And section 20—"The several clauses in the Schedules to this Act annexed shall be held to import such and the like meaning, and to have such and the like effect, as is declared by the Act of the tenth and eleventh of Queen Victoria, chapter 50, sections second and third, to belong to the corresponding clauses in the Schedule to the said recited Act annexed." The Schedule referred to was a form of a bond and disposition in security of lands. These sections were superseded, and the provisions therein contained re-enacted by the Titles to Land Consolidation (Scotland) Act 1868, secs. 118 and 119, and the Schedule was replaced by the practically identical form in Schedule FF (1) to that Act annexed and referred to above.

The pursuer craved warrant to poind the ground of the lands let for the principal, interest, and penalties due under his bond, which he averred were due and unpaid by the defenders.

The defenders pleaded, *inter alia*—"(5) In any event the pursuer's loan is not a *debitum fundi*, and poinding of the ground is therefore incompetent and illegal."

By interlocutor dated 30th January 1896 the Sheriff-Substitute (BUNTINE) sustained the fifth plea-in-law for the defenders, and dismissed the action, adding the following note:—

Note.—"The pursuer in this action of poinding of the ground founds upon a personal bond and disposition in security, containing an assignation in security of a policy of insurance, and also of a lease of certain subjects duly recorded. He pleads that this debt constitutes a *debitum fundi*, and justifies the action.

But a debt secured by a lease of land is in no sense a 'debt of the land,' or its owner. It is in truth only a debt of the lessee and occupant of the land, who has no real right in the land itself, but only a real title of possession. Accordingly the diligence of poinding of the ground, which is competent only to persons infeft in or having a real right by security or otherwise in the lands, is incompetent and inept—Ersk. iv. 1, 11. There are other defences stated to the action, but it is in those circumstances unnecessary to notice them."

The pursuer appealed to the Court of Session, and argued—The Act provided (section 4) that the registered bond and assignation in security should "constitute a real security." The forms prescribed and the interpretations put upon these forms by the statute showed that it was intended to put the creditor into the same position as the creditor in a bond and disposition in security over lands. The debt was secured on heritage. All the conditions necessary to constitute a *debitum fundi* were present here, and the pursuer was entitled to warrant as craved—*Scottish Heritages Company, Limited* v. *North British Investment Company, Limited*, January 23, 1885, 12 R. 550.

Argued for the defenders—The intention of the Act appeared from section 16 to be that possession should not be necessary to make the right to the lease real, if the lease and assignation in security were recorded. It was not intended upon registration to assimilate the right of a lessee or his assignee to that of an owner or disponee in security of the lands in all respects—*Stroyan* v. *Murray*, July 17, 1890, 17 R. 1170. The real security given by section 4 was over the lease and not over the lands, and a lease was not *sua naturâ* a real right in land—*Stroyan* v. *Murray*, *cit.* It followed that the pursuer's debt was not a *debitum fundi*, and poinding of the ground was therefore incompetent.

LORD JUSTICE-CLERK—I do not see any reason to disturb the judgment of the Sheriff-Substitute. I think Mr Wilson's clients had no interest to raise this question. It is a question which has never been raised before. I suspect the reason why it has never been raised is because no one has ever been advised to raise it before. Looking at the Act of Parliament, I think the words of the fourth clause are quite ineffectual to give a right to the creditor under an assignation in security of a registered long lease to poind the ground. All the clause says is that "such an assignation in security so recorded shall constitute a real security over such lease." That is not the same thing as a real security over the lands in the lease. If it had been intended to carry the right of the creditor any further, the framers of the statute would have said so plainly, and they might easily have found words to convey their intention.

LORD YOUNG and LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

The Court dismissed the appeal, of new sustained the fifth plea-in-law for the defenders, and dismissed the action.

Counsel for the Pursuer—Wilson. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for the Defenders—W. Campbell. Agents—William B. Rainnie, S.S.C.

Tuesday, March 17.

FIRST DIVISION.

[Magistrates and Council of Leith.

BROWN AND ANOTHER *v.* MAGISTRATES AND COUNCIL OF LEITH.

Burgh—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *secs.* 339, 368—*Assessment for Private Improvement Expenditure—Appeal to Police Commissioners—Appeal to Court of Session from Decision of Commissioners.*

Where the owner of property abutting on a private street appealed on legal grounds to the magistrates and council of a burgh, under section 368 of

the Burgh Police Act 1892, against an assessment imposed upon him for "private improvement expenditure," and the council sustained the assessment—*held* incompetent for the owner to appeal to the Court of Session under section 339 of that Act against the decision of the council, in respect section 368 enacts that "the decision of the commissioners upon all such appeals shall be final."

Burgh—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 54—*Power of Police Commissioners to Delegate to Committee—Appeal to Commissioners.*

Held competent, under section 54 of the Burgh Police Act 1892, for the magistrates and council of a burgh to delegate the function of hearing and deciding appeals against assessments under section 368 of that Act to a committee of their number.

The appellants in this case, Robert Ainslie Brown, S.S.C., and Miss Isabella Aitchison Brown, proprietors of certain subjects in Mayville Gardens, Leith, received a notice from the Town Clerk of Leith, dated 28th February 1895, intimating a resolution of the Magistrates and Council of the burgh "to cause the above-named street (being a 'private street' as defined by the said [Burgh Police (Scotland) 1892] Act, in which houses or permanent buildings have been erected on one-fourth of the ground fronting the same), and the footways, to be freed from obstructions, and to be properly levelled, paved, and causewayed, and flagged and channelled, the carriageway to be of macadam [and the footways of] and the same to be otherwise completed in terms of said Act." The words "and the footways of " were deleted in the notice.

They received a second notice dated 24th July 1895, bearing to supersede that of 28th February, and in precisely the same terms, with the exception that the words "cement concrete" were substituted for the word "macadam." The words "and the footways of " were deleted in the second notice as in the first.

To both notices was appended a note to the effect that " the whole of the costs, charges, and expenses incurred by the Magistrates and Council (who are to execute the work) in respect of said works are recoverable from the owners of the premises liable therefor, in terms more especially of clauses 137, 138, and 139 of said Act; and for any appeals as regards said works, reference is made to clauses 143 and 339 of said Act."

The appellants took no action, and the work was completed about the end of October 1895, the share of the expense allocated on the appellants being £74.

On 24th October 1895 the Treasurer's Committee of the Town Council of Leith approved the allocations, and, as their minute bears, "agreed to recommend the Council to impose the sums therein set forth upon the parties therein named, respectively;" further, to fix a specified day on which such sums should be payable, and a day for lodging appeals, and another on which appeals "shall be heard by the committee, for which purpose the committee crave a remit, with powers to act for the whole Council, in hearing and disposing of appeals."

At a meeting held on 8th November 1895 the Magistrates and Council, as their minute bears, "approved of the foregoing minute of the Treasurer's Committee, and resolved accordingly, and specially . . . approved of the allocation of private improvement expenses therein mentioned, and imposed, and hereby impose, the sums set forth in the said allocation upon the parties therein named respectively; and appointed, and hereby appoint, the days specified in the said article for the payment of the said expenses, and the lodging and the hearing of appeals, and further remitted to the committee, with powers as craved, to act for the Council in the hearing and disposing of appeals."

The appellants received notice, dated 20th November 1895, from the Collector of the burgh, intimating "that the Magistrates and Council, on 24th October 1895, imposed and charged you in respect of premises of which you are owner . . . with 'private improvement expenses,' amounting as per allocation to £74 for levelling and paving of carriageway, re-laying channel and kerb, and repairing footway, and that the Council have appointed" certain days for the lodging and hearing of appeals.

On 18th December 1895 the appellants lodged an appeal against the charge of £74. The grounds of appeal were (1) want of proper notice before the work was begun, (2) that the work had been done in concrete instead of macadam, and (3) that part of the charge was excessive. On 26th December, the Treasurer's Committee, after hearing Mr Brown in support thereof, dismissed the appeal. This decision was confirmed at a full meeting of the Magistrates and Council on 7th January 1896.

Mr and Miss Brown thereupon appealed to the Court of Session.

The grounds of appeal, as well as the contentions of the respondents, the Magistrates and Council of Leith, appear sufficiently from the arguments below.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55) enacts—Section 54—"The commissioners shall have power to form committees of their number . . . and to delegate to such committees the powers competent to the commissioners under this Act."

Section 133—"Where any private street in which houses or permanent buildings have been erected, on one-fourth of the ground fronting the same, or part of such street, as has not, together with the footways thereof, been sufficiently levelled, paved, or causewayed and flagged to the satisfaction of the commissioners, it shall be lawful for the commissioners to cause any such street or part thereof, and the footways, to be freed from obstructions, and to be properly levelled, paved, or causewayed, and flagged

and channelled in such way and with such materials as to them shall seem most expedient." . . .

Section 134—"If any private street shall at any time be made, paved, or causewayed and flagged . . . and put in good order and condition to the satisfaction of the commissioners, then . . . it shall be lawful for the commissioners to declare, and if such street has been paved and put in order on their requisition, as hereinbefore provided, they shall declare the same to be vested in the commissioners." . . .

By section 137 the whole of the costs, charges, and expenses incurred by the commissioners in respect of private streets are to be paid and reimbursed to them by the owners of the lands or premises fronting or abutting on each street, and shall be recoverable as private improvement expenses. Sections 138 and 139 provide for cases where owners are to be liable only for a proportion of such expenses.

Section 143—"As regards the making, altering, paving or causewaying, and maintaining streets and foot-pavements, it shall be lawful for any person whose property may be affected, and who thinks himself thereby aggrieved, to appeal to the Sheriff in manner hereinafter provided."

Section 339—"Any person liable to pay or to contribute towards the expense of any work ordered or required by the commissioners under this Act, and any person whose property may be affected, or who thinks himself aggrieved, by any order, or resolution, or deliverance, or act of the commissioners, made or done under any of the provisions herein contained, may, unless otherwise in this Act specially provided, appeal either to the Sheriff or to the Court of Session." . . .

Section 365 provides that private improvement expenses may be recovered in the same manner as any assessment under this Act.

Section 368—"The said . . . . private improvement expenses may be imposed and levied yearly, half-yearly, or at such other periods as the commissioners may think fit, . . . and at the meeting imposing the same the commissioners shall appoint a day upon which such rates and expenses shall be payable, and another day upon which appeals by any parties complaining that they have been improperly rated or charged may be lodged with the clerk or collector, and another day or days on which appeals in reference to such rates or expenses shall be heard by the commissioners . . . . and the decision of the commissioners upon all such appeals shall be final." . . .

It was admitted by the parties at the bar that the Treasurer's Committee of the Council consisted of the whole Council, sitting in private, with the Treasurer instead of the Provost in the chair,

Argued for the appellants—(1) The notice given to the appellants was insufficient. Before the magistrates could execute such work themselves, they were bound to present a formal requision to owners calling upon them to do it. Though this was not expressly laid down in sec. 133, it was clearly implied in sec. 134, and the implication was confirmed by secs. 141, 327, and 365. (2) Assuming that the notice of 24th July could be taken to be a requisition, it was much too vague, and was much less specific, for example, than that intimating the assessment. The appellants might quite well have assumed that the footway was not to be repaired. The notice was therefore insufficient, as not specifying the kind of work to be done—*Magistrates of Edinburgh* v. *Paterson*, December 3, 1880, 8 R. 197; *Campbell* v. *Magistrates of Edinburgh*, November 24, 1891, 19 R. 159. (3) The assessment having been imposed, not by the Council as sec. 368 required, but by the Treasurer's Committee, was invalid. Further, the appeal having been heard by the Treasurer's Committee and not by the Council, the approval of the assessment was invalid. The power to delegate conferred on the Council by sec. 54 did not apply to the power to impose or to confirm assessments—*Thomas* v. *Elgin*, July 4, 1856, 18 D. 1204. (4) The assessment having been imposed, if at all, by the Council on 8th November, and the notice of assessment bearing that it was imposed on 24th October, the assessment was invalid. (5) The present appeal was competent under sec. 339.

Argued for the respondents—(1) Neither requisition nor notice was necessary under the statute. There was nothing in sec. 133, which regulated the matter, as to calling upon an owner to carry out the improvements. (2) At all events, the notice sent was sufficiently specific. (3) The assessment was only recommended, not imposed, by the Treasurer's Committee, the Council afterwards approving of the recommendation and imposing the assessment. Even if it had been imposed by the Treasurer's Committee, that committee had had power delegated to it for the purpose, and the delegation was good under sec. 54. (4) The error in date was of no consequence. It occurred in a notice issued after the assessment had been validly imposed, and caused no hardship to the appellants. (5) The appeal was incompetent, being precluded by sec. 368. The right of appeal applied only to work not yet done. At a previous stage the appellant might competently have appealed (sec. 143), but he was too late now that the Council had, on his invitation, finally disposed of the matter. His only remedy was interdict.

At advising—

LORD PRESIDENT—The provisions upon the construction of which this appeal depends, occur in an Act of Parliament. Accordingly, I shall most decorously express my first remark upon them by saying that, doubtless for good reasons, their coherence and relation have not been made too plainly manifest.

The practical conclusion which I have come to is that this is an incompetent appeal. The present appellants, as I think, by their own act submitted the question whether they had got to pay for this street to the Commissioners, and the Commis-

sioners have decided that question against them. That decision, as I can best make out, is final. These propositions may seem simple; they are very far from simple on the statute.

In order to judge of the matter, it is best to begin with the position in which the appellants stood when they appealed to the Commissioners. They had been formally notified that they had got to pay £74 for making a road, about which they had been previously informed that it was going to be made. Well now, to take the first of the objections to this liability which they now state, they were perfectly aware that they had not first been asked to do the work themselves. They say that the Commissioners had no right to make the road at their expense without first giving them the opportunity of doing the work themselves. Of the merits of this objection more need not be said than that in this instance the statute, not having done something, talks afterwards as if it had, and the suggestion is that it is to be taken at its word. Such as it is, however, this objection is legal in its quality; and I think that it might have grounded an unsuccessful appeal to the Court of Session or the Sheriff under the 339th section. The appellants, however, did not avail themselves of this remedy.

The other objection to the notice of 20th November, now stated by the appellants, is that a wrong date was named as that on which the assessment was laid on. By the time the notice was given, the assessment had been imposed by the Commissioners, but the date mentioned in the notice was that of a committee recommending the rate, and not that on which the recommendation was acted on by the Commissioners. Now, I can quite understand that here again there was a question which might have been tried, although a somewhat technical one. But instead of looking round and seeing whether there were any such points capable of being tried in a court of law, the appellants appealed to the Commissioners themselves under section 368.

That section is a very curious one. It is now founded on, and I think rightly, as conferring a right of appeal against the rate or expense now in question. In most statutes a right of appeal would be conferred by substantive enactment. In this Act it is conferred by telling the Commissioners that among other things which they are to notify, they shall notify the day on which appeals will be heard.

The way in which the case of the appellants comes within, or at least may be held to come within the section at all, is also singular enough. The money which they are rated for is the cost of making up a private street. By way of simplifying matters the statute says that this cost is to be recoverable as a private improvement expense. When the reader searches for this presumably special method of recovery, he finds that the manner in which private improvement expense is to be recovered is defined in section 365 as being the same manner as that in which any other rate is recoverable.

Now, the 368th section purports expressly to apply to private improvement expense, and I suppose that, at least in this Act, it may be held to treat of the process of recovery. Under this section then, the appellants appealed to the Commissioners, and their appeal was refused. I shall, in the meantime, assume that the Committee had power to dispose of the appeal; and I ask, what was the statutory result? The section says that the decision of the Commissioners is final. I cannot get over this. The 339th section gives an appeal wherever it is not otherwise specially provided. I think that this 368th section is such a special provision. As already indicated, I consider that the appellants, being persons who were liable to pay or contribute towards the expense of work required by the Commissioners, had right to come to the Court by appeal under section 339; but if they chose to go to the Commissioners they submitted to a final decision.

The only remaining question is, did the Commissioners decide? Now, I take this question upon the footing that the body which heard and decided it was a committee, and certainly the attempts of the Commissioners to validate the proceedings by deciding a case which (*ex hypothesi*) the Commissioners themselves had not heard, cannot be regarded as successful. Nor do I feel sure that it would be safe to say that a committee of the whole Council would be equivalent to the whole Council in matters in which the Commissioners alone had jurisdiction, especially when we know that the Committee had appointed to it a different chairman from the statutory chairman of the Commissioners, and that it sat with closed doors. But then section 54 satisfies me that it was competent to the Commissioners to delegate this matter to a committee. The terms of that section are quite general. I see, and highly appreciate, the reasons why the Act might well have distinguished between what are, constitutionally speaking, such comparatively high matters as assessment on the one hand, and the execution of details on the other. This, however, is for legislators and not for courts of law; and while I do not wish to say anything against the case of *Thomas*, which was a decision on another statute, I cannot read into the statute now before us a distinction which the Legislature might have drawn and has not drawn, and which is not implied, as far as I am aware, in any established principle of statutory construction.

Had this last objection been good, I should have held the appeal competent, as the import of the objection is that the Commissioners did not exercise their jurisdiction under section 368. As it is bad, I am for refusing the appeal as incompetent.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court dismissed the appeal.

Counsel for the Appellants—Jameson—Craigie. Agent—R. Ainslie Brown, S.S.C.

Counsel for the Respondents—Salvesen. Agents—Irons, Roberts, & Company, S.S.C.

Tuesday, March 17.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MACKIE *v.* PRESBYTERY OF EDINBURGH AND OTHERS.

Process—Declarator—Relevancy—Trust—Competency of Declarator where there is no Civil Right—Church.

A church in an English town was vested in trustees, under an indenture providing that the managers should collect the seat-rents and subscriptions, and apply the money to the repair, maintenance, management, and endowment of the church, and pay the surplus to the minister, who was to be a party to the indenture, and to be elected by the congregation. The indenture conferred upon the trustees power to sell the church, and declared that the trustees should hold the money arising from such sale "for such purposes as the majority of the members for the time being of the Presbytery of Edinburgh at a meeting of the said Presbytery may in writing direct."

The trustees exercised the power of sale, and the congregation was in consequence dissolved. The proceeds of the sale lay unappropriated in the hands of the trustees.

The minister of the church raised an action against the Presbytery of Edinburgh and the trustees, to have it declared that the Presbytery might lawfully direct that a part of the money arising from the sale should be paid to him or applied for his benefit. He averred that a majority of the members of the Presbytery were favourable to his claim.

Held (*aff.* judgment of Lord Kincairney) that the action was irrelevant, and must be dismissed, on the ground that the pursuer had failed to set forth any civil right as an object of the trust, and that he was not entitled to declarator that an application of the money which the Presbytery had not proposed to make was lawful.

Opinion (*per* Lord M'Laren) that the minister or members of the dissolved congregation would, in the event of a proposal by the Presbytery to misapply the trust-funds, have a title to enforce the limitations of the trust, and that the Presbytery would have a title to declarator that the mode in which they might propose to execute the power conferred on them was a good execution of the trust.

By indenture dated 16th March 1863 the Scotch Church, Rushholme Road, Manchester, was vested in trustees for certain trust purposes which may be summarised as follows:—Worship in the church was to be conducted in accordance with the forms of the Established Church of Scotland by a minister in full communion with that Church, and any minister who might be elected to the church was to sign the indenture and thereby acknowledge his liability to the jurisdiction of the Church of Scotland. On a vacancy the right of electing a minister was to belong to the communicants above eighteen years old, being seat-holders. The managers for the time were to collect the seat-rents, collections, and subscriptions, and apply them in the repair, maintenance, management, and endowment of the church, as the managers with consent of the trustees might direct, and any surplus was to be paid to the minister.

The indenture further provided that at any time the trustees, with consent of the majority of the Presbytery of Edinburgh, might sell the premises, and it was declared that the trustees "should hold the moneys to arise from such sale . . . for such purposes as the majority of the members for the time being of the said Presbytery, at a meeting of the said Presbytery, may in writing direct."

In 1881 the Reverend James Mackie, the pursuer of this action, was duly appointed minister of the congregation worshipping in the Scotch Church.

On 29th February 1892 the church and effects were sold by the trustees with consent of the Presbytery of Edinburgh, and the money resulting from the sale continued to lie in the hands of the trustees under the indenture, subject to the directions of the said Presbytery. By the sale of the church the congregation was dissolved.

On 12th June 1895 Mr Mackie raised an action against the Presbytery of Edinburgh and the trustees under the indenture, concluding for declarator that the said trustees "hold certain sums of money, being the proceeds arising from the sale of the Scotch Church in Manchester . . . upon trust for such purposes as the majority of the members for the time being of the said Presbytery of Edinburgh, at a meeting of the said Presbytery, may in writing direct;" that a majority of the defenders, the said Presbytery, for the time being present at a meeting of the said Presbytery, "may, under and in virtue of the powers conferred on them by said indenture, lawfully and competently in writing direct the defenders, the trustees, to apply any part of the money held by them under the indenture arising from the sale of the said Scottish National Church, Manchester, or of the income accruing therefrom, in making payment to the pursuer of such sum or sums as such majority may appoint, and that by way of compensation to the pursuer in respect of the interruption of his pastorage by the sale of said church, or in lieu of stipend or by way of retiring allowance or otherwise, and that at such time or times and under such stipulations or conditions as such majority may so direct," and that in the event of such