Tuesday, December 9.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

RUSSELL *v.* THE ROAD TRUSTEES OF THE MIDDLE WARD OF THE COUNTY OF LANARK.

Road—Rating—Assessment for Maintenance and Repair—Roads and Bridges Act 1878 (41 *and* 42 *Vict. cap.* 51).

Held that the assessment for management, maintenance, and repair of roads, under the Roads and Bridges (Scotland) Act 1878, is leviable in respect of empty houses for the year during which they are empty.

Archibald Russell was for several years lessee of a coal-field near Wishaw belonging to Lord Belhaven's trustees. While working the colliery he had erected a number of workmens' houses. The coal-field becoming exhausted the lease was given up. By the terms of the lease the lessee was bound to remove the workmen's houses. Lord Belhaven's trustees not however insisting on their being at once removed, they were allowed to stand in the meantime.

In the valuation roll for 1883-4 the whole of these houses were entered in two lots—the total valuation of lot number one being £404, 3s., and that of lot number two £363, 1s.

Russell was assessed by the Road Trustees of the county of the Middle Ward of Lanarkshire, under the Roads and Bridges Act 1878, for the year 1883-84, as proprietor of these houses, on the total values above mentioned—the amount of assessments being respectively £8, 8s. 4d. and £7, 2s. 5½d. He declined to pay, in respect that a number of the houses in both lots were empty houses standing unlet, for which he maintained he was not liable as proprietor to pay assessment for management, repair, and maintenance of roads. The trustees obtained warrant to poind unless the rates should be paid.

On the 14th of May 1884 Russell lodged a note of suspension and interdict in the Bill Chamber, against the Road Trustees, and William Forrest, collector of county rates and of the assessment imposed under the Roads and Bridges Act for the Hamilton district of the Middle Ward of Lanarkshire, in which he set forth that the respondent Forrest had obtained a summary warrant against him as a defaulter to the extent of £7, 16s, 8½d, and £9, 5s. 2d. being alleged arrear of county rates and roads and bridges assessment for the Hamilton district for the year 1883-84, and expenses, and had threatened to poind his goods for the recovery of the same, wrongously and unjustly, and prayed the Court to suspend the assessments and warrant, and to interdict the poinding.

The complainer averred that out of the lot of houses valued at £404, 3s. there were empty houses to the extent of £193, 14s., leaving £210, 9s. as the total rent or income received by him from the houses in lot No. 1; while out of the £363, 1s. of lot No. 2 there were empty houses to the extent of £223, 7s., leaving £139, 14s. as the total rent or income received from the houses in lot No. 2. The unoccupied houses were, he averred, for the most part unfit for occupation in their existing condition.

The complainer's further statements and the respondents' answers were as follows:—"(Stat. 6) The complainer avers that he is not proprietor, or liable to be assessed as proprietor, of the said unlet houses, so far as the assessment for road management, maintenance, and repair is concerned. The Roads and Bridges Act does not authorise the respondents to impose or levy any such assessment from the proprietors of unlet and unoccupied property in respect of said unlet and unoccupied property. The said assessment leviable under said Act is only to be imposed and levied so as to be paid one-half by the whole proprietors of the county as a class, and the other half by the whole tenants and occupants as a class. (Ans. 6) The averment is denied. Explained that in the valuation roll the complainer is entered as proprietor of the said houses, and the entry in the valuation roll is a transcript of the return made by the complainer himself to the assessor. *Quoad ultra* denied, and the Roads and Bridges Act is referred to for its terms. (Stat. 7) In these circumstances, the complainer has offered, and is still ready and willing, to pay the whole roads and bridges assessment for management, maintenance, and repair imposed in respect of the said houses, so far as the same are let or occupied, and also the county rates and road debt assessment, amounting in all to £5, 19s. 11d. on lot No. 1, and £4, 6s. 7½d. on lot No. 2; but as the respondents insist on their right to recover the whole assessments claimed, including the roads and bridges assessment for management, maintenance, and repair as aforesaid, in respect of empty houses, and threaten to do diligence therefor, the present suspension has been rendered necessary. (Ans. 7) Admitted that the respondents refuse to accept anything less than the full amount of the assessment. Explained that said assessment as regards roads and bridges was duly imposed by the respondents at a uniform rate of 6d. per £. . . . . As regards the county rates, the proper respondents are the commissioners of supply. The county assessments are not levied in respect of unoccupied property."

The complainer pleaded—"(1) In terms of the Roads and Bridges (Scotland) Act 1878, no assessment for roads, management, maintenance, and repair is leviable in respect of empty houses for the year during which they are empty."

The defender pleaded—"(3) The assessments for roads and bridges having been duly imposed in terms of the statute, and the complainer being entered as proprietor of the subjects in question in the valuation roll, he is bound to pay the same."

The Lord Ordinary repelled the reasons of suspension.

"*Note.*—The complaint is rested on the record upon two grounds—first that no assessment under the Roads and Bridges Act 1878 is leviable in respect of empty houses for the year during which they are empty; and secondly that the complainer is not proprietor, or liable to be assessed as proprietor, of certain unoccupied houses. The second of these points was not insisted in, the complainer's counsel having stated at the bar that he did not desire to raise any question with the persons who are stated on the record to be the

true owners, but preferred that the case should be disposed upon the assumption that the complainer is proprietor of the subjects in question, and liable as such to be assessed, if any assessment is leviable.

"The only plea, therefore, which requires consideration is the first, viz.—that no assessment for roads is leviable in respect of empty houses for the year during which they are empty. It appears to be a sufficient answer that while in other statutes—as for example the Police Act of 1857—unoccupied and unfurnished houses are exempted from assessment by an express provision to that effect, there is no similar exemption in the Roads and Bridges Act. The assessment is imposed 'on all lands and heritages,' without exception. The complainer relies upon the provision that the assessment shall be paid, one-half by the proprietor and the other half by the tenant or occupier of the lands and heritages on which it is imposed. But it does not follow that no assessment can be imposed on unoccupied lands, or on lands occupied only by the proprietor. It is said that this may be inferred from the decision in *Galloway* v. *Nicholson*, 2 R. 650, with reference to assessments for relief of the poor. But all that is decided in that case was that by the method prescribed by the Poor Law Act of 1845, for dividing the assessment between owners and occupiers, one-half of the whole amount required to be raised must be laid upon the owners as a class, and the other half upon the tenants or occupants as a class. It is unnecessary to consider whether the same rule is to be followed in dividing the assessment in question, since no objection is taken to the method of division which has been adopted, nor indeed does it appear from the record in what manner the division may have been made. But whatever may be the rule for division the complainer's inference that unoccupied houses are not to be taxed appears to me to be in no way justified by the decision. On the contrary, the liability of the owner for unlet and unoccupied houses is referred to by the Lord President as suggesting a very good reason why the construction of the Act adopted by the judgment should have been intended by the Legislature."

The complainer reclaimed—The arguments appear from the opinion of the Lord Ordinary.

Authorities—Police Act (20 and 21 Vict. c. 72), sec. 29; County General Assessment Act (31 and 32 Vict. c. 82), sec. 4; Roads and Bridges Act (41 and 42 Vict. c. 51), sec. 52.

At advising—

LORD JUSTICE-CLERK—If the controversy here had been whether the proprietor of unlet houses was not to pay more than half of the assessment, I could have understood that the complainer might have had a case, but as his contention is that he is to pay nothing in respect of the houses being unlet, I think the Lord Ordinary was right in repelling the reasons of suspension.

LORDS YOUNG, CRAIGHILL, and RUTHERFURD CLARK concurred.

The Court adhered.

Counsel for Complainer—Darling. Agent—Alexander Morison, S.S.C.

Counsel for Respondents—Mackintosh—Graham Murray. Agents—Bruce & Kerr, W.S.

Tuesday, December 9.

SECOND DIVISION.

[Lord Adam, Ordinary.

T. B. SEATH & COMPANY *v.* MOORE.

Sale—Sale of Engines and Machinery for Ship on Stocks—Instalments—Delivery—Bankruptcy—Mercantile Law Amendment Act 1856 (19 *and* 20 *Vict. c.* 60), *sec.* 1.

A firm of shipbuilders entered into five contracts with a firm of engineers, whereby the latter agreed to supply the engines, boilers, and materials for various vessels to be constructed by the former at prices fixed with reference to each contract. In three of the contracts there were stipulations that the price was to be paid by instalments, but it appeared with reference to all of them that payments to account were in point of fact made from time to time according to a course of dealing between the parties. The engineers granted a letter to the shipbuilders which was to have reference to all contracts made or to be made between them, by and which the engineers agreed "that on payment being made to account of any such contract, the portions of the subject thereof so far as constructed, and all materials laid down for constructing the same, shall become the absolute property of the" shipbuilders. The engineers, who were in labouring circumstances at the date of this letter, became bankrupt, and the trustee on their sequestrated estate claimed as falling under the sequestration the engines, machinery, &c., for the unfinished contracts, which lay in the bankrupts' yards. The shipbuilders raised an action for declarator that they were proprietors, or at least entitled to delivery of, these engines, machinery, &c., on the grounds (1) that on a sound construction of the contracts and the agreement relative thereto, they became the purchasers of the materials in the yards so as to entitle them to protection against the trustee in the sequestration in virtue of sec. 1 of the Mercantile Law Amendment Act, and (2) that the payments by instalments to account operated delivery to the effect of vesting in them the property of the engines and machinery in the state in which they were as at each instalment.

The Lord Ordinary *assoilzied* the defender, on the ground (1) That a consideration of the proof disclosed that the agreement was one merely to give the pursuers a preferable security for their advances, and it could not be sustained in the interests of the sequestration, but assuming it to be valid, neither under it nor under the contracts was there in point of law such a completed contract of sale as would entitle them to plead the protection of the Mercantile Law Amendment Act 1856; and (2) that there was no exception in favour of engines and boilers to be supplied for a ship, where the price was payable by instalments, from the general rule of law that property in moveables does not pass without delivery. The shipbuilders reclaimed. The Court *adhered* on the same grounds.