

For these reasons I am of opinion that the appellants were properly convicted.

The present question was in terms decided in England in the case of the *Pharmaceutical Society v. Wheeldon*, 24 Q.B.D. 683, in the same way in which I propose to decide this case; and the same view of the statute was expressed by Lords Selborne and Blackburn in the case of the *Pharmaceutical Society v. Provincial Society Association*, 5 App. Cas. 857.

These are not perhaps authorities by which we are technically bound, but I concur in and adopt the reasoning in these cases, and I may say, seeing that this is a question of the construction of a British statute, that if I had doubted as to the proper construction of the Act, I should, without hesitation, have yielded to the authority of these eminent Judges.

LORD KYLLACHY—I regret that I am not able to concur in your Lordships' judgment. I have, I confess, great difficulty in reading this statute, as requiring more than that the seller of these poisons—that is to say, the shopkeeper—the trader—the seller in the ordinary and legal sense as distinguished from the mere salesman, shall possess the requisite qualification. Nor indeed have I been able to see how if the head of the establishment—the person responsible for its conduct—is duly qualified, it adds anything to the public security that the mere salesman who makes the sale, but may have nothing to do with the compounding of the drug, shall be also qualified.

At the same time I am not sorry that the majority of your Lordships see your way to a different conclusion. It would certainly be inconvenient that this statute should be differently construed in Scotland and in England, and that would, it appears, be the result if your Lordships took the view of the statute to which my judgment inclines.

LORD KINCAIRNEY—I concur in the opinion of the Lord Justice-Clerk and Lord Adam that the appeal should be refused, but I cannot say that I adopt that opinion without considerable hesitation. I have found the Pharmacy Act 1868 exceedingly difficult to construe. Of course its main object is to secure the safety of the public; but the doubtful point is, whether the scheme of the Act is to attain that object by endeavouring to secure that those who carry on the business of selling poisonous drugs in chemists and druggists' shops, shall be men of respectability and of adequate scientific knowledge, or by endeavouring to secure that their assistants also who may sell poison on their account shall be equally qualified and instructed; the whole difficulty apparently arising from the ambiguity or possible ambiguity of the words "sale" and "seller." The latter view has been adopted in England, and has been supported in elaborate judgments by Baron Pollock and Justice Hawkins in the case of *Wheeldon*, and in a very important judgment by Lord Selborne—concurring in on that point

by Lord Blackburn—delivered in the House of Lords in the case of *The London and Provincial Supply Association*—a case followed in our Courts in *Gray v. Brembridge*, July 20, 1887, 14 R. (J.C.) 10, and 24 S.L.R. 747.

These are very important judicial opinions on the construction of a British statute, unskilfully and obscurely expressed, and while I do not adopt everything that is said in them, their reasoning seems to me of great weight and force, and not having been able to form a very confident opinion as to the true construction of the statute I think myself entitled to defer to such weighty authority.

LORD STORMONTH DARLING—My view of the statute is the same as Lord Kyllachy's, but there is no question of principle involved, and I have no desire to detain the Court by stating my reasons at length, especially as I am conscious of some advantages in having the statute interpreted as the majority of your Lordships propose to do.

LORD JUSTICE-GENERAL—The judgment of the Court will be—"Refuse the appeal." My own opinion coincides with the opinions of the Lord Justice-Clerk and Lord Adam.

Counsel for the Appellant—Guthrie—Ure. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—Salvesen—T. B. Morison. Agent—Peter Morison, S.S.C.

## COURT OF SESSION.

Friday, June 1.

### SECOND DIVISION.

WELSH v. EASTERN CEMETERY COMPANY AND GOVERNORS OF TRINITY HOSPITAL.

*Process—Expenses—Several Defenders—Separate Defences.*

S and T having entered into a contract of excambion, S sold to W her property, of which W sold to C that part affected by the contract. W raised an action against T and C, averring that they each possessed from him ground in excess of their rights, and concluding for declarator of the contract, for demarcation of the ground in terms thereof, and for removal by the defenders from ground held in excess of their rights. The pursuer in his pleadings claimed from T ground which had never belonged to the pursuer, with which C had never been concerned, and which was not part of the excambion lands.

Held that the defenders were entitled to lodge separate defences, and also to separate expenses throughout.

In 1877 a contract of excambion was entered

into between The Lord Provost, Magistrates, and Council of the city of Edinburgh, as administrators and governors of the Trinity Hospital, on the one part, and Mrs Margaret Smith-Sligo, wife of Archibald Vincent Smith-Sligo of Inzievar House, near Dumfermline, and her husband, on the other part, with reference to the lands of Backdrum and Foredrum, which belonged to the parties respectively. The magistrates conveyed to Mrs Smith-Sligo certain parts of the lands of Backdrum, consisting of six separate pieces, all coloured blue, and each marked I. on a plan appended to the said contract, measuring *in cumulo* 4537 square yards and 3 square feet. Mrs Smith-Sligo and her husband conveyed to the magistrates certain parts of the lands of Foredrum, consisting of six separate pieces of ground, all coloured pink and each marked II. on the foresaid plan, and measuring *in cumulo* 4158 square yards. The testing clause of the said contract contained the declaration that the said Mrs Margaret Smith-Sligo and the said Archibald Vincent Smith-Sligo, with joint consent and assent as aforesaid, “hereby agree to give up that stripe of ground, part of the said lands of Foredrum, coloured yellow on said plan, for the purpose of forming part of and widening the Easter Road.”

In 1879 John Welsh, S.S.C., acquired by disposition from Mr and Mrs Smith-Sligo their property in the neighbourhood, and accordingly became possessed under the contract of excambion of the six pieces of Backdrum described above. The disposition of the property excepted the strip of ground mentioned in the contract of excambion.

In 1882 John Welsh sold to the Edinburgh Eastern Cemetery Company, Limited, certain ground, including a portion of the subjects affected by the excambion, measuring  $9\frac{6}{1000}$  acres, as shown on a relative plan. It was a condition “that in the event of the excambion arranged with Trinity Hospital in 1877 being carried out,” the pursuer “shall be at the expense of taking down and rebuilding such parts of the existing walls as may be necessary to give effect to the excambion, and that such rebuilt portions shall be of at least the same value and character as the existing walls, or that, at the option of the company,” the pursuer “shall pay to it a sum equivalent to what such removing and rebuilding would have cost.”

Subsequent experience showed that the relative plan was in some respects incorrect, and Mr Welsh conceiving that the Cemetery Company were in possession of ground in excess of their right, and of the intention of parties, raised this action against the Cemetery Company and the Governors of Trinity Hospital.

He asked declarator (1) that the lands of Foredrum and Backdrum were held subject to the contract of excambion; (2) that authority be granted to a man of skill to mark off the lands in terms of the contract; “(3) the defenders ought and should be decerned and ordained, by decree of our

said Lords, to cede possession to the pursuer of, and to flit and remove from, the area or areas of ground held by them respectively, to which, in the course of the process to follow hereon, the pursuer may be found to have right under the said contract of excambion, and to execute, or concur with him in executing, all such deeds, instruments, or writings, as may be necessary for carrying out the provisions of the said contract of excambion, and particularly a deed or deeds of discharge, freeing and relieving the property of the pursuer of and from the burdens and provisions of the said contract of excambion in all time coming; (4) for joint payment by the defenders of the expenses of ascertaining the boundaries.”

He averred—“(Cond. 5) At the date of the before-mentioned dispositions, the arrangements embodied in the said contract of excambion had not been carried out, except to a very small extent. The pursuer had given up to the defenders, the Governors of Trinity Hospital, a portion of the area belonging to him at the north-east corner of his property, and had received from them an area of somewhat larger extent immediately adjoining thereto. With that exception the defenders, the said Edinburgh Eastern Cemetery Company, possess the lands of Foredrum and Backdrum, as the said lands were enclosed and possessed before the execution of the said contract of excambion, and the present action has been rendered necessary to have the rights of parties under the said contract of excambion determined and defined, that possession may be obtained of the areas to which they are respectively entitled, and also that the said areas may be discharged and relieved from the other provisions of the said contract of excambion in all time coming. The pursuer, under an arrangement with the defenders (Trinity Hospital), whereby he was to receive ground of an equivalent extent, gave up a portion of ground belonging to him lying along the east side of the Easter Road, and in addition to that piece of ground, the defenders, the Edinburgh Eastern Cemetery Company, Limited, are at present in possession of ground belonging to the pursuer, in excess of what was conveyed to them by the foresaid disposition in their favour to the extent of 404 decimal parts of an acre.”

The two sets of defenders lodged defences. They explained that the ground affected by the contract of excambion belonged solely to them, that the pursuer was no longer interested therein, that they were agreed as to the disposal of the ground, and did not desire to have the contract implemented in the meantime. The Cemetery Company denied that they possessed an excess of ground. In addition the Governors of Trinity Hospital averred—“It was further agreed by the said contract of excambion that Mr and Mrs Smith-Sligo should give up the strip of ground coloured yellow, for the purpose of forming part of and widening the Easter Road. The said strip was further excepted from the dis-

positions in favour of the pursuer, which are referred to. The pursuer has accordingly no title or interest to sue the present action."

After certain procedure the Lord Ordinary (WELLWOOD) remitted to Mr Henderson, architect, to report, and having approved of the report, his Lordship, on 10th February, 1892, found "that the pursuer has no title or interest to sue this action except to secure that any obligations undertaken, and now prestable by him in connection with the contract of excambion mentioned on record, in so far as it has not already been carried out, are effectually discharged, and that he is freed and relieved from the same: Finds that the defenders, whose properties alone remain affected by the said contract of excambion, in so far as not yet carried out, do not desire that the said contract of excambion should be at present carried out and applied, and that they are agreed as to the manner in which the ground affected by it shall ultimately be dealt with: Finds that on the defenders granting, or procuring to be granted, an effectual discharge to the pursuer of his said outstanding obligations, they will be entitled to be assolized or to have the action dismissed, and, with these findings, appoints the case to be put to the roll that the defenders may state whether they are prepared to grant, or procure to be granted, such a discharge."

A discharge was accordingly lodged reciting the above facts and proceeding:—"Therefore we, the said Edinburgh Eastern Cemetery Company, Limited, with consent of the said The Right Honourable The Lord Provost, Magistrates, and Council of the city of Edinburgh, as administrators and governors of the Trinity Hospital of the said city, for any interest competent to them in the premises, do hereby (without prejudice to any informal discharge already granted by us) discharge and free and relieve the said John Welsh and his heirs, executors and successors, of all obligations undertaken by him in connection with the carrying out of the said excambion: Declaring always that the obligations of real warrandice and absolute warrandice contained in the said contract of excambion and of absolute warrandice contained in said disposition in our favour, are in no way affected by this discharge; and we consent to registration hereof for preservation."

On 21st November 1893, in respect of the execution of this discharge, "the Lord Ordinary assolized the defenders from the conclusions of the summons, and decerned; found the pursuer liable to the defenders in four-fifths of their expenses; allowed accounts thereof to be lodged; and remitted the same to the Auditor to tax and report."

The pursuer reclaimed, but before the close of the arguments in the Second Division he abandoned the action.

When the case appeared in the Single Bills counsel for the pursuer moved the Court to disapprove of the Auditor's report in so far as it allowed the expenses of lodging separate defences to both defenders, and argued—Where parties in one action had

the same interest, the general rule was they should be represented by one counsel. The matter was one for the consideration of the Court—*Cameron v. French*, October 26 1893, 1 S.L.T. 259. The action had been abandoned, but where that had been done by the pursuer the defender was not entitled to more expenses than he would have got if he had been victorious—*Lockhart v. Lockhart*, July 15, 1845, 7 D. 1045.

Argued for the Cemetery Company—The real object of the pursuer was to show that the Cemetery Company was in possession of more ground than he had supposed them to be. He chose to lay his action on the contract of excambion, although it was not clear how the declarator he sought would remedy his alleged wrong. There were two parties to the contract who were at one as to the arrangement of their neighbouring ground and they were both entitled to appear and defend.

Argued for the Governors of Trinity Hospital—The representation of the pursuer was that both the defenders possessed ground in excess of their right, and he concluded for decree of removal against each. The Cemetery Company were said to hold in excess of the disposition of 1882; the Trinity Hospital were alleged to hold 700 square yards given up by the pursuer without his receiving the stipulated equivalent. In point of fact, this 700 square yards had never belonged to the pursuer. It was given up to Trinity Hospital by Mrs Smith Sligo to widen Easter Road, the equivalent being a larger amount of land delivered to her under the contract of excambion than she delivered to the Hospital. It was excepted from her disposition to the pursuer. In this case there were different defenders, different subject-matter, different issues raised, and accordingly separate defences were competent.

At advising—

LORD JUSTICE-CLERK—No doubt it is a sound principle that where two or more parties who are called as defenders have only one case and one defence to state, the pursuer is not to be subjected to more than one set of expenses being incurred. But Mr Campbell has not succeeded in bringing his case under this principle; this is a case of a different kind. We did not hear the argument out; we had only heard part of a speech on one side and part on the other, and we had thus no means of knowing the whole case. When the case was in this position Mr Campbell abandoned his case. I therefore think this is a case in which we are bound to give expenses to both the parties whom the pursuer has called into Court.

LORD YOUNG—I am of the same opinion. We have not the means of judging whether only one set of expenses should be allowed. As to the discretion of the Court in the matter of expenses, I have no doubt we may refuse expenses altogether to a defender, or we may find him entitled to only a portion of his expenses for considerations which must be held to be reasonable and exe-

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