Counsel for the Pursuer and Respondent —W. Campbell. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Defenders and Appellants —G. Miller. Agent—Robert D. Ker, W.S.

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*Tuesday, May 20.*

## SECOND DIVISION.

[Lord Kyllachy, Ordinary.

## BENNIE AND ANOTHER *v.* COUPER.

*Contract—Essential Error—Consensus in idem.*

A firm of law-agents wrote with regard to the payment of a sum of money contained in a bond and disposition in security—"Let us know if you undertake to see the money paid at Whitsunday first, as if you cannot we shall call up the bond in the usual way by notarial intimation." They received the following reply, "I undertake to see the money paid at Whitsunday first," and abstained in consequence from giving notarial intimation. *Held* that the sender of the reply was bound to pay the money, although he averred that at the time when he wrote he was under essential error as to the property in question, having in his mind another property of a similar name.

James Bennie, nail manufacturer, Glasgow, and Mrs Grace Gordon Jessie Barnhill or Bennie, wife of John Bennie, nail manufacturer, Glasgow, as the said Mr and Mrs John Bennie's marriage-contract trustees, became creditors in a bond and disposition in security for £1390, granted by Andrew Goodall, builder, Glasgow, to the trustees of the late James MacLellan, manufacturer, Glasgow, over certain subjects in Windsor Circus, Glasgow, in the parish of Govan and shire of Lanark. Over these subjects the Property Investment Company of Scotland held a postponed bond and disposition in security, in virtue of which they had entered into possession, paying Mr and Mrs Bennie's marriage-contract trustees the interest on their prior bond. Of the said company Mr Peter Couper, accountant, 37 George Street, Edinburgh, was manager, and as trustee for the company held certain bonds and dispositions in security over houses in Windsor Quadrant, Glasgow.

On 9th February 1889 Messrs Mack & Grant, S.S.C., Edinburgh, agents for Mr and Mrs Bennie's marriage-contract trustees, wrote the following letter to Messrs Couper & Cook, of which firm Mr Peter Couper was a partner:—

"*Mrs Bennie.*

"Dear Sirs,—We beg to give you notice that Mrs Bennie, Lynwood, Lenzie, formerly Miss Barnhill, requires payment at Whitsunday first of the bond for £1390 granted by Mr Andrew Goodall, builder, Glasgow, to Mr MacLellan's trustees, and now held by her, over subjects in the parish of Govan. Please let us know if you undertake to see the money paid at Whitsunday first, as if you cannot we shall call up the bond in the usual way by notarial intimation."

To which they received the following reply:—

"*Windsor Circus, Glasgow.*

"Dear Sirs,—I duly received your letter of 9th inst. addressed to my firm, and beg to accept your notice that Mrs Bennie, Lynwood, Lenzie, formerly Miss Barnhill, requires payment at Whitsunday first of the bond for £1390 granted by Mr Andrew Goodall, builder, Glasgow, to Mr MacLellan's trustees, and now held by her, over subjects in the parish of Govan, and I undertake to see the money paid at Whitsunday first."

In June 1889 Mr and Mrs Bennie's marriage-contract trustees raised an action against the said Mr Peter Couper for payment of £1390, with interest from Whitsunday 1889.

The pursuers pleaded—"The defender having by the guarantee libelled personally undertaken to pay at the term of Whitsunday last 1889 the amount due under the said bond and disposition in security, and having failed to do so, the pursuers are entitled to decree against him as concluded for, with expenses."

The defender explained "that the Property Investment Company of Scotland (Limited), of which the defender is manager, is interested in two blocks of property situated in adjoining streets, Windsor Quadrant and Windsor Circus, Glasgow, being part of the Kelvinside estate. The property in Windsor Quadrant was acquired by the said company from the feuar, and the title taken in the defender's name as trustee for the said company. The defender, as *ex facie* the proprietor, is the obligant in five different bonds and dispositions in security over the five houses forming the Windsor Quadrant subjects, the said company being bound to relieve him of the obligations so undertaken. The house in Windsor Circus which is covered by the pursuers' bond is one of other six houses over which the said company holds a postponed bond, and over each of which there are separate bonds to private lenders, the particular subjects in question being burdened with the bond for £1390, in right of which the pursuers now are. The company at or about Whitsunday 1879 entered into possession of said subjects, and the defender's firm of Couper & Cook has since managed this property, as well as the Windsor Quadrant subjects, on behalf of the said company, drawn the rents, and paid the interest upon the pursuers' said bond. Neither in connection with the subjects of the pursuers' security in Windsor Circus nor with the property in Windsor Quadrant has the defender any personal interest whatsoever. When the defender received the letter of the pursuer's agents of 9th February 1889, not having the facts above mentioned and the distinction between the position of the property in Windsor Quadrant and that in Windsor Circus clearly before his mind, and being misled by the terms of the said letter, and

on the erroneous supposition that he was, on behalf of the said Property Investment Company of Scotland, the obligant under the pursuers' bond, and therefore without choice in the matter, and believing that all the pursuers' said agents wished was to obviate the necessity of giving notarial intimation calling up said bond, and having only in his mind the same object, namely, the saving of the expense of so calling up, the defender replied in terms of his letter of 12th February 1889, in which he merely echoed the terms of the request contained in the letter of the pursuers' said agents. . . . The pursuers have not been in any way prejudiced by the mistake which has occurred beyond being kept out of their money for six months in consequence of being delayed during that period in giving the necessary notarial intimation. The defender regrets the mistake which he made, and, under reservation of all questions of liability, offers to make payment of the half-year's interest to the pursuers due upon their bond at Martinmas next, and any other damage they may instruct."

The defender pleaded—"(2) The defender having undertaken no personal obligation to make payment of the bond referred to in the summons, ought to be assoilzied. (3) At the dates when the letters of 9th and 12th February 1889 were written, there having been no *consensus in idem* between the pursuers' agents and the defender, the defender ought to be assoilzied. (4) The defender having written the said letter of 12th February 1889 under essential error, ought to be assoilzied."

The Lord Ordinary (KYLLACHY) decerned against the defender in terms of the conclusions of the summons.

"*Opinion.*—I am of opinion that in this case the defender has not stated any relevant defence. He pleads that there was no *consensus in idem placidum* between himself and the pursuers, and he also pleads (although the two pleas are really one) that he granted the undertaking in question under essential error.

"I do not, however, see that the defender's case comes at the best to more than this—that he granted the guarantee in question under a misapprehension as to the nature of his interest in the property over which the pursuers' security was constituted. The fact, it appears, was—that the defender's company were postponed bondholders over the property in question, whereas the defender says he supposed that they were absolute proprietors, and that the title to the property was in himself as trustee for the company—that happening to be the case with another property held by his company in the same neighbourhood. He does not, it will be observed, aver that he was under any error as to the identity of the property. Neither does he say that he thought he was already a personal obligant in the pursuers' bond, or even that he was a personal obligant under any bond affecting the other property referred to.

"I do not, I confess, see the materiality in these circumstances of the alleged misapprehension, But assuming its materiality, I am not able to understand how such a misapprehension can be held to constitute error *in essentialibus* such as, apart from mutual error or misrepresentation, can afford ground for restitution. There is no error as to the subject of the security, or as to the debt to be guaranteed, or as to any other matter with which the other party to the contract had any concern. The error is simply with respect to the pursuer's own relation to the subject of the security; and that, both on principle and authority, I hold to be insufficient. The case is, in my opinion, *a fortiori* of the case of *Stewart* v. *Kennedy* cited at the debate. The present could not, in my opinion, be treated as a case of essential error, even according to the view of the minority of the Court in that case. The following cases were cited at the debate:—For the pursuers—*Balfour*, 4 R. 454; *Munro* v. *Strain*, 1 R. 522; *Wilson* v. *M'Lelland*, 4 W. & S. 409. For the defender—*Buchanan*, 4 R. 328-854, 5 R. 69; *Stewart* v. *Kennedy*, 16 R. 869; *Wemyss* v. *Campbell*, 20 D. 1090; *M'Lurin* v. *Stafford*, 3 R. 265."

The defender reclaimed, and argued—He was under essential error as to the subject when he wrote the letter of 12th February. He had the Quadrant property on his mind and not the Circus property. He was entitled to prove that this was so. His letter was intended merely to save the pursuers the trouble of serving a notarial intimation. There was no intention of undertaking any personal obligation. If it was necessary to distinguish this case from the recent case of *Stewart* v. *Kennedy*, June 25, 1889, 16 R. 857, and in the House of Lords, March 10, 1890, 27 S.L.R. 469, this was a unilateral contract in which the defender conferred a favour and received nothing in consideration thereof.

Counsel for the respondents was not called upon.

At advising—

LORD JUSTICE-CLERK—The circumstances of this case can be stated very shortly. Messrs Mack & Grant wrote to Mr Couper with reference to the sum in a bond granted by Andrew Goodall, Glasgow. They stated that the lender Mrs Bennie required payment at Whitsunday 1889. They added—"Please let us know if you undertake to see the money paid at Whitsunday first, as if you cannot we shall call up the bond in the usual way by notarial intimation." Mr Couper wrote in answer accepting the notice that Mrs Bennie required payment at Whitsunday of the bond "granted by Mr Andrew Goodall, builder, Glasgow, to Mr M'Lellan's trustees, and now held by her over subjects in the parish of Govan, and I undertake to see the money paid at Whitsunday first."

It has been said that this was a unilateral undertaking only. I think it was plainly a bilateral contract. But for the receipt of Mr Couper's letter guaranteeing payment at Whitsunday, notarial intimation would have been given and the money would have been called up in a formal manner.

The lender abstained from giving such intimation in respect of the undertaking.

The defender says now that he was under essential error when he gave that undertaking, and had in his mind a different property in Windsor Quadrant, and not the property in Windsor Circus. This error was entirely his own error. It was not an error which anyone had done anything to induce. He is not in these circumstances entitled to an issue of essential error in order to prove that he made this error, and so to set aside his obligation. No authority has been cited to us to justify such a contention, and the recent authority (*Stewart* v. *Kennedy*, June 25, 1889, 16 R. 857, and H. of L. March 10, 1890, 27 S.L.R. 469) is to an opposite effect.

I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

LORD RUTHERFURD CLARK—I think there was a binding contract and that no relevant ground has been stated upon which it should be set aside.

LORD LEE—I agree in thinking that no ground has been shown for interfering with the interlocutor of the Lord Ordinary.

LORD YOUNG was absent in the Justiciary Court.

The Court adhered.

Counsel for Pursuers and Respondents—MacWatt. Agents—Mack & Grant, S.S.C.

Counsel for Defender and Reclaimer—Goudy. Agent—Thomas Dalgleish, S.S.C.

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*Friday, May 23.*

## FIRST DIVISION.

[Lord Trayner, Ordinary.

## BRAND *v.* SMITH (CLERK TO THE ARBROATH POLICE COMMISSIONERS).

*Jurisdiction—Review—General Police and Improvement (Scotland) Act* 1862 (25 *and* 26 *Vict. cap.* 101), *sec.* 397.

Section 199 of the General Police and Improvement (Scotland) Act 1862 provides, *inter alia*, that if any house within the burgh be not drained to the satisfaction of the Commissioners, they shall provide for the drainage of the house, and recover the expense from the owner. Section 397 of the statute provides for notice to proprietors before works are authorised or performed; and further enacts—"It shall be lawful for any person whose property shall be taken or affected . . . to appeal to the sheriff from any order made or notice given by the commissioners in respect of such matter, . . . and all such appeals, . . . and all other appeals to the sheriff allowed by this Act not otherwise provided for, shall be disposed of summarily, and the decision of the sheriff shall in all cases be final and conclusive, and not subject to review by suspension, reduction, or advocation, or in any manner of way."

A proprietor, upon whom a notice had been served relative to certain drainage operations on his property, appealed to the Sheriff-Substitute, on the ground that the notice was not authorised by the Commissioners, and that the property was sufficiently drained. The Sheriff-Substitute found that the notice was unauthorised, but had been subsequently sanctioned by the Commissioners, and ordered new notice instead of the former irregular procedure. He found further, that the property was not drained to the satisfaction of the Commissioners, and to that extent dismissed the note of appeal.

The proprietor brought a reduction of the Sheriff's decree, on the ground that the notice having been null and void and unauthorised, there was no process before the Sheriff-Substitute in which he could competently issue such a decree.

*Held* that as the matter in the notice and the decree were within the scope of the statute, the clause of finality contained in section 397 applied, and the action *dismissed* as incompetent.

This was an action of reduction by Robert Brand, builder, Arbroath, of an interlocutor of the Sheriff-Substitute of Forfarshire pronounced in an appeal taken by him against a notice and resolution of the Commissioners of Police of Forfarshire relative to certain drainage operations which they proposed to carry out.

The summons was raised in the following circumstances:—The pursuer, who was proprietor of certain heritable subjects in the burgh of Arbroath, received on 7th December 1888 a notice signed by the Superintendent of Police of the burgh in the following terms:—"Sir,—By clause 199 of the General Police and Improvement (Scotland) Act 1862 it is enacted that 'If any house or building within the burgh be at any time not drained by a sufficient drain or pipe communicating with some sewer or with the sea to the satisfaction of the commissioners, and if there shall be such means or drainage within 100 yards of any part of such house or building, the commissioners shall construct or lay from such house or building a covered branch drain or pipe of such materials, of such size, at such level, and with such fall, as they think necessary for the drainage of such house or building, its areas, water-closets, and offices; and the expense thereof shall be recoverable from the owner of such house or building, over and above any sum that may be charged for the use of the sewers as above provided for.' You are therefore hereby informed that the Commissioners of Police are about to lay down proper pipes to carry the sewage into the main drain from your property at No. 34 St Mary Street, Arbroath (back land), occupied by Mrs Stewart, Arbroath, and that