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SAMUEL JAMES DOUGLAS, an Infant, and JOHN DOUGLAS, W. S., Tutor at Law to said Infant, . . . } *Appellants;*

JOHN SMITH WILSON of Netherhouse, *Respondent.*

DOUGLAS, &c. v. WILSON.

House of Lords, 8th May 1810.

DISPOSITION—ABSOLUTE, OR IN SECURITY—ABSOLUTE, OR IN TRUST—ACT 1696, c. 25.—A disposition of lands *ex facie* absolute and irredeemable, was granted to a party without any back bond. The granter of the conveyance, for many years thereafter, continued to act in all respects as proprietor with reference to the lands, in lifting rents, granting receipts for these rents, and granting leases of the lands; and he contended by these proofs,—of writings, of acknowledgments and admissions of the grantee, sufficient evidence was adduced to show that the grantee was a mere trustee or incumbrancer. Held that the disposition was absolute and irredeemable, and that he could not redeem or reclaim the lands.

The lands of Broom originally belonged to the infant appellant's ancestors, but had been sold to the respondent in 1764, under a conveyance *ex facie* absolute and irredeemable.

There had previously existed between the parties a series of money transactions, in which the appellant's ancestor became ultimately the debtor. And the present action of reduction, declarator, and count and reckoning was brought by him, to have it found that the said disposition and conveyance granted to the respondent was merely in security, and that he had a right to redeem on payment of the sum due thereon.

There was no back bond to found on; but the appellant maintained that the following were sufficient circumstances of evidence to show that the disposition was not absolute in its nature, but redeemable on payment of the debt:—1st. That Mr. Wilson of Maidenhill, the appellant's ancestor, after the date of this disposition, kept possession, and always drew the rents, which was proved by accounts and receipts, as well as by bills granted to him therefor. 2d. That the services of kain-fowls stipulated in the leases of Brown, were all performed and delivered to Mr. Wilson of Maidenhill. 3d. That he paid for the repairs on the houses and dikes of the farms. 4th. That he paid for six years the schoolmaster's salary exigible against the property, as per

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receipts. 5th. That he granted a lease, of this date, for twenty-two years, of a part of the lands of Broom, so alleged to be conveyed and sold absolutely. 6th. That a reference was thereafter entered into between Mr. Wilson of Maidenhill and Mr. Barclay relative to the value of a small piece of ground of Broom. This matter was settled by granting a perpetual lease in 1769 to Mr. Barclay of this piece of ground, which describes "John Wilson of Maiden-"hill, in the parish of Mearns, *heritable proprietor of the* "*lands after let.*" To this lease the respondent signed as a consenter thus, "with the consent of John Smith, *alias* "Wilson of Netherhouse." On 7th June 1770, the tenant having fallen into arrear, Mr. Wilson of Maidenhill registered the tack, and charged him, in the character of proprietor, which was arranged by an assignation to him of the stock, crop, &c. on the farm, in security. In the following year, 1771, a new assignation was granted to "John Wilson of "Maidenhill, my landlord." And in a discharge and renunciation of the lease granted by the said John Wilson, which sets forth, "considering that John Barclay, *my ten-*"*ant*, has delivered up his tack of *my lands*," &c. to which discharge the respondent was one of the testamentary witnesses. He also acted as Commissioner of Supply on account of this property. There was also a receipt produced, signed by the respondent, to show that, for long after the date of this conveyance, and in 1775, accounts were not closed between them, and that he had paid the respondent at that date £100 "*to account.*"

There was, further, an admission made by the respondent, in a former process, to this effect:—"The £200 was paid, "and the bill for the balance accepted by the petitioner "having hitherto deferred taking possession of the lands, *in* "*order* to afford Maidenhill every possible opportunity of "redeeming them, by making payment of what he owed to "the petitioner." There was also produced the draft of a bond which, though intended to be executed to show that this disposition was redeemable, yet was never executed.

The appellant contended that these proofs by writings, acknowledgments, and admissions and circumstances otherwise, amounted in law to the written evidence required by the statute 1696, c. 25, to establish a trust, and to show that the respondent was a mere incumbrancer. In defence, it was stated, that there was an absolute and irredeemable

sale of the lands of Broom to the respondent, and that the price stated in the disposition as paid, consisted in part of the heritable securities which he had previously over the property.

Upon these facts, Lord Glenlee, Ordinary, held that the respondent was bound to hold count and reckoning with the appellant, and, on payment of any balance, that he must make over the property to him. But, on reclaiming petition to the Court, this judgment was pronounced :—"The Lords May 14, 1802. "having advised this petition, with the answers, replies, "and duplies, alter the interlocutor reclaimed from, find "the sale of the lands of Broom absolute and irredeemable, "and assoilzie the defender, and decern." On reclaiming petition against this interlocutor the Court adhered. Feb. 28, 1804.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—Abstracting the question from any special rule of the statute or common law, and taking it merely as a question of evidence, there can be no doubt that the relation of the parties was merely that of debtor and creditor, not that of seller and purchaser; and that the disposition and conveyance in question was a mere security, and not an absolute and irredeemable right. Because, 1st. The respondent has judicially admitted, so late as 1773, that the conveyance was redeemable. 2d. That possession was all along retained by the alleged seller, by lifting the rents, granting leases of the farm, and doing other acts such as alone belong to a proprietor. The respondent pretends to explain away these proofs, by alleging, that although at first the conveyance was only intended to be in security, yet that, in 1773, it became finally absolute. That after this there was an entire change in the nature of the right. That he then took sasine on his absolute conveyance, and so had possession; but there is no evidence of such change of the nature of the right. The accounts then (1773) rendered did not prove such change; and the sasine taken only proved an intention to complete his *heritable security*. Neither the rules, therefore, of the common law, nor the Scotch statute with regard to trusts 1696, c. 29, can afford any bar to the evidence by which the real nature of the present conveyance, as being one in itself reducible, is sought to be established. In former times, the most solemn deeds and conveyances were frequently cut down by mere parole proof. And although by the statute 1696 it is de-

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clared that no declarator of trust shall be sustained except "a declaration or back bond of trust, lawfully subscribed by the person alleged to be trustee," be produced, yet the law had never been interpreted so rigidly as not to admit of proof of the nature now adduced as sufficient, which comprehends the judicial admission of the party.

Pleaded for the Respondent.—The appellant is barred in law from challenging the respondent's title, because he has produced an *ex facie* absolute and unexceptionable conveyance, for a valuable consideration, from the appellant's predecessor, followed by an uninterrupted possession for thirty years. He is therefore entitled to found upon those general principles of law on which the security of purchasers and landholders in general depend, and to plead that he is not bound to enter into any detail whatever, or to explain how he acquired right to the lands of Broom. According to the law of Scotland, an absolute and unqualified conveyance of land cannot, in opposition to written evidence, be construed into a conveyance in trust or security only, on mere extraneous presumptions. The general rule founded upon those principles is, that effect must be given to the written title, declaring clearly and explicitly the intention of the parties, without regard to the inferences or conjectures which may be drawn from extraneous circumstances when set in opposition to written documents and titles. The present case falls clearly under the act 1696, which excludes all challenge of title upon the allegation of trust, unless the trust be instructed by a written declaration or backbond, or offer of proof by the oath of party.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellants, *Sir Samuel Romilly*, *Fra. Horner*.

For Respondent, *Ad. Colquhoun*, *Wm. Adam*, *Thomas W. Baird*.

NOTE.—Unreported in the Court of Session.