

Tuesday, January 20.

FIRST DIVISION.

[Lord Stormonth Darling,
Ordinary.]

COLLIE v. PYPER.

Essential Error — Fraud — Reduction — Issues.

In an action of reduction of a will, brought against the party named residuary legatee therein, the pursuer alleged that the deed had been procured by the defender from the deceased by fraud and circumvention when the latter was in a weak and facile state of mind consequent on excessive drinking, and that the deceased had signed the deed under essential error as to its import and effect, induced by the defender falsely and fraudulently representing that the deed merely appointed him the trustee of the estate, and that the pursuer and other relatives of the deceased were to have the beneficial interest therein.

In addition to an issue of facility, fraud, and circumvention, the Court allowed the pursuer an issue of essential error, induced by the defender's misrepresentations, but (*altering judgment of Lord Stormonth Darling*) held that "false and fraudulent" should be inserted in the issue.

George Collie, grocer in Aberdeen, died on 12th August 1889, leaving moveable property of the value of over £2700, and a small amount of heritable property. He also left a trust-disposition and settlement dated 12th September 1888, by which he revoked all previous settlements made by him, and made over to William Pyper, as trustee for the purposes therein mentioned, the whole heritable and moveable estate which should belong to him at the time of his death, and also appointed William Pyper to be his sole executor.

By said settlement he directed his said trustee and executor (1) to pay his debts and funeral expenses; (2) to pay various legacies, amounting in all to the value of £1199, 15s., and including legacies of £500 to each of his brothers Thomson and James Collie. The settlement then proceeded— "And whatever residue there may be of my said estate shall be under the control and at the disposal of my said executor William Pyper; and I grant power of sale by public roup or private bargain; and I appoint James and George Collie, advocates in Aberdeen, to be the law-agents in the trust hereby created," &c.

William Pyper claimed that the whole residue, after deduction of the debts, expenses, and legacies, was his absolute property.

Thomson Collie brought this action against William Pyper for reduction of the above settlement, and for payment to the pursuer of such sum as should be found to be his true interest in the estate of his brother George Collie.

The pursuer averred—" (Cond. 4) On 12th October 1883 the testator executed a trust-settlement. . . . Under it the pursuer and his brother James Collie, or survivor (with the exception of a small portion left to George Collie Davidson), succeeded to the whole estate which the testator should die possessed of. (Cond. 5) The pretended settlement bears to be signed on 12th September 1888 in presence of Alexander Scorgie junior, warehouseman, and John Edwards junior, clerk, both in the employment of Lawson, Turnbull, & Company, merchants, Mealmarket Street, Aberdeen, of which firm the defender is a partner. (Cond. 6) The said settlement is not the deed of the said deceased George Collie. The deceased never intended to convey the bulk of his estate to the defender, as the said deed in point of fact does. The defender is a man of means. The settlement in question was procured by the defender from the deceased to his prejudice and lesion by fraud and circumvention and undue influence on the part of the defender. At the time when he subscribed the said pretended settlement of 12th September 1888 the said George Collie, whose mind had been failing for some months previously from excessive drinking and general debility, was not of a sound disposing mind, and was incapacitated from giving directions in regard to his affairs or the disposal of his property after his death. The deceased gave no instructions for the preparation of said settlement. At the time the testator signed it he did not understand the nature and effect of said settlement, and that it cancelled all previous settlements. Defender purposely did not explain to him that in particular it revoked his prior will of 12th October 1883, and made the defender his sole residuary legatee. The deed was purposely and fraudulently made by defender in the form of a trust in favour of defender in order to lead the deceased to suppose that the defender was appointed merely a trustee or manager of the estate for the benefit of the relatives of the deceased. It was not explained to the testator that the said settlement was truly an absolute conveyance to the defender of the bulk of the testator's estate. The defender alone instructed the preparation of the said settlement. He got Messrs J. & G. Collie, who are his own law-agents, and were not the law-agents of the deceased, to draft the deed, and the signature of the deceased was adhibited to said draft in defender's business premises. The defender prevented the deceased from having the advice of his own or any law-agent, and constituted himself his sole adviser. Neither Messrs J. & G. Collie, nor anyone on their behalf, ever received instructions from the deceased or consulted him regarding it. The deed was not read over to or by the deceased. For some time prior to execution of said settlement the defender stood in the relation of adviser to the deceased as regards his money matters. He invested his money for him, advised him in reference to his affairs generally, and had great influence

over the deceased, and by fraud and circumvention and undue influence, or one or other of them, upon the deceased, who was at the time in a feeble condition of body and mind, and weak and facile, the defender induced him to sign the said settlement. He fraudulently represented to the deceased that his estate was by the said deed conveyed to his (deceased's) relatives or some of them, and not to the defender, and he fraudulently concealed the fact that by said settlement nearly two-thirds of his estate was conveyed to the defender himself. This was not the intention of the testator, and if he had not been deceived by defender as to the import of the deed, and been acted upon by the fraud and circumvention and dominating and undue influence and pressure used by the defender he would not have signed it. The deceased signed the said settlement under essential error as to its contents and its effect, fraudulently induced by defender. The said testator from said 12th September 1888, and prior thereto, down to his death in August 1889, continued in a state of mental debility induced by bodily weakness and intemperate habits, and he was under the belief that his estate would go to his relatives. (Cond. 7) The pursuer believes and avers that the said pretended settlement was not signed by the said George Collie, now deceased, in presence of the said instrumentary witnesses, nor did the said deceased ever acknowledge his subscription thereto to them. The same is therefore null and void."

The Lord Ordinary (STORMONTH DARLING) approved of the following issues for trial of the cause—(1) Whether the trust-settlement dated 12th September 1888, of which reduction is sought, is not the deed of the deceased George Collie? (2) Whether on or about the 12th day of September 1888 the said deceased George Collie was weak and facile in mind, and easily imposed upon; and whether the defender, taking advantage of the said weakness and facility, did, by fraud or circumvention, obtain or procure from the said George Collie the said trust-settlement to the lesion of the said George Collie? (3) Whether the defender represented to the deceased that the said trust-settlement merely appointed the defender a trustee or manager of the estate, and that the pursuer and other relatives of the deceased were to have the beneficial interest therein, such not being the nature and import of the said deed; and whether the said deceased George Collie executed the said deed under essential error as to its nature and import induced by the said misrepresentation? (4) Whether Alexander Scorgie and John Edwards junior, the alleged witnesses to the said trust-settlement, or either of them, did not see the said George Collie subscribe the same, and did not hear him acknowledge his subscription?"

The defender reclaimed, and argued—The third issue should be disallowed altogether, as it could not reasonably be extracted from the conflicting averments made by the pursuer, who first charged the defender

with guilty silence, and then with having represented what he concealed. At all events, if an issue of essential error were allowed, it should only be of error induced by "false and fraudulent" representations, as there was no averment on record of error on the part of the testator being induced by anything but the false and fraudulent representations of the defender.

The pursuer argued—The third issue should be allowed. The averments on record were not inconsistent, but charged the defender both with concealing the true import of the deed and also with assigning a false effect to it. Further, it was quite settled that if in point of fact there was misrepresentation inducing the signature of a deed, that was quite enough to invalidate the deed, and it was also settled that though it was averred on record that a deed had been executed under essential error induced by false and fraudulent representations, still it was not necessary that "false and fraudulent" should be inserted in the issue—*Hogg, &c. v. Campbell, &c.*, March 12, 1884, 2 Macph. 848; *Munro v. Strain*, February 14, 1874, 4 R. 522.

At advising—

LORD PRESIDENT—We are all of opinion that the third issue should stand thus—"Whether the defender falsely and fraudulently represented to the deceased that the said trust-settlement merely appointed the defender a trustee or manager of the estate, and that the pursuer and other relatives of the deceased were to have the beneficial interest therein; and whether the said deceased George Collie executed the said deed under essential error as to its nature and effect induced by the said false and fraudulent representations?"

The Court approved of the issues as so adjusted, and appointed them to be the issues for trial of the cause, and remitted to the Lord Ordinary to proceed.

Counsel for the Pursuer—Comrie Thomson—Glegg. Agents—Macpherson & Mackay, W.S.

Counsel for the Defender—D. F. Balfour, Q.C.—Shaw. Agent—R. C. Gray, S.S.C.

Friday, January 23.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

LORD ELIBANK AND OTHERS v. HOPE AND OTHERS.

(Ante, vol. xxv. p. 927.)

Teinds—Sub-Valuation—Decree of Approbation.

In a question as to the valuation of teinds, a report by the Sub-Commissioners has no effect until it has been approved of by the High Commission.