Counsel for the Third Parties—Blackburn, K.C.—Maconochie. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for the Fourth Parties—Wilson, K.C.—D. Anderson. Agents—Fraser & Davidson, W.S.

Thursday, June 15.

FIRST DIVISION.

INGLIS' TRUSTEES *v.* MACPHERSON.

(*Ante*, 3rd November 1909, 1910 S.C. 46, 47 S.L.R. 43.)

Right in Security — Heritable Creditor — Ejection of Debtor in Occupation of Subjects—Heritable Securities (Scotland) Act 1894 (57 *and* 58 *Vict. cap.* 44), *secs.* 5 *and* 6. *Observations* (*per* the Lord President) as to the effect of sections 5 and 6 of the Heritable Securities (Scotland) Act 1894 with regard to the remedies of the holder of a bond and disposition in security.

[The case is reported *ante ut supra.*]

The Heritable Securities (Scotland) Act 1894 (57 and 58 Vict. cap. 44) enacts—Section 5—"When a creditor desires to enter into possession of the lands disponed in security, and the proprietor thereof is in personal occupation of the same, or any part thereof, such proprietor shall be deemed to be an occupant without a title, and the creditor may take proceedings to eject him in all respects in the same way as if he were such occupant, provided that this section shall not apply in any case unless such proprietor has made default in the punctual payment of the interest due under the security, or in due payment of the principal after formal requisition." Section 6—"Any creditor in possession of lands disponed in security may let such lands held in security, or part thereof, on lease, for a period not exceeding seven years in duration."

Mrs Catherine A. Hugonin or Inglis, Alton House, Inverness, and Etienne Hugonin, solicitor, there (Mr and Mrs Inglis' marriage contract trustees), *pursuers*, brought an action in the Sheriff Court at Inverness against Mrs Rebecca Brown or Macpherson, widow of the late Donald Macpherson, teacher, Inverness, *defenders*. The prayer of the initial writ was—"To grant warrant summarily to eject the defender, her dependents and effects, in virtue of section 5 of the Heritable Securities (Scotland) Act 1894, from the portion of the security subjects comprehending the dwelling-house known as Hanover House, Ness Bank, Inverness, now occupied by her without title; and further to grant warrant to cite the defender on an induciæ of three days."

The following *narrative* is taken from the opinion (*infra*) of the Lord President—"In this appeal the pursuers are a set of trustees who are the undoubted holders of a bond and disposition in security; and the action is one in the Sheriff Court, in which they pray the Court to grant warrant summarily to eject the defender, who is occupying a portion of the security subjects, namely, the dwelling-house known as Hanover House, Ness Bank, Inverness. The initial writ bears that they base that crave upon section 5 of the Heritable Securities Act of 1894.

"The history of the matter is this, that the bond and disposition in security was granted by the defender and her husband. Afterwards there were other money transactions between the defender and Mr Etienne Hugonin, who is a solicitor in Inverness, and who is one of the body of trustees. There was another bond granted which does not enter into the matter; but eventually there was a disposition granted by the lady—who afterwards became full proprietrix, the husband being dead—there was a disposition granted by her of the property in favour of Mr Etienne Hugonin. She says that the disposition was an out-and-out disposition and that at the time it was granted Mr Hugonin promised her that she should not be disturbed in her occupancy of a portion of the subjects, namely, this house Hanover House, Ness Bank, Inverness.

"Now the only question that could be raised was whether the crave of the pursuers was a legal crave. One can understand that if the defender considered that she had had this undertaking from Mr Hugonin she would consider herself very hardly used at being put out of her house by anybody for whom Mr Hugonin was really responsible. But at the same time in law there is no question that the body of trustees are separate persons from Mr Hugonin, and that the rights of the body of trustees under their bond and disposition in security cannot be affected by any engagement made by Mr Hugonin as an individual.

"Now the Sheriff-Substitute held that the section did not apply because he found that the section only dealt with a proprietor in occupation, and he thought that, standing the absolute disposition which I have mentioned, it could not be said that Mrs Macpherson was the proprietor. To that view the pursuers made answer that they should be entitled to prove that she really was proprietor, and that the disposition, though *ex facie* absolute, was truly a disposition in security; and they contended—and I do not suppose there was any doubt as to that—that if she was truly the proprietor then she answered to the description of proprietor in section 5 of the Act of 1894.

"Accordingly the learned Sheriff reversed the decision of the Sheriff-Substitute and allowed the pursuers a proof upon that matter; and having taken a proof, he came to the conclusion that the disposition, although *ex facie* absolute, was truly a disposition in security, and that the defender still remained proprietor. He therefore held that the section applied and granted the remedy craved."

The interlocutors of the Sheriff-Substitute (GRANT) and Sheriff (WILSON) were—"*3rd February* 1911—The Sheriff-Substitute

having considered the cause, finds in fact that the defender signed the letter No. 12 of process and adopted it as holograph; and in law that it acknowledged the existence of a radical right in her own favour notwithstanding the terms of the absolute disposition No. 11 of process: Therefore decerns ejection in terms of the crave, but supersedes extract for three days: Finds the pursuers entitled to their expenses," &c.

"*8th March* 1911—The Sheriff having considered the cause refuses the defender's appeal: Affirms the findings in fact and in law contained in the interlocutor of the Sheriff-Substitute, of date 3rd February 1911: Further finds in fact (1) that the pursuers are the creditors in right of the bond and disposition in security, No. 7 of process: (2) that the defender made default in the due payment to the pursuers of the half-year's interest which became payable under the said bond and disposition in security at the term of Martinmas 1909; and (3) that the defender is in personal occupation of a portion of the security subjects comprehending the dwelling-house known as Hanover House, Ness Bank, Inverness, which security subjects were disponed in security by the said bond and disposition in security: And finds further in law that the pursuers are entitled to obtain warrant to have the defender ejected from the said portion of the security subjects of which she is in occupation as aforesaid, and therefore affirms the interlocutor of the Sheriff-Substitute, of date 3rd February 1911, subject to this alteration, that extract shall be superseded for fourteen days, and decerns in terms of the crave of the initial writ and grants warrant of ejection accordingly, but superseding extract for fourteen days: finds the pursuers entitled to the additional expenses of this appeal," &c.

The defender appealed and argued that she was not proprietor in the sense of the Heritable Securities (Scotland) Act 1894 (57 and 58 Vict. cap. 44), inasmuch as she had conveyed the subjects in question to Mr Hugonin.

Counsel for the respondents submitted that no valid reason had been stated in support of the appeal, and therefore craved the Court to affirm the judgment of the Sheriff.

LORD PRESIDENT—[*After the narrative quoted supra*]—I am of opinion that the decision he came to was right, and I do not need to say anything more upon that point. But I would like to say this—perhaps the defender may be, I do not say consoled, but at least may appreciate her position better if I do say it—that even supposing I had considered that the Sheriff-Substitute was wrong, the result would have been the same in the long run. It would, I think, have needed a technical amendment of the prayer of the petition; but that amendment being made, the result would have been the same. What I mean is this—I think the law upon the position of the rights of a holder of a bond and disposition in security is not doubtful. Under the law prior to the Heritable Securities Act of 1894, the remedies of the holder of a bond and disposition in security, apart from sale, with which we are not dealing, were these—He could enter into possession by decree of maills and duties; he could, if he found the proprietor in personal occupation, turn the proprietor out, but not by summary process (I think that was settled by the case of *Blair & Galloway*, 16 D. 291); and he could at any time turn out a mere squatter.

The creditor could also, having entered into possession by an action of maills and duties, either live in the house himself or he could let it for as much money as he could get from anybody who chose to go into the house and who was content with a very precarious tenure, because the tenure at any moment could have been put an end to by the proprietor paying up the debt—in which case, of course, he would resume possession.

Well, now, the difference that the Act of 1894 made was this—By section 5 it gave a summary remedy where there was not a summary remedy before, and the very terms in which that summary remedy is expressed show quite clearly that it recognises the right of a heritable creditor to put out a mere squatter, because the terms are—"Such proprietor (that is, in personal occupation) shall be deemed to be an occupant without a title, and the creditor may take proceedings to eject him in all respects in the same way as if he were such occupant," provided always that default has been made in payment of the interest, and so on. That was the first thing it did. And then, in the second place, by section 6 it allowed a creditor in possession, that is to say, in possession (I take it) under a decree of maills and duties, with part of the subjects unlet, to let such subjects on lease for a period not exceeding seven years in duration. In these two matters it very largely increased the powers of the creditor.

Now the practical application of that to the present case is this—This lady is either here as a proprietor—in which case the 5th section applies—or she is here under the mere permission of the proprietor. Therefore I take it that she either comes under the definition of proprietor in the 5th section or else she could be turned out as a person who has no title at all. If she had had a lease she could not have been turned out, and the action would have been one of maills and duties; but having only the permission of the proprietors to be there, she really becomes a person without a title, and could therefore be turned out as a squatter.

LORD KINNEAR—I agree.

LORD MACKENZIE—I am of the same opinion.

LORD JOHNSTON was absent.

The Court affirmed the interlocutors of the Sheriff and Sheriff-Substitute, dated respectively 8th March 1911 and 3rd February 1911, and dismissed the appeal.

Counsel for Appellant—Party. Agent—P. Maclagan Morrison, Solicitor.

Counsel for Respondents—James Stevenson. Agents—P. Gardiner Gillespie & Gillespie, S.S.C.

Monday, July 17.

FIRST DIVISION.

(Along with Three Consulted Judges.)

[Sheriff of Aberdeen.

LAURIE *v.* TOWN COUNCIL OF ABERDEEN, AND ANOTHER.

Road — Burgh — Statute — Pavement of Public Street — Defective Condition — Reparation—Aberdeen Police and Water-Works Act 1862 (25 *and* 26 *Vict. c. xxiii*), *secs.* 307, 317, *and* 323, *and Aberdeen Municipality Extension Act* 1871 (34 *and* 35 *Vict. c. cxli*), *sec.* 143.

The Aberdeen Police and Water-Works Act 1862 enacts—Section 307—"All pavements . . . laid or to be laid on the streets made or to be made within the limits of this Act . . . shall belong to and be the property of the Commissioners, and are hereby vested in them for the purposes of this Act." Section 317—"The Commissioners may from time to time cause all or any of the streets within the limits of this Act, or any part of such streets respectively, to be raised, lowered, altered, and formed in such manner and with such materials as they think fit, and the pavements thereof to be removed, or the same to be repaved, and they may also form, with such materials as they think fit, any footways for the use of passengers in any such street, and cause such streets and footways to be repaired from time to time." Section 323—"Every person who wilfully displaces, takes up, or makes any alteration in the pavement, flags, or other materials of any street under the management or control of the Commissioners, without their consent in writing, or without other lawful authority, shall be liable to a penalty not exceeding five pounds, and also in payment of a further sum, to be recovered as damages, not exceeding five shillings for every square foot of the pavement, flags, or other materials of the street, exceeding one square foot, so displaced, taken up, or altered."

The Aberdeen Municipality Extension Act 1871, section 143, provides that the Town Council may in the circumstances therein mentioned cause footways to be formed and laid out "and the expenses incurred in respect thereof (to be ascertained as hereinafter provided) shall be repaid to the Town Council by the owners of the lands before or opposite to which such . . . footways . . . shall have been made, and shall be recoverable as hereinafter provided, and such street shall thereafter be maintained by the Town Council."

The titles of a proprietor of a house in a public street within a burgh included the *solum* of a strip of the pavement. A subsidence took place in the adjoining strip of pavement, which produced an inequality in level between the two strips, and an accident was caused thereby.

Held (unanimously) that the Town Council was liable in damages, and (by a majority of the Seven Judges, *diss.* the Lord Justice-Clerk, Lord Salvesen, and Lord Mackenzie) that the proprietor was jointly liable along with the Town Council.

Baillie v. *Shearer's Judicial Factor*, February 1, 1894, 21 R. 498, 31 S.L.R. 390, *considered.*

The Aberdeen Police and Water-Works Act 1862 (25 and 26 Vict. cap. xxiii, secs. 307, 317, and 323 are quoted *supra in rubric.*

The Aberdeen Municipality Extension Act 1871 (34 and 35 Vict. cap. cxli), sec. 143, enacts—"In the case of any street of which the carriage or footways are formed of undressed or unsquared stones, or have not in the opinion of the Town Council been previously well and sufficiently laid out or formed, or paved, or causewayed, or flagged, and where one-half of the building areas along such street has been built upon or sold or feued out for the purpose of being built upon, or as soon as areas to that extent are so built upon or sold or feued out, the Town Council may, after notice as hereinafter provided, cause footways with proper gutters or channels to be formed and laid out, either on one side or on both sides, and along the whole or part of said street as they may direct; and the said gutters or channels and footways shall be constructed in such manner and form, and of such construction and breadth, of dressed granite stones, or of such other materials, all as the Town Council may direct, and the Town Council may cause the carriageway of such street, or such part thereof either in length or breadth as they may think proper, to be paved or laid with dressed granite stones, or with such other materials, and in such manner, all as the Town Council shall direct; and the expenses incurred in respect thereof (to be ascertained as hereinafter provided) shall be repaid to the Town Council by the owners of the lands before or opposite to which such carriageway, footways, gutters, or channels shall have been made, and shall be recoverable as hereinafter provided, and such street shall thereafter be maintained by the Town Council: Provided that in so far as the obligations contained in this section depend on the extent of front feued out or built upon, the provisions herein contained shall, in the case of streets forming outlets from the city, operate and apply to any and every two hundred yards of such street in the same manner as if that were the whole length of the street."

On 16th June 1909 William R. Laurie, gardener, 12 Great Western Place, Aber-