belonging to the old waterworks, it shall be apportioned among the whole parishes in which any portion of the works, old or new, completed or uncompleted, are locally situated? I am of opinion, and indeed I think it follows from what I have already said, that such a claim is inadmissible. The cases of *Dalbeattie, Dundee,* and *Glasgow* have, it seems to me, no application. The principle of these cases is quite intelligible and just, but it can only in justice apply where the whole subjects of the undertaking are contributing more or less to the revenue or profits of the undertaking. Now that, of course, cannot be predicated of the filters and piping in question; and therefore I am, on the whole matter, of opinion that the determination of the Valuation Committee is right, and that the complaint should be dismissed.

LORD STORMONTH DARLING—I concur.

The Court were of opinion that the determination of the Valuation Committee was right.

Counsel for the Appellants—Ure, Q.C.—Chree. Agents—M. MacGregor & Company, W.S.

Counsel for the Respondents—Dundas, Q.C.—Cullen. Agents—Bruce, Kerr, & Burns, W.S.

HOUSE OF LORDS.

Tuesday, May 10.

(Before Lord Herschell (in the Chair), Lord Macnaghten, and Lord Morris.)

COMMISSIONERS OF INLAND REVENUE *v.* TOD.

(*Ante,* June 16, 1897, 34 S.L.R. 704; 24 R. 934.)

Revenue—Stamp—Conveyance on Sale—Decree under Heritable Securities Act 1894 (57 *and* 58 *Vict. cap.* 44), *sec.* 8—*Stamp Act* 1891 (54 *and* 55 *Vict. cap.* 44), *sec.* 54.

Held (*rev.* judgment of the First Division) that a decree by the Sheriff under section 8 of the Heritable Securities Act 1894, following upon an unsuccessful exposure of property under the power to sell contained in a bond and disposition in security, and declaring the debtor's right of redemption extinguished and the creditor vested in the property, is a decree whereby property is transferred "upon the sale thereof" in terms of section 54 of the Stamp Act 1891, and is accordingly liable to an *ad valorem* duty.

The case is reported *ante ut supra.*

The Commissioners of Inland Revenue appealed to the House of Lords.

At delivering judgment—

LORD HERSCHELL—In this case there was a bond and disposition in security which contained, as is commonly the case, a power of sale. Under that power of sale the property was exposed for sale at a price not exceeding the amount due under the security—there was no purchaser. Thereupon the creditor, under the provisions of the 8th section of the Heritable Securities (Scotland) Act 1894, applied to the Sheriff for a decree in the terms of Schedule D of that Act, and that decree was made by the Sheriff. The question has arisen whether that decree should be stamped with an *ad valorem* stamp as coming within the terms of section 54 of the Stamp Act 1891, or whether it should be charged only with the duty prescribed in section 62 of that Act.

Now, section 54 of the Stamp Act of 1891 includes within the expression "conveyance on sale" amongst other things "every decree or order of any court" "whereby any property or any estate or interest in any property upon the sale thereof is transferred to or vested in a purchaser." Of course it is not in question that by this decree of the Sheriff property or estate or an interest in property was transferred to or vested in the creditor, but the dispute between the parties is whether it was so transferred or vested "upon the sale thereof" within the meaning of the 54th section.

Prior to the Act of 1894, although the creditor himslef might be willing to purchase the property—that is to say, to acquire the entire title to the property—it was not competent for him to do so—he could not bid at the sale; and consequently under the power of sale he was unable to become the purchaser. But by the provisions of the 8th section of the Heritable Securities Act 1894 any creditor who has taken steps to sell lands which he holds in security may become, to use for the moment a neutral expression, the absolute proprietor of that estate at a price, retaining his rights in respect of the personal obligation of the debtor to anything in excess of the prices at which he so becomes the proprietor. It is to be observed that he can only so become the proprietor after exposing the lands held in security for sale, and further that the effect of the bond and disposition is only to create a real burden upon the lands. That is the right of the creditor, the title to the lands subject to that real burden remaining in the original proprietor. After the decree the title is completely vested in the creditor, and he becomes the proprietor.

Now, when the creditor applies to the Sheriff for his decree, the Sheriff may consider that the property has not been exposed under the most favourable conditions for securing the best possible price. He may think that it ought to be again exposed for sale, and if so he is to fix the price at which it is to be again exposed for sale, and then the latter part of the section comes into operation, to which I will recur in a moment or two. But if the Sheriff does not require another exposure for sale, that must be on the ground that he regards the price at which it was exposed by the creditor as the highest price which under the most favourable conditions of sale could

be anticipated as being likely to be given by any bidder, including the creditor himself. Having come to that conclusion he makes the decree.

Now, what are the terms of the decree? It declares that the debtor "has forfeited the right of redemption reserved to him in the said bond and disposition in security, and that the said right is extinguished as from and after this date, and that the petitioner has right to and is vested in the lands described in the said bond and disposition in security" "as absolute proprietor thereof" "at the price of" so many pounds. Then there is to be inserted "the price at which the lands were last exposed or the price at which the lands have been bought in." Now, is not that in substance and in effect a provision that under those circumstances the creditor shall be treated as the purchaser, that the lands shall be adjudged to him as purchaser at the price at which he exposed them for sale, and which in the opinion of the Sheriff is the highest price which anyone, even including the creditor, would give? That, I confess, seems to me the substance of the transaction—the lands which were the property of the debtor are transferred to the creditor, and they are transferred to him at a price. I cannot see why it is the less a sale to him at that price than if they had been put up again for sale and he had bid that price himself, because he puts them up, although the Sheriff fixes the price at which they are to be put up, and he bids the price at which they are adjudged to him, and in respect of which the decree is made. I cannot see the slightest difference in principle on that account.

The effect and the meaning, I think, of this 8th section was to enable in such a case the exercise of a power of sale to be carried through in such a manner as that the creditor might be the purchaser himself at a price which he is willing to give for the lands, and which in the opinion of the Sheriff is a sufficient and proper price, rendering unnecessary any further competition.

Now, in the second case, where the Sheriff directs the lands to be re-exposed for sale at a price which he fixes, it is provided that the creditor shall have the right to bid for the purchase of the land at such sale. If he bids, and to use the language of the statute itself "purchases" at such sale, the lands become vested in him by one of two means—either the Sheriff may issue a decree in the very same form in which he is to issue a decree under the earlier part of the section if he thinks no second sale is necessary, or the creditor may grant a disposition of the lands to himself. Now, it was, I will not say admitted by the learned counsel, but he had difficulty in contesting, that if the creditor had granted a disposition to himself in the same manner as if he had been a stranger, there would not have been an *ad valorem* duty payable in respect of the conveyance upon the sale of those lands. But it is scarcely open to a contention, if that be so, that it cannot make any difference as to whether one form of carrying out the transaction or the other is adopted by which the lands vested in the creditor, because the result is precisely the same, and if a disposition granted by the creditor to himself would be a "conveyance upon a sale" within the meaning of section 54, it seems to me absolutely certain that a decree vesting the property in the creditor in the form of the schedule must equally be a "decree vesting the property upon a sale" within the meaning of section 54.

It is to be observed that by the proviso at the end of section 9 "the personal obligation of the debtor shall be reserved in full force and effect so far as not extinguished by the price at which the lands have been acquired." The creditor is treated, as it seems to me, as the purchaser at that price, and then the obligation of the debtor, except so far as by that price his obligation had been discharged, remains in full force and effect.

It has been said, and I agree, that the tax is not to be regarded as imposed unless the words in the statute are clear. Now, it is clear that by section 54 the intention was to include all instruments within its scope where property was "vested or transferred upon the sale thereof," and it seems to me that in substance (I am not speaking simply of the language used or the form) that is the effect of what is done by a proceeding under section 8 of the Heritable Securities Act 1894.

I regret to differ for these reasons from the learned Judges in the Court below, but I cannot help observing that what seems to me to be a very important circumstance, namely, that in the decree the lands are vested in the creditor at a price, namely, the price at which he exposes them for sale—is not referred to in the judgments. Nor is the fact referred to, that the form of decree is applied indifferently to the case of the creditor being adjudged to be entitled to the lands at that price under the first part of section 8, and to his being adjudged purchaser on bidding at a subsequent sale, if the Sheriff thinks it necessary that they shall be exposed to a sale again, under the latter part of the section. The Lord President says—"The question therefore comes to be, whether the unsuccessful exposure to sale and the application to the Sheriff constitute a sale in the sense of the 54th section." Now, it is not in my opinion merely an unsuccessful exposure to sale and an application to the Sheriff, but it is the decree which the Sheriff makes after and in connection with those two occurrences by which he vests the property in the creditor at the price at which it is put up for sale.

Then Lord Adam says—"There is no disposition contained in this instrument at all—no conveyance by any seller whatever—there is no disponee." And Lord Kinnear says that "a sale of land is a consensual contract by virtue of which the seller becomes bound to convey the land which is the subject-matter of the contract to the buyer for a price, and the conveyance on sale must be a conveyance which is executed in the performance of such a contract. There is no such contract here."

Now, in the case of the creditor himself bidding at a sale at which the lands are exposed at a price fixed by a Sheriff, there is no more a consensual contract than there is in the case now before your Lordships. Who are the consenting parties to that contract? The lands are equally put up by the creditor, and the creditor himself becomes the purchaser. What is the consensual contract in that case in respect of which the decree is made and is the instrument carrying out that consensual contract? No doubt the creditor consents to take the lands at that price, but so he does in the first case, because, having exposed the lands for sale at that price, he applies to the Sheriff to adjudge them to him at that price. Equally in both cases he consents to the land becoming his at that price, and there is no more consensual contract in the one case than in the other. And when it is asked who is the seller, the same difficulty may be put in the case of the creditor becoming the purchaser—he is allowed to sell to himself—he is both seller and purchaser. Without that statutory provision that would be incompetent according to law, but the statute has provided for it. It has in effect enacted that notwithstanding that difficulty he may, under the safeguards which the statute has provided, be both seller and buyer of the property.

For these reasons I am unable to concur in the view adopted by the Court below. It seems to me that this was a decree by which property was "transferred upon the sale thereof."

With regard to the question of costs, the Crown does not ask for them, and I think, quite rightly. The matter when it was first raised and brought to the notice of the Commissioners of Inland Revenue appears not to have struck them in the light in which they now regard it, and which has given rise to this litigation. They having at that time publicly made known their view that the *ad valorem* stamp was not required, but only a stamp under section 62, I think it is quite right that they should not have any costs of this litigation. Of course the respondent must repay to the Crown the costs which the Crown was compelled to pay to him in the proceedings in the Court below.

It has been said that difficulties may be caused by the decision which your Lordships are about to pronounce owing to the view of the Commissioners of Inland Revenue having been acted upon in several cases. Of course, it is not like a long standing course of practice, because the question only arose for the first time in the year 1895; but with these difficulties your Lordships are in no way able to deal. All you have to do is to determine what is the true construction of the Statute of 1891 in relation to transactions under the Heritable Securities Act of 1894. The only remedy would be—and I own it does not seem to me to be an unreasonable suggestion in respect of the transactions which have taken place upon the faith of the view propounded by the Commissioners of Inland Revenue in the first instance—that the Legislature might intervene, so that transactions which have taken place upon that basis should be validated, and only in those which might take place subsequently to this decision, the duty should be enforced, according to the law which your Lordships are about to lay down.

I move your Lordships that the judgment appealed from be reversed; that each party do bear and pay their own costs here and in the Court below; that the respondent do pay to the appellants the costs he has received from them.

I ought to add that my noble and learned friend the Lord Chancellor desires me to say that he has heard substantially the argument for the respondent, and that he entirely concurs in the view that the judgment of the Court below should be reversed.

LORD MACNAGHTEN—I am entirely of the same opinion. I think that the transaction under consideration was in reality a sale, and I think that the Sheriff's decree was, in the words of the Stamp Act, a decree by which the property was "vested in" the creditor "upon the sale thereof."

The proceedings under the Heritable Securities Act are very simple, and I think their effect is very plain. The creditor having put the property up for sale at a price not exceeding the amount due under his and other securities, and having been unsuccessful in his attempt to sell it, comes to the Sheriff and says, in the words of the 8th section, "I have 'failed to find a purchaser,' I cannot buy the land myself, I ask you to allow me either to be the purchaser at the price at which I have put it up for sale or to give me the chance of becoming the purchaser at a price which you fix." If it is carried out in either of those ways, it seems to me to be a sale, and nothing else, and I think the Legislature (it is unnecessary for me to go through the Act again) plainly regarded it as a sale from first to last. The same form of decree applies to both those cases—in each case the property held in security by the creditor is declared to be vested in him as absolute proprietor at a certain price.

With regard to the English authorities which were cited, I think it is quite enough to say that the analogy between a foreclosure decree and a decree under the Heritable Securities Act is not so close as to make it necessary to say anything about it. It may hereafter come under the consideration of the Superior Courts, but I think it better at present to say nothing about it.

LORD MORRIS—I am of the same opinion. The question is, shortly, whether under the Stamp Act a decree by the Sheriff transferring property is a decree "upon the sale thereof." The decree is in the form prescribed by Schedule D of the Heritable Securities (Scotland) Act, and that form of decree seems to contemplate the two alternatives set forth in section 8 of that Act—the first where the Sheriff makes the decree at once on the application of the

creditor, and the second alternative, where, instead of so granting a decree at once, he directs that the property shall be exposed for a re-sale at an upset price fixed by him. Those two alternatives are both contemplated in the words in a parenthesis in Schedule D. In the first case the price to be inserted where the blank is left in the schedule would be "the price at which the lands were last exposed" for sale before the application was made. In the case of the second alternative referred to in section 8, the words inserted would be "the price at which the lands have been bought in," which is the alternative in the parenthesis. In both cases it is treated as a sale. If it is a sale in the second alternative it appears to me to be a sale in the first alternative.

Again, section 9 would appear to me to be almost decisive, if not entirely decisive, upon the question of what should be the construction. It depends upon whether you apply the words "upon the sale being carried through" to the whole of the preceding section, or only to the immediately preceding part of the 8th section. If they are to be applicable to the whole section, section 9 describes the transaction whether taking place under the first or second alternative as a "sale." If the words "upon a sale being carried through" are to be applied only to the second alternative, that would be a statement by the Legislature that it did not apply to the first alternative, and that that was not a "sale." I am of opinion that the words "upon a sale being carried through under the immediately preceding section" apply to both alternatives. It is necessary that they should apply to the first alternative by reason of the proviso, which says, "Provided always that the personal obligation of the debtor shall be reserved in full force and effect so far as not extinguished by the price at which the lands have been acquired." That proviso could scarcely be a proviso upon a section which previously had not applied to the subject-matter.

Upon those grounds I am of opinion that the judgment of the Court of Scotland should be reversed.

Ordered that the judgment appealed from be reversed; that the parties each bear their own costs in this House and in the Court below; that the respondent do repay to the appellants the costs he has received from them.

Counsel for the Appellants—The Attorney-General — the Solicitor-General for Scotland—A. J. Young. Agents—Solicitor of Inland Revenue, Scotland and England.

Counsel for the Respondent—Aitken—Spence (of the English Bar). Agents — Linds & Company, for John Stewart & Gillies, Writers, Glasgow.

COURT OF SESSION.

Friday, March 4.

FIRST DIVISION.

[Lord Low, Ordinary.

FERGUSON *v.* PATERSON.

Trust — Personal Liability of Trustees — Culpa lata—Defalcation of Agent to Trust — Trust Money Deposited in Agent's Name.

The agent for a trust having received certain trust money for investment stated to the trustees that it was in the meantime lying in a bank upon deposit-receipt. The trustees having called upon him to produce the receipt he made the excuse that he could not get access to it at the moment, but undertook to send it to them next day. In point of fact the money had not been deposited by the agent, but had been appropriated to his own use. Having deposited other funds in the bank, he sent to the trustees a deposit-receipt for the amount, dated the day after the meeting, taken in his own name on behalf of the trustees. The trustees had no reason to doubt the honesty of the agent, but thinking that the money should be deposited in their own names, called upon the agent for the purpose of having the transference made, and being unable to see him owing to his illness, wrote instructions to him to that effect. In the meantime the agent drew out the money and appropriated it to his own use.

Held that the trustees were not liable for the defalcation of the agent, in respect that as soon as they found out that the money was not deposited in their names they had taken every reasonable step to have it transferred.

Observed that it is contrary to the duty of trustees to allow an agent or factor to deposit trust funds in a bank in his own name for behoof of the trustees.

Mr James Ferguson, pawnbroker, Edinburgh, died on 1st April 1854, leaving a trust-disposition and settlement and relative codicils whereby he conveyed his whole estate to trustees. The trust-disposition contained the following clause of indemnity:—"*Sexto*—As this trust may last for a period of years, I empower my said trustees to appoint a factor under them, and to pay to him such salary as they may consider proper, and such factor, whether one of themselves or not, shall be entitled to such salary as shall be fixed; and my said trustees shall not be liable for the intromissions of such factors, or for debtors or companies to whom or where said estate shall be lent or invested, further than their being habit and repute responsible at the time of such loan or investment; neither shall they be liable for any agent who, in transacting the business of this