

Monday, June 24.

(Before Lords Herschell, Watson, and Fitzgerald.)

SCOTTISH DRAINAGE AND IMPROVEMENT  
COMPANY v. CAMPBELL.

(*Ante*, vol. xxv., p. 101; and 15 R. 108.)

*Right in Security—Personal or Real—Absolute Order Charging Fee of Lands—Glebe—Parish Minister—Scottish Drainage and Improvement Company's Acts 1856 and 1860 (19 and 20 Vict. c. 70, and 23 and 24 Vict. c. 170).*

The Scottish Drainage and Improvement Company's Act 1856, sec. 49, provides for the execution by the Enclosure Commissioners of an absolute order charging the amount of improvement expenditure "upon the fee of the lands improved." The form of the absolute order is prescribed by Schedule C of the statute, and by it the fee of the lands is charged, but no personal obligation is imposed. Sec. 61 provides—"Every charge on land by virtue of this Act may be recovered by the Company or the person for the time being entitled to the same, by the same means and in like manner in all respects as any feu-duties, or rent, or annual rent, or other payment out of the same lands would be recoverable in Scotland."

In a case where an absolute order had been granted in the form prescribed by Schedule C, charging the fee of a glebe with an annual rent charge in respect of an advance made to the parish minister for improvements on the glebe—*held* (*aff.* the judgment of the Court of Session) that the Enclosure Commissioners had not a personal action against the succeeding minister for the rent charge under the Act.

This case is reported *ante*, vol. xxv., p. 101, and 15 R. 108.

The Scottish Drainage and Improvement Company appealed.

At delivering judgment—

LORD HERSCHELL—My Lords, the only question that arises upon this appeal is, whether the appellants can maintain a personal action against the respondent in respect of his occupation of certain land over which they have obtained a charge. That charge has been obtained by reason of an advance made in pursuance of the provisions of the Scottish Drainage and Improvement Company's Act 1856, under which a limited owner is enabled to obtain an advance for the improvement of his land, and by pursuing the course there prescribed to give a charge upon the land which binds it in the hands of his successors.

The 52nd section of the Act provides that "when the fee of any land is in pursuance of this Act charged with any money, the company shall be entitled to, and shall have from the time from which such rent charges shall commence and take effect, a charge upon such land for the money ascertained and approved by the Commissioners as aforesaid"—that is, the Enclosure Commissioners, whose assent must be obtained in order to create a valid charge under the Act. The section further provides that "such lands

shall henceforth be and continue liable to the payment of such charge," and it gives the charge priority, speaking generally, over all other charges. It therefore in terms not merely creates a charge upon the land, but provides that the land is to be liable for the payment of the charge. So far as that section is concerned it is obvious that there can be no question of the creation of any personal liability, and if that provision stood alone it is conceded on the part of the appellants that the only remedy of the drainage company must be by real diligence—that is to say, by proceeding according to Scotch law for the recovery of the payments to be made out of the land.

But the appellants place reliance upon the 61st section of the Company's Act as giving them the right to enforce the liability personally which they claim by this action to enforce against the respondent. Before applying myself to the terms of that section, I desire to say that when an Act of this description is obtained by a company incorporated for purposes of profit, to confer upon them rights and powers which they would not have at common law, the provisions of such a statute must be somewhat jealously scrutinised, and I think that they ought not to be held to possess any right unless it be given in plain terms or arises as a necessary inference from the language used. The 61st section does not in terms create any personal liability. The appellants seek to infer that liability solely from the nature of the remedy which that section gives to the company. The section provides that "every charge on land by virtue of this Act may be recovered by the company" "by the same means and in like manner in all respects as any feu-duties, or rent, or annual rent, or other payment out of the same lands would be recoverable in Scotland." Now, it is said that that provision was unnecessary if the only effect of it was to enable the appellants to enforce a charge by real diligence. My Lords, I do not stop to inquire whether that view be correct or not. I think it is only natural, even if the Court would have inferred such a right from the mere creation of the charge, that the right should be given in express terms when you were creating a charge of this peculiar character—a charge which was created pursuant to these statutory provisions. However that may be, I think it clear that the language of this section is, at least primarily, directed to the mode of recovering the charge itself out of the land.

The contention of the appellants rested mainly upon the provision relating to the recovery of feu-duties. It was said that feu-duties are recoverable not only by real diligence, but also by a personal action against the original vassal or against any person who subsequently comes into occupation of the land in terms of the feu-charter, and that inasmuch as this section provided that the charge might be recovered "by the same means and in like manner in all respects as any feu-duties out of the same lands," that by implication must mean that the same kind of personal action which the superior would have against any person in occupation as his vassal was intended by this Act to be possessed by the Drainage Company against the person in occupation of the land over which the charge was created.

Now, my Lords, I think that the language of the Act does not necessarily, and does not even

naturally, bear such a construction. It is obvious that the words "feu-duties, or rent, or annual rent, or other payment out of the same lands" are all coupled together, and the use of the word "other" before the word "payment" indicates clearly that the Legislature is speaking of "feu-duties, or rent, or annual rent" in relation to their being "payments out of the land." They are bound together by that common character that they are all obligations for payment out of the land, and it is only in so far as they are payments out of or would be recoverable as payments out of "the same lands" that they are made recoverable in the case of this particular charge, because they are made recoverable by the same means and in like manner in all respects as feu-duties or other payments out of the same lands. And what is made recoverable? The provision in respect of recovery has relation to a "charge on land." It is only in respect of its being a charge that it is made recoverable in the same way as feu-duties or other payments out of the land.

My Lords, those words are perfectly apt to confer upon the company for the enforcement of that charge to which the land has been in terms rendered liable every mode of recovery, every mode of real diligence, which was open for the enforcement of any of these other payments which were charges upon the land in respect of their being payments out of the land. Is it possible to say that beyond those rights there has been conferred upon the company a right to enforce a personal liability? No doubt personal liability may be enforced as regards feu-duties not only against the original vassal, but also any occupier taking subsequently under the feu-charter. But if such a liability be enforceable, it does not arise by reason of the charge upon the land, it is not a mode of enforcing the payment out of the land, but it is a mode of enforcing a personal obligation which comes into existence owing to the creation of the relation of superior and vassal, or, it may be said, owing to the covenant for payment which arises from the original feu-charter running with the land, and passing to the person who afterwards takes the land from the original vassal. In whatever light it is to be regarded, that certainly is the enforcement either of a contractual or of a *quasi*-contractual obligation. Now, here there is no such original liability created at all in respect of the payment—it is never made anything except a charge upon the land, and there is certainly no such relation created between the drainage company and the occupier from time to time of the land as is created between the feuar and his vassal, or the person representing the feuar and any subsequent vassal.

My Lords, I have dealt principally with the words "feu-duties" which are here used, because those were most relied upon by the learned counsel for the appellants; but I do not think that the other words render the case any stronger in the direction of his contention. On the contrary, as was pointed out by Lord McLaren, if you are to regard these words as implying personal liability, the person who would become upon the death of an occupier liable to these payments would not in all cases be the same—(15 Court Sess. Cas. (4th series), note at p. 110). In the case of rent it might be the executor, in the case

of feu-duty the successor, and consequently you would be involved in very considerable difficulties if you were to say that this clause, which only relates to the mode of recovery, also determines the person against whom the recovery is to be had, because the contention of the appellants is and must be not merely that this section in effect says that there shall be a personal action in respect of this liability, but that it also determines against whom that personal action can be maintained, namely, against the person in occupation in succession to the original occupier, the occupier for the time being.

Therefore, my Lords, upon the construction of sec. 61, I am unable to find anything which by necessary inference confers upon the company a right which undoubtedly is not conferred upon them anywhere in terms, or creates a personal liability which undoubtedly there is no language expressly to create.

My Lords, certain other sections of the Act were relied upon by the learned counsel for the appellants as throwing light upon the section with which I have been dealing—those were principally secs. 68 and 69. The 68th section contains a provision in the first instance dealing with the liability to this charge as between persons becoming in succession entitled to the land upon which the charge is created; and then it has a proviso, I admit, of a somewhat singular character—"Provided that any such person entitled to succeed and becoming entitled in possession, shall not be liable to pay any arrears of the charge remaining unpaid at the time of his succession or right to succeed exceeding the amount of one year's payment of such charge." Now, it is said that this by implication shows that the person succeeding was to be personally liable to one year's arrears. It was admitted that if you were to take the analogy of feu-duties the successor would not be liable to the arrears in any personal action. There is no creation in terms of such liability. The argument was this—you must infer from these words that the Legislature created a liability even as to one year's arrears, and therefore it could hardly be supposed that it was not intended by the other section to make the successor liable in respect of his occupation of the lands for payments which became due during the time of his occupation. My Lords, whatever may be the meaning of this section, such an argument appears to me to be somewhat far-fetched. It cannot be put higher than this—that if that construction be correct it would render it probable that the Legislature would have made a provision creating a personal liability. We cannot from any such suggestion of probability come to the conclusion that a right has been given and a liability imposed which we do not find in the words which are said to create or impose it.

Then the 69th section undoubtedly speaks of "the person for the time being bound to pay the yearly or other periodical payments of such charge." I say again with regard to that, that it is not possible, whatever may be the meaning of those words and however they may have come to be used, to derive from them such assistance in construing the other section as to find in it the imposition of a liability which the words are not, I think, apt to create.

My Lords, there is one other provision, to

which I drew attention in the course of the argument, which I think is not without importance. By the 59th section of the original Act it is provided that "if any charge payable under this Act to the company shall be in arrear the same shall not bear interest for a longer period than six months," but that it shall for that period bear interest at the rate of 5 per cent. per annum. By the later Act amending the company's original Act, namely the Act of 1860, that provision was modified to this extent, that if there were not upon the land charged sufficient to answer and satisfy the arrears and interest for the period of six calendar months, then the arrears should continue to bear interest at the rate of 5 per cent. until payment or satisfaction, and such interest might be recovered in the same manner as the sum in arrear. Now, if the only remedy were against the land that provision would be perfectly intelligible, and by no means unreasonable, but looking at the provisions in the earlier Act and its manifest purpose, it seems to me that it would be very strange if, because there was not enough upon the land to enable the company to enforce to the full extent their charge, they should therefore be allowed to permit the payments to run into arrear, and interest on these arrears to run, enforceable (interest as well as arrears) at any subsequent time, at all events until barred by some Statute of Limitations, against the occupier of the land. I think therefore that this points in the opposite direction. I do not lay great stress upon it, but looking at the other parts of the Act as well as section 61, it certainly appears to me that they do not all point in the same direction, and that the safer course is to limit ourselves really to the interpretation of the only section which it can be contended confers the right which the appellants are now seeking to enforce.

Upon these grounds, my Lords, I think that the judgment of the Court below was right, and I move your Lordships that this appeal be dismissed with costs.

**LORD WATSON**—My Lords, notwithstanding the able and ingenious argument of Mr Asher, I have been unable to discover any good ground for disturbing the judgment of the Court below.

There are two sets of clauses in these statutes which require to be attended to, the first constituting as a debt the money advanced by the company for the purpose of drainage or improvements, and the second prescribing the remedies by which that debt is to be recovered by the company. As to the construction of the first set of clauses there is no controversy—their terms are perfectly plain—they declare the money advanced in terms of the Act to be a charge upon the estate, and raise no personal liability either against the representatives of the original borrower or against his successor in the lands drained or improved. The controversy is confined to the 61st section of the statute. It is said that the effect of that clause is to attach to the *debitum fundi* not only the remedies which are ordinarily competent by the law of Scotland in such a case, but also the remedies which are applicable to a mere personal debt.

Now, I think that in construing the clause it is necessary to keep in view the fact that a personal action is not an action for the recovery of

a charge upon land. It is a misnomer—a contradiction in terms—to say that a creditor is recovering a charge upon land when he brings a personal action of debt for the purpose of obtaining a decree under which he can recover payment out of any part of the debtor's estate, or (at the time when these Acts were passed) by his incarceration. In the same way, a sum recovered under a personal contract or obligation is in no sense a sum recovered out of land or a payment out of land. So also in the case of a feu-duty. When the superior sues on the express personal contract which is contained in the writs constituting the feudal relation between him and his vassal, he does not seek to attach the land or the accessories of the land. The same is true of "rent or annual rent" when in addition to its being made a charge upon the land it is matter of personal stipulation between the parties that the executors or successors of the owner or landlord shall be liable.

It is unnecessary for me, after the observations which have been made by the noble and learned Lord in the chair, to say anything further upon the terms of the 61st clause. I may say in a single word that the only remedies which it appears to me to give to the company are the remedies applicable to feu-duties, rent, and annual rent, in so far as these are charges upon land or payments out of land, and not in so far as they are matters of personal contract.

**LORD FITZGERALD**—My Lords, at the close of the address of Mr Asher I was in considerable doubt, possibly created by an impression that the pursuers ought to have judgment on the merits. There is no doubt as to the existence of the debt, there is no doubt as to its being a charge upon the land, and there is no question that the present incumbent of the parish, who has succeeded to the reverend gentleman who procured this loan, is in possession of the thing charged and in receipt of the rents and profits. It did seem to me at first to be a very strong thing to say that the company should have no personal remedy against this present incumbent (in respect of the profits he has received) but must resort to the land and the land only. However, we are dealing now not with a public but a private Act of Parliament, and I have always understood, with reference to private Acts as contra-distinguished from public Acts of Parliament, that if a charge is imposed upon the person of an individual it must be so imposed in clear and express terms and not left to implication.

My Lords, the original Act of 1856 seems to have been prepared with very considerable care, and I would say with a due regard to the rights and interest of others. But after all, the language of this Act is the language of the drainage company. I presume they had no opponents. The Act presents the language of the company and of the company alone.

Now, it has been already observed that all through this Act until you come to the 61st section there is no doubt that the Legislature is dealing only with a charge upon land—a real security—which by no means imports a personal obligation. One may further observe, too, that before a loan under this Act of Parliament is sanctioned an inquiry is made, and it is only

sanctioned by the Commissioners when they are satisfied that there is to be a permanent and real improvement of the land commensurate with the sum to be advanced, and with the annuity with which the land would thereupon become charged.

The Act being for the improvement and reclamation of land deals with public improvements as well as private improvements, and as to some of the classes of improvements it would be exceedingly difficult either to import a personal obligation, or to ascertain against whom it was to be enforced. I may refer for instance to the 4th section of the Act, and to the 12th class of improvements referred to in it, namely—"The construction or improvement of jetties or landing-places on the sea coast or on the banks of navigable rivers or lakes for the transport of cattle, sheep, or other agricultural stock or produce." It would appear to me in reference to these words that it would be difficult to ascertain where the personal responsibility could rest if it was intended to be imposed. But proceeding further on we find that the company is to be incorporated. What powers is the company to have? Such powers and authorities as by this Act are granted and none other.

The provisional contract deals with "the sum to be charged as an improvement loan on such land" (sec. 33); and the charging section (sec. 49) makes it a charge on the fee of the land and to take effect as such charge, and so far no allusion is made to any personal liability save in sec. 37, but that section, so far from importing any personal liability beyond its express provision, seems to me to negative it, for according to that section "the Enclosure Commissioners may require security by bond or otherwise" from the parties making the application, for the payment of the expenses; and if they do not grant a provisional order, "such payment shall be made by such landowner or by the company, and shall not be a charge on the land to which such application relates." That provision dealing with personal liability does not support the contention of the pursuers.

If there was nothing further in the statute, it is clear that the party would be left to the enforcement of his charge upon the land and that alone. Possibly he would have been in a better position without the aid of sec. 61, for then the law might step in and provide him with some adequate remedy if it were not given by the Act. But sec. 61 gives a remedy, and when a remedy is given by an Act of Parliament of this kind you must pursue that remedy.

Then, referring to sec. 61, upon which the argument principally turned, what does it do? The thing to be recovered, with which it deals, is a "charge on land by virtue of this Act." It provides for the means and manner by which that liability of the land may be enforced, but it uses no words or terms whatever to indicate that any mere personal liability is cast on either the landowner or his successor in title or in occupation, or that he shall be liable in respect of or to the extent of profits received. Two things are referred to, the charge on the lands and the recovery of it out of the same lands, which is to be "by the same means and in like manner in all respects as any feu-duties, or rent, or annual rent, or other payment out of the same lands would be recoverable in Scotland."

We were very much pressed by Mr Asher with this argument, that the 61st section did refer to an action "in like manner in all respects as any feu-duties" might be recovered by—and he called our attention to this circumstance, that in certain instances feu-duties were recoverable by what might be termed a personal action. But that was only in cases in which the superior sued upon the obligation of an express contract of the vassal for the payment of the feu-duty. I do not mean to say that the original contract between the company and the applicant might not possibly have been so framed as to give them a right to resort to his personal security. I express no opinion upon that, but I observe that in this case there is nothing urged in the summons or its conclusions to show any personal liability in respect of contract or in respect of the receipt of rents or profits of the land.

My Lords, my noble and learned friend in the chair has referred to section 68, but that section creates no real difficulty, for it only determines as between the landowner and his successor their respective rights, and if his successor should be compelled, in respect of the land, to pay "one year's payment of such charge" in arrear, which his predecessor ought to have paid, then he has a personal right to recover it from his predecessor.

My Lords, after four years' trial of this Act of Parliament there came an amending Act, and there are some provisions in the amending Act which are deserving of observation. Section 4 contains the same definition of improvements or even a larger one than had been in the original Act, and the 13th sub-sec. of that section is applicable to "the construction or improvement of jetties or landing-places on the sea-coast or on the banks of navigable rivers or lakes." Then, by section 11, when the land to which the application for a provisional order relates is land held in right of any church, the advance cannot be made without the consent of the presbytery of the bounds and the patron of the benefice. Section 13, which is not unimportant, provides for fire insurance. "Where any farmhouses, farm buildings, or works susceptible of damage by fire have been erected, improved, or added to" under these Acts, fire insurance is to be effected—"the person for the time being bound to make the yearly or other periodical payments of such charge shall insure and keep insured against damage by fire all such farmhouses," and so on; and in the event of his not doing so, "it shall be lawful for the company, with the assent of the Enclosure Commissioners, to insure against damage by fire the said farmhouses, farm buildings, and works in an amount not exceeding the principal amount originally secured by such charge"—the company may pay the premium, and he is bound to "repay to the company" (and here a personal right is given) "any sums so paid by them" in respect of premiums on fire insurance.

Now, when we are dealing with this amending Act it is not unworthy of observation that the only reference in it to any personal obligation is the obligation to keep up the fire insurance premium, and if that is not done by the person in possession the company may pay it, and then, and then only, they have a personal right to sue, not for the charge, but for the sum paid in respect of fire insurance.

My Lords, both these Acts of Parliament were no doubt very beneficial for their purposes; they gave a security charged only upon the land without any words which would import a personal obligation either upon the part of the original borrower or of the landlord in succession, or, in the case of an advance upon glebe land, which would make either the original incumbent or the next incumbent personally liable. Whilst I feel coerced to agree with the motion which is to be presently put from the chair that the decision of the Court below be affirmed, I do so somewhat unwillingly. If there is any property which would require for improvement purposes the aid of an advance of money upon such easy terms as are provided by this Act it would be such property as glebe lands and residences. I presume that this case is not defended by the present respondent merely in his own interest—probably he may be supposed to represent the interests of a large class; and I see this very clearly, that after the decision of this appeal it will be difficult, if not impracticable, to obtain from the Drainage Company advances of money upon such a security as the present.

My Lords, I concur in the judgment which has been proposed, affirming the decision of the Court of Session and dismissing the appeal.

Interlocutors appealed from affirmed and appeal dismissed with costs.

Counsel for the Appellants—Sir Horace Davey, Q.C.—Asher, Q.C. Agents—Grahames, Currey, & Spens, for Ronald & Ritchie, S.S.C.

Counsel for the Respondent—Rigby, Q.C.—James Wallace. Agent—John Graham, for Menzies, Coventry, & Black, W.S.

Thursday, August 8.

(Before Lords Herschell, Watson, and Fitzgerald.)

BINNIE v. BROOM AND OTHERS.

(*Ante*, vol. xxv., p. 303; and 15 R. 417.)

*Trust—Trust Management—Ultra vires—Process—Proof—Expenses.*

The beneficiaries under a trust-deed raised an action against the trustees to make good loss which it was alleged had been caused by their management of the estate, and averred that when the defenders entered office the estate was sufficient to cover the truster's liabilities, with a substantial reversion in favour of the pursuers, and that the defenders had exceeded their powers by borrowing upon instead of selling the heritable property. The First Division remitted to an accountant "to inquire into the amount of the trust-estate from the date of the truster's death, the debts due to the truster and paid by the trustees, and the yearly income and expenditure by the trust," and disposed of the case upon the basis of the report returned.

On appeal, *held* that the pursuer was entitled to a proof of his averments respecting the value of the heritable property when the trustees entered office and could have sold

it, on the ground that he had never renounced probation, or agreed to accept the report as including the evidence he wished to lead, and that it was still within his right to prove in the ordinary way disputed facts which were not proper matters of accounting, but that the appeal must be *affirmed* without costs, as the appellant had not previously asked for the restricted proof which was ultimately allowed him.

*Opinion (per Lord Watson)* that a trustee who has power to sell or borrow is only required to show ordinary prudence in selecting either course, and the question whether or not he acted prudently is one of fact to be solved according to the circumstances of each case.

This case is reported *ante*, vol. xxv., p. 303, and 15 R. 417.

The pursuer appealed.

At delivering judgment—

LORD HERSCHELL—My Lords, I have had an opportunity of perusing the opinion which my noble and learned friend (Lord Watson) is about to deliver, and I entirely concur in it.

LORD WATSON—My Lords, I have come, with much regret, to the conclusion that, notwithstanding the inquiry which has already been made in the Court below, the facts of this case have not been sufficiently investigated to enable your Lordships to dispose of it by a final judgment.

The action was brought in November 1886 by the appellant and two others, sons of William Binnie, builder in Glasgow, who died in October 1857, as beneficiaries under their father's settlement, against the respondents, who are the trustees or representatives of trustees who accepted office and administered the trust created by that deed. The trust-estate chiefly consisted of house property in Glasgow, burdened with an heritable debt of £12,000. The truster left a large amount of personal debt, and the trustees borrowed £26,000 upon the security of the real estate, with which they paid the charge of £12,000 and other debts, leaving a considerable balance unpaid. It is sufficient to say here that the results of their administration, whether prudent or not, were unfortunate, and that in June 1867 the trustees applied for a sequestration of the estate, which was accordingly realised and distributed under the provisions of the Bankruptcy Acts, some of the creditors receiving less than 20s. in the pound.

The pursuers averred that in 1857 and 1858, after the trustees entered upon office, the heritable property was worth and could have been sold for £42,980—a sum sufficient to pay the whole debt and leave a substantial margin for the beneficiaries—and that the trustees exceeded their powers and violated their duty in borrowing money on the security of the property instead of selling it. The defenders denied these allegations, and stated a variety of circumstances which it is unnecessary to detail in explanation and justification of the course of management which was pursued by the trustees.

The Lord Ordinary (M'Laren) allowed the parties a proof of their averments, but his interlocutor was recalled by their Lordships of the