THE PRINCIPAL AND PROFESSORS OF KING'S COLLEGE, ABERDEEN, . . } APPELLANTS.

LADY JAMES HAY AND HUSBAND, . . RESPONDENTS.

1854.
10th, 11th, 13th, 14th July, and 11th August.

The Conditions of a sale by auction stipulated that the purchase-money should consist of a certain annual feu-duty, to be increased by the biddings; and for securing the regular payment thereof, a personal bond was to be granted, binding the purchaser, his heirs and successors in perpetuity, and a surety with him for ten years. The Bond bound the purchaser, his "heirs, executors, and successors" for all time. The Surety, by the same instrument, bound himself, his "heirs, executors, and successors" for ten years.

Held (reversing the decision below)—That neither the obligor in the Bond, nor his general representatives, could, by alienating the estate, get rid of the obligation.

The feudal doctrine that a Vassal on ceasing to be Vassal ceases to be liable for the feu-duty issuing out of the land,—held inapplicable to a case where the parties chose to make special stipulations.

THIS case is very fully reported in the Court of Session (*a*).

The reasoning on which it turned is similar to that occurring in *Millar* v. *Small* (*b*), and the *Royal Bank of Scotland* v. *Gardyne* (*c*), decided by the House in 1853.

The *Lord Advocate* (*d*) and Sir *Fitzroy Kelly* appeared for the Appellants. The *Solicitor General* (*e*) and Mr. *Ross* for the Respondents.

(*a*) Sec. Ser. vol. xiv. p. 675. (*b*) *Suprà*, p. 345.
(*c*) *Suprà*, p. 358. (*d*) Mr. Moncreiff.
(*e*) Sir Richard Bethell.

The facts, as well as the arguments, deemed necessary to the decision, are embodied in the following opinion delivered from the Woolsack.

The LORD CHANCELLOR (*a*):

Lord Chancellor's opinion.

My Lords, the Appellants, who were the Pursuers in the Court below, are the Principal, Professors, and Members of the University and King's College of Aberdeen. The object of the summons was to obtain payment of a feu-duty of 502*l.*, which fell due at Martinmas, 1847, and substantially to establish a right to that payment annually against the Defender, Lady James Hay, and her husband, she being the heir of her late father, James Forbes, and the claim being made under a bond executed by him in the year 1818. The facts are as follow:—

On the 28th of May, 1818, the College or University being seised in fee of the lands of Bankhead, offered the same for sale by public roup. The Articles of Roup are as follow:—"The foresaid lands of Bankhead, salmon-fishing, and others, are to be exposed to sale by way of feu, for the space of nineteen crops and years, from and after the term of Whitsunday, 1807, and are to be entered and set up at the yearly feu-duty of 100*l.* sterling in money, and the price of fifty bolls of best farm or market bear, conform the sheriff fiars of Aberdeenshire, for the crop preceding each term's payment." The biddings were to advance at not less than one pound sterling from the 100*l.* at which the lands were to be put up. Then there was this proviso. "Tertio. The person who shall be preferred to the purchase of the said lands, salmon-fishing, and others, shall be obliged, within fourteen days after the roup, to grant a personal bond to the Exposer's constituents, with sufficient security to their satisfaction for

(*a*) Lord Cranworth.

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the regular and punctual payment of the foresaid yearly money and victual feu-duty at the terms before mentioned, for the space of ten years from the term of Whitsunday last, with the legal interest of each term's payment thereof, from the time the same becomes due till paid, and a fifth part more of liquidate penalty in case of failure, and which personal bond shall also contain an obligation on the purchaser, and his heirs and successors, for the regular and punctual payment of the said yearly feu-duty, in all time from and after the expiring of the said ten years, with interest and penalty as aforesaid. And in case the purchaser shall fail in granting such bond he shall not only forfeit his interest in the purchase, but also the sum of 1000*l.* sterling of liquidate penalty," and every purchaser, as he came in, was to be bound to grant a personal bond in like manner. Then, "Quarto, upon the purchaser's granting a personal bond as aforesaid, the Exposer becomes bound, and obliges himself, that the Principal and Professors of the College, or a majority of them, shall execute and deliver to the purchaser a charter to the lands, salmon-fishings, &c., in all time after the term of Whitsunday last past." There are certain other stipulations. In particular there is a stipulation, "That every heir and singular successor acquiring right to the said lands, and others or any part thereof, shall be obliged within six months thereafter to take out a charter or entry, upon their own expenses, from the Principal and Professors of the College as superiors, and to grant a personal obligation, if required, for payment of the feu-duties." Those were the terms of the roup.

My Lords, the roup took place; and the property having been put up at the feu-duty of 100*l.* a year, and fifty bolls of best market bear, the biddings went on, and a gentleman of the name of Duncan Davidson

eventually became the purchaser, at a feu-duty of 502*l.* annually, besides the fifty bolls of bear.

On the 5th of August, 1818, Davidson, who had been the purchaser, signed a memorandum acknowledging that he had bid only as agent for James Forbes, and James Forbes was accepted as the purchaser. On the 12th of August, 1818, Forbes executed the bond which is now in question. It is in these words: "I, James Forbes, of Seaton, Esquire, considering, that upon the the 28th day of May last, the lands of Bankhead," &c. "were exposed to sale by public roup, in way of feu, by David Hutcheon, advocate in Aberdeen, as having power to that effect from the Principal and Professors of King's College and University of Aberdeen, and that Duncan Davidson, advocate in Aberdeen, became purchaser of the same, for my behoof, at the yearly feu-duty after mentioned, and according to the conditions mentioned in the articles of roup of the said lands and others, by which *inter alia* it is stipulated that the purchaser should be obliged to grant a personal bond to the Exposer's Constituents with sufficient security to their satisfaction for the regular and punctual payment of the said yearly feu-duty, at the terms therein and after mentioned, for the space of ten years from .the term of Whitsunday last, and containing also an obligation on the purchaser, his heirs and successors, for the regular and punctual payment of the said yearly feu-duty, in all time from and after the expiry of said ten years," (that is, the surety was to be bound for ten years, and the principal for all time) "have therefore become bound, as I, the said James Forbes, the purchaser of the foresaid lands and others, do hereby in implement of the said articles of roup, so far as incumbent on me, bind and oblige myself, my heirs, executors and successors, duly and regularly to make payment to Doctor William Jack, Principal," and

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certain other persons, "all of the said College and University, or to their successors as Trustees of certain mortifications belonging to the said College, or to their master of mortifications for the time being, or any other person whom they may authorise to receive the same, the sum of 502*l.* sterling of money, feu-duty for the foresaid lands and others, at the term of Martinmass yearly, and of the price of fifty bolls of best farm or market bear, conform to the Sheriff fiars of Aberdeenshire, for the crop preceding each term's payment." "And for and with the said James Forbes, as Principal, I, the said Duncan Davidson, as Cautioner, bind and oblige myself, my heirs, executors and successors, for the true and punctual payment of the said yearly feu-duty, money and victual, at the terms above specified, during the space of ten years from the said term of Whitsunday last." "And I, the said James Forbes, bind and oblige myself and my foresaids to free and relieve the said Duncan Davidson" from all liability under his obligation. This Bond bears date the 12th of August, 1818.

On the 23rd of October following, the College executed a feu-charter, granting the lands in question to James Forbes, his heirs and assignees, at the feu-duty of 502*l.* and the price of the bolls referred to. He was duly infeft, and on his death the Defender Lady James Hay, as his only daughter and heiress, was infeft, and she and her husband, in June 1847, sold the property to James Gauld, upon which sale infeftment followed, dated and recorded 10th July, 1847.

The question is whether the liability of the Defender Lady James Hay, as the representative of James Forbes, ceased on her selling the land to James Gauld, as set forth in the proceedings, and on his being duly invested as the vassal. The *Lord Ordinary* (Lord *Wood*) held that it did not. He was of opinion, that

the obligation by virtue of the bond was a personal obligation which continued notwithstanding the disruption of the feudal relation of superior and vassal in the lands. But on the question being brought before the Inner House, the interlocutor of the *Lord Ordinary* was reversed, the late *Lord President Boyle* holding that Lord *Wood* was right, but the three other Judges, namely Lord *Cuninghame*, Lord *Ivory*, and Lord *Fullerton*, being of a contrary opinion, and thinking that the bond did not import any obligation to pay feu-duty, except by each vassal as he should be successively in possession. The result therefore was that the interlocutor of the *Lord Ordinary* was altered, and the Defenders were assoilzied. Against this interlocutor of the Inner House the Pursuers have appealed to your Lordships.

A case precisely similar to the present occurred at the same time in the Court of Session, between *Brown's Trustees* and *Webster* (*a*), and the two cases were argued together before all the Judges of that Court, who gave very elaborate opinions on the subject. Three of the consulted Judges concurred with the late *Lord President* and Lord *Wood*, and five of them with Lords *Ivory*, *Cuninghame*, and *Fullerton*. It thus appears that your Lordships have the opinions of eight Judges in favour of the decision appealed against, and only of five against it. It now becomes the duty of this House to decide between these conflicting opinions.

My Lords, I confess I have arrived at a clear opinion in favour of the view taken by the minority of the Judges.

I will assume the law to be that the ordinary contract of a feuar in a feu-contract, is operative so long only as the relation of superior and vassal subsists. But,

(*a*) Sec. Ser., vol. xiv. p. 675.

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of course, that can be true only in an ordinary case, and where there is nothing special in the terms of the contract; for it must always be open to contracting parties to make, if they think fit, a contract which shall be independent of the subsistence of the feudal relation.

Now here, I think it clear, whatever may be the ordinary doctrine, that the parties intended there should be a personal obligation independently of the feu-contract.

In the first place the obligation is contained in a separate instrument. This of itself, though not conclusive, is yet a circumstance strongly tending to show that an independent liability was meant to be created. No doubt two or more instruments may so entirely form part of one transaction that they ought to be read and construed together. But that is not the case here. The obligation, so far from being substantially a part of the feu-grant, was in truth a document to be executed by the purchaser before the seller was bound to convey at all. Until the bond was given, the vendor was under no obligation to part with his land. It is difficult in such a state of things to suppose that the construction of the bond could depend on the terms of a deed not yet executed, and which in the present case was not executed for more than ten weeks afterwards.

There was no purchase money, except the feu-duty, and the bond to secure it came in place of what in an ordinary sale would have been a bond for the purchase money, a bond clearly of an independent character, not to be interpreted by anything to be found in the subsequent deed of conveyance.

It was strongly pressed by the Counsel for the Appellants, that in this case there is a cautioner bound for a period of ten years. This obligation, it was said,

is in no respect dependent on any feudal relation. The surety binds himself absolutely for the payment of the feu-duty for ten years, into whosesoever hands the land may pass, and if the cautioner is liable, it is hard to suppose that the Principal is not liable also. Assuming that, according to the true construction of the bond, the cautioner is absolutely bound for ten years; the inference drawn by the Appellants can hardly be resisted.

But the true ground on which I consider the Judges who were in the minority to have been right, is that construing the bond according to the plain meaning of its language, there is no doubt but that it is binding on Forbes, the obligor, and his representatives for ever. It is in form a mere personal bond creating a personal obligation. Such an obligation was one which it was reasonable, or at all events lawful, for the vendors to require. Having obtained it without fraud they are entitled to put on it its plain literal construction, till it is shown that it was intended by the parties to have a more restricted operation. I observe that some of the Judges say the Appellants were bound to have made their meaning clearer, that they ought *apertius mentem explicasse.* But with all deference, I think that is to cast the burthen on the wrong party. The Appellants say they desired to have a personal bond, which should bind the purchaser and his representatives for ever, and such a bond they obtained. It was for the party granting the bond, if he did not intend it to operate to the full extent which its language imported, to introduce words qualifying its generality. This he has not done, and I must therefore assume that he intended his words to have their ordinary construction. Nothing can be more inconvenient than to allow parties to bind themselves in terms which, if interpreted literally, are clear and unambiguous, and then to cast

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on those to whom they are bound the burthen of showing that the instrument is to be construed literally, and expresses what was intended. Surely this is reversing the true order of things. Here the Appellants set up a personal bond given to them by James Forbes, by which he bound himself, and his heirs, executors and successors, for an annual payment in which, it is admitted, default has been made. I can discover no reason for enabling us to hold that this bond was not intended to have the full operation which its language imports.

I therefore move your Lordships to reverse the interlocutor complained of.

Lord Brougham's concurrence.

I ought to state that although my noble and learned friend Lord Brougham, who heard this case with me, is not here present to express his concurrence, yet we have gone over the subject together: he has seen the short notes that I made in order to guide myself in the observations which I should address to your Lordships, and he has authorised me to say that he fully concurs.

Interlocutor of the Inner House reversed, and Interlocutor of the Lord Ordinary affirmed (*a*).

(*a*) In this case attention was directed to some differences between the Lord Chancellor's speech in *Millar* v. *Small*, as given *suprà*, p. 345, and in the short-hand writer's notes.

The LORD CHANCELLOR: "The Report of Mr. Macqueen is extremely accurate. When I read it, I supposed that I must have written the judgment."

G. & T. W. WEBSTER.—JAMES DAVIDSON.