

1773. succeeding, neglect or refuse to do so, a forfeiture is imposed, extending to *all the descendants of his or her body*.
 LAWRIE
 v
 MACGHEE, &c. To Anne Lawrie, therefore, who is the *next heir of entail*, and the heirs of her body, does the estate fall to be conveyed. Because Margaret having succeeded to both estates, her sister Anne, as heir of entail, and not Margaret's second son, is the party in whose favour this devolving clause is conceived, and in favour of whom the estate falls to be conveyed. And it is erroneous for the appellant to maintain that the words heirs male of the body apply only to those who are in immediate succession, and therefore do not exclude the younger sons of the contravener; because the heirs of the body signify not only the descendants in the oldest line, but all the descendants who are entitled to take the succession when it opens.

After hearing counsel,

Lord Mansfield observed, in giving judgment, that this was the clearest case that ever came before the House. He should affirm, but would refuse to give costs, because the appellant had the misfortune to be born between two estates, and to get neither.

It was ordered and adjudged that the appeal be dismissed, and that the interlocutor therein complained of be, and the same is hereby affirmed.

For the Appellant, *Ja. Montgomery, Al. Wedderburn, Al. Forrester.*

For the Respondents, *Andrew Crosbie, Tho. Lockhart.*

Note.—Unreported in Court of Session.

(M. 16,776.)

ALEXANDER M'CLATCHIE of London, - *Appellant*;
 MARY BRAND OF BURNET, Widow of WILLIAM }
 BURNET, Merchant in Dumfries, } *Respondent.*

House of Lords, 22d March 1773.

DEED—INCAPACITY—PROOF—TESTAMENTARY WITNESS.—Circumstances held insufficient to reduce a deed on the head of fraud and facility. Also held, reversing the judgment of the Court of Session, that the writer who executed the deed challenged, and who was an instrumentary witness, is not, when adduced to prove the capacity of the maker of the deed at the time he executed it, an incompetent witness. Nor is he inadmissible on the ground of partial counsel, from having written into the Edinburgh attorney with instructions to defend this cause.

The deceased William Burnet, merchant in Dumfries,

married the respondent, and, by marriage articles of this date, he became bound to secure her a suitable life-tenant provision, in case of his predeceasing her, and also to make suitable provisions to his children in case there were issue of the marriage.

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April 29, 1741.

There being no issue of the marriage, he, about eight years thereafter, executed a set of deeds in implement of the obligation set forth in the marriage articles, by conveying *all his* heritable and moveable property that he might be possessed of at death, to the appellant, his nephew, and his brother Robert M'Clatchie, now deceased, equally between them, under burden of all his debts, and specially of payment of £100 to his wife, the respondent, and £20 per annum as a free annuity during her life. By the second deed he conveyed to his said wife, in property, a dwelling-house in Dumfries, as also the household furniture, &c. therein. By another deed, he altered the plan of his settlement as to his wife's right, so far as to convey to her the life-tenant use of all his real estate, in place of the annuity of £20 Sterling per annum. It was on these deeds that the appellant's rights were founded.

But it turned out that the deceased, two years before his death, when he was greatly impaired in health of body,—of great age,—almost constantly in bed, and his memory and judgment affected, had been prevailed upon to execute a deed, conveying to his wife, the respondent, his whole heritable and moveable property, in absolute property, that might belong to him at the time of his death. This deed was not drawn out by the lawyer who had drawn the former deeds, but by a different legal gentleman, Mr. Archibald Malcolm, writer in Dumfries.

Aug. 21, 1767.

Mr. Burnet died 7th July 1769: and, upon learning the contents of the latter deed, the appellant raised the present action of reduction to set aside the same, on the ground of fraud and facility, and that at the time the deed was executed, the deceased had fallen into a state of imbecility, and was not of disposing mind. Defences were lodged, denying imbecility, or the deceased's incapacity to execute the deed. A proof was allowed and reported. In taking the proof, Mr. Malcolm, the writer who drew the deed, was adduced as a witness to prove Mr. Burnet's health and situation at the time of executing the deed now challenged. To this it was objected, on the ground that Mr. Malcolm was the adviser of the settlement in question, and, in point of

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character, interested in the issue, and that he had been employed by the respondent as agent in this cause, and given partial counsel and advice therein. To this it was answered, that he never was agent in this cause for the respondent—he being a writer in the country, and not before the Court of Session. That when the action was first brought, he was employed by the respondent to transmit to her agent there, information and instructions about the suit, its defence, and the counsel to be employed. The commissioner ordered Mr. Malcolm's deposition to be taken down, to be sealed up separately, and transmitted to the Court.

On the merits, the appellant then maintained, 1st. That the mutual contract so made in 1767, and which deprived him of his rights, was a manifest fraud and imposition, practised upon Mr. Burnet, who had long prior thereto fallen into a state of imbecility, if not of total incapacity; and this the appellant endeavoured to support, both from the extraordinary nature and contexture of the deed itself, as well as from the circumstances attending its execution and the evidence brought, of Mr. Burnet's deliberate and firm resolution that the appellant should be his successor; and, 2d. That it had been clearly proved that Mr. Burnet had, after a severe shock he had in 1765, through the decline of age and indisposition, fallen into such a state of dotage or second childhood, as to render him incapable of comprehending or executing any deed of importance. Besides, in the deed itself, there was a special clause, applicable to the possibility of one of them dying within sixty days, and the deed thereby left open to challenge on deathbed, for, in that event, it is provided that the former settlements in the wife's favour, were to revive, and be in full force. These being the circumstances of the case, it would be extremely wrong to allow the depositions of Mr. Malcolm to be opened and read, because, from the very nature of the action, which challenges the deed he executed, on the ground of fraud and imposition, and on the head of facility, he has an interest in supporting its integrity. On the other hand, the respondent maintained that the reasons of reduction had not been proved; that fraud, imposition, or facility had not been proved. That old age was not incapacity,—that there was a distinction even to be taken between the weakness of old age, and total or partial deprivation of reason and judgment. And as to Mr. Malcolm's deposition, there was no reason alleged why it should not

be opened and read as evidence. He was a necessary witness respecting Mr. Burnet's capacity at the time of executing the deed in question : and his having been the attorney employed on that occasion, and receiving his instructions and directions from Mr. Burnet, was a very cogent reason for being examined as a witness. That this point had been settled in the case of the Earl of March against Anthony Sawyer, where John Dickie having been called as a witness for the Earl, to prove the execution and delivery of a deed, to which he was an instrumentary witness: the Court of Session sustained the objection taken to his admissibility, but, on appeal, this was reversed in the House of Lords.

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Nov. 21, 1749.

The Lords, of this date, pronounced this interlocutor:—
 “ Find that Archibald Malcolm cannot be admitted as a witness in this cause, and disallows his deposition to be opened, or to make a part of the proof ; And further, find the reasons of reduction of the deed challenged not proven, and assoilzie and decern.”

Nov. 28, 1771.

On reclaiming petition, the Lords adhered.

Against this interlocutor the present appeal was brought, a cross appeal being taken in so far as the Court had found the witness incompetent.

Pleaded for the Appellant.—This was the case of a deed executed, not where the maker had no near relations to leave it to, but where, after many years endurance of the marriage, he had deliberately resolved to settle his means in a given way, so as they might reap the advantage. Accordingly, the deeds previous to that under challenge, were drawn out and executed in favour of the appellant, taking care to secure his wife with an ample provision in the event of her surviving him. Not content, however, with this, she devised means to have possession of the whole ; and taking advantage of her husband's supervenient weakness, she prevailed on him to execute the deed in question. But when, to the real evidence of imposition appearing on the face of this deed, is added, the extreme secrecy and concealment attending its execution, the partiality of Malcolm, and prevarication of Copeland, the two instrumentary witnesses, joined with the evidence afforded by Mr. Burnet's former settlements, no doubt can remain as to the manner in which the deed was obtained. Yet the evidence of imbecility is so strong *per se*, as to be conclusive. It is proved his memory quite left him. He forgot the Sunday—forgot where his dwelling house in Dumfries stood—that he wavered and

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wandered in his conversation—became an object of observation and ridicule to the boys and soldiers in the streets of Dumfries, and the parties were so sensible of his being thus under the influence of disease, which would ultimately carry him off, that they inserted a clause in the deed challenged, giving validity to his former settlements, if the one then executed was found to be bad. In regard to the cross-appeal, it was quite right in the Court below to reject the evidence of Malcolm the agent, as a witness, both as an instrumentary witness, and also as having given partial counsel as agent.

Pleaded for the Respondent.—The several settlements of Mr. Burnet, from 1741 to the date of that under challenge, clearly shew his growing affection and regard for the respondent. Every new deed contains fresh marks of the grateful sense in which she was held. If, therefore, fraud is to be imputed to her, it must be one of many years' standing, and to have had for its source affection and duty. Mr. Burnet had no issue, and no near relation. The appellant had dropt all correspondence with him; and what step could be more prudent and proper, in the circumstances, than *that* taken by him, to leave his all to his wife? The proof taken in the cause clearly establishes, that he was, at the time of executing the deed, of sound disposing memory and judgment, and, though somewhat wasted by preceding indisposition and bodily infirmity, arising from old age, yet perfectly able of judging in his own affairs. And in regard to the objections for opening and reading Malcolm's deposition, which is made the subject of a cross appeal, the respondent submits, the fact that he was the writer employed to execute the deed, cannot render him an incompetent witness; how far it may affect his credibility is a different matter. He is, moreover, a *necessary witness* to speak to the maker's capacity. He was present at its execution, signed it as an instrumentary witness,—he is therefore competent; and the mere fact of his having transmitted instructions to the Edinburgh agent to prepare her defence in the action, does not affect him with partial counsel.

After hearing counsel,

LORD MANSFIELD said:

“That he did not agree with the judgment of the Court below, on the point of the competency of Malcolm the agent, as a witness. He recollected that he was counsel in a cause at their Lordships' bar in the year 1749, exactly similar to the present, only supposing

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and Stewart's
Reports, p.
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the wife to settle instead of the husband. It was that of the Earl of March *v.* Sawyer, on whom Lady March had settled a mortgage to a very large amount, he being her second husband; but the deed being found in an iron chest after her decease, and no proof of its being ever delivered according to the prescribed forms, Lord March endeavoured to set it aside; and it afterwards came to be contended, whether John Dickie, as being his lordship's agent and attorney in the cause, was competent to give evidence? This House was then of opinion, that though the objection might affect his credibility, it could not be pleaded in bar of his competency. I am therefore of opinion, in the present case, that Malcolm's testimony could not be refused, and that, on the whole, it was an incontrovertibly just exception to the general rule of law, that an agent, attorney, or solicitor, was always competent to give testimony in any cause in which they might be employed, where it is impossible to come to that species of evidence in any other manner whatever, and therefore necessary."

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COUNTESS OF
MORAY, &c.

It was ordered and adjudged that *that* part of the interlocutor of the 28th November 1771, complained of by the *cross* appeal be reversed. And it is declared that, to the purpose for which it was offered, the deposition of Archibald Malcolm ought to have been received as evidence and read. And it is further ordered and adjudged, that *that* part of the said interlocutor which is complained of by the original appeal, and also the interlocutor of the 7th March 1772, adhering thereto, be affirmed.

For Appellant, *E. Thurlow, Andrew Crosbie.*

For Respondent, *J. Montgomery, Al. Wedderburn..*

(M. 4392.)

JOHN BANE STEWART, and Others, Lessees of Glenfinlas	} Appellants ;
MARGARET COUNTESS DOWAGER OF MORAY, and FRANCIS EARL OF MORAY	} Respondents.

House of Lords, 24th March 1773.

LEASE—INCOMPLETE CONTRACT—POSSESSION—LOCALITY LANDS—
POWER TO LEASE.—An offer for a lease was made in writing by several tenants, and the landlord's factor wrote in answer to the sub-factor, through whom the offers had come, that the landlord had read