Counsel for the Glasgow Royal Infirmary—R. V. Campbell. Agents—J. W. & J. Mackenzie, W.S.

Council for the Magistrates and Council of Glasgow—Jameson. Agents—Campbell & Smith, S.S.C.

Thursday, January 12.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

ROSS *v.* MARTIN.

Property—Sale—Title—Possession.

Two adjacent feus were given out, the eastmost in 1795 to William Caldwell, and the westmost in 1803 to William Kelly. They were separately possessed for more than forty years. In 1875 both feus were the property of the same person, who in 1880 sold by public roup to M the westmost feu, described as "All and haill that part or portion of land feued out to William Kelly . . . bounded on the east by the house and garden now or formerly belonging to William Caldwell." This description was the same as that in the original feu. There was a marginal note upon the articles of roup—"Three houses near Millgate occupied by M. Finn." In 1880 the eastmost, or Caldwell's feu, was sold by public roup to B. B's title was prior to that of M. The articles of roup contained the same description as the original feu, with this marginal note—"House and garden occupied by William Hannah." In 1885 B sold this feu to R. In 1887 R raised an action against M, the conclusions of which were for declarator that certain subjects in the defender's occupation, consisting of a house and garden, with joiner's shop, were included in his title, and for removing. It was proved that the subjects in question were comprised within Caldwell's feu, and were therefore within the pursuer's title, but that the defender had been in the occupation of these subjects from the date of his purchase, and that B, the pursuer's author, had asserted no right to them. The pursuer admitted that he knew at the date of his purchase that the defender was in possession and reputed owner of the house, garden, and joiner's shop. The defender maintained that B did not intend to buy the subjects in dispute, and that the titles should be construed in conformity with the true bargain between the seller and B, which, he alleged, was contained in the marginal note upon the articles of roup. *Held* that the pursuer, being a singular successor, was not affected by any personal exception which could be stated against B, and that the defender could not claim the ground in question as it was not within his title.

In the village of Blackburn, Linlithgowshire, there were two adjacent feus, the eastmost of which had been feued out to William Caldwell in 1795, and the westmost of which had been feued out to William Kelly in 1803.

These feus continued to be separately owned and occupied for more than forty years, and in the year 1875 they were both bought by Thomas Robinson Johnstone.

In February 1880 Johnstone sold by public roup the eastmost or Caldwell's feu to Lawrence Balderston. In the articles and conditions of roup the description of the subjects was this—"All and haill that part or portion of land with the houses thereon in the village of Blackburn, bounded on the south by the Edinburgh and Glasgow road, on the west by the feu sometime ago granted to David Mitchell, on the north by the lands sometime belonging to the said William Honyman, and on the east by the feu now or formerly belonging to David Brownlee, lying in the parish of Livingstone and sheriffdom of Linlithgow." There was also this marginal note—"House and large garden occupied by William Hannah." The description in the disposition in favour of Balderston, which was dated 4th and recorded 11th February 1880, was the same as that in the articles of roup without the marginal note. The description was also the same as that in the original feu granted to Caldwell in 1795, except that in the original grant the western boundary was described as "the feu recently granted to David Mitchell." There was no trace of any grant to David Mitchell ever having been feudalised. By disposition, dated 27th and 30th May and recorded 5th June 1885, Balderston conveyed these subjects to John Ross.

In February 1880 Johnstone also sold the westmost or Kelly's feu by public roup to William Martin. In the articles of roup the description of the subjects was—"All and haill that part or portion of land feued out to William Kelly, merchant in Glasgow, by William Honyman, Esquire, of Græmsay, bounded on the east by the house and garden now or formerly belonging to William Caldwell, on the south by the Edinburgh and Glasgow road, and on the west and north by the lands sometime occupied by David Prentice, extending per measurement to twenty-two falls and nine ells of land, all lying within the barony of Blackburn, parish of Livingstone and sheriffdom of Linlithgow." There was also this marginal note—"Three houses near Millgate occupied by M. Finn and others." The description in the disposition to Martin, dated 26th and 28th February, and recorded 2nd March 1880, was the same as that in the articles of roup without the marginal note, but with this addition—"Together with the buildings and erections on the said part or portion of land, and all my right, title, and interest therein." This description without the addition and marginal note was the same as the description in the original feu granted to Kelly in 1803.

This was an action at the instance of James Ross against William Martin for declarator that a piece of ground extending to 11 poles 20 yards or thereby, delineated on a plan produced, was part of the piece of ground conveyed to the pursuer by the disposition in his favour from Lawrence Balderston, that it pertained heritably to the pursuer in virtue of his rights and titles, and that the defender had no right or interest therein. There was also a conclusion for removing.

The ground in question was occupied at the date of the action by a house marked C on the plan, and a garden, with a shed or building, used

as a joiner's shop, attached to the house.

The pursuer pleaded—"(1) The pursuer being by virtue of his titles heritable proprietor of the subjects in question, is entitled to decree of declarator and removing as asked."

The defender pleaded—"(3) Under the titles, including the articles referred to, the claim of the pursuer is unfounded, and the defender should be accordingly assoilzied. (4) The pursuer not having been a *bona fide* purchaser of the subjects described in the summons, he is not entitled to decree as concluded for, and the defender is entitled to absolvitor."

Proof was led with regard to the possession of the subjects, the import of which appears from the opinions of the Lord Ordinary and Lord Rutherfurd Clark.

The Lord Ordinary pronounced this interlocutor on 18th April 1887—"Assoilzies the defender from the conclusions of the action, and decerns: Finds the defender entitled to expenses: Allows an account thereof to be lodged, &c.

"*Opinion.*—There can be no doubt upon the evidence that the subjects in question form part of a property which was purchased by the defender in 1880 from Mr Robinson Johnstone, the common author of the parties, and which he has possessed ever since under the title given to him by Mr Johnstone in implement of the contract of purchase and sale. If the question had arisen between him and the seller there could have been no difficulty in sustaining the defender's right. But the subject in which the defender is infeft is described in the disposition in his favour as the portion of land 'feued out to William Kelly, merchant in Glasgow, by William Honeyman of Græmsay, bounded on the east by the house and garden now or formerly belonging to William Caldwell, on the south by the Edinburgh and Glasgow road, and on the west and north by the lands sometime occupied by David Prentice, extending per measurement to 22 falls and 9 ells of land.' The pursuer alleges that he has acquired the property originally feued out by the common superior, Honeyman of Græmsay, to William Caldwell in 1795, and that that feu has been shown to have included the piece of ground described in the conclusions of the summons. He therefore maintains that whatever may have been the defender's bargain with Mr Johnstone, and whatever possession may have followed upon it, the defender can have no right in the disputed ground available against him, because the description of the subject as the ground feued out to Kelly, and the boundary by 'the house and garden belonging to William Caldwell,' effectually exclude the disponee from any part of the ground originally included in Caldwell's feu.

"If the feus granted to Caldwell and William Kelly respectively had been separately possessed from the date of the original feu-right, and the question between the parties had depended exclusively upon the identification of the original feus, the pursuer must probably have prevailed. But for many years before the defender's purchase both feus had belonged in property to one proprietor, and the question is, what part of the property then belonging to him, the common author, Mr Johnstone sold and conveyed to the defender, and what part to the pursuer's immediate predecessor Mr Balderston?

"The piece of ground in dispute is occupied by a house and garden, with a shed or building, which is spoken of in the proof as a joiner's shop attached to the house. There can be no question that this house with the joiner's shop was part of the subject purchased by the defender, or that it was intended to be included in his title. He bought three houses, and if the pursuer's construction of his title is right he will only have two. But a few days before the sale to the defender, the common author Mr Johnstone sold to the pursuer's predecessor Balderston the subjects which the pursuer acquired in 1885. Upon his purchase being completed the defender entered upon possession of the property which he understood that he had acquired, including the house and joiner's shop in dispute, and he has continued in the undisturbed possession of the whole until the present claim was advanced by the pursuer. Mr Balderston entered on possession of the adjoining property, and asserted no right to the eastmost of the defender's three houses or to the joiner's shop. The pursuer frankly admits that when he made his purchase from Mr Balderston he was perfectly well aware that the defender was in possession, and was reputed proprietor of the house and garden now in dispute. His case therefore is based exclusively on a strict construction of the titles.

"The description in the defender's title requires to be explained by evidence, because what is meant by the feu granted to Kelly, or by the house formerly belonging to Caldwell, cannot be known without evidence as to the history of the possession. The result of the evidence appears to me to be that the ground of which he is now in posession coincides in part, but in part only, with the feu granted to Kelly. There appears to have been a small piece of ground included in the original feu to the west of the defender's property, and to which he asserts no right, and I think it probable that the disputed ground on the east was not originally in Kelly's but in Caldwell's feu. But then the extent of the ground conveyed to the defender is specified in the conveyance as 22 falls and 9 ells of land per measurement, and that is within 2 ells of the extent of the ground of which he is now in possession. The defender therefore will lose about half of the extent of ground specified in his title if he is deprived of the ground now claimed by the pursuer. In these circumstances I think the reference to Kelly's feu must be regarded as demonstrative, and not as taxative. There is no question about any of the boundaries except the boundary on the east. But it is to be observed that the eastern boundary is not 'Caldwell's feu,' but the 'house and garden formerly belonging to Caldwell,' and that is a description which will be satisfied by the boundary claimed by the defender, because the pursuer's house and garden which lie immediately to the east of the disputed ground did at one time belong to Caldwell. There is thus a description of a piece of ground by specific measurement within boundaries of which one alone is ambiguous. If the ambiguous boundary be construed in one way it will satisfy the measurement; if it be construed in the other way it will diminish the property to a very material extent. The larger measurement is in accordance with the possession which has followed

upon the title, and it is in accordance also with the evidence as to the extent of the ground embraced in the contract of sale to which the title was intended to give effect. I think it would be inconsistent with sound principles of construction to allow the description by measurement to be overruled by the reference to the original feu. Nor does it appear to me that the description by measurement will be satisfied by including portions of the old feu, to which the defender has admittedly no right, in order to restore the quantity of ground which will be cut off by the pursuer's claim. The measurement given in the defender's title must be taken to mean the measurement of the ground actually conveyed.

"There might have been greater difficulty if the pursuer could have alleged that the ground in dispute was clearly within his title, and that he had bought on the faith of the record. But neither of these points can be maintained. His boundary on the west is described as the feu granted to David Mitchell, and it is admitted that no trace of a feu-right to David Mitchell has been recovered. But he did not purchase in reliance upon any description in the titles, but upon his general knowledge of the ground, and he admits that he never supposed that he was buying the defender's eastmost house, which forms the most important part of the subject he now claims, but only the joiner's shop. The witness Young, who acted as the pursuer's agent in making the purchase, knew that the defender was in possession of the joiner's shop. But whatever doubt the pursuer may have had as to the joiner's shop, he had none as to the defender's property in the house. He claims the house, to which he admits that he has no just right, because he has been advised that the construction of the titles, upon which alone he can make good his claim to the joiner's shop, must either be pressed so far as to include the house also, or must be admitted to be untenable. It follows that the construction to which he asks that effect should be given is inconsistent with the admitted rights of parties."

The pursuer reclaimed.

Authorities—*Reid* v. *M'Coll*, October 25, 1879, 7 R. 84; *Stodart* v. *Dalzell*, December 16, 1876, 4 R. 236; *Lee* v. *Alexander*, August 3, 1883, 10 R. (H. of L.) 91; *Petrie* v. *Forsyth and Another*, December 16, 1874, 2 R. 214.

At advising—

Lord Rutherfurd Clark—This case, which is concerned with a property of trifling value, is attended with considerable difficulty.

In the village of Blackburn there were two feus, the one given out in 1795 to William Caldwell, and the other in 1803 to William Kelly. These were adjacent feus. It is true that in the feu-disposition of 1795 Caldwell's feu is described as bounded on the west by the feu recently granted to David Mitchell. But there is no trace of a feu-right in favour of Mitchell having ever been feudalised, for the feu granted to Kelly is described as bounded on the east by the house and garden belonging to William Caldwell.

It appears, then, on the face of the later title that Kelly's feu was adjacent to Caldwell's feu, and the possession which followed on the feu-rights puts this point beyond a doubt, for Caldwell and his successor possessed up to Kelly's feu, and Kelly and his successor possessed up to Caldwell's feu. There is no trace of the existence of any intermediate right excepting the mention of Mitchell's feu, which must be laid aside as having been nothing more than a personal fee.

The next question is, What did Caldwell's feu comprise? And here again the possession is decisive. It is clear that Caldwell and his successors possessed up to the margin—the western margin—of the ground coloured pink on the plan which is before us, which is the disputed ground. It is not necessary to examine the evidence, for it is all one way. The house marked C was all along in the possession of the Caldwells, as well as the ground behind it. The feus were divided from each other by a well-marked boundary hedge running along the west side of the pink ground, and, as I have said, each feuar possessed up to that boundary.

The defender suggested that Caldwell's possession of the ground coloured pink must be attributed to a title other than the feu-right of 1795, because, on the theory that that ground formed part of Caldwell's feu, Kelly's feu was materially less than the dimensions given in his title. There are two answers to the suggestion. Caldwell's possession must be attributed to the only title which he is shown to have had, and it is proved that Kelly's feu was diminished by alterations which were made on the Riddoch Hill Road. Mrs Lind, whose grandmother occupied a house on Kelly's feu, remembers that there was a garden on the west side of the house which no longer exists. It may be safely inferred that the garden was taken in order to make the alteration in the road.

So far, I think, all is clear. The two feus were contiguous, and the ground in dispute was comprised in Caldwell's feu. The titles and possession continued to be the same down to 1841 or 1842. At a later date the feus came to be held by one person, and of course from that time onward it is immaterial to consider the state of possession. We may advance to the year 1875, when they both belonged to Thomas Robinson Johnstone.

In February 1880 Johnstone disponed a piece of ground to Lawrence Balderston. The description and boundaries of the subject so conveyed are the same as occur in the original feu-right granted to Caldwell. This subject was conveyed by Balderston to the pursuer in 1885, and by consequence the pursuer is *ex facie* of his title the proprietor of the ground originally feued to Caldwell.

The subjects of which the defender is in right were acquired by him from Johnstone, conform to disposition dated March 1880, so that his title is later than the pursuer's. They were conveyed to him according to the boundaries contained in Kelly's feu, and therefore on the face of his title he is proprietor of Kelly's feu, and of nothing more.

If therefore the case were to be decided by the titles alone it seems to be clear that the pursuer must prevail. The title contains the ground in dispute. The defender's title does not contain it.

But the defender maintains that Johnstone did not intend to sell, and that Balderston did not intend to buy any part of the ground coloured pink. He points out that the entire subject as it

stood in the person of Johnstone was exposed for sale in two lots conform to articles of roup, under which Balderston made his purchase. Each of those lots were described in precisely the same terms as Kelly and Caldwell's feus are described in the feu-contracts. Indeed the description in the articles of roup is nothing more than an excerpt from the original title. But on the margin of the articles the lot which the defender acquired is described as consisting of three houses, while the lot which the pursuer acquired is described as consisting of a house and large garden occupied by William Hannah. The defender contends that the description contained in the latter must be construed in conformity with what is shown to have been the true bargain, that Balderston could not claim more than what he intended to buy, and that the pursuer is in no better position. I confess that I have much sympathy with the defender, for it is clear enough that he intended to buy, and thought he was buying, the whole subjects which he now possesses, and it is equally certain that after he obtained his disposition Balderston did not take possession of any part of the ground which is now in dispute. But the case cannot be disposed of on these considerations alone, because the defender has no title to the ground which he claims, and because the title is clearly in the pursuer, who is a singular successor.

If the question had arisen with Balderston it is by no means clear that he could not have vindicated all the subjects which were conveyed by the disposition in his favour. But if it were pleaded against him that such a claim was contrary to the good faith of the bargain, to what extent would his claim be limited if such a plea received effect? It is founded on the marginal note on the articles of roup, and I do not see that it could be pressed further against him than that his claim must be consistent with that note. In other words, that he could claim nothing which the articles under which he purchased assigned to the other lot which he did not buy. But that lot was described as consisting of "three houses near Millgate occupied by M. Finn and others." If he did not claim any of these houses there is no evidence that his claim would be contrary to his bargain.

It is true that when the defender took possession of what he thought he purchased, and erected some buildings on a part of the disputed ground, a question was raised by Balderston as to the defender's right with which he did not persevere or bring to decision. But there is no evidence to show that he surrendered any right, or that he would now be barred from putting forward his claims if he had continued to be the owner of the feu which he had bought. It is certain that he conveyed nothing to the defender, and nothing more is proved than that he did not at that time take any legal steps to vindicate what he accounted to be his rights.

Thereafter he sold to the pursuer, who bought according to the titles. The pursuer acquired all that was in Balderston's person, and, as I have already said, I do not think it can be doubted that he acquired the disputed ground. If the titles were ambiguous much might be urged in favour of the defender. But when they are clear how can the pursuer be prevented from vindicating what is in his title? He is not affected by any personal exception which could be stated against Balderston, for he is a singular successor. The defender cannot claim the ground in question, for he has no title to it. It is true that he is in possession, but he is without a title, and his possession has not been of such duration as to give him any aid. The case therefore comes to this point, that the pursuer has a title to the disputed ground, while the defender has not, and never had any title on which he could resist the pursuer's claim.

But I am disposed so far to modify the conclusion which I have reached as to give to the defender the house marked C. I do so because the pursuer explained that he did not desire to claim it, and in taking up this position I think that he acted very properly, for it is plain from his evidence that he never thought that he was buying the house which he knew to be in the possession of the defender.

Lord Young, Lord Craighill, and the Lord Justice-Clerk concurred.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the reclaiming-note for the pursuer against Lord Kinnear's interlocutor of 18th April last, Recal the same, and find and declare in terms of the declaratory conclusions of the summons, excepting always from the said declaratory conclusions the house marked C on the plan referred to in the said summons, being the eastmost of the three houses lying immediately to the west of the cottage belonging to the pursuer, and occupied at present by Hugh M'Conkie, and ordain the defender to cede possession of the piece of ground therein referred to, under the exception already excepted, and to flit and remove himself, his family and servants, and goods and gear, furth of the same: *Quoad ultra* assoilzie the defender: Find the pursuer entitled to expenses," &c.

Counsel for the Pursuer—Moncreiff—Gillespie. Agents—Tait & Johnston, S.S.C.

Counsel for the Defender—Shaw—Gunn. Agents—R. R. Simpson & Lawson, W.S.

Wednesday, November 16, 1887.

OUTER HOUSE.

[Lord Lee, Ordinary.

HOGG AND ANOTHER (M'GHIE'S TRUSTEES) *v.* URQUHART.

Issues—Form of Issues—Reduction—Subscription of Deed—Act 1681, *cap.* 5.

Form of issues adjusted for the trial of an action of reduction of a testamentary writing upon, *inter alia*, the following grounds—(1) That the deed, if signed by the deceased, was not in fact executed by him as a probative writ, because the alleged witnesses were not present as witnesses at the time of subscription, and because the testator did not "at the time of the witnesses subscribing"