

£20,000; they did want £5000 of new capital, and they obtained it by issuing these shares upon a deposit of five shillings a share, keeping the remaining £15,000 as a reserve to fall back upon; and it is in respect of that £15,000 that the appellants say that the parties holding those shares are entitled to no dividend whatever. But if they had intended that they had ample power under the 24th section of the Act of 1867 by resolution so to declare; they have not so declared; and in my judgment we ought to affirm the decision of the Court below.

Interlocutor appealed from affirmed and appeal dismissed with costs.

Counsel for Appellants—Benjamin, Q.C.—Buckley, Q.C. Agents—Wild, Brown, & Wild—Smith & Mason, S.S.C.

Counsel for Respondents—Solicitor-General Asher, Q.C.—Rigby, Q.C. Agents—Grahames, Currey, & Spens—J. & J. Ross, W.S.

COURT OF SESSION.

Wednesday, December 13.

SECOND DIVISION.

[Lord Kinnear, Ordinary.]

MILNE v. RITCHIE AND OTHERS.

Process—Reduction—Title to Sue—Agent and Principal—Title of Agent to Sue—Reduction of Contract by One who is not Himself a Party to it.

Held (rev. judgment of Lord Kinnear) that title to sue for reduction of a contract on the ground that it had been induced by fraud was not limited to the parties thereto, but extended to the agent of one of them who had been found liable, on the ground that he had acted in excess of the authority given him, to relieve his principal of an action at the instance of the other party to the contract, and founded upon it.

Lord Rutherford Clark *dissented and held* that not being a party to the contract the agent had no title to sue for reduction of it.

William Davison, hotel-keeper, and John Gamble Paterson, club-master, St Andrews, employed John Milne, architect, in the end of 1879, to prepare for them plans, specifications, and a schedule of measurements of two villas which they proposed to erect there, and authorised him to obtain offers from tradesmen for carrying out the work. Schedules for the mason-work, joiner-work, &c., were accordingly issued by Milne to various contractors, and among others a schedule for the mason-work was supplied to James Ritchie, builder, who returned an offer to execute the mason-work. His offer (the amount of which formed the subject of dispute as hereinafter narrated) was accepted by Milne on behalf of his clients Davison and Paterson, and Ritchie then proceeded with the erection of the two villas, and completed them towards the end of 1881.

In February 1882 Ritchie raised an action in

the Court of Session against Davison and Paterson for payment of £1924, 14s. 10½d. This sum of £1924, 14s. 10½d. was made up of £1646, 17s. (which Ritchie alleged to be the amount contained in the offer and acceptance constituting the contract made with him by Milne as architect for Davison and Paterson), and of further sums for extras; a sum of £1397 paid to account by Davison and Paterson from time to time during the building operations, on certificates furnished by Milne, and a sum of £132, 11s. 2d., fell to be deducted, leaving a balance of £395, 3s. 8½d. said to be still due. Davison and Paterson defended that action, and after proof LORD KINNEAR (Ordinary), on 20th July 1882, decreed against them for a balance of £136, 12s. 5d., against which judgment they reclaimed. On 24th April Davison and Paterson raised an action in the Court of Session against Milne for the relief of that action, and all expenses connected with it, in which they obtained decree in absence on 19th May following, on which they charged Milne. The ground of that action of relief was that the authority of Milne, as acting on their behalf in entering into a contract, was limited to the sum of £1465, 17s. The present action was raised by Milne against Ritchie and against Davison and Paterson on 13th October following for reduction of the acceptance signed by him founded on by Ritchie, and of the decree in absence in the action of relief by Davison and Paterson against him, and of the charge (which he alleged to have been made after he had intimated to them his intention of raising the present action to them), and of the execution of the charge. The grounds of reduction were fraud and essential error, and the pursuer's averments were to the effect that Ritchie's original offer was for £1447, and was finally adjusted between him and the pursuer with the knowledge and authority of Davison and Paterson; that the original offer was then handed by him back to Ritchie to be re-written, and the amount altered to £1465, 17s.; that Ritchie then left the pursuer's office, to which he returned about half-an-hour later with a written offer, which he (Ritchie) said to pursuer was in accordance with the schedule of prices as previously adjusted; that when pursuer opened the paper on which the offer was written, Ritchie, by a fraudulent device, diverted his attention from the amount of the sum in the offer, which he represented to be in accordance with the adjusted schedule, and so induced pursuer, who believed this representation, to write his acceptance of the offer without observing the fact, which he afterwards learned, that the figures were different from those in the schedule, being £1646, 17s. instead of £1465, 17s.; that after affixing his signature he handed the acceptance to Ritchie, by whom it was taken away; that it was not seen again by pursuer until produced in the action at Ritchie's instance against Davison and Paterson.

Ritchie in defence denied the pursuer's allegations of fraud. He averred that the pursuer declined to accept his original offer of £1447 as too low, and told him to reconsider it and send in a fresh one, and that he accordingly prepared a fresh offer, in the form of a letter addressed to the pursuer, for £1646, 17s., which he handed to the pursuer or his clerk at his office, and on the following day received from the pursuer an acceptance in the form of a letter, in which the sum

was £1646, 17s. On the faith of this acceptance he proceeded to execute the work.

The pursuer's averments in support of the action as directed against Davison and Paterson were not material to the questions decided in this stage of the proceedings.

These defenders also lodged defences. They averred that they instructed Milne to accept Ritchie's amended offer at £1465, 17s., and that it was not till threatened with the action at the latter's instance that they heard for the first time of an alleged offer and acceptance for £1646, 17s.; and that the pursuer's averments as to his dealings with Ritchie were outwith their knowledge.

The defender Ritchie pleaded, (1)* that the pursuer had no title to sue for reduction of the acceptance.

Davison and Paterson pleaded that the action, so far as directed against them, was irrelevant. They also pleaded *lis alibi pendens* with respect to the conclusions for reduction of the decree in absence and of the charge; and further, that the reduction was incompetent, suspension being the statutory remedy.

The Lord Ordinary pronounced this interlocutor:—"Sustains the first plea-in-law stated for the defender James Ritchie, and dismisses the action in so far as it concludes for reduction of the document first libelled, and decerns; . . . and in so far as regards the other conclusions of the action, repels the preliminary defences for William Davison and John Gamble Paterson in so far as preliminary, reserving their effect on the merits."

The pursuer reclaimed, and argued that having made a relevant averment of fraud or essential error, he was entitled to sue a reduction of the documents specified, in respect that if the contract were to stand as maintained by Ritchie he would suffer damage, having incurred liability to his principals for the excess of the contract price over that authorised by them.

Argued for defender Ritchie—The pursuer, who was an agent, was not entitled to reduce the contract, for his principals might adopt it if they liked. The latter alone have an interest to sue here. Only one who is a party to a contract has a title to reduce it.

Counsel for Davison and Paterson intimated that they were now willing to pay for the work done by Ritchie, on the principle of *quantum meruit*.

At advising—

LORD YOUNG—This is a rather peculiar case, but the questions raised in it are, I venture to think, of a simple character. The pursuer is an architect, and in the ordinary course of his profession he entered into a contract with certain builders to execute the building of a villa of which he had prepared plans. The present action is for reduction of that contract at his instance against the builder, with whom, on behalf of his clients, he made the contract. This is the only leading peculiarity of the action, and in order to understand this peculiarity it is necessary to turn one's attention to the circumstances in which the action was brought. In course of time the building was erected, and then the builder raises an action against the architect's employer for the alleged

contract price, that is, the price according to the contract made by the present pursuer between his clients and the builder. His clients said that they never authorised him to agree to that price, and that it is not binding on them. They say, "We authorised you to agree for another sum, not this one;" and thereupon they raise an action of relief against the architect, saying, "You made this contract without our authority, and so you are liable for the amount in excess of our instructions, and must relieve us of this action." And in that action they have got decree in absence ordaining him to relieve them of the action on the contract which he unauthorised by them had made with the builder. In the present action the architect now avers that he was cheated into making this contract, that he had adjusted one for £1400, that being the authorised sum, and that by the fraud and knavery of this builder a contract for £1600 was substituted to which he inadvertently adhibited his signature. He says, if that is true, he ought to be relieved of his liability in a question with both parties, in the circumstances in which he was fraudulently induced to put himself. He seeks to be reponed and restored so far as the builder is concerned, on the ground that the contract on his part was a fraud, and so far as his clients are concerned, in so far as he would have had a good defence in the action of relief which they brought against him as having made a contract in excess of his authority. That in these circumstances he is entitled to be reponed and restored somehow from the situation in which by fraud he has been placed is too clear for argument. But it is said that by our forms of process reduction is not the proper remedy here. Now I am quite clear that it is the proper form. An action of reduction is a declaratory action. It declares the reasons on which it proceeds. It is a drawing things back, so far as can be done, to the position in which they were before. It is reponing and restoring—replacing the sufferer, or replacing matters, in the position in which they were before that occurred which put them into the position from which they are sought to be reduced. Now the pursuer here is between two fires. He is subjected to liability to the builder if without fraud he made a contract in excess of his authority. If thereby in addition (which is the usual, or rather I should say which is the unusual, result) he bound his principals to a contract which he was not authorised to make, he is under liability to them, as they have shown by the action of relief which they brought, and by decree in that action which they obtained. So in order to be restored to his former position he calls both parties. He says, "I am defrauded by you the builder." Whether or not he is entitled to be restored in a question with his employer does not affect the question of title. He is entitled, if what he says is true, to be restored; he is entitled to be reponed. Thus, though the circumstances of the case are unusual, they are only incidentally so; the questions raised are simple, and of a kind familiar to us. Still one cannot help being surprised at the position taken up by the parties here. The most favourable position for the builder in such circumstances is one in which he is unlimited by contract, and the most unfavourable position for the employer is to have the work done without being covered by any contract; yet each party struggles for the

most unfavourable position. The builder says, "Let me have my contract price;" while the employer says, "Let me pay for the work at its real value." But that is only by the way. On the question of title to sue I think the Lord Ordinary has gone wrong.

LORD CRAIGHILL—I have come to the same conclusion as Lord Young. I must say I felt some regret and surprise that such a defence should have been stated. It cannot be of any benefit to the defender Ritchie; for he has conceded that supposing the reduction was not brought at all the same result might have been reached by an action of damages. But the reduction having been brought, the question is whether, considering the character of the reduction and the purpose of it, the pursuer has a title to insist in the action. His title depends on the interest he has. If he has an interest, the extent of it is the measure of his title. What was supposed to have been the contract is, according to the pursuer, that Ritchie was to do the mason-work of the buildings for £1465, while Ritchie says it was for £1646, that being the sum in the offer and also in the acceptance. The buildings were put up, and then comes the action by Ritchie against Davison and Paterson, to which the defence is that the contract sued on was made without their authority, Milne having been limited by them to a particular sum. They then raise an action of relief against Milne, saying, "This is your fault, and you must relieve us of this action;" and then, this second action having been raised against the architect, and decree in absence obtained against him, comes the present reduction at his instance. The present action is to be held as part of that in which Ritchie sues Davison and Paterson for the alleged contract price. If it be the case that this is a legal contract rendering them liable for more than they say they authorised, then Milne is liable to them for the consequences of exceeding the limits of his authority. In these circumstances I think it is plain that he has an interest to raise the question with Ritchie. The action is simply for setting aside the contract, this result constituting an indemnification to him for what he may have to pay to Davison and Paterson. But the action as far as the pursuer is concerned does not go beyond their interest; but he has shown an interest on which he may sue, and therefore I think we should recall the Lord Ordinary's interlocutor and sustain his title to sue.

LORD RUTHERFURD CLARK—I have the misfortune to differ from both of the opinions which have been delivered. This action is for the reduction of a contract, and for no other object. It is true it is also for reduction of a decree in absence, and a charge thereon which followed in consequence of the contract, but there is no conclusion for damages, and no other conclusion of any kind. Now, the contract sought to be reduced was one made by an agent, intended to bind not him but his principal. In short, the contract which was intended to be made was a contract between Ritchie on the one hand and Davison and Paterson on the other. Now, this contract is the subject of litigation between the two principals. The pursuer's clients do not say it was impetrated by fraud, but only allege they never authorised

their agent, the pursuer in this action, to make it. The Lord Ordinary has decided in that case to the effect that the contract sued on was binding on Davison and Paterson. In considering the present question we must assume his judgment to be right. If, then, the contract is binding on the principals, and not on him, he is not one of the contracting parties, and I am disposed to think he has no title to sue, on the simple ground that not being a party to the contract he is not entitled to sue a reduction of it. I go on the ground that no one but a party to a contract has a right to sue a reduction of that contract—to use the language of the summons, no one but a party has a right to be "reponed and restored thereagainst *in integrum*," that is, against the effects of the contract. And I think there must be authority for this, though I have not had an opportunity of consulting it. Of course if the pursuer has suffered from fraud he will recover the amount of his loss, but I do not think he needs an action of reduction to do so. Nor do I think that it would give him an effectual remedy, for even if he should succeed he would require another action in order to recover any sum of money from the defender—the builder. The case might assume another aspect if the Lord Ordinary had held the contract not binding on Davison and Paterson, because then the pursuer would be a party to the contract, but as that is not the aspect which matters have assumed, I do not enter upon it. I think that at present we should adhere to the Lord Ordinary's interlocutor.

LORD JUSTICE-CLERK—I have not much difficulty in concurring with the majority of your Lordships. This case differs from the category of cases where reduction of a contract is sought by one of the parties to the contract from which he says he suffered damage. But I think it presents a simple enough state of matters. Assuming the pursuer's allegation of fraud proved—assuming that Ritchie fraudulently induced him to accept an offer for £1646 on the representation that it was the same offer which he had formerly seen—the question then is, if the acceptance proceeded on that fraudulent misrepresentation, whether the pursuer is not entitled to reduce that acceptance with all that has followed upon it? I cannot imagine a state of circumstances in which a man so defrauded is not entitled to set aside such a contract, unless where he has suffered no actual damage by the fraud, and even then I am not prepared to say that he might not be entitled to have matters put into the position in which they ought to have been. But that is the allegation that the acceptance was obtained by fraud from him. His constituents knew nothing of the matter till the work was done, and then as to how the acceptance was obtained they say they have no personal knowledge. The Lord Ordinary, however, has found that they are liable as principals, and I do not say on grounds which appear unsatisfactory. Standing the contract, no sufficient reason has been shown why the pursuer should not endeavour to set it aside. It is said he had no title, because this was a contract made on behalf of third parties. The obvious reply to them is—there never was a contract, and you knew it all the time. It is said, moreover, things are not entire. This might be a formidable

answer if any other parties were here apart from the original wrongdoers, but they cannot be heard to plead, now that the house is erected, that they are not to be liable for the consequences of their own fraud. The circumstances which make restitution impossible are due to the fraudulent act of the defenders themselves. That is the ground of my judgment. On the whole matter I think the interlocutor of the Lord Ordinary ought to be recalled.

The Court repelled the defender Ritchie's plea of no title to sue, and remitted the cause to the Lord Ordinary to proceed.

Counsel for Pursuer (Reclaimer)—Campbell Smith. Agent—John Macmillan, S.S.C.

Counsel for Defender Ritchie (Respondent)—Rhind—G. Burnet. Agent—D. Todd Lees, S.S.C.

Counsel for Defenders Davison and Paterson (Respondents)—Trayner—Millie. Agent—William Officer, S.S.C.

Wednesday, December 13.

FIRST DIVISION.

[Lord Fraser, Ordinary.]

POE V. PATERSON.

Succession—Husband and Wife—Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. cap. 21), sec. 3, sub-sec. 2, and sec. 6.

Held that sec. 6 of the Married Women's Property Act 1881, which gives to a husband, in the event of the dissolution of the marriage by the death of the wife, the same right in his wife's moveables as is taken by a widow in her husband's moveable estate, is applicable to all marriages, whether contracted before or after the passing of the Act.

Robert Wilson Poe was married to his wife Janet Adam or Poe on the 1st August 1878. Mrs Poe died intestate and domiciled in Scotland on 13th January 1882, leaving no children. She had prior to her marriage become entitled to a legacy of £250, exclusive of the *jus mariti* of any husband she might marry, which sum was invested in a mortgage in her favour, and remained so invested at the date of this action. She had also become entitled prior to her marriage to a share of the residue of the estate of an uncle, but owing to an interposed liferent in favour of her father the money was not payable till his death. He died on 10th January 1882 intestate and domiciled in Scotland, leaving no widow, and she thereby became entitled, as one of his two children, to one-half of his whole estate, which was entirely moveable.

The Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. c. 21) came into operation on 18th July 1881, the date of the passing of the Act. Sections 1 and 2 abolish the *jus mariti* and right of administration in the case of marriages subsequent to the passing of the Act, and provide that a wife's property shall not, except in certain circumstances, be liable to the diligence

of her husband's creditors. Section 3 provides—“In the case of marriages which have taken place before the passing of this Act—(1) The provisions of this Act shall not apply where the husband shall have before the passing thereof, by irrevocable deed or deeds, made a reasonable provision for his wife in the event of her surviving him. (2) In other cases the provisions of this Act shall not apply, except that the *jus mariti* and right of administration shall be excluded to the extent respectively prescribed by the preceding sections from all estate, moveable or heritable, and income thereof, to which the wife may acquire right after the passing of this Act.” Section 6—“After the passing of this Act the husband of any woman who may die domiciled in Scotland shall take by operation of law the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be.”

Founding on this provision Poe raised the present action of declarator against Mrs Isabella Adam or Paterson, the sister and executrix-dative *qua* next-of-kin of his wife, concluding for declarator that he was entitled to one-half of the whole free personal estate which belonged to his wife at the date of her death, and that the defender should be ordained to exhibit a full account of her intrusions as executrix with the personal estate of Mrs Poe.

He pleaded, *inter alia*, that he was entitled to decree of declarator in respect of the terms of the two trust-dispositions and settlements by which the legacy of £250 and the share of residue of Mrs Poe's uncle's estate were left to her, and that at common law, and “*separatim*, by virtue of the Married Women's Property (Scotland) Act 1881, particularly sec. 6 thereof.”

The defender pleaded, *inter alia*—“(1) Upon a just construction of the trust-dispositions and settlements above referred to, the pursuer is not entitled to any part of the free personal estate which belonged to his late wife, and to which she acquired right under these deeds. (2) The pursuer's claim, in so far as resting on The Married Women's Property (Scotland) Act 1881, cannot be sustained, in respect of the provisions of section 3, sub-section 2, of said Act.”

The Lord Ordinary pronounced the following interlocutor:—“Sustains the second plea-in-law for the defenders, assoilzies the defenders from the conclusions of the action, and decerns: Finds the defenders entitled to expenses,” &c.

“*Opinion.*—The Lord Ordinary is of opinion that the 6th section of The Married Women's Property (Scotland) Act 1881 is not retrospective; and therefore that it does not apply to the case of married persons who were husband and wife at the time when it passed. There is a special provision in the 3d section which deals with the case of marriages which have taken place before the passing of the Act. That section is composed of two sub-divisions, the first of which declares that the provisions of the Act shall not apply where the husband shall have before the passing thereof by irrevocable deed made a reasonable provision for his wife in the event of her surviving him. The second sub-division is in the