*Friday, February 28.*

## SECOND DIVISION.

[Lord Guthrie, Ordinary.

## KINGS *v.* JOHNSTONS AND OTHERS.

*Right in Security—Extinction—Confusio—Bond and Disposition in Security—Disposition to Creditor of Security Subjects ex facie Absolute but subject to Unrecorded Back-letter.*

A creditor in a bond and disposition in security obtained, in security of further advances, an *ex facie* absolute disposition of the security subjects which he recorded. He granted a back-letter binding himself to reconvey on repayment of these advances. The back-letter was not recorded. In a question with the creditor in another bond and disposition in security over the subjects, coming in date between the first creditor's bond and his *ex facie* absolute disposition, *held* that the burden created by the first creditor's bond and disposition in security had not been extinguished *confusione*.

*Right in Security—Extinction—Confusio—Ground-Annual — Creditor in Ground-Annual Obtaining ex facie Absolute Disposition of Subjects.*

The creditor in a contract of ground-annual subsequently obtained and recorded an *ex facie* absolute disposition of the subjects. He granted a back-letter acknowledging that the disposition was merely in security of advances and undertaking to reconvey on repayment. The back-letter was not recorded. *Held, per* Lord Guthrie, Ordinary, in a question with a creditor in a bond and disposition in security over the subjects prior in date to the *ex facie* absolute disposition, that the ground-annual was not extinguished as a real burden on the subjects *confusione*.

*Opinion, per* Lord Guthrie, Ordinary, that a ground-annual is capable of extinction *confusione*.

On 1st March 1907, John King, 5 Burnbank Road, Hamilton, and Mrs Helen Robb or King, his wife, with his consent, raised an action against (1) George Readman, advocate, Edinburgh, (2) the Rev. Wm. Johnston, minister of Uphall, and Mrs Johnston, his wife, and others, in which they sought (1) declarator that the real burdens of £350 each, with interest and penalties, created by two bonds and dispositions in security granted by Robert Riddagh, builder, Airdrie, in favour of James Aitken, writer, Glasgow, dated 11th and recorded 13th June 1892, over the subjects therein specified, were as of 9th May 1903 extinguished, and that the said subjects were not affected by any assignations of said two bonds granted subsequent to 9th May 1903, and that the bond and disposition in security granted by Riddagh in favour of the pursuers for £1070 dated 14th and recorded 17th March 1903 created a real burden over the said subjects preferable to the real burdens created by the said two bonds; (2) declarator that five ground-annuals created by contracts of ground-annual between Riddagh and Aitken dated and recorded various dates in 1901 and 1902 were so far as real burdens on the subjects extinguished as at 9th May 1903 to the extent that they were then held by Aitken, or alternatively extinguished subject to a bond and disposition in security for £125 in favour of Catherine Storrie or Cation, and that the subjects were not affected by any assignations of the said ground-annuals subsequent to 9th May 1903.

The pursuers pleaded, *inter alia*—"(2) The real burden for the two sums of £350 constituted by the two bonds and dispositions in security first set forth in the summons having been *ipso jure* extinguished *confusione*, decree of declarator should be pronounced as first concluded for. (3) The five ground-annuals set forth in the summons having to the extent foresaid been *ipso jure* extinguished *confusione*, decree of declarator should be pronounced as second concluded for."

By disposition dated 11th and recorded 13th December 1901, James Aitken, writer, Glasgow, proprietor of certain subjects in Bell Street, Airdrie, having divided the subjects into plots or building stances, disponed plot 1 to Robert Riddagh, builder, Airdrie, under burden of a feu-duty of £2, 5s. 4d., which was the amount formerly exigible from the whole subjects. By five contracts of ground-annual dated in 1901 and 1902 Aitken disponed to Riddagh five other plots of the subjects under burden of the ground-annuals mentioned in conclusion (2) of the summons, amounting *in cumulo* to £22, 10s. Thereafter Riddagh proceeded to raise money on the security of the said six plots of ground, and granted, *inter alia*, the two bonds and dispositions in security, mentioned in conclusion (1) of the summons, for the sum of £350 each, dated 11th and recorded 13th June 1902, in favour of Aitken, over plots 3 and 4 respectively of the said subjects. On March 14, 1903, Riddagh granted over the whole six plots the bond and disposition in security for the sum of £1070 in favour of the pursuers. This bond was recorded on 17th March 1903. By disposition dated 8th and recorded 9th May 1903, Riddagh disponed the whole six plots to Aitken. This disposition though *ex facie* valid was qualified by a back-letter, in which Aitken acknowledged that he held the subjects in security of advances made and to be made by him, and bound himself to reconvey on repayment of said advances. The back-letter was not recorded. By assignation dated 1st and recorded 3rd October 1904 Aitken assigned the two bonds of £350 each to Readman, who, by assignation dated 9th and recorded 15th November 1905, assigned them to the Johnstons, who appeared as defenders.

The five contracts of ground-annual were also assigned by Aitken, but were subsequently acquired by the trustee in his sequestration, Robert Reid, C.A., who was

called for any interest he might have, and who appeared.

The pursuers' averments also contained allegations of fraud against Aitken, with which this report does not deal.

The Lord Ordinary (GUTHRIE) on 30th December 1907 pronounced this interlocutor:—"(1) With respect to the two bonds for £350 each mentioned in the summons, finds that the said bonds did not become extinguished *confusione* in the person of James Aitken, on the subjects and others embraced in said bonds being conveyed to him in absolute terms by Robert Riddagh, the disposition thereof being qualified by back-letters to the effect that the said James Aitken held the subjects merely in security of advances: Therefore finds that the pursuers' bond for £1070 is not a preferable security over the subjects contained in the foresaid two bonds for £350 each, and assoilzies the defenders the Reverend William Johnston and Mrs Eliza Arbuckle or Johnston, his wife, from the conclusions of the summons, and decerns . . . (2) With respect to the five ground-annuals mentioned in the summons, finds that the same were similarly not extinguished *confusione* in the person of the said James Aitken on his acquisition in absolute terms of the subjects over which these ground-annuals were created: *Quoad ultra* allows the pursuers a proof of their averments of fraud . . . and the defender Reid a conjunct probation."

*Opinion.*—"The pursuers are heritable creditors for £1070 over certain subjects in Airdrie. If these subjects are burdened by the two bonds and the ground-annuals mentioned in the summons, the pursuers' bond, looking to the value of the subjects, is believed to be valueless. The pursuers seek declarator that the defenders' bonds and ground-annuals were extinguished *confusione.*

"The pursuers' bond for £1070 is dated 17th March 1903. At that date Robert Riddagh was proprietor of the subjects and the bond was granted by him.

"Prior to 17th March 1903 the bonds for £350 were granted by Riddagh in favour of James Aitken. Subsequently to 17th March 1903, namely, on 9th May 1903, Aitken acquired the subjects over which both sets of bonds were placed in security by an *ex facie* absolute disposition under back-letters. The pursuers say that the £350 bonds were extinguished *confusione* in Aitken's person on 9th May 1903. These bonds were assigned between 1904 and 1906 to Mr George Readman, who assigned them to the defenders, the Rev. William Johnston and his wife.

"The ground-annuals mentioned in the summons were created for Aitken by Riddagh in 1901 and 1902. The pursuers say that they were also extinguished *confusione* in Aitken's person when he acquired the subjects, although only in security, on 9th May 1903. These ground-annuals are held by the defender, Aitken's trustee, free of any security other than the Cation bond for £125, which is excepted from the conclusions of the summons.

"The defenders deny confusion, because (1) Aitken did not acquire the subjects on 9th May 1903 as absolute proprietor but as a trustee for Riddagh; (2) so far as the ground-annuals are concerned, because ground-annuals cannot like bonds be extinguished *confusione;* and (3) because it must be presumed that Aitken's intention when he got the conveyance of 9th May 1903 was to keep alive both the bonds for £350 and the ground-annuals.

"I. The pursuers admit that if, as in a question with them, the back-letters must be recognised, then their case fails. To operate confusion one and the same person must become both debtor and creditor. But if the back-letters receive effect, while Aitken at the date of the conveyance was absolute creditor under the bonds, he did not become absolute debtor under the bonds in respect of the conveyance, but only trustee for the debtor. That this was in fact his position is admitted. If so, it does not matter whether the back-letters were recorded or not. The pursuers' rights were fixed on 17th March 1903. At that date the bonds for £350 each and the ground-annuals existed as prior rights coming before the pursuers' security. Apart from the question of fraud, which will be dealt with later, it must be held to have been their own fault if the pursuers did not know about the bonds which were recorded, and about the ground-annuals which were mentioned in their bond. The pursuers' security might have been improved at any time by Aitken becoming absolute proprietor of the subjects. But he never did become absolute proprietor, but by a transaction with which the pursuers had nothing to do he came into the position of a heritable creditor with an *ex facie* absolute disposition qualified by back-letters. I therefore sustain the defenders' contention.

"II. The defenders say that so far as the ground-annuals are concerned there could be no confusion, because *confusio* does not operate to extinguish ground-annuals. On this matter, in the case of *Murray* v. *MacEwan*, 1890, 18 R. 287, opposite opinions were expressed by Lord Rutherfurd Clark, who thought that *confusio* might operate extinction of a ground-annual, which is 'nothing more than an obligation for payment of an annuity secured over the heritable estate,' and by Lord Kinnear and Lord Trayner, who thought that ground-annuals being *ex facie* irredeemable rights in land completed by infeftment, cannot be extinguished *confusione.* I take the same view as that expressed by Lord Rutherfurd Clark. In a question of extinction it is significant that in ground-annuals as distinguished from feu-duties the real security is destroyed by the negative prescription if the ground-annual is omitted from the title for forty years.

"III. Aitken's alleged intention cannot enter into the disposal of this part of the case. The pursuers alleged fraud against him. . . . It would be out of the question to have a proof as to what was in point of fact the intention of this alleged fraudulent agent. . . ."

The pursuers reclaimed, and brought under review the first portion of the Lord Ordinary's interlocutor.

Argued for the reclaimers—It was admitted that if the disposition of 9th May 1903 had been in fact as well as in form a valid irredeemable disposition of the subjects, *confusio* would have taken place, and there could have been no subsequent assignation of the prior bonds. Where the disposition was *ex facie* valid and irredeemable, though qualified by a back-letter, the result was the same, so long as the back-letter was unrecorded, *quoad* any party in ignorance of the existence of the back-letter. The disponee was the feudal proprietor—*Scottish Heritable Security Company, Limited* v. *Allan Campbell & Company, Limited*, January 14, 1876, 3 R. 333, 13 S.L.R. 207; *Union Bank of Scotland, Limited* v. *National Bank of Scotland, Limited*, December 10, 1886, 14 R. (H.L.) 1, 24 S.L.R. 227; *Lord Blantyre* v. *Dunn*, July 1, 1858, 20 D. 1188, *per* Lord Mackenzie (Ordinary), at p. 1193; *Hogg* v. *Brack*, December 11, 1832, 11 S. 198. The pursuers were entitled to rely on the records, and *ex facie* of the records, at 9th May 1903, Aitken was absolute owner of the security subjects, and therefore the two bonds in his favour were at that date extinguished. The effect of an unrecorded back-letter was only to create on the party who was *ex facie* of the records absolute owner a personal obligation to reconvey. The back-letter, therefore, did not prevent the extinction of the security constituted by the two prior bonds, and the effect of the titles as appearing on the records could not be in any way affected by the intention of the parties—*Bald* v. *Buchanan*, 1787, 2 Ross' L.C. (Land Rights) 210. The case of *Mackenzie* v. *Gordon*, March 26, 1839, M'L. & R. 117 (*aff.* 16 S. 311), mentioned by Lord Ardwall, was distinguishable, because (1) a trustee was interposed in that case, (2) the question there dealt with was the extinction of the debts and not of the securities, and (3) the party pleading *confusio* was not in ignorance of the facts, but was in the position of a purchaser who has private knowledge of something not on the records. The records could therefore in that case not be founded on—*Petrie* v. *Forsyth*, December 17, 1874, 2 R. 214, 12 S.L.R. 157; *Stodart* v. *Dalzell*, December 16, 1876, 4 R. 236, 14 S.L.R. 164.

Argued for the defenders (the Rev. William and Mrs Johnston)—In order to operate extinction *confusione* the same party must be absolute creditor and absolute debtor in the same capacity—Bell's Prin., sec. 580. Here, Aitken was absolute creditor in his own right, but had never become absolute debtor, for he only became proprietor of the subjects in trust not in his own right. The effect of the back-letter was to make his *ex facie* irredeemable property merely a right in trust—Bell's Lect., 3rd ed., p. 1173. Trust might be proved by reading several writs together, and was sufficient to distinguish the capacity in which the property was held—*Lawrie* v. *Donald*, December 7, 1830, 9 S. 147. Further, *confusio* did not operate where the party in whom there was an alleged *concursus debiti et crediti* had an interest to keep up the debt—*Fleming* v. *Imrie's Trustees*, February 11, 1868, 6 Macph. 363, 5 S.L.R. 242. Aitken here had an interest to keep up the bonds, which represented cash to him, while *qua* owner he was only trustee. *Murray* v. *Parlane's Trustees*, December 18, 1890, 18 R. 287, 28 S.L.R. 223, was mentioned as referring to the question of ground-annuals, which was not before the Court.

LORD LOW—The question which we have to determine in this case is whether the two bonds and dispositions in security granted by Riddagh in Aitken's favour have been extinguished *confusione?* It appears that Riddagh, who is a builder, acquired certain ground which had been divided into six lots for building purposes. Aitken lent him two sums of £350 each, and in security of each loan he disponed to Aitken one lot of ground. Subsequently Aitken made further advances to Riddagh, in security of which Riddagh granted to him an *ex facie* absolute disposition of the whole ground, which was qualified by a back-letter from Aitken acknowledging that the disposition was in security only. The disposition was duly registered, but the back-letter remained unrecorded.

It is not disputed that if this disposition had been in fact as well as in form absolute, the rights of security which Aitken had in the two lots would have been extinguished. But in fact the disposition was only in security, and if Riddagh had paid his debt Aitken would have been bound to reconvey the ground to him. If that had been done it is plain that Riddagh would have got back the two lots under burden of Aitken securities. Now, if the securities were not extinguished in a question with Riddagh, why should they be so in a question with the pursuers, who derived their right from Riddagh prior to the date of the *ex facie* absolute disposition to Aitken? The pursuers say that they were entitled to rely upon the records, and that as nothing appeared upon the register except the absolute disposition it must be assumed that the property of the ground had been conveyed to Aitken. That would have been a good argument if the pursuers had acquired their title from Aitken after the registration of the absolute disposition in his favour, or even, it may be, if they had done something, or refrained from doing something, in reliance upon the register. But no considerations of that kind are present. The position of the pursuers simply is that prior to the date of the absolute disposition they obtained a bond and disposition in security for £1070 from Riddagh, postponed to the two bonds in favour of Aitken.

In these circumstances it appears to me that no question arises involving the faith of the records. The question is really one of fact, namely, whether Aitken did or did not acquire an absolute right to the ground.

For the reasons which I have given I think that it is clear that he did not do so, and accordingly the pursuers' case fails.

I am therefore of opinion that we must adhere to the Lord Ordinary's interlocutor.

LORD ARDWALL—I am of opinion that the course proposed by Lord Low is the right one and should be followed. I think the case a clear one, and I am somewhat surprised that this plea of *confusio* was ever put forward. It is, however, the only question that has been argued. It is said that the two bonds for £350 have been extinguished *confusione*, with the result that the pursuers' bond for £1070 is now a first security over the subjects in question. Now, at the time when the pursuers obtained this bond the state of the record was that in front of the bond which they were getting there stood these two bonds for £350 each on the record, and they therefore took their bond as a security postponed to the debts represented by these two other bonds. They say that they are now entitled to stand in the position of first security-holders, because owing to a subsequent transaction, with which admittedly they had nothing to do, and to which they were in no ways parties—these two bonds have been extinguished *confusione*. It appears to me to be settled law that *confusio* only takes place in a case where the full and absolute right of the creditor and the full and absolute debt of the debtor merge in one and the same person, and in no other circumstances.

Now, what was the case here? We have not the bonds before us, but it has not been alleged that the personal obligations in the bonds have ever been discharged—certainly the debt never was discharged—and therefore Riddagh remained the debtor to Aitken in these sums throughout, and it is vain to say that Aitken ever became the debtor to himself. This is sufficient, I think, to dispose of the plea of *confusio*, so far as the mere debt is concerned, because, as I understand the pursuers' case, they nowhere allege that Riddagh did not remain throughout the debtor in these sums to James Aitken.

But a plea which is not in so many words stated on the record was argued upon the reclaiming-note to the effect that the security title under the two bonds in which Aitken was vested at the time when the pursuers' bond was granted became merged in and extinguished by the absolute title to the subjects which he subsequently obtained from Riddagh, with the result of leaving the pursuers' bond the first security on the subjects. Now, I do not think it has been decided that if "A" holds a recorded bond and disposition in security for a certain sum over a property, and "B" subsequently obtains another bond and disposition in security over the same property, and thereafter "A" obtains an absolute disposition of the said property, the result necessarily is that A's security for his debt is postponed to B's security, or, to express it otherwise, is extinguished in consequence of "A" having acquired the property in fee. But this general question was not argued, the defenders being content to rest their case on the ground that Aitken was never truly, as matter of fact or law, absolute proprietor of the subjects in question, because although he held them under an *ex facie* absolute disposition granted by Riddagh, that disposition was qualified by a back-letter. I am of opinion that that argument is well founded.

Aitken was really holding as a *quasi*-trustee for behoof of Riddagh, under the obligation, if the debts in respect of which he had obtained the absolute disposition were paid off, to reconvey the property to Riddagh, or if the property were sold under the bonds, to account for the reversion of the price. And it was Riddagh who still remained the true proprietor of the subjects, because it was he who had the radical right thereto and who had the interest in the reversion. That being so, it appears to me that *confusio* cannot be held to have taken place, because Aitken was never truly the absolute proprietor of the subjects over which the bonds were granted, but only an encumbrancer. But it was argued very strenuously by Mr MacRobert that it did not matter what the nature of the transaction was so long as on the face of the records it appeared that these two bonds had been extinguished in the person of James Aitken by the disposition in his favour. Upon that point I have only to say this, that in my opinion this is not a question depending merely on the records; it is the true state of the facts that has to be looked to. The case of *Mackenzie*, 16 S. 311, referred to in the debate, seems to be almost a direct authority for this proposition, that notwithstanding that it may appear on the face of the records that the characters of creditor in a heritable bond and proprietor of the subjects over which the bond was granted have become united in the same person, yet if it be the fact that the person is not truly absolute proprietor but holds them on some lesser title *confusio* will not take place. None of the cases quoted for the pursuers seem to me to be authorities to the contrary. I accordingly think that the Lord Ordinary's judgment ought to be affirmed.

LORD STORMONTH DARLING—I agree with both your Lordships.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for the Pursuers (Reclaimers)—Wilson, K.C.—MacRobert. Agents—Ross Smith & Dykes, S.S.C.

Counsel for the Defenders (Respondents)—Horne—Strain. Agents—Drummond & Reid, W.S.