

Wednesday, January 22.

SECOND DIVISION.

[Sheriff Court at Greenock.]

LAVAN v. GAVIN AIRD & COMPANY,
LIMITED.

Writ—Decree of Court—Modification by Parole—Rei interventus—Payment of Instalments.

A debtor against whom an open decree in the Small-Debt Court had been obtained presented a petition for the recal of arrestments used by the creditors on the decree, and averred a verbal agreement between the parties by which defenders agreed to accept payment of the balance of the amount due by instalments of 5s. weekly, and that payment of certain instalments had followed thereon. The alleged verbal agreement was denied, but it was admitted that certain sums had been paid on the debt. *Held* that the payments in question not being inconsistent with the written obligation constituted by the decree did not amount to *rei interventus* so as to render admissible parole evidence of the alleged verbal agreement, and that the latter could accordingly only be proved by the writ or oath of the defenders.

William Lavan, railway servant, Greenock, pursuer, presented a petition in the Sheriff Court at Greenock for recal of arrestments used by Gavin Aird & Company, Limited, Glasgow, defenders, in virtue of an open decree for £7, 10s. 5d. obtained by them in the Small-Debt Court at Greenock in the hands of the Glasgow and South-Western Railway Company, Greenock, the pursuer's employers.

The parties averred—" (Cond. 3) With a view to arranging matters pursuer's wife on or about 16th November went to Glasgow and called upon defenders and interviewed their representative (whose name is unknown to pursuer). The result of this meeting was an agreement between parties by which defenders agreed to accept payment of the balance of the amount due under the decree by instalments of 5s. weekly, the first instalment to be paid on 24th November. The first instalment of 5s. was duly paid on 24th November, the second on 1st December, and the next on 8th December, and pursuer relied on defenders not doing further diligence under the decree so long as the agreed-on instalments were regularly paid. The arrested money has been paid to defenders. (Ans. 3) Admitted that pursuer's wife called upon the defenders as stated and interviewed their manager, and that the sum attached by the first arrestment, amounting to 15s. 5d., was received on 11th December. . . . Averred that at the meeting referred to defenders offered to accept 8s. per week—the amount then unpaid under the decree being £7, 17s.—and that pursuer's wife refused to pay more than 3s. per week, with the result that no agreement whatever was come to. At the same time she was warned that if 8s. per week were not paid diligence

would be done on the decree. The actings of pursuer and his wife subsequent to the first arrestment were prompted by their desire to stave off or at least delay further diligence. No mention was made of the alleged agreement by or on behalf of the pursuer until his agents by letter dated 15th December 1917 demanded withdrawal of the after-mentioned second arrestment."

The defenders pleaded, *inter alia*—"3. The alleged agreement being a modification or partial renunciation of a written obligation, viz., the decree, can only be proved by the writ or oath of the defenders."

The pursuer pleaded, *inter alia*—"4. *Esto* that the decree is a written obligation in the sense pleaded by defenders, the verbal agreement averred by pursuer having been followed by *rei interventus*, proof *prout de jure* of pursuer's averments should be allowed."

On 31st January 1918 the Sheriff-Substitute (WELSH) sustained the fourth plea-in-law for the pursuer, repelled the third plea-in-law for the defenders, and allowed a proof.

Proof was subsequently led and on 13th March 1918 the Sheriff-Substitute recalled the arrestments.

The defenders appealed, and argued—Parole evidence was incompetent to modify the decree. The Court had never allowed evidence as to the grounds on which a decree had been granted—*Countess of Argyll v. Sheriff of Murray*, 1583, M. 12,300. A written obligation could only be altered by writ or oath—*Hunter v. Dun*, 1809, Hume 584; *Kerr v. Skedden*, 1737, Elchies s.v. *Locus poenitentiae*; *Hamilton and Baird v. Lewis*, 1893, 21 R. 120, 31 S.L.R. 97; *Reid v. Gow & Sons*, 1903, (O.H.) 10 S.L.T. 606; *Sutherland v. Montrose Shipbuilding Company*, 1860, 22 D. 665; *Kirkpatrick v. Allanshaw Coal Company*, 1880, 8 R. 327, 18 S.L.R. 209; *Carron Company v. Henderson's Trustees*, 1896, 23 R. 1042, 33 S.L.R. 736; *Bargaddie Coal Company v. Sark*, 1859, 3 Macq. 467; *Walker v. Flint*, 1863, 1 Macph. 417. Parole proof was only competent to modify a written agreement where there were averments of actings inconsistent with the terms of the obligation, and that was not the case in the present action. The averments of part payment were not inconsistent with the enforcement of the decree and did not amount to *rei interventus*.

Argued for the respondent—The pursuers had sufficiently averred an agreement inconsistent with the terms of the decree, and the fact that payment by instalments had been made was inconsistent with enforcement of the decree for the full amount. The authorities quoted by the appellants were not in point because they dealt with abandonment of the debt. Reference was made to *Turnbull v. Oliver*, 1891, 19 R. 154, 29 S.L.R. 138.

LORD JUSTICE-CLERK—Although the amount at stake in this action is small, the case raises a question of law of the greatest importance.

On 7th November 1917 the appellants obtained against the respondent in the

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Small Debt Court at Greenock an open decree which would have entitled them at once to proceed to do diligence for £7, 10s. 5d. and expenses. The decree is not challenged so far as its validity is concerned, but the pursuer, the debtor in the decree, says that after the decree was obtained his wife called on the defenders, the holders of the decree, and the result of this meeting (I am reading condescendence 3) was "an agreement between the parties by which defenders agreed to accept payment of the balance of the amount due under the decree by instalments of 5s. weekly—the first instalment to be paid on 24th November. The first instalment of 5s. was duly paid on the 24th November, the second on the 1st December, and the next on 8th December, and the pursuer relied on the defenders not doing further diligence under the decree so long as the agreed-on instalments were regularly paid."

The defenders, among other pleas, stated this plea—"The alleged agreement being a modification or partial renunciation of a written obligation, viz., the decree, can only be proved by the writ or oath of the defenders." The Sheriff-Substitute having closed the record, had a debate upon the preliminary pleas, with the result that on 31st January he pronounced an interlocutor in which he sustained the 4th plea-in-law for the pursuer—which was a plea in replication of that of the defenders which I have just read—repelled that 3rd plea, and allowed a proof. The point which has been raised in the debate before us, so far as it has gone, has been whether that judgment of the Sheriff-Substitute—repelling the 3rd plea for the defenders, sustaining the 4th plea for the pursuer, and allowing a proof—is sound.

In my opinion that judgment cannot stand. As I understand it, the position with regard to the discharge or modifying of obligations constituted by writing depends upon authorities which have been quite well settled for a long period, certainly since the decision in the case of *Kirkpatrick v. Allanshaw Coal Company*, 3 R. 327, 18 S.L.R. 209, and amounts to this—where there is a written agreement constituting obligations between the parties these obligations can neither be discharged nor modified unless there be an agreement so to discharge or modify them followed by actings on that agreement inconsistent with, or contradictory to, the original obligation. Cases on the point have been decided by the Court from time to time.

Of course this is a decree, and therefore different from the obligations arising under it, or rather different from contractual obligations; but that, it seems to me, is in favour of the holder of the decree (the defenders in this action) rather than the pursuer, because, confessedly, one of the most solemn modes of the constitution of an obligation is by a decree of the Court obtained *in foro*. The authorities to which we were referred, beginning with the *Countess of Argyll*, M. 12,200, show to my mind that an obligation constituted by decree cannot be more easily discharged by subsequent actings of the parties than a con-

tractual obligation would. And in order to get rid of even a contractual obligation I think you must have two things—In the first place, an averment of an agreement inconsistent with the written obligation; and secondly, actings upon that verbal agreement which are inconsistent with the original obligation.

We have been referred to the case of the *Bargaddie Coal Company v. Wark*, 18 D. 772, where what had been done was clearly inconsistent with the lease which was founded on, because by the lease the coalminers were bound to leave certain barriers of coal, and the complaint made against them was that they had broken through these barriers in the course of their working and opened up the field without leaving the barriers as they were bound to do. Clearly that was not only inconsistent with but in contravention of the terms of the lease. Following upon that decision we have the case of *Sutherland v. Montrose Shipbuilding Company, &c.*, 22 D. 665, decided in 1860, where Lord Justice-Clerk Inglis clearly explained his view as to the import of the judgment of the House of Lords in the *Bargaddie* case, 3 Macq. 467. Thereafter—in 1880—the case of *Kirkpatrick v. Allanshaw Coal Company* was decided, and it showed that one of the most important elements in the considerations which allow written agreements to be got rid of was that the actings relied upon must be inconsistent with the original agreement. Mr Wark quite frankly conceded that that was a necessary part of his case—that he must aver not only the agreement, but that he must aver also actings inconsistent with the terms of the decree.

The only actings here alleged are three payments of the 5s. instalments which were made and accepted by the defenders—the holders of the decree. I cannot regard the fact of payments by instalment, in itself and alone, as in any sense inconsistent with the decree by which the creditor could, if he chose, insist upon immediate payment. They are partial payment and quite consistent with the decree for the immediate payment of the whole sum. The Sheriff-Substitute in dealing with this part of the case says, that "the defenders consented instead of being in a position to enforce an open decree to accept payment of the balance due under the decree by instalments, and this is an alteration of a written obligation which the pursuer is entitled, in my view, to prove by parole evidence." Then he goes on to refer to the Lord Justice-Clerk Inglis's observations in the case of *Bargaddie Coal Company*, where his Lordship said that he took the rule of law "to be, that where there are averments of acquiescence in operations inconsistent with the terms of the written contract they may be admitted to proof."

I cannot, as I have said, regard acceptance of instalments to account of the total sum due in the decree as in any sense inconsistent with the decree. Accordingly in my judgment the Sheriff-Substitute erred in allowing a proof at all, and we should therefore recal his judgment and find that the

defenders' 3rd plea-in-law is sound, with the result that they should be assoilzied on the ground that no relevant case has been averred against them.

LORD DUNDAS—I am entirely of the same opinion. I think the learned Sheriff-Substitute went wrong in allowing parole proof. I do not find on this record any relevant averment by the pursuer of acquiescence in or *rei interventus* following upon the verbal agreement to modify this decree. In the case of *Kirkpatrick v. Allan-shaw Coal Company*, 8 R. 327, 18 S.L.R. 209, Lord President Inglis said—"The acquiescence or *rei interventus* which is necessary to fortify that"—by "that" he meant a verbal variation of an important clause in a formal written contract—"must be something done which is inconsistent with the terms of the written contract." As the Lord Justice-Clerk has pointed out, there is nothing of that sort here.

LORD SALVESEN and **LORD GUTHRIE** concurred.

The Court recalled the interlocutor of the Sheriff-Substitute and assoilzied the defenders.

Counsel for the Pursuer and Respondent—Wark. Agents—Laing & Motherwell, W.S.

Counsel for the Defenders and Appellants—Maclaren—Burnet. Agent—James G. Bryson, Solicitor.

Saturday, January 25.

FIRST DIVISION.

WOODARD'S JUDICIAL FACTOR v. WOODARD.

Succession—Testament—Construction—Heritage—Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101), sec. 20.

A testator left a last will and testament, in which after bequeathing two legacies of money he directed the "remainder to be invested as my trustees may direct and the interest paid to my son." He thereafter appointed two trustees and directed "the principal sum invested for my son to remain until his children reach the age of twenty-one. In the event of no children the principal sum to be disposed of to charities as my trustees may think best." The testator left sufficient cash to meet the legacies, and he also left other moveable estate. He also left a dwelling-house in which he and his son had resided up to his death. Held that the testator's last will and testament did not carry the house referred to, and that his son as his heir in heritage was entitled to it.

Robert Cockburn Millar, C.A., judicial factor on the estate of the deceased Charles John Woodard, first party, and Frank Robert Woodard, only child of Charles John Wood-

ard, second party, brought a Special Case to determine whether the last will and testament of Charles John Woodard applied to heritable estate left by him.

Charles John Woodard died on 6th August 1918 leaving a holograph will in the following terms:—"89 Willowbrae Avenue, Edinburgh, 14/6/18.—This is my last will and testament. I request that—One hundred pounds to my step-sister Mrs Hunter of West St., Wallsend-on-Tyne, be paid. One hundred pounds to my daughter-in-law Mrs F. Woodard be paid. Remainder to be invested as my trustees may direct, and the interest paid to my son, F. R. Woodard. I appoint as my trustees Mr George Gray and Mr George Tod, of Currie & Co., Limited, to whom shall be given twenty pounds (£20) each for their services. The principal sum invested for my son to remain until his children reach the age of twenty-one. In the event of no children the principal sum to be disposed of to charities as my trustees may think best.—C. J. WOODARD. Mary Dickson (*witness*), clerkess, 11 Forth St., Edinburgh. Bessie Cross (*witness*), book-keeper, 28 Barony St., Edinburgh."

The trustees nominated in the will having declined to accept office Robert Cockburn Millar, C.A., Edinburgh, was on 13th September 1918 appointed judicial factor on the estate of the testator.

The Special Case set forth—"1. [The testator's] wife predeceased him. He was survived by the second party, [who] is of full age and married, but has no issue. The second party resided with his father, and still resides at 89 Willowbrae Avenue aforesaid. . . . 3. The estate left by the said Charles John Woodard belonging to him at his death was as follows:—(1) *Heritage*.—His house 89 Willowbrae Avenue, Edinburgh, which he purchased some years ago for £655, valued at, say, £600, but which at deceased's death was burdened with a bond for £400. (2) *Moveables*.—(a) Furniture, &c., in his said house, valued at £174, 17s. 6d. (b) Policy with the Lancashire Insurance Company for £300, with bonuses £29, 18s. 3d. (c) 200 ordinary shares of £5 each, fully paid, in Messrs Currie & Company, Limited, of the nominal or face value of £1000. (d) Cash in hands of Messrs Currie & Company, Limited, £723, 13s. 10d. (e) Small sums due to deceased, £12, 0s. 4d. (f) One share of £1, fully paid, in the Hanover Billiard Rooms Limited, 19 Rose Street, Edinburgh, say £1. The amount of debts due by the deceased was trifling."

The *questions of law* were—"1. Does the said last will and testament of the deceased Charles John Woodard carry his house, 89 Willowbrae Avenue, Edinburgh, and is the first party, as judicial factor aforesaid, entitled to hold the same for the purposes expressed in the said last will and testament? or 2. Has the said house devolved on the second party to this case as heir of the said Charles John Woodard, unaffected by the said last will and testament?"

Argued for the first party—A will could carry heritage if the words used showed with reasonable certainty that the testator intended it to apply to heritage—Titles to Land Consolidation (Scotland) Act 1868 (31