ground that the account incurred by Mr Guthrie of Scotscalder, when examined, shows that there is a sufficient amount due by him to this innkeeper, apart from charges for liquor altogether, to cover the amount of the bill which Guthrie has granted.

That is sufficient for the decision of the case, for I agree with the Lord Ordinary in that view, but it seems desirable, since we have had a full argument from the reclaimer on the question raised under the Tippling Act, that I should express my opinion on that matter also.

The object of the Tippling Act is plain enough. It is to prevent persons who have no ready cash from going to bars and drinking small quantities from time to time by getting credit. Such a practice tends to throw those persons into the power of the publican, and gives him an inducement to encourage drinking, and thus bring poor people under oppressive debt while injuring them morally. The Act is directed to the prevention of this public nuisance. But here the customer is a guest in the house and he orders the liquor for himself and his friends, but it is all supplied to him on his order and credit as a resident in the house. Does the Tippling Act apply to that case? I think it does not. I think that Lord Abinger's opinion in the case of *Proctor* referred to by the Lord Ordinary is quite sound. Lord Denham in the case in which he expressed some doubt as to that opinion, seems to have confused two things, viz., the case where liquor is supplied in a place for passing entertainment—a public-house or tavern—and the case of a hotel with guests living in it, it may be for considerable periods. It would be a very strange thing if the Tippling Act must be read so as to require a hotel-keeper to demand payment from a person living in his house for every glass of liquor as he orders it. It would lead to a total subversion of hotel practice, and if it were the law it would be very surprising that in the case of an Act passed so long ago it should only come to be held now that it applied to guests living in a hotel. I am of opinion that it does not apply, and therefore I entirely concur with the decision of Lord Abinger in the case of *Proctor*. I am confirmed in my view by finding that Lord Abinger's opinion is accepted as authoritative, and as the recognised law. Mr Wharton in his treatise in 1876 stated the law in accordance with that case. Mr Watt has, however, insisted upon the particular circumstances of this case. He maintains that this case is taken out of the rule approved by Lord Abinger, because Mr Guthrie got his liquor or gave his friends their liquor at the bar. But I am not dealing with any particular case. The enactment being statutory and prohibitory it must be strictly interpreted, and my reading of the Act is that it is intended to cover the case of liquor served out to persons coming to a licensed house for temporary refreshment, but not to cover the case of guests living in a hotel. I think therefore that the judgment of the Lord Ordinary must be affirmed, both upon the ground on which he has got his judgment and on the ground taken by Lord Abinger.

LORD RUTHERFURD CLARK—I am satisfied with the Lord Ordinary's judgment, and adhere upon the grounds which he has stated. I do not think we should give any judgment upon the Tippling Act, although I agree with the opinions which have been expressed regarding it.

LORD TRAYNER—I agree with Lord Rutherfurd Clark, but without expressing any opinion as to the Tippling Act although I have a strong inclination towards thinking Lord Abinger's view sound.

LORD YOUNG was absent.

The Court adhered.

Counsel for Complainer, and Reclaimer—Asher, Q.C. — Watt. Agent — Thomas Dalgleish, S.S.C.

Counsel for Respondents—D.-F. Balfour, Q.C.—M'Lennan. Agents—Philip, Laing & Company, S.S.C.

Saturday, May 23.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

WRIGHT'S TRUSTEES *v.* M'LAREN AND OTHERS.

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

The 47th section of the Conveyancing Act 1874 enacts that "a heritable security for money duly constituted upon an estate in land shall, together with any personal obligation to pay principal, interest, and penalty contained in the deed or instrument whereby the security is constituted, transmit against any person taking such estate . . . . by conveyance when an agreement to that effect appears *in gremio* of the conveyance, and shall be a burden upon his title in the same manner as it was upon that of his . . . . author, without the necessity of a bond of corroboration or other deed or procedure."

William M'Laren sold to Robert M'Laren property burdened with £800, and executed a disposition which contained *in gremio* the following clause—"Which sum of £800 it has been agreed is to remain on the security of the said subjects and others as aforesaid, and the said Robert M'Laren is to take upon himself the obligation to repay the same; and it is further agreed, as the said Robert M'Laren by acceptance hereof declares and agrees, that the personal obligation to pay principal and interest and penalty contained in said bond and disposition in security shall be a burden upon his title in the same manner as it was that of me,

without the necessity of a bond of corroboration or other deed or procedure, and the personal obligation may be enforced against him by summary diligence or otherwise, in the same manner as against me."

Held that the personal obligation had been transmitted to Robert M'Laren, and that the concurrence of the creditor in the bond was not necessary.

William M'Laren, butcher, 103 Nicolson Street, Edinburgh, proprietor of the heritable subjects No. 10 and No. 12 Cowgate there, in security of a debt of £800 granted a bond and disposition in security for that sum over said subjects dated 21st April 1876, to which the trustees of the late Alexander Wright, Esq., of St Catherine's, Edinburgh, acquired right by an assignation dated 1st August 1877. In 1878 William M'Laren sold the subjects to Robert M'Laren under said burden of £800, and executed a disposition in his favour which contained *in gremio* the following clause—"Which sum of £800 it has been agreed is to remain on the security of the said subjects and others as aforesaid, and the said Robert M'Laren is to take upon himself the obligation to repay the same; and it is further agreed, as the said Robert M'Laren by acceptance hereof declares and agrees, that the personal obligation to pay principal and interest and penalty contained in said bond and disposition in security shall be a burden upon his title in the same manner as it was that of me, without the necessity of a bond of corroboration or other deed or procedure, and the personal obligation may be enforced against him by summary diligence or otherwise in the same manner as against me." The disposition was duly recorded along with a warrant of registration in the following terms:—"Register on behalf of Robert M'Laren, residing at No. 4 Hope Park Crescent, Edinburgh, in the Register of the Burgh of Edinburgh, J. & J. Gardiner, Edinburgh, S.S.C., agents."

Mr Wright's trustees having failed to obtain payment of the sum contained in the bond upon demand, and to realise the subjects burdened, brought an action of maills and duties against Robert M'Laren and his tenants in order to get the rents of the subjects paid to them and Robert M'Laren found liable in the expenses of process.

M'Laren offered to let decree go out against him if expenses were not demanded, but he pleaded that, "not having rendered himself personally liable for the sums contained in and due by the said bond and disposition in security, and he not being liable therefor, decree of absolvitor should be granted in his favour with expenses."

The Act 37 and 38 Vict. c. 94 (Conveyancing (Scotland) Act 1874) provides by section 47—"Subject to the limitation hereinbefore provided (sec. 12) as to the liability of an heir for the debts of his ancestor, an heritable security for money duly constituted shall, together with any personal obligation to pay principal, interest, and penalty contained in the deed or instrument whereby such security is constituted, transmit against any person taking such estate by succession, gift, or bequest, or by conveyance, when an agreement to that effect appears *in gremio* of the conveyance, and shall be a burden upon his title in the same manner as it was upon that of his ancestor or author, without the necessity of a bond of corroboration or other deed or procedure; and the personal obligation may be enforced against such person by summary diligence or otherwise in the same manner as against the original debtor" . . . .

Upon 17th January 1891 the Lord Ordinary (KYLLACHY) decerned against the compearing defender Robert M'Laren in terms of the conclusions of the summons, and found the pursuers entitled to expenses.

M'Laren reclaimed, and argued — The creditors could still sue the granter of the bond—*University of Glasgow* v. *Yuill's Trustee*, February 10, 1882, 9 R. 643. They were not entitled as under the 1874 Act to enforce the personal obligation against the disponee unless he had plainly taken that obligation upon himself. The Act was intended to simplify conveyancing and to dispense with a bond of corroboration where formerly necessary, not to enlarge the rights of creditors in every case. The clause used here was not stronger than that used in *Carrick, &c.* v. *Rodger, Watt, and Paul, &c.*, December 3, 1881, 9 R. 242, which was held not to transmit the personal obligation. Even if it were stronger it was invalid to effect this purpose, as the creditor in the bond had not been a party to the disposition which contained the clause in question, and there was nothing in the disposition which the creditors could complete a title by infeftment. Nor was there anything on which they could take summary diligence against the disponee, whereas they could take such summary diligence against the disponer, the principal debtor who had not been relieved.

Argued for respondents—The clause here fulfilled all the conditions of the Act. It was a distinct agreement *in gremio* of the disposition to become personally liable for the debt. The clause in *Carrick's* case was only one of relief. Even there the Judges who had considered the question were equally divided as to the transmission of the personal obligation.

At advising—

LORD RUTHERFURD CLARK—The question is, whether the defender is personally liable to the pursuer for the sum contained in the heritable security? The answer depends, first, on the construction which is to be put on the 47th section of the Act of 1874, and secondly, on the terms of the disposition which the defender has obtained to the subjects over which the security has been exacted.

On the first point the contention of the defender is that there can be no transmission of the personal obligation to a disponee unless the heritable creditor is a party to the agreement by which the disponee undertakes to become personally liable for the debt. Before considering the

statute, I may observe that under the former law the personal obligation would not transmit against the disponee by the mere force of the disposition. If it was intended that he should become liable for the debt, the proper form was that he should grant a bond of corroboration. The effect of such a bond was not to discharge the original debtor, but to give the creditor in the security the further obligation of the granter of the bond. The creditor did not intervene. He merely accepted the bond of corroboration if he desired to be vested in the obligation of the granter.

The purpose of the statute was to provide a less cumbrous form for the transmission of the personal obligation. It deals with two cases — the disposition of the lands charged with the debt, first, on a lucrative title, succession, gift, or bequest, and second, on an onerous title.

In the first case it is declared that the heritable security, together with the personal obligation, shall transmit against the disponer without the necessity of any bond of corroboration or other procedure. It is obvious that in this case the intervention of the creditor is not required. He becomes the creditor of the disponee by the mere form of the statute. There seems no reason why a different rule should prevail when the title is onerous, though a mere disposition may not in that case be sufficient to transmit the obligation.

In the case of a disposition on an onerous title, the personal obligation does not transmit unless "an agreement to that effect appears *in gremio* of the conveyance." It is maintained that this means an agreement between the heritable creditor and the disponee. But while it is difficult to see why the creditor must intervene in the one case and not in the other, the necessity for the agreement is obvious.

When the disposition proceeds as on a lucrative title, the disponee takes the subject *cum onere*. There is no need for any declaration on his part that he is willing to become personally liable for the debt. His assent is implied as the legal inference from such a title. Consequently, the statute declares that the personal obligation shall transmit against him. In the case of an onerous title there is no room for any such implication. It is necessary that the disponee shall agree to be bound, or, in other words, that he shall signify his assent to that effect. Without such assent it would be manifestly unjust to bind him to pay the debt of the disponer. But when it is given the two cases become identical.

I am therefore of opinion that it is not necessary that the creditor shall be a party to the agreement.

It was further contended that the defender did not undertake to pay the debt, but that he merely became liable in an obligation of relief. I am of opinion that this contention is not well founded. The disposition bears that the defender "is to take on himself the obligation to repay" the debt charged on the lands, and that "the personal obligation shall be enforced against him by summary diligence." These words can have but one construction. They signify in the plainest terms the agreement or assent of the defender to be bound in the personal obligation, and he is consequently by force of the statute in the same position as if he had granted a bond of corroboration.

The case of *Carrick* was cited to us. In that case there was a great difference of judicial opinion. But in forming the opinion that our judgment should be in favour of the pursuer, I do not think that I am doing violence to it. In that case the obligation undertaken by the disponer was one of relief only, and consequently it was said that there was no assent on his part to come under a direct obligation to the creditor in the security. For obligation of relief is an obligation to the debtor and not to the creditor. At the same time I think it right to say that in my opinion the case deserves to be reconsidered.

The Lord Justice-Clerk and Lord Trayner concurred.

Lord Young was absent.

The Court adhered.

Counsel for Pursuers and Respondents—Rhind—Hay. Agent—John Clark Junner, W.S.

Counsel for Defender and Reclaimer—Guthrie — Guy. Agents — Reid & Guild, W.S.

Thursday, May 14.

FIRST DIVISION.

[Sheriff of Lanarkshire.

YOUNG *v.* MAGISTRATES AND COUNCIL OF GLASGOW AND OTHERS.

Reparation — Wrongous Apprehension — Responsibility of Magistrates and Town Council for Acts of Police — Glasgow Police Act 1866 (29 *and* 30 *Vict. c.* 273).

Held that an action of damages for wrongous apprehension by two constables belonging to the Glasgow Police force would not lie against the Magistrates and Council of that city, in respect that the management of the police force was vested by the Glasgow Police Act, not in the Magistrates and Council, but in a committee of the Magistrates.

Reparation — Wrongous Apprehension — Public Officer—Malice.

A woman who had been apprehended and charged with importuning passengers for the purpose of prostitution, by two constables, brought an action against them, averring that she had been apprehended close to her home, and when on her way thither; that the defenders when they arrested her refused to state any ground for her apprehension or to allow her to inform her mother thereof, but insisted on