liability. They had a duty as well as the pilot, that, namely, of having their vessel in navigable condition, and on the authority of the decision in the case of the "*Iona*" (and it does not stand alone) I think the defenders' liability has been established on that ground. The additional ground of fault averred by the pursuers that the tugs employed to shift the "City of Edinburgh" were not proper for the occasion is, I think, not established. On the whole matter, my opinion is that the presumption of fault on the part of the defenders, arising from the circumstance that the "Glassford" was stationary, has not been rebutted, and that the defenders have failed to show that the collision was occasioned through the fault of the pilot. I am therefore for dismissing the appeal.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor—

"Find in terms of the findings in fact in the interlocutor of the Sheriff-Substitute dated 8th July 1904 except the last two findings: Find further in fact (1) that the defenders have failed to prove that the collision in question was occasioned by any fault on the part of the pilot in charge of the defenders' vessel at the time of the collision; (2) that the said collision occurred through the fault of the defenders; and (3) that the damage occasioned by the collision to the pursuer's vessel amounts to the sum of £1200 sterling: Find in law that the defenders are liable to the pursuers for said sum: Therefor of new decern against the defenders for payment to the pursuers of said sum of £1200 sterling with interest as concluded for: Find the defenders liable to the pursuers in expenses in this and in the Inferior Court," &c.

Counsel for the Pursuers and Respondents—Salvesen K.C.—Horne. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Defenders and Appellants—The Lord Advocate (Dickson K.C.)—Younger. Agents—J. & J. Ross, W.S.

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*Thursday, December* 1.

## FIRST DIVISION.

[Sheriff Court of Perthshire at Perth.

## SCOTTISH UNION AND NATIONAL INSURANCE COMPANY *v.* SMEATON.

*Right in Security—Bond and Assignation in Security by Liferentrix—Summary Ejection of Liferentrix in Occupation of Mansion-house—Heritable Securities (Scotland) Act* 1894 (57 *and* 58 *Vict. c.* 44), *sec.* 5.

A liferentrix by constitution in certain lands and a mansion-house, assigned to a creditor by a bond and assignation in security her right in the lands and mansion-house. The creditor, having obtained decree of maills and duties, entered into possession and drew the rents of the lands, and thereafter brought an action in the Sheriff Court, under section 5 of the Heritable Securities Act 1894, for the summary ejection of the liferentrix from the mansion-house, of which she was in personal occupation.

*Held* that, a liferentrix not being a "proprietor" in the sense of section 5 of the Act, the summary remedy of ejection was incompetent, and action *dismissed.*

The Heritable Securities (Scotland) Act 1894 (57 and 58 Vict. c. 44) enacts:—Sec. 5—"Where a creditor desires to enter into possession of the lands disponed in security, and the proprietor thereof is in personal occupation of the same, or any part thereof, such proprietor shall be deemed to be an occupant without a title, and the creditor may take proceedings to eject him in all respects in the same way as if he were such occupant; provided that this section shall not apply in any case unless such proprietor has made default in the punctual payment of the interest due under the security, or in due payment of the principal after formal requisition." Sec. 6—"Any creditor in possession of lands disponed in security may let such lands held in security, or part thereof, on lease, for a period not exceeding seven years in duration."

The Scottish Union and National Insurance Company brought a petition in the Sheriff Court of Perthshire at Perth against Mrs Mary Margaret Young or Smeaton, residing at Coul, Auchterarder, and Elizabeth Margaret Smeaton, also residing at Coul, for warrant to summarily eject the defenders from the lands and estate of Coul, and particularly from the mansion-house of Coul, garden, stables, and offices in connection therewith, in terms of the Heritable Securities (Scotland) Act 1894.

The defender Mrs Mary Smeaton was the widow of Patrick Burgh Smeaton of Coul, and was the liferentrix of the estate of Coul, including the mansion-house and other offices, conform to disposition by the deceased Patrick Burgh Smeaton of Coul in favour of himself and the said Mrs Mary Smeaton, in conjunct fee and liferent, and the heirs of their marriage in fee, dated 10th April, and recorded in the General Register of Sasines, 4th October 1872. The defender Elizabeth Margaret Smeaton was the only child of the said Patrick Burgh Smeaton and Mrs Mary Smeaton. Both defenders resided in the mansion-house of Coul.

In March 1891 the pursuers advanced on loan to the defender Mary Margaret Young or Smeaton the sum of £1000, and in consideration thereof she and the defender the said Elizabeth Margaret Smeaton, and another, by bond and assignation in security duly recorded, bound themselves jointly and severally and their

respective heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, *inter alia*, to repay the said sum of £1000 to the pursuers and their assignees at the term of Whitsunday 1891; and in security and for more sure payment to the pursuers of the whole sums of money, principal, interest, and others therein specified, and generally in security of the several personal obligations and others contained in the said bond and assignation and security, *inter alia*, the defenders made over to and in favour of the pursuers their rights in and to the said lands and estate of Coul, including the mansion-house, garden, stables, and offices.

The pursuers averred that no interest had been paid on the principal sum due under the said bond and assignation in security since Whitsunday 1902. On or about the 16th day of February 1903 the pursuers intimated to the defenders a formal demand for payment of the principal sum of £1000 contained in the said bond and assignation in security under and in terms of The Titles to Land Consolidation (Scotland) Act 1868. The period of three months from the date of the demand for payment expired on or about the term of Whitsunday 1903, but payment had not yet been made to the pursuers.

On 23rd July 1903 the pursuers raised an action of maills and duties in the Sheriff Court of Perthshire, at Perth, against, amongst others, the said defenders, craving rights to the rents, maills, and duties of the said estate of Coul, in which they obtained decree, dated 14th August 1903.

The pursuers further stated that they desired to enter into possession of the said mansion-house and offices of Coul conveyed to them in the bond and assignation in security, of which the defenders were in personal occupation, in terms of the Heritable Securities (Scotland) Act 1894, and had intimated their wish to do so to the defenders, who declined to remove therefrom.

The defenders, *inter alia*, denied that no interest had been paid on the principal sum due under the bond and assignation in security, and stated that agents for the pursuers had been collecting the rents of the subjects for some considerable time, and that there was sufficient money, after paying the various burdens on the estate, to have paid the pursuers in full the interest on their bond.

The pursuers pleaded, *inter alia*—"(1) The pursuers being heritable creditors in possession of the estate of Coul, in virtue of the decree of maills and duties in their favour founded on, and the defenders being in personal occupation of the said mansion-house, garden, stables, and offices forming part of the pursuers' security subjects, the pursuers are entitled to decree of ejection in terms of The Heritable Securities (Scotland) Act 1894."

The defender Mrs Margaret Smeaton pleaded, *inter alia*—"(1) The action is incompetent. (3) The defender not being proprietor of the subjects in question, ought to be assoilzied, with expenses."

On 10th August 1904 the Sheriff-Substitute (SYM) granted warrant of ejection against the defender Mrs Mary Smeaton in terms of the conclusions of the petition, and refused the same as regards the defender Elizabeth Margaret Smeaton.

*Note.*—"It is thought that the liferent of Mrs Smeaton could form the subject of a heritable security. She is in possession. Though the word proprietor is used in the 5th section of the Heritable Securities Act 1894, and this defender is not in the full sense proprietor but a liferenter (the lands having been conveyed by her husband to him and her in conjunct fee and liferent and to the heirs of the marriage in fee), the Sheriff-Substitute considers that the remedy given to the creditor against the debtor in possession is available."

The defender Mrs Margaret Smeaton appealed to the Court of Session, and argued—Against a person in occupation of property neither vitiously nor precariously but under a good title, summary ejection was not a habile process—*Hally* v. *Lang*, June 26, 1867, 5 Macph. 951, 4 S.L.R. 146; *Robb* v. *Brearton*, July 11, 1895, 22 R. 885, 32 S.L.R. 671. Accordingly the present action being directed against a liferentrix by constitution was incompetent at common law. The action was equally incompetent under section 5 of the Heritable Securities Act 1894. Section 5 assumed a disposition of "lands" by the "proprietor." The pursuers here did not hold a disposition of the subjects in security, but merely an assignation in security of the right of the defender in the subjects, and the right of the defender was merely a right to the rents and profits and use of the subjects. Section 6 of the Act showed that in section 5 "proprietor" could not mean "liferenter," for section 6 gave a creditor in possession a right to grant leases for seven years. A liferenter could not grant such a lease, and section 5 could not be so interpreted as to lead to the result that an assignee was to have greater rights than his cedent.

Argued for the pursuers and respondents—It was admitted that, if section 5 of the Heritable Securities Act 1894 did not warrant summary ejection in this case, this process was not competent at common law. But the case fell within section 5 of the Act. The appellant had conveyed her whole right in the lands, including the mansion-house. That right was a heritable right, and she was "proprietor" of it. A liferent of land was the subject of a "heritable" security and could be attached by real diligence—Bell's Prin., secs. 1037 and 1478—so that the remedy provided for heritable creditors by section 5 of the Act applied. [LORD KINNEAR referred to Erskine's Institutes, ii, 9, 41, as showing that a liferenter could not dispone the lands but merely assign his right therein.] A "heritable right" fell within the term "heritable subject," and therefore the lawful owner of a heritable right was a heritable proprietor. It would greatly limit the operation of the Heritable Securities Act and cause much inconvenience if the words "proprietor"

and "land" were to be construed in the narrow sense contended for by the appellant.

LORD PRESIDENT—The question in this case is whether the Sheriff-Substitute was right in granting a warrant of ejection against the defender. She is the liferentrix of the estate under a disposition granted by her husband in her favour. I do not understand it to be disputed that unless the provisions of the Heritable Securities (Scotland) Act apply the interlocutor cannot be supported. The question therefore is, whether the case does or does not fall under the provisions of section 5 of that Act, which provides—[*His Lordship quoted the section.*] I cannot see any adequate ground for holding that this provision applies to the present case so as to bring the defender into the position of an occupant without a title. Mr M'Clure admitted that if he failed on the construction of the statute he could not make good his case, and accordingly I am of opinion that the judgment of the Sheriff-Substitute is erroneous, and that his interlocutor should be recalled.

LORD ADAM — The defender here is in possession of the mansion-house of Coul under a liferent right by constitution, which includes both the mansion-house and the lands. The pursuers are an insurance company, who are heritable creditors of the defender under a bond and assignation in security. Proceeding on this bond the pursuers have obtained decree of maills and duties of the estate of Coul, and have entered into possession of the lands, and are drawing the rents of the lands. This lady, the defender, being herself in possession of the house, is not affected by this decree, and the pursuers in order to get possession have had recourse to this summary remedy.

Mr M'Clure properly admits that, treated as an ordinary common law case of ejection, the action would be incompetent, in respect the occupier is not in the position of a person occupying without a title. But then he said the power of summarily ejecting the defender in this way is to be found in section 5 of the Heritable Securities Act 1894. That raises a question of the construction of section 5, viz., whether it applies to a person in the position of the present defender. I agree with your Lordship that section 5 applies to a person who is in fact proprietor of lands, and cannot be extended to a person like Mrs Smeaton, who is not a proprietor but a mere liferenter. If one refers to section 6 of the Act we find that, if Mr M'Clure's argument is right, the creditor on getting possession of the lands would be in a position to let the lands on lease for seven years. I should be very unwilling to put such an interpretation on section 5 as would involve giving the creditors of a liferentrix a power of management of the estate greater than that possessed by the liferentrix herself. The liferentrix does not have such a power to grant leases, and it would be very startling to find given to her assignee a power not possessed by her. In the Act stringent powers are given, which are all very well when the owners of the land are themselves in possession, but are not applicable to the case of a mere liferentrix. Accordingly I am of opinion that the word "proprietor" in section 5 is not to be extended to include liferenters who are not proprietors.

LORD M'LAREN—The facts of this case are simple. The liferentrix of an estate granted in security to an insurance company an assignation of her liferent interest in the estate of Coul including the mansion-house. The debt not having been paid on demand the insurance company obtained decree of maills and duties, and now bring this action to obtain possession of the mansion-house and curtilage which are in the natural possession of the liferentrix. They found on section 5 of the Heritable Securities Act 1894. That section is intended to apply to the case of a proprietor who is in the natural possession of the security subjects, so that the holder of the security may be able to dispossess him by summary process. The question is, whether this section extends to a liferenter in possession or whether it is confined to the case of a proprietor in fee. In order that a creditor should have the benefit of this section he must show he comes within the language of the section, *i.e.*, that he is in the position of a mortgagee of "lands disponed in security."

I was inclined at an early stage of the argument to the view that a liferent, though it be in certain respects not heritable and not specifically transmissible, yet, as it may be the subject of a real security and may be attached by real diligence, the section would apply. On further consideration I now think that such an extended construction of the statute is not maintainable. No doubt the liferent is a real security but it is not capable of being transferred so as to give the transferee a feudal right. As Mr Erskine points out, there cannot properly be an assignation of the heritable liferent estate. An assignation carries nothing more than the life interest, which is a different thing from the transfer of the liferent estate. The heritable estate is not transferred. One reason suggested from the bar is that the liferenter has no power to give an entry or warrant for infeftment. Another difficulty is that our law does not recognise the giving sasine for another man's life. The notary could only give liferent sasine to the insurance company, which would have no meaning.

This general argument is confirmed by section 6 of the Act, which provides—[*His Lordship quoted the section*]. Now, it is plain that a liferentrix could not grant a lease for seven years, but only for so long as her liferent subsisted. We are not to assume that it was intended that the assignee of a liferenter should exercise larger powers than the liferenter himself could have exercised.

I agree then that this summary process of ejection cannot be maintained. Whether there is any other process independent of

statute by which the heritable creditor can get possession may be a question of considerable moment, but it is not before us.

LORD KINNEAR—I agree. This is a process by which it is proposed to turn the defender out of the house she occupies by summary ejectment. That is a severe remedy, and we must see that it is carried out in rigorous conformity with the legal conditions upon which alone it can be employed.

It is conceded by the creditors that the process cannot be supported unless it falls under the provisions of section 5 of the Heritable Securities (Scotland) Act 1894, and therefore the whole question is whether that section applies to the creditors of a liferenter in possession. I think with your Lordships that it does not. The section begins with the words "when a creditor desires to enter into possession of the lands disponed in security," and it therefore assumes that the creditor has obtained a disposition of the lands from the proprietor; and nobody who is not in that position is enabled to take the summary proceedings afterwards authorised. The enactment goes on to say that the proprietor from whom the creditor's right is derived may be treated as an occupant without a title. The creditors in the present case are not in the position assumed by that enactment. They hold no disposition of the lands in security, but only an assignation in security of the fruits and profits of the lands during the subsistence of a liferent right. And this was all that the liferenter could give. The power of the liferenter to confer right on a transferee is quite clearly defined by Mr Erskine, who points out that the liferenter cannot give a disposition of the lands but merely an assignation of the fruits. That alone is sufficient to exclude the interpretation maintained by the respondents.

But when the fifth section is read along with sections 6 and 7 the matter becomes even more clear. The powers conferred on a creditor necessarily assume that he is to be put in the place of a proprietor in fee. By section 6 a creditor in possession may grant a lease not exceeding seven years, and by section 7 he may grant a lease for a longer period not exceeding twenty-one years, provided he gets the sanction of the Sheriff. It is impossible to suppose that the Legislature intended to give the creditors of a liferenter a right which the liferenter himself does not possess, and that to the prejudice of the undoubted rights of the fiar, who has nothing whatever to do with the creditors of the liferenter or their securities.

For these reasons I think that section 5 of the Heritable Securities Act must be construed as your Lordship proposes.

The Court sustained the appeal and dismissed the action.

Counsel for the Defender and Appellant —T. B. Morison—A. A. Fraser. Agents—Sibbald & Mackenzie, W.S.

Counsel for the Pursuers and Respondents —M'Clure. Agents—Cowan & Dalmahoy, W.S.

*Tuesday, December 6.*

## FIRST DIVISION.

## WATSON *v.* NORTH BRITISH RAILWAY COMPANY.

*Process—Jury Trial—Two Trials, in Both of which Pursuer Successful—Third Trial Granted—Contributory Negligence.*

A checker was run over and killed while engaged in checking waggons on railway sidings. His widow raised an action of damages against the railway company for the loss of her husband, and obtained a verdict. This verdict was set aside on the ground that there was contributory negligence on the part of the deceased. At the new trial the evidence was practically the same as at the first trial, and the pursuer again obtained a verdict. The defenders were granted a rule.

The Court *set aside* the second verdict on the same ground on which they had set aside the first verdict and *granted* a third trial.

On 4th August 1902 Richard Watson, a checker in the employment of a firm of shipping-agents at Bo'ness, while engaged at his work of checking waggons in the railway sidings adjacent to Bo'ness Docks was knocked down by an engine which was shunting some empty waggons, and run over by the engine. He died on the same day from the injuries received. The railway sidings where the accident occurred, and the engine, were the property of the North British Railway Company, and the engine-driver was their servant.

Mrs Jane Gemmell or Watson, the widow of the deceased, sued the Railway Company for £500 as damages for the loss of her husband, caused, as she averred, by the fault of the defenders or their servant. The case was tried before the Lord Justice-Clerk and a jury. The pursuer led evidence to show that the accident was caused (1) through the failure of the defenders to take proper precautions for the protection of the deceased and those who like him had occasion to be on the lines in the course of their duty; and (2) through the failure of their servant the engine-driver to keep a proper look-out and give warning. The defenders pleaded, and led evidence to prove, that the accident was caused or materially contributed to by the deceased's own fault or negligence. They also led evidence to show that there was no fault on their part. The purport of the evidence is stated in the opinions of the Judges.

The pursuer obtained a verdict with damages at £200. This verdict was set aside by the First Division, on the ground that the evidence disclosed a case of contributory negligence, the deceased having stepped on to the rails before the engine without having taken the precaution to look aud see that no train was coming, and a new trial was granted. At the new trial before the Lord President and a jury the evidence was substantially the same as at the former trial,