

Wednesday, June 7.

SECOND DIVISION.

[Lord Young, Ordinary.]

THE LEITH HERITAGES COMPANY v. THE EDINBURGH AND LEITH GLASS COMPANY.

Property—Disposition—Warrandice.

In 1788 the then proprietor of two glass works, which were separated by a piece of waste ground 167 feet long by 118 feet broad, applied to the superiors, who were the town council of Edinburgh, for a feu of the said piece of waste ground, and the town council passed an Act of Council granting this request, and authorising a charter to be made out in favour of the proprietors of the glass works. No charter was however obtained, nor was possession taken of the waste ground, which continued to lie waste and to be partially used as a public way, and in 1872 a macadamized road was made down the centre of it. In 1824 the glass works were sold, and in the dispositive clause of the disposition then granted by the seller the waste ground was mentioned in the following terms:—"All and whole that piece of ground lying betwixt David Stewart's feu on the east, and the road on the east side of the property hereinbefore disposed, with power to alter said road so as to be immediately to the west of David Stewart's feu, with all right, title, and interest I have therein in virtue of an Act of Council of the Lord Provost and Magistrates of Edinburgh, bearing date the 3d day of September 1788, or otherwise, but that under the burdens and conditions therein mentioned, my said disponees being to stand in my place." In this disposition there was a clause of absolute warrandice applying to all the subjects conveyed except the waste ground, in reference to which the warrandice was from fact and deed only. In 1852 another transmission of the property took place in favour of A, and the clause above quoted was copied into the disposition then granted. In 1874 B made an offer to A for the purchase of his property, specifying in his offer boundaries which included the waste ground. A accepted B's offer, but in his acceptance pointed out that there was a mistake in the boundaries, there being "a public road or street between the east and west works of the Company which is not their property, and of course is not included in the sale." B agreed to this alteration, and a minute of agreement and sale was entered into between the parties. By said minute of agreement and sale A agreed to sell, and B agreed to purchase, the "whole subjects disposed" in the disposition of 1852, and B agreed to accept the title as it stood. Thereafter a disposition was prepared by B's agents, who for that purpose obtained possession of the titles, including the dispositions of 1824 and 1852. The disposition was revised by A's agents, signed, delivered, and recorded. In the dispositive

clause reference was made to the said waste land in precisely the same terms as in the dispositions of 1824 and 1852. There was further a clause of absolute warrandice. B took possession of the waste ground, but was evicted by the local authorities, and the superiors refused to grant him a charter, as in implement of the Act of Council of 1788. In an action by B against A for repayment of the portion of the price applicable to the said waste ground, the Court *assolized* A in respect that all that he had disposed to B was any right which he might have under the Act of Council 1788, for what it was worth, and that the clause of warrandice only applied to what was actually conveyed.

This was an action at the instance of the Leith Heritages Company (Limited) against the Edinburgh and Leith Glass Company for the sum of £10,000 sterling in the following circumstances:—

In 1874 the pursuers had purchased their glass works from the defenders. The purchase was negotiated by offer and acceptance in February 1874. The offer was as follows:—"We are instructed on behalf of clients to make offer to purchase from your company, at the price of £52,000 sterling, the property belonging to them in Salamander Street, Leith, and which is bounded, we understand, as follows—*videlicet*, on the north by the property of the North British Railway Company: on the south by Salamander Street, Leith; on the east by a road leading from Salamander Street to the shore; and on the west by a road separating your property from that of the Edinburgh and Leith Gas Works." In accepting this offer the defenders' agents wrote—"We ought to mention that, as regards the boundaries of the property given by you, it is to be kept in view that there is a public road or street between the east and west works of the company, which is not their property, and of course is not included in the sale." The pursuers adhered to their offer under this exception.

A minute of agreement was thereafter executed by the parties, dated 15th, 16th, and 19th October 1874. The first article was:—"The first parties agree to sell and the second parties agree to purchase, at the price of £52,000 sterling, the whole ground thereon and buildings belonging to the first parties, situated on the north side of Salamander Street, Leith, being the whole subjects disposed in a disposition dated 24th December 1852, granted by James Hill, merchant in Edinburgh, as trustee for the society or company established under the firm of the Edinburgh and Leith Glass Company, in favour of William Henry Brown, china merchant in Edinburgh, and others, as trustees of the said society or company, with the exception of the subjects lying to the south of the said Salamander Street." In the fourth article it was agreed that "the second parties (the Heritages Company) shall accept the title as it now stands, and shall not be entitled to require the first parties to enter with the superiors of the said subjects, nor to make up any further titles to the same; without prejudice to the second parties, at their own expense, having right to make up further or other titles in the person of the first parties if the second parties think proper to do so." The pursuers paid the price at Martinmas 1874, and received

from the defenders a formal disposition of the property, dated 10th November 1874, granted by Dr Combe, as sole surviving trustee of the Glass Company, under a disposition dated 24th December 1852, in favour of himself and others. The disposition, after referring to the said minute of agreement, disposed to the pursuers and their assignees, heritably and irredeemably, "All and sundry those parts of the property of the said Edinburgh and Leith Glass Company situated on the north side of Salamander Street, Leith, with the buildings and others thereon, and with the whole privileges and immunities, parts, pendicles, and pertinents thereof, as the said subjects are described in the title deeds thereof as follows:— (Seventh) "All and whole that piece of ground lying betwixt David Stewart's feu on the east and the road on the east side of the property in the fourth and fifth places hereinbefore disposed, with power to alter said road so as to be immediately to the west of David Stewart's feu, with all right, title and interest I, as sole surviving trustee foresaid, have therein, in virtue of an Act of Council of the Lord Provost and Magistrates of Edinburgh, bearing date the 3d day of September 1788, or otherwise, but that under the burdens and conditions therein mentioned, my said disponees being to stand in my place; together with all right, title, and interest which I, as trustee foresaid, or the said Edinburgh and Leith Glass Company, had, have, or could any way claim or pretend to the said whole subjects hereinbefore disposed."

The disposition contained a clause of warrandice in the following terms:—"And I, as trustee foresaid, grant warrandice from my own facts and deeds only; and I, as trustee foresaid, and as authorised as aforesaid, bind the Edinburgh and Leith Glass Company in absolute warrandice." The disposition was recorded in the Register of Sasines for the county of Edinburgh on 11th November 1874.

The piece of ground disposed in the seventh place in the disposition was between what were the east and west works of the Glass Company, which it entirely separated. It was on the average 167 feet long by 118 feet broad. It had always been vacant ground, and had been used as an access from Salamander Street to the sands. There was formerly a road running along the eastern boundary of the west works, and latterly a road through the middle was made by the public authorities of Leith in 1872; the rest was left waste and unenclosed. To this piece of ground the Glass Company had not a feudal title. Their right to it was derived solely from an Act of the Town Council of Edinburgh, dated 3d Sep. 1778, which authorised a charter to be made out in favour of the Edinburgh Glass-House Company, upon conditions mentioned therein. No charter was however obtained applicable to the said piece of ground, no feu-duty was ever paid in respect thereof, nor any possession obtained of it. In 1824 the defenders' company was formed, and purchased both the glass-works, which had previously belonged to separate companies. In the disposition in their favour mention was made of the piece of ground in question in precisely the same terms as in the seventh head of the disposition above quoted. The disposition contained an assignation to an open charter of resignation and an open

feu-charter, but neither of these charters contained any reference to the said piece of ground, which, therefore, was not included in the infestments following upon them. There was a separate clause of warrandice from fact and deed only applicable to the said piece of ground.

Similarly, in the disposition dated 24th December 1852, in favour of new trustees for the company, and also in the instrument of sasine following on it, recorded 5th January 1853, the said piece of ground was mentioned, the dispositive clause in the charter of 1824 having been copied into this deed; but no mention was made of said piece of ground in the act of infestment, as it had been expressly excepted both from the obligation to infest and from the precept of sasine in the disposition. In the Act of Parliament by which the harbour and docks of Leith were vested in commissioners, half of the said piece of ground was included in the description of the property so vested.

The agents for the pursuers admitted that on examining the titles of the various portions of ground conveyed to their clients, they discovered that the Glass Company had no feudal title to the piece of ground in question. They applied to the town council for a charter applicable to it, which, after some delay, was refused. They then proceeded to take possession of the ground by erecting a fence round it, but were stopped while doing so by the authorities of Leith, and their fencing removed. In these circumstances the pursuers demanded repetition of the price paid by them for this portion of the subjects, which, however, the defenders refused to give. The pursuers thereupon raised the present action and pleaded—"The pursuers having purchased the said piece of ground from the defenders under a disposition containing absolute warrandice, and having been evicted therefrom, are entitled to decree for the sum concluded for as the value thereof."

The Lord Ordinary after proof pronounced the following interlocutor, dated 24th November 1875:—

"Having considered the proof and whole cause, and heard counsel thereon, Assolizies the defenders in the conjoined actions from the conclusions of the summonses, and decerns: Finds the pursuers liable in expenses; and remits the account when lodged to the Auditor to tax and report.

"*Note.*—The question is, whether the piece of ground referred to in condescendence 4, and marked on the plan as No. 7, was sold to the pursuers by the defenders under a warrandice of title; and I am of opinion that it was not. The ground, which is situated between the east and west works of the defenders has always been open ground—part being used as a road and part left waste. The defenders had no right to it other than the minute of council of 3d September 1788, quoted in statement 3, p. 16, and never professed to have any other. This was, of course, no title, but such precarious right (and it was literally a precarious right) as this minute gave they passed to the pursuers exactly as it had been passed to them. I do not assent to the argument by which the conveyance under the 7th head of the disposition is otherwise construed, and am of opinion that to construe it as an ordinary absolute conveyance of the ground,

subject to the warrandice, would be unjust, and contrary to the meaning and intention of the parties. Taking the contract of sale as it stood on the offer and acceptance prior to the disposition, I am of opinion that there was no contract for a sale of this ground with warranty of title, and the purchasers' agent admits that when he prepared the disposition he knew that the sellers had no title to it, or other right than the minute of council. Whether at this stage (prior to the disposition) the buyers might have resiled from the bargain because of no title to this piece of ground I have not to consider; but to take the disposition (so peculiarly expressed) in the knowledge that there was none, and with an undisclosed view to an action of damages founded on the terms of the disposition as warranting a title, is a proceeding I am unable to approve of. The pursuers knew (their agent certainly did) that the disposition was not executed in that view of its meaning and effect. The striking peculiarity in the terms of the deed as regards this piece of ground relieves me of any difficulty which I might otherwise have felt in rejecting the pursuer's claim; but I desire to say that in considering a claim of damages the Court is, in my opinion, entitled and bound to look beyond the technicalities of conveyancing language, and to refuse the claim if it shall appear that the bargain, as the parties understood and intended it, was fulfilled."

The pursuers reclaimed, and argued—The thing disposed was the piece of ground with a road upon it, and in addition there was given all right, title, and interest which the disponent possessed therein, and the clause of warrandice warranted the title to the subjects conveyed. If it turned out that there was no title, that was just one of the cases which the clause of warrandice was intended to meet. It was not competent to look at the missives or the agreement of sale, as the disposition, being the final contract, overrode all previous communings; but if the writings passing between the parties prior to the disposition were looked to, the pursuers' case was rendered clearer, because (1) a road was the only thing excepted, and a clearly defined road existed upon the waste ground; and (2) it could not be seen from the titles, the knowledge of which was said to bar the pursuers' claim that possession had not followed upon the Act of Council and the deeds shewed that the subject had continued in the defenders' titles.

The defender argued—There was no attempt here to prove an agreement different from that which was embodied in the disposition, and it was quite competent to look to previous communings to find out what was actually conveyed, and in any view it was competent to do so in the present action, which was in substance an action of damages. The Court was also entitled to know the circumstances under which the contract was made, and the state of the parties' knowledge when it was made (*Forlong v. Taylor*, 3 S. and M.L. 210). It did not admit of dispute that at the date of the disposition the ground was lying waste, and the pursuers' agent admitted that it had been pointed out to him as ground which the defenders claimed, and that he saw from the titles that the defenders had no title to the ground. The terms of the dispositive clause

were most peculiar, and only contained a disposition of any right in reference to the said piece of ground which the defender might be bound to have, and what the warrandice clause did was merely to warrant that right to the buyer. To give effect to the pursuers' contention would simply be to make the clause of warrandice a dispositive clause instead of merely a clause warranting the sellers' title to what had already been disposed.

At advising—

LORD GIFFORD—I have felt this case to be attended with very great nicety and difficulty, but ultimately, and with some hesitation, I have come to concur in the opinion expressed by the Lord Ordinary in his note to the interlocutor under review.

It appears to me that neither by the minute or agreement of sale of October 1874, nor by the disposition granted in implement thereof on 10th November 1875, did the defenders warrant and guarantee to the pursuers that the subject specially described as "seventh" in the dispositive clause, and marked upon the plan No. 10 of process as No. 7, should be the absolute property of the defenders, so as to give the defenders a claim of damage if, from any cause not imputable to the pursuers, the defenders should be unable to vindicate a title to that special subject or piece of ground.

The minute of agreement of sale is referred to and embodied in the final disposition, and must be read along with it. It is not superseded, as frequently happens by the final deed, as preliminary correspondence is superseded by a written agreement ultimately executed. On the contrary, the agreement forms the narrative of the disposition, and the disposition bears to be implement of the agreement, and nothing more; and in order fairly to understand the true meaning and import of the disposition it must be read along with the agreement which it bears to carry out.

Now, by the agreement the defenders sell to the pursuers, not the seven specific subjects shewn upon the plan, putting each separate piece of ground on the same footing, and warranting each and all alike to the purchasers. The property sold by the minute of agreement is quite differently specified. It is thus described—"the whole grounds and buildings thereon belonging to the first parties" (that is the Glass Company) "situated on the north side of Salamander Street, Leith," being the whole subjects disposed in a certain disposition of 1852, "with the exception of the subjects lying to the south of the said Salamander Street." In short, the defenders agree to sell to the pursuers all their ground and property on the north of Salamander Street, but not their property to the south of Salamander Street, and reference is made to the disposition of 1852 as the last title under which the sellers hold the subjects. The final disposition in favour of the pursuers, in exact accordance with the minute of sale, disposes not seven specific subjects specially described, but only "those parts of the pursuers' property" lying on the north side of Salamander Street, "as the same are described in the title-deeds thereof, as follows,"—and then follow the description of seven lots virtually quoted from the old titles.

Now on turning to the old titles to the disposition of 1859, and to the previous disposition of 1826, and to the previous titles to the property, all of which were before the pursuers' agents when the final disposition was prepared, it is at once apparent that the defenders' title to the different lots or pieces of ground stood in different positions. In particular, it became apparent that the sellers the Glass Company had no feudal or heritable title at all to the open or waste piece of ground marked No. 7. That piece of ground had never been conveyed to the sellers, the Glass Company. It was not their property in the strict sense of the word. The only right to or in that waste piece of ground, including the roadway which was part thereof, was a minute of the Town Council of Edinburgh dated 3d September 1788, by which minute it appears that the town council of that date agreed to feu to the Glass Company's predecessors that piece of ground upon certain conditions. No feu-charter, however, and no conveyance of any kind had ever been granted by the town council.

In these circumstances, this piece of waste ground and roadway was in the defenders' titles, and in particular in the disposition of 1852 referred to in the agreement, dealt with quite differently from the other plots of land marked upon the plan. It was not conveyed simply as the property of the Glass Company, but was described by its boundaries with this descriptive addition, "with all right, title, and interest I, as sole surviving trustee foresaid, have therein in virtue of an Act of Council of the Lord Provost and Magistrates of Edinburgh, bearing date the 3d day of September 1788, or otherwise, but that under the burdens and conditions therein mentioned, my said disponees being to stand in my place." I cannot read this very special clause as a mere conveyance of the granter's right, title, and interest in a subject absolutely conveyed. There is a general clause of right, title, and interest following the description of the whole subjects, and applicable to all of them, and this special clause must be something different. It seems to me to give the purchasers special warning that this minute of council of 1788 is the only title which the sellers hold to, or in virtue of which they have any claim upon the piece of waste ground in question, and it contains an express declaration that as to this piece of waste ground the purchasers are to stand in the sellers' place and to use their rights, but that nothing more is given. The sellers virtually say—Our right to No. 7 is a mere minute of council—not a disposition, not an infetment—and you, the purchasers, are simply to stand in our place. In short, I think, reading minute and disposition together, the thing given under the 7th head of description is not property warranted at all hands, but a mere claim or right of action against the Town Council of Edinburgh to implement their minute of 1788, and if on any grounds not imputable to the sellers, it should turn out that, either on the ground of the long prescription, or on the ground of Sir William Rae's Act, or on any other ground, the town council are not now bound to grant a feu-charter of this piece of waste land, the purchasers must take their chance of this, for I do not think that the absolute warrandice either in the minute of sale or in the disposition war-

rants or guarantees to the purchaser that the claim for a charter shall be successful.

In an action of damages for breach of warrandice or for breach of contract (and breach of warrandice is just breach of contract) I agree with the Lord Ordinary that the Court is not bound by any technical words in the final deed of conveyance, but are entitled to look to the whole contract, and to the circumstances in which it was entered into, in order to reach the real meaning and understanding of the parties, and to determine what the true bargain was for breach of which damages are now claimed, and I concur in the result which the Lord Ordinary has reached.

The other Judges concurred.

The Court adhered.

Counsel for Pursuers—Asher—Begg. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Defenders—Dean of Faculty (Watson)—Balfour—Low. Agent—John T. Mowbray, W.S.

Friday, June 9.

FIRST DIVISION.

[Lord Craighill, Ordinary.]

MOON AND OTHERS *v.* THE CALEDONIAN RAILWAY COMPANY.

Ship—Harbour—Demurrage—Regulation of Harbour—Bye-Laws.

Circumstances in which it was held that the owners of a harbour were entitled to alter a practice as to preference in loading at certain cranes in the harbour without notice to the public.

Opinions, that the harbour-master himself might in the circumstances have made the alteration without authority from the owners of the harbour.

This was an action brought by the pursuer and others, as owners of the steamship "Nellie," against the Caledonian Railway Company, as owners of the harbour of Grangemouth, concluding for £275 as damages for the loss sustained by the detention of the "Nellie" for eleven days outside the docks at Grangemouth.

The Lord Ordinary ordered a proof, and there- after pronounced the following interlocutor:—

"Edinburgh, 7th December 1875.—The Lord Ordinary having heard parties' procurators on the closed record, productions, and proof, and having considered the debate and whole process, in the first place, Finds, as matters of fact, (1) That the defenders are now, and since 1867 have been, the owners of the harbour of Grangemouth; this part, as well as the other parts of the undertaking of the company of proprietors of the Forth and Clyde Navigation having been transferred to the defenders' company by virtue of 'The Caledonian Railway and Forth and Clyde Navigation Companies Act, 1867' (30 and 31 Vict. c. 106): (2) That for four years or thereby prior to October 1874, steamers were allowed a