

Friday, June 6.

## FIRST DIVISION.

[Sheriff of Banffshire.]

## REID V. BARCLAY AND OTHERS (LYON'S TRUSTEES).

*Assignment—Warrantice—Cautioner where Bond Assigned in which Cautionary Obligations turn out to be null.*

S borrowed £60 from L, and in return granted a bond and assignation in security, to which B and C were *ex facie* bound as cautioners. L wished to be repaid, and S offered a cheque which R, a bank agent, had agreed to honour by letting S overdraw for the amount on condition that he gave him an assignation to the bond. L therefore, "in consideration of the sum of £60 paid to me by R, agent, &c.," assigned the bond to R, to whom it was sent through S. It having turned out on S's bankruptcy that the cautioners had never come under a binding obligation, held that L was liable to R in repayment of the £60.

The pursuer of this action was David Reid, agent of the North of Scotland Bank at Port Gordon, and the defenders were James Barclay and others, trustees of the late George Lyon, ironmonger in Banff.

In May 1873 Lyon's trustees lent £60 to John Simson, tobacco manufacturer, Banff, for which he gave a bond and assignation in security which assigned a policy on his life for £150, and which bore to be granted by himself as principal and by Robert Bruce and Robert Reid as cautioners. This bond and assignation was on 30th November 1875 assigned by Lyon's trustees to the pursuer David Reid by a deed which bore that "We, James Barclay . . . trustees of the late George Lyon . . . in consideration of the sum of £60 sterling paid to us as trustees and executors foresaid by David Reid, agent of the North of Scotland Banking Company at Port Gordon, do assign to the said David Reid, his heirs, executors, and assignees, the bond and assignation in security granted by John Simson, tobacco manufacturer, sometime residing in Banff, now in Fochabers, as principal, and Robert Bruce, farmer at Tynet, in the parish of Bellie and county of Banff, and Robert Reid senior, farmer at Bogend, in the parish of Rathven and county of Banff, as cautioners, sureties, and full debtors for and with John Simson, dated the 20th day of May 1873."

Simson's estates were sequestrated on the 29th November 1876, and both the cautioners in the bond and assignation denied liability, on the ground that Bruce's signature was not genuine, and that Reid consequently was also free. David Reid then raised this action against Lyon's trustees, pleading, *inter alia*—"The defenders, as trustees and executors foresaid, having assigned for value what they stated to be a valid bond and assignation in security, while the fact is that said document is invalid and illegal, are liable to the pursuer in repetition of the consideration money paid by him to them in respect of said assignation and interest thereon as concluded for."

The defenders pleaded, *inter alia* — "The

pursuer having given no value for the assignation in question, is not a *bona fide* onerous assignee, and is therefore not entitled to sue this action or to recover from the defenders, even were the claim a good one, which it is not."

The Sheriff-Substitute (SCOTT-MONCRIEFF) allowed both parties a proof, in the course of which Bruce, when called, denied that he had ever signed as cautioner, and the witnesses that they had ever tested his signature. It appeared also that Lyon's trustees requested Simson to repay the £60 which he owed; that being unable to pay that amount himself he got David Reid to agree to advance the money on condition that the bond and assignation was assigned to him; that in consequence Simson sent this letter to Mr Morrison, the agent for Lyon's trustees, in return for which the assignation quoted above was sent to him:—

"Fochabers, 20th November 1875.

"Dear Sir—I beg to enclose cheque, value sixty-one pounds, eleven shillings (£61, 11s.), being principal and interest of money advanced to me by Dr Barclay. I have added 1s. to cover com<sup>n</sup>. on cheque. Kindly have the bond and policy conveyed to David Reid, Esq., agent, North of Scotland Bank, Port Gordon, and forward to me marked 'Private.' At the same time send me your a/c in connection with extending and conveying the bond."

It also appeared that Simson had at the date of the cheque considerably overdrawn his account with the bank, but that Reid, the pursuer, never the less honoured the cheque on the faith of the assignation, debiting the amount to Simson's account.

The Sheriff-Substitute (SCOTT-MONCRIEFF) pronounced this interlocutor. . . "Finds, in point of fact, that the defenders by the deed No 13/14 of of the sum of sixty pounds paid to them by the process, in consideration as set forth in said deed, pursuer, assigned to him the document purporting to be a bond and assignation in security by John Simson, tobacco manufacturer, Banff, as principal; Robert Bruce, farmer at Tynet, and Robert Reid, farmer at Bogend, Banffshire, as cautioners: Finds that the sum of sixty pounds was advanced by the pursuer in respect of the assignation: Finds, in point of law, that the said document assigned to the pursuer by the defenders is invalid, and not what the defenders declare it to be in their assignation No. 13/14, and that they are now liable to him in repetition of the consideration money paid by him to them in respect of the assignation of said document: Therefore repels the pleas stated for the defenders, and decerns against them in terms of the prayer of the petition, under reservation of all right of relief competent to them, &c."

"Note—This case, although assuming the form of a simple petitory action for payment of £60, raises points of considerable nicety and importance. . . . Proof has been led by both parties, and the various questions arising upon the evidence debated with much ability. The first of these questions, viz., whether the defenders have given to the pursuer what they professed to give him, presents to my mind no great difficulty.

"In their assignation they assign, for a certain consideration paid to them by the pursuer, a bond said to be granted by three men in their favour, viz., John Simson as principal debtor,

Robert Bruce and Robert Reid as cautioners. The assignation being an onerous deed, there was an implied warrandice to at least this extent, that a debt existed due by these men in respect of their bond. The bond had been prepared by the defenders' agent, and sent for execution to the debtor Simson, who returned it with what appeared to be the signatures of himself, Bruce, and Reid and also of two witnesses, with certain information as to the time and place of execution, in conformity with which the testing clause was afterwards filled up. According to the testing clause, the bond had been signed by Simson, Bruce, and Reid, at the farm of Bogend, Banffshire, before two witnesses. Now this is not the fact. It is quite clear, and now admitted by the defenders, that Bruce never signed the deed at Bogend or before these witnesses. If he signed it at all (and he himself says the signatures are forgeries), it was not in presence of any witnesses. This bond is therefore not a regular probative deed in so far as he is concerned; but if Bruce is free from any obligation under it, so is Reid. In the case of the *Scottish Provincial Assurance Company v. Pringle and Others*, 28th January, 1858, 20 D. 465, the circumstances were similar. The lender had given the bond to the principal to procure the signature of the obligants. It was returned apparently signed by the whole parties, but it was afterwards discovered that one of the signatures was a forgery. The Court held "that it was the duty of the defenders' agent not to have given the borrower control of the bond, and that the cautioners were free from all obligation under it."

"What then remains? An obligation by or claim of damages against Simson, doubtless. But was it this which the defenders professed to convey, or would the pursuer have given £60 for the obligation of a man like Simson? I think not.

"Now, it appears to me that a bond does not differ from a horse or any article exposed for sale. If it is worthless, and the purchaser not to blame, he is entitled to have his money restored to him. But then the defenders say that the pursuer never paid any money. In their fourth plea they say that he is not a *bona fide* onerous assignee. This is rather awkward for them, in view of their own statement in the assignation to the effect that the sum of £60 had been paid to them by the pursuer. It was strongly and ably urged on behalf of the pursuer that the defenders could not get over their own deed, and that the pursuer must be assumed to be an onerous assignee. I am not quite disposed to go this length. The narrative of a deed may be got over—it often is inconsistent with facts (see *Hotson v. Paul*, 7th June 1831, 9 Sh. 685)—but I am certainly of opinion that the terms of the defenders' assignation raise a strong presumption against the truth of what they now assert. They appear to be in the position of parties trying to reduce their own deed, who must prove that it was granted in error, or obtained by force or fraud. Now, what do the facts in this case disclose. They may be very shortly stated. John Simson, the principal debtor in the bond, was called upon by the defenders to pay up the sum due under it. This, it appears, he could not do out of his own funds; but the money was nevertheless transmitted by him to the defenders in the form of a cheque upon his bank account, which was afterwards

duly honoured. How did this come about? The pursuer Mr Reid was agent at the bank with which Simson dealt, and Simson tells us—'I arranged to get conveyed to Mr Reid the bond if he advanced the sum to be paid to Lyon's trustees; and in consequence of that agreement he authorised me to issue the cheque. I understood that Mr Reid as agent was simply to allow me more credit in consequence of the bond being executed in his favour.' Accordingly the cheque was honoured, and the bond at the request of Simson assigned to Reid. Reid's account of what was done is as follows:—'I allowed him (Simson) to overdraw to this extent by becoming security for the sum, and receiving from him a bond for that amount.' Again—'It was arranged that the consideration money (sixty pounds) should be paid to Lyon's trustees by Simson granting a cheque upon my agency in name of Dr Barclay, which I would honour. Simson had at the time no funds in my bank. He was overdrawn to a considerable amount.' It is thus clear that Reid, the pursuer, never actually paid for the assignation by handing over so much money to the defenders. But what of that? Does it not remain the fact that the money was in reality advanced by Reid, and on the faith of this assignation? Trusting to this he honoured the cheque of one who had no funds with which it could be paid. It is of no consequence how the money was paid if it really came from the pursuer. Doubtless it was the bank's money; but the moment it was paid away Reid became liable to replace it out of his own private funds. I do not think therefore that the narrative of the consideration contained in the assignation is false, and I consider that the defenders have failed to establish their fourth plea. The greatest difficulty which I felt arose in determining whether this transaction was one in which Reid engaged as an individual, or as representing the North of Scotland Bank. As against the bank the defenders might have a successful defence. But I think the pursuer has made out his own personal title to sue in the circumstances disclosed."

The defenders appealed, and argued—The Court were entitled to look beyond the technicalities of conveyancing language in order to see what the parties really intended—*Leith Heritages Company*. Here the real transaction was that Reid was, at Simson's request, to come in place of Lyon's trustees. It was neither understood by him nor by them that they should give a warrandice *debitum subesse*. Then, again, this was, as between the bank and the trustees, a gratuitous transaction. The bank transacted with Simson, and with him alone, and for reasons known to themselves permitted him to have an overdraft. The trustees were paid by Simson, not by the bank, and how he got the money was a matter with which the trustees had nothing to do. In any case Reid was merely nominal pursuer—he had paid nothing out of his private means, and even if it were granted that the bank had paid Lyon's trustees, then the money had been repaid, for Simson, as the bank book showed, had since the date of the cheque paid more than the amount into his account, although at the date of his failure there was still an overdraft.

Authorities—*Russell v. Mudie*, Nov. 28, 1857, 20 D. 125; *Leith Heritages Company v. Edinburgh*

and *Leith Plate Glass Company*, June 7, 1876, 3 R. 789; *Bell's Lect. on Conveyancing*, i. 297.

Argued for the pursuer—In onerous transactions a warrandice *debitum subesse* was implied—*Ferrier v. Graham's Trustees*. This was an onerous transaction, and the money was paid by Reid. That was on the face of the deed, and behind the deed the Sheriff-Substitute ought not to have gone. But even on going behind, the equity was with the pursuer. The defenders could not have cashed the cheque unless they had assigned the bond. It was on that condition they got the cheque. And plainly they could never have got the £60 except for some such interposition, for Simson was wholly unable to pay from his own means.

Authority—*Ferrier v. Graham's Trustees*, May 16, 1828, 6 S. 818.

At advising—

LORD PRESIDENT—The pursuer of this action obtained from the defenders an assignation of a certain bond and disposition in security dated 30th November 1875. That assignation bears to be granted by the defenders “in consideration of the sum of £60 sterling paid to us as trustees and executors foresaid by David Reid, agent of the North of Scotland Banking Company at Port Gordon;” and upon that consideration they “assign to the said David Reid, his heirs, executors, and assignees, the bond and assignation in security granted by John Simson, tobacco manufacturer, sometime residing in Banff, now in Fochabers, as principal, and Robert Bruce, farmer at Tynet, in the parish of Bellie and County of Banff, and Robert Reid senior, farmer at Bogend, in the parish of Rathven and county of Banff, as cautioners, sureties, and full debtors for and with the said John Simson.” This bond and assignation is dated 20th May 1873. Now, it turned out that as far as the cautionary obligations were concerned the bond was invalid; and it was invalid in this respect, that not being granted by one of the cautioners, either because it was not signed by him or because his signature was not tested, it follows by necessity that the other cautioner is not bound either. In fact the pursuer obtained a bond which in one very material part was invalid and useless. In these circumstances he demands repetition of the money which he gave as the consideration for the bond; and he does so on the ground that there was an implied warrandice *debitum subesse*, and that this applies to cautioners equally with principals. And so far his case is perfectly clear in law.

But it is maintained by the defenders that there are peculiar circumstances which take the case out of the general rule; and they propose, among other things, to show that the statement in the assignation that they received £60 as the consideration is erroneous. That is the way in which it was put in argument, but it is not exactly so stated in the averments on record. I have examined these averments to see whether there was any reason for allowing a proof; and I am clearly of opinion that there was not, because there is no averment which interferes with the statement that £60 was received as the consideration. Therefore if I had been the Sheriff I should not have granted a proof. But as we have this proof here, what does it come to? I do not think that it is necessary to go into details; but I am of opinion that instead of contradicting the statement it proves

most conclusively that the £60 was advanced as the consideration for granting this assignation. I am therefore for adhering to the interlocutor of the Sheriff-Substitute.

LORD DEAS—I am of opinion that the case was rightly dealt with in the Court below. I am not prepared to say that there was any incompetency in allowing the evidence. The judgment and the reasons assigned are very well expressed. The sum of £60 was paid as the price of a certain bond. The bond turned out to be invalid. I do not know whether this invalidity arose from forgery or from a disregard of the statutory requisites. The agent did not himself see that the bond was properly signed. He entrusted it to the debtor, and the consequence was that it was signed in such a way as to be an absolute nullity; and the question comes to be whether when a worthless bond is assigned for value the party in whose favour the assignation is made is entitled to get back his money? I am clearly of opinion that he is. I therefore agree with the judgment of the Sheriff-Substitute.

LORD MURE—I am of the same opinion. Having regard to the law as laid down in the authorities, and more particularly by Lord Glenlee in *Ferrier v. Graham's Trs.*, I have no doubt that there was an implied warrandice that the debt of the cautioners was a good debt.

LORD SHAND—Throughout the greater part of this case I have felt some difficulty. It is only latterly that I have come to be of the same opinion as your Lordships. I agree with Lord Deas that the case was one in which it was right and competent to have a proof. If it had appeared that the real transaction had been a payment by Simson to the defenders out of his own funds, and thereafter a payment by the bank to Simson, as has been averred, I should have had considerable difficulty in adhering, for in such circumstances I should have doubted much whether the defenders could be held to have granted warrandice *debitum subesse*. But it appears that the defenders required their bond to be paid. The debtor being in difficulties went to Reid, who said, “I shall advance the money if you get the bond assigned to me.” Simson then went to the defenders, who agreed to grant the assignation, and afterwards granted it. I think there was quite enough to let the defenders know that this security was to be purchased. Then comes the important letter of the 20th November 1875, which I should say had laid an embargo on the cheque, and the answer by Morrison, the defenders' agent. When we read these two letters together I think it comes to this, that the reality of the transaction is that it was a purchase of this security, and that it was known to be so both by grantor and grantee. It may be that the money might have been got in some other way by the debtor, even if the bank had refused to assign their security or to assign it only expressly excluding warrandice on their part of any kind. But as to that we cannot speculate. I am therefore for adhering.

The Court adhered.

Counsel for Defenders (Appellants)—Gloag—Mackintosh. Agents—Alexander Morrison, S.S.C.  
Counsel for Pursuers (Respondents)—Trayner—G. Watson. Agents—Carment, Wedderburn, & Watson, W.S.