the general estate will ensue, but the contrary. I see no reason, therefore, why we should not answer the question as your Lordship proposes.

LORD SALVESEN—I am of the same opinion. The testator, in a certain event which has happened, directed his trustees, with the concurrence of his widow, to continue his business. They did so for a number of years, with results that showed that the business is one which is capable of being carried on at a profit, and, indeed, that a very large loss would in all probability be involved to the estate if the business had to be realised. They now propose, instead of carrying it on as a private partnership, to convert it into a private company, and to make such alterations on the constitution as the Companies Act of 1908 renders necessary. I am far from saying that we could authorise trustees to carry on a business as a private company under the Companies Act 1908 generally, but one has to consider what are the terms of the memorandum of the company which the trustees propose to form. These terms are set forth, as I think the parties were bound to do before we could determine the question raised by the case, and I find that in substance there is no change upon the old private partnership except such minute changes as compliance with the Companies Act 1908 requires, and which are in no degree adverse to the interests of the fourth party as residuary legatee. The same capital is being employed; the same persons are going to control the administration of the business; and in every respect, so far as I can see, the new company will be identical with the old, with this important difference, that the rest of the trust funds will no longer be endangered should disaster ultimately overtake the business. Now these being the facts, I think the trustees are substantially within the direction of the testator, and that this proposed new company is a continuation merely of the business, and is not the establishment of a new business which is impliedly prohibited. Accordingly I am of the same opinion as your Lordship, that we should answer the question in the affirmative.

LORD GUTHRIE—I agree. In the proposal which we are asked to approve there seem to be only two differences of any moment between the business as now proposed to be carried on and the business presently in existence. The one is that certain persons will now be interested in the management and in the profits who were not interested before; but the testator contemplated that his trustees might assume an additional person as partner, namely, the manager, if they appointed one. The other difference is a substantial one, namely, that under the new proposal the rest of the estate will not now be in risk. That does not seem to me a difference that can possibly affect the question now before us, because it is in the interest of everybody, including the fourth party, and it will be to the advantage of the estate left by the deceased.

The Court answered the question of law in the affirmative.

Counsel for the First, Second, and Third Parties—J. R. Christie. Agent—James G. Bryson, Solicitor.

Counsel for the Fourth Party—Malcolm. Agents—Carment, Wedderburn, & Watson, W.S.

Saturday, June 15.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

HOUSTON *v.* AITKEN.

Proof — Relevancy — Insanity — Hereditary Insanity — Will — Reduction.

In an action for the reduction of a will on the ground of fraud and circumvention, the pursuer, with a view to proving that the deceased was peculiarly liable to suffer, and did suffer, from mental disease, specified previous instances in which several of the deceased's relations had suffered from mental disorder. Objection having been taken to the relevancy of these averments, *held* that such evidence was not necessarily irrelevant, and objection *repelled*.

On 20th October 1911 Mrs Isabella C. Galloway or Houston, wife of Robert Houston, joiner, Dunfermline, *pursuer*, brought an action against Isabella Aitken, Pannie Cottage, Kennoway, trustee and executrix of her (the pursuer's) father Edward Galloway, *defender*, in which she sought reduction of a settlement executed by him on 7th December 1909, which she averred the defender—who acted as his housekeeper—had by fraud and circumvention succeeded in impetrating from him.

The pursuer, *inter alia*, averred—"(Cond. 2) The late Edward Galloway, who was seventy-one years of age at the date of his death, was for many years an engineer in the service of the Egyptian Government and in receipt of a large salary. . . . While on duty in the Red Sea the said Edward Galloway suffered from sunstroke and had to leave Egypt sooner than he intended to do. For many years before his death he suffered from arterio-sclerosis of the brain, and latterly softening of the brain. . . . (Cond. 5) The said deceased Edward Galloway was subject to violent fits of passion. On one occasion he took possession of the defender's clothes and set them on fire. He frequently behaved in an outrageous fashion and indulged in alcoholic liquor to excess. *A sister of the deceased's was confined in an asylum for twelve months on account of her mental condition, and David Galloway, a brother of deceased's, was a person of weak mind. A nephew of deceased (the son of a brother) is at present*

in an asylum. . . . (Cond. 6) For a number of years prior to his death the defender exercised a dominating influence over the deceased. About twelve years prior to his death deceased had a shock of paralysis, followed by a second shock four years afterwards. These shocks had a marked effect on the mind of the deceased, and for a number of years prior to his death he was mentally weak and easily influenced. For a period of about nine years prior to his death he was in a weak state of health and was intermittently confined to bed. For a period of at least two years prior to his death he was entirely under the control of the defender, who transacted all business for him and regulated his affairs. . . ."

She proposed the following issues—"(1) Whether the general disposition and settlement, dated 7th December 1909, is not the deed of Edward Galloway. (2) Whether on or about 7th December 1909 the said Edward Galloway was weak and facile in mind and easily imposed upon, and whether the defender Isabella Aitken, taking advantage of his said weakness and facility, did by fraud or circumvention impetrate from him the said general disposition and settlement, to the lesion of the said Edward Galloway."

The defender pleaded, *inter alia*—"(1) The pursuer's statements being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed; and, in particular, the averments with regard to the mental condition of the deceased's relatives are irrelevant, and should be excluded from probation."

On 19th December 1911 the Lord Ordinary (SKERRINGTON) appointed the passages in condescendence 5 (which are printed in italics) and the relative answer thereto to be deleted from the record, and approved of the proposed issues.

Opinion.—"This is an action for the reduction of a will in which the pursuer proposes the two ordinary and familiar issues. The defender's counsel moved that before approval of the issues the following passage should be deleted from article 5 of the pursuer's condescendence—'. . . [*quotes passage in italics*] . . .' Evidence of this kind has been repeatedly disallowed in criminal cases, but it would appear from Dickson on Evidence, vol. i, sec. 3, where the whole authorities are collected, that the law is not so clear in regard to civil cases. I do not regard such evidence as necessarily irrelevant. An expert in insanity, who was familiar with the whole history of the various relatives of the testator who are referred to in the passage above quoted, might be able to draw the inference that the testator had a hereditary predisposition to insanity, and this conclusion, if correct, might help him to form an opinion on the further questions whether the testator had in fact become insane, and whether his insanity was of such a kind as to affect the validity of the will. The real reason for excluding such evidence is that its bearing upon the main issue is remote, and that it would be valueless, and indeed positively misleading, unless the inquiry as to the alleged mental disorder of the testator's relatives was conducted with the same care and minuteness as the inquiry into the alleged insanity of the testator himself. Life is not long enough to allow of an exhaustive inquiry into every side issue which has or may have a bearing upon the main issue. I accordingly appoint the passage to be deleted from the record. . . ."

The pursuer reclaimed, and craved leave to amend the record by adding to condescendence 6, in lieu of the passage in condescendence 5 which the Lord Ordinary had ordered to be deleted, the following averments—"Deceased's father had a sister Christina who suffered from mental disease, although she was not actually confined in an asylum. A sister of the deceased was confined in Springfield Asylum for seven months on account of her mental condition. She suffered from melancholia and strong suicidal impulses, and David Galloway, a brother of deceased, suffered from epileptic fits accompanied by mental derangement. Another sister of deceased was for a period of nine months mentally incapax. These persons all suffered or suffer from mental disease. The disease showed itself in different forms in different persons. The fact that so many of the relations of the deceased Edward Galloway suffered from mental disease is a clear indication that mental disease is hereditary in the family. The fact that the disease showed itself in varied forms shows that the disease is deeply rooted in the family. Hereditary insanity is different from hereditary disease. In the former case the insanity may and usually does take a different form in the descendant, but the cause in both cases is mental disease. With such a family history the deceased was peculiarly liable to suffer and did suffer from mental disease."

Argued for reclaimer—The evidence proposed was relevant, and the amendment should therefore be allowed. Though the question of the admissibility of such evidence had often been raised in criminal cases, the only civil case in which the matter had been dealt with in Scotland was that of *Walker* v. *Macadam* (1806), Morr. Proof Appx. No. 3 (8th March 1806, F.C.), *affd.* 21st May 1813, 5 Pat. App. 675, *vide* Eldon, L.C., at p. 689. *Esto* that in Scotland the general rule in criminal cases was to reject such evidence, the rule in England was the other way—Taylor on Evidence (10th ed.), sec. 335; *Earl Ferrers*, 1760, 19 Cobbett's State Trials, 886, at pp. 923, 932; *Frere* v. *Peacocke*, 1843, 3 Curt. 664, at p. 669; *The Queen* v. *Tucket*, (1844) 1 Cox's C.C. 103; *The Queen* v. *Oxford*, (1840) 9 C. & P. 525, at p. 547. And in Scotland such evidence had sometimes been admitted—Hume on Crimes, i, 40; *H.M. Advocate* v. *M'Leod*, April 14, 1838, 2 Swinton 88; *H.M. Advocate* v. *Stewart*, April 25, 1848, Arkley's Rep. 471. The question of admissibility was really one of degree—Dickson on Evidence, sec. 3.

Argued for respondent—The evidence proposed was irrelevant, for many kinds of insanity were not hereditary, and a man might be insane in one respect and otherwise sane. To admit such evidence would not only open up a vast field of inquiry, but would have the effect of prejudicing the minds of the jury. It ought therefore to be disallowed—*A* v. *B*, February 23, 1895, 22 R. 402, 32 S.L.R. 297; *Inglis* v. *The National Bank of Scotland, Limited*, 1909 S.C. 1038, 46 S.L.R. 730. The case of *Macadam* (*cit.*), in which such evidence had been disallowed, was very carefully considered and should be followed. *Esto* that in certain criminal cases evidence of collateral insanity had been admitted, the general rule was to disallow it—*H.M. Advocate* v. *Gibson*, December 23, 1844, 2 Broun 333, at p. 347; *H.M. Advocate* v. *Brown*, April 25, 1855, 2 Irv. 154; *H.M. Advocate* v. *Dingwall*, September 20, 1867, 5 Irv. 466; *H.M. Advocate* v. *Paterson*, April 22, 1872, 2 Coup. 222; *H.M. Advocate* v. *M'Clinton*, September 18, 1902, 4 Adam 1, at p. 13; *H.M. Advocate* v. *Edmonstone*, June 9, 1909, 47 S.L.R. 7. *Esto* that in *H.M. Advocate* v. *Galbraith*, June 16, 1897, 5 S.L.T. 65, such evidence had been admitted, there was no discussion of the point in that case.

At advising—

LORD KINNEAR—I think with the alterations which have now been proposed, and which have been made at the bar, the amendment ought to be allowed. The relevancy of the proposed averments appears to me to raise questions not of law but of fact, because the only point in dispute is whether, if they were proved, the facts alleged would tend to make the fact in issue highly probable, and that does not depend upon any doctrine of law but upon medical opinion. The opinion of medical experts as to the significance of the family and personal history of the testator is a relevant fact, and the facts upon which such opinion is rested may also be proved in order to the proper application of the expert opinion to the question in issue. I think, accordingly, the amendment ought to be allowed, because we can decide nothing at present as to the importance or direct bearing of the evidence, and we decide no more than that it may be admissible if a proper foundation is laid for it.

As to the defender's motion that the case should be sent to proof before a judge instead of a jury, I am not disposed to accede to that. This is one of the appropriated causes. It is a case that is eminently suitable for trial by jury, and we should be going contrary to the ordinary practice if we appointed it to be otherwise tried.

LORD JOHNSTON—I concur, but with considerable hesitation, because I foresee great difficulty in dealing with the matters which are proposed to be proved in support of this action, in their proper bearing, and in confining them to their proper bearing before a jury. Three physical symptoms of mental incapacity are averred—arterio sclerosis, softening of the brain, and shocks of paralysis. And these three being the physical symptoms, the mental symptoms averred are fits of violent passion, outrageous conduct, and excessive indulgence in liquor. These physical symptoms are so definite and so personal to the deceased, and so closely connected with the mental condition alleged, that I see very great difficulty in so connecting them with the alleged hereditary history of this man's family as to make evidence of heredity relevant or pertinent. But I admit that there is very great force in a remark which was made, not to-day but at the first discussion, that a medical expert may view symptoms differently if he knows that there has been insanity among near relations in blood and was not drawing his conclusion solely from the symptoms themselves. I therefore do not see my way to refuse the addition of this very proper notice of details being added to the record if evidence of the sort referred is to be allowed.

LORD MACKENZIE—I am of the same opinion. In a case of this kind evidence of the opinion of medical men has of course great weight, and the facts upon which that medical opinion is founded must be proved. Now evidence may be tendered on behalf of the pursuer to the effect that the opinion of his medical witnesses is based to some extent upon the facts which are averred in this minute of amendment. If that is so, it would not be possible to exclude subsequent evidence to prove that the facts were as stated, and accordingly, if a sufficient foundation is first laid, I think that the averments in the minute of amendment may be made evidence in the case.

Upon the question of whether this case is to go to proof or to jury trial, I agree with what your Lordship in the chair has said.

The LORD PRESIDENT was absent.

The Court recalled the Lord Ordinary's interlocutor, allowed the record to be amended as proposed in the minute of amendment, and of new approved of the issues.

Counsel for Pursuer—Watt, K.C.—MacRobert. Agent—D. R. Tullo, S.S.C.

Counsel for Defender—Cooper, K.C.—Fleming. Agents—Mylne & Campbell, W.S.