cember 1774 also complained of be affirmed; and it is declared, that the appellants, Alexander Gray, writer to the Signet, and John M'Dowal, merchant in Glasgow, have the preferable right to the bills in question. 1776. ROSS v. ROSS.

For Appellants, *E. Thurlow, Ja. Wallace.*
For Respondents, *Al. Wedderburn, Alex. Murray, Ar. Macdonald.*

Unreported in the Court of Session.

MUNRO ROSS of Pitcalny, Esq. - *Appellant.*
CAPTAIN JOHN LOCKHART ROSS, - *Respondent.*

House of Lords, *9th May* 1776.

DEEDS CHALLENGED—FRAUD AND INCAPACITY—PRESCRIPTION.—Four several deeds were executed at intervals, conveying an estate to different parties, other than the heirs of investiture, and challenged on the head of incapacity, fraud, and circumvention.—Held the deeds irreducible, as there was no conclusive proof of incapacity, fraud, or circumvention. Held also prescription not to apply, so as to exclude the action.

This was an action of reduction, originally brought by the appellant's father, Alexander Ross of Pitcalny, for setting aside four several deeds, executed between 1685 and 1711, by David Ross, Esq. of Balnagowan, whereby that estate, which would have descended to the said Alexander, by the previous investitures, was conveyed away to strangers. The grounds of reduction were, fraud, circumvention, and incapacity of the granter.

The investitures of the estate of Balnagowan, for several centuries, had stood devised to *heirs male.* By charter from the crown 1615, it stood limited to George Ross, then of Balnagowan, and the heirs male of his body; whom failing, to David Ross of Pitcalny, the appellant's ancestor, and the heirs male of his body; whom failing, to Ross of Invercharron, and others, the next collateral heirs male, in their order; whom all failing, to the nearest heir male in general of the said George Ross.

The above George died in 1615, leaving issue a son,

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David, the *first* of that name, who died in 1620, leaving issue a son, David, the second of that name, who died in 1657. This last David Ross married Lady Anne Stewart, a daughter of the Earl of Moray; he was infeft in the estate under the above investiture in fee simple, and it is his four deeds which are now under challenge. He died without issue in April 1711, whereby the appellant's father, Alexander Ross, his lineal descendant and heir male, was entitled to succeed.

It was averred by the appellant, that Balnagowan was then worth £1000 per annum, and that there were on the estate valuable woods, worth a large sum. The whole debts against it amounting to £9000.

The first deed under challenge was executed in 1685, and was of the nature of an entail, which limited his own right in the estate of Balnagowan, from a fee to that of a mere liferent, and conveyed the fee to Francis Stewart, youngest son of the Earl of Moray, whom failing, to the heirs male of the body of Lady Anne, *by any other marriage;* and to certain other substitutes. This deed bore the appearance of a purchase, a price being mentioned, although none was paid; but the deed bore to be redeemable within two years by the heirs of Balnagowan's body; and if not redeemed within that time by them, the right of redemption was to be foreclosed, even against infants.

The second deed had been executed after he had come to relent, and consider calmly the nature of the former. But though a change had come over him, it was alleged to have been induced by the same sort of undue influence, though in favour of a different party, who had acquired a greater ascendancy over him. Accordingly, Francis Stewart, conscious how precarious his title was under the first deed, and apparently after a price paid to him, had little objections to give his consent to a new conveyance of Balnagowan, by a deed executed by David Ross and him jointly, in favour of Lord Ross,—a nobleman who was a mere stranger to Balnagowan, whom he had merely met by accident, and whose only connection or recommendation was, that he bore the same name. This deed likewise bore value given, and was taken to the heirs male of Lord Ross, whom failing, to such persons as the said David Ross should, by deed or writing, appoint.

The third deed was in the same terms, but contained an

extension of the substitution in favour of Lord Ross' heirs, and to the prejudice of Balnagowan's own heirs. This deed also contained an assignation to the remaining wood on the estate.

The fourth deed, executed in 1711 by *Balnagowan* and Lord Ross *together*, conveyed this estate to General Ross, Lord Ross' brother, in fee simple, but for a sum of £5550, to be paid by the General to his brother Lord Ross, but nothing to Balnagowan. 1711.

Balnagowan had at this time a pension of £200, which had been allowed to accumulate. He had also, by contract, sold part of his woods for £5000, under deduction of £2333 for expense of cutting and transplanting, and these were assigned to Lord Ross, who granted a discharge, binding himself to apply them in extinguishing David Ross' debts. The other part of the wood had already been conveyed to him in the deed of 1707.

The first deed was impeached, on the head of fraud and circumvention; it being alleged that undue influence was used by his wife and her father and brother, who represented to him the prospect of their obtaining him a peerage. The second, third, and fourth deeds, were executed under the same undue influence exercised over him by his wife—her chaplain William Stewart, and others,—the great idea held out being, to see his name, his arms, and his estate, merge once more in a peerage. And all of them were executed when the granter was labouring under weakness and incapacity of mind. On the third deed, infeftment never passed; and the fourth was executed on death-bed, and was undelivered at the time of his death. For the three last deeds, the only money which Balnagowan got was, as shewn by the correspondence, £55. 11s. 2d. In order to try the question, and to challenge these deeds, a bond was granted by the appellant's father to a trustee, who led adjudication against him, as charged to enter heir to David Ross the third of Balnagowan; and David Ross the second of Balnagowan; and David Ross, the first of Balnagowan; and to George Ross of Balnagowan. In defence, objections were stated to this title, which were sustained, but held the action good under the charter of Bishop Ross to David Ross in 1667, conveying the lands to him and his heirs-male, and repelled the plea of prescription. 1711. Interlocutors Feb 5 and 22, 1740.

A proof was allowed, and, when completed, was reported

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to the Court, and a debate had on the import thereof. It was contended by the appellant, that there was intrinsic evidence of undue influence and fraud, from the nature of the deeds,—their bearing a price when no price was paid. A great many witnesses proved that he was weak and under the influence of his wife—that it was a general report this. None, however, spoke distinctly to their own knowledge of the fact, and to any circumstance indicating it. Few had personal knowledge of him, and some even spoke to his good understanding. On the other hand, the respondent produced 200 and 300 letters written by him, exhibiting an intelligence in his affairs, that might be compared to any of that period. He was, besides, sheriff of the county of Ross. He also was member for the same county in Parliament in the years 1669, 1670, and 1672; and in 1689 he was appointed head sheriff, which he kept till the year 1703. He was also one of the Commissioners of Justiciary for one of the northern districts. He was also governor of Inverness in 1689. His letters, too, were as good in point of intelligence, as his correspondent, the Earl of Moray, then Secretary of State.

The Court of Session, after hearing counsel for six days, repelled "the reasons of reduction of the deeds quarrelled, "assoilzie the defender, and decern." On reclaiming petition the Court adhered.

July 25, 1761.
Feb. 26, 1762.
June 22, ——

Against these interlocutors the present appeal was brought to the House of Lords, and cross appeal for the respondents, in so far as the interlocutor 5th February 1740 repelled the plea of prescription.

Pleaded for the Appellant.—That the deeds sought to be reduced were procured from a weak man, by undue influence, combination, and fraud, is demonstrated, not only from the intrinsic evidence which the deeds themselves afford, as most irrational, absurd, and to the hurt and prejudice of the granter, but also from the parole and other proof adduced, indicating, in the clearest manner, undue means used in order to procure the execution of the deeds in question. The fact, that deeds are executed in favour of mere strangers, to the prejudice of the party's own heirs, elicits enquiry into the motive and the manner of granting. And this enquiry is always the more necessary, and such deeds liable to greater suspicion, in proportion as the granter has been of weak mind and capacity. If entirely capacitated, and of sound understanding, law will support settlements, however arbi-

trary, fanciful, or disadvantageous; but when the granter is proved, as in this case, to be of weak capacity, law does not bestow on such deeds the same indulgence, and therefore will give redress where parties in such circumstances have been deceived into the execution of ruinous and improper deeds. Facility and enormous lesion infer circumvention, and where lesion and facility concur, slender proof of fraud will be sufficient. The whole transactions which these deeds disclose, display the weakest capacity in the granter, and, on no other supposition than this, can they be supposed to exist. The deeds bore a price, and no price was paid; and though stript of his estate, he still continued liable for £9000 of debts, without making the payment of these debts a condition or burden on the conveyance. This intrinsic evidence is corroborated by parole testimony of witnesses. The artful means used in obtaining them; the subtility and address of those agents used to influence him, are clearly shewn from the letters produced. Not only his estate, but his pension, his woods, his future acquisitions, and even the nominal dignity which he supposed himself to have right to, were also swept from him. But, separately, the deed 1711 was liable to other objections. It was never a delivered deed, nor completed in the granter's lifetime, and it was further reducible on the head of death-bed. It bore a price not even adequate to the value of the woods on the estate. And, in regard to the cross appeal against the interlocutor repelling the plea of prescription, the same ought, on the ground of minority and *non valens agere*, to be adhered to.

Pleaded for the Respondent.—A reduction of so many deeds of settlement brought *post tantum temporis* must require a stronger degree of proof than if brought *de recenti*. They are almost a century old, and many circumstances which have escaped the knowledge of the present age may have been clear transactions at the time they were executed. The proof of weakness and incapacity have entirely failed. His numerous letters produced, show how he wrote and thought of the events of the period, and his own affairs, and in no degree betray want of intelligence or vigour of understanding. He was considered worthy of the most important offices. He was member of Parliament for his own county. He was head or principal Sheriff of the county. He was Commissioner of Justiciary; and, during a stirring period, and when the country was undergoing a change of govern-

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ment, he was appointed Governor of Inverness. These facts are totally inconsistent with the supposition of his being a weak man. The evidence adduced by witnesses on the other hand, to prove his weakness, is almost entirely of the nature of secondary evidence. The witnesses speak from hearsay; and those who pretend to have been acquainted with him personally, can give no satisfactory reason why they thought him weak. They refer to no particular circumstance to indicate this. There is no proof of any falsehood, any deceit, any fraud or circumvention; and the arts alluded to, and spoken of, are only conjured up by a suspicious mind. It was not very likely that his wife would join strangers, to cozen and cheat her own husband out of every thing he had in the world, so that her machinations with Stewart the clergyman, &c., disappear as incredible. The rationality of the deeds are accounted for at first. He wished his name and estate to be merged in a peerage. This may have been a vain desire, but it was a desire he was entitled to gratify; and however fanciful this may have been, and however injurious to third partics, law cannot question the right of the owner to settle his estate in any way he pleases. On the cross appeal, the appellant's ancestors being cut out by the settlement 1685, in consequence whereof Mr. Francis Stewart was infeft in the fee of the estate, the action brought by the appellant's father in the year 1738 was barred, both by the positive and negative prescription, the estate having been possessed under that deed and subsequent deeds more than 50 years before any challenge was brought.

After hearing counsel, it was

Ordered and adjudged that the said interlocutors complained of be affirmed.

For Appellant, *E. Thurlow, Ilay Campbell, J. Dunning, R. Macdonald.*

For Respondent, *Henry Dundas, Al. Wedderburn, Alex. Murray, Alex. Wight.*

This branch of the case not reported in Court of Session. First branch reported Elchies, "Fraud," No. 9.