KERR V. LEFFERTY

(1859), 7 Gr. 412

Upper Canada Court of Chancery , Esten V . C ., 1859

Principal and agent--Deed of gift--Sale by agent at undervalue

A widow having a claim to certain lands belonging to the Six Nations Indians, prevailed upon a person to act as agent in procuring the acknowledgement by the chiefs of her title, which was done, after great trouble and expense on the part of the agent, and in accordance with such recognition the Crown patent for the land was perfected; whereupon the grantee of the Crown conveyed by deed of gifts to the agent an undivided moiety of the estate as a reward for his services in procuring the grant, previously to which she had executed a power of attorney in favour of the agent, authorizing him to sell or mortgage all her lands in Upper Canada, and subsequently went to England, where she continued to reside until the time of her death. During her residence there she urged the agent to dispose of her moiety of the property, and in the course of the correspondence stated that she would be willing to accept £1,000 for it. The agent in 1844 having directed the property to be sold by auction, his sister became the purchaser for £628, having authorized the person who attended to bid at the sale, on her behalf, to go as high as £800 for the property. Upon a bill filed by the son and heir of the owner, in 1858, several years after the agent's death, seeking to set aside the deed of gift, as having been obtained by undue influence, and the sale by auction as having been made at a great undervalue; the court, under the circumstances, refused to disturb the title derived under the deed of gift; but set aside the sale by auction, as having been made at a price not warranted by the agent's authority. The infancy of the plaintiff at the death of his mother, and his absence subsequently on duty with his regiment, being deemed sufficient circumstances to excuse the delay which had occurred in instituting proceedings by him; and it was shewn that a suit instituted by his mother, during her residence in England, had been dis- missed, owing to her inability to procure security for costs to be given.

Semble, that an act done by an agent within the scope of his authority, and before any notification of its revocation, is good, al- though it may be entirely revoked at the time.

The facts of the case appear sufficiently in the headnote, and judgment of the court. [Argument.]

Mr. Brough, Q.C., for defendant.

ESTEN, V. C.--[before whom the cause had been heard.] --The subject of this suit is a piece of land, consisting of about 100 acres, situate near to, and, I believe, partly, within the town of Brantford, which was granted by the Crown to the late Mrs. Kerr, the plaintiff's mother, in pursuance of a previous surrender, made for that purpose by the In dian Nation. The late Mr. John W. Lefferty, the defendant's brother, was very instrumental in procuring the gift of the Indians to be perfected, and Mrs. Kerr, after its completion by the royal patent, made him a present of an undivided moiety of the land, as a reward for his services. This undivided moiety he afterwards conveyed to his mother. The other undivided moiety was retained by Mrs. Kerr, who before the execution of the deed of gift to J. W. Lefferty, gave him a power of attorney, authorizing him to dispose, by way of sale or mortgage, of all her lands in Upper Canada, at his

discretion, for her benefit. The power of attorney was executed in June, and the deed of gift in September, 1839. In 1840 Mrs. Kerr went to England, and never afterwards returned to this province. She appears to have become involved in legal proceedings in England, in relation to another property, and to have been occasionally in great distress for want of money. The 100 acres were subject to several mortgages, one of which was made before the deed of gift; the others, I believe, afterwards, but they comprised the entirety of the property, and were made in [Judgment.] the name of Mrs. Kerr, by J. W. Lefferty, as her attorney. Two of these mortgages to Mr. Blackstone appear to have amounted together to £600; and two others to Mr. Street, appear to have amounted together to &pouind;285; and there seem to have been others. It does not appear whether Mrs. Kerr received the whole of the moneys advanced upon these occasions, but her counsel appears to admit that such was the fact. On the 16th of March, 1844, J. W. Lefferty proceeded to a sale by auction of the undivided moiety of Mrs. Kerr in the lands in question; upon which occasion the defendant and her mother became the purchasers, but it would appear for the defendant's benefit, and this undivided moiety was afterwards conveyed to her in the name of Mrs. Kerr by J. W. Lefferty. I have no reason to think that this sale was not properly conducted. The advertisement, I think, strongly recommends the property to purchasers. At the same time it is possible that Mr. Lefferty, as argued, might not have used all means that it was proper for him as an agent to employ, in order to secure a good sale. The defendant and her mother authorized their agent to offer as much as £800 for the property, but the biddings reached only £628, at which sum the defendant and her mother be- came the purchasers. The defendant says that she was aware of the mortgages, and purchased subject to them, and afterwards pad the off, and that she paid the £628 to her brother for the use of Mrs. Kerr. I think Mrs. Kerr repudiated this sale from the moment she became aware of it; she instituted a suit in this court in order to impeach it, certainly within two years after it occurred. In this suit an order was obtained for security for costs, which Mrs. Kerr seems to have been unable to furnish, and the suit was suspended, and, as I understand, finally dismissed for non-compliance with this order. Mrs. Kerr died in 1846, leaving the present plaintiff her heir-at-law, a youth of fourteen or fifteen. He afterwards entered the army, and did not re-visit this country until a year or two before the [Judment.] commencement of this suit. He was born in France. He attained twenty-one in 1852, or 1853. Mrs. Kerr appears to have instituted two suits, one against J. W. Lefferty and his mother, to impeach the deed of gift; the other against the defendant to impeach the sale in 1844. The present suit is directed to both these objects. Of course it naturally divides itself into two parts, one relating to the deed of gift, the other to the sale; which depend upon totally different considerations. To begin with the deed of gift, I understand the law relating to such transactions to be, that if a deed of this nature is impeached, it is incumbent on the donee to establish that the donor perfectly understood the nature and effect of the transaction, at the time that he entered into it, and if the donee stood in a position of confidence towards the donor, affording a presumption of influence over him, it is incumbent on him also to prove that the gift was not the result of such influence. Tried by these tests, the question is, whether this gift can be successfully impeached. In the first place there was a motive inducing to it. Dr. Blackwell proves that Mrs. Kerr prevailed upon J. W. Lefferty with some difficulty to undertake to procure the completion of this gift of the Indians in her favour, and promised him half the property in case he should succeed. There is much reason to believe that it was a task of difficulty, and Lefferty appears to have made great exertions in order to ensure success. No doubt a gift of half the property was a very handsome reward for his services, but when it is considered that but for those services the whole might have been lost to Mrs. Kerr, and that the property was originally a

gift to herself, it will not perhaps appear excessive. That Mrs. Kerr fully understood that she had parted irrevocably with the property I think cannot be doubted. Her letters show that she was a most intelligent person, and in one of these letters she tells Lefferty in the most emphatic terms that the moiety she had conveyed to him was his own, to do with it what he liked. These expressions seem to have been elicited form her by some suspicion expressed by Lefferty that she was desirous of canceling the gift she had [Judgement.] made. I am aware that it may be contended that these letters show that a notion was entertained by both Mrs. Kerr and Lefferty, not correct, that she could recall this gift, and therefore that she mistook the legal effect of it. I, however, do not think so. In other letters she seems to speak of Lefferty as the owner of the moiety. With regard to the gift being the result of influence, I do not think it can be supposed for a moment that such was the case. Dr. Blackwell describes Mrs. Kerr as a person of superior intellect. He says that any one who was acquainted with her and with Lefferty could never suppose that he had any influence over her--that she might influence him, but that he could never influence her; and the correspondence between them fully corroborates this representation. Then the letter to which I have already adverted, in which Mrs. Kerr uses the strongest expressions to induce Lefferty to consider himself the absolute owner of this moiety, written as is was, at a distance of several thousand miles, strongly militates against the idea that influence could have been originally exercised in procuring this gift. Upon the whole, it appears to me that the circumstances of this transaction satisfy the rule of law, and that it must be deemed to have been the uninfluenced act of one, who was perfectly aware at the time of the legal effect of her own act. It is argued, however, that the subsequent mortgage made by Lefferty amounted to a repudiation of the gift. I do not think that this is the proper construction to be put upon his conduct. It was not unnatural, even supposing these mortgages to have been made for the exclusive benefit of Mrs. Kerr, that he should have been willing to encumber his own moiety together with hers the more readily to raise money for her benefit, trusting to her at some future time to exonerate his part of the property, without any intention of repudiating the gift; and I think that the letters in which his right to the moiety is recognized, were subsequent to those mortgages; that the mortgages were made in the name of Mrs. Kerr [Judgment.], by him as her attorney, is, I think, a circumstance wholly immaterial.

The other part of the case, namely, the sale to the defendant and her mother, admits of totally different considerations. It is argued that the authority was revoked before the sale in question, by the fragment of a letter which is produced; but I think this cannot be contended for a moment. It is quite clear from the internal evidence of the letter, that it could not have been received until after the sale, and I apprehend it to be clearly settled, that an act done by an agent within the scope of hid authority, and before any notification of its revocation, is good, although it may be entirely revoked at the time. Then it is said that the sale was a very improvident one; that a sale in one lot, when the property had, as appears from the map, been divided into lots, was highly reprehensible in an agent; and that the circumstances attending the sale were such as to make it an improper one, and one that ought not to be sustained. I have already made a remark as to the manner of conducting the sale. Mrs. Kerr's property in these lands was peculiar; it was an undivided moiety. No doubt it was highly expedient with reference to the local situation of this property, that it should be divided into town lots, and disposed of gradually with the growth of the place; and Mr. Lefferty was probably very willing to lend his assistance in the prosecution of any such design, as it might appear ungracious to refuse it; but suppose he had been otherwise minded; suppose he had wished to reserve his moiety ad a provision for any children he might have, until Brantford attained such a size that town lots had increased ten-fold in value, could

even Mrs. Kerr have made any reasonable objection to such a course? and if he had refused at that time to concur in a sale of the property in town lots, how could Mrs. Kerr's undivided moiety have been disposed of otherwise than in one lot? I think, too, she authorized a sale of it in one lot. The fragment of a letter already alluded to amounts to such an authority, and if this sale had been for £1,000 sterling, subject to the mortgages, I do not [Judgment.] think I should disturb it. It was, however, Mr. Lefferty's duty to exercise a sound discretion in the sale of this property, and to act for Mrs. Kerr in the disposition of her share of it in the same manner that he would have acted for himself in the disposition of his own. No doubt it would have been advisable for Mrs. Kerr to have allotted to Mr. Lefferty a specific portion of the property, in the first instance, instead of an undivided moiety; but circumstances, perhaps, forbade this at the time. It would have been prudent, however, to have made a partition as speedily as possible after the gift, and no doubt Mr. Lefferty would have cheerfully acceded to any proposal that effect; but such a step does not appear to have been suggested by Mrs. Kerr or by him, or to have occurred to either of them. Probably their concurrence in sales of town lots was contemplated by both parties, and no difficulty anticipated by either. Supposing no correspondence to have occurred between the parties since the execution of the power of attorney, what was the agent's duty with respect to the sale of this property under the peculiar circumstances of the case? Was it consistent with his duty to offer this undivided moiety for sale by auction, without communication with his principal? I think it cannot be so construed. It was, I think, his duty either to dispose of the property in town lots, himself concurring in the sales; or if he had been unwilling to dispose of his own share, to communicate with his principal, express his views with respect to the most expedient disposal of the property, and propose a partition to that end; and any sale of the undivided moiety, without a special instruction auth- orising it, would have been a breach of trust. Such, in the absence of any special authority, was the sale in the present instance. I think it was an improvident sale, and one inconsistent with the duty of the agent, and such as in the abstract cannot be supported. It becomes then important to enquire whether any authority can be discovered from the [Judgement.] correspondence for the sale in question I certainly think that Mrs. Kerr authorized the sale of her individual moiety for £1,000 sterling, clear of the incumbances. The fragment of a letter which has been mentioned, contains, I think, such an authority, but I cannot discover any other; and this of course would not justify the sale in question. Mr. Lefferty's letters, written just before the sale, so far from giving Mrs. Kerr any warning of what he intended, were calculated to mislead. She could not, from any letter that she received before the sale, divine his real intentions, Throughout his letters are scattered various allusions and assertions, pointing to pecuniary embarrassment and pressure on her part which might be contended to justify this sale; but supposing them adequate to produce this effect, these allusions and assertions are not evidence against the plaintiff, although no contradiction to them may appear; for in the first place her part of the correspondence has not been well preserved, and is extremely mutilated; and in the next place, she might not have thought it necessary to contradict every unfounded assertion or allusion contained in the somewhat reckless letters of her agent, if she apprehended no evil, and it would be too much to hold her bound by the truth of every such assertion or allusion which she had not specifically contradicted. It is true that Blackwell and Burwell both say that they saw before the sale letters from Mrs. Kerr, pressing a sale upon any terms, with extreme urgency. They do not however, prove these letters, much less do they account for their non-production. Their evidence, therefore, on this point is not admissible. But supposing that they could, as I dare say they could, prove the handwriting of these letters, and that evidence, as is probable, could be produced of an ineffectual search having

been made for them, so as to render secondary evidence of their contents admissible, would it be safe to act upon such evidence? These gentlemen, perhaps, gave but a cursory perusal to these letters, about fifteen years ago: in such a case almost every word might be important; but they do not profess to remember a single word that they contained, but [Judgment.] only state their recollection of their general purport. It is extremely odd that these letters were not preserved. Although Mr. Lefferty is represented as a careless man about papers, yet if he ever preserved any papers, one would think that he would have preserved these letters. They must have been received shortly before the sale and I think that from the first he entertained misgivings as to the propriety of this proceeding, and would be careful, one would think, to pre- serve any document that might appear to justify it. Mrs. Kerr's letter of the 20th of May, 1844, which he must have received in the middle, or towards the end of June, containing, as it did, very energetic remonstrance's on the subject of the sale, was well calculated to make him careful to preserve any letters that he might previously have received, and that might afford any justification of his conduct. I have no doubt that Burwell and Blackwell saw the same letters. Blackwell says that he saw two or three; that the first, he thinks, was in 1841; that latterly Mrs. Kerr became very urgent; but after stating that the first letter he saw was, he thinks, in 1841, he adds; "she urged him to sell in lots, and did the same in other letters; spoke of her embarrassment from debts. Ii it not extremely probable that these letters, however urgently they might press a sale, all pointed to a sale in lots, and afforded, therefore, no justification of the sale that actually occurred; and is it not possible, that, instead of being preserved, they might have been destroyed for that very reason? I think it would be certainly unsafe to act upon such evidence as that of Burwell and Blackwell, respecting these letters, supposing it to be legally admissible. It is probable that many letters that passed between these parties are not now forthcoming, and it is possible that with the incomplete data that we have for the decision of this case, we are in danger of falling into error; but we must make the best use of the materials that we have; and I must say, that judging from the tenor of Mrs. Kerr's that are produced, I think it extremely improbable that any thing could be found in any of her un- produced [Judgement.]letters to justify this sale, and I cannot suppose that the letters of J. W. Lefferty, which are not forthcoming, would materially alter the view that I have formed of this case. However, if this case be erroneously decided in consequence of the loss or destruction of letters, it is the misfortune of the defendant upon whom it id incumbent to produce some special instruction authorizing the sale in ques- tion, which, prima facie, involved a breach of duty on the part of the agent. If this be so, the only questions that re- main, are, first, whether Miss Lefferty can be fixed with notice of her brother's misconduct; and second, whether time or laches forms a bar to the present claim. Upon the first point, it cannot be doubted that Miss Lefferty must be deemed to have had notice of the invalidity of the present sale. It was indeed patent to every one dealing for the estate. The power of attorney was of course seen, imposing on the agent the duty of exercising a sound discretion as a prudent owner, in the disposition of the estate, and the local situation and advantages of the property made it plain that a sale in one lot of an undivided moiety was, in the absence of a special instruction authorizing it, a breach of duty in the agent. It became, therefore, the duty of the purchasers to call for such a special instruction, and none such was produced. Then, is the time that has elapsed in the present case, and the inaction of the plaintiff and his mother, a sufficient bar to the suit? Upon this part of the case I have entertained much doubt. It seems a strong measure to disturb a purchaser, who has been in the undisturbed possession of the property for fourteen or fifteen years. And yet the circumstances on the other side are extremely strong to excuse the delay that has occurred. Mrs. Kerr repudiated the sale very decidedly from the first, and appears to have entertained hopes for

some time that it would be voluntarily rescinded. She then instituted legal proceedings in order to have it annulled, but was stopped by an order for security, to which doubtless the defendants were entitled, but which it appears that Mrs. Kerr was unable to furnish. I think I must hold this obstacle to be the cause of the suspension of proceedings. They cease from the time [Judgment.]the order is obtained; the same motive which induced her to institute, would have likewise led her to prosecute, the suit; and we find her stating in one or two of her letters that she could not name a single individual to whom she could apply in this emergency. She survives the sale only two years, and at her death, her heir-at-law, the present plaintiff, is a youth of fourteen, who does not of course attain his age for seven years afterwards, and who, being attached to the army, is probably absent on foreign service during part of the interval, and who, at all events, does not visit this country until a year or two before the commencement of this suit. All this Miss Lefferty certainly knew, and she knew that her title was insecure and might be questioned at any time.

It does not appear that any great change has taken place in the condition of the property, except that, no doubt, it has progressively increased in value, like all other property in the country, especially that which is so favourably situated at the present. Under these circumstances, I think, I must hold that the delay which has occurred forms no bar to the present suit.

It is true that the death of J. W. Lefferty has occurred in the interval; but if the suit had been commenced in. his lifetime, would he not have been properly a party, or could he have given evidence? Even if he could, is it likely that it would have been material? It must have been by the production of letters, for the parties had never met. Upon evidence of this sort, which may formerly have existed, and may not now be forthcoming, I have already remarked. Then it is to be considered that the former suits were certainly commenced at a time when the evidence, if admissible, could have been obtained, but these suits were stopped; the plaintiff is a minor until 1853, and absent from [Judgment]the country until a year or two before the commencement of this suit.

I think the gift to J. W. Lefferty must be confirmed and established; but the sale to Miss Lefferty declared void and annulled. I shall give no costs. I think an enquiry should be directed as to the payment of the purchase money. I, am not satisfied that more light may not be thrown on that part of the transaction. William J. Lefferty was present, but has not been examined on the point. The payment to J. W. Lefferty would be good.

Miss Lefferty will be entitled to be repaid what was paid, with interest, and must account for the rents and profits of the estate. Upon payment of what may be reported due, the undivided moiety must be reconveyed.

I omitted to state the way in which I arrived at the conclusion that when Mrs. Kerr authorized a sale of her undivided moiety for £1000 sterling, it was clear of incumbrances, so that she might receive that sum clear of deduction. It is clear that Miss Lefferty intended to pay £628 for her property, and to discharge the mortgages herself. She says she actually paid this sum to her brother, and I think Mrs. Kerr perfectly understood that she was to receive the £628 clear of the mortgages. This sum she calls "pitiful and paltry, and of no use;" but if the moiety of the mortgages had been deducted from the £1000 sterling, she would not have received much, if any, more, and therefore I am satisfied that when she authorized the sale of her undivided moiety for £1,000 sterling, she meant clear of the encumbrances.