April 20, 1814.

WRIT—EX FACIE VITIATION.

Judgment.

Leach and *A. Murray* for Appellants; *Adam* and *Romilly* for Respondents.

Judgment *affirmed.*

Agent for Appellant, RICHARDSON.
Agent for Respondent, CAMPBELL.

ENGLAND.

APPEAL FROM THE COURT OF CHANCERY.

WILLAN—*Appellant.*
WILLAN—*Respondent.*

April 22, 25, May 13, 1814.

AGREEMENT.

AGREEMENT between uncle and nephew for a sub-lease to the latter at a fixed rent, with covenant for perpetual renewal, of premises held by the uncle under a church lease, renewable on fines at will of lessors, set aside on the ground of surprise and misapprehension of its effect in one or both of the parties; the facts being, that the agreement was entered into a few days before the uncle's death, when he was confined to bed by the illness of which he died, and was in such a state of bodily and mental imbecility as rendered him incapable of transacting business which required deliberation and reflection, the agreement being at the same time one for val. con. and in that view of it unreasonable.

Lord Redesdale doubting whether, even if there had been no evidence of imbecility, such an agreement, made under such circumstances, would not be set aside on the ground of surprise and misapprehension.

And since it was unfit that such an agreement should be acted upon in equity, it was held unfit to be acted upon at law, and it was ordered to be delivered up.

And as the agreement purported to be for val. con. the Court could not say that it was partly for val. con. and partly for natural love and affection, merely because it was made between relations; otherwise no agreement for val. con. between relations could be set aside, however inadequate the consideration.

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JOHN WILLAN, of How Hatch, South Weald, Essex, Appellant's uncle, in 1792, held the farm of Brownswood, Hornsey, from the Prebendary of St. Paul's, under a lease renewable every seven years at a fine at the will of the Prebendary. Willan, the uncle, died August 11, 1792, at the age of 82, having devised his freehold estates to his great nephew, William Willan, for life, and to the son of W. Willan in remainder, and limited his leasehold estates as nearly as possible in the same way as the freehold. On the 6th August, 1792, while the uncle was confined to bed by the illness of which he died, an agreement was entered into between him and his nephew, the Appellant, who then held the Hornsey farm of his uncle under a sub-lease; which agreement, signed by both parties, and witnessed by the attending physician and apothecary, was in these terms:—

Willan v. Willan, 6 Ves. 72.

Agreement, August 6, 1792.

"It is hereby agreed, between John Willan, of "How Hatch, in South Weald, Esq. of the one "part, and his nephew, John Willan, of the Bull "and Mouth Inn, London, on the other part, "that the present lease of the farm at Hornsey, "which the said John Willan, of the Bull and "Mouth, now has of his uncle, shall be cancelled, "and a new lease of 21 years, renewable every

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" seven years for ever, or so long as the said John " Willan, Esq. or his assigns, hold the same from " the Prebendary of St. Paul's, shall be granted of " the farm that he now holds, and also of that " farm now let to William Stap, and also of that " now let to Mary Collier, at the yearly rent of " 565*l.* clear of land tax, and all other taxes, to " commence at Michaelmas, 1794.

" And it is farther agreed, that if any fines shall " be demanded on account of an increase of build- " ings on any of the above farms, the said John " Willan, of the Bull and Mouth Inn, shall pay " those fines."

Lease founded on the agreement of 1795.

A lease having been executed in terms of this agreement by the trustees under the uncle's will, William Willan, the great nephew, alarmed at the increase of the fines, which threatened to render the Hornsey lease of no value to him, filed his bill in Chancery, praying that it might be declared that the agreement had been unduly obtained, and that it might be set aside; and that the lease founded upon it might be declared to have been executed by mistake, and might be delivered up, &c.; or at least, that the stipulation for perpetual renewal might be declared to be unreasonable, and to have been obtained by surprise and imposition upon the uncle without consideration, and that it ought to have no effect, &c.

Bill to set aside agreement and lease.

Evidence.

Elizabeth Willan, the uncle's widow, had, on the 5th August, written by his desire to the nephew, stating, that " the uncle was ill, wished to " give him the preference of Hornsey, and begged " that he would come and talk about it." The

nephew came next day along with the Rev. Joseph Baines, a clergyman of unblemished character, and much esteemed by the uncle. The nephew and Baines went into the uncle's bed-room, where the agreement was prepared, and then the physician and apothecary were called up to witness the signing. The widow was not present during any part of this transaction, but in a quarter of an hour after the nephew had left the room, the uncle sent for him again, and, in the widow's presence, said, "John, that agreement must not stand; it is giving "the estate away." The Appellant replied, "You, "sir, have left the estates to my son, on failure of "William Willan's having children, so I shall be "making the farm better;" and added, "if you do "not approve of it when you are better, the agree-"ment shall be cancelled."

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The physician on his examination (the apothecary and Baines had died some time before the bill was filed) stated, that on the day when the said agreement was prepared and signed, the uncle was in a state of the greatest imbecility of mind and body, and totally incapable of attending to or understanding any business *that required thought, reflection, or consideration;* that he hesitated to witness the signing, and would not have done so, had he not been informed, and believed, that it was merely a common lease, of which the terms might have been before considered. The deposition of the widow and several others went to show that the uncle was of sufficiently sound mind at this time, though the widow admitted that his mind occasionally wandered.

The uncle had on the same day (August 6) exe-

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cuted a codicil to his will. The uncle and nephew did not appear to have lived on terms of intimacy. It ought to be observed, that in 1789, Willan, the uncle, had made an agreement for a lease of certain other premises at Hornsey, held in the same manner, with one Hoare, covenanting to renew perpetually. But there he took a fine, and an advance of rent.

The agreement was set aside in the Court below, on the ground of its having been a surprise on both parties, and the lease executed in consequence was decreed to be delivered up. The decree was affirmed on a re-hearing, and thereupon the nephew appealed.

Romilly and *Leach* for Appellant; *Fonblanque* and *Hart* for Respondent. (Grounds of argument same as in Court below, *Vide* 6 Ves. 72.)

May 13, 1814. Observations in Judgment.

Lord Eldon (Chancellor.) He had not proceeded in his judgment below on the ground that the agreement was fraudulent, though he thought it would have been a fraudulent use of it to carry it into effect.

In the course of the evidence, a great deal of testimony had been given, to show that Willan, the testator, was not of sufficient understanding and capacity at the time of the agreement to give it validity. As to this point, there was evidence on both sides; and if the decree were to be altered, it must be considered whether an issue ought not to be directed to try that question. He had not thought it necessary to go into that point. But this had appeared to him to be an agreement obtained by surprise, and in this sense, that it was a surprise on both parties; and that the Appellant had agreed to give it up, if it had the effect of going beyond

The agreement a surprise on both parties. Con-

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what was intended. There had been a great deal of argument to show that the latter ground was not in issue. Every cause must be decided *secundum* ALLEGATA *et probata*, but on looking into the objection, he had no doubt that the pleadings were so framed as to let in the evidence on which he had proceeded.

He had stated below, and he still thought, that the testator intended to give the Appellant some additional advantage, but not the advantage of this perpetual renewal, &c. He was of opinion that the evidence bore him out in this, that the uncle was not absolutely of non-sane mind, but that he was in such a state of imbecility, arising from indisposition, that he might easily at the time misconceive the effect of the agreement; and, in point of fact, it did afterwards occur to him that it might have a different effect from what was intended, and that the estate must in a short time be purchased at a rate which would leave nothing to the lessor. It appeared that he desired his wife to call the Appellant, who had not left the house, into his room, and that when the Appellant came, the testator said,—not in these exact words, but in effect,—"this "matter must be reconsidered—the agreement must "not stand—it is giving away the estate." The Appellant then honestly said,—"You have left the "estate to my son, in failure of William Willan's "having children; so I shall be making the farm "better. If you do not approve of it when you re-"cover, it shall be given up." It had been strongly objected that this evidence ought not to have been received. But the Appellant had read it, and, independent of that, the evidence of this conversation was material, for the purpose of showing that there

Assent by Appellant that it should be cancelled if found contrary to what was intended.

Uncle not of non-sane mind at time of agreement, but in such a state of debility that he might easily misconceive its nature and effect.

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existed such a misunderstanding as that against which the bill prayed to be relieved; and besides, the interrogatories led to it.

If he could do all he wished, he should be glad to grant one lease. But the reason why he thought it could not be done was this. There was no analogy between this and cases where there were several distinct agreements, for these had been determined on the ground that there were contracts made by the parties which might be executed. But if the whole was but one contract which could not be executed, equity could not introduce another contract for the parties. If the Appellant had a right to one lease, the Respondent should be able to compel him to take one. If the uncle had recovered, he believed they would soon have agreed; but he having died, and there being no terms in the instruments upon which one lease could be supported, he could not act upon a contract which had not been made, and so had no authority, unless he could support the agreement *in toto*.

The agreement formed but one contract, which could not be divided and partly executed.

When he spoke of surprise, he merely meant, that it was a case where, from imbecility, and the absence of proper advice, the testator did not understand the effect of what he did, and that it was unconscionable in equity that an agreement should be executed which was a surprise on both parties.

The agreement delivered up.

It had then been insisted, that if one lease could not be granted, at least the agreement ought not to have been delivered up; and that this was one of the cases where, though equity would not execute the agreement, it would leave the party to his remedy at law. He thought this case did not fall within that distinction. He did not say that here there was any

dishonesty; but if an agreement was obtained by surprise, under such circumstances as occurred in this case, (*Vide* 16 Ves. 86,) it was against equity to permit any use to be made of it. May 13, 1814. AGREEMENT.

Then it had been said, that a lease had been actually executed by the trustees upon the foundation of this agreement. The answer was, that the trustees granted it without sufficient knowledge of the circumstances, and that their *cestui que trusts* ought not to be prejudiced. *Cestui que trusts* not to be prejudiced by the mistake of the trustees.

These were the grounds on which he had proceeded below, and with this statement he should leave the case with their Lordships. But, in justice to himself, to their Lordships, and the parties, he had again examined the case diligently, and if he had seen cause to alter his opinion, their Lordships would give him credit so far as to believe that no one could have been more ready to avow the change, and to act upon it.

Lord Redesdale. This was a bill to set aside an agreement entered into at a time when one of the parties was on his death-bed, and clearly in a state of imbecility, and also to set aside an actual lease founded upon it, on this ground, that the uncle, when he signed it, neither knew nor understood the contents of it, and that advantage was taken of his circumstances to get his signature.

The effect of the agreement was clearly to put an end, in no very long time, to the value of the property to the lessor; for the facts were these, (states them,)—the only stipulation in favour of the lessor being, that if there should be an increase of fines on account of new buildings, they should be paid by the lessee. All the rest, arising from improvements

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in agriculture, &c. were to fall on the estate. It was scarcely possible to suppose that any man in full possession of his faculties could enter into such an agreement for valuable consideration. Then it was said, that this was partly for natural love and affection. But where an agreement purported in the body of it to be for valuable consideration, it could never, though obtained by a relation, be supported on the ground of natural love and affection; for if it could, every agreement made with a relation must be supported, however inadequate the consideration.

This an agreement for valuable consideration.

The nephew came to the uncle's house in consequence of a letter written to the former by order of the uncle, and the letter stated the object to be to give him a lease in preference to others. The uncle was, at the time, not incapable of making an ordinary lease, or a codicil to his will, which he did the same day, but was incapable of applying himself to a contract of this kind, which required deliberation and calculation, for this was clearly a contract for valuable consideration. Doctor Kirkland attended as a witness: he remonstrated that the uncle was not then in a condition to attend to business, and he was informed that this was a mere lease between landlord and tenant, the terms of which had been settled before. No calculations appeared to have been entered into by the parties, or if entered into, they were perfectly false; for the agreement was such, that the lease would soon produce nothing to the lessor, who must therefore abandon it, as he was entitled to do; for there was no contract binding him at all events to renew. Suppose there had been no evidence of debility at the time, it might be questioned whether such an instrument, obtained

Evidence.

A person might be capable of making a codicil to his will when not in a capacity to attend to business requiring deliberation and calculation.

Suppose no evidence of imbecility, doubtful whe-

under such circumstances, without any previous consultation as to the terms of the contract, might not be considered as the effect of surprise.

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ther this might not be held a surprise under the circumstances.

Another circumstance had been brought into the cause,—the agreement for the lease to Hoare, in which also the lessor covenanted to renew, and the lessee covenanted not to erect new buildings. Possibly the lessor might have entered into this agreement without having sufficiently considered the terms of it; but at any rate the terms were very different from those of the agreement now impeached. There the lessor received a fine of 225*l.* and an advance of rent.

He did therefore conceive that the Respondent had made out the charge that the uncle did not understand the effect of the agreement, and that advantage was taken of his situation to induce him to sign it. There appeared to him no contrariety in the evidence as to the state in which the uncle was at the time of the signature. He was capable of making a codicil to his will, but not of doing any thing which required deliberation. This besides was a bargain, and different in its nature from that expression of volition required in making a will.

The evidence reconcileable.

If the whole of Mrs. Willan's evidence was to be received and believed, the uncle himself afterwards considered it as an improvident act. If the conversation stated by her actually took place, it showed that the effect of the agreement had before been understood by neither the one nor the other. But then it was said that this evidence ought not to have been received, because that point was not directly in issue. It appeared to him that it ought to be received,—1st, Because he considered it as evidence

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of the surprise which was directly in issue, as evidence of the mutual misunderstanding, or at least of misunderstanding in the uncle. 2d, Because it came out on the examination for the Appellant; and, 3d, Because it was read by the Appellant himself. He could not object to his own evidence, thus adopted, and say that he could have answered it by other evidence. According to the argument at the bar, if twenty facts were stated in the bill, and all were denied by the answer, and a single witness deposed to each fact, there must be issues to try them all. He did not think the rule went that length.

His conception of the case then was this,—that where a contract was manifestly unreasonable, if one of the parties, taken by surprise while in a state of debility, was made to depart from an original intention, and to act contrary to a previous design, then the contract ought to be set aside, as this was an advantage taken of his infirm state.

The agreement could not have effect as to one lease.

Then a question was made, whether the agreement might not have effect as to one lease. It appeared to him that it could not. When the agreement was found to be so unreasonable that it could not be executed *in toto*, they could not draw the line. They could not say what the uncle really meant to do. They had no evidence of his intention but this agreement, which was bad.

The agreement rightly ordered to be delivered up.

Another question was, whether the agreement ought to have been delivered up. He thought it perfectly clear, that where an agreement was obtained under such circumstances,—as by surprise, for example,—that it was not fit to be acted upon in equity, it was unfit that it should be acted upon at law, and in such cases the practice was to order

it to be delivered up; or, if an action was brought upon it, to order a perpetual injunction to restrain that action. He could not see why, if it was improper to act on this agreement in equity, it should be acted on at law. His opinion therefore was, that the decree ought to be affirmed, and he was authorised to state, that a noble and learned Lord, (*Carlton*,) not now present, but who had attended at the hearing, concurred in that opinion.

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Decree *affirmed*.

Judgment.

Agent for Appellant, WHITTON.
Agent for Respondent, ———

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

HENDERSON and BROWN—*Appellants*.
SIR JOHN MALCOLM—*Respondent*.

LEASE for 99 years falls under the prohibition against alienation in a strict entail. Points of form. Remit for review in *Macdonell v. Macdonald*, 66 *ante*, ought not to have been made.

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ENTAIL.—RES JUDICATA.

THE Respondent's father held the estate of Balbedie under a strict entail executed in 1725, with prohibition against alienation, &c. In 1754 he

Balbedie entail.