The Scottish Law Reporter.

WINTER SESSION, 1868–69.

COURT OF SESSION.

Thursday, October 15.

FIRST DIVISION.

BUCHANAN'S TRUSTEES *v.* PAGAN.

Landlord and Tenant—Long Lease—Feu-Holding—Year's Real Rent—Heir—Singular Successor. In a building tack for 999 years, the tenant bound himself, his heirs and successors, to pay a sum of 6s. 9d. yearly during the currency of the tack, and farther bound and obliged "him that his heirs, the first year of their entry to the said possession, shall pay one year's real rent of the subjects in the same way as used in feu-holdings." Claim by the landlord for payment of £26, as a year's actual rent on entry to the subjects, *repelled*, on the ground that the obligation was, by the terms of the tack, imposed on heirs only, and that what heirs paid in feu-holdings was merely a duplicand of the feu-duty and not a year's actual rent.

In 1777 Mr Logan of Knockshinnock let to Thomas Campbell, New Cumnock, a certain piece of ground in tack for nine hundred and ninety nine years. On the other part, the said Thomas Campbell bound and obliged himself, "his heirs, executors, and successors whatsomever, to content and pay to the said Hugh Logan, his heirs, executors, or assignees, the sum of 6s. 9d. sterling yearly, being at the rate of 30s. sterling per Scots acre, beginning the first term's payment at the term of Martinmas then next, and so forth, yearly and termly, at the said term of Martinmas, during the currency of the tack; and farther, to pay cess and other public burdens in proportion to £2 Scots of yearly valuation laid on the said lands, without getting any allowance or deduction for the same." Farther, by the said building lease or tack, the said Thomas Campbell "binds and obliges him that his heirs, the first year of their entry to the said possession, shall pay one reall year's rent of the subjects, in the same way as used in feu-holdings." It was further specially provided and stipulated by the said tack that, notwithstanding power was given to the said Thomas Campbell to asssign and subset, yet it should not be in the power of the said Thomas Campbell or his foresaids to bring in any person to live on the premises except by the previous consent of the said Hugh Logan or his foresaids.

Right to the greater part of these subjects was assigned to Alexander Pagan in 1787. In 1838 Mr Buchanan, then proprietor of Knockshinnock, granted to William Pagan, son of Alexander, a similar tack of another portion of ground, the deed containing a similar clause as to the payment of a real year's rent. In 1854 a writ of renewal, declaration and acknowledgment was obtained by William Pagan, whereby, on the narrative of the first mentioned tack and transmissions, and in consideration of the sum of £12 paid to the proprietor as one year's rent of said subjects, a renewal of the lease was granted, subject to the stipulations contained in the said feu-tack. On the death of William Pagan, his brother George, the defender, obtained right to the lands. The pursuers now claimed from him on his entry to the subjects a sum of £26, being one year's real rent. The defender denied liability for any sum beyond the ordinary rent stipulated by the lease to be paid annually, and alleged that the payment of £12 in 1854 was simply made in order that, the original assignation having gone amissing, a valid title might be obtained.

The Lord Ordinary (ORMIDALE) assoilzied the defender, holding that no more was exigible by the landlord on the entry of the tenant in this case than a year's ordinary rent or tack-duty, in addition to that payable for the year of entry.

The pursuers reclaimed.

CLARK and GIFFORD for reclaimers.

SHAND and ASHER for respondents.

At advising—

LORD PRESIDENT—I think the Lord Ordinary has done right in assoilzieing the defender, and that the claim made in the present action cannot be sustained.

The obligation in the earlier tack is that the principal tenant, Thomas Campbell, binds and obliges him that his heirs, "ye first year of their entery to the said possession, shall pay one reall year's rent of the subject, in the same way as used in feu-holdings." Now it is in vain, I think, in reading such a clause, to attempt to construe it on considerations of probable intention, where the words used are precise in their meaning. The obligation lies on the original tenant and his heirs, and there is no mention of any other obligant. In this respect the clause is in marked contrast to the other clauses of obligation which speak of the tenant and his heirs, executors, and successors, or the tenant "his heirs, assignees, and sub-tenants." Therefore, I read this clause as binding his heirs and his heirs only. That enables us to proceed to a consideration of the "real year's rent." A real year's rent of the subjects is to be paid by the obligant in the same way as used in feu-holdings. But who are the obligants? They are heirs, and no other parties. Now what do heirs pay in feu-holdings?

A duplicand of the feu-duty, and not a year's actual rents. The moment that you find that the obligation is limited to heirs, whether of the original tenant or of singular successors, there can be no doubt as to the rest of the case. I am therefore for adhering to the Lord Ordinary's interlocutor, though not precisely on the same ground.

LORD DEAS—I am of the same opinion. I am disposed to think that the first question arises equally as to both tacks, viz., What was stipulated to be paid in addition to the annual rent? The second question is, By whom was it to be paid? Now, I think we must keep in view that we are dealing with a tack and not with a feu-right. These tacks have not the qualities of feu-rights. There is nothing feudal about the rights at all. There is a very long term of endurance no doubt, but, except for that, there is no difference between a tack of this kind and an ordinary tack for nineteen years or for one year. The rights and obligations on both sides are those of landlord and tenant, and not of superior and vassal. When the landlord grants a tack, and stipulates a certain rent, and further, that on certain occasions a year's real rent shall be paid by the tenant in addition to the ordinary rent, the natural construction is that the additional rent is a duplicand of the actual rent. It does not mean the value of the subjects. It is not a very reasonable supposition that, in accepting a building lease comprehending a piece of ground worth very little, but on which valuable buildings are to be erected, the tenant undertakes to pay the whole annual value to which he has raised the subjects by laying out his capital: that the more he lays out the more he has to pay. If the landlord intended that to be the construction of the document, he ought to have made it very clear—much more clear than it is here. If to the stipulation of a year's real rent, the landlord had added the words "as it shall be at the time," the matter might have been made clear. The argument of the landlord comes to rest on the use of the words tack-duty in the outset of the deed. But when you come to the obligation, it is merely stated that the sum of six shillings and ninepence is to be paid. It is not called a tack-duty there. I am therefore disposed to think, that whatever may have been in the mind of the landlord at the time of the deed, he did not make it clear that he is entitled to make this claim. My only difficulty is, that in 1854, on a renewal of the grant, a sum of £12 was paid to the landlord. I rather think that at that time the advisers of the tenant thought that the landlord's construction was right. If that had happened often, the case might have been stronger, but this is a single instance, and under exceptional circumstances, for it was in favour of a party who had no title at all. I am confirmed in this opinion by the fact that, according to the very words of the contract, the obligation is limited to heirs of the original vassal. These are the very words, and we cannot extend them by implication. The obligation is on heirs only. The landlord seems to have trusted that assignees and singular successors could not come in without his consent, and then he could insist on any terms he chose.

Lord Ardmillan concurred.

Adhere.

Agent for Reclaimers—John Kennedy, W.S.

Agents for Respondent—Dalmahoy & Cowan, W.S.

BUCHANAN'S TRUSTEES *v.* KIRKLAND.

This was a similar case in which the Court, without hearing argument, pronounced a similar judgment.

Thursday, October 15.

MEIKLAM'S TRUSTEES *v.* MEIKLAM AND OTHERS.

Trust—Legacy—Cumulative Bequest—Mutual Contract—Obligation to Educate—Debitor non presumitur donare. A testator executed a deed of contract in which, *inter alia*, he bound himself to settle a sum of £2000 on each of his two children, payable at the first term after his death, and also to provide a suitable education for them. On the same day he executed a trust-settlement directing his trustees to pay £2000 to each of the children, payable at majority, with interest from the first term after his death. *Held* (1) that the provision in the trust-settlement was in implement of the provision in the contract; and (2) that the children were further entitled to the expense of education until they attained majority, the obligation thereanent not being terminated by the death of the testator.

On 31st January 1853 Mr Meiklam executed an onerous deed, whereby, in consideration of certain obligations undertaken by the other party to the deed, he bound himself, *inter alia*, to "settle £2000 on each of his two children, Philip Harper and Ada Harper, payable at the first term of Whitsunday after his death." He further bound himself to be at the expense of a suitable education for the children. On the same day he executed a testamentary deed providing, *inter alia*, that his trustees should pay to each of his said children, Philip and Ada, "the sum of £2000, payable at the first term of Whitsunday or Martinmas after my death, on their respectively attaining majority, with legal interest until that period from the first term of Whitsunday or Martinmas after my death." Mr Meiklam died in 1854, before either of his children attained majority.

In this action the children claimed payment from Mr Meiklam's trustees of a sum of £4000 to each, on the ground that the provisions in the two deeds were cumulative. They also claimed a sum of money for the expenses of their education.

The trustees contended that the provision by Mr Meiklam in the trust-deed was in implement of his obligation in the contract, and that the obligation for payment of expenses of education applied only to the education of the children during Mr Meiklam's life.

The Lord Ordinary (MURE) pronounced this interlocutor:—"Finds, 1st, that according to the sound construction of the third purpose of the trust-deed executed by the late Mr Meiklam in 1853, the provision thereby settled upon the claimants, Philip Harper and Ada Harper, must be held to be the fulfilment of the obligation undertaken by the truster under the second head of the conditions of separation founded on by the claimants, and not as a legacy or provision of £2000 to each of the said claimants in addition to the sums of £2000 which the truster undertook to settle upon them by the deed of separation: Finds, 2d, that in addition to the said sums of £2000 settled upon the claimants