1807.

THOMSON, &c. *v.* TATE, &c.

DAVID THOMSON, W.S., and MARGARET THOMSON and JEAN THOMSON, the Children and Representatives of ALEXANDER THOMSON, Esq. late Deputy-Cashier of the Excise in Scotland, deceased, - - - } *Appellants;*

ALEXANDER KINCAID TATE, Writer in Edinburgh, Trustee appointed by MRS. JEAN LIVINGSTONE or ALISON, relict of ALEXANDER ALISON, Esq., Deputy-Cashier of Excise, ELIZABETH HOOD and Others, } *Respondents.*

House of Lords, 11th July 1807.

REDUCTION OF DEEDS—INSANITY—RELEVANCY—INTEREST TO SUE.—1. A reduction of deeds was brought, on the ground of insanity. The granter of the deeds had been insane in 1795, and the deeds challenged were executed in 1798; but there was no specific allegation that the granter, at the dates of these deeds, was insane. Held the facts irrelevant, and too vague to go to proof. 2. There was a previous deed, which excluded the pursuer, but which was not challenged. Held him also to have no title, in respect of that deed, to insist in the present action.

This was a reduction of certain deeds, on the ground of incapacity, in the following circumstances.

Mr. Alison, deputy-cashier of Excise, on 7th March 1787, executed a trust-deed, giving to his wife, Mrs. Alison, the liferent of his whole property, with right to dispose of the sum of £500 of the capital at her death; the residue, at her death, going to the late Alexander Thomson, and even succeeding also to the £500, if not expressly otherwise conveyed by his wife. The deed contained a clause, reserving power to Mr. Alison to alter the destination of his property at pleasure.

On the 28th August 1787, he executed a deed relative to the trust-deed, in which he required his trustees, of whom Alexander Thomson was one, to convey "to Mrs. Jean Li-
" vingstone, my well beloved spouse, if she shall happen to
" survive me, and be alive at the end of twelve calender
" months after my decease; at which period I compute that
" my subjects may be liquidated, to whom, in that event,
" and to her disponee, expressly secluding her heirs and

" executors, I do hereby dispone, assign, and make over, 1807.
" the said free residue of my subjects, debts, means and
" effects, heritable and moveable, to be disposed of at her THOMSON, &c.
" pleasure, absolutely and without restriction, recommend- v. TATE, &c.
" ing to her, however, in the disposal thereof, either in her
" own lifetime or at her decease, that as my affection for
" her hath induced me to give her all my property, to the
" prejudice of my own relations, she have these, my nearest
" relations, in grateful remembrance in the disposal of what
" shall devolve to her by virtue hereof; and, in case the said
" Mrs. Jean Livingstone do not survive me, and be alive at the
" end of twelve calendar months after my decease, or shall
" fail to make any special disposition or conveyance in writ-
" ing as hereunto relative of what shall devolve to, and be
" vested in her by this deed; in either of these events, I
" do hereby declare, that, after the purposes aforesaid are
" fulfilled, then the whole free produce and residue of my
" subjects, means, and effects, heritable and moveable, shall
" belong to the said Alexander Thomson, my clerk and as-
" sistant, his heirs, executors, and assignees whomsoever; to
" whom I do hereby, in the above events, dispone and con-
" vey the same."

Mr. Thomson, the person intended to be ultimately favoured, was married to Mr. Alison's niece, and Mr. Thomson's family were the heirs at law of a Mr. Young, who was the heir at law of Mrs. Alison.

On the 16th of January 1792, Mr. Alison executed another 1792.
deed, by which he returned to his first intention, of bestowing on his wife the power only of disposing of £500, and the residue to belong to Mr. Thomson. In this deed he expressly revokes " the deed 28th of August 1787," and declared it " null and void."

But, on the 10th of November 1793, he appended to the 1793.
above deed, a revocation of it, also in these terms:—" Upon
" reconsidering the state of my affairs, which have lately
" altered, I have thought it proper to alter and make void
" this deed, and declare that my supplementary disposition
" and settlement, dated 28th August 1787, still remaining
" in my custody, shall be effectual and subsisting, if the
" same is not altered by me afterwards."

" On 29th November 1793, he executed another deed, 1793.
by which he bequeathed, " on account of faithful services
" and affinity, £1000 to Mr. Thomson," adding, that this

1807.

THOMSON, &c. *v.* TATE, &c.

was "besides the hope of succession," which sum was declared payable six months after his death.

1794. Mr. Alison died on 16th July 1794. On 29th October 1794, about four months after her husband's death, Mrs. Alison executed a testamentary deed, conveying to certain executors, her effects in general, without any mention of Mr. Thomson.

1795. In the following year she became insane, and remained under strict keeping for some time. The appellants allege that she never completely recovered her intellects; but

1798. stated, that in the year 1798, she could not have been pronounced to be entirely insane. On 22nd June of that year, she executed a trust deed, conveying to the respondent, in trust for the other respondents, her whole property, deducting several legacies, one of which was to Mr. Thomson,

1798. of £750. This deed was ratified by another on 22d December; and, on 10th December 1799, she executed another deed, revoking her legacy of £750 to Mr. Thomson.

It was of these three last deeds, executed by Mrs. Alison, that the present reduction was brought, first by Mr. Thomson, and afterwards continued by the appellants, in order to have them set aside, on the following grounds:—1. That Mrs. Alison had been, and was entirely insane in the year 1795. 2. That she never afterwards recovered the vigour of her mind which she may have possessed before her insanity, and that, at the dates of the deeds in question, and for some time prior and posterior thereto, although *not insane*, her mind was in a state of great imbecility. 3. That, in her weak state of mind, she was practised on and importuned by the respondents, Mr. Tate and Miss Hood before mentioned, in order to prevail on her to make a will in favour of themselves, and to deprive Mr. Thomson of his rights. 4. That her eyesight, at the dates of these deeds, was so bad as to be entirely incapable of reading these deeds. 5. That she had always expressed an intention of bequeathing her property differently. 6. That the deeds were not read over to her at the time she is said to have subscribed them, some of the testamentary witnesses not seeing her adhibit her subscription or hear her acknowledge it. 7. That Mrs. Alison had never given instructions to any one to frame the deeds under reduction, and that she never actually knew or understood the import of the deeds said to contain her last will.

In a condescendence, these facts were embodied, and offered to be proved by parole evidence.

The answer made to these was, that the facts condescended on, in regard to insanity and imbecility, were altogether irrelevant to infer the conclusions drawn from them; besides, that the appellants had no interest to insist in the action, being excluded by the prior deed 1794, which stood unchallenged.

Replies and duplies followed these answers, whereupon July 12, 1802. the Lord Ordinary pronounced this interlocutor:—"Having considered the foregoing condescendence, pursuers' "replies and duplies, productions, and whole process. With "regard to the first article in the condescendence, Finds, "that it is not alleged that the late Mrs. Alison was in a state "of insanity, when any of the deeds under challenge were "executed. As to the second article, finds, That though "it is said Mrs. Alison never afterwards recovered the "vigour of her mind which she possessed before insanity, "yet it is not alleged that she was in a state of incapacity "when these deeds were granted; (on the contrary, the "pursuer himself has shown, that in his opinion, she was "not incapable, by having transacted business with, and "taken receipts from her). With respect to the seventh "article, where it is said, that Mrs. Alison never actually "knew or understood the import of the deeds under re-"duction, finds, That this is too vaguely stated, and the "mode of evidence not sufficiently pointed out, so as to "obtain a proof thereof; finds, That the other articles "in the condescendence are not relevant; therefore, and "in respect of the prior deed, executed by Mrs. Alison on "the 29th October 1794, of which no challenge is brought, "and which excludes the pursuers' title to insist in the pre-"sent action, assoilzies the defenders from the whole con-"clusions thereof, and decerns."

This part deleted in the House of Lords.

On representation, suggesting that the Lord Ordinary might take the case to report, in case his Lordship continued of opinion that no proof ought to be allowed. The Lord Ordinary took the case to report. Informations were ordered and lodged; and, of this date, the following interlocutor was pronounced:—"On report of Lord Craig, and "having advised the informations, the Lords repel the "reasons of reduction, assoilzie the defender, and decern; "but find expenses due to neither party." On reclaiming petition and answers the Lords adhered.

Jan. 12, 1803.

June 7, ——

1807.

THOMSON, &c. v. TATE, &c.

Against these interlocutors the present appeal was brought by the pursuer to the House of Lords.

*Pleaded for the Appellants.*—Mr. Alison's deed of 28th August 1787 was revoked, and declared null and void, and not afterwards revived in a legal manner, so that Mrs. Alison (even if her mind had been entire), had it not in her power to dispose of her husband's property to any further extent than what was allowed by the prior deed, viz. £500. 2. The will made by Mrs. Alison, dated 29th October 1794, a few months after her husband's death, did not mention or refer to her husband's settlements, and neither was intended to comprehend, nor could comprehend, the property conveyed by these settlements to her, under the positive condition, that if that property should not be specially conveyed by her by a deed referring to them, it should belong to the appellants; consequently, the appellants are not precluded by that will from challenging what are alleged to have been Mrs. Alison's subsequent deeds. 3. Mrs. Alison not only gave no instructions to make out the deeds under challenge, but was incapable of doing so, on account of great weakness of mind and want of memory. 4. The deeds were not duly executed, not having been read over to her when signed, she being incapable of reading them herself from defect of eyesight, and the witnesses having been ignorant of her person. 5. At the date of the last deed she had relapsed into a state of absolute insanity. 6. The respondent and Miss Hood misrepresented to Mrs. Alison Mr. Thomson's conduct towards her, and, by importunity and deceit, prevailed on her to subscribe the deeds, the effect of which, if sustained, would be to disappoint Mr. Alison's heirs at law of the succession. 8. Evidence of all these particulars having been offered, the Court of Session ought, at any rate, before answer, to have allowed a proof of the facts stated in the late Mr. Thomson's condescendence and reclaiming petition.

*Pleaded for the Respondents.*—The disposition and deed of settlement executed by Mrs. Alison on 29th Oct. 1794, completely excludes the appellants' title to insist in the present action. That deed was executed when, according to the appellants' own statement, the vigour of Mrs. Alison's mind was yet entire, and, in fact, full ten months before the first attack of the malady which the appellants found on; and, accordingly, to this hour the appellants have never instituted any legal challenge of that deed. By the terms of

that settlement, Mrs. Alison vests her whole estate in trustees, for behoof of her nephew, Mr. Adam Callender, and Miss Hood; thus demonstrating her will and determination in favour of the very persons to whom she again gives the principal interest in her funds by the deeds under challenge. Hence it is plain, that although these last deeds were to be reduced and set aside *in toto*, the appellants would have neither right, title, nor interest in Mrs. Alison's estate, because, in that event, every fraction of her funds would go to Mr. Callender and Miss Hood, in terms of this prior settlement. Now the respondents apprehend, that no rule of law is more firmly established than this, that, when the interest of a pursuer is cut off by a deed not brought under challenge, and which stands unconnected with those to which the reduction applies, it puts an end to his right to insist. 2d. Mrs. Alison being the absolute and unlimited proprietor of the estate left her by her husband, she was entitled to dispose thereof in any way she thought fit; and she has accordingly done so in an unexceptionable manner, by the deeds under challenge. And Mrs. Alison was not rendered incapacitated from executing these deeds on the ground of insanity, for although she was afflicted with that malady some years before the dates of these deeds, it does not follow that she was so incapacitated at the time these were executed. This, in law, it is necessary to establish and prove. Here the pursuer has not ventured even to aver this, which, in order to found a relevant ground in law to set aside these deeds, on the head of insanity, was absolutely necessary. But the fact was, the late Alexander Thomson, the pursuer in the cause, could not, in conscience, aver what was so contrary to the fact, for, from the deceased Mrs. Alison's transactions with him in business in the years 1797, 1798, 1799, as one of the trustees of her deceased husband, it appeared that she had been consulted, as appeared from the trustees' sederunt-book and other writs in process, about the trust affairs, in any matter of importance, and that these trustees had continued to take, and she to grant and sign receipts and discharges in reference to payments received by her, and other matters regarding the trust. So that he has not been able, and, in point of law, has not stated any relevant averment of insanity at the times these deeds were executed. 3. As to the plea, that the deeds were not read over to her at the time they were executed, and that the witnesses did not know her, nor the contents of the deed

1807.

WILSON, &c. *v* ALEXANDER, &c.

they subscribed, in point of law, neither of all these were necessary in the present case. It is not necessary that the witnesses know, either the granter, or the contents of the deed. All that is necessary is, that they are informed of who it is that is to sign, and that *that* person is seen to subscribe the deed, or heard to acknowledge her subscription.

After hearing counsel, it was

Ordered and adjudged that the interlocutor of the Lord Ordinary of the 12th Jan. 1802 complained of be varied, by leaving out after (granted) to (with), and after (are) by inserting (either), and after (relevant) by inserting (or too vaguely stated), in page 5, and that with these variations, the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Wm. Alexander, W. Maxwell Morrison.*

For the Respondents, *Henry Erskine, Wm. Adam, Thomas W. Baird, Andrew Cassels.*

NOTE.—Unreported in the Court of Session.

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JOHN PETTIGREW WILSON, Principal Tacksman of the Lands and Coal at Green, near Glasgow; JANET, GRIZEL, ELIZABETH, MARY, AGNES, and MARGARET PETTIGREWS, Joint Proprietors of the said lands; and WALTER WILSON, Merchant in Glasgow, Husband of the said MARGARET for his interest, . . . . } *Appellants;*

JOHN ALEXANDER, Merchant in Glasgow; JAMES HOPKIRK of Dalbeth, Merchant there; and THOMAS EDINGTON, of Clyde Iron Works, - - - - } *Respondents.*

House of Lords, 12th August 1807.

DAMAGES—RELEVANCY—BANKRUPTCY — LIABILITY OF TRUSTEE AND COMMISSIONERS FOR DAMAGES.—The trustee and commissioners on a bankrupt company estate, the chief assets of which consisted of a valuable lease of coal, entered into the possession of the lease, and wrought the coal for behoof of the creditors. In doing this, they wrought the coal in such a manner as to do great damage to the value of the coal and surface above. In an action of damages against them, they stated that the action was irrele-