probability that the respondent will rather give up her claim for further aliment than part with her child. This consideration, however, does not furnish a ground for the decision of the controversy. The same thing has been or might have been said in most of the cases of this description which have come before the Court.

"The first consideration which is urged by the respondent as a reason why she should not be held bound to give up her claim on the complainer for aliment if she is to retain the custody of her child, is that he is now a married man, living with his wife and the children of their marriage. The introduction into the family of such a stranger as this bastard child, must, it is said, be a cause of misery to all, though the principal sufferer would of course be the bastard. This is a view which in all likelihood would be realised. Any arrangement more undesirable than what is proposed could scarcely be imagined; but nevertheless it has never been sustained as a ground upon which such an offer as the complainer's may be rejected without releasing him from liability for future aliment. The contrary indeed is proved by several decisions of the Court. The respondent, to strengthen this part of her case, alleges that illwill and violence have already been exhibited towards the child by the wife of the complainer. But the Lord Ordinary is of opinion that this has not been satisfactorily established; and, therefore, the allegation has been thrown out of account in repelling the reasons of suspension.

"What the Lord Ordinary has proceeded upon is this—The respondent is a Protestant, and as she desires that her child should be brought up as a Protestant, she refuses to give it up to the complainer, who is a Roman Catholic, and whose wife is a Roman Catholic, because it would be brought up by them as a Roman Catholic. The point thus raised for decision is new, and there is no authority touching it to be found in any of the books. This, of course, renders the decision of the present case all the more difficult. If a bastard is to regarded merely as an animal, for whose upbringing all that has to be provided is so much daily food, this objection must be overruled; but it cannot be so regarded exclusively. It is a human being. The child in question is already intelligent, and will soon be responsible for its conduct. There are thus other things to be supplied besides food and raiment, and of these religious training is the most important. This is a consideration which cannot be ignored. And who is to determine the creed which the child is to be taught? Not the complainer surely, for he has none of the rights of a father, and indeed is not held in full legal acceptance to be the father. The mother of a bastard is the only parent that, as such, is recognised. Her will, therefore, on this subject must be paramount. She has not only the relative right, but is under a relative obligation. The law is interested in the exercise of the one and in the fulfilment of the other, and neither, as the Lord Ordinary thinks, may be frustrated by forcing upon her such a temptation to sacrifice her duty as that presented in the offer of the complainer. He, indeed, has explained that, should the Court so direct, he, in place of bringing up the respondent's child as a Roman Catholic in his own house, will board it out in a respectable family that it may be brought up as a Protestant. The Court, it is thought, will not assume the responsibility of giving any such direction. Nor is there any need for its interference. The willingness of the complainer to transfer the custody shows plainly enough that there is no legitimate interest or end which is to be served by taking the child out of the custody of the respondent.

"Two other things may properly be explained. The first is, that the Lord Ordinary's judgment has nothing to do with the comparative merits of Protestantism and Roman Catholicism. The respondent happens to be a Protestant, but had she been a Roman Catholic and the complainer a Protestant, the same decision would have been pronounced. The other is, that though it has been suggested on the part of the complainer that the child in question has not been well cared for by the mother, the appearance and intelligence of the boy point to the opposite conclusion. This can have little influence upon the decision; but nevertheless it is only fair that the impression produced upon the mind of the Lord Ordinary in the course of the boy's examination as a witness should be communicated."

The interlocutor was acquiesced in.

Counsel for the Complainer—Vary Campbell. Agent—A. Kirk Mackie, S.S.C.

Counsel for the Respondent—Burnet. Agent—J. Scott Hampton, S.S.C.

Saturday, November 17.

SECOND DIVISION.

[Lord Rutherfurd-Clark, Ordinary.

YEATMAN *v.* PROCTOR AND OTHERS.

Error—Issues—Averments founding an Issue of Essential Error.

Held in an action of reduction of a probative deed on grounds of fraud, facility, and circumvention, that in order to obtain an issue also of essential error the record must contain a specific statement of what the error was, and of what the intention of the granter of the deed had been, and that merely negative averments were insufficient.

Process—Review—Statute 48 *Geo. III. cap.* 151, *sec.* 15—*Leave to Appeal to House of Lords.*

Circumstances where leave to appeal to the House of Lords against an interlocutory judgment disallowing an issue of essential error in an action of reduction of a probative deed was *refused*, with £3, 3s. of expenses.

This was an action raised by Mrs Yeatman, wife of Harry Yeatman, retired commander R.N., against James Proctor and others, some of the next-of-kin and the heir-at-law of Miss Macpherson Grant of Aberlour, Banffshire, concluding for reduction of a pretended deed of revocation bearing to be executed by her on 2d November 1876, and which bore that she thereby revoked all testamentary settlements theretofore executed by her, and

in particular a certain trust-disposition and settlement dated 8th March 1873.

Miss Grant in 1854 had succeeded on the death of an uncle to a fortune amounting to upwards of £200,000 in land and moveable property. Mrs Yeatman, then Miss Charlotte Temple, had met Miss Grant in London in 1864, and thereafter the two ladies became very fond of one another, till ultimately, in 1865, Miss Temple went to live with Miss Grant, and continued to do so until her marriage in February 1876. More than one will was executed by Miss Grant in Miss Temple's favour, the last of them being dated 8th March 1873, by which deed it was averred by the pursuer in this action that the succession to Miss Grant's estate fell to be regulated.

The document under reduction was executed in October or November 1876, and was in the following terms:—'I, Miss Margaret Gordon Macpherson Grant of Aberlour House, in the county of Banff, do hereby revoke all testamentary settlements heretofore executed by me; and, in particular, without prejudice to the generality of this revocation, I hereby revoke a trust-disposition and settlement dated the 8th day of March 1873, now in the custody of myself; in witness whereof I have subscribed these presents, written at my request by Simon Keir, Burnside, Duffus, by Elgin, at Aberlour House, on the 2d day of November 1876, before these witnesses, the said Simon Keir, tenant of Burnside, Duffus, by Elgin, and William Watt, my personal servant. (Signed) M. G. Macpherson Grant; S. Keir, witness; William Watt, witness."

In this action of reduction of that document the pursuer made averments upon which she proposed the following issues:—"(1) Whether the deed of revocation, of which No. 11 of process is an extract, is not the deed of the deceased Miss Margaret Gordon Macpherson Grant of Aberlour? (2) Whether in granting the said deed the said Miss Margaret Gordon Macpherson Grant was under essential error as to its import and effect? (3) Whether at the date of the said deed the said Miss Margaret Gordon Macpherson Grant was weak and facile in mind and easily imposed upon, and whether Simon Keir, tenant of Burnside, Duffus, by Elgin, taking advantage of her weakness and facility, did by fraud or circumvention impetrate and obtain the said deed of revocation from the said Miss Margaret Gordon Macpherson Grant to her lesion?"

There was no objection on the part of the defenders to the first and third issue. It was, however, contended that there was no relevant statement on record to justify the second issue.

The averments upon which the issue was asked were as follows—"(Cond. 9) No draft of said document was submitted for Miss Grant's consideration, and neither the principal nor a copy thereof remained in her custody, although the said trust-disposition and settlement was carefully preserved by her, and remained in her repositories till the last. The said document was not prepared or revised by or submitted to Miss Grant's solicitor before her signature was obtained thereto, although Miss Grant's local agents, who had prepared her settlement, were at Elgin, close at hand. It was not duly executed by Miss Grant, nor did the witnesses see her sign or hear her acknowledge her subscription, and it is wanting in the solemnities required by law. (Cond. 11) The said deed was signed by her in essential error as to its import and effect, induced by the misrepresentations or concealment of the said Simon Keir. Had she known and understood its import and effect she would not have signed any such document. In particular, she did not understand that the effect of the deed would be intestacy, and that all her directions for the disposal of her estate would be recalled; and she did not understand that the entail which she directed to be made could not be made, and that every one of the special legatees, who were her personal friends, were to be cut out in favour of heirs *ab intestato* with whom she would not and with whom she never did associate. (Cond. 12) . . . The effect of said writing, if the same be sustained, is not only to recall the foresaid trust-disposition and settlement of 1873, by which Miss Grant sought to perpetuate the name and family of Grant of Aberlour either in the person of her own descendants or of those of the pursuer or her nephews, but also to revoke the specific legacies in favour of the pursuer and Miss Grant's other friends therein mentioned, which Miss Grant never intended to revoke. The said writing also revokes a deed of directions executed by Miss Grant on 14th April 1874, in furtherance of what had been one of the most cherished schemes of her life, viz., the establishment and endowment of an Episcopal church and schools at Craigellachie. For this purpose Miss Grant had taken a feu from Lord Fife at Craigellachie, upon which a school was built, which was used as a church on Sundays, and she engaged a clergyman at her own expense to officiate. In 1874 she also acquired a feu from Mr Grant of Elchies of a piece of ground in the village of Aberlour for a girls' school. The services at Craigellachie were so well attended that Miss Grant resolved to build a church on her own property and endow it and the schools; and the foresaid deed of directions was accordingly prepared by her agents and executed. Following out Miss Grant's intentions, a constitution was obtained from the bishop, and as she had undertaken to build and endow the church the patronage was vested in her and her successors in the estate of Aberlour so long as they were members of the Episcopal communion. The church was partly built and consecrated at the time of Miss Grant's death, but no further deed of endowment was executed by her. If the will and deed of directions are to be held as recalled, one of the chief objects of Miss Grant's life will be frustrated. (Cond. 13) If the deed under reduction be given effect to, the result will be intestacy, and the succession will be opened to persons whom Miss Grant never intended to succeed to her, with whom she never in any way associated, and of whom when she spoke of them she did so in terms implying aversion and dislike. She never corresponded with any of them, and though they were in humble circumstances she never aided them by pecuniary assistance. She did not and could not understand that the effect of the deed she was signing was to hand over her property to these persons and divert it from her intimate friends.

Mr Simon Keir, it may be explained, was a London merchant, who had acted as factor in the keeping of the accounts of estates belonging to Miss Grant in the West Indies. The pursuer averred that he had visited Miss Grant in October and November 1876, and that it was on the

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 ırk, 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