

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.

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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

ship called the Andersons. This consignment he transferred to Fraser, Hubbard and Company, of which intimation was given to the appellants, who thereupon, (in addition to an account previously opened by them with Fraser), made out another with Fraser, Hubbard and Company, in which they debited them with the value of the slaves. Subsequent to this a great many transactions took place between that Company and the appellants, which gave rise to a complicated state of accounts.

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In 1801, Fraser, in the course of a voyage between Great Britain and the West Indies, perished, along with all who were on board of the ship. He left a widow and family, the eldest of whom was a son, James Fraser, junior, who at that time was in minority, and who succeeded as the heir of his father to the estate of Pitcalzean. Fraser appointed his widow, and certain other persons, his executors, one of whom was the appellant, John Anderson, who concurred with the widow in proving it. At the period of Fraser's death no settlement of accounts had been made between him and the appellants, or with Fraser, Hubbard and Company. Advances to a considerable amount were afterwards made by the appellants to the father of Fraser, senior, and to his widow and younger children; transactions were continued with his executors, some of whom resided in the West Indies; and the estate of Pitcalzean was managed by Mr Ross of Nigg, who resided in the immediate neighbourhood, and was a partner of the West Indian Companies.

James Fraser, junior, having gone to the West Indies, was seized with a fever, which had the effect, not only to impair his constitution, but to affect his mental powers. He was sent home to Scotland, where his health rather improved, but he was still in a state of mental imbecility. Being in want of money, he wrote to the appellants, informing them that he proposed to sell the estate of Pitcalzean, of which he wished to make them the first offer, but requested that in the meanwhile they would advance him L.200. The appellants thereupon wrote to their law-agent in Edinburgh, that the late Mr Fraser was indebted to them in upwards of L.1500; that they had eventual claims against him to a much larger extent; and to endeavour either to prevent the sale of the estate, or obtain a security over it for the debt. A transaction was then entered into, by which James Fraser, junior, agreed to give to the appellants an heritable bond over the estate of Pitcalzean for the L.1500, and also for the L.200 to be advanced to him; and accordingly, an heritable bond and infeftment, and also a promissory-note, were granted by him to the

May 26. 1824. appellants for these sums. No specific account of the alleged debt was rendered to James Fraser, junior, nor had any settlement been made with Fraser, Hubbard and Company, nor with the executors of the late Mr Fraser, and the above balance of L. 1500 arose partly out of the transactions with them.

Thereafter the appellants raised an action against James Fraser, junior, for payment of two bills drawn by Thomas Wade on and accepted by themselves, and another by Joseph Hunt on one Lawrence, amounting in all to L. 3431, which they alleged were debts truly due by his father, and for which he was liable. On this action they raised and executed an inhibition, and obtained decree in absence.

Soon thereafter James Fraser, junior, became insolvent, and granted a trust-deed in favour of the respondents, for behoof of his creditors. The respondents thereupon raised an action of reduction against the appellants, of the heritable bond and infestment, the promissory-note, and of the decree in absence, on the ground that they had been obtained from James Fraser, junior, sine redditis rationibus, while he was in a state of imbecility, and when in truth there was no debt justly due.

In defence it was maintained, that as James Fraser was sui juris, and had granted his solemn acknowledgment of the existence and amount of the debt, it was incumbent on the respondents to establish that no such debt existed, and that it had been sanctioned as correct by Mr Ross. The late Lord Meadowbank (before whom the case first came) pronounced this interlocutor on the 3d March 1809:—‘ As to the validity of the  
 ‘ heritable bond obtained by the defenders from James Fraser,  
 ‘ now of Pitcalzean, finds, That in as far as arising from debt  
 ‘ said to be incurred by the deceased James Fraser or his exe-  
 ‘ cutors in the West Indies, in the course of extensive mercantile  
 ‘ dealings with the defenders’ house in London, it is not alleged  
 ‘ that the same was instructed by any settlement or accounting  
 ‘ with the said deceased James Fraser, or with his executors, or  
 ‘ with any person empowered by them on that behalf: Finds, that  
 ‘ it is not explained how the opinion of Mr Ross of Nigg, who  
 ‘ resides usually on his estate, and took charge of Pitcalzean as  
 ‘ factor thereon, in favour of this debt, though proved to have been  
 ‘ so given, which it is not, could have been formed on sufficient  
 ‘ grounds, without first receiving the most ample communications  
 ‘ from the executors in the West Indies, which it is not alleged  
 ‘ he did; nor how that opinion could afford any sanction to ob-  
 ‘ taining the bond from James Fraser, who is not stated to have

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‘ taken himself any cognizance of the evidence on which it rested, or been in condition to take it: Finds it is not denied that the now deceased Mr Anderson, a partner of the house of the defenders, concurred with the widow of James Fraser in proving his will at Doctors’ Commons, as two of his executors alive when the said bond was obtained: Finds, that the decree in absence for the remainder of the debt claimed by the defenders, is in the same situation with that in the bond, as being supported by no settlement of accounts with the deceased Mr Fraser or the executors, and is also acknowledged to have been considered by Mr Ross as not sufficiently instructed: Finds, that it is acknowledged by the defenders, that part of this debt arises from transactions with the executors after James Fraser’s death, and that to the executors was committed, by the will of James Fraser, the exclusive charge of those West India concerns with which the defenders dealt during his life and after his death, and that the debt now challenged arose from those dealings: Finds, that under these circumstances it is competent for the defenders to have obtained security, by prohibitory diligence, for rendering their recourse effectual against the estate of Pitcairzean for any debt that may remain due of what may have been incurred to them by the deceased James Fraser; and before farther answer, ordains the defenders to put in a condescence, and therein explain how they can competently, in hoc statu, instruct that such a debt exists, or the amount thereof, without in the first place obtaining, judicially or extrajudicially, a settlement with the executors, or prevailing with them to become parties to the action.’

The appellants having reclaimed, the Court, on the 23d February 1810, recalled ‘ that part of the Lord Ordinary’s interlocutor complained of, which ordains the defenders (appellants) to give in a condescence, and remitted to his Lordship to allow the defenders (appellants) to produce their accounts and vouchers in support of the debt claimed by them, to hear parties thereon, and to do thereanent as he shall see cause.’ In consequence of this judgment, the Lord Ordinary made a remit to an accountant, who gave in a report, from which it appeared that there was no evidence of the existence of the debt contained in the documents under reduction, except the L. 200. The case having then come before Lord Pitmilley, he decerned in the reduction; and the appellants having reclaimed, the Court, on the 12th May 1819, found, ‘ That quoad the sum of L. 200 sterling advanced by the petitioners to the pursuer,

May 26. 1824. ‘ James Fraser, the writs called for to be reduced fall to be supported as valid legal securities to the extent of that sum, and the interest corresponding to it; and in so far alter the interlocutors complained of, sustain the defences, assoilzie the defenders, and decern; and remit to the Lord Ordinary to hear the parties farther with regard to the other sums claimed from the pursuer, James Fraser, as representing his father, and accounts in question, and how far all parties interested are in Court; and to do thereanent as he shall think just.’

The case then returned to the Lord Ordinary, who, on the 24th November 1819, pronounced this interlocutor:—

‘ Finds, first, with regard to the promissory-note and heritable security under reduction, that in respect the only sum of money advanced to James Fraser, junior, when he granted the promissory-note and the disposition, was the sum of L.200; and in respect this loan was made to him by the defenders on condition of his granting heritable security for the amount of the loan, and at the same time for an alleged debt of his father, James Fraser, senior, deceased—no detailed account, however, of the alleged debt of the father having been given in and examined at the time, and without any settlement having been made with the father’s executors, or any attempt to constitute the debt against them,—and the defenders not choosing to make the executors or their representatives parties to the present action, or to call them as defenders in a separate action,—and the late Mr John Anderson, one of the partners of the defenders’ house, having been one of the executors of James Fraser, senior, and having been alive when the heritable security was obtained by the defenders,—the said promissory-note and heritable security cannot be sustained, except to the extent of the foresaid sum of L.200, advanced by the defenders to James Fraser, junior, to which extent these writs have been supported by the interlocutor of Court of the 12th of May last. Separatim finds, with regard to a part of the debt included in the promissory-note and heritable security, viz. the debt transferred by the defenders from the account of James Fraser, senior, to the account of Fraser, Hubbard and Company, that although James Fraser, senior, continued to be accountable, as an individual, to the defenders, for the consignment of slaves by the Andersons, notwithstanding of the transference of the account to Fraser, Hubbard and Company, made by him, and recognized by the defenders; and although James Fraser, senior, was also accountable for this consignment, in his capacity of partner of

Fraser, Hubbard and Company, yet the defenders were not  
entitled, in settling with James Fraser, junior, and when ob-  
taining heritable security from him as his father's representa-  
tive for a debt alleged to be owing by the father, to transfer the  
debt, according to their own statement of its amount, due for  
the consignment per the Andersons, which had been made over  
to Fraser, Hubbard and Company, but were bound to have  
proved the subsistence and amount of the said debt, in the first  
instance, by settling accounts with Fraser, Hubbard and Com-  
pany, and giving them credit for every remittance made by  
them: And finds, that the heritable security taken by the de-  
fenders from James Fraser, junior, which includes the alleged  
debt of Fraser, Hubbard and Company, cannot, in the present  
action, in which Fraser, Hubbard and Company are not par-  
ties, and no settlement of accounts with them having taken place,  
be supported, in so far as it covers this debt, on the footing of  
its having been a debt of James Fraser, senior, whether as an  
individual or as a partner of Fraser, Hubbard and Company:  
Farther finds, that in accounting with James Fraser, junior,  
and these accounts being the subject of discussion in an action  
to, which the defenders have not made the executors of James  
Fraser, senior, or their representatives, parties, the defenders  
are not entitled to take credit for sums of money said to have  
been paid by them to the father, widow, and younger children  
of James Fraser, senior, posterior to his death, although these  
payments are said by the defenders to have been sanctioned by  
the executors: And finds, that the defenders ought to settle  
this matter with the executors themselves, or their representa-  
tives, the more particularly as the allegation of the executors  
having authorized the payments is, on the authority of the letter  
of the 3d March 1802, denied by the pursuers as to Mr John  
Anderson, who was one of the executors, and also a partner of  
the defenders' house, by whom, on the alleged authority of the  
executors, the payments are said to have been made. On these  
grounds, sustains the reasons of reduction of the promissory-  
note, disposition, and infestment, except quoad the sum of  
L. 200, as to which the writs have been supported by the inter-  
locutor of Court above referred to. With this exception, re-  
duces, decerns, and declares, in terms of the libel. 2dly, With  
regard to the decree in absence, finds, in respect of the reasons  
in the accountant's report, and of the admissions of the pur-  
suers with regard to Hunt's bill, that the said decree must sub-  
sist, in so far as it relates to this bill, with corresponding interest

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May 26. 1824. ' from 29th of August 1802, but under deduction of L. 354. 5s.  
 ' as the damages stated for returning the bill; but quoad ultra  
 ' reduces, decerns, and declares, as to the decree in absence, in  
 ' hoc statu, in terms of the libel: Finds the pursuers entitled to  
 ' expenses, but subject to modification, on account of the two  
 ' points which have been determined in the defenders' favour.'

To this judgment his Lordship adhered on the 17th December 1819 and 17th May 1820. Both parties having then reclaimed, the Court, on the 13th June 1821, refused the petition of the appellants; but in relation to that of the respondents they altered ' the interlocutors complained of, in so far as they find  
 ' that the decree in absence must subsist in so far as it relates to  
 ' Hunt's bill, in respect that, though it is admitted to be a good  
 ' claim against the estate of James Fraser, senior, it cannot be  
 ' sustained in the present accounting; and therefore reduced the  
 ' decree in absence in toto; and quoad ultra adhered to the in-  
 ' terlocutors of the Lord Ordinary complained of.\*'

Against these judgments the appellants and their assignees entered an appeal, in support of which they maintained,—

1. That as the debt was constituted by written documents, ex facie valid and legal, the onus probandi that no such debt existed lay upon the respondents, and could only be established by the writ or oath of the appellants; and as no such proof had been adduced, and the report of the accountant was erroneous, they were entitled to absolvitor.

2. That there was sufficient evidence by the documents in process to establish the existence of the debt. And,

3. That as the bills relative to which the decree in absence had been pronounced, were justly due by the late Mr Fraser, and as he was represented by his son, there were no grounds for setting it aside.

To this it was answered:—1. That as the heritable bond had been obtained by the appellants tempting a facile young man with a loan of L. 200, to supply his present wants, and for an alleged balance of accounts, sine redditibus rationibus, it could not be sustained as a ground of preference over the creditors of James Fraser.

2. That as it had been proved by the report of an accountant that no debt was justly due, both the security and the decree in absence must be set aside. And,

3. That the bills for which the decree in absence had been

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\* See 1. Shaw and Ballantine, No. 82.

pronounced could not be brought into the present accounting, May 26. 1824.  
so as to constitute them an heritable debt on the estate.

The House of Lords found, ' That, under the circumstances of  
' this case, the promissory-note and heritable security under re-  
' duction cannot be sustained, except to the extent of the sum of  
' L.200 advanced by the appellants to James Fraser, junior; and  
' further find, that the decree in absence, in the proceedings  
' mentioned, ought to be reduced in toto. And it is therefore  
' ordered and adjudged, that so much of the interlocutor of the  
' Lord Ordinary of the 24th of November 1819, complained of  
' in the said appeal, as reduces the said promissory-note, and  
' disposition and infestment, except as to the said sum of L.200,  
' be affirmed; and in regard to the other special findings in  
' that interlocutor, the Lords declare, that this House does not  
' feel it necessary to give any opinion thereon. And it is fur-  
' ther ordered and adjudged, that so much of the interlocutor  
' of the Lord Ordinary of the 17th December 1819, and the 17th  
' May 1820, and so much of the interlocutors of the Lords of  
' Session of the Second Division, of the 13th June 1821, and of the  
' 13th June (signed 14th June) 1821, also complained of in the  
' said appeal, which adhere to such parts of the said interlocutor of  
' the Lord Ordinary of the 24th of November 1819 as are hereby  
' affirmed, be affirmed: And it is further ordered and adjudged,  
' that so much of the said interlocutor of the 13th June (signed  
' 14th June) 1821, as reduces the decree in absence in toto, be  
' affirmed: And it is further ordered, that the cause be remitted  
' back to the Court of Session, to do therein as shall be consis-  
' tent with this judgment, and as shall be just.'

OSBALDISTONE and MURRAY,—Solicitors.

(*Ap. Ca. No. 43.*)

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JAMES, WOOD and JAMES, Appellants.—*Marryat—Stephen.*

No. 31.

JOHN TELFORD, for the Stirling Bank, Respondent.—

*John Campbell.*

*Principal and Agent—Bill of Exchange.*—An agent for a Company having in his own name drawn bills on a purchaser of goods from the Company, which the purchaser accepted, and having discounted them with a banker, by indorsing them also in his individual name, and he and the purchaser having become bankrupt;—Held, (reversing the judgment of the Court of Session), That although the agent was in the practice of drawing and discounting bills, sometimes in his own name, and at others per procuration of the Company, and the Company settled with the purchaser on the footing of his having granted these bills, yet, as the name of the Company was not on the bills, no claim lay against it for payment of them.