

The Court recalled the judgment of the Sheriff and decerned in favour of the pursuer.

Counsel for the Pursuer and Appellant—M'Kechnie—Kennedy. Agents—Pringle, Dallas, & Company, W.S.

Counsel for Defender and Respondent—Vary Campbell—Dickson. Agents—Dove & Lockhart, S.S.C.

Thursday, January 21.

SECOND DIVISION.

[Sheriff of Renfrewshire.

BAIN v. DUNCAN AND ANOTHER.

Loan—Bond and Disposition in Security—Titles Assigned to Lender—Right of Borrower to Delivery of Assigned Writs—Exhibition.

Held that a lender who held a bond and disposition in security over certain lands which contained an assignation of writs in common form was not bound to deliver up the property titles to the borrower, even for a limited period, while the loan remained unpaid.

On 17th October 1888 Mrs Margaret Helena Park or Bain, 115 Renfield Street, Glasgow, purchased a dwelling-house in Manse Road, Old Cathcart, at the price of £600, and thereafter granted a bond and disposition in security for £360 over the same in favour of Miss Barbara Duncan and Miss Ann Dunlop Duncan, Clyde Bank Cottage, Ferry Road, Yoker, which contained an assignation of the writs in common form. A second bond for £209 was subsequently granted over the same property. Thereafter Mrs Bain, on the ground that she was anxious to sell the property, or procure an additional loan upon the security thereof, applied to the Misses Duncan to deliver up the assigned property titles for a limited period. They refused this request, but offered to exhibit the titles when required. Thereupon Mrs Bain brought an action against them in the Sheriff Court at Renfrew to have them ordained to deliver to "the pursuer for such space of time, on such receipt, and under such obligation for the return thereof to the defenders as to the Court shall seem proper, the whole title-deeds, writs, vouchers, notices, receipts, searches, and all other documents whatsoever belonging to the pursuer, that have come into their possession, or are under their control."

It was averred that (Cond. 5) "the pursuer and her agent are, and have always been, willing to return said title-deeds and others to the defenders as soon as her purpose with them is served, and to grant a receipt and obligation in common form for their return, which is in accordance with the practice of the legal profession in Scotland. . . . (Cond. 6) The defenders wrongously and unwarrantably refuse to deliver up to the pursuer the

said title-deeds and others in their possession belonging to her. The defenders' explanation in answer, that their agent has informed the pursuer that he is willing to exhibit the deeds to her or her agent, is admitted under explanation that such exhibition of titles is insufficient for the pursuer's purposes, and is contrary to the common rule and practice of the legal profession in Scotland."

The pursuer pleaded—"(1) The said titles and others being the property of the pursuer, the defenders are bound to lend them as craved. (2) This action having been rendered necessary in the circumstances above set forth, the pursuer is entitled to decree, with expenses as craved. (3) The defences are irrelevant."

It was explained by the defenders, in answer to Cond. 3, that the agent held the said titles not only as their agent but also as agent for the second bondholders, and that they had been informed by him that he further held the deeds as hypothecated for an account due to him by the pursuer in connection with the purchase of the property and the bonds granted by the pursuer.

The defenders pleaded—"(1) The action is irrelevant, and should be dismissed, with expenses. (2) All parties are not called. (3) The deeds referred to in the prayer of the petition being held by the defenders' agent on their behalf, in virtue of the assignation of writs contained in the bond and disposition in security by the pursuer and her husband in their favour, the pursuer is not entitled to delivery thereof."

Upon 27th October 1891 the Sheriff-Substitute (COWAN) repelled the defences stated, and ordained the defenders, upon receiving from the pursuer's agent the usual borrowing receipt, and on undertaking to return the titles, to deliver to the pursuer for a period of 14 days the title-deeds specified in the petition.

"Note.—Although the pursuers have bonded their property, with the usual power of sale, so long as that power is unexercised the property remains in them, and they are entitled, if they can find a purchaser, to sell under burden of the bond, or they may raise a further loan on the property. For these and other purposes they have a legitimate right to obtain temporary use of the titles, and, in the opinion of the Sheriff-Substitute, the defenders have not averred any valid reason why this should not be granted to them."

The defenders appealed to the Sheriff (CHEYNE), who on 20th November 1891 pronounced the following interlocutor:—

"Finds, under reference to the accompanying note, that the pursuer is not entitled, *in hoc statu*, to have possession of the documents mentioned in the prayer of the petition, even under the restrictions therein set forth: Therefore dismisses the petition."

"Note.—When a bond and disposition in security is granted over heritable property the property titles are sometimes retained by the borrower under an obligation to make them furthcoming to the lender when required, and sometimes they are

delivered to the lender with or without an express obligation to make them forthcoming to the borrower. Now, the pleadings here are certainly somewhat vague as to the actual state of matters with regard to the possession of the titles in question; but it seems pretty clear that the petition proceeds upon the footing that the titles were delivered to the defenders at the time when the transaction was carried out, and it must be assumed, in the absence of any averment to the contrary, and of the bond, that it (the bond) contains no express obligation to make them forthcoming to the pursuer. Taking that to be the position of matters, the defenders maintain that while they are bound to exhibit the titles to the pursuer (as they have admittedly offered to do), they are not bound, except upon repayment of their loan, to part even temporarily with the possession of them; and this contention appears to me to be a sound one. It is true that it is matter of everyday practice for an agent to hand over titles which he holds for a client to a brother agent upon a borrowing receipt, but this is done as a matter of professional courtesy, and it is done, moreover, in a way which prevents the borrowing agent from acquiring an hypothec over them. The question to be determined here, however, is whether a borrower is entitled as matter of right to have possession, even for a limited period, of title-deeds which he has delivered unconditionally to a person in whose favour he has granted a bond and disposition in security which is still in force. I can find no authority in favour of such a proposition, and am not prepared to affirm it. It is urged that the borrower, the owner of the property, may be put to great inconvenience by not having possession of the titles, as the want of them may hamper him in selling the property or in effecting a second loan over it, but there are two answers to this argument. In the first place, if inconvenience does result, the owner has himself to blame, for he might have provided against it by a covenant in the bond; and in the second place, the inconvenience is more apparent than real, seeing that he can always get exhibition of the deeds, his interest in them being clearly sufficient to entitle him to that. It is further said that the lender has no legitimate interest to resist such a demand as is made here. I am, however, by no means satisfied as to that. To mention only one point. If the documents were handed over as ordered by the Sheriff-Substitute, the first thing the pursuer would do with them would be to put them into the hands of an agent with a view to his effecting a sale or procuring an additional loan, and, so far as I can see, there is nothing (assuming there to be room for a plea of personal bar) to prevent that agent getting an hypothec over them for any account that he may have against the pursuer. The result would be that the defenders might be subjected to much inconvenience, delay, and expense before they regained possession.

"I may add that even if I had been of a different opinion upon the merits, I would,

in view of the averment at close of answer to Cond. 3, have felt a difficulty about disposing of the case without Mr Smith (the defenders' agent) being called into the field; and I may also point out that in no view could the defenders be called on to part with the possession of the bond and disposition in their favour."

The pursuer appealed to the Court of Session, and argued that they were entitled to the production of the titles for a reasonable time, to be safeguarded by a borrowing receipt, or in any way that the Court thought proper. It would be extremely difficult to find a purchaser or lender if he could only see the titles by going to the office of the defenders' agent. [*By the Court*—Exhibition, although possibly less convenient, is surely quite sufficient for your purpose. Is it quite clear that you are entitled to demand even the exhibition which has been offered?]

Counsel for the defenders was not called upon.

At advising—

LORD JUSTICE-CLERK—I think the judgment of the Sheriff is right, and should be adhered to.

LORD RUTHERFURD CLARK—I entirely agree with the judgment of the Sheriff.

LORD TRAYNER—So do I absolutely.

LORD YOUNG was absent.

The Court refused the appeal.

Counsel for the Pursuer and Appellant—Salvesen. Agents—Gill & Pringle, W.S.

Counsel for the Defenders and Repondents—M'Clure. Agent—

Saturday, January 23.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

TAYLOR v. EARL OF MORAY.

Landlord and Tenant—Removing—Decree of Removing—Charge—Delay by Landlord to Charge on Decree.

A tenant against whom a decree had been obtained at the instance of the landlord, ordaining him to remove at the next Whitsunday term, continued in possession of his holding after that term. On 18th June he was charged under the decree to remove on pain of ejection. In a suspension of the charge brought by the tenant the Court *repelled* a plea to the effect that the landlord by his delay in enforcing the decree had allowed his remedy under it to lapse.

Landlord and Tenant—Holding—Agricultural Holdings Act 1883 (46 and 47 Vict. c. 62), sec. 35.

A tenant occupied a dwelling-house, garden and land, for which he paid