

Thursday, December 21.

SECOND DIVISION.

[Sheriff Court at Aberdeen.

M'BAIN v. GORDON.

Rates and Assessments—Lease—Long Leaseholder—"Owner"—Relief from Owner's Rates—Payment of Assessments and Rates Imposed by Subsequent Legislation.

The holder of a long lease, dated in 1853, brought in 1914 an action to recover from the representative of the lessor, an heir of entail, the amount paid by him and his predecessors as "owner's" assessments, burgh, county, and parish. The lease contained a clause whereby the leaseholder undertook to pay a proportion of what at that time constituted the local public burdens. The leaseholder had been entered under the Valuation Acts in the valuation roll in the owners' column, and had as owner been assessed for all existing rates and assessments. *Held* that the lessee was rightly entered as owner in the valuation roll and properly assessed as such, and that he had no right of relief.

William M'Bain, solicitor, Aberdeen, pursuer, brought an action in the Sheriff Court at Aberdeen against Arthur John Lewis Gordon of Ellon, Ellon Castle, Aberdeen, defender, for payment of a certain sum representing the amount of assessments, rates, and taxes on ownership, paid by the pursuer or his predecessors in the lease in respect of subjects at 3 Ythan Terrace, Ellon, a long lease of which had been granted in 1853 by Alexander Gordon of Ellon to George M'Bain and John M'Bain, the predecessors in the lease of the defender and the pursuer respectively.

The assessments, rates, and taxes sought to be recovered were as follows:—“(1) By the burgh of Ellon, which was created a Police Burgh in terms of the Burgh Police (Scotland) Act 1892—sewer assessment, water assessment, road assessment, and general public health assessment. These assessments are imposed under and in terms of the Burgh Police (Scotland) Acts 1892 and 1903, the Town Councils (Scotland) Acts 1900 and 1903, the Burgh Sewerage, Drainage and Water Supply (Scotland) Act 1901, the Roads and Bridges (Scotland) Act 1873, the Public Health (Scotland) Act 1897, and subsequent Acts amending the same, or one or other of these statutes. (2) By the Council of the county of Aberdeen, which was created under and in terms of the Local Government (Scotland) Act 1889—county general assessment, county voters registration assessment, Aberdeen Court-house assessment, Diseases of Animals Acts assessment, general purposes assessment. (3) By the Parish Council for the parish of Ellon, which was created under and in terms of the Local Government (Scotland) Act 1894—education rate, burial ground rate, poor rate.”

The facts of the case were set forth in the opinion of Lord Salvesen as follows:—“The

facts, so far as material, are within short compass. In 1819 the then proprietor of Ellon granted to Alexander M'Bain a 99 years' tack of half an acre, Scotch measure, of ground situated on the west side of the village of Ellon. In 1835 another tack was entered into between the same parties, which would have had the effect of prolonging the original tack *quoad* part of the subjects to the year 1935. This transaction was challenged by the succeeding heir of entail, and as a result parties arranged that a new tack should be entered into to expire at the same time as the original tack would have done, the trustees of the lessee renouncing any claim that they might have had under the challenged tack. Under this new tack the lessees bound themselves to pay a yearly rent of £5, 10s., and they also undertook 'to pay a proportion of school salary and other public and parochial burdens affecting the said piece of ground, and to perform a proportion of carriage of materials for rebuilding and repairing the kirk, manse, kirkyard dykes and school house of Ellon.' This tack is dated in 1853, and it appears from it that certain dwelling houses had by that time, and no doubt very soon after the original tack was granted, been erected on the ground, and these houses the lessees bound themselves to keep in tenantable repair during the whole currency of the lease. Subsequent to 1853 a number of new taxes have been imposed by supervenient legislation—such as county rates, parish rates, and burgh rates. These have all along been paid by the lessees, without any claim being made on the proprietor for repetition, and the total amount, which is accurately stated, without interest, at £58, 8s. 9d., is now sought to be recovered by the pursuer partly in his own right and partly as executor of predeceasing assignees of the long lease. The defender, who is now the heir of entail in possession of the estate of Ellon, succeeded in 1885, and the claim against him accordingly runs from that date. The pursuer's claim relates to only a portion of the subjects leased, on which a dwelling-house had been erected which has been entered on the valuation roll as of an annual value varying between £20, 10s. and £37, 15s. The amount of the tack-duty applicable to this piece of ground is £1, 4s., so that if the pursuer were successful in his demand the defender would have to refund not merely the whole of the rent which he received but a considerable sum in addition.”

The pursuer pleaded, *inter alia*—“2. The pursuer being entitled to repayment from the defender of the sum sued for, decree should therefore be pronounced as craved. 3. The assessments, rates, and taxes being imposed upon owners, and the pursuer having paid the same, and not being an owner in the sense of the statutes, and the defender being such owner, the pursuer is entitled to be repaid the same as craved. 4. In any event, on a sound construction of the statutes imposing the assessments condescended upon, the defender is bound to relieve the pursuer of the public burdens (except poor rate) payable by owners from

and after the date of the defender's succession in 1885."

The defender pleaded, *inter alia*—"2. The pursuer's averments being irrelevant and insufficient in law to support the conclusions of the writ the action should be dismissed. 7. The assessments, rates, and taxes in question not having been imposed on the defender or his authors, and they not being liable in repayment thereof, decree of absolver should be pronounced."

On 25th May 1915 the Sheriff-Substitute (LOUTTIT LAING) found the defender liable to pay to the pursuer the sum of £58, 8s. 9d.

The defender appealed, and argued—Rates and assessments were a charge upon a class to meet public expenditure. The taxes having been imposed by statute on the "owner" fell to be paid by the pursuer. The person in receipt of the rents was the "owner." He was entered as owner in the valuation roll. The roll was framed to establish a uniform valuation for the assessment of lands throughout Scotland, and the statute contained no mention of relief of the owner against the feudal proprietor of his subjects in respect of assessments levied. It merely rendered liable to assessment—Lands Valuation (Scotland) Act 1854 (17 and 18 Vict. cap. 91). The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), section 4 (22), in defining what an owner was, distinguished between a beneficiary recipient and a fiduciary recipient of rents. Section 6 of the Lands Valuation Act 1854 (*cit.*) did not materially differ from section 4 (22) of the Burgh Police Act 1892. One characteristic which was common to all persons who were designated as owner was the receipt of the rents, and it was on those who received the rents that the burdens were laid. The rates were not primarily imposed on the feudal owner but on the recipient of the profits in respect of which the tax was payable. Regarding the pursuer's contention that he was not liable as not being an owner in the sense of the statute counsel referred to *Armour on Rating*, p. 175; *Rankine on Leases*, p. 724; *Muirhead's Burgh Police Acts*, 198; *Cardwell v. Hanson*, (1871) L.R., 7 Q.B. 55, *per J. Lush*; *Truman*, [1894] 2 Q.B. 774; *Driscoll*, [1903] 1 K.B. 881, at p. 886, *per L.J.C. Alverstone*; *Mansfield v. Relf*, [1908] 1 K.B. 71; *Hay v. Edinburgh Water Company*, 1850, 12 D. 1240, *per L.J.C. Hope* at p. 1245; *Craig v. Edinburgh Tramway Company*, 1874, 1 R. 947, 11 S.L.R. 541; *Glasgow and Barrhead Railway Company v. Caledonian Railway Company*, 1855, 17 D. 1148, 1860, 22 D. (H.L.) 1; *Crawford v. Stewart*, 1881, 23 D. 965, *per L.J.C. Inglis* at p. 971; *Cowan v. Gordon*, 1868, 6 Macph. 1018, *per L.P. Inglis* at p. 1023.

The pursuer argued—The feudal proprietor was to be relieved of those burdens imposed by statutes existing at the time when the lease was granted but not of those due to supervenient legislation. Any question of supposed hardship as between the landlord and tenant, and especially the fact that the burdens imposed by supervenient legislation might exceed the amount of the superior's interest in the subjects, was

irrelevant—*Duke of Montrose v. Stewart*, 1863, 1 Macph. (H.L.) 25, *per L.C. Westbury* at p. 28; *Dunbar's Trustees v. British Fisheries Societies*, 1877, 5 R. 350, 15 S.L.R. 227, 772; *M'Laren v. Clyde Trustees*, 1865, 4 Macph. 58, *per Lord Neaves* at p. 65. The Lands Valuation (Scotland) Act 1854 (*cit.*) was purely a machinery and not an assessing statute, and particularly was this so as regards section 6. It did not impose an assessment on a person who would not be otherwise liable for it, and a long lessee could proceed to obtain relief in the same manner as anyone who paid another's debt, *e.g.*, a factor could get relief against his principal. The Act made it clear that a long lessee was not to be looked upon as the owner who bears the rates. By section 6 the owner of a long lease was bound to pay the assessments, and thus far he had the obligations of a proprietor, but the ultimate liability did not rest on him—*County Council of Lanark v. Miller*, 54 S.L.R. 45, *per Lord Salvesen and Lord Guthrie*. There were three kinds of statutes imposing rates with which a right of relief might be considered consistent. The first were those which contained a definition of the term "owner" within the statute itself, such as the Burgh Police (Scotland) Act 1892 (*cit.*), section 359. The second were those which contained a definition of "owner" by reference to the Lands Valuation Act 1854 (*cit.*), such as the Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50). The third were those without any clause defining "owner," the chief of which was the Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62). Accordingly the term "owner" ought to receive its proper and true significance. Regarding the matter in the light of equity it was clear that the imposition should be put on the feudal owner as he received the rental in respect of the land. It was well settled that a long lessee could not be looked upon as a proprietor—*Bell's Lect.* p. 1204. The English cases had no bearing on the present case as they were under English statutes. The Scottish authorities were substantially against the defender—*Crawford v. Stewart (cit.)*; *Hay v. Edinburgh Water Company (cit.)*; *Glasgow and Barrhead Railway Company v. Caledonian Railway Company (cit.)*; *Cowan v. Gordon (cit.)*.

At advising—

LORD JUSTICE-CLERK—In this action by substantial amendments made by both parties in the course of the hearing before us the question has been almost entirely changed from that which the Sheriff-Substitute decided, and the considerations which have to be taken into account in determining the question have also been changed.

The pursuer, being tenant under a long lease of a certain piece of land belonging to the defender on which the pursuer's author had built a substantial house, was duly entered in the valuation roll as the owner of the subjects at the valuation thereof, land and buildings both included. By virtue of certain statutes passed since the land was originally leased power was given to impose

assessments on lands and heritages according to the value thereof appearing in the valuation roll. In each of these assessing statutes a definition or interpretation was given of the word "owner" or "proprietor" unless in the cases of the education rate and the burial rate, but the reference in these cases to the poor rate, in my opinion, makes this omission immaterial. Further, I think for the purposes of this case the interpretation in the Valuation Act of the word "proprietor" may be taken as applicable to all the assessments referred to in the present action.

The pursuer was not only entered in the valuation roll as the proprietor or owner, but he was also entered as owner in the assessment rolls and collectors' books, and all the rates were duly demanded from and paid by the pursuer and his authors as proprietor or owner without demur or protest.

In my opinion the pursuer and his authors were rightly entered as owners and properly assessed as such in respect of all the rates in question. He and his authors received the rents actually paid for the subjects by the occupiers, and were therefore, as long leaseholders, properly called upon as statutory owners to pay.

But it is said that though the pursuer did not complain, and probably could not successfully complain, because he was so entered in the several rolls, he is entitled to ask the legal owner in feudal title to repay to him what he has paid in name of the rates in question. Of course, dealing with a rating statute, the question of hardship has little or no bearing. But it would require very clear statutory provision, in my opinion, to justify the result that the owner under feudal title drawing only a twentieth of the actual rent should have to pay the whole of the rates. I can find no warrant for such a claim of relief in any of the statutes to which we were referred. On the contrary, I think the statutes carefully provide for the reverse, viz., that the man who actually draws the rents must pay the rates. Further, in my opinion the common law affords no support to any such right of relief. If the pursuer had paid the defender's debt questions of relief might have arisen, but in my opinion he only paid his own debt.

The pursuer for obvious reasons declined to found any argument in favour of his contention on section 6 of the Valuation Act, and I express no opinion as to the construction of that section in this regard or on the effect thereon of section 41.

I am of opinion that we should sustain the appeal and assolvize the defender.

LORD DUNDAS—I concur.

LORD SALVESEN—The record in this case as originally framed did not raise the true questions, or some of them, which are at issue between the parties. It has now been amended on both sides, and formidable pleas to the title of the pursuer and the form of the conclusions have thus been cured, while the defender has stated in articulate terms the main ground on which he seeks absolvitor, and has added a plea

which was not proposed in the Sheriff Court. The result is that the learned note of the Sheriff-Substitute has very little application to the pleas of parties as now presented.

[*After stating the facts*—It is now conceded that the claim is not barred by *mora*, and that the rates of which repetition is sought do not fall within the obligation imposed on the lessee by the lease of 1853, the terms of which I have already quoted.

The claim is made on the footing that all the rates in question were imposed in respect of ownership, and that although in terms of section 6 of the Lands Valuation Act of 1854 the tenant under this long lease was properly entered in the valuation roll and liable to pay the rates in question in the first instance, he is entitled to be relieved of them by the defender as the actual proprietor. There is admittedly no precedent for such a claim, although if well founded many persons must have been in exactly the same relative position to each other as the pursuer and defender, and it can scarcely be assumed that the absence of claims is attributable to the circumstance (as suggested by pursuer's counsel) that the proprietors have always admitted their obligation to relieve the tenants under long leases of such rates. The fact that no claim of any kind was made here until the expiry of the lease does not suggest that such a practice was elsewhere well known and given effect to.

In the Sheriff-Substitute's note there is only a casual reference to the argument which the pursuer now maintains in a passage in which he appears to assume that the lessee has a statutory right of relief entitling him to deduct from his actual rent or tack-duty the assessments in question. The only statutory right of relief to which we were referred is that contained in section 6 of the Lands Valuation Act 1854, but this for obvious reasons is not founded on by the pursuer on record, nor in the argument which he addressed to us. Such a right of relief would have entitled the pursuer to something like 1-25th of the sum sued for, and would not be a claim which he could have insisted on in this Court. The pursuer's case as ultimately presented to us was that the right of relief from the actual owner of the lands falls to be inferred from the terms of the statutes imposing the rates in respect of which he seeks relief, on the ground that, although for purposes of convenience in collection the burden of the owner's rates was laid upon him in the first instance, the ultimate liability for the rates falls on the actual owner, and that irrespective of the length of the lease or the circumstance that the defender as the heir of entail in possession of the estate during the currency of the lease could derive no benefit beyond the tack-duty. On the other hand the defender maintained that under the definition clauses in the various Acts the pursuer was correctly entered in the valuation and assessment rolls as owner of the subjects, and that the feudal owner as such has no liability apart from contract, express or implied, to reimburse the statutory owner

for any rates which may be levied on him in that capacity.

In my opinion the defender is right. The interpretation clause of the Valuation Act of 1854 enacts that "the word 'proprietor' shall apply to liferenters as well as fiars, and to . . . adjudgers, wadsetters, or other persons who shall be in the actual receipt of the rents and profits of lands and heritages;" and the Burgh Police Act of 1892, sec. 4 (22), contains this similar definition—" 'Owner' shall include joint-owner, fiar, liferenter, feuar, or other person in the actual possession of, or entitled to receive the rents of, land and premises of every tenure or description." The other Acts founded on contain similar definitions. Under these Acts it is not disputed that the pursuer was properly entered in the valuation roll as owner of the house in question, or that he drew the rents on the amount of which the various assessments were calculated. The reason why the tenant under a long lease falls to be entered as owner is because the tack-duty originally stipulated may, and in most cases will, have no relation to the actual annual value of the subjects, especially in the case of a building lease where the main value of the subjects is derived from the buildings erected by the lessee after the tack has been executed. Such a tenant is in a totally different position from the tenant under a lease of ordinary duration. He is entitled to assign or sub-let without the consent of the landlord, and for practical purposes during the subsistence of the lease enjoys all the advantages of a feuar or other feudal owner so far as the surface of the ground is concerned. The object of all local taxation is to raise, year by year, the amount required to meet the expense of the various services to the ratepayers which the taxing authorities are bound to supply; and to ensure that these are levied fairly from all persons drawing rents from or in the beneficial occupation of lands or heritages at the full amount of their annual value. The Valuation Act of 1854 provides the basis so far as the valuation of lands and heritages in Scotland is concerned according to which all public assessments leviable according to the real rent may be assessed and calculated. The valuation roll, however, is only conclusive as regards value, and any person who alleges that he has been improperly assessed has his remedy in the courts of law. But even when properly entered in the roll and properly assessed as owner questions of relief may still arise, and this is the point on which the decision of the present case turns.

In certain cases where a person who is in actual receipt of the profits of land is entered as owner in the assessment roll and is liable for the rates imposed the right of relief is clear enough. Thus if a factor pays the rates he is entitled to take credit for them in accounting with his principal for the rents, and to recover the rates from the owner where the net rents are insufficient to meet the assessment. So also in the case of a heritable creditor entering on possession in virtue of a decree of maills and

duties. Again, where under a contract between an owner and a tenant under a long lease the owner has expressly undertaken to relieve the tenant of the rates which may be imposed in respect of the property there can be no doubt of the tenant's right to enforce such an obligation. But in all these cases the right of relief flows from some relation between the owner and the person who pays the rates or from some contractual obligation. Is a similar right of relief to be implied at the instance of the tenant under a long lease against the feudal owner, who, as in this case, may be deriving an almost nominal consideration by way of rent? We were referred to a large number of authorities, but none of them appear to me to support such a claim. In the case of *Hay v. Edinburgh Water Company*, 12 D. 1240, *affd.* 1 Macq. 682, it was contended that a water company could not properly be assessed for poor rates in respect of their water-pipes as they had no feudal title on which they could be infeft, and that the property of the streets remained, as it had done before, in the magistrates of the city. It was held, however, that they were rateable; and Lord Justice-Clerk Hope in the course of his opinion said—"Provided the party is in the actual receipt of the profits of the lands he is to be deemed the owner for the purposes of the assessment. Proprietor he may not be. Feudal title he may not have, and may never be in a condition to demand. Proprietor in questions with others it may be that law could not hold or describe him. His possession may be conditional. It may be anomalous. It may be such as to admit of assessment on another for the surface. In short, all difficulties are cut short, and all distinctions disregarded, and the statute declares that 'owner' shall apply to (significant terms) persons in the actual receipt of the profits of land." The definition of "owner" in the Poor Law Act is word for word the same as that in the Lands Valuation Act of 1854. A similar decision was given in *Craig v. The Edinburgh Street Tramways Company*, 1 R. 947. The case of *Hay* certainly was not one where the water company could be treated as long leaseholders, as they had a perpetual right to the pipes; but in the subsequent case of the *Glasgow and Barrhead Railway*, 17 D. 1148, reversed 22 D. (H.L.) 1, a case of this kind arose. Although the lease was one of 999 years' duration the Court of Session held that the lessors remained owners of the land, and were therefore assessable in respect of ownership. But the House of Lords reversed, agreeing with Lord Wood, who had dissented from the decision of the First Division. The case is a somewhat special one; but it is to be noted that the question arose before the Valuation Act of 1854, by which for the first time it was enacted that a long leaseholder was to be deemed to be the proprietor of lands and heritages within the meaning of that Act. The pursuer founded strongly on the case of *M'Laren*, 4 Macph. 858, where it was held that an assessment imposed upon heritors for the purpose of rebuilding a parish church could not be levied on tenants under long

leases. The ground of decision was that such tenants were not subject to the assessment prior to the passing of the Valuation Act 1854, and were not rendered liable by its terms. The decision was mainly founded, as I read it, on section 41, the closing paragraph of which expressly enacts that "Nothing contained in this Act shall exempt from or render liable to assessment any person or property not previously exempt from or liable to assessment." This clause has no application to rates which have been imposed since 1854, and which have been expressly imposed upon owners as therein defined. Any other view would result in the anomaly that while leaseholders under a building lease are by the 44th section of the Poor Law Act 1854 made liable to poor assessment, without, as it is admitted, any right of relief against the feudal owner, in the case of other assessments where there is the same or similar definition of "owner" in the taxing statute, the burden of the owner's rates, while in the first instance imposed upon the long leaseholder, is to be refunded to him by the feudal owner. The true meaning of the statutes seems to me to be that, for the purpose of public assessment, the tenant under a long lease, whether a building lease or any other, shall be deemed to be the proprietor, subject to the limited right of relief against the feudal owner provided by section 6 of the 1854 Act. Except upon this view it seems to me impossible to explain why the lessee was to be deemed and taken to be the proprietor. It would always be easy to enter the feudal proprietor in the roll and to assess him at the real rent or value of the subjects, and if the ultimate liability was to fall upon him this would be the convenient and proper course to adopt. The fact that a limited statutory right of relief is given to the long leaseholder is to my mind conclusive against the view that he was to have an unlimited right of relief at common law.

Considerations of equity do not perhaps enter very deeply into questions of taxation, but the idea underlying all the taxation statutes with which we are here concerned seems to me to impose the rates upon the persons entitled to or in actual receipt of the profits of land as a first charge upon such profits, and not to impose them in respect of mere feudal title where such title does not carry with it right to the full rents or to the occupation of the land itself. In this way the statutes secure that the persons who derive the benefit of the imposition of the rates shall contribute to them in proportion to the rents which they actually receive or to the subjects which they beneficially occupy. The contrary view would involve that some persons who neither receive rents nor have the beneficial occupation of lands should pay assessments in respect of the rents payable to, or income of land beneficially occupied by, third parties.

In reaching my opinion I do not go on the English decisions which were cited to us and which proceed upon statutes expressed in different terms. It is satisfactory to note, however, that in that country also

public assessments appear to be levied from the tenants of building leases and not from the owner. On the whole matter I have come without difficulty to the conclusion that we must recal the interlocutor of the Sheriff-Substitute and assoilzie the defender from the conclusions of the action as laid.

LORD GUTHRIE was absent.

The Court sustained the appeal and assoilzied the defender.

Counsel for the Defender and Appellant—Chree, K.C.—Scott. Agent—Alexander Ross, S.S.C.

Counsel for the Pursuer and Respondent—M. P. Fraser—Mackay. Agents—W. & F. Haldane, W.S.

Tuesday, January 23.

SECOND DIVISION.

[Lord Hunter, Ordinary.]

ANDREW v. MACARA.

Reparation — Slander — Verbal Injury — Holding up to Public Hatred — Counter Issue — Bill of Exceptions.

An action was brought to recover damages on the ground that the defender had publicly stated that the pursuer had made to him certain statements. The statements were of a character likely to prove very unpopular. Issues were allowed whether the defender's statements "are false and were made with the design of exposing, and did expose, the pursuer to public hatred, ridicule, and contempt." The defender took a counter-issue whether the pursuer had made the statements attributed to him. At the trial the presiding judge ruled that if the jury thought the counter issue proved they must return a verdict for the defender. Pursuer's counsel maintained that the counter-issue only partially countered the issues; that it did not meet the holding up to hatred; that so the pursuer might get a verdict even though the counter issue were proved.

Held, on a bill of exceptions, that the direction of the presiding judge was right.

John Macdonald Andrew, Denny, *pursuer*, brought an action against the Rev. Alexander Macara, minister of the parish church of Denny, *defender*, in which he sought to recover damages to the extent of £500 in respect of certain statements regarding the pursuer which had been publicly uttered by the defender.

The Lord Ordinary (HUNTER) appointed the following *issues* for the trial of the cause:—"1. Whether on 18th January 1916 in the parish hall at Denny the defender, in the presence and hearing of a meeting of the Denny Parish Church Work Party, and of Mrs Kirkwood, residing at Stirling Street, Denny, Mrs Jessie Dickson Kennedy, Union Cottage, Duke Street, Denny, Mrs Spack-