This being so—the construction of the title being clear—it appears to me that there is no room for inferences as to the right of property sought to be drawn from the evidence as to the possession. A servitude—a right of access—can never by any amount of possession be converted into a right of property. Nor, assuming that the defender's authors did in fact have what they call exclusive use of this staircase, can a right of exclusive use—as distinguished from a right of property—be constituted or recognised under our law—*Leck* v. *Chalmers*, 21 D. 408.

I am therefore of opinion, in conformity with the views expressed substantially I think upon this very question by the Judges of the First Division in the case of *Taylor* v. *Dunlop*, 10 Macph. 25, that the pursuer is entitled to decree of declarator with respect to the property of the staircase in terms of the conclusion of his summons.

As to the other question—the question as to the defender's right to build over the back court—I agree with the Lord Ordinary's conclusion. I am not sure that I agree that the clause in the title which is said to constitute the restriction is unintelligible. But if intelligible I agree that it is only intelligible in a sense which is fatal to its subsistence. It is quite plain that the clause in question—the clause against erection of buildings on the back ground—was not introduced for the first time upon the division of the original steading in 1830, or introduced with any special reference to that division. It was simply a repetition such as the previous titles required of a restriction affecting not merely the steading divided, but the neighbouring steadings in Bath Street. And therefore the question comes really to be *quo intuitu* was it repeated in 1830? Was it repeated by way of making it an independent condition, forming in a special sense part of the law of the newly divided tenement? Or was it repeated simply as one of the conditions applicable to all the steadings in that part of Bath Street? It is in this view, as it appears to me, that the terms of the clause which the Lord Ordinary holds to be unintelligible are important. For I think they are intelligible to this extent that they are at least inconsistent with the idea that the restriction in question was adopted with special reference to the division in 1830 of Mr Campbell's steading. If that had been meant I think it impossible that the clause would have been expressed as it is expressed, viz., as imposing a restriction upon the back ground of steadings not already erected but "to be erected." Taking the clause as we have it, it must I think be taken that it was inserted by Mr Campbell simply because under his title it required to be so inserted, under pain of nullity, and with no further or other purpose than that of bringing the two divided subjects into the same position with the undivided steading and the adjacent steadings in Bath Street.

But then if that be so, can there be any doubt upon the evidence that the restriction in question has been discharged by acquiescence just in the same way as if for instance Mr Campbell had remained proprietor of the original steading, and the present question arose between him and some of his neighbours. I am, I confess, unable to see that there can be much doubt on that subject. For not only does it appear—unless I wholly misunderstand the evidence—that the whole or most of the steadings in this division of Bath Street have had their back greens built over, contrary to the common restriction, but the house next door to the pursuers on the east—a house certainly subject to the same restriction—has had its back ground quite recently built over, and so built over not only with the tacit but with the express consent of the pursuers. I cannot in these circumstances see how a judgment in the pursuers' favour on this part of the case can be reconciled with the well-known class of decisions beginning with *Campbell* v. *Clydesdale Bank*, 6 Macph. 943, and including amongst many others *Fraser* v. *Downie*, 4 R. 942, and *Liddle* v. *Duncan*, 35 S.L.R. 801; or with the law as laid down in those cases, and in such cases as *Bunten*, 5 R. 1108, and *Johnston*, 24 R. 1061.

The LORD JUSTICE-CLERK intimated that LORD YOUNG concurred.

The Court recalled the Lord Ordinary's interlocutor; found for the pursuers in terms of the conclusion for declarator of property in the staircase, and the corresponding conclusion for interdict; and assoilzied the defender from the conclusion for declarator of right to prevent the defender from erecting buildings on the background, and the corresponding conclusion for interdict.

Counsel for the Pursuers and Reclaimers—Hunter—Wark. Agents—J. & J. Galletly, S.S.C.

Counsel for the Defender—Cooper, K.C.—M. P. Fraser. Agent—L. M'Intosh, S.S.C.

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*Thursday, March* 16.

## SECOND DIVISION.

[Lord Kyllachy, Ordinary.

## ROSCOE AND ANOTHER *v.* MACKERSY.

*Right in Security — Sale by Heritable Creditor—Objections to Title—Minute of Exposure — Advertisement — No Bank Named for Consignation of Surplus—Titles to Land Consolidation Act* 1868 (31 *and* 32 *Vict. cap.* 101), *secs.* 3, 119, *and* 122.

The creditor in a bond and disposition in security sold the security-subjects on a re-exposure on 20th April 1904. The first advertisement of exposure appeared on 10th February and the first exposure on 23rd March. The purchaser refused to implement his part of the contract in respect (1) that the minute of exposure was signed not by

the creditor herself but by her agent; (2) that the statutory period of six weeks had not elapsed between the date of the first advertisement and the first exposure; and (3) that no bank had been specified in the articles of roup for consignation of the surplus price. *Held* that none of the purchaser's objections to the title were tenable and that the sale was valid.

*Expenses—Sale—Objections to Title.*

The creditor in a bond and disposition in security sold the security-subjects by public roup. In an action for implement by the seller, *held* that the seller was entitled to expenses in respect that none of the purchaser's objections were substantial.

This was an action at the instance of Mrs Annie Grierson Lee or Roscoe and her husband Henry William Kent Roscoe against William Robert Mackersy, W.S., Edinburgh, to have the defender ordained to implement his part of the contract of sale of subjects in Montrose Terrace, Regent Road, Abbeyhill, as re-exposed by the pursuers on 20th April 1904, and purchased by the defender for £130, and further concluding for damages against the defender in the event of his failing within three weeks of decree to implement the said contract of sale. The subjects were sold by the pursuers in virtue of the powers of sale contained in a bond and disposition in security dated 11th June 1883 for £275 granted by William Smith, residing at 25 Montrose Terrace, Edinburgh, in favour of Mrs Roscoe. The first exposure was on 23rd March 1904 at the upset price of £180, and no one offering the upset price the subjects were re-exposed on 20th April 1904 at the reduced upset price of £130, and were bought at that price by the defender. The first advertisement of the exposure of the said subjects appeared on 10th February 1904. The minute of exposure was not signed by Mrs Roscoe herself, but by an agent authorised to act on her behalf. The articles of roup did not specify the bank in which the surplus price, if any, was to be consigned.

The pursuers pleaded, *inter alia*—"(1) A valid contract of sale of the said subjects having been constituted by the said articles of roup, minute of re-exposure, and minute of enactment and preference, and the defender having failed to fulfil the same, the pursuers are entitled to decree of implement as concluded for. (3) In the event of the defender's continued failure or refusal to implement the said contract of sale, the pursuers are entitled to reparation as concluded for in the alternative conclusion of the summons with expenses."

The defender pleaded, *inter alia*—"(3) The title offered by the pursuers to the defender, not being a marketable one, the defender ought to be assoilzied from the conclusions of the summons with expenses."

The Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. c. 101), sec. 119, enacts, *inter alia*, that a heritable creditor may, on the expiration of three months after a demand for payment, sell the security-subjects "on previous advertisement . . . published once weekly for at least six weeks subsequent to the expiry of the said three months."

Section 122 of the said Act enacts, *inter alia*, that the creditor shall upon receipt of the price consign the surplus which may remain after deducting the debt secured and expenses in a bank, "and the particular bank in which such consignation is to be made shall be specified in the articles of roup."

On 10th November 1904 the Lord Ordinary (KYLLACHY) pronounced this interlocutor:—"Finds the objections stated by the defender to the title offered by the pursuers cannot be sustained: Therefore appoints the defender to implement and fulfil in all respects his part of the contract of sale of the subjects libelled, and that by accepting a valid disposition of the same in his favour containing all usual and necessary clauses executed by pursuers of said subjects; also to make payment to the pursuers of the sum of £130, the price of the same, with interest as concluded for, and that within three weeks of the date hereof: Finds the pursuer entitled to expenses," &c.

*Opinion.*—"In this case the defender takes, I think, three objections to the title offered to him as purchaser of the property in question.

"His first objection is that there was no valid exposure, in respect that the minute of exposure was signed not by the creditor who was selling the property under the powers in his bond, but by the creditor's agent. As to that objection, there being no question of the agent's authority, I confess that it does not appear to me to be stateable.

"The second objection is, I think, on examination, also untenable. It is said that forty-two days had not elapsed between the date of the first advertisement and the sale. But the answer to that is that forty-two days had elapsed—that is to say, that there had been a full period of forty-two days between the morning of the day when the first advertisement appeared and the morning of the day when the sale took place. That, I think, amply satisfied the statutory requirement, that the prescribed advertisements should be inserted during a period of six weeks preceding the sale.

"That leaves only the third objection, which is founded on this, that the articles of roup did not contain a statement of the name of the bank in which the surplus price falling to the owner of the property was to be consigned in the event of the property realising a surplus over and above the exposer's debt. I have looked into this matter, which turns upon the terms of the 122nd section of the Act of 1868, and I am far from saying that if there had been here a surplus it might not have been possible for the defender to contend that the sale was subject to challenge by the owner of the property, in respect that there had

not been the prescribed intimation to him of the bank where the surplus was to be consigned. But in the present case it seems enough to say that there has been in fact no surplus; that the sale was one in which no surplus could possibly arise; and that therefore the owner of the property could not under the 122nd section make any claim or raise any question. I have come therefore to the conclusion that this objection is also untenable. And I am further of opinion, having considered the question of expenses, that none of the defender's objections were substantial, and that therefore he must be found liable in expenses."

On 3rd December 1904 the Lord Ordinary pronounced the following further interlocutor:—"The Lord Ordinary, in respect the defender has failed to implement the preceding interlocutor, Finds the pursuers entitled to damages: Of consent assesses the sum at £25, for which sum decerns against the defender as in full of the conclusions of the summons," &c.

The defender reclaimed, and argued that he was not bound to implement the contract, in respect that the title offered to him was defective, first, because the period of six weeks, laid down by the Act of 1868, between the first advertisement and the first exposure had not elapsed—*Ferguson* v. *Rodger*, June 12, 1895, 22 R. 643, 32 S.L.R. 525; Titles to Land Consolidation Act 1868, sec. 119; *Thomson* v. *Magistrates of Kirkcudbright*, January 23, 1878, 5 R. 561, at p. 563, 15 S.L.R. 299; *Ashley* v. *Magistrates of Rothesay*, June 20, 1873, 11 Macph. 708, 10 S.L.R. 513; *Wilson*, December 1, 1891, 19 R. 219, 29 S.L.R. 176; *Mackenzie* v. *Munro*, November 10, 1894, 22 R. 45, 32 S.L.R. 43; Digest, 44, 7, 6; *Nisbet* v. *Cairns*, March 12, 1864, 2 Macph. 863; *Lawford* v *Davies*, February 19, 1878, 4 Prob. Div. 61—and secondly, that the bank in which consignation of surplus was to be made had not been specified in the articles of roup as required by the Act of 1868—Titles to Land Consolidation Act 1868, sec. 122. The objection taken in the Outer House that Mrs Roscoe had not herself signed the minute of exposure was not pressed. On the question of expenses the reclaimer argued that expenses should be allowed, as the title was one that required clearing—*Howard & Wyndham* v. *Richmond's Trustees*, June 20, 1890, 17 R. 990, 27 S.L.R. 800.

The arguments for the respondents sufficiently appear from the opinions of the Judges.

LORD KINCAIRNEY—Two interlocutors were submitted for review by this reclaiming note. I am of opinion that both are right and ought to be affirmed.

The action is brought to enforce the sale of a shop and back shop in Montrose Terrace, Regent Road, Abbeyhill, which were sold by public roup on a second exposure on 20th April 1904, under powers in a bond, and were purchased by the defender, who has objected that the title tendered by the pursuer is not marketable. The defender's objections to the title are specified in the Lord Ordinary's opinion.

Nothing need be said about the first objection, which is plainly bad, and was, I understood, withdrawn at the debate. The principal objection is the second, which is, that the first exposure was not duly advertised in terms of the 119th section of the Titles to Lands Act. The defender avers that the necessary full period of six weeks had not elapsed between the first advertisement in the *Scotsman* of 10th February and the date of the last exposure on 23rd March 1904, "the period thereby embraced being one day short of the requisite period." The defender does not explain how he proposes to compute the requisite period, or whether he proposes to include the first day of advertisement and the day of exposure, or one of them, or neither. If he excludes both of these days, then it is true that there will be only 41 days to be reckoned as falling between the first advertisement and the exposure, but if he includes either of these days there will be 42 days between the first advertisement and the exposure.

The Lord Ordinary has expressed the opinion, on grounds which he has explained, that forty-two days elapsed between the first advertisement and the exposure, and I agree in that opinion. But the statute does not expressly require the lapse of any period between the one day and the other, but is expressed quite differently, because it requires the publication of the date and place of sale once weekly for at least six weeks, and it seems not doubtful that that requirement has been fulfilled, and indeed there is no averment to the contrary. There is no doubt that this sale has been advertised for six weeks weekly, so that I doubt whether this objection is supported by any relevant averment. At all events I agree with the Lord Ordinary that the objection must be repelled.

The third objection is somewhat singular. It is that the bank in which the surplus arising on the sale was to be consigned is not mentioned in the articles of roup, as required by the 122nd section of the Titles to Lands Act. It may be observed that the requirement is that the bank should be named at a time when it was necessarily uncertain whether there would be any surplus, so that the fact that in this case there was no surplus does not prevent the application of the section to the case nor affect the assertion that there has been an undoubted disregard of the requirement of the statute, although, as the facts have turned out, it has been a disregard which is of no consequence whatever, and I find no provision in the Act that a neglect of that requirement shall, when there is no surplus, affect the competency of the procedure. I therefore am of opinion that the interlocutor of the Lord Ordinary of 10th November 1904 should be affirmed.

I do not recollect that the interlocutor of 3rd December 1904 was challenged if the interlocutor of 10th November was affirmed, and I see no ground for such a challenge.

LORD JUSTICE-CLERK—That is the opinion of the Court.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Defender and Reclaimer —M'Lennan—A. M. Anderson. Agent— W. R. Mackersy, W.S.

Counsel for the Pursuers and Respondents —Graham Stewart—Sandeman. Agent— Wm. B. Rainnie, S.S.C.

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*Thursday, March* 16.

## SECOND DIVISION.

[Sheriff Court of Perthshire at Perth.

## M'EWAN *v.* MAGISTRATES OF PERTH.

*Master and Servant — Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7 (2) — "*Factory*" — *Warehouse —Factory and Workshop Act* 1901 (1 *Edw. VII. cap.* 22), *sec.* 104—*Headings of Sections.*

A workman in the employment of the magistrates of a burgh was injured while employed in breaking stones by a chip of stone striking him in the eye. The place of employment was a yard 60 poles in extent belonging to the magistrates, used for storing materials for making and repairing the roads, and at the side of the yard was a shed, 30 feet by 23 feet, in which implements were kept. No mechanical power was used in the yard. *Held* that the yard was not a "warehouse" within the meaning of the 104th section of the Factory and Workshop Act 1901, and was therefore not a "factory" within the meaning of section 7 (2) of the Workmen's Compensation Act 1897, and that consequently the workman was not entitled to compensation.

In an arbitration under the Workmen's Compensation Act 1897, on a claim by David M'Ewan, stonebreaker, Perth, against the Magistrates of Perth, the Sheriff-Substitute (SYM) found the pursuer entitled to damages.

The defenders appealed, and the following case was stated by the Sheriff-Substitute:—"This is an arbitration under the Workmen's Compensation Act. The question is whether the place in which the respondent was working comes within the definition 'warehouse.'

"The respondent was employed by the Road Department of the Corporation of Perth to break stones. These stones consisted of old street pavement and causeway blocks. The respondent neglected to have the 'goggles' which stonebreakers use, and which he was wearing, repaired. A piece of dirt or a chip of stone injured one of his eyes. It is not disputed that the accident arose out of his employment, and happened in the course of it, and it is not said that the respondent was guilty of any serious and wilful misconduct.

"The place in which the accident happened was a yard belonging to the Corporation, part of their gas undertaking, but used at the time by the Road Department. It was entered by one of the streets, and was separated from another yard, used as part of the gas undertaking, by a fence made of sleepers. The yard was about 60 poles in extent, 100 yards long by 17 wide. It was used for storage of pipes, concrete, and other materials used in the making and repairing of drains and roads. It contained also the bings of stone which the respondent and other men were breaking. It was sometimes crowded with materials, so much so that the men broke down the sleeper fence and put some of them into the adjoining yard, but the gas manager objected to this being done, and the fence was restored. At the side of it was a large shed, 30 feet long by 23 feet wide, in which implements were kept, and which was used for men to work in in wet weather. No mechanical power was used in the yard.

"The materials in the yard were used in the repair of roads under the charge of the Road Department in carrying out works ordered by the Corporation, and which private individuals had elected to leave it to the Corporation to do, and had to pay for; also to a small extent in doing work by contract for private individuals.

"It was maintained that this yard was a 'warehouse' in the sense of the Workmen's Compensation Act, and that it was not necessary to bring it within the definition that it must be a place in which manual labour was exercised for gain, and in which mechanical power was used in aid of a manufacturing process carried on in it.

"I was of opinion that this argument was right, for the following reasons, viz.— The definition of the word 'factory,' as having 'the same meaning as in the Factory and Workshop Acts 1878 to 1891,' and as including any 'dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the Factory Act is applied by the Factory and Workshop Act 1895 . . . has been affected by the Factory and Workshop Act 1901.' The combined effect of section 104 of that Act and of the Interpretation Act 1889 is that the provisions of the Factory Act with regard to accidents shall have effect 'as if every dock, wharf, quay, and warehouse, and all machinery and plant used in the process of loading or unloading, or coaling any ship in any dock, harbour, or canal, were included in the word factory, and the purpose for which the machinery or plant is used were a manufacturing process'—*Stevens* v. *Navigation Company*, 1 K.B. [1903], 890. The same Court has held that it is 'sufficient to say that a warehouse is a factory for the purposes of the Workmen's Compensation Act,' and that the meaning of the word warehouse is not modified by its collocation with 'wharf, dock, or quay'—*Wilmott* v. *Paton*, 1 K.B. [1902], 237. Further, the fact that an enclosed place is in the open air does not prevent it from being a 'factory'—Act 1901, sec. 149, sub-sec. 5.

"I was of opinion that 'factory' covers 'every . . . warehouse,' and that 'ware-