

Friday, November 18.

SECOND DIVISION.

(Sheriff of Lanarkshire.)

THE COMMERCIAL BANK OF SCOTLAND, LIMITED v. GOURLAY AND MAIR.

Company—Articles—Sale—Sale of Company Property to Director.

The board of directors of a company agreed, in return for an advance of money to the company by one of their members, M, to hypothecate or sell to him certain barrels, the property of the company. The transaction was entered in the books of the company as a sale, an invoice of the goods was sent to M, the price agreed on was paid, and a discharge therefor written on the invoice. The barrels were set apart in the company's premises, and enclosed with a fence and a locked gate, the key of which was handed over to M. The articles provided that officials of the company should be able to deal with the company, and that contracts between them and the company should be valid.

In a question with the liquidator of the company, held that the barrels were sold and delivered by the company to M, and that the property therein passed to him by the said delivery.

This was a multiplepointing in which the Commercial Bank of Scotland, Limited, was pursuer, and John Gourlay, C.A., Glasgow, liquidator of the West Lothian Oil Company, Limited, and Hugh Mair, Henley-on-Thames, the defenders. An interlocutor of the Court of Session dated 20th November 1891 ordered the West Lothian Oil Company to be wound up, and Gourlay was appointed liquidator. At that time Hugh Mair was chairman and a director of the company. The fund *in medio* (£2323, 17s. 4d.) represented price obtained by the sale of 14,500 oil barrels which were at one time the property of the Oil Company.

The following statement of facts is taken from the opinion of the Sheriff-Substitute (ERSKINE MURRAY)—“The company got gradually into difficulties, and Mair for a time supported it with advances. He being asked to make further advances, it was agreed by the board, at a meeting on 30th September 1891, at which Mair was present along with three other directors (no *quorum* being specified by the articles) that if Mair would advance the sums urgently required the directors would give him security, and in particular that they would hypothecate or sell to him 10,000 barrels, the property of the company, presently lying at Fauldhouse, and the secretary was instructed and authorised to have the necessary documents signed in connection with this arrangement. As appears from No. 11 of process, no price is mentioned in the minute, but it appears that while 4s. per barrel had

been spoken of, that price was agreed on between Mair and the officials, and the transaction was entered in the books of the company as a sale, and the invoice granted on 9th October containing the receipt for £2000 paid by Mair as the price. Before that time the 10,000 barrels had been set apart, and about the 14th October they were fenced round, with a locked gate to the enclosure. Similar invoices under similar minutes were granted on 16th and 30th October for 2000 and 2500 barrels respectively at the same rate of price, the amounts being £400 and £500 respectively in respect of money then paid by Mair. Of these the 2000 were enclosed on 16th October, and the 2500 on 2nd November. The keys of the enclosures were handed over. The company going into liquidation, the enclosed barrels have been claimed both by the liquidator and by Mair. Of consent the barrels have been sold, and the amount realised being £2323, 17s. 4d., constitutes the fund *in medio*, which is a good deal less than the £2900 paid by Mair.”

The articles of association of the company, No. 98, provided—“No contract, arrangement, or transaction entered into by or on behalf of the company with any director, or with any company or copartnership of which a director is a partner, or of which he is a director, managing director, or manager, shall be voidable in consequence of his official position, nor shall such director be liable to account to the company for any profits realised by such contract, arrangement, or transaction by reason only of such director holding that office, or of the fiduciary relation thereby established.”

The claimant Gourlay pleaded—“(1) The transactions being mere attempts to create a security without possession over moveables for advances made by the claimant Mair while the company was in difficulties, the claimant Gourlay is entitled to be preferred. (4) *Esto*, that the sales were made, yet the contracts having been entered into in contravention of the articles of association of the seller's company, are *ab initio* null and void. (5) No sale having taken place, and no possession having been given to the alleged purchaser, the liquidator is entitled to the fund *in medio* as a *surrogatum* for property belonging to the West Lothian Oil Company.”

The claimant Mair pleaded—“(1) The said barrels having been sold and delivered to the claimant as consigned on, and the price paid, the claimant is entitled to be preferred to the fund *in medio* as craved, as a *surrogatum* therefor. (2) *Esto*, that the said barrels were not validly delivered to the claimant, yet the same having been validly sold to him, and appropriated and set apart as being sold to him, and the price paid, the claimant is entitled, in virtue of the provisions of the Mercantile Law Amendment (Scotland) Act 1856, to vindicate the same against the creditors of the seller, and therefore is entitled to be preferred to the fund *in medio* as a *surrogatum* therefor as craved.”

After a proof the Sheriff-Substitute ranked and preferred the claimant Mair to the fund *in medio*.

“*Opinion*.— . . . The liquidator contends that the transactions were mere attempts to create a security without possession over moveables for advances made while the company was in difficulties, and that the barrels never having been out of the civil possession of the owners no real right of pledge was acquired by Mair.

“On these heads it must be remarked, in the first place, that under the Mercantile Law Amendment Act, sec. 1, if the circumstances give the purchaser a *jus ad rem*, the mere fact of delivery not having been given does not exclude the purchaser's right. In the second place, it falls to be held under the authorities that the fact of the transaction being for the purpose of giving a security to the lender of money does not exclude the right of the nominal purchaser, if the forms of purchase have been properly carried out, just as a lender of money on heritable property has the right of a purchaser if he has taken an absolute disposition, even though there be a back-letter. All that he is subject to is a subsequent claim for any balance that may accrue. See *M'Bean v. Wallace*, 8 R. 369; and *Darling v. Ross*, 15 R. 180. Therefore, as regards these matters, what requires to be shown is, that Mair was given a *jus ad rem specificam*. Now, in the first place, it is clear that the sale was not of any 10,000 barrels left lying loose among the company's other barrels. It was a sale of specific lots laid aside, fenced off, and locked. On the footing that they still remained in the company's possession, all was done that could be done. It seems, therefore, that in ordinary circumstances it would fall to be held that Mair had acquired a right *ad rem specificam*, and that therefore delivery being unnecessary, his acquisition of the barrels was as good as a purchase. But the liquidator points out that while the documents do not specify the kind of barrels, there were actually three kinds in use of different values—Petroleum barrels, bought at 4s. 10½d. each, paraffin and lubricating oil barrels, bought at 3s. 9d. and 3s. 10d. each. They say therefore that the sale was uncertain. But the evidence goes to show that the sale was of 10,000 barrels of the usual kinds bought by the company, and if any consideration of the matter at all was contemplated, it was simply that nothing radically unfair in the way of selection should be done. Mr Mair's evidence is a little confused, but it is clear that it was agreed to leave the matter to the company's servants; the first 10,000 contained barrels of all kinds, the 2000 were all petroleum barrels, the 2500 were all inferior barrels. Had they been all slumped together, Mair was getting for 4s. a barrel what had cost the company about 4s. 2d. the barrel, making a difference in price of about £120. If, therefore, the barrels when sold had realised their original price, assuming that the transaction fell to be dealt with as a security under the form of a sale, a deduction to that extent would have fallen to be made, to which the liquidator would have

been entitled. But as the sale has turned out, Mair, instead of gaining £120, has lost about £500 by the transaction, and as regards the plea of uncertainty, it seems to the Sheriff-Substitute that the choice of the barrels having been delegated to the officials of the company of consent of parties, the sale was a good one.

“Further, the liquidator contends that the sale was in contravention of the articles of association. This is not so. Sales to a director are good under the articles. A director is barred from voting on a transaction with himself. But there is nothing to show that Mr Mair did so; the resolutions were passed unanimously, three other directors being present. If Mair had voted, his vote would have had to be set aside, but the three others had power to bind the company. And even assuming that this plea were good, as it would only lead to *restitutio in integrum* on both sides, it would be useless to the liquidator, on the footing that Mair had acquired a specific right to the goods.”

Gourlay appealed, and argued—(1) This was not a true sale, but a means of securing an illegal preference to Mair by the appearance of a sale. The goods remained the property of the company; they were never delivered over to Mair, nor taken away by him. It was true that a certain amount of fencing was put round them as they lay in the company's yard, but that was not enough, as they appeared really to be the goods of the company. The Mercantile Law Amendment Act did not apply; there was no delivery of the barrels to Mair, and therefore no sale—Buckley on Companies Acts, 272; *Stiven & Scott v. Simpson*, June 30, 1871, 9 Macph. 923; *Darling v. Wilsons*, December 16, 1887, 15 R. 180; *Anderson v. Anderson's Trustees*, March 18, 1892, 19 R. 684. (2) This was a sale of the company's goods to one of the directors of the company, and was void on that account—*Aberdeen Railway Company v. Blaikie Brothers*, May 31, 1853, 1 Macq. 461; *University of Aberdeen v. Magistrates of Aberdeen*, July 18, 1876, 3 R. 1087; *Ashbury Railway Carriage Company v. Riche*, June 7, 1875, L.R., 7 (H. of L.) 653. The 98th article of the articles of association could not be pleaded in his favour, because these were made for management of the internal affairs of the company, and while the shareholders might not be able to object to a sale of goods to a director, the creditors of the company certainly could. The liquidator stood in place of the creditors as well as of the shareholders, so he had a right to object. (3) The company was not entitled to enter into this kind of business at all. Its trade was confined to dealing with oil outside its business altogether—to deal in empty barrels—*Ashbury Railway Company*, cited *supra*.

The respondent argued—This was a *bona fide* sale of these barrels to Mair, and the goods were delivered over to him by being set apart in the yard and fenced in, so that only Mair, who had the key of the fence, had access to them. It was not important

that the sale was made in order to give an advance if the sale was a true one—*M'Bain v. Wallace & Company*, January 7, 1881, 8 R. 360—*aff.* July 27, 1881, 8 R. (H. of L) 106; *Allan & Company's Trustees v. Gunn & Company*, June 20, 1883, 10 R. 997; *Robertsons v. M'Intyre*, March 17, 1882, 9 R. 772. Mair had all the rights of a purchaser. Even if there were no delivery, this was a sale in the ordinary course of business, and the Mercantile Law Amendment Act applied. The company had power to sell barrels. The contention was absurd that the company could not sell a lot of surplus barrels unless they were first filled with oil. Further, it was ridiculous to contend that a director could not buy from the company, as that would prevent him buying a small quantity of oil for his household use. At any rate, by the articles of association, article 98, the shareholders had precluded themselves from making any objection.

At advising—

LORD YOUNG—The question in this case arises in a multiplepointing which is brought in name of the bank with whom the money which forms the fund *in medio* was deposited. This sum amounts to £3323, and is said to represent a number of oil barrels which were at one time the property of the West Lothian Oil Company, and which are said to have been on its premises and in its possession at the time it went into liquidation in November 1891.

The competitors in the multiplepointing are the liquidator of the company on the one hand, and on the other Mr Mair, who was chairman of the directors at the time of the liquidation.

Now, it is certain on the evidence that these barrels were originally the property of the company, and at the date of the liquidation were upon the company's premises, although, as I shall afterwards have to explain, they were stocked in a part of the yard by themselves, were fenced round, and under lock and key.

The liquidator says that being on the premises of the company, and having originally been its property, he is entitled to have them unless Mr Mair can show that they are really his. This Mr Mair endeavours to do, and, he says, does successfully, by showing that he purchased them from the company on three separate occasions. He says that upon 9th October 1891 he purchased 10,000 barrels at an agreed-on price, upon the 16th October 2000 barrels, and upon the 30th October the remaining 2500 barrels, the prices for the whole number of barrels in the three transactions amounting to £2900. The question is, whether he did purchase them, for if he made the purchase as he avers, and the purchase is unexceptionable, then he is entitled to keep them. But the liquidator answers to each averment of purchase that there was no real sale at all, but that the whole thing was a mere device to create a security over moveables in exchange for advances made to the company by Mair before the liquidation.

Another objection by the liquidator is that—on the assumption that he as liquida-

tor is entitled to disregard the rules made by the company for its internal management—the sales were bad, because they were sales by the company of the company's goods to one of its directors.

As regards the first objection, we must see if there is any *prima facie* evidence of a contract of sale. Mair avers that there is, and he relies upon the evidence adduced in support of his averment. Now, it is plain, both upon the parole testimony and the written evidence, that in each case a contract of sale was *prima facie* entered into. There is written evidence that upon the 9th October 1891 the company sold Mr Mair 10,000 barrels, that they were invoiced to him, and that a discharge for the money received from the sale of the barrels was put upon the invoice. The same thing is true of each of the other two transactions. There is thus *prima facie* evidence that on these three occasions the contract of sale averred was entered into, and that it was implemented on the part of Mair by his paying the agreed-on price, and on the part of the company by separating the number of barrels sold from the others in their yard by putting a fence round them, and putting them under lock and key. But it is said on the other hand that in reality this was not a contract of sale at all, but a contract of loan. It is said that the company of which Mair was chairman of the board of directors was in difficulties and needed money to carry on its business. It is said that the company did not really wish to get rid of these barrels in the way that a seller usually wishes to get rid of what he has sold, and that Mair did not really wish to become proprietor of the barrels for the usual purpose that a man buys anything in view of keeping them for his own use and enjoyment or by selling them at a profit, but that he was willing and agreed to accommodate the company with a loan of £2000, and that the contract of sale was entered into between the parties with a view to secure the advance he made and protect him to some degree against loss. I think that in some respects each of the parties was affected by these feelings—that the seller was not wholly actuated by a desire to get quit of his goods, and that the purchaser, on the other hand, was not actuated by a desire to keep the goods for his own use and enjoyment or to sell them at a profit. I think that is true enough, but with regard to the objection urged, has this fact any effect upon the validity of the sale? I think the objection is bad both on principle and on the authorities.

The question is not a new one; it has occurred before; it is the case of the seller really desiring only to get accommodation to the amount of the price stipulated, and the purchaser desiring to be assured for the accommodation given, at least to the extent of the goods sold. In other cases in which this question has been raised, there was direct evidence that that was really the state of the case—accommodation on the one hand and security on the other. It was urged as a defence to regarding the contract as a contract of sale that

it was a mere pretence. That argument was urged upon the Court and was rejected, it being the opinion of this Court and of the House of Lords that if the one party was willing to grant the accommodation and the other party was willing to be accommodated, and they were willing to make the relation between them that of buyer and seller, and to do that by means of a contract of sale which was a contract of sale in form only, when what they really meant to do was to create a relation of buyer and seller between the lender and the borrower, the price being the accommodation transferred from the lender as the buyer to the borrower who was the seller—that has been held to be a legitimate transaction, although the real relation between them was that of borrower and lender. The determinations of the parties had no effect upon the bargain, and the validity of what was done was not affected because it was done with these views. The transaction is meant to place the parties on the footing of buyer and seller, although the seller did not wholly part with the goods, and the buyer neither used them for his own behoof nor sold them, and although it appears that if the seller should tender the amount paid for the goods with interest, the buyer would be bound to restore them, or if he sold the goods, that he would have to return to the seller the surplus received over what he had paid for the goods. That is the result of the decisions. Now, I think that in this case there was a valid contract of sale of these oil barrels, and that it must have effect.

Then, however the question arises, were these goods, which were validly sold and paid for, delivered as was necessary under the common law? I am of opinion that the setting aside of these goods in the yard, in fencing them round, putting them under lock and key, and handing the key to the purchaser, amounts to delivery at common law. But I think that the Mercantile Law Amendment Act applies to this case, so that delivery was not necessary to a valid contract of sale, and I do not think that it is any objection to the application of the Act that the contract was entered into with the parties having the view which I have expressed.

Now, that exhausts the case except as to the objection that the contract cannot have effect as being a contract of sale of the company's goods to the chairman of the board of directors. Now, I think there is some misapprehension on the part of the liquidator as to this objection. If there was room for the objection, and it could be advanced in the proper meaning of the doctrine upon which it is based, then I think Mr Mair would be very well pleased that it should be upheld. The doctrine upon which it is founded is this, that if a trustee or a person in fiduciary position should enter into a contract with the person to whom he stands in a fiduciary position, it may be set aside. It cannot be enforced if the person with whom the trustee made the contract objects to it

being carried out, and it may be rescinded altogether on the ground of imperfect restoration.

That doctrine is founded on a series of cases, the most important of which is the *Aberdeen Railway Company v. Blaikie Brothers*. In that case the contract was unimplemented, and the House of Lords refused to order the defenders to implement it, and that on the authority of a series of cases, the most important of which was *Mackenzie v. The York Building Company*. The Lord Chancellor specially referred to that case. It is not necessary to go into the details of the case. The York Building Company got into difficulties. It had a good deal of property in Scotland, which was sold, and amongst other properties was that of Niddrie, I think. Mr Mackenzie, a Writer to the Signet—an officer of the Court—was appointed common agent at the judicial sale of the estate, and Mr Mackenzie bought Niddrie, and paid the price for it. Then he took possession of it, and expended a great deal of money upon ornamental improvements, among other things, and had possession of it for eleven years. Then the York Building Company ascertained the English theory of law, which we had not at that time, that a contract between a trustee and the person to whom he stood in a fiduciary position was challengeable, and they brought an action against Mr Mackenzie. The Court here would not have it, but the case went to the House of Lords, where they referred to the doctrine upon which the objection here is founded, but they allowed it effect only upon the ground of restoration. And the restoration was made very complete, because not only did they order the price to be paid to Mr Mackenzie, there being no idea of fraud in the case, but they ordered that sums laid out even upon ornamental improvements should be repaid.

Now, a stronger illustration of the doctrine could not well be had, and it is referred to in the case of *Blaikie*. Therefore, I say, if there is room for the application of the doctrine here, Mr Mair will be delighted, because he will get back the money he has lost over the sale of these oil barrels. But the doctrine is not applicable.

There is also inserted in the articles of association of the company a provision which is commonly inserted in the articles of all joint-stock companies, that the officers of the company shall be able to deal with the company, and that any contract between them and the company shall be valid. That is a provision in the articles of all stores and other companies of that kind where the officials habitually deal, and to say that there is any invalidity in that, and that purchases by and sales to them are to be challengeable in case of a liquidation, approaches the ridiculous.

Therefore I am of opinion that Mr Mair's claim has been made out, and ought to be sustained.

LORD RUTHERFURD CLARK—I am also

of opinion that we should affirm the judgment of the Sheriff. I wish to say that my opinion is based upon the fact that I think that there was a true sale in each case. I do not think they were loan transactions. On the question as to whether a purchase by a director from the company without the clause in the articles of association, I desire to say nothing. I proceed entirely upon this being a real sale, and that the buyer has the authority of the Mercantile Law Amendment Act.

LORD TRAYNER—I am satisfied that in this case the defender has established that there was a *bona fide* sale of the goods. If, however, it had been a mere security transaction without delivery of the goods, I could not have taken that view, but I think there was a *bona fide* sale and delivery of the goods to the purchaser.

With regard to the other matter, while I think the transaction might have been set aside at common law, I do not think that can be done here, because the company cannot challenge the transaction, as by its own articles contracts such as this are not voidable, and the creditors cannot challenge it except upon the condition of *restitutio in integrum*, and no offer of that kind has been made.

The LORD JUSTICE-CLERK concurred.

The Court pronounced this judgment:—

“Recal the interlocutor appealed against: Find in fact (1) that the West Lothian Oil Company, Limited, on or about the month of October 1891, sold to the claimant Hugh Mair, and the said Hugh Mair purchased, the 14,500 empty oil barrels mentioned on record at the *cumulo* price of £2900 sterling; (2) that the said price was duly paid to the said company by the said Hugh Mair; and (3) that the said barrels were delivered to the said Hugh Mair by said Oil Company: Find in law (1) that the property in said barrels passed to the said Hugh Mair by said delivery; (2) that said barrels were the property of the said Hugh Mair at the time the same were sold of consent as set forth in the condescendence for the nominal raisers; and (3) that the price realised by the sale of said barrels, which now forms the fund *in medio*, belongs to the said Hugh Mair: Therefore repel the claim for the claimant John Gourlay, and sustain the claim for the said Hugh Mair: Rank and prefer the said Hugh Mair,” &c.

Counsel for the Appellant—C. S. Dickson—Cooper. Agents—Drummond & Reid, W.S.

Counsel for the Respondents—Sol.-Gen. Asher, Q.C.—Salvesen. Agent—John Rhind, S.S.C.

Friday, November 18.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

THOMSON v. CUNNINGHAM AND OTHERS (CLARKSON'S TRUSTEES).

*Writ—Will—Execution—Instrumentary Witness—Witness who Heard Testator Acknowledge Signature, Signing Outwith Testator's Presence—Act 1681, cap. 5—Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 39.*

*Held* that it was not a valid objection to the testing of a deed, *ex facie* probative, that the two instrumentary witnesses who had heard the granter acknowledge her signature did not affix their subscriptions until an hour afterwards, and outwith the presence of the granter.

The Act 1681, cap. 5, provides—“That no witness shall subscribe as witness to any partie's subscription unless he then know that partie, and saw him subscribe, . . . or that the partie did at the time of the witnesses subscribing acknowledge his subscription.”

The Conveyancing (Scotland) Act 1874 37 and 38 Vict. cap. 94), sec. 39, provides—“No deed, instrument, or writing subscribed by the grantor or maker thereof, and bearing to be attested by two witnesses, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the grantor or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same.” . . .

Mrs Margaret Clarkson or Thomson raised this action against William Cunningham and David Gray, both residing in Inverkeithing, and James Robert Russell, solicitor, Dunfermline, for reduction of a trust-disposition and settlement dated 6th March and relative codicil dated 23rd April 1891, alleged to have been executed by the deceased Miss Henrietta Lochtie Clarkson, sometime residing at Inverkeithing, under which the defenders were the accepting and acting trustees and executors.

The cause was tried under, *inter alia*, this issue—“Whether the trust-disposition and settlement dated 6th March 1891 is not the deed of the said Henrietta Lochtie Clarkson?” and evidence was adduced on both sides in support of the parties' respective contentions under the issue.

It appeared that Mr Russell went to Miss Clarkson at Inverkeithing on 5th March, and explained the trust-settlement to her, and that she signed it, but owing to her objection to have any of her neighbours as witnesses, her signature was not attested. On the next day Mr Russell sent two clerks from his office in Dunfermline to Inver-