SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

TOWART—*Appellant.*
SELLARS—*Respondent.*

May 16, 1817.

INSANITY.

IN support of an action brought in 1808 to reduce certain deeds executed by M. between 1782 and 1799, upon the ground of the insanity of M. the granter; parole evidence given that he was quite deranged from 1781 till his death in 1804; the evidence applying to his insanity generally, and not to the particular moments when the deeds were executed. This evidence encountered by parole evidence of his general sanity during the same period; and this latter evidence corroborated by notes or receipts written by M. having reference to the contents of the deeds; and showing that he understood their nature and effect; and also by the deeds themselves, which were rational in his circumstances; corroborated also by the circumstances that the deeds were attested by witnesses of unimpeached credit, and that M. had been in 1784 served heir, and infeft in the subjects conveyed by the deeds, and had then sold part of the lands, and mortgaged the remainder, &c. these transactions proceeding on the supposition of his sanity, and remaining unchallenged. Held by the House of Lords, reversing the judgment below, that the deeds were good.

The *Lord Chancellor* observing, that supposing M. to be weak or even insane, if he was sane at the time of executing the deeds, that was sufficient to support them: and that the distance of time between the period of their execution and that at which they were challenged was a material consideration; and, that if the deeds had been bad as titles, they could not have been good as securities.

Lord Redesdale observing, that if deeds were to be reduced on the ground of utter incapacity, they could not stand for any purpose; that in order to discover the truth from conflicting evidence, it is proper to try it by the test of collateral circumstances, the truth of which is unquestion-

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able; and that these circumstances in this case were inconsistent with the evidence of notorious incapacity in M.; and that the attesting witnesses to some of the deeds being dead, it must be taken that they would have sworn to the sanity.

THIS was an action brought by the Respondent, as heir and executor to James Maitland, deceased, to reduce certain deeds which had been granted by Maitland to the Appellant, on the ground of the insanity of Maitland at the time of their execution.

Trust Deed, Dec. 20, 1783.

Maitland, being entitled in possession to an heritable property of twenty acres of land in the vicinity of Glasgow, in 1783, executed a trust disposition of his property to his maternal grandfather, and two other persons who had been friends of his father; the purpose of the trust being to pay the granter's debts, wind up his affairs, and pay him the residue. The Appellant, who in the same year, 1783, had married Maitland's only sister (he had no brothers), brought an action against him for his wife's share of the father's executry, which Maitland compromised for 300*l.*; and in July, 1784, the trustees, with Maitland's concurrence, upon conditions stated in a deed of May 14, 1784, divested themselves of the trust in favour of the Appellant and his wife. And in August, 1784, Maitland executed a deed of renunciation and discharge and disposition of the whole right and property in the lands to the Appellant and his wife, under the burden of paying 100*l.* to one Armour, to whom he had mortgaged the property for that sum, and all other just demands, and of allowing him an an-

Deeds, May 14, and July 6, 1784.—Devolution of the trust.

August 28, 1784. Deed of renunciation by M.

nuity of 13*l.* for his maintenance. The wife died May 16, 1817. in 1793 without issue; and, in July, 1798, the Appellant obtained from Maitland a general irrevocable disposition *mortis causa*, of the whole property heritable and moveable which he then had, or might possess, or be entitled to, at the time of his death.

INSANITY. July 17, 1798. *Mortis causa* disposition.

In 1804 or 1805 Maitland died, and in 1808 the action was brought to reduce these deeds. The insanity being denied, a proof was allowed, and a great number of witnesses were examined on each side. Those adduced on the part of the pursuer deponed, that till 1780 or 1781, Maitland (or Maiklem) was a decent man, but from that time he became quite deranged; that he attempted to cut his own throat, and to burn the house; that he enlisted as a soldier, but was incapable of doing the exercise; that he was unfit for the common operations of field labour; that he was generally known by the name of *daft laird Maiklem*, and never recovered his senses. On the other hand, the witnesses for the Defender, including two attesting witnesses to the deed of 1798, deposed that Maitland was of perfectly sound mind, intelligent, and even acute in business when sober, but that he was much addicted to drinking, and often intoxicated.

Action.

Alleged insanity.

The Court below, by interlocutors February 3 and May 24, 1814, sustained the reasons of reduction as to the deeds of August, 1784, and July, 1798; and also reduced the other deeds challenged as titles to the subjects in question, and found that they could only be considered as securities entitling

Interlocutors Feb. 3, and May 24, 1814, reducing all the deeds as titles, but sustaining some of them as securities.

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the Defender to be heard in accounting. From this judgment the Defender Towart appealed.

INSANITY. Action of count and reckoning, 1807.

It ought to be noticed that Sellars, not being then aware, it seems, of the existence of the deeds disposing the absolute right; in 1807, before instituting this action of reduction, had brought an action of count and reckoning against Towart for his intromissions with the rents under the devolution of the trust in 1784; which must have proceeded on the supposition that the trust deeds were valid.

Delay.

Another material circumstance was that the Respondent might, as Maitland's next male agnate, have brought him in 1780, or any subsequent period, before a Jury, to have his insanity legally ascertained, if he was insane; but had never started the question till 1807 or 1808, about two or three years after Maitland's death.

As to the alleged insanity, the cases of *Arbuthnot (Viscount) v. Sime*, 1796—*Douglas v. Douglas*, 1771—*Dewar v. Dewar*, 1808—and the English case of *Faulders v. Silk*, in K. B. 9th December, 1811—were cited.

Evidence. Admissibility. Confidential agency. Interest, &c.

The Appellant offered in proof the deposition of his law agent, Mr. Peterson; but this was objected to:—1st, Because he was the Appellant's confidential agent:—2d, Because he had an interest in the issue of the cause, the interest being that he held an heritable security granted by the Appellant over the property, and was cautioner for loosening the arrestments which the Respondent had used in the hands of the tenants on the property pending the suit. As to this objection, the cases of *Adam v.*

Bruce, Kilk, 1743—*Govan v. Young*, 1752— *Stewart v. Montgomery*, 1677, Dict. vol. ii. 256 —*M'Alpin v. M'Alpin*, September 2, 1806— *M'Gregor v. M'Gregor*, 11th July, 1801— —— *v. Brand*, 27th November, 1771—were cited. The Court, 10th July, 1812, refused to admit the evidence *in hoc statu*, and there was no further proceeding on that point.

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The Appellant also offered in proof the deposition of Mr. Mark Reid, one of the witnesses to the deed of August 28, 1784, which had been taken in the presence of a magistrate and two witnesses in 1807; Reid being then eighty-three years of age, and in a declining state of health, and having died before the action of reduction was brought. The Lord Ordinary refused to admit the deposition or the evidence of the magistrate and witnesses as to its contents; and a petition having been presented to the Court, the Lords, June 5, 1812, "superseded, determining on the prayer of the petition until the state of the process should be before the Court for advising." But no further judgment was given on that point.

Sir S. Romilly and *Mr. Clason* for Appellant; *Mr. Leach* and *Mr. Brougham* for Respondent.

Lord Eldon, C. (after stating the case). I do agree that this is an extremely important case; for, as on the one hand, justice is always anxious to protect persons of weak minds from their own acts; and, where insanity is established at the time when deeds are executed, will set them aside, whether in

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their nature such as ought to be executed or not: so on the other hand, if a man of weak intellect executes a deed which would not be improper if executed by a man of the strongest mind, it is not for us to say that, because God has at one moment afflicted a person with such a malady, he shall, therefore, never be restored so as to be competent effectually to do an act which a moral and good man would think it most proper to do. The principle in our law is clear; and I do not know any difference in that respect between the principle of our law and that of the law of Scotland. I re-

Faulder v. Silk, in K. B. Dec. 9, 1811.

member the case of a gentleman who was confined for some years in a house for the reception and care of insane persons. He had a lucid interval, and made a disposition of his property which was exactly that which he ought to have made, having regard to the circumstance that he had before provided for some members, and not for other members of his family; and that which he, before his insanity, communicated to a friend, he intended to make: and he did it under a sense of his situation, and the impression that no time was to be lost, and to protect himself against a relapse. That was held to be a good deed. For the question is not, whether a man has been insane, but whether he has recovered that *quantum* of disposing mind at the time he executes the deed which ought to give it effect.

The question in these cases is whether a man is insane at the time of executing the deed.

Another principle which we may safely lay down is this: if property has been disposed of twenty or thirty years before, formally, and with the concurrence and assistance of individuals of good character; and if that disposition is not quarrelled with as speedily as

Delay in challenging the deeds a material circumstance.

may be, and only challenged when the parties best acquainted with the whole circumstances of the transaction are dead and gone, it is dangerous to set aside that disposition, at the distance of twenty or thirty years, upon a ground so fallible as human memory, and testimony as to the state of the person making that disposition at other moments, without at all applying to the moment when he executes the deed. May 16, 1817. INSANITY.

After these general observations, see what these deeds are. On the 20th December, 1783, he makes a disposition of his property, proceeding upon a narrative of Maitland. "That I am at pre-
"sent owing to sundry persons considerable sums
"of money which I am unable to repay, but
"which it is most just and reasonable should be
"paid and discharged as soon as possible; that I
"have no other fund for that purpose but the
"heritable subjects after described, from which I
"expect a considerable reversion will arise to me
"after payment of my debts: but from my par-
"ticular situation, at present, I incline to trust the
"management of my affairs to the persons after
"named, my creditors and friends, in whom
"I have an entire confidence." What the particular situation was I do not know; the witnesses are in their graves: but one of the witnesses to the deed of 1798, in which he recites that he was apt to be made the worse of liquor, and to be imposed upon by designing persons, says that he read it over himself, took it away with him, and kept it by him for some time, and at a second meeting executed it. In the recital to this deed of 20th Trust Deed, Dec. 20, 1783.

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December, 1783, he might perhaps allude to the calamity with which he had been afflicted. But if God afflicted me two years before with such a calamity, and I made a disposition of my property, reciting that I was afraid of the consequences of a relapse, whether it were the fear of imprudence, as in the Middleton case, or the fear of disease; is it to be held that because a man recites that reason for doing the very thing which he ought to do, he is therefore not sufficiently recovered to render him competent to do that act? Then the narrative proceeds:—"Therefore, I do hereby with the special "advice and consent of James Blair, my grand-"father, &c.;" so that he was acting by the advice and with the consent of his grandfather: Glen and Scott, who in this year, 1783, had been engaged in many transactions with Maitland, making no objection; and this is no small circumstance in the absence of other evidence as to his state of mind at the moment of executing the deed. The trustees were in the first place to sell parts of the property for payment of the granter's debts, *without any control from him.* That clause is not uncommon in instruments in this part of the island, and here again I refer to the case of the Chirk Castle estate.

Middleton v. Kenyon (Ld.), 2 Ves. Jun. 391.

Middleton v. Kenyon (Ld.), 2 Ves. Jun. 391.

I wish to call your Lordships' attention particularly to this fact, that at the time the deed was executed, he was aware that he had to defend suits carried on against him by this Towart; and there was a special provision in the deed, that the trustees should be at liberty to defend the two processes, one before the Court of Session, the other before

the Magistrates of Glasgow. This deed appears to have been executed with great particularity as to the date, the names of the witnesses, and the name of the writer of the deed. Then, with reference to this deed of December, 1783, Glen and Scott, who had been concerned with the granter in that year in certain bills of exchange, and transactions of business; and who, as far as we know, were respectable persons, are parties to it, and they are to sell and pay his debts, and give the reversion to the granter; and all this with the concurrence of his grandfather.

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Then it is said that Maitland enlisted as a soldier, and was unable to do his exercise, a defect which I have known to belong to many worthy and sensible men. And they fix upon certain acts which might be material if they had applied to the moment of executing the deed.

Then the deed of 6th July, 1784, proceeding upon the narrative of the trust deed of 1783, and the purpose for which it was granted, was executed. It does not appear that Maitland himself was a party to this deed. But then consider what a man may rationally do. Blair, the grandfather, Glen, and Scott, had no authority to execute this deed of July, 1784, unless they had the consent of Maitland; and you must suppose that they were satisfied that they had his consent, unless they meant to be responsible for the acts of Towart and his wife, which, without that consent, they would be.

Deed, July 6, 1784.

Then the deed of August 28, 1784, was executed; and from this it appears that Maitland was served heir to his grandfather, and duly infeft on the

Deed, August 28, 1784.

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17th August, 1784, a circumstance of great importance, though not noticed in the reasoning; and what follows upon that? A sale of a certain parcel of the land to one Armour, and a wadset for 100*l.* on the 18th of August. Is not this a transaction that deserved some attention? One who was supposed to be insane, served heir to his grandfather, and infeft on the 17th August, and selling and mortgaging his property on the 18th! And you are to suppose that Armour made no inquiries! Then it recites that the debts which he owed had been paid by Towart; and here be it noticed that Glen was a creditor to the amount of 144*l.* and was paid his debt under these instruments; and then he conveys the property to his sister and her husband, subject to the payment of the 100*l.* mortgage-money, and of an annuity of 13*l.* and 3*l.* per annum for clothes to himself.

It was said that he would not have executed this deed if he had not been insane. Now I do not say that if he had been insane the deed would have stood, though the consideration had been more than sufficient. But still that is a circumstance to be attended to; and the only evidence we have here is, that the consideration was more than sufficient. But if it had been less, he might have intended to make a gift to his sister and her husband; and a payment of this description was well enough calculated for a person in his situation, and the use which he made of money when he received it. Before the commencement of this process, all the witnesses to this deed were dead, except one of the name of Reid. Reid also died before he could be

examined in the cause; but he had been examined on this subject before a Magistrate of Glasgow and two witnesses. His deposition was not admitted; but the objection to it might have been waived, and there appears to have been no bad reason for insisting upon it. May 16, 1817. INSANITY.

We have no means, therefore, of knowing the state of Maitland's mind, except from these deeds themselves and the parole evidence, till the execution of the deed of 1798, which was a *mortis causa* disposition. This deed bears on the face of it that Maitland had favour and affection for his sister; and one of the witnesses speaks to the admission by Maitland, that he in fact had that favour and affection. The witnesses say that he read this disposition aloud, that he said he would think about it, took it away with him, and afterwards signed it. Then, as to the only instrument the witnesses to which were alive, they speak to his sanity; and, though they might have judged wrong, they must have been convinced that he was of sane mind when he executed it. This deed professes to give over all the property and all claims which he then had, or might have at the time of his death; and then he states that he was apt to be made the worse of liquor, and liable to be imposed upon, and therefore does this act. And is it to be said that, because he chooses to allege that reason which is the true one, therefore this and the other deeds are bad, though not quarrelled with till 1808, the Respondent being in a situation which enabled him to challenge them at a much earlier period? Deed, 1798.

Then the case comes to this, supposing Maitland The general

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to be a weak or insane man, if he was sane at the time he executed these deeds, his sanity at these moments is sufficient to sustain them. And the question is whether this mass of written evidence in support of his sanity at the moment when these deeds were executed, which cannot now have its full weight, but which must be considered as at any time very weighty, is so affected by the parole testimony of persons speaking to his condition at other times, that you can say, at the risk of what belongs to such a decision, that the deeds were executed by a man, not by one liable to be imposed upon, for that is not this case, but by a man entirely incompetent to do such an act.

It often happens in these cases, that when witnesses are describing the condition in which the man was two or three years before, there are no cases more difficult to deal with; the witnesses on the one side describing him as being as mad as mad can be; and those on the other side representing him as a man of the strongest and soundest intellect. Like the smuggling cases which we sometimes had in the Exchequer, where the question was, whether a vessel was within three leagues of the coast with barrels of a certain size, while the evidence on one side was that she was not three leagues from the coast; the evidence on the other side generally was, that she was at least twenty leagues from it. So in these cases the witnesses on the one side swear that the person whose sanity is in dispute, was one of the weakest; and those on the other side swear that he was one of the strongest minded men that ever existed. But the

question is not whether this man was weak, or whether he was mad when in liquor, or insane at other times; but whether in 1817, where the deeds challenged are rational in themselves, and are not quarrelled with till the witnesses to them are in their graves, except those to the deed of 1798, who give testimony which would support that deed in any case, whether you can say that these deeds ought to be entirely set aside (for they cannot stand as securities unless they can stand as titles), at such a distance of time, and under such circumstances. In my opinion, that would not be safe, and I cannot consent that this judgment should be affirmed. May 16, 1817. INSANITY.

Lord Redesdale. I concur in that opinion, and I confess this case appears to me very important. With regard to the words in one of the deeds, that the trustees were to act without control, they are not uncommon in English deeds of this nature. As to the decision of the Court below, that must be varied even on its own principle. It is uncertain, for one cannot see what are the deeds impeached by it; and it is inconsistent, because the deeds, if to be reduced on the ground of utter incapacity, cannot stand for any purpose.

Deeds reduced on the ground of utter incapacity, cannot stand for any purpose.

The deeds are impeached by parole evidence only, which is an important circumstance; and that evidence is applied generally, and not particularly to the time when the deeds were executed. The allegation is, that since 1781 or 1782, Maitland was utterly incompetent to execute any instrument, and that was attempted to be made out by parole evidence without any qualification whatever. But on that case the

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Court below has not decided. On the other side there is likewise strong parole evidence.

Now in endeavouring to find out the truth from contradictory evidence, try the evidence by the test of collateral circumstances, as to which there can be no doubt, in order to ascertain how far it is consistent with these circumstances. Having gained this ground, we have all that is necessary to dispose of the cause; for, when the evidence is so tried, it appears clear that the Respondent's evidence cannot be true, and that the Appellant's evidence may be true. The evidence of the Respondent's witnesses is inconsistent with the collateral circumstances. They represent him as utterly incompetent from 1782. Now

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in the first proceeding the Respondent did not quarrel with the deed of December, 1783; so that he then had no conception that Maitland was, at the time of the execution of that deed, in the state of mind which he afterwards attributed to him. The Respondent did not then pretend to reduce that deed, but treated it as a rational deed executed by the advice and with the concurrence of respectable persons; and it appears that about that time Maitland was engaged in a variety of dealings, utterly inconsistent with the evidence of notorious incapacity. The deed of the 14th May, 1784, was executed by the grandfather, and Glen and Scott, and was sustainable on the same grounds as that of 1783. Now what appears from that deed?—1. That Maitland had executed a bond for what was due to his sister. That was a distinct instrument, executed with the approbation of his grandfather and the other trustees. Do they not declare, then, that he was

competent? They had engaged to defend the suit, and this was a compromise of it. The persons who prepared these deeds, and who were parties and witnesses to them, were dead when this process commenced; and we must take it that they would have sworn that he was competent; for we have no right on this general testimony to assume the contrary. The same observation applies to the deed of 28th August, 1784. The parties to it must be taken to have sworn that he was of sane mind when the deed was executed, and no deed would be safe if that were not a principle of law. But the matter does not stop there. Part of the consideration in this deed is 5*s.* a week, or 13*l.* a year, to be paid to Maitland. Now it is in evidence that he was in the habit of receiving this 5*s.* a week under this deed; and the notes he gives acknowledging the receipt written by himself are in evidence; and from them it is demonstrable that Maitland was not in the condition in which he was represented to be by the Respondent's witnesses; for these notes show that he was capable of knowing what he received and ought to receive. He writes acknowledging the receipt of what was due to him, and expresses his hope that his sister and her child are well. Is that the language of a man in such a state that he could do no rational act? This written evidence is worth a host of parole testimony, as it demonstrates that the evidence for the Respondent cannot be true.

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The next point is the consideration. It has been said that the property was more valuable than the consideration paid for it; and, with reference to that,

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it ought to be recollected that there was a diminution of ten acres sold to Armour. That too is a transaction in which other persons were concerned as well as Armour who advanced the money, and all of them are in effect witnesses of Maitland's sanity; and it was impossible they could have so acted if this man had been, as the Respondent's witnesses represented him to be, notoriously insane.

Delay in challenging the deeds.

The length of time too that elapsed from 1784 till 1807 was to be considered. The value of the property might have trebled in that time, and yet Towart was suffered to remain in possession, managing and disposing of it as his own; and the effect of this decision is to impeach all these transactions. If then the consideration was equal to the value of the property in 1784, would it be justice to put an end to the transaction in 1807 or 1808, when the value was so different? The delay too had a tendency to deprive the Appellant of the means of showing that Maitland was of sound mind at the time of executing the deeds; and in that view also, the length of time is an important feature in the case.

Upon the whole, therefore, it appears to me that the decision of the Court below cannot be sustained. It is not consistent with the nature of the proceeding which impeaches these deeds on the ground of utter incapacity since 1782. But the judgment does not apply to that case, as it sustains the deeds to a certain extent. The result is, that the evidence for the Respondent is not sufficient to reduce these deeds. There is positive evidence to support them,

as it must be taken that the attesting witnesses would, if alive, have given evidence of the sanity of Maitland at the time the deeds were executed. There is positive evidence, therefore, of the sanity at the time of the execution of the deeds, or at least that he was sane in the judgment of the attesting witnesses; there is positive evidence of the sanity in the notes written by Maitland himself, which show that he knew and understood the nature of the transaction. There is on the one side clear positive evidence to support the deeds; and, on the other, only general evidence to reduce them, which, consistently with the positive evidence, cannot be true. This is not, therefore, a case of a doubtful balance of testimony, but the Appellant's evidence is decidedly the stronger.

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Judgment of the Court below REVERSED.

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APPEAL FROM THE COURT OF SESSION.

JOHNSTON—*Appellant.*
CHEAPE and another—*Respondents.*

AND

JOHNSTON—*Appellant.*
CHEAPE and others—*Respondents.*

ARBITER, well known to the parties for his skill in the subject of reference, acting under submissions re-

June 9, 11, July 8, 1817.