

dient. I must say I would have great difficulty in judging whether a party is acting unreasonably in choosing to be represented by his own counsel and agent instead of by that of his co-defender. In the present case I am not prepared to say that the Governors of Trinity Hospital acted unreasonably in preferring to be represented by their own counsel, and in declining to be represented by the counsel for the Cemetery Company, or that the Cemetery Company acted unreasonably in taking a similar course. If we had facts before us to enable us to judge that one of the defenders acted unreasonably, I do not doubt our discretion to refuse that defender his expenses. But I am not in a position to say that either of these defenders acted unreasonably. I am strongly of opinion that a motion such as this brought forward in the Single Bills on a motion to approve of the Auditor's report, and in a case in which there are no papers before us, is extravagantly out of the question.

LORD RUTHERFURD CLARK—I have a perfectly good recollection of the argument. I remember that the Court was occupied a considerable time in hearing a point which was not raised under the conclusions of the summons. I also recollect that claims were made by the pursuer on the estates of both defenders. It was therefore quite proper and indeed necessary that the defender should be represented by separate counsel.

LORD TRAYNER—I concur in the decision. The case which I referred to during the debate was *Burrell v. Simpson & Company*, 4 R. 1133, in which the late Lord President laid down the general principles regulating the case of several defenders in the same action. I should be sorry to say anything which would seem to infringe on that as a general rule.

The Court approved of the Auditor's report.

Counsel for the Pursuer—W. Campbell.
Agents—Welsh & Forbes, S.S.U.

Counsel for the Defenders, The Edinburgh Eastern Cemetery Company, Limited—Lorimer. Agents—Bell & Bannerman, W.S.

Counsel for the Defenders, The Governors of Trinity Hospital—Boyd. Agent—William White Millar, S.S.C.

Wednesday, May 30.

FIRST DIVISION.

[Lord Wellwood, Ordinary.]

M'CALLUM v. GRAHAM.

Fraud—Facility and Circumvention—Undue Influence—Nurse and Patient—Reduction—Issue.

In an action for reduction of a will, the pursuer averred that the testatrix some time before her death became much addicted to drink, with the result that she lost mental firmness and became of a facile and yielding disposition; that the defender, who had been called in to attend the testatrix as a nurse, perceiving her weak state of mind, set herself to induce the testatrix to make a will in her favour; and that by excluding her friends, by encouraging her to drink in violation of the medical directions, and by false representations, she succeeded in effecting her object. The pursuer proposed an issue of facility, fraud, and circumvention, and a further issue of undue influence.

The Court (*altering* the judgment of Lord Wellwood) *disallowed* the issue of undue influence, on the ground that facility was the basis of the case made by the pursuer on record.

This was an action at the instance of Mrs M'Callum for reduction of an alleged general disposition and settlement executed by her niece Miss Middleton, dated 28th March 1893, whereby Miss Middleton bequeathed her whole means and estate to the defender Mrs Graham, under burden of payment of her debts, and a legacy of £100 to the Royal Infirmary.

The pursuer was the residuary legatee under an earlier trust-disposition and settlement executed by the deceased.

The pursuer averred—Shortly after her father's death in March 1892, Miss Middleton became very much addicted to excessive drinking, and this habit increased, she being sometimes intoxicated for days together. From the time of contracting this habit until her death Miss Middleton's physical and mental condition deteriorated, and she never recovered the full possession of her normal faculties. She lost much mental firmness and became of facile disposition, and easily influenced by anyone with whom she was in personal contact. About three months before her death Miss Middleton's habits grew worse, and it became necessary to get the assistance of a strong nurse to prevent her drinking. On the suggestion of a neighbour the defender was called in, and she remained with Miss Middleton until her death. "(Cond. 6) The defender, perceiving the weak and facile condition of Miss Middleton, and her liability to be easily imposed upon and unduly influenced, immediately set herself to induce Miss Middleton to execute a will in her favour. In pursuance of said scheme . . . she

endeavoured, as far as possible, to prevent any other person having access to Miss Middleton, persuaded Miss Middleton to dismiss the servant girl who had been in her employment for about three years, and refused admittance to Miss Middleton's minister and her friends when they called to see her. Further, the defender, in direct violation of the medical instructions, encouraged Miss Middleton in her habits of drinking. She on several occasions drove and walked out with Miss Middleton, and brought her home in a state of intoxication. She falsely pretended to Miss Middleton that she was a trained nurse and the widow of a doctor of medicine, whereas she was a pickle-maker. The consequence of the actings and representations of the said Mrs Graham was that Miss Middleton was induced to execute the deed presently under reduction a few weeks after she obtained access to the house. (Cond. 8) Owing to the effects of illness produced by her habits of excessive drinking, her mind was weak and facile, and Mrs Graham obtained a great influence over her, and taking advantage of the said weakness and facility for her own purposes, by fraud and circumvention induced Miss Middleton to execute the deed above mentioned. Further, the defender, acting as sole nurse for Miss Middleton, occupied a position peculiarly favourable for predisposing and influencing the deceased in her favour. This position she strengthened by excluding, as above stated, and as her position enabled her to do, the relatives and friends of Miss Middleton from having access to her presence. It was only by the exercise of this undue influence that Miss Middleton was induced to grant the deed under reduction."

On 6th March 1894 the Lord Ordinary (WELLWOOD) approved of the following issues for trial of the cause—“(1) Whether, on or about the 28th day of March 1893, the deceased Miss Margaret Anderson Middleton was weak and facile in mind and easily imposed upon, and whether the defender, Mrs Mary Elizabeth Duncan or Mack or Graham, taking advantage of her said weakness and facility, did, by fraud or circumvention, obtain or procure from the said Miss Margaret Anderson Middleton the general disposition and settlement, dated on or about 28th March 1893, to the lesion of the said Miss Margaret Anderson Middleton? (2) Whether the defender, the said Mrs Mary Elizabeth Duncan or Mack or Graham, being the nurse of, and having in that position acquired a dominant and ascendant influence over the deceased Miss Margaret Anderson Middleton, did, by undue influence, procure and obtain from the latter the said general disposition and settlement, dated as aforesaid, to the lesion of the said Miss Margaret Anderson Middleton?”

“Note—The line which separates the first and second of the issues proposed is very narrow, because, to support an issue of undue influence, there must be proof of weakened will which borders on facility,

and of undue influence which is not easily distinguished from circumvention. But, under the latter issue, full proof of facility and circumvention is not required. It is sufficient to establish that ascendancy was acquired by the defender in a position of trust over the will of another, and the abuse of that position by unduly influencing the person over whom ascendancy was so acquired to execute a deed in favour of the defender.

“It only remains to consider whether there are sufficient statements on record to warrant an issue of undue influence. I am of opinion that there are. The pursuer avers that the defender, having been employed as a nurse to prevent Miss Middleton from drinking, instead of doing so, gave her facilities for drinking, and by this means, and by excluding her relations and friends, obtained such ascendancy over her, that in the course of a few months she obtained a will leaving everything to herself, with the exception of a legacy to the Infirmary.

“A nurse has as great, if not greater, opportunities of acquiring an ascendancy over her patient than a medical man has, who probably visits his patient only once a day, if so often; and I therefore see no reason why an issue of undue influence should not be granted in the present case.”

The defender reclaimed, and argued—The second issue should be disallowed. The case made by the pursuer was based on facility and circumvention, and was satisfied by the first issue—*Munro v. Strain*, February 14, 1874, 1 R. 522. *Gray v. Binny*, December 5, 1879, 7 R. 332. *Morrison v. Maclean's Trustees*, February 27, 1862, 24 D. 625. Further, the position of a nurse was quite different from that of a legal or medical adviser, and there was no authority for allowing an issue of undue influence in her case. The only Scotch case in which an issue of that kind had been allowed was one of agent and client—*Harris v. Robertson*, February 16, 1864, 2 Macph. 664. An agent, however, was not entitled to take a gratuity from his client—*Anstruther v. Wilkie*, January 31, 1856, 18 D. 405. *Logan's Trustees v. Reid*, June 13, 1885, 12 R. 1094. No such disqualification existed in the case of a nurse.

Argued for the pursuer—The second issue should be allowed. Undue influence was a relevant ground of reduction, and one known to the law of Scotland. It was appropriate to the circumstances of the case, and there were sufficient averments to support it. Such an issue was appropriate wherever, a relation existing between parties which created a dominant influence on the one hand, and induced confidence on the other, the party possessing the influence exercised it unduly to his own advantage—*Morley v. Loughnan*, L.R., 1893, 1 Ch. 736; *Kerr on Fraud and Mistake*, pp. 300 and 301; *Gray v. Binny*, *supra*, per Lord Shand, 7 R. 347. The relation between nurse and patient were eminently of that kind, and the defender was here alleged to have gained undue influence over her patient by encouraging the drunken habits

which it was her special duty to restrain. There might be perfectly sound testing capacity and yet undue influence. If the pursuer had gone to a jury in *Gray v. Binny* with an issue of facility and circumvention only, he must have failed. In *Munro v. Strain* there was no averment of undue influence.

At advising—

LORD PRESIDENT—In my opinion the pursuer's case on record is a case of facility and fraud or circumvention, pure and simple. The story is that this testatrix had got into a debilitated condition of body and mind, and was not in the full possession of her normal faculties; that a nurse was got to attend her; that this nurse, taking advantage of the patient's craving for alcohol, plied her with drink, and by this means and by false stories got the patient to make a will in her own favour. This is, on the face of it, a very plain-sailing case of facility and circumvention.

The general issue of weakness and facility and fraud or circumvention is, in its terms, and according to our practice, applicable to a great variety of circumstances and relations, and to the manifold forms in which facility and circumvention appear and meet. In a large proportion of cases the success of the circumvention implies the establishment of influence; and this influence often arises from some more or less specific relation between the testator and the person impetrating the will. But the element of undue exercise of legitimate influence does not make it necessary to take a separate issue.

The pursuer claimed the second issue on the ground that even if she failed to prove weakness and facility she was entitled to prevail. This is not the view of the Lord Ordinary, who thought that the pursuer, even under the second issue, would have to prove "weakened will bordering on facility." But the answer to the pursuer's demand is that the case which she has on record is one of which facility is the basis.

I am for recalling the interlocutor, and I think we should refuse the second issue and approve of the first issue as the issue for the trial of the cause.

LORDS ADAM and KINNEAR concurred.

LORD M'LAREN was absent.

The Court disallowed the second issue.

Counsel for the Pursuer—Comrie Thomson—Hunter. Agents—Dalgleish, Gray, & Dobbie, W.S.

Counsel for the Defender—G. Watt—Macaulay Smith. Agent—William Alston, Solicitor.

Tuesday, June 5.

FIRST DIVISION.

CLYNE, PETITIONER.

Trust—Trustee—Sale of Heritage without Authority of Court—Nobile Officium—Petition for Confirmation of Sale.

Petition by a testamentary trustee, who had no powers of sale, for confirmation of a sale of heritable property belonging to the trust-estate which he had effected, *refused*.

This was a petition by James Clyne, sole acting trustee under the trust-disposition and settlement of George Sinclair Waters, wherein he craved the Court to approve, ratify, and confirm the sale of the lands of Thuspister, part of the trust-estate, which had been sold by public auction on 17th November 1893 to Alexander Clyne.

The petition was presented with the consent of all the parties interested in the trust-estate, who were in majority, but there were other beneficiaries who were in minority.

The petition stated that the sale had been carried through by him in ignorance that he had no power of sale, and that he had not yet granted a disposition to the purchaser, and that the latter declined to pay the price until the petitioner could give him a good and unexceptionable title.

At advising—

LORD PRESIDENT—It is impossible for us to grant the prayer of this petition for the reasons which have been indicated in the course of the argument. But while I think that we should refuse the petition, it may be open to the parties, if they can free themselves of the existing contract, to come back to the Court with an application for authority to sell.

LORD ADAM concurred.

LORD M'LAREN—I agree with your Lordship that we must refuse the prayer of this petition for the reason that, *ex facie* of the decree which we are asked to grant, all objections to the sale founded on grounds distinct from the question of power to sell would be excluded. That being so, it appears to me that the confirmation which we are asked to grant would itself be reducible at the instance of a beneficiary who might wish to challenge the sale on extrinsic grounds. I agree with the suggestion made by your Lordship that the only way of working out the remedy desired is probably for the parties to make an application for authority to sell, when it might possibly be given in such terms as would enable the trustee to give a valid and otherwise sufficient title.

LORD KINNEAR—I agree with your Lordships. The Court may enlarge the powers of trustees by authorising them to sell, and this appears to be a case in which we should have had little difficulty in giving that authority. But the validity of any