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Saturday, November 17.

FIRST DIVISION.

[Lord Kinnear, Ordinary on the Bills.

SCOTTISH IMPERIAL INSURANCE COMPANY *v.* LAMOND.

Right in Security—Heritable Security—Sale by Creditor—Purchase of Subjects by Second Bondholder.

A proprietor of heritable subjects over which there were two bonds, one of which was postponed to the other, being charged by the second bondholder under the personal obligation in his bond to pay the debt, granted to him a letter of authority, if an opportunity offered within a certain time, to sell the subjects at a price not less than a certain sum. This sale was not effected, but within the stipulated period the first bondholder sold the subjects under the powers contained in his bond, and the second bondholder purchased them at a price less than had been contemplated in the letter of authority. *Held* that there was no relation of trust between the proprietor and the second bondholder; that the sale to him was unobjectionable; and that a second charge on his bond which he gave after the purchase was regular and not subject to suspension.

This was a note of suspension for Henry Lamond of a charge at the instance of the Scottish Imperial Insurance Company to pay the sum of £18,500, with interest and penalty, under deduction of £13,209, 15s. 5d. said to have been received to account. The complainer did not offer caution or consignation.

In 1877 the suspender along with John Miller purchased from Gavin Park certain heritable subjects in Sauchiehall Street, Glasgow, at £41,851, 13s. 9d., the title being taken in the suspender's name. The sum of £18,500 out of the price was allowed to remain a burden on the property, and was secured by bond and disposition in security, dated 8th May 1878, granted in Park's favour. As regarded the personal obligation, this bond was granted jointly by the suspender and Miller, and as regarded the disposition in security, by the suspender only. This bond was postponed to a prior bond for £20,000 granted by Park to the Life Association of Scotland.

The chargers, the Imperial Insurance Company, immediately, by assignation also dated 8th May 1878, took over from Park the bond for £18,500 at a price of £15,000. This had been arranged with him prior to the granting of the bond. No interest was paid upon the bond after Whitsunday 1880, and upon 19th July 1881 the chargers, who had a month previously served the usual intimation, requisition, and protests prior to a sale under the powers in the bond, gave the suspender a charge upon the bond. Upon 21st October 1881, after a correspondence in which sequestration was threatened by the chargers, a mandate was granted by the suspender in favour of the chargers, authorising them, if an opportunity presented, to effect a sale for not less than £40,000, and that this letter of authority be valid up to Candlemas 1882. By a subsequent mandate of 8th February 1882 the power to sell at the same price was continued until 1st August 1882. Each mandate authorised the chargers to sell the subjects, grant all necessary conveyances, and discharge the purchaser, and contained this clause:—"Declaring that the acceptance of these presents, and all and any endeavours to sell the said subjects in virtue hereof, shall in no way prejudice or interfere with the schedules of intimation, requisition, and protest served or to be served in connection with the said bond and disposition in security, or the obligations incumbent on me thereunder." On 21st October 1881, the date of the earlier of these mandates, the charge previously given was withdrawn and cancelled by the chargers. No sale was effected at £40,000. In January 1882 the prior bondholders, the Life Association of Scotland (who had in February 1881 served the usual intimation calling up their bond), advertised the subjects for sale. Previous to their doing so they had had a correspondence with the manager of the chargers' company, in which he requested a short delay, that a private sale which he expected to be effected at a price which would cover both bonds might be carried out, and he also asked them (and they assented) not to name an upset price in the advertisements lest that should be prejudicial to the sale. On 1st February 1882 they exposed the subjects unsuccessfully at £44,000, and thereafter, after further advertisement, they on 21st March 1882 exposed the subjects at £36,000, when they were purchased by the chargers, who were the only offerers at that price. On 19th July 1883 the chargers gave the suspender another charge under their bond, and it was of this charge that suspension was now sought.

In this process of suspension the suspender averred that it was matter of express understanding between himself and the chargers at the time he gave them the authority to sell, that as thus they had the exclusive power to sell and realise, the personal obligation in the bond should be abandoned as against him, and that it was on these terms that the charge was cancelled on 21st October 1881, as already stated. He also averred that in 1881 he could have sold the property for £45,000, or at least for such a sum as would enable him to pay off the bonds, but that he had been by the action of the chargers, in requiring the letter of authority from him, prevented from exercising the means of sale open to him, with the result, as now appeared, that they had taken advantage of their position to purchase the subjects at a price much below their real value, to his great loss. He averred that they were bound to account to him for the sale; and further—"The chargers are bound, as the suspender is advised, to adhere to the terms on which they received the said mandates, and to discharge his said personal obligation and the present charge, or otherwise and failing the first alternative, to indemnify the suspender against the consequences of their violation of the mandates, and to give him credit for the full value of the subjects."

He pleaded, *inter alia*—"(6) The chargers having been in the position of agents and fiduciaries for

the suspender in regard to the realisation of the heritable subjects, and they having wrongfully taken over the said subjects as their own, they are not entitled to enforce the suspender's personal obligation, and the charge should be suspended."

The chargers denied that they had ever undertaken not to enforce the personal obligation of the suspender, and averred that the property had been sold to the best advantage possible. They relied on the terms of the passage above quoted in the mandate to sell.

They pleaded—"(3) The chargers having been entitled to purchase the property as they did, the note should be refused. (4) The mandates or deeds of authority in question having in no way affected the suspender's obligations, or the chargers' rights under the bond in question, or the chargers' right to purchase the subjects, the note should be refused."

The Lord Ordinary (Kinnear) pronounced this interlocutor:—"Having heard parties' procurators, and having considered the note of suspension, answers thereto, and productions, passes the note."

The chargers reclaimed, and argued—No relevant demand had been made for an accounting. The bond and disposition were in ordinary form, and the chargers were only protecting their interests in a legitimate way when they purchased the property for £36,000. There was no collusion between the bondholders.

Argued for the complainer—The chargers were not entitled to give a charge for the whole sum in the bond, since they had given only £15,000 for it. The chargers had stepped out of their position as second bondholders; they were not entitled to purchase the subjects, or at any rate to purchase them for less than the £40,000 named in the deed of authority; they were by the mandate made agents for the complainer. From the averments on record a fair case had been presented for inquiry. There was evidence of collusion in the transaction.

At advising—

Lord President—There are three points upon which this suspension was maintained by Mr Campbell. The first was that the chargers have purchased the complainer's bond for a sum less than the amount contained in it by £3500, and are not entitled to charge for more than the price they paid for it. I do not see any ground at all for that. The second point was, that by the arrangement between the chargers and complainer, by which the power of sale was conferred under what was called the deed of authority, it was arranged that the chargers should not enforce the personal obligation contained in the bond, but should abandon their right to enforce that personal obligation in all time coming. Now, for that position no authority whatever has been cited, and I do not see my way to sustain it. The deed of authority, in which, if anywhere, we should look for such an abandonment of the chargers' right, contains nothing of the kind, but, on the contrary, contains a declaration that "the acceptance of these presents, and all and any endeavours to sell the said subjects in virtue thereof, shall in no way prejudice or interfere with the schedules of intimation, requisition, and protest served or to be served in connection with the said bond and disposition in security, or the obligations incumbent on me thereunder." An obligation incumbent on the person so expressing himself is the personal obligation contained in the bond for £18,500. On that ground also the complainer's case fails. There remains only this further point which was maintained by the Solicitor-General, that the second bondholders and chargers were not entitled to purchase this property at the sale at which the subjects were exposed by the first bondholder. Now, that must depend on the circumstances of the case, and the relation which had been created between the chargers and the complainer by what is called the deed of authority, for it is not suggested as a general proposition that a second bondholder is not entitled to purchase the subject of his security at a sale brought about by a first bondholder. Now, it is necessary to consider what is the exact position of the parties at the time the first deed of authority had been granted. There had been great pressure on Mr Lamond, the suspender, to pay up his debt, and particularly to pay up the interest of the debt, which had been unpaid since Whitsunday 1880. Accordingly, in the month of July 1881 a charge was given on the bond by the Insurance Company, the present chargers, and that charge having expired, of course the complainer was in a position of notour bankruptcy under the recent Act of Parliament, and the instructions which the agents of the chargers received, and which they communicated very distinctly to Mr Lamond, were to apply for sequestration of his estates. Now, it was in that condition of affairs that this deed of authority was granted, and whatever could be said of the object which Mr Lamond had in granting that deed of authority, I think it is plain, on the face of it, that there is no obligation expressly undertaken by the recipient of that deed of authority in favour of the granter. It is an authority and nothing else, with a declaration that nothing contained therein should in the slightest degree affect or prejudice the obligations of the granter. It is a giving of authority and power to the chargers, and nothing else. How it can possibly create the position of truster and trustee, or principal and agent, in any other sense than that it was a mandate, I cannot think. It was a mandate granted chiefly, certainly, for the benefit of the mandatory or of the company. It differed in no respect from the power of sale contained in the bond, and which I suppose was contained in the bond of the chargers, except in this, that it enabled the chargers to sell by private bargain. That really is the only difference between the two. Now, what was it that happened? The holders of this deed of authority, I think, seem to have been very zealous and energetic in their endeavours to get this property sold on the most favourable terms, and the negotiations between Mr Reid, the manager of the chargers' company, and the holders of the first bond indicate to my mind that they were doing everything they could to uphold the character of the property and its value in the market. They were particularly anxious that they should not state the upset price in their advertisement, in order that the value of the property might not be depreciated in the public mind. But it came to this, that the first bondholder insisted on going on with the sale, and when the time came for fixing the upset price, it was no longer possible to conceal what it was to

be. The first bondholder had consented for a long time at the solicitation of the second bondholder, but it was now no longer possible to conceal what the upset price was to be, and accordingly it was stated at £36,000. In these circumstances it seems to me that the chances of the second bondholder being able to take any advantage out of the sale under the deed of authority were much reduced. Nothing under £40,000, nor indeed £40,000 certain, would have paid both bonds with interest and expenses, and the utmost the second bondholders expected was to get something approaching £40,000. It is said £43,000 was talked of, and people do talk always in rather a sanguine way about the value of property when they are going about a sale trying to attract purchasers—that is all very natural. But it was a very narrow margin, supposing they had got all that had been expected by the sale of the property—a very narrow margin indeed beyond the sum requisite to pay off the two bonds with interest and expenses. In these circumstances was there anything to preclude the second bondholder—that is, the chargers—from doing what in the ordinary case they were quite entitled to do, by purchasing the property when it was next exposed to sale? I think there was not. They thought the £36,000 to be a very cheap price for the property, and accordingly bought it at that. I am quite unable to say that they acted in any way illegally. They were not the exposers. If the mandatory had been selling and purchasing the same estate—if they had sold on their own authority—they could not have been the purchasers. That is plain enough. But they had been unable to sell—they could not get a purchaser; and that being the state of matters, and finding the property brought to sale by another party who had a better right than they, namely, the first bondholder, there was nothing in the circumstances of the case to prohibit them buying the subjects in the circumstances. I therefore think the Lord Ordinary was wrong in passing the note.

Lord Deas concurred.

Lord Mure—I also am of the same opinion. It seems to me there is no ground on which the complainer can here insist on the charge being taken at £15,000 instead of £18,500 because the chargers happened to purchase the bond for the former sum. Nor do I think that there was any undertaking to abandon the personal obligation in all circumstances. I think the reservation in the end of the mandate or letter of authority appears to keep open all the rights of parties, because it is expressly declared to be without prejudice to those rights. I think there is more difficulty on the third point, and if the complainer had offered caution with the view of having this question more deliberately tried, I would have had very great difficulty in holding that he was not entitled to have the note passed, but as caution is not offered, I think it cannot be passed in the circumstances of this case. The transaction was in some respects peculiar, but unless we can hold that the rights of the chargers as the holders of the second bond were superseded altogether by the mandatory powers which they received to sell at not less than £40,000, and that they were thereby made trustees for the complainer, and waived their rights as the second bondholders, then it cannot be maintained that they did anything wrong. This case might be argued to fall within the category of cases where there is a violation of duty on the part of a trustee—a person entrusted with the sale of property and who cannot therefore purchase, and so it has been put to us. But I am not satisfied that we could pass the note for consideration of that question without caution. Otherwise I agree with your Lordship.

Lord Shand—If the complainer in this case had presented a case that I thought relevant in itself, I should have said there was a great deal in the view of the Lord Ordinary that the note ought to be passed without caution, for the kind of case which the complainer presents for the consideration of the Court is an alleged breach of duty towards him on the part of the respondent, and if such a case had been relevantly stated, I should have been disposed to hold that it would not have become absolutely incumbent on the complainer to find caution before he was allowed a trial. But my opinion is decidedly that there is no relevant case here, and, rather differing from what has fallen from my brother Lord Mure, even if caution had been found it would not have affected my opinion. I should still be of opinion that this note of suspension should be refused, on the ground that for the complainer there is no case for inquiry. As to the question about the purchase of the bond which the respondents hold for £15,000, whereas it was originally granted for £18,500, of course that was a purchase for their advantage. The chargers have the advantage of that. The complainer's obligation is for £18,500, and he must meet it accordingly. As for the second point—that these mandates were granted subject to a private understanding between the parties, by which, in respect of their being granted, the personal obligation on the complainer was entirely wiped out—it is needless to say it would be impossible to allow proof of such an averment. It could be proved only by writ. The writing that passed contains nothing of the kind, and that point therefore could not be made a subject of inquiry. There remains the question—and it has been put as the only question remaining in the case—whether the circumstance that the respondents took those mandates authorising them to sell the property privately or by public roup at a price not less than £40,000 prevented them making the purchase of the property. I am clearly of opinion that the mandate had no such force. They were pushing Mr Lamond, they charged for payment, and they agreed to withdraw that charge on condition of getting a power or authority in their own favour which would enable them to sell the property if they thought fit at this price, and to sell it by private bargain. If it could be said that in purchasing the property they had done anything improper, the complainer would have had a case against them. But I do not see that in taking that authority it imposed a duty on them of refraining from purchasing the subjects, seeing that they were sold by the first bondholder, or that they had a duty to the complainer in that respect. The property was sold by the first bondholder. The second bondholders, acting independently, had to consider whether they would

or would not buy it. If they had not done that, it would have been certainly putting a mark on the property that it would not sell at £36,000, and that might seriously have prejudiced them afterwards in a sale. I think they were clearly entitled to purchase that property. If indeed it could be made out, and even if it could be averred, that there was collusion between the first and second bondholders in any proceedings by which the second bondholder had excluded competition in the open market for this property, and got it at undue advantage, there might have been a case for inquiry, on the ground that the property had been purchased at an unfair price in consequence of collusive proceedings between exposer and purchaser. But there is no such case. The whole case is rested on the mandate to sell, which was a mere power to the recipients, to be exercised for their own benefit and in their own right. I do not think it affects the purchase which they made of the property when it was exposed by the first bondholder. On these grounds I am of opinion that the note does not present a relevant case for inquiry. If the note were passed, I do not see what the inquiry could be that could possibly result in favour of the complainer, and accordingly, even if caution had been offered, I should have held that the note should have been refused, as I certainly do when it is without caution.

The Court recalled the Lord Ordinary's interlocutor, and remitted to him to refuse the note of suspension.

Counsel for Chargers—J. P. B. Robertson—Dickson. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Complainer — Solicitor-General (Asher, Q.C.)—R. V. Campbell. Agents—W. & J. Burness, W.S.

Saturday, June 9.

OUTER HOUSE.

[Lord Fraser.

CANNON'S TRUSTEES *v.* LAKE AND OTHERS.

Process—Right in Security—Ranking and Sale—Act 1681, *cap.* 17.

The action of ranking and sale is still competent where the power of sale under a bond and disposition in security, or through the trustee in a sequestration, cannot be carried into effect.

The Act of Parliament 1681, cap. 17, introducing the process of ranking and sale, . . . "doth authorize and impour the Lords of the Session, upon a process at the instance of any creditor having a real right, to cognosce and try the value of such estates [estates affected with real rights exceeding their value] where the heretor is notouriously bankrupt, and the creditors in possession of the estate, and to value the same according to the true worth thereof in its rents, casualties, rights, and holdings, according to the usual custom of the county where the lands lye, and to commission persons to sell these lands and estate, or any part thereof, at the said rates or more as can be had for the same, with consent of the debtor where there is a legal reversion competent to him, and without his consent where there is no legal, and ordains the sale to be by public roup . . . Declaring alwaies that the price that shall be gotten for the said lands conform to the roup shall be distribut by the commissioners appointed to sell the lands, or by the purchaser of the same, amongst the creditours proportionally according to their several sums, rights, and diligences, as they are or shall be ordered and found preferable by the saids Lords, whether the saids creditours have compeared or not."

On 9th April 1877 Henry Lake, builder, Newton Grange, Edinburgh, borrowed from David Curror and C. N. Cowper, as trustees for the firm of Curror & Cowper, S.S.C., the sum of £3000 "out of the funds in the hands of the said firm belonging to other parties." For payment and in security of this sum he granted bond and disposition in security, dated the 9th, and recorded in the Register of Sasines the 19th April 1877, by which he undertook to repay the said sum with interest at 5 per cent., and in security disponed two building stances, and the houses built or to be built on them, in Ramsay Road, Portobello. Thereafter, by assignation dated 23d June, and recorded in the Register of Sasines the 4th July 1877, Mr Curror and Mr Cowper, as trustees for Messrs Curror & Cowper, in consideration of the sum of £3000, which, according to the narrative was paid to them by (1) William Blackhall to the extent of £800, (2) Alexander Cannon to the extent of £800, (3) the trustees of the deceased William Thomson to the extent of £800, and (4) the trustees of a Mrs Colston to the extent of the remaining £600 of the said £3000, assigned to each of these four parties, to the extent of the said sums, the bond and disposition for £3000, and also all and whole the subjects conveyed in it by Lake in security in the original bond. The assignation provided and declared that the sums of £800, £800, £800, and £600 in it contained, and penalties corresponding thereto if incurred, should be ranked and preferred *pari passu* on the subjects, and the rents and duties thereof, and also on the price thereof in case of a sale, and that without regard to the order or priority in which the several sums were mentioned therein.

Thereafter Mrs Colston's trustees assigned away their interest in the assignation. At the date of this action a Mrs Stewart and Mary Hamilton Stewart, both of whom were defenders of this action, were vested in that interest. Thomson's trustees also assigned their right, and at the date of this action it was vested in (1) the trustees of a Mrs Stewart; (2) the trustees of a Mrs Hogge; (3) a Mr Stewart; and (4) the trustees of another Mrs Stewart—all these persons were defenders in this action. Mr Blackhall assigned his interest of £800 to the extent of £300 to certain other parties, who were also defenders, retaining the remaining interest of £500.

Lake became bankrupt and was twice sequestrated, first in 1879, when Charles Prentice, C.A., was appointed trustee, and again in 1882, when G. S. Ferrier, C.A., was appointed trustee. Neither trustee had sufficient funds wherewith to pay the debts. Both trustees were called upon, under secs. 112 and 113 of the Bankruptcy Act 1856, to sell the subjects in the security. This