professional man or other person. The patterns and trade-mark were important items in the goodwill, and without them the business would not have been a profitable one. It was clearly settled that they were assets of a firm saleable on dissolution like any other asset. The goodwill, then, of this business formed an item in the assets of the firm separate and separable from the heritage, and in which the next-of-kin had a distinct and substantial interest.

Authorities—*Churton* v. *Douglas*, March 1859, Johnston's Eq. 174 (opinion of Vice-Chancellor Page Wood, p. 180); Lindley on Partnership, vol. 2, pp. 859 and 863; *Bain* v. *Munro*, January 10, 1878, 5 R. 416.

The respondents replied—Goodwill was not a saleable commodity by itself or separable from the heritage here—*Chersuin* v. *Dewes*, July 1828, 5 Russell's Rep., p. 29, Ch. Cas.; *Pile* v. *Pile*, May 1876, L.R., 3 Ch. Div., p. 36; *ex parte Punnet in re Kitchin*, November 1880, L.R., 16 Ch. Div., p. 226. It did not belong ordinarily to the executor but effeired to the premises in which the trade was carried on. But granting that it was marketable by itself, the moveables and heritage had in point of fact been sold together, and it was obvious that the price awarded to the next-of-kin in name of moveables was very greatly enhanced by this fact, and a much larger price obtained than would have been the case if they had been each sold separately. If everything, *i.e.*, all the stock, patterns, &c., except this imaginary goodwill, were sold, the next-of-kin could not prevent the purchaser selling the articles he manufactured under the former firm name. The Lord Ordinary's judgment, then, was right. (2) But he had decided erroneously in holding that the unpaid balance of the accounts secured by the bond and disposition in security in favour of the Union Bank formed a proper charge on the heritable succession. The burden of the debts of the ancestor attached to the real and personal estates according to their respective qualities, and in a question between the real and personal representatives the heir who pays a moveable debt, or the executor who pays an heritable debt, has relief against that part of the succession which is primarily liable—Erskine, iii. 9, 48; Bell's Prin., 1936; M'Laren on Wills and Succession, vol. ii. p. 476.

The next-of-kin replied, on this second point, that it was clear that the bond was intended by the ancestor here to create a heritable debt, and therefore the Lord Ordinary was right in charging it on the heritage. They cited the cases of—*Macleod's Trustees et al*, June 28, 1871, 9 Macph. 903; *Duncan, &c.*, June 22, 1883, 10 R. 1040.

At advising—

The Lord Justice-Clerk delivered the opinion of the Court as follows:—In the winding-up of the estate complicated and important questions have been argued before us, and after full consideration of the case I have come to be of the same opinion as the Lord Ordinary, although I have felt considerable difficulty on the question raised as to the sale of the goodwill of the business. On this point he says—The second question is, whether the next-of-kin are entitled, in respect of their right to the goodwill of the business, to any part of the price of £65,200 which was paid for the pottery, including the machinery, plant, and goodwill, except to such part as may be applicable to the moveable machinery and plant. Then he goes on to say that there can be no "question that what is called the goodwill greatly enhanced the value of the whole of the subjects exposed for sale," and at some length explains in detail his views on the matter, whether there is a separate or separable element of goodwill not covered by the enhanced price given for the other articles. I have come to be of the same opinion arrived at by him, and on the same grounds stated by him, that there is no such separate element of goodwill.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the reclaiming-note for James Bell and Others against Lord Kinnear's interlocutor of 26th March last, Refuse the reclaiming-note, and adhere to the interlocutor reclaimed against: Find the reclaimers and the respondents entitled to payment out of the sequestrated estate, of the expenses incurred by them since the date of the said interlocutor: Remit to the Auditor to tax the same and to report, and remit the cause to the Lord Ordinary to proceed therein as accords, with power to decern for the amount of the expenses now found due, when taxed."

Counsel for Reclaimers—Pearson—W. Campbell. Agents—J. B. M'Intosh, S.S.C.—J. & J. Galletly, S.S.C.

Counsel for Respondents—Mackintosh—Dickson. Agents—William Finlay, S.S.C.—C. & A. S. Douglas, W.S.

Tuesday, November 4.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

M'WHIRTER *v.* CAIRD AND ANOTHER.

Right in Security—Transmission of Personal Obligation against Singular Successor—Renunciation.

A, who was possessed of heritable property of the value of £40,000, burdened with heritable bonds to the amount of £37,000, entered into an agreement with B and C whereby they undertook to become cautioners for a composition to his creditors, while A on his part undertook to convey to them his whole estate heritable and moveable. The agreement contained a provision that B and C should have the absolute power of management of the whole subjects conveyed "with power to renounce any of the separate subjects, and give the same up to the heritable creditors for their separate heritable debts, according to their rights therein," and with power to sell and dispose of the subjects or any of them for their own benefit. A was to give his skill and attention in the management of the properties at a fixed weekly wage. The whole profit or loss was to be divided equally between B. and C. The agreement was implemented by A by a

disposition and assignation granted by him "for certain good causes and considerations, but not for a price paid," in favour of B and C, of his whole estate. About three years thereafter B and C executed a deed of renunciation of certain of the properties to the heritable creditors therein. Thereafter A, having been charged on a bond by one heritable creditor secured over one of these properties, and having had decree pronounced against him at the instance of the creditor secured over another for payment of a deficiency in the subject to meet the bond, raised an action against B and C for relief. *Held* (*diss.* Lord Justice-Clerk) that the personal obligation in the bonds in favour of the heritable creditors had, under the agreement, transmitted against B and C, and that the deed of renunciation did not affect their obligation.

Robert M'Whirter, who was engaged in a large building business in Greenock, was in 1878 proprietor of certain heritable subjects in Gourock, Greenock, and Glasgow, estimated to be of the value of between £40,000 and £50,000. Towards the close of that year, finding himself in want of capital to carry on his business, and being unable to meet his liabilities to his creditors, he entered into an arrangement with Colin Stuart Caird, merchant, and William M'Clure, of the firm of M'Clure & Macdonald, writers in Greenock, which was carried into effect by a memorandum of agreement, dated 3d January 1879, between Caird and M'Clure of the first part, and M'Whirter of the second part. This agreement, so far as bearing on the present case, was as follows:—"Whereas the second party having become involved in heavy building speculations, called a meeting of his creditors, and agreed with them that he should be discharged of his ordinary debts for a composition of five shillings in the pound, payable at six and twelve months, with security, and he having asked the first parties to become cautioners and sureties for the said composition, and to undertake certain other responsibilities for him, which they have conditionally agreed to do, it has been, and hereby is agreed as follows:—*First*, The second party agrees to grant a valid and absolute disposition and assignation to the first parties of his whole heritable and moveable properties, excepting only the household furniture in his dwelling-house at Gourock, and that whenever called upon to do so, and also to grant all other deeds, supplementary and otherwise, relating to the premises, which the first parties may require him to execute, and the necessity or propriety of granting which they shall be the sole judges; and he further agrees to concur in all deeds to be granted by the first parties if and when required; and he shall grant absolute warrandice of all deeds and writings, while the first parties shall only be bound to grant warrandice from their own facts and deeds. . . . . *Second*, It is agreed that the first parties shall have the absolute and uncontrolled power over, and management of, the whole subjects to be so conveyed to them, always under the several burdens at present affecting each separate subject, but with power to renounce any of the separate subjects, and give the same up to the heritable creditors for their separate heritable debts, according to their rights therein; and also with full power to the first parties to sell, use, and dispose of the whole or any of the properties at pleasure, and to uplift and use the price or prices thereof, as they may see fit, for their own benefit and advantage." By the third article M'Whirter agreed to give his utmost skill and attention in finishing the properties so conveyed, superintending the workmen, making necessary contracts, and managing the property, receiving a certain sum per week for his services, and being at liberty to perform other work. "*Fourth*, The said first parties agrees to grant bills for the composition due to the second party's ordinary creditors, according to a list subscribed as relative hereto (and which the second party warrants to be a complete list), and to pay the said bills when due; and the first parties also agree to pay the past due interest on bonds and dispositions in security and other securities affecting the properties, and also the past due feu-duties affecting the same, excepting always the feu-duties on the plots of ground feued on the Gourock estate, on which no buildings have been erected. *Fifth*, In order to finance for the purposes in article 4th, the first parties may either obtain a bank cash-credit, or they shall be at liberty to draw upon the second party, at such times and for such amounts as they please, and which drafts he agrees to accept for being discounted, the first parties always retiring such drafts when due. . . . . *Seventh*, Should the first parties be satisfied that the second party has given all due and proper attention to the duties herein agreed to be performed by him, that he has not directly or indirectly obtained or bargained for discounts, commissions, or profit, or advantage to himself beyond that herein agreed for, that he has not misrepresented the debts due by him, or the liabilities of the estate, or its value as agreed to be conveyed, of all which particulars the first parties shall be the sole judges, the first parties may allow the second party one-third part or share of all profit nett to be derived from the estate on being finally wound up, in addition to the money payments hereinbefore agreed upon, and the furniture; but in estimating this third, the profit in the foresaid machinery and plant, of which the second party must keep a correct account, will be included. *Eighth*, Subject to the terms of the 7th article hereof, the whole profits to be derived from the estate shall be held for behoof of, and to be divided equally between the two first parties and their representatives, and should there be loss, they shall sustain the loss in equal shares, none of them being to take profit directly or indirectly unless what is herein allowed or may be due and acknowledged as preferable, or specially admitted in writing, under pain of forfeiture of all interest under this agreement."

M'Whirter on 15th January following (1879) executed a disposition and assignation of his whole estate, heritable and moveable, with the exception of his household furniture and some other subjects agreed not to be conveyed, in favour of Caird and M'Clure. The narrative of this deed bore that it was granted "for certain good and onerous causes and considerations, but not for a price paid," and in implement of the obligation undertaken by him in the memorandum of agreement.

Caird and M'Clure thereafter became cautioners for the payment of M'Whirter's composition to

his creditors, and entered into possession of his whole means and estate, making up titles by notarial instruments to the heritable property, most of which was burdened with debts secured by bonds and dispositions in security.

In November 1882 Caird and M'Clure executed a deed of renunciation whereby they, on the narrative of the memorandum of agreement and the power thereby given them to make renunciation to heritable creditors, and of the disposition and assignation by M'Whirter in their favour, and of their having entered into possession and collected the rents of the heritable properties thereby conveyed to them, renounced and gave up to certain heritable creditors, therein enumerated, certain of the heritable subjects conveyed to them by M'Whirter, among them being included subjects over which the trustees of a Mr Ballantine held a bond and disposition in security for £900, and also the subjects in Brougham Place after mentioned. They sent a circular letter, with a copy of the deed of renunciation, to each of the heritable creditors secured over the property conveyed by M'Whirter.

In September 1883 David Alexander Tallach, liquidator of the firm of M'Clure & Macdonald (which firm had been dissolved), which had made to M'Whirter an advance of £500, receiving in security a conveyance, *ex facie* absolute but truly in security, of certain subjects in Octavia Terrace and Brougham Street, Greenock, raised an action against M'Whirter for payment of £161, 17s. 1d., being the balance with interest of said advance remaining unpaid after a sale of the property by M'Clure & Macdonald. The disposition to the purchaser in this sale was granted by Caird and M'Clure as heritable proprietors, with the firm of M'Clure & Macdonald and M'Whirter as consenters, and contained absolute warrandice. Tallach also claimed £25 as the expenses connected with the roup of the subjects. M'Whirter intimated the action to Caird and M'Clure, who gave him no instructions regarding it. He lodged defences, and, after a proof, decree was granted by the Lord Ordinary, on 8th March 1884, for payment of the sums sued for, with expenses. M'Whirter's expenses in the action were £133, 2s. 3d. In April following M'Whirter was charged on the decree for the sums found due in the action.

In January 1884 M'Whirter was charged on the bond held by Thomas Ballantine's trustees over a property in Greenock, to pay up the sum of £900 therein contained, with interest and penalty.

In May 1884 M'Whirter raised the present action of relief against Caird and M'Clure, concluding that the defenders ought to be ordained, jointly and severally, to pay to him, or otherwise to relieve him of all liability for payment of (1) the £900 in the bond to Ballantine's trustees; (2) the £137, 6d. 4d., which had been the principal sum concluded for in Tallach's action (and to which fell to be added £24, 10s. 9d. of past due interest, making the total £161 17s. 1d.), and also the £25 for which decree had been given against him in that action; and (3) for payment of £133, 2s. 3d., being the amount of expenses incurred by him in defending that action. He averred that it was a condition of his having conveyed his whole heritable property to the defenders under the agreement, that they should relieve him of his liability in respect thereof; that since taking over his whole means and estate the defenders had managed the same entirely for their own use and advantage, and had drawn the whole profits thereof.

The defenders averred that the pursuer, in breach of article 3 of the memorandum of agreement, had wilfully neglected his duties as their factor, and had in other ways failed to implement his part of the agreement, and that in consequence they, the defenders, had lost sums of money amounting in all to £8000. They set forth the renunciation above mentioned.

A statement of the pursuer's affairs, dated 29th October 1878, brought out a deficiency of £3184, 18s. 4d., and an estimated outlay of £1607, 10s. still required to complete certain properties. The estimated value of the heritable properties was £40,650, while the amount of bonds was £37,810, leaving a surplus of £2840, from which fell to be deducted £300 as the estimated cost of the formation of a street. An abstract of receipts and disbursements for the properties conveyed to them, prepared by the defenders, showed, at the date of the renunciation above mentioned, a nett deficiency of £7925.

The pursuer pleaded—"(1) Under the agreement dated 3d January 1879, the defenders are bound, jointly and severally, to pay to or relieve the pursuer of liability from the sums first and second concluded for in the present summons. (2) In respect of the said agreement and what followed thereon, and, in particular, the conveyance to the defenders of the pursuer's whole property, with the exception of the subjects they did not desire to take over, the pursuer is entitled to the relief concluded for in the summons. (3) The defenders, to whom intimation of the pursuer's claim to relief was duly given, are also bound to refund to him the expenses incurred in defending the action at the instance of Mr Tallach."

The defenders pleaded—"(1) The statements of the pursuer are irrelevant and insufficient in law to support the conclusions of the summons. (2) By the terms of the memorandum of agreement the defenders did not undertake to relieve the pursuer of his personal liabilities and the bonds affecting the heritable property. (3) *Separatim.* The pursuer not having fulfilled his obligation under said agreement, cannot sue thereon."

The Lord Ordinary decerned against the defenders in terms of the first and second conclusions of the summons, and with reference to the third conclusion, remitted the account of expenses libelled to the Auditor, and granted leave to reclaim.

"*Opinion.*—The parties are agreed that the case should be disposed of on the closed record. The only question is, whether the defenders, in taking over the pursuer's estate without any price being paid, have also taken over (as between disponer and disponee) the liability affecting his estate? The answer to this question may be made clear by reducing the case to one of a more usual character.

"If I purchase a house over which there exists a disposition in security of £1000, and if I am in want of £1000 to make up the price, my right is to require the seller to clear the property of the encumbrance, and I may then simultaneously contract a fresh loan in my own name on the security of the property, and for the same amount. Under this

mode of settlement the seller is discharged of his obligation by payment, and the purchaser comes under a new obligation to a creditor who may be the same person who had lent the £1000 to the seller. Now, if, by arrangement, instead of requiring the old bond to be cancelled, I agree to take over the house with the debt of £1000 affecting it, paying the difference only to the seller, evidently the seller's right against me is to require me to relieve him of his personal obligation under the bond, and to arrange with the creditor that he shall accept my obligation in its place. If this were not so, the seller would not be in as good a position as if the transaction had been carried out in the first-mentioned way. Because, observe, under the second way the seller has not received full payment; he has only got my promise to pay £1000 and actual payment of the difference, and in order that he shall be completely satisfied, my promise to pay the £1000 must be made as good to him as actual payment by the creditor accepting my promise as coming in place of his (the seller's) promise. All this is very elementary, and the principle is just the same when the property is mortgaged to its full amount. If I purchase the property for a price equal to the debt affecting it, and agree to take it over with the debt upon it, then while I pay nothing to the seller in cash, the consideration I give him for his property is that I relieve him of all liability for the mortgages, and take that liability on myself. The heritable creditor may possibly not be willing to discharge the seller, and take the purchaser bound; he may regard the seller's obligation as a valuable part of his security. In that case the heritable creditor may proceed against the seller for his principal and interest, and compel him to make payment, but of course in that case the purchaser must refund to the seller the money he was compelled to pay, because he (the purchaser) has got the property, and the consideration for which the seller parted with his property was that the purchaser should relieve him of the debts which were secured upon it.

"Now, in the present case I can regard Messrs Caird and M'Clure in no other light than as purchasers of M'Whirter's heritable property for a price or consideration equal to the debt affecting it. They were not agents or trustees; they were not employed to sell the property for M'Whirter's benefit; they were to take it, keep it, sell it for their own benefit, to divide the profit, if any, and to share the loss if loss should result. M'Whirter was to participate in profits no doubt in a certain contingency, but in substance the agreement was as I have represented.

"The disposition bears to be for onerous causes, and the onerous cause evidently is that the disponees take over the liability for the debt secured upon the property. They are not liable directly to the heritable creditor, but they are liable to relieve their disponer when distressed, because they have taken the property with its engagements.

"It can hardly be supposed by anyone that M'Whirter meant to give the defenders his property for nothing; that he, without a shilling in the world, was to continue to be responsible for the large loans affecting the estate, while he was giving away gratuitously the estate on which these loans were secured—the estate which was the only fund out of which he could honestly hope to pay back that loan. Clearly the disposition was not gratuitous. Then it was onerous; yet being onerous, it is admitted that no price was paid, and no other property was received by the pursuer in exchange. In what, then, did the onerosity or the valuable consideration consist? In the defenders relieving the pursuer of the obligations to his heritable creditors, which he was not—and they were—able to meet. No other consideration has been or can be suggested. The property was very properly considered by both parties to be fairly worth the money borrowed upon it to an owner who could afford to hold for a few years, and the defenders were willing to take it over and take their chance of the property being ultimately sold for a price exceeding the amount of the heritable debt. That being so, it follows that the defenders must relieve the pursuer of his liability for the debts heritably secured. These are the losses which by the agreement the defenders were to share equally, and to which the pursuer was not asked to contribute.

"As to the specific conclusions, I need say nothing as to the first and second conclusions. The third conclusion is for repayment of expenses incurred in resisting a claim which ultimately the pursuer was compelled to pay. The decree was pronounced in a litigated action which depended before myself. I think that this sum must also be paid by the defenders. The pursuer intimated the dependence of the action to the defenders, and the defenders ought to have instructed him whether to admit or to dispute the claim. In the absence of such instructions, the pursuer's only safe course was to defend the action, because if he had not defended it, the present defenders might have refused relief, on the ground that there was a good defence, which ought to have been stated. Probably the defenders thought that, as they were repudiating liability for the heritable debts, they ought not to give any instructions in regard to the defence of the action. But as I have found them liable to relieve the pursuer of the heritable debts, I think that this liability covers the expenses incident to a debt which the pursuer was not instructed by the defenders to admit."

The defenders reclaimed, and argued—It was no part of the agreement that the defenders were to relieve the pursuer of the personal obligation to the heritable creditors under the bonds. The Lord Ordinary in finding that the consideration the pursuer received could have been only an obligation to relieve him of liability to the heritable creditors, and that no consideration had been given for the conveyance of the property to them by the pursuer, had left out of account the payment by them of the composition to his creditors. Taking that into view, the composition was the price or consideration paid by them for the property. The pursuer's action, therefore, failed, because at common law, where the conveyance is onerous, only the real security passes, while the personal obligation still remains on the disponer. —*Carrick* v. *Rodger, Watt, Paul, & Co.*, Dec. 3, 1881, 9 R. 242 (p. Lord Young 245); *Ritchie & Sturrock* v. *Dullatur Feuing Co.*, Dec. 16, 1881, 9 R. 358. The existence in the agreement of the clause of renunciation implied a remaining liability on the part of M'Whirter. If the defenders were absolute owners, what was the object of inserting a power to renounce?

The pursuer replied—The conveyance to the defenders being absolute and gratuitous, and solely for their own benefit, the obligation to relieve the pursuer of the debts affecting the property passed to them—*Reid* v. *Lamond*, Jan. 13, 1857, 19 D. 265; *Kippen* v. *Stewart*, Feb. 24, 1852, 14 D. 553; *Carrick, supra cit., per* Lord Justice-Clerk, p. 249. The renunciation clause was inserted merely *ob majorem cautelam*, and could not affect the principle of law governing the case.

At advising—

Lord Young—It is, I think, not doubtful that by the minute of agreement of 3d January 1879, and the disposition and assignation of 15th January 1879, the pursuer was divested of his whole property, heritable and moveable, in favour of the defenders, who were thereby invested therewith. The purpose of the transaction was to carry out, in expectation of profit, the building adventures in which the pursuer was engaged, and which he could not proceed with unaided, inasmuch as his personal debts exceeded his personal property by £3043, 18s. 4d., while his heritable property, though worth £40,650, was bonded to the amount of £37,810, leaving only £2840 to the good. Neither party has suggested that the transaction was fiduciary, and that the defenders acted only as trustees for the pursuer. The speculation having turned out unfortunately, the pursuer has of course no interest to fasten a trust on the defenders, who on their part plainly cannot plead a trust in the face of the eighth head of the agreement, which stipulates that the whole profits to be derived from the estate shall be for their behoof, and be divided equally between them, and that should there be loss they shall sustain it in equal shares.

The question then is what is the contract between the parties upon the only point in dispute, viz., whether or not the defenders are at liberty to increase the profit to be derived by them from the estate, or to reduce the loss to be sustained by them, by the device of leaving the secured creditors, or such of them as they please, to recover their debts from the pursuer under the personal obligation in their bonds? That this was not contemplated at the time of the bargain is clear enough from the fact which I have already mentioned, viz., that the defenders took the pursuer's whole property, leaving him destitute of everything except his furniture and the prospect of employment by the defenders at £3 a-week while their speculation lasted. The Lord Ordinary, not specially referring to clause 2 of the agreement, which does not seem to have been relied on in the Outer House, is of opinion that the defenders having taken over the pursuer's whole property for their profit or loss, without any price paid, which would imply an obligation to clear it of debt, must take it as it is—that is to say, with its burdens and engagements. This seems very reasonable—that those who have the property, and the profit or loss from the use made of it, shall pay the debts on which the existence and amount of profit or of loss must of necessity depend. There can be no profit till the debts are paid, and the loss is not met till they are paid. But it was urged that the Lord Ordinary overlooked the fact that the defenders paid the composition on the personal debts, which was in effect a price. I think the Lord Ordinary did not overlook the fact that the defenders, who took over the pursuer's whole moveable property, of the estimated clear value of £2353, 8s. 11d., paid the composition, which they had themselves arranged, of 5s. per pound on his unsecured debts. The amount was exactly £1349, or little more than a half of the moveable property they received. But this was no price, in any sense of the word, which could be useful to the defenders here, viz., a price implying an obligation on the seller to clear the property of debt. It was, on the contrary, exactly what was of necessity to be paid by the defenders in the Lord Ordinary's view of the transaction, viz., that they were to take the property without price, pay off the debts on it, and then, with the pursuer's aid at £3 a-week, try to make profit of it as a building speculation. To say that the debts paid are, in a sense, price paid, is to say nothing in the least useful to the argument.

But the second head of the agreement was relied on by the defenders before us in a way that it does not appear to have been before the Lord Ordinary. I think it does not aid them. It is admittedly superfluous, except only the "power to renounce any of the separate subjects and give the same up to the heritable creditors for their separate heritable debts according to their rights therein;" and I think this also is surplusage or insensible, unless, indeed, it means that the pursuer should have no right to complain if the defenders saw fit to arrange with the bondholders on any building plot to take it over for his debt, so withdrawing it from the speculation to be prosecuted by the defenders in which the pursuer might be interested under heads third and seventh of the agreement. This is a fair enough meaning if the words will bear it. To renounce a bonded subject to the creditors, as professed to be done by the extraordinary deed printed for our use, is mere conveyancing nonsense, and the idea that the defenders might throw what proved to be unprofitable lots back on the pursuer and compel him to accept a reconveyance of them does not commend itself as fair, and therefore likely to have been intended. Nor do I think the words will bear that construction.

Lord Craighill—I concur with the Lord Ordinary, and think that his judgment ought to be affirmed.

In the first place, parties are agreed that the disposition to the defenders was absolute, and not a deed of trust. The defenders thus acquired right for their own benefit to what was conveyed, and this is the condition on which the argument from both sides of the bar was presented to the Court.

In the second place, the pursuer conveyed everything of any worth except household furniture—in other words, substantially the disposition was *omnium bonorum;* and the implication both of reason and of law is, that in these circumstances the defenders behoved to pay the debts by which the property was burdened. No doubt heritable creditors were not affected by this arrangement, and consequently might have proceeded against the pursuer just as if it had not been concluded. But plain it is, that possessing nothing he could pay nothing, and the natural, not to say necessary, inference is, that the defenders having acquired all that belonged to him, he, if distressed upon

the bonds, might, according to the reality of the arrangement between them, call on them for his relief.

In the third place, this result is not left merely to inference, because the agreement bears (article 2) that the conveyance to the defenders was given under the burdens by which the properties were affected, and the bonds were excepted from the warrandice given to the defenders. They took the property—may they shake themselves free of the burdens by which it was affected? This practically is their contention, but it is one which appears to me to be contrary to the plain character of the transaction, and to the express provisions of the contract. Their counsel admitted that such bonds as they paid would not be recovered from the pursuer. This shows that these had become their debts, and if they did not discharge them, but left the pursuer to be distressed for payment, might he not come against them for his relief? This appears to me to be a necessary result of the transaction. If the debts are not theirs, they have acquired the heritage practically without consideration; if they are theirs, they must relieve the person against whom the heritable creditors proceed for payment. The idea that the defenders might keep the property and leave the pursuer to be distressed for the burdens subject to which the properties were conveyed, without recourse upon them, cannot consistently with reason or with law, as I think, be entertained.

In the fourth place, the defenders, subject to any claim for a third of profits which the defenders might recognise to belong to the pursuer, were to have all the profit of the arrangement, and without any right to throw a part on the pursuer, were to bear the loss. This plainly implied that the defenders were to provide for the debts which were burdens on the property. Profit could be made only out of a free fund, and this could not possibly exist till the burdens had been provided for or discharged. The defenders no doubt say that they might leave the heritable creditors to take their money out of their security, but this was not the course which was contemplated, and if it was adopted and a balance remained unsatisfied, who in the end was to bear this burden? Surely the defenders, for the properties had been taken subject to the burdens, and the balance of the debt was not as in a question with them the debt of the pursuer's but their own.

In the fifth place, the provision in the second head of the agreement that the defenders might deliver over the property to the heritable creditors is in no way inconsistent with the views which have just been presented. Why such a clause was introduced into the agreement is not easily conjectured, for the defenders were absolute owners, and consequently might, without consent or authority from the pursuers, do with their own as they liked. But this clause is a part of the contract, and what does it prove? Had there been a dispute between the parties as to the footing on which the property had been conveyed, they might have been referred to for the purpose of showing that the conveyance was not absolute but only in trust. As things are, however, it seems to me immaterial, because the defenders could not make over to the heritable creditors subjects charged with a bond except on the footing that the creditor was to take these in satisfaction for his debt. The pursuers obviously never could be distressed by action under this head of the agreement.

On the whole matter, my opinion is clear that the Lord Ordinary's judgment is right and ought to be supported. The reasons given by the Lord Ordinary appear to be perfectly satisfactory, and my purpose in saying what I have said is simply to present to the parties what appear to me to be the salient points of this case.

Lord Rutherfurd Clark—I am also of opinion that the interlocutor of the Lord Ordinary should be affirmed.

Lord Justice-Clerk—The Lord Ordinary has, I think, left out of view the true nature of the arrangement between the parties, and the object for which it was concluded. He holds quite rightly, and indeed inevitably, that when it was entered into the pursuer had not a shilling in the world; and therefore a disposition *omnium bonorum* was not a commodity for which a large price was likely to be paid. Yet he holds that the consideration given for it by the defenders was an unlimited obligation to make good any deficiency which might arise on heritable debts amounting to £37,800 secured over property with substantially no margin, and in a fallen and depreciated market. I do not in any way dispute the legal principle assumed by the Lord Ordinary, in a contract of purchase and sale between solvent persons, but I think the transaction here had some specialties which have been overlooked. This estate was hopelessly insolvent, and it is plain on the face of the proceedings that the object of the defender was to interpose in pure friendliness to keep the property together, and to save the pursuer himself from inevitable bankruptcy. The defenders had no other connection with the pursuer's debts, and plainly the pursuer in any event could not be worse off than he was.

The hopeless position of his estate is sufficiently shewn by the fact that even with the assistance of the defenders he could only offer, and the creditors were willing to accept, a composition of 5s. in the pound on his personal debts. The defenders granted bills for this amount, but it seems certain that the estate has not yielded it. The real property was equally embarrassed, and in a condition in which, from mere hope of gain, no man would have advanced a shilling on it. This is clearly shown by the estimates furnished to the pursuer and committee of creditors, on which it may be remarked that while the debts are certain the assets are only conjectural. But as they stand, the indication they furnish is too evident to be resisted. Real property valued at £40,000 is burdened with £37,800 of debt, besides requiring £1600 of additional outlay, leaving only a margin of £600 of supposed surplus. There was of course always the chance that a change in the market might bring things right, but it is hardly reasonable to suppose that experienced men of business would on that chance assume liability for what clearly foreboded, and as the result has turned out, to be a serious deficiency.

I should therefore have expected to find some limitation to a liability so manifestly inequitable

expressed in the agreement; and I cannot doubt that the second clause of the agreement, giving the defenders the option of recovering any part of the property was, however obscurely worded, intended for that purpose. It is provided [*reads*]. If the disponees under the conveyance were entitled to renounce the purchase, that implied surrender of the benefit, and freedom from the conditions of the purchase, in any question with the pursuer, with whom alone this stipulation was made. It is said that the renunciation was to be made to the heritable creditors, and that his consent was necessary. But the creditors were not parties to this agreement. They had the personal obligation of their debtor, as well as that contained in their heritable bonds, and it was not supposed or contemplated that they should give up either. The true meaning was, that when the property turned out or seemed to be insufficient to meet the burden, the defenders should be under no obligation to retain it, but might free themselves alike from the benefit and the obligation.

It is said that this result would be hard on the pursuer. It would be no more hard on him than if his property had passed into the hands of a trustee in a sequestration, as it certainly would have done if the defenders had not interposed. It would no doubt have been easy to have expressed this very reasonable result in plain words, but such I believe to be the true import of the clause.

While I thought myself bound in justice to the parties to mention these views, it is right to add that even if I were right in my opinion of the true meaning of the memorandum of agreement, I have seldom seen a more unsatisfactory or indeed unintelligible document, and have felt the greatest difficulty in attaching an interpretation to this second clause.

The Court pronounced the following interlocutor:—

> "The Lords . . . ordain the defenders, jointly and severally, to free and relieve the pursuer of his liability for the sums specified in the first and second conclusions of the summons, by making payment thereof either to the creditors mentioned in the said conclusions or to the pursuer, that he may operate his own relief, and to this extent and effect vary the said interlocutor: *Quoad ultra* adhere thereto: Find the pursuer entitled to expenses from the date of the said interlocutor: Remit the cause to the Lord Ordinary to proceed therein as accords, with power to decern for the expenses now found due, and decern."

Counsel for Pursuer (Respondent)—Mackay—Patten. Agent—Adam Shiell, S.S.C.

Counsel for Defenders (Reclaimers)—Robertson—Graham Murray. Agents—Smith & Mason, S.S.C.

Friday, November 7.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

HERSKIND AND WOODS (OWNERS OF "HILDA") *v.* HENDERSON AND OTHERS (OWNERS OF "AUSTRALIA"), *et e contra.*

Ship—Shipping Law—Liability for Collision—Article 20 of the Regulations for Preventing Collisions at Sea—Overtaking Vessel.

The steamers "Hilda" and the "Australia" were proceeding in the same direction through the Great Bitter Lake, when the "Australia," which was the faster vessel and had been astern of the "Hilda," made up to and attempted to pass her. A collision occurred, the bow of the "Hilda" coming in contact with the starboard side of the "Australia." The Court *awarded damages* to the owners of the "Hilda," on the ground that the "Australia" was the overtaking vessel, and therefore bound under article 20 of the Regulations for Preventing Collisions at Sea, to keep out of the way of the "Hilda."

Where a faster vessel overtakes a slower one and attempts to pass her, and a collision results, there is a *prima facie* case against the former, which can only be removed by shewing that the accident was attributable to some fault on the part of the latter.

These were two conjoined actions raised at the instance of owners of the steamships "Hilda" and "Australia" respectively for damages caused by a collision between the two vessels on the 1st January 1883. The "Hilda" was steaming from Suez to Port Said through the Suez Canal, and was steering for the entrance to the canal at the northern end of the Great Bitter Lake. The weather was fine. Shortly after she had entered the Lake, the "Australia" also entered the Lake, and being the quicker vessel she gradually overtook the "Hilda" and (about 5 p.m.) passed to her port side; the two vessels thereafter collided, the bluff of the portbow of the 'Hilda' coming in contact with the starboard side of the "Australia." The account of the collision set forth by the owners of the "Hilda" was—"(Cond. 3) The said collision was caused by the fault and negligence of the master and crew of the 'Australia.' The 'Australia' was negligently steered too close to the 'Hilda,' and her course was wrongly altered so as to throw her across the bow of the "Hilda." The 'Australia' was navigated in contravention of article 16 of the regulations for preventing collisions at sea, which provides that 'if two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other;' and also in contravention of article 18 of said regulations, which provides that 'every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed or stop and reverse if necessary;' and also in contravention of article 20 of said regulations, which provides that 'notwithstanding anything contained in any preceding article, every ship, whether a sailing ship or a steamship, overtaking