

COURT OF SESSION.

Friday, May 29.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.]

MRS ELIZABETH M'LACHLAN v. ANDREW WATSON.

Agreement—Undue Consideration and Extortion—Reduction.

In a case where a party made an agreement to pay a certain sum for a certain number of years in consideration for a guarantee made by the other party to the said agreement, and for several years implemented it by granting promissory-notes for the yearly payments stipulated, *held* that, in the absence of evidence of fraud and circumvention, or of facility of the grantor, his executrix was not entitled to reduce the agreement on the ground of undue consideration and extortion.

This action was brought by the widow of the late David M'Lachlan, lessee of the George Hotel, Glasgow, for the purpose of reducing an agreement entered into by her late husband and the defender Andrew Watson.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 17th December 1873*—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, proof, and process; repels the reasons of reduction, sustains the defences, assoilzies the defender from the conclusions of the action, finds no expenses due, and decerns.

"*Note*—The question in this case is, whether the minute of agreement between the deceased David M'Lachlan, the husband of the pursuer, and the defender, dated 26th and 27th May 1868, and the eight promissory-notes, each for £300, granted by David M'Lachlan to the defender in pursuance of the said minute of agreement, are reducible upon the grounds stated by the pursuer, or any of them.

"The said minute of agreement was granted in the following circumstances—The deceased David M'Lachlan had for ten years previous to the date of that agreement carried on business as a wine and spirit merchant in Oxford Street, Glasgow. During the course of that business he had received from time to time pecuniary advances from the defender, all of which he had repaid, with the exception of about £150. Although that business had improved greatly under Mr M'Lachlan's management, and was in a flourishing state, he was desirous to give it up, and to become an hotel-keeper. Having seen, towards the end of 1867, an advertisement that the George Hotel in Glasgow was to let, he, after advising with the defender and other friends, applied for and obtained a lease of it for ten years from Whitsunday 1868, at the yearly rent of £770. The defender and the witness Robert Brown, a wine and spirit merchant, with whom Mr M'Lachlan dealt, became cautioners for payment of the first year's rent. As Mr M'Lachlan had not the funds which were necessary to enable him to carry on the hotel, he required assistance, and having applied to the defender, the latter agreed, as he avers, to assist him to the extent and

upon the terms set forth in the minute of agreement which the pursuer now seeks to reduce. The firm of Messrs J. & J. Boyd, writers in Glasgow, had been the law-agents both for Mr M'Lachlan and for the defender for some time before this agreement was made. They were employed to prepare it. Mr John Boyd, the senior partner of that firm, did so, and he went over the deed with both parties, and adjusted it with them before it was extended and executed.

"The said minute of agreement proceeds on the narrative of the lease of the hotel, and upon the further narrative that, in order to enable Mr M'Lachlan to furnish and carry on the hotel, he had applied to the defender to discount, or procure to be discounted, bills for him from time to time, to advance money, to guarantee payment of furnishings, and to purchase and give him various articles of furniture, plate, and others, and that the defender had agreed to do so on the terms and conditions therein set forth. By this agreement it is provided that, as the defender had already granted guarantees, or was liable to pay on account of David M'Lachlan to the extent of £4500, the defender thereby obliged himself, if called on, to lend or guarantee him to the further extent of £500. Mr M'Lachlan, on the other hand, bound himself duly to fulfil all guarantees come under by the defender; to grant bills for all sums paid by the defender to or for him, bearing interest at the bank discount rates; to repay all advances and furnishings, and to discharge all guarantees at or before Whitsunday 1872; and, in consideration of the advances and furnishings to be made, and guarantees granted by the defender for him, to pay the defender and his executors and successors, during the currency of the said lease, an annual bonus of £600 sterling, commencing the first payment of £300 at Martinmas first (1868), for the half-year preceding, and so on the same sum at each half-year of Whitsunday and Martinmas thereafter, until Whitsunday 1878 inclusive, with interest on each half-yearly payment if not paid. By the 6th article of the minute it is provided that M'Lachlan shall be entitled, so soon as the payments guaranteed and obligations undertaken by the defender shall have been fulfilled by him, to anticipate the payment of the said bonus, receiving discount on the payments made by anticipation at the rate of five per cent. per annum to the term when payable. The minute also contained a clause binding M'Lachlan, his executors and successors, to assign and transfer to the defender the lease and whole furniture, plate, and others, of the hotel, in security for the payment of the foresaid advances, furnishings, guarantees, and annual bonus, with power to the defender to sell or assign the same for payment of the sums due to him, or for which he should be liable.

"The £4500 mentioned in the minute as the sum to the extent of which the defender had at its date granted guarantees, or was liable to pay for Mr M'Lachlan, consisted of the proceeds received by the latter, less the discount of a bill for £1000, dated 30th April 1868, drawn by the defender upon and accepted by him, or of a promissory-note granted by M'Lachlan for that amount, which the defender endorsed, of a guarantee to Wylie & Lochhead for furniture to the extent of £2700, and of other guarantees. After the date of the minute of agreement, the defender gave further guarantees on behalf of Mr M'Lachlan, and

made furnishings to him. Mr M'Lachlan also received the proceeds, less the discount, of a promissory-note for £500, dated 10th November 1868, which he granted to the defender, and which the defender endorsed. The whole guarantees, advances, and furnishings exceeded the sum of £5000.

"Mr M'Lachlan died on 24th July 1872. The profits made by him during the four years that he carried on the hotel amounted to the sum of £5057, 3s., as appears from the report of Mr Hugh Blair, C.A., No. 37 of process. These profits were applied in payment of the sums due for furnishing the hotel and starting the business. Being unable to pay the half-yearly bonus stipulated in the minute of agreement, Mr M'Lachlan regularly granted to the defender for each bonus, as it fell due, the eight promissory-notes for £300 each now sought to be reduced. During these four years Mr M'Lachlan never objected to or challenged the minute of agreement in any way.

"In support of the conclusions of reduction the pursuer pleads—1st. That the obligations imposed on Mr M'Lachlan by the minute of agreement were without due or lawful consideration, and are exorbitant and unconscionable; 2d. That the minute of agreement and promissory-notes were imputed from Mr M'Lachlan by fraudulent representations and threats on the part of the defender; and 3d. That the deed was procured by the defender from Mr M'Lachlan by fraud or circumvention when he was in a weak and facile state of mind and easily imposed upon.

"The Lord Ordinary, after full consideration of the proof, is of opinion that the pursuer has completely failed to establish any facts and circumstances which can support the two last of these pleas. There is no evidence of any fraudulent representations or threats by the defender. There is no evidence that Mr M'Lachlan was in a weak and facile state of mind and easily imposed upon when he executed the minute, and no evidence that the defender, taking advantage of such facility and weakness, did by fraud or circumvention procure and obtain the said minute of agreement.

"The reason of reduction chiefly relied on by the pursuer is that which may be held to be embraced in her first plea in law. She maintained that the terms of the minute of agreement are so grossly inequitable and unconscionable as in themselves to establish fraud on the part of the defender, without the necessity of proving any special circumstances of fraud, the bargain being 'such as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would make on the other.'—(Lord Chancellor Hardwicke in *Chesterfield v. Janssen*, 4th February 1750, 1 White and Tudor's Leading Cases, 585). She also maintained that the consideration given by the defender was not only wholly inadequate, but that there was misrepresentation by him in regard to a very material part of that consideration, namely, the guarantee for £2700 to Messrs Wylie & Lochhead. And she contended that the position of Mr M'Lachlan was so necessitous in consequence of having taken the lease, and of not having the funds required to carry on the hotel, that he was entirely at the mercy of the defender, who (as he admits) advised and assisted M'Lachlan in the negotiations which terminated in the lease, and that the defender, taking advantage of such necessities, extorted from M'Lachlan the

exorbitant bonus of £6000 in consideration of the advances and guarantees above set forth.

"There can be no doubt that the defender made a very hard bargain with Mr M'Lachlan. But mere inadequacy of consideration will not, *per se*, invalidate the agreement. Such inadequacy will, no doubt, form a very important element in considering the question whether there has been fraud. The question then is, whether the facts and circumstances established by the proof in the present case do, when taken in conjunction with the great inadequacy of consideration, establish a charge of fraud against the defender in obtaining the minute of agreement from Mr M'Lachlan.

"And first of all, with regard to the consideration given by the defender; according to the proof he undertook obligations or granted guarantees for Mr M'Lachlan, and supplied him with goods to the amount in all of about £5070. Of these guarantees, one of them, for £368, 10s. 6d. to Roberts & Belk of Sheffield, was a verbal guarantee, and therefore not binding. But this does not seem to have been known to the defender. Mr Wylie of Messrs Wylie & Lochhead, who supplied the furniture for the hotel, and to whose firm a guarantee for £2700 was granted, depones that they were anxious to get the order for the furniture, that they did not seek a guarantee, that it was offered without being asked, that he does not think they had any thought of asking a guarantee, and that, 'of course we would have asked as to his arrangement for payment, but that would be all.' The Lord Ordinary, on considering the whole proof upon this part of the case, is of opinion that both Mr M'Lachlan and the defender conceived such a guarantee to be necessary, that there was no misrepresentation in regard to it by the defender, and that the defender granted it in *bona fide*. Had Mr M'Lachlan failed, the defender would have had to pay to Wylie & Lochhead, under this guarantee, £2700. As regards the two sums of £1000 and £500, these were obtained from the bank on the indorsation by the defender of Mr M'Lachlan's bill and promissory-note, payable at long dates, which were repeatedly renewed before these amounts were paid. The defender was therefore, in respect of the consideration which he gave as mentioned in the minute of agreement (exclusive of £180 due for goods supplied by him at cost price), liable to the extent of nearly £5000 for Mr M'Lachlan. Had the hotel venture proved unfortunate, the defender might have incurred a serious loss in respect of these obligations.

"Next, as regards the capacity of Mr M'Lachlan and the position on which he stood at the time he entered into the agreement: He had for ten years previously carried on with success a considerable wine and spirit business of a superior description in Glasgow, and had extended that business to England and abroad. Mr John Boyd, who was agent for both parties and prepared the minute of agreement, and who went over its terms with Mr M'Lachlan, depones that he fully understood it. The terms are clear and explicit, and easy to understand. It is proved that Mr M'Lachlan applied his mind to these terms. He suggested, in a letter to Mr Boyd, written immediately after discussing the agreement with him, an addition to the draft, giving him the right to forestal payments on receiving discounts. (See Letter, April 1858, No. 59 of process.) A clause to that effect was at his request inserted in, and now forms the sixth

article of the minute. The pursuer and her brother state that Mr M'Lachlan was nervous or timid, and easily excited about money matters. But Mr Boyd depones that he was a very intelligent man, much above the average, and that he spoke most intelligently on every matter of business regarding which he consulted him, including the agreement. His success too in conducting his business in Oxford Street, and afterwards the hotel, is a practical proof of his capacity, which is also instructed by other evidence. There is no proof of haste, or of pressure, or of undue influence, or unfair practices, or of force and fear, or that Mr M'Lachlan was labouring under essential error in relation to the agreement or any part of it. On the contrary, it is, the Lord Ordinary thinks, established by the proof that Mr M'Lachlan entered into the agreement with a full knowledge of its terms, and freely and voluntarily; that he was of undoubted capacity, and in a position to act and judge for himself; and that he did so, perfectly understanding what he was about. Mr John Boyd continued to be agent for both parties down to the date of Mr M'Lachlan's death, and he prepared Mr M'Lachlan's trust-disposition and settlement, in June 1872, a few weeks before his death. Mr M'Lachlan returned the draft of his settlement to Messrs Boyd for completion, along with one of the promissory-notes libelled on, which he asked them to deliver to the defender as on former occasions. Now Mr John Boyd depones he has not the slightest doubt that Mr M'Lachlan fully understood the agreement, and that he appeared to be quite satisfied with it; that he spoke to him at the time of having got a good bargain of the hotel, and of having got a place where he could make a fortune; that he afterwards told him that he was making £3000 a-year, and that he estimated his net profits at £1500 a-year, and that to the last he never indicated that the agreement was unfair, or complained of it in any way. No objections were ever stated by him to its terms to any person during the four years between the date of the minute of agreement and his death. He regularly sent promissory-notes for each half-yearly bonus as it fell due, these promissory-notes being accepted by the defender because Mr M'Lachlan was paying off the liabilities for which he was guarantee under the agreement, with the profits of the business, and was unable to pay the bonus at that time in cash. While the granting of these promissory-notes does not amount to a confirmation of the agreement sufficient to exclude the present challenge, they are an important element in the proof as showing that Mr M'Lachlan, during these four years, so far from considering the agreement as liable to challenge on the grounds now stated by the pursuer, recognised its validity.

"After repeated consideration of the proof, and of the authorities cited by counsel, the Lord Ordinary is of opinion that there have not been established any grounds on which the minute of agreement and promissory-notes libelled on can be reduced.

"On the question of expenses, the Lord Ordinary has had some difficulty. But, considering the very peculiar nature of the agreement, and that the pursuer insists in the action as executrix under the trust-disposition and settlement of her husband, he is of opinion that the defender,

although successful in establishing the validity of the agreement, is not entitled to expenses."

The pursuer reclaimed.

Authorities—*Tennent v. Tennent's Trs.*, 27 May 1868, 6 Macph. 840, 15 March 1870, 8 Macph., 10, H.L., and authorities there cited; *Aylesford v. Morris*, Feb. 1873, 8 Law Rep., Chan. App.; *Millar v. Cook*, 10 Law Rep. Eq., 641; *Moxon v. Payne*, May 1873, 8 Law Rep., Chan. App., 881; *Gibson v. Jayes*, 6 Vessey, 266; *A. B. v. Joel*, Nov. 27, 1849, 12 D. 188; *Ersk. Inst. iv.*, 1, 27; *Prin. iv.*, 1, 1.

At advising—

LORD ARDMILLAN—We are dealing with an action of reduction of an agreement signed by the late Mr M'Lachlan and the defender Mr Watson. The pursuer is executrix of Mr M'Lachlan, and the case must be viewed as if he had survived and were himself pursuing the reduction.

Mr M'Lachlan was at the date of the agreement a man of mature years; he was of ordinary or more than ordinary intelligence; he was accustomed to business, he was not unaccustomed to hotel business. He is said to have been to some extent nervous and easily excited; but it does not appear that he was nervous or excited or otherwise than in his sound and sober senses when he made this agreement. We must also assume that he knew the meaning of it, and that he signed it deliberately. I cannot see any evidence to support the averment of weakness of mind, or of want of capacity to understand the document which he signed.

But this agreement is seriously attacked on other grounds, and we have had ample and able arguments in support of these grounds.

It is said that the agreement was unequal, extortionate, and unfair—such as equity cannot recognise, and law ought not to enforce. It appears to me that the defender Mr Watson did make a bargain very favourable to himself, and pressing very severely on M'Lachlan. In other words, the consideration in respect of which Mr M'Lachlan undertook the obligation to pay to Mr Watson £600 a-year for ten years was very inadequate. But then it is quite settled, and I think rightly settled, that in the absence of fraud mere inadequacy of consideration is not sufficient to sustain reduction of an agreement between parties capable of contracting. This has been matter of decision, and has been frequently stated by high judicial authority; and all the Judges were of that opinion in the case of *Tennent*. My own view in that case was favourable to the pursuer—but not on that point—and the decision was for the defender.

The fact of inadequacy of consideration, if gross and manifest, is, however, important in regard to the ulterior question of fraud, and fraud is here alleged. Facts in the conduct of the defender in this transaction, and in relation to the terms of this agreement, are averred by the pursuer, and are said to amount to fraud.

The true import of the agreement, the ascertained relations of the parties, and the whole circumstances of the case, must be viewed in combination with the conduct of the defender, which has been adverted to, and which is said to amount to fraud, and in this combination the element of inadequacy of consideration is important and must be taken into account.

So viewing it, and giving, as I think, due weight to the inequality and inadequacy, I have still

arrived at the conclusion that fraud has not been proved. I can see no proof of fraud. The words of the agreement are not obscure or difficult to understand, and Mr M'Lachlan was quite able to understand them, and he had the assistance of Mr Boyd a professional agent, who was also, however, agent for Mr Watson, a position which I concur in thinking was in this case free from blame. Mr Boyd states that he was satisfied that Mr M'Lachlan "fully understood the agreement," and was "quite satisfied with it," and I see no reason to doubt that this was the case. Four years elapsed between the date of the agreement in May 1868 and the death of Mr M'Lachlan in July 1872. During these years Mr M'Lachlan, while granting bills periodically for the sums stipulated, yet made no objection to the agreement, and made no charge of fraud, misrepresentation, or deception. The hotel keeping did not prove a bad speculation, Mrs M'Lachlan seems to have been a clever, diligent and successful landlady, and no proposal to surrender the lease or give up the business has been made. That some benefit, some aid, some reasonable and convenient assistance and support, was given to Mr M'Lachlan by the interposition and the credit of Mr Watson, I can scarcely doubt. It may well be true, and I am disposed to think it is true, that the price paid for this support was extremely high. But not on that ground can we reduce this written agreement, clearly expressed, perfectly understood, and deliberately subscribed. Mr Watson obtained advances for Mr M'Lachlan, by his credit. He did not, I think, act merely as the friend of M'Lachlan. He made a speculation which proved successful, and he did so by means of an agreement which was quite distinct, and which he fulfilled. But if the hotel had proved a failure Mr Watson might have been a loser to a serious amount. That risk he undertook, and he bargained that for that risk he should be paid as a bonus the sum of £300 each half year for ten years. He has actually been paid by bills in terms of the agreement, and without objection, for four years. It is indeed possible that Mr M'Lachlan might have obtained in other quarters, and on more favourable terms, the funds which he required. It is not quite clear that he could. But if he was not deceived or defrauded by Mr Watson, and if, knowing the meaning of this agreement, he signed it, and acted on it, then the mere fact that he might have made a better arrangement cannot sustain this action.

I have carefully read all the proof, and shall not again refer to it in detail. I do not think there is any serious conflict of evidence. I have some sympathy with the pursuer. I think this has been a hard bargain. I think the consideration was inadequate. But I cannot find proof of fraud, deception, or misrepresentation; and I am unable to reach any other conclusion than that which your Lordship has expressed.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming-note for Mrs Elizabeth Simpson or M'Lachlan against Lord Mackenzie's interlocutor of 17th December 1873, Adhere to the said interlocutor, and refuse the reclaiming-note, except as to the finding of no expenses; recal that part of the interlocutor, and find

the defender entitled to his expenses in the cause; allow an account thereof to be lodged, and remit the same to the Auditor to tax and report."

Counsel for Pursuer — Watson and Asher. Agents—Gibson-Craig, Dalziel & Brodies, W.S.

Counsel for Defender—Dean of Faculty (Clark), Q.C. and Balfour. Agents—J. W. & J. Mackenzie W.S.

Friday, May 29.

FIRST DIVISION.

[Lord Mure, Ordinary.

COOK AND OTHERS (STORIE'S TRUSTEES) v.

GRAY AND OTHERS.

Succession—Legacy—Residue—Vesting.

Held that contingent legacies were only burdens on the residuary estate, which vested in the residuary legatee at the testator's death, although it was not until several years after that event that the amount was ascertained by the contingencies upon which the legacies depended being purified.

The following narrative is taken from the Note of the Lord Ordinary:—

"The questions on which the competing parties are here at issue have been raised in the following circumstances;—(1) By the trust-deed and settlement of the late Mr Andrew Storie, and relative deed of directions executed by him on the 6th of August 1861, he, by the fourth head of those directions, appointed his trustees to pay to Elizabeth Gray or Dymock, wife of Robert Dymock, Procurator-Fiscal of the City of Edinburgh, 'the yearly interest or produce of the sum of £6000 of my capital stock of the Bank of Scotland; and, in the event of her predeceasing her husband, to pay the said yearly produce to him during his life, and on the death of the survivor of them' Mr Storie directed the capital of this stock to be paid or transferred to their child or children who may be then alive 'in such shares, if more than one, as the parents or the survivor of them shall appoint, and failing such appointment, among the children equally.'

"By this deed of directions various other gifts and legacies were made by Mr Storie in favour of his relatives, including his niece, Mrs Penelope Ogle or Swan, and Mr Alexander Hill Gray, minister of Trinity Gask; and by the tenth head of the directions he appointed the residue of his estate 'to be divided into four equal parts, two whereof are to be paid to the said Mrs Penelope Ogle or Swan, under the restrictions aforesaid, one-fourth to the said Alexander Hill Gray, and the other fourth to the said Elizabeth Gray or Dymock, and their respective heirs.'

"(2.) On the death of Mr Storie, which took place in May 1862, he was survived by all his residuary legatees, and his trustees having entered upon the possession and management of the trust-estate, paid the various legacies bequeathed by Mr Storie, and otherwise administered the estate in terms of his directions, and paid the residue in so far as it had then been ascertained and was available, to the residuary legatees.

"(3.) Mr Storie was also survived by two sons of Mr and Mrs Dymock, viz., Robert Lockhart