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FIRST DIVISION.

[Lord Kincairney, Ordinary.

SPEIRS *v.* MORGAN.

Superior and Vassal—Casualty—Composition—Lands Disponed when in Non-Entry—Clause of Relief—Assignation—Title to Sue.

A in 1860 disponed to B lands which were then in non-entry. The disposition contained a clause binding the disponer to free and relieve the disponee of all casualties. The subjects, which continued still to be in non-entry, prior to 1874 came to be vested in C, but the dispositions in favour of C did not contain any special assignation of the clause of relief in the disposition by A to B. C having been called on by the superiors to pay a composition, and having done so, sought repayment from A. *Held* (*aff.* judgment of Lord Kincairney, *dub.* Lord M'Laren) that in the absence of a special assignation of the claim of relief in A's disposition to B, C had no right of relief as against A.

This was an action by Peter Alexander Speirs and Misses Harriet Martha Speirs and Anna Elizabeth Speirs against Mrs Clementina Morgan, as executrix of her mother the deceased Mrs Clementina Kyd or Morgan, widow of James Morgan, S.S.C., Edinburgh, and as an individual. The pursuers concluded for payment of £31, 4s., being the amount of a taxed casualty paid by the Misses Speirs as on the entry of a singular successor in respect of certain subjects in Walker Street, Edinburgh, to the superiors the Walker Trustees. They claimed relief for this payment against the defender in respect of a certain clause of relief contained in a disposition of the subjects granted by Mrs Morgan in favour of the pursuers' authors, the trustees of the late Archibald Speirs.

The defenders pleaded, *inter alia*—"(1) No title to sue. (2) The action is incompetent."

The facts sufficiently appear from the opinion of the Lord Ordinary (KINCAIRNEY).

On 15th July 1901 the Lord Ordinary pronounced the following interlocutor:—"Finds that the pursuers have no title to enforce the obligation of relief contained in the disposition by Mrs Morgan in favour of the trustees of Archibald Speirs: Therefore sustains the defender's first plea-in-law, dismisses the action, and decerns: Finds the defender entitled to expenses," &c.

Opinion.—"The question in this case is whether a vassal who has paid to his superior a taxed entry is entitled to recover it from a prior vassal from whom his title has proceeded. There are, I think, no material facts in dispute. The superiors are Miss Walker's trustees, and the entry is taxed. The charter bears (after the obligation to pay a feu-duty of £15, 12s. at the term of Whitsunday yearly) these words, 'trebling the said feu-duty at the entry of each heir or singular successor.' The entry-money is therefore the same amount whether the entered vassal is an heir or singular successor, and it is payable not at any fixed time, and not on the death of a vassal but on the entry of a succeeding vassal. The lands fell into non-entry on 5th January 1847, when the last-entered vassal died. The property after that came to belong to Mrs Morgan, who did not enter with the superiors, and

so paid no entry-money. She, on 13th November 1860, disponed the subjects to the trustees of Archibald Speirs, then deceased, for the ends, uses, and purposes of his trust as the disposition bears, and to their assignees whomsoever. The disposition contains the following clause of relief:—'I bind myself to free and relieve my said disponees of all feu-duties, casualties, and public burdens.' The trustees were infeft, and if they had been compelled to enter, Mrs Morgan would have been bound to repay them the entry-money. But the trustees did not enter.

"The trustees, in order to fulfil the directions in the trust-deed, in 1864 disponed to Peter Alexander Speirs, son of the truster, one *pro indiviso* half of the subjects, and by disposition in 1866 they, in fulfilment of the purposes of the trust, disponed the other *pro indiviso* half to Miss Harriet Martha Speirs and Miss Anna Elizabeth Speirs, daughters of the truster, to whom Peter Alexander Speirs in 1872 conveyed his *pro indiviso* half, so that at that date the Misses Speirs were proprietors of the whole property, and they were infeft, and they, if any one, were entitled to enforce the obligation in the disposition.

"By the disposition to Peter Speirs the trustees assigned the writs, and they bound themselves as trustees to free and relieve the disponee 'of all feu-duties, casualties, and public burdens.' There was a similar clause in the obligation by Peter Speirs to his sisters. But the clause is omitted in the disposition by the trustees to the Misses Speirs. There is nothing said on record about this omission. I presume it was by mistake or oversight, but not I think the only mistake made. None of the deeds contained a clause assigning the obligation in the disposition by Mrs Morgan.

"On 23rd November 1900 the Misses Speirs, on the demand of the superiors, paid them £31, 4s., for which two receipts were granted to the Misses Speirs, each for £15, 12s., dated 12th February 1901. Each receipt bears the words, 'being composition payable by them to the said superiors on their implied entry thereto.'

"The record bears that the Misses Speirs have been relieved of one-half of this payment by Peter Alexander Speirs under the clause of relief in the disposition by him.

This action has been raised against the executrix of Mrs Morgan. The conclusion is merely for payment of £31, 4s., and the pursuer's plea-in-law is—'The pursuers, in virtue of the clause of relief contained in the said disposition by the said Mrs Clementina Kyd or Morgan are entitled to relief of said composition, and having paid the same are entitled to decree as concluded for.' The executrix defends the action, and it has been debated in the Procedure Roll. The sum at stake is fortuuately small, but several important and difficult questions of law are involved. It was very well and fully debated, and a great many decisions were quoted.

"It is necessary, in the first place, to dispose of the second plea-in-law that 'the action is incompetent,' because if that be so there is no process in which the other pleas can be considered. It is founded on the compearance of Peter Speirs as a pursuer, and it is maintained that there are two pursuers with different interests suing on different grounds for one sum, and that this has in various cases been held to be incompetent. The last case in which this plea, as I understand it, received effect is *Conway* v. *Dalziel and Others*, June 13, 1901, 38 S.L.R. 662, in which the previous cases, *Barr* v. *Nelson* and others are quoted. In the first place, in all these cases there was a plurality of defenders sued on different grounds. Here there is only one defender. Further, I consider that as matter of mere process this action might have been raised by the Misses Speirs alone, who were competent to discharge the whole obligation. The addition of Peter Speirs as a pursuer was a superfluous precaution, which cannot destroy the instance otherwise complete, and he pleads on substantially the same grounds as the other pursuers, and the same plea is stated for them all. I think this technical defence fails, and that there is a process in which the questions debated may be competently decided.

"The first plea-in-law, 'No title to sue,' is preliminary, and after much consideration I have formed the opinion that it must be sustained. The pursuers are endeavouring to enforce the obligation of relief in the disposition by Mrs Morgan. But it is not an obligation which runs with the lands, and there is no privity of estate or of contract between the pursuers and the defender. The defender therefore maintains that the right to enforce the obligation cannot pass without an assignation, and that there is no assignation of the right of obligation in this case. The defender quoted *Maitland* v. *Horne*, 1842, 1 Bell's Appeals 296; *Sinclair* v. *Breadalbane*, 5 Bell's Appeals 353; and *Stewart* v. *Montrose*, 22 D. 751, *aff.* H.L., 1863, 4 Macq. 499. There are several cases of that class, and the result is clearly summed up in Bell's Principles 815A. I think that the law there correctly stated applies to this case, and that the right to enforce this obligation cannot pass without a special assignation. Mrs Morgan, by the obligation in her disposition, became liable to relieve Archibald Speirs' trustees of casualties, and if, while they held the lands, the superiors had insisted on them taking an entry and paying entry-money, no doubt the defender would have been bound to repay them. But when they disponed the subjects to Peter Speirs and the Misses Speirs they could not confer on them the same right without assigning their right to enforce the obligation. They did not do so. I think it was a mistake; and now, according to strict law, the pursuers have not acquired a title. I do not know why a special assignation was not inserted in the deeds, because the necessity for it was at that time well recognised. The mistake, if it was a mistake, might have been corrected at any time.

"I do not think that the clauses of relief in the dispositions by the trustees to the Misses Speirs, and by Peter Speirs to the Misses Speirs, help the pursuers' case. These clauses would have given the pursuers a right of action against the trustees in the one case and against Mr Speirs in the other, but did not supply the place of an assignation. So that I think that no title at all has been acquired by the pursuers. I am not able to see that it makes any difference in this matter that the first disponees were trustees for the pursuers. Of course the Misses Speirs acquired Peter's half on a somewhat different footing. He was not their trustee. They were just his singular successors. In the case of *Farquharson* v. *The Caledonian Railway Company*, November 21, 1899, 2 Fr. 141, closely resembling this case on the merits, there had been a series of transmissions, and in each case there was an obligation of relief. But there the last disponee from whom entry-money was exacted proceeded against his disponer, and he against his, until they reached the original disponer in the end. But here there is no nexus or contract between the pursuers and defender which can entitle them to sue. The trustees might, had they paid the entry-money, have had a good action against Mrs Morgan without the express obligation because of her implied contract as disponer to give her disponee an unburdened title. But there was no contract, express or implied, between the pursuers and Mrs Morgan. I am therefore of opinion that I must with some regret sustain the plea of no title. I say with some regret, because the judgment is the application of somewhat rigid law, and appears to be the result of an error in conveyancing."

The pursuers reclaimed, and argued—It was said there was no title to sue here because there was no special assignation of the obligation to relieve granted in the disposition by Mrs Morgan in favour of Archibald Speir's trustees; but no special assignation was necessary. The burden of a past due casualty was one which risked the estate itself because it would entail eviction. It was one which the seller was bound to clear off—*Straiton Estate Company, Limited* v. *Stephens*, December 16, 1880, 8 R. 299, 18 S.L.R. 187, and the obligation to relieve of it became therefore part of the title to the lands and ran with them. The nature of the burden distinguished such a clause of relief from one undertaking to relieve from augmentations of stipend, for augmentations did not endanger the estate. And the Lord Ordinary had erred because he had relied on cases which only dealt with clauses of relief from augmentations—*Maitland* v. *Horne*, February 21, 1842, 1 Bell's App. 1; *Breadalbane* v. *Sinclair*, August 14, 1846, 5 Bell's App. 353; *Spottiswoode* v. *Seymer*, March 2, 1853, 15 D. 458. The case of *Farquharson* v. *Caledonian Railway Company*, November 21, 1899, 2 F. 141, 37 S.L.R. 94, showed that relief could be obtained against the original disponer after any number of transmissions, although there was no special assignation but only the usual clause of relief of casualties. Further, there was authority for saying that the general clause of warrandice would imply such an obligation—Ersk. Inst. ii. 3, 31; Stair, ii. 3, 46.

Argued for the defender — The Lord Ordinary had rightly decided the case. An obligation to relieve of casualties was a personal obligation and formed no part of the title. It therefore required a special assignation, otherwise there was no connection between the granter and those who claimed the benefit—Bell's Lectures, 3rd ed., vol. i. 690; Duff's Conveyancing, p. 211, and cases *cit. sup.*

At advising—

LORD PRESIDENT—The question in this case is whether the proprietors of certain subjects, who have paid to their superiors a taxed composition in respect of their entry, have right to recover it from the representative of a prior proprietrix from whom, with various intermediate transmissions, their title was derived. The subjects fell into non-entry in 1847, when the last-entered vassal died. Mrs Morgan afterwards acquired right to them, but she did not enter with the superiors, and in November 1860 she conveyed them to the trustees of the deceased Archibald Speirs for the purposes of his testamentary settlement. Mrs Morgan's disposition contained a clause of relief from, *inter alia*, casualties, but the trustees of Archibald Speirs were not required to enter, and they did not enter, and no claim was made by them against Mrs Morgan. The trustees of Archibald Speirs afterwards conveyed the subjects to his son Peter Speirs and two daughters, and Peter Speirs conveyed his share to his two sisters, who thus acquired right to the whole subjects. There is an obligation of relief from, *inter alia*, casualties in the disposition by the trustees to Peter Speirs, and a similar obligation in his disposition to his sisters, but there is no such obligation in the disposition by the trustees to the sisters, and none of the dispositions contain any assignation of the obligation of relief contained in the disposition by Mrs Morgan to the trustees of Archibald Speirs. The Misses Speirs having in November 1900 paid a taxed composition to the superiors, on their demand were relieved of one-half thereof by Peter Speirs under the clause of relief in the disposition by him to them, and he and they now sue the defender as executrix of Mrs Morgan for payment of the taxed composition so paid.

The defender pleads, *inter alia*, that the pursuers have no title to sue, and the Lord Ordinary has sustained this plea, as I think, rightly. It is settled by the decisions referred to by his Lordship that such an obligation does not run with the lands, but requires an assignation in order to transmit it to a disponee, and in the present case there was no such assignation. It was maintained by the pursuers that the taxed composition was a burden on the subjects, and that the right to be relieved of it consequently ran with the conveyance of them. It appears to me, however, that

this contention is at variance both with principle and with the authorities referred to by the Lord Ordinary. The disponee on each transmission since the subjects fell into non-entry acquired only a base fee, as this was all that the successive disponers had to convey; but in the absence of any demand by a disponee that the disponer should enter or pay a composition, I think it must now be taken that each successive disponer, by conveying the base fee to his disponee, satisfied his obligation as disponer. It was argued for the pursuer that the disponer in such a case warrants that the fee is full, but I am not aware of any authority, nor do I see any principle, for holding that such a warranty is to be implied where it is not expressed. No doubt the agents for an intending purchaser usually examine the state of the title, and if they find that the seller has only a base fee they can stipulate that he shall enter or pay the entry-money which the purchaser would require to pay when he enters; but in the absence of any such stipulation I consider that after a conveyance of the estate as it stands in his person has been accepted, and the price has been paid, no such claim as that now put forward can be successfully preferred against the seller or his representatives. It is to be kept in view that all the transmissions of the subjects and the completions of the titles (in so far as they were completed) were prior to the passing of the Conveyancing Act 1874.

For these reasons I am of opinion that the judgment of the Lord Ordinary should be adhered to.

LORD ADAM—I concur.

LORD M'LAREN—I have had doubts as to the legal principle applicable to this case, and they are founded on this consideration, that under an ordinary contract for the sale of heritage, when there is no expressed stipulation as to entry the right of the purchaser is to have a clear title and to be entered with the superior. Consequently I should say that it was an implied condition of the contract of sale that the purchaser should be entered. So far my mind is clear. But the really difficult question arises out of the fact that a special obligation has been introduced into the conveyance to warrant what would be implied by law. The question then is whether the obligation is not so connected with the subject of sale that, to use language with which we are familiar in such cases, it must be held to run with the lands. Having regard to the reasons given by your Lordship in the chair, I cannot say that I entertain the affirmative view so strongly as to induce me to dissent from the decision proposed. I have not been able to clear my mind of the difficulty to which I have given expression, although I do not desire to throw any doubt on the soundness of the result at which your Lordships have arrived.

LORD KINNEAR—I concur.

The Court adhered,

Counsel for the Pursuers — Campbell, K.C.—Grainger Stewart. Agents—A. & A. Campbell, W.S.

Counsel for the Defender—Clyde, K.C.—Horne. Agents—Webster, Will, & Company, S.S.C.

Saturday, July 19.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

RANKINE *v.* LOGIE DEN LAND COMPANY, LIMITED.

Superior and Vassal—Obligation ad factum præstandum — Personal Obligation to Erect Buildings—Transference of Feu after Obligation Prestable—Liability of Prior Vassal—Liability of Executrix of Deceased Vassal—Acquiescence.

The obligations of a vassal in a feu, which have become prestable, are not discharged by the entry of a new vassal; and damages for the failure of a former vassal to implement such obligations may be recovered from his personal representatives after his death.

Marshall v. *Callander Hydropathic Company, Limited*, July 18, 1895, 22 R. 954, 32 S.L.R. 693, *followed.*

Macrae v. *Mackenzie's Trustee*, November 20, 1891, 19 R. 138, 29 S.L.R. 127, *distinguished.*

A proprietor feued lands subject to an obligation (declared to be obligatory upon all persons afterwards deriving or acquiring right to the subjects) to erect thereon buildings of a certain value. This obligation was never fulfilled. The titles contained stipulations that the vassals should pay double feu-duty so long as they should fail to build. After certain transmissions, and after the obligation to build had become prestable, the feu became vested in A and M and the survivor as trustees for themselves. M having died, A, the survivor, thereafter disponed the subjects to the L. Company, Limited. Mrs M, the widow and executrix of M, never made up any title to the subjects. Thereafter, and twenty-four years after the creation of the feu-right, the superior, who had never until recently made any demand for the fulfilment of the obligation to build, and had accepted payment of the feu-duty without exacting the double feu-duty provided for in the title, brought an action against the L. Company, Limited, A, and Mrs M, as executrix of her husband. The conclusions of the action were against A and the L. Company for implement of the obligation to build, and failing implement, for damages, and against Mrs M. for damages in the event of the obligation to build not being implemented. Decree was granted against A and the L. Company, ordaining them to erect the buildings within