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one of them there was a window looking westward, but that the eaves-dropping did not fall into Stewart's property.

Cockburn and *Maitland*, for the Pursuer.
The Solicitor-General, for the Defender.
(Agents, *Hotchkis* and *Meiklejohn*, W. S. and *J.* and *A. Smith*, W.S.)

PRESENT,

THE LORD CHIEF COMMISSIONER.

CLARK *v.* SPENCE.

1824, July 16.

Finding that a deed was obtained from a facile person by fraud and circumvention.

REDUCTION of a disposition and deed of settlement on the ground of imbecility—of facility, circumvention, and lesion—and of fraud.

DEFENCE.—Homologation.

ISSUES.

"It being admitted, that, on the 25th day "of November 1816, the late Marion or May "Thomson signed the disposition and deed of "settlement in process. It being also admit-"ted, that the said Marion or May Thomson "died on the 20th day of April 1818.

"Whether the said deed was not the deed "of the said Marion or May Thomson?

"Whether the said Marion or May Thom-
"son was a person of a weak and facile mind,
"and easily imposed upon, at the time of
"granting the said disposition and deed of
"settlement (viz. on 25th November 1816:)
"And whether the said defender James Spence,
"taking advantage of the said facility and
"weakness, did, by fraud or circumvention,
"prevail on the said Marion or May Thom-
"son to grant the said disposition and deed
"of settlement, to her enorm lesion?

"Whether the defender James Spence did,
"by fraud, prevail upon the said Marion or
"May Thomson to execute the said diposi-
"tion in his favour?"

Circumstances in which persons alleged to be interested as legatees, were received as witnesses.

When the first witness for the pursuer was called,

Moncreiff, for the defender.—She is interested, being a legatee in all the deeds.

In 1816, Mrs Thomson leaves the residue of her property to the defender. The two Misses Clark bring a reduction of this, and Miss Jane Clark executes a settlement, leaving to this witness L. 500.

If the action succeeds, she will get the legacy, and if it does not, a previous legacy must suffer a deduction of 20 per cent. It is said

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Gilbert, p. 119. Tait's Law of Ev. p. 362.

there was a previous deed of 1807, which, even if it revives, gives the property to the longest liver, and Miss Jane Clark being alive at the death of Mrs Thomson, she had a vested interest, and no doubt the witness will look to this.

Jeffrey, for the pursuer.—The fact answers the objection, for, in the deed 1807, the sum is left to the surviving sister, and Miss Plummer Clark is the survivor. The witness cannot be in a better situation than Miss Clark was when alive. They must prove their objection, and it is sufficient if I can state any thing to elide it. Can they, by a side wind, reduce this holograph deed? Nothing comes to Jane by the death of Mrs Thomson, so the witness can have no interest.

LORD CHIEF COMMISSIONER.—Every thing depends on the terms of the bequest. It appears that the interest of Miss Clark lapsed, and that the funds are now in the funds of Miss Plummer Clark. Mrs Thomson's will is to the longest liver of her sisters; and as Miss Plummer Clark is the survivor, the interest of Miss Jane ceased at her death.

The general line of distinction in every question of this sort is, whether the objection renders the witness incompetent, or whether it

goes merely to affect the credit to be given to the evidence?—whether it goes to establish an interest in the witness, or only goes to influence the mind? If it establish an interest, then we must reject the witness, but if it only goes to influence the mind, then we must receive the evidence; but the Jury will weigh it in golden scales, and, in this case, I will call on the Jury to look narrowly to the evidence.

The question of interest in a witness has been frequently discussed, and if the interest is direct, the witness must be rejected. Here the interest is said to be direct, because the legacy must suffer a deduction of 20 per cent., but it appears to me of a complex nature. No doubt, the action is at the instance of both sisters, as next of kin or heirs to Mrs Thomson, but the conclusion is not to recover the funds, but merely a general conclusion for reduction of the deed, and the effect of this must depend on the other deeds that may be in existence, or if there are none, then they succeed to the fee-simple. It is in evidence, that there is a deed in 1807, and to that deed, resort may, and will be had, if this action succeeds. That deed gives the residue to the longest liver, and if that deed is to regulate, then the death of Jane Clark put an end

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to her interest, and, of course, to the interest of the witness. Can I, in such circumstances, reject the witness? Would it not be seeking for an interest that is conjectural, in order to exclude her?

In England, from the days of Lord Holt to the present Chief Justice, the leaning of all the Judges has been to relax the objection to the competency of a witness, and allow it to go to his credit. There is the same leaning in Scotland, though it has been more fully brought out in England. In the present case, I shall put it strongly to the Jury, as affecting the credit, though I cannot sustain it as affecting the competency of the witness.

The deposition of a haver cannot be produced to prove a fact in the cause.

The defender proposed to give in evidence the depositions of the pursuers, as havers.

Jeffrey, for the pursuer, objects, It is incompetent to read the deposition of *any* haver, and the only oath of a party is one on a reference, and an oath by one pursuer could not be used against the other.

Moncreiff, for the defender.—It is not in proof of a fact, but to show that we did all in our power to recover the written instructions; and, in the deposition, it is admitted that they existed.

Scott v. M'Gavin, Vol. II. p. 494.

LORD CHIEF COMMISSIONER.—We are to consider this as if the papers had been called for in this Court at the period when the haver was put into the box and examined. The purpose is, first to obtain the document, and, next, if it is withheld or lost, to entitle the party to give secondary evidence of the contents. A party called in this way cannot be turned into a witness, and I do not think that any fact in the deposition can be produced to the Jury.

The defender then called for production of a memorial sent to counsel, which was described by the pursuer in the Court of Session, as containing a correct statement of the facts. To this Mr Jeffrey objected.

LORD CHIEF COMMISSIONER.—They do not choose to produce this, and I cannot compel them.

Skene opened the case, and stated the failure of mind in Mrs Thomson before her death,—that she had employed the defender to make her settlement, and had put into his hands a previous deed, by which the residue of her property was left to the longest liver of her sisters,—that the new deed, framed by the defender, conveyed the residue to himself. In

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general, the presumption is in favour of a deed, and it requires strong evidence to cut it down; but the contrary is the presumption, when the deed is in favour of the writer.

13 Vesey's Rep. 52.
Paske *v.* Ollat, 2 Philamore Rep. 323.
Bell on Test. Deeds, p. 96 and 142.

It has been held in England, and adopted here, that a deed in favour of the writer requires to be supported by strong evidence. There is no evidence here that the party knew the alteration made on her former deed, executed in 1807, with a codicil in 1815.

Cockburn.—There are three facts in issue, and the pursuer is bound to prove them. This is a regularly attested subscription, and there is no impropriety in a party writing a will in his own favour. To cut down the deed, the

Bell on Test. Deeds, 145, and 146.

evidence must be such as would entitle you to cognosce her if alive. She had the deed in her possession, and made marginal notes upon it, so that, if she was not facile, there was no fraud; and if fraud and facility are excluded, then it was her deed. A failure of memory may be proved, but there is no proof of facility, as the facts stated do not warrant the conclusion drawn from them by the witnesses, many of whom transacted with her as a person of sound mind. The pursuers knew that she was executing a settlement, and took no step to prevent her.

Jeffrey.—It is not necessary to prove extinction of mind; it is sufficient if there was that degree of imbecility which renders it easy for interested and designing persons to impose. It is on the second issue we expect a verdict; I do not press the first, and it is unnecessary to find upon the third. Less mind may be necessary to make a will than another deed, but if there is the least advantage taken, it is in the same situation with any other deed. The witnesses swearing that she acted in such a manner as convinced them of her incapacity, is sufficient, though they had not stated any facts. The proof of facility and circumvention assist each other; it was most improper to make a deed in his own favour, and, in such circumstances, they must prove not only the deed was read, but that it was explained.

Bell on Test. Deeds, 142.

LORD CHIEF COMMISSIONER.—It is not essential to prove the reading; but in this, as in other cases, it must be proved that the deed was not read. The want of certain things, however, will cut in upon a deed in favour of the person who prepares it, which would not affect a deed in favour of a different person.

When the case was opened for the pursuer, it was stated as if the deed by Mrs Thomson

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was the only one, but it appears that the other sisters executed deeds of the same nature, at the same time, in which the defender is also residuary legatee. We are now in the same situation as the Court of Session was in Steel's case, and I must state the law on the subject, and the Jury apply the facts to the law.

(To the Jury.)—The first point here, is the meaning of the issues, and I shall simplify the case by clearing away the rubbish, and then stating the evidence as applicable to the issues.

The last issue was meant to try a case of pure unqualified fraud, and as there is no evidence of this, you may find for the defender.

The first issue may apply either when a deed is void, from the want of something required by law, or where there is a want of mind in the subscriber, as in a case of insanity or idiocy.

This is not a case of unqualified incapacity; and, therefore, I am clearly of opinion, that, according to the right understanding of the first issue, as applicable to this case, the pursuer has not made out his case either on the first or last issue. But, on the second issue, there is a case for grave and serious consideration. There are two questions in this issue; the first is a question of fact, the other is a mixed ques-

tion of law and fact. In considering this, it is necessary first to fix in mind the fact, whether this person was weak and facile, for if there was not weakness and facility the second falls, as there was nothing for the fraud or circumvention to operate upon.

The second is a mixed question of law and fact, and you are to apply the fact to the law, as explained by the Court. The facts of the pursuer being the writer and instigator of the deed, and that he is more favoured than by the former deed, are not sufficient to cut down a regular probative deed.

To undo a probative deed, there must be imposition, at least imposition sufficient to operate on the state of the granter's mind; and to undo such a deed, facts and circumstances less strong will be held sufficient where the person favoured is the confidential agent of the party.

His Lordship then stated the nature of the evidence, and that several of the witnesses, though he held them admissible, might speak under the influence of an opinion, that their legacies would be more secure, provided this deed was set aside.

There is no doubt that a different degree of mind is necessary for transacting ordinary

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business, than what is necessary for making a will, but, in this case, the situation of the person in whose favour the will is made, must form a counteracting circumstance. The deed must be good, unless cut down by law and fact combined, but here we must be more strict in seeing that all was properly done. You must judge of the parol evidence, and consider whether the witnesses for the defender had equal opportunities of judging with those on the other side. You must also contrast what they say of her ceasing to take charge of the family—with the very important documentary evidence—the letters written by her within a very few months of the date of the deed, where she acts for her sisters as well as herself. Having the deed so long in her possession, and having made alterations on several of the legacies, show that she must have read the deed, and the documentary evidence seems to be at variance with the witnesses.

She seems to have lost her memory as to recent events; but many persons in this situation, if the mind is roused, have sufficient memory and mind to execute such a deed as this.

Is the inference from the facts that there were no instructions? (and verbal instructions were sufficient,) or are you to hold that, having

it so long in her possession, and reading it repeatedly, but not altering this clause, must be held evidence of instructions, in addition to the presumption of law?

The law will sustain this deed, unless you are satisfied that there was fraud and circumvention operating upon a mind which was incapable of understanding the subject when directed to the point. If your opinion is in favour of the defender, you may find for him, but if for the pursuer, you had better find in terms of the issue.

Verdict—On the first and third issues for the defender, and on the second issue for the pursuer.

Jeffrey, Skene, and *G. G. Bell,* for the Pursuer.
Moncreiff, Cockburn, and *Ivory,* for the Defender.
(Agents, *Gibson* and *Oliphant,* W. S. and *William Dallas,* W. S.)

Dec. 30.

Cockburn applied for a rule to show cause why there should not be a new trial, on the ground that the verdict on the first and second issue was inconsistent.

A new trial granted, it being doubtful whether the Jury had well considered part of the evidence which was material.

That it was supported by interested witnesses, and by a trustee; that there was no prior subsisting deed; that it was against evi-

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dence, even if the witnesses had been admissible, as too much weight was given to their testimony; that the written evidence made the testimony as to imbecility ridiculous; and that there was evidence of written instructions.

LORD CHIEF COMMISSIONER.—We grant the rule. The distinction taken by the Court was, that the witnesses were not interested, but might be under influence. The point as to the deposition of the haver proving written instructions, may also be discussed.

Jan. 13, 1825.

Jeffrey.—The objection of inconsistency is not to the verdict, but the issues, and a new trial of them would do no good. Incapacity and fraud are the grounds in the summons, and this case requires the union of the two. But the chief reliance is on the alleged interest of the witnesses. But this rests on a mistake, as Mrs Thomson left her property to the longest liver of her sisters, and Miss Jane Clark is now dead. It is said that deed was revoked, but there was a prior one of the same import, which revived on the revocation of the other. The trustee did not act, and a nominal party is an admissible witness. In Cowan's case, the witness was a real defender, and in Pent-

Yule, 28th February 1755. M. 16765. Sim *v.* Simpson, 9th Feb. 1793. M. 16781. Reid *v.* Gardym, 10th July 1813, and Cowan *v.* Cowan, 10th July 1813.

land's, the matter to be proved was incompetent.

The examination of the haver does not prove any thing, but merely entitles the party to produce secondary evidence, if the writing is not recovered.

Scott v. M'Gavin, Vol. II. p. 494.

The Court ought not to interfere, as there was evidence on both sides. It cannot be said there was no evidence of facility and fraud sufficient, when combined with the facility, to cut down this settlement.

Bell on Test. Deeds, 142. 2 Philamore, 324.

Jan. 14, 1825.

Moncreiff.—We do not admit that the prior deed would revive, and Lord Fife was found entitled to pursue a reduction of a deed in similar circumstances. The trustee did act, and none of the authorities are in point. Yule's case is that of a tutor, and is stated to differ from a trustee. Pentland's was not decided, and Cowan's is too strong a case for the pursuer, and seems not sound law.

Recovering a writing, and entitling the party to give secondary evidence, is not the only object of the examination of a haver—it may also establish that the paper existed at a particular time. In M'Gavin's case, there is an indication of opinion that the haver must be put in the box, but that cannot apply to a party, and this party is dead. In Knowles' case at Aber-

Scott v. M'Gavin, Vol. II. p. 494.

Smith v. Knowles, *ante* p. 419.

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deen, a deposition was rejected at the first trial, but received at the second, the person being dead.

There was *no* evidence of facility, of a liability to be imposed upon, or of fraud. The real evidence is to be taken, rather than the testimony.

Whyte *v.* Clark, Vol. I. p. 233.

Feb. 9, 1825.

The Court delayed for the purpose of consideration, and the judgment was delivered this day.

LORD CHIEF COMMISSIONER.—A new trial was moved for in this case, on the grounds, that the findings on the different issues are inconsistent—that the deposition of a haver was not received as evidence—that certain legatees, who were alleged to have an interest, were received as witnesses—and that the verdict is contrary to evidence.

On the discrepancies of the findings, it is only necessary to look at the different issues to be satisfied that the finding on any one of them gives a clear right to judgment, unless it is set aside for other reasons.

As to the deposition of the haver, it is inadmissible to prove a fact in a cause, as a haver is called to produce writings, not to speak to facts. It was so decided in this Court

Vol. II. p. 494.

in the case of Scott and M'Gavin; but this point will be more fully spoken to by my brethren.

The objection to the trustee as a witness, has nothing in it, as he had no benefit from the trust—had ceased to be a party to the cause—and would not be liable for the expence.

But the admissibility of the legatees as witnesses is a question of great consequence to the law generally, as well as to this cause. This objection is founded on their having an interest, and that interest consisting in a right to certain legacies said to depend on the success of this reduction. But the fact is, that this reduction, if successful, only brings forward another deed, a holograph codicil, which must also be set aside.

I felt great anxiety when I had to decide this case at the trial. I was then of opinion; that the expectations of the witnesses might have influence on their minds, but that there was not such an interest as in law disqualifies a witness. But that the influence was such as affects the credit, not the competency, of a witness. I have given the subject much consideration since; have looked into all the authorities and text doctrine on the subject; and I am fully satisfied that the decision at the trial was right,

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and depends on principles sound in themselves, and which do not interfere with any technical rule of the law of Scotland. To affect the admissibility of a witness, the interest must be certain—whereas this is uncertain; it must be present and immediate—whereas this is very remote; it must be vested—this is contingent. The verdict, or judgment upon it, in this case, could not be given in evidence in any suit at the instance of the witnesses. The effect of their evidence would be to bring the holograph codicil into operation, and as that codicil was the testator's own act when in good health, it could not be affected by either fraud, circumvention, or facility, at the time of making it, which are the grounds upon which this reduction is brought. This proves the uncertainty of the interest so distinctly, as not to leave any doubt as to the witnesses having been properly received.

Still, after very mature and repeated consideration, the Court have come to the opinion that, in the circumstances of this case, it ought to be tried again. I have attentively reviewed all the cases where New Trials have been granted, because the Jury may have drawn an erroneous conclusion from the evidence; and I am of opinion, that, consistently with those

cases, the discretion of the Court would be soundly exercised in granting a New Trial in this case. Lord Mansfield's doctrine in 1757, and the present Lord Chancellor's in 1814, are in conformity on this point, and all the intermediate cases concur. Lord Mansfield, in the case of Eynor, says most general issues involve legal consequences, and a Jury may infer contrary to law, which is a ground for a New Trial. In the case of Lord Seaforth *v.* Macleod, the Lord Chancellor said, If this case had been tried by a Jury, I would have granted a New Trial, not but that the same verdict might be found again, but because of the difficulty of collecting the true effect of the evidence.

Crisp *v.* Eynor, 1 Bur. Rep. 393.

In this case, the Jury may not have attended to the direction given them, that, by the law of Scotland, a drawer of a deed may take property under it. But the main ground is this, that the documentary evidence, which was most important, was not sufficiently weighed by the Jury, so as to make it certain that they had given the true effect to it.

There were here two descriptions of evidence, parol and real. The purport and tendency of the parol evidence was to show a weakness in Mrs Thomson's mind, and also a de-

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gree of circumvention. On the other side, the real evidence of her codicil and letters show, that though she wandered in the ordinary affairs of life, she continued to write on the money and other business of her sisters to the last, and that still, when called to act, her mind was capable of being roused. It appears to me that the Jury have not maturely weighed the evidence, at least we cannot be sure that the real evidence has been fully in their view.

LORD PITMILLY.—I have paid much attention to the objection to the six witnesses, and have come to concur in the opinion delivered, that it is not a reason for granting a new trial, and my opinion rests on the grounds that have been stated. To disqualify a witness, the interest must be certain and present, not contingent; and, in this case, when we take all the deeds, it is impossible to say that the witnesses would profit by the success of this reduction.

I was startled by the observation, that a witness had said there was the same incapacity in Mrs Thomson at the date of the codicil in 1815; but that goes to affect the credit, not the admissibility of the witness. We are not

reduced to this nice point, as the codicil is holograph, and there is no statement that the defender was there to induce or circumvent her. We are also clear of the point stated, of the interest of an heir to pursue a reduction of one deed when he is excluded by another. I looked into Lord Fife's case to refresh my memory, and there the argument was, that, even if the prior deed did revive, Lord Fife still had an interest.

As to the admission of the evidence of the trustee, I also completely concur. The objection to him was, that he is a trustee and defender. Being nominally a trustee, is not a good objection; and, from the first, he protested against being held a defender. If he were liable for expences, that might be a good objection, but his protest saves him. Being only a nominal trustee, I am quite clear that it was right to admit him.

As to the deposition of the haver, it is a point of general importance, and fit to be brought before the Court; but I have a clear and decided opinion, that it was right to reject the deposition of the haver.

This is founded on the history and the limited nature of the examination of a haver. In the early period of our law, when a person

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wished to recover a writing, it was necessary for him to proceed by an ordinary action to get exhibition of the writing. From this, it appears that a haver is called more as a defender than a witness, and he is merely called to swear whether he has the paper. This practice was abolished by the regulations 1672, and the matter put upon the footing on which it now stands. By the present practice, the haver is called by a diligence to produce the writing called for, or to say whether he put it away. This again was changed by the act of sederunt, February 1688, which allowed special interrogatories; but still these interrogatories must be limited to whether he has the paper, or knows where it is. Still all these are merely machinery for getting the paper, or informing the party where it is. The haver is viewed more as a defender than witness, and is called upon to exhibit the writing. Accordingly, it would be irregular to examine a haver *in initialibus*, or purge him of malice or partial counsel; and there are authorities in the books supporting this view.

If the writing is produced, that is sufficient; but if the party wishes to prove the way in which the writing was got, the haver ought to be put into the box and examined, if admis-

sible as a witness, or, if he is dead, perhaps his deposition as a haver may be read. I state this more with a view to future cases than to the present, for the deposition here goes to the very essence of the cause, and there appears to me to have been an irregularity in taking it down. This is said to be an admission by the party, but shall a party be tricked into an admission of this sort? Her being dead does not alter the case. It appears to me that the Court is asked, most irregularly, to make the pursuer a witness against herself.

On the other point, I quite agree with your Lordship.

LORD GILLIES.—I concur in the opinion delivered. The most important point here, is the admission of the witnesses. Undoubtedly, at first sight, these witnesses have an interest; but the answer is complete, that if this deed is reduced, another starts up, and being holograph, it does not seem challengeable on any ground. But whether it is challengeable or no, the point of law is the same. Put the case, that the witnesses prove the case, and the deed is cut down, still they take nothing by the reduction. Unless this is the rule, I do not know where it may stop; for, even in the case

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of a renunciation of his interest by a witness, he or his heirs may have grounds for setting aside the release which he granted; and would the possibility of this render him an incompetent witness to support the deed?

On the point as to the examination of the haver, I concur with Lord Pitmilly. Our practice has for long been too loose, but this arises from the manner in which proofs have been taken. But, in the present case, it is clear, that examining a party in this way, makes it an oath of reference. A party may be called as a haver, but the questions must be limited to whether he has the paper, or knows or suspects where it is? and it is incompetent to ask whether such a paper existed. I am decidedly of the same opinion on this point.

I am also, upon the whole, of opinion, that a new trial ought to be granted on payment of costs.

When the verdict on one of several issues exhausts the case, it is unnecessary for the Jury to find upon the other issues.

Moncreiff.—May we ask whether all the issues go again to trial?

The Court suggested, that it was better that it should go on one issue, and that this might be done of consent.

Jeffrey.—The motion applies to all, but we

may afterwards agree to try the question on one.

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LORD CHIEF COMMISSIONER.—If the first issue had stood alone, it would have been competent, under it, to try whether the deed was not good on the ground of incapacity, or of facility and circumvention, or of fraud,—as a deed that is void on any of these grounds is not the deed of the party.

NEW TRIAL.

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

1825, March 14.

The legatees again admitted as witnesses.

ON this day, the second trial proceeded, and the same objection was made to the witnesses as at the first, on the ground of interest.

LORD CHIEF COMMISSIONER.—I take it down that this, and all the other legatees, are objected to, as interested under the will. At the first trial, the same objection was taken. I then ruled that they were admissible, but that their credit was subject to observation to the Jury, as they may be biassed, though they

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have no interest. The other Judges confirmed my doctrine. The case is again brought, and the same objection taken, and the same observation will again be made to the Jury, and there will be the same opportunity of excepting to their admission.

Incompetent to give evidence of the good character of a defender.

It was proposed to give evidence of the good character of the defender to meet the charge of fraud made against him.

LORD CHIEF COMMISSIONER.—It is incompetent to give evidence in a civil action of the character of the defender; and it has been several times so decided in this Court.

Skene opened the case, and stated, that the parties had agreed that the return by the Jury should be on the first issue only; and said, That a man of business, executing a deed in his own favour, was bound to *show* specific instructions.

But the main argument is one in law upon which I address myself to the Court. It will be said, that this being a writing regularly tested in terms of the statute 1681, c. 5, it must be held the will, unless the contrary is proved. But the circumstance of the party acting as agent, alters that presumption. The

inductive cause of the act 1593, c. 175, is, that the writer, an impartial person, may be present to explain.

The writer being the person favoured, is not a nullity, but affords a presumption against the deed, both here and in England.

Kilpatrick v. Ferguson, Nov. 21, 1704. M. 12061. Petrie v. Lithgow, Nov. 15, 1735, M. 15941. Wills v. Middleton, 13 Vesey, 52. 2 Philamore, 323. Bell on Test. Deeds, 139. Steel's Case.

In this country, the deed, if executed in suspicious circumstances, must not only be read, but explained; and the instrumentary witnesses ought to be able to prove that it was explained.

Moncreiff agreed that the return should be made on the first issue, and said, The ground insisted on is facility, or an easiness, or liability to be imposed upon, but this must be combined with proof of fraudulent circumvention.

This is a pure case of fact, and I was surprised to hear it said to be a question of law,—it is a question of the incapacity to make a will, which is the most favoured deed.

Mrs Thomson must be held to have known the contents, as she had it in her possession, and made several holograph alterations upon it. The want of instructions, even if proved, is no nullity in the deed. There were written instructions, and we examined Miss Jane Clark to recover them.

Jeffrey.—Does Mr Moncreiff mean to say

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that there were written instructions different from the prior deed.

LORD CHIEF COMMISSIONER.—What I understood him to say, was, that, besides the will, there was a note taken down by the defender, and given by him to Miss Clark. He may state that she was examined for the purpose of recovering this paper, but is not entitled to draw any conclusion from this, as to what the paper contained.

Jeffrey.—It is proved that there was a certain failure of mind, and if any advantage was taken of her, the two are sufficient. It may be a question whether it is not a nullity, when the writer is the person favoured, as that defeats the provision of the statute. The cases referred to being cases in evidence, cannot bind you, but they show the principle with more weight than by our stating it.

LORD CHIEF COMMISSIONER.—The parties have agreed that you should return a verdict on the first issue only, and it is quite sufficient to meet any of the cases which are embraced by the other two; for if you are of opinion that it is made out that the defender took ad-

vantage of Mrs Thomson's facility and weakness, and obtained the deed by fraud and circumvention, then it was not her deed; and the same is the case if a deed is obtained purely by fraud.

You may throw pure fraud and total imbecility out of view, as the pursuer does not hold either to be proved in this case.

The question then is, whether the degree of facility, together with the imposition or imposture proved in this case, is such as to render this not the deed of Mrs Thomson? This is a deed probative in law—it has all the circumstances about it which the acts of Parliament require, and must stand, unless proof is laid before you that it has some defect.

In this case, the defect alleged is weakness of mind in the granter, coupled with imposition. The proof of the first, is, by the opinion of those who frequently saw her, and by proof of facts; the proof of the other rests on the situation in which the defender stood in being the writer of the deed, and the person benefited.

The proposition laid down by Mr Skene is not a proposition in law, but was properly stated as a ground of judging of the evidence. By law, the defender may take by the deed;

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but, *prima facie*, he is not in the same situation in which an indifferent person would have been; and, in judging of this case, you will view it with a scrupulous eye. I shall not go through the evidence in detail, but you must consider it in reference to this, as a probative instrument. Some of the witnesses are said to be interested—the Court held them admissible, and I cannot even say that you ought to weigh their credit with great nicety, from the circumstances in life in which they are. The general tendency of their opinion was, that incapacity was coming upon the granter of this deed.

With respect to the argument upon the acts of Parliament, we are both of opinion that, if we construed the acts according to what counsel contend for, it would be repealing the acts, and rendering the deeds executed under them null.

It is not contrary to the law of Scotland for a person to make a deed from which he is to take a benefit; but it is said that there are no written instructions. Taking it that there were no instructions for the deed of Mrs Thomson, the defender might have rested the case on what took place after the deed was in her possession. It is said there is suspicion in such a

case, but there are circumstances to counter-vail it—there were here three parties—he was to make a deed for each—the deeds are all the same—and whether is it most probable that this was an imposition, or that it was a common understanding among them? With respect to the reading, the true way is to consider not the fact of reading the technical phraseology, but whether the substance was conveyed to her mind, and whether this deed expressed the intention of the maker of it; and whether, in all the circumstances, she understood that the residue of her property was left to the defender. It does not seem a difficult thing to understand; but the question must be taken in reference to her state of mind, whether, when stripped of the technical words, she could, or could not understand it.

There was no attempt on the part of the defender to keep possession of the deeds, and there is a power of revocation in them.

The question is, whether the defender operated on her mind, so as to induce her to do a thing which a perfect mind would not have done?

His Lordship then commented on the documentary evidence, and the manner in which it was written, and said, the Jury must consider

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whether the facts sworn to were not incident to old age, and whether the mind of this person, when excited, was not sufficient to do its duty.

The case made out is, that this was an old woman with a certain degree of failure of mind —that a deed is framed without previous instructions—that the defender drew deeds for the other sisters at the same time—that they all contained a power to alter—that that power was understood and exercised by Mrs Thomson—that the clause which is objected to does not seem more difficult to understand than the other—that she continued to make alterations down to 1816; and the question is, whether it is right for you to conclude that she had not the power of exciting her mind so as to understand this clause? If there had been previous instruction, there could not have been a question; but we must now judge of whether there was such, by the subsequent transactions. If you think she must have seen the clause, and that there was not such imbecility as to prevent her from understanding it, then it was her deed; but if it was an imposition on a frail mind, then it was not her deed; and the law is, that the evidence to reduce a deed must be clearly made out, though, in this case, it is to be weighed with

reference to the situation of the defender being the man of business who wrote it.

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Verdict—"For the defender on the first issue."*

Jeffrey, Skene, and *G. G. Bell,* for the Pursuer.
Moncreiff, Cockburn, and *Ivory,* for the Defender.
(Agents, *Gibson & Oliphant,* W. S., and *Wm. Dallas,* W. S.)

PRESENT,

THE THREE LORDS COMMISSIONERS.

WATSON v. HAMILTON.

1824. Dec. 6.

Findings—as to the capacity of a person to judge of the effect of certain deeds—as to their being her free and voluntary acts—as to her settling accounts—and explaining the reason for calling notaries.

IN this case, which is reported at p. 29 of this volume, the Court of Session sent five "New "and Additional Issues."

Whether Mrs Noble "was in such a state of "mind as enabled her to judge correctly with "regard to the effect of the said deeds, as de- "priving her of all power of revoking or alter- "ing the same?" Whether the deeds were her "free and voluntary acts?"—"or obtain-

* A minute was given in, agreeing that a verdict on this issue should be held to exhaust the question.