1817.

WHITE
v.
BALLANTYNE.

WILLIAM WHITE, the Nephew, Heir-at-Law, and one of the next of kin of John Dalgleish, deceased, . . . } *Appellant;*

ROBERT BALLANTYNE of Phahope, residing at Dryhope, in the County of Peebles, *Respondent.*

House of Lords, 17th, June 1817.

REDUCTION—FACILITY, FRAUD AND CIRCUMVENTION.—A deed of settlement having been challenged on the head of facility in the grantor, and fraud and circumvention on the part of the grantee, the reasons of reduction were repelled in the Court of Session, but in the House of Lords, case remitted for reconsideration, with certain declarations made.

The appellant brought an action of reduction as heir-at-law of the deceased John Dalgleish, to set aside and reduce a testamentary disposition executed by him before his death, on the 3d day of February 1808.

The chief ground of challenge was, that at the time this disposition and settlement was executed, John Dalgleish, the grantor of this disposition and settlement, was a man of very weak and *facile temper*, and at same time much addicted to drinking. 2d, That the said settlement was highly irrational in itself, inasmuch as it disponed a very considerable and valuable property to the defender (respondent), a very distant connection of the grantor, to the prejudice of his whole near relations; and 3d, That the foresaid disposition was obtained through concussion on the defender's part, while he detained the said John Dalgleish in his house, apart from his relations and friends, who were not permitted to see him; and the deed was thus impetrated by the defender, through gross fraud and circumvention on his part, and through facility on the part of the grantor.

It further appeared, that in consequence of a letter received, Mr Cairns, the writer, went to the respondent's house, where John Dalgleish then was, and received his instructions to make the will of February 1808. The jotting of these instructions written down by him was, that John Dalgleish appoints Mr Ballantyne of Phahope (respondent), his executor, burdened with his debts, and funeral expenses;—the land to Mr David Ballantyne; £100 to William White; £100 to Alexander White; £100 to Elizabeth White, &c., and lastly, £300 *to Mr David Ballantyne, besides the land.*

But instead of the deed being made out conformable to this jotting, the land was conveyed to Robert Ballantyne, and only £300 to David Ballantyne. No proper explanation was made of this discrepancy; and it was not proved that the deceased was informed of it; but, conscious that this could not stand scrutiny, a letter was concocted by Mr Cairns and the respondent, in order to explain this away. This letter was signed by Robert, and addressed to Mr Dalgliesh, and, instead of being dated of same date with the deed, was dated 7th September 1808, setting forth: "Sir, I understand that, by the disposition and assignation, dated 3d February 1808, granted by you to me, as executor, with the burden of certain legacies therein mentioned, you also disponed all and whole these two pieces of land, the one lying in the Bridgelands of Peebles, and the other lying in the Kirkland of Peebles, bounded and described as particularly mentioned in the title-deeds thereof; and as you declare that it was your intention to have disponed these two pieces of land to David Ballantyne, my brother, *but which could not be properly done at the time, for want of the title-deeds to give a particular description of the lands*, I hereby bind and oblige myself and my heirs, if the disposition granted by you to me stands unaltered at your death, to grant to the said David Ballantyne, immediately on that event, a valid disposition to the said two pieces of land."

In Cairns' evidence, it was deponed that the deed of 3d February 1808, when executed, was sealed up and delivered into his custody, and so remained *without being shown to any one till the packet was opened after the testator's death.* The letter therefore, it was strongly represented, was a device, an *ex post facto* operation, to disguise the whole transaction.

A proof was allowed and reported. After memorials were given in, the Lord Ordinary, finding a difficulty from the contradictory nature of the proof, ordered the cases to be printed and boxed to the judges of the First Division. July 8, 1813.

After hearing parties, and considering the memorials, the Court pronounced this interlocutor:—"Repel the reasons of reduction, assoilzie the defender from the conclusions of the libel, and decern: Find the pursuer liable in the expenses of process, allow an account thereof to be given in; and remit the same, when lodged, to the auditor of Court to tax and report." Jan. 21, 1814.

Against these interlocutors, the present appeal was brought by the pursuer (appellant) to the House of Lords.

1817.

WHITE
v.
BALLANTYNE.

Pleaded for the Appellant.—1st, John Dalgleish, the alleged testator, is proved to have been a man of the weakest understanding, and of that facile disposition which renders it incumbent on those favoured, to show that the will was his spontaneous act, and that there was no means used, but the utmost purity on their part. So far from this being the case, it is here proved that the respondent intruded himself into the management of Dalgleish's affairs, set him at variance with his relations without cause, excluded them from all communication with him, kept him, in truth, a prisoner in his own house, where he was allowed to have little or no intercourse with any one out of the respondent's family, and thus he acquired and exercised a complete ascendency over him, evidently with a view to obtain his property in the way in which the instrument in question conveyed it. The respondent has failed in his proof of capacity. He did not produce a single witness to whom the deceased was intimately known, and all the witnesses are either his own servants or others under his control.

2d, It is proved and admitted that the disposition of a considerable part of John Dalgleish's property purported to be made by the instrument in question, was not agreeable to, but directly contradictory to his instructions and his intention, and, therefore, the instrument cannot be considered or supported as his will. There is no evidence of Dalgleish's being subsequently informed of the error (if it can be ascribed to error), and acquiescing in it, or converting what was an absolute gift, into a trust for another, by the declaration of the donee; nor was that a proper or *habile* mode of conveying property, or ascertaining the will of the alleged donor, even allowing the respondent's letter not to have been an *ex post facto* fabrication, which there is every reason to believe it was.

Pleaded for the Respondent.—1st, It is fully established, not merely by the testimonies of the witnesses, but by the real evidence in the cause, and by the conduct of the appellant himself and his friends, that John Dalgleish was possessed of understanding and capacity sufficient to qualify him for making a settlement.

2d, There is not only no evidence brought, that the deed was impetrated from, but it is clearly established, on the contrary, that the settlement under reduction was the genuine deed of Mr Dalgleish, freely and voluntarily executed by him, and, therefore, entitled to be regarded as the rule for the distribution of his property. It would be irrelevant and

incompetent to defeat this deed by parole evidence, and the testator intended something different. But, in point of fact, there is no such evidence in the case; for, although the writer of the deed has made it appear that the testator intended the land for David Ballantyne, yet his deposition must be taken in whole, and not separated into parts; and then it will appear from the same evidence, that there was no mistake, and that the testator meant his intention to be carried into effect, by conveying the whole, in the first place, generally to the respondent, and taking an obligation from him afterwards to dispone particular subjects to David Ballantyne. This was accordingly done, so that the testator's intentions have in every respect received effect.

After hearing counsel,

It was declared by the Lords, that it is established in this cause, that John Dalgleish was of understanding and capacity sufficient to enable him to execute a settlement of his property, if he should be duly and fully informed of the nature and effect thereof. And it is ordered that with this declaration, the cause be remitted back to the Court of Session in Scotland, to review the interlocutors complained of, in the said appeal, having regard to all the circumstances of this case, and having more especial regard, as far as the Court's forms of proceedings will permit, to the facts and circumstances following, viz., to the fact that the jottings respecting John Dalgleish's settlement contain the following words:—"The land "to Mr David Ballantyne," and "Three hundred pounds "to Mr David Ballantyne, besides the land."—The fact that the settlement, nevertheless, containing a disposition of £300 to David Ballantyne, contains no disposition of land to him. The fact that the reason given by Mr James Cairns, in his testimony, why he made the disposition of the heritage general, is, that he had not at that time by him John Dalgleish's title deeds. The fact that the description of the two pieces of land, described in the letter of September 1808, hereinafter mentioned, is, nevertheless, nearly in the very same words as those which contain the description of two pieces of land described in the settlement of February 1808.—The fact that the settlement, the validity of which is in question, in this cause, bears date on the 2d February 1808, by which lands, and those two pieces

Journals of the House of Lords.

1817.

WHITE
v.
BALLANTYNE.

of land are given, not to David, but to Robert Ballantyne.—The fact that the letter addressed by Robert Ballantyne to John Dalgleish, containing the obligation to grant the two pieces of land to David Ballantyne, does not bear date till September 1808, although the settlement bears date in February 1808, being more than seven months after the date of the settlement. To the circumstance that it seems to be totally unexplained for what reason no such letter was written until the month of September, although the settlement was executed in the previous month of February.—And to the circumstance, that it does not seem to appear how far John Dalgleish was or was not informed of what would have been the effect of the settlement of the month of February, in case his death had happened before the month of September. And it is further ordered, that after reviewing the said interlocutor, the said Court do decree and decern as to the Court shall seem meet.

For the Appellant, *W. Erskine, H. Cockburn.*

For the Respondent, *John Leach, Duncan Mathewson.*

NOTE.—Unreported in the Court of Session.

1817.

STEEL
v.
STEEL, &c.

[Fac. Coll. Vol. xvii. p. 594.]

ROBERT GEORGE STEEL, Merchant, London, *Appellant;*

ROBERT STEEL, eldest son of the deceased Robert Steel, Merchant in London; JOHN MABERLY of Castle Street, Longacre, Westminster, Currier; and ALEXANDER DUNCAN, W.S., ... } *Respondents.*

House of Lords, 18th and 24th June 1817.

ENTAIL—PROHIBITORY CLAUSE AGAINST SALES—"MEMBERS OF TAILZIE."—An entail contained a clause prohibiting "All or "any of the said heirs or members of tailzie, or their succes- "sors, to sell," &c. There was no express mention of the institute as included within this prohibitory clause, although from other clauses in the entail, it was contended that he was included. Held, that under the terms "all the heirs or mem- "bers of tailzie," the institute or disponee was not included, and, therefore, that he had right to sell the estate.

George Steel, the appellant's granduncle, made an entail of his estate, of this date, 6th March 1790, conceived in these