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"they stood in the leets as aforesaid: That "this usage has existed from 1719 till 1818 "inclusive."

Moncreiff, D. F., Hope, Sol.-Gen., Ivory, and *Johnston,* for the Pursuers.

D. M'Neil, Robertson, and *H. Bruce,* for the Defenders.

PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

1828. March 8.

HOGG, &c. v. MACGILL, &c.

Reduction of a deed on the ground that the granter was not of sound mind, &c.

AN action of reduction of a trust-deed signed by notaries, on the ground that the truster was not of sound mind, occasioned by a stroke of palsy, and that the deed was impetrated from him.

DEFENCE.—The deed was framed by instructions from the truster, who lived eight months after its execution, and gradually improved in health till within a few days of his death.

ISSUE.

Whether it was not the deed of the truster?

A. Macneil opened the case, and stated the facts as to the health of the truster. That the truster could write with his left hand, and there was not proper authority given to the notaries.

Cockburn, for the defenders.—This plea of express authority not having been given to the notaries is surprise to us, as it is not stated in the record.

A counsel in opening allowed to state matter not in his condescendence, but warned, that the verdict will be set aside if given on that ground.

LORD CHIEF COMMISSIONER.—I do not think we can stop it at present, as it is difficult to separate it from the rest of the case; but the party must take care, as, if he gets a verdict on this ground, it must be set aside, if what you state is correct. If I could separate this from the rest of the case, I would probably say that it was incompetent; but the evidence may bear on the capacity of the truster.

Jeffrey, for the defender, contended, That there was a presumption in favour of a regular deed, and that it required very little mind to enable a person to say who should succeed to his property. In the case of the Duke of Roxburghe, his deed was sustained, though he had only strength to name two out of three whom he proposed to make his executors.

Duke of Roxburghe, *v.* Wauchope, 13th Dec. 1816.

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This deed was rational; it proceeded from the party, was publicly and deliberately executed before respectable persons; and it is sufficient that he was capable of judging of each legacy separately, though he might not recollect the whole. He lived for months after making the deed. You must hold it as executed on the day when he was in best health after the date of the deed.

LORD CHIEF COMMISSIONER.—This is a short issue; and the question for you to try under it is, whether this deed was the free and unconstrained; or the circumvented act of this person? You may throw out of your consideration what was said as to authority not having been given to the notaries, as there is no evidence impeaching the regularity of the execution of the deed. It is said the deed is unfair and partial, but this is a regular deed, and there is nothing law more respects than a regular deed. If there is no deed, then law distributes the effects; but where there is a regular deed by a person in a sound state of mind, that deed must regulate the succession; and we are not entitled to inquire into the grounds upon which one person is preferred to another.

The question here is the capacity of this

person, who had been affected with palsy, which no doubt affects the mind, and frequently to a great degree.

In this case the person for a certain time lost the use of his speech and understanding, but they were restored to a certain degree; and the question is, whether they were so far restored that he was capable of carrying on the train of reasoning necessary to the execution of this deed? A deed of this nature does not require the same degree of mind as in making a bargain. In the case of a will, it is sufficient to be able to judge of a preference, and to be capable to express it. (His Lordship then stated the facts given in evidence, and said,) It is difficult to say whether he understood the whole deed at once, as he could not carry a detail in his mind, but he was capable of judging of each part as it was presented to him, and it was proper for the agent to draw the deed as the instructions were properly given in detail. There is evidence of this party forgetting names, and at one time of a total want of recollection; but he immediately recovered himself, and the obscurity which came over his mind was dispelled at the time. Evidence was given of his capacity after the execution of the deed, but that can only be received, provided he recollected the execution of the deed.

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It is his capacity at the time to which we must look, and the deed is not to be set aside if he was capable of understanding it in detail, though not capable of dictating it from beginning to end. The medical evidence is, that he was capable of understanding distinct propositions; and the other evidence shows that he assented to the different parts of the deed when read to him, and lived for many months after the deed was executed, and knew that he had made a deed.

1828.
June 10.

A rule granted to show cause why a verdict should not be set aside.

The Court granted a rule to show cause why the verdict should not be set aside.

Robertson showed for cause against the rule, That the one notary had acted on the faith of the other, without inquiring into the state of the truster's mind. The question is, whether he had capacity to execute this deed? not whether he could express a preference for an individual. The facts given in evidence proved him incapable, and this was a case of fact left on the evidence to the jury; and although the Court might have come to a different conclusion, was it so clear a case, that you will overturn the verdict? In the cases of Watson, Brydon, and M'Niell, the Court refused to interfere; and this is more dangerous than a case of damages, as a question of capacity is purely for the jury.

3 Mur. Rep. 35, 123, and 1 Mur. Rep. 341. Grant on New Trials, 159 and 170.

LORD CHIEF COMMISSIONER.—In England, questions on the validity of a will, whether on the ground of capacity or any other, are in a situation which makes it not so easy to derive from them the principles on which new trials are granted as from other cases. Whenever there is real property they are tried in an action of ejectment, and as this is an action that may be brought as often as the party chooses, the Court refuse to aid him by granting a new trial.

Jeffrey.—This is not a case of contrary evidence of fact, but of contrary opinions; and the error is rather in law than fact, and consists in the degree of capacity which the jury held to be necessary to the making such a deed; and the interference of the Court is necessary to correct this misunderstanding. It was clear the evidence of the medical gentleman was given under this erroneous impression, and I agree that the Court are not to go near the limit where the jury are to judge of the credit of evidence.

1828. June 24.

A New Trial granted on the ground that the jury may not

LORD CHIEF COMMISSIONER.—This was a question on the validity of a trust-deed or latter will of a man of business, who was in the full exercise of his faculties until he had an attack

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have understood the weight to be given to a regular deed, and the degree of capacity necessary in the granter of it.

of illness; and it is material that the deed was subject to be altered or revoked till the day of his death. If he at any time came to be of sound mind and recollected the deed, and did not alter it, that is sufficient to support it. Any attempt to attack the deed on the ground of unjust partiality was abandoned, and the objection was confined to incapacity or insufficiency of mind. The incapacity proceeded from an attack of palsy, and for some time he was comatose, and incapable of making any deed. But it appeared on all the evidence that he had recovered to a certain extent, and was capable of doing certain acts, and indicating certain opinions, and was capable of making a will. The only question being, whether he was capable of making one containing so much detail? The witness who gave the strongest evidence of incapacity said, he thought him incapable of understanding a complex proposition, and that he sometimes misapplied words; but the same witness proved that he understood an idea that was not complex, and was acquainted with the value of money.

The medical gentlemen were not present at the time the will was executed, but the notaries and witnesses were; and though it appears that some suggestions were made to him, yet he

named the trustees, and proposed an annuity of L. 25 for his sister, and named L. 500 as the principal sum necessary for that annuity. This is the most complex idea in the will, and was suggested by him. He thought an annuity better, and named the sum corresponding with that annuity. He was then asked whether he had any other brother or sister to whom he wished to leave any thing, and he did not name the pursuers, and the suggestion produced no effect.

In these circumstances, if he had died within a few days of executing the will, granting a new trial would have been matter for serious consideration; but this was not the case; on the contrary, he lived ten months after it, and improved in health, and, having taught himself to write with his left hand, acted as a notary. The facts proved show his power of judgment; and it is proved that he recollected that the will existed, as he mentioned certain bequests which he had made, and there was no evidence of any indication of a wish to alter it. On the whole, it is important that the will of a person not of sound mind should not stand, but it is equally important that the real will of a person destining his property should not be

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disturbed. The Court are of opinion that this has not been sufficiently taken into consideration by the jury, perhaps from its not having been so pointedly stated to them as it might have been. We think it has not received all the consideration which it ought to have done, and, therefore, that a new trial ought to be granted.

July 1828. The case was again set down for trial, but the parties settled it by a compromise.

Robertson and *A. M'Neil*, for the Pursuers.
Jeffrey, Cockburn, and *Maitland*, for the Defenders.
(Agents, *James Bridges*, W. S. & *J. H. Lothian*, W. S.)

PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

1828. March 14.

SHERIFF *v.* STEIN'S ASSIGNEES.

Circumstances in which a merchant in London was found entitled to commission and *del credere* commission.

AN action of count and reckoning to recover the balance of the price of a certain quantity of whisky transmitted to the defender.

DEFENCE.—The defender rendered an account to the person in the management of