occasion of that visit that "Mr Keir, in order to gratify his feeling against the pursuer, and taking advantage of the facility and weakness of Miss Grant's mind, did, by fraud or circumvention, obtain her signature to the document in question."

The Lord Ordinary (RUTHERFURD CLARK) disallowed the second issue, and approved the first and third for the trial of the cause.

The pursuer reclaimed against this interlocutor, and sought to have the second issue allowed.

At advising—

LORD JUSTICE-CLERK—This is a very clear matter, though one by no means unimportant. An issue has already been allowed the pursuer upon the ground of incapacity on the part of the testatrix when this deed of revocation was executed, and also upon the ground of fraud, and the third ground on which parties have come here is essential error. The Lord Ordinary has refused the pursuer an issue based upon this ground, and practically the averments amount to this, that the deed was not understood by the testatrix, although it is probative and by no means technical, but couched in ordinary popular language. Now I think the deed is very clear about the revocation—[*reads*]. A probative deed such as this one is conclusive against a mere allegation, and I am unable to find any collateral circumstances to support this ground of action.

As to the statement made here (which might in some circumstances be relevant), that what Miss Macpherson Grant recalled she had very much at heart, it is met by the answer that she might have made a new will. No cases can be cited which come near such a view as is here contended for. It would be entirely a different matter were it alleged, for example, that Mr Simon Keir had received instructions to do one thing and had in error done another, but there is nothing of that kind; and I am clear the Lord Ordinary is right, and that there is no ground for allowing an issue of essential error.

LORD ORMIDALE—I am of the same opinion. The only question is whether the allegations on behalf of the pursuer are enough to entitle her to an issue of essential error. If error there has been, we must have some intelligible statement of what it is. What the error was here we are not told. Who prevented this lady from resettling her property? I think there was no error in recalling the deed. There was no error as to the document itself or its nature. If there was any error, it was such as is entirely covered by the other issues.

LORD GIFFORD—I am of the same opinion, but I base my judgment chiefly on the pursuer's failure to state in the averments made upon record what Miss Grant intended to do. I think that an issue of essential error requires as an absolute essential that the pursuer should precisely condescend upon what the error was. There are two reasons for this—first, the other side are entitled to get due notice; and second, the jury should clearly know what the error was. Now in this record I cannot find what the essential error was. Not only what was done should be fully set forth, but also what was intended to be done which was not done.

The Court adhered and disallowed the second issue.

The pursuers shortly afterwards presented a petition to the Court for leave to appeal against the above interlocutory judgment of the Court to the House of Lords under sect. 15 of 48 Geo. III. cap. 151, by which it is provided "that hereafter no appeal to the House of Lords shall be allowed from interlocutory judgments, but such appeals shall be allowed only from judgments or decrees on the whole merits of the cause, except with the leave of the Division of the Judges pronouncing such interlocutory judgment, or except in cases where there is a difference of opinion among the Judges of the said Division."

It was argued that this was the proper stage to appeal, and that in several cases like the present leave had been granted—*Dunbar* v. *Skinner*, 9 Mar. 1849, 11 D. 1014; *Adam* v. *Allan*, 3 July, 1841, 3 D. 1147; *Losh* v. *Martin*, 3 Mar. 1858, 20 D. 721

The application was refused, with £3, 3s. of expenses, on the ground that it being in the discretion of the Court whether such applications should be granted, the applicant must shew reasonable grounds for his application; that here he had not done so, as the present question was one of the simplest of its kind, being merely whether certain statements on record were sufficient to warrant an allegation of essential error, and involved no wide questions of law.

Counsel for Pursuer—Fraser—Pearson. Agents—Boyd, Macdonald & Co., S.S.C.

Counsel for Defender (Heir-at-Law)—Asher—Guthrie. Agents—Gibson, Craig, Dalziel & Brodies, W.S.

Counsel for Defenders (Executors-dative)—Balfour—Mackintosh. Agent—T. J. Gordon, W.S.

Tuesday, November 20.

FIRST DIVISION.

SPECIAL CASE—DUNLOP OR ROSS AND OTHERS.

Minor—Process—Appointment of Curator ad litem *to Pupils, parties to Special Case, where Father resident abroad.*

In a Special Case involving the construction of the terms of a trust-settlement, the parties were, firstly, certain beneficiaries under the deed, and their father, who was resident in New Zealand, as tutor and administrator-in-law for such as were pupils; secondly, the trustees; and thirdly, a pupil brother of the parties of the first part. The interests of the first and t d parties conflicted. The Court *held*) (distinguishing the case from that of rk, June 15, 1876, 3 R. 850) that they could competently entertain the case as presented to them, but (2) that as the father was resident at so great a distance from home, the proper course was for them

to appoint one curator *ad litem* to such of the first parties as were pupils, and another to the third party.

Charles James Tennant died in 1870, leaving a trust-diposition and deed of settlement under which he left his whole estate to trustees for certain purposes. After bequeathing a number of annuities and legacies, he provided for the disposal of the residue of his estate as follows:—"Lastly, I direct and appoint my trustees to divide and apportion the residue and remainder of my means and estate, including the sum set apart to meet the said annuities at the termination thereof, respectively among my nephews and nieces and their descendants, in the following proportions." Then follows a list of residuary legatees, and the proportions of residue that they were to receive, and among these the following:—"To the children of James Dunlop, Esquire, residing at Poverty Bay, New Zealand, equally among them, eight one-hundreth parts or shares."

The said trust-disposition contained, *inter alia*, the following declarations, viz.:—"Declaring that the provisions of minors shall not vest or be payable until they respectively attain majority" . . . "and, until the beneficiaries respectively attain majority, my trustees shall pay over and apply the annual profits and proceeds of the said residue, in the proportions of their rights to the share of residue, to them, or to any guardian for their behoof."

At the time of the truster's death James Dunlop had eleven children, and on 16th May 1874 a twelfth child, named Henry Colin Dunlop, was born to him.

This was a Special Case brought for the purpose of having a decision from the Court as to whether Henry Colin Dunlop was entitled to the benefit of the provisions of the trust-settlement, and if so, to what extent. The parties to it were, firstly, the eleven children born before the decease of the testator, and their father as tutor and administrator-in-law for such as were pupils; secondly, the trustees under the deed; and thirdly, Colin Henry Dunlop, and his father as his tutor and administrator-in-law. James Dunlop was resident in New Zealand when the case was presented.

The question of competency was brought before the Court when the case was in the Single Bills. Counsel for the third party argued that the case was different from that of *Park*, June 15, 1876, 3 R. 850, 13 Scot. Law Rep. 550, as there there was a conflict of interest among the parties; the father and the administrators-in-law of the pupils, two of the parties to the Special Case, had each conflicting interests with that of the pupil, while here neither the trustees nor the father of the pupils and minors had any interest whatever in the case, and therefore it was no object to them to prejudice the interests of any of the parties.

Authorities—*Stodart* v. *Stodart*, March 5, 1870, 8 Macph. 667; *Ranken* v. *Beveridge*, June 17, 1870, 8 Macph. 878; *Park* v. *Park*, June 15, 1876, 3 R. 850, 13 Scot. Law Rep. 550; *Walkinshaw*, May 31, 1872, 10 Macph. 763, 9 Scot. Law Rep. 484; *Johnston* v. *Johnston*, M. 16,346; *Christie*, Nov. 27, 1873, 1 R. 237; *Young*, Dec. 20, 1828, 7 S. 220; *Walker* v. *Walker's Trustees*, June 17, 1870, 8 Macph. 870; *Morrison*, May 13, 1871, 9 Macph. 736; *M'Leod*, June 28, 1871, 9 Macph. 903; *Moir*, June 17, 1871, 9 Macph. 848; *Hope* v. *Hope's Trustees*, March 15, 1870, 8 Macph. 699; *Orr*, Feb. 10, 1871, 9 Macph. 500, 43 Scot. Jur. 264; *Mackintosh* v. *Wood*, July 5, 1872, 10 Macph. 933; *Chancellor*, July 19, 1872, 10 Macph. 995; *M'Neill*, M. 16,384.

At advising—

Lord President—In this case the second parties are the trustees of Mr Tennant under his trust-settlement, and they seem to have no interest in the question which is brought for the decision of the Court, being merely stake-holders. They do maintain, however, that they must retain in their hands a portion of the funds to provide against certain contingencies.

The first parties are those children of James Dunlop who were alive at the time of the testator's death, and the third party is a son born to Mr James Dunlop since Mr Tennant's death. The question is, whether the third party is entitled to participate in a certain fund? The only other question is whether the trustees are entitled to withhold the fund in case of more children being born to Mr Dunlop. It is clear that James Dunlop has no interest in the decision of the question. He may have a feeling, but he has no interest. On that ground I do not think it is unsafe in the interests of those concerned that he and the trustees should have adjusted a Special Case for the trying of the question between the children born before and after Mr Tennant's death, and of the further questions between the children and the trustees.

Now that the case has been brought into Court, I am of opinion that the children must be represented by curators appointed by the Court, and not by the father, and that there must be a curator for the children born before Mr Tennant's death, and another for the children born after. My chief reason for holding so is that Mr James Dunlop is not living at home, but is resident at a great distance, and therefore cannot elect for himself which side he should take charge of, and it would be very strange were we to elect for him. In the circumstances it seems the most proper and the safest course that there should be representation by curators.

The case is entirely different from that of *Park*, June 15, 1876, 3 R. 850, 13 Scot. Law Rep. 550. That was where pupils had rights to a certain estate in a certain event. The other parties were his three cousins, who also happened to be their tutors-nominate under the testament, the terms of which raised the question in the case. The father of the pupils was also a party. The three cousins were beneficiaries, and had a direct interest against the pupils, and the object of the Special Case was to settle their respective rights. The cousins also had a question with the pupils' father, and he had a question with his sons—thus the whole parties had adverse interests. The only protection that the pupils had was that the Special Case was made by their cousins and their father. We held that such a Special Case could not be entertained for a moment, and that the pupils' interest could not be allowed in any way to be affected by it. It is because the father in the present case is in a totally different position from the position occupied by the father in *Park's* case that I come to the present conclusion.

Lords Deas and Mure concurred.

Lord Shand—With regard to the appointment of curators, both to the children who were alive at the time of Mr Tennant's death and to the one born after that date, I should have been disposed to think it sufficient to nominate a tutor to the child born after the death, and allow the father to continue in his administration for the children. But as your Lordships have thought fit to do otherwise I do not feel inclined to differ.

The Court therefore appointed a curator *ad litem* to each of the first parties as were pupils and to the third party, the Lord President intimating that in such cases as the present the curators should be nominated by the Court itself.

Counsel for First Parties—Jameson. Agent—John Martin, W.S.
Counsel for Second Parties—Couper. Agent F. J. Martin, W.S.
Counsel for Third Party—Crawford. T. & R. B. Ranken, W.S.

Tuesday, November 20.

SECOND DIVISION.

SPECIAL CASE—LOW AND OTHERS.

Provisions to Wives and Children—Revocability of, where Postnuptial and no Children born.

Three years after marriage a husband had executed and delivered a trust-deed for behoof of his wife and children, if any should be born of the marriage. Four years thereafter, when there were no children, the truster and his wife desired to terminate the trust, and have the proceeds realised—*held* that the trustees were not so entitled to pay the funds over to him on his and his wife's joint requisition although there was no issue of the marriage, and that the same rule applied as if the deed had been antenuptial.

Question (*per* Lord Ormidale) whether the decision would have been the same in a case where there was no likelihood of children of the marriage.

Captain Low executed a trust-deed on 12th February 1875, by which he conveyed to himself, his wife, William Mitchell, S.S.C., and Charles Baxter, W.S., a sum of £400, and four insurance policies affecting his own life, in trust for the purposes therein stated. These purposes were the administration of the estate during the truster's life, and the distribution of it, in certain events, after his death among his wife and children, if he should have any. Captain Low delivered this trust-deed to Messrs Mitchell & Baxter, who, on behalf of themselves and the other trustees, and as agents for the trust, duly intimated the assignation of the insurance policies to the insurance companies, and invested the sum of £400 in certain securities specified in the deed. Mitchell & Baxter were agents of the trust, and held the securities in their hands, which were transferable by delivery. They paid the premiums of the insurance policies out of the interest of the £400.

The truster was born on 10th May 1845, and Mrs Low on 8th August 1849. They were married on 7th June 1873. Both thereafter being anxious to terminate the trust, desired the trustees to realise the securities and to pay the proceeds thereof and convey the policies to Captain Low. But Messrs Mitchell & Baxter, two of the trustees, were not satisfied that the trustees were legally entitled to accede to the request.

This Special Case was therefore presented, in which Captain and Mrs Low were the parties of the first part, and Messrs Mitchell & Baxter, as trustees, the parties of the second part. There had been no children of the marriage when the case was before the Court. The question submitted was—"Whether the trustees were entitled or bound to denude in favour of Mr Low upon the joint requisition of Mr and Mrs Low, and on receiving from them a full discharge of all their trust-actings and intromissions?"

Authorities cited—*Murison* v. *Dick*, February 10, 1854, 16 D. 529; *Anderson* v. *Buchanan*, June 3, 1837, 15 S. 1073; *Fletcher Menzies*, March 5, 1875, 2 R. 507; *Smitten* v. *Tod*, December 12, 1849, 2 D. 226; *Thornhill* v. *Macpherson*, January 20, 1841, 3 D. 394.

At advising—

Lord Justice-Clerk—Very frequently there occur cases under this category of law of a very perplexing character, but I do not think that this is one of them—[*His Lordship narrated the facts*].

Now, this deed was executed three years after the marriage, and it purports to be one for behoof of the truster's wife and children. Apparently it is a trust substantially of a *mortis causa* character, but with the peculiarity of being delivered during the truster's lifetime. A postnuptial contract it is not, but it is a postnuptial provision for a wife and children in all respects of a reasonable character, and therefore I regard it as onerous. The question then comes to be, Whether Mr Low can revoke this deed with the consent of one of the parties in whose interest it was executed? No doubt at present there are not any children born of the marriage, still Mrs Low is only one of the parties to the deed, even supposing she were able herself to give an efficient consent to the revocation. The husband and wife in a case such as the present cannot by combining together frustrate the *jus quæsitum* of children, whether born or unborn. There is not any authority exactly bearing on the question of unborn children, but the principle is clearly recognised.

On the whole, the case appears to be a clear one, and although it is quite true that in most cases such questions arise under an antenuptial contract of marriage, yet I do not see that any difference in principle can be made out where the deed is postnuptial. I am accordingly for answering the question proposed in the negative.

Lord Ormidale—I am of the same opinion, although I should wish to reserve any expression of my views in a case where the husband and wife were advanced in years and not likely to have any children; but that is not the case here at all. The provision made by Mr Low is a most rational one, and that disposes of one line of ob-