stood in the person of Johnstone was exposed for sale in two lots conform to articles of roup, under which Balderston made his purchase. Each of those lots were described in precisely the same terms as Kelly and Caldwell's feus are described in the feu-contracts. Indeed the description in the articles of roup is nothing more than an excerpt from the original title. But on the margin of the articles the lot which the defender acquired is described as consisting of three houses, while the lot which the pursuer acquired is described as consisting of a house and large garden occupied by William Hannah. The defender contends that the description contained in the latter must be construed in conformity with what is shown to have been the true bargain, that Balderston could not claim more than what he intended to buy, and that the pursuer is in no better position. I confess that I have much sympathy with the defender, for it is clear enough that he intended to buy, and thought he was buying, the whole subjects which he now possesses, and it is equally certain that after he obtained his disposition Balderston did not take possession of any part of the ground which is now in dispute. But the case cannot be disposed of on these considerations alone, because the defender has no title to the ground which he claims, and because the title is clearly in the pursuer, who is a singular successor.

If the question had arisen with Balderston it is by no means clear that he could not have vindicated all the subjects which were conveyed by the disposition in his favour. But if it were pleaded against him that such a claim was contrary to the good faith of the bargain, to what extent would his claim be limited if such a plea received effect? It is founded on the marginal note on the articles of roup, and I do not see that it could be pressed further against him than that his claim must be consistent with that note. In other words, that he could claim nothing which the articles under which he purchased assigned to the other lot which he did not buy. But that lot was described as consisting of "three houses near Millgate occupied by M. Finn and others." If he did not claim any of these houses there is no evidence that his claim would be contrary to his bargain.

It is true that when the defender took possession of what he thought he purchased, and erected some buildings on a part of the disputed ground, a question was raised by Balderston as to the defender's right with which he did not persevere or bring to decision. But there is no evidence to show that he surrendered any right, or that he would now be barred from putting forward his claims if he had continued to be the owner of the feu which he had bought. It is certain that he conveyed nothing to the defender, and nothing more is proved than that he did not at that time take any legal steps to vindicate what he accounted to be his rights.

Thereafter he sold to the pursuer, who bought according to the titles. The pursuer acquired all that was in Balderston's person, and, as I have already said, I do not think it can be doubted that he acquired the disputed ground. If the titles were ambiguous much might be urged in favour of the defender. But when they are clear how can the pursuer be prevented from vindicating what is in his title? He is not affected by any personal exception which could be stated against Balderston, for he is a singular successor. The defender cannot claim the ground in question, for he has no title to it. It is true that he is in possession, but he is without a title, and his possession has not been of such duration as to give him any aid. The case therefore comes to this point, that the pursuer has a title to the disputed ground, while the defender has not, and never had any title on which he could resist the pursuer's claim.

But I am disposed so far to modify the conclusion which I have reached as to give to the defender the house marked C. I do so because the pursuer explained that he did not desire to claim it, and in taking up this position I think that he acted very properly, for it is plain from his evidence that he never thought that he was buying the house which he knew to be in the possession of the defender.

Lord Young, Lord Craighill, and the Lord Justice-Clerk concurred.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the reclaiming-note for the pursuer against Lord Kinnear's interlocutor of 18th April last, Recal the same, and find and declare in terms of the declaratory conclusions of the summons, excepting always from the said declaratory conclusions the house marked C on the plan referred to in the said summons, being the eastmost of the three houses lying immediately to the west of the cottage belonging to the pursuer, and occupied at present by Hugh M'Conkie, and ordain the defender to cede possession of the piece of ground therein referred to, under the exception already excepted, and to flit and remove himself, his family and servants, and goods and gear, furth of the same: *Quoad ultra* assoilzie the defender: Find the pursuer entitled to expenses," &c.

Counsel for the Pursuer—Moncreiff—Gillespie. Agents—Tait & Johnston, S.S.C.

Counsel for the Defender—Shaw—Gunn. Agents—R. R. Simpson & Lawson, W.S.

Wednesday, November 16, 1887.

OUTER HOUSE.

[Lord Lee, Ordinary.

HOGG AND ANOTHER (M'GHIE'S TRUSTEES) *v.* URQUHART.

Issues—Form of Issues—Reduction—Subscription of Deed—Act 1681, *cap.* 5.

Form of issues adjusted for the trial of an action of reduction of a testamentary writing upon, *inter alia*, the following grounds—(1) That the deed, if signed by the deceased, was not in fact executed by him as a probative writ, because the alleged witnesses were not present as witnesses at the time of subscription, and because the testator did not "at the time of the witnesses subscribing"

acknowledge his subscription; and (2) that the deceased was induced to subscribe by a representation that as no witnesses were present the writing would not be binding or complete.

James Hogg, writer, Bellshill, and William Neilson, bank agent, Bellshill, trustees and executors of the late William M'Ghie, portioner, Bellshill, acting under his trust-disposition and settlement, dated 14th November 1883, and codicil thereto dated 30th December 1885, raised this action against Adam Urquhart, flesher, Bellshill, for reduction of a writing bearing to be dated 12th July 1886, and to be duly witnessed by Robert Harvie, cabinetmaker, and John Baird, carter, both residing in Bellshill. By this writing the deceased William M'Ghie left and bequeathed to the defender the sum of £300, being the amount of a bond and disposition in security granted by the defender and his father in November 1883, in favour of William M'Ghie, over their property in Bellshill.

The pursuers averred that William M'Ghie at the time of his death, which took place on 28th January 1887, was between seventy-three and seventy-four years of age, and that for some years prior to his death Mr Hogg had been his sole agent, and as such had prepared his trust-disposition and settlement and codicil thereto. In Cond. 7 the pursuers averred—"For some time before July 1886 the defender urged the said William M'Ghie to assign to him or to discharge the said bond, but Mr M'Ghie refused to do so. The pursuer knew that Mr Hogg was Mr M'Ghie's agent, but he did not consult him on the subject, or let him know anything about it; on the contrary, in order to secure his purpose, he endeavoured to conceal the matter from Mr Hogg, and in every way to obtain influence over Mr M'Ghie, and he succeeded in doing so. The defender also got an agent on his instructions to prepare the draft of the writing in question, and then extended the same himself. On or about 12th July 1886 the defender induced Mr M'Ghie to put his name to the said paper, representing to him that the same was not binding on him, as no parties were called to witness its execution. Mr M'Ghie did not sign the said writing in the presence of instrumentary witnesses, at all events he signed it in the belief that no one was present to witness his signature, and he never became aware that anyone had seen him sign the deed, or was present when it was signed, or that any persons had adhibited their signatures as witnesses to his signature, nor did he ever acknowledge his signature to anyone. None of the witnesses signed the said deed in his presence, or with his knowledge, and he did not intend to sign the same in the presence of any witness, but, on the contrary, would not have signed if he had known any witness was present. If John Baird and Robert Harvie, the alleged witnesses to the said document, saw Mr M'Ghie signing the same, which is denied, it was quite unknown to Mr M'Ghie, who had previous to the said 12th day of July 1886 refused to sign a document in presence of witnesses when requested by the defender to do so. He put his name to the document in question in the defender's shop. It was not read over to Mr M'Ghie, and he got no opportunity of reading it, and in point of fact he was not aware of its purport and effect. He had never given any directions for the preparation of any such document, and he never became aware of its contents." They also averred that for at least twelve months before his death he was not of a sound disposing mind, that he was from physical and mental weakness quite incapable of transacting or giving instructions for the transaction of business, that his mind was gone when he signed the document sought to be reduced, that he was so very facile from mental disease, caused partly by age and physical weakness, as to render him liable to circumvention, and incapable of resisting importunity, and that the document was procured from him to his and the pursuers' lesion by fraud and circumvention and undue influence on the part of the defender, in pursuance of a fraudulent design to benefit himself.

The plea-in-law for the pursuers was as follows:—"The document in question should be reduced in respect—(1) It is not the deed of the said William M'Ghie; (2) it was not signed in presence of instrumentary witnesses, and the alleged witnesses did not hear Mr M'Ghie acknowledge his subscription; (3) the deceased Mr M'Ghie did not intend to sign in presence of witnesses, and did not do so, or otherwise did not know he had done so; (4) *separatim*, the said deed was signed when Mr M'Ghie was weak and facile in mind, and easily imposed on, and was procured from him by fraud and circumvention on the part of the defender taking advantage of said weakness and facility; (5) it was obtained by undue influence exercised by defender on the said William M'Ghie."

The following issues were proposed by the pursuers—"(1) Whether the writing of 12th July 1886 is not the deed of the deceased William M'Ghie? (2) Whether both Robert Harvie, cabinetmaker, Bellshill, and John Baird, carter, Bellshill, were not instrumentary witnesses to the writing of 12th July 1886? (3) Whether the deceased William M'Ghie did not sign the writing in presence of Robert Harvie, cabinetmaker, Bellshill, and John Baird, carter, Bellshill, as instrumentary witnesses, or whether he did not acknowledge his subscription to the said alleged witnesses? (4) Whether on or about the 12th day of July 1886 the said deceased William M'Ghie 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 William M'Ghie the said writing, to the lesion of the said William M'Ghie? (5) Whether the subscription of the said deceased William M'Ghie attached to the said writing was procured by means of fraudulent representation on the part of the defender, to the lesion of the said William M'Ghie."

The defender took exception to the second, third, and fifth issues.

For the forms proposed the pursuers relied upon the cases of *Cumming* v. *Skeoch's Trustees* Jan. 17, 1879, 6 R. 540; *Tener's Trustees* v. *Tener's Trustees*, June 20, 1879, 6 R. 1111 (see Lord Gifford's opinion); *Arnott and Others* v. *Burt*, Nov. 14, 1872, 11 Macph. 62; *Stewart* v. *Burns*, Feb. 1, 1877, 4 R. 427 (Lord Justice-Clerk, p. 432). They argued that if the form of issue in *Morrison* v. *Maclean's Trustees* (*infra*) was adopted, the words "as witnesses to the deed," should be inserted.

The defenders maintained that the form of the third issue in *Morrison* v. *Maclean's Trustees* (June 14, 1861, 23 D. 1099, and Feb. 27, 1862, 24 D. 625) given at p. 627 of 23 D., was the proper form of issue for the trial of the case.

In the course of the argument the Lord Ordinary (LEE) drew attention to the cases of *Duff* v. *Fife*, May 22, 1826, 2 W. & S. 166, and *Cleland* v. *Cleland*, July 6, 1837, 15 S. 1246, and Dec. 15, 1838, 1 D. 254.

The Lord Ordinary approved of the following issues for the trial of the case—"(1) Whether the writing of 12th July 1886 is not the deed of the deceased William M'Ghie? (2) Whether at the time when the names of Robert Harvie, cabinet-maker, Bellshill, and John Baird, carter, Bellshill, were adhibited as alleged witnesses to the writing of 12th July 1886, they, or either of them, did not, as witnesses to the deed, see the deceased William M'Ghie subscribe the same, and did not hear the said William M'Ghie acknowledge his subscription? (3) Whether the subscription of the said deceased William M'Ghie, attached to the said writing, was procured by means of fraudulent representation on the part of the defender, to the lesion of the said William M'Ghie? (4) Whether, on or about the 12th day of July 1886, the said deceased William M'Ghie 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 William M'Ghie the said writing, to the lesion of the said William M'Ghie?"

"*Opinion.*—The first issue was not objected to. It is the usual issue for trying a question as to the capacity of the maker of a deed; nor was any objection offered to the fourth issue as to facility and circumvention. The points discussed upon the second, third, and fifth issues are of some importance. They involve a decision as to the proper issues for trying the questions of fact raised upon condescendence 7, which is as follows—[*reads Cond. 7, quoted above*].

"There are here two allegations. The first goes to this, that the deed (though signed by the deceased) was not in fact executed by him as a probative writ, because the alleged witnesses were not present, as such, at the time of subscription, and therefore did not see him subscribe within the meaning of the Statute 1681, and because the deceased did not 'at the time of the witnesses subscribing' acknowledge his subscription. The other allegation is that the deceased was induced to subscribe the writing by a representation that as no witnesses were present the writing would not be binding or complete.

"I think that the first of these allegations may be tried under one issue, and that neither the second nor the third of the proposed issues is in the proper form. My opinion is that the issue (No. 3, 24 D. 627) settled in the case of *Morrison* v. *Maclean's Trustees*, with a slight alteration adapting it to the alleged circumstances of the case (24 D. 625, and 23 D. 1099), is sufficient to try the question of execution. The terms of that issue imply that 'at the time when the names of the alleged witnesses were adhibited' they must either have seen the granter subscribe, or have heard him acknowledge his subscription. This appears to me to be in accordance with the requirements of the Act 1681, and to be all that is necessary to enable the pursuer to ascertain by the verdict of the jury whether the alleged witnesses were present as witnesses to the subscription, and were entitled to subscribe as such. For example, if the witnesses were only present surreptitiously, and the writing was signed by the granter in the belief that there was no one present, and that he was not completing the execution of it, the pursuer will have an opportunity of asking a verdict to the effect that they did not, as witnesses, at the time when 'they adhibited their signatures as witnesses,' see him subscribe. What the statute requires is, that 'no witness shall subscribe as a witness to any party's subscription unless he then knew that party, and saw him subscribe, . . . or that the party did at the time of the witnesses subscribing acknowledge his subscription.' There are cases in which it has been held that a witness may subscribe *ex intervallo*, and that it is not essential that a witness should know the granter at the time of his subscribing. But I am aware of no case in which one who did not know the granter, and was not present 'as a witness,' has been held entitled *ex intervallo* to make a deed probative and complete by signing as a witness unless he heard the granter acknowledge his subscription at the time he so signed. Lord Cowan, in the case of *Arnott* v. *Burt*, 11 Macph. 72, explained that the case of *Frank*, M. 16,824, and 5 Pat. App. 278, was not such a case, and I think that the opinions given by Mr Bell in his treatise on Testing of Deeds, p. 256, show that the proceedings in that case were held to form a continuous transaction. And in the cases of *Tener's Trustees*, 6 R. 1111, and *Stewart* v. *Burns*, 4 R. 427, the case of a casual spectator or a concealed witness subsequently attaching his signature as a witness was clearly distinguished.

"It will be for the Judge at the trial to direct the jury as to what is required to nullify the subscription of a witness, and to disentitle the writer of the deed to say in the testing clause that it was subscribed in the presence of the persons subscribing as witnesses. But unless it is proved that the alleged witnesses neither saw the granter subscribe, within the meaning of the statute, nor heard him acknowledge his subscription at the time when they subscribed as witnesses, I think that the pursuers cannot succeed under the statute in nullifying the execution. It appears to me therefore that the issue settled in *Morrison* v. *Maclean's Trustees* is all that the pursuer is entitled to or requires.

"With regard to the fifth issue, I have come to be of opinion that there is an intelligible and sufficient allegation of fraud, and that it may be allowed. It is possible that the pursuers, though they fail on the second issue, may be able to prove that the signature of the deceased was procured by the fraudulent representations alleged.

"I think that the fifth issue, however, should take precedence of the question of facility and circumvention, which only arises if the deed was properly completed, so far as execution is concerned.

"I have adjusted the issues in accordance with this opinion."

Counsel for the Pursuers—Watt. Agents—J. & A. Hastie, S.S.C.

Counsel for the Defender—M'Kechnie. Agents—Macpherson & Mackay, W.S.