

Friday, November 3.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

DUNCAN v. MITCHELL & COMPANY.

Right in Security—Disposition ex facie Absolute—Back-Letter Recorded—Sale by Creditor—Sale by Private Bargain Competent.

A creditor held heritable subjects in security on an *ex facie* absolute disposition along with a minute of agreement between the parties which provided for reconveyance to the debtor on payment of the debt, but that meantime the creditor should have power to let and feu the subjects, "and that the execution of this minute of agreement by the creditor shall not in any way affect or prejudice his right to lease, feu, or sell said subjects;" and further, that in the event of the creditor "selling the said subjects, or any part or portion thereof, which he is specially authorised to do as aforesaid, and that at any time or times by public roup or private bargain," &c., he was to account for any balance in his hands after repayment of his advances. *Held* that under the *ex facie* absolute disposition and the terms of the recorded minute the creditor was entitled to sell the subjects by private bargain.

William Duncan, S.S.C., Edinburgh, acquired certain subjects at Springfield, Leith, from William Stewart, wood merchant there, conform to disposition in his favour dated 30th April 1881. This disposition, although *ex facie* absolute, was in reality a security for money due by Stewart, and in connection therewith a minute of agreement was entered into between the parties. The minute was dated 2nd May 1881, and recorded 28th January 1887.

The minute set forth, *inter alia*—"Third. It is also specially conditioned and agreed that on said William Duncan being repaid the various sums due and to become due to him under the first article of this agreement, including interest and expenses, and on the said William Stewart paying off or getting transferred all loans due to the said William Duncan or any of his clients on the said properties . . . in or near Leith, then the said William Duncan shall be bound, at the expense of the said William Stewart, to reconvey to him the said subjects, superiorities, and others contained in the said disposition, in exchange for a discharge by the said William Stewart of all his actings and intromissions in the premises, but that meanwhile the said William Duncan shall have the full and absolute power and control of letting the subjects to tenants, and granting leases of such duration, and at such rents as he shall agree to, collecting by himself, or any factor or parties appointed by him, and intromitting with the whole rents, feu-duties, and casualties, and other profits

of said subjects, feuing out to such person or persons, and at such rate or rates of feu-duty as he shall fix and determine, to be held of himself and his foresaids, the whole or any part or parts of the said subjects and others still unfeued, and otherwise managing the said subjects and others; and that the execution of this minute of agreement by the said William Duncan shall not in any way affect or prejudice his right to lease, feu, or sell said subjects, or any part thereof, all which powers shall remain as entire as if this minute of agreement had not been entered into, and as if the absolute right of proprietorship and beneficial interest of the said William Duncan, constituted by the said disposition in his favour, had been in no way qualified by this minute of agreement. . . . Sixth. In the event of the said William Duncan selling the said subjects and others, or any part or portion thereof, which he is specially authorised to do as aforesaid, and that at any time or times, by public roup or private bargain, and with or without advertisement, he shall be bound to account for and pay over to the said William Stewart any balance of the price of said subjects which may remain in his hands after repayment of all advances made and to be made, and of all sums due and to become due, under the various heads specified in the first article hereof."

Mr Duncan held the subjects from the date of the disposition and transacted therewith as authorised by the minute of agreement. He exposed the subjects three separate times for sale by public roup after full advertisement during the spring of 1893, but failed to sell them. He then sold the subjects by private bargain to Messrs Mitchell & Company, wood merchants, Leith. When the draft disposition to carry through the sale had been prepared, Mitchell & Company objected that Mr Duncan could not give a proper title, and insisted that the trustee upon the sequestrated estate of Stewart should give his consent. The trustee refused his consent.

Mr Duncan then raised this action to compel implement by Mitchell & Company, and claimed £500 damages for breach of contract if they failed to implement the bargain.

The pursuer pleaded—"(1) In respect of said contract of sale contained in said letter, and the disposition tendered by the pursuer to the defenders, the pursuer is entitled to decree in terms of the first conclusion of the summons. (2) On a sound construction of the disposition in favour of the pursuer, and relative minute, the pursuer is entitled to dispoise to a purchaser the subjects described in the summons without the consent of any other party."

The defenders pleaded—"(1) On a sound construction of the disposition in favour of the pursuer, and relative minute of agreement, the pursuer is not entitled by himself to sell the said subjects by private bargain. (2) The pursuer being only a security holder of said subjects, a private sale by him thereof can only be effected

under the conditions imposed by the Bankruptcy Acts."

The Lord Ordinary (KYLACHY), by interlocutor of 14th July 1893, found that the defenders were bound to implement the sale they had entered into.

The defenders reclaimed, and argued—The minute did not expressly give a power of sale. At common law an *ex facie* absolute disponee with recorded back-bond was only a security holder, and could not sell by private bargain without the debtor's consent, or the consent of the bankrupt debtor's trustee—*Baillie v. Drew*, December 2, 1884, 12 R. 199; *Gardyne v. Royal Bank of Scotland*, March 8, 1857, 13 D. 912; Bell's Comms. ii. 272.

At advising—

LORD JUSTICE-CLERK—I think this case is disposed of by the documents before us. The pursuer Duncan got an *ex facie* absolute disposition to the subjects mentioned in the summons, and under that disposition there is no doubt that he could have sold them by private bargain. But his debtor Stewart and he entered into a minute of agreement, which minute was recorded, and it is said that his position has been so altered by it that he cannot sell these subjects by private bargain. I find, however, that according to this minute Duncan was to have full power over the subjects, and that its execution was not in any way to "affect or prejudice his right to lease, feu, or sell said subjects or any part thereof," *i.e.*, he is to sell them under the title he has as an *ex facie* absolute proprietor, because the minute goes on, "all which powers shall remain as entire as if this minute of agreement had not been entered into, and as if the absolute right of proprietorship and beneficial interest of the said William Duncan constituted by the said disposition in his favour had been in no way qualified by this minute of agreement." Then the sixth article assumes that the pursuer is specially authorised to sell the subjects either by public roup or private bargain. These provisions seem to me to leave the pursuer's position as to selling the subjects as if nothing had been done to affect his position as proprietor. The Lord Ordinary's interlocutor is, in my opinion, right, and I move that we adhere to it.

LORD YOUNG—It is sufficient for the decision of this case for us to hold that the title given in the conveyance by the pursuer to the buyer is a good one, and is sufficient implement of the contract of sale between them. I think, however, that the minute of agreement assumes—and rightly assumes—that a creditor who has taken a disposition as security qualified by a recorded back-letter, which this minute of agreement really is, has an absolute power of sale. I do not doubt that the law laid down by Mr Bell is right, that the possession of an absolute disposition with a back-bond recorded puts a creditor in a different position from that in which he would have been if he had not got his back-bond recorded. I do not doubt, however, that he has the power of sale over the subjects,

and I think that power is rightly assumed in the minute of agreement. The minute no doubt allows the creditor to sell, and provides that he shall account for the balance of the sum received above the amount necessary to satisfy his debt, but I repeat that it is quite sufficient for the decision of the case that the conveyance was sufficient implement of the contract between the parties.

LORD RUTHERFURD CLARK—In my opinion, under this minute the pursuer is entitled to sell the subjects by private bargain.

LORD TRAYNER was absent.

The Court adhered.

Counsel for the Reclaimer—G. Stewart. Agents—Curror, Cowper, & Curror, W.S.

Counsel for the Respondent—Craigie. Agent—William Duncan, S.S.C.

Tuesday, November 7.

SECOND DIVISION.

[Lord Wellwood, Ordinary.]

BURNS v. THE STEEL COMPANY OF SCOTLAND, LIMITED.

Process—Jury Trial—Verdict—Rider by the Jury—Reparation.

In an action by a widow for damages for the death of her husband caused by the alleged fault of the defenders in not firmly securing a disused gate, the jury returned a unanimous verdict for the defenders, but added this rider, "While accepting unanimously the law as laid down by your Lordship, we do not think that a due measure of supervision and care over the gate in question had been exercised by the defenders." The verdict was entered for the defenders. The pursuer moved for a rule to show cause why a new trial should not be granted.

Held that the verdict of the jury negatived fault on the part of the defenders, and that the rider was not inconsistent with the verdict, and the rule *refused*.

This was an action by Mrs Jane Armstrong or Burns, widow of Michael Burns, labourer, Glasgow, against The Steel Company of Scotland, Limited, for £400 as damages for the death of her husband, which she alleged was caused by the fault of the defenders.

The defenders were proprietors of a large piece of vacant ground to the north of their Blochairn Iron Works in Glasgow, on which stood two cottages let by the defenders to some of their employees. The ground was surrounded by a high sleeper fence. In this fence was a large wooden gate the body of which was about fifteen feet long and seven feet high. It was moved on overhead pulleys. The ground being vacant, the defenders about two years before the date of the accident, caused the gate to be firmly fixed up. A wicket-gate at the side allowed the inhabitants of the cottages entrance to the piece of ground.