that if he allows himself to be sued, or allows the debt to be ranked on his estate, he may be able to get a discharge upon terms short of full payment. That is a matter as to which the debtor in relief has no right to dictate. If he (the debtor in relief) thinks that the principal creditor is for any reason likely to take less than full payment, he can himself try to settle with the principal creditor on that footing. But he cannot insist on the principal creditor ranking on the estate of the principal debtor or on the original debtor (the creditor in relief) compelling him so to rank. His obligation is, as I have said, to relieve the original debtor of the debt, by paying or settling it; and this obligation he may, so far as I see, be called upon to perform in the case of the original debtor's bankruptcy, either by the original debtor or by his trustee in bankruptcy, or by the principal creditor to whom the obligation of relief may have been assigned by the original debtor or his trustee.

"In my opinion, therefore, the defender has no good ground of defence to the present action founded upon the bankruptcy of Fullarton, the original debtor. I shall therefore repel the first two pleas stated for the defender, and send the case to the roll in case there should be any further questions between the parties, which, however, I scarcely anticipate. I may add—what I should perhaps have pointed out earlier—that the bankrupt, the original debtor, has or may have a material interest to prevent this bond being ranked on his estate. In questions of discharge, for example, its ranking or not ranking may make all the difference to the bankrupt, and no doubt there are other interests of the same kind arising both to him and to the body of creditors."

Counsel for the Pursuers—J. C. Lorimer. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Defender — Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, December 10.

OUTER HOUSE.

[Lord Trayner.

TULLY *v.* RODGER AND ADAIR.

Reparation—Law-Agent—Agent for Both Buyer and Seller — Duty to Disclose Burden.

T bought from R a heritable property. The conveyance was prepared by A, the law-agent of R, and was subscribed by R. Before the deed was delivered, or any price paid, T employed a law-agent to attend to his interests in the transaction. The title-deeds and proposed conveyance were sent to him for consideration, and he, as agent for T, finally settled the transaction. A held a bond over the property. The existence of this bond was not disclosed to T either by R or by A, and was not discovered by his law-agent. T brought an action against R and A to have them ordained to disencumber the property of the bond or for damages.

Held that as A did not act as law-agent for T in completing the transaction, there was no duty upon him to disclose the existence of the bond, and that the action against him was irrelevant.

This was an action at the instance of William Tully, Colfin, Portpatrick, against James Rodger, flesher, Stranraer, and John Mackie Adair, solicitor, Stranraer, concluding that the defenders should be ordained either (first) to exhibit to the pursuer a search of incumbrances over the heritable subjects in Portpatrick, disponed to the pursuer in the disposition granted by the said James Rodger in his favour dated 19th May 1873, showing that the same are purged from all bonds and dispositions in security, or other incumbrances affecting the same; or (second) to pay or discharge all incumbrances affecting the said subjects, and in particular to pay or discharge the bond and disposition in security for £250 sterling granted by the said James Rodger to the said John Mackie Adair dated the 13th September and registered in the Division of the General Register of Sasines applicable to the county of Wigtown the 4th October 1869, and to exhibit a discharge of the said bond, and discharges of any other incumbrances affecting the said subjects, to the pursuer: Or otherwise, and in the event of the defenders failing to exhibit the said search or the said discharge to the pursuer, they ought and should be decerned and ordained, jointly and severally, or severally, by decree foresaid, to make payment to the pursuer of the sum of £300 sterling, or such other sum as may be necessary to free the subjects in question from all incumbrances prior in date to 19th May 1873, and to enable the pursuer to pay off the said incumbrance or incumbrances: Or otherwise, and in any event, the said defenders ought and should be decerned and ordained by decree foresaid, jointly and severally, or severally, to make payment to the pursuer of the sum of £300 sterling, being the amount of loss, injury, and damage sustained by the pursuer through the defenders' wrongous concealment of the existence of the said bond and failure to free the subjects in question from all incumbrances prior to 19th May 1873."

The pursuer averred—"(Cond. 1) By disposition dated 19th May 1873 the defender James Rodger, in consideration of the prestations therein contained, disponed to the pursuer certain heritable subjects situated in Portpatrick, as particularly described in the said disposition, for the sum of £200, which was the full price or value thereof. (Cond. 2) The said disposition was prepared by the defender John Mackie Adair, who is a solicitor in Stranraer, and who was at the time the usual law-agent of the defender James Rodger. Up to the date of signature—19th May 1873—the pursuer was not represented by a separate agent in the

transaction, but Mr Adair acted for both parties. On 20th May 1873, however, the late Alexander Ingram, solicitor, Stranraer, began to act as the agent of the pursuer in the matter. Finally the transaction was carried through, the price was paid, and the title-deeds were delivered to the pursuer, who entered into full possession of the subjects. (Cond. 3) *Ex facie* of the said disposition the subjects conveyed are unburdened. There is the usual warrandice clause, and no reference is made to any incumbrance on the subjects, or to any bond and disposition in security applying to them. At the time of the granting of the said disposition no mention was made to the pursuer, or to anyone on his behalf, by either of the defenders or by any other person of the existence of any such incumbrance or bond. The pursuer was in ignorance of the existence of any debt or security over the property, and he purchased the property, and paid the full price therefor, on the understanding that it was not incumbered by any debt. The defenders so represented it. (Cond. 4) On 1st April 1889 the pursuer was served with a schedule of intimation, requisition, and protest for payment of £200, together with £3, 7s. 6d. of interest due thereon, under a bond and disposition in security over, *inter alia*, the said subjects, and with the usual notice of sale of the subjects in default of payment. This intimation and requisition was at the instance of Hugh Todd, solicitor in Stranraer, who has now acquired right to the said bond. Up to the said 1st April the pursuer had not been informed of the existence of the bond, and was not aware of it. The said Hugh Todd is now proceeding to carry out a sale by advertising the property for sale in terms of the statute. (Cond. 5) The said bond and disposition in security, as the pursuer has now learned, was granted by the defender the said James Rodger to the defender the said John Mackie Adair, and is dated 30th September and registered 4th October 1869. It was held by the defender Adair until March 1886, when he first assigned it. At the time of the disposition by the said James Rodger to the pursuer, Mr Adair, although aware of the existence of the said bond, and himself the holder of it, failed to inform the pursuer, or anyone on his behalf, of the same; and although he prepared the said disposition Adair failed to insert therein any declaration of this incumbrance. The defender Rodger, although aware of the existence of the said bond, nevertheless sold the subjects to the pursuer as unburdened by any such debt, and granted the said disposition in such terms. The defenders thus wrongfully concealed from the pursuer the fact of the existence of the said bond, and in their respective capacities misrepresented the true state of the subjects."

The pursuer pleaded, *inter alia*—"(2) The defender Adair having been guilty of gross negligence, and having failed to exercise proper professional care as a law-agent in carrying through the said sale transaction, is liable in damages to the pursuer."

The defender Adair pleaded—"(1) The pursuer's statements are irrelevant and insufficient to support the conclusions, so far as the defender Adair is concerned."

The Lord Ordinary (TRAYNER) pronounced the following interlocutor:—"Sustains the first plea-in-law for the defender Adair: Dismisses the action in so far as regards the said defender, and decerns: Finds the pursuer liable in expenses, &c.

"*Opinion.*—The present action, in so far as concerns the defender Mr Adair, is practically one for damages on the ground that Mr Adair failed in his duty as law-agent for the pursuer to his loss and damage. It appears that the pursuer bought a property in Portpatrick from the defender Rodger, and that Mr Adair, who was then Rodger's agent, prepared the conveyance in favour of the pursuer, which was subscribed by Rodger on 19th May 1873. At that time Mr Adair held a bond over these subjects for £250, the existence of which was not disclosed to the pursuer by either of the defenders. If in these circumstances the transaction between the pursuer and Rodger had been completed—Mr Adair acting for both parties—the latter would have been liable to the pursuer. The pursuer does not aver that he ever saw the defender Adair, or employed him to prepare the conveyance, but merely that at 19th May 1873 "Mr Adair acted for both parties." The preparation of the conveyance being the duty of the buyer's agent, Mr Adair would probably have been held to have accepted employment from and acted as agent for the pursuer, and to have incurred all the responsibilities which that office implied if the transaction had been completed when the conveyance was signed by delivery of the conveyance and payment of the purchase price. But the transaction was not then settled. On the 20th May the conveyance not having been delivered, and no price paid, the pursuer instructed Mr Ingram, another law-agent, to attend to his interests in the transaction. The title-deeds of the property and the proposed conveyance were sent to him for consideration, and he acted as the pursuer's agent thereafter, and finally settled the transaction. In these circumstances it became Mr Ingram's duty to see that the subjects were free of incumbrance and the record clear, and the defender Adair, as the seller's agent, was under no duty to disclose to the pursuer that he held a bond over the property.

"The pursuer has not averred, in my opinion, any facts relevant to infer a claim of damages against Mr Adair. Assuming the pursuer's very vague averment as to Mr Adair's agency to amount to this, that up to the 19th May he (Adair) had acted as agent for the pursuer, and that he had up to that time concealed the fact that he held the bond already mentioned as a burden on the subjects the pursuer was purchasing, that would not infer a claim of damages against Adair, because no damage had then been done to the pursuer. He had not accepted the conveyance, he had paid no price, he was still entitled to resile from the transaction or insist upon the record

being purged. The whole loss sustained by the pursuer was sustained after Mr Ingram became his agent, and it rather appears that it was through Mr Ingram's neglect of duty alone that the pursuer has suffered any damage."

Counsel for the Pursuer — Chisholm. Agent—D. Milne, S.S.C.

Counsel for the Defender Adair—Macllellan. Agent—Robert Broatch, Solicitor.

Friday, May 30, 1890.

SECOND DIVISION.

[Sheriff of Dumfries.

DUKE OF BUCCLEUCH AND OTHERS *v.* KEAN.

(*Ante, Gilbertson* v. *Mackenzie and Beattie*, February 2, 1878, vol. xv., p. 334, and 5 R. 610; *Coulthard* v. *Mackenzie*, July 18, 1879, vol. xvi. p. 768, and 6 R. 1322; *Mackenzie and Beattie* v. *Murray*, December 1, 1881, vol. xix., p. 157, and 9 R. 186.)

Fishings—Salmon Fishings—Public Right of White Fishing—Stake Nets on Foreshore Alleged to be White-Fish Nets Found to be Injurious to Salmon Fishings.

In an interdict by the proprietors of salmon fishings in the Solway against the use of certain stake nets or paidle nets on the foreshore, the Court *held* that although the public had universal right, both at common law and under statute, to fish for white fish by means of fixed nets on the Solway, the nets in question were of the same description and were erected in the same situation as those interdicted in the cases of *Coulthard* v. *Mackenzie*, July 18, 1879, 6 R. 1322, and *Mackenzie and Beattie* v. *Murray*, December 1, 1881, 9 R. 186; and were therefore of opinion, though it was only proved that two salmon had been caught in them, that the complainer was entitled to interdict, and that the respondent was not entitled to erect such nets *ex adverso* of the petitioners' property either in the open salmon season or in close time.

The Duke of Buccleuch and Queensberry, Sir Frederick Johnstone of Westerhall, Baronet, and William D. Mackenzie of Newbie, proprietors of lands and salmon fishings within the limits of the district of the river Annan, brought this action in the Sheriff Court at Dumfries to interdict David Kean, fisherman, Powfoot, Dumfries, "from maintaining or using stake nets, bag nets, or other fixed engines for the capture of salmon on the shores of the Solway Firth, between high and low water-mark, *ex adverso* of lands situated at the foot of Pow, opposite Powfoot village, in the parish of Cummertrees, and to decern and ordain him forthwith to take down and remove the stake nets, bag nets, or other fixed engines for the capture of salmon already erected by him on the shores of the said Solway Firth *ex adverso* of the said lands, and that at the sight and to the satisfaction of an engineer, or other person of competent skill, who may be appointed for the purpose by the Court."

By the Solway Salmon Fisheries Commissioners (Scotland) Act 1877 provision is made for the appointment of commissioners, to be styled "the Special Commissioners for Solway Fisheries." One of the duties of the said special commissioners was to inquire into the legality of all fixed engines erected or used for the taking of salmon in the waters and on the shores of the Solway Firth in Scotland, as fixed under the authority of the Salmon Fisheries (Scotland) Act 1862, and in the rivers flowing into the same, and to abate and remove all such fixed engines as should not be found to their satisfaction to be privileged, as thereinafter provided. By section 4 of the said Act it is enacted that the expression "fixed engine" "shall include any net or other implement for taking fish fixed to the soil or made stationary in any other way, not being a cruive or mill-dam; and 'privileged fixed engine' shall only include such fixed engines as were in use for taking salmon during the open season of one or more of the years 1861, 1862, 1863, and 1864, in pursuance of any grant or charter or immemorial usage." By the 5th section of the Act it is provided that where a claim is made by any person on behalf of a fixed engine that it is privileged, the Commissioners shall, on being satisfied by proof that such engine is in whole or to any extent privileged, certify to that effect, and shall state in their certificate the situation, and also the size and description of the engine, so far as the same is privileged. In the two following sections provision is made for the holding of courts, after due advertisement in the several districts, for determining the legality of the fixed engines in use therein, for which privilege might be claimed.

Commissioners appointed in terms of the Act held courts at Annan in April and May 1878 for determining the legality of fixed engines used within the district of the river Annan which should be claimed as privileged, and issuing certificates accordingly. Various claims of privilege were made and certificates granted, but no certificate of privilege for any fixed engine or engines was granted for the lands specified in the prayer of the petition. At these courts a number of fishermen who fished in the Solway with fixed engines called "paidle nets," appeared before the Commissioners in answer to citation in order that there might be inquiry by the Commissioners touching the legality of the fixed engines, and the fishermen having pleaded that the "paidle nets" or fixed engines were neither erected nor used for taking salmon, the said Commissioners, after receiving evidence and hearing parties, found that it had been proved to their satisfaction that the fixed engines were erected and used for taking salmon, and that it had