

of intromissions; and further, reserves *in hoc statu* the question of expenses.

*Note.*—Questions of considerable difficulty have arisen here, as the Lord Ordinary anticipated as probable when he allowed proof under the terms of the interlocutor of 1st February last; but although the Lord Ordinary is still conscious of the delicacy of the matter in point of law, he has come with some confidence to the conclusion that the judgment now pronounced is in accordance with the true intent and purpose of the deceased Mr Craig in making the written renunciation set forth in the third head of the condescendence."

The defenders reclaimed.

WATSON and GUTHRIE, for them, contended that the proof allowed by the Lord Ordinary was incompetent, except to the extent of proving the authenticity of the document founded on by the pursuer. A declaration of trust could only be proved by the trustee's writ or oath; and although the document in question was in Mr Craig's handwriting, it did not amount to an acknowledgment that the subjects were held by him in trust either for David Miller or anyone else.

SOLICITOR-GENERAL (CLARK) and RUTHERFORD, for the pursuer, maintained that the granting of the documents to Mrs Patrick and herself could only be explained consistently with the existence of a trust in Mr Craig for behoof of Miller during his life, and on his death for their behoof as beneficiaries under his settlement. The reason of the title being taken in Craig's name was that Miller as bondholder could not lawfully purchase the property after having exposed it to sale in virtue of the powers contained in the bond, but it was not proved that Craig paid the price alleged. Cases referred to—*Duncan v. White*, M. 12,761; *Robson v. Bywater*, 19 March 1870, 8 Macph. 757; *Taylor v. Watson*, 8 D. 400; *Macfarlane v. Fisher*, 15 S. 978, 23 May 1837.

The Court unanimously recalled the Lord Ordinary's interlocutor, and dismissed the action.

Their Lordships were of opinion that as this was an action of declarator of trust, the conclusions could only be proved by the writ or oath of the trustee. The writ here produced, though sufficient to meet the requirements of the statute, did not sufficiently instruct a trust for behoof of Miller. Lord Benholme was of opinion that a writ of declarator of trust must be delivered by the trustee to the person in whose favour it was intended to operate. In the present case the document had not been delivered to Miller, but to his two nieces.

Agents for Pursuer—Hill, Reid, & Drummond, W.S.

Agents for Defenders—M'Ewen & Carment, S.S.C.

Tuesday, June 6.

DUFFY v. MUNGLE.

*Landlord and Tenant—Sub-tenant—Injury—Damages.* A having purchased a house and adjacent ground, proceeded to erect an adjoining house, and made use of the gable of the first house for this purpose, to the injury of a sub-tenant, who occupied it. In an action at the instance of the sub-tenant, plea repelled that the landlord had bargained with the principal tenant for the injury done, and

that it was *jus tertii* of the sub-tenant to object, although he might have an action against the principal tenant who had granted him his sub-lease; and action sustained and decree for damages granted.

This was an action brought by Mrs Duffy, draper and general merchant, Mid-Calder, against Alexander Mungle, farmer, Muirhouse Mains, concluding for damages in respect of injury sustained by the pursuer through certain operations of the defender upon the house and shop occupied by the pursuer, and of which the defender was the landlord.

The circumstances of the case sufficiently appear from the following interlocutor and note of the Lord Ordinary (ORMIDALE):—

*Edinburgh, 20th March 1871.*—The Lord Ordinary having heard counsel for the parties in the case, and considered the argument and proceedings, including the proof,—Finds, as matter of fact, that the defender, in or about the months of October and November 1870, wrongously executed certain operations on the west gable of the house in West Calder then in the lawful possession and occupation of the pursuer, as sub-tenant thereof, to her loss, injury and damage: Finds therefore, in point of law, that the defender is liable in damages to the pursuer; assesses said damages at the sum of £40; and decerns therefor against the defender: Finds the pursuer entitled to expenses; allows her to lodge an account thereof, and remits it, when lodged, to the Auditor to tax and report.

*Note.*—Although the proof in this case is somewhat voluminous, the circumstances necessary now to be noticed may be shortly stated.

"The defender, in the course of last year, purchased the house in question, which was then in the possession and occupation of the pursuer, as sub-tenant thereof under the principal tenant, Mr Hunter. Her right as sub-tenant extended to Whitsunday next 1871. The house consisted of two apartments, one to the front and one to the back. The front apartment was occupied by the pursuer as a shop, and she kept in it her stock of goods, consisting of clothes of various kinds and ironmongery. The pursuer's back apartment was used by the pursuer and her family as their dwelling place, and it is alluded to in the proof as the kitchen.

"The defender also purchased some ground adjoining the pursuer's house, and on that ground he took measures for building another house, a storey higher than the pursuer's; and he proposed to avail himself of the existing west gable of the pursuer's house by making it answer as one of the ends or gables of the new house. He accordingly obtained from Mr Hunter, the principal tenant, the missive No. 7 of process, whereby that individual agreed, for the consideration therein stated, to the defender 'building upon the wester gable' of the pursuer's house. But in this missive no mention is made of any intention on the part of the defender to break into the existing gable of the pursuer's house, or otherwise to interfere with it, further than to build upon it. Nor did Mr Hunter, either by the missive or otherwise, undertake anything for the pursuer. It does not appear, indeed, that Mr Hunter had any right to authorise operations injurious to the pursuer, or inconsistent with the right of possession vested in her as sub-tenant; and he did not do so. The defender was, for anything disclosed in the proof, left to make his own terms with the pursuer.

"But the defender did not apply for or obtain any consent from the pursuer for his building operations, nor was any explanation or notice regarding them made to her before they were commenced. Not only, however, did the defender build his new house in connection with that occupied by her, but in doing so he slapped out places in the west gable of her house for two fire-places, nearly opposite to the fire-places in her house—one being opposite to the fire-place in her kitchen or back apartment, and the other opposite to the fire-place in her shop or front apartment. A new vent was also formed in the pursuer's gable by the defender, from his fire-place opposite the pursuer's kitchen, for a height of about 8 feet from the ground, where it joined or intersected the pursuer's vent. The vent from the defender's fire-place opposite the fire-place in the pursuer's shop or front apartment was formed by connecting it at once with the existing vent from the fire-place in the pursuer's shop or front apartment.

"In addition to these operations, the defender, in raising his new house a storey higher than the pursuer's house, cut through part of her house, where the roof commenced, thus exposing her premises, more or less, to the fall of rain, dust, lime, and other materials.

"The consequence of the defender's operations altogether was to prevent the smoke getting away from the fire-place in the pursuer's kitchen or back apartment, and to cause her loss and damage in the various ways after alluded to.

"The Lord Ordinary cannot see any room for reasonable doubt on the proof that such are the circumstances of this case; and if so, there can be as little doubt, he thinks, that the defender is liable in damages to the pursuer.

"It was contended, however, for the defender, as the Lord Ordinary understood the argument of his counsel,—1st, That the pursuer's claim, if she had any at all, was not maintainable against him, but against Mr Hunter, the principal tenant, from and under whom the pursuer had her right to the premises. The Lord Ordinary cannot assent to this view. The pursuer was in the lawful occupation of her house as sub-tenant thereof when the defender commenced, and during the whole time he carried on, his operations; and the proof shows that he was all along quite aware of this. And yet he proceeded with his operations without leave asked or given, so far as the pursuer was concerned. If, therefore, these operations were wrongous, either in themselves or owing to the negligent or unskilful way they were executed by the defender, it appears to the Lord Ordinary that the defender must be answerable to the pursuer for the consequences, and Mr Hunter might also be answerable to the defender for these consequences if he had authorised the operations which caused them. But there is no evidence that Mr Hunter did authorise them. He stated, in the course of his examination as a witness, that he never did authorise them; and the Lord Ordinary cannot read the letter or missive, No. 7 of process, on which exclusively the defender relies, as containing any such authority. The result, therefore, of holding that the defender is not liable, would be to leave the pursuer without a remedy.

"The defender maintained, 2dly, that his operations were in no sense wrongous, as he was the proprietor of the pursuer's house and adjoining ground, within the limits of which all the opera-

tions in question were carried on; and therefore, that he was entitled to deal as he pleased with what belonged to himself. But the Lord Ordinary cannot assent to this proposition, which, in the circumstances of the present case, he holds to be quite untenable. The defender might perhaps have operated on the house in question as he pleased if the pursuer had had no right to it, and had not been in the lawful occupation of it. But she had for the time a perfectly valid right to the house as sub-tenant thereof, and was, as such, in the lawful possession and occupation of it. The defender was therefore no more entitled to operate or carve on her gable, so as to cause her injury and damage, than he would have been entitled to pull down her house about her ears. The Lord Ordinary, therefore, cannot doubt that the operations complained of by the pursuer were wrongous, so far as she was concerned.

"But, 3dly, the defender contended that as the operations complained of were executed not by him personally, but by a contractor, the latter is alone liable. It appears to the Lord Ordinary that in the circumstances of the present case, there is no room for this view of the matter. He holds it to be unquestionable law that, although a person employing a contractor to do a lawful act is not responsible for the negligence or misconduct of the contractor or servants in executing that act, yet, if the act itself is wrongful, the employer is responsible for the wrong so done by the contractor or his servants, and is liable to third persons who sustain damage from the doing of that wrong. Such was the law given effect to in the case of *Ellis v. The Sheffield Gas Company*, 2 E. and B. 767, cited in argument for the defender himself. In that case, accordingly, Lord Campbell (C.-J.) said, with reference to the argument addressed to the Court for the wrong-doer:—'Mr Jones argues for a proposition absolutely untenable, viz., that in no case can a man be responsible for the act of a person with whom he made a contract. I am clearly of opinion, that if the contractor does the thing which he is employed to do, the employer is responsible for that thing, as if he did it himself.' Now in the present case it appears very clearly from the proof that the operations complained of were authorised by the defender, and that the necessary consequences of their being executed, however skilfully and carefully, were just those which occurred. The testimony of the defender's architect, Mr Waddell, and of his builder, Mr Mitchell, is plainly and unmistakably to this effect.

"The pursuer maintained, in the last place, that it had not been proved that the damage sustained by the pursuer was occasioned by his operations. This being entirely a question of fact on the proof, the Lord Ordinary need only refer to the proof, which he thinks amply supports the contention that she has sustained loss, injury, and damage by and through the defender's operations.

"The only question that remains is the amount of damages to which the pursuer is entitled. That her stock of new soft goods was injured to the extent of £19, 6s. 11½d. is proved by her witnesses M'Gregor and Forrest, who appeared to the Lord Ordinary to be persons of intelligence and skill in the matters spoken to by them. But besides the loss and damage spoken to and proved by M'Gregor and Forrest, the Lord Ordinary thinks there is sufficient evidence to show that

the pursuer must also have sustained loss and damage in consequence of the defender's operations—1st, In goods which were not examined or spoken to by M'Gregor and Forrest, viz., soft goods, consisting partly of what had been sold by her before their inspection took place, and partly of old or second-hand things which they did not examine; 2dly, In ironmongery goods, and the furniture of the house; 3dly, In loss of custom arising from the condition in which the premises were for some time; and 4thly, In the discomfort and inconvenience to which she and her family were subjected. It would be difficult, perhaps impossible, to estimate with exactness the amount of loss and damage sustained by the pursuer in these various ways; but, judging of the matter as a jury would probably do, the Lord Ordinary believes he is within rather than beyond very moderate limits when he assesses them at £20, 13s. 0½d., which, with £19, 6s. 11¼d. spoken to by M'Gregor and Forrest, make £40, being the amount of damage decerned for."

The defender reclaimed.

GUTHRIE SMITH for him.

BLACK, for the pursuer, was not called on.

The Court adhered.

Agent for Pursuers—David Forsyth, S.S.C.

Agent for Defenders—William Milne, S.S.C.

Wednesday, June 7.

## FIRST DIVISION.

### SPECIAL CASE—MACMORINE AND OTHERS.

*Faculty—Trust—Fee—Vesting—Clause—Construction.* Circumstances in which it was held that a power of disposal given in a trust-deed did not entitle the person on whom it was conferred to execute a deed in his own favour, and demand a conveyance from the trustees,—the power being restrained, among other things, by the fact that over its subject certain legacies were secured, which were not payable till the death of the person gifted with the power; and that a substitution of another person, failing the assignee of the person gifted with the power, showed it was a mere faculty of appointment, only exercisable in a deed to take effect after death.

This Special Case arose under the trust-disposition and settlement of the late Miss Eliza MacMorine. The parties to it were:—

1. George MacMorine, the brother of the said testatrix, and a beneficiary under her settlement, and at the same time proprietor of one-half *pro indiviso*, in his own right, of the property of Glenarm, the other half *pro indiviso* of which belonged to the testatrix, and was disposed of by her settlement.

2. The trustees acting under the said trust-disposition and settlement of Miss MacMorine.

3. General Maxwell of Portrack, a conditional residuary legatee under the settlement.

By her trust-disposition and settlement Miss MacMorine left to her trustees, the second parties to this case, her whole heritable property, including the one-half *pro indiviso* of the estate of Glenarm; as also her whole moveable property.

The first four purposes of this trust were for payment of lawful debts, &c., and of certain legacies, and for the provision of certain annuities, to meet which about £1600 of the trust funds were

required. The trust-deed then proceeded:—"And lastly, for conveying or paying over to the said George MacMorine, during all the days of his life, in the event of his surviving me, the annual income or produce of my said estate and effects above conveyed, under deduction of said legacies;" "and upon the lapse of three months from his (George MacMorine's) death in the event of his surviving me, or on the lapse of six months from my death in the event of his predeceasing me, for payment of the following legacies, videlicet:" (then followed an enumeration of legacies to the amount of about £3000), "and for conveying or paying over to the assignees of the said George MacMorine in the event of his surviving me, in fee, and failing such assignees, or in the event of the said George MacMorine predeceasing me, for conveying or paying over to the said Colonel John Harley Maxwell, and his heirs or assignees, in fee, the residue and remainder of my said estate and effects; and in respect I believe that my heritable property will be more than sufficient for the said legacies, bequeathed by the last purpose of this trust, I give and grant to my said trustees full power, should they at any time during the subsistence of this trust, see it to be for the advantage of the said George MacMorine to advance, and convey, and pay over to him such portion of the said personal estate and effects as they may resolve upon, and in the event of a deficiency of funds for meeting these legacies after such advance, the said trustees shall not be liable therefor, but my said legatees shall rank proportionally upon the estate retained by my said trustees." By a codicil to her settlement Miss MacMorine left farther legacies amounting to nearly £3000, to be paid like those in the last narrated clause of her settlement, six months from the date of her own death, or three months from the date of her brother George's death, should he survive her and enjoy the life rent provided him.

The total value of the trust-estate, exclusive of the heritable property, was about £9000, as given up in the inventory. There was therefore amply sufficient to meet the legacies and other payments of the first class, amounting, as already said, to £1600, and also to provide for the legacies of the second class, amounting to less than £6000, payable after the death of George MacMorine, and the termination of his life rent.

On the other hand, the value of the heritable estate was between £4000 and £5000, and therefore insufficient to pay or secure the said legacies of the second class, payable after the death of the first party.

Upon the construction of this settlement certain questions arose between Mr George MacMorine, the first party, and General Maxwell, the third party, chiefly connected with the power of disposal of the residue conferred upon the former.

"According to the construction of the last purpose of the said trust-deed contended for by Mr MacMorine, the said first party, he is entitled to the life rent of the residue of Miss MacMorine's trust-estate, with an absolute power of disposal of said residue, either by testamentary settlement or deed *inter vivos*. Upon this assumption, Mr MacMorine, the said first party, executed upon 2d December 1870 an assignment, disposition, and appointment of the fee of the said one-half share *pro indiviso* of the estate of Glenarm, &c., now vested in said trustees, in favour of himself, the said George MacMorine, and his heirs whatsoever,