

petitioner thereupon furnished at his own cost, and also in regard to the farms; and the respondent, Mr Oakeley, was thereafter allowed, by permission of the petitioner, to have the use of the dwelling-house on the said farm of Kilmarnaig, and of the horses and carriages, &c., till Christmas last 1866, he still refuses to remove from the said dwelling-house, farm, and lands of Kilmarnaig, with the pertinents and shootings above mentioned, and refuses, by himself and his servants, to give the petitioner possession thereof, although required to do so by the petitioner. Mr Oakeley personally left the farm-house of Kilmarnaig and proceeded to England on 19th December 1866, or about that date, but he refused to hand over the keys of the house to the petitioner, and hence the present action became necessary." This is a very curious statement. He says he obtained immediate possession under the missives. Both as to the house and farm, and then left Oakeley in possession of the dwelling-house, and Oakeley refused to cede possession of the farm which was not left to him. This is plainly a mere device, and a device which runs through the whole argument of the pursuer, namely, representing that under the missives of August he really got possession, while in the other petition he candidly admits he never had possession. But, had he any possession in fact? Only through Carruthers, and the way in which that was attempted to be done was by converting Carruthers, Oakeley's servant, into Cannon's servant. But Carruthers is not very loyal to the side he undertakes to support, and it is plain that, if he ever seriously understood that Cannon was to be his master, he soon understood the reverse, for he engaged himself entirely in the interests of Oakeley. The contemporary letters are very important, as showing that Carruthers never was Cannon's servant at the date when possession is said to have taken place, but continued to be Oakeley's servant, and that puts an end to the pretence of possession by Cannon through his servant. It is unnecessary to go into the proof more fully, and therefore I hold that Cannon, in so far as regards the stocking and implements on the farm, had a title—a sort of assignation—to these moveables, without any possession, and therefore that, according to the principle of common law, they fell under the sequestration and now belong to the trustee.

The only other question is under the Mercantile Law Amendment Act. The first section of that Act introduced a novelty into our law as to the sale of moveables. Under certain circumstances a sale shall be effectual to transfer the real right although the goods remain undelivered in the hands of the seller. But is that applicable to a right in security or a contract of pledge? I think not; for this reason, that the Legislature speaks of sale only, and not of pledge—the two contracts being as distinct from each other as can be. They sometimes resemble each other, and sometimes, in a special case, it is difficult to say whether it is a pledge or sale, as in the case of *Park v. Latta*, 16th February 1865. But the mere fact that, in a complicated transaction, it is difficult to say whether it is a pledge or a sale, does not make transactions the same. They are quite distinct. One is a right in security, and the other is an absolute transference. Here the pursuer has admitted that his right over the moveables is only a right in security; and, by force of that admission, I think he has deprived himself of his plea under the Mercantile Law Amendment Act.

The only remaining question is as to the furniture. Cannon contends that, from the beginning, this furniture belongs to him, and never to Oakeley; that he bought it with his own money and never transferred it to Oakeley. The trustee contends, that it was bought for Oakeley, and that the right to it was in Oakeley, but that the money advanced to pay for it was Cannon's. That is a mere question of fact, and I think Cannon can be met by statements of his own, which are quite clear. In the letter of 25th September to Mr Officer, he says:—"When you asked me to undertake the furnishing of the house at Kilmarnaig, both Mr Oakeley and you assured me that the money would be paid by Martinmas, or at the New Year at most, and upon this understanding I became obligated for £435, value of furnishings, and £115 of other a/cs, and paid a/cs and charges to the amount of £357, and these, along with the considerations agreed to be paid to me, amounts in all to about £992, as will appear from the state I sent you. There is a further sum of £17 due to Mr Birrell for groceries; a sum due for cultivating the farm of £81; further expenses cultivating the farm, up to the New Year's Day, £50; Whitsunday rent and burdens, say £90; making in all a sum which I have either paid, or become obligated for, of about £1230. Against this I have the value of the stock, crop, implements of husbandry, and household furniture at Kilmarnaig, amounting, as per state, to £1040, thus leaving a clear deficiency of £190. In addition to this I have calculated in my securities a sum of £125 for corn, hay, turnips, and potatoes, which will be, for the most part, consumed before the New Year, leaving a total deficiency of £315, against which there can only be placed the increased value of the stocking and dogs, &c., which cannot come to anything like that sum. It is out of the question, therefore, to expect any further assistance from me." After this letter it is to be observed that he deals with his advances for the furniture as being in the same sense as his other advances. His Lordship then referred to other passages from the correspondence, and continued—All that is inconsistent with the notion that the furniture was Cannon's, and points to this, that it was bought for Oakeley's house, and that the price was advanced by Cannon under the security of August. After that it is not for Cannon to maintain that the furniture is his property. Upon the whole matter, I am for assailing from the conclusions of the action except from the declaratory conclusion as to the sub-lease.

The other Judges concurred.

Agent for Pursuer—W. Officer, S.S.C.

Agents for Defender—J. & W. C. Murray, W.S.

Wednesday, June 9.

## SECOND DIVISION.

WALKER v. THE TRADES' HOUSE OF GLASGOW & OTHERS.

*Property—Boundaries of Feu—Right of Access—Public Street—Declarator—Interdict.* Circumstances in which the Court granted decree of declarator in favour of the proprietor of a feu that he was entitled to have a public street opened up along one of the boundaries of his property, and interdict against encroachments

on the streets surrounding his property, which had the effect of limiting the intercommunication of the streets which bounded his feu.

This was an action of declarator and interdict, by which the pursuer sought to have it found that he was entitled to have a public street 60 feet in width opened up along the western boundary of certain subjects belonging to him in Tradeston of Glasgow; and to have certain persons interdicted from making encroachments on the streets surrounding his property. The pursuer's predecessor had obtained from the Trade's House a feu of a piece of ground bounded by four streets or proposed streets, as shown on a plan, and he was taken bound within three years to causeway the half of the breadth of the streets opposite to his land. This had been done with regard to three of the streets; but the fourth—that of the west side (and what is now called Centre Street)—had not been laid out opposite pursuer's feu. The southern boundary of the pursuer's lands is now called Victoria Street. Subsequent to the grant to the pursuer, Dixon's trustees acquired right to certain lands in Tradeston, and *inter alia* to the *solum* of portions of Centre and Victoria Streets, subject to existing rights and interests in other feuars of the adjacent lands. Dixon's trustees in 1854 gave off a portion of the lands to which they had so acquired right to Allan's trustees—which portion included a part of Victoria Street immediately to the west of the pursuer's feu, and to the extent of one-half of the breadth of that street over a portion of its length. Allan's trustees enclosed the ground so conveyed to them, and the effect of their operations was to shut off communication between Victoria Street and the continuation of Centre Street, which the pursuer now proposed to have opened up as a public street. Dixon's trustees objected to the character of the street being declared in this process, or to their being found liable to any extent to open up and form the street. Allan's trustees objected to the interdict (which was directed against them alone) in so far as it was an attempt to interfere with them in the exercise of their rights as proprietors, and maintained that all the pursuer was entitled to was to have streets *ex adverso* of his boundaries, and that he was not entitled under his titles to have a communication maintained between Victoria and Centre Streets, when they met at the corner of his lands.

The Lord Ordinary (BARCAPLE) pronounced the following interlocutor and note:—

“*Edinburgh, 8th April 1869.*—The Lord Ordinary having heard counsel for the parties, and considered the closed record, productions, and whole process—Repels the defences for all the defenders, in so far as they are stated as defences against the first declaratory conclusion of the libel: And in terms of said conclusion, finds, decerns, and declares that the pursuer, as heritable proprietor of the plot or area of ground therein described, is entitled to have a street 60 feet wide forthwith opened up and formed along the whole length of the western boundary of the said subjects, and thereafter to have the said street maintained and upheld as a public street: Finds that the defenders the said Trades' House of Glasgow and the trustees of the deceased William Dixon, are not, one or other or both of them, bound themselves to open up and form said street: the expense of forming and causewaying the eastmost half thereof, or such expenses as may be legally exigible in terms of his titles, being borne by the pursuer: Therefore assilzies

the said defenders from the second declaratory conclusion of the libel, and decerns; reserving to the pursuer all claims competent to him against the defenders Dixon's trustees to have them ordained to implement all obligations incumbent upon them in regard to opening up, forming, and completing said street; Repels the defences stated for the defenders the trustees of the late James Allan and the firm of Allan & Mann, and the individual partners thereof, against the third declaratory conclusion, and the conclusions following thereon, to have them interdicted, prohibited, and discharged as therein set forth; and finds and declares, and interdicts, prohibits, discharges, and decerns against said last-mentioned defenders in terms of said conclusions: Finds the pursuer liable in expenses to the defenders the Trades' House of Glasgow: Finds the other defenders liable in expenses to the pursuer; allows accounts thereof to be given in, and when lodged, remits the same to the auditor to tax and report.

“*Note.*—The first question in the case is, whether the pursuer is entitled to have the street claimed by him opened up and formed on the western boundary of his feu? The defenders, who oppose this conclusion of the action, maintain that the demand is not well founded, because the feuing plan on which this and the adjoining streets are laid down is not so referred to in the pursuer's feu-charter as to import it into the contract. But the Lord Ordinary does not think that the pursuer's claim depends upon the plan as having been made part of the contract, in the sense of being obligatory on the superior and the other feuars, independently of the provisions of the feu-charter. At the same time, he is of opinion that it may be looked to as explanatory of these provisions. He thinks that the pursuer's demand is well founded, and that it rests upon the description of the subject feued, as bounded by a street of definite length and width on each of its four sides, and the obligation to causeway and maintain these streets which are contained in the original feu-charter of the adjoining plot of ground marked C, to which the defenders Dixon's trustees have now right. The Lord Ordinary thinks it was clearly of the essence of the feu-contract between the Trades' House, as superior, and the pursuer's author, that the ground was feued with a frontage to streets on every side, which were to be made at the expense of the pursuer's author and the opposite feuars. With that view, he was taken bound to make his half of these streets; and when lot C was soon after feued to the author of Dixon's trustees, a similar obligation was imposed upon him. The obligations thus constituted would be altogether unmeaning if it was not implied that the party who was taken bound to make half of the streets in front of his feu was entitled to have these streets opened and constructed so as to afford access to the houses on his property. It might be a question whether the superiors were bound to be at the expense of making the other half of the streets while the ground opposite was still unfeued. But when they have feued the ground opposite, and taken the new vassal bound to make his half of the street, the only condition which can be suggested as suspensive of the first feu's right to have the contemplated street made and opened, has been purified. The Lord Ordinary thinks that the cases in which the Court refused to sustain such a claim, where it rested solely upon the fact that streets were laid down in a plan which was not truly imported into the contract, are

not adverse to this view. On the contrary, it appears to him to be supported by the reasoning on which these decisions proceeded.

"He does not think that if the pursuer's author did originally acquire such a right, it can be held to have fallen on the ground that he and the author of the defenders Dixon's trustees were taken bound, 'within three years,' each to make their half of the street. There appears to him to be no ground for holding that this was meant to be a limitation of the obligation, so that the pursuer could not be called upon to fulfil it after the lapse of three years.

"But the question remains, whether the superiors, the Trades' House, having imposed the proper counterpart of the pursuer's obligation upon the feuar of the opposite ground, the superiors can now be decerned against as debtors in the obligation. The Lord Ordinary thinks that is not their position. Any *jus crediti* in the pursuer's author was only acquired by implication from the nature of the transaction; and the implied obligation of the superiors must, it is thought, be held to have been of such a kind that it was fulfilled by their taking the opposite feuar bound to make his half of the street, that being a liability imposed for the mutual benefit of the feuars, and prestable by them. Accordingly, the decree now pronounced in terms of the first declaratory conclusion is, in so far as regards the Trades' House, merely a decerniture against them for any interest they may have in the matter, the Lord Ordinary being of opinion that they cannot be called upon to do anything towards making or opening up the street. The late Mr Dixon obtained a reconstitution of the feu now held by his trustees, without any obligation to make the street. But it was conceived in such terms that admittedly it does not affect the present question.

"Another question between the parties in reference to the first declaratory conclusion is, whether the pursuer is entitled to have the street opened up as a public street. In the titles to both feus, the pursuer's and that of Dixon's trustees, the streets by which they are bounded are spoken of as public streets. The Lord Ordinary is of opinion that the pursuer is entitled to have the street now in question opened as a public street, in the sense of the feu charters, *z. e.*, in the ordinary legal sense of that expression. It is not *hujus loci* to inquire what effect that may have with reference to the provisions of the Glasgow Police Act as to the custody and maintenance of streets.

"By the second conclusion the pursuer seeks to have it declared that the superiors and Dixon's trustees are, one or other or both of them, bound to open up and form the street, the expense of forming and causewaying the eastmost half of it being borne by the pursuer. The Lord Ordinary has already said that he does not think any such obligation lies upon the superiors. And as to Dixon's trustees, he does not see his way to give decree against them in terms of this conclusion, as it is framed. They can only be liable to do that which the superiors took them bound to do, *viz.*, to causeway the half of the breadth of the street, and maintain and uphold the causeway in all time thereafter, and to keep in conformity, as to level, to the scale laid down in the plan. The Lord Ordinary is of opinion that the pursuer would have been entitled to decree to that effect against Dixon's trustees if the conclusion had been so framed. But there is no obligation upon them to

make the entire street, partly at their own expense and partly at the expense of the pursuer, as concluded for. While the Lord Ordinary thinks that Dixon's trustees must be assolvied from this conclusion, as it is framed, he thinks that it is only fair to the parties that he should express his opinion upon the point that was discussed at the bar on this part of the case, *viz.*, whether the pursuer is entitled to insist upon Dixon's trustees implementing the obligations as to forming and maintaining the street which are contained in their feu-charter.

"The remaining conclusions are directed against Allan's trustees and Messrs Allan & Mann, to have them prevented occupying the *solum* of the street forming the western boundary of the pursuer's ground, and also the crossing of the continuation southward of the line of that street, with the continuation westward of the line of the street which forms the pursuer's southern boundary. These defenders hold their property under Dixon's trustees, who are bound to relieve them of any obligation which may be held to exist as to making the street. They did not maintain in argument that they are entitled to occupy any part of the street directly opposite the western side of the pursuer's feu. But they contend that he has no right to object to the ground which would form the crossing of the two streets forming his western and southern boundaries at the south west corner of his feu, being enclosed and occupied by them. The Lord Ordinary is of opinion that this is much too strict a reading of the description of the subjects and the provision as to streets in the feu-charters. If applied to all the four corners of the pursuer's feu, it would make these provisions practically useless. He thinks it is excluded by a fair interpretation of the deeds on which the reference to streets in the description of the subject, and in the obligation on the feuar in regard to them, must be held to imply that there is ish and entry by them to and from the subject feued. The provision for having the streets formed on one level aids this interpretation. The Lord Ordinary also thinks that on this matter reference may legitimately be made to the plan, as showing the nature of the streets in this respect."

Dixon's Trustees and Allan's Trustees reclaimed.  
GORDON, Q.C., and A. MONCRIEFF for Dixon's Trustees.

FRASER and MACLEAN for Allan's Trustees.

CLARK and LEE for Trades' House.

WATSON and LAMOND for pursuer.

The Court adhered with a qualification, declaring that they did not mean by *public* street that it was to be so in the sense of the Glasgow Public Act, or to any other effect than that the public were to have the full right to use it.

Agents for Pursuer—W. & J. Burness, W.S.

Agents for Trades' House—Hamilton, Kinnear, & Beatson, W.S.

Agents for Dixon's Trustees—Melville & Lindsay, W.S.

Agent for Allan's Trustees—J. Galletly, S.S.C.

Friday, June 11.

### FIRST DIVISION.

KNOX'S TRUSTEES *v.* KNOX AND OTHERS.  
*Trust—Power of Apportionment—Annuity—Marriage-contract—Special Legacy.* In a marriage-