

June 20. 1823. forward, in which nothing is brought before us that would enable us to argue, even if we had the power of an appeal from the interlocutor, whether this would be brought within the principles upon which a matter, arising after the last continuance, as we call it in our proceedings, could or could not be a bar to the action brought? I say there is no statement enabling us to judge of that; the single question is, Have we the right, on that which is here stated, to stop the proceedings in the Jury Court? My opinion, my Lords, is, that your Lordships have no such right, and that therefore this appeal ought to be dismissed.

No. 63.

WILLIAM WHITE, Appellant.—*Clerk—Cockburn.*  
ROBERT BALLANTYNE of Phaap, Respondent.—*Warren—Abercromby.*

*Facility—Fraud—Reduction.*—Circumstances in which it was held, (reversing the judgment of the Court of Session,) That it was necessary to show that a deed executed by a party who was proved to have been naturally weak in intellects and facile, but who was legally capable of making a deed, fully understood it; and this not being done, that the deed was reducible.

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1ST DIVISION.  
Lords Balgray  
and Cringletie.

WILLIAM WHITE, the nephew and heir-at-law of the late John Dalgleish, proprietor of certain lands and heritable subjects, brought an action of reduction of a deed of settlement, which Dalgleish had executed on the 3d of February 1808, and by which he conveyed these subjects to the respondent Robert Ballantyne. The grounds on which he made this demand were,—

1. That Dalgleish, from his state of mind, was totally incapable of making such a deed: And,—

2. That, at all events, it had been obtained by gross fraud and circumvention on the part of Ballantyne.

In support of this action he stated, that John Dalgleish had, from his earliest years, been afflicted with mental imbecility, and was unfit to manage his own affairs:—that he had been originally a herd, and had at one time obtained by means of his friends a farm, but was found to be unable from mental incapacity to attend to it:—that his brother, who was a clergyman, and was possessed of considerable property, became desirous that he should be placed in a situation where he might be properly attended to, and that accordingly he was boarded in the house of Ballantyne at Dryhope:—that, by the death of his brother the clergyman, John Dalgleish succeeded to the subjects in question, and to personal funds, amounting in all to about

£7000:—that while he was residing with Ballantyne, a Mr. Cairns, who was a writer, was sent for to make out John Dalgleish's deed of settlement, and that Dalgleish had given instructions that the land should be conveyed to David Ballantyne, whereas the deed had been made out in favour of the respondent Robert Ballantyne; and therefore, as it was not agreeable to his intention, it could not be regarded as his deed of settlement; and as he must be thus held to have died intestate quoad hoc, the land fell to White as his heir-at-law. June 20. 1823.

A proof having been allowed, Cairns was examined as a witness in relation to the circumstances under which the deed had been executed. He deponed, that on the 3d of February 1808 he went to Dryhope, but that the respondent Ballantyne was not at home:—that he remained to dinner, ‘and that after dinner the deponent went up stairs to a room where there was a fire, and where he found John Dalgleish:—that John Dalgleish told the deponent that he wanted to make his will:—that the deponent asked him to condescend upon the particulars, and the deponent took a piece of paper and jotted down the particulars dictated by Mr. Dalgleish:—that they were a considerable time about it, Mr. Dalgleish taking some time to recollect all his relations, as he said he was to give to every one a share,’ &c. ; and that on that afternoon the deponent extended a settlement on stamp paper from these jottings in the house of Dryhope. That jotting was in these terms:—‘John Dalgleish appoints Mr. Ballantyne of Phaap his executor, burdened with his debts and funeral expenses,—the land to Mr. David Ballantyne, £100 to William White, baker, London;’ and then there followed a number of legacies of the same amount to different parties, ‘with £300 to Mr. David Ballantyne besides the land.’ In the deed of settlement, however, the lands, instead of being conveyed to David Ballantyne, were disposed to the respondent Robert Ballantyne.

In defence against this action the respondent stated, That although John Dalgleish was somewhat weak in his intellects, yet he was perfectly capable of making a valid deed:—that the reason why Cairns had not framed it according to the jotting was, that he had not the title-deeds at hand, nor more than one sheet of stamped paper, which would have been necessary, if a separate disposition of the lands had been executed:—that as the respondent was nominated the executor, Cairns made out the deed generally in his favour, burdened with the legacies, and explained to John Dalgleish that he would take a back letter from the respondent, binding him to convey the lands to David Ballantyne;

June 20. 1823. and that accordingly, on the 17th September 1808, the respondent addressed the following letter to John Dalgleish, and delivered it to Cairns:—‘ As I understand that by disposition and assignation, dated the 3d day of February 1808, granted by you to me as executor, with the burden of certain legacies therein mentioned, you also dispone to me all and whole these two pieces of land, the one lying in the Bridgclands of Peebles, and acquired by your brother, the late Dr. Dalgleish, from John Deans, and the other lying in the Kirklands of Peebles, and likewise acquired by him from John Baird, 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 and assignation 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 said two pieces of land, in order that your intentions may be fulfilled. I am,’ &c. The Lord Ordinary, on advising the proof, reported the case to the Court, ‘ in respect that the case is of considerable importance to the parties, and that the evidence regarding the capacity of the granter of the deed is contradictory.’ On advising informations, the Court, on the 21st January 1814, repelled the reasons of reduction, and assoilzied the defender.\*

White having appealed against this judgment, the House of Lords, on the 17th June 1817, ordered and adjudged, ‘ 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 hereof; 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 admit, 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 ‘ £300 to Mr. David Ballantyne besides the land;’—the fact that the settlement, nevertheless, containing a disposition of £300 to David Ballantyne, contains no

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\* Not reported.

‘ 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, herein after 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 of land, are given not to David, but to Robert Ballantyne ;—the fact, that the letter addressed by Robert 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 interlocutors, the said Court do and decern as to the Court shall seem meet.’ In consequence of this remit, Lord Cringletie (before whom the case now came) appointed Ballantyne to give in a condescendence of what he averred, in explanation of the circumstances stated in the judgment of the House of Lords. In that condescendence he in substance gave the same statement as he had formerly done, which he offered to prove by the evidence of Cairns. On advising that condescendence with answers, the Lord Ordinary, ‘ for the reasons fully explained in the foregoing note, recalled the interlocutor complained of by the pursuer,’ and reduced and decerned in terms of the libel. The reasons on which his Lordship proceeded were thus stated in the note alluded to :—‘ The Lord Ordinary having perused the former procedure in this cause, to enable him to understand the subject now under consideration of this Court, sees that the House of Lords has declared itself satisfied that John Dalgleish had capacity sufficient to make a settlement of his estate, but has not seen reason to believe, that in making the deed under challenge he was aware of its import, and has therefore remitted to this Court to investigate the subject

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June 20. 1823. ‘ which embraces these topics of inquiry.—1st, Why the settlement  
 ‘ executed by John Dalgleish, dated the 3d February 1808, bestows  
 ‘ on David Ballantyne a legacy of £300, when, by the instructions  
 ‘ given to Mr. Cairns, the writer of the deed, that legacy was to  
 ‘ be given, and over and above it the land to which John had suc-  
 ‘ ceeded as heir to his brother, the Rev. Dr. Dalgleish? And why  
 ‘ that land was not given to David, as ordered by the testator, but  
 ‘ was disposed to Robert Ballantyne, the defender, in opposition  
 ‘ to the instructions? Is this sufficiently accounted for by the rea-  
 ‘ son assigned by Mr. Cairns, viz. that he had not the title-deeds  
 ‘ by him when he wrote the settlement, when the settlement con-  
 ‘ tains a description of these lands, and at the distance of seven  
 ‘ months, (September 1808,) Robert Ballantyne wrote to John  
 ‘ Dalgleish a letter obliging himself to convey the lands to David,  
 ‘ and in that letter described them in the same way they were de-  
 ‘ scribed in the settlement.

‘ The inference from this seems to be twofold, on which the  
 ‘ Lord Chancellor desires to be satisfied.

‘ 1st, Could not Mr. Cairns have made John Dalgleish convey  
 ‘ these lands to David in the settlement in February 1808 by a  
 ‘ general disposition, as well as he conveyed them to Robert?  
 ‘ And,

‘ 2d, Could not, and ought not, Mr. Cairns to have declared Ro-  
 ‘ bert to be a trustee only for David as to these lands, and ordered  
 ‘ him to convey them to David; or at least ought he not to have  
 ‘ taken from Robert a letter in February 1808, similar to that which  
 ‘ Robert wrote to John Dalgleish in the following September?

‘ 2dly, The Lord Chancellor wishes to have it explained why  
 ‘ Robert Ballantyne delayed granting said letter from February  
 ‘ till September 1808; and whether John Dalgleish was or was  
 ‘ not, during all that period, aware that the effect of his settle-  
 ‘ ment was to convey to Robert what he intended for David.

‘ In obedience to this remit, the Lord Ordinary appointed the  
 ‘ defender to give in a condescendence, and the pursuer to answer  
 ‘ it; which having been done, he will now explain to the parties  
 ‘ what appears to him on the subject.

‘ In article 1st of the condescendence it is stated, that John Dal-  
 ‘ gleish was informed that the land intended for David was actually  
 ‘ conveyed to Robert Ballantyne, and was satisfied that, notwith-  
 ‘ standing of this deviation, his intention would be carried into  
 ‘ execution.

‘ In article 2d it is said that Mr. Cairns was instructed to com-  
 ‘ municate to Robert this confidence reposed in him, and did com-  
 ‘ municate it accordingly, and was satisfied, that, in consequence

‘ of this communication, the land was as safe to David as if it had been conveyed to him. June 20. 1823.

‘ 3d, That Mr. Cairns did not make the defender write the letter declaring the trust till September, because he had not a proper opportunity of doing so till that time, when the defender came to Mr. Cairns’ office, where the letter was taken.

‘ 4th, That Mr. Cairns’ reason for making the conveyance a general one was the want of the titles; and his reason for not disposing the land to David was the want of a sheet of stamped paper: ‘ For to have conveyed the land to David, and every thing else to Robert, would have required either two deeds, or a single deed that would have consisted of more words than could by law be written on one sheet.’

‘ To these articles the condescendence avows that Mr. Cairns is the only witness; and the Lord Ordinary having read Mr. Cairns’ former deposition, considers the testimony thus offered to be totally inadmissible. For Mr. Cairns swears, in his deposition formerly emitted, ‘ That he did not see Mr. Ballantyne on the occasion when he made John Dalgleish’s settlement, either on that day or on the morning before he left Dryhope: That he never afterwards communicated to him the import of that settlement, nor did he ever ask about it.’ At what time, then, did Mr. Cairns make the communication to Mr. Ballantyne of the confidence reposed in him? He did not do so in the evening when the settlement was made; and although it is now said that he was desired to do so, he left the house next morning without doing it, nor did he do so at any after time. On looking at the letter 17th September 1808 by Robert Ballantyne, it appears to be addressed to John Dalgleish; it is dated at Dryhope; it bears the communication of the nature of John’s settlement to have been made by himself; and as he desired the declaration of trust, so it was granted to him. All this is consistent with Mr. Cairns’ deposition, that he never opened his mouth to Robert Ballantyne on the import of the settlement; but now, in the condescendence, the defender wishes to make Mr. Cairns not only communicate the nature of the settlement, but be the person who took that letter from Robert Ballantyne, and that, too, in his own office at Peebles, in opposition to the fact of its being dated at Dryhope. Mr. Cairns’ former deposition must have been overlooked, otherwise the defender could not now propose to call him to contradict it; nor can the Lord Ordinary suffer this to be done, and as little can he believe that Mr. Cairns could do so.

‘ 2dly, It is quite common in settlements of a man’s affairs to dispoone one subject, although heritable, to one person, and

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‘ another to a different person. But admitting that this may be  
 ‘ against the stamp law, or that Mr. Cairns thought so, it is im-  
 ‘ possible, with his intelligence, that he did not know that he could  
 ‘ have made John Dalgleish dispone these parks which he describes  
 ‘ in the settlement to Robert Ballantyne, in trust for David, and  
 ‘ appointed him to convey them to David. It was surely equally  
 ‘ competent to have made him a trustee in the land as one in the  
 ‘ money, and to bind him to dispone that land to David, as well  
 ‘ as to pay him a share of the money; but not only is this not  
 ‘ done, but Mr. Cairns left the house without seeing Mr. Bal-  
 ‘ lantyne, or taking from him the letter, which was taken at the  
 ‘ distance of seven months; and the reason for taking which is not  
 ‘ yet explained, though an attempt is made to account for the  
 ‘ delay in taking it.

‘ Article 6th is expressed with perplexity; but if the Lord Or-  
 ‘ dinary understands the meaning, it is evidently also inconsistent  
 ‘ with article 4th, wherein it is said that Mr. Cairns had only one  
 ‘ sheet of stamped paper by him in February 1808; and that to  
 ‘ have conveyed the subjects to David would have required either  
 ‘ two deeds, or a single deed that would have consisted of more  
 ‘ words than could by law be written on one sheet. In article 6th  
 ‘ it is said that if Mr. Cairns had been possessed of the title-deeds,  
 ‘ he would have so framed the settlement in February 1808, as  
 ‘ to have disponed the various subjects specially, and to have  
 ‘ contained the necessary warrants for completing the disponee’s  
 ‘ title.’ Now, although he had been in possession of the titles,  
 ‘ yet, as he had but one sheet of stamped paper, this could not  
 ‘ have been done, if article 4th be correct. But Mr. Cairns’  
 ‘ memory was correct enough to have enabled him to write any  
 ‘ conveyance without the title-deeds, since the description in the  
 ‘ settlement, and in the letter in September 1808, is quite sufficient  
 ‘ to have conveyed the subjects.

‘ In short, when Mr. Cairns’ former deposition is kept in view—  
 ‘ when the circumstances on which the Lord Chancellor desires  
 ‘ explanation are considered, and the whole compared with the pre-  
 ‘ sent condescendence and the offer of proof it contains, it appears  
 ‘ to the Lord Ordinary, that as the testimony of Mr. Cairns is the  
 ‘ only evidence which the defender has to offer, it is quite inad-  
 ‘ missible; and as it distinctly appears that if the facts, to investi-  
 ‘ gate which the remit was made by the House of Lords, should  
 ‘ not be satisfactorily explained, it was the opinion of that Right  
 ‘ Honourable House that the interlocutors appealed from should  
 ‘ be altered,—the Lord Ordinary alters these interlocutors, and  
 ‘ reduces the settlement.’

Against this judgment the respondent reclaimed, and the Court thereupon remitted to the Lord Ordinary to allow a re-examination of Cairns, and a proof of the condescence by other witnesses. This having been done, his Lordship reported the case to the Court; and their Lordships, on the 26th of May 1819, 'having considered the whole cause, and having regard to the whole circumstances of the case, in terms of the remit from the House of Lords, and especially to the several circumstances specified in the said remit,' repelled the reasons of reduction, and assoilzied the defender.\*

White then appealed against this judgment, on the ground,—1. That although it had been found by the former judgment of the House of Lords, that John Dalgleish was of sufficient understanding and capacity to enable him to execute a settlement of his property, yet this was under the qualification that it should be established that he was duly and fully informed of the nature and effect thereof;—that it was therefore incumbent on the respondent to show that he had been so informed;—and that although a deed which was *ex facie* unobjectionable proved itself, yet so soon as it was shown that the granter was not of ordinary capacity and understanding, the presumption was, that he did not understand the nature of it without its being explained to him, and consequently the onus lay upon the respondent of showing that such information and explanation was given to John Dalgleish;—that the only witness who had been adduced to show that this had been done was Cairns, who stood in a suspicious situation,—contradicted himself in several respects,—and assigned unsatisfactory and inconsistent reasons for deviating from the written instructions, and therefore the essential circumstance required by the judgment of the House of Lords to give validity to the deed had not been established.—2. That it was undoubted, that from the month of February, when the deed was executed, till September 1808, when the alleged back letter was granted, the settlement did not express that which was the will and intention of John Dalgleish;—that that letter could not be regarded as part of the settlement, and, even according to the respondent's own statements, had been written under circumstances of great suspicion, being dated at Dryhope, whereas it was admitted that it was written in Cairns' office at a great distance;—and, 3. That as the deed did not express the will of John Dalgleish, and no other settlement had been made, he had died *quoad hoc* intestate, and therefore the lands belonged to the appellant as his heir-at-law.

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\* Not reported.



June 20. 1823. To this it was answered,—

1. That as it was established that John Dalgleish was capable of making a valid deed, the one in question must be regarded as unobjectionable, and therefore it was incumbent on the appellant to make out his case by sufficient evidence: And,—

2. That, at all events, it had been proved by the deposition of Cairns, that the reason for introducing the name of the respondent into the deed, in place of that of David Ballantyne, had been fully explained to John Dalgleish; and that as the respondent had granted the back letter binding himself to convey the lands to David Ballantyne, the intention of the granter had been carried into full effect.

The House of Lords ‘ ordered and adjudged, that the said interlocutor complained of in the said appeal, so far as it repels all the reasons of reduction alleged by the appellant, and assilzies the respondent from all the conclusions of the appellant’s libel, and finds the appellant liable in the expenses of process, and all the directions consequent thereupon, be, and the same is hereby reversed; and it is declared, that the disposition contained in the instrument under reduction, so far as it imports to dispose of any interest in the lands therein mentioned for the benefit of the respondent, his heirs and assignees, was contrary to the intention of the said John Dalgleish, as expressed in the jottings made by James Cairns, when he took instructions from the said John Dalgleish for preparing such instrument; and that the instrument, purporting to be a letter from the respondent, dated Dryhope, 17th September 1808, and signed Robert Ballantyne, cannot, under the circumstances, be deemed an instrument affecting the disposition of the said lands contained in the instrument under reduction; and that, therefore, such instrument under reduction, so far as the same imports a disposition for the benefit of the respondent, his heirs and assignees, ought to be reduced, without prejudice to any question with respect to the several charges imposed on such lands by the said instrument, in case the other property of the said John Dalgleish shall prove not to be sufficient to satisfy such charges; and therefore it is ordered and adjudged, that such instrument so under reduction be, and the same is hereby reduced, so far as the same imports any disposition of a beneficial interest in the said lands to the respondent; without prejudice, nevertheless, to any question which may be raised with respect to the several charges imposed on such lands by the said instrument so under reduction, in case the other property of the said John Dalgleish, disposed of by such instrument, shall prove not to be sufficient to satisfy such charges; but

‘ that such beneficial interest (subject to such claim as aforesaid) June 20. 1823.  
 ‘ ought to be considered as not disposed of by the said instrument,  
 ‘ and as having therefore descended to the appellant, as heir of the  
 ‘ said John Dalgleish, subject to any charges which may affect  
 ‘ the said lands, independent of the disposition contained in the  
 ‘ said instrument: And it is further ordered and adjudged, that  
 ‘ the said cause be remitted back to the Court of Session in Scot-  
 ‘ land, to do therein as shall be consistent with this judgment,  
 ‘ and as shall be just.’

J. CHALMER,—A. MUNDELL,—Solicitors.

(*Ap. Ca. No. 19.*)

WALTER LEARMONTH and COMPANY, Appellants.—*Copley—* No. 64.  
*Pemberton.*

JOHN LIVINGSTONE and his Factor loco Tutoris, Respondents.—  
*Bell—M'Neill.*

*Partnership.*—Circumstances under which it was held, (affirming the judgment of the Court of Session,) That there was no evidence of the respondent being a partner of a company indebted to the appellants.

THIS was a question of fact depending on the import of voluminous written evidence. The appellants, Walter Learmonth and Company, brought an action against the late Alexander Livingstone, Esq. of Parkhall, (who was now represented by his son, the respondent,) concluding for payment of upwards of £12,000, being a debt due to them by the company of Learmonth and Sons, of which company they alleged that Alexander Scott Learmonth and Company formed a constituent part, and that Alexander Livingstone had been a partner of that latter company. In defence, Mr. Livingstone admitted that he was a partner of Alexander Scott Learmonth and Company, but denied that it formed a part of that of Learmonth and Company, or that he was a partner of the latter firm, and therefore contended that he could not be liable for its debts. The Lord Ordinary, on advising the evidence, assoilzied Mr. Livingstone; and Learmonth and Company having reclaimed, the Court remitted to Mr. Galloway, accountant, to examine into the facts, and report. He reported, ‘ That there is complete evidence of the concern of  
 ‘ Alexander Scott Learmonth and Company being separate and  
 ‘ distinct from Learmonth and Sons; that the accounts of profit  
 ‘ and loss have been erroneously kept by Learmonth and Sons,  
 ‘ but that the transactions of the one company can be separated

July 2. 1823.  
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 2D DIVISION.  
 Lord Robert-  
 son.