United Kingdom House of Lords Decisions

(1870) 2 Paterson 1719

REPORTS OF SCOTCH APPEALS IN THE HOUSE OF LORDS.

No. 91

GEORGE KELLIE MACCALLUM, Esq. of Braco, Appellant

v.

SIR W. D. STEWART of Grandtully, Bart. and J. DUNDAS, C.S., his Trustee.

FEBRUARY 17, 1870.

Subject_**Sale of Land — Consignation of Price — Articles of Roup — Stipend — Relief of Purchaser —**

M. purchased an estate from S., one of the articles of roup stipulating, that part of the price should be consigned to meet the event of certain undecided questions, as to an obligation of relief from future augmentations of stipend, and should until those questions were finally determined. S. raised an action, and obtained decree to the effect, that he as vassal was entitled to relief from A. qua *superior, and then claimed payment of the consignment.*

HELD (affirming judgment), *That S. was entitled to the money, having fulfilled the condition, and that he was not bound to raise another action to settle the liability other ulterior events.*

Subject_**Superior and Vassal — Feu Contract —**

Clause of Relief against Augmentation of Stipend.

Subject_**Semble —**

An obligation in a feu contract on the granter, his heirs and successors, to relieve the vassal of future augmentations of stipend is binding only on the successors qua *superiors*.— *Per* **Lords Chelmsford**, **Westbury**, and **Colonsay**. [1]

_____ Footnote _____

[1] *See previous reports 6 Macph. 382; 40 Sc. Jur. 206. S. C. 8 Macph. H L. 1; 41 Sc. Jur. 206. See also D. Montrose v. Stewart, 4 Macq. Ap. 499; 1 Macph. H. L. 25; 35 Sc. Jur. 420; ante, p. 1168.*

This action was raised by the respondent against the appellant, concluding for payment of a sum of £1500, consigned in the Royal Bank of Scotland in terms of a minute of enactment appended to articles of roup, under which the lands and teinds of Braco were in 1853 purchased by Mr. MacCallum from the respondent. The minute of enactment was to this effect:—That, in respect of the undecided questions as to augmented stipend, which on the average of the last three years amounted to £100 10 *s*. 11 *d.*, a sum of £1500 out of the price shall be consigned, except the interest accruing thereon, as after mentioned, until those questions have been finally determined, and shall be then disposed of as follows:—1st, The exposer shall take all necessary proceedings for effecting the claims of relief under the original feu disposition and titles of the land, or in the existing locality or otherwise, and shall

follow out the same to a final determination. 2d, In the event that the exposer shall succeed in obtaining total or partial relief of the augmented stipend, the consigned sum shall be payable to him either wholly or in such proportion as shall correspond to the amount of the relief effected. 3rd, In the event that the exposer shall fail in effecting relief to any extent, then the consigned sum shall be payable to the purchaser, the purchaser taking on himself the burden of the augmented stipend in all time thereafter. 4th, Until the final issue of the foresaid proceedings, the annual payments of the augmented stipend shall be made by the exposer; he, on the other hand, uplifting and receiving the whole interest accruing on the consigned sum so long as those payments are continued by him. In pursuance of this minute, the respondent raised an action against the Duke of Montrose, his superior in the lands of Braco, and the result had been, that the House of Lords, on appeal, found, that the Duke as superior was liable, under the obligation in the original feu contract, to free and relieve the respondent as vassal of all stipend and augmentation imposed on the teinds of the lands of Braco since the date of the feu contract of 1705. The respondent thereupon claimed to uplift the above sum of £1500, because he had succeeded in his action. The appellant, however, resisted this, on the ground that the action did not establish an absolute liability of the Duke and his heirs to relieve the lands of Braco, but only established the liability of the Duke as superior of the lands. The whole Court by a majority held, that the respondent had substantially succeeded according to the meaning of the condition of sale, and done all that he had engaged to do in order to acquire the money. The majority of the Judges consisted of Lord President Inglis, Lord Justice Clerk Patton, Lords Curriehill, Cowan, Ardmillan, Jerviswoode, Mure, Kinloch, Benholme, and Barcaple, while the minority consisted of Lords Deas, Neaves, and Ormidale. The purchaser now appealed against that judgment.

The appellant in his *printed case* stated the following reasons for reversing the interlocutors: —"1. Because, according to the sound construction of the articles and conditions of roup, as well as according to the understanding and view of both parties to the contract of sale at the time of their entering into the same, the specific claims of relief, for effectuating which the respondent, Sir William Drummond Stewart, thereby became bound to take all necessary proceedings, were claims of relief against the general heirs and representatives of James, Marquess of Montrose, and not a mere claim of relief against his successors in the superiority of the estate of Braco. 2. Because the said claims of relief against the general heirs and representatives of James, Marquess of Montrose, have not been to any extent established, or made effectual to the appellant. 3. Because the respondents have not taken, or followed out to a final determination, the proceedings necessary for establishing and effectuating the said claims of relief, or for judicially ascertaining their validity as in a question with the heirs and representatives of James, Marquess of Montrose. 4. Because the respondents have hitherto failed either to put the appellant *in titulo* to assert and

establish the validity of said claims of relief against the heirs and representatives of James, Marquess of Montrose, or to take and follow out the proceedings necessary for that purpose. 5. Because, even on the assumption, that, under the obligation of relief from future augmentations of stipend contained in the feu contract of 1st February 1705, no claim of relief is competent to the vassal except against the heirs and successors of James, Marquess of Montrose, in the superiority of Braco, such relief is not the relief contemplated by the parties; and, in any view, is partial and not total, within the meaning of the articles and conditions of roup. 6. Because the respondent, Sir William Drummond Stewart, has failed to implement those conditions of the contract of sale between him and the appellant, upon the fulfilment of which by the respondent his right to receive payment of the consigned money is, by the terms of the contract, made to depend."

Lord Advocate (Young), and *Anderson* Q.C., for the appellant.—The judgment of the Court of Session was erroneous. The articles of roup made it necessary, that the respondent should effectuate all claims of relief under the original feu contract of 1705. At the time of this roup no definite claim of relief was pending, and therefore the obligation must be taken to mean an entire relief, and not a partial relief. By the feu contract, the clause of relief imported an obligation, not only upon the granter of the feu as superior, but also upon himself as an individual, and upon his general representatives. There was then constituted an effectual personal obligation against the Marquess and his representatives in the feu contract— King's College v Hay, 1 Macq. Ap. 526, *ante*, p. 429. Such an obligation is not inconsistent with the existence of a

right in the feuar to claim relief from his superior for the time being by reason of privity of estate. Thus under an assignable lease, the obligation of a lessee and his heirs to the landlord for rent is not terminated by the assignation of the land to a third party, and his acceptance by the landlord as tenant—Bank, i. 2, 9, 14; Ersk. ii. 6, 34. And though the case of Skene v. Greenhill, 4 S. 25, was to the contrary, it was overruled by the late case of Miller v. Small, 1 Macq. Ap. 352, *ante*, p. 222.

Sir R. Palmer Q.C, and *Mellish*, Q.C., for the respondent, were not called upon.

Lord Chancellor Hatherley.—My Lords, this is an appeal from two interlocutors, the first of which is an interlocutor of the Second Division of the Court of Session in Scotland, by which, in effect, it has been decided, that the respondent, Sir William Drummond Stewart, is entitled to recover the sum of £1500, which had been consigned under certain articles of roup, upon which a sale had taken place in which the respondent was Vendor or disponer, and the appellant was purchaser. The property

in question consisted in part of certain teinds, and by virtue of a feu contract dated in 1705, these teinds had been conveyed to David Grahame by the then Marquess of Montrose, with a certain contract of warranty contained in the instrument. That contract was in the following terms:—"The Marquess obliged himself and his heirs and successors, in consideration of (a certain payment which is there referred to), to warrant the said teinds, parsonage, and vicarage, which had been disponed, to be free, safe, and sure, to the said Mr. David Grahame and his said son and his foresaids, from all ministers' stipends, future augmentations, annuities, and other burdens imposed, or to be imposed, upon the said teinds."

That engagement had been fulfilled by the successors in title of the Marquess of Montrose, towards those who held the property which had been so conveyed. But the year 1846, up to which time the engagement had been fulfilled, introduced this change in the conduct of the Marquess, or rather of the Duke, as he was at that time. In consequence of certain decisions of your Lordships' House, the Duke of Montrose, who succeeded to the title of the Marquess, conceived, that he was not bound to make these payments to the present respondent, inasmuch as the present respondent was not entitled to demand these payments of him; in other words, that however he might have been bound, if there had been a regular deduction of title to the obligation to the respondent, yet inasmuch as that regular deduction of title to the obligation had not become vested in the respondent, he (the Duke) was not liable any further to continue the payment. Accordingly, no payment was made from the year 1846 down to the year 1853, the time of the roup. The respondent in the present appeal was not disposed to submit to this withdrawal from the obligation on the part of the Duke. The sum in dispute had become considerable in amount, somewhat exceeding £100 a year, in consequence of these augmented stipends, and the respondent being minded to sell this property, was compelled, in consequence of the dispute, to enter into the special engagement which has been the subject of the action which we are now considering in the present appeal.

The property was put up to auction, and the present appellant, as I said before, became the purchaser of it. A condition was inserted amongst the conditions of roup, that a sum of £1500, was to be consigned in respect of this question, and the articles of roup specify very distinctly what is to be done with reference to this consignment. The articles in question areas follows:—"That in respect of the undecided questions as to augmented stipend, which, on the average of the last three years, amounted to £100 10 *s*. 11 *d.*, a sum of £1500 out of the price shall be consigned in such bank as the parties may agree upon in the joint names of the exposer and purchaser, or of their agents, which sum shall remain consigned, except the interest accruing thereon as after mentioned, until those questions have been finally determined, and shall be then disposed of as follows:—First, the exposer shall take all necessary proceedings for effectuating the claims of relief under the original feu disposition and title of the

lands, or in the existing locality or otherwise, and shall follow out the same to a final determination."

This appears to point out very plainly the precise terms of the contract and engagement which was entered into. There were pending these disputes, and in respect of these disputes the respondent was contemplating legal proceedings. Those legal proceedings were contemplated with a view of enforcing the obligation on the part of the Duke to indemnify the owner of the property from the payment of augmented stipends. There is nothing whatever said in this condition, or anything referred to which can intimate that the present appellant contracted, that anything more was to be done than to insist upon the original feu disposition and titles in order to obtain such relief as might be obtainable under those instruments. There is no provision whatever, that the respondents shall take any proceedings to obtain by way of special contract or special assignment from that vassal any right which he might have as against the superior, but the whole turns upon the engagement to take the necessary proceedings for effectuating the claims of relief under the original feu disposition and title.

It is true that the Lord Advocate read to us certain letters which he appeared to think had a bearing upon this subject, so far as related to a supposed obligation on the part of the respondent to obtain from the heirs of the original vassal, David Grahame, a special assignment of this obligation. So far as those letters were to any purpose, it seemed to me, that they indicated the

contrary, because no sooner was such a claim asserted than it was immediately contradicted; and looking to the pleadings that have taken place, it will be observed, that there is no admission whatsoever of any responsibility of that character. I carefully looked at the different statements made in the pleadings in this cause for the purpose of seeing whether such an admission could be found, and I found nothing of the kind, nor any admission extending in any way the terms of the written contract into which the parties entered.

That being so, the sole point, as it appears to me, which we have to consider is, whether or not this respondent has taken the necessary proceedings for effectuating the claims of relief under the original feu disposition and titles, and whether he did follow them up to a final determination. What has been done is this: The respondent, proceeding to enforce the claim of indemnity as against the Duke of Montrose, he rested his case upon the original feu contract, and upon so resting his case he undoubtedly raised other questions. He said—You are liable by virtue of the contract, and you are liable by virtue of the tenure on the ground of your being the holder of the

superiority, and my being in the position of vassal. You are engaged to fulfil that contract, at all events, so long as those two conditions exist, and upon your ceasing to hold the superiority, the same obligation will pass to whomsoever may be placed in your position towards me, and towards all those who may fill my present position as vassal. Now the respondent having raised those two points without pursuing the question as regards the litigation that took place in the Court below, the matter was brought to your Lordships' House, and your Lordships did determine, that the Duke was liable in respect of tenure, and that he was bound to indemnify the vassal in the manner in which the vassal asserted that he was bound to indemnify him. That engagement, therefore, on the part of the respondent has been fulfilled, and it appears to me, that the Lord Justice Clerk has not incorrectly stated the contest which has been raised when he says this: "The defender maintains, that the pursuer has not fully complied with the conditions, and is not entitled to have the consigned money paid over to him, inasmuch as he has not yet succeeded in having it found that the Duke is liable in the obligation as the general representative of the original granter of the feu —in other words, his defence is, that though total relief has been effectuated, it has been effectuated in respect of one only of two grounds which were insisted on." I think that is not an incorrect description of the controversy which has been raised by the defender.

If we find, therefore, that the claim has been pursued, that it has been effectually pursued, that it has been brought to a termination, and that that relief has been obtained which was contracted to be obtained, the condition upon which the consignment became payable to the respondents appears to me to be fully and completely fulfilled, because the objection really assumes this shape, and simply this shape: True it is, that you have succeeded upon one ground which would bind all who come into possession of the superiority towards all who come into the position of the vassal to fulfil the engagement, but it may be that the Duke or those who succeed him may pass over the superiority to one who is insolvent. Then the right will remain; the title will remain; the only difference is, that *de facto*, if the person be in that condition which the appellant assumes in his argument, of course the effect will be, that he will not receive relief, simply because the person who has the obligation cast upon him is unable to fulfil it. But if you take the matter as a matter of contract, this state of things might as well have occurred in that view of the case as in the other. True it is there is less likelihood of the noble Duke and those who come after him being unable to fulfil their obligation; still, even in our own times, unfortunately those in the highest position have been found incapable of fulfilling their money engagements, and therefore this single circumstance, that there is a possibility of the relief being in effect lost, and not from any want of title, but from a want of ability on the part of the persons to fulfil the engagement, ought not to have any influence in the decision of this question.

It appears to me, that the respondent having established a title to indemnity, this engagement is strictly fulfilled, not only in its mere words, but according to all that appears to have been contemplated between the parties; because if it had been intended, that a further engagement should be entered into, namely, that the construction of the contract should be such, that though relief might be fully given upon that contract in one point of view, there should also be a second ground upon which the parties might rely for indemnity, namely, that of requiring that another process should be taken with a view of putting the respondent in the original position which was occupied by the first vassal—I say if any such term had been originally contemplated, I apprehend that that term ought to have been, and, what is more, I think I may say it would have been, inserted in the engagement.

Then how does the rest of the engagement proceed with reference to the uplifting of the consigned sum when this has been done? "In the event, that the exposer shall succeed in obtaining total or partial relief of the augmented stipend, the consigned sum shall be payable to him either wholly, or in such proportion as shall correspond to the amount of the relief effected." Now, reading those words, it is perfectly certain, that the meaning of the expression "total or partial relief," must be a total relief from the payment of the charge, or a partial relief from the

payment of the charge, in events which might have occurred no doubt from its being possible, that some of the charges might be disputed, whilst others were not, or from a variety of other causes. "Total relief" must mean relief from the total amount of the charge, and of course, as being a relief from the total amount of the charge, it must be a complete and final relief, and that for all time. That is exactly what is meant for all time; the holder of the superiority is to be held liable to the total amount of the charge, and accordingly the relief has been effected to the extent of giving a title to the whole of the consigned sum.

The remaining part of the clause is this: "In the event that the exposer shall fail in effecting relief to any extent, then the consigned sum shall be payable to the purchaser, the purchaser taking on himself the burden of the augmented stipend in all time thereafter. Until the final issue of the foresaid proceedings, the annual payments of the augmented stipend shall be made by the exposer," etc. The rest is immaterial to the consideration of this question.

Now, according to the appellant's contention, he has been relieved: he has been indemnified; and I can see no other conclusion to the theory of the appellant than this, that although he has been so relieved, and although, in point of title, the Duke of Montrose and those who succeed him in the superiority, will be bound to pay, and

although, being solvent, they will *de facto* pay, and although he has for 17 years been *de facto* indemnified, and he may for 100 years more be *de facto* as well as *de jure* indemnified, yet he says, there may be some construction put upon this instrument (which appears to me to be a most unwarrantable and unreasonable construction, to be inferred from the contract or from any words therein contained) to this effect: I am to be entitled for all time to keep this money in suspense, until it shall be determined, not only that I am *de facto* and *de jure* entitled to relief in one way, but until you have also established an additional right in my behalf to be entitled in the other way if the first should fail.

I find nothing in the contract to authorize my coming to such a conclusion, and therefore, I shall humbly submit to your Lordships, that we should affirm the two interlocutors complained of, the one being the interlocutor of the 14th of February 1868, by which the previous decision of the Lord Ordinary in favour of the present appellant was reversed, and the other interlocutor, being one of the 25th of February 1868, which has reference merely to a calculation of the expenses to be paid by the present appellant, and I shall recommend your Lordships in affirming these two interlocutors, to dismiss the present appeal with costs.

Lord Chelmsford.—My Lords, I agree with my noble and learned friend on the woolsack, that the interlocutors appealed from ought to be affirmed, The first interlocutor "finds, declares, and decerns against the defenders in terms of the conclusions of the summons." The summons prays, that it may be declared, that the pursuers had the sole and exclusive right to the sum of £1500, which was consigned in the Royal Bank of Scotland, and that they are now entitled to uplift the same and dispose thereof at their pleasure. The ground of the decision was, that the respondents had fulfilled the conditions imposed upon them by the articles of public sale of the lands of Braco under which the sum of £1500 was deposited. Before that sale, which was in the year 1853, the Duke of Montrose, who was the superior of the lands of Braco, and who had paid down to 1847 the augmented stipend upon the lands, objected that the Mr. Drummond, from whom the respondent purchased, had no title to relief under that obligation. In consequence of this objection, additional articles were introduced upon the public sale. The original articles having been signed on the 22d of October, on the 26th of October these additional articles were inserted:—"In respect of the undecided questions as to augmented stipend, which, on an average of the last three years, amounted to £100 10 *s*. 11 *d*., a sum of £1500 out of the price shall be consigned in such bank as the parties may agree upon in the joint names of the exposer and purchaser, or of their agents, which sum shall remain consigned, except the interest accruing thereon as after mentioned, until those questions have been finally determined, and shall be then disposed of as follows: First, the exposer shall take all necessary proceedings for effectuating the claims of relief under the original feu disposition, and titles of the lands, or in the existing locality or otherwise,

and shall follow out the same to a final determination." The other articles provide, that in the event of his either wholly or partially obtaining relief of the augmentation, he shall have the whole or a part of £1500, and if he fails in obtaining that relief, then the £1500 shall belong to the purchaser. Some stress has been laid in the argument upon the words in these articles "questions" and "claims of relief" in the plural, but I apprehend that the real question, and the only question, was, whether the Duke of Montrose was bound to give relief under the obligation in the feu contract of 1705.

The Duke having refused to pay the augmented stipend, an action of declarator of payment was brought against him by the respondent, and in that action the appellant concurred as pursuer. But it is said, that that was under an arrangement, that his concurrence should not prejudice his right to insist upon the respondent taking all effectual means to obtain relief from the augmentation. In this action it is stated by Lord Neaves, that the plea of the pursuer was, "that the present defender, the Duke, was equally liable in payment and relief as concluded for, both as heir and representative of the granter of the said obligation, and as successor in the superiority of the lands, teinds, and others." And it appears, that the defence of the Duke in that action was this:

His Grace insisted that the obligation in the feu contract was a personal and collateral obligation, which did not run with the land, and which had not been transmitted by special assignation so as to sustain an action of relief by a singular successor. The Lord Ordinary pronounced an interlocutor, that the obligation of relief against future augmentations of stipend in the feu contract has not been duly transmitted to the pursuer, but upon a Reclaiming Note the Judges of the Second Division recalled the interlocutor, and found, that the defender, the Duke of Montrose, as superior of the lands and teinds libelled, was liable under the obligation libelled, to free and relieve the pursuer, as vassal in the lands libelled, of all stipend and augmentation of stipend imposed or to be imposed on the teinds of the lands libelled, subsequent to the date of the feu contract, and upon an appeal to this House that interlocutor was affirmed.

The respondent, considering that he had done all that was necessary to entitle him to receive the deposited sum of £1500, instituted the present suit, and then he was met by the plea on the part of the appellant, that by the said articles of roup and minute the pursuer became bound to adopt all measures necessary or practicable for the purpose of vesting the right to the said obligation of relief in the defender, so as to enable the defender to operate relief from augmentation, not only against the feudal superior, but also against the general representatives of the said James Marquess of Montrose. In other words, that as the singular successor, he could not obtain the benefit of a

personal obligation without a special assignation from the heir of David Grahame, the disponee in the feu contract.

This renders it necessary to consider what is the exact character and effect of that obligation contained in the feu contract. And upon that subject I confess I am disposed to agree with the opinion of the Lord President and the other Judges who concurred with him, that that obligation in the feu contract is confined to an obligation upon the Marquess of Montrose and his heirs and successors in the superiority. The Lord President states the opinion of himself and the other Judges in these terms:—"The demand of the defender is founded upon a misinterpretation of the terms of the obligation in the original feu contract. According to its true meaning the Marquess of Montrose by that obligation bound only himself and his heirs and successors in the right of the *dominium directum* of the subjects to relieve the vassal and his heirs and assignees in the *dominium utile* of the burden of the augmentation of stipend, etc. That is the true meaning of such obligations in the class of mutual contracts by which an owner of heritable property grants a subordinate right in that property to another party to be held by him of and under the granter." Lord Kinloch agrees with the Lord President and the other Judges in that opinion. If that opinion be correct, of course there is an end of all question upon this subject, because undoubtedly he has obtained relief from the augmentations against the Duke in the only character in which he is held to be liable.

Lord Benholme is of opinion that the construction of this obligation was settled by this House in the case of The Duke of Montrose v. Stewart, *ante*, p. 1168; 4 Macq. Ap. 499. He says—"I consider that that construction is to negative the view of those who consider it to be a personal obligation incumbent upon general heirs and successors, and to affirm, that it is an obligation that runs with the land incumbent on the superior for the time on the one hand, and prestable to the vassal on the other. That, I think, is the fair result of the judgment of the House of Lords." But it appears to me that that is hardly correct, because what this House decided in the case of The Duke of Montrose v. Stewart was, that the Duke was liable as the superior of the lands of Braco under the obligation in the feu contracts of 1705.

This House had no occasion to consider, and did not consider or decide, whether the obligation was not also a personal obligation upon the Duke of Montrose and his general heirs.

Now that is the argument upon the present occasion. It is said, that the obligation is not only an obligation upon the original granter, and his heirs and successors in the superiority, but that it is also a personal obligation upon him which is binding upon his general representatives. Assuming, for the purpose of the argument, that the obligation is of that cumulative description, still I should be of opinion, that the

respondent has fulfilled all the terms and conditions of the articles, particularly in the mode in which they are expressed, because the articles are, that the exposer shall take all necessary proceedings for effectuating the claims of relief under the original feu dispositions and titles of the lands, or in the existing locality, or otherwise, and shall follow out the same to a final determination. Now, what is the meaning of the word "titles" there? Surely it must mean existing titles. The respondent has not made out his title to the personal obligation, and it is contended, on the part of the appellant, that he is bound to make out a new title, and that that obligation is imposed upon him by the condition in the articles of sale. I confess it appears to me, that there is no such obligation upon him, and if there is no such obligation, then he has entirely fulfilled all that was imposed upon him as a condition in these articles of sale. He has obtained a decree against the Duke of Montrose, by which he is rendered liable as superior of the lands to relieve all the vassals from the augmentations of the stipend, and that to the full amount.

It seems to me, that it would be unreasonable to impose upon him the additional liability, perhaps impossible to be satisfied, of procuring a special assignment from the heir of David

Grahame upon the contingent possibility that the Duke of Montrose, or some future superior of the lands, might part with them to a person of no substance, and so the appellant or those who succeeded him in the lands might be prevented from having an effectual remedy for the breach of the obligation. It appears to me, that the respondent has fulfilled all that was necessary to be performed by him upon these conditions, and that he is entitled to receive the sum of money consigned.

Lord Westbury.—My Lords, I have very few words to add to what has fallen from my noble and learned friends. Some questions of nicety have been discussed at the bar upon the appeal, but I think they are immaterial to the point we have to decide, and will not call for any determination. That point is a very simple one. Has the present respondent implemented the engagement that he entered into in the additional article to the articles of roup under which the appellant bought? Says the appellant he has not done so, because under the original warranty and obligation contracted by the Marquess of Montrose in the original feu disposition 1705, there was a contract which bound the Marquess, in his capacity of superior, and there was also a contract that bound all the heirs and representatives of the Marquess.

The appellant further says: "You have undoubtedly, by your action, and by the decision of the House of Lords, determined this point, namely, that in respect of the sale of the estate between you, the vassal, and the present Duke, the heir of the

Marquess of Montrose, the superior, is liable; but I affirm that it is possible for you also to get a decision, that, in respect of the personal contract, the Duke is liable, and I shall not have complete relief unless you obtain that decision also."

Now I am by no means prepared to admit the validity in point of law of the proposition of the appellant, which is his first assumption in his argument. He contends, that the warranty involved not merely an obligation binding the superiority, but a personal obligation of indefinite extent, that would bind all the heirs of the Marquess who originally gave the warranty. The language is peculiar. The superior, the Marquess, having then in himself both the *dominium directum* and the *dominium utile*, sold the *dominium utile* to David Grahame, and the warrandice that he entered into is peculiar. I do not mean to say that it is unusual, but it is a warrandice that cannot be referred in its terms to anything beyond the relation which by that sale was constituted between Grahame and himself, namely, the relation of superior and vassal, for the Marquess warrants against himself, his heirs and successors in the superiority. My opinion undoubtedly would be, though it is by no means necessary for your Lordships to decide the point in the present case, that the warrandice was intended to bind the heirs and successors in the superiority, and not to have any further obligation.

But now let us grant the assumption of the appellant, and suppose that the warrandice involved not merely a liability *ratione tenurae*, but a liability *virtute contractus*, the result would be, that the benefit of that personal contract vested originally in Mr. David Grahame, the purchaser, and would belong now to the personal representative of Mr. David Grahame. Now Mr. David Grahame, or whoever was entitled under him, long ago sold the *dominium utile* of these lands, and by a succession, partly of descents and partly of sales to singular successors, the *dominium utile* has come now to be vested in Sir William Drummond Stewart. I desire to know by what means, after Grahame sold the lands, can you hold that Grahame would still have retained a title to the benefit of that supposed contract in the warrandice, and that Sir William Drummond Stewart would be entitled to demand his assignation of it? It is very difficult to arrive at such a conclusion. What benefit would Grahame have in the personal relief after he had sold and parted with the lands? and what title would the purchaser have unless it were stipulated in the conveyance to claim from Grahame *ultra* the conveyance or special assignation of this contract? And yet it is now gravely propounded by the appellant at the bar, that, after the lapse of 165 years from the date of that contract with Grahame, the present respondent shall be put to find out the representative of Grahame if he can possibly do so, and if not, to adjudge this contract as something *in hæreditate* of Grahame, and thereby give himself a title to the alleged personal contract of warrandice, and that, in respect of the new title thus obtained, if it be possible to obtain it, he shall institute proceedings against the present Duke of Montrose, who has already had an action brought against him for the purpose of

having it declared, that he was liable to relieve the title from any further augmentation, and who has had a decree against him upon that point.

Such a proposition cannot be maintained. A more impossible proposition could not possibly be brought forward, and yet it is gravely said, that Sir William Drummond Stewart intended by these additional articles of roup to impose on himself that monstrous extent of obligation. Observe the extreme improbability, the madness rather, of any such contract; for it would be a contract imposing on him, in addition to the extraordinary things I have mentioned, the obligation of getting a personal liability against all the heirs of the Marquis of Montrose, from the date of the feu contract in 1705 down to the present time. When we look to that we are better entitled to put a rational interpretation upon the language of the contract of the present respondent as contained in the additional article; and when you come to look at that, you can put upon that language no other interpretation than this, that he binds himself to use the title that he has, and

the rights of suing that he has against the Duke of Montrose for the purpose of getting a declarator of the liability of the Duke to relieve the teinds from any augmentation.

That plainly is the meaning of the additional article. The appellant, on the other hand, maintains, that he put himself under obligation to take these extraordinary proceedings, if they were capable of being taken, in order to impose upon himself another obligation of maintaining in a different character an action against the Duke of Montrose in respect of the personal contract.

The appellant does nothing but this: He insists, “I have not got complete relief, therefore the contract has not been fulfilled; complete relief is not to be regarded as something resulting probably from the obligation of Sir William Drummond Stewart, but what we are to look to is, what is the amount of obligation that Sir William Drummond Stewart put upon himself, and what he did put upon himself was nothing in the world more than to bring that action which he did bring, which he prosecuted in fact, with the concurrence of the pursuer, to the extent of having it declared, that the Duke as superior was bound to exonerate the land.”

By the result of that action, in my opinion, he implemented the obligation which he had incurred, and I cannot but regard the proposition which the appellant has put forward at your Lordships' bar as a very extravagant one. Therefore I have no hesitation in concurring in the advice given to your Lordships by my noble and learned friends, that the appeal be dismissed with costs.

Lord Colonsay.—My Lords, having arrived at the conclusion at which your Lordships have arrived as to the manner in which this appeal should be disposed of, I have scarcely anything to add. My views as to the construction of this contract contained in the articles of roup are in accordance with those that have been stated. I think Sir William Drummond Stewart has implemented this contract by following out the action which he brought, and obtaining judgment as to the liability of the Duke of Montrose. Again, if it were necessary to express any opinion upon the subject, I should concur in the opinion suggested by two of your Lordships, that the obligation in the feu contract 1705 was an obligation against the superior of the lands, and was not in the nature of those personal obligations which were made the subject of discussion in the previous cases. Finding it in a feu contract of this kind, I hold that is a contract as between superior and vassal, and that it ought to be dealt with as such, and that it did not import any personal obligation. I do not think it necessary to say more than that I concur with your Lordships in thinking that this appeal should be dismissed with costs.

The interlocutor affirmed, and appeal dismissed with costs.

Solicitors: *Appellant's Agents*, Gillespie and Bell, W.S.; Grahames and Wardlaw, *Westminster.—Respondent's Agents*, Dundas and Wilson, C.S.; Loch and Maclaurin, Westminster.

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