any agricultural lease inferred an alienation of this right in favour of the tenant, whilst a joint right is not to be presumed—much the reverse. The law is, that the right to enjoy this privilege is not carried by a lease along with the right to the land for agricultural purposes. Leases are simply personal contracts and in this present case there is nothing to show that any thing more is included than the usual right to the agricultural fruits.

On the second point of the case I give no opinion. I desire to be taken as neither approving nor condemning that part of the Lord Ordinary's interlocutor.

Lord Justice-Clerk—I concur. The questions argued were two. The first as to the landlord's privilege of killing game; and second whether a lease of this length is to be held as implying a transfer of this right to the tenants. As to the policy of the game laws themselves, I express no opinion, any more than as to that of the old forest laws. What we have to do is to interpret these laws. There can be no doubt that the law recognises a distinction between game and other wild animals, first, by reserving to landholders the privilege of killing game; second, by the laws passed for preserving valuable wild animals; and third, by the revenue laws, which make a licence to kill them necessary.

It is not necessary to go into the principle upon which the law depends; a long course of decisions has determined that the landlord possesses the privilege of killing game in respect of ownership of the land, and that he is not to be presumed to part with it in leases for agricultural purposes.

The only further question is as to whether a lease of unusual length raises any presumption of a contrary intention. I do not say that the case is altogether free from difficulty. If it could be considered that the right of occupancy under a long lease was equivalent to a right of property, there might be a good deal to be said in favour of that view in the present case, but the *Traquair* case settled the opposite principle. Here, the kind of tenure in this contract was occupancy for agricultural purposes only, and there is therefore no reason for holding that the landlord conveyed, or intended to convey, to the tenant the right of killing game. If the other view were taken, we must hold that the landlord by this lease is excluded from exercising the enjoyment of this privilege of killing game over his own property.

I cannot take a view that would lead to such a conclusion.

Their Lordships adhered to the Lord Ordinary's interlocutor.

Counsel for Pursuer—Balfour and H. J. Moncrieff. Agents—Maconochie & Hare, W. S.

Counsel for Defender—Solicitor-General (Clark) and Keir. Agents—Adamson & Gulland, W. S.

Friday, February 6.

FIRST DIVISION.

[Lord Shand, Ordinary.

HUTTON RIDDELL, PETITIONER.

Entail Amendment Act 1848, § 3—*Date of Deed of Entail*—Mortis causa *settlement.*

By certain *mortis causa* deeds, executed prior to 1st August 1848, a party imposed the restrictions of an entail upon his heirs, and died in 1849. His successor applied to the Court for authority to record an instrument of disentail, on the footing that the entail under which he held was one dated prior to 1st August 1848—holding the date of the *mortis causa* deed to be, with reference to the question of entail, the date of the execution of the deed and not the date when the deed came into operation.

The question was reported by the Lord Ordinary to the First Division of the Court.

Held (*dis.* Lord Deas) that the contention of the pursuer was sound, and that he was entitled to disentail under the provisions of 11 and 12 Vict. c. 36, § 3.

This was a petition presented to the Court for the purpose of obtaining authority to record an instrument of disentail of the estate of Muselie and others, under the 3d section of the Entail Amendment Act, 1848, which enables any heir of entail, of full age and in possession of an entailed estate in Scotland "holden by virtue of any tailzie dated prior to the 1st day of August 1848," to acquire such estate in fee simple, with the consents of the three nearest heirs at the time entitled to succeed after the heir in possession, provided that the nearest heir entitled to succeed after the heir in possession shall be twenty-five years of age.

The entail of Muselie was constituted by two deeds granted by Charles Riddell, Esq. of Muselie, the first being a disposition and deed of tailzie executed on 25th February 1836, and the second a deed of destination and alteration executed on 1st July 1848. By the first of these deeds Mr Riddell, the entailer, disponed the estates to himself and the heirs of his own body, whom failing to John Riddell, his only brother, and the heirs-male of his body, whom failing to a series of other heirs, under the fetters of a strict entail; but reserving absolute power at any time of his life, and even on deathbed, not only to alter the destination, but to recal the disposition in whole or in part, and to deal otherwise with the estate as he might think fit; and by the later deed, on the narrative that his brother and certain of the other heirs had in the meantime died, he altered the destination by disponing the estate of new to Mrs Mary Riddell or Hutton, his niece, in liferent, for her liferent use allenarly, and to the petitioner, George William Hutton, her eldest son, and the heirs-male of his body, whom failing to the other heirs of tailzie therein mentioned, but under the whole conditions, provisions, restrictions, and others contained in the original deed, excepting in so far as the same were thereby revoked and altered. This deed of destination and alteration contains certain relaxations on the provisions and conditions of the original entail, and declares "that the whole conditions, restrictions, reservations, and clauses prohibitory, irritant, and resolutive, contained in the said disposition and deed of tailzie, so far as not herein altered, and the whole conditions, provisions, and restrictions herein written, shall apply to and affect and limit the said George William Hutton, notwithstanding that in form he may now succeed as institute under the said entail, it not being my wish and intention that his powers and rights should be in anyways extended in consequence of the present deed of alteration, but that the whole fetters and condi-

tions of the said tailzie shall be applicable to him in the same manner as if he had continued to be a substitute heir of entail, as in the within written deed of tailzie." The deed of alteration also reserved power to the granter to dispose of the estate at any time of his life, and even on deathbed, in any way he might think fit. This deed and the deed of entail both contain clauses dispensing with delivery, and declaring that the same, and any alterations which the granter might thereafter make thereon, should be equally good and effectual to all intents and purposes as if the same had been fully completed by infeftment, and formally delivered to the heirs of tailzie, or any other person for their behoof.

Mr Riddell, the entailer, died on 11th December 1849. The present application was made on 29th April 1873. On 4th June 1873 the Lord Ordinary, in accordance with the usual course of procedure, remitted to Mr George Dalziel, W.S., to inquire into the circumstances stated in the petition, and whether the provisions of the statutes and Acts of Sederunt had been complied with, and to report.

On 16th July 1873 Mr Dalziel issued a report, in which he raised a question as to what was to be held to be the date of the entail. The portion of the report bearing on this point was as follows:—

"The petition is founded on the statutes 11 and 12 Vict., cap. 36, and 16 and 17 Vict., cap. 94, and particularly on the 3d section of the former and the 4th section of the latter statute.

"The disposition and deed of tailzie, and deed of destination and alteration above-mentioned, both contain a reserved power of revocation, which was not exercised by the granter previous to his death further than in so far as the disposition is altered by the deed of destination and alteration; and together these deeds, which are both *mortis causa* deeds, constitute the entail under which the estate is held. The late Charles Riddell, the granter of both deeds, died on 11th December 1849, at which date his settlements came into operation, though *dated prior* to 1st August 1848. Your reporter would submit for your Lordship's consideration whether the entail constituted by these settlements was a subsisting entail at the date of the Rutherfurd Act; and whether, looking to the principle of that Act, it can be regarded as an entail dated prior to the 1st day of August 1848, and so subject to the provisions of the 3d section of the Act.

"Looking to the importance of this point, your reporter has thought it right to obtain from the petitioner his views on the subject, and to submit them to your Lordship for consideration.

"To enable the petitioner to take advantage of the 3d section of the Rntherfurd Act, it is necessary for him to show that the two *mortis causa* deeds above referred to, both executed prior to, but not coming into operation until after 1st August 1848, constitute a tailzie dated prior to that date within the meaning of the 3d section of the Act.

"By section 1 of the Act it is enacted that 'where *any estate* in Scotland shall be entailed by a deed of tailzie *dated* on or after the 1st day of August 1848, it shall be lawful for any heir of entail born after the *date* of such tailzie, being of full age and in possession of such entailed estate by virtue of such tailzie, to acquire such estate' in fee-simple by compliance with the procedure therein pointed out.

"By section 3 it is enacted 'That it shall be lawful for any heir of entail, being of full age and in possession of an entailed estate in Scotland holden by virtue *of any tailzie dated prior to the 1st day of August* 1848, to acquire such estate' in fee-simple, by complying with the procedure therein mentioned. The petitioner contends, in the sense of the Acts referred to, and particularly the 3d section of the Rutherfurd Act quoted, that the *date* of an entail in such a case as the present is the date on which the entail was *executed*, and not the date on which it came into operation.

"In support of this contention he has submitted to your reporter the following considerations, desiring it to be kept in view that the principle of the Rutherfurd Act, and subsequent Entail Acts, and the principle of construction applicable thereto, is to favour freedom from the fetters of entail:—

1. "The petitioner submits that in the Rutherfurd Act a material distinction is drawn between entails dated on or after 1st August 1848 and entails dated prior to that date, and the rights of heirs of entail under the same. The Act, he says, speaks of a 'deed of tailzie dated *on or after*' 1st August 1848. and 'any tailzie *dated prior to*' that date; and the expressions used, he contends, refer to the *actual* dates of the deeds, and not to any *constructive* date, excepting only in one class of cases specially provided for by the Act, where a *constructive date* is to be applied, as will be afterwards adverted to.

"He points out that in the general case the Act speaks of entails without making any distinction between *mortis causa* deeds and deeds *inter vivos*; and with reference to their date speaks only of when they are *dated*, without any allusion either to the date of delivery in the case of deeds *inter vivos*, or to the date when they came into operation in the case of *mortis causa* deeds; and maintains that it is irrelevant under the provisions of the Act to inquire either as to the date of delivery in the one case, or as to the date of the death of the maker, which comes in place of delivery, in the other.

"[It appears, however, to your reporter that it must be kept in view that until the death of Charles Riddell, his *mortis causa* deeds had neither the effect of divesting him of his property, nor of investing the grantees with any right or claim under them, and that until his death it was impossible in any view to hold that the lands were subject to the fetters of an entail.]

2. "The petitioner further submits that his view, that the date referred to in the Rutherfurd Act in the general case (and he makes reference specially to section 3d, on which the petition is founded), is the *actual* and *not* any *constructive* date, is further strengthened by a consideration of the provisions of section 28. By this section a constructive date is, for the purposes of the Act, applied to any entail made thereafter in execution of a trust, such constructive date being the date at which the Act of Parliament or deed constituting the trust first came into operation, whatever be the actual date of the entail.

"Under that section the petitioner maintains that the constructive date of any entail to which it applies must be *before* and *cannot be after* the *actual* date, and that the provision proceeds on the principle of drawing dack the date of the entail in order to favour *freedom from the fetters*, which is the leading principle of the Act.

"[In regard to this your reporter begs to notice that section 28 is in the following terms:—'And be it enacted that for the purposes of this Act the

date at which the Act of Parliament, deed, or writing placing such money or other property under trust, or directing such land to be entailed, first came into operation, shall be held to be the date at which the land should have been entailed in terms of the trust, and shall also be held to be the date of any entail to be made hereafter in execution of the trust, whatever be the actual date of such entail.' This section, it will be observed, applies to cases where money *has* already been placed under trust, and the deed or other writing *has* come into operation; and it seems to your reporter rather to favour the view opposite to that contended for by the petitioner, viz., the view that until the deeds in question came into operation there was no entail. The petitioner attributes the drawing back of the date of entail to the principle of favouring freedom from its fetters; but keeping in view that the section deals with property placed under trust previous to its date, it would rather seem that the object and effect of the drawing back is to put under fetters property which, but for the enactment, would not be so fettered until the constitution of the entail itself. It must be kept in view that in this provision of the Act the Legislature regards the trust-deed as inoperative until the truster's death; and it appears to your reporter that there can be little doubt that it does so, because the trust-deed is, like the entail in the present case, a *mortis causa* deed.]

"5. The petitioner also points out that his view is confirmed by section 47 of the Act, where *mortis causa* deeds are expressly referred to, and where the date of such deeds is spoken of as that on which they are *dated*, and not that on which they came into operation; and the party who is thereby authorised to acquire in fee-simple the property held under any *mortis causa* deed, under limitations of entail, is a party of full age, born *after the date of such deed*, and not after the death of the maker of it, or when the deed came into operation.

"[As far as necessary for present purposes, your reporter may further quote the section referred to, which is in the following terms:—'And be it enacted that where any land or estate in Scotland shall, by virtue of any trust-disposition or settlement, or other deed of trust whatsoever, dated on or after the 1st day of August 1848, be in the lawful possession, either directly or through trustees for his behoof, of a party of full age, born after the date of such trust-disposition or settlement or other deed of trust, such party,' &c. This enactment was passed to prevent the Act being defeated by trusts. It expressly deals with deeds executed after the passing of the Act, and it seems doubtful whether it has any bearing on the question now under consideration.]

"4. As further confirmatory of the petitioner's view, he also makes reference to the Entail Amendment Act, 16 and 17 Vict. c. 94, § 8, where, in authorising the application of money held in trust for the purpose of purchasing land to be entailed, the deeds under which the same is held are referred to as 'any deed executed prior to the 1st day of August 1848.'

"The petitioner states that it will be noticed that the deeds to which that section applies may be either deeds *inter vivos* or *mortis causa*; and in both cases he holds that it is the date when the deed is executed, and whether *executed prior to or on or after* 1st August 1848, and *not when it comes into operation*, that rules the application of the enactment. The petitioner further holds that that section assumes that the date of entails contemplated by the Rutherfurd Act is the date when they are executed, and not the date when they may come into operation.

["The 8th section referred to is as follows:—'Where under any deed executed prior to the 1st day of August 1848, any money is or shall be held in trust for the purpose of purchasing land to be entailed,' &c. Looking to the bare words of the section, the use of the word '*executed*' seems to favour the petitioner's contention. But if weight is to be given to the marginal rubric of the section, and which in cases of ambiguity it is thought may be read in connection with the section itself, the words, 'where under any deed executed prior to the 1st day of August 1848, any money is or shall be held in trust,' are spoken of as 'money placed in trust prior to 1st August 1848.' In that view the word 'executed' has not the same meaning as 'signed,' but infers the trust being in *actual operation* previous to 1st August 1848.]

"5. The petitioner further points out that by the Entail Amendment Act of 1868, 31 and 32 Vict., c. 84, § 17, provision is made for the constitution of liferent interests in moveable or personal estate, by virtue of any deed dated after the passing of that Act; and that it is there parenthetically enacted that the date of any testamentary or *mortis causa* deed shall be taken to be the date of the death of the granter. He observes that that enactment must be held as applicable only to the deeds referred to in the section, which are deeds relating merely to *moveable or personal estate*, and dated (in the sense of that section) after the passing of that Act; and that it leaves untouched all deeds relating to heritage, and all deeds dated (in the sense of any of the Acts) prior to the Act of 1868.

"[Your reporter does not consider that these views have much bearing on the point in question, but it rather appears to him that if anything is to be gathered from the 17th section of the Act of 1868, it is an additional confirmation of the view that an entail constituted as the present one cannot be held to be a tailzie in terms of the Act until the death of the granter.]

"The petitioner contends that the question is not—When did the deeds become a tailzie? but What is the date of the entail? and, in conclusion, he submits that the date of entails contemplated by the Rutherfurd Act, whether contained in deeds *inter vivos* or *mortis causa*, is their *actual* and *not* any *constructive* date, excepting only in the class of cases where a constructive date is expressly given by the 28th section of the Act, an exception which, he argues, proves the rule, and an exception which proceeds upon the same principle as the rule—one of the ruling principles of the Act—that of *favouring freedom from the fetters of entail.*

"[Your reporter has been unable to discover any decision exactly bearing on the point raised, and he has therefore thought it right to lay before your Lordship thus fully the petitioner's views in regard to it.] . . .

On 12th January 1874, the Lord Ordinary pronounced an interlocutor reporting the petition to the First Division of the Court. In a note to his interlocutor his Lordship observed:—"The Lord Ordinary, after consideration, has come to be of opinion that the petitioner is entitled to succeed in

this application to have the lands and estate of Muselie disentailed. The question involved in the application is, however, of so much importance, that he thinks its decision ought not to rest on the opinion of a single Judge, and as the only mode of securing that his opinion should be reviewed, he has thought it right to report the case. If the application had been simply granted, the interlocutor would have been acquiesced in, and as this course would probably be also followed in other cases coming before the Lord Ordinary involving the same question, it is of importance that the point should now be raised and determined in the Inner House. . . .

"The petitioner can only exercise the power to disentail the estate as proposed if it shall be held that he is in possession by virtue of a tailzie dated prior to 1st August 1848; for if the entail be truly dated after 1st August 1848 in the meaning of the statute, then, under section 1st of the statute, where the heir in possession, as in the case of the petitioner, was born before the date of the tailzie, he must have the consent of the heir-apparent under the entail, and such heir-apparent must be of the age of twenty-five years complete, and born after the date of the tailzie. The petitioner has no issue, and the next heir entitled to succeed after him is his brother.

"The question properly raised by the report of Mr George Dalziel, W.S., to whom the proceedings were remitted, is whether the entail can be truly regarded as dated prior to 1st August 1848, when in point of fact the original deed and deed of alteration were at that date lying in the repositories of the granter, subject to his entire control, and did not come into existence as operative deeds until the granter died on 11th December 1849. The Lord Ordinary was at first disposed to take the view which Mr Dalziel has adopted, and to hold that the deed could not be taken under the statute as a tailzie dated prior to 1st August 1848, or prior to the day when it first became operative; and, although executed prior to 1st August 1848, yet, as it had not been delivered, that it could not be regarded as dated prior to its delivery through the death of the granter. But after further consideration of the provisions of the Rutherfurd Act, and of the two Entail Amendment Acts which have been passed since 1848, viz., the 16 and 17 Vict., c. 94, and 31 and 32 Vict., c. 84, he has come to the conclusion that the terms of the third section of the Rutherfurd Act are to be taken literally; and that if a deed of entail has in point of fact been signed or executed before 1st August 1848, although not then delivered, and although it be a *mortis causa* deed, which might never have come into operation in consequence of a change of intention on the part of the granter, and which in fact did not come into operation till the granter's death, after 1st August 1848, yet, having become operative, it is then to be taken under the statute as of the date when it was signed, and the estate is to be regarded as holden by virtue of a tailzie 'dated prior to the 1st day of August 1848.'

"It is somewhat startling that a deed should be taken as a tailzie prior to 1st August 1848 which did not become an effectual or operative deed at all for years thereafter; but this is only the result of giving to the language of the statute its literal interpretation, according to which the date of signature or execution of the deed is the test to be applied in ascertaining whether the entail is to be regarded as one prior or subsequent to 1st August 1848. The words are—'holden by virtue of any tailzie *dated* prior to the 1st day of August 1848,'—not by virtue of any tailzie created after 1st August 1848, or by virtue of any tailzie coming into operation after that date or taking effect after that date—any of which expressions would naturally have been used had the Legislature intended that anything should be regarded except the date when the deed was signed.

"This literal interpretation of the Act—giving to the terms used their usual and ordinary meaning where that meaning is quite intelligible—must receive effect unless some obvious absurdity or some repugnancy with the purposes of the statute should follow, or unless there be something in other parts of the statute to conflict with the literal interpretation, and to show that a different meaning was intended. The Lord Ordinary does not think any such absurdity or repugnancy results from giving to the word 'dated' its ordinary meaning of 'signed' or 'executed,' and he has been unable to find in the Act any expressions which conflict with this meaning. The statute, which came into force on 14th August 1848, introduced important general rules or provisions applicable to entails, distinguishing between what may be called past or old entails and future or new entails, and it is true that the division to be naturally expected would be between entails which came into operation before and after the passing of the Act respectively, or before and after a date fixed by the Act. But just as the statute arbitrarily fixed a certain date as the point of time for distinguishing between old and new entails, so there is nothing absurd or unreasonable in the further arbitrary provision that the date of the deed, and not the date when it came into operation, should be made the criterion by which the distinction should be settled. There does not therefore appear to be any strong or good reason for saying, contrary to the literal interpretation of the words used, that the meaning of the statute must have been that the tailzie should be held as dated on the day when it came into operation, and not on the day of the true date of the deed, viz., the date of its execution. The application of the rule of taking the actual date of execution of the deed as the only criterion, has this to recommend it, that it provides a test which is free from uncertainty, and which admits of being readily applied.

"The expression used throughout the Rutherfurd Act, with the exception of the provisions of section 28th, to be immediately noticed, seem to be always the same, and to distinguish between a tailzie dated on or after 1st August 1848 and a tailzie dated prior to that date. Reference may be made to the 1st, 2d, 3d, 5th, and 12th sections, as illustrating this observation, and as showing at the same time how important it is with reference to other cases which may arise that the statute should receive an authoritative interpretation on the question which has been now raised. The 28th section of the Act (which formed the subject of much argument and consideration in the case of Petition *Black*, 4th November 1873, 11 Scottish Law Reporter, p. 48), is important in the present question, as showing that when it is intended that the words used in the statute shall not receive their literal and usual signification, this is expressly provided. But for the provisions of that section, it would appear that, for the purposes of the Act, the

actual date of investment of trust-funds, or at least the date when presumably an investment could have been got, would have been taken as the date at which any entail in pursuance of trust directions should have been made, or as the date of the entail; but the Act has declared that the date at which the Act of Parliament or deed placing the money or property under trust 'first came into operation,' shall be held to be the date at which the land should have been entailed, and also the date of the entail. This section also warrants the observation and argument, that where it was intended that the date of a deed coming into force should be the important point of time for the application of certain statutory provisions, or in reference to which certain privileges or advantages were conferred, language apt and suitable for the purpose was used. The words 'first came into operation,' would have been quite suitable in place of the word 'dated' in the 3d section, and the other sections of the statute to which the Lord Ordinary has referred. Occurring as these words do in this very statute, it is only reasonable to infer that if the Legislature had meant that the date when the deed came into operation should be appealed to, it would have been provided that the powers competent to heirs of entail in possession would have been made to depend upon whether such heirs were in possession of an estate holden under an entail which had 'come into operation' prior to 1st August 1848, or on or after that date.

"In the case of *Black*, the date when the trust came into operation was held to be the date of the entail, although the making of an entail at all had been dependent on a contingency. But for the occurrence of that contingency there might never have been an entail; but the contingency having occurred, the entail was then held as of the date of the trust-deed. It is less remarkable to hold, as the Lord Ordinary does in the present case, that an entail which did come into operation shall be held as 'dated' on the day when it was really executed, although it depended on a contingency, viz., the final will or intention of the maker, which was not determined for some years thereafter, whether the deed should become an operative entail.

"Taking, therefore, the provisions of the Rutherfurd Act alone into view, the Lord Ordinary is of opinion that the petitioner is entitled to have the estates held by him disentailed under section 3d of the statute.

"The terms of the provisions of the Act 16 and 17 Vict., cap. 94, appear to confirm and strengthen the view which the Lord Ordinary has taken. In sections 8, 12, and 13, the word 'executed' is used in connection with the making of an entail, and for the purpose of distinguishing between old and new entails, in place of the word 'dated' and evidently referring to the signature of the deed by the granter.

"The deed now under consideration could not, in the opinion of the Lord Ordinary, be taken as a deed 'executed' after 1st August 1848, so as to make the provisions of the two last mentioned sections applicable to the estate. This suggests the further observation, that if, in place of the word 'dated,' the word 'executed' had occurred in section 3 of the Rutherfurd Act, the term executed must have applied to the date of signing, for the execution of the deed is its signature, as 'the solemnities of execution' are the requirements of the statutes for the testing of deeds at the time when they are signed or executed.

"In section 22d of the Act 16 and 17 Vict., another mode of expression is introduced, viz., 'under an entail created before the passing of the said Act,' viz., 14th August 1848. These terms would probably be held to have a different meaning from either of the words 'dated' or 'executed;' for the expression 'created,' as applied to an entail, does not refer necessarily or directly to the act of signature or execution of the deed, but rather to the deed becoming operative. But, however this question might be determined, it does not appear to affect the present question, because the word 'dated' has ordinarily a different signification from the word 'created,' and the section in which this last-mentioned word occurs relates to a subject, viz., the propulsion of the fee of an entailed estate, which is quite distinct from that of any of the other provisions of the statutes to which the Lord Ordinary has alluded, in which the word 'dated' occurs.

"The Act 31 and 32 Vict., cap. 84, in its 13th and 18th sections, repeats the use of the word 'dated' in the same way as in the Rutherfurd Act; but again, in section 17, as in section 28 of the Rutherfurd Act, an artificial date—if the expression may be used—is introduced by the special enactment 'that the date of any testamentary or *mortis causa* deed shall be taken to be the date of the death of the granter, and the date of any contract of marriage shall be taken to be the date of the dissolution of the marriage.'

"But for these qualifying and enacting words, it is to be assumed that even in the case of *mortis causa* deeds, for the purpose of the enactment, they must be taken as being dated on the day when they were signed; and the absence of such qualifying words in section 3d of the Rutherfurd Act leads to the inference that the words used are to be taken in their ordinary and literal meaning.

"The Lord Ordinary may further observe, that he does not think the general rule that *mortis causa* deeds, and at least wills or settlements, are to be read as speaking from the time of the granter's death, affects the view which he has adopted. For, in the first place, this rule is subject to the qualification, that if there are expressions in the will showing that the granter intended to refer only to property, heritable and moveable, with reference to the day of the date of the will, and not to the day of the death, the deed will be so construed, and this shows that the actual date of the deed—that is, of its execution—is often of extreme importance in its consequences. But besides, though it be true that the deed must be read as speaking from the death, it is not a deed 'dated' on deathbed, or which can be properly so described. And so, referring to the Scottish law of deathbed, recently abolished, though a *mortis causa* deed disposing of heritage was read as speaking from the date of the death of the granter, and thus included property acquired down to that time, yet, if 'dated' upwards of sixty days before his death, it was free from the challenge of the heir.

"On these grounds, while the Lord Ordinary regards the question as one of importance, and not free from difficulty, he has come to the conclusion that the petitioner holds his estate under a tailzie dated prior to 1st August 1848, and is therefore entitled to have the estate disentailed with the consents of the three next heirs as proposed. . . . "

At advising—

LORD PRESIDENT—This is an application for authority to disentail under the 3d section of the

Entail Amendment Act of 1848, and the 4th section of the Act of 1853. The entail of Meuslie, in which the petitioner is heir in possession, was created by two deeds both executed by Charles Riddell. The first is a disposition and tailzie of 25th February 1836, and the second is a deed of alteration of 1st July 1848. Both these deeds are *mortis causa*, and therefore did not come into operation until the death of the granter, which occurred on 11th December 1849.

Now under the 3d section of the Entail Amendment Act of 1848 the petitioner cannot succeed unless the estate came under the entail prior to 1st August 1848. That section provides—[His Lordship here quoted the 3d section of statute]. Now there is no doubt that the petitioner has complied with all the requirements of the statute if he can show that he holds the estate by "a deed of tailzie dated prior to 1st August 1848." So the question before us is, What is the true date of the entail? It his been very properly suggested by the Reporter for consideration that the date of a *mortis causa* deed is the time when it comes into operation, and not the date of execution of the deed. If that is a correct view, then the petitioner must fail, for the 3d section of the Act 1848 provides that in order that the heir of entail may avail himself of its provisions he must hold under a deed of entail dated prior to 1st August 1848. But the deed in this case only came into operation in 1849, and if that is to be taken as the date of the deed the petitioner must fail. But it is contended for the petitioner that the words in the statute must be construed according to their literal and ordinary meaning, and the date of the deed means the date which the deed bears—the date of execution.

I am of opinion with the Lord Ordinary that the latter is the true construction of the provisions of the statute.

The date of the entail is a matter of great importance in the execution of the statute, and the date, 1st August 1848, is also of great importance, and is referred to in many clauses of the statute. The first place where that date is mentioned is the 1st section of the statute. The date occurs there twice, for it is provided that "Where any estate is entailed by deed of tailzie dated on or after 1st August 1848, it shall be lawful for an heir of entail born on or after such date," &c., to acquire the estate in fee simple. Now, while it would not be a strange construction of this clause to say that a tailzie made by a *mortis causa* deed is dated at the death of the granter—for then only it comes into operation—it is difficult to maintain that an heir of entail born after the execution of the deed of entail, but before the death of the granter, has not been born after the date of the entail. So in the 1st section it is difficult to take the date of the entail as meaning anything else than the date of the execution of the deed—the literal meaning of the expression. I need not go through all the sections of the statute in which the date of the deed is of importance, but shall only refer to one in particular, the 47th section. That section provides against the Act being defeated by trusts, and enacts that where lands are, in virtue of a trust disposition or settlement or other deed of trust, dated after 1st August 1848, in lawful possession of a party born after the date of such deed, such party shall not be affected by any prohibition in the deeds, &c. Now here trusts in regard to *mortis causa* deeds are plainly contemplated, for the word "settlement" is used. If it had been intended that the date of *mortis causa* deeds should be taken to be the date of their coming into operation, this would have been a very natural place to make such a provision and explanation. But there is no such provision here, and we find that where the framers of the statute intended the date of the deed coming into operation to be looked to it is so provided. Thus, in the 28th section of the Act of 1848 the date of the deed coming into operation is specified as the date of the entail in reference to the matter with which that section deals. An artificial date is introduced to meet the particular case, and the fact that it is so is a strong argument against any such artificial date being assumed by implication when there is no positive provision.

Then, in construing this Act it is not improper to consider the other statutes upon the same subject. The Act of 1848 was amended by the Act of 1853, and again by the Act of 1868. It is remarkable that in the Act of 1853 the expression "date" does not occur when dealing with the same case to which that expression is applied in the Act of 1848; and I think it is reasonable to conjecture that this change of expression is intended to remove any such doubt as exists here. In the Act of 1853 the word used is "executed." Now, it is difficult to say that a deed is executed at the death of the granter. The execution of a deed means a single act, performed in one moment—viz., the signature of the deed in presence of witnesses. Execution of a deed has no other meaning. Further, in the Act of 1868 there are some sections worthy of consideration. Here the Legislature revived the old expression "dated." In the 13th section it is provided that "Where any heir of entail in possession of an entailed estate under an entail dated prior to the first day of August 1848 shall have lawfully propelled the estate," &c.; and in the 18th section a similar expression is used. But in the 17th section, again, there is a remarkable provision, illustrating this question by contrast, in the same way as the 28th section of the Act of 1848. This 17th section prohibits liferents of personal estate beyond certain limits, and in the section the following words occur:—"And where any moveable or personal estate in Scotland shall, by virtue of any deed dated after the passing of this Act (and the date of any testamentary or *mortis causa* deed shall be taken to be the date of the death of the granter; and the date of any contract of marriage shall be taken to be the date of the dissolution of the marriage), be held in liferent by or for behoof of any party of full age born after the date of such deed," and so on. Here, again, for particular purposes artificial dates are introduced. So the inference is, that where no such special provision is made as to the meaning of the expressions used, they must bear their natural meaning.

It is suggested that inconvenience may arise from taking the date of execution of the deed as what is meant. I am not much moved by that argument. I do not, in the first place, see that there would be any inconvenience; and even if there were, we could not on that account put a different construction on the statute from what it plainly bears, for rules of statutes are arbitrary, having for their purpose the attainment of an ultimate design.

If the question we are now considering had been brought up when these statutes were framed, a great deal might have been said on both sides of the

question. But, as I have said, I do not see how taking the date of execution could give rise to any inconvenience, for there cannot be any mistake about the date of the execution of a deed. But it is not uncommon to find difficulty about the date of the death of the maker of the deed.

Then the construction which takes the date of execution is more in accordance with the leading principle of the statute—which is, that no one is to be entitled after 1st August 1848 to impose fetters on a person then unborn. Now, surely in carrying into effect this principle it is much easier to say that a person is not to do this when he makes the deed than when he dies.

So I come to the conclusion that the petitioner here is entitled to disentail.

LORD DEAS—I agree with your Lordship in observing that we cannot look much to matters of convenience or inconvenience in construing a statute; and I would only remark on this point that the inconvenience pointed out by your Lordship as likely to arise if the date of the testator's death was taken, applies equally to the cases contemplated in the 28th section, where the statute provides that the date of the deed is the death of the granter.

The rule is, that *mortis causa* deeds do not come into operation until the death of the granter, and therefore in all questions—with few exceptions—as to the effect of such deeds, the date of the death of the granter, and not the date of execution of the deed, is taken.

There are some kinds of questions in which it is allowable to look at the date of execution—for example, in questions as to the meaning of the testator; but such cases are exceptions to the general rule, which is as I have stated. I do not think the 28th section influences this question, whether that section is looked upon as a particular provision to meet a particular case, or as indicating the reasonableness of taking the time when a deed comes into operation as the date of the deed. So the question is, whether, in construing this statute we are to hold that the expression "date of the deed" means the same thing when applied *inter vivos* and to *mortis causa* deeds. I am disposed to construe the words, "the date of the entail," as meaning the date when the deed becomes an entail, which it does not do until the death of the granter.

I have arrived at this conclusion with some hesitation and difficulty; but, on the whole, I must dissent from the opinion expressed by your Lordship.

LORD ARDMILLAN and LORD JERVISWOODE concurred with the Lord President.

The Court pronounced the following interlocutor:—

"Find that the tailzie of the estate of Muselie, of which the petitioner is the heir in possession, being contained in two deeds dated respectively 25th February 1836 and 1st July 1848, the said tailzie must be held, within the meaning of the 3d section of 11 and 12 Vict., c. 36, to be dated prior to the 1st day of August 1848, although the granter of the said two deeds did not die till the 11th December 1849; and remit to the Lord Ordinary to proceed further as shall be just and consistent with the above finding."

Counsel for Petitioner--Solicitor-General (Clark), Q.C., and Rankine. Agents—Paterson & Romanes, W.S.

Friday, February 13.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

LYON & M'INTOSH *v.* FORBES IRVINE.

Lease.

Circumstances in which certain articles and regulations were *held* to be incorporated in the lease.

Lease—Irritancy—Assignation—Factory.

In articles and regulations to be observed on an estate, and which were incorporated into the lease of a farm, it was provided "that creditors, or others acting in their names, or in that of the tenant, after insolvency, are specially excluded, and in all cases of bankruptcy of tenants the same shall operate as a violation, irritancy, and extinction of the lease, and the heritor shall be at liberty to raise an action of removing," &c.; "and the same action shall be competent to the heritor in the event of assigning or subletting." The tenant of the farm under the said lease granted a factory and commission in favour of a third party, conferring upon him all the management of the farm, and excluding himself from any share thereof, and declaring the said deed not to be revocable. *Held*—(1) that assigning or sub-letting operated an irritancy of the lease; (2) that the factory and commission amounted to an assignation; and (3) that the irritancy was not purgeable.

Process—Action of Removing—Competency.

A lease contained a provision that in certain events "the heritor should be at liberty to raise an action of removing and remove the tenant, alike in the same manner as if the lease were expired." One of the events contemplated having occurred, an action was brought on 25th February 1873, concluding for "immediate removal," while under the lease the earliest term of removal was the 1st of March—*Held* that the action as laid was incompetent under the lease.

This was a Note of Suspension of two decrees in the Sheriff-court of Aberdeenshire and Kincardineshire, for William Lyon junior, residing at Newton-of-Drum, Aberdeenshire, and for Daniel M'Intosh, farmer, Craiginches, Kincardineshire, against Alexander Forbes Irvine, of Drum, Aberdeenshire, in the following circumstances:—By contract of lease, dated the 7th day of April 1856, the respondent, Alexander Forbes Irvine of Drum, as factor and commissioner for his father, the deceased Alexander Forbes Irvine, who was then proprietor of the lands and estate of Drum, let to the now deceased William Lyon, whom failing to his youngest son David Lyon, and his heirs, whom also failing to his eldest son the complainer, William Lyon junior, and his heirs, the farm of Newton-of-Drum, including the Whinnyhill, for the space of nineteen years from the term of Whitsunday 1859. In a memorandum, dated the