

No. 59. JOHN GIBSON and Others, Noble's Trustees, Appellants.
 MRS WATSON, or GILBERT, and Husband, Respondents.

Reduction—Facility—Writ.—Held, (affirming the judgment of the Court of Session,) that a deed of settlement was not effectual, which had been executed by a party who was found by the verdict of a jury to be capable of disposing of her estate, but not in such a state of mind as to enable her to judge correctly with regard to the effect of the deed as depriving her of all power of revoking or altering it, and as not being her free and voluntary act, although not obtained by the undue influence of the parties in whose favour it was granted.

June 29, 1827.

2D DIVISION.
 Lord Cringletie.

MRS NOBLE, on the 6th of May 1815, executed a trust-disposition and settlement, whereby she disposed her whole estates, in favour of trustees, for payment of her debts and funeral expenses,—to convey the fee of one half of the lands of Badinggill to one of her nieces, Mrs Hamilton, whom failing, to Mrs Hamilton's husband; to convey the fee of one half of the croft acres and houses at Biggar to him, whom failing, to Mrs Hamilton; in the event of their death, before execution of these deeds, to sell these subjects, and divide the price among Mr and Mrs Hamilton's children; to sell and dispose of the remainder of the heritable and moveable estate, and out of the proceeds thereof to pay the truster's other niece, Mrs Gilbert, L.100, and divide the remainder equally between Mrs Gilbert's and Mrs Hamilton's children. Mrs Noble labouring under defect of sight, the deed was executed by notaries.

In this deed Mrs Noble reserved her liferent, but she did not reserve a power to revoke or alter; nor was a clause introduced dispensing with delivery. It neither contained procuratory of resignation, nor precept of seisin.

The disposition was delivered to the trustees, and thereafter the following supplementary deed was executed, 2d August 1815:—‘ Considering that, on the 6th May 1815, I executed a
 ‘ trust-disposition and settlement in favour of James Hamilton,
 ‘ &c. for the purposes therein mentioned, and delivered the
 ‘ said deed to a majority of the said trustees, without reserving
 ‘ any power to revoke or alter the same, it being my intention
 ‘ at the time to render it absolute and irrevocable; and seeing
 ‘ that the said conveyance cannot be used for vesting the herit-
 ‘ able subjects thereby conveyed to my said trustees, from the
 ‘ want of the necessary clauses, and that I am desirous to re-

‘ medy that defect, and to express more fully the irrevocable June 29, 1827.
 ‘ nature of the said right, so as to leave no doubt of my inten-
 ‘ tion on that point; therefore, I do hereby give, grant, and ir-
 ‘ revocably dispone to my said trustees, as expressed in the
 ‘ foresaid deed, with the powers and faculties therein expressed,
 ‘ and for the ends and purposes therein specified, the lands, an-
 ‘ nual-rents, and heritages, therein and herein after described,
 ‘ reserving only my own liferent use of the same,’ &c.; ‘ and in
 ‘ order to give full effect to this deed, and to the foresaid trust-
 ‘ disposition and settlement, I not only revoke all former settle-
 ‘ ments, but I declare this to be a delivered evident, to the ef-
 ‘ fect of depriving me of all power of altering the same.’ The
 deed was signed by notaries, whose doquet bears, that they did
 so at her special request, ‘ the above deed having been previous-
 ‘ ly read over to her, and she approving of the same in presence
 ‘ of the witnesses also named and designed.’ A procuratory of
 resignation, and precept of seisin were introduced, on which
 the trustees took infestment, and recorded the seisin. Mrs
 Noble died on 17th May 1820.

Mrs Gilbert and husband raised an action of reduction of these
 settlements, on the grounds, that they ‘ were subscribed by
 ‘ notaries public for the said Margaret Dickson, alias Noble,
 ‘ who received no proper authority to execute the same for her,
 ‘ and had no previous conversation with, or instructions from
 ‘ her, authorizing them to do so. At the time the foresaid
 ‘ two deeds of settlement were executed, the said deceased Mar-
 ‘ garet Noble was in such a weak and debilitated state, both
 ‘ of body and mind, as to disqualify her from understanding
 ‘ the nature and import thereof, and render her incapable of
 ‘ conceiving the plan, and giving directions for framing such
 ‘ deeds of settlement; and the same were concocted, prepared,
 ‘ and extended, for the purpose of being executed without the
 ‘ man of business who prepared the same having proper in-
 ‘ structions from the said Margaret Dickson, alias Noble, or any
 ‘ communication or conversation with her thereanent, he having
 ‘ received his instructions solely from the said James Hamilton,
 ‘ writer at Biggar, and his family, in whose favour, and for
 ‘ whose behoof and benefit the deeds were granted, or from
 ‘ their connexions and relations, and that without any commu-
 ‘ nication or advisement with the said deceased Margaret Dick-
 ‘ son, alias Noble, or with the pursuer, Grizel Watson (Gilbert),
 ‘ and her husband, who are equally related to the said deceased
 ‘ Margaret Dickson, alias Noble, but who were kept altogether
 ‘ ignorant of the execution of said deeds of settlement; and the

June 29, 1827. ' said deeds were not the free and voluntary expression of the
 ' will of the said Margaret Dickson, alias Noble; but it was by
 ' means of the undue influence used by the said James Hamil-
 ' ton and his family, and their connexions, over the said Mar-
 ' garet Dickson, alias Noble, that she was prevailed upon to ap-
 ' pear to authorize said deeds to be executed for her, if she ever
 ' did give authority, or apparent authority, to the notaries by
 ' whom the deeds are subscribed, to execute the same for her.'

Thereafter certain issues were sent to the Jury Court for trial. To the two first of these, which inquired whether, at the date of the deeds under reduction, Mrs Noble ' was of a
 ' sound and disposing mind, and capable of understanding her
 ' affairs?' the jury returned a verdict, finding, that ' she was in
 ' such a state of mind as to be capable of disposing of her es-
 ' tate and effects.' And in answer to the other issues, they found, that ' the said Margaret Dickson, on the 6th May, and
 ' 22d August, 1815, was not blind, but laboured under a de-
 ' fect of sight; yet not such as to render her incapable of read-
 ' ing or seeing what she might write. That there is no evidence
 ' before the jury, that Margaret Dickson gave instructions to
 ' prepare either the deed of 6th May, or 22d August, 1815; that
 ' on 22d August 1815, the previous deed of 6th May was not read
 ' over, nor the tenor thereof explained to the said Margaret
 ' Dickson; and that on the 6th May, and 22d August, 1815, the
 ' said Margaret Dickson declared, that, from defect of sight
 ' she was unable to sign the deed aforesaid, and that she in-
 ' structed notaries to sign on her behalf.'

The Lord Ordinary repelled the reasons of reduction, and as-
 soilzied. But the Court appointed new and additional issues.
 ' 1. Whether Mrs Margaret Dickson, or Noble, at the date of the
 ' trust settlement in May 1815, and the subsequent one of 22d
 ' August of the same year, was in such a state of mind as ena-
 ' bled her to judge correctly with regard to the effect of the said
 ' deeds, as depriving her of all power of revoking or altering
 ' the same. 2. Whether those deeds were the free and volun-
 ' tary acts of Mrs Noble, or obtained by the undue influence of
 ' the defenders, or one or other of them. 3. Whether, from the
 ' date of the factory* granted by Mrs Noble to the defender,
 ' James Hamilton, to that of the settlement just mentioned, or
 ' afterwards, while she lived, Mrs Noble settled accounts with
 ' Mr Hamilton. 4. Whether Mrs Noble, at the date of the two

* On 9th February, 1815, Mrs Noble had executed a factory in favour of Hamil-
 ton, proceeding on the narrative of ' my being, from old age, unable to manage my
 ' affairs, and having full confidence in the fidelity and attention of James Hamilton.'

deeds respectively, could write or subscribe those deeds. 5. June 29, 1827. Whether, at the execution of the two deeds above mentioned, the said Mrs Margaret Dickson, or Noble, explained to the notaries the object she had in view in making use of their professional assistance, or did express her assent to, or acquiescence in such explanation, if any was given in her presence.'

To these issues the following verdict was returned:—1. That Mrs Dickson, or Noble, at the date of the trust settlement in May 1815, and the subsequent one, 22d August of the same year, was not in such a state of mind as to enable her to judge correctly with regard to the effect of the said deeds, as depriving her of all power of revoking or altering the same. 2. That these deeds are not the free and voluntary acts of Mrs Noble; but there is not sufficient evidence to show that they were obtained by the undue influence of the defenders, or one or other of them. 3. That from the date of the factory granted by Mrs Noble to the defender James Hamilton, to that of the settlement first mentioned, or afterwards, while she lived, there was no evidence that any accounts were regularly settled betwixt Mrs Noble and Mr Hamilton, her factor. 4. Finds for the defenders, in respect that no evidence was produced by the pursuers. 5. That at the execution of the two deeds above-mentioned, the said Mrs Dickson, or Noble, explained to the notaries the object she had in view in making use of their professional assistance, by declaring that she could not see to write by reason of blindness.' The Court refused the defender a new trial; and thereafter, on the 18th November 1825,* on consideration of the issues tried before the Jury Court—verdicts returned thereon—mutual information for the parties, and whole proceedings altered, the interlocutors sustained the reasons of reduction of the deeds quarrelled, and reduced, decerned, and declared, in terms of the reductive conclusions of the libel.†

* See 4 Shaw and Dunlop, No. 167.

† At the second trial, the appellants proposed to examine Hamilton Ritchie as a witness, to prove that he, as the agent of Mrs Noble, received instructions from her to prepare the trust deed; but his admissibility was objected to by the respondents, on these grounds:—1st, Because he was nominated a trustee by the late Mrs Noble in the deed under reduction. 2dly, Because he is a defender in the present action, and interested by paying the expenses which may be incurred in defending the action. 3dly, Because he is the nephew of James Hamilton, residing in Biggar, one of the parties benefitted by the deed of the said Mrs Noble, sought to be reduced by the present action.' The Court having sustained the objections, the appellants presented a bill of exceptions. 1st, Because, though appointed a trustee by the late Mrs Noble in the deed under reduction, the said William Hamilton Ritchie derived no interest

June 29, 1827. Mrs Noble's trustees and others appealed.

Appellants.—Mrs Noble's capacity to dispose of her estate and effects, has been established by a verdict of a Jury. The deeds prove that instructions to draw them were given; and the respondents did not prove that no instructions were given for that purpose. It is immaterial whether she was in such a state of mind as not to be able to judge correctly with regard to the effect of her deeds, as depriving her of all power of revoking or altering the same. That is a matter quite distinct from the capacity to will and dispose of her estate and effects after death, which capacity she is proved to have possessed. The verdict, finding these deeds 'were not the free and voluntary acts of Mrs Noble, but that there is not sufficient evidence to show that they were obtained by the undue influence of the defender,' is not only inconsistent with the previous verdict, that she was capable of willing and disposing of her estate and effects, but is so also with itself; it being proved that the deeds were not obtained by undue influence, and yet it is found they were not Mrs Noble's deeds, although she was capable of making them. The respondents took issues as to particular allegations, which, not having been proved affirmatively, the result to the appellants is the same as if the Jury had found negatively these points. Indeed the respondents being pursuers, any inconsistency or contradiction in the verdicts must be fatal to their plea. As to signing by notaries, it is sufficient that Mrs Noble felt the defect of her sight, and desired the notaries to sign. The respondents cannot be permitted to falsify the subscription, unless they at the same time prove no authority given the notaries to sign; but the Jury have found that she gave the notaries instructions to sign in her behalf.

Respondents.—The incapacity of Mrs Noble to understand these deeds—and that these deeds were not her free and volun-

' whatever under that trust-deed, and has not been left any legacy or other provision by the said deed. 2dly, That Mr Hamilton Ritchie has been called as a defender in this case, merely to deprive the defenders of the benefit of his evidence, and that he cannot be made personally responsible for the costs of suit. 3dly, And that there being necessarily, from the very nature of the case, a penuria testium, Mr Hamilton Ritchie is a necessary witness, and admissible as such by the law of Scotland, although he is the nephew of one of the defenders.' This bill of exceptions was disallowed; and against this judgment, as well as one refusing a new trial, the appellants entered an appeal, but the respondents having presented a petition in regard to the competency of the appeal as to those judgments, the appellants withdrew it.

tary acts—being established by a verdict of a Jury, the deeds cannot be supported. They are not her deeds; and that puts the inquiry at rest. But these deeds were irregularly executed, and ought to bear no faith in judgment, not having been subscribed by Mrs Noble herself, and the reason assigned by the notaries, in their doquet, having been proved to be false. June 29, 1327.

The House of Lords ordered and adjudged that the appeal be dismissed, and the interlocutor complained of affirmed.

Appellants' Authorities.—Bell on Testing Deeds, p. 174. Robertson, Feb. 4, and Nov. 3, 1742. (15943.) Scott, Nov. 17, 1789. (4946.)

Respondents' Authorities.—Bell on Testing Deeds, p. 207. 55 Geo. III. c. 42, c. 8. Gillespie, Feb. 11, 1817. (F. C.)

MONCRIEFF and WEBSTER,—SPOTTISWOODE and ROBERTSON,
—Solicitors.