

jecture and speculation were admissible, to believe that the testator may have had some such intention, as the Lord Ordinary has, with hesitation, extracted from it, in giving effect to the argument for the defender. But, in my opinion, such conjecture is excluded in dealing with language so precise and unambiguous as that used in the clause before us. It appears to me that what the testator provided for was, that a certain liferent right should be enjoyed by the heirs under a certain entail in succession, as and while each heir was in possession or had right to be in possession of the entailed estate. No benefit is conferred on anyone who is not so in possession or entitled to possession. It is the essential quality of the person claiming the liferent that he shall be in possession, or be entitled to the possession of the entailed lands. The defender does not, and no other person now can, possess that quality, for the entail is no longer in existence. The Lord Ordinary thinks "it is not impossible to hold that the disponent, (not contemplating the event of disentail) used the words in question, not as adjecting to the succession a condition depending on the possession of 'the entailed lands,' but simply as describing the person who, assuming the entail of that estate to remain in force, had right to the succession under it." If I could adopt that view, I would assent to the Lord Ordinary's conclusion. But, on the contrary, I think it is impossible to hold that the disponent had any such intention or purpose, unless some conjecture is resorted to, not authorised, or to my mind even suggested by the disponent's language. And it is just there that the distinction, in my opinion, lies between the present case and the case of *Gillanders*, to which the Lord Ordinary refers as the authority on which he proceeds. In the present case you have the person who is to be benefited specially designated by the possession of a certain character or quality—he is to be the heir in possession or entitled to the possession of entailed lands under a certain entail. No benefit is conferred on any person, except the one for the time being possessed of the qualification. In *Gillanders'* case the benefit was conferred on certain persons named, one of them being "the heir in possession" of an entailed estate, "and to the other heirs-substitute in the said entail, in the order set down in the same entail successively." Now, there the Court regarded the reference to the entail practically as a reference to the source from which the trustees would learn who were the persons intended to share in the benefit, and the order in which they were to succeed to it. It was regarded as the means which the truster used to designate the heir, and not as denoting a quality necessary to his succession. And this destination is emphasised by Lord Watson in the opinion delivered by him in *Gillanders'* case, when that case was decided in the House of Lords.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be recalled, and the pursuer found entitled to decree.

LORD YOUNG and the LORD JUSTICE-CLERK concurred.

LORD RUTHERFURD CLARK was absent.

The Court recalled the Lord Ordinary's interlocutor, and granted decree in terms of the conclusion of the summons.

Counsel for the Pursuer—Dundas—Craigie. Agents—Mackenzie & Black, W.S.

Counsel for the Defender—Macphail—Blackburn. Agent—J. C. Couper, W.S.

Tuesday, July 2.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

BELFORD v. RANKIN.

Right in Security—Bond and Disposition in Security—Sale—Sale by Posterior Bondholder—Right of Posterior Bondholder to Pay off Prior Bondholder—Premonition—Titles to Land Consolidation (Scotland) Act 1863 (31 and 32 Vict. c. 101), esp. sec. 122.

The holder of a posterior bond and disposition in security sold the security-subjects upon 10th August 1894, in virtue of the power of sale contained in the bond. On the same day he gave notarial premonition to the holder of a prior bond and disposition in security that payment would be made to him of the sum due under his bond at the next term of Martinmas. The premonition bore to be granted with the consent of the debtor in the bond, but was signed only by the postponed bondholder.

Held (rev. judgment of Lord Stormonth Darling) that the prior bondholder could not refuse to accept payment, in respect (1) that the postponed bondholder was entitled, under the provisions of the Titles to Land Act 1868, to give him premonition, and insist on his accepting payment and discharging his bond; and (2) that in any view the premonition was valid, as it had been granted with the consent of the debtor.

Upon February 18th 1893 the estates of Hugh Adair, writer, Stranraer, were sequestrated. Among his assets was found a bond and disposition in security for £400 by the firm of Adair & Thorburn (of which he was a partner), and the individual partners thereof, over certain heritable subjects in Stranraer, dated 13th and recorded 14th December 1877. William Gibson Belford, writer, Stranraer, as his trustee, made up a title to this bond. The subjects were burdened by a prior bond and disposition in security for £1000 dated 28th and recorded 29th June 1877, granted by the firm in favour of the trustees of the late John Kerr, and after-

wards acquired by John Marquis Rankin, solicitor, Stranraer, as judicial factor on the estate of Mr and Mrs John Adair, both now deceased.

On 10th August 1894, after the usual statutory premonition and advertisement, Belford, Adair's trustee, exposed the property for sale by public roup under the powers of sale contained in the bond. It was sold for £1172.

Upon the same date Belford gave notarial premonition (which bore to be granted with consent of the firm of Adair & Thorburn, and the individual partners thereof) to Rankin that payment would be made at Martinmas 1894 to him as judicial factor of the sum of £1000, the whole sum contained in the bond and disposition in security held by him, and that in case of his absence or refusal the sum would be consigned in bank in terms of section 119 of the Titles to Land Consolidation (Scotland) Act 1868.

In October 1894 Rankin intimated his refusal to take payment of the amount due under his bond at Martinmas, or to give any account of his intromissions with the rents of the subjects which he had been collecting since February 1893.

In December 1894 thereafter Belford raised an action against Rankin in which he concluded, *inter alia* (second) for declarator that the notarial premonition given by the pursuer with consent of the said Adair & Thorburn and Alexander Adair and James Thorburn to the defender was valid and effectual, and that the defender was bound to have accepted payment of the said bond at the said term; and further that the defender, as judicial factor foresaid, was now bound to accept immediate payment of the amount remaining due under the said bond and disposition in security as at the term of Martinmas 1894, with interest on the principal sum at 2 per cent., or at bank deposit rate, from the said term until payment; (third), that on payment or consignment being made, the defender should be ordained to execute and deliver a valid discharge of the bond and disposition in security. The price of the property under deduction of expenses was consigned in bank in names of the purchaser and of Belford.

The defenders averred—“(Ans. 6) The premonition is referred to. Explained that it is not signed by Adair & Thorburn, nor any of the partners of that firm, nor does it bear to be signed by anyone on their behalf. At the date of said premonition the pursuer had divested himself of his rights under his bond by selling the subjects, and the purchaser, who thus became proprietor, was no party to the premonition.”

The defender pleaded—“(1) No title to sue. (2) The pursuer's averments are irrelevant. (3) The necessary statutory notice of payment not having been served upon the defender, *et separatim*, the defender not being bound to accept intimation from the pursuer as sufficient, he is entitled to absolver. (4) The pursuer having no right or title to insist upon the defender accepting payment of the amount of his bond, the

defender is entitled to absolver with expenses.”

Upon April 23rd 1895 the Lord Ordinary (STORMONTH DARLING) sustained the fourth plea-in-law for the defender, and assolized him from the conclusions of the summons.

“*Opinion.*—Messrs Adair & Thorburn, wood merchants, Stranraer, were proprietors of certain heritable subjects in that town, over which they granted (1) a bond and disposition in security for £1000, dated 28th and recorded 29th June 1877, and now held by the defender; (2) a bond and disposition in security for £400, dated 13th and recorded 14th December 1877, and now held by the pursuer; and (3) a further bond of which the particulars are not given. The firm of Adair & Thorburn and the individual partners thereof were sequestrated in August 1885, but the trustee in the sequestration did not take up the property, as there was no prospect of any reversion after meeting the bonds. The pursuer as second bondholder gave the usual statutory premonition, and on 10th August 1894 exposed the property to sale by public roup under the powers contained in his bond. The property was sold for £1172. On the same day he made premonition to the defender as first bondholder that payment would be made to him of the sum of £1000 with interest at Martinmas 1894. The defender refused to take payment of the amount due under his bond, and the present action has been brought to compel him to take payment and to discharge the bond. The summons also contains conclusions calling upon the defender to account for his intromissions with the rents of the property since he entered into possession under an action of mails and duties, but these conclusions are merely for the purpose of ascertaining the sum due to the pursuer under his bond, and are purely ancillary to the main conclusion. The real question therefore is, whether the pursuer as second bondholder can compel the first bondholder to discharge his bond?”

“I am of opinion that he cannot. It may be difficult to see what the defender's precise interest is to resist this demand, because most bondholders would probably be quite satisfied to receive payment in full where the margin is so small as it is here. The defender says that he is satisfied with his investment, and does not wish it disturbed, but whatever be his motive he demands a judgment on the legal question, and I think he is entitled to it.

“Section 123 of the Titles to Land Act 1868 provides that, upon a sale being carried through in terms of the Act, and upon consignment of the surplus of the price, if any (in terms of section 122), ‘the disposition by the creditor to the purchaser shall have the effect of completely disencumbering the lands and others sold of all securities and diligences posterior to the security of such creditor as well as of the security and diligence of such creditor himself.’ It will be observed that this section says nothing of any security prior to the security of the selling creditor. It is true that section 48

of the Conveyancing Act of 1874, which provides for the case of there being no surplus, does provide that the disposition by the creditor to the purchaser shall, when recorded along with a notarial certificate of there being no surplus, have the effect of completely disencumbering the lands of all securities and diligences prior and posterior to the security of such creditor as well as of the security and diligence of such creditor himself. But it cannot have been intended to make the right to pay off a prior bondholder dependent on the mere accident of there being no surplus. It is also true that section 122 of the Titles Act, in defining the surplus which is to be consigned in bank, uses the words 'after paying all previous encumbrances, and the expense of discharging the same.' But this, I think, only amounts to an assertion that there can be no surplus until previous encumbrances are provided for. It implies that previous encumbrancers are willing to discharge their bonds; it does not enact that they can be compelled to do so.

"The question, however, seems to me to be concluded by the opinions expressed in the case of *Nicholson's Trustees v. M'Laughlin*, 19 R. 49, which decided that, where there are two *pari passu* bondholders, either might bring the security-subjects to sale without consent of the other, but the security of the other would remain unaffected thereby. Lord M'Laren, in particular, assimilates the case of a *pari passu* bondholder to that of a prior bondholder. His Lordship says—'I cannot see that either the debtor or the *pari passu* creditor has an interest to prevent the other *pari passu* creditor exercising his power of sale. The debtor has to pay up the debt. The other creditor can have no interest, because the effect of a sale is only to disencumber the lands of postponed securities. The security of a *pari passu* creditor is in no way affected by the sale, because his right does not fall within the description of a security posterior to that of the seller. In this respect there is no difference between the position of a creditor who ranks *pari passu* and that of a preferable creditor. Their securities are unaffected by a sale under the power. The true answer to the argument of the pursuer is, that he has an effectual power of sale, but that he can only sell subject to the right of the defender. The pursuer, therefore, may either arrange with the defender to pay off his bond, or he may sell the lands subject to the defender's security.' Lord Kinnear says of the selling bondholders—'They cannot compel the defender to realise her security,' and if that be true of a *pari passu* creditor, much more must it apply to a prior one.

"The recent Heritable Securities Act (57 and 58 Vict. c. 44), sec. 11, contains a provision (no doubt with the case of *Nicholson* in view) that any *pari passu* bondholder, who is unable to obtain the consent of another creditor in the same position, may apply to the sheriff for warrant to sell, and the sheriff may authorise both or either of the parties to carry through the sale, and to convey and to disencumber the lands of

both securities as fully as if the creditors were carrying through the sale by agreement. But this section does not mention and cannot affect the case of a prior bondholder.

"I was referred to a series of cases (of which *Cunningham's Trustees v. Hutton*, 10 D. 307, is an example) in which it has been held that a postponed heritable creditor is entitled, on payment by him of a first heritable debt, to demand an assignation thereto, if he can show that such assignation is necessary to enable him to recover his own debt. But these were all cases in which the prior creditor had consented to be paid off, and was willing to grant a discharge, the only question being, whether he was not bound to grant something more, viz., an assignation. They cannot therefore affect the question whether he can be compelled to grant a discharge at the instance of a postponed bondholder. My opinion is that he cannot be compelled to do so, either at common law or under the statutes, at the instance of anyone but the debtor in the bond. It is said that here the debtors concur, but the debtors have now no interest in the subjects, and one of them at least is still under sequestration. Even if this were not so, I do not think that mere concurrence would supply the want of title in the pursuer, and my view is that the pursuer has no title to make the demand which he does. I shall therefore sustain the fourth plea-in-law for the defender, and assolzie him with expenses."

The pursuer reclaimed—The premonition was given upon 10th August 1894; that was sufficient intimation to the prior bondholder, and gave him time to find a new investment by Martinmas. It was given with consent of the debtors in the security, both as a firm and as individuals, and, under the Titles to Land Act, 1868, if the value of the prior bond was paid or consigned in bank, the bondholder was bound to give a discharge, so as to enable the seller to give a clear title to his purchaser, which he was bound to do—*Cunningham's Trustees and Others v. Hutton*, 18th December 1847, 10 D. 307.

The respondent argued—The premonition was not given by the debtor in the bond, but by some one who had no title to sue; the concurrence of the debtor could not give him a title. The defender was not bound to give a discharge if he was not willing. The Titles to Lands Act, 1868, by section 123, only provided that a sale by a creditor should have the effect of disencumbering the lands of posterior securities, and the Heritable Securities (Scotland) Act, 1894, only provided that the sheriff should grant warrant to sell the lands which were the subject of the security, and upon payment or consignment of the price of a *pari passu* security should give a title to the lands, but that did not apply to the case of a prior bondholder.—*Nicholson's Trustees v. M'Laughlin*, November 4, 1891, 19 R. 49; *Park v. Alliance Heritable Security Company*, January 24, 1880, 7 R. 547.

At advising—

LORD YOUNG—The defender holds a bond and disposition in security, dated June 1877, over a house in Stranraer for £1000, and the pursuer holds another, dated December 1877, over the same property (and from the same proprietor) for £400. On 10th August 1894 the pursuer sold the property by public auction for £1172, and I assume, there being nothing alleged to the contrary, that the sale was regular in all respects, and therefore efficacious in terms of the Titles to Land Consolidation (Scotland) Act, 1868. The defender says in answer 4, “that by the articles the subjects were not to be sold under burden of the prior bond, but absolutely, the seller (the second bondholder) undertaking to pay off the prior debt.” I assume that this is so, and that the sale must be taken to have effect accordingly. A sale by a posterior bondholder under burden of a prior bond might possibly be made by special agreement, and with the consent of all persons interested, but such a sale is certainly not contemplated or provided for by the Titles to Land Act. When a posterior bondholder failed to find a purchaser at a price sufficient to pay off a prior security, and was unwilling (as he most likely would be) to pay it himself, he was helpless, prior to the Act 57 and 58 Vict., cap. 44, by sec. 8 of which an expedient to meet the case is provided. Here the seller was fortunate enough to find a purchaser at a price sufficient to pay the previous encumbrance and leave a small surplus. This price he was not only entitled to receive, but bound to receive, a trust and liability being imposed upon him with respect to it by the statute under which he sold. By sec. 122 of the Act of 1868 provision is made for the receipt by him of the whole price, and for the consignment of the surplus remaining “after deducting” certain specified payments to be made out of it. These are (1st) his own debt, (2nd) the expenses of the sale, and (3rd) “all previous encumbrances, and the expense of discharging the same.” It hardly needs to be pointed out that this excludes the idea of a sale under the burden of “previous incumbrances,” it being a distinct enactment that the seller shall out of the price pay them, and also the expense of discharging them.

Having thus, with the strictest regularity, as I must assume, sold the property on 10th August for £1172, the pursuer proceeded to take steps for implementing his part of the sale by paying the prior encumbrance and getting it duly discharged. To this end he gave the defender (the only prior encumbrancer) the premonition referred to in cond. 6. It happened fortunately that the sale was effected in time to give the notice three months prior to the Martinmas term. I assume, from the defender's ans. 6, that the notice was after the sale, though on the same day.

The defender took no objection to the premonition till the following October, when on being asked for the information necessary to enable the pursuer to have his bond paid and discharged at Martinmas, he intimated his declinature to take pay-

ment and give a discharge, saying, as the Lord Ordinary quaintly expresses it, “that he is satisfied with his investment, and does not wish it disturbed.” I should have thought that it would have occurred to any man of business that after the sale of the property the investment could not remain undisturbed unless the purchaser agreed to continue or renew it.

The purchaser of the property insists that the sale shall be fulfilled to him according to its terms, and having consigned the price, requires the seller (the pursuer) to clear the property of the prior encumbrance by having it duly and regularly discharged, as provided by sec. 122 of the Act of 1868, and to give him a disposition which will have the effect, under sec. 123 of the same Act, of disencumbering the lands of the seller's own security, and all securities posterior to his, without any other discharge of these than the disposition implies. The distinction between the two classes of encumbrances—prior and posterior—appears clearly enough on a comparison of sec. 122 with sec. 123.

The first step towards paying the defender's encumbrance and getting it duly discharged is to ascertain the amount due, and the defender having been in possession of the property for some time, an accounting is of course due by him to any one entitled to demand it. The next step is to ascertain whether or not the premonition of 10th August 1894 was well given, and with the result that the term of Martinmas 1894 is the term of payment, so that the defender is to be dealt with on that footing. Looking to the position which the defender took up—that he was entitled to hold on to his security as a good investment—the action which the pursuer has brought appears to have been unavoidable, unless he was prepared for his own part to throw up the sale which he had made, and to resist the purchaser's demand for fulfilment.

The defender's 4th plea-in-law is—“The pursuer having no right or title to insist upon the defender accepting payment of the amount of his bond, the defender is entitled to absolvitor, with expenses.” The Lord Ordinary has sustained this plea, and assolizied the defender with expenses, and we have now to determine whether this is a right judgment. I am of opinion that it is not, and the grounds of my opinion are indicated perhaps sufficiently by what I have already said. I must hold that in selling the property on 10th August for £1172 the pursuer exercised his legal right, and that he did so with unquestionable regularity and formality. It follows that he must fulfil the sale to the purchaser by giving him a title to the property completely disencumbered,—first, of the prior encumbrance, by paying and obtaining a discharge of it; and, second, of his own and any posterior encumbrance, by a disposition with consignment in the appointed bank of the surplus of the price, if any (and there is admittedly none). It is his right under the contract of sale, and also his duty (in which others are interested), to receive the price, £1172, with the obligation of using it as I

have pointed out, the chief use being to clear the property sold of the defender's bond.

The Lord Ordinary here, I think, misapprehended the case of *Nicholson's Trustees*, which he refers to in his note. That case relates to a security *pari passu* with that of the bondholder selling or proposing to sell, which is a *casus improvisus* in the Act of 1868 and also in the Act of 1874. These Acts provide that prior securities shall be paid in full by the selling creditor out of the price, and that the holders of posterior securities shall either go unpaid, or have such payment as the consigned surplus may yield, the property being disencumbered of them without any discharge; but no provision is made regarding securities *pari passu* with that of the selling creditor. In *Nicholson's* case the Court held that they were not at liberty to supply the omission. It has now been supplied in the only way in which it naturally could be by sec. 11 of the Act 57 and 58 Vict. cap. 44. We have no case of the kind to deal with here.

The Lord Ordinary has not noticed the defender's first and second pleas. They are, I think, clearly bad. The third plea is perhaps included in the fourth, and, at any rate I think it bad, being of opinion that the pursuer, in his capacity of lawful seller of the property, was entitled, and indeed in duty bound, to give the premonition, as necessary to enable him to fulfil his obligation, and apply the price as directed by the statute under which he sold. I am therefore prepared to repel all the pleas-in-law for the defender, and to sustain those for the pursuer, to the effect of finding—1st, that the defender had by the premonition of 10th August good and sufficient notice that the bond held by him would be paid at Martinmas 1894; 2nd, that he is liable to account to the pursuer, so as to show the amount due on the bond at Martinmas 1894; and, 3rd, that on payment thereof, with interest from Martinmas 1894 at bank deposit rate, he is bound to grant a discharge of the bond.

With regard to expenses, these must, of course, so far as the pursuer is concerned, follow the result. But the defender is judicial factor on a testamentary estate, and in finding him liable to the pursuer in expenses I think we must guard against indicating that we think they will form a good charge by him against the factorial estates. His conduct in declining the payment offered, and so necessitating this action, is *prima facie* inexplicable, and his counsel, when appealed to, could suggest no explanation of it. It is probably sufficient to say that by finding him liable in expenses to the pursuer we mean only to give the pursuer his due, and abstain from expressing any opinion on the question which may arise on his factorial account, regarding either those which he must pay to the pursuer or those which he has incurred in conducting his defence.

LORD TRAYNER—The pursuer in this case gave premonition in statutory form that the bond held by the defender would be

paid up at Martinmas 1894. That premonition bears that it was given by the pursuer with the consent of the debtor in the bond, but it is objected to it that it is not signed by the debtor. I do not regard that as essential. All that the statute requires is that it shall be a premonition by the grantor of the bond, and I should think a premonition given for the grantor by his authorised agent would be sufficient. It is not said here that the pursuer was acting without the consent or authority of the grantor, and I therefore presume that he was acting with it. But the whole purpose of the statute was undoubtedly served by the premonition in question. It has no other purpose than to give the holder of the bond such reasonable notice of the debtor's intention to pay up the bond, that the creditor may have time to look out for another investment. This purpose was, as I have said, amply served by the premonition in question. If, however, the premonition was sufficient, the defender was not entitled to refuse payment of his money at Martinmas 1894. In that view of the case, the pursuer is entitled to decree, in terms of the 2nd and 3rd conclusions of the summons.

I think this sufficient for the decision of the case, without considering the effect of the different statutory provisions which have been referred to by Lord Young, from whose opinion, however, I am not to be regarded as differing.

The LORD JUSTICE-CLERK concurred.

LORD RUTHERFURD CLARK was absent.

The Court recalled the Lord Ordinary's interlocutor, and gave decree in terms of the second and third conclusions of the summons.

Counsel for the Pursuer—C. S. Dickson—Wilson. Agent—P. Pearson, S.S.C.

Counsel for the Defender—Dundas—Abel. Agents—Hope, Todd, & Kirk, W.S.

Tuesday, July 2.

SECOND DIVISION.

THE DUKE OF SUTHERLAND'S TRUSTEES v. COUNTESS OF CROMARTIE AND OTHERS.

Succession—Trust-Disposition—Construction—Heirs-Female.

A granted a trust-disposition, whereby, "in order to make and secure additional provision" for his second son and "the other heirs of entail succeeding to him in the lands and estate of Cromartie, to enable them to support the dignity and title of Earl of Cromartie," he conveyed a number of securities to trustees, and directed them, after his death, to pay the free annual proceeds of the funds conveyed to his second son and the heirs-male of his body, whom