Lord Craighill—The order on the appellant M'Beath for caution was in excess of the Sheriff's powers, but I confess I have doubt if it is in our power to substitute something else for that part of the sentence which we set aside. We do not make sentences here; we decide if sentences are according to law, and if they are excessive we give redress.

Lord Justice-Clerk—I have no difficulty in regard to the point last mentioned. Here the only flaw in the conviction is the excessive order for caution, and if we set that right we are only doing justice in the case before us. As an Appellate Court of last resort we have power to do so. It is quite a different case when there is no separable part of the conviction, but that is not the case here.

Lord Young—Our powers in this respect are very ample, for by the Summary Prosecutions Appeals Act 1875, sec. 3, sub-sec. 9, it is provided that "the Superior Court shall have power to affirm, reverse, or amend the determination in respect of which the case has been stated, or to remit the matter to the inferior judge with the opinion of the Court thereon, or to make such other order in relation to the matter and the costs of the appeal as they shall see fit." . . .

The Court pronounced the following judgment:—

"Sustain the appeal to the effect of restricting the period to which the appellant Thomas M'Beath shall find caution to six months: Allow no expenses to either party."

Counsel for Appellants—Watt. Agent—Wm. Officer, S.S.C.

Counsel for Respondent—Wallace. Agent—Crown Agent.

COURT OF SESSION.

Tuesday, November 23.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

LEASK *v.* JOHNSTONE AND OTHERS.

Sale—Sale of Heritage—Bond—Intimation of Sale under Bond—Title.

The purchaser of heritable subjects sold under a bond and disposition in security, refused to implement his bargain on the ground that intimation calling up the bond had not been made to a person whose name stood on the Register of Sasines as the *ex facie* absolute disponee of the subjects. It was shown by documentary evidence that the right of this person, if good at all, was truly only a security, and that he was well aware of the intimation of the creditor and of the sale. *Held* that the title was such as the purchaser was bound to take, but that his objection being reasonable and only obviated by the proceedings in the action, he was entitled to his expenses.

In July 1881 William A. Fraser, baker, Aberdeen, purchased a piece of ground (with buildings thereon) at the corner of Albert Street and Westfield Lane, Aberdeen, and in January 1882 he borrowed on the security of the subjects two sums of £600 and £200 respectively, the former from Dr James Leask of London, and the latter from Mr Peter Clark, advocate in Aberdeen. Bonds and dispositions in security for the said sum were on 1st and 3d February 1882 granted and duly recorded. Dr Leask subsequently acquired Clark's bond also. Fraser got into difficulties, and after Martinmas 1883 no interest was paid on the bonds. He was sequestrated on 6th November 1885.

In July 1885 Dr Leask exposed the subjects for sale under his bonds, at Aberdeen, after due advertisement in terms of the statute, and after serving notarial intimation on Fraser on 13th February 1885 calling up the bonds. The subjects were purchased for £1200 on behalf of Robert Johnstone, accountant, 9 York Buildings, Queen Street, Edinburgh, who subsequently declined to implement his purchase on the ground that intimation calling up said bonds should also have been made to Messrs Stark & Hogg, writers, Glasgow, in respect that on 26th January 1885 there was put on the Register of Sasines a disposition by the said William Alexander Fraser in their favour of the subjects of security. He contended that no marketable title had been offered. This disposition conveyed the subjects to Stark & Hogg, with power to them to sell and borrow. It was recorded 26th January 1885, and bore to be dated 23d January 1884, but that date was in this process alleged not to be a true date.

On 12th January 1886 Dr Leask raised the present action of declarator and implement against Johnstone, and also against Stark & Hogg for their interest. The conclusions were (1) that the intimation given by the pursuer to Fraser on 13th February 1885, and the advertisement of the sale, and the whole other proceedings taken by the pursuer in connection therewith, were valid and effectual, and that the defender Johnstone was bound by them; (2) that Stark & Hogg were barred from making any challenge, on the ground that no such intimations were given to them; (3) that Johnstone was not entitled to refuse to implement his purchase, on the ground that the pursuer as holder of the bonds did not give formal intimation calling up the bonds and demanding payment to Stark & Hogg; and (4) that he, Johnstone, should be ordained to implement the contract of sale, and pay the pursuer £1200, being the price, with interest at 5 per cent. from 11th November 1885 till payment.

Stark & Hogg did not defend, and a decree in absence was taken against them.

The pursuer averred that the disposition by Fraser to Stark & Hogg, while purporting to be an absolute disposition, stated no consideration, except that it bore to be for certain good and onerous considerations, and was written on a 10s. stamp; that it was merely a security-right, as it conferred a power to sell or to borrow; that in view of the relationship of agent and client existing between Fraser and Stark & Hogg the disposition had no validity, and being merely in security, no intimation to Stark & Hogg was necessary; that they were aware of the pursuer's intimation and intentions, and took no objections during the five months that elapsed after the sale,

The defender (Johnstone) averred that he was ready and willing to implement his purchase, but he declined to accept the title offered, as defective and unmarketable, and not one which a purchaser at an adequate price was bound to take. He further alleged that he timeously objected to the title, but offered to accept it if fortified by Stark & Hogg's consent to the disposition in his favour which was not obtained. He further averred that the articles of roup were not in conformity with the Titles to Land Consolidation (Scotland) Act 1868, sec. 122, in respect they did not specify the particular bank in which consignation was to be made.

At adjustment the pursuer named the Union Bank of Scotland at Aberdeen.

The pursuer pleaded, *inter alia*, (2) that in the circumstances no intimation was required to be made to Stark & Hogg preparatory to the sale by the pursuer of his security subjects; and (3) that Stark & Hogg were barred *personali exceptione* and by *mora* and taciturnity from insisting on formal intimation, and such being found, that pursuer was not entitled to refuse to implement his purchase for want of such intimation.

The defender pleaded, *inter alia*, that he was willing to implement his purchase on the pursuer tendering him a valid and marketable title.

On 16th March 1886 the Lord Ordinary pronounced the following interlocutor:—"Finds and declares and decerns as against the defender Robert Johnstone conform to the declaratory conclusions of the libel against him: Decerns also against the said defender to implement his part of the contract of sale entered into between him and the pursuer, and to make payment of the price of the subjects, being £1200 sterling, with interest thereon at the rate of 4 per cent. per annum from 11th November 1885 until payment, together with one-half the expense of the disposition and relative expenses, as concluded for; but finds no expenses of process due as between the parties."

The defender reclaimed, and argued:—1*st*, *Upon the question of intimation*—The Titles to Land Consolidation Act 1868, required that prior to sale under bonds in security intimation must be given to a "disponee" as well as to the debtor. This was the true meaning of the statute. See sec. 121, and the cases of *Fleming* v. *Imrie*, Feb. 11, 1868, 6 Macph. 363, and *Stewart* v. *Brown*, Nov. 22, 1882, 10 R. 192. This was a bad title, and not in any sense marketable, and the purchaser, who was paying a full price, was not bound to take it. Besides, this was a disposition to a firm, and therefore it was a disposition in trust. It bore *ex facie* to be absolute, and so the disponee maintained it to be. The statute allowed a sale on a bond provided certain solemnities were complied with, but it was not reasonable that a purchaser for value should be called on to risk an action with a disponee whose name stood on the record, and that on a question of intimation. A sale carried through without the statutory notice was a bad sale, and no provision or arrangement by parties could get over the difficulty of the exposer having no title to expose the subjects.

Authorities—Bell's Lectures on Conveyancing, ii. 705; and Bell's Principles, sec. 890; *Wood* v. *Magistrates of Edinburgh*, June 22, 1886, 19 R. 1006.

Replied for pursuer—As a formal requisition and protest might be supplanted by equivalents, so in the present case no formal notice to the disponees was necessary, for they were well aware of all that was going on in connection with the sale of the subjects. The terms of the disposition showed it to be in security only, as no money equivalent was given. (2) *On the question as to the articles of roup*—The naming of a bank was done timeously, but it could competently be done at any time. The provision to this effect was merely directory and an omission to comply did not imply nullity. On this point see *Duchess of Sutherland* v. *Reid*, Feb. 25 1881, 8 R. 514; *Campbell* v. *Duke of Athole*, Dec. 17 1869, 8 Macph. 308; *Cole* v. *Green*, 18 L.J., C.P. p. 30.

In the course of the discussion it was suggested by the Court that it would be desirable to recover any documents which existed showing the relation between Stark & Hogg and Fraser, and the dealings between them at the time the disposition in question was granted.

Accordingly on 5th November 1886, the Court, on the pursuer's motion, granted a diligence at his instance to recover, *inter alia*, the books of Stark & Hogg, that excerpts might be taken of entries relative to their transaction with Fraser, regarding the heritable subjects bearing to be disponed by him to them by the deed recorded in January 1885, or as to the payment of the price thereof, or backbonds, or agreements relative to the deed or the subjects, or Fraser's indebtedness to them, and to recover missives of sale, agreements, or other writings passing between them. There were recovered under the diligence two agreements, the first dated 24th January 1885, and the second 2d February 1885.

One of these agreements, dated 23d and 24th January 1885, was an agreement between Stark & Hogg and Fraser, whereby on the narrative of Fraser's embarrassed circumstances in consequence of a criminal charge against him, and a decree against him, and inhibitions used against him, and that Stark & Hogg had offered to take his whole interests in hand, and make advances to secure legal assistance for him in Edinburgh and Aberdeen, he agreed to pay them "£1000 by way of honorarium," in security whereof he, of even date with the agreement, disponed to them the heritable property and building materials thereon, and agreed to accept, in the event of the property being reconveyed to him, a bond and disposition in security for the honorarium upon the subjects. He also agreed to pay them in addition to the honorarium their legal charges, and that the dis- position should be in security thereof.

By the second and supplementary agreement, which was dated 2d February 1885, in respect that Stark & Hogg had agreed to forego the honorarium, he renounced and discharged all right of redemption or retrocession in the heritage and building material, and declared the disposition to be, as it bore to be, heritable and irredeemable.

At advising—

Lord President—The ground upon which the defender refuses to implement his bargain in the present case is that the sale of the subjects was not intimated to a disponee, whose name

appeared on the record, and who was thus the *ex facie* owner of the subjects. Fraser was the real owner, but if the disposition by him in favour of Stark & Hogg was an absolute disposition, then Fraser, whenever that disposition was recorded, would of course have ceased to be the real owner, and intimation to Stark & Hogg of the intended sale would have been necessary. But this apparently absolute disposition now turns out to be nothing more at its best than a deed in security, and that is made abundantly clear by the documents recovered under the diligence granted to the pursuer.

The first agreement laid before us under it brings out the character of this deed, showing it, as I have said, to be at its very highest a right in security only (if indeed it was that) of a debt of a very questionable character incurred between parties occupying to one another the relations of agent and client.

In the second agreement an attempt is made to convert a right in security into an absolute right by the debtor renouncing all his rights of redemption and retrocession. This certainly does not improve the position of the disponees, inasmuch as they sought by this means to make effectual against a client a claim which they could never in this or in any other way have enforced. It is clear therefore, I think, that Stark & Hogg were not disponees to whom any notice was necessary, and that being so, we have sufficient to remove all difficulties and to make the title of the purchaser a perfectly good one. Looking to the fact that Stark & Hogg were perfectly aware of all that was going on in connection with the sale of these subjects, I am of opinion that they were not proprietors of the estate in such a sense as to make any notice necessary.

As regards the question of interest, I do not think that any should be charged, and therefore I am against the Lord Ordinary upon that part of his interlocutor.

Lord Mure—It is quite clear that the agents here were quite aware that this property was to be put up for sale. They were therefore in very much the same position as the parties in the case of *Stewart*, to which we were referred. Upon that account, as well as on the grounds stated by your Lordship, I think we should adhere to the Lord Ordinary's interlocutor except upon the matter of interest, as regards which I concur with your Lordship.

Lord Shand—I think that the purchaser was quite entitled to raise this question looking to the circumstances of this disposition and relative infeftment standing on the record. I also hold that Stark & Hogg were not proprietors of these subjects, and further, that they are effectually barred from maintaining any right of proprietorship in the future. The disposition is in many respects a rather peculiar deed. It is written on a 10s. stamp, and contains a power to the disponees to sell the subjects publicly or privately, and to borrow money on the security thereof. At or about the same date we have the two agreements referred to by your Lordship, from which it appears that Stark & Hogg got this property for nothing from Fraser at a time when they were acting as his agents. While that agency lasts the agreement is on the very face of it null. When it is kept in mind that Stark & Hogg were acting for Fraser in the sale of these subjects, that a decree in absence was taken against them in the present process, that they were also examined as havers at the commission, then I think it is clear not only that they have no rights of proprietorship in these subjects at present, but that they are barred from founding upon any such rights in the future.

In that state of matters I agree with your Lordships in thinking that the title to these subjects is such as a purchaser is bound to accept.

Lord Adam—The title is now of a kind such as a purchaser may safely take, for it has been incontestably shown by deeds what the true relation of Stark & Hogg to this property was. The agreement was one entered into between an agent and client; while that relation still subsisted its terms were therefore valueless. Upon that ground I am prepared to concur with your Lordships.

The Court pronounced this interlocutor:—

"Recal the interlocutor of the Lord Ordinary of date 16th March 1886 in so far as it decerns for interest on the price since the term of entry under the articles of roup, and in so far as it finds no expenses due: *Quoad ultra* adhere to the said interlocutor, and find the defender Robert Johnstone entitled to expenses," &c.

Counsel for Pursuer— Pearson — Kennedy. Agents—Macpherson & Mackay, W.S.

Counsel for Defenders—D.-F. Mackintosh, Q.C. —Rhind. Agents—W. & F. C. M'Ivor, S.S.C.

Wednesday, September 29, 1886.

OUTER HOUSE.

[Lord Ordinary on the Bills, Lord Kinnear.

CALEDONIAN CANAL COMMISSIONERS *v.* ASSESSOR OF RAILWAYS AND CANALS.

Valuation Cases—Principle of Valuation—Statutory Disabilily to Make Profit.

The Commissioners of the Caledonian Canal were under their Acts forbidden to make profit out of the revenue from tolls, dues, &c., levied thereon. *Held*, in a question as to the valuation of the canal, that in fixing the annual value, deduction should be allowed from the gross revenue of all necessary outlays for management, maintenance, and repairs properly chargeable against revenue, and *quoad ultra* that no deduction should be made.

The Assessor of Railways and Canals fixed the valuation of the Caledonian Canal for the year ending Whitsunday 1887 at the sum of £1537, 6s. 3d.

The Commissioners of the Caledonian Canal appealed to the Lord Ordinary on the Bills, maintaining that the valuation should be *nil*.

They stated that the Assessor, whose duty was to ascertain the yearly value or rent of the canal, being the rent at which, one year with another,