any good account of his grounds of suspicion, and cannot point to any particular creditor who is likely to have got a preference, and therefore the suggestion loses much weight; for, considering how far the sequestration has advanced, it is probable that if there had been such a case something would have been heard of it by this time. But further, I am not prepared to say that he has not barred himself from bringing this petition. I should not have been disposed to give effect to this consideration if he could have shown that he was acting for the interest of the general body of shareholders. But he has failed to do that. He has let things go very far before presenting this petition; and here again I think the Lord Ordinary has been misled by the case of *Ballantyne;* for in that case the objection that the petitioner was barred was sufficiently answered by showing that the sequestration had been incompetent from the beginning—a very different state of matters. No creditor can waive his right to ask to have an incompetent sequestration recalled, for everything that has followed on such a sequestration is worth nothing. But there is nothing like that here, and therefore I think that the conduct of Tennent in making this delay and allowing proceedings to go on is a good ground for refusing a remedy. I differ from the Lord Ordinary, and think the petition ought to be refused.

Lord Deas and Lord Mure concurred.

Lord Shand—I concur. The Bankruptcy Act no doubt allows forty days to ask recal of a sequestration, but it is a matter in the discretion of the Court, and in my opinion the determining element of this case is the conduct of the petitioner, who, though in full knowledge of the proceedings that were going on, lay by till nearly all those days had expired, and then asks recal. This distinguishes the case from those quoted by the Lord Ordinary, and I think in the circumstances the petition ought to be refused.

The Court therefore recalled the Lord Ordinary's interlocutor, and refused the prayer of the petition.

Counsel for Pursuer (Respondent)—Millie. Agents—J. & A. Hastie, S.S.C.

Counsel for Defender (Reclaimer)—Mackintosh—J. A. Reid. Agents—Ronald & Ritchie, S.S.C.

Friday, March 7.

FIRST DIVISION.

[Lord Young, Ordinary.

SMITH *v.* SMITH.

Right in Security—Back-Letter—Declarator of Expiry of the Legal.

A father disponed *mortis causa* certain heritable subjects to his son on condition that the son should make payment to his brother of a sum of £300 in three annual instalments, the sum to be a real lien and burden on the subjects so disponed. This arrangement was part of a family transaction between the father and his eldest son, the disponee. After making up a title to the subjects on his father's death, the son inadvertently burdened them in favour of a third party to such an extent as seriously to diminish their value as a security for payment of the £300. In consequence he made them over to his brother by a disposition *ex facie* absolute, the brother granting a back-letter in which he stated that "the said disposition, though a full and effectual transference of the present right of said property, is truly intended as betwixt us only legally to secure me in my said appointed provision, I do hereby bind and oblige myself, my heirs and successors, on occurrence of the death of our mother, when the estate of our late father falls to be finally wound up, or at any time within the space of one year thereafter, if required by you or your heirs, to reconvey to you or them the said property," &c. The mother died in 1862. In 1877 the disponer requested his brother to reconvey the property, which the latter declined to do. *Held* that the disposition was in security merely, and as there had been no declarator of expiry of the legal the disponer was entitled to reconveyance on payment of the debts.

The pursuer in this case was the eldest son of Robert Smith senior, hardware merchant in Johnstone, who died on 15th May 1837, possessed of, *first*, certain subjects on the north side of the High Street of the town of Johnstone; *second*, certain subjects on the south side of Houston Square in Johnstone; and *third*, certain subjects at Floors, in the town of Johnstone. By contract and deed of settlement, dated 17th March 1832, entered into between the pursuer and his father, it was agreed that the pursuer should make up titles to all of these subjects in the event of his surviving his father, and should dispone the second of them to his brother Robert, and the third to his brother James, the defender, at all events within six months of his father's death. The entry of the three brothers to their respective shares was declared to be the first term of Whitsunday or Martinmas after the death of their mother, who was liferented in Robert's portion; and the rents of the other two subjects were to be accumulated and at that date divided between the three brothers.

By the third purpose of the settlement the pursuer bound himself, in order to equalise the value of the heritable subjects destined to him and his brothers, to pay his brother James £300, in instalments of £100 yearly at the three first terms of Whitsunday occurring after their mother's death, if she survived her husband, "which sum shall be a real lien and burden on the subjects on the north side of the High Street first above described."

In 1834, after his father's death, the pursuer completed titles to the three subjects, and in 1852 he executed dispositions in favour of his brothers of the properties which were destined to them respectively.

The property in High Street, Johnstone, which was left to the pursuer, was burdened by Robert Smith senior in May 1820 with a bond and disposition in security for £300, and after the death of his father the pursuer borrowed another sum of £300, for which he granted a further bond and

disposition in security over it, dated and recorded in October 1849. In granting the latter bond the pursuer left out of view the provision in the settlement whereby it was declared that the £300 which the pursuer became bound to pay to James Smith was a real burden on the property. The pursuer accordingly granted in favour of James Smith an *ex facie* absolute disposition, of the subjects in question, dated 26th April 1852, upon which James Smith became infeft. This disposition narrated the deed of 1832 executed by the pursuer and his father, the death of the father, that the pursuer had thereafter, without securing the defender's provision of £300, burdened the subjects with a loan of £300 in addition to the original bond for £300 and that no effect had been given to the direction to make the defender's provision of £300 a real burden on the subjects; and it then proceeded—"And whereas the said subjects, as so burdened with the said original bond of £300, and the said farther loan of £300 taken by me thereon, is held to be insufficient in value to secure my said brother James in payment of his said provision of £300, while a sale thereof has farther been formally intimated to me as immediately intended under and for payment of the contents of the aforesaid second security, which I have no means of averting, it has been agreed, as the only means of securing to my said brother payment in whole or in part of his said provision of £300, that I should now make over to him the said subjects absolutely, towards enabling him, with the further security of his own property, to provide the means of averting a sale of the said subjects and the consequent absorption of the only means of ever meeting or satisfying the said provisions, therefore the aforesaid provision of £300, with the sum of £600, constituting the amount of the said two heritable bonds, amounting in whole to £900 sterling, being held and taken as the full value and price of my interest in the after-disponed subjects, I, the said William Smith, do hereby sell and dispone to the said James Smith, his heirs and assignees whomsoever, heritably and irredeemably, All and Whole," &c.

On the same day that the pursuer granted this disposition, James Smith granted a back-letter in the following terms:—"Mr William Smith, wright, Johnstone. Sir,—As you have by disposition of this date disponed to me the property in High Street of Johnstone destined to you under your father's deed of settlement, and thereby burdened with a provision of three hundred pounds to me, and as said disposition, though a full and effectual transference of the present right of said property, is truly intended as betwixt us only legally to secure me in my said appointed provision, I do hereby bind and oblige myself, my heirs and successors, on occurrence of the death of our mother, when the estate of our late father falls to be finally wound-up, or any time within the space of one year thereafter, if required by you or your heirs, to reconvey to you or them the said property on your making payment to me of the said provision of three hundred pounds with such interest as may then be due thereon, and freeing and relieving me and my foresaids of the debts of three hundred pounds secured by heritable bond upon said subjects by my said deceased father . . . and the like sum of three hundred pounds secured farther over said subjects . . . and whole interest due upon these securities, or such equivalent sum or sums as I may borrow for clearance of the said past securities should transference thereof be found necessary, and whole expenses of the said arrangement and the required reconveyance, the rents of the said subjects being meantime applied—First, to the interest of the said bonds and expenses of arrangements; next, in payment of the principal sums in said bonds; and latterly, should there be a surplus balance, for division betwixt us and our brother Robert agreeably to the direction of our father's said will. In witness whereof," &c.

On the following day (27th April) the pursuer and both his brothers entered into an agreement, which proceeded upon the narrative of the settlement of 1832, that James Smith's rights had been prejudiced by the pursuer burdening his property in High Street, that it would be to the great prejudice of the three brothers if the property in High Street was sold, as the free rents exceeded the annual interest of the securities to an extent which would insure the ultimate clearance of the burdens, and that therefore it had been resolved that William Smith should dispone the property to James Smith. It was therefore agreed that the rents of the property in High Street and of the subjects at Floors should be applied, in the first place, towards the payment of the interest upon the heritable bonds and of the other expenses; that the surplus should be deposited in bank in the joint names of William, Robert, and James Smith, to be applied to the extinction of the heritable securities; and that if after the payment of the burdens there should be a balance of accumulated rents arising from the survival of their mother, it should be divided equally among the three brothers, in conformity with the agreement and settlement of 1832.

The mother died in August 1862. In May 1852 the pursuer went to Australia, where he remained till May 1877. During his absence he corresponded with his brother James. The nature of the correspondence sufficiently appears from the opinions of Lord Deas and Lord Shand *infra*. On his return he requested the defender to reconvey the property. This the defender declined to do. This action was therefore raised, the summons in which concluded for declarator that the disposition of 26th April 1852 was granted only in security of the £300 provided in the *mortis causa* settlement, and that the defender should be ordained to count and reckon with the pursuer for his whole intromissions, &c.

The pursuer pleaded, *inter alia*—"(1) The disposition of 1852, granted by the pursuer of his property in High Street in favour of the defender, being in security merely, the pursuer is entitled to reconveyance thereof upon payment of the provision to defender, secured upon said property, or of so much thereof as may remain unpaid, and relieving him of the two bonds for £300 each. (2) The said clause in the said letter of reversion or back-letter had not and was not intended to have the effect of rendering the said property in High Street the absolute property of the defender if reconveyance thereof was not demanded within a year of the said Mrs Smith's death. (3) At all events, the said clause in the said letter of reversion or back-letter was not sufficient to give the defender an absolute right

to the said property without declarator of his right, or at any rate due notice to the pursuer. (4) *Separatim*, The defender is barred by his own actings from founding upon the said back-letter as giving him an absolute right to the said property."

The defender pleaded, *inter alia*—"(1) The pursuer's averments are not relevant or sufficient to support the action. (2) The pursuer having failed to demand a reconveyance of the property and pay the money due to the defender within the period fixed in the back-letter, the defender's absolute title became effectual, and he is not bound to reconvey the property and remove therefrom as concluded for. (3) The subjects having been sold for an adequate price, and the sale having become absolute, the pursuer is not now entitled to redeem. (4) The pursuer is barred by taciturnity and *mora*. (5) The subjects in question having become the absolute property of the defender in or about August 1863, he is not bound to account for the period subsequent thereto."

The Lord Ordinary (YOUNG) sustained the first, second, and third pleas-in-law for the defender, and assoilzied him accordingly.

The pursuer reclaimed, and argued—What was intended here was a security, not a sale. There was no irritant clause. A declarator therefore was necessary. In *Martin* v. *Duncanson* it was not stated in the back-letter that the disposition was in security merely; here it was so stated most explicitly. But whether a particular arrangement was a sale or a security was a question of fact, and therefore precedents were of little value. Here the facts showed that what the brothers did was substantially what their father intended.

Authorities—Ersk. ii. 8. 4; Stair, ii. 10. 6; *Earl of Tullibardine* v. *Murray*, February 1, 1667, M. 7206; *Pollock* v. *Storie*, November 10, 1738, M. 7216; *Macdonald* v. *Stewart*, November 26, 1760, M. 7286; *Thomson* v. *Threshie*, June 7, 1844, 6 D. 1106; *Martin* v. *Duncanson*, November 23, 1875, 13 Scot. Law Rep. 86.

Argued for the defender—Where the parties agreed to a sale with a condition of reversion in favour of the seller, the law would not interfere to prevent the contract receiving full effect, except from considerations of equity, as for instance inadequacy, of price in which case the construction would be for impignoration — *Latta* v. *Park*, February 10, 1865, 3 M. 508. Here the price was adequate. The clause stipulating for a year after the mother's death within which to reconvey was unintelligible unless on the footing of a sale, in the event of its not being fulfilled.

Authorities—*Dundas* v. *Murray*, December 14, 1714, M. 7269; *Athole and Tullibardine* v. *Campbell*, July 20, 1697, M. 7208; *Young* v. *O'Rourke*, May 25, 1826, 4 S. 625.

At advising—

LORD DEAS—This is a case of very considerable importance in the law of heritable rights, and requires, I think, very careful consideration. The leading question is, Whether a disposition of heritable rights granted by the pursuer, with certain relative writings, is to be held to have been an absolute and irrevocable conveyance of that heritable subject? That is a sort of question which always requires very special attention to the terms of the writings and to the real evidence afforded by the relative position of the parties, and by the facts and circumstances of the case. It is a kind of case which cannot be determined by any abstract general rule, although there are general principles applicable to it. Now, then, the first thing is to see what the circumstances were under which the writings were executed, and what were the terms of the writings.

[*His Lordship then narrated the facts of the case ut supra*].

The question then arose between the pursuer and the defender—Whether these High Street subjects had become the absolute and irredeemable property of the defender? That depends, I think, substantially upon the terms of the writings, taking into view the facts and circumstances which I have narrated. The circumstance that most undoubtedly was the origin of the whole matter was that under the father's deed of settlement the defender was to have a security for £300; and what he has to make out is that the effect of the writings coupled with lapse of years is to convert what was originally only a security into a right of absolute property. I am humbly of opinion that that is not the effect.

The first question is, whether the disposition is to be taken as a sale under the condition specified in the back-letter, or whether it was not at its origin a security merely? That is often a nice question, and it is a nice question here. But upon the face of that back-letter it is expressly set forth that the object of the transaction is a security merely. It says that the disposition, "though a full and effectual transference of the present right of the said property, is truly intended as betwixt us only legally to secure me in my said provision;" and that being the intention, "I bind and oblige myself to reconvey," &c. It is no doubt set forth that the sum of £300 was the full value of the subjects, and that unquestionably is a circumstance to be kept in view. But although that is so, the transaction is distinctly set forth as a security only. It may become an absolute right, but originally it is a security; and in this question we must look particularly at the nature of the whole transaction as I have stated it — the provisions as set forth in the father's deed, the brother's embarrassment, a family transaction between brothers—not that the one was anxious to buy and the other to sell, but that it was difficult to carry out the directions of the deed in any other way, and that it was undesirable for all parties that the property should be sold. That was what all parties were anxious to avoid, and it was upon that narrative that this disposition proceeds. In short, the transaction is a security, with a condition that in a certain event it might become an absolute sale.

The question then is, Whether, without any declarator—without any intimation even—the right of property should pass from the pursuer to the defender. I cannot hold that. I do not think that it is according to law or to the intention of the parties. In point of substance the deed just comes to this, that the property might be redeemed. Another question that is raised is, Whether there is an irritancy implied, though not expressed, by which the property is to pass from the one brother to the other? I do not think that there is. It would be inconsistent with the

whole case from beginning to end. There is just one fact the other way—that £300 is said to be the full value of the property. But that is a single fact, and on the whole matter I cannot think that this is a sale or anything else than a security, with a forfeiture in a certain event. I am therefore of opinion that this is not an absolute disposition, but that the property belongs to the pursuer, subject to the security of his brother's debts.

I do not think that there is anything in the correspondence at which it is necessary to look at, at all events until the mother's death. There are expressions in that correspondence from which it appears that it was not intended that these subjects should become the absolute property of the defender. The very fact of silence, especially on the part of the defender, is strongly indicative of that intention. I refer to the letters —so far as I refer to them at all—as tending to construe the intention of parties. I just notice them without going into particulars, because I do not attach much importance to them. There is nothing in them to control the effect of the deed. I think the opposite. The plain meaning of the transaction is that it was a security and not an out-and-out sale. That being so, the pursuer does not lose his right of property by the mere lapse of the twelve months from his mother's death. I therefore think the interlocutor of the Lord Ordinary ought to be recalled.

Lord Mure—The main question is, Whether the transaction was in its nature a sale or a disposition in security merely? If it is the latter, the law is quite clear that there must be a declarator before the party can take possession of the subject. Now, in the back-letter the true character of the transaction is stamped at once. It distinctly describes the agreement as a security, and is accepted by the parties as the concluding deed in the transaction. Now, that being so, the case of *Thomson* v. *Threshie* is an authority; another disponee cannot acquire the property without intimation and declarator of expiry of the legal. The clause most strongly founded on by the defender is that which refers to the year after the death of the mother. But the Act of 1672, c. 19, provides in these words, after the lands are adjudicated, "which lands and other rights adjudged as said is shall remain heritably and irredeemably with the creditor in case they be not redeemed within the space of five years after the decreet of adjudication." Now, nothing can be clearer than these words, but when the clause came to be construed it was felt that a declarator of expiry of the legal was necessary before the rights of parties could be altered. I agree with Lord Deas that there is here a security and not a sale.

Lord Shand—I concur. I think that the nature of the transaction is very clear, whether we look at the express declaration in the back letter that the disposition "is truly intended as betwixt us only legally to secure me in my said provision," or to the latter part of the back-letter, from which it is plain that the parties contemplated that there would be a balance of rents after paying off the burdens. So that altogether it is very difficult to represent the matter as an out-and-out sale. And I am confirmed in this opinion by the correspondence, for the defender in one of his letters, dated 16th November 1861, writes to the pursuer that "the £150 you sent home to help to pay off the bond, he (Robert the third brother) has made use of in other ways." Thus the defender himself recognises that it is a debt on the property, and not a sale.

Lord President — In my opinion the law is quite settled, and its application to the present case is very clear. The only question of real importance is whether the transaction was a sale or the creation of a security? And I hold it to be the latter, because it is so expressly described in the letter of reversion. If it had been a sale, even though subject to a suspensive condition, the opposite result would have been as clear. If a man sells, reserving nothing more than this, that within a certain period he should be entitled to buy back, if he fails to do so the sale becomes absolute. But here there is a declaration under the hand of the defender that this disposition, although *ex facie* absolute, is truly only intended as a security, and if the matter had stopped there I think we should never have heard the contention that the pursuer was not entitled to redeem. But the defender refers to that clause with reference to the occurrence of the death of his mother, and says it is implied that if the pursuer did not redeem within a year after that event, then his right should come to an end, and his estate should become the property of the defender. That is not expressed. It may be implied. But assuming that it is clearly implied—assuming that it had been clearly expressed that the right, if not exercised within that period, should fall—I should still hold that until a declarator was raised against the pursuer to have it found that he had lost his right of reversion, this would not convert the transaction from a security to a sale, for the rule is quite fixed that if a transaction be originally a security it cannot be converted into an absolute conveyance without a declarator of expiration. Upon that simple ground I come, without the least hesitation, to the conclusion that the pursuer is entitled to prevail in the first conclusion of his summons, and is entitled to redeem the property on making payment of £300 to his brother, and relieving him of the other burdens.

I would therefore suggest that we recal the Lord Ordinary's interlocutor, and repel the first five pleas for the defender, and decern in terms of the first conclusion for the pursuer, and remit to the Lord Ordinary to proceed with the count and reckoning.

The Court accordingly recalled the Lord Ordinary's interlocutor, repelled the first five pleas for the defender, and decerned in terms of the first conclusion of the summons, remitting the conclusion for count and reckoning to the Lord Ordinary.

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