

May 20. 1824. the Lord Justice-Clerk being absent from indisposition, and the other four Judges being equally divided in opinion, Lord Pitmilley was called in, and their Lordships thereupon adhered to the interlocutor, 'reserving to the petitioners to be farther heard before the Lord Ordinary on their claim to such sum as the trustees shall think proper to apply annually towards their maintenance and education, not exceeding L. 100 sterling per annum.'

Having again reclaimed, the Court, on considering the petition, with answers, and whole circumstances of the case, found the petitioners entitled to the residue of the estate in question, and in so far altered the interlocutors complained of; but remitted to the Lord Ordinary to hear the respondent, John Little, farther upon his claim to an annuity payable to him as a burden on the said residue.' And to this judgment their Lordships adhered on the 19th of January 1820.\*

Mrs Murray then appealed; but no appeal was entered by John Little. When, however, the case came to be heard, it appeared to the House of Lords that John Little ought to have been a party to the appeal, and that as he was now dead, his representative ought to be called in his place. In consequence of this, the further hearing was adjourned, and his sister Margaret having obtained herself decerned executrix-dative of John, she presented a petition, praying that she might be admitted as an appellant; and this having been granted, their Lordships, after hearing the appellants, on the motion of the Lord Chancellor, ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed.'

SPOTTISWOODE and ROBERTSON—J. RICHARDSON,—Solicitors.

(Ap. Ca. No. 40.)

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No. 29. HECTOR F. M'NEILL, Appellant.—*Warren—Abercromby.*

WALTER MOIR and Others, Trustees of the late Dr M'NEILL,  
Respondents.—*Keay—Brougham.*

*Facility—Fraud.*—Circumstances under which (affirming the judgment of the Court of Session) a deed was set aside, which had been obtained from a facile person,

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\* Not reported.

nearly 80 years of age, whereby he discharged a debt of L. 3000, heritably secured, for a bill of L. 230, and an annuity of  $7\frac{1}{2}$  per cent during his life, for payment of which no security was granted.

In 1787, Dr M'Neill lent L. 1000 to Daniel M'Neill of Gallochilly, (the father of the appellant), for which an heritable bond was granted, on which Dr M'Neill was infest; and besides this sum, there was also due to Dr M'Neill a debt of L. 600, with interest.

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1ST DIVISION.  
Lord Alloway.

On the death of his father and an elder brother, the appellant, Hector Frederick M'Neill, succeeded to the estate, subject to these burdens; and it appeared, from a state of debt made up in February 1806, that the sum due to Dr M'Neill then amounted to L. 2516. This sum, it was alleged, Dr M'Neill at the same time restricted to L. 2136, by a holograph writing, but it was not signed by him. The only payment which was subsequently made by the appellant was L. 100. In December 1811 he came to Edinburgh, where Dr M'Neill then was, and had a meeting with him on the subject of the debt. At this time, Dr M'Neill was nearly 80 years old, and the infirmities of age had been considerably increased by a habit of indulging in spirituous liquors. His affairs were managed by Mr Jaffrey, writer to the signet, and he was in the habit of consulting Mr Walter Moir, accountant, and David Bridges, merchant in Edinburgh. The above meeting took place on the 24th of December, at the Turff Coffee-house, where the appellant resided, and no other person was present except the parties themselves. A missive of agreement, in the form of a letter, addressed by Dr M'Neill to the appellant, was then drawn out by the latter, which was expressed in these terms:—‘Edinburgh, 24th December 1811. ‘SIR,—As you have this day given me your bill for L. 230 ‘sterling, I bind myself to give you credit for the same in my ‘account; and I farther bind and oblige myself, in consequence ‘of this payment from you, to free you from all bonds and ‘other claims that I may have against you, on condition that ‘you grant me your bond of annuity, during my life, for a ‘sum equal to the interest of the balance you owe me, after ‘deducting this L. 230, at the rate of seven and a half per cent. ‘(Signed) JAMES M'NEILL. (Agreed) HECTOR F. M'NEILL.’

Subjoined to this, Dr M'Neill added the words:—‘To be ‘adjusted with Mr Walter Moir's approbation.’

On the following day, being the 25th, another meeting took place at the Turff Coffee-house, on which occasion a Mr Galbraith

May 21. 1824. was present, who, it was alleged, was the agent of the appellant ; and, on that occasion, a letter, regularly tested, was written by that person, in these terms :—‘ Edinburgh, 25th December 1811. ‘ SIR,—As you have this day given me your bill for L.230 ‘ Sterling, I bind myself to give you credit for the same in my ‘ account ; and I farther bind and oblige myself, in consequence ‘ of this payment from you, to free you from all bonds and other ‘ claims that I may have against you, on condition that you grant ‘ me your bond of annuity, during my life, for a sum equal to ‘ the balance you owe me, after deducting this L.230, at the rate ‘ of seven per cent. In witness whereof, I have subscribed these ‘ presents, (written by David Stewart Galbraith, factor upon the ‘ estate of Largie), at Edinburgh, the 25th day of December ‘ 1811 years, before these witnesses, the said David Stewart Gal- ‘ braith, and Alexander M'Donald, waiter in the Turff Coffee- ‘ house, Edinburgh. (Signed) JAMES M'NEILL. ‘ D. Stewart Galbraith, witness ; Alexander M'Donald, witness. ‘ To Hector F. M'Neill, Esq. of Gallochilly.’

At this time the debt due to Dr M'Neill amounted to nearly L. 3000, and no duplicate of the missive was given to him. At these meetings it was alleged by the respondents, that gin had been brought in and given to Dr M'Neill. On the same day he called on Mr Moir, and mentioned the circumstance of the missive to him, and that gentleman, in a letter which he wrote to Mr Kennedy, (who was the regular law agent of the appellant), in relation to a state of the debt which he wished to see, stated, —‘ That the Doctor has been just mentioning to me something ‘ of an arrangement to be gone into by Gallochilly and him, ‘ the meaning or effect of which he does not seem to have any ‘ idea of. He wished me to assist him in this arrangement with ‘ Gallochilly ; but so far as I can comprehend it, it appears to ‘ me to be of such a nature, that I felt it my duty to inform him, ‘ that I declined having any thing to do with it. I am,’ &c.

And on the following day, in answer to a similar request by the appellant, Mr Moir wrote to him, that ‘ you misunderstood one ‘ another very much, I suspect, as to the terms of your pro- ‘ posed settlement.’

On the 27th, Mr Moir again wrote to the appellant, in reference to a meeting which had taken place at his house, that ‘ at a meeting of some of the Doctor's friends to-day, relative to ‘ the state of matters betwixt him and you, he insisted positively, ‘ as he did in your own presence at my house, that it never ‘ was his intention to sink the balance of the debt, as stated in

‘ the memorandum, and that he did not understand it to have  
 ‘ such a meaning. Indeed, he was quite out of temper when it  
 ‘ was mentioned to him that such was the construction of the  
 ‘ writing;—that he thought the capital was to be at his disposal;  
 ‘ but he was not to have the power of calling it up during his  
 ‘ life, unless you chose to pay it on the principle of a redeema-  
 ‘ ble annuity, of which, however, he seems to have a very con-  
 ‘ fused notion.’

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In answer to this letter, the appellant stated, that he was perfectly aware that a great advantage had been conferred upon him; but that it was the intention of the Doctor to do so, and that he had expressly said so on the occasion alluded to in Mr Moir's letter. This letter from the appellant, it was said, had never been received; and as he was about to leave town, Messrs Moir and Bridges, acting on behalf of Dr M'Neill, executed a protest against the appellant, in which they stated, that it was never the intention of Dr M'Neill to enter into a transaction, whereby to discharge a debt of L. 3000 upon the terms contained in the missive, but that, on the contrary, he had been purchasing a perpetual annuity.

The appellant having afterwards brought an action for implement, Dr M'Neill assigned the debt in trust to the respondents, Messrs Moir and Bridges, who raised an action of reduction, on the ground that the ‘ said missive was obtained from the said  
 ‘ Dr James M'Neill by the defender, through extreme facility on  
 ‘ the part of the granter, on an understanding of the transaction by  
 ‘ him totally different from that which is pretended to be borne  
 ‘ out by the words of the said missive, without any onerous or  
 ‘ just cause, and to the granter's great hurt and prejudice, and  
 ‘ enormous lesion.’ The Lord Ordinary, after conjoining the two processes, pronounced this interlocutor:—‘ In the said pro-  
 ‘ cess of reduction, finds it asserted upon the part of the pursuers,  
 ‘ that Dr M'Neill is about 80 years of age, although, from his  
 ‘ having been born in a part of Ireland where no register of  
 ‘ baptisms had been kept, his precise age is not exactly known;  
 ‘ and finds it not denied by the defender, that Dr M'Neill is a  
 ‘ man far advanced in years: Finds, That the missive under  
 ‘ reduction, dated 25th December 1811, contains an agree-  
 ‘ ment to the effect, that, as the defender had that day given  
 ‘ the Doctor his bill for L. 230 sterling, payable three months  
 ‘ after date, which was to be deducted from the account due by  
 ‘ the defender to Dr M'Neill, he thereby agreed to free the defen-  
 ‘ der from all bonds and other claims that he had against the

May 21. 1824. ' defender, on condition of his granting him a bond of annuity  
 ' during his life for a sum equal to  $7\frac{1}{2}$  per cent of the balance:  
 ' Finds, That Dr M'Neill having, on the very day on which the  
 ' missive was written, communicated the scroll thereof, as deli-  
 ' vered to him by the defender, to Walter Moir, accountant, now  
 ' acting as one of his trustees, that gentleman, upon the same day,  
 ' wrote to Gallochilly's agent, that "the Doctor had been just  
 ' mentioning to me something of an arrangement to be gone  
 ' into by Gallochilly and him, the meaning or effect of which he  
 ' does not seem to have any idea of;" and that this letter was  
 ' followed by a protest upon the 28th December 1811, on the  
 ' part of the present pursuers, as trustees for Dr M'Neill, against  
 ' the defender and his agent, demanding delivery of the agree-  
 ' ment as having been totally misunderstood by Dr M'Neill, and  
 ' offering back the promissory-note for L.230 sterling: Finds,  
 ' That there was no person present upon the part of Dr M'Neill  
 ' at the time this agreement was entered into, although there was  
 ' a man of business present on the part of the defender, and who  
 ' is the writer of the missive in question, which is a probative  
 ' document, in terms of the Act 1681: Finds, That the defender  
 ' kept this missive of agreement, and gave Dr M'Neill a scroll  
 ' not probative, whereby the defender had it in his power, by  
 ' destroying the probative document in his possession, to put an  
 ' end to all legal evidence of its existence; whereas Dr M'Neill  
 ' had no document whatever from which the agreement could  
 ' have been legally authenticated: Finds, That the accounts were  
 ' not adjusted, nor was the amount of the balance due by the  
 ' defender to Dr M'Neill ascertained at the time this missive was  
 ' entered into: Finds, That the agreement affords no presump-  
 ' tion of any intention upon the part of Dr M'Neill to abate any  
 ' part of his claim, nor to pass from any part of it as doubtful;  
 ' but, on the contrary, to convert the whole balance of principal,  
 ' of whatever remained after the payment of L.230, into an an-  
 ' nuity at the rate of  $7\frac{1}{2}$  per cent, which it is said the Doctor under-  
 ' stood to be a perpetual annuity; whereas the missive in question  
 ' bears, that it was only an annuity during his life: Finds, That an  
 ' annuity at the rate of  $7\frac{1}{2}$  per cent to a man of so great an age  
 ' as Dr M'Neill, was a most unequal and unfair transaction, as  
 ' the life of Dr M'Neill, at his age, was not insurable; and  $2\frac{1}{2}$   
 ' per cent above the ordinary interest afforded no compensation  
 ' for the sinking of the principal for such an annuity during the  
 ' Doctor's life: Finds, That a large part of the debt due by the  
 ' defender to Dr M'Neill was secured by heritable bond and

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‘infestment; whereas this agreement for sinking the balance  
 ‘into an annuity does not even stipulate heritable security for  
 ‘the payment of that annuity in lieu of the heritable debt  
 ‘which was to be thereby extinguished; and therefore, in the  
 ‘whole circumstances of the case, reduces, decerns, and declares,  
 ‘in terms of the libel: And in the action Hector Frederick  
 ‘M'Neill against Dr M'Neill for implement of the said agree-  
 ‘ment, assoilzies him from the conclusions of that action; and  
 ‘in both actions finds the said Hector Frederick M'Neill liable  
 ‘in expenses, of which allows an account to be given in, and  
 ‘decerns.’ To this judgment the Court adhered on the 4th of  
 July 1816.\*

In the meanwhile Dr M'Neill had died, leaving a deed of settlement in favour of his natural daughter, Mrs Mary Black M'Neill, spouse of Robert Jolly, of which a reduction had been brought by his heir-at-law, on the ground of fraud and facility. Issues were sent to a jury, who negatived the allegations of fraud, but found that Dr M'Neill was facile. This, however, not being sufficient of itself to set aside the deed, the Court sustained it, and Mrs Jolly and her husband thereupon became parties to this cause. At the distance of nearly five years after the last judgment, the appellant brought an appeal against the interlocutors setting aside the missive and refusing to give implement to the transaction, on the ground,—

1. That as the missive was *ex facie* a regular and valid deed, executed by a party *sui juris*, and who had homologated the same by receiving the appellant's bill for L.230, it was binding and effectual against him; and as there was no evidence either to prove facility, or to shew that the consent by Dr M'Neill had been obtained otherwise than lawfully, the judgments complained of were erroneous. And,

2. That as the terms of the agreement were quite explicit, it was impossible to allege that the Doctor had misunderstood the transaction; and it was not relevant to state that there had been inequality. To this it was answered,—

1. That although facility of itself was not sufficient to set aside a deed, yet if it were combined with any other circumstance indicative of an undue advantage having been taken of the facile person, the deed was ineffectual: that, in the present case, Dr M'Neill was nearly 80 years of age, and it had been proved by the verdict of a jury that he was in a state of facility: that the

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\* Not reported.

May 21. 1824. transaction upon the face of it appeared so grossly unequal and irrational, that it was plain that it could only have been brought about by a fraudulent advantage having been taken of his facility: and that it had been arranged in a tavern, where spirits had been introduced; and while Dr M'Neill was unassisted by a law adviser, the appellant had the assistance of an agent. And,

2. That as Dr M'Neill had subjoined a qualification, that the arrangement was to be adjusted by Mr Moir, and had gone to him upon the very day on which the transaction took place, with a view to obtain his advice; and as it appeared from the correspondence that he had misapprehended the nature of the transaction, there never had been any concluded agreement at all.

The House of Lords 'ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed, with L.100 costs.'

*Respondents' Authorities.*—4. Ersk. 1. 27.; Kames' Prin. of Equity, p. 50.; Mackie, Nov. 24. 1752, (4963.); 1. Bridgeman's Index, 58.—Donald, June 12. 1821, (1. Shaw and Bal. No. 79.); Sanderson, Nov. 17. 1821, (Ib. No. 181.); Leiper, July 9. 1822, (Ib. No. 604.); Forbes, Dec. 13. 1822, (2. Shaw and Dunlop, No. 82.); E. of Roseberry, July 1. 1823, (Ib. No. 422.)

A. MUNDELL—MONCREIFF and WEBSTER,—Solicitors.

(*Ap. Ca. No. 42.*)

No. 30. JOHN and ALEXANDER ANDERSON, and their Assignees,  
Appellants.—*Shadwell—Adam.*

WILLIAM BERRY and A. FORSYTH, (Fraser's Trustees,)  
Respondents.—*Warren—Abercromby.*

*Facility—Fraud.*—Circumstances under which (qualifying but affirming the judgment of the Court of Session) an heritable security was reduced, which had been obtained from a facile young man, for an alleged balance owing by his deceased father, arising out of a complicated state of accounts, which were not rendered to him, and for which, if there was truly a balance, other parties were liable.

May 26. 1824.

2D DIVISION.  
Late Lord  
Meadowbank,  
and Lord  
Pitmilley.

THE late James Fraser was proprietor of the estate of Pitcalzean, in the county of Ross, and was possessed of extensive estates in the West Indies, where he in general resided, and where he established certain partnerships, and particularly one, Fraser, Hubbard and Company. In 1799 the appellants, trading under the firm of John and Alexander Anderson, merchants in London, consigned to Fraser a cargo of slaves on board the