

ised value was the amount of the debt. This appeared from the power of redemption in the contracts. The sum due annually was just interest on the amount of the capitalised value. A ground-annual was an "annual-rent," and that expression was in the institutional writers used as equivalent to interest—Ersk. Inst. iv. 1, 11.

**LORD YOUNG**—The creditor in a ground annual is a creditor in perpetuity for payment of a certain sum annually. Now that payment is secured on land. That is why it is called a ground annual; it is an annual payment secured on land. I have already said that payment is due in perpetuity, and in order to ascertain the amount of the debt we must capitalise the annual payment in the ordinary way. The capitalised value is the amount of the debt. Now, the annual payment is just the return or rent to him on this debt. It appears to me such an annual payment is indistinguishable from interest. I think he is entitled to point the ground for that to the extent allowed by the statute, that is, for the amount due for the current half-year and one-half year before. Now, the Sheriff-Substitute has sustained that contention. I think, even on the literal meaning of the clause, that his view is correct. But according to the true meaning and intent of the statute it is impossible to doubt it. I cannot distinguish between the position of the respondent and the position of a creditor under a bond. I am therefore of opinion that the Sheriff-Substitute's interlocutor was right, and ought to be affirmed.

The LORD JUSTICE-CLERK concurred.

**LORD TRAYNER**—I agree. I think the argument for the appellants is ingenious, but it is based on a too strict construction of section 118 of the Bankruptcy Act, and if sustained would have the effect of placing a certain class of heritable creditors in a very anomalous position. The question comes to be whether the holder of a ground-annual is to be put in a worse position than a heritable creditor under a bond. I should be averse from so holding. The annual payment under the contract of ground-annual is not the amount of the debt; the debt is the annual payment capitalised. Accordingly the interest on that debt is just the amount which the creditor here is trying to recover.

**LORD RUTHERFURD CLARK** was absent.

The Court found that the pointing for which warrant was craved was available only for the ground-annuals for the half-yearly term current at the date of sequestration and for the preceding half-year, and remitted the cause to the Sheriff to proceed as accords.

Counsel for the Pursuers—Rankine—Guy. Agent—W. Finlay, S.S.C.

Counsel for the Defenders—Clyde. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, March 13.

## SECOND DIVISION.

[Sheriff-Substitute of  
Stirling, &c.

**LUKE v. WALLACE AND OTHERS.**

*Poinding of the Ground—Assignment in Security of Long Lease—Debitum fundi—Registration of Long Leases (Scotland) Act 1857 (20 and 21 Vict. cap. 26), secs. 4, 16, and 20.*

The creditor in a bond and assignation in security of a lease, both recorded in the Register of Sasines in terms of the Registration of Long Leases (Scotland) Act 1857, is not entitled to a warrant for pointing the ground of the lands leased.

This was an action of pointing of the ground brought in the Sheriff Court at Stirling by John Luke, Headswood House, Denny, against John Bryson Wallace and Archibald Cruickshanks, Denny, as sole partners of the firm of Wallace, Cruickshanks, & Company, iron-founders, Denny. The action proceeded upon a bond and assignation in security of a lease for 99 years. The bond and assignation in security was in the form of Schedule (B) annexed to the Registration of Long Leases (Scotland) Act 1857, and both the lease and the bond and assignation in security had been duly recorded in the Register of Sasines in terms of that Act. Schedule (B) is practically identical with the form of a bond and disposition in security of lands in Schedule FF (1) annexed to the Titles to Land Consolidation (Scotland) Act 1868, except that it assigns the lease instead of disposing the lands, and that it omits the following clause—"and that in real security to the said C D and his foresaids of the whole sums of money above written, principal, interest, and penalties."

The Registration of Long Leases (Scotland) Act 1857 (20 and 21 Vict. cap. 26) provides, section 4—"It shall be lawful for the party in right of any such lease recorded as aforesaid, and whose right thereto is recorded in terms of this Act, but in accordance always with the conditions and stipulations of such lease, and not otherwise, to assign the same, in whole or in part, in security for the payment of borrowed money . . . or other legal debt or obligation, in the form as near as may be of the Schedule (B) to this Act annexed; and the recording of such assignation in security shall complete the right thereunder, and such assignation in security so recorded shall constitute a real security over such lease to the extent assigned." Section 16—"The registration of all such . . . assignations in security . . . in manner herein provided shall complete the right under the same . . . to the effect of establishing a preference in virtue thereof as effectually as if the grantee or party in his right had entered into actual possession of the subjects leased . . . at the date of registration."

And section 20—"The several clauses in the Schedules to this Act annexed shall be held to import such and the like meaning, and to have such and the like effect, as is declared by the Act of the tenth and eleventh of Queen Victoria, chapter 50, sections second and third, to belong to the corresponding clauses in the Schedule to the said recited Act annexed." The Schedule referred to was a form of a bond and disposition in security of lands. These sections were superseded, and the provisions therein contained re-enacted by the Titles to Land Consolidation (Scotland) Act 1868, secs. 118 and 119, and the Schedule was replaced by the practically identical form in Schedule FF (1) to that Act annexed and referred to above.

The pursuer craved warrant to poind the ground of the lands let for the principal, interest, and penalties due under his bond, which he averred were due and unpaid by the defenders.

The defenders pleaded, *inter alia*—"(5) In any event the pursuer's loan is not a *debitum fundi*, and poinding of the ground is therefore incompetent and illegal."

By interlocutor dated 30th January 1896 the Sheriff-Substitute (BUNTINE) sustained the fifth plea-in-law for the defenders, and dismissed the action, adding the following note:—

Note.—"The pursuer in this action of poinding of the ground founds upon a personal bond and disposition in security, containing an assignation in security of a policy of insurance, and also of a lease of certain subjects duly recorded. He pleads that this debt constitutes a *debitum fundi*, and justifies the action.

But a debt secured by a lease of land is in no sense a 'debt of the land,' or its owner. It is in truth only a debt of the lessee and occupant of the land, who has no real right in the land itself, but only a real title of possession. Accordingly the diligence of poinding of the ground, which is competent only to persons infeft in or having a real right by security or otherwise in the lands, is incompetent and inept—Ersk. iv. 1, 11. There are other defences stated to the action, but it is in those circumstances unnecessary to notice them."

The pursuer appealed to the Court of Session, and argued—The Act provided (section 4) that the registered bond and assignation in security should "constitute a real security." The forms prescribed and the interpretations put upon these forms by the statute showed that it was intended to put the creditor into the same position as the creditor in a bond and disposition in security over lands. The debt was secured on heritage. All the conditions necessary to constitute a *debitum fundi* were present here, and the pursuer was entitled to warrant as craved—*Scottish Heritages Company, Limited v. North British Investment Company, Limited*, January 23, 1885, 12 R. 550.

Argued for the defenders—The intention of the Act appeared from section 16 to be that possession should not be necessary

to make the right to the lease real, if the lease and assignation in security were recorded. It was not intended upon registration to assimilate the right of a lessee or his assignee to that of an owner or disponee in security of the lands in all respects—*Stroyan v. Murray*, July 17, 1890, 17 R. 1170. The real security given by section 4 was over the lease and not over the lands, and a lease was not *sud naturæ* a real right in land—*Stroyan v. Murray, cit.* It followed that the pursuer's debt was not a *debitum fundi*, and poinding of the ground was therefore incompetent.

LORD JUSTICE-CLERK—I do not see any reason to disturb the judgment of the Sheriff-Substitute. I think Mr Wilson's clients had no interest to raise this question. It is a question which has never been raised before. I suspect the reason why it has never been raised is because no one has ever been advised to raise it before. Looking at the Act of Parliament, I think the words of the fourth clause are quite ineffectual to give a right to the creditor under an assignation in security of a registered long lease to poind the ground. All the clause says is that "such an assignation in security so recorded shall constitute a real security over such lease." That is not the same thing as a real security over the lands in the lease. If it had been intended to carry the right of the creditor any further, the framers of the statute would have said so plainly, and they might easily have found words to convey their intention.

LORD YOUNG and LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

The Court dismissed the appeal, of new sustained the fifth plea-in-law for the defenders, and dismissed the action.

Counsel for the Pursuer—Wilson. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for the Defenders—W. Campbell. Agents—William B. Rainnie, S.S.C.

Tuesday, March 17.

## FIRST DIVISION.

[Magistrates and Council of Leith.

### BROWN AND ANOTHER v. MAGISTRATES AND COUNCIL OF LEITH.

Burgh—*Burgh Police (Scotland) Act 1892* (55 and 56 Vict. cap. 55), secs. 339, 368—*Assessment for Private Improvement Expenditure—Appeal to Police Commissioners—Appeal to Court of Session from Decision of Commissioners.*

Where the owner of property abutting on a private street appealed on legal grounds to the magistrates and council of a burgh, under section 368 of