have not established against the defenders any of the other objections stated by them to the said account: Find it not proved that the defenders received an offer of £32,000 sterling for the said ship referred to in condescendence 8, or that the defenders were guilty of any negligence or default in connection with the sale of the said ship: Find in law that the defenders are entitled to absolvitor: Therefore assoilzie the defenders from the whole conclusions of the action, and decern: Find the defenders entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for Appellants—Sir C. Pearson—Ure Agents—J. W. & J. Mackenzie, W.S.

Counsel for Respondents—Low. Agents—Macpherson & Mackay, W.S.

Thursday, July 17.

SECOND DIVISION.

STROYAN AND ANOTHER (BLACK'S EXECUTORS).

Succession — Heritable and Moveable — Security by Assignation of Lease—Titles to Land Consolidation Act 1868 (31 *and* 32 *Vict. c.* 101), *secs.* 3 *and* 117.

Held (Lord Rutherfurd Clark *diss.*) that a debt secured by an *ex facie* absolute assignation of a lease qualified by a back-letter is moveable estate as regards the succession of the creditor.

Question, whether such an assignation of a lease is a heritable security under the Titles to Land Consolidation Act 1868.

The late John Black, farmer in Horsepark in the parish of Glasserton, Wigtownshire, and his wife Mrs Elizabeth Murray or Black, executed a mutual disposition and settlement in 1876, by which they disponed to the survivor the whole estate, heritable and moveable, now belonging or which should belong to both or either of them at the death of the predeceaser.

In May 1883 they lent £450 upon the security of the assignation of a lease for 999 years (from Whitsunday 1810), but they granted the borrower a back-letter upon the narrative that the assignation although *ex facie* absolute was in security for repayment of said loan. They expede a notarial instrument in their favour, which was registered along with the original lease in the General Register of Sasines in terms of the Registration of Leases (Scotland) Act 1857.

The said John Black died in 1886 survived by his wife, who died in 1888.

This special case was presented by John Stroyan, farmer, Dindinnie, Wigtownshire, and another, Mrs Black's executors, of the first part, and William Murray, farmer, Skate, her nephew and heir-at-law, of the second part, to have it determined "whether the said sum of £450 secured by the said *ex facie* absolute assignation of the foresaid long lease, qualified by the foresaid back-letter, forms part of the moveable estate of the late Mrs Elizabeth Murray or Black, and as such falls to the first parties as her executors-nominate: . . . Or, whether the said £450 is heritable estate of the said Mrs Elizabeth Murray or Black, and as such falls to the second party as her heir-at-law in heritage."

The Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. c. 101), by sec. 3 provides that "the words 'heritable security' and 'security' shall each extend to and include all heritable bonds, bonds and dispositions in security, bonds of annual rent, bonds of annuity, and all securities authorised to be granted by the 7th sec. of the Act 19 and 20 Vict. c. 91 . . . and all deeds and conveyances whatsoever, legal as well as voluntary, which are or may be used for the purpose of constituting or completing or transmitting a security over lands or over the rents and profits thereof as well as such lands themselves and the rents and profits thereof, and the sums—principal, interest, and penalties—secured by such securities, but shall not include securities by way of ground annual, whether redeemable or irredeemable or absolute dispositions qualified by back-bonds or letters." And by sec. 117 it provides that "from and after the commencement of this Act heritable security granted or obtained either before or after that date shall, in whatever terms the same may be conceived . . . be heritable as regards the succession of the creditor in such security, and the same shall be moveable as regards the succession of such creditor, and shall belong after the death of such creditor to his executors or representatives *in mobilibus* in the same manner and to the same extent and effect as such security would under the law and practice now in force have belonged to the heirs of such creditor." . . .

Argued for the first parties—(1) The security here was not heritable security, and therefore even before 1868 the sum which it secured would have gone to the executors of the creditor. (2) If it was heritable security then the Act of 1868 applied. The second party wished to make it heritable security and then to include it among the exceptions to which the Act of 1868 was declared not to apply. These exceptions did not contain *nominatim* assignations of leases, and they were to be read strictly.

Argued for the second party—The security here was clearly heritable security. (1) At common law the money it secured went to the heir-at-law of the creditor. The 1868 Act did not apply, for assignations of leases were not among the heritable securities dealt with by that Act. (2) If it was a heritable security in the sense of the 1868 Act it was an absolute disposition qualified by back-letter and as such among the exceptions to which the Act was expressly declared not to apply.

At advising—

LORD YOUNG—The question in this case arises quite generally and without specialty or peculiarity in the individual case, but I

do not regard it as a question of anything like general interest or importance or likely to be of frequent occurrence in the future, seeing that it has never occurred at all in the past. The question is, whether a personal debt for money lent became heritable with respect to the succession of the creditor by the fact of the creditor having taken security therefor in the form of an assignation of a lease qualified by a back-letter? That is a full and accurate statement of the case.

The lease to which the assignation was thus taken was for the long period of 999 years—a period stated almost superstitiously, because there is no reason for 999 years rather than 1000 years or any other long period—and the assignation which the creditor in the debt took in security entered the record by notarial instrument under the Long Leases Registration Act 1857. It was conceded, and is to my mind quite clear, that the question is not affected by the length of the lease or by its registration. It is familiar enough law—it is so stated by all the text writers—that the length of lease does not affect the tenants' succession should he die before it expires. It must never be lost sight of that a lease is wholly a personal contract, although upon the tenant's death during its currency it goes, unless it is otherwise provided in the contract, to the tenant's heir-at-law. This is because the law implies that according to the contract between the parties that was intended, there being no provision to the contrary. That applies to a lease of any duration.

Two questions then occur here, either of which being answered in one way would dispose of the question presented to us. These are, in the first place, whether irrespective of statute—and the only statute of importance in this case is the Statute of 1868, whereby it is provided that heritable securities shall no longer affect the succession of the creditor in the debts which they secure—whether, I say, at common law, and irrespective of statute, the nature of the security for this personal debt renders the debt heritable as to the succession of the creditor. I put the question in the course of the discussion whether that question had ever occurred, and I was told by counsel that it had not so far as they knew. Accordingly, this question at common law, and irrespective of statute, occurs now for the first time. If it is answered in the negative, and the succession of the creditor is not affected, that disposes of the question. We know that in ancient times there was a strong prejudice in this Court in favour of primogeniture, and a disposition to send as much as possible by that law to the heir-at-law, and in that direction were the decisions. Security over land therefore was held to affect the character of the debt, and make it heritable. Modern opinion and feeling are not in that direction, and in England the debt, with respect to the succession of the creditor, always maintained its original character. In this country the ancient law was corrected so far as possible by the more modern decisions, which, violating somewhat the prejudices of the older Judges, held that the character of the debt would not be affected by anything less than immediate infeftment upon the security, or at least the right to take immediate infeftment. In short, modern feeling so far prevailed against the views upon which the ancient decisions which governed the law proceeded, and in 1868 an Act was passed setting aside the ancient rule, and providing that personal debts should remain personal notwithstanding the heritable security of whatever character and in whatever form. If, then, we are to decide this case at common law, I am not prepared to proceed upon the antiquated views based upon the principle of primogeniture, but rather upon the modern and now prevailing sentiments on the subject. I am however of opinion, that even according to these views on which the older decisions proceeded, a lease was without their scope. A lease, it should be kept in view, is not an estate in land. It is a personal contract with respect to land, but it gives no real right in land. It is a contract between the owner of land, who remains the owner, and the person contracting with him for a certain use of it. That is not affected in this case or in any other by the fact that by the Statute of 1449 this personal contract was rendered real to this extent, that it should be good against singular successors. At common law the contract itself was not held good against singular successors, and that caused hardship and hence the statutory rule. Subject to that exception a lease is a personal contract whether of longer or of shorter duration, and I do not think that an assignation of this personal contract is a suitable security within the views of the older decisions.

In the view of modern feeling I should be unwilling to hold now—for the first time—that the assignation of a lease in security of a personal debt rendered that debt heritable. The decisions holding that a heritable security had that effect led to results ridiculous enough, but to hold that a lease did, might lead to even more extravagant consequences. Suppose a lease, whether long or short, is on the eve of expiry—will expire, it may be, next year—and an assignation is taken to it in security of a debt, then, according to the proposition that the character of the debt is affected, if the creditor in the debt dies within the year his debt goes to his heir-at-law. That is not according to the decisions to which I have referred. Upon the first question, therefore, my opinion is that at common law an assignation of a lease by way of security does not render the debt heritable or affect the succession of the creditor, and that disposes of the question before us.

But in the second place I shall refer to the Act of 1868. It is proper that I should, although it is only in the view that a lease may be regarded as a heritable security that any reference to the Act is necessary. That Act provides that no heritable security shall affect the character of the debt as regards the creditor's succession, and we were very properly referred to the definition of heritable security given in the Act.

If this is not a heritable security it does not affect the character of the debt, and if it is the Act declares that no heritable security in whatever form shall affect the character of the debt. But then, it is said, the definition clause provides that "heritable securities . . . shall not include securities by way of ground annual, . . . or absolute dispositions qualified by back-bonds or letters," and it is contended that this is a heritable security to which the Act does not apply by reason of its being an absolute disposition qualified by back-bond.

The first question which presents itself here is, What does the statute mean by absolute disposition? I looked through the interpretation clause to see if I could find any definition of disposition or absolute disposition. There is no such definition, but it is not doubtful that it means a disposition to land and not an assignation to a lease. It would not have occurred to anyone that it meant an assignation to a lease. It means a disposition to land whereby the disponee becomes proprietor of the land, and the back bond is merely a personal obligation upon the landed proprietor. That is the case to which the Act does not apply. This case does not fall within that exception. An assignation to a lease qualified by a back-letter is not an absolute disposition qualified by a back-bond.

Therefore, in that question also, I arrive at the conclusion that the character of this debt is personal, and that the succession of the creditor is not affected by this lease.

LORD RUTHERFURD CLARK—I am sorry that I am obliged to differ from the opinion which has just been delivered.

It may be a question whether securities over leasehold properties fall under the Act of 1868 or not. But in whatever manner it may be resolved, I am of opinion the security with which we are dealing is heritable.

Assuming the question to be answered in the negative, I am of opinion that the security under consideration is heritable at common law as being secured over heritable property. It is constituted by the absolute assignation of a lease for 999 years. This is plainly an heritable right, and I have always understood that securities constituted over heritable rights are themselves heritable.

It is said that the question is the same whether the security is over a lease of short duration or, as here, over a lease of very long duration. I agree. But I do not see the value of the observation. So long as the lease exists the money is secured over heritable property, and the security is therefore heritable. If the lease comes to an end the security terminates, and the money being no longer heritably secured is moveable. In other words, the money goes to the heirs so long as it is heritably secured, and to the executor when it ceases to be so secured.

If, again, securities over leases come under the operation of the Act, I think that the exception contained in the 117th section applies. For in my opinion the meaning of the Act is that securities standing on an absolute title shall be heritable as contradistinguished from securities standing on a mere security title. It is said that the word "disposition" does not include "assignation." That may furnish an argument to show that the Act does not apply to securities over leases. But assuming that the Act does embrace such securities. I think that the word "disposition" will include "assignation," so that all securities constituted by an absolute title over heritable property shall be heritable.

LORD LEE—The question in this case is whether a sum of £450 invested on the security of an assignation to a long lease, registered under the Leases Act of 1857, and as to which the debtor held a back-letter bearing that though *ex facie* absolute it was truly in security for a loan of that amount, is heritable or moveable as regards the succession of the creditor.

That this question must be answered in favour of the executors does not admit of doubt if the 117th clause of the Titles to Land Act 1868 applies.

It is said that the statute does not apply, firstly, because it has no application to leases but only to feudal titles. But this argument, I think, is negatived by the 116th and 134th sections of the statute. The former expressly refers to such leases as within the scope of the Act, and the latter applies the provisions relative to bonds and dispositions in security to "all heritable securities unless in so far as such provisions, &c., may be inapplicable to the form or objects of such securities."

It is said, secondly, that the expression "heritable securities" is by the interpretation clause limited so as not to include absolute "dispositions qualified by back-bonds or letters."

But the security here is not an absolute disposition. It is an assignation of a lease. Such an assignation registered constitutes a real right. But it is not a disposition of the lands. I am therefore unable to arrive at the conclusion that the exception expressed in the interpretation clause is sufficient to save such a security from the operation of the 117th clause of the Titles to Land Act.

LORD JUSTICE-CLERK concurred with the majority.

The Court answered the first alternative of the question submitted in the affirmative.

Counsel for the First Parties—Lorimer. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Second Parties—Goudy Agents—Carmichael & Miller, W.S.