Thursday, February 1.

SECOND DIVISION.

SPECIAL CASE—GIBSON MAITLAND *v.* GIBSON MAITLAND.

Executor—Heir and Executor—Liability—Postponement of Rents.

An heir of entail died on 16th May 1876. The entailed property was burdened with payment of annuities, improvement debts, drainage rent charges, &c. *Held*, in a Special Case between the succeeding heir of entail and the executor—(1) that the liabilities of the latter was limited to the burdens effeiring to the possession down to Whitsunday 1876; and (2) that the rights of parties were not affected by the conventional postponement of the rents.

This was a Special Case, the parties to which were (1) Lady Ramsay Gibson Maitland, widow and executrix of Sir Alexander Ramsay Gibson Maitland of Barnton and Cliftonhall, Bart.; and (2) Sir James Ramsay Gibson Maitland, her son, heir of entail in possession of Barnton and other estates. Sir Alexander died on 16th May 1876. He was in possession of several entailed estates. Barnton estate was burdened with £32,000, being the balance of debt heritably secured thereon. The debt was secured, in terms of a Private Act, by bonds and dispositions in security over the fee of the estate in ordinary form. It was also burdened with an annuity to the Honourable Mary Ramsay, widow of William Ramsay Ramsay of Barnton, of £3571, 8s., secured to her by virtue and in terms of the Aberdeen Act. The annuity was payable, as the bond bears, "at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas after his decease, and so forth half-yearly," &c.

The estate of Cliftonhall was burdened with two sums of £2000 and £1000, as improvement debt under the Montgomery Act, by Alexander Maitland, constituted by a decree assigned by him to lenders. Sir Alexander also provided under the Aberdeen Act to the first party, as his widow, a liferent provision by way of annuity of £600 from the Cliftonhall estates, and of £2400 from the Barnton estates, the first half-yearly payments of both which annuities commenced at Martinmas 1876, and were declared to be payable to her as in advance. The lands held in fee-simple were burdened with certain sums of debt, secured by bonds and dispositions in security in ordinary form.

The entailed estates were further burdened with various sums expended in drainage and other improvements, which were charged upon the estates by virtue and in terms of the Improvement Statutes, and particularly 27 and 28 Vict. cap. 114, sec. 66. Part of the principal and the interest of the sums so expended were payable in half-yearly instalments at various dates throughout each year, the first half-year's payment beginning, in the case of each rent-charge, six months after the time when the works in respect of which the same was granted were executed to the satisfaction of the Commissioners under the said statute. It was agreed between the parties to the case that one-half of the rent-charges should be held as constituted under the above-mentioned statute, and one-half of the same under the Statute 12 and 13 Vict. cap. 100, sec. 21.

The rents and feu-duties receivable at Whitsunday 1876 were accredited to Sir Alexander, and the burdens due at that date were paid out of his funds. His executrix confirmed to the following rents, viz.:—(1) Farm rents payable under the leases at Lammas 1876, being for second half of crop 1875, and possession from Whitsunday to Martinmas 1875; amount £3050. (2) Farm rents payable under the leases at Martinmas 1876, being for first half of crop 1876, and possession from Martinmas 1875 to Whitsunday 1876; amount £5136. (3) Farm rents payable under the leases at Candlemas 1877, being for first half of crop 1876, and possession from Martinmas 1875 to Whitsunday 1876; amount £2658.

The grass parks on Barnton had been let in February 1876 for the then ensuing season at a rental of £981. The offerers had had the option of paying forehand under discount, or of granting bills payable on 1st November. About two-thirds of the rent had been paid in cash, and the remaining third in bills. The grass parks on Cliftonhall had been let for the season 1876 at a rental of £135. The rents were payable at Martinmas 1876. It was stated that all the said grass rents or maills fell, on the authority of *Swinton* v. *Gawler*, 20th June 1809, F.C., to be divided equally between the first and second parties, and it was further stated that the first party made no claim for any apportionment of rents in respect of the one day's survivance and possession after the term of Whitsunday 1876.

The rents conventionally payable after the death of Sir Alexander down to and inclusive of Martinmas 1876, were disposed of as follows, viz:—At Lammas 1876 and at Martinmas 1876 Lady Maitland drew the rents payable at these terms, amounting to £8186, and Sir James, on the other hand, drew down to and at Martinmas 1876 rents amounting to £826. Of the rents conventionally payable during the half-year from Martinmas 1876 to Whitsunday 1877 the executrix drew only the Candlemas rents, amounting to £2658. All the remainder of the half-year's rental, payable down to and at Whitsunday 1877, being the greater part thereof, fell to Sir James. The payments due after the death of Sir Alexander Maitland were as follows:—

(1) *Interest* on entail and improvement debt, heritable bonds, &c. referred to above, for the half-year to Martinmas 1876, payable at same term—amount, £1175; and the like amount of half-yearly interest due at Whitsunday 1877.

(2) *Annuities.*—Half-year's payment of annuity to Honourable Mrs Ramsay, payable at Martinmas 1876, £1785, 14s. Half-year's payment of annuity to Lady Maitland, payable at same term, £1500; and the like amount of the half-year's annuities to both annuitants, due at Whitsunday 1877.

(3) *Feu-duty.*—Half-year to Martinmas 1876, £9.

(4) *Poor-Rate, School-Rate, &c.*—For the year from Whitsunday 1876 to Whitsunday 1877—amount, £438.

(5) *County Rates.*—For same period; amount, £277.

(6) *Stipends.*—Crop 1876, amount £424; payable in March 1877.

(7) *Drainage Rent-Charges*, referred to above —For previous half-years ending respectively at sundry dates between June and Martinmas 1876 —amount, £499; and for previous half-years ending respectively at sundry dates between Martinmas 1876 and June 1877—amount, £560.

(8) *Heritors' Assessment.* — Cramond parish; amount, £37; imposed by consent of the heritors 30th June; paid 17th July 1876. This assessment was imposed partly to meet debts incurred prior to Whitsunday 1876 and partly to provide for the expenditure of the year following 30th June 1876—in equal proportions.

(9) *Statute-Labour Conversion Money.*—For year 1876; amount £18; paid 6th October 1876.

(10) *Land Tax.*—For year from 25th March 1876 to 25th March 1877; payable 1st January 1877; amount, £13.

(11) *Property Tax.*—Year from 5th April 1876 to 5th April 1877; payable 1st January 1877; amount, £226; amount for personal occupation by landlord, continued by the second party, £52.

The Special Case proceeded (Art X.):—"It is maintained by the first party that the liability of the executry for the annual or other burdens on the lands above specified ceases as at Whitsunday 1876, and is limited to the burdens effeiring to the possession prior to that term. On this view the first party is not liable for any part of the (1) interest, (2) annuities, (3) feu-duty, (4) poor and school rates, (5) county rates, and (8) Cramond heritors' assessment, all as above mentioned; and the first party is liable only for such part of the (6) stipends, (7) drainage rent-charges, (9) statute labour conversion money, (10) land tax, and (11) property tax, as effeir to the possession prior to Whitsunday 1876." (Art. XI.)—"On the other hand, it is maintained by the second party that the burdens in question are proper deductions from the rents falling] to the executrix, and conventionally payable after the death of Sir Alexander, and that the executrix can only draw these rents on condition of discharging the said burdens therefrom. The second party accordingly maintains as chargeable against the first party a proportion of the (1) interest and (2) annuities for the half-years before mentioned corresponding to the amount of rent drawn by the first party down to the terms of Martinmas 1876 and Whitsunday 1877 respectively; that the first party is also liable for (3) feu-duty, (6) stipends, (7) drainage rent-charges, (8) Cramond heritors' assessment, and (9) statute-labour conversion money, all as above mentioned; and that the first party is also liable for one-half of (4) poor and school rates, and (5) county rates. The second party also maintains that the first party is liable for the whole amount of the (10) land tax and (11) property tax, in respect Sir Alexander survived the dates 25th March and 5th April respectively, from which these taxes are imposed."

Argued for Sir James Maitland—The burdens were upon the rents, and the person who drew the rents must pay the burdens.— Lady Maitland £8000, Sir James £800. [Lord Gifford—Suppose there had been no postponement, *quid juris?* I should like to be satisfied that the conventional postponement makes any difference.] Whatever rent was due at a certain time, that rent must bear the burden. [Lord Gifford—All the old cases were decided upon the legal, not upon conventional terms.] The principle of deduction to be found in *Paul* v. *Anstruther* was what was founded upon. It was a rent-charge solely. [Lord Gifford —Each must pay the burden effeiring to his possession.] [Lord Justice-Clerk referred to the case of *Campbell* v. *Campbell.*] The statutory rent-charges were in the same position as the other burdens. [Lord Gifford—The intermediate payments, not those at each term, are the difficulty.] Under the Apportionment Act nothing but "arrears" are recoverable. [Lord Justice-Clerk—There is no question of arrears here.]

Argued for Lady Maitland—There was no question as to the rents, only as to the burdens on them. The rents were legally due before the conventional term of payment. The question was at common law, not under the Apportionment Act. As to the annuities, they were both payable in advance. The result of the heir's contention would be that Lady Maitland would have to pay herself the first term of her annuity out of her own funds. As to the rents, the case of *Paul* v. *Anstruther* did not affect the matter. Take the case of an heritable bond with assignation of maills and duties. What rents would be allocated by that assignation? Surely those which became payable after the date of the loan, whatever crop they might be for. Otherwise there would be a period of free-rent, such as was here claimed, The real principle of *Paul* v. *Anstruther* was, that he who took the accruing benefit bore the accruing burden.

Authorities — Connell on Teinds, ii. 83-95; Poor Law Act, 8 and 9 Vict. cap. 83, sec. 37; Improvement Acts, 12 and 13 Vict. cap. 100, sec. 21, 27 and 28 Vict. cap. 114, secs. 25, 26, 27. 51, 62, 66, 76; Stephen's Comms. i. 674; Apportionment Act, 4 Will. IV. cap. 22, sec. 2; *Hard* v. *Anstruther*, 14th November 1862, 1 Macph. 14, reported as *Paul* v. *Anstruther*, 2 Macph. (H. of L.) 1; *Campbell* v. *Campbell*, 18th July 1849, 11 D. 1426.

The point with reference to the annuities was first argued.

At advising—

Lord Justice-Clerk—On the first question, which is the most important one, I have not any doubt. Lady Maitland is entitled to the annuity laid upon the estate, beginning the first term after Sir Alexander's death. The heir in possession contends that as the rents are conventionally postponed he is not bound to pay the annuity for this half-year. I cannot conceive that there is any ground for such a contention; the burden is upon the heir, and to give effect to the argument maintained by him would be to relieve him of this burden for half a-year. There is no authority for that, and it appears contrary to principle.

Lord Ormidale concurred.

Lord Gifford—The general principle, and the equitable one, is, that when rents are postponed such postponement is a mere question of indulgence between landlord and tenant, and is not to affect the rights of heir and executor, were the case one of intestacy, the simplest case of all. The interest of the executor ceased at 16th May 1876, and that of the heir then began. All payments after that must be made by the heir; but what he wants here is, not only the rents effeiring to the second half of the crop, but also the annuities and burdens; while the executrix

was thus to pay the whole burdens while getting only half the rents. The postponement makes no difference, and there is no question of apportionment here.

Thereafter the case was further argued on the other questions.

At advising—

Lord Justice-Clerk—There are three classes of burdens payment of which has fallen due since the death of Sir Alexander Gibson Maitland, the liability of which, as between the succeeding heir of entail and the executor of the last heir, is the question raised in this Special Case. These payments are substantially (1) those falling due at the usual half-yearly terms; (2) those payable for the year; (3) payments falling due at irregular periods.

The first class is the most important. As to these, I have been unable to find any point of difficulty. The question is, Whether or not these burdens should be paid out of the funds of the executor? On the statement made in the case I can see no ground on which this can be maintained. To take the first of these—the interest falling due on the heritable bonds at Martinmas 1876 for the half-year from Whitsunday 1876—it is stated in the case (1) that these are bonds charged under the Montgomery Act for improvements, and by ordinary bonds and dispositions in security for money borrowed, from which it follows that the heir in possession for the time, being bound to keep down the accruing interest, is the primary debtor in the interest falling due for the period of his possession; (2) it is stated that the last heir in possession kept down all the interest accruing during the period of his possession, whence it follows that the heir succeeding is the proper debtor in the interest which fell due thereafter; and (3) that the rents in question were debts due by the tenants to the last heir in possession, and now belong to his executrix. It follows from all this that there can be no pretence for taking payment of a debt due by the heir in possession out of the funds of one who is not the debtor, and who has no concern with the debt; and on this simple ground I am of opinion that the executrix is not bound to bear the burden of this sum. The only ground on which the opposite contention has been maintained is, that these rents, which are admitted to belong to the executrix as in right of Sir Alexander Maitland, are payable at the same terms as the interests in question. No doubt these were postponed rents—that is to say, the debtor of the deceased heir in possession had by the terms of his lease so much credit before he was bound to pay his debt. I cannot see what interest the succeeding heir of entail has in that matter. He is not the creditor of the tenant for this amount, and it cannot affect him at what period his predecessor chose to exact his debt. He might have discharged the debt altogether, or assigned it during his life, or postponed the payment to any period he pleased. Having discharged during his life all the obligations incumbent on him in respect of his interest in the estate and its fruits, his rights in these rents vested in himself and transmitted to his executor free of any claim at the instance of the next heir of entail. There thus arises no question whatever as regards the right of those rents in consequence of their being payable at postponed terms, although the law on this head is not clearly settled. The statements in the Case are conclusive of the rights of heir and executor in this respect.

The case of *Paul* v. *Anstruther* has no application whatever to the point now in dispute. It related to a claim by an assignee of a prior heir of entail for repetition of two sums, which he contended were proper debts of the succeeding heir. The House of Lords held that as regarded the first of these sums the cedent was the proper debtor in the debt so paid, which he clearly was. The claim as to the second was in regard to a proportion of a term's annuity corresponding to the proportion of rent which the assignee drew under the Apportionment Act—an entirely different question from the present.

If Sir Alexander Maitland had lived till August 1876, and the executrix had drawn under the Apportionment Act a quarter's rent, postponed or not postponed, she must have borne the same proportion of the current burden. As the heir in possession was bound to keep down the interest for the period for which he or his representatives drew the rents, so, for the fractional period for which by the Apportionment Act the representative was made entitled to the rents, the liability for the proportional amount of burden necessarily followed.

Lord Ormidale—I have no doubts as to the decision already given on the first question, and I entirely concur in your Lordship's opinion upon the other points, though I place even more weight upon the provisions of the Drainage Act, 27 and 28 Vict, cap. 114, sec. 66.

Lord Gifford — I not only adhere to the opinion I have already expressed, but after the further discussion we have had I do so with more clearness. All the arguments for Sir James Maitland proceed upon the fallacy that the conventional postponement of rents has an influence on the incidence of burdens. Now, it may be in a word said that it has no such influence, just as in the case of the rents themselves it has no effect. On the drainage and heritors' assessment I have felt some doubts, but I do not in any way differ.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the Special Case, are of opinion and find—(1) That the liability of the first party as executrix is limited to the burdens effeiring to the possession down to Whitsunday 1876; (2) That the liability of the first party as executrix did not extend to all or to any part of the burdens payable at or prior to the terms at which the rents falling to the executry are conventionally payable; (3) That each of the eleven classes of burdens specified in the Case fall to be charged and apportioned, as between the the first and second parties thereto, in the mode stated in article 10 of the Special Case; and decern."

Counsel for First Party—M'Laren—Campbell. Agents—Maitland & Lyon, W.S.

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