

General (Asher)—Jameson. Agents—J. & J. Ross, W.S.

Counsel for Defender (Alexander)—Lorimer.  
Agent—F. J. Martin, W.S.

Friday, December 16.

SECOND DIVISION.

[Sheriff of Lanarkshire.

DULLATUR FEUING AND BUILDING COMPANY v. RITCHIE AND STURROCK.

*Heritable Security—Bond and Disposition in Security—Transmission of the Personal Obligation in a Bond and Disposition in Security—Act 37 and 38 Vict. c. 94, sec. 47 (Conveyancing Act 1874).*

A property over which certain heritable securities had been granted was disposed "under burden of the sum of £6800, being the amount of several heritable securities existing over the said subjects." Held that this clause did not transmit as against the disponee any personal obligation under the bonds, as being an agreement to that effect *in gremio* of the conveyance, in the sense of section 47 of the Conveyancing Act 1874.

*Bond and Disposition in Security over Property on which Buildings are to be Erected—Advances to Builders Payable on Architect's Certificate.*

Money having been advanced to a builder over property on which buildings were to be erected, and the erection of which was necessary to make the security of sufficient value to cover the advance, a balance of the money was paid into bank in joint names of the agents for the borrower and lender, to be uplifted by instalments as the buildings progressed, on the certificate of an architect named. The borrower having become bankrupt, held that any person in his right who produced the necessary certificate of the progress of the buildings was entitled to payment of the corresponding instalment.

In February 1877 Daniel Mellis, wright and builder in Glasgow, having borrowed from Peter Ritchie £1200, and from John Sturrock £800, granted in their favour bonds and dispositions in security (which were declared to rank *pari passu* on the subjects disposed in security), binding himself to repay to them at Martinmas 1877 the sums so borrowed, with interest at 5 per cent. In security he disposed two lots of ground at Dullatur, in the parish of Cumbernauld. As the sufficiency of the security depended on the completion of certain buildings then in process of erection on the property by Mellis, it was agreed that only a first balance of £450 of the sum thus lent should be then paid over, the balance being deposited in bank in the joint names of the lenders' and borrower's agents for behoof of the parties (except a sum of £100 to be retained in the meantime by the lenders till the subjects should be occupied, as a security for their interest), and paid over by instalments as the buildings progressed upon the reports of the architects named. The loan was not paid up at Martinmas

1877, and in the course of that year two additional instalments amounting to £1000 were paid over from the bank to the borrower on the architect's reports.

In September 1877 Mellis, "for sundry good and various causes," conveyed the subjects disposed in security, along with certain other subjects, to his agent Mr Lennox. This disposition was recorded on 6th October 1877. Lennox was sequestrated in March 1878. Soon afterwards the sequestration was brought to an end by a deed of arrangement, pursuant to which, in August 1878, he conveyed to the defenders the Dullatur Feuing Company, with entry as at 6th March 1878, the date of his bankruptcy, *inter alia*, the subjects acquired by him from Mellis as above mentioned, under the burdens contained in the several feu-contracts thereof, "and also under burden of the sum of £6800 sterling, being the amount of several heritable securities existing over the said subjects." That sum of £6800 included the bonds of Ritchie and Sturrock. Mellis became bankrupt shortly after the bankruptcy of Lennox. Disputes having arisen between Ritchie and Sturrock on the one hand, and the Dullatur Feuing Company on the other, as to whether or not the buildings were "finished" in the sense of the contract between the parties, and as to the obtainment by the Dullatur Feuing Company of a balance of £450 of the amount deposited in bank as above mentioned, in respect of their having "finished" the buildings, Ritchie and Sturrock, after an unsuccessful attempt on the part of all parties concerned to sell the subjects by public roup at a fair upset price, having become aware of the terms of the disposition containing the clause above quoted by Lennox to the Dullatur Feuing Company, raised an action against them in the Sheriff Court of Lanarkshire for payment with interest of the amount contained in their bonds, with penalty and interest since Whitsunday 1879.

They pleaded, *inter alia*—"(1) The defenders having accepted from Duncan Lennox a disposition to the subjects of the pursuers' securities, under burden of these securities, all as above set forth, are liable to the pursuers, both at common law and by statute (37 and 38 Vict. c. 94, sec. 47), for the amounts contained in and due by the two several bonds and dispositions in security herein before specified and partly recited."

The defenders pleaded, *inter alia*—"(3) There not being *in gremio* of the disposition in favour of the defenders an agreement that the personal obligations contained in the said bonds and dispositions shall transmit against the defenders, the defenders are not personally liable for the sums contained in the said bonds. (4) There being no personal obligation upon the said Duncan Lennox to pay the principal, interest, and penalties contained in the said bonds and dispositions in security, he could not transmit any such obligation against the defenders."

The Sheriff-Substitute (GUTHRIE) being of opinion that the clause "under burden of the sum: £6800, being the amount of several heritable securities existing over the said subjects," was intended to import, and did import a substitution of the defenders in the personal obligations which attached to Mellis under the bonds, decreed against the defenders for the amount contained in bonds, with interest.

On appeal the Sheriff (CLARK) adhered.

The defenders appealed, and argued—As to the question whether the personal obligation in a bond transmitted under such a clause under the law as amended by the Conveyancing Act of 1874, the recent case of *Rodger, Watt, & Paul, supra*, p. 179, was conclusive in their favour. That was a much stronger case for transmission than the present. Besides, the question could not properly arise, since Lennox, from whom the appellants got their title, never was under the personal obligation of Mellis. In his disposition from Mellis there was not even the personal obligation here founded on.

Argued for respondents—The special circumstances of this case distinguished it from that of *Rodger, Watt, & Paul*. The appellants were just Lennox in another form, and stood in his place. At all events, the pursuers were entitled to recover the £450 paid over to the Dullatur Company after they became proprietors. For that sum there was personal liability. The certificates had been improperly presented when the buildings were not finished, and the money had been advanced on the faith of it.

At advising—

LORD JUSTICE-CLERK—[*After narrating the facts*]—In regard to the statute, to say that this was an agreement by the purchaser engrossed on the conveyance—in *gremio* of it—that he would undertake the whole debt secured over this property, seems to me to be out of the question entirely, and that apart altogether from the decision we came to the other day. The only question that had any plausibility in it was whether these assignees—for that was their position—were entitled to uplift the sum for work done on this building. If it had turned out that there was a specific allegation and proof that the money had been paid on a false certificate that the work had been done, there might have been something to say as to that, and I wanted to be quite sure that we saw the full averments and their force on this branch of the case. But I am satisfied that no case is made which we can in any shape consider as importing such an allegation. On the record it is plain that the payment was made on the assurance of Mr Selkirk's certificate that the work was sufficient. If Mr Selkirk had made a false assurance, which is not stated, I do not know what the claim might be on him, but it is clear even from the condescendence that there is no foundation for that allegation, and with the exception of some trifling things which are manifestly not matters that would cost a material sum, the thing has been fairly and honestly completed. Upon the whole matter, therefore—disagreeing with the ground on which the Sheriff-Substitute has given judgment, thinking the Act of Parliament has no concern with this whatever, and indeed doubting whether there would be any relevancy in alleging that by facts and circumstances the parties had become liable to pay up this bond secured over the heritable estate—I am of opinion there is no relevant case stated for supporting the judgment of the Sheriff.

LORD YOUNG—That is also my opinion, and I think the case is too clear for argument. I agree with your Lordship that, without reference to the recent judgment in the case of *Rodger, Watt, &*

*Paul*, the judgment of the Sheriff here is entirely wrong. It was never the law that the purchaser of a property which is burdened with debt thereby comes under any personal obligation to the lender. The property is under the burden and liable to the debt, and against it diligence may be done for the sum covered by the security, but the purchaser was never under personal obligation, nor has he been made so by the Act of 1874. The defenders here are disponees under the burden of heritable debt on the property. That puts no personal obligation upon them. In so far as the creditors are concerned, the words used are not of the least significance, as in any case the property would have been taken under the existing burdens. The words are of some consequence in a question with the disponent, for they mean that he was not to pay off the debt which otherwise he would have been bound to do.

The case of *Rodger, Watt, & Paul* was one where the disponent bound himself to free and relieve the disponent of the debt with which the subject was burdened, the question being whether there was an agreement in *gremio* of the disposition to accept the personal obligation, and on that the judgment depended. The judgment there was that the words used implied no agreement to that end. Here there were no such words, and therefore the sole ground of the Sheriff's judgment is wrong. The defenders got payment of instalments of the lent money to be applied by them, they having fulfilled the purpose to await which it had been deposited, by building on the ground. How did that infer any personal obligation? The contract of loan was complete. The bond was given and the money paid, but to make sure that it was applied in a certain way it was deposited in bank, to be uplifted by instalments according to certain contracted stipulations. But the borrowers were entitled to assign their right to anyone they pleased, and on production of the necessary certificate the assignee could uplift the whole or part of the money. The loan was executed, the money was paid, and a new contract supervened to ensure its proper application, and to regulate the payment by different instalments, which vested an absolute right in anyone to uplift the money on production of the certificates. To ensure certain things the money was deposited. If there had been no disposition at all, but any party having the borrower's authority went with the certificate, he would be absolutely entitled to the money. That was precisely what was done by the defenders. But that has no necessary connection with their being disponees. No answer could have been given to anyone who came provided with the necessary certificates, and therefore I regard the ground of action as extravagant. It has been suggested that there is here a case of fraud on the pursuers by the presenting of a false certificate, which was not warranted by the circumstances. I am of opinion that no such case is presented on record, nor was any attempted to be argued before the Sheriff. I therefore concur with your Lordship.

LORD CRAIGHILL—I also am of opinion that the interlocutor appealed against must be recalled. The pursuers and appellants are creditors under bonds secured upon property now belonging to the

defenders and appellants, and the action has been raised for the purpose of recovering the contents of the bonds. The ground of action is, that by the disposition under which the defenders and appellants acquired the property, they entered into an agreement with the disponent that liability for the heritable bonds should be transmitted against them, the case in this way falling under the provisions of the Conveyancing (Scotland) Act 1874, sec. 47. That Act provides that if there be such an agreement the creditor in the bonds may proceed against the disponent of the property, but this agreement must appear *in gremio* of the disposition. Now, all that is said of the disposition to the defenders relative to the bonds is that the property was disposed under burden of the bonds. There is nothing else appearing in the deed by reference to which an agreement may be predicated. It appears to me to be plain that a disposition of property under burden of bonds does not involve an agreement that the disponent is to be liable in payment. This would have been my opinion of the case even apart from the recent decision in the case of *Carrick, &c. v. Rodger, Watt, & Paul*, but the decision there is decisive on the present occasion, and had it been pronounced before judgment was given by the Sheriff there is no reason to doubt that his judgment would have been, not in favour of the pursuers, but in favour of the defenders.

The pursuers further contend that even if they are not entitled to sue the defenders for the full contents of the bonds, they are entitled to recover the £450 which were received by the defenders after they became proprietors. This also, I think, is an unfounded contention. The £450 was paid, not under a contract with the defenders—for there was no contract with them—but was the instalment of that loan which the pursuers had agreed to give to Mellis, the granter of the bonds. The defenders in the taking of this money were in reality only the hand or representatives of Mellis, and the only thing on which the pursuer relied when he consented that the balance in bank should be drawn upon to this extent was the certificate that work of this value had been put upon the houses which were the subjects of the security. There is no averment that the pursuers trusted to the credit of the defenders. Even if there had been, there is no evidence of the averment, and in these circumstances it appears to me that the ground of action as regards the £450 is not better established than that upon which payment of the full contents of the bonds is sued for by the pursuers.

On the whole matter, I concur in thinking that the interlocutor of the Sheriff ought to be recalled, and judgment for the defenders pronounced. I only say further that the Sheriff has misapprehended the import of the statute referred to, when in place of limiting himself to the consideration of an agreement within the four corners of whether there is any evidence of the disposition, he refers to circumstances in the conduct of parties which subsequently occurred. The Act is precise; if there is an agreement such as is sufficient to transfer liability, that agreement must appear in the disposition itself, otherwise the case will not be brought within the operation of the statute.

The Court recalled the interlocutor of the Sheriff and assoilzied the defenders.

Counsel for Appellants—D. F. Kinnear, Q. C. — Murray. Agent — J. Gillon Fergusson, W. S.

Counsel for Respondents—Trayner—Dickson. Agents—Duncan & Black, W. S.

Friday, December 16.

## FIRST DIVISION.

SPECIAL CASE—ROYAL INFIRMARY OF EDINBURGH AND OTHERS *v.* MUIR AND OTHERS (MUIR'S TRUSTEES).

*Succession—Will—Legacy—Cumulative or Substitutionary.*

Where two sums of equal amount are given to the same legatee in two distinct testamentary papers, both equally formal and complete, the presumption is that the legacies are cumulative.

A testator, by formal trust-disposition and settlement dated October 1877, left his whole moveable estate in trust for certain purposes, and, *inter alia*, "in payment of any legacies or bequests which I may hereafter bequeath by any codicil or signed memorandum, however informal, expressive of my intention." This trust-disposition was on the truster's death found in an iron box in which he kept his private papers, enclosed in an envelope along with two holograph testamentary writings, dated respectively the 23d and 30th April 1880. In the same box, but within the folds of the disposition of a house, another holograph writing was found, dated 2d February 1880. The truster left no other papers of a testamentary nature. By the writing of 2d February there were bequeathed four legacies of £1000 each, one of £500, seven of £250 each, one of £50, and one of £10—in all fourteen legacies, of the aggregate amount of £6310. By the writing of 30th April the four legacies of £1000, the legacy of £500, the seven legacies of £250, and the legacy of £50, being thirteen out of the fourteen, were given in the same terms and to the same persons respectively as in the earlier paper, but there were two new legacies of £250 each, two new legacies of £10 each, and the former £10 legacy was increased to £20, making in all eighteen legacies of £6840. The words of bequest in the two papers were substantially identical. *Held* that the legacies in the later testamentary paper was intended to be cumulative, not in substitution of those contained in the original bequest.

This was a Special Case to which the Royal Infirmary of Edinburgh and certain other charitable institutions were the parties of the first part, and the trustees of the late William Muir of Inisstrynich were the parties of the second part. The following were the material statements in the Case:—The late William Muir of Inisstrynich, Argyleshire, who resided at 7 Wellington Place, Leith, died on 30th May 1880, leaving moveable