# HOUSE OF LORDS.

*Monday, June 5.*

(Before the Lord Chancellor (Halsbury), and Lords Macnaghten, Davey, James of Hereford, and Robertson.)

ASSETS COMPANY, LIMITED *v.* BAIN AND OTHERS (BAIN'S TRUSTEES).

ASSETS COMPANY, LIMITED *v.* WATT AND OTHERS (PHILLIPS' TRUSTEES).

(In the Court of Session May 28, 1904, reported 41 S.L.R. 517 and 559, and 6 F. 692 and 754.)

*Proof—Onus of Proof—Mora—Effect of Delay in Increasing Onus.*

At a distance of time "every intendment should be made in favour of what has been done as being lawfully and properly done."

*Contract — Discharge — Reduction — Compromise Proceeding on Written Statement of Party's Property and its Value, Declared to be to the Best Knowledge and Belief—Discharge Founded on Completeness of Disclosure of Party's Property—Inaccuracy of Written Statement Disclosing Property.*

A compromise was made with, and a discharge from liability granted to, a contributory to a bank in liquidation "on the basis and on the condition of the truth, accuracy, and completeness" of a written state of the contributory's property and its value made in answer to printed questions. The state was declared to be true and correct to the best of his knowledge and belief. Twenty years later a reduction of the discharge was brought on the ground that the state was inaccurate, it having been discovered that the contributory had been possessed of property, at that time of doubtful value, which did not appear in the state.

*Held* (*rev.* the judgment of the Court of Session) that reduction should not be granted (1) because the declaration being only to the best knowledge and belief of the declarant, it was not sufficient to prove inaccuracy, but fraudulent concealment must be established; and (2) because, as it was not a special condition of the compromise that the disclosure of the contributory's property should be of all his effects in writing, a verbal disclosure of the property in question would have been sufficient, and it was not proved that such verbal disclosure had not been made.

The cases are reported *ante ut supra.*

Bain's trustees and Phillips' trustees (the defenders) appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—These appeals arise on two independent cases, but I think they are open to the same observations, and although they may in some comparatively immaterial particulars differ from each other, the substance of the matter to be discussed is a matter which is common to both. I confess I am of opinion that these appeals ought to succeed.

I agree with the learned Lord Ordinary, and to some extent with Lord Kinnear also, although in the result he differed, and with the other learned Judge who gave judgment in favour of the appellants. It appears to me that the matter rests not upon any question of technical law but upon broad common sense, and especially upon these two principles—that at this distance of time every intendment should be made in favour of what has been done as being lawfully and properly done, and that the persons who are now insisting upon these rights have lain asleep upon their rights so long that as a matter of fact we know that witnesses have perished, and the opportunities which might have been had, if the question had been earlier raised, have passed away. We are asked at a distance, in the one case of twenty years, and in the other case of twenty-two years, to rip up a transaction which had apparently been completely disposed of.

The question arises in this way—Those who are appearing as litigants in this case, the pursuers, are asking to have undone a release, a compromise, which has now been in existence for twenty years, and they ask it upon grounds which seem to me to be unsound for more reasons than one. In the first place, I wish to say that I do not concur with the view which has found favour with some of the learned Judges below, that this compromise, and the release which has been executed in pursuance of that compromise, must be so construed that nothing but that which is contained in the written document itself can be applied to as explaining or affecting the legal effect of the document. If I understand the argument rightly it comes to this—You have in this document made it part of your bargain that you shall disclose all your effects—I want to introduce into that, as part of the legal effect of the instrument, not only that you must disclose, but that you must disclose in writing, and in this writing all your effects. The questions have been propounded for the purpose of getting written answers to those questions. The questions are intended to ransack your whole estate, and if you do not disclose all your estate—nay, further, if you do not disclose it by written answers to these written interrogatories—it must be part of the condition of this release that the release therefrom becomes void. It seems to me that that is an unsound view of this document for more reasons than one, particularly for the reason which one of the learned Judges points out, that the statement on which the release is granted is made to the best knowledge and belief of the person executing the document that such is the state of his affairs. Unless something much more definite were placed in the document to make the accuracy of the statement therein a part of the contract, as

is done in some policies of insurance, so that any inaccuracy should avoid the instrument executed, I decline to put into that document either by express words or by implication something which is not there. The statement appears to be made according to the knowledge and belief of the person who is making the declaration, and therefore if, according to the belief of the person who made it, this was the true and accurate state of affairs, even though it should turn out to be inaccurate, I construe that document as making it a perfectly good release notwithstanding an inaccuracy—an unintentional and non-fraudulent inaccuracy—which afterwards might be discovered in it.

Therefore I differ entirely from the view that the disclosure must either be in writing, or must be in the particular document in writing. If a disclosure was made at the time to those who were entitled to put the questions and take the answers, even though it was made verbally, I am of opinion that that would be enough to make the release a perfectly good release.

With regard to Lord President Inglis' judgment it was said that his observations were *obiter*. I am not quite certain that I concur in that view, though I notice one of the learned counsel said he admitted it was *obiter*. When a learned Judge is giving his views why this or that does not come within the meaning of the law which makes a thing inoperative, and when he distinguishes the case before him by pointing out that there was no fraud and therefore the fraud imputed did not exist, I very much doubt whether that is one of those things which can be described as a mere *obiter dictum*. It is part of the law which is guiding his judgment and part of the law he is bound to expound in the judgment he is pronouncing. So far therefore I am bound to say that the two propositions of law which appear to have supported the judgment of the Court below I am unable to concur in—on the contrary, I wish to express my entire dissent.

With regard to the facts upon which the question then turns, I do not think any very elaborate exposition is required. There are two things which are indicated here as points upon which disclosure was withheld—in the one case certain shares, and in the other case two promissory-notes are alleged and must, in order to make the case insisted upon by the pursuers, be alleged to have been withheld, and in truth a false statement made in respect to them.

With regard to the question of the shares, to my mind, assuming I am right in the view I have taken that a verbal statement is sufficient, it only requires to be stated in a very few simple sentences, to point out how extremely unreasonable at all events is the suggestion that the mere non-statement of these shares ought of itself, at this distance of time, to set aside the release. A number of shares undoubtedly existed; if they were valueless I should have thought it was not at all an unlikely thing to happen (I am speaking now of ordinary inferences of fact from the facts in proof, rather than any presumption of law one way or the other) that those who were charged with the administration of the affairs of the Glasgow Bank on its insolvency would have been very shy of taking up these absolutely useless shares and encumbering their statement of affairs with them. And what were these shares? These shares were shares of a shipping company which from its commencement had made losses, whose ships, according to the evidence, were unfitted for the services for which they were intended, and as to which there was no reasonable expectation that they would make a commercial success. To my mind it was not an unreasonable suggestion that these shares were not considered of any value, and were not put down in the list. It is said—But at all events these were shares that might become of value. I do not think anybody believed that they would become of value. Therefore, at all events at this distance of time, I am not going to assume that they were thought to be of value at a time when I should think nobody supposed they were of value. Then it is said that they were kept back—that he "kept them dark"—I think that was the phrase used by one of the learned counsel. I do not understand quite what that referred to. If this gentleman, who was equally with the other a person of character and position, had intended to keep back the existence of those shares as part of his assets, there are very familiar modes by which he could have done that without exposing himself to risk. When he was getting together a good deal of money, both from friends and others and himself, and buying his discharge, as it were, from the liability, he might have adopted various devices; one is so familiar with this sort of device that it becomes hardly necessary to state it; he might have conveyed every one of these shares to somebody or another who would have no responsibility, and have had a secret trust if he had any thought of their being of value. Instead of that, from the time he makes this statement until the time of his death—eighteen months afterwards I think it was—the shares are allowed to remain in his own name, capable of being ascertained and capable of being known to be his; and yet I am to assume that he was either fraudulent or at all events endeavouring not to do what he had agreed to do, namely, to give up his whole estate notwithstanding the effort that he was making to free himself from liability. If he was fraudulent, is it conceivable that he would have allowed this to remain after him as a perpetual drag upon whatever he did leave behind him, and so give the opportunity of detection, and of avoiding the effect of what he was doing?

Then it is said, and said with great force—But he died eighteen months afterwards, and then facts were exhibited which could not be concealed and must be known as to the state of his affairs. He left behind him a considerable sum, that is, considerable having regard to what he had been doing, that is to say, making a compromise. Then why was not that at once made the

subject of inquiry after his death within eighteen months of his compromise? I think it is not necessary for me to pursue this line of observation. One of the learned Judges I think has not exaggerated the state of facts when he points out the number of deaths that have intervened, and the impossibility at this distance of time of disentangling what could have been very easily disentangled and ascertained if an earlier investigation had taken place.

I do not propose to differentiate Mr Watt's case from the case of Mr Bain, although to some extent there is a difference between them. All I shall say about either of them is, that at this distance of time I shall make every intendment in favour of that having been honestly done which purported to be done. I think I should expect some evidence to be produced contradicting that state of things rather than insist on evidence in its support at this distance of time, and with the loss of evidence that undoubtedly has occurred from the delay that has taken place. I should be content to rest my judgment on the language of the Lord Ordinary himself, in which, on both occasions, he has pointed out, I think with great force and accuracy, the result that ought to follow from the absence of evidence which has been the fault of those who are the pursuers here, that is to say, they have lain by upon their supposed rights all this time during which time witnesses have died and the means of explanation have disappeared also to an extent which, to my mind, renders it impossible, or at all events extremely inexpedient as a matter of law and administration, to allow these things to be ripped up at this distance of time when both the opportunities of explanation have gone by and when witnesses have passed away.

Under these circumstances I move your Lordships that both these appeals be allowed, that the judgment of the Lord Ordinary be restored, and that the respondents do pay to the appellants the costs both here and below.

LORD MACNAGHTEN—I concur. I think the judgment of the Lord Ordinary is perfectly sound, and I think it ought to be restored,

LORD DAVEY—I also agree.

The case has been so copiously considered in the Court of Session in the numerous judgments, to which I have given my best attention, that I think I should not be justified in saying more than that I agree with Lord Kyllachy, Lord Young, and Lord Moncreiff.

I only wish to add this, that in coming to this conclusion I am not treating *mora* or delay as a plea-in-law. I do not think it is a plea-in-law, but I think the lapse of time is a circumstance which ought to be taken into account and ought largely to influence our estimate of and the conclusion we come to upon the facts of the case.

LORD JAMES OF HEREFORD—I also concur.

LORD ROBERTSON—I entirely agree in the general principles stated by the Lord Chancellor as applicable to an action of this nature, brought after this lapse of time. For a more detailed examination of the facts of the case I would refer to the judgment of Lord Kyllachy in each case, entirely concurring, as I do, with all that his Lordship has said.

Interlocutors appealed from reversed with costs.

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*Friday, July* 28.

(Before the Lord Chancellor (Halsbury) and Lords James of Hereford and Robertson.)

## M'EWAN *v.* WATSON.

(In the Court of Session November 18, 1904, reported *ante*, p. 213, and 7 F. 72.)

*Reparation—Slander—Privilege—Privilege of Witness—Privilege in Precognition.*

*Held* (*rev.* the judgment of the Second Division) that the privilege which protects a witness for statements made by him in the witness-box protects him also for statements made in precognition.

This case is reported *ante ut supra.*

There was taken with it another case, *Jones* v. *Watson,* arising out of the same facts, raised by James Jones, the father of the female pursuer in the first case, Mrs Jessie Prentice Jones or M'Ewan, against the same defender, Sir Patrick Heron Watson, Kt.

The defender appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—When one examines these two appeals I think it is impossible to say that any different question arises in the one from that which arises in the other. The same judgment is applicable to both.

When one examines with care the different allegations made in the condescendences and the answers I do not think any question arises as to the confidential nature of the employment between patient and medical man. I do not propose to express any opinion upon what would be the legal determination of that question if it arose. It may be that it raises very serious and