

Saturday, June 19.

FIRST DIVISION.

RIDDELL'S EXECUTORS,  
PETITIONERS.

(*Vide Gillespie v. Riddell*, in the Court of Session, February 20, 1908, 45 S.L.R. 514, 1908 S.C. 628; and in the House of Lords, November 10, 1908, 46 S.L.R. 29.)

*Lease—Entail—Obligation to Take Over Sheep Stock—Lease by Heir of Entail—Transmissibility of Obligation against Executors of Lessor.*

An heir of entail in possession granted leases of sheep farms in which there was an obligation on the landlord (proprietor) to take over from the tenants at the end of the leases the sheep stock which the tenants received on entry, and at the same prices. The grantor of the leases having died and his successor in the entailed estates having refused to take over the stock, the tenants sought to enforce the obligation against the grantor's executors, maintaining that they were bound to take over the stock at the termination of the leases or to pay damages.

*Held* that the obligation had transmitted against the executors, and that, as such, they were liable to make it good.

[Reference is made to the case of *Gillespie v. Riddell*, reported *ante, ut supra.*]

On 29th April 1909 William Neale Bubb and another, executors and trustees of the late Sir Rodney Stuart Riddell of Ardnamurchan and Sunart, Baronet, presented a petition under the British Law Ascertainment Act 1859 (22 and 23 Vict. cap. 63) for the opinion of the Court of Session on a case stated by the High Court of Justice in England, Chancery Division, as to their obligations as executors foresaid under certain leases of sheep farms on the entailed estate of Sunart granted by the late Sir Rodney while heir of entail in possession of the said estates.

By a lease (called the "Ardery lease," ) dated 29th May and 6th June 1903, and made between the said Sir Rodney Stuart Riddell (first party), and Charles Gordon Gillespie (second party), which lease Sir Rodney "warrants at all hands against all mortals," the first party let to the second party and his heirs the farms, grazings, and croft therein specified and described as forming part of the entailed estate of Sunart for fifteen years from the term of Whitsunday 1903, determinable, nevertheless, at the option of either party at the end of the fifth or tenth year by twelve months' previous notice. The obligations of the second party under the Ardery lease included, *inter alia*, the following:—"He (*i.e.*, the second party) shall deliver at the end of the lease to the landlord or incoming tenant, as far as possible, not more than the same number of sheep, and the same classes

as he receives on his entry, and the proprietor agrees that the second party or his representatives shall receive the same prices as he paid on his entry, provided always that the landlord or incoming tenant shall not be bound to take over more ewes, ewe hogs, or tups, than the tenant took over at his entry; further, the proprietor or incoming tenant will not be bound to take over more than fifty of the following three classes, viz.—One, two, and three year old widders over and above the number of stock the tenant took over at his entry, and the second party during the last year of this lease, whether at either of the breaks or at the natural expiry, shall not keep a greater number on the farms than the proper stocking of the farm." Certain reservations were made on behalf of "the first party, his heirs and successors," and Sir Rodney by name, and the lease in places in connection with these spoke of "the landlord."

By a lease (hereinafter called the "Ranachan lease") dated the 25th October and the 8th November 1904, and made between the said Sir Rodney Stuart Riddell, therein described as "the landlord," and the said Charles Gordon Gillespie, therein described as "the tenant," the landlord let to the tenant and his heirs the farms and grazings therein specified, and described as forming part of the entailed estate of Sunart, for fifteen years from the term of Whitsunday 1905, determinable, nevertheless, at the option of either party at the end of the fifth or tenth year on twelve months' previous notice. The obligations of the tenant under the Ranachan lease included, *inter alia*, the following:—"At the expiry of this lease the tenant shall deliver to the landlord or incoming tenant a sheep stock of not more than 1300 of all classes at the prices in the respective classes paid by the tenant at his entry, and the landlord hereby binds himself and his foresaid to take the said sheep stock to the foresaid number of 1300 over from the tenant and at the same prices." The landlord reserved to himself, his heirs and successors, certain rights, and bound himself and his foresaids to warrant the lease.

By a lease (called "Milligan's lease") dated the 18th and 22nd July 1901, and made between the said Sir Rodney Stuart Riddell of the one part and James Milligan of the other part, Sir Rodney let to the said James Milligan and his heirs the farms and grazings therein mentioned, and described as forming part of the entailed estate of Sunart, for the term of ten years from Whitsunday 1899. The lease contained the following clause:—"At the termination of this lease the incoming tenant or proprietor shall be bound to take over the average stock of sheep on the farms, but specially providing and declaring that the said stock to be taken over shall not exceed 6500 sheep, as the same may be valued by two men mutually chosen as arbiters, or by an oversman to be appointed by the said arbiters, declaring that if the said arbiters should not agree in such appointment said oversman shall be

appointed by the Sheriff of Argyllshire on an application by either the proprietor or tenant, and declaring that security for the price of the stock on the respective farms shall be given before delivery, and also declaring that the price so fixed shall be paid by the landlord or incoming tenant on delivery or as may otherwise be fixed by the arbiters or by the parties themselves." Sir Rodney bound himself, his heirs and successors to warrant the lease. Certain reservations were made on behalf of "the proprietor."

By a lease (called "Moir's lease") dated the 2nd and 8th June 1906, and made between the said Sir Rodney Stuart Riddell on the one part and William Boyd Moir on the other part, Sir Rodney let to the said William Boyd Moir and his heirs the farms and grazings therein mentioned, and described as forming part of the entailed estate of Sunart, for sixteen years from the term of Whitsunday 1906, determinable, nevertheless, by either party at the end of the sixth and eleventh years on twelve months' notice. The lease provided as follows:—"The proprietor or incoming tenant shall, at the termination of this lease, whether at the natural expiry or at any break, be bound to take over not more than the same number and classes of sheep as the said William Boyd Moir shall take over as aforesaid on his entry at Whitsunday 1906 (but this obligation shall not be held to apply to the lambs of the year of the delivery of the stock), and that at the same price or prices as the said William Boyd Moir shall pay therefor on his entry as above mentioned, unless it shall be shown that the stock of sheep on the subjects let is not then of the same quality and description as when taken over by the said William Boyd Moir, when there shall be a corresponding reduction in price, and he shall be bound to give the number of sheep on the farms according to his annual clipping and dipping lists whenever asked by the proprietor or his agents, and any difference arising at expiry hereof with regard to the quality of the sheep stock, or the price to be paid therefor, or otherwise, shall, in case of difference of opinion, be referred to the arbitration of two neutral men mutually chosen as arbiters, or by an oversman to be appointed by the said arbiters." There were reserved to "the proprietor" certain rights, as also to "the landlord." Sir Rodney bound himself, his heirs and successors, to warrant the lease.

On the death of Sir Rodney in 1907 Miss Louisa Margareta Riddell, his successor in the entailed estate of Sunart, repudiated the obligation to take over the sheep stock contained in the leases. It having been decided that she was not bound to take over the stock, the tenants made a claim against Sir Rodney's executors, maintaining that they (the executors) were bound as such executors to take over the sheep stock at the termination of the various leases, and failing their doing so that they would be liable in damages. In these circumstances the executors raised an action

in the Chancery Division of the High Court of Justice in England for the administration of Sir Rodney's estate, in the course of which the Court of Session was requested to pronounce its opinion upon the following questions:—"(1) Whether upon the true construction of Milligan's lease, and in the circumstances above stated, the whole or any and what part of the heritable and moveable estates respectively of the said testator Sir Rodney Stuart Riddell is, according to the law of Scotland, under any and what liability in respect of the clause in Milligan's lease contained, as to taking over and paying for the stock of sheep on the farms comprised in that lease at the term of Whitsunday 1909. (2) Whether, upon the true construction of Moir's lease, and in the circumstances above stated, the whole or any and what part of the heritable and moveable estates respectively of the said testator is, according to the law of Scotland, under any and what liability in respect of the clause in Moir's lease contained, as to taking over and paying for the stock of sheep on the farms comprised in that lease at the expiration or sooner determination of that lease. (3) Whether upon the true construction of the Ranachan lease, and in the circumstances above stated, the whole or any and what part of the heritable and moveable estates respectively of the said testator is, according to the law of Scotland, under any and what liability in respect of the clause contained in the Ranachan lease, as to taking over and paying for the stock of sheep on the farms comprised in that lease at the expiration or sooner determination of that lease. (4) Whether upon the true construction of the Ardery lease, and in the circumstances above stated, the whole or any and what part of the heritable and moveable estates respectively of the said testator is, according to the law of Scotland, liable to the said Charles Gordon Gillespie for such loss (if any) as he has sustained by reason of his stock of sheep on the farms comprised in the Ardery lease not having been taken over in terms of the lease."

Argued for petitioners, Sir Rodney's executors—There was no obligation on the executors with respect to any of the leases. The obligations were imposed not on the grantor of the leases personally, but on him *qua* proprietor of an entailed estate. An executor could not be called on to fulfil an obligation imposed on the succeeding heir of entail, and the fact that the obligation was found to be invalid did not render the executor liable—*Duke of Bedford v. Earl of Galloway's Trustee*, July 8, 1904, 6 F. 971, 41 S.L.R. 804. The case of *Gardiners v. Stewart's Trustees*, 1908, S.C. 985, 45 S.L.R. 800, founded on by the claimants, was distinguishable. *Esto* that in *Police Commissioners of Dundee v. Straton*, February 22, 1884, 11 R. 586, 21 S.L.R. 410, an obligation on a vassal to pay feu-duties was held binding on his representatives though he had disposed the feu, the words imposing the obligation were much wider than those used here.

Argued for the claimants—The obligation in the leases was a personal one and therefore the executor was liable. A man's representatives were bound by his obligations, unless an intention to the contrary was clearly expressed or implied. If the obligations in question had become prestable during Sir Rodney's life, all his estate would have been liable. The terms of the leases showed that the obligation to take over the stock was a personal one, and that being so, it was binding on the grantor's executors—*Moncrieff v. Tod & Skene*, May 27, 1825, 1 W. & S. 217; *Fraser v. Fraser*, May 29, 1827, 5 S. 722 (673); *Gardiners v. Stewart's Trustees* (cit. supra). Moreover, in all the leases the contract was between Sir Rodney on the one hand and the respective lessees on the other. It was, in short, a personal obligation between individuals, and at common law such obligations were binding on the grantor's representatives.

At advising, the Court (the LORD PRESIDENT, LORD KINNEAR, and LORD PEARSON) answered questions 1, 2, and 3 by declaring that the whole of the heritable estate of the late Sir Rodney Riddell held by him in fee-simple, as also his whole moveable estate, was liable to make good the obligations contained in Milligan's lease, Moir's lease, and the Ranachan lease, to take over and pay for the stock of sheep on the farms comprised in these leases at the term of Whitsunday 1909 in the case of Milligan's lease, and at their expiration or sooner determination in the case of the other two; and question 4 by declaring that the whole heritable estate held by the late Sir Rodney in fee-simple, as also his whole moveable estate, was liable to make good to Charles Gordon Gillespie the loss, if any, which he had sustained by the stock of sheep on the farm contained in the Ardery lease not having been taken over and paid for in terms of the lease.

Counsel for Petitioners—Morison, K.C.—Chree. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Claimants (Milligan's Trustees)—Constable, K.C.—Jameson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Claimants (Gillespie and Moir)—Constable, K.C.—Jameson. Agents—Macrae, Flett, & Rennie, W.S.

Friday, June 4.

FIRST DIVISION.

[Sheriff Court at Kirkcaldy.

MACNAB v. NELSONS.

*Sheriff—Process—Prorogation—“Prorogate”—Lodging Production or Pleading—Implementing Order—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), First Schedule, Rule 56.*

The Sheriff Courts (Scotland) Act 1907, First Schedule, Rule 56, enacts—“In a defended action (including a jury cause), when any production or pleading has not been lodged or order implemented within the time required by statute or ordered by the Sheriff, or where in a defended action either party fails to appear by himself or his agent at any diet, or fails to make payment of any Court dues or deposit, the Sheriff may grant decree as craved, or of absolvitor, or may dismiss the action with expenses, but the Sheriff may, upon cause shown, prorogate the time for lodging any production or pleading or implementing any order. If all parties fail to appear, the Sheriff shall, unless sufficient reason appear to the contrary, dismiss the action.”

Held that the power of the Sheriff to “prorogate” the time was not restricted in its exercise to the period of the currency of the time, but that after the time had expired the Sheriff had power to allow further time.

*Sheriff—Process—Counter Claim—Competency of Counter Claim when No Pecuniary Conclusion in the Action—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), First Schedule, Rule 55.*

The Sheriff Courts (Scotland) Act 1907, First Schedule, Rule 55, enacts—“Where a defender pleads a counter claim it shall suffice that he state the same in his defences, and the Sheriff may thereafter deal with it as if it had been stated in a substantive action, and may grant decree for it in whole or in part, or for the difference between it and the claim sued on.”

Held that a “counter claim” must be a claim which could be set off pecuniarily against the claim sued for, and that when the conclusions of the action itself were not pecuniary, but merely declaratory, there could be no such thing as raising in defence a counter claim.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), First Schedule, enacts—Rule 43—“Within six days of the condescence being lodged, the defender shall lodge his defences.”

Rules 55 and 56 are quoted in the rubric.

John Macnab of Kinglassie, Fifeshire, heritable proprietor of the farm of Parknook, raised an action in the Sheriff Court at Kirkcaldy against John Nelson and David Nelson, both farmers, residing at