

state of things not contemplated by any of the circumstances of this case. I am therefore of opinion, that the Court of Session and the Lord Ordinary came to a perfectly correct conclusion; and I humbly move your Lordships that this appeal be dismissed with costs.

Interlocutors affirmed with costs.

Second Division.—Richardson, Loch and M'Laurin, *Appellants' Solicitors*.—Law, Holmes, Anton and Turnbull, *Respondent's Solicitors*.

MARCH 17, 1853.

GEORGE MILLAR, *Appellant*, v. JAMES SMALL, *Respondent*.

Feudal—Ground-Annual—Burgage—Personal Obligation—Liability of purchaser.

HELD (reversing judgment), *that a personal obligation by S, to pay a ground annual, did not transmit against A, a purchaser of the subjects, to the effect of extinguishing the obligation as against S, the original acquirer and obligant, although no infeftment had followed either upon the original contract or the purchase, and although the personal obligation of S was fortified by a clause, whereby certain parties bound themselves as cautioners for him, his "heirs, executors and successors," aye and until property of a certain value should be built upon the ground.*¹

The appellant sought a reversal of the judgment of the Court of Session on the following grounds:—1. Because, by the deed in question, Small, the respondent, became bound, by an express personal obligation, to pay the ground annuals. 2. Because the respondent could not discharge himself by transferring the lands. 3. Because the relation between the appellant and respondent, with regard to the ground-annuals, was that of creditor and debtor, and could not be affected by the rules applicable to the feudal relation of superior and vassal. 4. Because, even supposing that a personal obligation, in the general case, would cease to be binding on an original disponee after transfer, the respondent, considering the terms of the deed, would remain bound. 5. Because, assuming that a transference of the *real* right, by means of a completed infeftment, would have the effect of liberating the original disponee, that result would not follow here, no infeftment having ever taken place.

The respondent in his *printed case* supported the judgment on the following grounds:—1. Because the unanimous decision of the Judges in the Court of Session in *Soot's Trustees v. Peddie*, not appealed from, had established the principle, that a ground annual is properly and substantively a burden on land, to which the personal obligation of the proprietor, whether implied or expressed, is merely accessory,—being coincident with, and lasting no longer than, the personal relation to the land of the party upon whom it is imposed. And the result of this was, that the personal contract binding the disponee, and his heirs and *successors*, creates an obligation transmissible from the disponee to the successor, who, by means of a *bond fide* conveyance, assumes that relation to the land, as affected by the real burden upon which the personal liability depends. According to the state of the title here, the respondent duly transferred to Adamson, as his successor, the only right and relation to the subjects burdened with the ground annual, which he himself possessed, and thereby transferred from himself to Adamson the personal liability. 2. Because the cautionary obligation in regard to the building of houses, which could only be built by the proprietor in possession, became, by the conveyance to Adamson, an obligation for the latter as the successor in the property, and did not imply the continued existence of liability on the part of the respondent. 3. Because the notice given to the appellant, in his own title, of the transference to Adamson, and of his acceptance of that party as debtor in the personal obligation for a series of years, without making any claim against the respondent, imported his knowledge of, and acquiescence in, the relief of the respondent from the personal obligation, as having been transferred from him to Adamson, as his disponee and successor.

Sol.-Gen. Bethell, and *Anderson Q.C.*, for appellant.—This is a question of construction of a contract. The deed is a disposition in which the price is stated to be a perpetual annuity, which, indeed, is made a real burden on the land, but there is added a personal covenant of the disponee to pay it. The personal covenant is added in order the better to secure payment—in other words, the solvency of the parties was an element of consideration. The real security, however, does not impair the personal obligation. The sole relation thus constituted between the annualer and the disponee, is that of creditor and debtor, and there is nothing in it of a feudal nature. When Small conveyed the subjects to Adamson, it is clear from the terms of the disposition, that he did not believe that he would be freed from liability, and hence an elaborate clause in which

¹ See previous report, 11 D. 495; 21 Sc. Jur. 143. S. C. 1 Macq. Ap. 345; 25 Sc. Jur. 334.

Adamson relieves him of payment; nor did the creditor believe Small was thus freed, as appears from the fact of his having refused to substitute Adamson's name for 'Small's in the original disposition, and from the terms of the receipts granted by him, which clearly import that Small was the person still liable. The question therefore is, was Small in reality, seeing he was not in the understanding of the parties, freed from his obligation. If he be, then it will follow, that a person who has bound himself by a personal obligation in the way Small did, may the next moment, without the consent of the other contracting party, get quit of that liability by merely selling the subjects to a man of straw. Another strange consequence will be, that whereas Small's cautioners remain liable, yet he himself, the principal, by an act in which they do not concur, escapes; in other words, the cautioner's liability, which is expressed in the very same terms as that of the principal, exceeds that of the principal, which is absurd. The personal covenant was a collateral security, and is no more avoided by a transference of the subjects, than if there had been a separate personal bond granted by the disponent, collateral with the reserved burden, and referred to in the reservation. The ground annual in this case, is nothing more than the price of the lands, and it makes no difference that the price is an annual payment instead of a single sum, or that the personal covenant is contained in the same deed by which the real burden is created. It is therefore a mere assertion to say that the personal security is accessory to the real security; on the contrary, the personal obligation may be by far the more valuable of the two, and there is nothing in the terms of the deed to shew that that obligation was to cease on a transference of the land. The disponent binds himself, his heirs, executors, and successors whomsoever, to pay &c. in all time coming. It is said "heirs" means those who succeed to the lands; but we construe it as meaning "general heirs;" we also construe "successors" as meaning, not singular successors, but representatives, and the whole phrase is of that well-known form which imports an absolute and unqualified personal obligation.—*Thomson*, 22d May 1810, F.C.; *M'Lachlan v. Tait*, 2. S. 303. It is quite competent in Scotland, as well as in England, to enter into a perpetual covenant, such as exists under this contract.—*King's College v. Hay*, 14 D. 675. It is said the analogy of superior and vassal holds in this case; but, in feus, the new proprietor, in order to relieve the vassal, must always have been received as a vassal in the room of his disponent—thereby implying, that the superior has agreed to receive the disponent as a vassal—*Wallace v. Ferguson*, M. 4195. There is no such implied agreement here, but rather the contrary, and therefore there is no pretence for viewing this as a feudal relation. It is also said, the analogy of landlord and tenant is against us; but there it is because the landlord receives the assignee in the room of the first tenant, that the latter ceases to be liable.—*Skene v. Greenhill*, 4 S. 25. And *Bankton*, 2, 9, 14, and *Erskine*, 2, 6, 34, both hold, that the privity existing between the landlord and the original lessee cannot be destroyed except by both parties.—*Grant v. Lord Braco*, M. 15,279.

[LORD ST. LEONARDS.—The law of England is exactly the same.]

We say, therefore, that in principle this case, as well as that of *Soot's Trustees*, 8 D. 560, was wrongly decided by the Court below; but even assuming *Soot's Trustees* to be correct, there are two material points of distinction, sufficient to make this case an exception. 1. There was no cautionary obligation in *Soot's Trustees*, as there is here, thereby shewing that the personal obligation of the disponent was here a principal and essential feature of the contract. And this disposes of the main fallacy of the other side, viz. that here the personal obligation was intended to be merely accessory to the ground annual. 2. In *Soot's Trustees* the second disponent was infest, and the feudal transfer was complete, while, here, neither the original nor the second disponent was infest.

Rolt Q.C., and *H. Pyper*, for respondent.—There is no distinction between this case and *Soot's Trustees*. As to the fact, that the disponent there had been infest, it is enough to answer, that the decision did not turn upon that point, but simply on the view, that the personal obligation was merely accessory to the real burden. It cannot be said that both disponents here are liable, and therefore it is assumed that Small alone is so, and that Adamson was never liable, because he was never infest. But neither was Small ever infest, and he therefore cannot be liable any more than Adamson; so that infestment cannot make the difference. On the other hand, we contend, that where both have been infest, it being clear that by transference of the land, the personal obligation is gone, the principle must be the same when neither is infest, because infestment merely means that the superior has accepted the disponent.

[LORD ST. LEONARDS.—Then, suppose £1000 of purchase money, which has not been paid by the second disponent, can he, by procuring the superior's acceptance of a third disponent, absolve himself, by a transfer of the land, from the payment of this purchase money?]

No; we do not so contend, because that would not be rent proceeding out of land, and therefore the analogy would fail.

[LORD ST. LEONARDS.—But they are both cases of personal obligation. You see you assume there is a feudal relation here, while in reality there is none.]

A ground annual was of feudal origin, and stands on a similar footing to a feu in Scotland.—2 *Ross's Lect.* 324. The real question however is, whether the personal obligation is the

principal, and the disposition in security the accessory, or *vice versâ*. We say it must be assumed, from the nature of the case, that the land was the primary debtor. It is admitted by the other side, that Adamson became liable in respect of possession, but not in respect of the contract,—and from that again it is inferred, that it must be Small who is liable under the contract. But this implies that possession of the land is not the source of the primary obligation, for we say it is impossible the accessory obligation can attach upon one who is not liable in the principal. Then it is said, that Adamson is not liable under the contract, because he is not included within the term “successors;” but this is impossible, for that term is used in the sense of successors in the land, whereas Small could have no successors in the land, simply because he himself was not infeft.

[LORD CHANCELLOR.—How is it, then, that the same term “successors,” occurs in the clause in which the cautioners bind themselves?]

We apprehend the word must have been there used inadvertently—certainly it seems unnecessary, though, perhaps, it might be construed to mean, that any voluntary disponee under them would be bound—that is, if the sureties have lands. At least we hold that the term means “singular successors” in the clause in which Small binds himself. Again it is said, that while the personal obligation is a substantive and primary obligation, it could not be transferred to Adamson till the ground annual had been made a real burden by infeftment, so as to warrant real diligence for its recovery; but real diligence was all the time competent, and not only so, but it was actually resorted to. At all events, the respondent did not undertake to infeft himself; and as the right was granted to him and his assignees, he was clearly entitled to transfer it, leaving the annualer to take what remedy he chose. As to the intentions of the parties as shewn by the deed, much importance is placed on the fact, that Adamson was taken bound in a clause of warrandice to relieve Small; but that was merely *ob majorem cautelam*. It is also said, the annualers refused to receive Adamson as tenant; but they had no right to do so, if the subjects were *bonâ fide* sold. It is also said, the terms of the receipts shew that the respondent is the proper debtor; but his name was merely used as aiding the description of the subjects, and nothing more;—at all events, the receipts are *res inter alios actæ*. As to the cautioners, their obligation can have no effect whatever on the construction of the primary obligation to which it relates: and the plain and obvious construction of the whole deed as to them is, that their right of relief is co-ordinate with their obligation, and passes against the parties successively becoming liable for the ground annual, as proprietors of the subjects, each proprietor in succession becoming the principal for whom they are liable. They are sureties for our successors, as well as for us.

[LORD ST. LEONARDS.—Now, only consider for a moment what such a transaction is. Their consent was not necessary for Small to transfer the subjects. Hence it will come to this, that their principal for whom they contracted to be sureties, and whom alone they knew in the matter, should be at liberty next day to discharge himself of his liability as principal, and leave them to become liable for a third person, whom they did not know, and with whom they never contracted: Is it just or consistent to hold that such was the position of these parties?]

No; we say it would not be just, unless they specially contracted to be liable in that way; but here is their own contract, and they have done it with their eyes open, and cannot now complain—Ersk. 3, 3, 64. In short, to hold that Small still continues liable, would be to make him liable for ever—a condition which, in Scotland, would be impossible, and which is totally inconsistent with the very functions of an executor.

[LORD ST. LEONARDS.—How impossible? Do you mean to say, that a grant of an annuity by which a man binds himself and his heirs for ever to pay £10, is not a good and valid grant? The thing can't be impossible, because it is done here every day. Is there anything in the law of Scotland to prevent it? It may be inconvenient, but it is not at all impossible.]

All we say is, that there is no instance of such an obligation having ever been recognized in the law of Scotland; and though it may not be impossible, yet the practical difficulties are so great as almost to make it unknown. It is said, one of the Judges in *King's College v. Hay*, *supra*, recognized such a perpetual covenant as possible; but that case is under appeal, and there is no authority for the doctrine; besides, there the disposition of land was unilateral, and the covenant was contained in a separate deed.

LORD CHANCELLOR CRANWORTH.—(After stating the facts, and quoting from the deeds)—My Lords, the ground on which the Court below rested its decision in this case was, that, after 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 transference to Adamson of the property in respect to which the real burden subsisted, 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 as that now under consideration, was decided by the Court of Session in a case of *Peddie v. Gibson*, referred to in the argument as the *case of Sool's Trustees*. There Peddie, on the 31st January 1829, disposed to Sool, his heirs and assignees, certain

burgage lands at a ground annual of £150, and Soot entered into a personal obligation binding himself, his heirs, executors and successors, to pay the ground annual to Peddie, his heirs and successors. Soot was afterwards duly infeft *more burgi*. In October 1836, *Soot's Trustees* disposed to Borrie at a ground annual of £410, including the original ground annual of £150, 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 infeftment 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. The original ground annual of £150, 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 burdened, 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, 2d. The covenant by Small was not like that of Soot—a covenant by himself alone—but a covenant in which several 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. 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 that case, proceeds to explain in a very lucid manner the nature of a ground annual, and then to state, with equal perspicuity, what had been relied on by the heirs of Peddie, the original vendor, as giving them a right against those who represented Soot, the original purchaser. He then goes on to state what he considers to have been the object of the addition of the personal obligation. What he says on these subjects, seems to me a very fair exposition of the point to be decided, though I confess the conclusion at which I arrive is not that to which the reasoning of the learned Judge led him and the rest of the Judges.

The *first* thing which occurs on this judgment is, that the question is treated as being one merely of construction. Was it, Lord Wood asks, the purpose of the deed, that the original disponee should become bound for himself and his heirs for all time? "I do not think," he adds, "that this is the legal construction of the deed." My Lords, I think that this is the only fair and just way of putting the case. 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;—but to say what is the meaning of a contract of very modern adoption, now ordinarily introduced into deeds of a particular description; and, in interpreting such words, I conceive that the only safe canon of construction is that which is now universally acted on—namely, that we are bound to understand words in their plain ordinary sense, unless there is something in the context shewing 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 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 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 under appeal, 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 such a distinction. I do not, my Lords, rely on the engagement by the sureties as creating a distinction between this case and that of *Soot's Trustees*. I doubt whether the fact of there being sureties in the one case and not in the other, does afford any safe ground for such a distinction. If, when there are no sureties, the obligation ought to be construed as contended for by the respondents, it might perhaps be contended, that where 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, as helping me to a due construction of the deed, is not to vary the nature of the contract, according to the distinction of there being or not being sureties, but as shewing 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, which they certainly do when used by sureties. In this way of viewing the question, it is immaterial, so far as the construction is concerned, whether in fact there are sureties or not. If there are sureties, the contract on their part imports an absolute contract enduring through all time. The same words must have the same meaning when applied to the principal; and this, as I think, affords a safe rule for construing the words, whether in fact there are sureties or not.

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 has 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 a third, what would have been his liability 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, supra*. 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 Bankton. His words are these—"An assignment of a tack assignable does not free the tacksman of the obligations he lies under by the tack; but the assignee, by his own consent and possession, becomes likewise subject thereto; and, therefore, it is optional to the heritor either to insist against the original

tacksman, or the assignee, for the rent ; but if the first assignee shall transfer the tack to another who enters to the possession, he can be no longer liable for the rent which falls due thereafter, because he was only answerable for the rent on account of his right and possession, from which, therefore, he must be free when that ceases, as it fully does by the transmission, whereas the original tacksman remains still bound, in terms of his obligation in the contract or tack ; but if the assignee grants a sub-tack, he possesses by the sub-tacksman, and so remains subject to the heritor in the rent ; and, while the assignation continues in his person, he is liable to all the prestations incumbent upon the original tacksman." And the same doctrine is laid down by Erskine, 2, 6, 34. Lord Glenlee is reported to have said in *Skene's case*, 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 into such an instrument as that now under consideration. In *Skene's case*, the Court professed to proceed on the special circumstances, though what they were does not appear. At all events, whether that decision, relating to the assignment of a lease, was or was not correct, the present case must be decided on its own grounds. And, for the reasons which I have stated, the decision below appears to me to be clearly erroneous, and I therefore move your Lordships that it be reversed.

LORD ST. LEONARDS.—My Lords, after the very full statement and discussion that this case has undergone by my noble and learned friend, I shall not occupy your Lordships any considerable time in stating what my views on this subject are. I confess I incline to give more weight, and I am afraid much more weight, to the circumstances of the cautioners joining in the first deed, than has been given to that circumstance by my noble and learned friend.

The nature of the deeds has already been fully stated. Small bought the property, as I may conjecture, on speculation. He bought in the early part of October. Adamson had property which adjoined the property so purchased. On the 31st of October Small took the conveyance to himself of the property, subject to this annual ground rent ; and he only took it to himself because, having applied to the persons who sold to him, the sellers refused to convey immediately to Adamson, to whom he had resold, before he himself had obtained the conveyance for the premium of £200. It is clearly proved, and not disputed, that that application was made to the sellers, and that they refused to adopt Adamson as their disponee. The consequence was, that Small was forced in the first instance to take a conveyance of the property to himself, and afterwards to convey it to Adamson, who in effect was the real purchaser, Small putting the £200 into his pocket as a bonus.

Now, the persons who are named as cautioners in the deed are joined with Small as of the one part. That is a very trifling circumstance, but it shews that Small and his sureties were considered as one party. They join in the same part of the deed together, and Small enters into an obligation to pay the ground rent.

Now, that ground rent had in point of fact been borrowed from our English law, in regard to the grants of perpetual rent charges. That seems clear enough. But the Courts in Scotland do not seem exactly to have known what to do with covenants or obligations with regard to the payment of such charges. Their difficulties appear to have been two. In the first place, they had a great objection to a perpetual covenant binding a party in respect of land, after he had ceased to be the owner of that land, and they thought that the obligation of the party should bind the persons who took the land, and that when the land was transferred, the obligation of the man who entered into the obligation, should cease. They thought a continuing obligation was against the law of perpetuity, and they fancied it prevented the free alienation of property.

Now, in the first place, that is a very arbitrary rule to set up—contrary to what the deed expresses. That a man may bind himself for all time, is clear both by the law of England and of Scotland. There is no question that, by the law of Scotland, a man may covenant to pay an annuity for all time, and that is binding just as it is by the law of England ; and it does not touch the question I have referred to, because a man who has an estate, can convey that estate, sell it, dispose of it, and settle it just as he could any other property. No doubt the mere circumstance, that his assets would in all time be bound to perform the obligation, would lead 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.

In this particular deed, Small covenanted to pay the ground annual for himself, his heirs, executors and successors,—the assignment being by the man, his heirs and assigns, which shews an obvious distinction. It is said "successors" there must mean the persons who are to take the property, and that the consequence is, that as those persons are bound by this covenant, the man who actually enters into the covenant is not bound. That is a very singular mode of reasoning. In this country, we have covenants which run with the land, and which bind the assignee ; but the man who enters into the covenant, is not the less bound by his covenant. He covenants,

and he covenants so that the covenant will bind the assignee, provided there is something to be done which relates to the land itself. No doubt cases have been decided in Scotland, that the man who covenants that his assignee shall do a certain thing, binds the assignee, but releases himself the moment he has procured the assignee.

I will assume for a moment that the case of *Soot's Trustees* was properly decided, and that the rule is, that after his transfer of the estate, an obligation binding, as in this case, the heirs, executors and assigns, does, in point of fact, bind the assignee of the property assigned, and that the man himself is released. Then, what is the consequence and effect of these cautioners joining? Your Lordships will observe, that they not only join in point of form by themselves separately, but, in so many words, they joined for and with Small himself, as the principal, for payment of the ground annual. The way in which the Courts have come to this extraordinary conclusion—for such I must call it—that Small himself, by his assignment, without the leave of the cautioners, and without the acceptance of the seller, is discharged from this obligation, while his sureties remain liable to it, is this—they say the word “successors” binding those persons who take the property, and the effect of their being bound being to release Small the principal, the sureties must be considered to have entered into that obligation to the extent of binding themselves further than the principal bound himself, from which obligation the sureties never can be released, though the principal himself is released.

Now the law of Scotland, like the law of this country, does provide, as all laws ought to provide, a remedy for sureties against the principal. Where men enter as sureties into an obligation for a principal, there is a remedy by law for the sureties against the principal. Let us for a moment consider what would be the effect of the decision to which I have referred. Could Small have possibly asked his friends—for I assume them to be such—to have entered into an obligation for him, that he and his successors would at all times pay the rent, or that the sureties themselves would pay the rent, and at the same time that he, Small, should be at perfect liberty, of his own motion, without the concurrence of the sureties, without the possibility of contest by them, and without the acceptance even of the seller, to transfer the property which he had thus acquired, and in respect of which, while he had it, he would pay the rent, thus divesting himself of that property, and releasing himself of the obligation, while they the sureties should continue liable? One can understand the principal continuing liable, although the sureties are released; but no one can understand an obligation, unless it is so clearly expressed that no question can arise upon it, that the sureties shall enter into an obligation to be bound beyond the extent of their principal, and to become in effect principals—they cease to be cautioners—they are principals, because it cannot be said that the successor, of whom they know nothing, can be considered as their principal—their character is changed;—and when Small became absolved from the liability he had undertaken, and which he ought to have performed in all time, they became themselves alone liable, and would lose their remedy against Small.

Let us consider for a moment what the effect would be. If Small is properly released from the obligation, then, of course, the sureties can have no remedy against Small; their remedy must be gone, because Small is no longer liable. The right of the sureties is in respect of common liability, and out of that common liability sprang an obligation on the part of Small to indemnify the sureties. They never would have entered into an obligation as original debtors, if it had not been that Small was the principal, and entered into that obligation with them. How is it possible, then, according to the intention of the parties, to separate that joint obligation of Small and his sureties, and to hold that, as regards Small, it is limited in point of time, and dependant upon his will, but that it is absolutely binding, for the whole time for which it has been entered into, on the sureties, and that they have no power to release themselves from that obligation? It seems quite impossible. As far as the intention goes, therefore, I think it is quite impossible to contend that these parties must not have intended that Small, as between himself and his sureties, should remain liable as long of course as they remained liable.

I am now looking to the construction as it is derived from intention. If Small was bound to remain liable as long as the sureties were liable, as between himself and the sureties, it follows of necessity that Small must remain liable as between him and his granter, because there is no other way in which Small could remain liable. If he was absolved from his liability to pay, the liability was thrown upon the sureties, without reference to the person who bought the property. See, then, what the consequence was. Small sells to a man who becomes a bankrupt; the sureties of course are left exposed, unless Small himself is liable. It is of necessity, therefore, if the intention was that Small should remain liable with his sureties, that Small must remain liable as between him and his original granter. What is there inconsistent in it? Is there any reason, if he asks other men to become liable with him for the payment of the ground annual, notwithstanding there is a transference of the estate—he having bought the estate subject to a ground annual—why he should not remain liable himself with his own sureties? Is there any case in law in which a principal can escape from a liability into which he has entered jointly with sureties, and leave the sureties burdened with the whole liability, while he stands absolved from that obligation into which they had entered, entirely and wholly to oblige him? It is impossible on

the ground of intention, and equally impossible on any fair construction of this instrument, to say that that can have been the meaning of it. I come therefore to the conclusion, that even if *Soot's case* was properly decided, upon the clear and manifest intention of this deed, and the nature of the obligation, this case is so far distinguished from the case which has been already decided, that I should on that ground have been prepared to concur with my noble and learned friend on the woolsack, in advising your Lordships to reverse this decision.

Independently of that, my Lords, an important question of law arises. Now I think this question of law is not one in which this House can be represented (although one can never speak without great respect of the learned Judges in the Court below, and it must always be with hesitation that this House will reverse a unanimous decision of the Judges there) as striking at any principle depending upon the law of Scotland. If your Lordships should reverse this decision, you will not strike at the root of any rule of law in Scotland, but you will simply hold, that a principle which is not disputed, has been extended to a case to which it cannot properly be applied. A matter of modern introduction, unknown to the law of Scotland, but known well to the law of England, embarrassed the Judges, and they have applied to the present case a rule of feudal tenure, arising out of ancient instruments, which has no application, at least no sufficient application to it, to induce your Lordships to adopt that view. As the House is well aware, the rule originally arose from a simple feu, and there, where it was unilateral, and there were feu duties reserved, it followed as a matter of course, that when the vassal, with the consent of his superior, had divested himself of the property, and a new vassal was introduced in the tenancy, the obligation passed along with the benefit, and the new vassal became subject to the old duties; and when he became subject to the duties, the man who was the former vassal ceased to be subject to them, but he was subject to them during his own tenure. It was an application arising out of the nature of the tenure, and subjected the land itself, without any other obligation, to the feu duties. It would be just the same in the English law—there is no magic at all about it. If the same case arose in the English law, the result would be just the same as in the Scotch law. For a long time, what are called annual ground rents were not known to the law of Scotland. What was known to the law of Scotland was a case that may be considered to bear very much upon the present, and that was the case of leases; because, certainly, where a lease was granted at a rent, and there was an assignment by the lessee of that lease—in cases where the lease was assignable, the question would naturally arise, What, under the assignment, became of the obligation to pay the rent? Because I do not observe in other cases that there was an obligation to pay the rent, but the obligation appears to have arisen out of the corresponding relation of landlord and tenant; and the question would arise, whether or not the tenant could, by assignment, divest himself of his liability to pay the original rent.

I will, in a very few words, call your Lordships' attention to how the authorities stand upon that point. The case which has been most referred to, is the case of *Grant v. Lord Braco*, Kilk. 532. The question was, whether a man could assign—that was the question which was raised. “Some were of opinion, that in either case he might assign, and that the difference lay only in this, that where a tack is to assignees, the tacksman is, after assignation, no more liable for the rent than a feuar is for the feu duty after a sale of the lands; whereas, where the tack is to the tacksman and his sub-tenants, the principal tacksman, notwithstanding of an assignation, remained still bound to the seller. But the more general opinion was, that where a tack is to the tacksman and his assignees, the tacksman remains bound, even after the assignation, just as in any other contract—*e. g.* a contract of victual—the assignation to that contract does not liberate the cedent; and that the difference lay in this, that a power to subset did only imply a power to give off a part, but not the whole.” So that, as far as the opinion went at that time, it certainly was, that the tenant did not get rid of the liability to pay the rent by an assignment, where an assignment was authorized.

My noble and learned friend on the woolsack has read to your Lordships, and I therefore will not read them again, the opinions of Lord Bankton and of Mr. Erskine. Nothing can be more precise and clear than both those opinions. They state, without any doubt, that notwithstanding the assignment, the tenant remains liable. It is rather singular. Here is a general opinion stated to the Court. There seems to be no doubt that both Lord Bankton and Mr. Erskine founded themselves upon *Lord Braco's case*; that seems to be the general opinion. But was not it sufficient to enable them, with their knowledge of what the general opinion of the profession was, to state, as text-writers, the rule as they have stated it? As far, therefore, as their authority goes, which is very great, it is clear that, by the law of Scotland, as it was then understood, the tenant was not absolved from his liability to pay the rent in consequence of his assigning the property.

My Lords, there was a case, *Low v. Knowles*, Mor. 13,873, in which this question arose—“How far, where a lease is granted to assignees, the original tenant, after assignation, continues liable to the landlord for the rent, and consequently has any title to insist in a removing against the assignees?” And then there is a second question, which is unimportant:—“The Court considered the first question to be attended with difficulty, and one upon which there was no

precedent; the opinions of Lord Bankton, 2, 9, 14, and Mr. Erskine, 2, 6, 34, (it was observed,) who think the cedent still liable, being founded entirely on an observation incidentally made by the Court in the case of *Grant v. Lord Braco*, Kilk. 24th Feb. 1743, *voce* Tack, which was decided on other grounds." Now your Lordships will observe, that that point did not call for a decision, but the Court gave no opinion upon it; they merely said, that the opinions of Bankton and Erskine, which were expressed, were founded upon this case of *Lord Braco*, in which the Court gave no opinion. But, as has been already remarked by my noble and learned friend, when the case to which we have been referred in the argument, of *Skene v. Greenhill*, came before the Courts in Scotland, one of the learned Judges, the Lord Justice Clerk, observes, that the *dicta* of Bankton and Erskine were reprobated in the case of *Low v. Knowles*, and that they are not supported in the case of Lord Braco, on which they are founded. That must be a misreport or a misapprehension; there was no reprobation of the doctrine in the case of *Low*. The fact was simply stated there, that what the text-writers had stated to be the law, had not been decided in *Lord Braco's case*, which was decided upon another point, but only stated incidentally. Therefore, when the Court in Scotland founds itself upon Knowles' cases as reprobating the *dicta* in Bankton and Erskine, it certainly proceeds upon a misapprehension, as far as we have the means of knowledge.

In this case of *Skene v. Greenhill*, your Lordships will observe there was a right of assignment. There was a right to assign, and the question arose, whether the party should be bound or not. The judgments are not very clear. It is rather difficult to come to any conclusion as to what the true grounds were, upon which the decision rested. It was said at the bar, that the case turned upon the circumstance, that the assignment could not be made to a son without a sufficient stocking, and that it did not appear that there had been a sufficient stocking; but in that case there was an acceptance, and therefore no question could arise. There was a right to assign, subject to a certain provision, and there was an assignment and an acceptance of the assignee, and therefore everything occurred that was necessary. The Court therefore held, that the obligation ceased upon that assignment.

I have referred to the case of a lease for this reason. It was founded upon in the Courts below, and has been referred to at your Lordships' bar, and it certainly has led in some measure to the decision which has been complained of. That decision depends upon the supposed analogy to the case of a regular feu, that as, in that case, the obligation to pay the feu duties would cease when the estate was transferred, therefore, by analogy, not by any rule of law, but reasoning by analogy, the obligation would also cease in a case like this, where the property has not been the subject of proper infeftments, where no seisin has been taken, where the party has not made out his title, and where, in the transfer of a personal obligation, the person to whom he has transferred it has not made out his title. And your Lordships observe, that there has not only been no acceptance in this case, but there has been a repudiation to this extent, that the party, who sold originally, refused to take the person who is now said to be bound. The case, therefore, differs from *Soot's case*, because, if we take *Soot's case* as we find it, (as we must,) there were two ingredients in it. First of all, there was an actual infeftment. The party took up seisin, and was properly infeft, so that there was an absolute change of tenant, and a regular deed followed by livery of seisin between them, and the whole was complete. There was also an acceptance in that case, and so the rubric states it. There is no doubt that there were those ingredients in that case.

Now, in this case, neither of those circumstances occurs. There has been no infeftment, because it remained simply upon personal obligation, and there has been no acceptance. Those are both material circumstances if you are to argue by analogy. Does it follow, that because, in a regular feu, where there is a transference of the estate, an acceptance (by the lord of a new vassal, and an obligation in the new vassal to pay that which was formerly paid by the old vassal, who has ceased to hold, the obligation ceases, therefore, in a case of mere personal obligation, to which effect has not been regularly given, that mere personal obligation shall of necessity be transferred to the person who takes the benefit of the assignment by an analogy to the case of an original feu? I apprehend it would be very difficult to establish such an analogy, and it would be still more difficult where there has been not only no acceptance, but a rejection.

It was insisted upon in this case, that there was an acceptance, because the receipts shew, that in point of fact the trustees who sold had accepted Mr. Adamson. My Lords, I have read those receipts with great care, and I can venture to represent to your Lordships that they prove just the contrary. The language of one of them a little differs from the rest, yet the effect of all of them clearly is this, carefully, without an express acceptance or rejection, to exclude any inference of an acceptance of Adamson as the transferee of the personal obligation which had been transferred from Small. Small's obligation is stated throughout, and it is clear, therefore, that the original sellers not only refused to convey to Adamson, but they afterwards took care, while Adamson was in possession, and actually paying rent, in the receipts which they gave to him, not to acknowledge him as the person liable to pay that rent.

Now, my Lords, I would not found much upon this circumstance ; but when we are told that there is a clear and established rule of law in Scotland which we have overlooked, what becomes of that second deed of Adamson's ? Who were the conveyancers who prepared that deed as an indemnity to Small, who had sold to Adamson, by his sureties, and by Adamson himself against the obligation of Small, and to this extent, that if it were necessary, they would pay the ground annual itself to Small, in order to enable him to meet the obligation which rested upon him. Now the first deed cannot be construed by the second deed—that is a perfectly clear proposition of law. I did not understand the learned counsel to argue otherwise. But the construction of that deed, the mode in which it is drawn, shews to me clearly that it was not understood by the persons who carried this contract into effect, that the rule of law in Scotland was so clearly settled ; because if the mere transfer, as it is now contended, did release Small, why should Small require that elaborate indemnity from both Adamson and his sureties, from an obligation which he was no longer liable to ? I use the deed in no other way than as shewing, that the knowledge of this supposed rule of law in Scotland had not obtained such general circulation as to have reached the persons who prepared these very deeds.

My Lords, I have gone through with great care the reasons given for the decision in the Court below. I have done so with all the respect and attention which they so much deserve, on account of the very learned persons who gave those opinions. I cannot say that I am at all satisfied with the reasons which are given. Upon the first advising, Lord Wood seems to think there is no difference between a personal obligation and a regular feu, and he thinks it makes no difference that the sureties become bound for the successors, and that though the principal himself became discharged the sureties would remain liable. Upon the first advising before the Court at large, very great weight was given to the special circumstances of this case. Several of the learned Judges were of opinion, that the introduction of the cautioners did lead to a great deal of difficulty, involving as it did the question, whether Small and they were not bound for all time in the common way, or whether the effect would be to release the cautioners as well as the principal. If you could by law release the cautioners as well as the principal, then, to be sure, you would have carried out a reasonable rule—the only objection to it being, that you would be carrying into effect a rule which was contrary to the intentions of the parties. When the same learned Judges came to advise ultimately, they came to a conclusion, no doubt, against the present appellant : but it is singular that even at that moment the Lord President said he should like to have further consideration and further information in regard to the case, and yet with that statement he proceeded to decide against the appellant.

I think the case has been taken up in Scotland on the ground of an analogy which cannot be supported, and it is satisfactory that your Lordships will not, if you reverse this decision, strike at the root of any principle of the law of Scotland, which certainly ought on all occasions to be most carefully avoided. I believe nobody ever addressed your Lordships upon any question of law, who was more anxious than I am to hold by the law of Scotland in deciding upon the right of parties under that law, and not to import the law of England improperly as bearing up those rights. I consider, however, that your Lordships will in no manner break in upon any principle or rule of law in Scotland, by reversing the decision which is now appealed from. I therefore concur with my noble and learned friend upon the woolsack, though not exactly with the same views, in recommending your Lordships to reverse this decision.

Mr. Rolt.—Your Lordships will pardon me—you will not lose sight of the point which is not yet determined.

LORD ST. LEONARDS.—No, certainly not ; it will be remitted. The decision will be reversed, and it will be remitted with the declaration, that Small should not be released from his obligation by assignment. With that declaration, it will be remitted to the Court below to do what may be just.

Mr. Anderson.—I think it will dispose of the whole cause. The defence in the action against the Whale Fishing Company was made the ground for an application by my learned friend's client, to sist the procedure. Upon 15th March 1844, the cause was sisted. In the interim, between March 1844 and May 1846, the case of *Soot's Trustees* was decided. The respondent, feeling himself strongly fortified by that case, moved the Court to take off the sist, and give judgment upon the cause as it stood.

Mr. Rolt.—That is only stating my case.

LORD ST. LEONARDS.—Is your contention that, in point of fact, by their acts, they have waived that other point ?

Mr. Rolt.—Yes, my Lord, that is their contention ; and the only evidence of it is this, that having taken both points, and having had the decision in the case of *Soot's Trustees* after both points had been taken, we then went to the Court for judgment—no doubt relying upon that case, but not waiving or abandoning the other.

LORD ST. LEONARDS.—I understood that during the argument.

Mr. Rolt.—It was so treated on both sides.

LORD ST. LEONARDS.—I thought it was clearly understood, that if the House reversed the decision, still the case must be remitted. I stated that several times during the argument.

Mr. Anderson.—I apprehend there will be a power to the Court to deal with the question of expenses.

LORD ST. LEONARDS.—No ; that is not the habit of this House. I do not recollect any instance of it.

Interlocutors reversed, and cause remitted.

First Division—Adam Burn, *Appellant's Solicitor.*—Nicholson and Parker, *Respondent's Solicitors.*

APRIL 12, 1853.

GEORGE FRASER, *Appellant, v.* WALTER HILL and others, *Respondents.*

Partnership—Jury Cause—Issue—Bill of Exceptions—Pawnbroker—Statute 39 & 40 Geo. III. c. 99—*In an action of reduction, count, reckoning and payment, against the representatives of F., an issue was sent to a jury which involved a question, whether F., whose name did not appear in the licenses of a pawnbroking establishment, or over the door, or on the tickets, was a partner of the concern.*

HELD (reversing judgment), *that the two questions for a jury, there being no partnership deed, were (1) whether there was a partnership at all ; (2) if so, then whether it was part of the contract, that F.'s name should not appear, in which case the contract would be void.*¹

The pursuer appealed, pleading that the judgment of the Court of Session should be reversed on the following grounds :—1. As the 4th exception (being the only one now in question) raised no principle of law, and was not submitted for the opinion or direction of the Judge who presided at the trial on any matter of law or otherwise, it was erroneously sustained. 2. That exception ought to have been disallowed, in respect that, if sustained by the presiding Judge, the province of the jury would have been invaded, as the issues of fact sent to them for trial would have been thereby withdrawn from their consideration.

The respondent supported the judgment on the following ground :—Because, on the facts proved, there was no lawful partnership between the appellant's father and Alexander Hair, in the business of pawnbrokers, between the years 1840 and 1844, and the jury ought to have been directed accordingly.

Sol.-Gen. Bethell and Bramwell Q.C., for appellant.—The sole point in dispute between the parties, as disclosed in the pleadings, was, whether the violation of the law was the result of the agreement between Hair and the appellant at the time of making the contract. The issues do not exactly raise this point, for we can suppose the jury to have well found for the appellant on all these issues, even though it were true that the partnership was illegal. It is clear that the property of the appellant could not be transferred to Hair by the mere force of the Pawnbrokers' Statute, and therefore it might be fraudulent in Hair to convey such property away, even though the partnership was illegal. It was not necessary to the appellant's title, therefore, that the partnership should have been valid. The existence of a partnership *de facto*, however, as between Hair and the appellant, was *res judicata*, and the other defenders, in their defences, admitted that fact. The first issue, nevertheless, involves the question, whether there really had been a partnership, but yet leaves it ambiguous whether that question was intended to be raised. Such a pleading would have been bad in English law, as involving a negative pregnant. We may, however, consider the allusion to partnership property in that issue, as used merely for identification. But, at all events, there were substantially two questions to be tried—1. whether there was a partnership *de facto*; 2. whether it was a legal partnership. Now, there was evidence on both sides at the trial, and the 4th exception was tendered to the Judge's summing up. The first objection to the exception is, that it is too vague. An exception ought always to be precise enough to allow the thing complained of to be remedied before it is too late—*Bain v. Whitehaven, &c. Co.*, 7 Bell's App. C. 79 ; 22 Sc. Jur. 483. This exception may mean, either that there was no partnership *de facto*, or that it was unlawfully carried on. Now the cases establish, that an agreement to carry on a partnership in pawnbroking, secretly as to one partner, is unlawful, and also that the mere carrying it on in an unlawful way, though evidence of a contract so

¹ See previous reports 14 D. 335 ; 24 Sc. Jur. 162.

S. C. 1 Macq. Ap. 392 ; 25 Sc. Jur. 391.