

Friday March 13.

SECOND DIVISION.

[Sheriff-Substitute of
Lanarkshire.]

BELL'S TRUSTEES v. COPELAND &
COMPANY'S TRUSTEE.

Poinding of the Ground—Ground-Annual—Sequestration—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 118—Conveyancing (Scotland) Act 1874 Amendment Act 1879 (42 and 43 Vict. cap. 40), sec. 3.

The Bankruptcy (Scotland) Act 1856, sec. 118, as re-enacted by the Conveyancing (Scotland) Act 1874 Amendment Act 1879, contains the following proviso:—"Provided that no creditor who holds a security over the heritable estate preferable to the right of the trustee" (in a sequestration) "shall be prevented from executing a poinding of the ground after the sequestration, but such poinding shall in competition with the trustee be available only for the interest on the debt for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of such term."

Held that a creditor in a ground-annual was entitled, as a creditor holding a real security over the heritable estate preferable to that of the trustee, to poind the ground under this proviso, the annual payment under the contract of ground-annual being properly the "interest on the debt," the principal of which was to be taken as the capitalised value of the annual payment.

The trustees of the late James Bell, letterpress printer, Dublin, were creditors in two ground-annuals of £248, 16s. 2d. and £68, 7s., respectively due out of two properties in Glasgow belonging to J. Copeland & Company, and James Copeland and Lawson Forsyth as trustees for that firm. The contracts of ground-annual were in common form, and consisted of (1) a disposition of the lands by the original creditor in the ground-annual to the original debtor under the real lien and burden of the respective amounts of the ground-annuals payable half-yearly; (2) a personal obligation by the debtors to pay the ground-annuals; and (3) a disposition in security of the personal obligation of (a) the ground-annuals, and (b) the lands themselves. The dispositions to the debtors were under declaration that the debtors should have power at any time within ten years from the term of Whitsunday 1895 to redeem the ground-annuals upon making payment of a capital sum equal to twenty-one years' purchase thereof.

At Whitsunday 1895 neither of the half-yearly payments due under the contracts of ground-annual were paid.

On 27th June the estates of J. Copeland & Company and James Copeland & Lawson Forsyth, sole partners of that firm, as such

partners and as individuals, were sequestrated by the Sheriff of Lanarkshire, and John Gourlay, chartered accountant, Glasgow, was appointed trustee.

The Bankruptcy (Scotland) Act, sec. 118, provides—"No poinding of the ground which has not been carried into execution by sale of the effects sixty days before the date of the sequestration . . . shall (except to the extent hereinafter provided) be available in any question with the trustee; provided that no creditor who holds a security over the heritable estate preferable to the right of the trustee shall be prevented from executing a poinding of the ground . . . after the sequestration, but such poinding . . . shall, in competition with the trustee, be available only for the interest on the debt for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of such term."

This enactment was repealed by the Conveyancing and Land Transfer (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 55, but it was re-enacted by the Conveyancing (Scotland) Act 1874 Amendment Act 1879.

On 3rd October the trustees of James Bell brought an action of poinding of the ground in the Sheriff Court at Glasgow against Copeland & Company, and the partners of that firm, and Mr Gourlay, as trustee on their sequestrated estates, craving warrant to poind the moveables on the ground of the lands disposed in the contracts of ground-annual above mentioned. The defenders admitted that the amounts of ground-annual due at Whitsunday were unpaid, but explained, as follows—"The defender John Gourlay, as trustee foresaid, is, and has been ready, and offers to pay any interest on the pursuers' debt (*i.e.*, upon his ground-annuals) up to Martinmas 1895, in terms of section 3 of the Conveyancing (Scotland) 1874 Amendment Act 1879, and sec. 2 of the Conveyancing (Scotland) Acts 1874 and 1879 Amendment Act 1887."

The defenders pleaded—" (1) Decree of absolvitor ought to be pronounced, in respect the Bankruptcy (Scotland) Act 1856, section 102, confers a preferable right to the moveables upon the defender John Gourlay, as trustee upon the sequestrated estates, subject only to the payment of the interest which has been tendered, and for which alone the pursuers could poind the ground."

By interlocutor dated 9th December 1895 the Sheriff-Substitute (BALFOUR) repelled the defences and decerned in favour of the pursuers, adding the following note:—

Note.—"The pursuers are holders of two ground-annuals over certain heritable properties belonging to the defenders J. Copeland & Company. The estate of these defenders was sequestrated on 27th June 1895, and the defender John Gourlay appointed trustee in the sequestration.

"This is an action of poinding of the ground, and warrant is craved to poind the moveables upon the premises in satisfaction of the ground-annuals due to the pursuers at the term of Whitsunday 1895 for the

half-year preceding. There are two different subjects over which the ground-annuals exist, and there are two separate contracts of ground-annual, which are in the usual terms. The security known as a ground-annual is substantially the same as a feu-duty. There are certain well-known distinctions between the two rights. In the case of the contract of ground-annual there is no relation of superior and vassal, and it was either in order to get quit of the prohibition by superiors against subinfeudation, or prior to the Conveyancing Act of 1874 in the case of lands held by burgh tenure, that parties transacted by way of ground-annual. The contract of ground-annual is a complex document; but, generally speaking, it consists in the seller disposing the lands in consideration of a certain ground-annual, which is made a real burden, and the purchaser binds himself to pay the ground-annual and re-dispones to the seller in security of the ground-annual not only a ground-annual of the specified amount to be uplifted out of the lands, but also the lands themselves. The ground-annuals are therefore annual payments created real burdens on lands on the same principle as real burdens are created for capital sums. The amount of the ground-annual is ascertained by taking the value of the lands generally at a certain price per square yard, and converting the capital sum at a certain rate of interest into an annual payment, but the contract of ground-annual does not contain these details; it merely stipulates for payment of the ground-annual. The ground-annual is postponed to the feu-duty, but as a *debitum fundi* it forms the foundation of pointing the ground. The defenders defend this action on the strength of a certain clause (the 118th) which appeared in the Bankruptcy Act of 1856. That clause was repealed by the Conveyancing Act of 1874, but it was restored by the Conveyancing Amendment Act of 1879, and an addition was made to it by the further amending Act of 1887. The clause is as follows—
[The Sheriff-Substitute quoted the section.]

“It will be noticed that this clause provides that no creditor who holds a security over the heritable estate of the bankrupts, preferable to the right of the trustee, shall be prevented executing a pointing of the ground after the sequestration, but such pointing shall, in competition with the trustee, be available only for the interest on the debt for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of such term. The present pointing is alleged to be for the interest on a debt for the current half-yearly term, but the defenders say that a ground-annual is not interest on a debt at all, but that it is a perpetual annuity having no reference to any principal sum or debt. This, however, seems to me to be a very narrow reading of the clause of the statute. The result of this reading would be that a superior would have a preference over the trustee for his feu-duties, because the superior's rights are reserved by the Bankruptcy Acts, and a

bondholder could have the statutory preference over the trustee for his interest, but the holder of a ground-annual, who is preferable to a bondholder, would have no preference at all. It is contended that a ground-annual is not interest on a debt in the same way as interest on the principal sum contained in an heritable bond. But I hold that it is an annual payment which has been fixed by taking a certain rate of interest on a principal sum, viz., the price of the lands, and there is no principle whatever in holding that the statutory preference applies to a bond and not to a ground-annual. The argument appears to me to be founded upon a constrained reading of the expression ‘interest on debt.’ All the other elements which go to confer the preference exist in the person of the pursuers, inasmuch as (1st) they hold a security over the bankrupt's heritable estate; (2nd) this security is preferable to the right of the trustee; and (3rd) they are entitled to execute a pointing of the ground after the sequestration.

“This is not a case which, in my opinion, falls to be determined by nice inquiries as to what the meaning of the ground-annual is, and as to whether it is not tantamount to interest and annual rent. It falls to be dealt with on a broader basis, viz., whether in the sense of the statute a ground-annual is not really an annuity determined by the price of the lands, and whether it may not from that point of view be fairly described as interest on debt. There is no reason whatever, that I can see, for a holder of a ground-annual being deprived of the preference under the statute, and for the holder of an heritable debt, which is an inferior burden, being preferred to him.

“I am therefore of opinion that the holder of a ground-annual is entitled to the statutory preference, and that this pointing is competent.”

The defenders appealed to the Court of Session, and argued—After sequestration pointing of the ground was only available in competition with the trustee for “interest on a debt” secured over heritable estate (Bankruptcy (Scotland) Act 1856, sec. 118, as re-enacted by the Conveyancing (Scotland) Act 1874 Amendment Act 1879, sec. 3). The sum due annually under a contract of ground-annual was not interest on a debt. There was no principal sum on which it was interest, but only a right to an annual payment, and the security was for the annual payment only.

Argued for the pursuers and respondents—If the defenders' contention were correct that the highly anomalous result would be that a heritable creditor in virtue of a bond could point the ground after sequestration, but the creditor in a ground-annual, whose debt was preferable to that of such a bondholder, could not. This could not be assumed to be the intention of the Legislature. But the debt in a ground-annual was not the payment for any one year. A ground-annual was a right to an annual payment in perpetuity. Such a right could be capitalised, and the capital-

ised value was the amount of the debt. This appeared from the power of redemption in the contracts. The sum due annually was just interest on the amount of the capitalised value. A ground-annual was an "annual-rent," and that expression was in the institutional writers used as equivalent to interest—Ersk. Inst. iv. 1, 11.

LORD YOUNG—The creditor in a ground annual is a creditor in perpetuity for payment of a certain sum annually. Now that payment is secured on land. That is why it is called a ground annual; it is an annual payment secured on land. I have already said that payment is due in perpetuity, and in order to ascertain the amount of the debt we must capitalise the annual payment in the ordinary way. The capitalised value is the amount of the debt. Now, the annual payment is just the return or rent to him on this debt. It appears to me such an annual payment is indistinguishable from interest. I think he is entitled to point the ground for that to the extent allowed by the statute, that is, for the amount due for the current half-year and one-half year before. Now, the Sheriff-Substitute has sustained that contention. I think, even on the literal meaning of the clause, that his view is correct. But according to the true meaning and intent of the statute it is impossible to doubt it. I cannot distinguish between the position of the respondent and the position of a creditor under a bond. I am therefore of opinion that the Sheriff-Substitute's interlocutor was right, and ought to be affirmed.

The LORD JUSTICE-CLERK concurred.

LORD TRAYNER—I agree. I think the argument for the appellants is ingenious, but it is based on a too strict construction of section 118 of the Bankruptcy Act, and if sustained would have the effect of placing a certain class of heritable creditors in a very anomalous position. The question comes to be whether the holder of a ground-annual is to be put in a worse position than a heritable creditor under a bond. I should be averse from so holding. The annual payment under the contract of ground-annual is not the amount of the debt; the debt is the annual payment capitalised. Accordingly the interest on that debt is just the amount which the creditor here is trying to recover.

LORD RUTHERFURD CLARK was absent.

The Court found that the pointing for which warrant was craved was available only for the ground-annuals for the half-yearly term current at the date of sequestration and for the preceding half-year, and remitted the cause to the Sheriff to proceed as accords.

Counsel for the Pursuers—Rankine—Guy. Agent—W. Finlay, S.S.C.

Counsel for the Defenders—Clyde. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, March 13.

SECOND DIVISION.

[Sheriff-Substitute of
Stirling, &c.

LUKE v. WALLACE AND OTHERS.

Poinding of the Ground—Assignment in Security of Long Lease—Debitum fundi—Registration of Long Leases (Scotland) Act 1857 (20 and 21 Vict. cap. 26), secs. 4, 16, and 20.

The creditor in a bond and assignation in security of a lease, both recorded in the Register of Sasines in terms of the Registration of Long Leases (Scotland) Act 1857, is not entitled to a warrant for pointing the ground of the lands leased.

This was an action of pointing of the ground brought in the Sheriff Court at Stirling by John Luke, Headswood House, Denny, against John Bryson Wallace and Archibald Cruickshanks, Denny, as sole partners of the firm of Wallace, Cruickshanks, & Company, iron-founders, Denny. The action proceeded upon a bond and assignation in security of a lease for 99 years. The bond and assignation in security was in the form of Schedule (B) annexed to the Registration of Long Leases (Scotland) Act 1857, and both the lease and the bond and assignation in security had been duly recorded in the Register of Sasines in terms of that Act. Schedule (B) is practically identical with the form of a bond and disposition in security of lands in Schedule FF (1) annexed to the Titles to Land Consolidation (Scotland) Act 1868, except that it assigns the lease instead of disposing the lands, and that it omits the following clause—"and that in real security to the said C D and his foresaids of the whole sums of money above written, principal, interest, and penalties."

The Registration of Long Leases (Scotland) Act 1857 (20 and 21 Vict. cap. 26) provides, section 4—"It shall be lawful for the party in right of any such lease recorded as aforesaid, and whose right thereto is recorded in terms of this Act, but in accordance always with the conditions and stipulations of such lease, and not otherwise, to assign the same, in whole or in part, in security for the payment of borrowed money . . . or other legal debt or obligation, in the form as near as may be of the Schedule (B) to this Act annexed; and the recording of such assignation in security shall complete the right thereunder, and such assignation in security so recorded shall constitute a real security over such lease to the extent assigned." Section 16—"The registration of all such . . . assignations in security . . . in manner herein provided shall complete the right under the same . . . to the effect of establishing a preference in virtue thereof as effectually as if the grantee or party in his right had entered into actual possession of the subjects leased . . . at the date of registration."