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HENDERSON *v.* SELKRIG.

WM. HENDERSON, Trustee on the Sequestrated Estate of Francis Garbett and Co., late Merchants at Carron Wharf, and of Charles Gascoigne, one of the partners of that Company as an individual, . . } *Appellant;*

CHARLES SELKRIG, Trustee for the Creditors of Messrs Adam and Thomas Fairholme, *Respondent.*

House of Lords, 27th June 1816.

CONTRACT—POWERS OF TRUSTEES ON BANKRUPT ESTATE.—A Contract entered into by the Trustees on a bankrupt estate, with concurrence of the creditors, was held not reducible, on the allegation (not proved) that it was entered into without due authority, and to the hurt of the creditors. Affirmed as to this. *Quoad ultra*, the case remitted.

Francis Garbett and Charles Gascoigne carried on business as merchants, at Carron Wharf, for some years previous to 1772, under the firm of Francis Garbett and Company.

In 1769 Mr Gascoigne entered into a transaction with Mr Ludovick Grant, then trustee for the creditors of Messrs Adam and Thomas Fairholme, by which he purchased, on his own private account, a debt due by the Carron Company to Messrs Fairholme, and a quantity of Carron stock or shares which belonged to them. Mr Gascoigne in return, gave a bond subscribed by himself, by Mr Francis Garbett, his partner, and by Mr Samuel Garbett of Birmingham, by which they bound themselves, conjunctly and severally, to pay to Mr Grant, on the 30th June 1773, the sum of £11,024, 2s. 6d., and the farther sum of £11,927, 2s. 6d., on the 30th of June 1775, with interest from the respective terms of payment. The bond contained also a disposition by Francis Garbett and Charles Gascoigne, of their lands of Abbotshaugh, and by the latter of his lands of Fullershaugh, in further security, in which lands Mr Grant was in consequence duly infeft.

Before the first of these instalments in this heritable bond became payable, the affairs of Mr Gascoigne, and of Francis Garbett and Company, had fallen into disorder, and their respective estates were, in June 1772, sequestrated by the Court of Session. Mr George Home, W.S., was appointed factor. At the first meeting of the creditors, Sir Thomas Hallifax and Thomas Stevenson of London, and Alexander Ferguson of Craigdarroch, were chosen trustees for managing

both the estates of the company and of the individual partners. Mr Gascoigne was allowed to act under them.

When the first instalment of the bond fell due, diligence of horning was raised, and arrestments used in the hands of the Carron Company, so as to attach the stock or shares held by either Francis Garbett and Company, or belonging to Charles Gascoigne, or to Francis Garbett, the individual partners, or to Samuel Garbett, the other obligant.

It was stated by the appellant that Mr Grant and his constituents knew well that these arrestments could not avail in giving a preference. The Carron stock, he stated, belonged to Francis Garbett and Co., and that of Mr Gascoigne, as an individual, could not be affected at all, in consequence of the previous sequestration. *That* of Francis Garbett, supposing it to be covered by the sequestration, (a thing disputed), had been previously assigned to Messrs Glynn and Halifax of London, in security of a *Company* debt, amounting to above £24,000, which was more than double its then value; and Samuel Garbett's stock was also mortgaged in security of some of his debts. The diligence of arrestment might, he stated, have been defeated by a new sequestration of all the parties concerned, within thirty days of its date.

In this situation of matters, and in the year 1774, an arrangement was gone into by the trustees of Francis Garbett and Co., whereby the trustee (Mr Grant) for the creditors of Messrs Fairholme, was to receive an assignment of £6000 of Mr Gascoigne's Carron stock, and £2000 in money, and the interest of his debt paid regularly; he, on his part, loosing the arrestments used by him. This agreement was gone into with the sanction of the trustees for the creditors of Francis Garbett and Co., and by Mr Gascoigne, on the one part, and it was accepted of by Mr Grant, and a committee of Messrs Fairholme's creditors. The assignment of stock was made, of £6000 value, and implement made otherwise under this arrangement.

The creditors, however, of Messrs Garbett and Co., became dissatisfied with Mr Gascoigne's management as factor under the trustees, and it was subsequently found that the trustees were not legally appointed or vested with the office, and their whole management was therefore set aside, but Mr Home's appointment as interim factor was held still to subsist. He, however, having applied to be relieved from that duty, and exonerated, Mr Wm. Anderson, W.S., was appointed in his stead.

It thus became necessary to traverse the same ground gone

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over; to review the transactions formerly gone into with Mr Grant, the trustee for Messrs Fairholme's creditors, and to lay that agreement, as the basis of a new agreement, before the creditors. This was done in 1777, and after having several meetings with the creditors, who, upon the question, whether the former agreement of 1774 should be confirmed, agreed to confirm, and confirmed it accordingly.

Thereafter the Carron Company brought three several processes of multiplepoinding, for ascertaining the various rights and the validity of the claims made by different parties to the Carron stock. In so far as regarded the stock standing in the name of Francis Garbett, there was no room for question. The assignation of it in security held by Messrs Glynn and Hallifax had been granted long before the bankruptcy. These gentlemen were preferred to it.

The respondent, Mr Selkrig, succeeded, on Mr Grant's death, as trustee for the creditors of Messrs Fairholme.

The appellant, who succeeded to Mr Anderson as trustee, stated, that a series of transactions then occurred, which proceeded on the footing that he, Mr Selkrig, was to be paid proportionally with the other creditors, and that he had received dividends on the individual estate of Mr Gascoigne, on this principle.

He then thought proper to prove of new, under the commission on Samuel Garbett's bankrupt estate, omitting all notice of the agreement.

Having also, sometime afterwards, discovered, in consequence of the Carron stock having greatly risen in value, in an interval of twenty years, that there would be a reversion after paying Glynn and Hallifax's preferable claim, he attached the stock belonging to Francis Garbett, by confirming as executor-creditor to Francis Garbett, then deceased. The appellant here interposed, considering himself entitled to demand from the preferable creditors an assignation to the reversion of that stock. This forms the subject of the next appeal.

Mr Selkrig then brought an action for payment of £30,885, 9s. 3d., as a balance of debt still due the Fairholmes, after giving deduction of the sums paid under the original agreement, and founding on that agreement as the basis of the action.

Reductions were brought by the appellant, as trustee on the estate of Francis Garbett and Co., and one in the character of trustee on the estate of Mr Gascoigne, concluding that

the agreement or contract entered into by Mr Grant and Mr Anderson, and the decree of preference obtained by the former to the twenty-seven shares of the Carron stock, should be reduced and set aside, and the appellant and his constituents restored against the same *in integrum*, on the following grounds, 1st, That it was highly unequal, and unjust, and attended with enormous lesion to the general body of creditors. 2d, That the agreement was illegal, as beyond the powers, not only of those who made it, but of Mr Anderson and his committee, who afterwards confirmed it. 3d, That, supposing the trustee to have possessed power of entering into the agreement, it was not exercised in the form required by the meeting of creditors. 4th, That supposing the contract obligatory, it did not entitle him to immediate payment of both his bygone interest and principal debt.

The Court pronounced this interlocutor, "The Lords "conjoin the actions of reduction with each other, and with "this process; in the actions of reduction sustain the de- "fences, repel the reasons of reduction, assoilzie the defender, "and decern, but find no expenses due; and in this process, "adhere to the interlocutor reclaimed against, and refuse the "desire of the petition, but reserve to the petitioner to be "heard on any errors which he may allege to exist in the "statement of the debt, as made up by the respondent, and "particularly as to the effect of the abatement of £181, 6s. 9d. "sterling, and interest admitted by him, and remit to the Lord "Ordinary to hear parties accordingly, and do as he shall "see cause." Feb. 21-23, 1815.

Against this interlocutor an appeal was brought to the House of Lords.

Pleaded for the Appellant.—1st, The agreement or contract on which the respondent's claim is founded, was highly unequal and unjust, being attended with the most enormous lesion to the general body of the creditors, both of Francis Garbett and Co., and of Charles Gascoigne. This appears clearly from a comparison of the stipulations on each side. The trustee for Messrs Fairholme's creditors, was creditor of Charles Gascoigne, having Samuel and Francis Garbett bound to him as cautioners. He had also an heritable security over certain lands. In regard to the rest of Mr Gascoigne's funds, he was entitled only to rank proportionally with the other creditors, and he had no right whatever to any part of the estate of Francis Garbett and Co. By the terms of the agreement, while his heritable security was to be

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made more effectual by various new provisions, he was to receive, in the first place, twenty-seven shares of Mr Gascoigne's Carron Stock, then valued at upwards of £6000, and which by the dividends drawn on them, and the price for which they were ultimately sold, have yielded him nearly double that sum. He was, in the *second* place, to receive in part of his principal sum, £2000, and was, besides, to draw dividends in proportion with other creditors, not only from the separate funds of Mr Gascoigne, but from the Company estate, on which he had actually no claim. He was, *lastly*, to have his interest regularly paid each year, till his debt should be wholly discharged, an obligation which he contends, and which the Court of Session, by the interlocutors appealed from, have found to import that he was to have his debt, principal and interest, fully paid, though no other creditor should receive one farthing.

The only equivalent given in return for these advantages was a consent to withdraw (or as it was ultimately arranged), to make over to the appellant's predecessors, the arrestments of Charles Gascoigne's, Francis Garbett's, and Samuel Garbett's, Carron stock.

But Mr Gascoigne's Carron stock was covered by the previous sequestration, and the arrestments, in so far as regarded it, were null and void.

The stock belonging to Francis Garbett was effectually impledged for a debt more than double its supposed worth. It was more than twenty years after this transaction, before there appeared the least probability of a reversion, and it then arose only from the preferable creditors having chosen to refrain from selling the stock, and from his drawing dividends on his full debt from the sequestrated estates. The private creditors of Mr Gascoigne had, besides, no interest in this stock, which could have made it an object with them to liberate it from arrestment.

It was the liberation of Mr Samuel Garbett's stock, however, or the acquiring right to the arrestment of it, which, from the history which has been given of the transaction, was the main inducement, which led to the agreement and its subsequent confirmation.

Several of the creditors of Francis Garbett and Company, had Samuel Garbett bound in farther security, but three times as many of them, (and who were creditors for debts to a very large amount), had no concern with him or his Carron stock, and could derive no benefit from having the arrest-

ments withdrawn, yet their interest was materially sacrificed by admitting Messrs Fairholme's debt, not only to rank on the Company's estate, but to be fully paid in preference to every Company creditor. In the same manner, one-half of Charles Gascoigne's proper creditors, and whose debts amounted to greatly more than one-half of his whole proper debts, exclusive of that due to Fairholme's trustee, had no interest in liberating Samuel Garbett's Carron stock from the arrestments, and even those creditors of the Company, and of Mr Gascoigne as an individual, to whom Samuel Garbett was bound, would have made a very bad and absurd bargain, if they had agreed to pay out of the sequestrated funds, the whole debt due to Fairholme's trustee, for the chance of drawing a part of it back from Samuel Garbett's funds, in virtue of the arrestments which had been used by Fairholme's trustee; and besides, whatever might be so drawn, would, in fact, be in so far drawn out of their own pockets, as it would diminish the dividends they would be entitled to, in their own right, as creditors of Samuel Garbett.

The creditors on either estate have not drawn one farthing in virtue of the arrestments which Mr Grant made over to them. The prospect of a reversion from the stock either of Francis or Samuel Garbett, appeared at the time the actions of multiplepoinding were brought, to be so hopeless, from the amount of the preferable claims, that it was thought useless to attempt obtaining a decree of preference *secundo loco;* and as no change to the better took place for much more than five years afterwards, the arrestments and the actions founded on them were cut off by the quinquennial prescription established by the Statutes, 1669, c. 9, and 1685, c. 14.

Neither is there the least ground to doubt that the arrestments, had they remained with Mr Grant, would have been just as useless and unproductive, as they were to Mr Anderson. The original trustees appear, from their letter to Mr Gascoigne, of 30th December 1773, to have been perfectly aware of their power to defeat the arrestments by a sequestration, and to have been determined to do so, if the arrestments were persisted in.

2d, The agreement in question was in itself illegal, as beyond the powers, not only of those who originally made it, but of Mr Anderson and his committee, who afterwards confirmed it.

The original agreement, 1774, it is not disputed, was altogether null, being formed by a set of trustees who were found by

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the Court of Session, to have had no right to act. The question turns entirely on the confirmation 1777, which, in the circumstances, had the same effect, and must be regulated by the same principles, as if the agreement had been then, for the first time, concluded.

An objection to the validity of Mr Anderson's appointment arises from the form of his election. There were two distinct estates under sequestration, belonging to different classes of creditors, and each class was alone entitled to direct the management and distribution of its respective estate. When the creditors present, therefore, proceeded to determine that the sequestrated estates should be managed by a trustee, and to appoint Mr Anderson to that office, without distinguishing whether they were acting as creditors of Francis Garbett and Company or of Charles Gascoigne, but in a sort of mixed capacity of creditors on both, they acted irregularly and incompetently, and nothing they did could be legally effectual, as under the Act of Parliament in virtue of which they were met.

The appointment of themselves as a committee to be a check on the trustee, lest he should improperly confirm the transaction of the former trustees, was also objectionable, as three of the five gentlemen who thus elected themselves, represented constituents who had an interest in these very transactions. And although no one could vote where his constituent had a direct interest, yet, as all the transactions were liable to the same objection, each had the strongest inducement to confirm those of others, however improper. But supposing the trustee to be effectually vested with the office, both as to the estate of Francis Garbett and Co. and Charles Gascoigne, he could have had no power to make an agreement of the present nature, by which one particular creditor of Mr Gascoigne was to receive full payment of his whole debt from both estates, though he had no claim on that of the Company in preference to every creditor, and though not one of them should draw a farthing.

3d, Supposing the trustee to have possessed a power of entering into the agreement, it was not exercised in the form required by the meeting of creditors by which he was appointed.

The first meeting called for considering the transactions of the former trustees, was held on the 21st October 1776, but the minutes do not state that it was called on ten days previous notice, though this was an indispensable condition. No

resolution was then come to, but the particular transaction with Fairholme's trustee was afterwards approved of by four of the committee, at an ordinary monthly meeting on 2d December. It was impossible to hold that this meeting was one in terms of the tenth condition imposed by the general meeting of creditors.

4th, The contract was, except in so far as regarded the twenty-seven shares of Carron stock assigned to Mr Grant, abandoned and given up, the parties having, for a period of above thirty years, regulated their conduct on principles which were quite incompatible with its remaining in force.

5th, Though the contract should be held to be still obligatory in all its parts, it does not entitle the respondent to the immediate payment of both his bygone interest and principal debt. He was to get preferable payment of the interest on the debt regularly every year; and in so far there may be a claim which is preferable to that of the other creditors. But there is no preference as to the principal sum, which is to be paid by dividends, made proportionally to the whole. Nor does the obligation to pay his interest regularly till his debt be discharged, imply a *preference* as to the *principal sum*, for that would be, in fact, giving him an undue preference over all other creditors as to his whole debt.

Pleaded for the Respondent.—1st, The contract, of which implement is demanded by the respondent, and of which the appellant has brought a reduction, was solemnly concluded by a regular deed, duly executed by the parties having interest on the one side and the other. It was ratified by a solemn judgment of the Court of Session. It was carried into effect by full implement on the part of Mr Grant, and by partial implement on the part of the appellant's predecessor, and it has subsisted unchallenged for thirty-seven years. The obligations of it are not prescribed and not discharged. Therefore, it is not competent to the appellant either to reduce the contract or to refuse implement of the obligations thereby undertaken by the trustee for the creditors of Francis Garbett and Co., and Charles Gascoigne, on any ground whatever.

2d, The allegation of the appellant, "that the agreement "1774, and the subsequent contract 1777, were unequal "and unjust, being attended with the most enormous lesion "to the general body of the creditors both of Francis Garbett "and Company, and of Charles Gascoigne," is both irrelevant in law and unfounded in fact. It is irrelevant at a distance

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of forty years, to allege as a reason for not fulfilling the stipulations of it, that it was unequal or unjust, which is only saying that it has not turned out so advantageous as was expected, and, besides, the fact is unfounded, it was manifest to all that it was the only way advantageously to dispose of the estates.

3d, Mr Anderson, as trustee for the creditors of Francis Garbett and Co., and Charles Gascoigne, with the consent of the committee appointed for the purpose, had full power to conclude the contract; these powers were lawfully and effectually exercised; and the contract so concluded, though effectual without any judicial confirmation, was, in fact, sanctioned by an express judgment of the Court.

After hearing counsel,

It was ordered and adjudged that so much of the interlocutor of 23d February 1815, as sustains the defences in the actions of reduction, repels the reasons of reduction, assoilzies the defender, and decerns be, and the same are hereby affirmed; and with respect to all other matters in the several interlocutors complained of in the said appeal, it is ordered that the cause be remitted back to the Court of Session to review the said interlocutors, with relation to such other matters, and, particularly, for the purpose of considering the true intent and meaning of the contract and agreement of the 28th April 1777, referring to, ratifying and confirming the contract of January 1774; and more especially with regard to the question as to interest beyond the 1st January 1776, and after such review and consideration, to do therein as shall be just.

For the Appellant, *Sir Saml. Romilly, Mat. Ross.*

For the Respondent, *John Leach, John Clerk, Jas. Moncreiff, Francis Horner.*

NOTE.—Unreported in the Court of Session.