£100 and £40,—and as to the subjects themselves, which are described as "the farms of Rossal and Dernacullen as at present possessed by me," which I think is meant really to refer to the identification of the subjects, and not in any way to conditions in previous leases. There is not a word added in regard to what are to be the special conditions of this lease, and I agree with your Lordships that it is impossible for this Court now to add, as a term of this agreement, what I daresay the parties really meant should be a term of it, that the conditions usual on the estate should form part of the lease. The correspondence, indeed, which followed seems to me to show that both parties had that in their view. But when we come to the question of the strict legal interpretation of a contract of that kind, although it does appear from the correspondence that the parties respectively had certain conditions in their minds, I do not think that a court of law, with missives entirely silent as to any conditions, can proceed to investigate what each of the parties meant, and so by an addition to the lease, it may be, to add stipulations as to which they were never agreed.

In regard to another question, as to whether a custom might not be made part of a lease by a missive of this kind if the tenant had been able to prove an extensive universal and clear custom in regard to the matter of the stock to be taken over and maintained and afterwards given over at the end of the lease, I should think that if such a custom were proved, the Court in adjusting the lease would give effect to that custom, and would have inserted clauses which would give effect to it. But I find in this case that the Lord Ordinary and the Court of Appeal are both agreed that upon the proof the facts are against the tenant. It has been held by these concurrent judgments on this matter of fact that no such custom has been proved; that the only custom that is shown is that it is usual to make stipulations in regard to the stock to be taken up and given over at the end of a lease, but that those stipulations vary according to different circumstances, and cannot be said to be universally the same. And I did not understand that the appellants' counsel could displace this finding of fact. It is therefore out of the case that such a custom should be imported as part of the contract under these missives.

On these grounds, distinguishing from the ground of judgment in the Court of Session, I am of opinion with your Lordships that this appeal must be dismissed.

LORD BRAMPTON — I agree that this appeal ought to be dismissed with costs, and for the reasons that have been so very clearly stated by the Lord Chancellor, and I have nothing further to say.

LORD ROBERTSON—I also concur.

Appeal *dismissed* with costs.

Counsel for the Appellant — Haldane, Q.C.—A. S. D. Thomson. Agents—Flux, Thomson, & Flux, for Gill & Pringle, W.S.

Counsel for the Respondents—The Lord Advocate (Graham Murray, Q.C.) — Macphail. Agents — Grahames, Currey, & Spens, for Tods, Murray, & Jamieson, W.S.

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*Tuesday, November* 28.

(Before the Lord Chancellor (Halsbury), and Lords Macnaghten, Brampton, and Robertson.)

## WEIR *v.* GRACE.

(*Ante*, Dec. 13, 1898, vol. xxxvi. p. 200, and 1 F. 253.)

*Fraud — Undue Influence — Agent and Client.*

*Opinion* (by the Lord Chancellor and Lord Robertson) that where a will is made in favour of a law-agent by a client, but is prepared and carried through by an independent law-agent, then in the absence of collusion between the two law-agents the onus of proving that the will was obtained by undue influence on the part of the agent benefited by it rests, as in the ordinary case, upon the persons challenging the will.

Evidence upon which *held* (*aff.* the judgment of Second Division) that even assuming the onus in such a case to lie upon the law-agent, he had proved sufficiently that the making of the will in his favour was the free and deliberate act of his client.

This case is reported *ante, ut supra.*

The pursuers appealed against the judgment of the Second Division.

At delivering judgment—

LORD CHANCELLOR—I have not been able to entertain any doubt in this case that the judgment of the Lord Ordinary was correct. It appears to me that one of the difficulties under which the very learned and able counsel who has been arguing this case before your Lordships on the part of the appellants has laboured is that he has not been able to propound the simple proposition upon which he asks your Lordships to reverse the judgment of the Court below. Although I have invited him to do so once or twice, I observe that he has always repeated his proposition in language which confuses two totally different issues, namely, first, Was this in fact the will of a sane and capable testatrix; was it executed by her? That is one issue. The second issue, and, as I say, a totally different one, was, Is it or is it not induced by the person by whom it was practically made as it is alleged (of course I do not concur in that view), so that although it was the act of a sane and capable testatrix, it was unduly influenced by the person for whose benefit it was made. These are two totally different issues, and they ought not to be confused together; they must be treated differently.

With respect to the first issue, of course it is the duty of the person propounding a will to show that it is the will of the testator or testatrix. That includes its execution and the sanity and testamentary capacity of the person who has executed it. If doubt is left on either of these propositions the ordinary consequence of law follows, namely, that the person whose duty it is to establish the proposition has failed to establish it, and therefore the judgment would be against him. But with respect to the other and totally different issue, it rests upon those who dispute the will to show that although by the hypothesis it is the will of the testatrix, and although by the hypothesis the testatrix was in a condition in which she could properly exercise volition, yet that volition has not been exercised, and the actual execution of the will being admitted, and the fact of the general capacity of the testatrix to execute it being admitted, there is an additional fact, namely, fraud or coercion, under which the thing was done. It appears to me that the whole difficulty of the argument of the learned counsel is that he has not put his finger upon anything that shows that the first issue has not been established, and that then when it comes to his turn to establish the other issue, he has been wholly unable to point to facts upon which he can rely to establish it. The question of what is undue influence has been before your Lordships' House, and although that, like every question of this sort, has to be judged of by the circumstances of the particular case with which the learned Judges in the Court below or your Lordships are dealing, yet it appears to me that Lord Cranworth gives a good general exposition of what the law is on the subject, which it is worth while to quote, because some propositions have been advanced before your Lordships to which I at all events could not assent, and which I think could not be assented to consistently with the judgment of this House, to which I refer, namely, in the case of *Boyse* v. *Rossborough* (6 H. of L. Cas. 47). Lord Cranworth says this—"The difficulty of deciding such a question arises from the difficulty of defining with distinctness what is undue influence. In a popular sense we often speak of a person exercising undue influence over another, when the influence certainly is not of a nature which would invalidate a will. A young man is often led into dissipation by following the example of a companion of riper years to whom he looks up and who leads him to consider habits of dissipation as venial and perhaps even creditable; the companion is then correctly said to exercise an undue influence. But if in these circumstances the young man, influenced by his regard for the person who had thus led him astray, were to make a will and leave to him everything he possessed, such a will could certainly not be impeached on the ground of undue influence. Nor would the case be altered merely because the companion had urged, or even importuned, the young man so to dispose of his property, provided only that in making such a will the young man was really carrying into effect his own intention formed without either coercion or fraud. I must further remark that all the difficulties of defining the point at which influence exerted over the mind of a testator becomes so pressing as to be properly described as coercion, are greatly enhanced when the question is one between husband and wife." [There his Lordship was referring to the facts of the particular case]. "The relation constituted by marriage is of a nature which makes it as difficult to inquire, as it would be impolitic to permit inquiry, into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish, and this is the case with which your Lordships have now to deal. In order, therefore, to have something to guide us in our inquiries on this very difficult subject, I am prepared to say that influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud. In the interpretation, indeed, of these words some latitude must be allowed. In order to come to the conclusion that a will has been obtained by coercion, it is not necessary to establish that actual violence has been used or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency. A will thus made may possibly be described as obtained by coercion. So as to fraud. If a wife by falsehood raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions which she knows he thus had formed to their disadvantage may never be removed, such contrivance may perhaps be equivalent to positive fraud, and may render invalid any will executed under false impressions thus kept alive. It is, however, extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say that allowing a fair latitude of construction, they must range themselves under one or other of these heads—coercion or fraud."

Now, that is the expression of opinion given by a very learned Judge in this House, and assented to by the judgment of your Lordships' House in the conclusion to which they came. Taking that as my guide, and giving every latitude of interpretation to the words "coercion and fraud," and having satisfied myself in the first instance that this was undoubtedly the intelligent act of a sane and capable testatrix, I ask myself what possible evidence is there here of any coercion or fraud, giving the fullest latitude which could be

given to those words—what evidence is there which ought to be submitted to any tribunal at all? For my own part I confess I see none whatever. As to the first issue it seems never to have been contested, and indeed it could not be. Was there ever a case heard in which it was suggested that it was not the free and intelligent act of a sane and capable testatrix when, sixteen years before her death, the instrument was executed, and executed in the presence of a person having no interest whatever in the transaction—a clerk to a respectable solicitor, and himself, I rather think, a Writer to the Signet, sent for the express purpose of getting this will executed, that will being read over to the testatrix? Some criticism was made about his saying that he only read over one of the wills, but the wills were in duplicate—read over the one and said the other was the same according to the best of his recollection. There is ample authority for saying that in the case of an intelligent and sane person where the will is read over to her and executed by her it must be assumed to be the free will of the person who executed it. That person must be taken as knowing and approving the will as read over to him or her. But does the case end there? In the handwriting of the person whose will it is there is a direction to make this will. The will is made by an independent person. The cloud of suspicion which Mr Bargrave Deane has from time to time suggested is to involve the very respectable person who actually made the will seems to be grounded on the fact that his firm were themselves the agents of Mr Grace in other matters. And there is a third person who takes the instructions for the will, not Mr Grace, but another of the persons employed in the Edinburgh firm; so that one of those independent persons, as I will call them, takes the instructions for the will, another of those persons goes and reads the will over to the lady, and then it is executed. I am not surprised that in that condition of things, even if it stood there, no effort was made or could be made to suggest that this was not the act of a sane and capable testatrix. But even there the question is not left, because the document itself being in the custody of a perfectly independent and disinterested person, as I have said, it is referred to by the ladies themselves and certain alterations made in it, so that for a period of something like sixteen years in the case of one and a somewhat shorter period in the case of the other, these ladies must have had a perfect knowledge of what they had done, and during the whole of that period no suggestion is made either that Mr Grace has further intervened or that he has done anything at all which anybody could suggest affected, or would affect, the volition of the ladies in the disposition of their affairs which they had already made. I confess what happened after that seems to me also to be not without importance. A dissolution of the firm gives rise to a distribution of the documents of which the firm had the care and keeping, and some time before the lady's death this document was sent to her. For I believe three or four years before her death this document was in her possession. Really when one sees that for a period of sixteen years this had been going on, and that for the last three or four years of her life the lady had the document in her possession, it being established, as it certainly is to my mind, that she knew perfectly well what it was, and had acted as if she knew perfectly well what it was, and had made certain alterations in it in that period, the suggestion after that that this was not the free and uncontrolled expression of her own mind is to me somewhat absurd. I do not think it necessary to go through the history of the case. I think the Lord Ordinary has with great clearness described what was the course which was pursued. Wherever there is no real evidence of any such undue influence or conduct as one could describe as likely to affect the free exercise of the will of the testator or testatrix, one has a difficulty of course in enlarging upon a negation of any evidence of the sort. The truth is, that there is no evidence at all which could be properly applicable to such an issue. All the evidence there is is of a character—well, I do not want to comment too much upon Mr Bargrave Deane's observation about "a cloud of suspicion"—which arises from minute circumstances of contradiction and supposed allegations which are not made out, and it is said that this ought to have cast grave suspicion upon the whole of the case. It is said—I certainly do not mean that it is accurate—that Mr Grace told one or two lies upon the subject, and his son did the like. I do not think that that is made out. I should be very sorry that anybody should suppose that I assented to that proposition, but if it were true the case does not turn upon Mr Grace or Mr Grace's son. There is the fact that we have what I have described as the sensible act of sane persons proved by testimony perfectly independent of Mr Grace, and if it is once conceded that the onus of proving undue influence is upon the person alleging it then the fact that Mr Grace or Mr Grace's son told lies upon the subject would really be absolutely irrelevant to that issue. That would not make undue influence. The utmost one could say would be that the evidence of such persons could not be believed because they had been guilty of such and such a falsehood. As to that, I can only say that for my own part I see no evidence at all which would justify a finding against Mr Grace or his son that they had been guilty of falsehood. There is a very violent prejudice in the mind of the gentleman who makes the allegation, and it is possible that, as Lord Kincairney says, he somewhat misunderstood in speaking of it, or thinking of it afterwards, what had been said by the person with whom he had the conversation upon which his allegation is based. It is to my mind an extremely unlikely thing that Mr Grace senior would have said that there was no will, and I say so for two reasons. In the first place,

everybody knew that a search for the lady's papers was about to be made immediately after the funeral, and that Mr Grace should say positively that there was no will at that time would be a very unlikely thing for him to do when in the course of the next twenty minutes he would be confronted with the fact that the will was found there. But there is another to my mind very strong reason for taking the view that Mr Grace senior is speaking accurately about these facts —and I wish to say here that I am only dealing with this matter lest it should be supposed that I disagree with Lord Kincairney in what he has found, namely, that he believes Mr Grace senior. It has but very little relation to the decision which your Lordships will have to pronounce, but I think it is only just to Mr Grace that I should say this— How could he possibly have said that there was no will? Perhaps the witness who speaks of it may have understood him to say there is no will. That is intelligible enough, but I think it is very unlikely that he would have said so, and one reason for that I have already given. But there is another and a more important one. No one has suggested that up to that time the lady's box had been looked at—they were going to look and see what papers were in the box, and it is very unlikely that as they were actually going for the very purpose of examining to see whether there was a will there or not Mr Grace should at that time have taken upon himself to say that there was none. It seems to me so absolutely absurd that I cannot believe that he could have said it. In addition to that, there was the reason to which I have already referred—that he would be confronted with it in a very short time. Therefore I think what Lord Kincairney said is accurate. It is probable that the gentleman who gave the evidence, being extremely excited, and obviously very angry (because it is part of their case that it had for some time been known or believed that Mr Grace was to inherit all the property), was confused and misunderstood what passed. I do not wish unduly to condemn him—it may be that he was very angry, and that he has forgotten whether the conversation was with the father or the son. The son undoubtedly does say that there was something said on the subject with him. And there again the question is—Was the question put in this form, "Have *you* made a will for her?" or was it put in the form, "Was there a will?" It is not at all impossible that those two propositions might have been confused in the minds of the persons talking about it; without imputing falsehood to either of them it is possible a mistake was made.

The only other question arises from a supposed contradiction between one of the documents which has been produced and the evidence. It is said, Here is a letter written by the lady, asking for something to be done which she would have known perfectly well, if it was her own uninfluenced act, was already done a week before. Undoubtedly the dates raise that contradiction. I am sure I do not know myself what the truth of that matter may be. It may be they misdated the letter, or it may be that it was something that was thought of afterwards. But just let us consider what is the conclusion one is asked to draw from that contradiction, namely, that this was something which the conspirators (because that is what it comes to) had contrived for the purpose of being found afterwards and so establishing the fact of the lady so intervening in her affairs that she was to be held to have been a capable and sane testatrix. Really it requires a considerable amount of ingenuity to come to that conclusion. That the letter is in her own handwriting appears to be undoubted. It was produced by Mr Grace's son as having been found amongst her papers afterwards. What was the necessity for this? Apparently to establish a contradiction. If one was to put in definite language the meaning of it—if this was a thing contrived by Mr Grace for the purpose of giving credibility and plausibility to his case afterwards, what would have been so easy as to put a date that would make it correspond, or leave it undated? You are to suppose a contrivance beforehand. It is said the lady must have defeated this ingenious contrivance by dating it, and that is what has made it unfortunately not coherent with the rest of the case. How in any court of justice can such an argument be heard? You are to imagine a whole series of events and to argue upon that imagination, and then again you are further from that to argue that Mr Grace and his son had been conspiring with this amount of fraud to misrepresent what these two ladies had done. I am wholly unable to follow such an argument. In a court of justice you are not to presume fraud. You are not wherever there is contradiction necessarily to suppose perjury on the one side or the other. It appears to me there is no foundation for any such imputation upon either of the Mr Graces, and I should be sorry to say, or even to think, that such a suspicion should be entertained without evidence to support it.

It appears to me, therefore, that the decision upon the facts arrived at by the Lord Ordinary and affirmed by the Second Division of the Court of Session ought to be affirmed, and this appeal dismissed, with costs.

LORD MACNAGHTEN—I am of the same opinion, and upon the same grounds. I only intervene for the purpose of saying that I do not think in the whole course of my experience I ever came across a case in which charges so grave were rested upon such very flimsy material. I think it is clear that the ladies were shrewd and capable women. I think it is clear that this will proceeded from their own minds without any hint or suggestion on the part of Mr Grace. I think it is clear that the survivor of the two ladies remained of the same mind until her death during a period of sixteen years, and how after that it can be said that this is not her will I really do not understand.

I do not think that any blame attaches to Mr Grace in respect of any part of this transaction. I think he acted, as far as I can see, properly throughout. If any blame attaches to anybody, perhaps some blame was attributable to Mr Lyon, because I think it was his duty to have obtained and preserved in the handwriting of these ladies, or the survivor of these ladies, clear proof that this was her own will, and I think it is possible that if Mr Robertson had not been living and had not been examined some sort of suspicion might have arisen, because there was one rather curious point. He was told to go to Mr Grace for directions. If that had not been explained there might have been some suspicion excited, but it turns out that the direction which he was told to go to Mr Grace for was simply to find out in what street or at what place the lady was living. I do not think there is any ground for the suspicion which has been cast upon Mr Grace at the bar, and I entirely agree that the judgment of the Court below ought to be affirmed with costs.

LORD BRAMPTON—I also entirely concur in the judgment which has been delivered by the Lord Chancellor. I have myself very carefully and diligently considered every portion of the evidence adduced against Mr Grace in this inquiry, and having done so I have come to the conclusion at which my noble and learned friends have arrived, that there is not a particle of evidence throughout the whole case which justifies any imputation upon either Mr Grace or his son of any misconduct or fraud or dishonesty in the whole course of the transaction. I think it right to express myself personally in this way, although I entirely concur in every comment which has been made by the Lord Chancellor in delivering his judgment.

LORD ROBERTSON—I also agree. Upon the general facts of the case I think it is quite well made out that this will was the deliberate act of these ladies, looked forward to, considered, and deliberately adhered to; but I think it right to point out that the question which your Lordships have to consider is perhaps narrower. It is rather in justice to the respondent that I make that general observation. If the case be looked at more strictly, it appears to me that we have first to make up our minds whether this will was prepared and carried through to execution by Mr Grace or not. If it was, then, according to the authorities which have been cited, it would fall upon Mr Grace to establish that this was the volition of the testatrix; but, on the other hand, if it was not prepared and carried through to execution by him, but by another, then there is no law which has been cited to us, or which I know, would compel us to put Mr Grace to proof that a will which he did not prepare or carry through to execution, but which was in his favour, was the deliberate intention of these ladies. If Mr Grace had colluded with Mr Lyon, and if Mr Lyon had in truth been acting not for the ladies but for Mr Grace in carrying through the will, then I should hold upon those facts that the case was as bad as if Mr Grace had himself directly and overtly carried through the affair. But it seems to me that the evidence here is conclusive to show that this lady was honestly introduced by Mr Grace to Mr Lyon, and that her interests were directly attended to by Mr Lyon and his establishment without reference to Mr Grace, and that the ladies had the fullest opportunity of communicating their wishes to the representatives of Mr Lyon. That being so, I do not think the onus is upon Mr Grace of establishing that it was the deliberate intention of the ladies. I think, on the contrary, he would only be liable to attack, and the will only be liable to attack, on the ordinary grounds of fraud, coercion, or circumvention. But it is satisfactory to know that the evidence is such as to entitle the respondent to a judgment in his favour even supposing the wider and not the narrower issue were to be involved.

Appeal *dismissed* with costs.

Counsel for Appellants—Bargrave Deane, Q.C.—Robertson Christie. Agent—Gordon M. Folkard, for Simpson & Marwick, W.S.

Counsel for the Respondents—Dean of Faculty (Asher, Q.C.)—C. K. Mackenzie—R. H. Pritchard. Agents—William Robertson & Co., for Mackenzie & Kermack, W.S.

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*Monday, March* 12, 1900.

(Before the Lord Chancellor (Halsbury), and Lords Macnaghten, Morris, Shand, and Brampton.)

## GREAT NORTH OF SCOTLAND RAILWAY COMPANY *v.* DUKE OF FIFE.

(*Ante*, Nov. 23, 1897, vol. xxxv. p. 78.)

*Railway—Construction—Statutory Powers—Drainage of Adjoining Lands—Decreet-Arbitral Followed by Conveyance—Railway Clauses Consolidation (Scotland) Act* 1845, *secs.* 60 *and* 65.

By the terms of a decreet-arbitral proceeding on a statutory submission between a railway company and the proprietor of lands taken for the construction of the railway, the company were taken bound to pay a certain sum as purchase-money, and to execute certain works, not including the drainage of the adjoining lands. In releasing the company from all other claims by the proprietor the decreet-arbitral excepted "the obligations upon the said company to preserve the effective drainage of the lands, in so far as the same may be interfered with by the construction of the works, and to keep up the works, fences, water-courses, and others falling upon the said company under the Railway Clauses Consolidation (Scotland) Act 1845." . . .

A disposition was thereafter granted by the proprietor conveying the