

The Court granted the prayer of the petition, with expenses.

Counsel for Petitioners—Trayner—Pearson.  
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Saturday, January 24.

## SECOND DIVISION.

[Lord Curriehill, Ordinary.]

PARKS v. ALLIANCE HERITABLE SECURITY COMPANY (LIMITED).

*Sale—Debtor and Creditor—Sale by Creditor in virtue of an Ex facie Absolute Disposition—Articles of Roup.*

A heritable creditor holding, *inter alia*, an *ex facie* absolute disposition of his debtor's property, qualified by a back-letter, sold the property upon ten days' notice, which in terms of his security he was entitled to do in a certain event which happened. The debtor brought a reduction of the sale, on the grounds, *inter alia*, that the creditor only held on a security title, and had failed to give him due notice of the sale, or to advertise it sufficiently in accordance with usage; and further, that the articles of roup were unfair in their conditions, and prejudicial to his interests. The Court held (1) that the creditor, holding under an *ex facie* absolute disposition, and there being no stipulation for any formality in connection with the sale, except the notice which was given, was entitled to sell as if he were absolute proprietor; and (2) that though the articles of roup were in some respects open to objection, there was no such defect as entitled the debtor to the remedy he sought—it being observed that an action of damages was still open to him.

*Observations (per curiam)* on the distinction to be drawn between the cases where a creditor holds on an *ex facie* absolute disposition, and where he holds merely under a bond and disposition in security with a power of sale.

*Observations* upon the requisites of articles of roup; and *opinion* that where a Heritable Security Company was selling certain property in the execution of its business, it was not necessary that the articles of roup should be authenticated by the company seal or by the signatures of the directors.

The pursuers in this action were formerly proprietors of certain heritable property in Glasgow, having acquired it from their father Gavin Park by disposition dated June 30, 1876. In view of building operations which they contemplated upon that property, they obtained from the defenders, the Alliance Heritable Security Company, a loan of £7000. The following deeds were granted by the pursuers in security—(1) a disposition *ex facie* absolute, dated November 3, 1876, on which the defenders were infeft on November 4. This disposition, *inter alia*, provided and declared that

the defenders should have all the rights of absolute proprietors in and over the said subjects so long as any part of the said loan of £7000, or of any further advance, and interest and disbursements, should remain unpaid, and that in the event of the pursuers allowing a full half-year's payment of £425, 5s., or any part thereof, to remain unpaid for fourteen days after the date when the same should respectively fall due and be payable—which, in the option of the defenders, should constitute a default within the meaning of the bond—it should be lawful to and in the power of the defenders, on giving to the pursuers ten days' previous intimation in writing under the hands of their managers or secretaries, or one of them, to be in their option delivered personally to the pursuers or transmitted by post to their address as given in the bond, without any other or further intimation or process of law whatever, to sell the said subjects or any part thereof, "and that either by public roup or private bargain, and with or without advertising, and at such time or times and place or places, and in such lot or lots, all as the said company or their foresaids shall think proper, and to grant a disposition thereof in favour of the purchaser or purchasers thereof, binding us or our foresaids in absolute warrandice; which dispositions and all other deeds or conveyances by the said company or their foresaids, alone, in favour of the purchaser or purchasers, shall be good and sufficient to the grantee or grantees, without any consent of us or our foresaids." (2) A back-letter by the company reciting that the conveyance was in security of an advance of £7000. (3) A bond by the pursuers for said sum, repayable by 24 instalments of £425, 5s. on the 15th May and 11th November of each year, and providing that in the event of default the company should have all the rights of absolute proprietors, and be entitled on ten days' previous notice to enter into possession and sell the property. (4) A back-letter by Messrs J. & W. Pollard, stating that £5750 of said loan had been handed to them by the pursuers on deposit accounts for the purpose (1) of being applied with the interest thereof, when the company should think it expedient, in or towards discharging incumbrances affecting the subjects; (2) of paying instalments due on the buildings, as the buildings on the ground went on; and (3) that in the event of the pursuers failing to finish the buildings to the satisfaction of the company's valuator, the money in its hands should be applied in such a way as the company might think proper, towards the completion of the buildings or in repayment of the advance.

The buildings were proceeded with, and were alleged by the pursuers to be finished and worth £9350; the defenders averred that the buildings were only imperfectly finished, and not worth nearly so much.

The pursuers failed to pay the instalment of £425, 5s. due at Whitsunday 1878, and notice was sent to them on 31st May that the property would be advertised for sale. Further notice was sent on 11th June that the property would be sold in ten days, and on 31st July the property was exposed for sale by public roup at the upset price of £7000, and after some competition was sold for £7400 to George Mackenzie, coalmaster, Glasgow, who, however, afterwards brought an action to have it found that the sale could not be

enforced as against him, in which he was successful, and the sale then devolved on the next offerer, Thomas Wilson, writer in Glasgow, who had offered £7370. This action was for the purpose of reducing the articles of roup, and also the minute of enactment at the end of the articles, bearing, *inter alia*, that George Mackenzie was preferred to the purchase. A number of objections to the sale and the articles of roup were stated by the pursuers as grounds of reduction. Mackenzie and Wilson were called as defenders along with the company for their interest.

The following were the pursuers' pleas—“(1) The defenders, the Alliance Company, having only a security title over the subjects in question, and having failed to give any fair or due notice to the pursuers of their intention to sell the subjects, or a statement of their claim against the pursuers, and having failed to advertise the sale according to the statutory requirements and the usages of the profession, the sale ought to be reduced. (2) The articles of roup not having been lawfully signed or sealed on behalf of the said company, they, and the pretended sale which followed thereon, ought to be reduced. (3) The said articles having conditioned that a judge of the roup should be appointed, who alone had power to prefer the purchaser to the subjects, and as no such judge was appointed, the said pretended sale was invalid. (4) The said articles and conditions of roup having been unfair in their conditions, and prejudicial to the legal rights of the pursuers, the said articles and conditions of sale, and the sale which followed thereon, ought to be reduced. (5) The defenders, the said Alliance Company, having concealed the fact that they held the property simply in security of a debt, and that they were in reality bondholders with a redeemable title, the sale ought to be reduced, and the defenders, the said Alliance Company, should be found liable in expenses. (6) The pretended sale in question having been made in disregard of the pursuers' rights, and greatly to their prejudice, the same should be set aside.”

In reference to the 4th plea the pursuers averred—“(Cond. 5) . . . The first condition of the articles of roup provided that the property was to be sold under all the ‘real burdens, &c., specified in the titles, or to which the same are otherwise liable.’ At the same time, no titles or searches to show the burdens were exhibited. The only title exhibited at the sale, or to inquirers after the property, was the said disposition by the pursuers to the company, which did not disclose any real burden, but referred to prior titles for their disclosure, and the articles provided that that writ should be held a sufficient and valid title, and also a good title to the exposers to the subjects, and right to sell the same, as also as to the rental, valuation, extent, or description of the subjects, and that the purchasers should not have right to require exhibition of any titles other than those before referred to, or any searches in the register of sasines or diligence record, on any ground whatever, or to retain any part of the price on any allegation or pretext of arrears, or on the ground of defective title, or alleged deficiency of the rental, value, or extent of the feu-duties, ground-annuals, or arrears thereof, or any other ground whatever. (Cond. 6) The titles exhibited to the purchaser did not disclose the amount of the feu-duty, ground-annuals, nor the

burdens and servitudes affecting the subjects. No rental, value, or statement of the extent of the subjects was set forth in the articles, nor was there any other means given whereby intending purchasers could ascertain what was the real rental or extent of the subjects, and yet the defenders, the said company, conditioned that the purchasers should be satisfied with the statements as contained in the articles and disposition. The company did not exhibit the foresaid bond by the pursuers in its favour, nor the back-letters, nor copies thereof, as instructing their power of sale. These were all purposely withheld, and it was thus impossible for intending purchasers to satisfy themselves as to the company's power to sell the subjects. The pursuers were not requested to become parties to the articles of roup as they ought to have been. If these had been subscribed by them this would have increased the value of the subjects. (Cond. 7) The said company, the exposers of the subjects, while it made those unusual conditions which were also injurious to the interests of the pursuers, unfairly withheld from intending purchasers the prior titles of the subjects which it had, and which consisted of the following documents—[*specifies them*]. These three titles relate exclusively to the subjects in question, but they were neither to be delivered along with the disposition of the subjects nor exhibited to intending purchasers. There are also earlier and more extensive title-deeds, of which, according to the deeds above referred to, the exposers might have called for exhibition. But the articles of roup are silent regarding them, beyond stating that the exposers shall assign all right competent to them to demand their exhibition. Nevertheless, the sixth condition of the articles of roup states that the purchaser and offerers shall be held to have satisfied themselves with the said writ, and that the disposition to themselves and the articles of roup shall form a sufficient title, and that they shall not thereafter be entitled to require further or other titles than these two. The defenders, the said exposers, were well aware that the last-mentioned disposition and the articles did not of themselves form a valid title to the subjects. They also had completed searches against the subjects in their possession down to and including the disposition by the pursuers in favour of the company. These searches were also unduly withheld from exhibition and delivery to intending purchasers, although they disclosed a clear search. Their having been so withheld depreciated the value of the subjects and injured their sale.” It appeared that the defenders' agents had it in their power to obtain possession of these titles from the pursuers' agents, to whom they had been lent on a borrowing receipt.

The articles further provided that the conveyance to be granted by the exposers should contain a clause of warrandice from the exposers' facts and deeds only, whereas by the disposition from the pursuers upon which they held the subjects they were authorised to bind the pursuers in absolute warrandice. There were also various other objections, such as that interest at 10 per cent. was to be charged on the full price from date of entry, &c., which it is not considered necessary to specify.

The Lord Ordinary (CURRIEILL), after a proof and various other procedure, on 24th March 1879 pronounced the following interlocutor:—“The

Lord Ordinary having considered the cause, Finds that on the pursuers . . . finding caution to the extent of £1000 for all loss and damage which may be sustained by the defenders in the event of the subjects libelled being hereafter sold by them and realising a price insufficient to meet the debts due to them by the pursuers, and all claims competent to them against the pursuers, in security of which debts and claims the said property is held by the defenders, the pursuers will be entitled to decree of reduction as concluded for . . . and grants leave to both parties to reclaim." His Lordship added this note—

"*Note.*— . . . Now, the law applicable to a case like the present is, that although the seller holds the property under a disposition *ex facie* absolute, and as such is entitled to bring the property to sale, he must do so with a due regard to the interests of the disponent, and he is not entitled, wilfully or recklessly or negligently, and in disregard of these interests, to conduct the sale in a manner calculated to prevent the full value of the subjects from being realised. It is unnecessary to refer to authority on such a question, but the case of *Simson v. M'Lellan*, 16th March 1770, 2 Paton's App. 227, may be mentioned as illustrating the principle to which I have referred. In that case the House of Lords, affirming the judgment of the Court of Session, decided that irregularities in a sale carried through by a party holding a disposition *ex facie* absolute, but truly in security, whereby an unduly small price was obtained for the property, did not relieve the disponent from his liability to account for the full and true value of the subjects in a question with the disponent. In that case a reduction of the sale was not attempted, but the sale was allowed to stand good, an option being given to the seller either to reconvey the subjects to the debtor on payment of the debt, or to account for the full value of the property irrespective altogether of the price which had actually been obtained at the sale.

"In the present case it is alleged that the defenders conducted the sale of the property with such wilful disregard to the interests of the pursuers that the subjects realised much less than their true value; and reduction of the sale is sought on that ground. Mackenzie, the purchaser at the sale, is not only not defending this action, but in a separate process of suspension (in which, however, he is represented by the agents of the present pursuers) he is seeking to get rid of the purchase altogether, on precisely the same grounds as are pleaded by the pursuers in support of the present action of reduction. It is impossible not to suspect that the pursuers, their father—Gavin Park—and Mackenzie have been for some time acting in concert in this matter. [His Lordship then gave his reasons for thinking so]. But although these circumstances are, as I have said, somewhat suspicious, and ought not to be lost sight of in dealing with this case, I cannot say that enough has been proved to disentitle the pursuers to have the grounds of reduction fully considered.

"Several pleas are stated against the validity of the sale, many of which may be disposed of in a few words.

"The first plea-in-law for the pursuers is— [reads plea as above].

"That plea would have been a very good one

if the title of the defenders had been an ordinary bond and disposition in security, because under such a title no sale can be effectually carried through by the creditor unless the strict statutory requirements as to notice, advertisement, and the like, are duly attended to. But, as has been already explained, the defenders were not *ex facie* security holders, but were *ex facie* absolute disponents, and as in a question with the pursuers they were entitled to exercise all the powers of absolute owners, except in so far as they were limited by the other deeds granted in connection with the disposition. Now, in the first place, a sale was to be competent as soon as the pursuers were in default of payment of any one instalment in whole or in part.

"It is not pretended by the pursuers that they were not in default, at least as regards one of the instalments. They had paid nothing at Whitsunday or Martinmas 1877, but, on the other hand, it is not maintained that the non-payment of these instalments was default, seeing that at that time the work of the building was still going on, and the whole of the loan had not been advanced to the pursuers. But at Whitsunday 1878 the instalment then due was not paid, and after giving credit to the pursuers for the sum of £295, being the last remaining portion of the deposit in the hands of the defenders, a considerable portion of the instalment payable at Whitsunday 1878 remained unpaid, and the defenders were in the position of being not only entitled, but expressly authorised to sell the property. Then, as I have said, they duly gave the notice that was required of them; indeed they gave several notices more than was required. Further although they were authorised, to sell either by public roup or by private bargain, and that with or without advertisement, as they should see fit, they determined to sell by public roup, and made ample and repeated advertisement.

"The first plea-in-law, therefore, being wholly unfounded in fact, must be repelled.

"The second plea is—[states plea as above]. This is a very technical plea, and I think no effect ought to be given to it. The business of the defenders' company was to deal in transactions of which the present is a very good illustration. They were to advance money on loan to enable persons to purchase property or to build houses, and they had power to sell the property in the event of any irregularity in the repayment of the instalments of the loans. Their managers, who had full power to act for them in these matters, ordered the subjects to be advertised and exposed to sale, and signed and sealed the articles of roup. It does not appear to me that such a document should be authenticated either by the seal of the company or by the signatures of any of the directors. The managers are proved to have had full authority to conduct this part of the business without invoking the assistance of any of the directors. When a formal disposition of the property comes to be granted in favour of the purchaser, it may then be, and I think probably would be, necessary for the seal of the company to be affixed and authenticated, not only by the managers, but by two or more of the directors themselves. But for the mere purpose of carrying on the trade of the company, which partly consists in selling property of this description, it appears to me that the seal of the com-

pany attached to the articles of roup is a superfluity and unnecessary. (See the case of the *South of Ireland Colliery Company v. Waddle*, June 17, 1869, L.R., 4 C. P. 617).

"The third plea is—[states plea as above]. This objection, like its predecessors, appears to me to be untenable. Were it to be sustained, I believe that there are few sales of heritable property under articles of roup which would not be found to be liable to the same defect. The name of the judge is left blank in the articles, because until the actual sale it is not known, and cannot be known, who will be the auctioneer conducting the sale; and the ordinary course of procedure (which was that followed in the present case) is for the auctioneer to sign the minute of enactment as judge, adding the word 'judge' to his signature.

"Omitting the fourth plea-in-law in the meantime, I pass to the fifth, which is—[states plea as above]. I am of opinion that this plea is utterly unfounded. So far from thinking that it would be an advantage to the pursuers to have the fact disclosed that the sellers were merely security holders, it appears to me that a sale by an *ex facie* absolute owner is much more likely to be beneficial to the debtor than a sale ostensibly by a creditor. But be that as it may, the defenders were under no obligation, legal or moral, to disclose, neither was it a matter of expediency that they should disclose, on the face of the articles of roup, that they were not truly owners of the property.

"The sixth plea-in-law is—[states plea as above]. On this branch of the case there has been no attempt on the part of the pursuers to show that at the time when the sale took place a larger price could have been got for the property than that offered by Mackenzie. It is proved, however, that at the date of the loan transaction in November 1876, and while the buildings were only a little way above the ground, the property had been prospectively valued by Mr Smellie at about £9000. On the other hand, the defenders have proved that in and before July 1878, when the sale took place, there had been a great fall in the value of house property in Glasgow; and four valuers of acknowledged skill and responsibility have, without any attempt on the part of the pursuers to contradict them, given it as their opinion that it was judicious to expose the property at the upset price of £7000, and that the price of £7400, at which it was knocked down to Mackenzie, was its fair value at the time.

"Now, although it is expected, and probably not without reason, that the value of such property will again rise, the defenders were not bound to continue to hold the property after the pursuers began to be in default in paying up the instalments of the loan; and in the face of the evidence of these valuers the pursuers must make out a very strong case of irregularity on the part of the defenders in conducting the sale to entitle them to have effect given to their 4th plea in law, that—[states plea as above]. But I am bound to say that in some respect the articles of roup are undoubtedly calculated rather to repel than to invite competition. It appears that although the defenders or their agents were not at the date of the sale actually in possession of the title-deeds and searches relating to the sub-

jects, except the disposition in their own favour and the bond and back-letter, they had it in their power to obtain the prior titles and searches from the pursuers' agent, to whom they had been lent on a borrowing receipt. Nevertheless, in the 6th article of roup they set forth that the disposition referred to shall alone be delivered to the purchaser, and that the expositors shall merely assign all right competent to them to demand exhibition or delivery of the prior or other writs; that the purchasers and offerors by offering at the sale shall be held to have satisfied themselves that the said writs form a sufficient and valid title, and shall not have right to object to the same or any of them thereafter, or to require further or other titles than those before referred to, or any searches in the sasine or diligence records, upon any ground whatever, or to retain any part of the price on the allegation or pretext of any error, defect, invalidity, informality, or deficiency of the said title-deeds or others, and that the purchaser should not be entitled to call upon the expositors to procure the consent or signatures of any person or persons other than themselves. It is also provided in article 5th that the disposition or conveyance to be granted by the expositors should contain a clause of warrandice from the expositors' facts and deeds only, whereas it will be remembered that they were expressly authorised to bind the pursuers in absolute warrandice. Now, I think that these conditions are calculated not only not to invite competition, but, on the contrary, to deter offerors from coming forward, by raising doubts as to the sufficiency of the titles.

"These peculiarities in the conditions of sale were wholly uncalled for. It appears from the proof that the reason why the earlier titles were not produced and offered by delivery was simply this—Not that there was any difficulty in procuring them, but that the conveyancing clerk of the defenders' agents had, in some unaccountable way, taken up the notion that the titles were hypothecated for a business account in the hands of the pursuers' law-agent in Glasgow. There was no foundation for any such idea. He had heard a rumour to that effect, and instead of satisfying himself by inquiring at the law-agent, when he would have discovered that it was unfounded, and that the titles would have been given up on demand, he deliberately prepared the articles of roup, with the 6th article as it stands, which, I think, could not be read by any intending purchaser without causing in his mind considerable doubt as to the sufficiency of the title. And the limitation of the warrandice to the fact and deed of the expositors, who, be it remembered, were *ex facie* absolute owners of the property, was calculated to increase the doubt.

"Had this been a *bona fide* purchase in open market by a third party *omni suspicione major*, and able and willing to implement the transaction, I should, without much difficulty, have refused to reduce it, leaving the pursuers to the remedy of an action of damages against the defenders. But as the purchaser is here refusing to implement his purchase, the question to be decided is, whether, looking to all the circumstances of the case, the objections to the regularity of the sale are such as to entitle the pursuers to have it set aside and reduced? It is true that

they have entirely failed to prove that a higher price than £7400 might have been obtained for the property on 31st July 1878. But, on the other hand, the irregularities in the articles are, in my opinion, so material as to entitle them to the benefit of the presumption that if these articles had been prepared with due regard to the interests of the pursuers there would have been greater competition at the sale and higher offers than £7400. At the same time, the evidence of value adduced by the defenders is so strong as to raise a presumption in their favour that the sum of £7400 was the full value of the subjects at the time. Now, after balancing these presumptions, and being of opinion that nothing approaching to fraud can be alleged against the defenders, the result at which I have arrived is, that on complying with the conditions embodied in the foregoing interlocutor the pursuers ought to obtain decree of reduction. Should they fail to do so, the presumption in their favour as to the unfairness of the sale will be displaced, and the defenders will be entitled to absolvitor."

The defenders reclaimed, and it being stated to the Court on behalf of the pursuers that they were not prepared to find caution to the extent of £1000, the question at issue was decided on its merits.

Authorities—*Sheill v. Guthrie and Others*, June 26, 1874, 1 R. 1083; *Companies Act 1867*, sec. 37; *Bell's Lect.*, ii. 721; *Johnstone's Trustees v. Johnstone*, Jan. 19, 1819, F.C.; *M'Laren, &c. v. Managers of the Royal Infirmary of Edinburgh*, Oct. 24, 1871, 44 Jur. 17; 2 *Bell's Comm.* (M'Laren's ed.) 225; *Stewart v. Laing's Trustees*, Nov. 30, 1839, 2 D. 167; *Malcolm Kerr v. M'Arthur's Trustees*, Dec. 23, 1848, 11 D. 301; *Simson v. MacMillan*, March 16, 1770, 2 *Paton's App.* 227.

At advising—

LORD JUSTICE-CLERK—It is not necessary for me to narrate the details of the titles in this case or the relations of the Alliance Heritable Security Company to the pursuers; these have been set out at full length by the Lord Ordinary, and the question we have to answer remains a simple one.

The pursuers entered into an arrangement with the Alliance Heritable Security Company for an advance of £7000. The Company held certain rights over the property in question which constituted them proprietors, and they executed in favour of the company (first) an *ex facie* absolute disposition upon which the company were duly infeft, and (second) a personal bond binding themselves to repay the loan by instalments, and (third) there are two back-letters granted by the Alliance Company in favour of the pursuers. The result of this was that while the bond and back-letters showed that the disposition was really in security, the Alliance Company were *ex facie* proprietors to all intents and purposes, including the purpose of selling. The instalments of interest having fallen into arrear, the Alliance Company brought the property to a sale under the absolute disposition, and in the articles of roup there was nothing to lead the public to suppose that the sellers were only creditors and not the actual owners. The property was exposed for sale, and M'Kenzie bought it at the price of £7400, Mr

Wilson being the prior and second highest offerer at £7370. The sale to M'Kenzie has been found to be not binding, and the purchase has been well devolved on Wilson, and now this action has been brought to have the whole transaction set aside. Wilson has not appeared, and apparently does not propose to appear, to support the sale in his favour, and the Lord Ordinary has held that the action was between the original owners on the one hand and the security owners on the other, and has found that the first objection, to the effect that the provisions of the back-letter were not implemented, was not well founded, but that two objections to the articles of roup had a considerable foundation, viz., (1) that the exposers only offered warrandice from their own facts and deeds, whereas by the terms on which they held the property they were authorised to offer absolute warrandice; and (2) that it was provided that certain titles were not to be exhibited or delivered to intending purchasers, but that all that could be offered was the sellers' right to demand exhibition or delivery of them.

The Lord Ordinary's conclusion as stated in his note is in these words—"Had this been a *bona fide* purchase," &c.—[quotes last paragraph *ut supra*]. He has found that if security for £1000 that no loss will be sustained by a subsequent sale is found by the Parks, the sale may be set aside, and if not, that the sale must stand. Though no doubt this would be an equitable manner of disposing of the case, I almost doubt the competency of it, but we are relieved from the necessity of considering that, because the pursuers have refused to find the necessary caution, and have asked for a decision on the merits, and I shall state in a few words why I think the Lord Ordinary's view as expressed in the last sentence of his note should be adhered to.

There are two forms of sale by a heritable creditor—(1) on an absolute disposition with a back-letter; (2) on a bond and disposition in security with a power of sale. These two are radically different. It has been held that if there is a provision in the back-letter stating the manner in which advertisement is to be made, it must be carried out by the exposing creditor. But I take it that a creditor who holds an absolute disposition sells in his own right as absolute proprietor, and indeed there would be no virtue in that method of taking the title unless that were so. The creditor acts as absolute proprietor in selling as in every other result of his title. Though this is so, I am far from holding that a creditor in this position can do as he likes; but I know of no case where a sale of this kind was set aside unless there was a strong element of fraud in the matter. There may be a remedy if there has been carelessness or inattention, in the shape of an action of damages, but no setting aside of the sale. The case of *Simson v. M'Millan* (*supra*) illustrates this very well. There, there was an averment of fraud in respect of the manner in which the sale had been conducted, and an averment that an insufficient price had been obtained, and in short the real owner protested against the sale being carried out, but notwithstanding these there was no attempt to set it aside, though the seller was found liable to account to the real owner for a much larger sum than was obtained by the sale. I think here, therefore, that there are no

sufficient grounds upon which to set aside the sale. I agree with the Lord Ordinary that both objections might have been material if this had been a case of a sale under a bond with a power of sale, but it is quite different.

I am not sure as to the matter of warrandice; the sellers were entitled to give absolute warrandice, whereas they only gave their own from fact and deed. This was undoubtedly wrong, for the Parks in their disposition to the company had bound themselves in absolute warrandice, and the company in assigning this probably did all that was necessary, but this should have been stated. There was no excuse for not showing the titles; the excuses given out were only pretences; but even if this were a sale under a power, I doubt if it would be sufficient to invalidate it.

What lies at the root of the matter is the damage to the original owners, and in this case that affords another ground for decision, for the price received has been proved to have been sufficient at the time. I think that if we were to set aside this sale now we should probably be sacrificing a full sale for an imperfect one. I am therefore of opinion that the defenders should be assolizied.

**LORD ORMDALE**—I agree in the result your Lordship has arrived at, and I would only remark, in the first place, what is the fact, that most of the technical grounds of reduction—in fact all the grounds with the exception of two—were given up at the debate. I think it right that this should be known and understood. In the second place, there is here prescribed no form of sale or procedure in view of sale which the Alliance Company was bound to observe. In the ordinary form of bond and disposition in security, various forms in connection with a sale, should such be necessary, are generally prescribed; these are the mandate that a seller holds to which he must conform; but here it is quite different. The company held on an *ex facie* absolute disposition, and are in the position of absolute owners in bringing the property to a sale. It is quite true that we have here deeds which prove that the company only held the property in security, and they were of course bound to conform to these deeds. But there is no formality in the bond to which the creditor was bound to conform, except to give 10 days' notice to the original owners, which was done. The bond gives up every other kind of formality in express terms. In such a case, therefore, it is impossible that without relevant allegations of damages incurred a pursuer can prevail. I can quite conceive circumstances which might render the sellers liable in damages, but there is no conclusion for damages here, but only for reduction.

**LORD GIFFORD**—I am of the same opinion both in law and in the equity which shines through the case. The Alliance Company have an absolute disposition, and the very object of this is to give them the most ample and absolute power to sell. This must be given effect to if all is fair in the sale. The Lord Ordinary says—and I agree with him—that in a question with a *bona fide* purchaser the sale here could not be infringed.

In regard to the question of warrandice, absolute warrandice is in point of fact given against the Parks, for in the conveyance from the Parks to the company they bind themselves in absolute

warrandice, and the company therefore in assigning all their rights assign the absolute warrandice of the Parks. There is nothing therefore in that objection. There is a little more on the question of non-production of the titles; it was gross carelessness; but the *bona fide* purchaser will not appear, and accordingly the Lord Ordinary, taking an equitable view of the matter, gave him a chance of getting off on the Parks finding caution. I should have been inclined to fall in with the Lord Ordinary's view and stretch a point if the parties could have agreed to this, but they will not, and therefore we have no alternative but to give absolutor to the defenders.

The Court recalled the interlocutor of the Lord Ordinary and assolizied the defenders from the whole conclusions of the action.

Counsel for Pursuers (Respondents)—Lee—Mair. Agent—W. Officer, S.S.C.

Counsel for Defenders (Reclaimers)—Guthrie Smith—Strachan. Agent—T. F. Weir, S.S.C.

Saturday, January 24.

## SECOND DIVISION.

[Sheriff of Aberdeen.]

PETERHEAD GRANITE POLISHING COMPANY v. THE PAROCHIAL BOARD OF PETERHEAD.

*Property—Diversion of Water from a Stream by Upper Proprietor under Public Health (Scotland) Act 1867 (30 and 31 Vict. cap. 101), secs. 89, 90—Right of Lower Heritor to Damages or Compensation.*

By the Public Health (Scotland) Act 1867 the local authority of any parish when desirous of providing a water supply for a district under their charge, are stated to have all the powers and rights given to promoters of undertakings by the Lands Clauses Acts—“Provided always that they shall make reasonable compensation for the water so taken by them;” “and further, for the purposes of this Act, the words ‘lands’ and ‘land’ in the said Acts (Lands Clauses) and in this Act shall include water and the right thereto.” The 90th section provided for the observance of certain regulations with regard to the purchase and taking of “land” for the above purpose. *Held* that the abstraction of water by a local authority for the above purpose, which led to a diminution of the flow which the lower heritor used for the purposes of certain works, did not under the 89th and 90th sections of the above Act entitle a lower riparian proprietor to compel the local authority to treat with him as for the purchase of his interest in the stream, but entitled him only to compensation as for land injuriously affected; that he therefore was not entitled to interdict; and further, that an action of damages for compensation was incompetent under the Lands Clauses Acts, other procedure being therein provided.