

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of David Guillan Clark v. John Guillan Clark and Jane Lawrence (by her next friend George Clark Allan) from the Supreme Court of the Colony of Victoria, delivered 12th July 1884.*

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Present :

LORD WATSON.

SIR BARNES PEACOCK.

SIR ROBERT P. COLLIER.

SIR RICHARD COUCH.

SIR ARTHUR HOBHOUSE.

In this case a bill was filed on the 15th of August 1881 to set aside a transaction which was entered into in the month of April 1866. The Plaintiffs, the now Respondents, are the two youngest children of John Clark, viz. John Guillan Clark who attained 21 in October 1869, and Jane the wife of William Lawrence who attained 21 in January 1867. Mrs. Lawrence sues by her next friend George Clark Allan, and her husband is a Defendant. The principal Defendant, the now Appellant, is David Clark the eldest son of John Clark.

In 1864 John Clark had for some time been carrying on a tannery business near Melbourne. In July 1864 he took his two sons David and George into partnership; and in January 1866, on the sudden and simultaneous death of John and George, David became surviving partner. The impeached transaction is the purchase of the

partnership assets and of the site of the business by David.

The partnership was regulated by a deed made in April 1865, of which the now material provisions were that the business should be carried on upon certain land belonging to John Clark; that so long as it was so carried on he should be entitled, in addition to his share in the profits, to receive out of the funds of the partnership by way of rent the sum of 150*l.* a year; that John's stock-in-trade should be taken by the partnership at the price of 5,300*l.*, which should be considered as a loan and a first charge upon the partnership assets; that he should be entitled to receive out of the funds of the partnership, in addition to his share of the profits, interest at 7 per cent. on that sum, and that the net profits should be divided in the proportions of one half to David and one fourth to each of the others.

By his will John Clark appointed David and a Mr. Balderson his executors and trustees and the guardians of his infant children, and he gave directions for the conversion of his real and personal estate and its equal division amongst his children. The surviving children were five in number, the three parties to this appeal, Ann Clark, and Agnes the wife of G. L. Allan.

When the news of John and George's deaths arrived, which happened on the 16th of March 1866, David had to consider his position; and he was advised by Counsel on the 11th of April 1866 to the effect that if he wished to continue the business he had better not prove the will, that it would not be judicious for him to continue the business for the benefit of himself and the family, and that arrangements should at once be made for winding up the business. Counsel then suggested that David might make a fair arrangement with the representatives

of John and George for the purchase of their shares, but that in such case it was essential that he himself should not be one of those representatives.

In point of fact David never did prove his father's will. On the 1st of May 1866 he renounced by deed the office of trustee and executor and all trusts powers and authorities whatsoever by the will expressed to be made or given to himself and Balderson. There is no allegation in the bill, and no suggestion in the evidence, that he ever acted as executor or guardian, or was looked upon by the others of the family as filling either of those characters.

On the 17th May 1866 Balderson alone proved John Clark's will. In August Ann Clark took out administration to George. On the 15th October Balderson and Ann executed a deed whereby they agreed to sell to David their interest in the partnership assets and the land whereon the business was conducted for the sum of 5,000*l*. By the same instrument David gave security for payment of the purchase money with interest to Balderson by ten instalments, the last of which fell due on the 4th of May 1871. The stipulated payments were duly made by David to Balderson, and accounted for by Balderson to the beneficiaries.

This is the transaction which the Respondents have impeached, and which has been set aside by the decree of the Supreme Court now appealed from. It is impeached by the bill on the one ground of fraud and misrepresentation, on the part of David, but that ground is not the only one on which the Court has rested its judgement.

There are passages in this judgement from which it appears that the Court considered that at least until his final renunciation David must be treated as being an executor, and that he was

also guardian to the Respondents. And it has also been contended that the sale may be considered as one by an executor to himself, and as proceeding upon misrepresentation made by David the surviving partner to David the guardian of the infant legatees. If that were so of course it could not stand when duly challenged by the beneficiaries. But David never was a guardian at all. And their Lordships cannot agree that a sale is to be avoided, merely because when entered upon the purchaser may at his option become the trustee of the property purchased, though in point of fact he never does become such. A man so placed might possibly use his power in such a way as to raise a case for setting aside the transaction, and whether David so acted is one of the questions to be decided. But that is a different thing altogether from the absolute disability attaching to one who would at the same moment be a vendor in trust for others and a purchaser on his own behalf. No such case as that existed, nor was any such charged by the bill.

The case made by the bill is to the following effect. That at a family meeting held soon after the news of John Clark's death had arrived, David stated that John Clark's entire estate was not worth more than 5,000*l.*, and offered to give the four others of the family 1,000*l.* each for the purchase of the whole estate, excepting a saddlery business; that, relying on the good faith of David, believing his statement as to value, being in great distress of mind, and anxious to avoid a family quarrel which David threatened to force on, Jane, who was then 20 years old, and Ann and Agnes who were adult, assented to David's proposal, and that John, who was only 17 years of age, was not consulted; that the three sisters expressed their desire to have independent legal advice, but did

not persist in their wish because David expressed great indignation thereat as an impeachment of his good faith; that David never stated his intention of disclaiming the trusts till he had procured the assent of his sisters to his proposal, but executed the deed of disclaimer immediately afterwards; that, on the 15th day of October 1866, an agreement was executed by Balderson of the first part, Ann Clark (who had become the legal personal representative of George) of the second part, and David of the third part, by virtue of which David claimed to have become absolutely entitled to the tannery and the land on which it stood, but that the Plaintiffs were ignorant of its purport or effect; that though David's three sisters and brother knew as a matter of repute that a partnership existed between John David and George, they were in entire ignorance of its terms, and it was not until the month of April 1881 or thereabouts that by the accidental discovery of the indenture of partnership they for the first time learned how greatly they had been deceived by David in respect of the value of John's estate; that Ann Clark had discovered the deed in a box in her possession; and that the value of the land on which the tannery was conducted was 3,700*l.* at John Clark's death, whereas it was valued to David at 2,000*l.* The bill also complained of the sale to David of another piece of John's land at an undervalue, but that part of the case has been given up. Beyond the foregoing statements nothing was alleged to show the fraud and misrepresentation of David, which was the sole equity of the bill.

It will be seen then that the case made by the bill rests upon David's statement as to the value of the estate, the belief of the others in that statement, his threatening to quarrel with them, his deterring them from taking legal advice, his

reserve to them about disclaiming the trusts, their ignorance of the partnership deed, and the undervalue of the land. There is no charge that the partnership assets had in fact been undervalued, nor that David knew or believed their value to be more than he stated. On that point the Plaintiffs only adduce the value given in the partnership deed. They do not allege that David concealed the deed. They do not suggest that there was any collusion between him and Balderson, or that Balderson was in any respect incompetent or neglectful of his duty. Balderson died in 1875 and his executor is a party to the suit, but no relief is prayed against him except the formal prayer for the administration of John Clark's estate.

If then the case had been proved exactly according to the facts stated in the bill, it is at least doubtful whether the charges of fraud and misrepresentation against David could be sustained. But the case proved is a very different one.

It appears that Balderson was an experienced man of business employed by John Clark, and much trusted by him and all his family. Allan the husband of John Clark's daughter Agnes is described by the Plaintiff Jane as a first class man of business and an honourable man. She adds that she and her sister Ann were on very good terms with him, saw him and his wife frequently, and consulted him as to John Clark's affairs. His relations with David appear to have been rather unfriendly. It may be added that Ann and Jane lived in the house where both the tannery and the saddlery businesses were carried on.

Such being the position of the family, the proposal that David should purchase the partnership business proceeded from Balderson. On what day this proposal was made does not appear.

Indeed, the evidence is not clear as to the dates of the various steps in the negotiations, but they began some time before the 15th of April, and the terms were accepted before David's renunciation on the 1st of May.

On Balderson's proposal much bargaining took place between him and David as to price. Balderson employed one Dixon, who acted as a clerk in the tannery business, to make a valuation of the assets, which Dixon stated at 5,240*l.*, and he took other steps to satisfy himself of their amount and value. As early as the 17th April he consulted his solicitor Mr. Sedgefield who continued to act for him until the completion of the sale. David consulted other advisers, first a Mr. Hanwell whom he calls a law clerk, and afterwards Messrs. Bennett and Taylor who took the opinion of Counsel which has been stated. Allan went to the tannery more than once to see things for himself. He denies this, but it is proved by other witnesses. He also consulted a solicitor, one Mr. Crisp, who, on the 24th of April had an interview with Mr. Sedgefield and fully discussed the matter. Allan now says Mr. Crisp acted only as a friend, but he was paid by Allan for his services and was treated by Sedgefield as a solicitor.

After carefully considering the state of the business, David made up his mind that 5,000*l.* was a full price to pay to his father's estate, and on that basis he offered to pay 1,000*l.* each to the other four children. Balderson tried to get better terms, and so did some of the family. Jane says they claimed 1,600*l.* each. Allan says that putting together John Clark's claim for the value of the original stock which was fixed by the partnership deed at 5,300*l.*, and the sum of 2,500*l.* at which John Clark's will valued the land, he thought his wife should get 1,500*l.*, and held out for that sum for a considerable time. But David declared that his father had placed an

extravagant value on the land, and that the partnership had counterclaims against the 5,300l. ; and that his offer based on the value of 5,000l. must be taken as final. Balderson then had to consider the alternative of accepting David's offer, or winding up the business and carrying it into the market. Trade was very dull. Other tanneries were in the market. Balderson appears to have been afraid that the property would sell for very little, and moreover that, if David did not buy, the estate would get involved in litigation, and, as he expressed himself to Allan, the property would be frittered away and the girls would get nothing.

In these circumstances Balderson became very anxious that David's offer should be accepted. But he would not take the responsibility of doing so on himself. If the adult members of the family agreed, he would prove the will and conclude the bargain. If they were adverse, he openly told them he would not involve himself in a family quarrel, but would renounce probate. David was equally open. If his offer was accepted he would renounce probate, as indeed he was advised that he must do ; if not, he would act as executor, or at all events would hold himself open so to act.

There was more than one family meeting held to discuss these matters, and at the last of these meetings, which probably took place on the 23rd of April, the affair was brought to a head. It is clear that the family acted under Balderson's advice. Jane says, "Balderson advised us to accept the offer, because he believed, as David said, that it would realize no more." Ann says, "Balderson told me it was advisable to accept 1,000l., as he thought it was not a saleable business." And again, "I took the 1,000l. because Balderson advised, and David said we could get no more." And Allan says, "Balderson assured me that he believed the offer



“ was full value. It was not at once accepted. “ I, for my wife, accepted 27th or 28th April. “ Balderson was constantly seeing me about it “ in the interval.” There is no trace in the evidence of that reliance on David’s assurances upon which the equity of the bill is built.

The view taken of the transaction by their Lordships is this. It was one quite within the competence of Balderson as executor. It is not the less so because Balderson declined to clothe himself with the character of executor unless and until he could see a good chance of avoiding family quarrels and litigation. He need not have consulted the family, but as a prudent man he did so. David was not in any position of advantage except as surviving partner, which may have thrown upon him the obligation of giving full information. That Balderson, and Allan too, had free access to all available means of information is clear. It is equally clear that they were well advised, understood the bearings of the question, and struggled to enhance the price beyond what David would give. Nor can their Lordships find any trace of dishonesty or concealment on David’s part from first to last.

The cause was heard before Mr. Justice Molesworth, who dismissed the bill without costs, except as against Balderson’s executor whose costs the Plaintiffs were ordered to pay. It would seem that the prayer for the administration of John Clark’s estate was treated as only incidental to the recovery of assets for that estate by setting aside the sale to David.

The Plaintiffs then appealed to the Full Court, who set aside the sale as against them, directed accounts and administration of the partnership estate and of the estates of John and George Clark, and ordered David to pay all the costs both of the original hearing and of the appeal.

One of their reasons for making such a decree has been already disposed of. Having stated what is the case made and the case proved, their Lordships will advert briefly to the other reasons of the Supreme Court.

The learned Judges think that Balderson was placed in an unfair position by David's uncertainty whether or no he would renounce. But it is difficult to see how that circumstance placed Balderson at any disadvantage, and there is no evidence whatever to show that any embarrassment did in fact arise from it. It was very natural that David should make his renunciation dependent on the acceptance of his proposal, the more so because Balderson declined to prove if the proposal was rejected, and their Lordships cannot appreciate the objections which have been raised to his so acting.

But then, the learned Judges ask, was the sale fair? The contract, they say, may have been fair enough between Balderson and David, supposing them to have been dealing as strangers at arms length, but unfair towards the testator's estate treating both parties as representatives of the estate and bound to protect the interests of the beneficiaries. And then they go on to show the imperfect nature of Dixon's valuation (Exhibit H), and their reasons for thinking that more ought to have been coming to John Clark's estate from the partnership.

Now if the contract was fair as between Balderson and David, that is sufficient to maintain it, for it was within Balderson's competence, and David never held any fiduciary position. But their Lordships desire to add that notwithstanding a very ingenious argument at the bar, they cannot find from any evidence before them reason to think that David gave any great under-value for the assets, even considered on the basis of a book valuation, while there is strong reason

to think that the family got at least as much as they might have got by the only possible alternative, viz. winding up and sale. It is possible and probable that David got a good bargain, which he turned to good account, especially as the course of trade turned strongly in his favour the next year; but it does not follow that the family got a bad bargain.

Finally, the Court say, the sale could have been successfully challenged on the ground of a misrepresentation of value of the testator's estate, made by both Balderson and David directly to the Plaintiff Jane Lawrence and indirectly to the Plaintiff John Clark, as it would naturally be repeated to him by all his relatives who heard it, and was in effect repeated to him by Balderson when he received the securities on which he was told that his share, 1,000*l.*, was invested. Upon this it is sufficient to observe that from the filing of the bill down to the argument at this bar there has not been any suggestion or insinuation on the part of the Plaintiffs that Balderson made any misrepresentation or behaved otherwise than with honesty and with zeal for the family interest.

Even if a more adverse view could be taken of the conduct of David or of Balderson, there would be much difficulty in giving relief to persons who have so long delayed to make their claims. The younger of the Plaintiffs attained majority nearly twelve years before the bill was filed. He then received from Balderson what he knew was his share of the tannery business. The other Plaintiff, who also duly received her share, was old enough to be present at the family discussions in 1866, and knew the whole story perfectly well. The only excuse given for action after such long delay is the discovery of the partnership deed. Supposing that suggestion to be well founded in fact, it is clear that the question how much would be coming to the estate of John Clark from the

partnership must be determined by the state of the accounts in January 1866 and not by the agreed amount at the date of the deed ; and that the value of the land must be determined by the state of the market at the time of the sale and not by the agreed rent stated in the deed. But their Lordships cannot believe in the truth of the suggestion. The partnership deed was referred to and partially read at one of the family meetings attended by the Plaintiff Jane. Allan, who was consulted by Jane, founded his claim on the contents of the partnership deed. It was not retained by David or by Balderson. It was handed to Ann by Balderson during the negotiations, he telling her that it was of no use, in which he was not far wrong. Ann kept it in her desk. In cross-examination she says :—“ I knew it was “ there, but thought it was of no value. I looked “ among the papers, not particularly for a deed of “ partnership, but for what I then thought was a “ copy of a will. When I went lately I was “ looking for a deed of partnership. I remembered “ that I had such a thing. It was last year I “ got it, before August 1881.” Their Lordships cannot doubt that the purport of the deed was well known to the whole family, except possibly the Plaintiff John, or that he knew that the partnership business purchased by his brother was carried on under some arrangement, the nature of which he might have learned at any moment by asking a question of his sisters or of his brother-in-law.

Even if the deed had turned out to have a direct and strong bearing on the question of value instead of a remote and weak one, its production under such circumstances as appear in this case would not justify the bringing of a suit after so long a lapse of time, during which the important testimony of Balderson was lost.

In the opinion of their Lordships this suit

is one which ought not to have been brought. It was rightly dismissed by Mr. Justice Molesworth. The Full Court ought to have dismissed the appeal with costs. Their Lordships will now humbly advise Her Majesty to make an Order to that effect. The costs of this appeal must be paid by the Respondent John Clark, and the next friend of the Respondent Jane Lawrence.

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