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dispositions they elicited from Jean Mackie of parcels of land lying about the town, before the pursuer's purchase. By the proof it came out, *1mo*, That Jean Mackie was a habitual drunkard; that she sold her very clothes to purchase liquor, scarce leaving herself a rag to cover her nakedness; and that it was in any person's power, by bribing her with a few shillings, to make her accept of a bill for any sum, or to make her dispone any part of her lands. *2do*, That the dispositions challenged were granted for no adequate cause.

Upon these and other facts, the Court had no difficulty to find the reasons of reduction upon the head of fraud and circumvention, relevant and proved.

The singularity of this case is, that however well founded the reduction was, there was no ingredient of fraud or circumvention in the case. There was not the least evidence that Jean was imposed upon, or circumvened in any manner, nor was there a necessity for such indirect dealing. Five shillings to buy drink would have tempted her at any time, drunk or sober, to give a dispositon to any subject that belonged to her. And she herself being called as a witness, deponed, that she granted these dispositions voluntarily, knowing well what she did.

Therefore fraud and circumvention must be laid aside; and then where lies the ground of reduction? It is certainly unjust to take advantage of weak persons, who cannot resist certain temptations; and to make use of such temptations to rob them of their goods. Let us examine the foundation of a judicial interdiction. It is nothing but a notification to the lieges of the weakness of the person interdicted, and to caution them against dealing with that person, unless upon an equal footing. It was therefore wrong in the defenders to take advantage of the known facility of Jean Mackie, and to elicit from her dispositions for a song, at least far under the true value.

Where a weak person makes a deed, perhaps foolish, but voluntary, in favour of any person who is entirely passive, such a deed admits of a very different construction. It is not reducible, however strong the lesion may be.

Elchies *observed*, That, for ought he knew, the disposition in favour of the pursuer might be under the same challenge; but that, as there was no reduction of it, the Court were not called upon to take it under consideration.

Fol. Dic. v. 3. p. 245. Sel. Dec. No 22. p. 25.

1789. *November* 17.

MRS HELEN SCOTT *against* ARCHIBALD and JEAN JERDONS, and their Tutors and Curators.

No 60.
A deed was sustained, though the granter, at the date of it, was in his

AN action was brought by Mrs Scott, the niece and heir at law of Mr Jerdon of Bonjedward, for setting aside certain deeds executed by him in the year 1783, in favour of Arehibald and Jean Jerdons, his grandchildren by a natural daughter.

It appeared, that the testator had for some time treated the mother of the defenders with little kindness; but after her marriage in 1777 with Thomas Caverhill, which met with Mr Jerdon's approbation, he entirely changed his measures with regard to her. In 1778 he made a settlement of his lands, one small parcel only excepted, in favour of her and the heirs-male of her body, with a substitution in favour of the children of Mrs Scott, his niece.

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95th year, and it appeared that he had repeated attacks of the palsy, which weakened his memory, and it was proved that neither he nor the writer clearly understood the effect of the deed he signed.

Afterwards, in 1781, on the death of his daughter, who had born two children, Archibald and Jean Jerdons, Mr Jerdon made another settlement, in favour of his grandson, and the heirs-male of his body, with a substitution in favour of Mrs Scott's family. To his grand-daughter he also bequeathed L. 2000, beside other legacies to some of his other friends.

In 1783, the settlements last mentioned were amissing. This circumstance being ascribed to Mrs Scott's interference, by those about Mr Jerdon's person, who were in the interest of his grandchildren, was very displeasing to him. A renewal of the settlements was proposed by the writer by whom the former ones had been framed; and this being agreed to by Mr Jerdon, a new deed was prepared and executed, whereby, on the narrative of the former deeds having been abstracted or mislaid, Mr Jerdon's whole property was devised to Archibald Jerdon his grandson, and his heirs and assignees, with a destination in favour of Mr Jerdon's heirs in case of his grandson's predeceasing him. By separate deeds executed a few days after, Mr Jerdon named tutors and curators to his grandchildren, and he likewise renewed the legacy in favour of his grand-daughter Jean Jerdon.

At this time Mr Jerdon was in his 95th year. Before he executed the first settlements in favour of his daughter and her children, he had more than once been affected with a paralytic disorder, which for a while rendered him quite unfit for business, and long afterwards continued to impair his memory so much, that his conversation and writings were often extremely indistinct, and sometimes unintelligible. It clearly appeared too, from the evidence of the writer employed in extending the deeds in 1783, as well as from the testimony of other witnesses, that neither Mr Jerdon, nor the writer himself, foresaw that the effect of the writings signed by him would be, in the event of the old gentleman's predeceasing his grandson, to prefer Thomas Caverhill the father, and the other relations of his grandson, and even the King himself as *ultimus hæres*, to those whom, on all former occasions, Mr Jerdon had called to his succession.

Mr Jerdon lived till the year 1786; and from several transactions which took place after the date of the last settlements, it appeared that he was perfectly satisfied with what he had done, so far as related to his grandchildren.

For the pursuer it was *pleaded*; In the transmission of property from the dead to the living, the will of the owner ought to be the governing rule. And, no doubt, where a settlement appears duly authenticated and expressed in unequivocal terms, the legal presumption is strongly in its favour. If, at the time of executing the deed, the testator was in the full possession of his faculties, it

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would lead to the most dangerous consequences, were the testimony of witnesses, however numerous and respectable, to be listened to for setting it aside, or for giving it an effect contrary to the legal meaning of the words occurring in it. But, on the other hand, it seems to be not less just, to prevent those who are placed beside the aged and infirm from availing themselves of such artifices as may be successfully practised on persons in this enfeebled state, in order to substitute what they wish instead of the will of the owner. If it appear that the settlement as made is really different from the one which the testator meant to execute, the very principle on which last-wills are justly held sacred requires that no regard should be paid to it.

It is not necessary for annulling destinations of succession, any more than it is for setting aside a mutual agreement, that the granter was in a state of absolute incapacity, or that they were brought about by such a degree of fraud and deception as might have misled those who are in the full possession of their intellects. It may not perhaps be so easy in the one case as in the other, to discover, from the intrinsic nature of the deed, that degree of weakness or imposition which led to the making of it. But in both cases alike, it will be enough to shew, that the whole originated in error and mistake; and where it appears that the granter, though not wholly deranged, was much enfeebled in mind, those circumstances which otherwise could not be supposed to have any improper influence on his conduct, will be attended to in determining what effect the settlements ought to have. In the present case, the testator, in the imbecility of great age, and labouring under the effects of disease, seems to have been made to entertain groundless suspicions against those who had formerly been favoured by him; and thus, while unable to attend to consequences, he was induced to put his hand to a settlement not truly authorised, because not fully understood by him; nor had it even been duly weighed by the writer of it. So far indeed as it introduced an essential alteration in the succession of his estate, it seems impossible for a moment to believe that it met with his approbation, or can be justly considered as his will. In many former cases, similar circumstances appear to have been fatal to settlements of this sort; such as those of Dallas *contra* Dallas in 1773, of Brown *contra* Chalmers in 1778, and of Crawfurd *contra* Doomside, also in 1778. *See* APPENDIX.

Answered; It must be admitted to have been the will of the deceased, that his own offspring, though illegitimate, should inherit his fortune. It must be likewise admitted, that the testator's mind was not so wholly debilitated as to render him incapable of making settlements of his affairs; and if so, the validity of those that he has made, which are authenticated in the most regular manner, cannot be disputed. Even although it were proved, that in the framing of it the writer had gone beyond his instructions, this cannot derogate from its validity, the testator's subscribing the deed being sufficient evidence of his intention to regulate his succession in the manner there pointed out.

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'Were it enough for setting aside a deed, that the testator himself, or the person employed to frame it, did not understand or foresee all the remote consequences which might possibly result from the destination, and if such allegations were to be established by parole testimony, the most approved principles of our law would be overthrown, and no settlement could ever be secure from challenge. Though landed property cannot be devised without written documents, and these framed in such a manner as to shew, that the testator was able and desirous to regulate his succession, it would thus be in the power of inattentive, unmindful, or false witnesses, to disappoint the most deliberate settlements, and to substitute in their place a destination wholly inconsistent with the wishes of the proprietor; Duke of Hamilton and Earl of Selkirk *contra* Douglas, in 1776. *See* APPENDIX.

After advising memorials, counsel were heard; and the LORDS, by a very narrow majority, sustained the defences.

A reclaiming petition was preferred, which was followed with answers, when, the former judgment was altered, and the deeds set aside.

But after advising a reclaiming petition for the defenders, with answers for the pursuer, the LORDS returned to their first opinion, by sustaining the defences.

Reporter, *Lord Dunsinnan.* Act. *Lord Advocate, Dean of Faculty, Solicitor-General.* Alt. *Wight, Blair, Abercromby, Armstrong.* Clerk, *Gordon.*

C. *Fol. Dic. v.* 3. *p.* 246. *Fac. Col. No* 89. *p.* 161.

*** This cause was appealed:

THE HOUSE OF LORDS, 23d February 1791, 'ORDERED, That the appeal be 'dismissed, and the interlocutors complained of affirmed.'

SECT. XII.

Reviving an extinguished obligation in prejudice of a creditor.—Discharging a bond, and taking a new one, payable to a third person, to disappoint a creditor.—Sale *retenta possessione.*

1725. *July* 8.

DAVID MACCLELLAN *against* HENRY ALLAN, Writer in Edinburgh.

No 61.
A cautioner in a bond having granted a bond of cor-

IN the competition of Sir George Hamilton's creditors, there arose a debate betwixt Mr Macclellan and Mr Allan, concerning their different interests: