COURT OF SESSION.

Wednesday, June 13.

FIRST DIVISION.

BERESFORD'S TRUSTEES *v.* GARDNER.

Ante, p. 134.

Lease—Agreement—Reduction—Fraud.

A entered into an agreement with B to give him a lease of certain subjects on certain terms. A formal lease was executed, and B entered into possession. Thereafter A reduced the lease on the ground that it had been fraudulently represented to him as being in terms of the agreement, whereas it was not so. On A's seeking to remove B, B pleaded that he should be allowed to remain in possession, on the footing that he was still entitled to a lease in terms of the agreement. A replied that the agreement was improbative, and pleaded *locus penitentiæ.—Held* that B's possession, which had commenced on a fraudulent title, must be put an end to, and that it lay on him to prove that he was entitled to begin a new possession under the agreement.

This was an action of reduction at the instance of the late Sir George Beresford's trustees, appointed under a deed of direction and declarator of trust dated 9th November 1870, against James Gardner, concluding for reduction of a lease of certain slate quarries at Ballachulish, granted to Gardner by the pursuers of date 1st and 14th November and 2d December 1873, on the ground of fraud. The action was tried before the Lord President and a jury at the Spring sittings, when the jury found for the pursuers. They now moved to apply the verdict, and asked the Court (1) to reduce the lease in question; (2) to remove the tenant. Previous to the trial the defender had added a plea in law to the record, viz.—"(3) The pursuers are not entitled to decree of removing as concluded for, in respect that, in the event of the lease under reduction being set aside, the defender will be entitled to obtain a lease from the pursuers in terms of the agreement of 7th June 1873, or otherwise in terms of the agreement set forth in the condescendence,"—and now opposed the pursuer's motion on that ground. The agreement referred to was an agreement to adjust a lease for fifteen years, the lease which the defender fraudulently obtained having been for a much longer period. It consisted of several sheets, and bore to be initialed by Lady Beresford, one of the pursuers, on each sheet, signed by the defender on each sheet, and signed on the last sheet by both Lady Beresford and the defender. The testing clause had not been filled up until the closing of the record.

The argument to a considerable extent was directed to the execution of this deed of agreement, the pursuer maintaining that it was not probative, not being properly subscribed, and the testing clause not having been timeously filled up. As the Court in delivering judgment did not find it necessary to decide that question, the authorities quoted on either side are not given.

Gardner resisted the motion for decree of removing, on the ground that he was entitled to possession under the agreement referred to. This had never been reduced. Indeed, it was because of its disconformity to that agreement that the lease for thirty-five years had been set aside. The pursuers themselves all through the record speak of the defender as their tenant, who had doubtless, as the jury has found, obtained a lease on terms different from what was intended, but still had a right to a lease for fifteen years. The proper course, therefore, was for the Court to remit to some qualified person to prepare a lease in terms of that agreement.

The pursuer argued—There was here a contract which required to be reduced. Had the lease been *ab initio* null, then the defender's argument, that the agreement had revived, might have some foundation. But since there was here error induced by fraud, and that of the kind *quod tantum in contractum incidit*, there was a second contract taking the place of the first, and so when the second was reduced there was nothing left—Stair, i. 9, 9; Bell's Com. i. pp. 242, 289, 297 (5th ed.); in M'Laren's ed. 262, 309, 316. On the principles laid down in *Stewart's Trustees* v. *Hart*, Dec. 2, 1875, 3 Ret. 192, the terms of the contract actually concluded could not be modified by reference to any other transactions between the parties. Besides, the defender here is asking the Court to replace him against his own fraud.

At advising—

Lord President—The motion of the pursuer is that the verdict of the jury shall be applied, and that decree shall be pronounced in terms of the reductive conclusions of the summons, and also in terms of the conclusion for removing. The objection offered to that on the part of the defender is founded upon his third plea, which was added to the record on the authority of the Lord Ordinary's interlocutor of 9th January 1877. Now, in order to judge of the validity of that plea, it is necessary to have distinctly in view what is the nature of this action and its conclusions.

The first conclusion is for reduction of a lease, which is dated in November and December 1873, of the slate quarry of Ballachulish; the second conclusion is for the removing of the tenant who has taken possession under that lease; and the third and only remaining conclusion of the summons is for a count and reckoning by the defender of his intromissions, not only as tenant, but also as creditor in possession of the estate under an absolute disposition with an explanatory agreement. Now, the pursuer avers in the 13th article of his condescendence that "after the lease in question was executed, the defender entered into possession of the quarries under the said lease at the term of Whitsunday 1874;" and that is admitted by the defender. It is now established by the verdict of the jury that this lease was obtained from the pursuer by fraud, and it falls to be set aside. It is the only title of possession that the defender ever had, and it is the title under which he obtained, and now holds, possession of the slate quarries of Ballachulish. It seems to me to follow as a necessary consequence that when that title is set aside on the ground of fraud the fraudulent possession which has followed upon it must come to an end also. If I at all understand the nature of an action of reduction, a decree in terms of the reductive conclusion of the summons operates as an entire restitution of the pursuer against the fraud which has been practised upon him, and consequently that, as the summons itself expresses it, they ar

to be restored, not only against the particular deed which is sought to be reduced, but against all that has followed or that is to follow thereon; and the notion of allowing, even for a single day, a person who has obtained possession of an heritable subject under a fraudulent title to remain in possession is, I think, utterly inconsistent with the theory of an action upon this ground.

Now, what is the plea maintained here by the defender? It is that "the pursuers are not entitled to decree of removing as concluded for, in respect that, in the event of the lease under reduction being set aside, the defender will be entitled to obtain a lease from the pursuers in terms of the agreement of the 7th of June 1873, or otherwise in terms of the agreement set forth in the condescendence"—that last being a fraudulent arrangement. Now, I need not say a word about this last alternative. The only thing that can seriously be maintained—if indeed even that can be maintained seriously—is that the defender is entitled to remain in possession notwithstanding the reduction of this fraudulent title, because he has another title under which he may obtain a lease to be executed; and that is all the length that the plea goes. Now, supposing the writing of 7th June 1873 to be a probative instrument, I think this would be a bad plea, because all that that paper binds the parties to do is to adjust a lease under which the defender might obtain possession of the quarries; but according to the true construction of that instrument, in my view, he is not entitled, unless with consent of the pursuers, to enter into possession under that document. As the document is expressed, I think he was bound to have the terms of the lease adjusted before the term of Whitsunday 1874, so as to enable him to enter into possession then, and if the lease was not adjusted by that time, in my opinion he was not in law entitled to possession then. But over and above that, the document is, to say the least of it, not clearly a probative document; and how is it set up here? It is mentioned incidentally and historically by the defender in his record as a paper that was made for the purpose merely of a memorandum of terms verbally agreed to; that is all that is said about it in this record, and so far as the pursuers are concerned they have had no opportunity whatever of saying one word about it on record. And before we could therefore consider what in law are the rights of the defender under this paper of the 7th of June 1873 the first thing we should be bound to do is to have a record made up on the subject, and then when that record is considered, if it be found relevant, we should then be bound to allow the parties a proof, for certainly without proof here this document can never be set up. Now, in these circumstances, I think this plea in law which was added to the record under the interlocutor of 9th January 1877 is irrelevant; and therefore I am for granting the motion of the pursuers, decerning in terms of the reductive conclusion of the summons, and also the conclusion for removing. Of course, if the defender thinks that he can set up a fresh title to the possession of this subject under the document of 7th June 1873, there is nothing to prevent him from attempting to do so in the proper manner.

Lord Deas—I concur in the result arrived at by your Lordship, and I agree in thinking that this lease, which the defender had obtained subsequent to the document that he now founds upon, having been set aside on the ground of fraud, he cannot be allowed to retain possession in the meantime at all events, whatever he may make of that document of June 1873 in any subsequent proceedings. To say the least of it, there are very important questions to be tried before that document of June 1873 can be set up as a lease or so as to entitle him to a lease. It is a question whether it is a lease or whether it is simply an agreement that a lease shall be granted. We are quite familiar with the law and practice in regard to holding that a document which contains the subject of a lease, and the rent and the endurance, may itself form a lease; these are the essentials of a lease. There are many cases in which tenants in possession upon such a document have been held to be tenants upon those conditions, and the adjustment of the formal lease has been held frequently to be a thing which can be done at any time, and which it is not essential to the rights of parties shall ever be done at all. This document is in that respect peculiar in its terms. I will not go into the terms of it, but there is a great deal to be said on the face of it in favour of its not being a document of the kind I have been alluding to, but a document proceeding upon the express condition that there is to be held to be no lease until a formal lease has been prepared. That is one of the questions to be tried. This seems *prima facie* a very startling document, and unless the defender makes out either that it is probative under the statute and valid, so that he is entitled to set it up under that statute, then he neither has a case now nor ever will have. Under these circumstances, I concur in the result arrived at by your Lordship, that whatever the defender may establish by future proceedings, it is out of the question to hold that he is entitled in the meantime, in the face of this verdict, to retain possession of the subjects in question.

Lord Mure—I have come to precisely the same conclusion, and on substantially the same grounds. The memorandum under which we are now asked to allow this party not to set up a title, but to keep possession of the slate quarries of Ballachulish, is dated in the year 1873, and it is, as I think, not a lease in itself, and it is not proposed by the defender to set it up as such. The plea put forward by the defender is that he will be entitled to obtain a lease in terms of that memorandum. Therefore it is merely an agreement between the parties in certain terms that a lease is to be completed prior to Whitsunday 1874. Now, no lease followed on that memorandum, but another lease was framed in different terms, and possession was taken upon those different terms, and the lease was drawn out by the defender's agent. That lease has now been reduced on the ground of fraud; and instead, therefore, of having a lease completed in terms of the agreement between the parties, the defender is in the position of having fraudulently impetrated a lease in different terms, which has been reduced, and he now asks to retain the possession thus fraudulently obtained in respect of the memorandum in question. Now, in the first place, the memorandum is, *ex facie* at all events, improbative; whether it can be set up or not by any of the processes by which documents can be cleared up is

another question. Then what I go mainly upon is this, that, even if probative, I agree with your Lordships that it is not a lease, and the defender does not say it is a lease; it is merely an agreement to make and complete a lease, but subject to the condition of its being made and completed prior to Whitsunday 1874. This has not been done, and it is a question whether it can ever be done. The defender has missed his opportunity of having a lease in terms of this memorandum, and I think he ought not to be entitled to remain in possession under such circumstances.

Lord Shand—I am of the same opinion, and if I were to state the grounds of my opinion I should only be repeating what has been stated by your Lordships, and as that would serve no good object I shall simply concur.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the motion for the pursuers, No. 1224 of process, Apply the verdict, and in respect thereof reduce, decern, and declare in terms of the reductive conclusions of the summons: Further, repel the third plea-in-law stated by the defender, and decern in terms of the conclusion for removing: Find the pursuers entitled to expenses since 15th December 1876, the date of closing the record; and remit to the Auditor to tax the account of said expenses and report to the Lord Ordinary: And remit to his Lordship to proceed with the conclusions for accounting, and with power to decern for the said expenses when taxed."

Counsel for Pursuer — Balfour — Robertson — Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defender — Kinnear — Asher — Lorimer. Agents—Adamson & Gulland, W.S.

Thursday, June 14.

FIRST DIVISION.

[Sheriff of Renfrew.

M'CARTER *v.* STEWART & MACKENZIE.

Sale—Contract—Rejection of Goods.

Held that the ordinary rule in a contract of sale as to rejection of goods which are insufficient in quality, viz., that the buyer is bound to give immediate notice to the seller and to rescind the contract, may be relaxed in a case where there is a course of dealing between the parties with deliveries from time to time.

Special circumstances where the strict rule of law was held not to apply.

This was an action raised in the Sheriff Court of Renfrew by John M'Carter, marine store dealer, Glasgow, against Messrs Stewart & Mackenzie, paper-manufacturers there, for the price of various bales of "round ropes" alleged to have been delivered in the month of February 1876 to the defenders.

The defenders pleaded—"(1) The goods supplied in the month of February, charged for in the account annexed to the summons as 'round ropes,' not being of that class, but mixed material, of an inferior quality, the defenders are not bound to keep the same, or at least are not bound to pay more than a fair and reasonable price for same; and the fact of the defenders having taken delivery of the said goods cannot operate against them, seeing that they used all practicable expedition in examining the large bales into which the said goods were packed, and acquainting the pursuer of the contents thereof, and offering to return the same, and that the said bales were so packed as to deceive or mislead the defenders as to the nature of their contents on such a casual examination as was possible on delivery being taken."

The Sheriff-Substitute (Cowan) ordered a proof. It appeared that there had been a course of dealing between the parties of some duration, the goods being delivered at various times in various quantities. The Sheriff-Substitute thereafter held that the bales which were found to be of deficient quality were those delivered by the pursuer, and he so far found in favour of the defenders. The Sheriff, on appeal, finding that there was no doubt of the deficiency of the goods, and that they were those furnished by the pursuers, adhered, adding this note:—

"*Note.*— . . . The consequence in law from these facts is, that the pursuer cannot recover payment for an article that, if ordered (about which there is contradictory evidence), was not the article said to have been ordered, unless the defenders have done something which barred them from stating this plea. The last article delivered was upon the 29th February, and the objection is stated on the 3d of March. There was no great delay there in stating the objection; but still it may be argued that each delivery during the month of February must be treated separately, and ought to have been examined at once. The Sheriff is not inclined to hold that there is any specialty in this particular trade which would free the purchaser from his obligation of immediate examination of the article purchased and immediate rejection. It may, no doubt, have been very inconvenient to examine bulky bales at the time of delivery, and before they were needed for manufacture. But this inconvenience is not a sufficient answer for delay in examination and rejection, unless there were specialties in the particular case; and there are such specialties. The bales were so made up that upon opening them the first thing presented was round rope; and any person inspecting would naturally conclude that the whole contents were of the same character and quality, and would not think it necessary to turn out the whole bale. But such was not the case. The round rope was only on the exterior shakings, and inferior materials were in the interior. Again, the delay in examination till the article came to be needed for manufacture was in accordance with the dealing and understanding between these parties. And lastly, no damage or inconvenience has resulted to the pursuer from the delay."

The pursuer appealed, and argued on the question of law that the defender was bound, on the authority of the cases of *Chapman* v. *Couston*, March 10, 1871, 9 Macph. 675, H. of L. 2 Law