Tuesday, December 2.

SECOND DIVISION.

[Lord Fraser, Ordinary.

BAILLIE *v.* DREW.

Right in Security—Disposition ex facie *Absolute—Authority by Debtor to Sell Subject of Security either by Public Roup or Private Bargain—Sale by Creditor—Damages—Relevancy.*

A debtor granted in favour of his creditor a disposition to a house, *ex facie* absolute but really in security of his debt, and subsequently granted him a letter of authority to sell the security subjects either by public roup or by private bargain. The creditor sold the subjects by private bargain for £227, 10s. The debtor raised an action of damages against the creditor, averring that the letter of authority had, "as was well known to the defender," been recalled, that the creditor had wrongfully sold the subjects by private bargain, and had failed to realise an adequate price, which would have been, "it is believed, £350." *Held* (1) that the debtor had no power to recal the letter of authority, and (2) that in the absence of averments that a higher offer had been made than the one accepted by the creditor, the action fell to be dismissed as irrelevant.

Question—Whether a creditor holding an absolute disposition has power to sell by private bargain?

In 1874 Alexander Baillie obtained advances from James Drew to enable him to build a house on a piece of ground which he had feued in Newton-Stewart from the Earl of Galloway—the advances being made from time to time during the building of the house, which was finished in 1875. At Whitsunday 1881 the debt and interest and unpaid feu-duty amounted, according to a statement made up by Drew, to £210. When the house was finished Baillie granted to Drew a disposition of the house *ex facie* absolute, which was duly recorded. The disposition was, however, as was admitted in this action, only in security. Baillie having fallen into arrears of three years' feu-duties, Drew, after advertisement, sold the property by private bargain for £227, 10s., with entry at Martinmas 1883, the proceeds of the sale being applied in repayment *pro tanto* of the amount due to him and the expenses of the sale.

Baillie raised this action against Drew for £150 in name of damages for the loss he alleged he had sustained by the sale, which was, he averred, illegal and unwarrantable. He made the following averments—No formal back letter was granted or entered into with the defender stating the terms on which under the disposition he held the house, or the conditions on which he could sell it, but the defender accepted the conveyance and held the house therein contained only in security for the sums due to him. The pursuer occupied the house till 1882, when he left it and went to Edinburgh, it being arranged that defender should collect the rents and apply them towards payment of the interest on the loan. "(Cond. 6) In or about the month of October 1883 the pursuer received an offer of Two hundred and twenty-seven pounds ten shillings for the said cottage, but this offer he declined to accept, and intimated his refusal of it to Mr Stroyan, solicitor, Newton-Stewart, through whom the said offer had been made. The defender became aware that such an offer had been made, and that the pursuer had declined to accept of the same, yet notwithstanding he (the defender) took it upon himself, without any previous intimation to the pursuer, to sell and dispose of the said cottage and pertinents at the price of Two hundred and twenty-seven pounds ten shillings, and he accordingly completed the sale, and granted a conveyance to the purchaser, not only without any intimation to the pursuer, but recklessly and wilfully, as he well knew, against his express wishes, and to the serious sacrifice of his interests. With reference to the explanation in the answer, the letter therein mentioned is referred to for its terms. Admitted that the defender sold the property by private bargain for the sum, and with it entry at the term stated. *Quoad ultra* the statements in the answer are denied. Specially denied that there was due advertisement. Explained and averred that, as was well known to the defender, the pursuer recalled any authority he may have given before the defender had acted upon it, and averred that the letter of authority quoted in answer was so recalled. The defender had no right to sell by private bargain. The property should not have been sold except by public roup, and then only after judicial authority had been obtained, and after due advertisement. Had it been so sold, it would have realised a much larger sum than the defender obtained for it—it is believed £350."

The defender in reply admitted that he told the pursuer that he did not wish to become proprietor of the property, and that if the pursuer made punctual payment of interest and feu-duty, which payment had not been made, he would be willing to hold the property for his behoof. But he averred that on the 4th August 1883 he met the pursuer and it was arranged that the property should be sold, and the pursuer then granted him this probative letter of authority to sell, in terms of which he had acted—"I hereby authorise you to dispose of Gertrude Cottage either by public roup or private bargain, as may be considered best, and out of the first of the price you will pay yourself for your claim against me, accounting to me for any balance which may remain thereafter." He denied that the letter had been recalled.

The pursuer further stated that the sale was wrongously carried out, and without regard to his (pursuer's) interests, both as to the time and the circumstances of the sale, and was illegal, and had caused damage to the amount of £150.

The pursuer pleaded—"(1) The sale by the defender being, in the circumstances above set forth, illegal and unwarranted, and the pursuer having in consequence sustained loss and damage, the defender should be found liable in damages as craved, with expenses. (2) The defender having no right to the said subjects save a right in security, and having sold them against the wishes of the pursuer, who was proprietor of the same, without any authority, is bound to pay the pursuer the true value thereof, under deduction of the pursuer's debt to him."

The defender pleaded—"(1) The statements of the pursuer are not relevant or sufficient in law. (2) The defender being proprietor of the subject

under an absolute disposition thereof, and, *separatim*, having the express authority of the pursuer, was entitled to sell the same, and that either by public roup or private bargain."

The Lord Ordinary (FRASER) "before answer allowed to the pursuer a proof of his averments contained in the 6th article of the condescendence, to the effect that he recalled the letter of authority therein referred to before the defender had acted upon it, and to the defender a conjunct probation, &c.

"*Note.*—The answer made by the defender to the fifth article of the condescendence is not a direct and explicit answer, as it ought to have been, to the pursuer's averment that the *ex facie* absolute disposition in the defender's favour was merely granted as a security for the sums advanced by the latter to the pursuer. Judging, however, from what the defender admits, and from what he has not explicitly denied, the Lord Ordinary concludes that the *ex facie* absolute disposition was merely a security. Whether, in virtue of the right which such a title gave him, the defender could, without the pursuer's consent, have sold the property, it is unnecessary to inquire, because the defender himself states that it was in terms of the authority granted to him by the pursuer's letter that he sold the property. Such being the state of the averments upon the record, it is necessary o ascertain whether this authority existed at the time when the sale was made. The pursuer avers that it was recalled; but this is stated in such a way as to raise a difficulty as to the relevancy of the averment. It is said that the letter was recalled, 'as was well known to the defender.' Does this mean that the pursuer recalled it by a resolution which he retained in his own breast, and without communicating it to the defender? The words seem to imply that there was no direct intimation given to the defender of a recal, and the Lord Ordinary had therefore some hesitation in allowing a proof, which he has only done before answer.

"The other averments as to the mode in which the defender carried out the sale are too vague and indefinite to go to proof. The objection that the sale was not by public roup is answered by a reference to the letter of authority, which authorises a sale by private bargain, and the other averment that the sale 'was wrongously carried out, and was effected without a due regard to the pursuer's interests, both in respect of the price and of the time and circumstances of the sale,' is an averment of a rhetorical character, which is so indefinite that the Lord Ordinary cannot allow it to go to proof."

The defender reclaimed, and argued—The pursuer was not entitled to proof that the authority to sell was recalled, for—(1) It could not in law be recalled. (2) There was no relevant statement on record that it was recalled. Any possible recal would have to be in writing. And (3) The sale was one under an *ex facie* absolute disposition without a backbond. It was one, then, by a person who could act as absolute proprietor of the subjects until he was satisfied of the debt for which the disposition was granted.—*Park* v. *Alliance Heritable Security Co.*, Jan. 24, 1880, 7 R. 546; *Scottish Heritable Security Co.* v. *Allan Campbell & Company*, Jan. 14, 1876, 3 R. 333.

The pursuer admitted that the Lord Ordinary was in error in allowing a proof as regards the recal of the letter of authority, but asked for a proof at large as to the value of the property sold. He argued—The security-holder was trustee for the granter of the security, and therefore if he sold he must do so in such a manner as would enable him to realise the largest price for the subjects sold.— M'Laren on Trusts, i. 350; Lewin on Trusts, 388. Here he sold at a grossly inadequate price, which had been previously refused. The averments on record were amply relevant to cover a case of malversation and recklessness—*Simpson* v. *Macmillan*, March 16, 1770, 2 Pat. App. 227.

The defender in reply admitted that the security-holder was bound to act reasonably and fairly in selling the subjects contained in the security, but argued that there was no relevant averment of anything unreasonable, fraudulent, or reckless on record. The pursuer must give the Court *prima facie* reasons for saying that the price at which the subjects were sold was inadequate.—Bell's Com., vii., 271, 7th ed.

At the request of the Court, some correspondence which was not in process was referred to, and the import of it was that Mr Stroyan, who acted as man of business for the pursuer, and certain of the pursuer's creditors, had been duly consulted by the defender as to the sale of the subjects, and had been satisfied that the price offered and ultimately accepted for them was a full one at the time.

At advising—

LORD JUSTICE-CLERK—The Lord Ordinary has here allowed the pursuer a proof of his averments contained in the sixth article of his condescendence, to the effect that he recalled the letter of authority therein referred to, by which he authorised the defender to sell a certain cottage by public roup or private bargain, as might be most advisable; and that he recalled that letter before the defender had acted upon it. The Lord Ordinary also allowed to the defender a conjunct probation.

The only question that arises directly on that interlocutor is whether the proposition that it contains is a sound one—that is to say, whether it was within the power of the pursuer who had granted this obligation—or letter of authority, as it is called—to a creditor, to recal it, whether before it was acted upon or not; and if not, whether there was any doubt of the right of the creditor, who held an absolute disposition of the subjects, to sell by private bargain? I apprehend this letter of authority conferred but little additional security, and that it was out of the power of the debtor to recal it any more than he could recal the disposition itself. I think, however, that the general view may be taken as to what the power was which the debtor conferred upon the creditor, and I am quite clear that he could not recal that to the prejudice of the creditor who held this disposition. Now the disposition is absolute. There is not even a back-letter. There is nothing apparently to qualify the disposition, or to indicate—I mean within it, or apart from it—that it was a security. But the parties are agreed that it was a security. There is no dispute about it; and the defender must be dealt with as a creditor, and not as a person in the position of absolute proprietor. The question, in the first place, is—What are the

limitations upon his right? and, secondly—What are the averments we have here? Now, in regard to the limitations of his right, it has been well settled that, in the first place, the absolute disposition will give the purchaser under it—where the sale is by virtue of powers to the granting of which the debtor has been a party—an absolute right, and that it will not be in the power of the original proprietor, the debtor, to quarrel that position, if the powers of the creditor have been duly and properly exercised. It is another matter where the question is between the real debtor and the creditor, for if the creditor has not exercised this right—absolute as it is where third parties are concerned—in a fair, reasonable, and equitable manner, the Court will give a remedy, and that remedy will not be by setting aside the sale, but by giving the pursuer, the debtor, an opportunity of proving damage, arising from reckless or inequitable use of the powers which the disposition gave him.

Now, the other question is—Are there sufficient grounds stated in this record to justify our allowing a proof on that subject? That is not the ground on which the Lord Ordinary proceeds, and I have already said that I do not think the Lord Ordinary's view is sound, for I do not think the debtor could have recalled the letter as long as the creditor was unpaid. But I am of opinion on this second ground—the ground of malversation and injurious and reckless conduct—looking to the interests of the debtor, there are no reasons for it at all. There might have been grounds for it. But it is not said that any higher offer for the subject could have been obtained at the time; and it rather appears from the correspondence that has been read that so far from these things having been done behind the back of the original proprietor, in point of fact it had been brought under his notice apparently long before the sale took place. There seems to have been another person acting for his other ordinary creditors, and there are some letters to him in which there is not any such allegation as was made on the record. I am compelled to come to the conclusion that no relevant allegation has been made on the record to justify our sending the case to proof.

Lord Young—That is my opinion also. It was very candidly admitted by Mr Thomson in opening that the judgment of the Lord Ordinary here could not be supported, and that the pursuer's case, if he had any case at all, consisted in this, that in selling the property the defender had neglected his—the pursuer's—legitimate interests to such an extent as to subject him to a claim for compensation in the way of damages. I quite agree that the Lord Ordinary's interlocutor is erroneous. I think his Lordship has fallen into the misconception that this was an ordinary case of mandate, and that therefore it was relevant to aver that the letter had been recalled before being acted upon. I think it is not an ordinary mandate—that is to say, it was not an authority to perform a piece of business for the pursuer who granted it. It was an authority granted by a debtor to his creditor. It was an onerous proceeding, and I assume it was stipulated for, and insisted on by the defender, the creditor who took it. I agree with your Lordship that it could not be recalled to the prejudice of the creditor.

I further think that there is no relevant averment on the record; for assuming, contrary to my opinion, that it could be recalled—my opinion being that it could no more be recalled than could the disposition—I think there is no relevant averment that it was recalled. Plainly, a written authority of that kind would not be revocable by mere conversation. That would be an unsafe thing to found an action upon against a party acting upon a written authority—a mere conversation to the effect that the person who gave the written authority no longer wished it to be acted upon. And there is only the most general statement that it was recalled, "as the defender well knew." But that is not relevant. Well, laying all that aside, the sale was legal, and it was a sale by a creditor with a property title, who had stipulated for and received written authority to sell either by public roup or private bargain. And that written authority to sell either by public roup or private bargain relieves us of the necessity of considering whether a creditor who stipulates for a property title may sell otherwise than by public roup. I should like to reserve my opinion upon that point. For it takes a written authority to sell either by public roup or by private bargain. I repeat that I am of opinion that that written authority was not revocable at the mere will and pleasure of the granter of it; and besides that, there is no relevant averment that it was recalled. Then there was a legal sale by a party having a competent title and written authority to sell by private bargain. Then the allegation is made that he sold without due attention to the interests of his debtor, who was really interested, notwithstanding the form of his title—for he was no doubt liable to account for anything over and above the amount of his debt. But reading and examining this record fairly, I think there is nothing relevant in it to instruct the proof here asked for. We were told that the correspondence which has been read is not in process, but parties seem to be agreed about what it showed. It showed satisfactorily enough that there was no impropriety, and therefore one does not suffer any feelings or misapprehensions about the possibility of something being disclosed upon a proof which might show the justice of the case to be other than according to the decision we are to pronounce. It is quite plain upon that correspondence that it was an honest sale for the highest price that could be got at the time, not only in the estimation of the defender, who had no other interest than to sell for the best price that could be got, but in the opinion also of the man of business of the pursuer—the debtor. But the more strictly accurate ground of judgment is that there is no averment of impropriety; for I cannot take it as an averment of impropriety that if he had sold by public roup, and with judicial authority, he would have got more for the property, and that therefore when he sold privately as he did, in pursuance of the authority which he held in his hand, and which could not be taken from him, he acted wrongly. I do not think, I repeat, that that is a relevant averment. But I entirely agree—and the observations I have made imply that I entirely agree—that a creditor, even with such a title as this, and such an authority as this defender held, to sell by private bargain, may so sell as to subject himself to an action for damages. If there had been an averment of any impropriety

of conduct on his part, and that he neglected the legitimate interests of his debtor, I should have sustained the action, and remitted it to probation on those grounds. But I am of opinion that this case presents no such aspect. I therefore agree that the interlocutor should be recalled and the action dismissed.

Lord Craighill—I am entirely of the same opinion. In most cases where relevancy is to be a ground of judgment, in whole or in part, we are not in the habit of dealing strictly with the record when the party by whom the averments are made is seeking to enlarge that which has been put forward as the base and scope of his case. Sometimes matter may be introduced into the record by which the difficulties entertained on the subject-matter of contention are lessened; but where, as in this case, the party declines to accede to any proposal of that kind, the consequence is that we are left to determine a point like this on the pleadings as they stand. And I have no doubt in my own mind, in regard to the allegation on the record of a recal of the authority, and in regard also to the allegation of reckless and irregular conduct on the part of the defender in carrying through this sale, that the judgment your Lordship has proposed cannot be avoided.

Lord Rutherfurd Clark was absent.

The Court recalled the Lord Ordinary's interlocutor, found that the record contained no relevant statements to support the conclusions of the action, and dismissed the action.

Counsel for Pursuer—Rhind—A. S. D. Thomson. Agents—Brown & Patrick, L.A.

Counsel for Defender—Wallace. Agents—Russell & Dunlop, C.S.

Tuesday, December 2.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

WHITWORTH & BROTHERS *v.* SHEPHERD.

Ship—Insurance — Abandonment — Transfer of Share—Process—Mora.

A ship was stranded, and the owner intimated to the underwriters who had insured her that he abandoned her, and claimed for a constructive total loss. On this footing he sued one of them, who setled the case by paying him the whole sum which he had underwritten. It was afterwards decided in an action against the other underwriters that there was only a partial loss. The underwriter who had made the payment then brought an action against the owner to have it found that having accepted an abandonment, and paid a claim on that footing, he had an interest in the vessel to the extent of that payment, and for an accounting. The ship had meantime been unprofitable. The Lord Ordinary gave decree for the value of a share of the ship corresponding to the pursuer's payments, but expressed the opinion that an offer by the defender to transfer such a share would have been an answer to the action. The defender reclaimed, and offered such a transfer, but the pursuer declined to accept it except on condition of being freed from losses down to the date of the tender. *Held* that the offer came too late, and that the pursuer was not bound to accept it.

In May 1879 the screw-steamer "Krishna," of Glasgow, was stranded on the coast of India, near Bombay. She was insured at a value of £9000, of which £500 was underwritten by Benjamin Whitworth & Brothers, of Manchester, and the remainder with an insurance company and Glasgow underwriters. On 7th June her owner, Joseph Augustus Shepherd, of Bombay, tendered total abandonment of her to the underwriters, and claimed as for a constructive total loss. Whitworth Brothers disputed this claim, and Shepherd raised an action against them in England, which was settled before trial on the footing of the defendants (Whitworth Brothers) paying the total sum sued for, viz., £500, as the sum contained in the policy, £75 under the suing and labouring clause, and £20 of interest thereon, in all £595, together with the costs of the action.

The Glasgow underwriters also disputed (in the Scottish Courts) liability for a constructive total loss, and in an action against them (reported February 25, 1881, 18 Scot. Law Rep. 349, and December 1, 1881, 19 Scot. Law Rep. 577, 9 R. (H. L.) 1) it was held by the House of Lords that the loss was partial, not total.

Thereafter average adjusters found the partial loss to be 20 per cent. of the value of the ship.

From the time when the vessel was salved, and taken to a port of safety, in November 1879, Shepherd used her as his own, and he did so at the date of the action, retaining her whole earnings and exclusive control over her.

On 20th September 1883 Whitworth Brothers, having used arrestments, raised an action in the Court of Session against Shepherd, concluding for decree for £700, with interest at 5 per cent. from 7th June 1879 (the date on which he had intimated total abandonment to them) till payment, and further, to have the defender ordained to exhibit an account of his intromissions with the vessel and with the freight, and other moneys derived therefrom, from 23d May 1879 till the date of his lodging such an account, whereby the true balance due by him to the pursuers might appear, and to pay them the sum of £700, or such other sum as should appear to be the true balance due by him to them, with interest, from 7th June 1879.

The pursuers stated that they had accepted the abandonment of the "Krishna." "(Cond. 7) By the abandonment and acceptance thereof foresaid, and the payment made by the pursuers in respect of said policy undertaken by them, the pursuers acquired and had vested in them a right of property in said vessel to at least an extent proportionate to the amount insured by them by said policy, which was not less than one-eighteenth share of the whole vessel." "(Cond. 9) The value of the share to which the pursuers acquired right by virtue of said abandonment, acceptance thereof, and payment, is not less than £700. The defender, however, refuses to pay this sum, or any sum, to the pursuers, or to give to the pursuers control of the said share, although he has appropriated and still retains as his own the said share of said vessel, and the whole freight and earnings thereof and effeiring thereto. On payment of said