

leave his heritage to his son, burdened with a liferent to his widow of the cottage, and also an annuity to her of £15 to be paid out of the other subjects. The son, as we see, had been in possession of the subjects for some years, and I do not think the father meant to give his widow the power at his death to turn him out.

Now, that being so, I think the husband only meant to give the pursuer the power of testing upon his moveable estate. If you read "means and estate" as including heritage, then that interpretation is totally inconsistent with the other terms of the deed. You would have expected that the widow would have got the fee of the property if that had been intended. But the obligation to make his heirs and successors pay the annuity makes his intention clear. If the pursuer's view is right, that was an obligation laid on the person who is not proprietor to pay to one who is. That is really a *reductio ad absurdum*. When the other parts of the deed are looked at, where the words "means and estate" are used, they are also used with reference to the powers given to, and the duties of, the wife as executrix.

On the whole matter I have no doubt that your Lordships have put a right construction on this deed.

LORD SHAND was absent from illness.

The Court recalled the interlocutor of the Lord Ordinary, and dismissed the action with expenses.

Counsel for the Defender (Reclaimer)—Asher, Q.C.—Baxter. Agent—James Gavin, L.A.

Counsel for the Pursuer (Respondent)—Balfour, Q.C.—Craigie. Agents—Fodd, Simpson, & Marwick, W.S.

Friday, December 2.

## FIRST DIVISION.

[Lord M'Laren, Ordinary.]

### SCOTTISH DRAINAGE AND IMPROVEMENT COMPANY v. CAMPBELL.

*Personal or Real—Absolute Order Charging Fee of Lands—Glebe—Parish Minister—Scottish Drainage and Improvement Company's Acts 1856 and 1860 (19 & 20 Vict. cap. lxx., and 23 & 24 Vict. cap. clxx.).*

The Scottish Drainage and Improvement Company's Act 1856, sec. 49, provides for the execution by the Inclosure Commissioners of an absolute order charging the amount of improvement expenditure "upon the fee of the lands improved." The form of the absolute order is prescribed by Schedule C of the statute, and by it the fee of the lands is charged, but no personal obligation is imposed. Section 61 provides—"Every charge on land by virtue of this Act may be recovered by the company, or the person for the time being entitled to the same, by the same means and in like manner, in all respects, as any feu-duties, or rent, or annual rent, or other payment out

of the same lands would be recoverable in Scotland."

In a case where an absolute order had been granted in the form prescribed by Schedule C, charging the fee of a glebe with an annual rent-charge in respect of an advance made to the parish minister for improvements on the glebe—held that the Inclosure Commissioners had not a personal action against the succeeding minister for the rent-charge, and that their only remedy was by real diligence against the land.

This was a personal action at the instance of the Scottish Drainage and Improvement Company, incorporated under the Scottish Drainage and Improvement Company's Acts of 1856 and 1860 (19 and 20 Vict. cap. lxx., and 23 and 24 Vict. cap. clx.), against the Rev. John Peter Campbell, minister of the parish of Urquhart, Drumna-drochit, Inverness, to recover payment of certain rent-charges upon the glebe for improvement debt incurred during the tenancy of the previous incumbent.

These rent-charges were constituted by absolute orders executed by the Inclosure Commissioners under the said Acts according to the form prescribed by Schedule C, appended to the Act of 1856. The following is a specimen:—"The Inclosure Commissioners for England and Wales, in pursuance of the Scottish Drainage and Improvement Company's Acts, do, by this absolute order under their hands and seal, charge the fee of the lands mentioned in the schedule annexed hereto with the payment to the Scottish Drainage and Improvement Company, their successors and assignees, of the yearly sum of Sixteen pounds eight shillings and eightpence, payable half-yearly on the 15th day of May and the 11th day of November in every year, for the term of twenty-five years, and being a proportionate repayment, according to the table annexed, of the capital sum of Two hundred and forty-five pounds five shillings, with interest at Four pounds ten shillings per centum per annum, the first half-yearly payment to be made on the 15th day of May One thousand eight hundred and seventy-eight."

The Scottish Drainage and Improvement Company's Act 1856 (19 and 20 Vict. cap. lxx.) provides as follows:—

"Section 49. When a provisional order for charging any lands to be improved has been made, and the commissioners are satisfied that the works of improvement contracted to be executed, or some part of such works, have been properly executed, the commissioners shall execute a charge under their hands and seal, upon the fee of the lands improved, or to be improved, or some sufficient part thereof, for the whole amount by the contract agreed to be charged on the land to be improved, if all the works contracted for are so executed or a proportional part of such amount, if part only of such works are executed, as the case may be, to be paid with interest to the company."

"Section 52. When the fee of any land is, in pursuance of this Act, charged with any money, the company shall be entitled to, and shall have from the time from which such rent-charge shall commence and take effect, a charge upon such land for the money ascertained and approved by the commissioners

as aforesaid, with such interest as contracted for, not exceeding five pounds per centum per annum, or, if there be not any contract as to the interest thereon, at the rate of five pounds per centum per annum; and such lands shall thenceforth be and continue liable to the payment of such charge, and such charge shall have priority over every other then existing and future charge and incumbrance whatsoever, upon or affecting such lands, except feu-duties, ground-annuals, and other charges incident to tenure, teinds, and any charges created or to be created under any Act authorising advances of public money for drainage, and any charges previously created under the provisions of any Act of Parliament authorising the charging of land with the expense of and incident to the improvement of lands by or under the sanction of the Inclosure Commissioners, respectively, if any."

"Section 61. Every charge on land by virtue of this Act may be recovered by the company, or the person for the time being entitled to the same, by the same means and in like manner, in all respects, as any feu-duties, or rent, or annual rent, or other payment out of the same lands would be recoverable in Scotland."

The defender averred—"The pursuers' Act of Parliament contains no clause importing personal liability against a limited owner who happens to succeed to an estate charged with improvement expenditure, and the absolute order under which the expenditure is charged, charges only 'the fee of the lands mentioned in the schedule annexed thereto with the payment of the several instalments therein mentioned.'"

The pursuers pleaded—" (1) The defender, as minister of the parish of Urquhart, being in possession of the glebe thereof, is liable to make payment of the rent-charges sued for. (2) The rent-charges sued for being a preferable burden on the glebe, the same are payable by the minister for the time being of the parish, and the pursuers are entitled to decree against him therefor as sued for, with expenses."

The defender pleaded—" (1) The averments of the pursuers are irrelevant. (2) There having been no contract between the defender and the pursuers, he is not personally liable, and should be assoilzied, with expenses."

The Lord Ordinary (M'LAREN) pronounced the following interlocutor on 15th June 1887—"Finds that the pursuers have no personal claim or right of action against the defender: Therefore assoilzies the defender from the conclusions of the action, and decerns: Finds the defender entitled to expenses, &c."

"*Opinion.*—This is an action at the instance of a company constituted for the purpose of advancing money for the improvement of lands against the incumbent of a rural parish claiming payment of eight half-yearly instalments of a charge upon the glebe for improvement debt incurred during the tenancy of the previous incumbent."

"The defence (so far as relevant) is that the charge is not a debt personally affecting the defender, and that the pursuers can only recover their instalments by real diligence directed against the lands secured by the charge. The defence appears to me to be well founded, having regard to the terms of the deed libelled, and the private Acts of Parliament which regulate the powers and rights of the company."

"The deed libelled is called an absolute order, and is in the form of Schedule (C) of the company's principal Act. It declares that the Inclosure Commissioners for England and Wales (who under the Act have certain quasi-judicial functions) 'do, by this absolute order under their hands and seal, charge the fee of the lands mentioned in the schedule annexed hereto with the payment to the Scottish Drainage and Improvement Company, their successors and assignees, of the yearly sum of £ , &c., for the term of , &c.'"

"In this order the important words evidently are the words 'charge the fee of the lands. The word 'charge' is not one of the customary technical terms which are used by the conveyancers of this part of the United Kingdom, and I am not aware that the word has been the subject of judicial interpretation in Scotland. But if the Judge is entitled to use his knowledge of the English language as a guide to the interpretation of such expressions, it is my opinion that a charge on the fee of lands means nothing more than a real security unconnected with personal obligation—in other words, a real burden on the lands. If, in the absence of any authorised interpretation of the term, I am at liberty to consider the probable intention of the Legislature, I may say that I think it is very unlikely that Parliament should authorise the minister of a parish to enter into obligations connected with the improvement of the glebe in such terms as would be personally binding on his successors. I will add that the Act authorises advances to be made on the security of entailed estates in Scotland, and that in my opinion it is unlikely that Parliament intended that such debts should be personally binding on succeeding heirs of entail."

"Apart from personal obligation, the pursuers have an excellent security for their advances, because I observe that by section 52 their advances are to have priority over all other incumbrances, existing or future, except charges of the like nature. Again, I observe, it is most improbable that the Legislature would have granted preferential rights to the company if the company was also to have the rights of a creditor in a bond and disposition in security against the person in possession."

"Section 49 of the principal Act authorises the execution of charges in the form of the schedule by the Drainage Commissioners, but it does not define the nature of the security to be constituted. The pursuers, as I understand, rest their case mainly on the provision of section 61, which provides that such charges may be recovered 'by the same means and in like manner as any feu-duties or rent or annual rent, or other payment out of the same lands would be recoverable in Scotland.' Now, as I read this clause, the expression 'may be recovered,' at the beginning of the section is grammatically and logically connected with the words 'out of the same lands,' near the end of the section, and this connection is in no way disturbed by the reference to feu-duties, rents, and annual rents in the intervening part of the sentence. The company are to have all the remedies against the heritable estate which are competent to superiors or creditors in obligations of annual rents, but it is not said that they are to have a remedy against the person. We know that the remedy against the

person is very different in the two illustrative cases. The superior's remedy is against the entered vassal, the remedy of the creditor in a ground annual rent is against the debtor and his heirs. It can hardly be supposed that Parliament intended to give a concurrent right of relief against heirs of the debtor and also against successors in the estate. But it is quite possible that the company were intended to have every remedy against the estate which is known to the law, and in this view the enumeration of different kinds of real securities in this section becomes intelligible. There being no conclusions for real diligence it follows that the defender is entitled to absolvitor."

The pursuers reclaimed, and argued—The pursuers have a personal claim against the defender for the rent-charge. The argument against the pursuers is that the absolute order by its terms only charges the fee of the lands without imposing any personal obligation on a party in the position of the defender. But sec. 61 involves the personal liability of the possessor at the time, for (1) a personal action is a *habile* mode of recovering a feu-duty from the vassal, sub-vassal, or from anyone in possession and in right of the rents and fruits; (2) as regards rent, in a question between landlord and tenant there is a personal action against the tenant; and (3) annual rent, which is the best illustration of the contention, is payable by an heir of entail in possession and the succeeding heirs of entail on money expended by order of the Court—sec. 13 of the Rutherford Act. In ordinary circumstances the borrower is personally liable for interest on borrowed money. The Lord Ordinary's reading of sec. 61 is not grammatical. The words "out of the lands" are merely used as descriptive of the kinds of payment. It is improper to read them after the word "recovered." All the kinds of payment mentioned are recoverable by personal action. [LORD PRESIDENT—If personal liability is not imposed in the absolute order it must be clearly made out from the words of the statute.] It is imposed by sec. 61. The object of the Act is to put owners in funds to make improvements, and it is not unlikely that the object was to make a successor in improved lands liable for money spent in improvements which have benefited him. Sections 68 and 69 imply personal liability as well as a real remedy against the land. [LORD PRESIDENT—By sec. 70 a tenant may consent to be charged; then he is to be personally liable. Now, there is no such provision for personal liability elsewhere.] But it is just as clearly the intention of the Act that the present defender shall be personally liable.

Argued for the respondent—It is conceded that there is no personal contract between the parties, and the Act does not impose any personal obligation on the respondent. By a proper construction of sec. 61, the charge is only recoverable by real diligence. The words "out of the lands" must be read into the whole section. "Out of the lands" is clearly not applicable to each kind of payment, for payment of rent is not recoverable out of the lands. The result of any other construction would give the remedy of personal diligence against both the present incumbent and the representatives of the previous incumbent, and this supposition is not reasonable in view of the terms of the absolute order,

except in the case of annual rent, which is different.—*Royal Bank of Scotland v. Gardyne*, March 8, 1851, 13 D. 912—*rev.* May 13, 1853, 1 Macq. 358. Under sec. 27 an obligation might have been imposed on a successor in possession, but this has not been done. The intention of the statute is that the pursuers shall have only the remedy of real diligence for enforcing payment of their debt.

At advising—

LORD PRESIDENT—The pursuers in this case are a company constituted for the purpose of advancing money for the improvement of land. The defender is minister of the parish of Urquhart, and the object of the action is to recover from him arrears of a certain charge for money advanced by this company in 1875 and 1877. The documents which constitute the ground of action are called "absolute orders," made by the Inclosure Commissioners under the authority of an Act of Parliament constituting the company, and the charge here is precisely in terms of the schedule appended to that statute. One of these absolute orders is printed in the appendix, and bears that "the Inclosure Commissioners for England and Wales, in pursuance of the Scottish Drainage and Improvement Company's Acts, do, by this absolute order under their hands and seal, charge the fee of the lands mentioned in the schedule annexed hereto with the payment to the Scottish Drainage and Improvement Company, their successors and assignees, of the yearly sum of Sixteen pounds eight shillings and eightpence, payable half-yearly on the 15th day of May and the 11th day of November in every year, for the term of twenty-five years, and being a proportionate repayment, according to the table annexed, of the capital sum of Two hundred and forty-five pounds five shillings, with interest at Four pounds ten shillings per centum per annum, the first half-yearly payment to be made on the 15th day of May One thousand eight hundred and seventy-eight."

Now, that is the whole document, and that it contains a valid charge or incumbrance over the glebe of this parish is beyond all question. But the present action is brought for the purpose of recovering arrears of this charge from the present incumbent. This is merely a personal action, and not one for a debt recoverable against the land. The question is, whether such an action is competent? It appears very clear that on the face of the document there is no personal obligation imposed on anyone. There is nothing but a charge on the land itself, and therefore, so far as that is concerned, there is no room for doubt. But it is said that notwithstanding the terms of the charge there are clauses in the company's Act of Parliament which give authority to the company to sue the existing proprietor or present possessor of the land in a personal action for the amount of the rent-charge as it becomes due. The charge itself is provided for by the 49th section of the statute, and the extent of the security is fixed by the 52d section. Now, there is thus provided for the company a very good security. But there is no reference to anything of the nature of a personal obligation.

But it is said the 61st section does create such a personal obligation. Before adverting to ist terms, I think it right to say that where a security

of this kind is created in an Act of Parliament, and itself imposes no personal liability, it would require very clear grounds before I would hold that any such liability existed. One would have expected that a personal obligation would appear on the face of the document itself. Keeping that in view, the 61st section is thus expressed—"Every charge on land by virtue of this Act may be recovered by the company, or the person for the time being entitled to the same, by the same means and in like manner in all respects as any feu-duties or rent or annual rent, or other payment out of the same lands, would be recoverable in Scotland." Now, undoubtedly this section regards the mode of recovering the charge, but it is not concerned with anything else. It does not profess to create any new obligation or to extend the obligation in the absolute order. Then, again, the means and manner to be adopted are those by which other payments are recovered, but "out of the lands." These are the very words of the section. The latter part of the section really means that the charge is to be recovered by the same means as any feu-duties, rents, or other payments are recovered out of lands. In short, the means and manner referred to are the means and manner by which according to the law of Scotland these payments are recovered out of the land itself, or just as if the section had stated that all real diligence was competent to the company, but no other diligence, and certainly no personal action. I therefore think that the Lord Ordinary's judgment is right.

**LORD MURE**—I have come to the same conclusion. The charge is expressly laid on the lands, and therefore unless there are some words used in the Act giving a personal remedy, such as is here asked, such an order will not warrant a personal action. I agree with your Lordships that we would need to have very distinct provision made for personal actions before we would give effect to the pursuers' contention. In this case the difficulty is created by the 61st section. This is the only section from which the company can derive any benefit. At first sight it would rather seem that this section gave all the remedies which a superior has for the recovery of his feu-duties. But then there is that expression, "out of the lands," and I think that these words are to be read in the way proposed by your Lordship, and that therefore the company are precluded from maintaining that they have a right of personal action such as is claimed.

**LORD ADAM** concurred.

**LORD SHAND** was absent from illness.

The Court adhered.

Counsel for the Pursuers and Reclaimers—  
Gloag—Low. Agents—Ronald & Ritchie,  
S.S.C.

Counsel for the Defender and Respondent—  
Wallace. Agents—Menzies, Coventry, & Black,  
W.S.

Saturday, December 3.

## FIRST DIVISION.

STEWART v. STEWART.

(*Ante*, vol. xxiii. p. 773; 13 R. 1052.)

*Husband and Wife—Separation and Aliment—  
Restriction of Aliment.*

In an action of separation and aliment decree of separation was pronounced, and the sum of £250 as aliment was decreed for in terms of a joint minute of the parties. The two children of the marriage—girls, then aged fifteen and twelve respectively—continued to live with their mother. About two years thereafter the husband presented a petition to restrict the amount of aliment to £52, on the ground that his business had fallen off, and that his income otherwise was insufficient to enable him to continue payment of the full amount. The Court remitted to an accountant to inquire into the circumstances of the parties. He reported that the petitioner's income was about £430, and that his wife had no means other than her allowance from the petitioner. There was no evidence that the circumstances of the petitioner had changed since the date of decree for aliment. The Court *restricted* the aliment to £150 per annum.

On 5th March 1884 decree of separation was pronounced in an action at the instance of Mrs Jane M'Cubbin or Stewart against her husband Thomas Stewart, hatter in Glasgow.

The sum of aliment decreed for was £250 in terms of a joint minute of parties. This sum was for the aliment of the pursuer, and also for the maintenance of the two daughters of the marriage, then aged fifteen and twelve respectively, who resided with the pursuer.

On 25th May 1886 Mr Stewart presented this petition for restriction of the amount of aliment to £52, on the ground that his business had fallen off, and that his income otherwise was insufficient to enable him to continue payment of the full amount.

Mrs Stewart lodged answers, in which she stated that she did not know the amount of the petitioner's income, nor anything as to the condition and prospects of his business.

The Court remitted to Mr Alexander Moore, C.A., to inquire into the circumstance of the parties and report, and granted diligence for the recovery of writings, and commission to the accountant to examine havers and receive their exhibits.

Mr Moore's report stated that the petitioner carried on the business of a hatter and hosier in three different shops in Glasgow, and that he had taken the opinion of a skilled party as to the probable profit realisable from the business of these shops, and that, from this opinion, combined with the information obtained from the petitioner's books and papers, it appeared that the income derivable by the petitioner from the business of the shops might be stated approximately at £200 per annum; that the peti-