over the deceased, and by fraud and circumvention and undue influence, or one or other of them, upon the deceased, who was at the time in a feeble condition of body and mind, and weak and facile, the defender induced him to sign the said settlement. He fraudulently represented to the deceased that his estate was by the said deed conveyed to his (deceased's) relatives or some of them, and not to the defender, and he fraudulently concealed the fact that by said settlement nearly two-thirds of his estate was conveyed to the defender himself. This was not the intention of the testator, and if he had not been deceived by defender as to the import of the deed, and been acted upon by the fraud and circumvention and dominating and undue influence and pressure used by the defender he would not have signed it. The deceased signed the said settlement under essential error as to its contents and its effect, fraudulently induced by defender. The said testator from said 12th September 1888, and prior thereto, down to his death in August 1889, continued in a state of mental debility induced by bodily weakness and intemperate habits, and he was under the belief that his estate would go to his relatives. (Cond. 7) The pursuer believes and avers that the said pretended settlement was not signed by the said George Collie, now deceased, in presence of the said instrumentary witnesses, nor did the said deceased ever acknowledge his subscription thereto to them. The same is therefore null and void."

The Lord Ordinary (STORMONTH DARLING) approved of the following issues for trial of the cause—' (1) Whether the trust-settlement dated 12th September 1888, of which reduction is sought, is not the deed of the deceased George Collie? (2) Whether on or about the 12th day of September 1888 the said deceased George Collie was weak and facile in mind, and easily imposed upon; and whether the defender, taking advantage of the said weakness and facility, did, by fraud or circumvention, obtain or procure from the said George Collie the said trust-settlement to the lesion of the said George Collie? (3) Whether the defender represented to the deceased that the said trust-settlement merely appointed the defender a trustee or manager of the estate, and that the pursuer and other relatives of the deceased were to have the beneficial interest therein, such not being the nature and import of the said deed; and whether the said deceased George Collie executed the said deed under essential error as to its nature and import induced by the said misrepresentation? (4) Whether Alexander Scorgie and John Edwards junior, the alleged witnesses to the said trust-settlement, or either of them, did not see the said George Collie subscribe the same, and did not hear him acknowledge his subscription?"

The defender reclaimed, and argued—The third issue should be disallowed altogether, as it could not reasonably be extracted from the conflicting averments made by the pursuer, who first charged the defender with guilty silence, and then with having represented what he concealed. At all events, if an issue of essential error were allowed, it should only be of error induced by "false and fraudulent" representations, as there was no averment on record of error on the part of the testator being induced by anything but the false and fraudulent representations of the defender.

The pursuer argued — The third issue should be allowed. The averments on record were not inconsistent, but charged the defender both with concealing the true import of the deed and also with assigning a false effect to it. Further, it was quite settled that if in point of fact there was misrepresentation inducing the signature of a deed, that was quite enough to invalidate the deed, and it was also settled that though it was averred on record that a deed had been executed under essential error induced by false and fraudulent representations, still it was not necessary that "false and fraudulent" should be inserted in the issue—*Hogg, &c.* v. *Campbell, &c.*, March 12, 1884, 2 Macph. 848; *Munro* v. *Strain*, February 14, 1874, 4 R. 522.

At advising—

LORD PRESIDENT—We are all of opinion that the third issue should stand thus—"Whether the defender falsely and fraudulently represented to the deceased that the said trust-settlement merely appointed the defender a trustee or manager of the estate, and that the pursuer and other relatives of the deceased were to have the beneficial interest therein; and whether the said deceased George Collie executed the said deed under essential error as to its nature and effect induced by the said false and fraudulent representations?"

The Court approved of the issues as so adjusted, and appointed them to be the issues for trial of the cause, and remitted to the Lord Ordinary to proceed.

Counsel for the Pursuer—Comrie Thomson — Glegg. Agents — Macpherson & Mackay, W.S.

Counsel for the Defender—D.-F. Balfour, Q.C.—Shaw. Agent—R. C. Gray, S.S.C.

Friday, January 23.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

LORD ELIBANK AND OTHERS *v.* HOPE AND OTHERS.

(*Ante*, vol. xxv. p. 927.)

Teinds—Sub-Valuation—Decree of Approbation.

In a question as to the valuation of teinds, a report by the Sub-Commissioners has no effect until it has been approved of by the High Commission.

Teinds—Sub-Valuation—Decree of Approbation — Augmentation — Reduction of Augmentation—Qualified Decree.

The Sub-Commissioners for Haddington reported in 1630 as to the value of the lands of Ballencrieff in the parish of Aberlady. Various augmentations were granted thereafter. In 1865 an augmentation was obtained, the locality in which, made final in 1868, localled the augmentation on Ballencrieff. In 1888 the proprietor of Ballencrieff obtained decree of approbation of the sub-report. In 1890 the proprietor raised a reduction of the locality of 1868 as having been from the beginning null and void. The heritors did not object to decree of reduction, provided it was so qualified as to exclude all claim of repetition of stipend paid by the pursuer under the decree of locality of 1868.

The Court *granted* decree of reduction, to have effect only from and after the decree of approbation of 1888, for the second half of the crop of 1888 and in all time coming.

This was an action of reduction of a decree of augmentation, modification, and locality obtained by the minister of the parish of Aberlady on 20th March 1868.

No objection was taken to the proposed reduction, but the only compearing defender sought to have the decree qualified as to the time from which any new or rectified locality should take effect.

The circumstances in which the action was raised were as follows:—The Right Honourable Montolieu-Fox-Oliphant-Murray, Lord Elibank, was heir of entail in possession of the estate of Ballencrieff, in the parish of Aberlady, presbytery and county of Haddington. A process of augmentation of stipend was brought by the minister of Aberlady, the Rev. James Hill Tait, who on 20th March 1868 obtained a decree of augmentation. The whole of the said augmentation was localled on Lord Elibank's lands of Ballencrieff. The teinds of these lands were at the date of this decree supposed to be unvalued, but in May 1886 Lord Elibank raised a summons before the Teind Court, concluding for approbation of a sub-valuation dated 10th May 1630 of, *inter alia*, the teinds of the lands of Ballencrieff, and on 16th July 1888 the Teind Court granted a decree in the said action ratifying, allowing, and approving of the report of the Sub-Commissioners of the Presbytery of Haddington in so far as regarded Lord Elibank's lands.

Lord Elibank accordingly raised the present action of reduction against the minister of Aberlady and others to have the decree of locality of March 1868 set aside as null from the beginning, and the pursuer reponed thereagainst. He averred that there were no free teinds of the estate of Ballencrieff when the decree of locality of 1868 was obtained; that there was sufficient free teind belonging to other heritors in the parish to pay the augmentation granted to the minister. He further averred that a new and rectified locality fell to be prepared, which should give effect to the foresaid sub-valuation and decree of approbation, and that the teinds of his lands in the parish should be exempted from any portion of the augmentation.

Defences were lodged for the Right Hon. the Earl of Wemyss, and the Rev. John Hart, minister of the parish of Aberlady, and also for Mr Henry Walter Hope of Luffness. A joint-minute was lodged for the pursuer and the two first-named defenders.

Mr Hope pleaded—"(2) In the event of any decree of reduction being pronounced, it should be so qualified as to exclude all claim by the pursuers against the present defender for repetition of stipend paid by the pursuers under the said decree of locality, in respect—(1st) The said payments were made under a final decree of locality. (2nd) The pursuers were parties to the process in which the said final decree was pronounced. (3rd) All parties have acted with the acquiescence of the pursuers on the footing that the said decree of locality finally fixed the measure of their liability."

On 19th June 1890 the Lord Ordinary (KYLLACHY) granted decree of reduction as concluded for, and ordained the locality then set aside to stand as an interim rule of payment to the minister until furnished with a new locality, and remitted to the Clerk to prepare a locality, and found Mr Hope liable in expenses so far as occasioned by his appearance.

"*Note.*—In this case the only defender who now appears is Mr Hope of Luffness. He does not object to the decree of reduction, at least no argument against the reduction was submitted on his behalf. But he contends that the decree should be qualified by a reservation to the effect that the existing locality should remain the rule of payment of stipend up to the date of decree of reduction being pronounced. His object of course is to obviate claims against him at the instance of the pursuer for overpayments of stipend since the locality was approved final in March 1868.

"I do not doubt that it is competent—that is to say, that it is in accordance with the practice of the Court of Teinds—to qualify a reduction of a locality in the way proposed. This appears to be settled by the case of *Duncan* v. *Brown*, 10 R. 332, and the report by the Clerk of Teinds, which was in that case furnished to the Court. But in the present case I do not consider that the circumstances call for such a reservation. It is here ascertained that the pursuers have during the whole period of the locality under reduction been paying stipend out of stock. In other words, the valuation on which the reduction proceeds is a valuation made so far back as 1630, although only discovered and approved by the High Court in 1888.

"The case is therefore not at all the same as if the reduction had proceeded on a valuation led, say in 1888, which could have been no criterion, or, at all events, no certain criterion, of the previous value of the pursuer's teinds, and particularly of their value when the locality was established in 1868.

"In that state of the facts it might be quite proper that, as in the case of *Duncan*, the decree of reduction should be qualified so as only to operate from its date, but here I have not been able to see any sufficient reason why it should not operate *retro*, nor was any authority quoted to me for making the suggested reservation in a case like the present, where it has been ascertained that the locality has been from the first and all along erroneous. I must therefore repel the whole defences, and grant decree in terms of the conclusions of the summons."

Mr Hope reclaimed, and argued—That the qualification which he sought to have inserted in the decree of reduction was one which the Court could competently make—*Duncan* v. *Brown*, December 8, 1882, 10 R. 332. If the decree of approbation was right as the defender admitted it was, then any rectification of the locality should only take effect from the time when the error was discovered. The sub-valuation in question might have been discovered long before, and it was owing to the pursuer's negligence that it was not. In these circumstances, the decree of reduction should be limited to 16th July 1888, the date of the decree of approbation, as it was only after that date that the decree of locality was wrong.

Argued for the respondent — The reclaimer was not entitled to appear in this process, or to have the qualification which he sought inserted in the decree. The report of the Sub-Commissioners, though it was of no effect until the date of the decree of approbation thereupon, carried back to the date of the report. Any questions of over or under payment must be open to the pursuers, as these could not be determined by the Court of Teinds—*Mackenzie* v. *Lord Advocate*, February 1, 1878, 5 R. (H. of L.) 589.

At advising—

LORD PRESIDENT — A good deal of the argument which we have heard depends upon what is the true character of the report of the Sub-Commissioners which was issued by them for the valuation of the teinds of the lands of Ballencrieff. The heritor was the party to come forward and have the teinds valued, and he accordingly led evidence, and the effect might be either favourable or unfavourable to him. He might have found that less stipend was upon the report of the Sub-Commissioners due than was hitherto due upon the unvalued lands, and on the other hand we might find and did find in that very case that he took no benefit by the report, but on the contrary he would have been better off as a heritor with unvalued teinds, paying one-fifth part of the rent. Now, it was not an obligation on the heritor to carry on the matter further unless he was desirous, and of course he would not do it if he found the report of the Sub-Commissioners adverse to him.

There are a number of cases referred to in the books in which such reports have been acted on by all concerned, and so have come to receive the same effect as if a decree of approbation had been pronounced.

In the ordinary case, until the report has been approved of by the High Commission, it has no effect at all. No one knows anything about it beyond the Sub-Commissioners and heritors, and it may be the Procurator-fiscal of Court. It remains a dead letter till some one gives it vitality by getting it approved of by the High Commission, and the only person who can do this is the heritor. There is no one else I am aware of who is entitled to pursue a summons of approbation of the sub-valuation. The conclusion seems I think necessarily to follow, that the report of the Sub-Commissioners is of no practical avail whatever until it is approved of. It may be acted upon, but no one can be forced to act upon it or be subject to liability under it. In short, it remains entirely dormant. It seems curious that the statute of Charles I. did not limit the time within which the sub-valuation was to be approved of if it was to be operative. But so it is, and accordingly sub-valuations have sometimes been approved of at a distance of centuries beyond the time at which the reports were actually made.

The conclusion I therefore come to is, that the report of the sub-valuation has no practical legal effect until it is approved of by the High Commission; it is really a document of no legal existence.

If that is so, when did this sub-valuation come into existence and receive effect? That is easy to answer—on the 16th of July 1888. It had no existence and could receive no effect before that date, and therefore that is the date at which it became for the first time a valuation of the teinds in question.

Now, the ground upon which the decree of locality is sought to be set aside here is that the heritor has been made to pay more than he had to pay under the old sub-valuation. But the teinds were not valued till 16th July 1888, because he had no valuation before that date. His teinds were before that unvalued, and he was just in the same position as every other heritor whose teinds were unvalued. His valuation of teinds must consequently in my opinion date from 1888. From all this I arrive at the conclusion that this decree of reduction must be qualified in some way in order to do justice to the parties, because as it stands now it might be read—though not necessarily—as meaning that the reduction of the final decree of locality proceeded upon the footing that this heritor had since 1630 overpaid. If the reasoning I have been endeavouring to state is conclusive, then that is just what he has not been doing. He has not overpaid anything until 1888, when the sub-valuation was approved of. The decree of reduction then must, I think, be qualified by some such words as these—"This decree shall have effect only from and after the decree of approbation of 1888 for the second half of the crop of 1888 and in all time coming."

LORD ADAM—No one disputes that the decree of locality in 1868 is to be reduced.

The only question is, whether the decree in the action of reduction is to be qualified by such additional words as are proposed, to the effect that the new scheme of locality is only to receive effect from and after the 22nd July 1888.

The Lord Ordinary is of opinion that it is competent to thus qualify the decree, for he says in his note—"I do not doubt that it is competent—that is to say, that it is in accordance with the practice of the Court of Teinds—to qualify a reduction of a locality in the way proposed. This appears to be settled by the case of *Duncan* v. *Brown*, 10 R. 332, and the report by the Clerk of Teinds which was in that case furnished to the Court." We are at one with his Lordship on the question of competency. But then the Lord Ordinary goes on to say—"But in the present case I do not consider that the circumstances call for such a reservation. It is here ascertained that the pursuers have during the whole period of the locality under reduction been paying stipend out of stock. In other words, the valuation on which the reduction proceeds is a valuation made so far back as 1630, although only discovered and approved of by the High Court iu 1888." Now, these words show wherein lies the Lord Ordinary's misapprehension. He has treated the approbation of the report of the Sub-Commissioners as if it had the same effect as a decree of the High Court at the date of the report of the Sub-Commissioners. It is obvious that the teinds of the lands in question were never valued until 1888, because the effect of that decree of approbation of 1888 was for the first time to value those teinds, and from that date only the stock and teinds in the lands in question were separated. If that is so, then during the long period down to 1888 the teinds were unvalued. and were rightly estimated as at one-fifth of the rent. There was therefore nothing wrong in the valuation of the teinds contained in the scheme of locality of 1868, and it was only in 1888 that that scheme of locality ceased to contain a proper allocation on the teinds of Lord Elibank's lands.

Now, as to the competency of qualifying the decree in the manner proposed, as I have said, I entertain no doubt upon the matter. The question, I think, depends upon what is the fact which requires the final scheme of locality to be altered. It may be such a fact as the discovery of a valuation of the High Court of a date preceding that of the final scheme. If that is so, it may well be that you cannot qualify the decree by stating a date from which it is to receive effect later than the date of augmentation granted, because where that is the state of the facts which makes the alteration required it is obvious that during the whole period there has been an encroachment upon the stock of the heritor's lands which there ought not to have been. When we deal with the particular facts, and see that the lands were for the first time valued in 1888, I think the inference we derive from that fact leads to this, that the new scheme of locality shall not have any effect except from its own date.

LORD M'LAREN—I concur, and only desire to add that I think the true solution of the question is to be found in an observation which was made by Lord Kinnear in the course of the argument, to the effect that the Act of the Scottish Parliament gave every landed proprietor the option of paying stipend according to the actual rental of his lands or according to a valuation to be ascertained by a public commission. The Act further declared that until a permanent valuation was made the annual value of the teinds should be one-fifth of the rental.

These considerations make it plain that the scheme of locality which was made up prior to the valuation of the particular lands by the decree of approbation is a scheme in accordance with the Act of Parliament. Payments under it are legal payments, and are not liable to be altered or rectified by any authority. It follows that the present decree must be qualified in the way your Lordship has suggested.

LORD KINNEAR—I am of the same opinion. The summons assumes that the decree of locality which it is proposed to reduce was erroneous at its date, because it has now been ascertained by a decree of approbation in 1888 of a report by Sub-Commissioners in 1630 that the teinds of Ballencrieff were not of the value of which they were believed to be when the locality was made final in 1868.

I agree with all your Lordships in thinking that the report of the Sub-Commissioners was ineffectual until approved by the High Court. It follows that the decree of approbation did not fix the value of the teinds of Lord Elibank for the past but only for the future, and therefore the decree does not ascertain that the locality of 1868 was erroneous, but only that the stipend payable out of teinds of the pursuer's lands as then allocated is in excess of the amount which he is liable to pay in the future. It follows therefore that the allocation made by the decree of locality ought not to be altered for the period prior to that date, because it was up to that time a perfectly right decree. The teind of the pursuers was fixed by law at a fifth part of the rent for the time being until the constant rent should be ascertained, and the constant rent was not ascertained until the decree of approbation had been pronounced. The decree of reduction must therefore be qualified in the manner proposed.

As to the competency, I am of opinion that it is not only competent for us to determine whether the decree we are now to pronounce should be qualified in the manner proposed, but that is a question for this Court alone. It is for the Court of Teinds to fix the respective liabilities of the heritors in a process of locality, and that is all we are asked to do. The pursuer is to substitute a new locality for that which was declared final in 1868, and we are now to determine whether the stipend should be allocated according to the new scheme or

according to the old scheme during the period between the last augmentation and 1888. That is a question of locality which in my judgment is competent for the Court of Teinds alone. If our decision had been adverse to the defender the pursuer might have raised an action for repetition of over-payments in the Court of Session, and in that action the defender might have stated the plea of *bona fide* consumption which has been argued before us. But we have nothing to do with any such question in this Court, nor can it arise at all in consequence of our decision. It might or might not have been available to the defender if his payment of stipend for the period in question had been below the amount for which he was legally liable, but the decision is that he paid according to his liability, and the plea is therefore unnecessary and inapposite.

The Court pronounced this judgment:—

"Vary the interlocutor in so far as to insert in the seventh line thereof, after the words 'conclusions of the libel,' the words 'but this decree of reduction to have effect only from and after the date of the decree of approbation, 16th July 1888, for the second half of crop 1888 and in time coming;' Recal the interlocutor in so far as it finds the said Henry Walter Hope liable in expenses occasioned by his appearance: Find him entitled to expenses in the Outer House: *Quoad ultra* adhere.

Counsel for the Pursuer—Graham Murray—C. N. Johnston. Agents — Thomson, Dickson, & Shaw, W.S.

Counsel for the Defender Hope—Asher, Q.C.—Sym. Agents—Reid & Guild, W.S.

Saturday, January 24.

FIRST DIVISION.

[Lord Low, Ordinary.

COCHRANE *v.* LAMONT'S TRUSTEE.

Sequestration—Husband and Wife—Claim by Assignee of Wife in Husband's Sequestration—Married Women's Property Act 1881 (44 *and* 45 *Vict. c.* 21), *sec.* 1, *sub-sec.* (4).

By the first section of the Married Women's Property Act 1881, sub-sec. (1), it is provided that the whole moveable estate of the wife shall be vested in her as her separate estate, and shall not be subject to the *jus mariti*. By sub-section (4) it is provided that any money of the wife lent to the husband shall be treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the value of such money after but not before the claims of the other creditors of the husband have been satisfied.

A husband less than a week before his sequestration granted to his wife a promissory-note, payable one day after date, for £1370, as the amount of sums lent to him at various times by his wife out of her separate estate. On the same day as she received the promissory-note the wife assigned it and the sum contained therein to a relative in consideration of a payment of £50. The wife's assignee thereafter lodged a claim for £1370 in the husband's sequestration, which the trustee, in respect of the provisions of section 1, sub-sec (4), of the Married Women's Property Act 1881, rejected as an ordinary claim, but admitted to a ranking on whatever assets might remain after the whole claims of the ordinary creditors of the bankrupt had been satisfied.

In an appeal by the wife's assignee, *held* that the deliverance of the trustee was right.

The estates of John Lamont were sequestrated on his own petition on 3rd February 1890. A claim was lodged in the sequestration for Miss Mary Cochrane to be ranked as an ordinary creditor for the sum of £1370.

The claim arose under the following circumstances—Mrs Lamont, the bankrupt's wife, had separate moveable estate by virtue of the provisions of the Married Women's Property Act 1881, and out of that estate she was alleged to have lent at various times sums of money to her husband, amounting in all to the sum of £1370. On 28th January 1890, being the day on which he granted a mandate to his agent to apply for sequestration, the bankrupt granted to his wife a promissory-note for the sum of £1370 payable one day after date.

On the same date Mrs Lamont, with consent of the bankrupt, and in consideration of £50 paid to her by William Anderson junior, accountant, Glasgow, assigned to the latter the sum contained in and due under the promissory-note, and the promissory-note itself, which is described in the assignation as having been granted "for sums advanced by me, the said Mary Anderson or Lamont, from my separate means and estate, on loan to the said John Lamont." On 28th May 1890 Mr Anderson executed in favour of the claimant Miss Mary Cochrane an assignation of the said sum of £1370 and the promissory-note, upon the narrative of the assignation in his favour and that Miss Cochrane had purchased the debt from him for the sum of £50. Mr Anderson was a cousin of Mrs Lamont, and Miss Cochrane was her daughter by a former marriage.

By sub-section (1) of section 1 of the Married Women's Property Act 1881 it is provided—"Where a marriage is contracted after the passing of this Act, and the husband shall at the time of the marriage have his domicile in Scotland, the whole moveable or personal estate of the wife, whether acquired before or during the marriage, shall, by operation of law, be vested in the wife as her separate estate, and shall not be subject to the *jus mariti*." By sub-section (4) it is provided—"Any money, or other estate of the wife lent or entrusted