

MILLAR, APPELLANT.

SMALL, RESPONDENT.

1853.
24th Feb. and
10th and 17th
March.

THIS case is very fully reported in the Court below (a) ; so that it is only necessary to give here the following short statement of the leading circumstances.

By Deed of Agreement and Disposition, dated the 30th and 31st October, 1835, the Trustees of the Dundee Whale Fishing Company sold and conveyed certain land to the Respondent Small, in consideration of a ground annual of 273*l.* reserved to them, their heirs and assigns. By a covenant in the deed, Small bound himself, his heirs, executors, and successors, with five sureties for the regular payment "in all time coming" of this ground annual ; but without taking infestment in his own favour, he, by a deed of agreement and assignation dated 31st October, 1835, transferred the benefit of his bargain to one Adamson, in consideration of a bonus of 200*l.* The trustees were not parties to this second deed ; but the five sureties joined in it, and not only bound themselves for the regular payment by Adamson of the ground annual, but they moreover bound themselves "to free the said Small of and from the payment of the same ;" Adamson likewise binding himself to relieve Small from his obligations under his agreement with the original vendors.

Adamson was not infest on this conveyance.

In 1836 the trustees sold the ground annual to Millar, the present Appellant, for 6150*l.*

From 1836 to 1842, the ground annual was regularly.

Where an estate is purchased in consideration of a perpetual rent-charge which the purchaser binds himself and his representatives to pay to the vendor, the subsequent transfer of the estate to a third party—*cum onere*—will not release the original purchaser from the obligation of paying the rent-charge. See next case, *infra*, p. 358.

The analogies supplied by reference to the doctrines of ancient feudal tenures (on which the Court below had erroneously proceeded) held inapplicable.

What are called "ground annuals" in Scotch law, are derived from the English perpetual rent-charge.

(a) Feb. 3rd, 1849. Second Series, vol. ii. p. 495.

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paid by Adamson to Millar; but at Martinmas, 1842, the half-year's amount then due not being satisfied by Adamson, Millar called upon Small for payment of it, and upon his refusal, commenced in the Court below the proceedings which led to the present appeal.

On the 3rd February, 1849, the Judges of the First Division (the *Lord President*, Lord *Mackenzie*, Lord *Fullerton*, and Lord *Jeffrey*, agreeing with the Lord Ordinary *Wood*), held unanimously that Small was not liable.

The *Solicitor-General* (*Bethell*) and Mr. *Anderson*, for the Appellant. Mr. *Rolt* and Mr. *Pyper*, for the Respondent.

The arguments are fully discussed in the following opinions.

THE LORD CHANCELLOR (*a*):

*Lord Chancellor's
opinion.*

My Lords, the ground on which the Court below rested its decision was that the personal obligation of Small was not intended to be, and in point of law could not be considered as, an obligation enduring after his transfer to Adamson of the property; and that such an obligation ceases to exist when the party bound has no longer an interest in the subject-matter to which it relates.

Very nearly the same question was decided by the Court of Session in *Peddie v. Gibson* (*b*), referred to in the argument as the case of *Soot's Trustees*. There *Peddie*, on the 31st of January, 1829, disposed to *Soot*, his heirs and assigns, certain burgage lands for a ground annual of 150*l.*, and *Soot* entered into a personal obligation binding himself, his heirs, executors, and successors, to pay the ground annual to *Peddie*,

(*a*) Lord Cranworth.

(*b*) Feb. 27th, 1846. Second Series, vol. viii. p. 560. -

his heirs and successors. Soot was afterwards duly infeft *more Burgi*. In October, 1836, Soot's trustees conveyed to Borrie for a ground annual of 410*l.*, including the original ground annual of 150*l.*; and Borrie was duly infeft. Soot's Trustees, in June, 1837, sold and assigned the ground annual to George Moon, who was infeft, and Moon afterwards sold and assigned the ground annual to the Eastern Bank, who were infeft in February, 1840. The infeftment first of Soot, and afterwards of Borrie, was necessary for the absolute perfecting of their title to and seisin of the lands. But I do not understand that the enfestment of Moon, and afterwards of the Eastern Bank, was necessary for completing their title to the ground annual, though such a measure could of course work no prejudice to them.

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The original ground annual of 150*l.* due to Peddie's heirs having fallen into arrear, the question arose and had to be decided, whether Peddie's heirs had any claim against Soot's trustees under the personal covenant by which Soot had bound himself, his heirs, executors, and successors. It was decided after great deliberation that they had not; the ground, or the main ground, of the decision being, that the personal covenant was but an accessory to the real right; and that when the party who had entered into the covenant sold and disposed the land burthened to a purchaser, and that purchaser was duly infeft, the original personal obligation ceased to be binding.

It was contended that the case now under the consideration of this House differs from that of *Soot's Trustees* in two respects. 1st, the purchaser Adamson never completed his title by infeftment, as had been done by Borrie in the other case; and, 2ndly, the covenant by Small was not like that of Soot—a covenant by himself alone, but a covenant in which several

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sureties or cautioners also concurred. The Appellant Millar therefore contended at your Lordships' bar that the present case is distinguishable from that of *Soot's Trustees* on these two grounds; or if no such distinction exists, then he argued that your Lordships are bound to disregard the decision in the former case, and to hold that it is not law.

With respect to the argument that the present case may be distinguished from that of *Soot's Trustees*, I confess my strong impression is, that if the former case was correctly decided, it must govern that now before us. But I do not go minutely into this question; for after very anxious reflection on the subject, I have come to the conclusion that the decision in the former case (I mean that of *Soot's Trustees*) was erroneous; and if that is so, there can be no doubt but that the decision in the case now under appeal was erroneous also.

In forming an opinion on this point, my Lords, we have the advantage of knowing very distinctly the grounds on which the Judges of the Court of Session proceeded. Their reasons, though they have not convinced me, are very fully and ably stated in the opinions of the consulted Judges, copies of which are printed in the Appellant's case. They are given at the greatest length in the opinion of Lord *Wood*, and to that opinion therefore I shall refer in pointing out to your Lordships why I think the view of these cases taken by the Court below is incorrect. The opinion, as your Lordships know, relates not to the case now to be decided, but to the case of *Soot's Trustees*. The reasoning, however, is applicable to both cases; or at all events, if it did not, as I think it did not, warrant the former decision, then it is clear the judgment now appealed from cannot stand.

Lord *Wood*, after stating the facts of the case,

proceeds to explain in a very lucid manner the nature of a ground annual. Says that learned Judge,—

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A ground annual, in its own nature, is a right in connection with land, charged upon it, and payable out of it. It cannot subsist as a mere personal right. Specimens of the old forms are to be found. They warranted no immediate proceeding against the proprietor. The personal obligation is a modern addition, and the question is, Does it create a separate obligation which is to subsist after the land has been conveyed to a third party? Was it the purpose that the party entitled to the ground annual should be a creditor against the first disponee under a perpetual undischageable personal obligation? And not only so, but that if the lands with the burden were transmitted to succeeding disponees, he should be a creditor to each of them in succession, and their heirs under the personal obligation, come under by each not merely while in possession, but after they were entirely divested of the lands, and had thereby terminated their connection with them. I do not think that this is the legal construction of the deed.

My Lords, the question is merely one of construction. What is the meaning of the obligation? In answering this question, we must bear in mind that we are called on to interpret a covenant or obligation of very recent introduction; not to inquire whether words which for a long series of years have been understood in a particular sense, have been rightly so understood. Now, my Lords, in interpreting words of recent adoption, I conceive that the only safe canon of construction is that which is now universally acted on, namely, that we are bound to understand them in their plain ordinary sense, unless there is something in the context showing that they are to be understood differently, or unless the general rule would in any particular case lead to some manifest absurdity or inconsistency. If this rule be adopted in the case now under consideration, the result, I apprehend, admits of no doubt. If such a covenant or obligation as that into which Soot entered with Peddie, or that into which Small entered with the Whale Fishing Company, had

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been contained, not in a deed creating a ground annual, but in a separate deed, merely granting a security or perpetual annuity of the like amount, there could have been no doubt as to its meaning. It must have been construed to be an absolute obligation binding the contracting party and his representatives for ever. I see nothing in the other parts of the deed in *Peddie's case*, or in that now more immediately in view, to warrant your Lordships in saying that such a construction is inconsistent with the context, or that it would lead to any manifest absurdity or inconsistency.

In the deed of 31st October, 1835, is an obligation by five sureties or cautioners for payment to the Whale Fishing Company of the ground annual, couched in language the very same, and absolutely identical with that in which the obligation of Small himself is framed. It is not disputed that the obligation of the sureties is binding on them and their representatives for ever. Why should not the same words, when expressing a contract by Small himself, have the same meaning as it is admitted they must have when used by his sureties? I can discover no reason whatever for any distinction. I doubt whether the fact of there being sureties in the one case and not in the other is material. It might perhaps be contended that when there are sureties, their contract ought to be construed merely as a guarantee for the due performance by the principal of what he would have been understood to engage for, if he had bound himself without sureties. The use which I make of the obligation by the sureties is to show what the meaning of the contract necessarily is (what in fact it is admitted to be) when entered into by sureties; and then I infer that the same words must imply the same contract when used by a principal himself. If there are sureties, the contract on their part imports an absolute contract

enduring through all time; and, in my opinion, the same words must have the same meaning when applied to the principal.

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I have felt bound to explain this as being my view of the case, because I could not conscientiously say I am satisfied that the fact of there being sureties in this case makes the decision here wrong, if the decision in the case of *Soot's Trustees* was right. I feel also bound to add that if the case of *Soot's Trustees* had been, according to my view of the law, rightly decided, I do not think the circumstance that neither Small nor Adamson had perfected their title by infestment would have made any difference. The meaning of the deed, as regards the obligation in question, must be ascertained at the time of its execution, and could not be varied according as Small might subsequently act or not act on the power given to him by the deed of causing himself to be regularly infest in due form of law.

In my opinion, then, my Lords, the decision below was wrong, independently of the distinctions, if any, between it and the previous case of *Soot's Trustees* on which it was founded. The Court of Session in the case now under appeal might justly feel itself bound by the decision in *Soot's case*. But that authority does not bind this House, and ought not, as I think, to deter your Lordships from reversing the interlocutor complained of. It may not be without its use to point out that there would be, or might be, cases in which the principles on which the Court of Session had proceeded would be very difficult, if not impossible, of application. In the case of *Soot's Trustees* and in the present case the original disponee who had entered into the personal obligation parted with the whole of the land out of which the ground annual issued. But suppose he had disposed of a portion of it only—one half or one third—what would have been his liability

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under his personal covenant? It cannot surely be argued that the personal obligation would be apportionable; and yet if this could not be, the strange anomaly would result, that, so long as the original disponee or his heirs or general successors retained any the smallest portion of the land liable to the ground annual, he or they must continue liable on the personal contract for the payment of the whole, though by parting with the whole all liability would cease. The impossibility of any sort of apportionment affords, as I think, a strong additional argument against the construction put on the covenant by the Respondents.

The only authority really bearing on the question to which I feel it necessary to advert, was the case of *Skene v. Greenhill* (a). That was the case of a lease. The original lessee had personally bound himself, his heirs and executors, for payment of the rent, and the Court held that, after assignment by the lessee and acceptance by the landlord of the assignee as his tenant, the obligation of the original lessee was at an end. As a general proposition, this is certainly at variance with principle, and with the law as it is very clearly laid down by Lord *Bankton* (b) and *Erskine* (c).

Lord *Glenlee*, indeed, is reported to have said in *Skene v. Greenhill*, that *Bankton* and *Erskine* are wrong in holding that the liability of the original tenant continues. No reason is given for this. It is not necessary, however, now to consider what the law is in the case of an assignment of a lease. It may be that Lord *Bankton* and Mr. *Erskine* were wrong. But if they were, it must be in consequence of some peculiarities in the law of Scotland relating to leases, and which certainly cannot apply to a covenant of recent introduction.

(a) May 20th, 1825; 4 Shaw, 26.

(b) B. 2. T. 9. s. 14.

(c) B. 2. T. 6. s. 34.

For these reasons, the decision below appears to me to be clearly erroneous, and I therefore move your Lordships that it be reversed.

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Lord ST. LEONARDS :

It seems clear enough that what are called ground annuals in Scotland, were borrowed from our English law of perpetual rent-charges. But the Scotch Courts have not known exactly how to deal with covenants for the payment of such rent-charges. Their difficulties appear to have been twofold. In the first place, they had a great objection to an endless covenant binding a person in respect of land after he had ceased to be owner of that land; and, secondly, they thought that the obligation should bind only the person who took the land, and consequently that, when the land was transferred, the obligation of the first taker should terminate. They were of opinion that a continuing obligation was against the law of perpetuity, and they fancied it prevented the free alienation of property.

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My Lords, it was a very arbitrary thing to set up such reasoning in opposition to the express deeds and conventions of parties. That a man may bind himself for all time is clear both by the law of England and by that of Scotland. No doubt the circumstance that his assets are perpetually tied up leads to difficulties which we have to encounter in our Courts every day. We meet those difficulties as best we may; but we consider them to be no ground for setting aside a solemn transaction by which a man has intended to bind himself and his assets for ever.

I confess, my Lords, that I incline to give more weight to the circumstance of the sureties joining in the first deed, than has been assigned to that circumstance by my noble and learned friend.

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Small bought this property, as I conjecture, upon speculation. He took the conveyance to himself; because, having applied to the vendors, they refused to convey directly to Adamson. It is clearly proved, and not disputed, that that application was made, and that they refused to adopt Adamson as their disponee.

The persons who are named as sureties in the deed are joined with Small as of the one part, and they not only join in point of form by themselves separately, but in so many words they join for and with Small as the principal.

Now the law of Scotland, like the law of this country, does provide, as all laws ought to provide, a remedy for sureties against their principal. It seems impossible to doubt the intention to have been that, as between Small and his sureties, he should remain liable so long as they remained liable. If this be so, he must continue, like them, responsible to the original vendors. If you suppose him to be absolved from his liability, and if you suppose the liability to be thrown exclusively on the sureties, see what the consequence must be. Small sells to a man who becomes insolvent. He escapes and his sureties are left exposed. Is there any case in law in which a principal can leave his sureties bound while he stands absolved from the burden which they have undertaken solely to oblige him? There cannot be such a case. Yet the Court below has here decided that Small, by merely transferring the property without any acceptance on the part of the original vendors, has successfully effected his own liberation, and yet has left his sureties in the lurch.

If, my Lords, you could have released the sureties as well as the principal, then, to be sure, you would have carried out a reasonable result; the only objection being, that it would, in this case, be contrary to the intention of the parties.

The doctrine of leases has been much referred to. Where a lease was granted, and there was an assignment by the lessee, the lease being assignable, the question would naturally arise what became of the obligation to pay the rent. Upon this point we have the case of *Grant v. Lord Braco* (a) from which it appears that the opinion of the profession a century ago was certainly that the tenant did not get rid of his liability by an assignment, where assignment was authorized.

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My noble and learned friend has read to your Lordships the opinions of Lord *Bankton* and of Mr. *Erskine*. Nothing can be more precise and clear than both those opinions. As far, therefore, as their authority goes, which is very great, it is clear that by the law of Scotland, as it was understood when they wrote, the tenant was not absolved from his liability in consequence of his assigning the property.

My Lords, there was a case of *Low v. Knowles* (b) in which this question arose—How far, where a lease is assigned, the original tenant continues liable to the landlord for the rent. It is stated that the Court below “considered the question to be attended with difficulty, and one upon which there was no precedent;—the opinions of Lord *Bankton* and *Erskine* being founded entirely on an observation incidentally made by the Court in the case of *Grant* against *Lord Braco*, which was decided on other grounds.”

One of the learned Judges, the Lord-Justice *Clerk*, observes, that the *dicta* of *Bankton* and *Erskine* were reprobated in the case of *Law v. Knowles*, and that they were not supported by the case of *Grant v. Lord Braco*, on which they are founded. That, I apprehend, must be a misreport or misapprehension. There was no reprobation of the doctrine of these eminent text-

(a) Morr. 15,279.

(b) Morr. 13,873.

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writers in the case of *Law v. Knowles*. The fact was simply stated that what they asserted to be the law had not been decided in *Grant v. Lord Braco*.

I have referred to these cases because they have certainly led in some measure to the decision which has been complained of. That decision depends upon a supposed analogy to the case of a regular feu; and the contention is, that because the obligation to pay feu duties would cease when the estate was transferred, therefore the obligation would also cease in a case like the present, where, on the transfer of a personal right, the person to whom it has been transferred has not completed his title by seisin.

Your Lordships will observe that there has not only been no acceptance by the original vendors, but to a certain extent a repudiation. The case differs from *Soot's case*, where there was an actual infestment, and also an acceptance. But here there has been no infestment, and there has been no acceptance.

It was indeed insisted that in point of fact the original vendors had accepted Adamson. My Lords, I have read the receipts with great care, and I can venture to represent to your Lordships that they prove just the contrary.

The second deed is an indemnity to Small by his sureties, and by Adamson himself. Now, the first deed cannot be construed by the second; but the second deed shows that it was not understood by the persons who carried this contract into effect that the rule of law in Scotland was settled; because, if the mere transfer did release Small, why should Small require that elaborate indemnity from both Adamson and his sureties?

On the whole, my Lords, I concur with my noble and learned friend on the woolsack, though not exactly

with the same views, in recommending your Lordships to reverse this decision (*a*).

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ORDERED and adjudged, That the interlocutors complained of in the said Appeal be, and the same are hereby reversed: And it is declared that the Respondent Small was not released by the disposition and assignation to Thomas Adamson, in the record mentioned, from his obligation to make payment of the said ground annual of 273*l.*: And it is further ordered, that the said cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this declaration and this judgment.

(*a*) See the next case.

BURN.—NICHOLSON & PARKER.