

Tuesday, March 15, 1881.

FIRST DIVISION.

[Lord Lee, Ordinary.

HAGGART v. M'PHERSONS.

Process—Compromise—Judicial Offer—Acceptance—Record.

The defenders in an action offered on record to settle in the terms of one of the alternative conclusions of the summons on receiving a certain assignation. The record was closed on October 20th. On January 8th, after a discussion in the procedure roll, but before any deliverance thereon, the pursuer lodged a minute accepting the offer precisely in terms thereof. On February 15th the pursuer lodged a minute withdrawing the offer, parties having in the meanwhile been engaged in a correspondence with a view to settle the exact terms of the assignation. *Held* (rev. Lord Lee) that the action had been settled in terms of the offer and acceptance, and that the defender could not be allowed to withdraw his offer as he proposed to do.

This was the action by John Haggart against Charles and James M'Pherson referred to in the case of *M'Phersons v. Haggart*, December 15, ante, p. 212. The general circumstances of the case were narrated in the report of the former action. The following were the minutes referred to by the Lord Ordinary (LEE), upon which the present point depended. No. 11 of process, lodged January 8, was in these terms—"PEARSON, for the pursuer, stated that the pursuer accepted, and hereby accepts, the offer made by the defenders in article 9 of the statement of facts for them, and agreed, and hereby agrees, upon payment being made to him in conformity with the said offer, to grant an assignation in the defenders' favour of the Bank of Scotland's right, contained in the letter of guarantee dated 25th June 1879; and he craved the Court to decern accordingly." And No. 12 of process, lodged February 15, was as follows—"M'KECHNIE, for the defenders, stated that they withdrew, and hereby withdraw, the offer contained in the following terms:—"The defenders are willing, and they hereby offer, each to pay his share of the foresaid sum of £539, 7s. 7d., upon condition of their obtaining an assignation to the said bank's right, contained in the foresaid letter of guarantee of June 1879,"—in answer 9 of their statement of facts; and counsel therefore craved the Lord Ordinary to delete the said offer from the record."

The Lord Ordinary pronounced this interlocutor:—"Having resumed consideration of the cause, and heard counsel, on payment of three guineas of expenses allows the defender to amend his record as craved in the minute No. 12; and this having been done at the bar, sustains the amendment, and before answer allows to the defender a proof of his averments on record, and to the pursuer a conjunct probation: Appoints the proof to take place on a day to be afterwards fixed, and in so far as necessary grants leave to reclaim against this interlocutor."

The following was his Lordship's note:—"This cause was sent to the procedure roll without any acceptance of the defenders' offer in statement 9.

It was discussed in that roll on 6th January, the pursuer contending that he was entitled to decree unless the defender should prove his averments by writ or oath, and maintaining that he was not bound to grant any assignation to the defenders on payment. The defenders, on the other hand, contended that they were entitled to inquiry, and referred to *Thorburn v. Howie*, July 18, 1863, 1 M. 1169. But towards the close of the discussion the parties concurred in asking that the case should stand over to enable them to confer as to some arrangement. On January 8th the minute No. 11 was lodged by the pursuer, and the Lord Ordinary was again asked to allow the case to stand over to allow of an adjustment of the dispute. But no progress was made, and the Lord Ordinary was ultimately moved by the pursuer to ordain the defenders, in respect of the minute No. 11, to lodge in process a draft of an assignation to the bank's right under the guarantee of June 1879. It then appeared that there was a difference between the parties as to the extent of the assignation to be granted by the pursuer, and that the defenders were desirous of withdrawing their offer in statement 9 if they were understood as limited by its terms to an assignation of the bank's right under the guarantee of June 1879. The Lord Ordinary accordingly, on 15th February, allowed the defenders to lodge the minute No. 12, in terms of the interlocutor of that date, and appointed the discussion in the procedure roll to be resumed. It appeared to him that as the cause stood the question whether the pursuer was entitled, as matter of right, to end the discussion by lodging the minute No. 11, or whether the defenders were still entitled to maintain their pleas, was not a question which could be decided as a mere matter of contract. He was of opinion that it was a question of pleading, and that the pursuer's minute was not by itself conclusive against the defenders. The whole cause remained to be disposed of upon the record. The question for the Lord Ordinary was, what should be the procedure under that record? and it seemed to him not too late for the defenders, if there was any misunderstanding on their part, to crave leave to amend their record by withdrawing the offer, the effect being of course that both parties retain all their pleas unprejudiced. On condition therefore of the defenders paying expenses from 6th January, which he modified at £3, 3s., the Lord Ordinary allowed the defenders to amend as craved."

The pursuer reclaimed.

At advising—

LORD PRESIDENT—In this case there are two alternative conclusions. The one is that the defenders ought jointly and severally to make payment to the pursuer of the amount of principal and interest payable by the pursuer to the bank, and the other is that the defenders should pay each one-fourth of the sum. The defences are, in the first place, that the defenders are entitled to absolvitor on the general ground that James Reid Haggart had agreed to relieve the defenders, and on the ground that he was the party truly liable, and (2) that in any case each is liable only in one-fourth of the sum. Now, on the record the defenders say that they are willing to settle on the view in their second plea-in-law. The defenders are willing, and hereby offer to pay, on

getting an assignation of the bank's right as contained in the letter of July 1879. This is the letter granted by James Reid Haggart after he became of age. The record was closed on 20th October 1880, and up till that time there was no proposal on the part of the pursuer to accept the offer. A discussion took place on 6th January on the procedure roll, and apparently the Lord Ordinary threw out some views on the case which induced the pursuer to reconsider his position. The case then dropped for this purpose, and the pursuer lodged a minute in which he accepted of the offer. This is an acceptance precisely in the terms of the offer, and therefore, unless something intervenes to prevent the offer and acceptance having their effect they must receive their effect. I do not understand that anything took place except that both parties agreed to reconsider their position. I do not see that there was anything to intervene, but if so, I should have expected that the defenders would come forward at once, but this they did not do. A copy of the minute is sent to them, and they take no notice of it. Until 15th February they make no mention of it. There is a correspondence which shows that both of them contemplated an arrangement. The pursuer is pressing for a draft of the assignation, and the defenders do not refuse. In the meantime the case was on the roll and dropped, just because nothing else was done. I do not say that this was a tender—it was an offer to settle the case. The defence was that the defenders were not liable at all. The other alternative was that they were only liable in a fourth each, and they offered to pay this on getting an assignation. It was accepted in terms of the conclusions of the summons, and in terms of the offer. I am for recalling and remitting to the Lord Ordinary.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Lords pronounced this interlocutor—

“Find that the cause has been settled by compromise between the parties on the footing that each of the defenders shall pay to the pursuer the sum of £134, 16s. 10d., on condition of the pursuers granting them an assignation to the bank's right contained in the letter of guarantee by James Reid Haggart, dated 25th June 1879: Remit to the Lord Ordinary to adjust the terms of the said assignation, and to dispose of all questions of expenses, including the expenses incurred in the Inner House.”

Counsel for Pursuer (Reclaimer)—Brand.
Agents—Irons & Speid, S.S.C.

Counsel for Defenders (Respondents)—M'Kech-
nie. Agents—Curren & Couper, S.S.C.

Friday, December 16.

FIRST DIVISION

[Lord Curriehill, Ordinary.]

MOORE AND OTHERS (BELHAVEN UNITED
PRESBYTERIAN CHURCH TRUSTEES) V.
PATERSON AND ANOTHER.

Obligation—Personal and Real—Transmissibility
—Where by Transmission the number of Creditors is increased.

One of the disponees of a Land Building Company, as part of the transaction by which he acquired a portion of the company's land, but by a separate and personal agreement, undertook within a period of twelve months from the date of the agreement to open up and form the continuation of an intended road through a strip of ground belonging, and known to belong, to a third party. The strip of ground measured 590 feet in length by 4½ in breadth. The Building Company did not themselves seek to enforce the obligation, but some years after its date, when they were in liquidation, their entire lands having been disposed of and their other purposes fulfilled, they assigned to another disponee of an adjacent parcel of their ground the right to enforce the obligation, but under the declaration that the assignation was granted “without prejudice to any rights already granted to other parties, or to our own rights to enforce by ourselves alone, or to assign said obligation to any other parties having a legal interest in the due implement thereof.” The company had granted in all 35 conveyances of other parcels of this ground after the date of the original obligation. The owner of the strip in question having refused to sell the portion required for the road, except at a price of £1500, he having paid £142 for the whole strip, the assignee raised an action for specific implement of the obligation, or alternatively for damages. *Held* that the obligation was personal only, and that the company were not entitled to assign it so as to multiply the creditors therein, and action *dismissed*.

Obligation—Damages—Specific Implement.

Observed that it is within the discretion of the Court to say whether a pursuer is entitled to specific implement of an obligation, or to damages merely, and that the pursuers, in the foregoing circumstances, even if they had a title, were not in a position to obtain decree for specific implement of their obligation.

This reclaiming note was a sequel to the case of *Paterson v. M'Ewan and Others*, March 18, 1881, *ante* vol. xviii., p. 475, 8 R. 646. The question in dispute in both actions related to the formation of a road in the suburbs of Glasgow which was to be a continuation of the Victoria Circus Road, and was intended to connect that road and the lands of Downhill with the Great Western Road. In order to do this it was necessary that the road should pass through the estate of Kelvinside, and also through a narrow strip of ground, originally part of Kelvinside, which separated that estate from Downhill, and had been acquired by