

pose he is a collier, I may say his employment exposes him to the risk of having things falling upon him from the roof, to the danger of tumbling down a shaft, and so on. In short, there is a peculiar class of dangers which exists only for people who go down into mines. I put in debate, I think, the illustration of the sandwichman who goes about the streets all day, and, mercifully for the other pedestrians, is not allowed to go on the pavements; and he is exposed on the streets to the danger of being run over by wheeled traffic. But if you had asked this, what are the special dangers incidental to the employment of a plumber who occasionally has outdoor work, nobody in their senses would have said, "Oh, heat apoplexy"; and when you come to the cause of heat apoplexy you come to the circumstances here, and I should say the *causa causans* was much more the man's own drinking habits than the sun on that particular day. There was an attempt to base an argument on the Sheriff's use of the words "excessive heat." Excessive heat is no standard. He only says it was in July 1911. We all know that July 1911 was a hot month; but to say that anyone who works, as it has been called, "Neath the baleful star of Sirius" is necessarily exposed to an excessive or peculiar danger, is a proposition which has no foundation.

On the whole matter I am very clearly of opinion here that there was no ground upon which this workman ought to have been awarded compensation. I think this case is very analogous to the case of *Warner v. Couchman* ([1911] 1 K.B. 351), and that one's whole opinion is very well summed up in the words in which the reporter has rubricated that case. It is this—that even assuming that there had been an accident, there was no peculiar danger to which the applicant had been exposed beyond that to which other persons engaged in outdoor work on that day had been exposed, and consequently that the accident had not arisen out of his employment.

LORD KINNEAR—I agree, for the reasons which your Lordship has given, and which I do not repeat. I only say in a word that I do not think that this man was exposed by his employment to any special risk to which other people were not liable, provided they happened to be working in the open air on the 26th July 1911. The only special circumstances which the Sheriff's statement of facts adds to that which I have mentioned is that the man, owing to his own habits, was in a state of impaired vitality at the time; and accordingly the Sheriff thinks that the danger of working in unusual heat was aggravated by his own physiological condition; but that is not an exceptional circumstance incident to the employment, but incident to the person. I therefore agree with your Lordship.

LORD MACKENZIE—I agree.

LORD JOHNSTON did not hear the case.

The Court pronounced this interlocutor—

“ . . . Answer the questions stated

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by declaring that the injury to the deceased Joseph Blakey was not an accident within the meaning of the Workmen's Compensation Act 1906, arising out of his employment: Therefore reverse the determination of the Sheriff-Substitute as arbitrator, and remit to him to dismiss the claim.”

Counsel for Appellants—Morison, K.C.—W. J. Robertson. Agents—Macpherson & Mackay, S.S.C.

Counsel for Respondent—D. Anderson—Steedman. Agents—Steedman, Ramage, & Co., S.S.C.

Wednesday, December 20.

FIRST DIVISION.

[Lord Ormidale, Ordinary.]

HORSBURGH v. THOMSON'S EXECUTORS AND OTHERS.

Fraud—Facility and Circumvention—Will—Reduction—Averments—Relevancy.

Circumstances in which held that a bare averment that A had impetrated a will, taken in conjunction with the "setting" in which it appeared, which included relevant averments of the testator's weakness and facility, and of A's great influence over him, was relevant to support an issue of facility and circumvention.

On 24th July 1911 Amelia Taylor Horsburgh, residing at Lochtyknowe, Carnoustie, pursuer, brought an action against (1) John Thomson, potato merchant, then residing in London, and others, executors of the late John Thomson, 11 Nethergate, Dundee; (2) the said John Thomson as an individual; (3) Mrs Isabella Thomson or Campbell, widow, 11 Nethergate, Dundee; (4) Mrs Jane Thomson or Watson, wife of and residing with Frank Watson at Rosemount, Carnoustie, and the said Frank Watson as curator and administrator-at-law for his said wife, *defenders*, for reduction of (*first*) the last will and testament of the said John Thomson, dated 25th February 1896, *quoad* a pretended deletion on the first page thereof of a clause containing these words—"In the event of any of them dying, their share to be divided to their children," and a pretended withdrawal of the clause by a marginal addition in the following terms—"I withdraw this.—J. Thomson"; (*second*) a pretended codicil dated 19th January 1901; (*third*) a second pretended codicil dated 1st October 1907; and (*fourth*) a third pretended codicil, undated, and containing these words—"Bella is get the ground in the Western Cemetery."

The pursuer averred—"(*Cond.* 1) The deceased John Thomson, of 11 Nethergate, Dundee, died on 30th March 1911, being then not less than 93 years of age. He left a last will and testament dated 25th February 1896, whereby he appointed the defenders John Thomson and Frank Wat-

son executors, and which provided for the liferent of his estate being given to his wife (who predeceased him), and on her death, with certain exceptions, being divided into 'Four equal parts, 1st to John, 2 Jessie, 3rd Bella, 4 Jeannie, in the event of any of them dying their share to be divided to their children.' The said deceased John Thomson was survived by his son John, and by his daughters Mrs Isabella Thomson or Campbell (Bella) and Mrs Jane Thomson or Watson (Jeannie), who are called as defenders. He was predeceased by his daughter Mrs Jessie Thomson or Horsburgh (Jessie). The pursuer is a daughter of the said Mrs Jessie Thomson or Horsburgh, and as such has an interest in the estate of the said deceased John Thomson as a beneficiary under the said last will and testament. The pursuer is also one of the heirs *in mobilibus* of the said deceased John Thomson. (Cond. 2) After her husband's death in 1900 Mrs Campbell made her permanent home at 11 Nethergate, Dundee, and continued to live there right down to the date of her father's death. From Mrs Thomson's death in 1899 to Mr Thomson's death in 1911 the only occupants of the house were Mr Thomson, Mrs Campbell, and a maid. . . . (Cond. 3) The pursuer's mother Mrs Jessie Horsburgh was the favourite child of her parents, and during her lifetime both Mr and Mrs Thomson took a great interest in her and in her husband and children. They paid frequent visits to the pursuer's parents at Invergowrie, and sent their grandchildren a small present each year. In the year 1899, shortly before Mrs Thomson's death, and when Mrs Horsburgh was also seriously ill and little hopes entertained of her ultimate recovery, Mr Thomson sent for her to come into Dundee to see him. Mrs Horsburgh went to the house at 11 Nethergate, Dundee, as desired, and saw her parents. Her father Mr Thomson on that occasion acquainted her with the terms of the said will and testament of 1896, and requested her not to worry about money matters as he had made it all right for her children. . . . (Cond. 4) After Mrs Horsburgh's death her husband and her children continued on friendly terms with Mr John Thomson. Mr Horsburgh, who was nominated an executor in the will and testament of 1896, called for him once a fortnight, as had been his custom for years, and the pursuer and her brothers and sisters also paid him visits at frequent intervals. It soon became noticeable to them, however, that there was a change in Mrs Campbell's attitude towards them, and this became still more apparent after Mr Horsburgh's death in 1905. When the pursuer or any of her brothers or sisters called they were not shown as formerly into their grandfather's presence, but were put into an ante-room to await Mrs Campbell. They had great difficulty in seeing their grandfather at all, and on their expressing a wish to do so, were always put off by some excuse made by Mrs Campbell, who excluded them from seeing their grandfather. Their grandfather, who for-

merly sat in a front room, was kept by Mrs Campbell in a small back room, and during the last four or five years prior to his death the pursuer was only able to see him on two occasions, although she called very frequently to ask for him. It was evident to the pursuer and her brothers and sisters that Mrs Campbell did not want them to call at their grandfather's home, and that Mrs Campbell was endeavouring to estrange the affection in which their grandfather had held them and to cause him to forget them altogether. Neither Mrs Campbell nor Mrs Watson took any interest in the pursuer or her brothers or sisters. (Cond. 5) The late Mr John Thomson was at his wife's death over eighty years of age, and thereafter changed very rapidly in his mental capacity. He became taciturn and reserved and could only keep up a conversation with difficulty. About or shortly after this time his memory began to be defective, and he could not grasp the meaning of things. His mental condition became gradually worse, owing to advancing age and senile decay, and before Mr Horsburgh's death in 1905 it was obvious that he was quite unable to attend to any business affairs. From 1905 onwards the symptoms became worse, he was quite unable to read, and he could not distinguish the different coins of the realm, he had frequent attacks of heart seizure, but when he recovered he could not recollect that he had been ill. He was dazed and stupid. He was unable to talk with intelligence on any subject, and he took no interest in his own affairs. The enfeebled physical and mental condition of the said John Thomson was well known to the defenders, who both verbally and in writing expressed the opinion that he was no longer capable of managing his own affairs. He had no friends, having outlived his contemporaries, and he spent the last four or five years of his life sitting gazing into the fire in the back room. The pursuer believes and avers that from the year 1900 until the date of his death the said John Thomson was mentally incapable of disposing of his estate, or of giving intelligent directions for its disposal, and that the deeds sought to be reduced are thus not the deeds of the deceased, and that he was not mentally capable of making the deletion in question, *which as after mentioned was made on or about 1st October 1907.* [The words in italics were added by way of amendment in the Inner House.] Even assuming that deceased was mentally capable of executing the said deeds and making said deletion, which is denied, he was at the dates in question weak and facile in mind and easily imposed upon, and the defender Mrs Campbell, as before and after mentioned, taking advantage of his said weakness and facility, procured the said documents from him to his lesion. . . . (Cond. 6) After Mrs Thomson's death Mrs Campbell obtained a great influence over the said John Thomson. She assumed the management of his affairs, and intromitted with the rents of his property. She demanded various sums at different times as remuneration for addi-

tional trouble in nursing him during his frequent heart attacks and obtained these sums by threatening to go away and leave him to strangers. He was pliable in her hands and was unable to resist any suggestion she made, and she prevented him seeing his other relatives, or at any rate the pursuer and her brothers and sisters. On several occasions Mrs Campbell applied for her own use without her father's knowledge sums of money belonging to him. Mrs Watson, who was aware of Mrs Campbell's actings, was given a portion of these moneys to ensure her silence. The deceased in his younger days was particularly careful of money, indeed miserly, but for years before his death, and in particular at and prior to the date of the deeds sought to be reduced, he was quite unable to look after money or appreciate its value. Mrs Campbell in particular, taking advantage of the said John Thomson's facility, got into her possession the money which the said John Thomson had deposited with the Dundee Savings Bank or other Dundee bank, and applied it for her own purposes. She also without his knowledge or consent collected and applied to her own use a sum of money due to him by the tenants of his Melville House property. The said John Thomson during the last five or six years of his life, owing to old age, weakness, and facility, was in a condition to be influenced by anyone who desired to take advantage of his facility, and the pursuer avers that Mrs Campbell, taking advantage of the deceased's weakness and facility, on or about 1st October 1907 induced him to delete from his last will and testament the said clause in favour of the children of any predeceasing parent, and to execute the said pretended withdrawal and the said pretended codicil in favour of the defenders Mrs Campbell, Mrs Watson, and Mr John Thomson, when he was in such a condition physically and mentally as not to be able to resist Mrs Campbell's influence and the pressure which she brought to bear on the deceased to make the foresaid deletion and to execute the deeds under reduction. The said Mrs Watson and Mrs Campbell are and have been on terms of great intimacy for some years, although formerly they were otherwise, and it is averred that they decided to have the pursuer and her brothers and sisters disinherited, being influenced through greed and a desire to hurt the pursuer and her brothers and sisters, towards whom they had conceived an ill-will. The pursuer further avers that the pretended codicil of 19th January 1901, and the pretended codicil dealing with the ground in the Western Cemetery, were similarly procured by the said Mrs Campbell at a time when the said John Thomson was incapable of appreciating their import and effect or executing them, and in any event when he was weak and facile and easily imposed upon and circumvented by Mrs Campbell. In these circumstances the deletion and withdrawal in said last will and testament and the said three pretended codicils, all under reduction, were impetrated from the deceased by the defender

Mrs Campbell by fraud or circumvention when he was weak and facile, and this action has accordingly been rendered necessary. . . ."

The pursuer pleaded, *inter alia*—“(2) The said pretended deletion and withdrawal, and the said three pretended codicils having been impetrated from the deceased John Thomson by the defender Mrs Campbell by fraud or circumvention, when the said deceased was weak and facile and easily imposed on, the pursuer is entitled to decree of reduction as craved.”

The defenders pleaded, *inter alia*—“(1) The pursuer's averments, so far as material, being irrelevant, the action ought to be dismissed.”

The defender Mrs Campbell stated the following additional plea—“*Separatim*—The pursuer's averments of facility and circumvention are irrelevant and wanting in specification, and ought not to be remitted to probation.”

On 7th December 1911 the Lord Ordinary (ORMIDALE) allowed, *inter alia*, the following issues—“(4) Whether on or about 1st October 1907 John Thomson was weak and facile in mind and easily imposed on, and whether the defender Mrs Isabella Thomson or Campbell, taking advantage of his said weakness and facility, did by fraud or circumvention obtain from him the said pretended deletion on the first page of the said last will and testament of the said clause containing these words—‘In the event of any of them dying, their share to be divided to their children,’ and the said pretended withdrawal thereof by a marginal addition in the terms above set forth, to the lesion of the said John Thomson? (5) Whether on or about 1st October 1907 John Thomson was weak and facile in mind and easily imposed on, and whether the defender, the said Mrs Isabella Thomson or Campbell, taking advantage of his said weakness and facility, did by fraud or circumvention obtain from him the said second pretended codicil to said last will and testament, dated 1st October 1907, to the lesion of the said John Thomson? (6) Whether at and subsequent to 1st October 1907 John Thomson was weak and facile in mind and easily imposed on, and whether the defender, the said Mrs Isabella Thomson or Campbell, taking advantage of his said weakness and facility, did by fraud or circumvention obtain from him the said third pretended codicil to said last will and testament, undated, to the lesion of the said John Thomson?”

[An issue was not asked for with regard to the validity of the codicil dated 19th January 1901.]

Opinion.—“In my judgment the averments contained in cond. 5 are clearly relevant to infer that the deceased Mr Thomson was not of sound disposing mind at the dates of the writings which are sought to be reduced.

“With regard to the questions raised by issues 4, 5, and 6, it was not disputed by defenders' counsel that weakness and facility were relevantly averred, and I think it must be taken from all that is said

about her and her relations to her father, that the defender Mrs Campbell had very great influence with and over her father. That fact of itself does not raise any presumption against the fair dealing of Mrs Campbell. It was only natural that she should have such influence, and that he should impose very great confidence in her, and it was quite proper, if not necessary in the circumstances, that she should take into her own hands the entire management of the household affairs. But it is averred—I give the substance of the averment—that she abused the confidence of her father, and that she appropriated to her own use, more than once, sums of money which she had no right to take, and that she bribed her sister to hold her tongue with regard to these delinquencies. The averments may be absolutely untrue, but I am bound at this stage of the proceedings to assume the contrary, and the incidents referred to must be taken as instructing at once the inability of the deceased to protect himself against his daughter, and of the readiness of the daughter, when she had a purpose to serve, to take advantage of her father's weakened state of health.

“It was maintained, however, by the defenders that there was nothing said on record to connect any instance of Mrs Campbell's alleged abuse of her father's trust in her with the impetration of the writings sought to be reduced. There is much force in this contention, and it is, I think, literally correct, but at the same time I should, in my opinion, be reading the record too strictly if I were to give effect to it. The averments of impetration in cond. 5 and cond. 6, though expressed in general terms, are just the accustomed averments made in cases like the present, and they must not be dissociated from the setting in which they are found. Regarding and reading them in the light of the other averments in the record, I am bound, on the authority of the cases cited at the bar—*inter alia*, *Rooney v. Cormack*, June 22, 1895, 22 R. 761, 32 S.L.R. 544; *Williams v. Philip*, 15 S.L.T. 396—to hold that there is sufficient matter to found an issue of facility and circumvention. There is an averment of motive, and the statements as to what Mr Thomson said to the pursuer's mother about not worrying about money matters as he had provided for her children, and the denial by Mrs Campbell to his grandchildren of access to their grandfather's room, go some way to meet what seems to me otherwise a well-founded argument of the defenders on the terms of the writings themselves.

“As regards the absence of any specific averment of the arts and wiles practised by the defender, the case of *Cluny v. Stirling*, November 14, 1854, 17 D. 15, warrants the view that precise details of the mode of circumvention are not required. Much must, of course, depend on the circumstances of each particular case. Here it may be noted that the writings are all holograph of the deceased, and the assistance

of an agent was not therefore required for their execution, and the *locus* of the impetration was the deceased's room, from which he was unable to move. On the whole matter it seems to me that it would not be safe to dispose of the question of facility and circumvention without inquiry—and I see no reason for not following the usual course and sending the case to a jury—I shall therefore approve of the issues proposed by the pursuer.”

The defenders reclaimed, and argued—The impetration by Mrs Campbell must be proved as well as the facility of the testator, but there were no averments which connected Mrs Campbell with the impetration. Without such averments the case was irrelevant—*M'Kechnie v. M'Kechnie's Trustees*, October 30, 1907, 1908 S.C. 93, 45 S.L.R. 38. In the case of *Clunie v. Stirling* (*supra*) the deed reduced had caused enorm lesion to the signatory, but in the present case the effect of the deletion was not wholly in favour of Mrs Campbell. If she had predeceased the testator her children would have been excluded from benefiting under the will. The case of *Rooney v. Cormack* (*supra*) was distinguishable, because in that case it was averred that the deed had been impetrated by the grantor's confidential law agent, who had actually procured the signature.

Counsel for the pursuer were not called upon.

LORD PRESIDENT—I have no doubt that the Lord Ordinary is right. Indeed I think the whole of the reclamer's argument was only made possible by the confusion of two questions—the question of what is a relevant averment, and the question of what the pursuer must prove in order to succeed in the action.

I do not know what the pursuer could have averred, beyond saying that the testator was in a weak and facile state of mind. She must prove that before she goes any further, and if she does not prove that her case goes. Having proved that, she must proceed to show that some particular person impetrated the deed. She has stated that this was done by Mrs Campbell, and I do not see what more she could be expected to aver.

A great point has been made by the defenders that anyone could make such a statement. That is quite true, but such a statement would only carry a pursuer the length of a proof and no further.

After all I do not think that it can be said, in fairness to the pursuer, that her averments are so bald as they were argued to be, because you cannot dissociate the statement in cond. 6 from what I may call its setting as set forth in cond. 5. I wish to say very little on this point, and I am far from saying that that setting would necessarily lead to a conclusion that is inimical to the defender. It is just one of those settings which it is for a jury to consider and to say whether it does or does not give rise to the imputed suspicions.

I think this is a case that may perfectly well be tried under the recognised issues that have been allowed here.

LORD DUNDAS and LORD JOHNSTON concurred.

LORD KINNEAR and LORD MACKENZIE were absent.

The Court adhered.

Counsel for Pursuer and Respondent—Watt, K.C.—MacRobert—W. L. Mitchell. Agents—Cowan & Stewart, W.S.

Counsel for Defenders and Reclaimers, except Mrs Campbell—M'Clure, K.C.—C. H. Brown. Agents—Buchan & Buchan, S.S.C.

Counsel for Defender, Mrs Campbell—Macquisten. Agents—Alex. Morison & Company, W.S.

Thursday, December 21.

FIRST DIVISION.

[Sheriff Court at Kirkcudbright.

KIRKPATRICK v. LOCAL AUTHORITY OF MAXWELLTOWN.

Process—Appeal—Note to Ordain Sheriff to State a Case for Opinion of Court—Competency—Housing, Town Planning, &c., Act 1909 (9 Edw. VII, c. 44), sec. 39 (1).

The Housing, Town Planning, &c., Act 1909, sec. 39 (1), as applied to Scotland by sec. 53 (14), enacts—"The procedure on any appeal under this part of this Act . . . to the Sheriff shall be such as the Court of Session may by Act of Sederunt determine, and on any such appeal the Sheriff may make such order in the matter as he thinks equitable, and any order so made shall be binding and conclusive on all parties . . . Provided that (a) the Sheriff may at any stage of the proceedings on appeal, and shall, if so directed by the Court of Session, state in the form of a special case for the opinion of the Court any question of law arising in the course of the appeal . . ."

In an appeal to the Sheriff against a closing order pronounced by a local authority under the Housing, Town Planning, &c., Act 1909, the appellant lodged a minute craving the Sheriff-Substitute to state a case on certain questions of law. The Sheriff-Substitute having refused the motion, the appellant presented a note to the Court for an order on the Sheriff-Substitute to state a case.

Circumstances in which the Court sustained the competency of the note, but, of consent of parties, disposed of the case on the merits.

Sheriff—Appeal to Sheriff against Closing Order—Power of Sheriff to Disallow Condescence and Answers—Housing, Town Planning, &c., Act 1909 (9 Edw. VII,

c. 44), secs. 17 (3) and 39—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, c. 51)—A.S. 4th November 1910.

The Act of Sederunt 4th November 1910, for regulating appeals to the Sheriff under Part I. of the Housing and Town Planning, &c., Act 1909, enacts, sec. 1—"Appeals to the Sheriff under Part I. of the Housing and Town Planning, &c., Act 1909 shall be by initial writ under the Sheriff Court (Scotland) Act 1907 (7 Edw. VII, c. 51), Form A (m); and the proceedings thereon shall be as laid down in that statute."

A local authority pronounced a closing order under the Housing, Town Planning, &c., Act 1909, closing a dwelling-house as unfit for human habitation. The owner appealed to the Sheriff, who disposed of the appeal without allowing a condescence and answers. The report by the medical officer was, however, produced in process, and the appellant was fully aware of the grounds on which the order was pronounced.

In an application at the owner's instance for an order on the Sheriff to state a case, held that the appeal was a summary application in the sense of the Sheriff Courts (Scotland) Act 1907, and that accordingly it was in the discretion of the Sheriff to refuse to allow a condescence and answers.

Local Government—Closing Order—Validity—Owner Not Heard or Called on to Repair before Order Made—Housing, Town Planning, &c., Act 1909 (9 Edw. VII, c. 44), secs. 15 and 17 (2).

The Housing, Town Planning, &c., Act 1909, sec. 15, empowers a local authority to call upon the owner of a dwelling-house which appears to them to be unfit for human habitation, to execute the necessary repairs, and failing his doing so to repair it themselves. Section 17 (2) enacts—"If, on the representation of the medical officer of health, or of any other officer of the authority, or other information given, any dwelling-house appears to them to be in such a state, it shall be their duty to make an order prohibiting the use of the dwelling-house for human habitation (in this Act referred to as a closing order) until in the judgment of the local authority the dwelling-house is rendered fit for that purpose."

Held that the local authority was entitled to proceed under sec. 17 (2) without first exercising their powers under sec. 15.

Held further that the fact that the owner had not been heard before the order was made did not render it inept, his remedy being to appeal to the Sheriff before it became operative.

Local Government—Closing Order—Validity—Form of Order—Specification of Grounds—"Dwelling-House"—Tenement of Houses—Housing, Town Planning, &c., Act 1909 (9 Edw. VII, c. 44), sec. 41.