PRESENT,

THE LORDS CHIEF COMMISSIONER AND MACKENZIE.

1830.
May 11, 12, 13, and 14.

MACKENZIE *v.* ROY.

A jury discharged in terms of 55 Geo. III. c. 42, § 35, not having agreed in a verdict.

THIS was an action to reduce a trust-disposition and a deed of settlement and entail on various grounds—the one relied on was fraud and circumvention, facility, and enorm lesion.

DEFENCE.—A denial of the truth of the facts stated and of the conclusions drawn.

ISSUE.

Whether they were not the deeds of the late Mr Mackenzie of Dundonnel?

Robertson opened for the pursuer. *—This

* Before the case was opened, it was proposed that an individual should be inclosed with the other witnesses; but the Solicitor-General said he claimed him as an agent in the cause.

LORD CHIEF COMMISSIONER.—The objection is, that he ought not to hear the evidence of the other witnesses; but the counsel for the pursuer states that he has received instructions from the witness, and no one can suspect that the evi-

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is an extraordinary case; and it will be necessary to go into much detail, and to show, that, from his earliest years to his death, the granter of these deeds was weak and incapable of receiving ordinary instruction suited to his rank —that he associated with idiots—was fond to excess of poultry—and that, when in the militia, it was necessary to have a serjeant near him to direct him.

The contract of marriage with the sister of the defender is unexampled, as it gives her a separate provision during the marriage, and declares it incompetent to sell the estate without her consent.

1 Hag. Ecc. Rep. 401.

In the case of Ingraham *v.* Wyatt, 1 Hag. Rep. 401, Sir J. Nichol lays down the law on this subject in language better than I could use; and in the case of Bull *v.* Mannin, March 1829, Lord Tenterden is represented by the short-hand writer as stating, That the question in such a case is whether the granter was capable of understanding what he did by executing the deed when its general purport was fully explained to him?

dence of such a person will be affected by being present. This is not a case for drawing the rule tight.

The gentleman was accordingly not inclosed.

An objection of agency was taken to a witness, as he had seen the summons and defence, but was repelled.

A witness received who had seen the summons and defences. The objection of enmity in a witness must be distinctly proved, and must be of a deep and serious kind.

When Mr Mackenzie of Millbank was called, he was examined *in initialibus*, but denied having used any threatening expression against the defender. An offer was made to prove the expressions used; and when a witness was called for this purpose, the pursuer proposed to call a witness to contradict him.

Cockburn.—I state a good objection, and offer to prove it—one witness is called to contradict mine, but that is not sufficient.

Hope, Sol.-Gen.—There is no case where this was done after the witness denied malice; besides we do not admit the relevancy, as we say a reasonable cause of malice must be stated of which the Court must judge.

LORD CHIEF COMMISSIONER.—Is there any practice of this sort in the Court of Justiciary? If the objection is competently proved by two witnesses, we must reject him, but the leaning is always to receive the witness, and allow the objection to go to his credit. There is only one witness to the fact, and I cannot admit collateral matter in support of it.

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LORD MACKENZIE.—I have known this attempted in the Criminal Court; but I wish to know whether there are other witnesses who can prove not merely scattered expressions, but serious malice, which is necessary to sustain the objection. There is no doubt of the objection being a very substantial one; but it must be malice of a deep and serious kind, and not mere expressions. The cause of enmity ought also to be stated.

Incompetent to ask a witness whether, if on a jury, he would have cognosced an individual.

The objection was not insisted in; and the witness being called, was asked whether, if he had been on a jury, he would have cognosced Dundonnel?

LORD CHIEF COMMISSIONER.—You must ask as to facts, not the conclusion from them.

If a pursuer observes on letters proved on cross examination, they become his evidence.

In re-examining a witness, some questions were put as to the contents of two letters proved on cross-examination.

LORD CHIEF COMMISSIONER.—If you observe on these now I must consider them as your evidence.

A witness not allowed to refer to books not kept by himself.

An objection was taken to a postmaster producing certain books.

Hope, Sol.-Gen.—This was overruled in the case of Young and Aytoun, not reported.

Cockburn.—The case there was different, as the witness knew the fact but referred to his books for the detail. This witness knows nothing of the fact.

LORD CHIEF COMMISSIONER.—The books in Young's case were to refresh the memory of the witness as a memorandum made at the time. But this witness was not the postmaster, and did not make the writing at the time; he must therefore be considered as producing a document showing how the business was carried on at the time.

The instrumentary witness to the deeds was shown other deeds, and a question put as to them, to which an objection was taken.

A deed being proved, incompetent to prove by parol the transaction to which it relates.

LORD CHIEF COMMISSIONER.—You have done what is correct in proving the signature to the deeds, and I can never allow a defender to do more. You may ask questions independent of the paper; but if you have any questions as to the transaction, these papers are the evidence of it, and you cannot get it by parol.

Cockburn opened for the defender and said, The question here is not as to the propriety of these deeds, but whether Dundonnel was ca-

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pable of having an object of affection? and the pursuer is bound to prove that, with the feelings and views which he had, these were not his deeds.

There are only two grounds on which they can be attacked, either that he was an idiot totally bereft of reason; and if this is your opinion no more need be said:—or that he was a frail halfling, who was practised upon by fraud, and this must be tried by *evidence*, not by Ross-shire clamour. We shall prove him a sensible man, with strong affection and resentment, and you must judge of him by his acts when roused to exertion, not when yielding to his natural obesity. He was in the army; he acted as chairman of meetings of justices of peace; and was engaged in numerous transactions in business, many of them with the pursuer. He disliked the pursuer, and was fond of the defender. The deeds were deliberately executed, and the scrolls were corrected by himself, and he survived the execution of them for five years.

There is no proof of facility, and, if that were established, there is none of fraud, intimidation, or solicitation. They say he hated the defender; and was it ever heard of that a person in such a situation could prevail on the other to give him his property?

When, in the course of the evidence, it was proposed to show a document to the jury, his Lordship remarked, that it was much better not to distract their attention till the whole was before them.

Documents in general ought not to be shown to the jury during a trial.

It was doubted by the counsel for the pursuer how far Mrs Mackenzie's letters could be given in evidence, when his Lordship said, If it is part of a train, the competency depends on the fact. And when an objection was taken to the defender putting in letters addressed by others to Dundonnel,

Letters admitted to prove correspondence with a party, though not evidence of the facts stated in them.

LORD CHIEF COMMISSIONER.—They put in letters from a number of persons to Dundonnel, not for the purpose of proving any fact contained in them, but to show that these persons corresponded with him. You draw one inference from them, and they draw a different; but I see no objection to the production.

Mr Solicitor-General stated that the defenders should produce a mandate mentioned in the opening.

A document referred to in the opening for the defender may be produced by the pursuer.

LORD CHIEF COMMISSIONER.—I do not think I can compel this,—all I can say is, that they must produce the best evidence. Let the witness be asked whether the mandate is necessary to aid his recollection, and if so, it must be pro-

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duced. If necessary for the case of the pursuer, you may produce it.

The deposition of a witness received without evidence on oath that his illness was permanent.

An objection was taken to the production of the deposition of a witness.

LORD CHIEF COMMISSIONER.—I wished to enforce the strict rule, but there has been a relaxation at the Bar. My rule would have been, that I would grant a commission only where a witness was not likely ever to be able to attend; and I had been accustomed to see this granted only on affidavit, but I understood that here a certificate on soul and conscience was held sufficient.

Hope, Sol.-Gen., in reply.—It is only by convicting the witnesses for the pursuer of perjury, that a verdict can be given for the defender. There is nothing in law, common sense, or general feeling, which warrants a man who can merely feel a preference in changing the order of succession to his estate; his right to do so implies that he has a sound and disposing mind, and is capable of managing his affairs with ordinary discretion. We deny that he had this capacity, but admit that he was not an idiot. He must understand *the* deed which he executes, and the powers he confers; not mere-

White *v.* Ballantyne, H. of Lords. 1 Shaw, 472.

ly who is called to the succession. The presumption, no doubt, is in favour of a deed; but Sir J. Nichol lays it down, that when the person benefited is the instigator of the deed, the presumption is the other way. In the present case the question is, whether he was capable of comprehending and originating *these* deeds, and if he was not, then there was contrivance from the first; and if he did sign them, he did not know what he gave to the person favoured. The account given of the first instructions for the deeds is incredible, and if the evidence of the agent and clerk is deducted, the other witnesses prove Dundonnel a halfling; and the letters on which the defenders rely could not be his own composition, and the letters from the defender to Dundonnel are evidently written for the purpose of evidence.

1 Hag. Eccl. Rep. 393.

The deeds are not what were ordered—they are not in the form of the scroll—not in terms of the written instructions—nor in conformity with the instructions, as proved by the agent himself.

LORD CHIEF COMMISSIONER.—We have now been four days occupied with this case, and have had from fifteen to sixteen hours speaking upon it, and it is now sifted to the bran. It

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requires much abstraction to simplify the case for your consideration, after such brilliant addresses, and the examination of thirty-five witnesses on the one side, and twenty-three on the other. It would not be conducive to the ends of justice, were I to go over the case in detail; but I shall endeavour to generalize it, and to state it in such a manner as to enable you to take a view of the whole. That your verdict will be according to your conscience, I have no doubt, and my anxiety is, that it should be final in the cause, and not infringe on any principle of law.

This settlement by entail cuts out the blood relations of the maker of it, but not those of his lady. In all countries real property has certain fixed rules attached to its conveyance from the dead to the living; and the law of inheritance is held so sacred, that any violation of it creates a feeling which is apt to affect the mind in considering it. But sacred as the law of inheritance is, it is not more sacred, or more fit to be preserved, than the sacred right of disposing of property according to the will of the individual disposing of it, which is a right sacred and established in all civilized societies. It is the object of all wise systems of law to prevent any aberration from the intention of the proprietor, but

it is necessary that it should be the intention of a disposing mind. The only question, therefore, on this part of the case is, whether Dundonnel was of a disposing mind? The disposal of property must be free, but the disposal must be defended from fraud, force, fear, or circumvention, and by the law of this country a disposing mind is most clearly protected from all these. The law has also done much more than this, by establishing the wisest and best regulations for the protection of property, especially heritable property. These regulations are clear, short, and sure. The deed must be executed in a certain manner; and the forms being attended to, the deed becomes what is called probative, and establishes a right in the person favoured by it, provided the mind of the maker of it was capable, and was not influenced by fear or fraud. But if it is impugned on either of these grounds, then the proof of these lies entirely on the person who impeaches it. In this case it lies entirely on Thomas Mackenzie, who has brought a variety of evidence to establish two points. 1*st*, That his brother had not a mind capable of disposing of it, and that he was circumvented and defrauded. *2d*, That if he was not absolutely unable to make the disposition, yet there is such evidence of weakness and facility, that

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the fraud and circumvention which took place are sufficient to set it aside.

Absolute incapacity is not made out, and, therefore, this last is the question for your consideration, and you will have to attend to the evidence of the facility and of the circumvention, and to say whether the schemes, the fraud acting on his facility, made him deprive the second son of his father of the family estate.

The issue is plain, and the one party says these were, and the other that they were not, the deeds of Dundonnel. In considering this, we have nothing to do with the situation of the trustees, or the hardship to the heir-at-law; these may influence feeling, but cannot influence the decision in a court of justice, which must depend on principles as applicable to the evidence.

There is no question here as to such fraud as would set aside the deed of a sound mind; but the question is, whether it is such as would affect a mind proved to be weak? I have great difficulty on the fraud and circumvention, as there is no specific act, which I can point out, of circumvention, or of fraud accompanied with circumvention, which can be made applicable to this case. The case depends on facts and circumstances, and you ought to keep steadily in mind, that, before coming to the conclusion,

that it is not the deed of Dundonnel, you must be satisfied on consideration of the circumstances proved, that they establish circumvention operating in *this* case.

Much evidence was given to prove his weakness from a child, but from the situation he held in the militia,—afterwards living in a separate residence from his father,—managing his affairs,—and being left by his father without being cognosced or interdicted,—we must hold him as *sui juris*, and capable of managing and disposing of his property till the reverse is proved. If he is proved facil, then law protects him against a smaller degree of fraud and circumvention, and it is in this view that the evidence is to be considered. You will consider, *first*, the evidence as applicable to his mind in general, and then as applicable to the transaction as to these deeds, for it is as applicable to such a mind, that the facts and circumstances must be considered.

There was much evidence to show the weakness of his mind when a boy, but he may have recovered, and you had the opinion of some persons, competent to judge, that in after-life he was capable of understanding the propositions of the deed separately, and if this evidence stood alone it would be decisive, as the main question is, whether he chose his brother or brother-in-

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law to succeed him; and as he wrote the name of his brother-in-law on the margin of the scroll, he must have understood this part of the deed; and if their was no fraud or circumvention, this would validate the deed. There was much evidence as to his habits, (several of which his Lordship stated,) and certainly they prove him to have been a man of weak mind; but though his conduct in presence of his servants and those in an inferior situation was degrading to his rank and character, his habits were different with those of equal or higher rank than his own. There was also evidence of the management he took of his estate, and of the pursuer writing to him as to bill transactions, and we find him doing all that any one else does in the world without any defect so far as appears.

With regard to the other part of the case, I cannot lay my hand on any fact showing impetration or circumvention. But it is said you must take all the circumstances together, and that if he had such a mind as to be influenced by these, then you should find for the pursuer. This is an important question, and differs from any we have had before, and you would require to consider it well; but fraud, facility, and circumvention may no doubt be made out from facts and circumstances; and if from these

you draw the conclusion, that there was fraud and circumvention acting on a *facil* mind, then you will find for the pursuer; but if not well satisfied of the fraud and circumvention, you will find for the defender. The terms on which Dundonnel lived with his brother and brother-in-law, and the attempt of the brother to cut him out of the succession, by getting his father to execute a deed on deathbed, are material facts; but it is also in evidence that Dundonnel did many kind acts to his brother.

As to the preparation of the deed, you find the defender is the copyist of the instructions for preparing a deed in his own favour, which was very incorrect. You have one gentleman declining to prepare the deed proposed, cutting out the heir, but sending a scroll of a deed in his favour. You have also the facts as to the deeds under reduction, and will say whether you consider Dundonnel a free agent in the execution of them? It is said the instructions were for a simple destination, and that he may not have known the difference between that and an entail, but he got the scrolls and approved of them; and there was evidence that he disapproved of the scrolls sent by the gentleman first applied to.

You must make up your minds whether these deeds were obtained by contrivance, whether they were made up in the family; but

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in deciding this, you must not act on suspicion, but must be satisfied of it as a fact on the evidence. If his mind was weak and unduly imposed on, then the deeds cannot stand; but if not, then he was a man *sui juris*; he had the management of his affairs, and as this is a probative deed, it must have effect, though it excludes the heir-at-law.

Skene.—We wish your Lordship to explain to the jury what is meant by contrivance.

LORD CHIEF COMMISSIONER.—It must be clear, from facts and circumstances, that there was a contrivance by the persons concerned in making and obtaining the deed, amounting to fraud and circumvention; at least that species of fraud which is not direct, but circumvents a weak mind.

The jury not having agreed in a verdict, they were discharged, after being twelve hours enclosed.

The case was again tried, and on the 8th January 1831, a verdict was returned for the pursuer.

Hope. Sol-Gen. and *Robertson*, for the Pursuer,
Cockburn, Skene, Rutherford, Penny, and *Gibson-Craig*, for, the Defender.

(Agents, *Hugh Macqueen*, w. s. *Gibson-Craigs, Wardlaw*, and *Dalziel*, w. s. and *Mackenzie* and *Innes*, w. s.)