

sustain the defences, and assoilzie the defender.”

Counsel for the Pursuer—Young—A. S. D. Thomson. Agent—J. Murray Lawson, S.S.C.

Counsel for the Defender—Rhind—M'Clure. Agents—Smith & Mason, S.S.C.

Tuesday, November 12, 1889.

OUTER HOUSE.

[Lord Kyllachy.

THE CALEDONIAN HERITABLE SECURITY COMPANY (LIMITED) AND ANOTHER *v.* STEWART.

*Right in Security—Bond and Disposition in Security—Obligation of Relief—Bankruptcy—Whether Obligation Limited by Bankruptcy of Original Debtor.*

The debtor in a bond and disposition in security disposed the subjects over which the bond existed, and took the disponee bound to relieve him of the personal obligation in the bond. The debtor having become bankrupt, his trustee assigned to the creditor in the bond the obligation of relief contained in the disposition of the property, and the creditor sued the disponee for the balance due under the bond. The disponee contended that his obligation to relief was limited to the amount of the dividend payable by the debtor. *Held* that the obligation was not so limited, but was available to the creditor to recover the whole balance due under the bond.

This was an action by the Caledonian Heritable Security Company, Limited, in liquidation, and Peter Couper, accountant in Edinburgh, liquidator, and John Halley, architect, London, against Alexander Stewart, accountant and house-factor, Glasgow, concluding for payment of the sum of £850, 5s. 9d., the amount due to the Caledonian Heritable Security Company, Limited, and the liquidator under a bond and disposition in security for £1100 granted by John Fullerton, commercial traveller, Glasgow, in favour of the company.

The pursuer averred—“(Cond. 1) By bond and disposition in security dated the 18th, and recorded in the Division of the General Register of Sasines applicable to the county of the barony and regality of Glasgow, the 25th, both days of May 1875, John Fullerton, commercial traveller, residing at No. 11 Regent Terrace, Strathbungo, Glasgow, granted him to have instantly borrowed and received from the pursuers, The Caledonian Heritable Security Company, Limited, the sum of £1100 sterling, which sum the said John Fullerton bound himself to repay to the said Company at the term of Martinmas 1875, with a fifth part more of liquidate penalty in case of failure, and the interest of the said principal sum at the

rate of 6 per centum per annum from the date thereof to the said term of payment, and half-yearly, termly, and proportionally thereafter during the non-payment of the said principal sum, and that at the terms, and in the proportions, and under the penalties, all as specified in the said bond and disposition in security. (Cond. 2) In security of the personal obligations contained in the said bond and disposition in security, the said John Fullerton thereby disposed to and in favour of the said company, pursuers, and their assignees and disponees, heritably but redeemably, as therein mentioned, yet irredeemably in the event of a sale by virtue thereof, all and whole the subjects and others therein described, being three steadings of ground on the south-west side of the road leading from Glasgow to Maryhill, part of the lands of North Woodside, lying in the barony parish of Glasgow and Sheriffdom of Lanark, and that in real security and for payment to the said company, pursuers, and their foresaids, of the whole sums of money above mentioned, principal, interests and penalties, as the said bond and disposition in security, containing assignation to the rents and writs, power of redemption and power of sale, and sundry other clauses, in itself more fully bears. (Cond. 3) The arrangement with John Fullerton and the pursuers, The Caledonian Heritable Security Company, was, that the loan should be repaid by instalments, on the fourteen years' scale of contribution, at the rate of £117, 14s. sterling, per annum, payable half yearly, as set forth in a back-letter, dated 18th May 1875, granted by the company. But it was therein stipulated that in the event of any of the instalments being allowed to fall three months into arrear, it should be competent and lawful for the company to take all legal procedure competent under the bond, in the same way and to the same effect as if the back-letter had not been granted. Instalments have long been in arrear, and the amount exigible at Whitsunday 1879 was £850, 5s. 9d., since which term no payment has been made. (Cond. 4) By disposition dated the 28th day of November 1876, and recorded in the said Division of the General Register of Sasines the 8th day of March 1877, granted by the said John Fullerton in favour of the pursuer John Halley, the said John Fullerton sold and disposed to the said John Halley the subjects contained in said bond and disposition in security. The price of the subjects was £5100, and to account thereof Mr Halley paid £700 in cash, and the remainder was made up of £4400 of heritable securities affecting the subjects, which were allowed to remain on the subjects, namely, (1) loan of £3000; (2) the loan by the pursuers, the Caledonian Company, of £1100; and (3) a loan of £300, postponed to that of the Caledonian Company. Mr Halley's entry was at 28th November 1876, and the disposition contains a clause of relief in the following terms—'of which three bonds and dispositions in security, and of the principal sums therein contained, and of all interest due and to become due thereon, the said

John Halley, by acceptance thereof, binds himself and his heirs and successors to free and relieve me' (that is, John Fullerton), 'and my heirs and successors, from and after the date of entry after specified.' The clause of warrandice is in the following terms:—'And I grant warrandice, but excepting therefrom the foresaid three bonds and dispositions in security for the *cumulo* sum of £4400.' (Cond. 5) By disposition dated the 15th May, and recorded in the said Division of the General Register of Sasines the 30th day of June, both in the year 1877, granted by the said John Halley, in favour of the defender Alexander Stewart, the said John Halley sold and disposed to the defender Alexander Stewart, the subjects contained in the said bond and disposition in security. The price agreed on between the pursuer John Halley and the defender Alexander Stewart was £5850, whereof £1450 were paid by Mr Stewart in cash, and the remaining £4400 was made up of the three bonds and dispositions in security above mentioned. The term of entry was Whitsunday 1877, and the disposition contains a clause of relief in the following terms—'of which three bonds and dispositions in security, and of the principal sums therein contained, and of all interest due and to become due thereon, the said Alexander Stewart, by acceptance hereof, binds himself and his heirs and successors to free and relieve me' (the said John Halley) 'and my heirs and successors from and after date of entry after specified.' The clause of warrandice is in the following terms—'and I grant warrandice, but excepting the foresaid three bonds and dispositions in security for the *cumulo* sum of £44000.' (Cond. 6) At an extraordinary general meeting of the Caledonian Heritable Security Company, Limited, held on 13th July 1880, it was resolved that the Company should be wound up voluntarily, and the pursuer Peter Couper was appointed liquidator. The liquidation was by order of the Court, dated 11th December 1880, continued subject to the supervision of the Court. (Cond. 7) The said defender Alexander Stewart is presently in possession of the said subjects, and has uplifted the rents thereof since the date of the disposition in his favour. The estates of the said John Fullerton were sequestrated on 12th June 1888, and John Wright Robb, accountant, Glasgow, was elected and confirmed trustee on the said sequestrated estate. (Cond. 8) Certain sums have been paid towards reduction of the principal sum of £1100 contained in the said bond and disposition in security, but the principal sum of £850, 5s. 9d. is still due and resting owing to the pursuers, together with the interest thereof at six per cent. per annum from Whitsunday 1879. No payment has been made since 21st May 1879. (Cond. 9) In order to enforce payment of the said balance with interest at the said rate under the said bond and disposition in security, the pursuers, the Caledonian Company and liquidator, on 11th March 1889 lodged an affidavit and claim in the sequestration of the said John Fullerton. No dividend has

been received from the said estate, and the said John Wright Robb as trustee and the commissioners have now, on the narrative *inter alia* of the bond and disposition in security, the two dispositions of the subjects therein in favour of the said John Halley and Alexander Stewart respectively, and of the clauses of relief therein mentioned, and on the further narrative that the liquidator, the better to enable him to enforce payment of the sums due under the said bond, had requested the trustees on John Fullerton's estate to assign the obligations of relief in the said two dispositions, in so far that they refer to the said bond for £1100, which, in order to obviate the necessity of his (the trustee's) suing out said obligations of relief (for which he had no funds) and for other good causes he had agreed to do, assigned to the pursuers, the Caledonian Company and liquidator, the said two dispositions with the said obligations respectively therein contained so far as the trustees had right thereto, but that only so far as the said obligations of relief relate to the said bond for £1100, and also any other right of relief, or any other right competent to the trustee, against the said John Halley and Alexander Stewart, or either of them, in relation to the said bond. The assignation also gives the assignees power to sue but only in their own names. The said assignation is dated 30th April and 1st May 1889, and has been duly intimated to the said John Halley and Alexander Stewart. (Cond. 10) The said John Halley was also called upon by the pursuers, the Caledonian Company and liquidator, as assignees of the said John Fullerton's trustees to pay the balance due under the bond with interest, but has failed to do so, and in order to avoid being sued therefor, he, on a similar narrative, and in order to enable the liquidator of the pursuers' company to enforce payment of the sums due under the bond, and at the request of the liquidator, assigned to the Caledonian Company and liquidator the said disposition granted by him (the said John Halley) to the defender, with the obligation of relief therein contained, but only in so far as said obligation relates to the said bond for £1100, and also any other right competent to the said John Halley against the said Alexander Stewart in relation to the said bond. The said assignation gives the assignees power to sue, either in their own names or in the name of the cedent. It is dated 22nd May 1889, and has been duly intimated to the defender, the said Alexander Stewart. (Cond. 11) The defender Alexander Stewart has been called upon to pay the said balance of £850, 5s. 9d. due under the said bond and disposition in security, with interest thereon at the rate of 6 per cent. per annum till paid, but he has failed or refused to do so, and the present action is therefore necessary."

The pursuers pleaded—"(1) The original debtor in the bond having failed to pay, the pursuers, as assignees in the obligations of relief in the dispositions libelled, granted by Fullerton to Halley and by Halley to the

defender respectively, are entitled to payment from the defender of the balance due under the said bond and disposition in security, with interest and expenses. (2) The amount due under the said bond, after crediting payments made prior to Whitsunday 1879, being as condescended on, the pursuers are entitled to payment thereof, with interest at the rate of 6 per cent. stipulated in the bond."

The defender pleaded, *inter alia*—" (1) No title to sue. (2) The pursuer's statements are irrelevant."

Authorities cited at discussion on procedure roll—*Cunninghame v. Montgomerie*, 6 R. 1333; *Carrick v. Rodger*, 9 R. 242; *Reid v. Lamond*, 19 D. 265.

The Lord Ordinary pronounced the following interlocutor:—"Repels the first and second pleas for the defender; and, in respect it is stated that there are questions of facts between the parties which still require to be disposed of, appoints the cause to be put to the roll; and, on the defender's motion, grants leave to reclaim.

*Opinion.*—The pursuers in this case are the creditors in a bond and disposition in security who desire to enforce the personal obligation in the bond against the defender, the present owner of the security subjects. They claim to do so on the ground (1) that the defender became bound as a condition of his purchase to relieve the original debtor of the personal obligation in the bond; and (2) that the pursuers have obtained an assignation to this obligation of relief from the trustee in the original debtor's sequestration.

"There is some complication in the case from the fact that there were two transmissions of the property, as between the original debtor (Fullarton) and the defender and present owner (Stewart), but the obligation of relief was the same in both transmissions, and the immediate purchaser may, for the purposes of the argument, be put out of the case. Indeed, any difficulty on that head is sufficiently met by this—that the pursuers have also an assignation from the intermediate purchaser, and that the latter is himself a pursuer of the action.

"It is not disputed that if the original debtor (Fullarton) had been solvent he could have enforced as against the defender the obligation of relief. Nor is it disputed that he could in the same circumstances have assigned that obligation to the pursuers to the effect of enabling them to operate full payment. But the defender's point is, that as Fullarton, the original debtor, is bankrupt, and may not pay more than a dividend; and as he, or rather his estate, cannot thus be distressed for more than a dividend, the pursuers, as his assignees, cannot claim to be relieved of more than the dividend, which is thus the limit of the distress. In short, the defender's proposition is, that the debtor in the obligation of relief may always raise in defence the question of the ability of his creditor in relief to pay the principal debt, and if that creditor can be shown to possess nothing, and therefore to be unable to pay anything,

then the obligation of relief becomes inoperative, and the debtor escapes altogether from his obligation.

"I have, in so stating the proposition, left out of view the element of bankruptcy, *i.e.*, declared insolvency of the creditor in relief, because I do not see how that can affect the question, except as making the proof of inability to pay in full more easy, and perhaps also as making more easy the ascertainment of what exactly the creditor in relief is able to pay.

"Subject to that, the defender's proposition is, I think, as I have stated it; and I confess, as so stated, it strikes me as startling. It implies that the defender here shall obtain an advantage by the bankruptcy of Fullarton which he could not have anticipated, and which, if it comes to him, can only come to him as a windfall. It also implies that every debtor in an obligation of relief has right to inquire into the circumstances of his creditor in the obligation, and to pay or not pay according to the result of that inquiry. It must be admitted that all this is at least anomalous. Nor is it the necessary alternative that the creditor in relief who has compounded the principal debt or obtained an abatement in settling it, shall be entitled to recover by way of relief more than he has actually paid. It may be that the ultimate debtor shall be always entitled to claim the benefit of any abatement which his creditor in relief has in fact obtained; and yet it may not follow that such creditor is bound to seek or accept such abatement, or to enter with the ultimate debtor upon an inquiry as to whether and how far such abatement might be obtained.

"The true solution of the question will, I think, be found by recalling the true legal character of an obligation of relief as illustrated by the manner in which it falls properly to be worked out. It is not, it will be observed, an obligation under which money falls properly to be paid by the debtor in relief to the creditor in relief. On the contrary, the obligation is to relieve of the principal debt, and the natural mode of doing that is by paying the debt to the principal creditor. That is what the creditor in relief is entitled to require. No doubt he may when distressed pay the debt himself and seek repayment; and if he has paid after notice, or can show that he has paid no more than the debtor in relief must have paid, he will obtain repayment; but he cannot insist in taking that course, and the debtor in relief cannot insist on his taking it. The creditor in relief can always, if he is so minded, decline to have anything to do with the debt. So long as it remains unpaid his right is to call on the debtor in relief to pay it; or, what comes to the same thing, his right is, if he can so arrange, to settle with the principal creditor by assigning over to him his obligation of relief, and so freeing himself from all further trouble. He is, it must be noted, entitled to insist not merely that he shall not be ultimately out of pocket, but that the principal debt shall not come against him. And it is no answer to him to say

that if he allows himself to be sued, or allows the debt to be ranked on his estate, he may be able to get a discharge upon terms short of full payment. That is a matter as to which the debtor in relief has no right to dictate. If he (the debtor in relief) thinks that the principal creditor is for any reason likely to take less than full payment, he can himself try to settle with the principal creditor on that footing. But he cannot insist on the principal creditor ranking on the estate of the principal debtor or on the original debtor (the creditor in relief) compelling him so to rank. His obligation is, as I have said, to relieve the original debtor of the debt, by paying or settling it; and this obligation he may, so far as I see, be called upon to perform in the case of the original debtor's bankruptcy, either by the original debtor or by his trustee in bankruptcy, or by the principal creditor to whom the obligation of relief may have been assigned by the original debtor or his trustee.

"In my opinion, therefore, the defender has no good ground of defence to the present action founded upon the bankruptcy of Fullarton, the original debtor. I shall therefore repel the first two pleas stated for the defender, and send the case to the roll in case there should be any further questions between the parties, which, however, I scarcely anticipate. I may add—what I should perhaps have pointed out earlier—that the bankrupt, the original debtor, has or may have a material interest to prevent this bond being ranked on his estate. In questions of discharge, for example, its ranking or not ranking may make all the difference to the bankrupt, and no doubt there are other interests of the same kind arising both to him and to the body of creditors."

Counsel for the Pursuers—J. C. Lorimer.  
Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Defender—Dickson.  
Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, December 10.

## OUTER HOUSE.

[Lord Trayner.

### TULLY v. RODGER AND ADAIR.

*Reparation—Law-Agent—Agent for Both Buyer and Seller—Duty to Disclose Burden.*

T bought from R a heritable property. The conveyance was prepared by A, the law-agent of R, and was subscribed by R. Before the deed was delivered, or any price paid, T employed a law-agent to attend to his interests in the transaction. The title-deeds and proposed conveyance were sent to him for consideration, and he, as agent for T, finally settled the transaction. A held a bond over the property. The existence of this bond was not disclosed to T either

by R or by A, and was not discovered by his law-agent. T brought an action against R and A to have them ordained to disencumber the property of the bond or for damages.

*Held* that as A did not act as law-agent for T in completing the transaction, there was no duty upon him to disclose the existence of the bond, and that the action against him was irrelevant.

This was an action at the instance of William Tully, Colfin, Portpatrick, against James Rodger, flesher, Stranraer, and John Mackie Adair, solicitor, Stranraer, concluding that the defenders should be ordained either (first) to exhibit to the pursuer a search of incumbrances over the heritable subjects in Portpatrick, disposed to the pursuer in the disposition granted by the said James Rodger in his favour dated 19th May 1873, showing that the same are purged from all bonds and dispositions in security, or other incumbrances affecting the same; or (second) to pay or discharge all incumbrances affecting the said subjects, and in particular to pay or discharge the bond and disposition in security for £250 sterling granted by the said James Rodger to the said John Mackie Adair dated the 13th September and registered in the Division of the General Register of Sasines applicable to the county of Wigtown the 4th October 1869, and to exhibit a discharge of the said bond, and discharges of any other incumbrances affecting the said subjects, to the pursuer: Or otherwise, and in the event of the defenders failing to exhibit the said search or the said discharge to the pursuer, they ought and should be decerned and ordained, jointly and severally, or severally, by decree foresaid, to make payment to the pursuer of the sum of £300 sterling, or such other sum as may be necessary to free the subjects in question from all incumbrances prior in date to 19th May 1873, and to enable the pursuer to pay off the said incumbrance or incumbrances: Or otherwise, and in any event, the said defenders ought and should be decerned and ordained by decree foresaid, jointly and severally, or severally, to make payment to the pursuer of the sum of £300 sterling, being the amount of loss, injury, and damage sustained by the pursuer through the defenders' wrongous concealment of the existence of the said bond and failure to free the subjects in question from all incumbrances prior to 19th May 1873."

The pursuer averred—" (Cond. 1) By disposition dated 19th May 1873 the defender James Rodger, in consideration of the prestations therein contained, disposed to the pursuer certain heritable subjects situated in Portpatrick, as particularly described in the said disposition, for the sum of £200, which was the full price or value thereof. (Cond. 2) The said disposition was prepared by the defender John Mackie Adair, who is a solicitor in Stranraer, and who was at the time the usual law-agent of the defender James Rodger. Up to the date of signature—19th May 1873—the pursuer was not represented by a separate agent in the