and representative, to procure himself served as nearest and lawful heir in special to the said Sir William Pulteney, as well as the trust-disposition in favour of the trustees, and in virtue of which they completed their right.

The adjudication so led against Sir Frederic George Johnstone, and followed by charter, was equivalent to a disposition by Sir William Pulteney in favour of Sir Frederic George Johnstone as Sir John Johnstone's heir, and I think it impossible now to represent his son and heir, Sir Frederic Johnston, as a stranger to the investiture, or to distinguish the case from that of the trustees having obtained a disposition in trust from the last-entered vassal or from his heir duly infeft.

I therefore think that the case is ruled by the case of the *Advocate-General* v. *Swinton*, 17 D. 21, and other cases, in which it has been held that if a composition be paid for a new investiture, the intervention of a trust to execute an entail or to convey in a certain destination will not render the disponee (being heir of the investiture) liable to pay composition as a singular successor.

Sir Frederic Johnstone is only in form a singular successor, and in my opinion is entitled to obtain entry as an heir.

I therefore answer the first question in the negative and the second in the affirmative.

The Court answered the first question in the affirmative.

Counsel for the First Party—Graham Murray — P. J. Blair. Agent — Robert Strathern, W.S.

Counsel for the Second Party—Guthrie—Ure—Craigie. Agents—Welsh & Forbes, S.S.C.

Saturday, February 28.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

GILCHRIST AND OTHERS *v.* MORRISON AND OTHERS.

Process — Reduction — Title to Sue — Disponee — Heir-at-Law — Proving of the tenor.

On 16th December 1889 a testatrix executed a trust-disposition and settlement in favour largely of certain members of her family, including her heir-at-law and next-of-kin.

On 20th January and 6th February 1890 she executed other deeds of settlement which excluded the members of her family, who then raised an action to reduce the two latter deeds on the ground of facility and circumvention, and for declarator that the succession to the testatrix fell to be regulated by the deed of 16th December 1889. It appeared from the statements in defence that this deed was destroyed, and the Lord Ordinary (Wellwood) found that the pursuers must prove the tenor of this deed, and sisted process to give opportunity for raising the necessary action.

Held that while this would have been the proper procedure if the title of the pursuers had been only that of disponees under the destroyed deed, as they included the heir-at-law and the next-of-kin of the testatrix, they had sufficient title to call for reduction of the deeds granted to their prejudice; that the question of the case was the state of the testatrix's mind on the 20th January and 6th February 1890, and that that question would best be tried before a jury on the usual issue, and not incidentally in the proposed action of proving the tenor.

This was an action of reduction by the widow and children of the deceased John Gilchrist of Summerside Place, Leith, in which they sought to set aside certain testamentary writings of the deceased Mrs Jemima Gilchrist or Purdy, who was also a daughter of John Gilchrist.

The pursuers averred that in 1889 Mrs Purdy was in a failing state of health, and that (Cond. 10) "About the middle of December she sent for the family law-agent, Mr Asher, and gave him instructions to make a fresh will, as she knew her illness was incurable, and she wished to make a final settlement of her affairs in prospect of an early death. Mr Asher accordingly prepared a trust-disposition and settlement, which was executed by her on the 16th day of December 1889, and by which she conveyed her whole means and estate to Mr Asher and his managing clerk Mr John Rose, whom she appointed her trustees and executors. The purposes of the trust were, *inter alia*—1. Payment of debts, funeral expenses, &c. 2. Payment of the following legacies free of duty at the first term of Whitsunday or Martinmas after her death—(1) To Mrs Jane Molinda Goodlet or Morrison (the defender) £500; (2) To Mrs Elizabeth Watson or Hume (an aunt) £100; (3) To Mrs Elizabeth Allan or Blair £100; 3. Payment to the pursuer Mrs Gilchrist during her life of the free annual income or revenue to be derived from the remainder of her means and estate. 4. Payment of the following legacies at the first term of Whitsunday or Martinmas after Mrs Gilchrist's death—(1) To Mr Rose, one of her trustees, £1000; (2) To the Leith Hospital £300; (3) To the Leith Industrial Schools £300; (4) To the Redhouse Home for Destitute Boys, Musselburgh, £300. 5. Lastly, the trustees were directed to pay and convey the residue and remainder of her means and estate to the pursuers William Gilchrist and Jane Alexander Gilchrist, her brother and sister, equally between them, or to the survivor in the event of the other dying without leaving lawful issue. The said will was carefully prepared by the instructions of Mrs Purdy, and it was fully considered by her before she signed it. The said deed contained the real wishes of the testatrix with regard to

the disposal of her estate after her death." In Cond. 13 they averred that on 20th January 1890 the deceased executed another will, whereby she left a few legacies to the amount of £1000, and the remainder of her estate to the defender Mrs Morrison. The pursuers were entirely excluded. (Cond. 14) "On or about 6th February thereafter another will is alleged by the defender Mrs Morrison to have been executed by the said Mrs Purdy. By this deed, which is called a last will and testament, Mrs Morrison was appointed sole executrix and universal legatory, and Mrs Purdy's whole estate conveyed to her under burden of payment of a legacy of £500 to Mrs Cochrane, and £100 each to Mrs Hume and Mrs Blair, as in the immediately preceding will. The said last will and testament was prepared by Mr P. P. Slater, solicitor, Edinburgh, who is a relative of Mrs Morrison."

At the adjustment of the record the following additional averment was made—"The pursuer William Gilchrist is Mrs Purdy's heir-at-law, and the pursuer Jane Alexander Gilchrist is one of her next-of-kin."

The defenders Mrs Morrison and the trustees under the deed of 20th January stated—"It is explained that on the 28th January 1890, the testatrix being then of sound disposing mind, and fully understanding and comprehending the legal results of such action, sent for Mr Peter Peterson Slater, solicitor and law-agent, and after requesting him to act as her agent, explained to him that the said trust-disposition and settlement in the said condescendence mentioned, had been in fact revoked by the will prepared by Mr Asher, and executed on the 20th January, as mentioned in condescendence 13, and desired Mr Slater to destroy the same in her presence as useless and as not expressing her will, which Mr Slater accordingly did. Such destruction was deliberately done *animo revocandi*, and the said trust-disposition and settlement is not now in existence."

The pursuers alleged—"With reference to the statement in answer, the pursuers have no knowledge whether the will in question was destroyed or by whom it was destroyed. If Mrs Purdy destroyed it as stated by the defender, she did so in consequence of the defender having by fraud or circumvention induced her to do so while she was weak and facile and easily imposed upon." They also averred that upon 6th February 1890 Mrs Purdy executed the deed of gift (now sought to be reduced), which she delivered there and then to the defender.

The pursuers pleaded—"(1) The deeds sought to be reduced, not being the deeds of the late Mrs Purdy, ought to be set aside in terms of the conclusions of the summons. (2) *Separatim*—The said deeds ought to be reduced, in respect that at the dates when the same were executed, the deceased Mrs Purdy was weak and facile in mind and easily imposed upon, and that the said Mrs Morrison and John Goodlet, or one or other of them, taking advantage of her said weakness and facility, did by fraud or circumvention impetrate the said deeds from Mrs Purdy to her lesion. (3) The trust-disposition and settlement of 16th December 1889, being the deed regulating the succession to the deceased Mrs Purdy's means and estate, the pursuers are entitled to decree in terms of the conclusions of the summons."

The defenders pleaded—"(1) No title to sue. (2) The pursuers' averments are not relevant to support the action. (3) The deed of 16th December 1889 having been duly revoked, and that of the 6th February 1890 having been voluntarily executed by the testatrix while of sound disposing mind and full capacity, the latter, as expressing the real wishes of the testatrix in regard to the disposal of her means and estate, regulates the succession."

On 15th January 1891 the Lord Ordinary (WELLWOOD) pronounced the following interlocutor:—Sists process *in hoc statu* in order that the pursuers may, if so advised, raise an action of proving the tenor of the trust-disposition and settlement executed on 16th December 1889 by Mrs Jemima Gilchrist or Purdy, upon which they found &c.

"*Opinion.*—This action is laid entirely on the footing that the deed by which the succession to the means and estate of the deceased Mrs Purdy falls to be regulated is a trust-disposition and settlement dated 16th December 1889, under which the pursuers are beneficiaries to a large extent. The pursuers claim as beneficiaries under that deed, and the conclusions of the summons and the statements on record, especially those in condescendence 10 show that that deed is the title on which they rely. It is true that they now state that the pursuer Willian Gilchrist is Mrs Purdy's heir-at-law, but so little was that in view when the action was raised, that the fact was not stated in the original condescendence.

"Now the deed of 16th December 1889 is not forthcoming. It is stated by the defender—and there is little reason to doubt the truth of the statement so far—that it was destroyed on the 28th January 1890, about a week after the execution by Mrs Purdy of a trust-disposition and settlement dated 20th January 1890, which is the first in date of the deeds under reduction. In these circumstances I think it is necessary for the pursuers to prove the tenor of the deed of 16th December 1889 on which they found. In doing this they will have to prove the *casus amissionis*; and if it is true that the will was destroyed by the orders of Mrs Purdy, to prove that she was not then in such a state of mind as to be capable of effectually cancelling or revoking it. The question to be tried in the action of proving the tenor will therefore practically be the same as that sought to be raised in this action. But an action of proving the tenor proceeds in the Inner House, and therefore the present process must be sisted until the pursuers take steps to set up the deed of 16th December 1889—*Shaw* v. *Shaw's Trustees*

3 R. 813, and *Bonthrone* v. *Ireland*, 10 R. 779.

"The pursuers strongly maintain that William Gilchrist, being heir-at-law and entitled to succeed to the heritage left by Mrs Purdy, if she died intestate, he is in any case entitled to sue the action and challenge the deeds under reduction. As I have already indicated, the summons is so framed that I do not think it can proceed as an action at the instance of the heir. But, further, if the pursuers' averments are true, William Gilchrist as heir-at-law was cut out by the deed of 16th December 1889, and the parties really entitled to challenge the subsequent deeds are the disponees or beneficiaries under that deed."

The pursuers reclaimed, and argued—That they had a double title to sue, and under one or other of these titles they must prevail. (1) They were disponees under the deed alleged to have been destroyed, and (2) they included in their number the heir-at-law and one of the next-of-kin of the testator, and they were entitled to have the deed granted by the deceased to their prejudice set aside if they could. If the deed of 16th December was destroyed the pursuers had a good title as heir and next-of-kin, while if it was not destroyed then they took as residuary legatees. The present case differed from the case of *Shaw;* there a proving of the tenor was necessary, because the deeds which could not be recovered constituted the pursuer's title to sue. Here the pursuer fell back on his title as heir-at-law. The questions to be tried were, (1) whether the deed of 16th December 1889 was destroyed as part of a fraudulent scheme? (2) As to the validity of the deeds of 20th January and 6th February? and these questions could best be determined by an issue in the usual terms.

Argued for respondents—There was a question here not only of the pursuer's title to sue but also of his interest, as he could not be both disponee and heir-at-law at once—for example, an heir could not reduce *ex capite lecti* if he had already been disinherited— *Gordon* v. *Robertson*, October 28, 1873, 11. S.L.R. 35. The pursuer sought a declarator that the deed of 16th December was good, and any questions of fraud in connection with its loss could as efficiently be tried by a judge as by a jury. The case of *Bonthrone*, *supra*, supported the contention that all the questions raised by the present case could be satisfactorily disposed of in a proving of the tenor—see *M'Millan* v. *The Free Church*, December 23, 1859, 22 D. 290, and 24 D. 1282,

At advising—

LORD ADAM—This is an action for reduction, declarator, and accounting at the instance of Mrs Gilchrist, widow of John Gilchrist, and William Gilchrist and Jane Alexander Gilchrist, two children of the deceased John Gilchrist. The defenders are—First, Mrs Jane Morrison, as the sole executrix and universal legatory under the last will and testament, dated 6th February 1890, by the deceased Mrs Purdy, and also as the sole disponee and donee under the disposition and deed of gift of the same date executed by Mrs Purdy; and second, two gentlemen, William Rew and William Asher, as trustees under the trust-disposition and settlement of date 20th January 1890. The leading conclusions of the action are for reduction of these deeds, dated respectively, two of them, 6th February 1890, and the third of them the trust-disposition and settlement of 20th January 1890.

Now, the grounds of reduction of these three deeds are that at the date of executing them Mrs Purdy was not of disponing mind, and therefore that they are not her deeds, and also that she was weak and facile in mind, and that they were obtained from her by the defender Mrs Morrison by fraud and circumvention. These are the grounds of reduction, and there is, and there can be, no question that if the pursuers have a good title to try this action as to the validity of these deeds, the averments on record are perfectly sufficient to sustain the action.

But besides these reductive conclusions, which I think are leading conclusions of the action, there is a conclusion for declarator, by which the pursuers seek to have it found and declared that the trust-disposition and settlement executed on 16th December 1889 by Mrs Purdy is the deed by which her succession falls to be regulated, and having obtained that decree of declarator there are then conclusions of accounting to the pursuers in the capacity of beneficiaries under that trust-disposition and settlement.

I need not advert, as I have said, to the averments as to the state of Mrs Purdy's mind, and as to the alleged fraud and impetration of these deeds, because really no question turns on that at the present stage. But the material case on record about which the present discussion arises is stated in Cond. 10. It is stated there "That about the middle of December she"—that is, Mrs Purdy—"sent for the family law-agent, Mr Asher, and gave him instructions to make a fresh will, as she knew her illness was incurable, and she wished to make a final settlement of her affairs in prospect of an early death. Mr Asher accordingly prepared a trust-disposition and settlement, which was executed by her on the 16th day of December 1889, and by which she conveyed her whole means and estate to Mr Asher and his managing clerk Mr John Rose, whom she appointed her trustees and executors." The purposes of this settlement were that debts should be paid and various legacies, among which I mention one of £500 to Mrs Morrison, the present defender, and then after various legacies she directed her trustees to pay and convey the residue to the pursuers William Gilchrist and Jane Alexander Gilchrist, her brother and sister, equally between them, or to the survivor. There is no doubt that when the action was brought into Court the pursuers thought that deed was still in existence, or at least did not know whether it was destroyed or not, and there can be no doubt that that was the title on which the action was originally brought, and that accounts

for these declaratory and accounting conclusions. However, when the case was brought into Court this explanation was made by the defenders—"It is explained that on the 28th January 1890 the testatrix, being then of sound disposing mind, and fully understanding and comprehending the legal results of such action, sent for Mr Peter Peterson Slater, solicitor and law-agent, and after requesting him to act as her agent, explained to him that the said trust-disposition and settlement in the said condescendence mentioned had been in fact revoked by the will prepared by Mr Asher, and executed on the 20th January as mentioned in condescendence 13, and desired Mr Slater to destroy the same in her presence as useless, and as not expressing her will, which Mr Slater accordingly did. Such destruction was deliberately done *animo revocandi*, and the said trust-disposition and settlement is not now in existence." The reply made to that by the pursuers was this—"With reference to the statement in answer, the pursuers have no knowledge whether the will in question was destroyed, or by whom it was destroyed. If Mrs Purdy destroyed it as stated by the defender, she did so in consequence of the defender having by fraud or circumvention induced her to do so while she was weak and facile and easily imposed upon." Upon these averments being made by the defender on record as to the destruction of this deed, which the pursuers supposed to be in existence when they brought this action, and which they do not now admit to be destroyed, this averment was put on record—"The pursuer William Gilchrist is Mrs Purdy's heir-at-law, and the pursuer Jane Alexander Gilchrist is one of her next-of-kin;" and that averment is not disputed in point of fact.

Now, it was in these circumstances and in that state of the record that the interlocutor which has been submitted to review was pronounced by the Lord Ordinary, and it is in these terms—"Sists process *in hoc statu* in order that the pursuers may, if so advised, raise an action of proving the tenor of the trust-disposition and settlement executed on 16th December 1889 by Mrs Jemima Gilchrist or Purdy upon which they found;" and the question that was argued to us is, whether or not in the state of circumstances disclosed, and in the present state of the record, that judgment should be adhered to. Now, from what I have read of the record it is obvious—perfectly obvious—that the real question at issue between the parties here is the state of the testatrix Mrs Purdy's mind at the date 20th January, when the first of the deeds sought to be reduced was executed, and on 6th February, when the two other deeds were executed. That is the real question at issue between the parties—whether or not these three deeds ought to be reduced on the ground stated. That is the real question with which we have to deal, and I think also that no one could doubt that that question would best be tried in the usual way before a jury with the issue, whether the deed has been obtained by fraud and circumvention in the usual terms. I think that unless there be some strong ground to the contrary, that would be the proper way to try the question at issue between the parties in this case, unless indeed the pursuer has no title to sue. I think that the case would be much better so tried than as the course indicated by the Lord Ordinary would point at, namely, incidentally merely in course of a proving of tenor which would go to show the state of Mrs Purdy's mind on 28th January, when she is said to have destroyed the deed in question, and which, if that fact were established, would no doubt indicate her state of mind at or about the time when these deeds were destroyed, and might afford inference one way or other, but would not decide the question between the parties to this case, for it is not the state of mind on 28th January that is the question, but the state of mind on 20th January.

I think it is clear also that the pursuers have a double title to insist in this action. It is obvious and set forth in this record—and perfectly sufficiently set forth in this record—that the pursuer William Gilchrist is the heir-at-law, and that the pursuer, his sister, Miss Gilchrist is one of the next-of-kin of Mrs Purdy. That being so, if the deed of 16th November is not in existence it is perfectly clear they have a perfectly good title to try this case. That is quite clear, and if the deed of 16th December has not been destroyed—and the pursuers do not know whether it is destroyed or not—and if it is produced before the trial, they have a perfectly good title. The other is the title of heir-at-law, but they have a perfectly good title on which to try the question here. If the first deed had been the only title upon which the pursuers had to rely, I should, on the authority of the case *Shaw* v. *Shaw's Trustees*, referred to by the Lord Ordinary, and on the principle of it, have had no doubt whatever that the course pursued by the Lord Ordinary was the right one, namely, that if that had been the sole title it would have been necessary to bring a proving of the tenor—either to produce it, or, if not recoverable, to proceed by way of proving the tenor first before they could go on with the action. But that is not the state of the title, for as I have already pointed out, the only effect of this first deed is not to destroy the pursuer's title to sue but to give another and equally good title to sue. If it is not produced or not proved, then he is heir-at-law and next-of-kin.

That being so, I have come to the conclusion that the Lord Ordinary's interlocutor should be altered. I think in this case the pursuers have a perfectly good title to try the question here on issues in the usual form. It may be that after the leading conclusions of the action are decided in one way or another, it may be necessary for the further progress of this action then to have a proving of the tenor. That may be quite possible. If it should be that these deeds are set aside by the verdict of a jury, then it may be that

the pursuers will not be enabled to go on with the declaratory and accounting conclusions without putting themselves in a position to insist in these. But if the main question is settled in one way or another, I think that will clear the way for the proper disposal of the remainder. I am therefore of opinion that the interlocutor should be altered, and the case tried by a jury.

LORD M'LAREN—If there had been no averment in this action as to the pursuers, that one of them stands in the relation of heir-at-law, and the other in that of next-of-kin to the defunct, I should have agreed with the Lord Ordinary that this action could not proceed without a proving of the tenor of the lost disposition, for I think no one can pursue a reduction founding on the title of disponee without being liable to be called upon as a condition of prosecuting the case to produce the deed which he asserts to be his title. Admittedly the pursuers are not in a condition to produce the deed which they libel, because it has been destroyed—they say destroyed under circumstances which do not affect its validity, but that is a matter which I think would have to be investigated as a condition of establishing the title to sue in the character of disponee. Now, when the summons was originally brought into Court, the character of disponee was the only title alleged by the pursuers. Since then they have apparently without objection amended their condescendence by asserting a title of heir-at-law and next-of-kin. I confess it would have been more satisfactory to my mind if that amendment had been made by leave of the Court, by minute of amendment and interlocutor following upon it. There has been an amendment of that nature made already, but that does not touch this question; it is an amendment having relation to the character of the defenders. But as I should at anyrate have been prepared to consent to such an amendment if it had been asked for, and as I understand your Lordships think it is within the power of the pursuer on revisal to make such an addition to his condescendence, I am quite satisfied to deal with the case as one in which the pursuers now found on the double title of disponees and also of heirs *ab intestato*. In the second of these characters they are clearly entitled to follow out this action, because the title of heir and next-of-kin is always a good title to challenge any deed whatsoever alleged to be granted by a deceased person, and challengeable on these grounds. While therefore sympathising with the Lord Ordinary's desires to enforce strictness of pleading in matters of title, I think that the objection that seemed to his Lordship to be insuperable may be got over, and that this action ought to be allowed to proceed. I concur with Lord Adam in thinking that if it turns out that the real interests of the pursuers rest upon anything in the deed, it would then be necessary to set up the deed by some subsequent procedure before operative effect could be given to it.

LORD KINNEAR—I concur.

LORD PRESIDENT—I think that if the only title of the pursuers of this action had been that of disponees under the destroyed deed, the course which the Lord Ordinary has adopted would have been the right one, because until that deed was either produced or the tenor of it proved, they could not come to Court at all with a title to challenge what has been done. But the character of heir-at-law on the part of one pursuer, and that of one of the next-of-kin on the part of the other, removes that difficulty altogether, because whether the destroyed deed is to be set up again or not, they are quite entitled to have the deed which has been granted by the deceased to their prejudice set aside if they can make out that the testatrix was not of sound disponing mind at the date of the deed, or was in a state of facility and was circumvented by the defender. The effect of a verdict setting aside the deeds made by the testatrix will be merely this, that these deeds will have no effect whatever; but that will not settle the question whether the deed which is said to have been destroyed, and of which the tenor is sought to be proved, is to be set up or not; but the parties when decree of reduction has been pronounced, will be in position then to reconsider their interest in the two events of setting up the destroyed deed, or acquiescing in its destruction. We do not know exactly what the interests of the pursuers are under that original destroyed disposition, but if there are interests created by that disposition which are adverse to the interest of the heir and next-of-kin, it will then be a question whether the proving of the tenor might not settle the question between the parties; and therefore I think the logical order of the proceeding is to settle in the first place whether the testatrix was of sound disponing mind, or was circumvented in the granting of the deeds which are now maintained and set up by the defenders. And I therefore come to exactly the same conclusion as Lord Adam, that it is quite unnecessary to consider at present what the effect of a decree of reduction may be.

The Court pronounced the following interlocutor:—

> "Recal the interlocutor of the Lord Ordinary, and remit to adjust issues to try the question whether the deeds of 20th January and 6th February 1890 were not the deeds of the testatrix, or whether she was in a state of facility and weakness and was circumvented by the defender."

Counsel for the Pursuers—Dickson—Salvesen. Agents—Snody & Asher, S.S.C.

Counsel for the Defenders — Graham Murray—Brodie Innes. Agents—Stuart & Stuart, W.S.