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THE EARL OF TRAQUAIR, &C. *v.* BURROWS, &C.

The EARL OF TRAQUAIR and JOHN ANSTRUTHER, Esq., his Trustee, - - - - *Appellants;*

WALTER BURROWS and Others, Assignees under a Commission of Bankruptcy issued, against PATRICK MORGAN and ARTHUR STROTHER, Merchants in London, - } *Respondents.*

House of Lords, 20th March 1815.

DEBT—CONSTITUTION—FOREIGN BOND—SURETY—BENEFICIUM ORDINIS.—(1.) Circumstances in which a notarial copy of a bond granted in Spain, together with other evidence was sustained as proving the constitution of the debt. (2.) Held that a cautioner in this bond was not entitled to plead the privilege of discussion, he being bound, not only "as surety," but also as "principal payer."

While the Earl of Traquair was residing for some time in Madrid, during the war, he became surety in a Spanish bond, granted by the debtor, Don Andres Fletcher, to one Don Arthur Strother. To this bond the respondents acquired right, as the official assignees of Messrs Morgan and Strother, to whom the same was alleged to have belonged as copartners.

A demand was made in this country against the Earl for the contents of the bond, £1084, 11s. It appeared that in Spain, the originals of bonds are executed in books of record, the party holder of the bond only getting an attested copy. The Earl's trustees refused payment, stating that, from various circumstances, they doubted whether the paper in question did constitute a proper debt, and if it did so, it was strange that no demand had ever been made on the Earl while he remained in Spain. Though *ex facie* of the document, the Earl was merely a surety, yet no demand had been made in Spain against Fletcher, the principal obligant.

Action having therefore been raised, it was pleaded in defence, 1st, That the original bond or obligation, which was the foundation of the claim, was not produced. 2d, That, even if produced, the pursuers must show that they have discussed the original debtor by diligence before coming against the surety. Lord Polkemmet, after hearing parties at considerable length, pronounced this interlocutor, "The Lord Feb. 6, 1800.
"Ordinary having considered the libel with the defences and
"writs produced, and heard parties' procurators, before an-
"swer, ordains the pursuers to state, in a condescendence, what

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" evidence they have produced, or can instruct that the debt " sued for is still owing; and likewise to state what diligence, " if any, has been used for recovering of said debt against " the principal debtors in the bond libelled, and that against " next calling."

June 18, 1801. The respondents reclaimed to the Court, and the Court were pleased to " remit to the Lord Ordinary to hear parties " further, and to proceed and determine upon the whole cause, " as to his Lordship may seem just."

The respondents then applied to the Lord Ordinary to have the judicial examination to be taken of the Earl; this the Lord Ordinary refused, but ordained the Earl by a writing under his hand, to answer certain interrogatories put to him. From his answers he admitted that a bond due to Lady Traquair's maid, was brought to this country in the same form as the one in question; that his trustees declined to acknowledge a debt in that form, but that, upon the Earl coming forward to substantiate it, the trustees paid it. It was also acknowledged by the Earl, that he had signed the present bond, as surety, but only on the most positive assurances given him, on the part of Strother and his agent, Kearney, that he should never be troubled for it, and that his signing the bond was a mere form. Upon these latter statements the whole case turned, and the Lord Ordinary was about to grant a commission to examine Strother and Kearney as to these facts, when the appellants agreed to make a reference to the oaths of Morgan, Strother, and Kearney, as above. This reference was allowed.

Before the commission was gone into, Kearney had died, and Morgan was abroad, and the respondents insisted that the commissioner ought to proceed with the examination of Strother. The commissioner declined this, and it appearing that there was no reference to the oath of Strother alone, he reported the matter to the Court. The Court saw no difficulty to the oath of Strother being taken under the reference, but the appellants argued that this was not what they had agreed to. It was to the oaths of Morgan, Strother, and Kearney as a whole, that had been referred to. The Lord Ordi-

Nov. 21, 1804. nary thereupon decerned in terms of the conclusions of this libel. On reclaiming the petition, the Court pronounced

May 23 and 27, 1806. this interlocutor: " The Lords recall the interlocutor of the " Lord Ordinary reclaimed against; repel the objection to " the constitution of the debt, and remit to the Lord Ordinary " to hear parties farther on the other branches of the cause;

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June 14, 1806.

" namely, how far the debt is due, or interest is exigible " thereupon, and to proceed and determine thereupon."

The case having come back to the Lord Ordinary, his Lordship, on considering the whole cause, pronounced this interlocutor: " Having considered the whole of this process, " and particularly the points remitted by the above interlo- " cutor of the Court; in respect that the objection to the con- " stitution of the debt is finally repelled by the Court; fur- " thur, in respect that the defender (the Earl), though only " the surety, is thereby subjected, conjunctly and severally, " with the principal debtor; and also in respect, that the " defender (the Earl), since the beginning of the cause to the " present time, has produced or condescended upon nothing " to instruct, either that the debt has been paid by the prin- " cipal debtor, or that the defender has been otherwise libe- " rated from payment of it, therefore finds the defender (the " Earl), liable for the principal sum libelled, and decerns; but " before answer as to interest, of which no mention is made " in the document, appoints the pursuers to state in a con- " descendence, the grounds on which they claim interest, and " when it should begin to run."

The appellants reclaimed, contending 1st, That no title had been adduced to this debt on the part of Morgan and Strother. The debt appeared to be due to Strother alone, and it did not appear by any assignation, or other right, to have been assigned to that Company. 2d, It being admitted that the principal debtor had not been discussed, the respondents were not entitled to come against the surety in the first instance. The obligants mentioned in the instrument, are " Don Andres " Fletcher, as principal debtor, and Don Charles Stewart, " Count de Traquhair, as his surety and principal payer." The appellant therefore being merely surety or cautioner for Fletcher, was entitled to plead the benefit of discussion, and could not be subjected to any legal demand, until it appeared that all diligence had been ineffectually used against the principal obligant. This is neither a joint obligation nor an obligation in which the privilege of discussion has been expressly renounced. Here the party is bound expressly as surety, which of itself entitles him to the benefit of discussion. The respondents answered as to the *beneficium ordinis*, that the terms of the bond sufficiently disposed of that point, that the appellant had bound himself " as surety " *and principal payer, though both of them jointly, and of one* " accord, and each of them separately," &c.

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The Court adhered to the interlocutor complained of, of this date.

Against these interlocutors the present appeal was brought to the House of Lords; but, after hearing counsel, their Lordships were pleased to affirm the judgment of the Court of Session.

For the Appellants, *A. Gillies, D. Monypenny.*

For the Respondents, *John Dickson, Patrick Walker.*

NOTE.—Unreported in the Court of Session.

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JOHN BERRY, of Inverdovat, and WILLIAM BERRY, W.S., - - - - - *Appellants;*

ARCHIBALD CAMPBELL STEWART, of St Fort, and his Tutors, - - - - *Respondents.*

House of Lords, 14th April 1815.

SALMON FISHING—RIGHT "CUM PISCATIONIBUS"—POSSESSION.—Held that the appellants had only a general right to fishings in the Frith of Tay, and that they had not proved forty years' possession of salmon fishing *ex adverso* of their lands, in order to entitle them to fish salmon under that title. Affirmed in the House of Lords. (2) Held that they were not entitled to erect a new quay and pier on their own lands, prejudicial to the right of salmon fishing in the respondents. Cause remitted as to the pier.

This action was raised about the right to fish salmon in the Frith of Tay, *ex adverso* of the lands of Inverdovat, belonging to the appellants.

The fishings to which the appellants laid claim were two in number. The eastmost one was called "Low Water Fishings," and the other was situated *ex adverso* of those portions of the lands of Inverdovat, called in the plan Well-gate, and in another place, "Welgate," and "Pluck the Crow."

The respondents, on the other hand, maintained that the appellants had shown no right to these fishings; and, further, that they were part of the fishings of Broadheugh, and of that marked "W. Gordon's fishings" on the plan, now belonging to the respondent, Mr Stewart.

But the appellants argued, 1. That there was a general right of salmon fishing annexed to their lands of Inverdovat,