[Mor. 4964.]

HELEN RUTHERFORD or SCOTT, Widow of WM. SCOTT of Newcastle, ... } *Appellant;*

ARCH. JERDON, (formerly called JERDON CAVERHILL), and JEAN JERDON his Sister, Infants, by their Guardian, and THOMAS CAVERHILL, Jedburgh, } *Respondents.*

House of Lords, 23d Feb. 1791.

REDUCTION OF DEEDS—FRAUD AND INCAPACITY.—Held that deeds granted by a person 95 years of age, subject to attacks of palsy, and where the memory was a good deal impaired, were sustained;—the deeds having been executed several years before his death, and before these shocks and impaired memory had appeared.

The appellant was the heir at law, and next of kin of the late Archibald Jerdon of Bonjedward, her uncle: She brought the present action before the Court of Session to set aside and reduce the will of her said uncle, executed by him, whereby he conveyed his whole real and personal estate to the respondents, who were the children of a natural daughter of the deceased, to whom he had a strong attachment, and who had been brought up in his house from infancy.

The grounds of the reduction were, 1. That at the time the deeds were executed, the said Archibald Jerdon was through age, and the effects of a paralytic disorder, so much reduced in point of intellect, as to be incapable of giving directions for executing his will, and was in a state liable to be led by any person who happened to be about him, and was totally incapable of judging for himself, or forming any deliberate will of his own, or understanding the import of any such. 2. That the deeds so executed were fraudulently impetrated from him by the respondents, or some of them, or by persons employed by them. Thus incapacity and fraud were the grounds of the reduction.

The Lord Ordinary having allowed a proof.

It was proved that the maker of the deed had had a severe stroke of the palsy before executing the deed—that he was 95 years of age. The doctor who attended him for six years before his death, stated about three years before his death that he had a stroke of the palsy, and that he attended him:—"that he did not continue very long ill "of that disease, and he recovered perfectly of it in point of bodily "health; but he had upon him at the same time a scorbutic erup- "tion, which continued for years, and for which and other complaints "the deponent continued to attend him to the time of his death. "That after he recovered the said stroke of palsy, Mr. Jerdon, in "the intervals of his illness, appeared to the deponent to converse "rationally and sensibly enough; but that he had more shocks of "the palsy than one; namely, one in 1784, which was the first, and

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"after that he had several other slight shocks: That at these times "he appeared to the deponent to be considerably affected both in "point of judgment and memory, but more in point of memory than "judgment, being at a loss for words to express his ideas: That "some of these shocks were so slight as to be got the better of in a "day or two; and that there was no shock that he can remember "of between 1780 and 1784: That between the years 1780 and "1784 Mr. Jerdon did appear to him to be capable of ordinary "business; as also that he appeared to the deponent tenacious of his "own opinions, and attentive to his own interests."

Mr. Jerdon died in 1786, at the advanced age of 95. And the three deeds executed were dated respectively in 1778, in 1781, and a third testamentary deed 25th September 1783.

Nov. 17, 1789. The Court repelled the reasons of reduction.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—Although it is certainly a just rule, that effect should be given to the *ultima voluntas testatoris* even to the exclusion of the lawful heirs; yet, on the other hand, the best and the wisest may be reduced to such a state of weakness, in which situation advantage may be taken, by the artifice of designing and officious men. The law is properly careful to preserve the succession of persons labouring under such weakness of understanding, and therefore the utmost jealousy is to be entertained of deeds of settlement executed in the circumstances of the present deed. At the time these deeds were executed, it is established by the proof that Mr. Jerdon was incapacitated both in mind and body, and this, added to the fraud and circumvention, ought to be sufficient to set them aside. Under the head of circumvention, it is not necessary to prove such a degree of it as would have deceived even a person of sound understanding. But that it is enough if such a degree of incapacity is proved as makes the person evidently liable to be acted upon by that specific degree and kind of artifice and influence which are also proved to have been exerted against him. Even supposing total incapacity were not proved, and that Mr. Jerdon had still flashes of reason and partial restoration, yet, it is undeniable his mental capacity was impaired, and the will obtained by the arts of strangers who were about him at the time. In many instances the Court of Session have set aside deeds on similar grounds. Thus in the case of Dallas *v.* Dallas in 1773, the deed was reduced on proof of weakness on the part of the granter, and circumstances of undue influence on the part of those who obtained the deed in prejudice of the nearest heirs. In the case of Trotter *v.* Trotter, in 1774, the will was set aside, although in favour of the nearest heirs, because it had been procured by importunity and fraud. In the case of Macarthur, the chief ingredient in the proof was that the father, who was the daughter's heir, was kept at a distance; and there was no proof of previous instructions to execute the deed, emanating from Miss Macarthur her

self. And in Brown against Chalmers, where the judgment of the Court of Session was affirmed in the House of Lords, the chief circumstance in the cause was, the interference of a writer, who used arguments with his employer, a man far advanced in life, and rendered weak by disease, and by habits of intemperance, though, at the time of executing the will, he was quite sober, and the will was read to him. In the case of Crawford of Doonside there was no bad intention of any kind; but Mr. Crawford had delayed too long the important business of making his will. He relied upon very honourable gentlemen, who were present when he put his name to it, without being able either to read or hear it read, and the will was set aside.

Pleaded for the Respondents.—There are two points. 1st. Incapacity. 2d. Fraud. As to the first, the only point of time at which it is material to inquire into the state of Mr. Jerdon's health and understanding is the date of the will. What he was before, or what he became after, is of no consequence, provided that at that date he was of sound disposing mind. But the appellant's evidence, avoiding that particular period, takes a range of several years, and, picking up scanty anecdotes of infirmity or occasional mental debility during parts of that period, imagines this is enough. She has proved the deceased had a stroke of palsy in 1780—that he continued more or less under it till May 1781—that though he then recovered completely, he had a second attack in 1784, and others at different times. But there is no evidence that he was ill at the date of these deeds. As to his not being able, after the first stroke, to express himself with that ease and fluency as formerly, the respondent is willing to admit this, but that can never go to establish incapacity. On the contrary, down to the date of his death in 1786, he continued to enjoy the full possession of his mental faculties for a man of his years. In regard to fraud, the whole is founded upon the mere supposition that she, being the deceased's heir, he must have had a predilection for her, unless some fraud had been used; but the whole circumstances showed that he had never any intention of favouring her, and that this predilection was in favour of his natural daughter, in whose favour every deed that was made was executed. The last will was in favour of her infant children, who could not be participant or privy to any fraud or scheme whatever, and the agent chosen to execute this deed was a man of established character in the first rank of his profession. On all these grounds, therefore, there was not sufficient evidence to set aside the deed.

After hearing counsel, it was
Ordered and adjudged that the interlocutors be affirmed.

For the Appellant, *T. Erskine, J. Anstruther.*
For the Respondents, *Sir J. Scott, Rob. Blair, Alex. Abercromby.*