tions have been made by the party complaining; these may in their turn be objected to. It is no good justification of one illegal act that another has been committed by the other party.

The result of these views will be, if your Lordships concur with me, substantially to make perpetual the interdict granted by Lord Mure *ad interim*, in the Bill Chamber, on the 30th January 1866, as to operations of a nature affecting permanently the condition of the larger of the two islands and as to the jetty.

Lord Cowan concurred. He thought the complainer was entitled to interdict to the extent proposed to be granted, as, though less, it was clearly within what he asked, and was warranted by the facts and the proof, even supposing exclusive right in the complainer to the islands might not have been proved in the present case. His Lordship stated that he had a very clear opinion as to the complainer's right to object to the jetty in question, even though it may have been in existence for some years, which fact of itself would not, he thought, bar the complainer's right to have it removed as an illegal erection, because, perhaps, its evil effects might only now be beginning to be seen. The complainer's superiority title was sufficient to entitle him to appear and have the superiority lands protected from damage, but here the Court did not require to rely upon that title alone, for damage was being done to the complainer's property lands immediately further down through the erection of the jetty complained of by the great body of the water being diverted into the north channel.

Lord Benholme and Lord Neaves concurred.

The Court unanimously recalled Lord Ormidale's interlocutor, and returned substantially to the one pronounced by Lord Mure in the Bill Chamber when disposing of the question of interim interdict, and so granted interdict against the respondent to the extent of prohibiting him from cutting down trees or planting others on the larger island, and also from making any extensions of the existing jetty, or from building new ones in the *alveus* of the stream opposite the complainer's lands. *Quoad ultra* they refused the interdict craved, and found no expenses due to either party.

Agents for Complainer—James C. Baxter, S.S.C.
Agent for Respondent—M'Ewan & Carment W.S.

Monday, March 30.

SHEARD *v.* YOUNG'S TRUSTEES.

Reduction—Assignation—Fraud—Essential Error—Concealment and Misrepresentation. Circumstances in which the Court, on advising a proof, reduced a deed on the ground of essential error on the part of the granter, fraudulently induced, and on the ground of concealment and misrepresentation.

This was an action in which the pursuer was Mrs Elizabeth Macadam or Sheard, residing in John Street, Ayr, and the defenders were the trustees of the late James Young, doctor of medicine in Ayr, and brother-in-law of the pursuer, and the action *inter alia* concluded for reduction of a certain assignation of £1000 Consols made by the pursuer in favour of Dr Young, prior to the latter's death, and which was said to be reducible on the ground of fraud and essential error. The pursuer's allegation was that for many years Dr Young had managed her (the pursuer's) business, and had, *inter alia*, deposited in his hands a sum of money corresponding to £1000 value in British Consols; that on or about the 3d February 1866, he obtained from her an assignation in his own favour of these Consols; that the said assignation was obtained from her by misrepresentation and fraudulent concealment practised by the said Dr Young, and that the same was signed by her under essential error as to its tenor and effect, and under the belief that it was a mere matter of form and would have no effect on her estate. The pursuer also alleged that no consideration was given for the said deed, and that at the time she signed it she was between seventy and eighty years of age. There was a conclusion for count and reckoning, and a claim under it for £3000.

The defenders denied the pursuer's averments, and averred that the pursuer fully understood the effect of the deed, and that the same was prepared by an agent employed for the purpose, in terms of her repeated instructions, and executed by her in presence of the said agent and Dr Young, who carefully explained to her the nature and effect of what she proposed to do.

The Lord Ordinary reported the case upon issues proposed by the pursuer, which were—

"Whether the pursuer, in granting the assignation, translation, or conveyance, dated on or about the 3d day of February 1866, of which No. 21 of process is an extract, was under essential error as to the tenor and effect of the said deed?

"Whether the pursuer was induced to grant the said deed by fraudulent concealment practised by the said deceased James Young, or false and fraudulent representations made by him as to the tenor and effect of the said deed?"

His Lordship added the following note:—

"The defenders objected to the pursuer's proposed issues, No. 29 of process—1st, That as no sufficient case was laid by the pursuer on essential error, the first of the proposed issues was inadmissible; and, 2d, that as no sufficient case was laid on the head of concealment, the second of the proposed issues, so far as it was founded on that ground, was inadmissible. It appears to the Lord Ordinary that the points thus raised require the serious attention of the Court, and he very much doubts whether the proposed issues are maintainable, so far as objected to. It is not averred by the pursuer that she had no mind to grant any deed; and although in condescendence 18 she states that at the time she executed the deed in question her mind had been weakened by illness, she does not propose to take any issue founded on fraud and facility. Her averments, however, in condescendence 18 and 19, taken together, may be held as supporting the issue founded on fraudulent misrepresentation, and accordingly no objection was stated to that issue, so far as founded on that ground. But the question is—Are these averments sufficient to support the issues, so far as founded on essential error and concealment? In condescendence 19 the pursuer substantially admits that the deed in question was read over to her before she subscribed it, and it is not said that it was of a complicated nature, or otherwise in itself difficult to understand. It will also be noticed that the pursuer does not

put in issue that the essential error was caused or induced by the defender. No authorities were cited to the Lord Ordinary, but he may refer to the cases of *Campbell's Trs.* v. *Campbell and Others*, 12th March 1842, 2 Macph., p. 848, and *Ritchie* v. *Collie and Others*, 13th January 1866, 4 Macph., p. 292, as bearing on the points now to be disposed of."

Parties having agreed to supersede the issues, a proof was allowed, and a remit made to the Lord Ordinary to take the proof, which was done.

YOUNG, CLARK, and ASHER for pursuer.

D.-F. MONCREIFF and WATSON for defenders.

At advising—

LORD COWAN—The object of this action is to set aside a deed of assignation and transference, purporting to have been granted by the pursuer to and in favour of the deceased Dr James Young, bearing date 3d February 1866.

At the date of the deed the pursuer was in the 80th year of her age, and her affairs were under the entire charge of Dr Young, who was her brother-in-law, as her confidential adviser and trustee. The grounds on which reduction of the deed is sought are (1) essential error as to its tenor and effect, fraudulently induced by Dr Young; and (2) concealment and misrepresentation as to the true nature of the transaction practised on her by him in her state of facility and feebleness incident to extreme age. The relevancy of these grounds of reduction cannot be doubted; and the sole question is, whether they have been established by the proof? But I may observe at the outset that there is no situation in which parties can be relatively placed, in which the presumptions of law and of reason weigh so heavily against the rectitude of the proceeding, as when a guardian or trustee has succeeded in obtaining from the person whose interests he is bound to protect, a gratuitous transfer of property or some other selfish advantage. And, in the peculiar circumstances of this case, it was to be expected that the utmost care and circumspection would be taken, that no doubt might exist, that the deed of so aged a person in favour of her trustee, was the expression of her true intention and mind.

The deed sets forth in its narrative that about fifteen years ago the pursuer "voluntarily deposited with and invested in the hands of Dr Young, a sum of money corresponding to £1000 value in British Consol Stock, the interest, dividends, or other annual return," whereof "being to be paid over to and retained by him *for his own use* during my pleasure, as a gratuitous payment, while the said principal sum was to be held at my disposal and subject to my control and directions." The pursuer avers that this statement is false, inasmuch as no such voluntary deposit or investment was ever made or sanctioned by her. The deed farther narrates that Dr Young "has *faithfully accounted for and applied the interest* or annual return of said sum," from the date of investment to January 1866, in manner directed, to the granter's entire satisfaction; and it is added—inconsistently enough with the purpose previously stated—that Dr Young had been discharged, and was thereby of new discharged of said interest or annual return. This statement also is alleged to be false, inasmuch as the annual proceeds referred to were never retained by Dr Young for his own use, but were paid over to the pursuer, on the footing of being dividends on an amount of Consols which did not in fact stand in her name or in that of Dr Young for her behoof at all. The deed, however, proceeds to state that, being desirous of "still farther evincing the gratitude and obligations" the granter was under to Dr Young, she had resolved to execute the transference that follows.

On this narrative the granter makes over to Dr Young and his heirs and assignees, absolutely and irrevocably, "*the foresaid sum of* £1000 *of stock of British Consols* from and since January last 1866, and in all time coming thereafter,"—reserving the granter's liferent interest in the principal sum, and which interest amounts to £15 each half year. Dr Young binds himself and his heirs "to pay over to me regularly and termly in June and January, as the same shall become due, without deduction of income-tax." The deed contains obligation of warrandice from fact and deed, but it contains no clause dispensing with delivery.

The evidence establishes (1) that at the date of this deed there was no sum of £1000 stock of British Consols belonging to the pursuer which could be assigned by her, and the dividends on which, payable in June and January, could be paid over to her, (2) that in 1852 that or a similar amount of stock in British Consols, which stood in his name for behoof of and in trust for the pursuer, had been sold by Dr Young, and been invested by him at a higher rate of interest, without the knowledge of the pursuer for his own use; and (3) that for years previous to the date of this deed, Dr Young, as the pursuer's confidential adviser and trustee, had the entire management and control of her money matters.

This previous connection of Dr Young with the pursuer and her affairs is an essential part of the case, and the facts bearing on it, as established by the proof, require to be briefly noticed. The pursuer was married in 1834, and by antenuptial contract the whole property then belonging to her, or which she might acquire during the marriage, was assigned to her brother, Dr James M'Adam, then resident in Bombay, and to a Mr Gill, in trust for her separate use, exclusive of the *jus mariti*. This marriage was dissolved by the husband's death in November 1849 without issue. The pursuer's brother died in 1842, and subsequent to that event (in 1843), Dr Young, who had married the pursuer's sister, was assumed as a trustee under the marriage settlement along with Mr Gill, and took the principal charge of the trust affairs, receiving the monies and estate which fell under the trust and belonging to the pursuer; Mr Gill having left Scotland, and being still outwith the jurisdiction of the Court. On the death of their brother, it appeared that a sum of £4000 was left by him to each of his two sisters, the sum provided to the pursuer being placed under trust, to secure for her sole use the interest and dividends thereof, and the fee to be at her absolute disposal; and farther, there being no destination of the residue in their brother's will, the pursuer and Mrs Young succeeded to it equally, the amount being about £4300. Various accounts relative to these funds are produced in evidence. It is sufficient to observe that the sum of £4000 was invested in name of the pursuer's trustees, Messrs Gill and Young, in the Consolidated Three Per Cent Annuities—the proceeds of which were annually drawn by Dr Young for the pursuer's behoof as her trustee; and that of her residuary interest in her brother's estate, £1000 was separately vested in the Three Per Cent. Consols. This investment was subsequently transferred to the sole name of Dr Young in or about 1847. It is this sum of £1000 Consols which is pretended in the deed under reduction to have been transferred to Dr Young in 1866, when he had disposed of it and appropriated the proceeds in 1852.

Both the narrative and the substance of this transference and conveyance are thus essentially false; and the inference is irresistible, both that the pursuer had been kept ignorant of the sale of Consols in 1852, and that she did not comprehend the import and effect of the deed to which her signature was attached. Farther, it is in evidence that half-yearly dividends of £15 of the £1000 were continued to be paid to her, along with the dividends on the £4000, precisely on the same footing as if there had been no sale; and although the pursuer's earlier receipts have not been recovered from the repositories of Dr Young, a receipt is in process taken by him from the pursuer, dated 30th July 1866, subsequent to the execution of the deed, for £15, "being the half-year's dividend, viz., from January to June 1866, upon the sum of £1000 of British Consol Stock without deduction of income-tax." The same delusion in regard to the actual state of matters was thus kept up in the pursuer's mind; and in relation to these half-yearly payments, it is important to observe that the deed carefully embodies a renewed discharge for the whole interest or annual return on the investment. Now it is not doubtful that as Dr Young, in breach of his duty as trustee, had sold the consols and employed the £1000 to his own profit, he must have accounted to the pursuer, and was in truth her debtor, for greatly more interest than the mere dividends on that amount of stock which he paid to her. And this part of the deed thus proceeds upon the same untrue assumption of the fact, and affords corroborative evidence that the pursuer was ignorant of the true condition of the matter, and that the intention must have been to keep her in that state of ignorance.

The circumstances attending the pursuer's execution of the deed have now to be noticed. On the morning of the day of its execution Dr Young called for Mr Robertson, solicitor in Ayr, who had been his agent for two or three years (but of whom the pursuer knew nothing), and told him that he had been to see the pursuer, and that she had requested him to call for Mr Robertson for the purpose of having a deed prepared, transferring a sum of £1000 stock absolutely to him, the interest being reserved to the pursuer during her life. Of this alleged commission from the pursuer, which she altogether denies, there is no proof whatever. Mr Robertson, however, acting on Dr Young's instruction, immediately prepared the deed, without having had any communication with the pursuer, as he certainly ought to have had; and in the course of an hour he was waited on by Dr Young, who revised and approved of the draft. The deed was then extended by Mr Robertson himself, still acting exclusively on the instructions of Dr Young, the party to be benefited by the deed.

Two remarkable circumstances appear from Mr Robertson's evidence as to the preparation of the deed, demonstrating the false impression of the actual state of matters on which he acted. It is his distinct statement, *first*, that he understood that previously to that time "Dr Young had received the interests or dividends, and put them into his own pocket, to the pursuer's satisfaction, and that afterwards Dr Young was to pay the interests or dividends to the pursuer;" and *second*, that his understanding was, that the deed was to operate the transfer of stock, and that he "advisedly used the word stock, which was either to continue with Dr Young, or be transferred to him, as the case might be;" and in accordance with this, Mr Robertson states further that the pursuer's distinct understanding was "that the deed made over £1000 Consols stock to Dr Young, reserving her liferent interest." There cannot be a doubt of the truth of these statements by Mr Robertson; and I refer to them as showing that Dr Young, under whose instructions he prepared the deed, had deceived his own agent on these two material points, and led to the preparation in good faith by his agent of a deed at once false in its narrative and false as regards the subject-matter which it purported to assign.

The deed, thus prepared without instructions, oral or parole, from the pursuer, and without communication with her, was taken by Dr Young and Mr Robertson the same forenoon to Mrs Sheard's house. Her servant says that the visit was unexpected, but that the pursuer, who was just recovering from a protracted bilious attack, was out of bed when they came; while the pursuer herself says she was only half dressed at the time, and not expecting visitors. She went into the room to them on being informed by her servant of their arrival. The deed was then produced by one or other, that it might be signed by her at the moment. The only other person present was a young man of the name of Stevenson, taken there for the purpose of subscribing as witness, an inexperienced lad of about seventeen years of age. What occurred is variously stated by Mr Robertson and by Stevenson and by Mrs Sheard. Stevenson says the deed was read over only once, and not distinctly. Mr Robertson says it was read over by him twice, and that he explained the meaning of it clause by clause to the pursuer, and that she said it was perfectly right. And as to the fact of the deed having been read twice over, the pursuer confirms that statement, adding, however, that she did not understand a word of it. The deed was then subscribed by the pursuer and by Mr Robertson and the lad Stevenson as witnesses; and Mr Robertson says that he "then and there completed the testing clause," and that he "did not remain more than a minute in the pursuer's house after completing it," but went home, carrying the deed with him which he delivered to Dr Young either that day or the next. The whole time occupied in the affair does not seem to have been more than fifteen or twenty minutes.

Prior to this interview there is no evidence whatever that the pursuer had intended to make such a donation to Dr Young. There are, indeed, some vague statements made by witnesses for the defender as to conversations which the Dr appears to have had about the sum of £1000 which he owed her; and as to which he desired to have some paper signed by her, and of his having been evidently much agitated in his mind in respect to the money. But as to any deliberate intention to give him that money, absolutely and irrevocably as a gift, I see no proof whatever on which reliance can be placed. A statement by Dr Young to the witness, Mrs Rintoul, is indeed sworn to by her, to the effect that he had, *two days or so before the deed was signed*, given Mr Robertson instructions to prepare the deed. But this statement is contradicted by Mr Robertson, and must be held to have been falsly made for a purpose, assuming the witness to be stating the truth. The case to be dealt with is thus that of an old woman of 80 called on of a sudden, without the presence of any one to give her advice, and without the opportunity of consulting her ordinary law agent, to execute a deed, giving

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