over absolutely a large sum of money, on the footing of its being invested in the 3 Per Cent. Stocks, to the only party present, other than his own law agent and the young man brought by them to subscribe as the additional witness. No wonder that the pursuer was agitated, and as she says very uneasy in her mind afterwards, and that at the earliest hour possible on the Monday morning, she should have gone to Mr Dunlop, who had acted as her law agent in other matters, to consult him on the subject. This leads me to notice the deposition of that gentlemen, and from his statement it is manifest to my mind that the pursuer had not understood the nature of the deed she had executed on the Saturday. Mr Dunlop says that the pursuer was a good deal excited, and wanted explanation about a paper which she had signed, and that he had difficulty in understanding what she meant. But imagining that it must have been a will, and therefore revocable, he recommended her to execute another will which would have the effect of revoking the deed. This recommendation he gave on finding that the pursuer would not allow him to send for the deed either to Dr Young or to Mr Robertson; for which she gave as a reason that the doctor would be displeased, and that she could get no money except through him, as he was sole executor of her brother's money and the trustee through whom she got her whole income. In the argument for the defenders, it was urged that Dr Young survived the execution of the deed for several months, and that no challenge of it was instituted till after his death. But the evidence of Mr Dunlop, which I have just referred to, affords an explanation quite satisfactory to my mind. The pursuer plainly did not know the import of the deed, and any injurious effects on her succession her agent believed to be counteracted by the will which he advised her to execute on the Monday. And this too may account for some of the observations said to have been made by her on the subject to Dr Young during his illness, and to allay the apprehension he appears to have had about the transaction to which the three relatives of Dr Young examined for the defender refer in their depositions.

Altogether, it appears to me clearly established that this deed was executed by the pursuer in circumstances entitling her to redress. She is proved to have been ignorant of its contents, and under essential error as to its import, influenced by the misrepresentation and concealment practised on her in the facility and feebleness of her great age, by the grantee of the deed who stood in the confidential position of her trustee without the aid of any disinterested adviser or law agent. Upon the evidence, therefore, I cannot doubt that the deed is open to reduction on both of the grounds contended for by the pursuer.

Lord Benholme and Lord Neaves concurred.

Lord Justice-Clerk was absent.

Agents for Pursuer—Murdoch, Boyd, & Co., S.S.C.
Agents for Defenders—Tait & Crichton, W.S.

Tuesday, March 31.

REID *v.* REID.

Proving of the Tenor—Disposition—Fraud and Circumvention—Undue Influence—Inadvertent Destruction. Circumstances in which *held* that the *casus amissionis* in an action of proving of the tenor was not proved, and defender assoilzied.

The pursuer of this action is William Reid, sometime teller in the head office of the City of Glasgow Bank, now agent for the branch of that bank at Lannerton, and the defender is his brother, the eldest son and heir of the late John Reid, sometime farmer at Auchengour, in the parish of Lochwinnoch. The object of the action is to prove the terms of a certain trust-disposition and settlement executed by Mr Reid, the father of the pursuer and defender. The *casus amissionis* set forth was, that the deed in question was burned by the deceased on the 21st February 1867, in such circumstances as to leave it still an unrevoked deed. Three grounds were averred to support the conclusions of the action—(1) That at the date of the burning of the deed the deceased was of unsound mind and could not understand what he did. (2) That at any rate the deceased was weak and facile and easily imposed upon, and that the destruction of the deed was brought about by fraud and circumvention on the part of the defender. (3) That the deed was inadvertently destroyed, and that the deceased on his deathbed confirmed that by a writing under his hand.

The Court sustained the adminicles produced as sufficient for allowing a proof of the tenor and *casus amissionis* of the disposition libelled on, and allowed a proof.

The case came up on the proof.

R. V. Campbell for pursuer.

Macdonald for defender.

At advising—

Lord Justice Clerk—We are asked in this action to revive a disposition executed by the deceased John Reid, on the 1st April 1858, and to declare that when revived the deed shall be as valid and effectual in all respects as the original which has been destroyed.

The pursuer is the second son of the deceased, and by that deed a small property which the deceased himself lived on and cultivated was disponed to him. The defender is the eldest son and heir-at-law of the deceased, and defends the action upon the ground that the deceased destroyed the deed intentionally.

It is proved that the deed of the 1st April was executed, and that its terms are those set forth; it is proved that the deed was destroyed by the deceased. The parties are at issue to the circumstances under which it was destroyed. The case of the pursuer is, that at the time of the destruction of the deed the deceased, from mental incapacity, was ignorant of the nature of the act done by him; or otherwise, that the destruction was brought about by fraud and circumvention, and undue influence exercised by the defender on a mind reduced into a condition of facility and weakness.

The question is not solved in favour of a party taking benefit by the destruction of a deed by proving simply the act of destruction of a deed; it must be done intelligently and with a view to operate as a revocation. If the deceased was in a condition of mental incapacity at the time, so as not to know what he was doing, there can be no question as to the right of the disponee under the deed to have it restored; it might have admitted of question, how far the alternative view of an act truly done by the granter—but where the act has been induced by circumvention—can be, without the aid of reduction, given effect to in this process; but no such point is taken, and as it is desirable to dispose o

the whole case truly at issue between the parties, I think that we shall state our views on that alternative view of the circumstances.

The first question is, whether the deceased when the deed was destroyed was in such a condition of mental incapacity as to be ignorant of the true nature of the act done by him.

I have come to a clear conclusion that the act was done by the deceased when he was aware of the nature and effect of the act done, and that he destroyed the deed intending at the time to do so.

The history of the transaction itself seems to me inconsistent with the assumption of the absence of mental capacity. The deceased was enfeebled physically, and, to a certain extent mentally, by recent paralysis; but having expressed an anxious desire to see his eldest son, in the apparent consciousness of his dangerous illness, his son comes to see him, has an interview on the Thursday, and returns on the Saturday.

We have a statement of what was said and done by a sister who is present during the entire duration of both interviews.

She says,—that when John, the defender, came on the Saturday he came in and spoke to his father, "who answered him quite intelligently." That he gave John the deed afterwards destroyed to read, saying "you will see there what I have done," that he took the paper back when John had read, and gave it to her to keep, John retiring, but promising to return. He returned, and then the deceased held out his hand to get the deed—that he got it, and, on a nod, John put it into the fire. That John having said slap it down, the father did so.

These are acts done by a party who certainly knew what he was doing. His possession of the deed upon the occasion seems to me conclusive of his having entertained some purpose with regard to it. John says, that he himself went to search for and bring the deed from the back room. In the course of the first interview Mrs Laird says, that he had the deed about him. According to Mrs Laird, he was undressed; according to John, the defender, he had on his trousers: but it is, I think, quite opposed to every reasonable presumption that the deed was there in his possession by mere chance. If it was there, either with a view to what passed with John on the Thursday, or was brought by him from his repositories during the interview, it is impossible to say that he was so mentally incapacitated as not to know what he was about. In bringing it he must have known what it was, and he must have had some intention with regard to it. In showing it to his son as he did, in giving it to Mrs Laird to keep, having no means of doing so conveniently himself; in asking it back, and finally consigning it to the flames, I find a series of acts done which import intelligence.

Other considerations tend to the same result. The family did not, certainly, deal with him as in a state of mental incapacity; and the medical man, shortly before the occurrence, testifies to the perfect correctness of his mind, and knowledge of his condition. But it is unnecessary to say more on that head.

I am not moved by the views of the two medical men who saw him on the Saturday evening. I am not satisfied that the facts to which they speak when examined do not tell against the theory of mental incapacity—the fact of the deceased having had a fall (to which he recurred repeatedly), which seems to have at first led one of them to suppose that he was speaking nonsense; while the ignorance of his own son William turns out to be naturally accounted for by the fact that his back was to him, and that he was all covered with waterproof. The test of bargains, and selling of juries, is not that which applies to a case of testamentary volition, and they are at variance on the vital question as to whether there was or was not a state of excitement on that evening.

The case then turns on the alternative question of fraud and circumvention, deceiving, or, as repeatedly put in the course of the argument, of undue influence overpowering the weakened mind of the deceased.

The presence of Mrs Laird during the whole of the interviews of the Saturday excludes the inferences to which we might have given legitimate effect had the parties been alone at the time when the deed was destroyed. Such an act being done *remotis testibus*, and where the object of the destruction—a matter as vital as the act of destruction itself—required to stand upon the evidence solely of the party benefited by the act of destruction, courts of law would justly hesitate to give weight to it; but here, if there were acts done, or threats held out by which the will of the deceased was overpowered, or if deceit was practised by any misrepresentation, we could not fail to have it brought out. As for moral or physical force—of act of violence or threatened violence we have literally nothing whatever—there is no suggestion of them, and the very conception is removed by the fact that John was there plainly in consequence of the desire and invitation of his father, that he was welcome when he came, and that not one angry word escaped from either.

Then, was there deception? John was shown the deed, and said it was of no use. The deceased had certainly spoken of a provision to Martha, and the deed contained no such provision. If the old man knew, as I think he did, that the deed was in favour of his second son, such a statement would be absurd if it was meant that it was of no use to William.

If that single expression be discarded we have no suggestion as to any misrepresentation or deception, and the case must be resolved into one of undue influence. The eldest son had been with his father on the Thursday alone, and he returned to visit him on the Saturday when his married sister was present; he left after two short interviews. There was but slender opportunity for exercising any influence; as for the undue influence, I confess I feel great difficulty in discovering any trace of its existence or exercise. John tells us that he spoke of the settlements on the Saturday, and suggested an alteration if his father retained the purpose which he says he had previously expressed of righting him. It seems to me that the statement of the purpose of doing away with the deed, or of righting his eldest son, is supported by the fact that he made that very statement to various of his acquaintances from time to time; but whether John introduced the subject in consequence of his father having previously spoken of it or not, I do not find, in the suggestion of restoring him to his rights, any such act as can be held to be subject to legal objection. A suggestion by an elder son, to the effect that his father should leave him the inheritance which the law gives him unaccompanied by anything violent in statement or demeanour, cannot surely constitute a legal ground for annulling the act by which his position is restored. I think that

the use of deception, of threat, of violence, of misrepresentation, or the unjustifiable exercise of any undue influence, is not proved; and that the presence of Mrs Laird, and her evidence, fairly read as to the event, excludes the second or alternative view. The mere presence of a son who had been invited to come by his father, and who was guilty of no intrusion in coming, and welcomed when he came, cannot, without a very violent extension of presumption,—without a fanciful conception as to influence for which there is no room in the proof,—be held to warrant the conclusion that the act was unduly impetrated.

There are, no doubt, difficulties arising from what passed subsequently. The deceased, if John's statement is to be believed, dreaded the effect of the act, as one tending to dispeace in the family; he expressed a desire that he would stay with him till he died. Whether this dispeace, actual or anticipated, caused him to take the course of executing the new deed, or whether he did so repenting of the act done, and desirous of reinstating his second son, he certainly indicated intentions directly opposite to those which led him to destroy the deed. Whether in sending for Paterson, the Lochwinnoch writer, on the Saturday, his purpose was the same as that which led him to execute the deed on the 30th, or only to provide for Martha, is not quite clear; but it is certain that on the 30th he did what, had he had survived for the requisite period, would have undone the act. The question is, does that make it clear that there was no intention on the Saturday, or that the intention had changed.

There is one fact brought out in the evidence of the pursuer which has appeared to me to be of considerable importance, and which it is certainly difficult to reconcile with the result to which I am disposed to come. Several witnesses speak to the deceased having expressed himself, subsequently to the 26th, of John as a vagabond, and one who should be put in jail. Mr Williamson says that the expressions were at first used in common with some settlement of accounts between the deceased and John; others connect them more or less directly with the act of destruction of the deed; but none to the precise effect of the punishment being due by reason of any special act of misconduct. In the act of the destruction, which was certainly an act of the deceased himself, I am unable to perceive any indication of anything done by John which could be of such a nature as to merit imprisonment; and I am constrained, therefore, to trace it rather to the other source indicated, suggested or actual, as to a difficulty about accounts.

I think it is remarkable, if there had been no intention on the part of the deceased to destroy the deed, that he should not have said so expressly.

And in the deed itself, proceeding on the information of Williamson, the deed is said to have been destroyed "inadvertently"—a word not used by the deceased, but resulting from a statement that he wished Williamson to get the farm, and never had any other intention. But that he had a different intention at some time is proved by a number of witnesses.—The statement to Spiers; that of James Alexander, of Orr, and of Campbell, prove distinctly that the deceased did express not only the intention to give his eldest son his property, but that influence was exerted in the family to prevent him carrying out the intention.

Taking into view the details of the event itself, and these previous expressions of a purpose carried out in conformity with them, I come to the result that we should sustain the defences, and find that the *casus amissionis* in this action of proving the tenor is not proved.

The other judges concurred.

Agent for the Pursuer—A. K. Mackie, S.S.C.

Agents for the Defender—M'Ewen & Carment, W.S.