

burdened with the warehouseman's lien, the evidence of title was equally conclusive, at all events, in a question between the transferee and the warehouseman—Benjamin on Sales (4th ed.) 786; and *Connal v. Loder & Others*, July 17, 1868, 6 Macph. 1095, referred to. The language of the Act of 1891 was perfectly unambiguous—See *Tennant v. Inland Revenue*, March 14, 1892, 19 R. (H. of L.) 1, per Ld. Ch. Halsbury, 3.

At advising—

LORD PRESIDENT—In my opinion the Commissioners are right.

The theory of the section imposing the duty demanded is that a warehouseman can grant to the owner of goods a writing which is evidence of title to the goods, and I do not see what better could be granted by a warehouseman than such an acknowledgment as that now in dispute. The argument against the decision was that this writing is not the proper evidence of title, the true title being that which is granted by the seller of the goods. But then this argument really means that a warehouseman cannot, in the nature of things, give a title to goods which of course never belonged to him in his quality of warehouseman. The statute, however, in the section before us, says that he can give a writing which is evidence of title, and, as I have said before, I do not see that any more direct evidence of title could be given by a warehouseman than the writing in question. The fact that the writing does not on its face specify the particular articles but refers for this to the delivery-order does not seem to me to affect the question. That you are referred by this writing to another document for the description of the subjects need not in this, or in any other kind of title, deprive it of its validity as evidence of title. In a question with the warehouseman it is direct evidence of title.

LORD ADAM concurred.

LORD M'LAREN—If the warehouseman—in this case I presume the maker of the spirits—had merely acknowledged the delivery-order that was sent to him, I think that acknowledgment would not have been a warrant in the sense of the taxing statute, because it would have left the warehouse-keeper or custodian perfectly free to set up any counter-claim or charge upon the right of the transferee. By merely acknowledging intimation the custodian does not bind himself to anything. But then this deed does more, because it acknowledges that by virtue of the delivery-order the transferee has acquired right to the whisky, subject to no other condition than the payment of warehouse rent during such time as the whisky may remain undelivered. It was therefore, in a question between the transferee and the warehouse-keeper, evidence—I think conclusive evidence as between them, but at all events evidence—that the right of the transferee was acknowledged by the warehouse-keeper, and I cannot doubt that the person who holds such a document is in a better position for transferring the spirits than he would be if he

merely held a delivery-order with a simple acknowledgment of intimation. It appears to me, then, as it does to your Lordship, that this is a document of the kind described in the Taxing Act as a warrant evidencing title to the goods. I think it is evidence of title, even although that evidence should be unavailing in a question with outside persons, but good evidence in a question between the grantee of the delivery-order and the warehouse-keeper who is called upon to deliver.

LORD KINNEAR concurred.

The Court confirmed the assessment of the Commissioners of Inland Revenue.

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Friday, March 10.

FIRST DIVISION.

[Lord Pearson, Ordinary.]

RITCHIE v. SCOTT AND OTHERS.

Lease—Title to Grant Lease—Beneficial Ownership—Radical Right—Mandate Inferred from Possession to Grant Lease.

Certain subjects were disposed by the proprietor to R., who was feudally invested therein on an absolute title. A back-letter was granted by R. to S., a third party, who was occupying part of the subjects as tenant, which narrated that though the disposition bore that the price of the subjects had been paid by R., it had truly been paid by or on behalf of S., and that the disposition was truly granted in favour of R. in security for repayment of certain advances, and in relief of cautionary obligations. It was stipulated that R. should at any time be entitled to enter into possession of the subjects and draw the rents, and that on repayment and relief as aforesaid R. should be bound to convey the property to S. It was further declared that on the lapse of five years R. should at any time be entitled to demand repayment, and in default thereof should have right of action and diligence, and power of sale. The main object of the arrangement was to maintain S. in possession of a business carried on in part of the subjects, R. thereby obtaining an outlet for his goods. S. remained in possession of the whole subjects, acting in all respects as if he were owner for a period of nearly ten years. At the end of that period he granted a trust-deed for behoof of creditors, and conveyed his whole estate to a trustee. The trustee took possession of the premises and carried on the business

therein for behoof of the creditors. A lease of the premises was granted nominally by S. with consent of his trustee, but in reality the transaction was carried out by the trustee. R. objected to the granting of the lease, and the trustee was aware of his objections when he granted it. In an action at the instance of R. for the reduction of the lease, *held (rev. the judgment of Lord Pearson)* that the granters of the lease had no right or title to grant it, and that the pursuer was entitled to have it set aside.

Abbott v. Mitchell, May 25, 1870, 8 Macph. 791, *distinguished*, on the ground (1) that the debtor in the present case had never been infeft in the subjects, and had never had any title to them, but merely a *jus crediti*; and (2) that even if the debtor had an implied mandate to grant the lease from the proprietor feudally infeft, that authority did not extend to his trustee.

On the 21st September 1886 the trustees of the late James Scott, Brechin, exposed to public roup the property forming Nos. 51, 53, and 55 High Street, Brechin, and the subjects were sold to William Scott, grocer, Brechin. By disposition granted in November 1886 the trustees, on the narrative that since the date of the purchase William Scott had declared that it was made "for and on behoof of" George Ritchie, grocer, Dundee, and with the consent and concurrence of William Scott for all his right, title, and interest, disposed the subjects to George Ritchie and his heirs and assignees whomsoever, heritably and irredeemably.

A back-letter dated 18th and 19th November 1886, and recorded in September 1896, was granted by George Ritchie to William Scott, on the narrative that "whereas, notwithstanding the disposition granted by the former proprietors of said subjects, bears that I the said George Ritchie paid the foresaid price of £1326, and is in its terms granted *ex facie* absolutely in my favour, yet said price was truly paid by or on behalf of you, the said William Scott, and said disposition was truly granted in my favour in security as after mentioned; and whereas it is proper I should grant these presents in manner underwritten: Therefore I hereby acknowledge and declare, (*First*) That the foresaid property is to be held by me in security and for repayment of all advances and outlays made and to be made by me to you, or on your behalf, excluding sums due or to become due by you to me for the price of goods supplied in the course of business, but including feu-duties, casualties, taxes, and public burdens, improvements, and repairs, insurance, and generally all charges and expenses incurred and to be incurred by me in connection with the foresaid property, and interest at the rate of five per cent. per annum on all such advances and outlays from the date when the same shall be made by me, until complete repayment thereof, and said property shall likewise be held by me as a security for my relief

of all cautionary obligations undertaken or to be undertaken by me on your behalf; (*Second*) I shall at any time be entitled to enter into possession of the foresaid subjects, draw the rents thereof, and apply the same in and towards payment of the foresaid advances, outlays, and interest, and in and towards discharge of the foresaid cautionary obligations; (*Third*) On repayment of the whole of said advances, outlays, and interest, and my total relief of said cautionary obligations, I shall be bound to convey the foresaid property to you and your heirs and assignees, with warrandice from fact and deed under exception of all securities granted by me over said property with your consent; (*Fourth*) Upon the lapse of five years from the date hereof, I or my representatives shall at any time be entitled to demand that the whole advances, outlays, and interest as foresaid, then due by you to me shall be repaid, and that all cautionary obligations undertaken by me on your behalf, shall be discharged, and if at the end of three months after intimation of such demand shall have been made by registered letter posted and addressed to you at your last known place of residence, the said advances, outlays, and interest shall remain unpaid, or any such cautionary obligation shall remain undischarged, I, or my representatives, shall thereupon be entitled (1) to use all manner of action, diligence, and execution, real and personal, against you, or your representatives, for recovery of said advances, outlays, and interest, and for my relief of said cautionary obligations; and (2) and without prejudice to said right of action, diligence, and execution, I, or my foresaids, shall thereupon also be entitled to sell the foresaid subjects either by public roup or private bargain in whole or in lots, and at such price or prices as I or they may think proper, and thereafter to apply said price or prices, *primo loco*, in payment of the whole expenses attending the sale of the foresaid subjects, and, *secundo loco*, in repayment to me of the foresaid advances, outlays, and interest and discharge of the foresaid cautionary obligations."

The letter, which contained a consent to registration for preservation, was recorded in the Books of Council and Session on 3rd September 1896. The letter was signed by Mr Scott in token of his approbation. To enable him to meet the price of the property William Scott borrowed £900, and in accordance with the terms of the back-letter Mr Ritchie agreed to become cautioner for the amount, and a bond and disposition in security of the subjects was granted to the lender. The bond was granted *quoad* the personal obligation therein contained by Mr Scott and Mr Ritchie, and Mr Ritchie with consent of Mr Scott, "for all and any right, title, and interest competent to me in the premises," granted a disposition in security of the subjects.

Mr Scott, who had been in occupation of No. 55 High Street as a tenant, and had carried on a licensed grocery business there, continued in possession of the whole sub-

jects down to the year 1896. His name throughout that period appeared in the valuation roll as proprietor of the subjects, and he let the subjects, received the rents, and paid the taxes, feu-duty, repairs, &c.

In July 1896 Mr Scott granted a trust-disposition and conveyance for behoof of creditors in favour of Mr William M'Inroy Vallentine, bank-agent, Brechin, whereby he disposed to him his whole estates, heritable and moveable, and substituted him "in my full right and place of the premises," with full powers to relet the premises or keep them in his own hands. The trustee took possession of the property and carried on the licensed grocery business for the behoof of creditors. After sundry negotiations as to the sale of the property, on 9th September 1896 Mr Hugh M'Gregor, grocer, Brechin obtained from Mr Scott and Mr Vallentine a lease of the premises for ten years at a rent of £32, on paying £210 for goodwill and fittings. Under the lease it was contracted and agreed "between William Scott . . . heritable proprietor of the subjects, with the consent and concurrence of William M'Inroy Vallentine, so far as it is competent for him to do so, or he has interest therein," that the premises should be let to Mr M'Gregor on conditions which it is unnecessary to specify.

An action was raised by Mr Ritchie against Mr Scott, his trustee, and Mr M'Gregor, concluding for declarator that Mr Scott "has not and never at any time had any right of property and was never feudally vested "in the subjects in question," and for reduction of the lease of September 6, 1896. There was a further conclusion for payment of £1000 by way of damages.

The pursuer averred that he had taken objection to the granting of the lease, stated specific objections to its terms, and maintained that it was invalid *ab initio*, seeing that the defender William Scott had never had any title to the subjects leased, and further, had granted the trust-deed for behoof of creditors two months prior to the granting of the lease.

The defenders averred that the pursuer had assented to the realisation of the licensed business, for which it was necessary to give a lease of the premises to the purchaser.

They pleaded — "(2) The title held by the pursuer to the property in question being in security merely, and the defender Scott, and the trustee, under his trust-deed, having been allowed to possess the subjects, and to act as proprietors thereof, they were entitled to grant leases of the subjects for reasonable rents."

The Lord Ordinary (PEARSON) on the 5th January 1898 allowed the parties a proof. The result of the proof so far as is necessary for the decision of the case sufficiently appears in the opinion of the Lord Ordinary *infra*.

The Lord Ordinary on 4th April assoilzied the defenders from the conclusions of the summons.

Opinion.—"In this action the pursuer,

who is a wholesale grocer in Dundee, seeks to set aside a lease of premises in the High Street of Brechin, which has been granted by the defender William Scott and his trustee in favour of the defender Hugh M'Gregor.

"The pursuer is infeft in the subjects, and has been so since 16th November 1886. Neither William Scott nor his trustee was ever feudally vested in the subjects; but William Scott was in uninterrupted possession of them from a period prior to the pursuer's infeftment until July 1896, and his possession was continued by his trustee until the lease now challenged was granted.

"The pursuer's objections to the lease are two:—(1) That Scott never having been proprietor of, nor feudally vested in the subjects, neither he nor his trustee was entitled to exercise any right of ownership therein; and (2) that the lease was granted illegally, and in pursuance of a collusive scheme as condescended on, the new tenant being in full knowledge of the position of parties.

"The subjects let have been occupied by the defender William Scott as a licensed grocery since 1883. At that time the property No. 51, 53, and 55 High Street, Brechin, of which they form part, belonged to James Scott's trustees, from whom William Scott obtained a five years' lease of the shop in question. The property includes another shop, let to a chemist, and two dwelling-houses, one of which was converted from a stable.

"William Scott had been in the employment of the pursuer Mr Ritchie, and from the time he obtained the five years' lease of the shop in 1883 the pursuer furnished him with goods and cash advances.

"In 1886, before that lease ran out, Scott represented to the pursuer that it would be desirable to acquire the property which was about to be exposed for sale, and the pursuer assented. Scott attended the roup, and was preferred to the purchase at the price of £1326. But having declared that the purchase was made by him for and on behalf of the pursuer Ritchie, the disposition was granted by the exposers with consent of Scott in favour of Ritchie, who took infeftment.

"Two days later Ritchie granted a back-letter addressed to William Scott, which narrated that Scott had purchased the property, and that notwithstanding the disposition bore that Ritchie had paid the price and was granted *ex facie* absolutely in his favour, 'yet said price was truly paid by or on behalf of you the said William Scott, and said disposition was truly granted in my favour in security as after mentioned.' The letter bore that the property was to be held by Ritchie in security, and for repayment of advances and outlays, with certain exceptions, and in relief of cautionary obligations. It stipulated that Ritchie should 'at any time be entitled to enter into possession of the foresaid subjects, draw the rents thereof, and apply the same' towards the said advances and obligations; and that on

repayment and total relief as aforesaid, Ritchie should be bound to convey the property to Scott and his heirs and assignees, with warrandice from fact and deed, under exception of all securities granted by Ritchie over the property with Scott's consent. It was further declared that upon the lapse of five years from the date of the letter Ritchie should at any time be entitled to demand repayment of all advances and discharge of all cautionary obligations; and failing such repayment and discharge at the end of three months after intimation, he should have right of action and diligence, and power of sale. The letter, which contained a consent to registration for preservation, was signed also by Scott 'in token of his approbation.' It remained unrecorded until 3rd September 1896, when it was registered in the Books of Council and Session for preservation.

"To enable him to meet the price Scott borrowed £900 from a Mr Birrell. For this a bond and disposition in security was granted, the personal obligants being Scott and Ritchie (the latter as cautioner and full debtor); while Ritchie, with consent of Scott, disposed the said High Street property in security. This loan subsists to the extent of £800.

"It was one of the main objects of these arrangements to maintain Scott in the possession of the licensed grocery business, Mr Ritchie getting at the same time an outlet for his goods and securities for his advances. He continued to supply Scott with goods and money, and Scott remained in undisturbed possession, acting in all respects as if he were owner, for a period of nearly ten years. His possession was not limited to his own shop. So far as that is concerned, his then subsisting lease, which had two years to run, merged in the ownership; and from that time he paid no rent to anyone. But he also acted as owner of the whole property. He did all the ordinary repairs and unkeep. He uplifted the rents of the chemist's shop, accounting to no one for them; and when the chemist's lease ran out he renewed it for five years at an increased rent. He was entered in the valuation roll as proprietor, and paid the owner's rates and taxes. He altered the stable in the back premises into a dwelling-house at a cost of £200 or £300, and obtained the necessary warrant from the Dean of Guild on a petition in his own name as proprietor.

"No doubt he was frequently in communication with the pursuer about these matters or some of them. The pursuer was financing him, and when money was required some explanation of the proposed outlay had to be given; but the pursuer never took any step, either under the clause in the back-letter authorising immediate entry, or under the clause providing for three months' premonition, with a view to sale.

"In 1896 Scott's affairs became embarrassed. The pursuer was by far the largest creditor; and in July of that year Mr Vallentine, bank agent, Brechin, whose bank was also a creditor, suggested to the pursuer that Scott should sign a trust-deed. This was finally arranged with Scott at a meeting in

the pursuer's office, and Scott signed the trust-deed on 15th July, Mr Vallentine being the trustee. It is admitted (Stat. III.) that 'on the granting of the trust-deed the trustee took possession of the property and carried on the licensed grocery business for behoof of the creditors until it was realised by the sale to the defender M'Gregor.'

"Mr Vallentine set about calling a meeting of creditors, and inquiring as to claims. He was in confidential communication with the pursuer both before and after the trust-deed was signed; but neither he nor his law-agent Mr Steedman knew of the terms of the back-letter until some weeks later. They knew generally that the pursuer was a large creditor, and that he was to some extent secured by having the property vested in him.

"Accordingly, Mr Vallentine all along recognised that if the property came to be sold they must take the pursuer along with them. Thus, in writing to the pursuer on 15th July intimating the first meeting of the creditors and asking for a note of his claim, Mr Vallentine says—'Do you think the property ought to be advertised for sale at once? If you do, perhaps you would send on the titles, holding this letter as a guarantee that I would account to you for the proceeds up to the amount of your claim on Scott's estate. If I am to sell, it must be done with your consent as nominal owner.'

"But the property has not been sold, although at least one offer for it was entertained. What has been sold is the licensed grocery business, and this only as incidental to a ten years' lease of the shop. The defender M'Gregor obtained from Scott and his trustee a lease of the shop for that period at a rent of £32 on paying £210 for goodwill and fittings; and that is the transaction which is now challenged.

"The pursuer's first plea-in-law raises, as it appears to me, the very question which was decided in the case of *Abbot v. Mitchell* (1870, 8 Macph. 791). There a person vested in heritable property under a disposition *ex facie* absolute, but truly in security, had allowed the true owner to continue in the possession and administration of the subjects for two years. It was held that a lease granted by the latter, without the concurrence of the former, was valid.

"I think that case rules the present so far as regards the first plea-in-law, unless some workable distinction can be suggested. (1) It is urged that here Scott never was feudally vested in the subjects; that his possession began in 1883 on a title of tenancy, and was continued from 1886 on no title except an unrecorded back-letter. But in a question with Ritchie I regard that as quite immaterial. It is plain on the face of the transactions of November 1886, and specially on the terms of the back-letter, that Ritchie was content to take the position of creditor, and acknowledged that he held for Scott as the true owner. If Scott had at any time tendered to Ritchie the amount of his debt and a valid discharge of the cautionary obligations, Ritchie would have been bound, not to reconvey, but to convey the property to Scott. I do not see

how, in a question [between] the principal parties, it can make any difference that the title was taken (as it was) direct to Ritchie with Scott's consent, instead of passing through Scott as feudal proprietor. (2) Even if Scott's position was only that of a factor or mandatory, the powers and rights of parties depended on the back-letter; and Ritchie did not put in force either of the clauses which empowered him to resume possession, the one peremptorily, the other on three months' notice with a view to sale. The pursuer's agents did indeed intimate to the trustee on 31st August that he would not homologate any sale or lease not submitted to him for approval; but by that time there was a binding bargain with M'Gregor, although the lease was not signed. (3) It is suggested that while an ordinary lease might have been unchallengeable, there was here in addition a sale of the goodwill; and that as the goodwill was inherent in and inseparable from the heritable subject, this was truly a partial realisation of the subjects held in security. Now, I assume that it would have been beyond Scott's power to sell or burden the security subjects in whole or in part without the creditor's concurrence. But then these are acts which can only be done effectually by a person who is either infeft or holds an express mandate from one who is infeft; and they are in no sense acts of ordinary administration. Here it is obvious that a lease could hardly have been negotiated without the goodwill being transferred as incidental to it. For one thing, the licence clearly belonged to the trust-estate, and the power to withhold a transfer of it gives the holder a commanding position in the case of a sale or lease of the premises. It is another question whether the terms obtained here were fair. But assuming that the lease is not otherwise challengeable, it does not appear to me to be fatal to it that the bargain included a sum in name of goodwill. It may be observed that in *Abbot v. Mitchell* a large sum had been paid for stock and goodwill, but it does not seem to have been suggested that that formed a good objection to the lease on the part of the security-holder."

The pursuer reclaimed, and argued — 1. This case was clearly distinguishable from that of *Abbot v. Mitchell*, May 25, 1870, 8 Macph. 791, upon which the Lord Ordinary based his judgment. Scott had never had any feudal title at all; all that he had was a *jus crediti* under a personal contract, in respect of which he could demand a conveyance from the pursuer on discharging the whole of his obligations. In *Abbot v. Mitchell*, on the other hand, the granter of the lease was infeft in the subjects under burden of a heritable security. See also *Union Bank v. Mackenzie*, March 27, 1865, 3 Macph. 765. Moreover, in *Abbot v. Mitchell* there were special circumstances in the possession from which the authority to grant a lease might be inferred. Here, however, the lease had not been granted by Scott while in possession, but by his trustee, and it was impossible to hold that even if he had an implied authority from the pur-

suer to grant a lease, such authority was delegated to his trustee. The only ground for holding that there was such implied authority was Scott's possession, and when that terminated the supposed authority must necessarily terminate also. It was perfectly clear from the evidence that the pursuer had objected to the granting of the lease. 2. The pursuer was entitled by way of damages to recover the equivalent of the 2½ years' occupation of the shop, *i.e.*, £90, or alternatively the interest on the money owed to him, which he would have recovered had the property been sold.

The respondents argued — 1. Scott had been left in precisely the same position as the granter of the lease in *Abbot v. Mitchell*, which case must rule the present one. He had been treated as the actual proprietor, and was in point of fact the person with the radical right acting as owner. He and the trustee were accordingly entitled to grant the lease without any consultation with the pursuer, who was merely the security-holder. 2. No harm had accrued to the pursuer from the granting of the lease, and he could only prove damage if he could show that the value of the shop was less if it were let, which there was no evidence to show.

At advising—

LORD KINNEAR—This action is brought for reduction of a lease of a shop in Brechin, which forms part of a property in which the pursuer is feudally invested on an absolute title, but qualified by a back-letter in favour of the defender William Scott. The lease in question was granted by Scott with the concurrence of the other defender William Vallentine, the trustee for his creditors, and the defence which the Lord Ordinary has sustained is that they had power to grant it by virtue of the contract expressed in the back-letter. It is to be observed that Scott was never proprietor of the subjects in question. But it appears that he was tenant of the shop which he occupied as a licensed grocer, and that when the property was exposed to sale by a former owner, it was arranged between him and the pursuer that the premises should be bought for him, that the pursuer should become cautioner to a lender from whom Scott was to borrow the purchase money, and that the property should be held by the pursuer in security for advances already made and to be made, and also in security for relief of his cautionary obligation. In accordance with this arrangement the subjects were conveyed by the vendors to the pursuer by a disposition *ex facie* absolute and irredeemable; and the pursuer immediately thereafter granted a back-letter to the defender expressing the conditions upon which they had agreed. The legal effect of these instruments is perfectly clear. The pursuer is feudally vested in the subjects as heritable proprietor, and the defender Scott has no other right than a *jus crediti* under a personal contract, by virtue of which he can demand a conveyance from the pursuer, but only on condition of paying the whole amount of the

debts now due to him and relieving him of his cautionary obligation.

But then it appears, as the Lord Ordinary says, "that the main object of the arrangement was to maintain Scott in the possession of the licensed grocery business, the pursuer Mr Ritchie getting at the same time an outlet for his goods and security for his advances. He continued to supply Scott with goods and money, and Scott remained in undisturbed possession acting as if he were owner," not only of his own shop but of the whole property. This course of administration continued for about ten years, until in 1896 Scott's affairs became embarrassed, and in July of that year he executed a trust-deed for creditors in favour of the other defender Mr Vallentine, which was afterwards superseded by a sequestration. In the course of his administration of the estate for the benefit of creditors, Vallentine and Scott granted the lease under reduction by which the shop in question was let to the defender M'Gregor on certain terms. I say the lease was granted by Vallentine, because although in form it is a lease by Scott with Vallentine's concurrence, it appears on the evidence that the transaction was really carried through by Vallentine as trustee, the administration of Scott's estate being then in his hands and no longer in the hands of Scott himself.

In these circumstances the pursuer maintains that the lease is bad, first, as having been granted by persons who had no right or title to do so, and secondly, as being prejudicial to his security. In support of the first ground it is maintained that the pursuer, being the sole proprietor of the subject, he alone could grant a valid lease either by himself or by some person duly authorised to act for him. I think this is perfectly sound. But the Lord Ordinary has held, on the authority of *Abbot v. Mitchell* (8 Macph. 791), that the defender Scott had full power to grant a lease because he was left in possession and control of the subjects in the same way as if he had been proprietor. In *Abbot v. Mitchell* a person vested in heritable property under a disposition *ex facie* absolute but truly in security had allowed the disponent, the true owner of the subjects, to continue in possession and administration for two years; and it was held that a lease granted by the latter without concurrence of the former was valid. The reasons for the judgment are stated very clearly by the Lord President, who after explaining the manner in which the debtor had continued to act as proprietor of the subjects, notwithstanding his apparent divestiture, says, that he has no doubt as to the validity of the lease because the creditors had left debtor "in full possession of the subjects as proprietor while they never entered into possession and were no parties to any of the acts of ownership," and his Lordship adds—"I think it would be no objection to say that the debtor had been divested of the feudal title to the property, for a feudal proprietor may delegate to anyone a power to grant leases, and Abbot could have no better authority than the

back-letter in his favour." The ground of judgment therefore was that the nominal granter of the lease had authority from the proprietors, and if that can be shown in the present case there can be no question that *Abbot v. Mitchell* is in point. There is a very important distinction between the two cases as regards title, because in *Abbot's* case the granter of the lease was proprietor infest, under burden of a heritable security. But I agree with the Lord Ordinary that that difference, however material otherwise, has no material bearing on the grounds of judgment explained in the opinion I have cited, because according to that opinion the validity of the lease was held to depend, not upon the title of the granter, but on the contract between him and his disponent as expressed in the back-letter. But if the question depends upon an authority conferred by contract, it is of no consequence whether the person so authorised had a feudal title or not, and I am therefore disposed to agree with the Lord Ordinary that it would be quite as legitimate to infer an implied mandate to grant leases in such a case as the present as in *Abbot v. Mitchell*, provided the facts will support that interference; and I think further that there is enough to support it in so far as regards the other parts of the property. But it seems to me very doubtful whether there is sufficient evidence of authority to grant a lease of the shop in question, because that would defeat the whole purpose and intention of the arrangement, which required that the shop should be occupied by Scott himself, so that he might carry on his business there with the benefit of his licence. I do not, however, think it necessary to decide this, because assuming that any lease which might have been granted by Scott prior to his insolvency might have been supported on the authority of *Abbot v. Mitchell*, that would be because on the reasoning of the Judges the pursuer's authority must have been inferred from Scott's possession on the conditions expressed in the back-letter; and supposing such authority to be implied during Scott's administration of the estate, I do not see how it should survive his insolvency and the conveyance of his estate to a trustee for creditors. The only ground for the inference of authority to grant leases is Scott's continued administration of the estate as if he were proprietor, and that was absolutely and at once brought to an end by his own act when he conveyed his whole estates to a trustee for creditors. It is true that that conveyance did not carry the property of the subjects leased, because the property was not vested in Scott himself, but it carried every right and interest in the subjects which was capable of transmission, and so determined the rights upon which his title to administer depended. But then the implied authority to grant leases was determined in him without being transmitted to his trustee, because such an authority is nothing more or less than an implied mandate which is necessarily personal and intransmissible. There is no ground whatever for holding

that by allowing Scott to occupy the premises while he was solvent the pursuer had given authority to his creditors or their trustees either to manage or to continue in occupation of the property. The effect of the trust conveyance, so far as the property in question was concerned, is simply to transfer to the trustees the *jus crediti* to demand a conveyance from the pursuer on payment of the whole amount due to him. But it gave no right to the trustee to interfere with the property in any way except upon condition of making such payment. I am therefore of opinion that the authority which *ex hypothesi* was vested in Scott was brought to an end by surrender of his estate and his conveyance to Vallentine. But if that were doubtful it is perfectly clear that if any authority from the pursuer to grant leases were transferred from Scott to Vallentine, it was absolutely and expressly withdrawn before the lease in question was granted.

I think this is conclusively established by the correspondence. But it is unnecessary to refer to documentary evidence, because Mr Vallentine's own statement in the witness-box is conclusive. "I knew before the lease to M'Gregor was granted that the pursuer objected to a lease being given." I think it quite impossible to say in the face of that evidence that a lease granted by Vallentine can be supported on the ground that he was duly authorised by the pursuer to grant it, and if that cannot be said the decision in *Abbot v. Mitchell* (8 Macph. 791) is of no avail to the defender if my reading of it is correct, because it rests upon the authority which was held to have been given by the proprietor infest, so that the debtor who actually granted the lease was held to have been acting as the mandatory of his creditors in whom the property was vested. But there is another ground on which *Abbot v. Mitchell* might be supported irrespective of any mandate by the creditor to the debtor, and that is the familiar doctrine of radical right, which is established by a series of very well-known cases, of which *Campbell of Edderline* (1801, M. v. Adjudication App. 11); *M'Millan v. Campbell* (March 4, 1831, 9 S. 551, August 14, 1834, 7 W. & S. 441); and *Giles v. Lindsay* (February 27, 1844, 6 D. 771, 16 Scot. Jur. 357) are probably the most important. I infer from some passages in the opinions in *Abbot v. Mitchell* that the Judges had this doctrine in view, although they rested their judgment mainly upon the other ground already stated, which I think is independent of it; and if that be so, it is necessary to consider whether it will also support the Lord Ordinary's judgment in the present case. I am very clearly of opinion that it will not support the judgment, and that in that respect the difference between the position of a debtor infest who disposes his estate to his creditors by an absolute disposition, but really in security, and that of the defender, who had never had at any time a right of property in the subjects, is very material indeed. The doctrine is that a security in the form of an

absolute disposition but qualified by a back-bond declaring the title to be limited to a definite security is neither more nor less than a heritable security, and therefore that the granter's title of property remains entire subject to the security. It follows that the granter of the disposition remaining in possession has a perfectly valid and sufficient title to dispose of the property in any way provided he does not trench on the security. Nothing hinders him to sell, subject of course to the security, or to make an entail, or to grant other postponed securities either in the same form or in any other. But the principle is that a security in this form being merely a security after all in substance although in form a disposition absolute, does not divest the granter even feudally, and he is therefore in a position to deal with his estate by virtue of his own original title, and requires no other right or authority so long as he leaves his creditor's security unimpaired. This is put very clearly in the interlocutor in the case of *Campbell of Edderline*, which finds "that the late Dugald Campbell of Edderline was not completely divested of the real right and property of his estate by the trust-right and infestment thereon founded on by the objectors," and accordingly throughout the whole series of cases it is found that the trust right or the security right as the case may be constituted in the form in question is not even a feudal impediment to the administration or disposal of the estate, subject always to the supposed trust or security. A striking illustration of the doctrine is the case of *Bartlett v. Buchanan* (February 21, 1811, F.C., and November 27, 1812, F.C.), in which it was found that a widow's right of terce remained untouched by an absolute disposition with infestment qualified by a back-bond. This of course means that the husband's infestment remained entire, subject to the heritable debt, because the widow's right of terce is measured by the infestment of the husband. Now, it is elementary that the title to grant a lease is the infestment of the granter, and it seems to me that an infestment which is sufficient to support alienations and conveyances in security must be equally sufficient to support a lease. But then the right to deal with estate in this way depends entirely on the original title, on which the trust or security is merely a burden, and therefore the doctrine is altogether unavailing to support a lease flowing from a person in the position of the defender, who had no original title but only a *jus crediti*. The distinction is clearly stated by Lord President Hope in *Russell v. Macdowall* (February 6, 1824, 2 S. 682), and by Lord Moncreiff in *Giles v. Lindsay* (February 27, 1844, 6 D. 771, 16 Scot. Jur. 357).

I am therefore unable to see any ground on which the validity of the lease in dispute can be sustained; it cannot be supported by the original title of the granters, because they had no title; and it cannot be supported by the mandate or authority of the pursuer as heritable proprietor, because if there was such a mandate at any time it

was determined by the conveyance to the trustee for creditors, and at all events was expressly withdrawn before the lease was granted.

I come, therefore, to the conclusion that the lease is bad, because it is granted by persons who had no right or title to do so; and that makes it unnecessary to consider the second ground of objection, namely, that it was not a fair act of administration because it is prejudicial to the pursuer's security. I think that the objections taken to it on this head are not unsubstantial. But I am not prepared to hold that they would be sufficient of themselves to justify a reduction; and I prefer to rest my judgment on the other ground already stated.

The pursuer maintains that he is entitled to damages as well as reduction of the lease. But no ground for damages has, in my opinion, been established. On the other hand, it was urged that the best arrangement in the interest of the pursuer, as well as of the other parties, is to leave the arrangement undisturbed. But that is for the pursuer to consider. All that we have to do is to determine legal right, and I am of opinion that he is entitled to have the lease set aside.

The LORD PRESIDENT and LORD ADAM concurred.

LORD M'LAREN was absent.

The Court pronounced this interlocutor:—

“Recal the said interlocutor [of 4th April 1898]: Decern in terms of the declaratory and reductive conclusions of the summons, and in terms of the conclusion thereof to cede possession of and remove from the subjects in question: Dismiss the action *quoad* the conclusions for damages therein, and decern: Find the pursuer entitled to expenses from the compearing defenders, and remit,” &c.

Counsel for the Pursuer—W. Campbell, Q.C.—Macfarlane. Agents—Henderson & Clark, W.S.

Counsel for the Defenders—Ure, Q.C.—J. Wilson. Agent—A. R. Steedman, Solicitor.

Saturday, March 11.

FIRST DIVISION.

SMITH v. LORD ADVOCATE.

Friendly Society—Trust—Charitable Trust—Jurisdiction—Settlement of Scheme.

The Society of Sailors of Dunbar was incorporated by an Act of the Town Council of that burgh in 1730. Power was given to the Society to levy the duties used and wont, “payable to the poor of their trade, commonly called the ‘Sailor’s Box,’” and to settle pensions for relief and support of poor

sailors belonging to the burgh, and their wives and children. In 1806 the Society issued a code of bye-laws which, *inter alia*, enacted that no person over 40 years of age should be admitted a member unless he had previously been a member and paid up all arrears; which specified the amount of entry-money and quarterly contribution to be paid by masters and sailors respectively; which regulated the amount of sick-allowance and pensions; and from which it appeared that, apart from widows and children, only members in sickness or distress, or members over sixty years of age and unable to go to sea, were to receive allowances from the Society’s Box. In the course of its history the Society had occasionally granted relief to seafaring persons outside its membership.

A petition having been presented by the last surviving member of the Society for the settlement of a scheme of administration, *held* that the Society was not a charitable society, and therefore that the Court had no power to make directions as to the application of its funds.

This was a petition presented by Captain William Smith, boxmaster and sole surviving member of the Society of Sailors of Dunbar, craving the Court to settle a scheme of administration of the funds of that Society.

The following facts were set forth in the petition:—From time immemorial there have existed in Scotch seaport towns funds formed by the sailors for the necessitous or aged of their own number, and known as the “Sailors’ Box.” Such a box existed at Dunbar, and at the beginning of the 18th century had fallen under such bad management that the Provost, Bailies, and Magistrates intervened and assumed the control of it.

In 1730 certain shipmasters, for themselves and the other sailors of Dunbar, presented a petition to the Town Council praying them to grant a charter erecting the petitioners “into a society or body politic for the levying, managing, and applying of the said charity for the relief and behoof of poor sailors within this burgh, and other indigent seafaring persons.” The petition proceeded upon the narrative that “it is of great use in society for men of every craft and employment to erect funds of charity among themselves towards the relief and support of their own poor,” that a Sailors’ Box had been kept in the burgh time out of mind, and that the funds by which it was supported were “a duty of eight pennys on the pound Scots out of all wages paid to masters, mates, and sailors, together with such donations and free gifts as were made to the Box by persons charitably disposed.” In response to this petition the Town Council erected into a society or one body politic “all shipmasters residing in or sailing from the burgh, together with such others as have removed or shall remove their residence, and do or shall exercise their employment elsewhere, but nevertheless do or shall contribute and pay into the Poor’s