was included in the disentail obtained on 10th September 1863, form an exception to that remark, because, as I have also shown, that disentail was obtained only in virtue of a transaction with or on behalf of the three next heirs of entail; and it was an express condition of that transaction, to which effect was given in the deed of entail authorised by the Court, that the subject thereof should be re-entailed on the same conditions as those in the original entail of 1724, including, of course, the condition that the terce of widows should be excluded. And this part of the estate, as well as all the rest of it, having thus been exempted from liability to terce, the deed of locality is not protected from challenge to any extent whatever, on the ground of its having been a security for a legal right of terce.

3. It remains for consideration, whether the bond for an annuity of £500, which was granted by the late Mr Hay Newton in favour of the defender, on 13th December 1860, in terms of the statute 5 Geo. IV., c. 87, is effectual either to support the subsequent deathbed deed of locality, or as an independent provision? That provision would have been effectual, in virtue of the provisions in the Aberdeen Act, if the granter had continued to hold the estate exclusively on the title upon which it was possessed by him at the date of that bond, and if, moreover, he had never revoked or innovated that provision. But that bond contained merely a *mortis causa* provision, which the granter could render ineffectual at any time by destroying it, by revoking it, or by otherways indicating his intention that it should be inoperative. And, in my opinion, he did do so by his granting the deed of 17th July 1861 and by the proceedings under which he obtained authority to grant it. Although the restrictions which were imposed upon the owner's right by the original entails of 1724 and 1842 were continued by the deed of 1861, and some others were added, yet it was expressly declared by that deed that the granter himself, and his heirs of tailzie, should thenceforth "enjoy, bruick and possess the said lands, barony, and others *by virtue of this present tailzie*, and infeftments, rights, and conveyances to follow hereupon, and by no other right or title whatsomever." This being the case, I think he intentionally evacuated the revocable provision he had made, more than a year before, under the powers in the statute of 5 George IV., because, by the 12th section of the Entail Amendment Act, it is enacted that the former of these statutes shall not be applicable to any entail dated on or after 1st August 1848; and without indicating any opinion as to the effect of the original entails in other respects, yet Mr Newton, having granted this deed in 1681 on the authority and in the terms I have stated, indicated clearly enough that the bond of provision in question was not to take effect. And he did so still more explicitly in the preliminary proceedings under which he obtained authority to grant the deed of 1861. I refer particularly to the affidavit which he made and produced to the Court, as to the burdens which affected the entailed estate. It is dated 4th June 1863; and it sets forth that Mr Newton appeared, and being solemnly sworn and interrogated, deponed, *inter alia*, there are "no provisions to husbands, widows, or children affecting, or that may be made to affect, the fee of *the said entailed lands or others, and the heirs of entail.*" And that he held that provision to be evacuated and inoperative is confirmed by his having, in 1863, granted the other provision to the defender by way of locality; for by the 12th section of the statute 5 George IV., c. 87, that liferent locality would have been ineffectual if the provision which had been granted by that statute had been effectual.

4. It only remains to advert to the provision which the late Mr Newton made in favour of his younger children. That provision was permitted by the entail, and would have been effectual if it had been granted *in liegie poustie*. But it was granted on deathbed; and no relevant ground has been stated for exempting it from the operation of the law of deathbed. Although power to grant it was excepted from the restrictions in the deeds of entail, yet the effect of that exception was merely to leave the owner of the entailed estates power to exercise his powers of ownership to the effect of making such a provision. But the law itself rendered him incapable of exercising his powers of ownership to that effect when he was on deathbed.

The result is that, in my opinion, the Lord Ordinary's judgments as to all the provisions in question ought to be adhered to.

The judgment of the Lord Ordinary was adhered to.

Agent for Pursuer—James Dalgleish, W.S.

Agents for Defenders—Hunter, Blair, & Cowan, W.S.

Thursday, July 18.

ADVN.—GRANTS *v.* EARL OF SEAFIELD.

Lease—Power to Plant—Abatement of Rent—Taciturnity. Circumstances in which held that planting had been made by a landlord on his tenant's farm at the request and for the convenience of the tenant, and not under a reserved power in the lease, which conferred a right on the landlord to take ground for that purpose.

This is an advocation from the Sheriff Court of Morayshire, brought by James Grant, writer in Elgin, and the other trustees of the late John Grant, distiller, Glen Grant, against the respondent, the Earl of Seafield. His Lordship's predecessor, in 1844, granted a lease of the farm of Drumbain, consisting of 241 acres of arable land and 1057 of pasture, to the Messrs Grant. The lease contained the following provision:—"The proprietor is to have power at all times to take off what ground he may see proper for the purpose of planting, the tenant being to be entitled to such deduction of rent therefor as shall be fixed by two or three persons of skill to be mutually chosen." In the same year as the lease was entered to, the tenants addressed a letter to Lord Seafield, in which, after suggesting various improvements, they said—"The farm would be improved by a little planting, and we would afford every facility for doing it if your Lordship approve of it." Subsequent to this letter the proprietor planted a little more than an acre of arable ground and six acres of pasture. In the letter written by Lord Seafield's factor in answer to the tenant's letter suggesting improvements, while all the other topics mentioned were touched upon, nothing was said of the suggested planting. The tenants continued in possession till 1863 and made no claim for abatement of rent on account of the ground taken off, but on the expiry of their lease they made a demand for £47, 12s. 4d., being the *cumulo* amount of the yearly value of the

ground taken for the purpose of planting. This claim was made to Lord Seafield's factor, by whom the farm had been let. He suggested that it should be withdrawn as untenable, and stated that he had a counter-claim against the tenants which would compensate the sum asked. An action having been brought, Lord Seafield pleaded that he was not liable, because the planting had not been made under the reserved power of the lease, thereby raising up an obligation against him, but had been made at the request and for the convenience only of the tenants.

The Sheriff-Substitute (SMITH) assoilzied the defender.

The Sheriff (BELL) adhered.

The pursuers advocated.

LANCASTER (with him CLARK) argued on the facts of the case, that the understanding of parties must be taken to be that the planting was under the lease; that it was not to be presumed that the pursuers had renounced any of their rights; and that the concurrence of the facts that there was a reservation in the lease of planting, and that planting had taken place, threw upon the defenders the *onus* of showing that it was not done under the lease.

GIFFORD and W. A. BROWN, for the respondent, were not called upon.

The Court unanimously adhered to the judgment of the Sheriff, holding it to be clear as a question of the understanding of parties, that the planting had not been done under the lease, and that that was confirmed by the delay that had occurred in bringing forward the claim.

Agents for Advocators—H. & A. Inglis, W.S.

Agents for Respondent—Mackenzie, Innes, & Logan, W.S.

Thursday, July 18.

SECOND DIVISION.

THE DUMFRIESSHIRE ROAD TRUSTEES *v.* JOHNSTON.

Contract—Road Trustees—Alleged Failure to Perform—Judicature Act—Interim Possession—Right to Complete. Circumstances in which held that road trustees who had employed a contractor to erect a bridge over a river were entitled, he having performed his work in an inefficient manner, and that remaining unfinished, to take it of his hands, not only for *interim* custody but for the purpose of completing it, and that with his tools and materials.

This was an application by Alexander Simpson, clerk to the Road Trustees of Dumfriesshire, to obtain possession of a bridge and works which the respondent, Robert Johnston, contracted to erect over the river Annan at Shillahill. The bridge was commenced in March 1865, and the contract between the parties stipulated that it should be completed by August 1866. The road trustees allege that the works have been carried on in an unsatisfactory manner, owing to the contractor's negligence and incapacity; that from the first his operations were insufficient; and that the portion of the bridge which is erected is of an insecure and unworkmanlike character, and that it will require to be taken down. These statements were denied by the contractor who alleges, as a reason for the delay in completing the bridge, that a large amount of extra work was required by the trustees. The road trustees, however, had obtained from the engineer in superintendence two certificates testifying to the bad quality of the work done; and the arbiter under the contract had corroborated this view, and, in pursuance of a provision to that effect in the contract, had authorised the road trustees to take the works out of the respondent's hands. The contractor refused to hand over the works in obedience to this order, and raised two actions of reduction against the decree-arbitral and the certificates of the engineer. These actions of reduction being in dependence, the contractor maintained his right to keep possession of the works, and to carry them on to completion. The present application by the road trustees for interim possession was founded on the 42d section of the Judicature Act.

The Lord Ordinary (JERVISWOODE) granted the order craved, and the case came before the Court on a reclaiming note by the respondent Johnston. The Court expressed a desire to obtain information from a neutral person regarding the present condition of the works, and a remit was made to Mr Leslie, C. E., to examine the bridge and to report upon its state, and how far there is urgency for the work being immediately proceeded with. Mr Leslie visited the bridge, and reported that though the piers were built, none of the arches were covered or thrown, and that the timber centring is "very deficient, being very badly framed and insufficiently fastened, so as to be liable to sink, and they do show systoms of sinking by the opening of the beds of the archstones at the springings." Mr Leslie also reported that the works in their present unfinished state might be endangered by floods, and that there appeared great urgency for the bridge being completed with the least possible delay.

The road trustees, alleging that the whole procedure prescribed by the contract had been observed, and founding also upon their right at common law to expel the contractor from the works at their discretion, subject to any claim of damages at his instance for non-implement of the contract, maintained a right to take the works out of his hands and to complete them at his expense, and with his tools and implements. The contractor argued that the circumstances did not warrant such a proceeding; and, moreover, that, under the Judicature Act, it was not competent for the Court to hand over the works to the trustees to the effect of allowing them to complete them, but that simple custody alone could be granted.

The Court to-day adhered to the interlocutor of the Lord Ordinary, and allowed the trustees to take the works out of the hands of the contractor and complete them by the means of tools and materials belonging to him; caution being found by the trustees for any damages which may result to the contractor in the event of his ultimately succeeding in the actions of reduction. Interdict was also recalled against Hunter, a new contractor whom the trustees had employed, and the works were permitted to be completed by him.

Counsel for Road Trustees—Mr Fraser and Mr Stewart. Agent—James Stewart, W.S.

Counsel for Contractor—Mr Gifford and Mr Black. Agent—Mr Curror, S.S.C.