Saturday, December 3.

SECOND DIVISION.

[Lord Fraser, Ordinary.

CARRICK AND OTHERS *v.* RODGER, WATT, & PAUL.

Heritable Security—Personal Obligation contained in Bond and Disposition in Security—Transmission of Personal Obligation to Person taking the Subject under Burden of Security—Act 37 *and* 38 *Vict. c.* 94 (*Conveyancing (Scotland) Act* 1874), *sec.* 47.

The Conveyancing (Scotland) Act 1874 provides by section 47 that a "heritable security for money duly constituted upon an estate in land shall, together with any personal obligation to pay principal, interest, and penalty contained in the deed or instrument whereby such security is constituted, transmit against any person taking such estate by . . conveyance, when an agreement to that effect appears *in gremio* of the conveyance . . without the necessity of a bond of corroboration or any other procedure." *Held* (*rev.* Lord Fraser, *diss.* Lord Craighill) that a clause in a disposition by which it was narrated that the sale took place on consideration, *inter alia*, of the purchasers "freeing and relieving" the seller, "as by acceptance hereof they bind themselves to free and relieve me, of payment of" the sums contained in certain bonds and dispositions in security over the subject, did not amount to an agreement in the sense of the Act.

The Act 37 and 38 Vict. c. 94 (Conveyancing (Scotland) Act 1874) provides by section 47—"Subject to the limitation hereinbefore provided (sec. 12) as to the liability of an heir for the debts of his ancestor, an heritable security for money duly constituted shall, together with any personal obligation to pay principal, interest, and penalty contained in the deed or instrument whereby such security is constituted, transmit against any person taking such estate by succession, gift, or bequest, or by conveyance, when an agreement to that effect appears *in gremio* of the conveyance, and shall be a burden upon his title in the same manner as it was upon that of his ancestor or author, without the necessity of a bond of corroboration or other deed or procedure; and the personal obligation may be enforced against such person by summary diligence or otherwise in the same manner as against the original debtor . . . A discharge of the personal obligation of the original or of any subsequent debtor, whether granted before or after the commencement of this Act, shall not, where the debt still exists, prejudice the security on the estate or the obligation as hereby made transmissible against the existing proprietor."

In January 1876 George Pearson, builder in Glasgow, borrowed from the North British Building Society (established under the Act 6 and 7 Will. IV. c. 32) £600, and in security for the price granted a bond and disposition in security over steadings of ground belonging to him at Kelvinside. The bond was recorded on 28th January 1876. In July following he borrowed other £600, and granted bond and disposition in security over certain other steadings at Kelvinside. This bond was recorded on 1st August 1876. In order to entitle him to become a borrowing member of the society, Pearson held at the date of the bonds shares to the same amount in the society as required by the rules.

By disposition dated 3d February 1877 Pearson, who was largely indebted to the firm of Rodger, Watt, & Paul, writers in Glasgow, conveyed to the three partners of that firm, and the survivors or survivor as trustees for the firm, the subjects over which the bonds above referred to, as well as other securities, had been granted. The disposition bore to be in consideration of the sum of £1000 instantly paid by them to Pearson, and to be further "in consideration of their freeing and relieving me, as by acceptance hereof they bind themselves to free and relieve me, of payment of the sum of £6400 contained in certain bonds and dispositions in security granted by me over the said subjects, said sums amounting *in cumulo* to the sum of £7400, being the agreed-on price of said subjects."

Pearson's estates were sequestrated in 1877. The shares in the North British Building Society which he held to the amount of his two loans therefrom, as above stated, were transferred by his trustee in bankruptcy to Mr Watt, one of the partners of Rodger, Watt, & Paul, in March 1878, and were divided by him between himself and his partner Mr Rodger, the firm having been dissolved at 31st December 1877, and these two partners having taken over the assets and liabilities of it. Mr Watt, as an individual, had taken over the subjects over which the earlier of the two bonds for £600 had been granted, while Mr Rodger had taken over the subjects over which the £600 contained in the latter bond had been lent.

On 31st May 1831 Carrick and others, the pursuers, as trustees of the North British Building Society, raised this action against Rodger, Watt, & Paul, and the individual partners of the firm, concluding for £661, 5s. 6d., being, with interest, the sum contained in one of the £600 bonds, and £676, 19s. 7d., being, with interest, the sum contained in the other. They maintained that under the disposition above quoted the personal obligation contained in the bonds had been transmitted against the defenders.

They pleaded—"The defenders being justly indebted in and resting-owing to the pursuers the sums concluded for, in respect that the personal obligations contained in the bonds and dispositions in security above libelled were effectually transmitted to and became enforceable against the defenders by the terms of the disposition of the subjects in their favour also above libelled, decree as concluded for should be granted in favour of the pursuers."

Separate defences were lodged for (1) Rodger, Watt, & Paul, and Andrew Paul, (2) Rodger, and (3) Watt.

All the defenders pleaded, *inter alia*, that the action could not be maintained, in respect that the disposition founded on contained *in gremio* no agreement that the personal obligations contained in the bonds should transmit against the disponees.

The Lord Ordinary, after findings in fact to the effect above stated, and finding that among the

bonds and dispositions in security granted by Pearson, and of payment of which he was to be relieved, were the two bonds of £600 each, found in law, "that the said clause" (above quoted) "in the above disposition accepted by the defenders amounted to an agreement *in gremio* thereof, to the effect that the personal obligation to pay principal, interest, and penalty, contained in the bond by Pearson to the North British Building Society, shall be held to transmit against the defenders taking the estate by conveyance, all in terms of the 47th section of the Conveyancing (Scotland) Act 1874." He therefore gave decree as concluded for. He added this note—"The defenders obtained the ownership of the property on payment of £1000 in cash, and by undertaking to relieve Pearson of payment of sums which he had borrowed on it to the extent of £6400. Apparently, therefore, the property was worth £7400. Now, when they undertake to free and relieve the seller Pearson of all his obligations to pay the money he had borrowed, it surely must be held that there was *in gremio* of the conveyance an agreement on their part that the obligation under which Pearson lay to pay the borrowed money should transmit against them. Of course such an agreement might be made in more express language and more direct form. But the legal effect and meaning is the same under the form which was here adopted. If Pearson was to be relieved of the obligation, the object surely was that the defenders, his disponees, were to come in his room—See *Reid* v. *Lamond*, 19 D. 265. The subsequent divisions of the property among the various partners of Rodger, Watt, & Paul can have no effect in restricting the rights of the pursuers or in limiting the liabilities of the defenders, by whom freedom was given to Pearson, the original debtor."

The defenders reclaimed, and argued—That it was quite settled law prior to the date of the Conveyancing Act of 1874 that an obligation by a disponee to relieve the disponer of the sum due under a bond did not give the bondholder any right to sue the disponee—*Kippen* v. *Stewart*, February 24, 1852, 14 D. 533. In the case of *Reid* v. *Lamont*, January 13, 1857, 19 D. 265, referred to by the Lord Ordinary, the bondholder was no doubt held entitled to sue, but he had obtained an assignation of the disponer's right to relief, and thus sued merely *qua* assignee. In the present case there would be no objection to the pursuers' right to sue if they obtained an assignation from Pearson, but then they could be met with a plea of compensation in respect that Pearson was very largely indebted to the defenders. Section 47 of the Conveyancing Act was not intended to create in every case an agreement between a disponer and a disponee to the effect that the latter should become personally liable to a bondholder, but merely to enable the parties to embody such an agreement, if come to, in the conveyance, instead of in a separate bond of corroboration. What the section required was an agreement to the effect that the personal obligation should transmit, and it was settled law that an obligation of relief was not an agreement to that effect. The only creditor in the obligation of relief was Pearson, who might grant a discharge without the pursuers' consent.

The defender Paul specially argued—That even if the pursuers' construction of the statute were correct, he (Mr Paul) had been liberated by the subsequent conveyance of the properties to the other two partners, in respect that the Act and the relative schedule imposed liability only on the existing proprietor. To hold the contrary would be to hold that the statute had the effect of reversing the decisions of the House of Lords in regard to ground-annuals in the cases of *Small* v. *Millar*, February 3, 1849, 11 D. 495—*rev.* March 17, 1853, 1 Macq. 345; and *Gardyne* v. *Royal Bank*, March 8, 1851, 13 D. 912—*rev.* May 12, 1853, 1 Macq. 358.

The pursuers argued — That the statute was intended to correct the common law, as laid down in the case of *Kippen* v. *Stewart*. A bondholder might have a *jus quæsitum* in respect of an agreement between seller and purchaser. Had the conveyance declared that the purchaser was to pay the amount of the bonds to the bondholder, he would clearly be entitled to sue the purchaser. The obligation of relief was practically a declaration to that effect. As regarded the liability of Paul by ceasing to be the proprietor, he might no longer be subject to diligence under Schedule K, which assumed that the person to be charged was the existing "proprietor," but he was nevertheless not discharged of the liability imposed upon him by the words of the section, and he might therefore be sued in an ordinary action.

At advising—

Lord Young—The pursuers are holders of two bonds and dispositions in security for £600 each, granted in 1876 by George Pearson over certain building ground then his property. In 1877 Pearson conveyed the property to the defenders under burden of the securities, the defenders binding themselves, by acceptance of the conveyance, to free and relieve him of payment of the sums received.

The pursuers now sue the defenders for payment of these sums. It is admitted that the action is bad at common law, and it clearly is so on the authorities—*Kippen* v. *Stewart*, 14 D. 533, and *Reid* v. *Lamont*, 19 D. 265—which decide that an obligation to a debtor to relieve him from payment of his debt does not found a direct action to the creditor in the debt. There may be circumstances in which the Court will, to avoid circuity of action, imply an assignation of the obligation of relief. But such implication, which is only for convenience of procedure, will never be made to the prejudice of the legal rights of the obligant by depriving him of any right of compensation or set-off competent to him in a question with his proper creditor in that obligation. In the present case the pursuers do not seek to support their action by implying an assignation of their debtor's claim of relief against the defenders' firm, by which they admit he would himself take nothing in respect of his indebtedness to them. The action accordingly is maintained only on section 47 of the Conveyancing Act 1874, and the Lord Ordinary has so decided it. His Lordship is of opinion that by this Act an obligation to a debtor to relieve him of his debt operates in favour of the creditor in the debt, and affords him a direct action against the obligant, which may not in a question with him be met by exception or counter claims incompetent against his debtor to whom the obligation was granted. He

holds, in short, that the common law on the subject as settled prior to the Act is changed by the provisions of the Act.

There is no question that at common law, irrespective of the Act, the real security runs with the land into whose hands soever it may pass, and that the personal obligation also passes against legal successors and gratuitous disponees without anything being said on the subject. In the case of onerous disponees the real security alone passes—I mean at common law—unless it is otherwise bargained, the personal obligation remaining exactly as it was. But it was always competent to bargain otherwise if the parties were so minded, and whenever it was intended that the debt should continue to subsist, a special bargain of some kind was necessary, for otherwise the disponer would have been bound to the disponee to clear it off. The bargain to this end frequently took the form of an obligation of relief between the disponer and disponee, whereby the creditor was in no way affected either beneficially or prejudicially, to which he was no party, and with which he had no concern. Another form of bargain more rare, but not uncommon, was for a bond of corroboration by the disponees in favour of the heritable creditors. That generally occurred where the creditor required some inducement to allow the debt to stand, and bargained for that, viz., a direct obligation by the disponee to himself. Now, I find nothing whatever in section 47 of the Act of 1874 except a provision for simplifying conveyancing by substituting an agreement in the conveyance itself for a bond of corroboration or other separate deed in favour of the heritable creditor, where the parties have so bargained, and allowing summary diligence to proceed on such agreement.

There is nothing to the effect that a bargain for relief to the disponee from the disponer may not be made and expressed as heretofore, and with the same legal consequences as heretofore.

The Lord Ordinary notices the fact that the amount of the debt was imputed to the price. I do not see the importance of the fact in the question before us. It was so imputed, of course, and always is, where the debt is to remain a burden on the property. The heritable creditor is not prejudiced, but has his heritable remedy as before and his personal obligation as before, and it is not alleged that he bargained for anything more, while it is settled law that an obligation of relief granted to his debtor is no *jus quæsitum* to him.

I am therefore of opinion that the interlocutor ought to be altered, and the defenders assoilzied from the action. I need not say that this judgment will in no way affect the pursuers' rights against the subject of this security, and those who may be personally bound to them for their debt. It only decides that no new personal obligants are given to them by the conveyance on which they found.

Lord Craighill—The facts in this case are not in dispute. They are these—George Pearson, a builder in Glasgow, granted the two bonds, each for £600, referred to in the second and third articles of the condescendence, in favour of the North British Building Society, for whom the pursuers are trustees, binding himself to repay the money to the lenders, with interest and penalty, and granted a security over heritable subjects belonging to him. Pearson, by the disposition mentioned in the sixth article of the condescendence, sold to the defenders the heritable subjects affected by these bonds; and the disposition of the property was granted in favour of the defenders Robert Rodger, David Watt, and Andrew Paul, and the survivors and survivor of them, and the heir of the last survivor, as trustees and trustee for their copartnery of Rodger, Watt, & Paul, in consideration of the sum of £1000 instantly paid by them to Pearson, and further in consideration "of their freeing and relieving me, as by acceptance hereof they bind themselves to free and relieve me, of payment of the sum of £6400 contained in certain bonds and dispositions in security granted by me over said subjects, said sums amounting *in cumulo* to £7400, being the agreed-on price of said subjects." Among the bonds and dispositions in security granted by Pearson, of payment of which he was thus to be relieved, were the two bonds for £600 each above referred to. The bonds remain unpaid, and the pursuers desiring payment have raised the present action against the defenders concluding for payment of the contents of the bonds.

There is one general defence for all the defenders, which is, that the pursuers, the creditors in the bonds, have no claim upon the defenders, and are not entitled to sue the defenders for payment. The merits of this defence depend upon the question whether there appears *in gremio* of the disposition by Pearson an agreement that the personal obligation to pay the contents of the bonds to the creditors therein should transmit against the defenders. The Lord Ordinary has found in the affirmative, and I concur in the opinion of the Lord Ordinary.

There must appear *in gremio* of the disposition an agreement to the effect stated, but it is not provided that the agreement to be obligatory shall be couched in the words occurring in the statute, or if not in these words, that it must be in some other form for which the statute has made provision. The agreement *in gremio* of the disposition that the personal obligation for a heritable debt should be transmitted is all that has to be established. Such an agreement may, I think, be validly constituted, not directly merely, but by implication. The statute in this matter ought to be liberally construed, and whenever it appears that the words which are used involve, as the natural result, the payment by disponees to the creditors in the bonds, the condition upon which liability depends must, I think, be held to be established.

This being so, the import of the words contained in the disposition by Pearson to the defenders that are founded on by the pursuers comes to be the next matter for determination. The defenders bound themselves to free and relieve Pearson, as by accepting the disposition of the lands they bound themselves to free and relieve him, of payment of the bonds, the contents of two of which are sued for in the present action. Had the clause been so expressed as not merely to imply, but to bear in so many words, that this freedom and relief were to be afforded by making payment to the creditors of the heritable debts, it was conceded on the part of the defenders that such an agreement as the statute required would have been established.

The words "by making payment to the creditors" are not to be found in the obligation. But the obligation is so conceived as in the circumstances plainly to imply that this was the manner in which the relief undertaken was to be afforded. In the first place, the thing of which Pearson was to be freed and relieved was "payment of the bonds." In other words, the defenders undertook to come between him and the creditor—that is to say, to pay to the creditor; for in no other way could the stipulated relief be afforded. Unless the defenders were to pay to the creditor, the latter could not be secured from the consequence of his obligation for the payment, and as he was to be relieved of payment the defenders must, if their obligation is to be fulfilled, pay to the creditor, that the creditor may be prevented from coming against Pearson, the original debtor. But the obligation of the defenders to go to the creditor, and the right of the creditor to come to or insist on payment from the defenders are reciprocal. This is a corollary from his admission that had the clause provided for relief, not simply of payment, but for such relief by paying to the creditors, the right of the latter to come against the defenders would have been established. And on this ground, independently of these considerations, my opinion is, that in this disposition there is such an agreement as that which is made the condition of the transmission of liability.

In the second place, the nature of the thing makes it certain that the true reading of this obligation to relieve could not be that Pearson was to be relieved by the defenders paying to him the contents of the bonds. These bonds affected the heritable subjects which had been purchased by the defenders, and it could not be in the contemplation of the parties that the money by which the bonds were to be satisfied was to be paid by the defenders to Pearson, the original debtor in the bonds. If the defenders were to pay, they were entitled to the discharge by which the subjects would be disburdened. Pearson could not grant such a discharge; that could be given only by the creditor. But were the defenders bound to entrust the money to Pearson? He might, once it were in his hands, have used it otherwise than for the purpose for which it was given, and it is out of the question, as I think, so to construe the obligation to relieve as to bring about the result that the defenders, according to the contract, were to pay, not to the creditor, but to the debtor in the bonds, taking the risk of the possible improper application of the money. The case of *Kippen*, February 24, 1852, 14 D. 533, was referred to on the part of the defenders, but that authority appears to me to be inapplicable, as the question here is the import of the clause in question read in the light of the statutory enactment. Without the statute the pursuers, it may be, could not have sued the defenders, but the latter nevertheless may be sued if there is an agreement, either expressed or implied, that the obligation for payment should transmit against them.

These, shortly stated, are the reasons by which I am influenced in expressing my concurrence with the opinion of the Lord Ordinary.

The second defence is to the effect that as the obligation was undertaken by the defenders Paul, Rodger, & Watt in the character of trustees for their firm, liability against them personally could not be transmitted. The fault in this contention appears to me to be an inadvertence to the consideration that the defenders were not only trustees, but trustees for themselves. They interposed as trustees merely to satisfy in a matter of form a feudal exigency, but they did so on their own account as the individuals who were the beneficiaries in the trust; and the individuals who were the trustees were the individuals for whose benefit the disposition was granted. The trustees and the individuals therefore on the present occasion cannot be separated. The form of the conveyance is simply an accident, and the liability of the individual defenders is not thereby affected.

The next defence which is stated is in behalf of the defender Paul, and also in part for the defender Rodger, and is to the effect that as Paul has ceased to be the proprietor of the subjects burdened by the bonds in question, and as Rodger has ceased to be proprietor of one of those subjects, the former is now free from all liability for both bonds, and the latter from liability for the bond affecting that particular subject of which he has ceased to be proprietor, even assuming that the defences already considered are unsound. This point is one that appears to me to be difficult of determination, because there is difficulty so far as it is concerned in the interpretation of the 47th section of the statute.

But after consideration I have come, on this question, to concur with the Lord Ordinary, who has presented his views in the concluding portion of the note explanatory of his judgment. There is *ex hypothesi* an agreement by which the obligation is transmitted. This is an agreement made, not primarily for the benefit of the creditor, but for the benefit of the debtor, and were the contention which is maintained by the defenders to be sanctioned, the result would be that possibly without a new obligant becoming bound, the party undertaking the obligation involved in such an agreement would be set free to the prejudice of the debtor. The words of Schedule K, referred to in the 47th section, are not only consistent with, but may plausibly be said to suggest, an opposite conclusion, but the result to which the words of that schedule point cannot be implicitly adopted, for if it were to be inferred from the use of the words "present proprietor" in that schedule that only the present proprietor, not being the original debtor, was to be bound, it might reasonably also be inferred that the mere circumstance of being present proprietor was of itself sufficient as a ground of obligation.

This, however, is inconsistent with what the statute has provided, because ownership without agreement for transmission of the obligation is not a ground upon which liability can be established.

On the whole matter, therefore, agreeing with the Lord Ordinary, I am of opinion that his interlocutor ought to be affirmed.

Lord Justice-Clerk—This is a question of some practical importance. I concur with Lord Young, and I have little to add to his opinion. This 47th section of the Conveyancing Act of 1874 only makes a purchaser liable to the original creditor in the personal obligation if he has agreed to be so—that is, he only is liable to have the

personal obligation transmitted against him if there is an agreement *in gremio* of the conveyance that the purchaser shall take the place of the debtor in a question with the creditor; and transmitting under this clause of the statute means that the purchaser shall take the place of the original debtor in a question with the creditor. It can mean nothing else, because if there is such an agreement as this clause contemplates, it is to be equivalent to a bond of corroboration. Therefore the whole question we have to consider is, whether in this conveyance from the seller to the purchaser there is an agreement to that effect—that is to say, that the purchaser shall take the place of the debtor, renounce all right to compensate or set-off against any obligation in the conveyance, and become directly liable to the original creditor. It seems to me too clear to require further illustration that there is nothing of the kind in this conveyance. There is an obligation of relief by payment, or of relief otherwise; but whatever the way of relief may be, the relief must be given if the debtor be distressed. But if there be debts which can be set off against this obligation of relief, then it is quite as clear that no payment need be made by the purchaser of the land until his debt which he sets off has been paid or satisfied. That surely was the state of the relative rights prior to the Act. The whole matter is to simplify the conveyance by superseding the necessity of granting a bond of corroboration, and making the agreement to that effect, if it be found to that effect sufficient for that purpose.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

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Saturday, December 3.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

HENDERSON *v.* CLIPPENS OIL COMPANY.

Patent—Specification.

The title of a patent bore that it was "for improvements in the destructive distillation of shale or other oil-yielding minerals, and in apparatus therefor." The specification stated that the patent had for its object "the economical and satisfactory obtainment and application of the heat required for the destructive distillation of shale or other oil-yielding minerals, and it comprises improved arrangements for the utilisation of the spent shale or mineral itself as fuel for supplying the heat." . . . The claiming clause described as the invention protected by the patent "the conducting of the destructive distillation of shale . . . substantially according to the system, and by means of the arrangements and apparatus, hereinbefore described." The application of the spent shale as fuel was admittedly old and not patentable. *Held* (*rev.* Lord Rutherfurd Clark) that no new system of distillation apart from the arrangements and apparatus and their use was claimed, but that the claim made was for certain improvements in the way of arrangements and apparatus for carrying out the old form of distillation, that the "system" was merely the method in which the apparatus worked, and that there being novelty and utility in these improvements the patent-right to them should be protected by interdict.

Observations on the construction to be applied to specifications.

By letters-patent sealed 7th October 1873 Norman M. Henderson obtained the exclusive privilege for the ordinary term of fourteen years of making, using, and vending an invention for "improvements in the destructive distillation of shale or other oil-yielding minerals, and in apparatus therefor." At the time of this litigation the right to the letters-patent was vested in Henderson and in William Kennedy.

The specification lodged in pursuance of the conditions of the letters-patent bore—"My said invention has for its object the economical and satisfactory obtainment and application of the heat required for the destructive distillation of shale, or other oil-yielding minerals, and it comprises improved arrangements for the utilisation of the spent shale or mineral itself as fuel for supplying the heat, or a portion thereof." Then followed a detailed description referring to drawings lodged with the specification of the "best practical arrangements and apparatus as made with my improvements." The nature of the apparatus, which consisted, shortly speaking, in an arrangement of shale retorts such as to enable the spent shale, which contains little carbon and therefore rapidly loses its heat on any exposure to the open air, to be passed from the upper to the under of two retorts placed vertically (the system being also capable of application to horizontal retorts), and thereby to effect a saving of fuel, is described in the opinion of the Lord Justice-Clerk.

After a detailed description of the apparatus said to form the invention, with references to the drawings lodged with the specification, that document proceeded—"Existing vertical retorts with vertical discharge doors on their outer sides close to their bottoms may be adapted for carrying out my invention by building or forming a chamber in front of each door, and with a lateral passage or opening leading down into the fire chamber, and provided with a valve to close the passage, excepting when the retort is being discharged. Any convenient number of the retorts may be arranged in one building or oven, and the retorts may be horizontal, or inclined if preferred. Any convenient arrangement of discharge door may be used, provided a valve or equivalent screen is interposed between it and the fire chamber, excepting when the spent shale or mineral is being transferred from the retort to the fire chamber. The arranging of one fire chamber in connection with