

opinion upon it. On the facts as stated in the case I do not see how we can give effect to the plea of bar.

The answer to the first question should, in my opinion, be that the Court finds that the provisions of section 29 (2) apply to the 50 acres which were under cultivation at the expiry of the lease, but in so far only as the cultivation thereof had not been in contravention of the terms of the lease.

Further, find that the tenant has a claim for compensation for the erection of the forcing-house in question, but only in so far as it was not erected or enlarged in contravention of the terms of the lease, and continue the cause in order that parties may obtain the opinion of the arbiter; and, as regards the second question, that it is unnecessary to answer it, the appellant not having insisted in his plea of bar.

LORD PRESIDENT—LORD KINNEAR concurs in Lord Mackenzie's opinion.

LORD PRESIDENT—It is the opinion of the majority of the Court—Lord Johnston would go further—that we cannot deal with the expenses until we know what the arbiter has done, and we shall therefore pronounce an order upon the arbiter to state whether the cultivation of the rhubarb and the erection of the forcing house were in contravention of the lease. If he answers that question affirmatively we shall then find the respondent entitled to expenses.

The Court pronounced this interlocutor—

“Recal the interlocutor of the Sheriff-Substitute of 23rd August 1912: Find, in answer to the first question of law in the case, that the provisions of section 29 (2) apply to the fifty acres which were under cultivation at the expiry of the lease, but in so far only as the cultivation thereof had not been in contravention of the terms of the lease: Further, find that the tenant has a claim for compensation for the erection of the forcing-house in question, but only if and so far as the said forcing-house constitutes an improvement in connection with a cultivation which was not prohibited by the terms of the lease: Find it unnecessary to answer the second question of law in the case, and remit to the arbiter to proceed: *Quoad ultra* continue the cause.”

Counsel for Claimant and Appellant—Dean of Faculty (Scott Dickson, K.C.)—Guild. Agents—Guild & Guild, W.S.

Counsel for Respondent—Constable, K.C.—Mitchell. Agents—John C. Brodie & Sons, W.S.

Tuesday, January 28.

FIRST DIVISION.

MACRAE v. LEITH.

Right in Security—Agent and Principal—Heritable Security—Lien—Right of Creditor in Possession to Delivery of Leases and Estate Documents in Hands of Estate Factor.

A heritable creditor in possession under a decree of mails and duties, wishing to appear at an approaching meeting of the Land Court, presented a petition for delivery of the “leases . . . and all other documents whatever” connected with the estate and which were then in the hands of the factor. The latter lodged answers in which he maintained that he was entitled, in virtue of his lien as factor, to retain them in security of his claims against the estate.

Held that the petitioner was entitled to delivery for the purposes stated of the leases, and also of such of the other documents as served to show the relation between the estate and its tenants, and respondent *ordained* to lodge an inventory of the documents in his possession in order that these might be ascertained.

On 11th December 1912 Sir Colin G. Macrae, W.S., Edinburgh, heritable creditor in possession under a decree of mails and duties, dated 1st June 1911, of the estate of Thrumster in the county of Caithness, *petitioner*, presented a petition to the First Division for delivery of “the whole leases, writs, books, accounts, vouchers, and all other documents whatever, of or in connection with the estate of Thrumster, to which the petitioner as heritable creditor in possession has right, and in the possession or under the control of” David Leith, bank agent, Wick, *respondent*, who claimed to retain them in respect of a balance which he alleged to be due to him as factor on the said estate.

The petitioner averred—“The necessity of obtaining the said documents has recently become a matter of extreme urgency, owing to intimation having been received by the petitioner that the Land Court appointed under the Small Landholders Act of 1911 is to begin its sittings in Wick on the 13th September next for the purpose of adjudicating on claims by the landholders and statutory small tenants on the estate of Thrumster for valuation or re-valuation of holdings under the provisions of the said Act. No less than fifty-four claims have been lodged by small tenants on the estate of Thrumster, and the petitioner finds it essential to have immediate access to the said leases, books, and other documents of the estate for the purpose of answering these claims. The petitioner has applied to the said David Leith on more than one occasion for production of these documents, but the said David Leith declines to comply with his

request unless and until a sum of £112 is paid to him as aforesaid, and the petitioner avers that the said David Leith is using the circumstances of the present Land Court inquiry as an occasion for causing the petitioner, inconvenience and prejudice and thereby obliging him to pay the said amount.

“The position in which the petitioner is now placed is one of very serious gravity, and unless he can obtain the papers referred to he may be found liable in claims for reduction of rent and ultimate compensation which he is prevented from answering through the absence of documents which would sufficiently explain the circumstances.”

Mr Leith lodged answers, in which he stated, *inter alia*—“The said books, documents, and others referred to in the petition are the property of the trustees on said estate, and the petitioner as a mere encumbrancer thereon has no right or title to delivery thereof. Moreover, the respondent as factor on said estate has a good and valid lien thereon, and cannot be compelled to part therewith until his just and lawful claims against the said estate are satisfied.”

Argued for petitioner—Even assuming that the respondent was factor, a factor's lien could not defeat the petitioner's right as security holder to possession or at least exhibition of the documents. He was also clearly entitled to have the use of them in support of his claims before the Land Court, for the Act gave all parties having a right or interest in the land an opportunity of being heard—Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), sec. 7 (10).

Argued for respondent—The petitioner's claim was founded on the assignation of writs in the bond and disposition in security, but that clause did not cover leases, accounts, &c. It only included the titles to the estate—Titles to Land Consolidation (Scotland) Act 1868 (32 and 33 Vict. cap. 101), sec. 119; Glog and Irvine on Rights in Security, p. 90; Juridical Styles (3rd ed.), vol. i, 289; *Schaw v. Blacks*, November 21, 1888, 26 S.L.R. 545. The assignation to writs could not cover leases, for if it did a creditor would not require to raise an action of mails and duties.

[LORD PRESIDENT—The right to the rents vests on the disposition of the lands. It is so stated by Erskine, iv, 1, 49.] *Esto* that the petitioner was entitled to delivery of the leases for submission to the Land Court, he was not entitled to all the documents called for. These the respondent was clearly entitled to retain in virtue of his lien as factor, or at all events until his claims against the estate had been satisfied—*Glendinning v. Hope & Company*, 1911 S.C. (H.L.) 73, *per* Lord Kinnear at p. 78, 48 S.L.R. 775.

At advising—

LORD PRESIDENT—This is a petition at the instance of Sir Colin Macrae, and it asks for an order upon the respondent, David Leith, to deliver to the petitioner

the whole leases, writs, books, accounts, vouchers, and all other documents whatever, of or in connection with the estate of Thrumster, to which the petitioner as heritable creditor in possession has right, and which are in the possession or under the control of the said David Leith.

The petitioner is a trustee who is the holder of a bond and disposition in security in ordinary form granted by a predecessor of the present possessors of the estate of Thrumster. The estate at this moment is in the hands of trustees so far as the title is concerned, but the interest on the bond not having been duly paid, the petitioner on 1st June 1911 entered into possession by means of a decree in an action of mails and duties, and is now in possession under the decree. The estate was managed by the trustees through a factor, and the respondent Mr Leith in his answers alleges that he is factor. The reason why the petitioner asks for these various documents is that a sitting of the Land Court has been arranged for this part of the country and various tenants are in the course of making applications for reduction of rent. The petitioner wishes to appear at the Land Court in order to be heard. Now the petitioner's interest in that matter is quite clear. He is in possession under his decree of mails and duties, and if a rent is reduced by the Land Court he will, of course, get less at the next term when he uplifts. I think his title and interest to appear would have been sufficiently evident even if nothing had been said; but the matter is made perfectly clear by the Act itself, because it provides—section 7 (10)—with reference to the orders which the Land Court can make for settling a fair rent, that before making such an order the Land Court shall give all parties having a right or interest in the land an opportunity of being heard. Now that clearly gives a title to the bondholder. He is in possession under his decree in the action of mails and duties, and his reason for wishing the documents is obviously legitimate.

The petition is resisted by the respondent upon two grounds. In the first place, he says that the petitioner has no right as heritable creditor to the various estate documents. I shall have a word or two to say afterwards as to the nature of the documents, but for the moment I am going to take the simplest document, namely, the lease, and the respondent contends that the petitioner has no right to the leases. I think that is an entire mistake, and the only way in which the argument became possible was that at first it rather seemed from some words used in the petition as if the demand were based upon the clause of assignation of writs. I do not think the clause of assignation of writs has anything to do with it. The bondholder under a bond and disposition in security has got a conveyance of the estate. It is a conveyance which is redeemable, although irredeemable in a certain set of circumstances—the old well-known form of words “heritably and redeemably, but irredeemably in the case after mentioned” shows

that. There is also a clause of assignation of rents but although the assignation of rents is a clause in common form, I do not think it would have made any difference if there had not been any such clause. That is clearly indicated by Erskine (iv, 1, 49), who says that the action of maills and duties "is competent not only to a proprietor who has a feudal right perfected by seisin, but to a simple disponee or assignee, because a right to the rents is included virtually under a disposition of the lands."

Now there is here a disposition of the lands. It is only a redeemable disposition and may be got rid of. I think it follows that anything that the petitioner may get here does not go to him as his property. He merely gets the right to use it for legitimate purposes. Take the ordinary and most simple case, where a man is in possession of a decree of maills and duties, and goes to the tenant and says—"There is my decree, pay me your rent of £50 or whatever it is," and the tenant says, "No, my rent is not £50, it is £25." How is that question to be determined unless the demand for the lease is granted? The learned counsel for the respondent tried to say that the ordinary custom was to go to the valuation roll. No doubt for convenience it is; but after all the valuation roll has got no more to do with it than the directory has, and the action of maills and duties has been part of the law of Scotland for hundreds of years, whereas the valuation roll came into being only in 1854. That part of the argument therefore was quite inept.

But then the respondent went on to contend that notwithstanding that he had a right of retention as factor. Now it seems very doubtful from the documents produced before us whether this gentleman is factor or not. That he has been acting as factor is pretty clear, but that he holds the position of factor is more than doubtful. I do not think it necessary to go into that. I assume that he is factor. What right has he to resist the production of the leases which he holds? The only person according to the law of Scotland who has got such a right against all and every other person is a law agent, and he doubtless has that right even against the heritable creditor, although the heritable creditor's infetment was dated long before the law agent's account was incurred. That was settled a very long time ago by the case of the *Creditors of Hamilton of Provenhall* 1781, M. 6253, and that case has been followed and regretted ever since, and in the various judgments—I do not need to quote them, there is a whole series of them which deal with that case—the learned Judges have always said that they cannot go back on the *Creditors of Provenhall*, because it was settled so long ago, but that the doctrine is never to go one whit further, and certainly it has never been extended to anyone else than a law agent. It was pled that the effect of the case of *Glendinning v. Hope & Company*, 1911 S.C. (H.L.) 73, which was decided in the House of Lords about two years ago,

was to alter that rule. I do not think that case has anything to do with it. That decision was based on the old doctrine that where there are contracts between A and B, A cannot call upon B to fulfil his part of either one or several contracts while he, A, is refusing to fulfil his part of one or more of the contracts. In that case a stockbroker who refused to deliver a transfer which he had got was held to be entitled to do so because the client was refusing to pay under another stockbroking transaction. There is no contract whatever between this bondholder and the gentleman who calls himself factor. There is no question of mutual prestations between them, and therefore the case of *Glendinning* has no application.

I now come to the question of what the petitioner is entitled to get. I do not think that the petitioner here can be blamed for having put his prayer in a general form, and for having used words which probably, indeed I might say certainly, go beyond the measure of his right, because as he was entirely refused access to the documents he really does not know what the respondent has got. I think the way out of that is very clear. It is to pronounce a summary order on the respondent to lodge an inventory of what he has got, and then the petitioner will be able to say what he conceives he is entitled to. But in order to assist the parties I may say generally that, while I think that the petitioner is entitled to have the leases, and everything that shows the relation of contract between the estate and the tenant, I do not think he has any right to ask for estate documents which have been created simply for the proprietor's own uses, and which have nothing to do with the contract between him and his tenants, and therefore the crave for books and so on may go far beyond what the petitioner is entitled to crave. I do not think a book is necessarily outside the crave, because it might be that a contract between the landlord and his tenant was made by an entry in the books, but ordinary books which are for the proprietor's own use, and for his own purposes, seem to me not to fall within the class of documents which the bondholder ought to get.

LORD JOHNSTON—I agree with your Lordship. I do not think that this gentleman is factor, although it is not necessary to decide that question, because there is a passage in his own answers which I think practically prevents him saying that he is so. But assuming that he is factor, it seems to me that the use of the term "factor's lien" is misleading. There is a common enough use of the expression "factor's lien," but the use is, I think, confined to cases of mercantile agency, and has not been extended beyond that. It was because in mercantile agency goods are often bought and sold, shipped and received, advances made thereon, and responsibilities undertaken thereon, that the lien was given to mercantile agents over what could be turned into money,

such as goods, claims, bills, and so on, and I do not think it has ever in practice been held that this factor's lien could or should extend to an estate manager who is called in Scotland a factor, but who in England would be called a land agent.

Now this gentleman pleads, and must plead, his alleged lien as high as if he were a law agent. No case has arisen in Scotland in which this demand has been put forward. But I have come across a case in England to which I think it is worth while to draw attention. The report is so very brief that I may read it. It is the case of *Champernown v. Scott*, in which the precise question we have here came up for consideration. The case came before the Vice-Chancellor, Sir John Leach, and is reported in 6 Maddock 93, and also in 22 Revised Reports 248. A motion was made that the defendant might deliver up books and papers.

The defendant was a solicitor, and insisted that he had a lien upon them, and his answers stated that he received them in his capacity of steward of a manor and not as solicitor.

The Vice-Chancellor held that though a solicitor had a lien upon all papers delivered to him in that character, not only for professional business in the matter of the papers, but for all professional business whilst they remained in his hands, yet that he had no lien as solicitor on papers which he received as steward.

That seems to be exactly in point. And in accordance with it I hold that this alleged lien cannot be sustained.

LORD PRESIDENT—LORD DUNDAS CONCURS.

LORD KINNEAR and LORD MACKENZIE did not hear the case.

The Court pronounced this interlocutor—

“Order the respondent David Leith within eight days to deliver up to the petitioner the whole leases mentioned in the prayer of the petition, and further, to lodge in process within eight days an inventory of all other writs and documents in his possession, and decern.”

Counsel for Petitioner—Hon. W. Watson.
Agents—Macrae, Flett, & Rennie, W.S.

Counsel for Respondent—W. T. Watson.
Agents—Melville & Lindesay, W.S.

Wednesday, January 29.

SECOND DIVISION.

[Lord Ormidale, Ordinary.]

STURROCK v. CARPHIN.

Bankruptcy—Trustee—Personal Liability—Adoption of Bankrupt's Contract.

The trustee on the sequestrated estate of a bankrupt, and of the firm under which he carried on business, having brought an action against the bankrupt's former partner under the deed

of dissolution of the copartnership, the latter thereupon brought an action against the trustee for implement of the obligations thereby undertaken by the bankrupt. Held that the trustee had not by so suing adopted the deed of dissolution so as to render himself personally liable for the obligations incurred by the bankrupt thereunder.

John Sturrock, solicitor, Edinburgh, pursuer, brought an action against George Henry Carphin, C.A., Edinburgh, trustee on the sequestrated estate of the late John Logie Robertson, W.S., Edinburgh, and of the firm of Wylie & Robertson, W.S., of which Mr Robertson was sole partner, and also against William Robertson, F.F.A., Edinburgh, as Mr Robertson's cautioner for any interest he might have, *defenders*, for declarator that the defender Carphin had adopted a memorandum of agreement between Mr Robertson and the pursuer dated 30th December 1907, providing for the dissolution as at 10th November 1907 of the firm of which Mr Robertson and the pursuer were then partners, and that the pursuer was bound as trustee and also as an individual to implement the obligations therein undertaken by Mr Robertson, and in particular to free and relieve the pursuer of all claims and liabilities to which he was subject or which he had paid as a partner of the dissolved firm.

The memorandum of agreement for the dissolution of the copartnership provided, *inter alia*—“4. In respect that the said John Logie Robertson is to continue the business of Wylie & Robertson for his own behoof, the partners agree as follows:—The said John Logie Robertson will take over the whole assets and liabilities of the firm, conform to balance-sheet as at tenth November nineteen hundred and seven, and signed as relative hereto, it being expressly stipulated that the said John Sturrock shall not be liable for any of the liabilities which may be shown in the said balance-sheet, but subject always to clause sixth hereof; the said John Sturrock on the other hand agreeing not to make any claim on the firm of Wylie & Robertson in respect of capital, accounts outstanding, goodwill, or any other claim which he could make, with the exception of the furniture to be delivered to him conform to inventory annexed, and signed as relative hereto. . . . 6. . . . [Arrangement as to a cash-credit bond.] . . . 7. The said John Logie Robertson, as principal, and the said William Robertson, as cautioner and as taking burden on him for the said John Logie Robertson, hereby discharge and free and relieve (subject to the agreement mentioned in article sixth hereof) the said John Sturrock of all claims and liabilities of every kind against the said firm of Wylie & Robertson as partner of the said firm.”

The pursuer averred—“(Cond. 5) On 20th March 1909 the defender George Henry Carphin, as trustee foresaid, raised an action in the Court of Session against the present pursuer, in which he sued for payment to himself, the said George Henry Carphin, as trustee foresaid, of the sum