

Friday, December 3.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

DUNN v. CHAMBERS AND OTHERS.

Judicial Factor—Curator Bonis—Realisation of Ward's Estate—Double Capacity of Buyer and Seller—Invalid Sale.

One of the directors of a company, the board of which by the articles of association had a right of pre-emption of any of its shares in the market at a price to be fixed by agreement or arbitration, was appointed *curator bonis* to a shareholder. Having been ordered by the Accountant of Court to effect a judicious realisation of the ward's shares, which it would have been *ultra vires* of a curator to hold, he sold them to the directors at a price mutually agreed upon, the return from which would necessarily be considerably smaller than the interest on the shares had been.

Held (following *Aberdeen Railway Company v. Blaikie Brothers*, July 20, 1854, 1 Macq. 461) that the ward was entitled to have the transaction reduced, and upon repayment of the price to have the shares restored to her.

Opinion reserved (per Lord M'Laren), whether having regard to the observations of L. J.-C. Inglis in *Perston v. Perston's Trustees*, January 9, 1863, 1 Macph. 245, at p. 253, it was absolutely incumbent on the curator in the circumstances to have resigned office.

On 31st March 1897 Mrs Nina Grace Chambers or Dunn raised an action against Charles E. S. Chambers and others, as directors of W. & R. Chambers, Limited, and as individuals, and against the testamentary trustees of the late Robert Mowat, managing director of the said company, concluding for reduction of a transfer of 100 shares in the company granted by Robert Mowat as her *curator bonis* to a nominee of the directors of the company, and also for reduction of the consequent entry in the share register of the company, and of the share-certificate granted in favour of the directors' nominee. The summons also contained conclusions of a pecuniary character which need not here be detailed.

The facts of the case as disclosed on record are thus summarised in Lord M'Laren's opinion—"It appears that in December 1895 the health of the pursuer was affected to such a degree that she was deemed incapable of managing her affairs, and on 21st January 1896, on the application of her relatives, a *curator bonis* was appointed to take charge of her estate. The Lord Ordinary, as is not unusual in non-contentious cases, gave the appointment to the petitioner's nominee, Mr Mowat, and at the time this was no doubt considered a very suitable appointment, because Mr Mowat had been in the management of the pursuer's affairs as her factor,

and was conversant with the business which he had to manage.

"The difficulty which arose was probably not anticipated by the petitioners or by Mr Mowat himself. It was this—The pursuer is a daughter of the late Robert Chambers, a partner of the publishing house of W. & R. Chambers, and in 1890 the business of the firm was transferred to a limited company, of which the pursuer became a shareholder. An important part of the curatorial estate consisted of 100 shares in this company, representing a capital of £10,000, and Mr Mowat was advised by the Accountant of Court that he could not continue to hold these shares.

"Now, the articles of association of W. & R. Chambers, Limited, contain the following provision:—'Any member proposing to sell his shares shall be bound to offer them in the first instance to the directors, at such a price as may be agreed upon between the directors and the member, or failing such agreement, at such price as may be fixed by two neutral persons to be mutually chosen, or by an oversman to be named by such valuers in case of their differing in opinion.'

"Within a week after the first intimation of the Accountant of Court's opinion, Mr Mowat wrote to the secretary of the company inquiring whether the directors were prepared to purchase shares. The directors offered £13,000, being a premium of £30 on each £100 share. At the suggestion of the Accountant of Court, the offer was increased to £15,000, and was then accepted, and the shares were transferred in terms of the articles of association to a nominee of the directors.

"The sale was completed on 26th March, being about a month after the date of Mr Mowat's appointment. On 16th June the curatory was recalled, the pursuer having been previously informed of the sale of her interest in the company to the directors.

"These facts are not in dispute. It is admitted that Mr Mowat was managing director of W. & R. Chambers at the time when he held the curatory, and negotiated the sale of his ward's shares to the company. It is also admitted that the income derived by the pursuer from her shares amounted to £1550 per annum."

The Accountant of Court conveyed his opinion as to the impropriety of holding the shares to Mr Mowat in the following document appended to the inventory of the curatorial estate:—"Examined, adjusted, and signed by me, subject to judicious realisation of shares held in W. & R. Chambers, Limited, and transference of securities in Dr William Chambers' trust to name of ward. "J. CAMPBELL PENNEY."

The pursuer pleaded, *inter alia*—"In respect that Mr Mowat, at the time of selling the pursuer's shares, was the managing director of the company, and one of the purchasers, the sale was illegal and invalid, and the pursuer is entitled to decree of reduction as craved."

The defenders pleaded (1) that the action was incompetent; and (2) that the pursuer's averments were irrelevant.

On 30th October 1897 the Lord Ordinary (KYLACHY) repelled the first plea-in-law for the defenders, and allowed a proof before further answer.

Opinion.—"In this case I have considered the argument, and I have come to the conclusion that there must be a proof. I am not as at present prepared to hold that the transaction was null and void in respect simply of Mr Mowat's double position as *curator bonis* and as a director of the company, but I do not propose to decide that or any other question at present. There is a separate ground on which the transaction is impeached, viz., that it was not fair, and that the curator did not take due steps to protect the pursuer's interests; and the facts with respect to that matter must, I think, be ascertained. It is true that the pursuer's averments upon this part of her case are exceedingly vague; but I think with the amendment which I have allowed they may be held as not plainly irrelevant.

"As regards the defenders' contention that the documents produced sufficiently establish that every precaution was taken by Mr Mowat either directly or through the Accountant of Court for the protection of the lady's interests, I do not feel at liberty to deal with the correspondence and documents produced without having either a renunciation of probation or an exhaustion of the whole evidence available. I think the proper course is that the cause should be concluded and the evidence exhausted in the usual way before any final judgment is pronounced. I shall therefore allow a proof in the usual terms."

The pursuer reclaimed, and argued—Proof was quite unnecessary. The material averments of the pursuer were admitted by the defenders, and they disclosed a violation of one of the elementary principles of trust law, viz., that one in the position of a trustee could not act both as seller and buyer of the trust property.—*Aberdeen Railway Company v. Blaikie Brothers*, July 20, 1854, 1 Macq. 461, per L. C. Campbell, 471. It made no difference in the application of the rule there recognised that the Accountant of Court had ordered the sale of the shares. The curator's proper course would have been to resign, and thus escape from the dilemma.

Argued for the defenders—The pursuer had not stated a relevant case. The decision in the *Aberdeen Railway Co.*, *ut supra*, had no application here, for the conflict of interest was brought about by no voluntary act of the curator's own, but (1) by the order of the Accountant of Court, and (2) by the right of pre-emption enjoyed by the directors of the company. The only duty left to Mr Mowat was to fix the price of the shares, and the defenders were prepared to prove that he had got a good price for them. If that were so, and the pursuer had suffered no damage, there was no such inherent nullity in the transaction as to entitle her to reduction—*Fleming v. Imrie*, February 14, 1868, 6 Macph. 363. It was very doubtful if the curator would have been allowed to resign his office merely

because of a problematical conflict of interest. Trustees were not entitled to resign merely because "they have succeeded to such a right as may bring them in one particular case into a position of antagonism to the trust-estate and its interests"—*Perston v. Perston's Trustees*, January 9, 1863, 1 Macph. 245, per L.J.-C. Inglis, 253.

At advising—

LORD M'LAREN—This case comes before us by reclaiming-note against an interlocutor of Lord Kyllachy allowing a proof in an action of reduction, the reclaiming-note being at the instance of the pursuer. Under ordinary circumstances I should have thought the interlocutor undoubtedly right. But on studying the condensation and answers I find that the statements of the parties on matters of fact are so entirely candid and free from reserve, that there is really nothing left for inquiry except a question of law. [After narrating the facts as quoted above, his Lordship proceeded]—These facts are not in dispute. It is admitted that Mr Mowat was managing director of W. & R. Chambers at the time when he held the curatory, and negotiated the sale of his ward's shares to the company. It is also admitted that the income derived from her shares amounted to £1550 per annum. Now, as the sum of £15,000 got for the shares would not, if invested according to the rules of trust administration, produce more than one-third of that income, it is obvious that the sale was a very disadvantageous one for the pursuer, and it is for consideration whether this sale can be supported. The pursuer's case is founded on the rule as to fiduciary disqualification. It must be admitted that a voluntary sale of trust estate by a trustee to a company of which he is managing director is a breach of trust and therefore reducible at the instance of the beneficiary. But the question is complicated by two considerations—(1) that the sale of the shares was advised by the Accountant of Court, and (2) that the company had a right of pre-emption under its articles of association. Hence it is contended the *curator bonis* was not a free agent in this matter, and there was no breach of the rules of trust administration, because the *curator bonis* in selling to his company only did what he might have been compelled to do.

On consideration of the facts I have come to be of opinion that the compulsor was not nearly so strong as it has been represented to be.

To begin, the Accountant's opinion was not absolutely binding on the *curator bonis*. Mr Mowat was an officer of Court, and he might have applied to the Lord Ordinary, and if necessary to the Court, for authority to hold the shares for a definite time, or until he should be able to test their market value.

Keeping in view what has been done in similar cases, it is not at all unlikely that a period of six months would have been allowed preparatory to realisation, and if that had been the view of the Court the

sale would not have been necessary at all, because the curatory only lasted four months. Or again, the *curator bonis*, if he had not shown such haste in selling to the company, might have heard of some perfectly unexceptionable purchaser who was willing to give more than £15,000 for stock yielding a yearly income of £1550. In that case the directors could hardly have forced a sale at a lower price.

This leads to what I think is the critical point in the case, that while the articles of association gave the company a qualified right of pre-emption, they did not oblige Mr Mowat to sell at any price the directors might choose to offer. The right of the directors was to take the stock at such price as should be agreed on, or failing agreement, at a price to be fixed by neutral persons mutually chosen. Now, in this case a sale by agreement was impossible. Mr Mowat was the managing director, and he was also the *curator bonis* for Miss Chambers. He could not come to an agreement with himself. The plain meaning of the article is that there is to be one person representing the seller and another person or body of persons—namely, the directors—representing the purchasers, and if the two parties concerned are agreed as to the price the sale will be complete. But in this transaction the seller was not represented at all. There was only the managing director to act for her, and of course it was his business, as well as that of his colleagues, to get the shares on terms advantageous to the company. I will put a parallel case. Suppose that a railway director is also curator for a minor or insane person whose property is to be taken under powers of compulsory purchase, what would his duty be? Of course, to have the price fixed by arbitration or by a jury. A sale by agreement in such a case would be open to the same objection which annulled the contract between Messrs Blaikie and the Aberdeen Railway Company.

In this case I assume that Mr Mowat meant to deal fairly with reference to the interests of his ward, but I think that a perfectly independent curator would have insisted either that the price should be fixed by arbitration, or that he should be left a free hand in disposing of the shares; and the fact that no such alternative was put before the directors only proves how unfit it is that a person holding the double position of seller and intending purchaser should be allowed to act in that double capacity with reference to the interests of a third party.

There is another course that might have been taken. The *curator bonis* might have resigned his trust when he found himself placed in a position in which his duty conflicted with his personal interests, for it is not to be overlooked that Mr Mowat was a shareholder as well as a director in the company of W. & R. Chambers. Having regard to the observations of the Lord President in the case of *Perston's Trustees*, I should wish to reserve my opinion as to whether it was absolutely incumbent on Mr Mowat to resign. At least it was a

way out of the difficulty—perhaps a more satisfactory way than a reference of the price to arbitration, because even in the choice of an arbitrator it is desirable that the ward's interests should be independently represented.

In the admitted circumstances of the case I am of opinion that this is a case of a purchase of the ward's interest by a person in the position of a trustee, and it makes no difference in the result that Mr Mowat had his co-directors in partnership with him in the purchase, because they are all affected with knowledge of the trust. They knew that the shares which they purchased from Mr Mowat were the estate of his ward, and they were not entitled to purchase that estate, or at least they could not purchase it except under the condition that the sale was voidable at her instance.

As regards the relief to be given, I do not follow the pecuniary conclusions of the action, and nothing was said in support of them. I think the right of the pursuer is to have decree of reduction of the transfer of the shares conditional on her repayment of the sum of £15,000 received in exchange for the shares by her curator on her behalf. This decree will entitle the pursuer to the dividend, if any, which may have been declared on the shares during the subsistence of the transfer.

LORD ADAM and the LORD PRESIDENT concurred.

LORD KINNEAR was absent.

The Court pronounced an interlocutor finding that on repayment of the sum of £15,000 the pursuer will be entitled to reduction, and continuing the cause.

Counsel for the Pursuer—Sol.-Gen. Dickson, Q.C.—Cullen. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Defenders—Balfour, Q.C.—W. Campbell. Agent—Lindsay Mackersy, W.S.

Friday, December 3.

SECOND DIVISION.

[Sheriff of Lanarkshire.

KENNEDY'S TRUSTEE v. HAMILTON & MANSON.

Sale—Transference of Property—Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), secs. 16, 17, 18 (Rules 1, 2, and 3), and 62 (1) "Specific Goods," and (4).

Evidence on which held that the parties to a contract of sale intended the property in the goods sold to be transferred to the buyer at the date when the contract of sale was concluded, and that consequently, in terms of section 17 of the Sale of Goods Act 1893, the property in the goods was so transferred at that date.