George Rigg by Paterson. No such uses and purposes had ever been declared. So Mr Rigg says. Mr Jamieson says the clause got into the deed by mistake. I do not doubt that such must have been the fact. At the same time, Mr Rigg is a great deal more misty on that subject, nor does

he deny that he must have said something to Mr Jamieson which raised that impression on his mind. And if that were so, I can only say it was a most improper provision as circumstances stood, for Mr Rigg admits that no such purposes or uses had ever been mentioned to him by the testator at all. Mr Jamieson and Mr Murray both thought it necessary to explain to Mr Rigg that if the deed was executed in the terms of the new draft the testator would die intestate. Mr Rigg denies that Mr Murray and Mr Jamieson told him any such thing; but he takes the extended deed to Mr Paterson on the 28th. He says that he read it over, although that fact also depends on his own evidence, but he admits that he did not, explain to him what Mr Murray and Mr Jamieson unquestionably explained to Mr Rigg, that if no purposes were declared Paterson would die intestate. Under these circumstances, in the afternoon of the same day two clerks from Mr Jamieson's office came to the testator; they found him in bed; there is no conversation—there are a few fragmentary utterances, but the deed is not read over at that time; it is executed then and there, and from that time forward it lies in Mr Jamieson's possession. The testator died in the February after.

Now, my Lords, the question is, whether under these circumstances—for I think it unnecessary to go into the remainder of the case—the jury had ground upon which they might reasonably conclude in favour of the affirmative of the second part of that issue; that is to say, whether the deed was obtained by fraud or circumvention. The elements are simply these, that in these negotiations between Mr Paterson and the agents, Mr Rigg did endeavour to obtain first one and then the other of the two objects that he had fruitlessly endeavoured to obtain before, viz., first, the restriction of the Orphanage to girls of the Catholic persuasion, and, secondly, the entire revocation of the deed by which the Institution was founded. It is no matter that he had no personal interest in these objects; that was his wish, and it was not the wish of the testator; and I am afraid it is equally clear that in both instances he had no instructions to that effect. And if it were the case that the instructions were given on the chance and in the hope that the testator might adopt them, I am afraid that of itself would go very far to entitle the jury to come to an affirmative result on the second issue. But, my Lords, when we find that not only does the agent never come into contact with his client, but that Mr Rigg does not faithfully represent to the client the instructions which he got from the agent, and leaves the client, for aught that he knows, in total ignorance of the legal effect of that which he is doing, while the agents have thought it necessary very carefully to explain it to Mr Rigg—without saying what verdict I should have returned, for that is not our business, on this second issue I cannot say that the jury have gone against the evidence in affirming that part of it. I add to that, that excepting the evidence of Mr Rigg, there was nothing proved from first to last in this man's conversation or conduct to induce any one to believe that he had ever changed his mind upon the matters in question. He never said that he had changed his mind about the Orphanage to anybody—not even to Mr Rigg. He never said that he intended to die intestate; his whole conduct implied the reverse. He never indicated the slightest intention of leaving his money to his grand-children. He was the last man to leave that matter simply to the operation of the law. If there was anything clear in the man's character it was his determination to leave his fortune according to his own will and intention, and therefore, upon the whole of that matter, on the second part of the issue I am of opinion that the jury have not gone against the evidence which was before them. In regard to the facility, the case is more difficult and much narrower. I could not have affirmed the issue if it had meant the man's mind was reduced to a state of imbecility, or was materially impaired. I do not think it was. My impression is, that to a great extent he remained an acute, vigorous, tenacious man. I think, at the same time, that he was undoubtedly shaken by the death of his eldest son, and that from that time forward he was not quite the man he had been even as regarded mental vigour. But that is not the question. Taking the evidence as a whole, if the jury came to the conclusion that the old man permitted things to pass without inquiry in his enfeebled state which he would not have allowed to pass in the days of his vigour, I cannot say they would be wrong as to this fact; and when we look to the position in which he stood in regard to Mr Rigg, that he was bedridden, that he was infirm in body—he was, in truth, on his death-bed—that he was unable to read with facility, greatly dependent on those who read to him, I am of opinion that that condition, of itself, was sufficient to fulfil the first part of the issue, if the fraud or circumvention be clearly proved. Indeed, the mere fact that he dispensed with seeing his law agent, and permitted Mr Rigg to negotiate this matter by himself, tends to confirm that impression. His age and his infirmities, and his difficulty in reading, were all circumstances which conspired to enable one in whom he had confidence to circumvent him. I told the jury—and no exception was taken to what I said—that facility may be inferred from or may consist in circumstances giving to one man an unusual power and influence over another—not necessarily mental weakness, and this was very clearly illustrated in the case of *Marianski*, and I have always understood it to be the law of an issue of this kind. Much must depend upon the nature and amount of the fraud or circumvention used; but the success of the fraud or the circumvention is almost always a very material element as regards the facility upon which it is practised. In the present case, looking to the nature of the devices used, I cannot say that I think the jury, although they did it with difficulty, in which I entirely sympathise, went against the evidence in returning their verdict on this part of the issue also. I am therefore for discharging the rule.

Lord Benholme—The address that your Lordship has favoured the Court with in this case relieves me from the necessity, or indeed the propriety, of going so much into detail as I should otherwise have been inclined to do. The only part of this case that has occasioned me much anxiety has been one rather of form than of substance. The issue upon which the verdict has been returned consists of two parts, the first being that the deceased Paterson was weak and facile in mind and easily imposed upon, and the second relates to the advantage which is alleged to have been taken

by the defender George Rigg of the said weakness and facility, to impose upon him by fraud or circumvention. Upon the last part of this issue I say nothing; for what your Lordship has already favoured the Court with appears to me to be so conclusive that it is unnecessary to say more upon it. But I confess that upon the first part of the issue I had for some time considerable anxiety. It was argued that this was an independent part of the issue, which required to be made out satisfactorily, as well as the latter part; and it was argued with great plausibility that there was necessary to the affirmance of this part of the issue something in the shape of an independent intellectual weakness which might be obvious to all the world. Had that been really the true interpretation of this part of the issue, it might have led to great difficulty; but I confess your Lordship's explanation, confirmed as it has been by reference to authority, and also to the fact that it was not excepted to, has completely satisfied me that that view of what is required to support the first part of the issue is not sound. It appears to me that the weakness and facility forming the earlier part of such an issue may take its character and its nature from the fraud or circumvention with which it is combined; and that if the jury had sufficient evidence to convince them that, in reference to the defender, Paterson was subject to weakness and facility arising from over confidence, or from professional relations which led the one to exercise and the other to submit to a certain intellectual dominion, which would not have occurred had that relation not subsisted,—I am satisfied that that is sufficient, when combined with the whole evidence on the latter part of the issue, to render the finding of the jury satisfactory. My difficulty was not a little increased by the fact that the jury had themselves at first some difficulty in going the full length of this issue, and seemed rather inclined, if possible, to avoid the affirmation of weakness and facility; but when they were advised by your Lordship that they could not pass it over in that way, they seem to have deliberately considered the matter, and to have arrived at a result with which I for one am not inclined to interfere; and therefore I agree with your Lordship that this rule ought to be discharged.

Lord Neaves—I concur in the opinions that have been delivered by your Lordship and Lord Benholme. The question that we have to consider is not what verdict we should ourselves have been inclined to pronounce or concur in, but whether the jury, having pronounced this verdict, there are grounds on which we,—a different tribunal,—are not only entitled, but bound to set aside their verdict, and to grant a new trial on the footing that it was contrary to evidence. That leads to the question whether the evidence was such as to justify a jury, within their own province of considering the facts, in returning the verdict which they did return. I abstain from giving the least opinion upon the disputed matters of fact themselves; but I cannot say that I see any ground for coming to the conclusion that the jury, applying their minds to this case, with the assistance which they had from your Lordship on matters of law, were not entitled, if that was their conviction, upon their oath, to return the verdict that has here been returned. The issue undoubtedly involves two things,—both facility and fraud or circumvention; but I think it is very plain that in cases of this kind, as regards the mere fact, each of these has a bearing on the other. We cannot see into this man's mind, for he is now no more; we can only see the facts as they present themselves externally, and draw inferences from these; and each of the elements that is brought into the field may help the other, because if a result at variance with what appears to have been the deliberate purpose of the man, for a long time entertained, was brought about by questionable means or by means that the jury considered to be questionable, that throws light upon the state of mind of the party. There cannot be a doubt that the two things bear upon each other. In the same way, if there had been strong and direct proof of facility, there would have been the less need for any very strong evidence as to the other circumstances. Now, the case altogether is a very peculiar one, and certainly one which it is impossible to think that a jury could approach without very grave suspicion. Here is a will made out at variance with the deliberate and express purpose of this man through a long period of his life, recorded in formal deeds in the most formal manner; and the result is, that while he makes a new deed, he makes it so as to die intestate; and this too brought about by the intervention of a minister of religion,—I do not care of what pursuasion,—the party having himself no personal communication with the man of business who prepared it, and having no other channel for conveying his intention to his agent, or conveying from his agent to himself the warning and information that his agent was willing and anxious to give. That is of itself always a circumstance of very grave suspicion attending such a case. And when we came to see the whole circumstance, I do not wonder at the jury arriving at this result. With reference to facility, there is no doubt that Paterson was originally a man of vigorous mind. He had made a fortune in the particular department of business which he had chosen, he had been very successful, and was very devoted to his business; and those very virtues or qualifications which enabled him to thrive in that way might also be weakness in another way; because it is very plain that he had one great weakness, namely that he wanted everything done cheap, and cheapness and quality are not always the same thing. That was one point on which he was weak, but we also see that he met with a very sad bereavement. He had a son who had been apparently a dutiful and useful son to him, and a help in his business; and that son's death occurred in circumstances that confessedly had an effect on his mind. The view taken by the defenders is that the only effect it had was a moral effect,—that it softened him in point of lenity or kindness towards his descendants. I am not quite sure that it is clear that his mind was much softened in that way, because some things show how very keen he still was towards his son's family. But if there was a change in his mind, a shock of that kind might affect his views of life, and might occasion a want of firmness to resist inducements that he would otherwise have disregarded. I think it is clear that after his son's death we do not see any repetition of that vigorous assertion of his own determined purpose to do what he meant to do, which had been repeatedly exhibited before. That of itself is a remarkable circumstance. Then the whole of this

matter is left in the hands of Mr Rigg, and there are two or three things there which strike one very much. The drafts that were prepared certainly contained some features of rather a remarkable kind. The clause that now stands deleted on p. 88, by which the trustees, failing his executing a deed himself, were to "hold the estate for uses, ends and purposes which I have explained to the said George Rigg" is one of the most singular clauses I ever saw in any deed; and how it got there is not explained to us. I should have thought that at the time the sight of that clause ought to have raised the strictest inquiry, because unless all suspicion had been lulled asleep, it could not to all appearance have got there without communication by Mr Rigg to lead to it. How could it? He was the only person communicated with, and must have said something. I don't say he meant to say it, but he must have said something that was misinterpreted to mean that. And when that had been looked to and seen, it was a thing at once to shake the confidence of anybody in Mr Rigg's accuracy, at least of expression, and reliability as the channel of communication between the testator and the man of business employed, who on seeing that clause thought it one that ought not to appear in any deed; and it was accordingly struck out. But no explanation was given to us of that. It seemed to have dropped from the memories of the parties. Then another thing is very striking, and that is, that when this deed came ultimately to be prepared for execution, the agents thought it their duty, as it undoubtedly was, to intimate to Mr Rigg distinctly that that deed as it stood would leave Paterson intestate if no other deed of instructions was executed. I don't suppose that the agents made that communication without feeling that it was a very necessary thing to do in order to explain the nature of the deed that they were putting out of their hands, and yet, although they thought it their duty to communicate that to Mr Rigg, Mr Rigg did not think it his duty to communicate it to the testator. The only way that I can explain the non-communication between the agents and the testator is that the agents must have had perfect confidence that whatever they said to Mr Rigg would be faithfully and literally communicated to the testator. Mr Rigg scarcely admits that he was told that. [Lord Justice-Clerk—He says he was not.] He totally forgot it. But certain it is that he never told it to the testator, and whatever the testator's means of instruction might have been, Mr Rigg says nobody could doubt that the executing of one deed revokes another. That is rather a rash expression, because that by no means follows. But so it is, that that which the agents thought it right and necessary in the discharge of their duty to communicate to Mr Rigg as the representative of the testator, Mr Rigg did not communicate to the testator, his constituent, for whom he was acting in that matter. Now, how can we tell what the effect of that may have been. If it be true, as Mr Rigg says, that nobody could doubt that it was a revocation of all previous deeds, then that brings us to the question, Did the testator know that he was dying intestate at that time? If he did not know what Mr Rigg says everybody knows, he must have been in a state of mind to be easily imposed upon, or at least not very well capable of judging and acting for himself. If he did know it, can there be a stronger inferential proof of the weakness of his mind, than that, living for months after that he should never have dreamed of carrying out what was necessary to give effect to his purpose by that deed of instructions which was necessary to prevent him from dying intestate? That of itself leads one to see that his mind was in that state that it could be worked upon,—I don't say by fraud, and I don't say by circumvention in one sense of the word, but by having a pious purpose accomplished in an indirect manner; and that is a thing which the law will interfere with, if a jury take that view. On these grounds, I think there was evidence to go to the jury whether this was not in their opinion a deed brought about in this manner upon a man who, taking all his foibles together, and the affliction and the perplexity that he was in, was thus led to abandon what had been the purpose of his life for a long time. I cannot say that I look upon that purpose in the light in which it has been spoken of by some of the parties. I think this man when in the full possession of his faculties thought that it was for the benefit of his family, whom he had already placed in a good way, that they should to a certain extent make a fortune for themselves as he had done, and exert themselves for that purpose; and that being so, I think that this was one of the most benevolent objects that he could have entertained. If he thought in his conscience that he had already sufficiently provided for his family, there cannot be a better charity than that which he chose. On these grounds, I do not feel justified in interfering with the verdict which the jury, acting in their proper province, have returned; and I therefore concur in the proposal of your Lordship, that the rule should be discharged.

Lord Ormidale—The motion for a new trial in this case has been made for the defenders on the ground exclusively of the verdict being contrary to evidence. It is not said that there was any misdirection on the part of the learned Judge who presided at the trial. It was, indeed, distinctly acknowledged that the case was properly and fairly left to the jury, as one for their determination on the evidence. The only question, therefore, which the Court has now to dispose of is, whether the verdict of the jury, to the effect that James Paterson's disposition and settlement, which is the subject of challenge, was, in the words of the only issue with which we are at present concerned, executed when he was "weak and facile in mind and easily imposed upon; and that the defender George Rigg, taking advantage of the said weakness and facility, did by fraud or circumvention obtain or procure from the said James Paterson the said disposition and settlement, to the lesion of the said James Paterson"—is contrary to evidence?

Although this is a well-known and well-established form of issue in the law and practice of Scotland, and although the legal principles involved in it are not in themselves attended with much difficulty, the application of them to the various, and it may be complicated circumstances in which a consideration of them arises, is often a matter for careful and delicate discrimination. While in some cases the turning point of the dispute may be, as I understand it to be in the present instance, the capacity of the testator, in others it may be the fraud or circumvention which was practised upon him. And, although both elements must concur to entitle a jury to

find in the affirmative of such an issue as that referred to, they do not require to exist in an equal degree. On the contrary, it has, in the trial of such issues, been frequently laid down by Judges of ability and experience that the greater the weakness or facility, the less fraud or circumvention is necessary, and the more pregnant the fraud or circumvention, the slighter comparatively need be the weakness and facility; and that this should be so is so reasonable in itself as to be really beyond dispute. Nor was it disputed in the argument in this case that the weakness and facility necessary to be established may be of a varied character, and may arise from a variety of different causes; that it may arise from the natural disposition of the individual, or from the decay and prostration of his mental and bodily powers, consequent upon advanced age or severe affliction, or many other agencies.

In like manner, the fraud or circumvention which ought to be established in conjunction with weakness or facility may differ in degree according to circumstances. Nor is it necessary that there should be direct and positive proof of the fraud or circumvention. It is enough that there are facts and circumstances sufficient to entitle a jury to infer in a reasonable sense that there has been fraud or circumvention. And in considering this matter, as well as the matter of facility and weakness, it is competent and proper for the jury to look at them not separately merely, but also in combination, and in the light of all the surrounding circumstances. I need scarcely add that amongst these circumstances there can be none more important than the nature and effect of the challenged deed itself, the way in which it was obtained from the granter, and the relative positions of the granter and the party by whom it was obtained or procured from him.

It is in reference to these general principles that I have considered the question, Whether, in the present instance, sufficient evidence was laid before the jury to entitle them to return as they did a verdict for the pursuers; or, rather, whether their verdict must be held to be contrary to the evidence? Without entering into any minute analysis of the evidence, or going into much detail, it clearly enough appears, I think, from the evidence, *first*, that the deceased James Paterson was on the 28th of November 1872, when the deed challenged was executed by him, about sixty-seven years of age; that he was then, and had been for some time previously, labouring under painful and mortal disease; that in consequence of the death shortly before of his only son George, who had been for long to a certain extent associated with and assisting him in his business, his firmness of character, as also his memory, came in some degree to be shaken and impaired; that when James Paterson executed his disposition and settlement on the 28th of November he was in bed, and never subsequently was out of his house; that he was a Roman Catholic, and that the defender Mr Rigg was his clergyman and confessor. It also appears from the evidence, *secondly*, that no written instructions for the preparation of the deed under challenge were given by or asked from Paterson; that the man of business by whom the deed was prepared was not instructed by Paterson himself, and never saw him either on that subject or any other, but that, on the contrary, his instructions came exclusively from the defender Mr Rigg; that although Mr Menzies was,—and continued to be till his (Paterson's) death on the 10th of February, nine or ten weeks after the challenged deed was executed,—Paterson's ordinary professional man of business, he was not consulted or spoken to in reference to that deed, and did not know of its existence until after Paterson's death; that no draft of the deed was ever seen by or sent to Paterson for his consideration, and that the deed itself was not read over, or its nature and effect explained to him by the clerks of the agent by whom it was prepared, and who brought it to him to be executed, before it was subscribed by him, that immediately on the deed being subscribed by Paterson it was taken away and remained in the custody of the agent by whom it had been prepared until after Paterson's death; and that the statements of Mr Rigg to the effect that shortly before the deed was brought to Paterson for execution it had been read over to him by Mr Rigg, and that he (Paterson) must have understood its import and effect, are without corroboration by any other witness, or other evidence of any kind. It appears, *thirdly*, that Paterson had entertained a long cherished and deeply rooted purpose of leaving the bulk of his means and estate to establish and endow an institution for the education and training of young orphan girls, irrespective of their religious persuasion, and had by a regular deed of settlement executed by him on the 31st of August 1872,—that is about three months before the execution of the deed in dispute—left his means and estate for the furtherance of that object, and that nothing seems to have occurred to change his mind regarding it in the intervening period, unless it was the death on the 31st of October of his son George, who had been one of the trustees named by him in his settlement of August. But there is, *fourthly*, evidence to the effect that the defender Mr Rigg had for some time before Paterson's death been desirous of getting him to give such directions in his settlement as would confine the benefit of the purposed institution to girls of the Roman Catholic faith exclusively; that although the deed under challenge contains no such directions, or any directions at all as to the disposal of the residue of Paterson's means and estate, it is of such a nature that in the absence of a declaration of his intentions to the contrary, and as it revoked the prior deed of August, such residue must go to those entitled to it *ab intestata*, and that Paterson's long cherished purpose of establishing an institution for the training and education of orphan girls irrespective of their religious persuasion would be thereby defeated and put an end to.

These are the features of the case which have chiefly impressed me, and having regard to them and to the observations which have fallen from all your Lordships, in which I generally concur, I am of opinion that there was sufficient evidence to require that the case should be left for the consideration and determination of the jury, and that it, having been so left without objection, it is not for the Court to disturb their verdict,—the more especially as the learned Judge who presided at the trial is not dissatisfied with it.

The Court pronounced the following interlocutor:—

"Discharge the rule formerly granted to shew cause why the verdict in this case should

not be set aside and a new trial granted: Refuse to grant a new trial, and appoint the verdict to be applied and judgment to be entered up, reserving the question of expenses of the discussion upon the rule."

Counsel for the Next of Kin, J. S. Paterson, and Others—Watson and Guthrie Smith. Agents—Douglas & Smith, W.S.

Counsel for Bishop Strain and Others—The Dean of Faculty and J. P. B. Robertson. Agents—Tods, Murray, & Jamieson, W.S.

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

Saturday, June 20.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

HANSEN *v.* DONALDSON.

Demurrage—Charter-Party.

Terms of charty-party and bill of lading under which *held* that demurrage, arising solely from inability of the crew to give delivery within the lay days allowed, does not fall upon the consignee.

The summons in this suit was raised by Job Ludvig Hansen, as master of the foreign vessel 'Hilda,' and as representing the owners of the vessel, against Donaldson & Son, timber merchants, Alloa, indorsees and holders of a bill of lading, for payment of £30 in name of demurrage.

The facts of the case and the contention of parties are fully set forth in the Lord Ordinary's interlocutor:—

"*Edinburgh, 12th February* 1874.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, proof, and process, Decerns against the defenders, in terms of the conclusion of the summons: Finds the defenders liable in expenses, of which allows an account to be given in, and remits the same, when lodged, to the Auditor to tax and to report.

"*Note.*—The question raised in the present case is—Whether the defenders are liable in seven days' demurrage, under a charter-party of the brig 'Hilda' and a bill of lading, by which they acquired right to her cargo of battens, paying freight and fulfilling 'the other conditions as per charter-party.' It is admitted by the parties that No. 18 of process is an accurate translation of the charter-party and bill of lading.

"The charter-party provides that the vessel when loaded shall proceed from Drammen to South Alloa, where her 'proper place of discharge shall be, the cargo to be discharged according to B/L and the voyage ended.' It is also stipulated by the charter-party as follows:—'The loading of the cargo to be quick, and its discharging at South Alloa is in all stipulated at eight working days, counted from the day when the ship is ready to load and to discharge; should the ship be kept above that time at the port of discharge the sum of £5 (five pounds) sterling to be paid for every day over and above the said lying days, as well as the freight.'

"The port of South Alloa consists of open quays, facing the river Forth. The 'Hilda' arrived at South Alloa early on the morning of Monday, the 27th of October, before the harbour-master was on duty, and was taken by the pilot to the Stone Pier, where she was moored and everything made ready for discharging. She was reported on the same day at the custom-house, and was then ready to discharge. It is proved by the harbour-master that a great many vessels discharge wood at that pier. At that time there was a large quantity of timber on the pier, which would have interfered with the expeditious discharge of the 'Hilda's' cargo had she been discharged there. On the following day, being Tuesday 28th October, the pursuer was told by the defender Mr George Donaldson, and by the harbour-master, to move the 'Hilda' to the quay at the coal spout. But the tide was then ebbing, and it was too late for want of water to get that done on that day. On Wednesday the 'Hilda' was moved, and reached at a late hour the place, outside another vessel, where she began to discharge. And on Thursday, the 30th October, the unloading of her cargo was commenced, and was thereafter carried on by means of a stage across the other vessel until the 4th of November, when that vessel sailed, and the 'Hilda' got alongside the coal spout quay. The cargo was not all discharged until the 12th of November, that is seven days beyond the stipulated number of lay days, assuming that these commenced on Tuesday the 28th of October, being the day after the ship was moored alongside the Stone Pier, South Alloa, and was ready to discharge.

"The defenders maintain, *first*, that the 'Hilda' did not arrive at the proper place of discharge until Wednesday the 29th of October, so that her lay days did not begin until the following day; and *second*, that the delay in the discharge beyond the specified lay days having been occasioned by the fault of the pursuer in not causing the cargo to be put out of the ship within these days, the pursuer is not entitled to the demurrage claimed.

"1. The Lord Ordinary is of opinion that the lay days commenced to run on Tuesday the 28th October, being the day after the arrival of the ship at the Stone Pier, and her entry at the custom-house. That is one of the piers at South Alloa where vessels are in the practice of discharging timber, and the ship was on that day ready to discharge her cargo. By the charter-party the pursuer engaged to proceed to South Alloa as his proper place of discharge, and the lay days are expressly stipulated to run from the day when the ship is ready to discharge. It was the duty of the defenders, as owners of the cargo, to procure a proper berth for the speedy discharge of the 'Hilda,' if, as was the case, the blocked state of the Stone Pier prevented the expeditious discharge of the cargo there. And the delay which was occasioned by the shifting of the vessel to another of the quays, must, it is thought, fall upon them, seeing that it is expressly stipulated by the charter-party that the cargo is to be discharged in eight working days, counted from the day when the ship is ready to discharge.

"2. The Lord Ordinary is also of opinion that it is not proved that there was any fault on the part of the crew in putting the cargo out of the ship. The evidence is contradictory on this matter, but after full consideration of it the Lord Ordinary thinks that the crew, which consisted of five hands, besides the captain, mate, and cook, could not have unloaded 14,000 battens in less time than they took, even with the assistance of one of the