

might have been asked which would have stated restitution as the thing he claims. What he asks is not restitution but damages, and these two remedies are entirely different in themselves and are open to different defences.

If the action be one of damages, then it was scarcely disputed that it is necessary to the pursuer's success that he prove fraud. Now, that there are in the case several things constituting, so far as they go, cogent evidence of fraud cannot be ignored. Each of these matters is involved in circumstances requiring a good deal of attention; but several mis-statements were made which, when all is said, are not well accounted for. Still, the question is one of personal conduct. The Lord Ordinary saw and heard the witnesses whose conduct is inculpated, and he has held that the pursuer has failed to prove that the mis-statements were made fraudulently. I attach the more weight to the Lord Ordinary's conclusion because his opinion discloses a complete grasp of the points which bear against the honesty of the gentlemen involved. With these things fully in view he absolves the defender. As I do not regard any one of the proved misrepresentations, nor the whole taken together, as demonstrative or conclusive of fraud, I do not feel justified in rejecting the Lord Ordinary's conclusion that in fact there was no deceit.

I am for adhering to the interlocutor reclaimed against.

LORD M'LAREN—I agree with your Lordship and the Lord Ordinary. I think the rule which renders necessary the averment and proof of fraud where damages are sought is by no means artificial or technical, but is a rule consistent with equity and justice. Where a pursuer only desires to set aside a contract of sale on the ground of innocent misrepresentations, he may obtain relief, but only on condition of making *restitutio in integrum*. While the other party may thus be deprived of the benefit of a bargain which he considers advantageous to him and is desirous of retaining, yet he receives compensation in the shape of restitution. But when we are in the region of damages it does not appear to be consistent with equity or with any sound principle of law that in respect of a mistake for which neither party is responsible the seller shall pay to the purchaser a sum of damages, the purchaser retaining such benefit as the contract has given to him. The remedy of damages—according to all the light which our decisions throw on the question—perhaps there is not very much light to be got from them—is confined to the case of proved fraudulent misrepresentations, and the damages we find as compensation for loss sustained through fraud. I agree with your Lordship in the chair that on a question of the fraudulent character of representations which are proved or admitted to be made, the judgment of the Lord Ordinary is entitled to the utmost weight, because such questions generally resolve into matter of credibility and of the fairness or unfairness of profes-

sions made by the principal witness, the defender. I see no ground for disturbing the Lord Ordinary's judgment on the question of the fraudulent character of the representations which were the basis of the sale, and which were certainly not correct in fact. It follows, in my opinion, that the action must fail.

LORD KINNEAR—I agree with your Lordship.

LORD ADAM was absent.

The Court adhered.

Counsel for the Pursuer—Sol.-Gen. Dickson, Q.C.—Ure, Q.C.—Morton. Agents—Philip, Laing, & Harley, W.S.

Counsel for the Defender—Balfour, Q.C.—W. Brown. Agent—Alexander Morison, S.S.C.

Friday, November 18.

FIRST DIVISION.

[Sheriff Court of Aberdeen.

ROTHWELL v. STUART'S TRUSTEES.

*Trust—Liability of Trustees—Personal Loan by Trustees on Security of Contingent Right of Beneficiary.*

A truster directed his trustees to pay the liferent of his whole estate to his widow, and on her death to pay to R. a legacy of £350. By the terms of the trust-deed the legacy was not to vest in R. till the death of the liferentrix, and it was declared to be "strictly alimentary, and not assignable by her nor arrestable, nor attachable by diligence of creditors, . . . and exclusive always of the *jus mariti* and right of administration of her husband, and not affectable by the debts or deeds of her husband."

R. survived the liferentrix and became entitled to payment of the legacy free of the restrictions imposed by the truster. Before that date R. had authorised the trustees to pay a debt due by her husband "now out of the legacy left me by my uncle, or when the same is payable," and on the strength of this they had advanced the money to pay the debt. *Held* that the advance by the trustees was to be treated as a personal loan at their own risk upon the contingent security of the legacy should it vest in R, and that the trustees were entitled on making payment of the legacy to retain the amount thus advanced by them.

*Fraud—Undue Influence—Husband and Wife.*

In an action by a wife against the trustees on a testamentary estate to which the husband was indebted, and under which the wife was a beneficiary, she alleged that she had been induced to authorise the trustees to pay the debt due by her husband out of her share of the trust estate. *Averments* of fraud and undue influence on the part of the husband and of the trustees which *held* irrelevant.



Mr Alexander Stuart, builder, Peterhead, died in August 1887 leaving a trust-disposition and settlement, in which he directed his trustees to pay the income of his whole estate to his wife. By the fourth purpose he provided—"Fourthly, on the death of my said wife, and on the expiry of her said liferent, I hereby direct and appoint my trustees to hold and apply my said whole means and estates, heritable and moveable, and the prices and produce thereof, as follows, viz., In the first place, I direct and appoint my trustees to hold and apply the following bequests and legacies to and for behoof of the persons after named or referred to, being relations of my said wife . . . (Third) To each of the lawful children of my said wife's brother, the late David Ewan, as follows . . . (8) Mrs Isabella Christian Ewan or Rothwell, Three hundred and fifty pounds sterling." There was a provision to the effect of postponing the vesting of these legacies in the beneficiaries till the period of payment, and it was further provided that "the foregoing provisions in favour of my own and also of my said wife's nephews and nieces, and their descendants, are hereby declared strictly alimentary, and not assignable by them, or by any of them, nor arrestable nor attachable by the diligence of creditors; and further, with regard to such of the foregoing provisions, or of any provisions to be made by me in any codicil hereto, as are in favour of or may descend to females, I hereby declare that the same are and shall be exclusive always of the *jus mariti* and right of administration of their respective husbands, and not affectable by the debts or deeds of such husbands, or by any action, diligence, or execution competent to follow thereupon." The truster's widow survived him and died on 31st August 1896, and in accordance with the terms of the trust-disposition the legacy to Mrs Rothwell vested and became payable at that date.

At the date of the truster's death Mrs Rothwell's husband was due to him a sum of £80, and had granted a promissory-note in his favour which fell due on 12th September 1887. On 21st September Mrs Rothwell wrote to the agents who were acting for Mr Stuart's trustees in the following terms:—"Gentlemen,—With respect to my husband's acceptance to a bill of £80 now due to my uncle, the late Mr A. Stuart, builder, Peterhead, and made payable within the North of Scotland Bank, Limited, Crieff, I write to say that I consent to the suggestion of the bank agent, authorising you to pay the bill *now* out of the legacy left me by my uncle, or when the same is payable.—I am, yours respectfully,  
"ISABELLA C. ROTHWELL (*Late Ewan*)."

Her husband by a letter of the same date expressed the wish that her application should be favourably entertained by the trustees. The trustees accordingly on 1st December paid the promissory-note.

On the death of the liferenter, when the legacy of £350 became payable to Mrs Rothwell, the trustees in sending the discharge of the legacy for her signature intimated that the amount paid by them in respect of the promissory-note would be

deducted, and they received from her a receipt on the Inland Revenue schedule in the following terms:—

"RECEIPT ON DUPLICATE OF FOREGOING ACCOUNT.

"Received, the 11th day of November 1896, the sum of Three hundred and sixteen pounds, 17/3, being the legacy above-mentioned, having first allowed or paid Thirty-five pounds, 4/1 for the duty thereon.

"ISABELLA CHRISTINA ROTHWELL."

[Stamped Id.]

The trustees thereupon sent to Mrs Rothwell a cheque for £235, intimating that they had deducted the £80 in question, and that if she accepted the cheque it was in full payment of all claims. On 30th November she wrote to the effect that she accepted the cheque; "it would be folly to refuse it; I don't blame you for the loss of the £81." Mrs Rothwell thereafter raised an action against the trustees in the Sheriff Court craving the Court to ordain them to pay over the sum of £118 under deduction of legacy-duty, being the balance not paid to her out of the legacy of £350.

The pursuer made certain general averments to the effect (1) that she was under undue influence of her husband and ignorant of her rights, or otherwise under essential error, force, or fear when she granted this letter, and that the letter was fraudulently devised by defenders, or others on their behalf, acting without their authority, in the interest solely of the residuary legatees; and (2) with reference to the period when the receipt was granted, that defenders' agents still kept her in the dark as to the true nature of her legal rights, and assured her that she had no alternative but to allow the deduction to be made from her legacy of the amount of the promissory-note. Further, that the pursuer was acting under the direction of defenders' agent as agent in the trust, and had no independent adviser, and was ignorant of the true nature of her rights under testator's settlement when she signed the Government schedule for the amount of the legacy, and that when she accepted the cheque she did so under essential error, and in the fear that if there was delay her husband might, if he heard of the matter, deprive her of her legacy.

She pleaded—" (3) The letter of 21st September 1887 founded on by defenders, having (a) been impetrated from pursuer, a married woman, fraudulently or by undue influence, force, or fear; or (b) the same having been granted under essential error as to pursuer's rights, and contrary to the express terms of the testamentary bequest in her favour, the same, and all that has followed thereon, is void or reducible, and objection can be pleaded thereagainst *exceptione*. (4) Any alleged discharge of the sum sued for (a) having been obtained under essential error and *sine causa*; and (b) the same having also been induced fraudulently and contrary to the testamentary rights of pursuer and powers of defenders, such alleged discharge is liable to reduction, and objections thereto may be pleaded in the present proceedings *exceptione*."

The defenders pleaded that having paid



the promissory-note in accordance with the pursuer's letter, they were entitled to retain the amount from the legacy, and that in respect of the discharge granted by her they should be assoilzied; and (4) the pursuer's averments are irrelevant and insufficient to support the conclusions of the action."

The Sheriff-Substitute (DUNCAN ROBERTSON), on 14th July 1897, found that the pursuer had failed to state a relevant case, and accordingly sustained the defenders' fourth plea and dismissed the action.

[His Lordship, after stating the facts of the case, and the nature of the pursuer's averments as quoted above, proceeded]—

"Before considering these averments and how far they are relevant, it is, I think, necessary to consider what in point of fact were pursuer's rights under the settlement of which she is alleged to have been ignorant. As to this there was no controversy; it was not disputed that as soon as the money came into pursuer's hands she could do what she liked with it, and it was in no way protected against her creditors. Even before it came into her hand it was quite open to her to assign her prospective interest for what it was worth, and such an assignation would have been quite good. The money could not be kept intact as an alimentary fund without the intervention of a trust. That being so, it is, I confess, somewhat difficult to see what rights or supposed rights of pursuer were concealed from her. The money was hers and she could do with it as she liked; if she chose to assist her husband by paying off his debt to prevent him being discussed, it was quite within her power to do so, and I cannot see that it required special intimation to her to inform her that she might give or withhold. She does not say that she was led to believe by defenders or her husband that she had no other course open to her, or that her husband could touch the money. It is merely stated that pursuer was under essential error and in ignorance of her rights when she wrote the letter of authority, but it is not said what the essential error was about, nor is it said what the rights were which she was ignorant of, and I imagine that no right could be stated except that she was entitled to refuse if she liked, and that her husband could not touch the money. In my opinion these averments are not relevant averments of essential error. It is further, however, said that the letter was granted under the undue influence of her husband, but it is merely said it was so granted—there is no detail or specification given. It is not said how the influence was exerted, or why pursuer should have been more amenable to it than any other wife. It may quite well be that the husband exercised his influence to induce the pursuer to send the letter, but unless he did more than this, I am not prepared to say the letter can be gone back upon, and a mere use of the word 'undue' does not, in my view, materially alter the matter. It is quite easy to use such words, but the mere use of them has never been held to make relevant a case otherwise irrelevant. The same applies to the use of the

word 'fraud.' It is here alleged that the said letter was 'fraudulently' devised by the defenders, or by others on their behalf acting without their authority, in the interests solely of residuary legatees. It is all very well to say that, but there are absolutely no facts averred which can support such an allegation. I confess I have some difficulty in apprehending what the averment exactly means. It says that the letter was 'fraudulently devised,' but there is no question that pursuer wrote and signed it, and what 'fraudulently devised' means I hardly see. If it means it was suggested by defenders or these others to the bank agent that he should suggest to pursuer that she might write the letter, which is the only solution I can think of, I cannot see that this, even assuming that it were true, in any way savours of fraud. The defenders would be naturally anxious to recover the money as a debt due to the estate; it was their duty to do so, if they made this suggestion, and the pursuer chose to agree to it to save her husband, I cannot at all see how that could be called fraud on their part. If it was said that defenders and pursuer's husband were acting in concert, the matter might be different, but there is no such allegation. These observations, I think, cover all pursuer's averments above referred to on the first head, and my opinion therefore is that these averments do not constitute a relevant case; but the case against pursuer is stronger when we come to consider what happened when her legacy was paid to her after the liferentrix's death. Her husband then was not living with her, and she could not be under his influence, and we may take it from the letter produced that she signed the Government receipt produced, and accepted the cheque afterwards sent, in the full knowledge at least that this amount was being deducted, and after consideration on her part. That there was consideration is certain from the terms of the letter. Of course, it is again said that she did all this without independent advice, and in ignorance of her rights under the testator's settlement, but again the answers seem to me clear that there were no rights which at this time could affect her legal position. She could have done no more than she has done now, namely, attempt to go back upon her former authority—that is, fight the matter in Court; and further, so far as appears, there was no reason whatever why she should not have taken independent advice before signing the receipt. No doubt she further alleges that the agent assured her then that she had no alternative but allow the deduction, and no doubt this was the view of the agents, but even assuming it proved, it could not help pursuer with reference to the granting of the letter of authority itself; if it is good, and she is bound by it, then pursuer had no course open to her but to allow the deduction, and holding, as I do, that no relevant case has been stated for going back upon the letter, it is plain that to allow proof of this would be useless. The same observation applies to the other allegation already referred to as to her reason for accepting the cheque; if the



letter of authority was binding, she could get no more than the amount in the cheque; further, on this point, pursuer had only to ask to ascertain that her husband had no claim. She does not aver that she asked and was misled; if she had this mistaken idea, as we must assume, it could not be imputed to defenders. No doubt one has considerable sympathy with a woman in the position of pursuer. She has done what she now realises was a foolish thing, which she did not require to do, but while that is so, it is, in my opinion, very necessary to be certain before incurring serious expenses that now she is trying to go back upon her former action she avers facts and circumstances which, if true, will justify the Court in allowing her to do so. In my opinion she has not made such averments here, and I am therefore to dismiss the case as irrelevant. That being my view as to pursuer's case, it is, of course, not necessary for me to say anything as to the relevancy of the defence."

The pursuer appealed to the Court of Session, and argued—It was admitted that at the date she wrote the letter authorising payment the pursuer had no vested interest in the legacy, but in addition to that it was declared to be strictly alimentary and not assignable. It was not incompetent to put a legatee under the disability to assign a legacy before it was actually paid to her, and this was what the trust-deed effectually did. Accordingly, this was not an assignation which could be made at all. But even assuming that it could be made effectually if the question were one with a third party, the trustees were not entitled to found upon it in accounting with the beneficiaries. It was the plain duty of the trustees to hand over the legacy intact to the pursuer as soon as it became payable. Their fiduciary relation to the beneficiaries and the truster as well rendered this imperative on them. Moreover, this letter was of the nature of an obligation by her, which was not binding upon her as a married woman. *Burnet v. British Linen Company Bank*, February 9, 1888, 25 S.L.R. 356; *Jackson v. MacDiarmid*, March 1, 1892, 19 R. 528; *M'Lean v. Angus Brothers*, February 2, 1887, 14 R. 448.

Argued for respondents—There could be no doubt that in spite of the provisions to the effect that the legacy was alimentary it became the pursuer's absolute property as soon as it vested, for in the case of a gift of absolute fee such words of restriction flew off. She was perfectly entitled to assign her contingent rights to a third party, though of course the value of such an assignation depended upon her surviving to have a vested interest. Accordingly the trustees were not bound when the date of payment arrived to tender the legacy intact to her personally, but to herself or her assignees as the case might be. The case fell under the rule of such cases as *Miller's Trustees v. Miller*, December 19, 1890, 18 R. 301; *Wilkie's Trustees v. Wilkie*, November 30, 1893, 21 R. 99; *Simson's Trustees v. Brown*, March 11, 1890, 17 R.

581; *Murray v. Macfarlane's Trustees*, July 17, 1895, 22 R. 927. The letter authorising the trustees to pay amounted to an assignation to them of the legacy to that extent, and there could be no reason why they should not repay themselves just like a third party who might be an assignee.

At advising—

LORD PRESIDENT—Very numerous topics were discussed under this appeal. Ultimately, however, it appears that the case admits of decision on less complicated grounds.

The undisputed facts which seem material may be thus stated:—In September 1887 the pursuer wrote to the defenders authorising them to pay a bill out of a legacy left her by her uncle, and this was done. The legacy was one of £350, and at the time it had not vested in the pursuer, because the uncle's wife was still living, and if the pursuer had predeceased the widow the £350 went to others. In fact, however, the pursuer has survived the widow, and the legacy is vested in her. She now claims the £350 without deduction of the £80 paid by the trustees on her authority. The trustees offer her the balance.

Now, it is plain enough that when the trustees acted on the lady's authority and paid the £80 they did so at their own individual risk in this sense, that if the pursuer had predeceased the widow the trustees would have had to make good the whole £350 to the legatee conditionally instituted after the pursuer. On the other hand, it is equally clear that (to quote the Sheriff-Substitute) "as soon as the money came into the pursuer's hands she could do what she liked with it, and it was in no way protected from her creditors. Even before it came into her hands it was quite open to her to assign her prospective interest for what it was worth, and such an assignation would have been quite good." The soundness of these propositions is established by the considerations that while the capital of the £350 was to be held by the trustees until the death of the widow, it was then to be paid to the pursuer, and that, while the provision was declared strictly alimentary and not assignable, those words did not avail either to protect the fund, once it should be paid to the pursuer, from her absolute disposal, or to render ineffectual an assignation of her contingent right to obtain such payment. Accordingly, there was no legal difficulty in the way of her raising £80 from a third party by assigning in security her contingent right to this £350. What she did, in fact, was to borrow it from the trustees, directing them to repay themselves out of her legacy. This, of course, they could only do when the legacy came to be hers, and this is exactly what they have done.

It was suggested, however, that the trustees were under a special disability from doing this, owing to the declaration of their truster that this provision was to be strictly alimentary. Now, if this means that the trustees were not entitled to give to the pursuer any part of the £350 until



the death of the widow, that is past dispute, for on the widow's death the legacy might have come to be payable to a third party and not to the pursuer. To hold that the clause describing the legacy as alimentary and not assignable applies to the contingent right as well as to the vested right is somewhat difficult, but even assuming that construction, I have found it impossible to conclude as a legal result that the trustees must lose this £80. The order of the pursuer to the trustees to pay themselves this £80 out of the legacy was an order to take effect and be performed at a time when the money was absolutely payable to the pursuer, viz., at the death of the widow. The fact that this order was given for value received, viz., £80 advanced by the trustees at their own risk, does not, in my judgment, disentitle them to found on it.

What I have said depends on the validity of the letter of request addressed to the trustees by the pursuer in September 1887; and the pursuer impugns the validity of that letter. But when her averments on this subject are examined they prove to be completely irrelevant. The Sheriff-Substitute's criticism of these averments seems to me perfectly just and conclusive. Once the true rights of the pursuer are understood it becomes apparent that what she says of error is meaningless, while the other words used as alternatives are unaccompanied with any indication, much less statement, of the facts which they characterise.

I am for adhering to the Sheriff-Substitute's interlocutor which sustains the plea of irrelevancy. I do not proceed at all upon the Inland Revenue receipt, because it is open to two objections, neither of which received a satisfactory answer—the first that the adhesive stamp has not been properly cancelled, and the second that it is a receipt to the Inland Revenue authorities for Revenue purposes. Nor do I rely on the pursuer's letter of 30th November 1896, which could only legitimately be considered as an item of evidence on a proof having been allowed and closed.

LORD ADAM—Mr Stuart died in 1887 and left a legacy to Mrs Rothwell payable upon the death of his widow, who enjoyed a life interest in his whole estate, and admittedly the legacy did not vest till the death of the liferentrix. It not only did not vest, but was declared to be strictly alimentary and not assignable by her, nor arrestable nor attachable by her creditors; but notwithstanding this qualification it was not and could not be disputed that on vesting it would become the property of the pursuer, and that the trustees would have no alternative but to pay it over. It was also not disputed that though the legacy did not vest *a morte testatoris* the pursuer had power to assign her contingent right.

Such being the nature of the legacy, the pursuer's husband was due to the trustees a sum of £80 upon a promissory-note, which fell due on 15th September 1887, and which he was not in a position to meet. In the circumstances he wrote to the trustees on

the 21st September enclosing a letter from the pursuer authorising them to pay the note out of her legacy. The trustees did so, and they now propose to deduct that sum from the legacy.

I cannot doubt that the pursuer's letter was a good mandate to the trustees to pay; there is no reason why it should not be good. It is clear that if her husband had urged her to assign her contingent right, and she had done so, it would have been the duty of the trustees to pay the legacy, when it vested, to her assignee. That being so, it appears to me that the trustees are in no different position from a third party. There is no disqualification appertaining to them, and if the mandate were good, it was good authority for their paying the money and deducting it from the legacy.

If this be the correct view, it is unnecessary to enter into the question of the receipt granted by the pursuer.

LORD M'LAREN—From the first hearing of the case I never doubted that the decision proposed by your Lordships was in accordance with justice, because even supposing we were unable to give effect to the attempt of the trustees to separate their action as trustees from that as individuals, and to repay themselves by retention out of the legacy, there would have been a good action against the pursuer for the money advanced to her husband at her request and on her credit.

The only question is, whether in the settlement of their accounts as between trustees and beneficiaries the trustees were entitled to introduce this item of payment and set it off against the beneficiaries' claim. After the second hearing I had some doubts as to whether in the arrangements made the trustees acted consistently with their duty to see that the provision was alimentary, but I am satisfied that they did nothing contrary to their duty. In the advances made by them, they were acting not as trustees but as individuals, and they were not barred from performing an act of benevolence to a family in whom they were interested, taking their chance of repayment when the money should come into their hands.

LORD KINNEAR concurred.

The Court dismissed the appeal and adhered to the interlocutor reclaimed against.

Counsel for Pursuer—Sol.-Gen. Dickson, Q.C.—Clyde—Hunter. Agent—W. Croft Gray, Solicitor.

Counsel for Defenders—A. Jameson, Q.C.—W. Campbell, Q.C.—W. Brown. Agents—Boyd, Jameson, & Kelly, W.S.