ALEXANDER MOFFAT of Sundaywell, . *Appellant.*

ISABELLA MOFFAT, only child of the deceased Wm. Moffat, and her Curator *ad litem*, *Respondents.*

House of Lords, 19th June 1816.

REDUCTION OF DEED—PROOF—ADMISSIBILITY OF WITNESS—AGENCY—*Penuria testium.*—1. Circumstances in which deeds were reduced and set aside on the ground of incapacity, force and fear, and irregularities in the execution of the deeds. 2. Held that the objection stated to the admissibility of two witnesses on the ground of relationship (nephews) to the party adducing them, fell to be sustained. 3. Objection being stated to the admissibility of Anthony MacMillan as a witness, on the ground of agency, the same was repelled, in respect that there was a *penuria testium* on the matters in which it was proposed to examine him.

The late William Moffat, Esq. of Muirbrook, made a disposition of his estate, whereby he conveyed it to the appellant, excluding his daughter, the respondent.

Actions of reduction were brought by the respondents on various grounds, chiefly, 1st, That the late William Moffat having been seized with palsy, was ever afterwards weak in his mental faculties, easily persuaded, and liable to be concussed into the granting of deeds. 2d, That, in particular, he was compelled *vi et metu* of his brother, the appellant, to grant the deeds libelled on, by carrying him away from his own house to Sundaywell, and there getting him to grant the deeds. 3d, That the deeds were not signed in a proper manner. That his hand was led, and no notarial subscription attested these facts. 4th, That the deceased wished to revoke these deeds, but was prevented *vi et metu* of his brother, the defender. He had desired a friend to send him a man of business for that purpose, assigning this reason, that the deeds so granted had been granted through misrepresentation, force, and fear. The misrepresentation here alluded to was, that the respondent was not his child, but that she was begot while he and his wife were staying with a Mr Grierson.

A long proof was led, in the course of taking which, an objection was stated to the admissibility of Anthony MacMillan, a writer (who was adduced for the purpose of proving that, after the execution of the deeds sought to be reduced, the deceased had intended to execute a settlement in favour of the respondent, Isabella Moffat), on the ground that he had

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been employed by the respondents as the agent in the country, from the commencement of the process, and still continued to act in that capacity; and that he had made inquiries at many of the witnesses as to the evidence they could give in the cause; and that he had attended the examination of several of the witnesses. Mr MacMillan's examination *in initialibus* estab-

Feb. 21, 1811. lished these facts. The Lord Ordinary (Robertson) repelled the objection, "in respect he understands that Alexander "MacMillan has not been examined as a witness in the cause "generally, but merely as to the particulars stated in the "fifth article of the pursuer's condescendence, as to some of "which it is alleged there is a *penuria testium*." On the other hand, the appellant adduced Thomas and Robert Stott, his nephews, as witnesses, but the respondents objected to

Nov. 26, 1812. them on the ground of relationship and interest, and the Court unanimously sustained this objection on account of the interest.

Jan. 14, 1813. Upon the result of the proof, the Court were clearly for

Mar. 9, 1813. reducing the deeds, and pronounced judgment accordingly.*

Against these interlocutors, the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1st, The late William Moffat of Muirbrook was absolute and unlimited proprietor of his estate and effects, and disposed of the same to the appellant by the dispositions dated 28th February, and 31st May 1802, which were executed by the said William Moffat, while of a sound and disposing mind, and according to the formalities prescribed by the law of Scotland. It is true that Muirbrook had been seized with a palsy some years before he executed the deeds in question, but it is not true that his faculties were impaired by the effects of disease. The proof which has been led in this case, demonstrates that the respondents' allegations are altogether unfounded, and that Muirbrook, at the time of executing the deeds under challenge, was not only of a sound and disposing mind, but was possessed of a judgment

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* NOTE.—Opinions of judges:—

"The Court all refused a reclaiming petition, Lord Robertson only for Sundaywell, I went mainly on the evidence of weakness on the part of the testator, the powerful and sedulously sustained influence by the defender over him, and finally (not noticed in the petition), the preventing him from having an opportunity to alter the deed, which he seemed desirous to do."—*Lord Meadowbank's Session Papers.*

perfectly clear and unimpaired by disease. In judging of the evidence on the head of his capacity, it ought to be kept in view that he had always a determination to leave his property to some one or other of his relations, to the exclusion of the respondent. This resolution he often expressed. From an analysis of the evidence regarding the state of Muirbrook's mind, it appears that the respondents have scarcely even attempted to prove the slightest degree of incapacity, although upon this the foundation of their case was rested; while the evidence of the appellant on this subject is of the most decisive character. But, it is said, that the deeds challenged were procured by intimidation and undue influence, which the appellant acquired over him, and, therefore, that he was compelled *vi et metu*. If he had previously determined to convey his estate in the manner he did, that is, by excluding his wife's daughter, it could not be possibly necessary to use either undue influence or force and fear to make him do that, which, for years, he had resolved to do. But this is negatived in the most positive manner by the person who drew the deed, and the instrumentary witnesses, who declare that it was freely and voluntarily executed by him, after having been read over.

2d, Supposing it to be proved that the appellant had obtained a certain degree of influence over the mind of his brother, this would afford no relevant ground in law for setting aside deeds which the grantee had full power to execute, and which he actually did execute freely and voluntarily, and in sound mind.

3d, The evidence of Thomas and Robert Stott would have been extremely material to the cause, and these persons ought to have been admitted as witnesses. Although, in the general case, persons standing in the relation of nephews to a party have been incompetent, yet, where there is a *penuria testium* upon the point, the law relaxes that rule. Thomas Stott lived in the same house with Muirbrook, and Robert Stott was his medical attendant, and both were well qualified to speak as to whether undue influence had been used by the appellant.

Pleaded for the Respondents.—1st, That the deceased, when he executed the deeds under reduction, was labouring under a painful and most distressing disease, which impaired his mental faculties, and rendered him peculiarly subject to be swayed, intimidated, and concussed into doing whatever might be wished for by those who had the charge of him.

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He was completely under the influence of the appellant, as is proved by several witnesses, which influence was produced by fear, by persuasion, or the joint operation of both, of the appellant, in whose favour these deeds were executed.

2d, That he was kept in a state of imprisonment, from which he was anxious to get free. He was not permitted to see any person with the appellant's knowledge; and, in particular, that watch was put upon him, with strict orders to have the appellant instantly sent for, whenever the deceased should be seen speaking to a man of business.

3d, The deeds in question were, besides, made out by the agent, and under the orders of the appellant, and not of the deceased; that the appellant was present, and gave his directions when they were executed; and that the deceased, the grantor of the deeds, repeatedly and solemnly declared that he did not know their import, as is proved both by the depositions of numerous witnesses, and by the undoubted fact that he understood them to have been *mortis causa* settlements. The deceased was most anxious to alter these deeds, and that he was prevented from doing so, by the direct and personal interference of the appellant himself, at the moment when he had got a new settlement written out, ready for subscription, by which he intended to alter them.

4th, That the examination of Anthony MacMillan was admissible, according to the principles of the law of Scotland, but that it was incompetent to examine the Stotts as to the points proposed by the appellant.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *H. Brougham, R. Jameson.*
For the Respondents, *Francis Horner, Robt. Bell.*

NOTE.—Unreported in the Court of Session.

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[Dow., Vol. iv., p. 279.]

SIR DAVID MAXWELL of Cardoness, Bart., and Others, Heritors of the parish of Anwoth, in the Stewartry of Kirkcudbright, } *Appellants;*

ROBERT GORDON, Writer, Factor, appointed by the Reverend the Presbytery of Kirkcudbright, ... } *Respondent.*