There is a statutory presumption to begin with against a conjunct and confident person receiving property after the notour insolvency of the person who transfers it. It is of course only a presumption, and may be overcome. Now, the Sheriff-Substitute allowed the creditors of the insolvent to prove their averments which raised this statutory presumption, and further allowed the appellant a conjunct probation. This was very proper I think, for it gave the latter an opportunity of removing, if he could, the presumption against him. Now, I am of opinion with the Sheriff that he has not satisfactorily removed it. He has failed satisfactorily to show that the sale was a *bona fide* transaction. We have nothing from him but his own statement.

Lord Craighill—I am of the same opinion. The burden of proof lay with Roberts. Once it was established that he was a conjunct and confident person, then the statutory presumption became applicable. The question decided by the Sheriff-Substitute was, whether Roberts had shown there was any reality in the sale. Now, all that is adduced for this purpose is his own oath, and while I recognise the authority of Prof. Bell when he says that there may be cases where the alleged purchaser's oath is sufficient, I am of opinion that this is a case outside that *dictum*, because (1) there are suspicious circumstances surrounding the transaction, and (2) I think that there was other evidence available to the appellant for corroboration of his own statement. This has not been adduced, and of course we must bear this in mind when we consider whether he has discharged the *onus*.

Lord Rutherfurd Clark—I am of the same opinion. It is very clear that the transaction has been brought within the statute, and the appellant has failed to discharge the *onus* thereby thrown on him of overcoming the presumption against him.

The Court dismissed the appeal and affirmed the judgment of the Sheriff-Substitute.

Counsel for Appellant—Nevay. Agent—Robert Broatch, L.A.
Counsel for Respondents—Shaw. Agent—Peter Morison, S.S.C.

Friday, November 17.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

STEWART AND OTHERS *v.* BROWN AND OTHERS.

Property—Heritable Creditor—Sale under Bond and Disposition in Security—Relative Rights of Prior Creditor and Postponed Creditor—Disposition ex facie *Absolute—Title to Sue*—Mora *and Acquiescence—Heritable Securities Act* 1847 (10 *and* 11 *Vict. c.* 50), *sec.* 3.

The representatives of the holder of an *ex facie* absolute disposition of certain subjects which was qualified by a back-bond, and formed in reality a postponed security, brought in 1875 a reduction of two dispositions of these subjects which had followed on a sale in 1866 at the instance of two prior bondholders, on the ground that the provisions of the Heritable Securities Act 1847 had not been complied with, in respect there had not been proper intimation and advertisement of the sale, and that an adjournment of the sale "to the day of " which had been made was invalid. *Held* that the pursuers, who were not proprietors of the subjects, had no title to sue, and *separatim*, that in any event they would have been barred by delay in bringing the action, the facts on which it was founded having been all along within their knowledge.

Heritable Creditor—Intimation and Requisition for Payment—Premonition—Adjournment of Sale.

Observations on (1) the duties in relation to postponed creditors of a heritable creditor selling under powers in his bond; (2) the effect of an intimation and requisition for payment; and (3) the meaning of the term "adjourned sale."

Opinions that where after premonition property has been exposed for sale, and in consequence of no sale being effected the sale is adjourned for such a time that a subsequent exposure is rather a new sale than an adjourned sale, fresh premonition to the debtor might be necessary.

On 15th May 1854 Thomas Pearson, clothier in Glasgow, granted two bonds and dispositions in security over certain subjects in Glasgow belonging to him, and known as the Arcade property, for £5000 each, in favour of A. J. Brown of Balloch, and the trustees of the deceased Mrs Meiklam respectively. The grantees were infeft on the precepts of sasine in the bonds. The said bonds and dispositions in security contained all usual and necessary clauses, including a power of sale, and were declared to be *pari passu* securities; at the date of granting them the said Thomas Pearson was infeft in the subjects conveyed. By disposition dated 21st December 1852 Pearson disponed the said subjects to John Stewart, but excepted from the warrandice the foresaid bonds. The said John Stewart was infeft in said lands conform to instrument of sasine dated 21st January 1856. The disposition to him, however, though *ex facie* absolute, was really in security, being qualified by a back-letter dated 21st December 1855, signed by Stewart and Pearson, and which bore that the said disposition was to be held by John Stewart in security, and for payment and relief of such sums of money as he had advanced or might thereafter advance to Pearson, and of all obligations undertaken, or that might thereafter be undertaken, by him for Pearson. This back-letter was never recorded. By disposition dated 24th April 1856 John Stewart disponed the Arcade property to the Western Bank, who were infeft on 4th June 1856, but this conveyance, though *ex facie* absolute, was also in security only for debts due by John Stewart. John Stewart thereafter became bankrupt, and was sequestrated on 16th January 1861; in October 1863 he was discharged without a composition, but was retrocessed in his whole heritable and moveable estate in July 1866 and December 1872. The Western Bank, by disposition and assignation

dated 12th and 23d February 1866, conveyed the said subjects to James, son of the said John Stewart, who completed his title by recording said disposition and assignation on 10th March 1866.

Meantime in 1858 the foresaid bondholders, Brown and Meiklam's trustees, finding that they were unable to recover payment of the interest on their loan of £10,000 from the Arcade property, resolved to sell under the powers contained in their bonds and dispositions in security.

It is enacted with regard to such bonds and dispositions in security by 10 and 11 Vict. c. 50, sec. 3 (Heritable Securities Act 1847), the statute then in force—"The clauses reserving right of redemption and obliging the granter to pay the expenses of assigning or discharging the security, and on default in payment granting power of sale, shall be in all respects as valid, effectual, and operative as if it had been in such bond and disposition in security specially provided and declared . . . that if the granter or his foresaids (*i.e.*, his heirs and succcesors) should fail to make payment of the sums that should be due by the personal obligation contained in the said bond and disposition in security within three months after a demand of payment intimated to the granter or his foresaids, whether of full age or in pupillarity or minority, or although subject to any legal incapacity, personally or at their dwelling-places if within Scotland, or if furth thereof at the office of the Keeper of the Record of Edictal Citations above mentioned by a notary-public and witnesses, then and in that case it shall be lawful to and in the power of the grantee or his foresaids, immediately after the expiration of the said three months, and without any other intimation or process at law, to sell and dispose, in whole or in lots, of the said lands and others by public roup at Edinburgh or Glasgow, or at the head burgh of the county within which the said lands and others, or the chief part thereof, are situated, or at the burgh or town sending or contributing to send a member to Parliament, which, whether within or without the county, shall be nearest to such lands, or the chief part thereof, on previous advertisement, stating the time and place of sale, and published once weekly for at least six weeks subsequent to the expiry of the said three months, in any newspaper published in Edinburgh, and also in any newspaper published in such county, or if there be no newspaper published in such county, then in any newspaper published in the next or a neighbouring county, the grantee being always bound, upon payment of the price, to hold count and reckoning with the granter or his foresaids for the same, after deduction of the principal sum, secured interest due thereon, and liquidate penalties corresponding to both which may be incurred, and all expenses attending the sale, and for that end to enter into articles of roup, grant dispositions containing all usual and necessary clauses, and in particular a clause binding the granter of the said bond and disposition in security, and his heirs, in absolute warrandice of such dispositions, and obliging him and them to corroborate and confirm the same, and to grant all other deeds and securities requisite and necessary by the laws of Scotland for rendering such sale or sales effectual, in the same manner and as amply in every respect as the granter could do himself, and as if it had been thereby further provided and declared that the said proceedings should all be valid and effectual whether the debtor in the said bond and disposition in security for the time should be of full age or in pupillarity or minority, or although subject to any legal incapacity, and that such sale or sales should be equally good to the purchaser or purchasers as if the granter himself had made them; and also that in carrying such sale or sales into execution it should be lawful to the grantee and his foresaids to prorogate and adjourn the day of sale from time to time as they should think proper, previous advertisement of such adjournment being given in the newspapers above mentioned once weekly for at least three weeks, and as if the granter had bound and obliged himself and his foresaids to ratify, approve of, and confirm any sale or sales that should be made in consequence thereof, and to grant absolute and irredeemable dispositions of the lands and others so to be sold to the purchaser or purchasers, their heirs and assignees, and to execute and deliver all other deeds and writings necessary for rendering their rights complete."

On 3d February 1858 the said A. J. D. Brown and the said Mrs Meiklam's trustees served instruments of intimation, requisition, and protest for payment of their respective bonds on Pearson, John Stewart, and the Western Bank, by which it was intimated that failing payment within three months the said subjects would be sold. In consequence, however, of the then unfavourable state of the market, the intended sale was postponed, and arrangements were made for the management of the property by a factor, who was to draw the rents and apply the same in extinction of the interest on the said bonds. On the 20th April 1864, without any fresh premonition, but after due advertisement for six weeks previously, Brown and Meiklam's trustees exposed the subjects to public roup at the upset price of £11,000. No person having offered the upset price, the sale was adjourned to the day of . This blank was afterwards filled up on 1st August 1866, when the subjects were again exposed for sale in manner to be immediately mentioned, with the date "1st August 1866," but it remained until that date had been fixed on as the date of the second exposure. On 1st August 1866, without renewed requisitions and intimations of sale, but after advertisement for three weeks (being the period required for advertisement in the case of an adjourned sale), the subjects were re-exposed at the reduced upset price of £10,000, and James Morrison, auctioneer, Glasgow, became the purchaser at that price. On 13th July 1866, while these advertisements were being made, James Stewart wrote to Mr Keyden, the agent for the heritable creditors, stating that he observed the advertisement, and requesting an account of the intromissions of these creditors, and stating that if he found that account correct he would take an assignation to the debt, and take the property into his own hands. This letter is quoted *infra* in the opinion of the Lord President, as is also a letter written after the sale intimating that James Stewart would hold the heritable creditors liable for any prejudice to his interest arising from the sale. Morrison obtained a disposition from Brown and Meiklam's trustees, as heritable creditors, dated 24th, 27th, 29th, and 30th August, and 3d

September, which was recorded on 6th September 1866. Thereafter Morrison, by disposition dated the 13th May 1874, sold the subjects to the Scottish Lands and Buildings Company (Limited), who recorded their disposition on 16th May 1874, and were the proprietors of the subjects when this action was raised. James Stewart died in March 1873, and John Stewart in November 1874.

This was an action of reduction which was raised in November 1875 at the instance of John Russell Stewart, artist, Glasgow, immediate elder brother and heir of conquest of James Stewart, and the trustees and executors of John Stewart, against (1) A. J. D. Brown and Mrs Meiklam's trustees, the original bondholders; (2) James Morrison, the first purchaser; (3) The Scottish Lands and Buildings Company (Limited), the second purchasers; and (4) the assignees of the bond granted to Mrs Meiklam's trustees. The pursuers concluded for reduction of (first) the disposition of 1866 in favour of James Morrison, and (second) the disposition of 1874 in favour of the Scottish Lands and Buildings Company (Limited), and for declarator that the pursuers had "the only good and undoubted right and title to the lands and to possess the same, and to uplift the rents, maills, and duties thereof, and that the defenders had no right or title thereto."

The pursuers pleaded—"(1) The pretended sale of the said lands and others to the defender James Morrison was illegal, because—(First) The intimations required by the statute, and on which the sale pretended to proceed, had fallen by arrangement of parties, or otherwise by *mora*, and were not renewed. (Second) The subjects not having been sold when first exposed, the day of sale was not adjourned to any specified time. (Third) Assuming that the sale was validly adjourned, the adjournment was to a time too distant, and the intimations which had been made fell by *mora* or otherwise subsequent to such adjournment. (Fourth) The bondholders did not advertise the adjourned sale."

The defenders A. J. D. Brown and Meiklam's trustees pleaded—"(1) No title to sue. (6) The sale of the property under the defenders' bonds having been validly carried out in compliance with the statute libelled, the defenders are entitled to absolvitor. (9) The pursuers are barred by acquiescence, taciturnity, and *mora*."

The action originally depended before Lord Curriehill (Ordinary), who on 23d February 1876 allowed the defenders a proof of their averment that Stewart's original right was limited; this order, however, was discharged on the discovery of the back-bond. On 13th June 1876 an interlocutor was pronounced by the Lord Ordinary finding, *inter alia*, "that the pursuers have right to the property libelled, and to the rents thereof, under the disposition by Thomas Pearson to John Stewart, dated 21st December 1855, and to sue for the same, subject to the conditions contained in the said disposition and relative back-bond." This finding was recalled by the First Division on 16th November 1876, and the cause was remitted back to the Lord Ordinary, who on 29th June 1877 remitted the accounts between the late John Stewart and Thomas Pearson to Mr William Mackinnon, accountant, Glasgow. A second remit was made on 22d February 1881, and the accountant finally reported that a balance of about £600 was due to the pursuers. Thereafter on 16th June 1882 the Lord Ordinary (M'Laren), after a proof, assoilzied the defenders from the conclusions of the action.

"*Opinion.*—This case was argued before me very elaborately, and raises some interesting questions in the law of real property, particularly with reference to the powers and duties of heritable creditors. But in the view I take of it, my opinion may be very shortly stated.

"The pursuers are the representatives of John Stewart, house agent in Glasgow, and of James Stewart, his son. They claim to set aside a sale of certain heritable subjects in Glasgow described in the proceedings as 'The Arcade property,' at the instance of heritable creditors, in the assumed exercise of the powers of their bond, on the ground of alleged informalities in the proceedings preliminary to the sale. The action is directed against (1) the heritable creditors; (2) Mr James Morrison, the purchaser; and (3) The Scottish Lands and Buildings Company (Limited), purchasers from Mr Morrison. From the nature of the action it might be supposed that it was instituted by the former proprietor, who would have a direct interest to challenge a sale by his creditors to his prejudice. But this is not the case. Mr Pearson, the proprietor, is not objecting to the sale, and Mr John Stewart, whose representatives are prosecuting the action, was not the proprietor of the subjects, but a heritable creditor secured by *ex facie* absolute disposition subsequent in date to the bonds of the heritable creditors. His son James, who is also represented by the pursuers, is identified in title with his father. The father had at one time granted a sub-conveyance to the Western Bank, and afterwards became bankrupt. After the termination of the proceedings in bankruptcy the Western Bank reconveyed the subjects, not to the father, but to the son. John Stewart, the father, was only a heritable creditor, and it is plain that James Stewart, the son, who was a gratuitous disponee acquiring right to the subjects mediately from his father, could have no higher title than that which the father himself possessed—that of a creditor secured by a disposition qualified by a separate obligation.

"The first objection to the sale is, that it was not preceded by an instrument of intimation, requisition, and protest, in terms of the statutory power of sale as defined by 10 and 11 Vict. c. 50, the Act of Parliament regulating the contract. It appears that an instrument in regular form was on 3rd February 1858 served on the proprietor Thomas Pearson, and also on Mr John Stewart and the Western Bank of Scotland. But the subjects were not exposed to sale until 20th April 1864, and the actual sale only took place on 1st August 1866, eight years after the notarial requisition. It is contended by the pursuers that the requisition of 1858 had become ineffectual through lapse of time, and that their constituent was entitled to a second notarial requisition, preceding the sale by the customary interval of three months.

"If it were necessary for the purposes of the case to offer an opinion on the question, I should have great difficulty in assenting to the pursuers' proposition that the effect of a notarial requisition and protest can be neutralised or displaced by delay on the part of the heritable creditor in bringing the subjects to sale. No such sugges-

tion has ever been made with reference to a notarial protest upon a bill of exchange, and I am not aware that a different principle has been held applicable to notarial protests applicable to bonds. The object of the requisition and protest is to certiorate the debtor in the bond that the contract of loan or agreement for the forbearance to demand the principal of the debt is to come to an end at the next half-yearly term. It converts the borrower's obligation from a conditional promise to pay at the first term to which a demand is applicable into an unqualified obligation to pay at the next ensuing term. On the expiry of the period of premonition the debtor is in *mora*, and the creditor is entitled to use all the powers which his deed of security confers. These powers have relation to the unpaid debt, and I presume they continue until the debt is extinguished by discharge or prescription. That the debtor should be a second time informed by a notary that his debt is unpaid, and that the creditor may any day exercise his powers of sale, appears to me, to say the least, to be a superfluous proceeding. I do not proceed, however, upon this ground at all. I am of opinion that neither John nor James Stewart were parties to whom a notarial requisition should properly be addressed. They were not debtors in the bond. A charge of payment directed against either would have been instantly suspended, and would have rendered the charger liable in damages. The Stewarts were heritable creditors secured by mortgage, or, as we term it, *ex facie* absolute disposition and back-bond—a common form of security to banks and public companies. Such companies would be surprised to be told that they were liable to be called to pay the debt of a prior creditor secured by bond and disposition in security. For the same reason I can give no effect to the pursuers' objections to the heritable creditors' proceedings founded on the factory granted by Stewart. This was merely an arrangement of convenience while the powers of sale were in suspense. The act of the heritable creditors in calling up the bond did not in any way displace the creditors' heritable security or deprive them of the right to levy maills and duties from tenants. The granting of a factory to obviate recourse to legal proceedings would not, in my opinion, militate against the creditors' rights to enforce their power of sale when a favourable opportunity should occur.

"2. The next and only other objection to the sale is, that it was adjourned from April 1864 to August 1866 by a minute blank in the date of the adjournment, the blank having been filled up apparently before the sale actually took place, and that the adjourned sale was preceded by the advertisements appropriate to an adjourned sale instead of the advertisement for six successive weeks required in the case of a first exposure.

"No authority was cited in support of the objection to an adjournment in blank, and the practice is entirely opposed to the pursuers' contention. It is quite settled that blanks in matters immaterial may be filled up by the writer of the testing-clause. It would be in the highest degree inexpedient that the auctioneer, where no offerer appears, should then and there be obliged to fix a day for a re-exposure. The statute requires that re-exposures should be advertised. This is the proper and only useful notice, and if it is fairly given the filling in of the date in the minute is of very little consequence.

"As I hold that the sale on 1st August 1866 was an adjourned sale and not a new exposure, it follows that the advertisements were legally sufficient. I do not overlook the circumstance that the adjournment extended over a period of two years, and it is to be regretted that the agents in the sale did not advertise during six successive weeks as in the case of an original exposure. The interests of postponed creditors are under the protection of the Court, and if Mr Stewart had applied for interdict against the intended sale on the ground of insufficient notice it is most probable that the Court would have ordered further advertisement, in order if possible to ensure competition. But no complaint was made, and I cannot say that the advertisement was legally insufficient, nor do I think that there is any evidence of fraud or unfairness in the proceedings of the heritable creditors. Mr Stewart was aware of the sale, because shortly before it was appointed to take place he wrote to the agents demanding an accounting, and offering to pay the debt, but making no objection to the proceedings on the ground of informality. It is clear that Mr Stewart at that time had not the means of paying the debt, and I cannot regard his letter as a *bona fide* offer of payment. Such an offer could not possibly oblige a heritable creditor to stop a sale. There ought to have been a tender of the principal sum at all events, or an offer to consign that sum in bank pending inquiry into the heritable creditors' intromissions with the rents.

"In the circumstances I will assoilzie the defenders with expenses. I understand that my general finding of expenses entitles the Auditor, under the provisions of the Act of Sederunt, to disallow the expenses of a previous part of the case in which the defenders were unsuccessful, and leaves open the question how far the two defenders are entitled to the expense of separate appearances in a case in which their interests were to a great extent identical so far as regards the conclusions of the action."

The pursuers reclaimed, and argued—They had a good title to sue, as being absolute disponees, and because the accountant in his report had brought out a balance in their favour. No intimation had been made to them of the exposure in 1864, and the intimation given in 1858 having fallen by *mora*, the provisions of the statute had not been complied with. A person holding an *ex facie* absolute disposition qualified by a back-bond is proprietor in all questions, except that the debtor has a right to redeem, and therefore John Stewart was entitled to intimation. The minute of adjournment being to the day of , instead of to a day certain, was invalid, and the sale following was not an adjourned sale but a new exposure, and therefore required advertisement for six weeks instead of three. The creditors were bound by the terms of their bonds, and this was not a case in which the debtor was entitled to waive any of his rights.

Authorities—*Hagart* v. *Robertson*, December 20, 1834, 13 S. 234; *Morrison* v. *Millar*, June 18, 1818, Hume 720; *Gardyne* v. *The Royal Bank of Scotland*, March 8, 1851, 13 D. 912—*rev.* May 15, 1853, 3 Macq. 358; *Liquidators of City of Glasgow Bank* v. *Nicolson's Trustees*, March 3, 1882, 9 R. 689; *Leckie* v. *Leckie*, November 21, 1854, 17 D. 77; *M'Bain* v. *Wallace & Co.*, &c.,

January 7, 1881, 8 R. 360; *Fleming* v. *Imrie*, February 11, 1868, 6 Macph. 363; Bell's Lect. ii. 1154; Bell's Comm. (5th ed.) ii. 292; *Melville* v. *Dundas*, January 28, 1854, 16 D. 419; *Hope* v. *Moncrieffe*, January 26, 1833, 11 S. 324; *Dickson* v. *Magistrates of Dumfries*, January 15, 1831, 9 S. 282; Menzies' Lect. (3d ed.) 860; *Nisbet* v. *Cairns*, March 12, 1864, 2 Macph. 863; Ersk. Inst. ii. 8, 25; Stair, ii. 10, 22; *Campbell* v. *Bertram*, November 10, 1865, 4 Macph. 23; *Cowan* v. *Kinnaird*, December 15, 1865, 4 Macph. 236.

The respondents argued—The position of James Stewart was merely that of a postponed creditor, and as such he was not entitled to notice under 10 and 11 Vict. c. 50, sec. 3, his interest being protected by sec. 8, which imposes an obligation on the creditor selling to account for the balance of the price. The statute does not prescribe any term of adjournment, and therefore this case was different from the cases of *Hope*, *Melville*, and *Nisbet* cited by the reclaimers. The adjournment was made in the usual form. The reclaimers' contentions rested on form only, and they did not aver prejudice; but a postponed creditor has no right to interfere with a sale by a prior bondholder without qualifying substantial injury. The reclaimers having been all along in the knowledge of these merely technical objections, were not now entitled to appeal to the equitable jurisdiction of the Court.

Authorities—*Wilson* v. *Stirling*, March 14, 1843, 8 D. 1261; *Dunlop* v. *Marshall*, January 19, 1821, Hume 666; Bell's Comm. (5th ed.) ii. 292; *Beveridge* v. *Wilson*, January 17, 1829, 7 S. 279; *Moffat* v. *Calderhead*, June 16, 1825, 4 S. 98; *Keir* v. *M'Arthur's Trustees*, December 23, 1848, 11 D. 301; *M'Kenzie* v. *Mitchell and Others*, June 25, 1872, 10 Macph. 861; *Glas, &c.* v. *Stewart*, May 29, 1830, 8 S. 843.

At advising—

Lord President—This case is of considerable importance to the law regulating the rights of heritable creditors selling under powers contained in their bonds. We have a good deal of evidence, parole and documentary, but I think that a statement of the condition of the titles of the subjects in question, and a few facts, will be sufficient to ground a judgment on the questions argued before us. With regard to the titles: A person named Pearson was the proprietor of what was known as the Arcade property in Glasgow, and on the 15th of May 1854 he granted two securities over it, each for the sum of £5000, one in favour of Mr Dennistoun Brown, and the other in favour of Meiklam's Trustees. These securities were in the usual form of bonds and dispositions in security, and it was provided in the bonds that they should rank *pari passu*; they were both put upon record. Thus there was constituted over the subjects a valid first security to the amount of £10,000. Then upon the 21st of December 1855 Pearson granted an absolute disposition of the property to Mr John Stewart, but this disposition though *ex facie* absolute was truly in security of advances made and to be made; This was not disclosed, and the back-bond was not recorded. We know now, however, that the disposition was in security, and formed a second charge on the Arcade property. Mr Stewart did not long remain proprietor of the subjects for, on the 24th of April 1856 he conveyed them to the Western Bank in security of advances made to him. The right of Stewart, whatever it may have been, remained vested in the Western Bank until 1866, when the property was reconveyed by the bank to James Stewart, the son of John Stewart. This conveyance, though executed in February, was not recorded until March 1866. In this same year John Stewart, who had been bankrupt and was sequestrated in 1861, obtained a retrocession, having been discharged; so that James Stewart, who had paid nothing for the property, and John Stewart really stood in the same position, or, as the Lord Ordinary aptly expresses it, "James, who is also represented by the pursuers, is identified in title with his father." We may thus deal with John Stewart alone, and this being the state of the titles, proceed to ascertain the facts on which the action of reduction is grounded. The first bondholders, Mr Dennistoun Brown and Meiklam's trustees, finding that they could not get payment of the interest on their loans, wished to sell the subjects burdened, and Brown accordingly served an intimation and requisition of payment on Pearson. On the 3d of February 1858 this was intimated to John Stewart and to the Western Bank. I may here mention that the creditors were under no obligation whatever to intimate this to John Stewart, for he had originally no right to have intimation, and whatever right he ever had was by this time transferred to the Western Bank, for this was in 1858 and his conveyance to the bank was in 1856. However intimation was made. After the requisition was served requiring payment to be made at Whitsunday 1858, the bondholders considered when they should sell, and found the state of the market very unfavourable for a sale at that time. They thereupon delayed the sale, and as the delay might be considerable, arrangements were made for the management of the property, and a factor was appointed to draw the rents and pay the interest on the debt; this continued until 1864. On the 20th of April 1864 the subjects were exposed for sale by the bondholders. The advertisement of the sale was regular, and in terms of the conditions attached to the powers of sale under the bonds, and was continued for a period of six weeks; the upset price was £11,000, and the day of the sale having arrived, the subjects were exposed, but there was no bid. It is said that this exposure should not have been made without a new requisition or premonition, because six years had elapsed since the previous requisition had been served, and this objection applies also to the later exposure and subsequent sale I am now about to mention. The only premonition was in 1858, and no one having bid at the exposure in 1864 the sale was adjourned; the minute bears that the adjournment was made to a day certain, namely, the 1st of August 1866. But it was admitted that this date was not filled in at the time of adjournment—that the day to which the sale was adjourned stood blank in the minute as originally executed, and that it was filled in when the date of the second exposure was settled. In 1866, with a view to the new exposure, fresh advertisements were made, not however for the same period as in 1864, which were as for a first exposure; the advertisements in 1866 were made as for an adjourned sale, being fewer in number and extending over

a shorter period of time. For the pursuers here it is objected, first, that the exposure was incompetent because the date of adjournment was blank, and, second, that as there was no adjourned sale, that in 1866 was a new exposure, and required six weeks' advertisement instead of three, the number of weeks during which advertisement was in fact made. These, I understand, are all the objections to this sale, the proceedings at which were quite regular, the purchaser, whose name was Morrison, being preferred to the subjects in question, and in the same year he got a disposition, which was recorded, and his title feudalised. Thereafter in 1874 Morrison sold to another party, the Scottish Lands and Buildings Company (Limited), and their disposition was recorded. On the ground of the objection which I have just mentioned this action of reduction has been brought, concluding for reduction of these two dispositions, viz., the one to Morrison and the other by him to the company, and following on the conclusions for reduction we have conclusions for declarator—"And it ought and should be found and declared, by decree foresaid, that the pursuers have the only good and undoubted right and title to the lands and others before described, and to possess the same and to uplift the rents, maills, and duties thereof, and that the defenders have no right or title thereto." The object of inserting such a conclusion into the summons is to extinguish the title in the person of Morrison and his disponee, and vest the property in the person of the pursuer. It is difficult to see how a postponed security-holder could succeed in such a declarator as that, and I see no other practical purpose for which he asks decree, and to state that he has a right to decree on such a ground as this is, I think, a very startling proposition indeed. When we come to consider the further grounds of reduction, they seem to be of such a nature that this security-holder has, in these circumstances, and after such a length of time, no title or legitimate interest to maintain this action. He was divested of the property from 1856 until 1866, during which period the title was transferred to the Western Bank. No doubt Mr Stewart was in form restored to his position of proprietor in 1866, but what was the right he had? It was merely the right of a postponed creditor, and I am not aware that in bringing subjects to a sale under powers in a bond and disposition in security it is indispensable that notice should be served on a postponed security-holder. I know of no law for that. Intimation must be served on the debtor, and if the debtor has ceased to be owner of the estate, then intimation must be made to the present owner that his estate is to be brought to sale. I know no law that requires premonition to be made to anyone else except these two, and this gentleman therefore has no ground of complaint. Supposing, then, that a second requisition had been served on the debtor and owner, it would not have benefited this postponed creditor, for it is clear that Pearson never made any complaint, and that he acquiesced in the sale as being carried out very properly and for the interests of all concerned, and it is not competent for the pursuer to step into Pearson's place and lodge objections which might have been open to Pearson but are certainly not open to him. Add to this the fact that this objection was never thought of, or at least never spoken of, until 1875, and the case against the pursuers appears very strong, and it becomes impossible for them to maintain this action to any effect. If they had averred prejudice this case might have been different, but we have no intimation of this, and if they had said that Stewart did not know of the sale that might present a difficulty. I am far from saying that a first bondholder is not to have any regard for the interests of those bondholders whose rights are postponed to his; on the contrary, I think there is a duty incumbent on him to see that the proper preliminaries precede any sale, and to have a due regard to the surplus which may remain after paying off the first bondholder's debt. The principle applicable to such a case is remarkably well stated in the opinions of the consulted Judges in the case of *Beveridge* v. *Newton*, 7 Shaw 279, where it is said by them —"By law the heritable creditor, whose right is constituted by infeftment in the way and manner here done, cannot be deprived of his right to sell. Still, however, it is a right subject to control. He is but an encumbrancer, and subordinate rights may be lawfully created by the common debtor, to which the creditor must pay a certain regard, provided they do not injure his own rights." And therefore if it could be shown that in bringing the subjects to sale any undue haste had been exhibited in selling at an unfavourable time so as to procure for the first bondholder immediate payment of his debt, that would be a good ground of complaint to a postponed security-holder. But there was no undue haste. The bondholder found the market in such a state that he could not sell favourably; in 1864 it is proved that the upset price of £11,000 could not be got, and there is no blame in the subjects being exposed in 1866 at £10,000. Now, this amount was just sufficient to pay the first security-holder, but it is not suggested how a better price could have been obtained, and there is not the slightest appearance of injury of the slightest kind to the postponed security-holder from the manner of the sale. But again, was this security-holder aware that these subjects were to be sold in 1866 at the upset price of £10,000? We have the most complete evidence of his knowledge under his own hand, in his letter of 13th July 1866, —"I observe that you are advertising the Royal Arcade property under the powers of sale contained in two bonds. Your clients have now been upwards of eight years in possession under these bonds. I will thank you to render me an account of your intromissions, and if found correct I will take an assignation to your client's debt, and take the management of the property into my own hands." This distinctly shows he had seen the advertisement of sale, and that he was in a position to make himself aware of the conditions of sale if not disclosed in the advertisement. The proposal contained in this letter the Lord Ordinary has characterised as not *bona fide*, and I am inclined to agree with him. Mr Stewart was at that time not in a position to advance £10,000 or any sum at all, and Mr Keyden, to whom the letter was addressed, says in his evidence that on receipt he wrote to Mr Stewart asking him to call; he never called, and never made any further proposal. After the sale Mr Keyden received from Mr Stewart the letter of 14th August 1866, which was in the following terms:—"Understanding that you have sold the Arcade property in

Cowcaddens notwithstanding my offer to take an assignation to your securities on production of a satisfactory account of your intromissions, I hereby intimate that I shall hold you responsible for any results that may prejudice my interest in the property." And there the matter rested. There was no intimating that anything had been done amiss, and no objection to the way in which the sale was carried through. With the knowledge Stewart had he could have had a remedy for any injustice or prejudice he might have suffered; if the upset price was too low, or the advertisements invalid or insufficient, the Court would have interfered and prevented the sale. But with the knowledge that if he had good grounds for complaint the Court would have stopped the sale until proper notice and advertisement had been made, Mr Stewart did not take that step. He was aware of the objections, but did not choose to state them, and because he knew that the statement would do him no good—that it would serve no good purpose to him or anyone else. We have the evidence of a friend of his, Mr George Hally, who says that he was consulted by Mr Stewart as to what was going on, and that he said he intended to stop the sale. He says:—"I understood the ground of his objection to be that there was not a regular premonition given by the bondholders—in fact, that the property was sold without any premonition or intimation about the bond at all. Mr Stewart frequently spoke to me about the matter. I used to ask him if he was moving in it, and he said, No, I am not moving in it, but I have a rod in pickle for them. I think he used that expression the very next day after I had seen Mr Morrison. He often spoke about it to me in subsequent years." Thus we have it very clearly shown that Mr Stewart being in the full knowledge of the irregularity before the sale did not take this objection, but keeps it up to be, as he says, "a rod in pickle," to be used at the time it would do most mischief. No second security-holder was entitled to deal with the property in that way when his legitimate interests were not injured, especially after such a length of time. There was a sale, and then a second sale, and he was not entitled to state this objection for the purpose of cutting down a regular feudal title. I have abstained from dealing with the objections on their merits, and I am not disposed to adopt the opinion of the Lord Ordinary that a premonition would avail for any length of time. I think that would be a dangerous doctrine. Whilst I am not prepared to state that these objections would not vitiate the sale, I could not hold that they would be ineffectual as a ground of challenge if brought forward at the proper time and in a proper way. On the grounds I have stated, therefore, I am for adhering to the Lord Ordinary's interlocutor.

Lord Mure—I concur, and the view I take proceeds on much the same grounds which have been stated by your Lordship. It is important in dealing with the matter of these objections to keep in view the precise dates of the various steps taken and the date of raising the action. This is a summons of reduction of two dispositions, one granted in August 1866, the other in May 1874. The first conveyance, which was to Morrison, though called a disposition by the bondholders, was really granted by the original proprietor; the second conveyance was in favour of the building company who are called as defenders here. Under the powers contained in their bond and disposition in security, the bondholders proposed in 1858 to sell the subjects, and accordingly served a requisition on Pearson and Stewart, as your Lordship has fully explained. No sale followed on this requisition until the year 1866, or eight years after the requisition was served; the property was exposed in 1864 after due advertisement, and then the sale was adjourned; in 1866 the property was re-exposed and purchased by Morrison. The additional advertisements made with a view to the second exposure did not continue for the same time as these made originally, but we have clear evidence that when the sale took place in August 1866 it was in the full knowledge of John Stewart, the predecessor of the pursuer; and that letter of 13th July 1866 which your Lordship read shows that he was quite aware that the sale was taking place, that an adjournment had been made in 1864, and that the property was to be disposed of without a new requisition on himself or anyone else. But he takes no steps to prevent it. This is confirmed by the evidence of Mr Hally, which shows that while Mr Stewart was aware of these irregularities he yet abstained from taking any steps to set aside the sale which followed. Stewart lived until November 1874 in the full knowledge of these objections, and yet no steps are taken until December 1875, or upwards of a year after his death; then this action is brought. The grounds of reduction are of such a description that they may be called formal or technical. As to the objection that the sale was carried through without a renewed requisition, I agree with your Lordship in thinking that a requisition cannot last for an indefinite time so as to operate a fulfilment of the bondholder's obligation, and if the point had been raised purely I would have been for some limitation. But if the party who has received a requisition, and knows the sale is to take place, allows the sale to proceed, and for a period of eight years takes no objection, then it is quite a different thing to raise the question in that form, and it is in that form that we now have to deal with it. The second objection, that there was no proper adjournment, since it was made to the day of , and the third objection that the advertisements were of insufficient duration, together with the objection I have just dealt with, were the three leading objections taken by the pursuer. If these were good—and I do not say whether they are good or bad—it would have been quite easy to make them available so as to prevent the sale except on condition of a repeated requisition and further advertisement at the time; but no such steps were taken. The sale goes on, the property was possessed between 1866 and 1874 by Morrison, and thereafter by the building company; and now upon technical grounds an action of reduction is raised at the instance of the representatives of the party who all along knew of these objections. I think it comes too late, and that the party is barred in the circumstances from insisting in the action.

Lord Shand—I concur in thinking that the interlocutor of the Lord Ordinary should be adhered to, and I also concur in the reasons your Lordship has given.

If this case had arisen between the owners of the property and a bondholder who had sold under powers of sale, and if the question had been raised shortly after the sale took place, it would then have been necessary to decide the important questions upon which the Lord Ordinary has expressed an opinion. To me it is satisfactory that it is not necessary in order to uphold the validity of the sale that it should be held that the pursuer's objections are ill-founded. It appears that a requisition was made in 1858, but that this requisition was not followed by a sale until 1866, so that there were eight years between the requisition and the sale. From the evidence we find that the parties entered into negotiations with the object of making arrangements for the management of the property, and a factor was appointed to draw the rents for the interest of all concerned in the meantime. I think that it is a grave question whether in the circumstances a new requisition was not necessary, both from the lapse of time and from the nature of the communications between the parties. But it is unnecessary to decide that. I only say that I agree with your Lordships on this point, and that I find no rule of law which lays it down that a requisition once given will operate many years afterwards. Another objection raised, and which has been disposed of by the Lord Ordinary, has reference to another peculiarity in the proceedings of the bondholders. The property was not only exposed without a new requisition in 1864, but having been exposed, an adjournment was made, which I may call an adjournment *sine die*, and it was not until August 1866, or two years and four months after, that the property was sold. The objection is that advertisements were made for this sale for three weeks as if for an adjourned sale, whereas the advertisements should have been for six weeks, since this was in reality not an adjourned but an original sale. This raises a grave question, and no mere technicality. That the sale was adjourned to a date blank, or to a day to be afterwards fixed, would not weigh with me apart from other circumstances; but the adjournment was not merely for the short period contemplated by the terms of the 3d section of 10 and 11 Vict. cap. 50—"and also that in carrying such sale or sales into execution it should be lawful to the granter and his foresaids to prorogate and adjourn the day of sale from time to time as they should think proper, previous advertisement of such adjournment being given in the newspapers above mentioned once weekly for at least three weeks." Here the adjournment was so long as practically to be a new exposure, and if the adjourned sale does not take place until two years after the first exposure it is a serious question whether that would be compliance with the terms of the statute. But it is quite unnecessary to decide that question. There was no objection on the part of the proprietor Pearson; he was aware of what was going on, for that is proved, and he acquiesced in all that the bondholders did, and so far as we can see was quite satisfied. The question is, whether the pursuer is in a position to maintain these technical objections? Now, when the defenders' authors obtained their securities in 1854 there was no other burden upon the lands, and the present pursuer had no relation to the lands; it was only in 1855 that the pursuer's authors obtained the conveyance which is now admitted to have been in security only, and which was granted by Pearson to John Stewart. That placed a second burden upon the subjects. I must here observe that there was no contract between the person who got that conveyance and the persons who held the first securities, so that there is no tie of contract between the defenders here and the pursuers, and they therefore have only such rights as arise out of their relation to the property, and not out of contract. The pursuers maintained that they were proprietors in relation to the first bondholders, but I think that the Court settled that that was not so in the recent case of *Nicolson's Trustees*, which was cited to us in argument. I think that it was there held—and I adhere to that part of the judgment—that as in a question between a first security-holder and a second security-holder who has obtained a disposition *ex facie* absolute, the rights of the latter are not those of a proprietor. It is here admitted that this is not a case of a first security-holder dealing with the proprietor, but of two security-holders dealing with each other. The pursuers were holders of a disposition *ex facie* absolute, but qualified by a back-bond, and though I do not say that in a question with the granter or with tenants they were not proprietors, yet in relation to first security-holders their right was no higher than that of holders of a bond and disposition in security. It has been conceded that the original conception of this action is not sound in so far as it seeks a declarator that the pursuers are sole proprietors of the subjects in question, and it is not disputed that so clearly are they security-holders that if after the sale and payment of the first bonds there had remained a surplus of £100, or £200, or £600, the amount which the accountant has brought out as due to them, the pursuers would have been out of Court on this balance being tendered to them by the defenders. Their interest was that of security-holders and not of proprietors. As the result of these observations, the questions between these parties must be dealt with as questions not between security-holders and proprietor, but between two security-holders. What are the grounds of action by this second security-holder against the first security-holder? No prejudice has been averred; it is not said that there was a want of publicity; the price was adequate; and it is not suggested that the property would have brought one farthing more. The pursuers' objections are technical and formal—that certain formalities were not observed—that is to say, that there were certain forms with reference to which the proprietor contracted, and that these were not carried out. But a second security-holder is not entitled to plead stipulations contained in a contract not entered into with him, and he has no relation to the party who entered into the contract. As I indicated during the argument, if the owner and the first security-holder dispensed with the forms prescribed, there is nothing to prevent them. The owner might say, "I shall accept the requisition," or "I dispense with the requisition, and I do not want a three months' premonition." Now, I would say still further, that they could modify the terms of the bond with regard even to advertisement, for the stipulation is between the first security-holder and the owner, and the second security-holder could not say that he had a *jus crediti* to enforce the obligation.

The pursuer therefore has no title to insist i1

these objections, and that is enough to decide this action. But even if he had a title, he would be bound by his delay. The sale was in 1866; the purchaser improved the property, and openly possessed it for a number of years on an unchallenged title, and then sold to another. We are now in the year 1882, so that it is sixteen years after the sale that this challenge is made on technical grounds, and I think that it is out of the question to sustain the action in such circumstances. Perhaps something might be said if the pursuer could aver that the proceedings were carried on behind his back; but the contrary is the case—the pursuer said he knew everything, and put his rod in pickle accordingly, but then he has kept it in pickle so long as to be utterly useless to him. Eight days would have been long enough, and if he intended that the sale should be challenged he ought to have come forward at once. In my opinion, therefore, the pursuer has, in the first place, no title to sue; and secondly, he is barred by his own conduct. I may add that I agree with what your Lordship in the chair has said about the duties of first to second and third bondholders. By the 8th section of the Act 10 and 11 Vict. c. 50, it is provided that "the creditor upon receipt of the price shall be bound to hold count and reckoning therefor with the debtor and postponed creditor, if any such there be, and their heirs and assignees, or with any other party having interest, and to consign the surplus." There is no contract between first and second security-holders; still there is a resulting trust that the first security-holder shall not only secure full payment of his own debt, but also get a full price for the property, having regard to the interests of others as well as his own; and while a bondholder selling under his bond is not bound to observe all the conditions engrafted by the statute if the owner dispenses with these, yet there must be due publicity by sufficient advertisements, and he must take care that the second security-holder knows of the intended sale. In short, he must do all he can to ensure a full price, and take as great care as if the price were all going into his own pocket. But even if this action had been brought on the ground that from a want of due advertisement a full and fair price had not been obtained, it should have been brought at once. It would not do to let others purchase the subjects and sell to third parties, who make their arrangements on the footing that the property belongs to them, and then after the lapse of such a length of time attempt to cut down the sales. I am therefore of opinion that the interlocutor of the Lord Ordinary should be adhered to.

Lord Deas was absent.

The Court adhered.

Counsel for Pursuers and Reclaimers—Guthrie Smith—Rhind. Agent—W. Officer, S.S.C.

Counsel for Defenders and Respondents—Gloag—Lorimer. Agents—Ronald & Ritchie, S.S.C.

Tuesday, February 21.

OUTER HOUSE

[Lord Lee.

SUTHERLAND *v.* THE COMMERCIAL BANK OF SCOTLAND (LIMITED).

Bank—Cheque—Action against Drawee—Title to Sue.

Held that there is a right of action at the instance of the payee of a cheque against the bank on which it is drawn.

Cheque—Assignation.

Held that a banker's cheque is intended, when proved to have been drawn for value, to operate an assignation of the funds in the bank at the drawer's credit.

This was an action at the instance of James Sutherland, farmer, Caithness, against the Commercial Bank of Scotland (Limited), concluding for payment of £190, being the amount of a cheque, dated 29th June 1881, drawn by George Mackenzie, farmer, Killimster, on the defenders' branch bank, Wick, in favour of the pursuer. The cheque was alleged to have been granted in payment for cattle. On the 30th June 1881 the pursuer presented the cheque at the Thurso branch of the defenders' bank, where he kept his own account, and got payment. On presentation at Wick the cheque was dishonoured, and the pursuer then gave a cheque in repetition of the £190 paid to him. The defenders averred that there were not sufficient funds at George Mackenzie's credit to meet the cheque. The cheque was allowed to remain in the hands of the bank for a considerable time, but was eventually returned to the pursuer.

The pursuer's averments are given in detail in the opinion of the Lord Ordinary. His ground of action was contained in the following averment—"The legal effect of presenting the cheque was to operate as an assignation in the pursuer's favour of all funds belonging to Mackenzie in the defenders' custody, as also of all funds coming into their custody during the time it was in their possession."

He pleaded—"(1) The cheque in question being a valid precept to pay, effectually assigned Mackenzie's funds to the pursuer to the amount specified in said cheque, in so far as held by the defenders."

The defenders pleaded—"(1) The pursuer's averments are not relevant or sufficient to support the conclusions of the action. (3) The cheque is ineffectual to assign the amount at the credit of the account on which it was drawn, in respect that at and since the date of the presentation of the cheque the credit has not amounted to the sum contained in the cheque."

The pursuer stated that his first plea-in-law was founded on *Carter* v. *M'Intosh*, March 20, 1862, 24 D. 925, L.J.-C. Inglis at p. 934.

The defenders argued—A cheque does not operate an assignation of funds at the drawer's credit, even when these are sufficient, because it is revocable, and there is no presumption of onerosity as in the case of bills of exchange—Ersk. Inst., iii. 2, 29; Guthrie's Bell's Princ. sec. 308; *Waterston* v. *City of Glasgow Bank*, Feb.