Tuesday, March 8.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

TAWSE *v.* RIGG.

Right in Security — Right of Postponed Bondholder on Sale by Prior Bondholder — Agent and Client — Agent's Lien over Title-Deeds—Agent Acting for Both Borrower and Lender — Titles to Land Consolidation Act 1868 (31 *and* 32 *Vict. cap.* 101), *sec.* 122.

The holder of a first bond over heritable subjects, who had sold the subjects of security under the bond, in accounting for the surplus of the price with a second bondholder claimed to deduct a sum which she had paid to law-agents who acted both for her and the debtor in the bond in settlement of a business account due to the law-agents by the debtor in the bond. The sum in question was paid by her on the assumption that the law-agents had a right of lien over the title-deeds of the subjects for their account. The title-deeds had been delivered to the purchaser of the heritable subjects when the price was paid.

Held that the first bondholder was under no obligation to pay to the law-agents the account due to them by the debtor in the bond, and accordingly was not entitled, in holding count and reckoning for the price of the security-subjects with the second bondholder, to deduct the sum paid in settlement of that account.

Opinion (*per* Lord M'Laren) that under the provisions of section 122 of the Titles to Land Consolidation Act 1868 a prior bondholder, who had sold the subjects, could not in accounting with a postponed bondholder take credit for payments made to the debtor's law-agent in order to discharge his lien over the title-deeds.

In an action of accounting at the instance of Miss Christian Tawse, 11 Royal Terrace, Edinburgh, against Mrs Watson or Rigg, 17 Morningside Gardens, Edinburgh, it was found by the Lord Ordinary (KINCAIRNEY) that the effect of certain transactions (which it is unnecessary to specify) was that the defender was a first bondholder for £500 with interest over certain heritable subjects belonging to Mr Lamb, and the pursuer was a second bondholder for £1249 over the said subjects.

The subjects were sold by the defender under her bond, and the title-deeds of the subjects were delivered to the purchaser when the price was paid by him.

The questions were whether the defender the first bondholder, in accounting with the pursuer the second bondholder, was entitled to take credit for £96, 9s. 5d., being the amount of a business account due by Mr Lamb to Messrs Somerville & Watson, S.S.C., and paid by the defender. Messrs Somerville & Watson acted as agents in connection with the loan both for the defender the first bondholder and for the borrower Mr Lamb. They made no attempt to prevent the sale of the subjects.

An excerpt from a statement of intromissions of the defender with the rents and prices of the heritable subjects bore, *inter alia*, as follows:—"Business account due by Mr Lamb to Messrs Somerville & Watson, and for which titles of properties hypothecated to them, £96, 9s. 5d; Business account to them in connection with management and realisation of securities, &c., £57, 4s."

The Titles to Land Consolidation Act 1868 enacts—sec. 122—"The creditor upon receipt of the price shall be bound to hold count and reckoning therefor with the debtor and postponed creditors, if any such there be, and to consign the surplus which may remain after deducting the debt secured and the interest due thereon and penalties incurred, and expenses in reference to the possession of the estate, if the creditor has been in possession, including expenses of insurance, repairs, and management, and whole expenses attending such sale, and after paying all previous encumbrances and the expense of discharging the same in one or other of the said banks." . . .

On 31st July 1903 the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having considered the cause—(1) Finds that in accounting for the rents of the subjects in the defender's bond, and for the price of the said subjects, the defender is entitled to be regarded as a first bondholder to the extent of £500 with interest, and the pursuer as a second bondholder postponed to the first bondholder to that extent but to no further extent; (2) Finds that the defender is not entitled to take credit in a question with the pursuer for the sum of £96, 9s. 5d., being the business account due by Mr Lamb to Messrs Somerville & Watson entered in the statement of the defender's intromissions: Sustains the pursuer's objection to said entry, and finds that it falls to be struck out of said account: (3) Finds that the entry of £57, 4s., being the amount of the business account to Messrs Somerville & Watson entered in said statement falls to be audited," &c.

Opinion.— . . . "I am further of opinion that the defender is not entitled in accounting with the pursuer to take credit for payment of Lamb's account to Messrs Somerville & Watson stated at £96, 9s. 5d. The entry made by the defender herself is—'Business account due by Mr Lamb to Messrs Somerville & Watson,' and the question is, How does it happen that the defender pays Lamb's account, for which she was in no respect liable, if she has paid it? Of course, she could not in account with the pursuer take credit for a debt due by Lamb to Somerville & Watson if it were paid by the defender voluntarily. She could make such a charge only if she could not without mak-

ing that payment carry out the sale of the subjects under her bond; and accordingly it is stated in the entry that the agents hold the titles hypothecated. That implies that the agents were entitled to withhold the titles, although with the effect of preventing the lender from recovering her money by a sale. That is I think beyond the power of agents, who, as in this case is admitted, acted both for Lamb the borrower, and for the defender the lender. If the lender could not have been compelled to pay that account, it appears to me that she ought not to have paid it, and that she is not entitled to charge the payment in accounting with a prior creditor—*Drummond & Muirhead* v. *Guthrie Smith*, February 13, 1901, 2 F. 585, 37 S.L.R. 433."

On 3rd November 1903 the Lord Ordinary approved of the Auditor's report on the business account incurred by Messrs Somerville & Watson, and decerned against the defender for payment to the pursuer of £118, 0s. 9d., consisting of, *inter alia*, the sum of £96, 9s. 5d. mentioned in interlocutor of 31st July 1903, with interest, and found the pursuer entitled to expenses.

The defender reclaimed, and argued—The payment of Lamb's account to the law-agents was not a voluntary payment by the defender, but the law-agent had a lien over the title-deeds until this account was paid in full. Although the law-agents acting for both borrower and lender could not plead their right of retention of the title-deeds of the property to the prejudice of the lender, they were entitled to operate this right against the postponed bondholder—*Drummond & Muirhead* v. *Guthrie Smith*, February 13, 1900, 2 F. 585, 37 S.L.R. 433; *in re Messenger*, July 10, 1876, 3 Ch. Div. 317. The rule that the lien of a law-agent of an owner of property prevails over heritable creditors of the owner was well settled—Bell's Comm. ii. 108—and though this rule suffered exception in a question with a heritable creditor for whom the law-agent acted, it held good against a postponed heritable creditor for whom he did not act—*Paterson* v. *Currie*, July 3, 1846, 8 D. 1005. There was here no prejudice to the heritable creditor (the defender), for the price obtained was sufficient, after paying the law-agents' business account, to pay off the defender's loan in full.

Argued for the pursuer—The defender was under no obligation to pay the account due by Lamb to the law-agents. A law-agent's right of lien was a mere right to keep possession of the title-deeds, and terminated as soon as his possession came to an end. When the defender sold the subjects she was entitled to the title-deeds free from any lien, and the title-deeds were in fact handed over to the purchaser. If the defender chose to pay the account in question to the law-agents, the payment could not, in a question with the second bondholder the pursuer, be deducted from the balance of the price remaining after paying off the first bond. The deductions which were permissible to a first bondholder, in accounting with a postponed bondholder, were enumerated in section 122 of the Titles to Land Consolidation Act 1868 (quoted *supra*), and the payment in question was not within the enumeration.

LORD PRESIDENT—This is a short point although it is an important one. The law-agent here parted with the possession of the titles in question in carrying out a particular transaction, and when he did so any right in security which he had resulting from his possession came to an end. The lien of a law-agent (apart from special agreement) is a security resulting wholly from possession, and (again apart from special agreement) it terminates with possession. The possession, as I have already pointed out, ceased in this case voluntarily for a consideration. This is, in my view, quite sufficient for the decision of this case, and I am of opinion that the judgment of the Lord Ordinary is right.

LORD M'LAREN—The solution of this question is best seen by supposing that all the parties had separate agents or acted as their own agents. When a proprietor comes to borrow money for the first time on the security of his estate, the lender gets a bond which contains an assignation of writs, and that assignation entitles him to delivery of the title-deeds. Whether he always exercises his right I do not know; it is enough that he has it. If he called for the title-deeds and they were withheld or retained against a law-agent's account with the borrower, this would be a breach of warrandice, entitling the heritable creditor to a personal remedy against the borrower, who would then have to pay the account and clear the titles. Now, I take it that when money is lent on a second bond the rights of the lender are of the same character but subject to the prior right of the first bondholder. These rights seem to me to be entirely independent of the question whether the parties have the same or different agents. It is admitted that when the first bondholder sold the subjects he was entitled to delivery of the title-deeds free from any lien, and his duty towards the other parties interested in the price is perfectly clear under section 122 of the Titles to Land Consolidation Act 1868. He may first pay the expenses of the sale, next the debt due to himself, and then he must consign the balance for the benefit of all concerned. The heritable creditor who sells under a power has no other duty to other creditors and has no further interest in the disposal of the price. Instead of consigning the balance in accordance with the terms of that section, it is admitted that the bondholder in this case, after paying his own debt paid a law-agent's account, of which payment had been demanded on an assumed right of lieu. I cannot see that in a question with the second bondholder the payment of this account was a good payment. It was not a payment in terms of the statute, and it was not a debt which the first bondholder could be compelled to pay. The second

bondholder was entitled to have the balance remaining after payment of the first debt and expenses consigned in bank undiminished by further payments. I agree that consignation has not been made in terms of the statute, and if a heritable creditor is so foolish as to pay an account which he is not under legal obligation to pay, he cannot pass it on as a charge against the second bondholder.

LORD KINNEAR—I agree with your Lordships. I think that a law-agent's right in his client's title-deeds is in principle a right of retention, depending on possession. It follows that the right is determined by the loss of possession. But I think the present case may be determined on the grounds on which the Lord Ordinary has decided it. The first bondholder has sold the subject of her security and is called upon to account to a second bondholder for the surplus of the price received, and the only question is, what portion of that price the first bondholder is entitled to deduct before paying over the surplus? She has deducted the sum of £96, 9s. 5d., being the amount of an account due by the borrower to his law-agent, and that deduction is objected to. I think with the Lord Ordinary that if she was under no legal obligation to make this payment she cannot deduct it from the surplus, and I think that in this case she was under no obligation. In my opinion the law-agent's right of retention had come to an end when the titles were delivered to the purchaser and the price paid to the first bondholder; but in addition to that it is common ground between the parties that the law-agent in this instance was acting both for the borrower and the lender, and so could not act in any way to the prejudice of his own client's rights. Here then the law-agent had no rights against the first bondholder, for even while his right of retention over the title-deeds lasted he could not have pleaded it against her, so as to prevent her selling for payment of her debt. But since she has sold and obtained the money she must account to postponed creditors, and in that accounting she can make no deductions except such as are enumerated in section 122 of the Act of 1868. I do not think it necessary to consider the question raised by Mr Macfarlane whether the necessity for getting rid of a law-agent's lien would in any case justify a deduction of the account of such law-agent's account as an "encumbrance" in the sense of the statute, which it was necessary to clear away before a sale could be effected. However that may be, the defender was under no such necessity, because the law-agent could not have interposed any kind of obstacle to a sale and did not attempt to do so. There was no encumbrance therefore to affect the defender, and it follows that she can have nothing on that ground to deduct. I therefore agree with the Lord Ordinary, and am for adhering to his interlocutor on the grounds that he has stated.

LORD ADAM was absent.

The Court adhered.

Counsel for the Pursuer and Respondent — Macfarlane, K.C. — Cullen. Agents—Tawse & Bonar, W.S.

Counsel for the Defender and Reclaimer —C. N. Johnston, K.C.—Morison. Agents —Somerville & Watson, S.S.C.

Wednesday, March 9.

SECOND DIVISION.

[Lord Low, Ordinary.

FORBES' TRUSTEE *v.* OGILVY.

Compensation—Bankruptcy—Lease—Decree of Removing—Sequestration of Tenant—Right of Landlord to Set off Arrears of Rent Against Sum Due for Crop, Manure, &c.

By a lease for 19 years from Martinmas 1885 a tenant bound himself to leave to the landlord the waygoing crop, the quantity to be ascertained by arbitration and the price to be fixed according to the fiars' prices for the year, and also the dung on the farm and the turnip crop at a valuation to be made by the arbiters.

On 12th June 1902 the landlord obtained decree of removing against the tenant and decree of payment for arrears of rent. On 14th June the tenant's estates were sequestrated, and a trustee was appointed on the 30th.

By letter dated 7th August the landlord elected to take over the waygoing crop, &c., and to deal with the trustee as regards all valuations. An agreement dated 21st August was entered into between the landlord and the trustee which narrated the foregoing provisions of the lease, reserved the question as to the right of the landlord to retain any portion of the prices of the valuations on account of rents, and contained a nomination of arbiters to ascertain the quantity of the way-going crop and to value the dung and turnips.

Held (1) that the agreement in the lease relative to the sale of the waygoing crop, dung, and turnips, was a personal contract which did not confer on the landlord any real right in these subjects; (2) that the trustee had not adopted the lease; (3) that the sale of the waygoing crop, &c., was not in implement of the provisions of the lease, but was an independent contract between the landlord and the trustee; and therefore (4) that the landlord had no right to set off arrears of rent against the price.

In April 1903 George Robertson, as trustee on the sequestrated estate of Arthur Forbes, farmer, Mains of Murthill, Tannadice, raised an action against Major John Andrew Wedderburn Ogilvy of Ruthven for £538, 3s. 6d.

The following statement of the facts giving rise to the action is taken from the