MARCH 26, 1855.

GEORGE ELMSLY, Treasurer of Aberdeen, (on behalf of the Magistrates,) *Appellant*, *v.* WILLIAM BROWN and Others, *Respondents*.

Burgage—Superior and Vassal—Personal Obligation—Perpetual Covenant to pay Feu duty—*By articles of roup, exposing building areas belonging to the town of Aberdeen to roup, it was stipulated that purchasers should be obliged within six months after acquiring right to feus, "to grant personal obligations for payment of said feu duties or annuities, as well as for performance of the whole clauses and conditions prestable by them in consequence of said articles," declaring "that the feu duties shall be real burdens affecting the said lots or stances hereby exposed, and houses to be built thereon." B having acquired right to a feu, the magistrates executed in his favour a burgage disposition, which set forth in the narrative the granting of the personal obligation stipulated in the articles of roup. In point of fact, the obligation was granted by B soon after, in a separate writing, and not of the same date as the burgage right. In this separate obligation, B, referring to the articles, bound himself and his heirs, executors, and successors whatsoever, to content, pay, and deliver the sum stipulated as feu duty, and to implement and perform the whole conditions in the articles of roup, in so far as incumbent or prestable by the proprietor or feuars of the premises.*

HELD (reversing judgment), *that the personal obligation was binding on B and his representatives* in perpetuum, *and could not be defeated by an alienation of the burgage right.*[1]

The Treasurer of Aberdeen having appealed against the judgment of 11th March 1852, it was maintained in his case that it ought to be reversed for the following reasons:—"1. Because, according to the sound construction of the personal obligation granted by Brown, in terms of the stipulation contained in the articles of roup, he thereby bound himself, his heirs, executors, and successors generally, to make payment to the appellant of the ground annuals stipulated to be paid for the subjects in all time coming; and from this liability he could not escape by any transference of the lands in respect of which the ground annual was payable. 2. Because the liability of Brown and his representatives would have been established, even if the personal obligation for payment had been contained in the disposition granted to him; but *a fortiori* must this be the case, where the liability arises under a separate deed of obligation granted in terms of a prior stipulation contained in the original articles of roup. 3. Because, taking the whole deeds together, it was clear that the sellers contemplated, and that the purchaser undertook, a permanent liability for the ground annuals, notwithstanding any transference of the subjects."

The respondents supported the judgment on the following grounds:—"1. Because it was not stipulated in the articles of roup that the purchaser should grant an obligation binding himself and his general representatives to pay the ground annual in all time coming, but merely that the purchasers, and all succeeding heirs and singular successors in the premises, should be obliged, within six months after their acquiring right, to grant a personal obligation for payment of the ground annual, as well as for performance of the whole clauses and conditions prestable by them in consequence of the said articles. 2. Because the obligation drawn by the agent of the sellers, and signed by the respondents' constituent, ought to be construed in accordance with the articles of roup. 3. Because, according to the true import of the obligation granted by the respondents' constituent, he was only personally bound in payment of the ground annual during the period of his possession of the subjects sold to him. 4. Because the singular successor, now in possession of the subjects, is ready to grant a personal obligation binding himself and all succeeding heirs and singular successors in the premises to pay the ground annual, and perform the other conditions incumbent on the proprietor for the time."

Rolt Q.C., and *Anderson* Q.C., for appellant, having referred to the cases of *Millar* v. *Small*, *ante*, p. 222: 1 Macq. Ap. 345; 25 Sc. Jur. 334; Royal Bank of *Scotland* v. *Gardyne*, *ante*, p. 245: 1 Macq. Ap. 358; 25 Sc. Jur. 399; *King's College* v. *Hay*, *ante*, p. 428: 1 Macq. Ap. 526; 26 Sc. Jur. 643, as having subverted the doctrine on which the Court of Session had proceeded in this case, were stopped, and the other side were called upon to distinguish the present case from those cases.

[1] See previous reports 14 D. 675; 24 Sc. Jur. 342. S. C. 2 Macq. Ap. 40; 27 Sc. Jur. 346. See also *Millar* v. *Small*, *ante*, p. 222: 1 Macq. Ap. 345; 25 Sc. Jur. 334, and *King's College* v. *Hay*, *ante*, p. 428: 1 Macq. Ap. 526; 26 Sc. Jur. 643.

Lord Advocate (Moncreiff), and *Solicitor-General* (Bethell), for respondents.—In order to construe the bond in this case, it is necessary to consider that it was granted by the purchaser in implement merely of the conditions of roup. The obligation, which those conditions called for, was one binding the purchaser merely so long as he continued to possess the lands, and not an obligation binding himself and his representatives in perpetuity. This is further apparent from the fact that "the heirs and singular successors *in the premises*," should each grant a similar obligation, which could only mean a personal obligation by the person then holding the lands. That characteristic was not in the case of *Millar* v. *Small* at all. The distinctions between the present case and that of *Jack* v. *Hay* were clearly stated by Lord Colonsay in the Court below. The bond proceeds on the narrative of the articles of roup, and must be construed by reference to those articles, for no other bond than what was warranted by those articles could have been demanded. The terms of the disposition in favour of the respondents' constituent confirm this construction.

LORD CHANCELLOR CRANWORTH.—My Lords, if there had not been the decisions in your Lordships' House which have been referred to in the cases of *Millar* v. *Small*, *Jack* v. *Hay*, and *Gardyne* v. The *Royal Bank of Scotland*, I confess that this is a matter upon which I could not honestly have said that I entertained the least doubt in the world. It is most important that parties should be taught, that they must frame their contracts precisely to carry into effect what they intend. It is neither seemly nor convenient that parties should frame their contracts in terms distinctly meaning one thing, and then call upon the Courts to interpret them as meaning another thing.

Now, looking at the present contract only, this is a matter which can admit of no possible doubt. The words of the bond are—"I bind and oblige myself, my heirs, executors, and successors whomsoever, to contract, pay, and deliver" to certain persons, "as trustees aforesaid, and to such other trustee as may hereafter be assumed into the said trust, and to their assignees, or to any person having authority from them to receive the same, the foresaid sum of £375 8*s*., in name of ground rent or feu duty, at the terms following"—stipulating what the terms are. Now, that that binds this gentleman himself, and his heirs, is perfectly obvious. His answer is this:—I gave this bond in consequence of a stipulation in certain articles of roup upon a sale by roup, whereby I was bound to give an obligation, but not such an obligation as this. Therefore, he says, I ought not to be called upon to pay the sum in dispute.

Now, whether the obligation, that he has given, is more extensive than he was bound to give, is not now before your Lordships' House. That must be decided in a suit, which I understand is already instituted in the Court of Session in Scotland, and your Lordships' decision in this case will not at all affect the rights of Mr. Brown, if he have any rights in that suit. All that your Lordships have to do is, to see whether, construing this bond in the terms in which it is framed, Mr. Brown is or is not liable for the payment of this money.

Now, my Lords, it is admitted that he is liable, unless this bond is to be taken as incorporated with the articles of roup. In the first place, I think there can hardly be any doubt whatever that the bond cannot be so construed. The document speaks for itself. The articles of roup are stated as the reason which induced him to enter into this contract, not that the articles of roup are in any manner incorporated; therefore they cannot, in any way, be brought in to construe the words which the obligor has himself chosen to use. If I were bound to say whether the articles of roup did demand such a contract, I would beg leave to say, that I do not assent to the proposition, that the articles of roup would have been satisfied by a contract short of this. The Solicitor-General has very truly said, you might have contracts framed in that way in analogy to what is very common in England. It is a very common thing in a sale of an estate, where a party covenants for the production of the title deeds, to enter into a stipulation that that covenant shall no longer be binding if the estate should be sold, and the new purchaser should give an equivalent covenant by way of substitute. All that your Lordships can say is, that there is no provision at all, of that sort, in this bond. There is an absolute covenant to pay this ground rent; and I am of opinion, that it would be most dangerous if your Lordships were to interfere with the contracts of parties, and the language which they use, and to speculate upon anything so wide as this, and to hold that, though they have said in terms which cannot be misunderstood, that they would pay the ground rent, still they are not liable under this bond to pay it. Therefore, I think that the appellants have made out a ground for reversing the interlocutor.

I may say at once that the House will, I have no doubt, dispose of this case with the less hesitation, because, in truth, it is not an appeal from a decision of the Lords of Session, after they had become acquainted with the view which your Lordships take of these cases. It was an interlocutor of the Court of Session, pronounced before they had the benefit of knowing your Lordships' decision in *Millar* v. *Small*. It is very true, that in those cases which have been referred to there was the circumstance of the service. That may be one additional argument in those cases, but it can be none as regards this case.

LORD ST. LEONARDS.—My Lords, I am entirely of the same opinion as my noble and learned friend. In the case of *Millar* v. *Small*, although I thought it right to rely upon the cautionary

obligation, as that would put all doubt at an end, yet I had a very clear opinion, which I took the liberty of expressing in this House, upon the general doctrine. To that opinion I still adhere: and I am of opinion that in this case the bond is general, and will continue in force for all time, notwithstanding the supposed doctrine in Scotland.

My Lords, the only argument which we have heard in this case is this, that you are to import into this bond the articles of roup. I cannot admit that that should be done, nor would the importation of them into the bond at all meet the intentions of the parties. The bond itself is in these words:—"And whereas, by the articles of roup under which the said piece of ground was purchased, it is incumbent on me to grant the personal obligation under written;"—not something else, but the obligor here puts his own construction upon the bond, and he tells you that what he is bound to do is, not what is in the articles of roup, but what is under written.

Now, if your Lordships look at the articles of roup, you will find that the intention clearly was, that every singular successor should come under the obligation within a certain time. Now, how was that to be executed? The Solicitor-General says that we are to put the same construction upon this bond as if there had been, first of all, a general obligation, and then a proviso determining that obligation upon the successor entering into a new bond. That would have been a very reasonable construction to put upon the articles of roup, no doubt; but how can we put that construction upon this bond? Where is there a single word within the four corners of this bond, which imposes any obligation upon any successor to enter into such a bond as is stipulated for in the articles of roup? Therefore, if we were not to give to the general words a general expression—if we were not to extend the intention of the bond as far as the words themselves go, that is, generally, where would you ever get for this seller another security? You say that this bond has ceased, because he has transferred the land; but the land, at all events, was not to be transferred so as to get rid of the obligation, unless the successor did enter into a bond. He entered into no obligation for him to do so at all. And all that could have been said upon an equitable ground would have been this—that if you had not entered into a bond for the successor to conclude a real *bonâ fide* purchase to answer these obligations, (and therefore you had a right then to have them delivered up,) you would then have tried the general equity, as it were—that is, whether the articles of roup did not mean that the general obligation into which you had entered was to cease when you had sold, and when you had obtained a purchaser to enter into the obligation. But you have done so such thing. You have desired the one party to cease without attempting to substitute any other party. You have not, therefore, attempted to perform your own obligation, nor attempted to perform that which is relied upon, viz., the articles of roup. The effect, therefore, is, that it is not a fair point to raise, for it is attempting to ask this House to decide contrary to the clear words, and, I must say, contrary to the clear intention, of the instrument, in order to defeat the obligation, and the very articles of roup upon which you found your equity, and upon which you wish the House to decide.

My Lords, I am clearly of opinion, that there is no foundation for that distinction—that the cases decided in this House rule this case, and that the party has no foundation for his contention. Upon that ground, I think that the appeal must be allowed; not merely looking at it with reference to the state of the law, but upon the ground which I have stated. If the law had been otherwise, I should have thought this not a proper mode of relieving the party. That is to say, if, by the true construction of the instrument, it had been confined to the particular period of the enjoyment, there ought to have been a new instrument tendered to carry on the obligation by the successor, and that not having been done, I think that the appeal should be allowed.

Mr. Rolt.—Your Lordships find us entitled to the expenses in the Court of Session?

LORD CHANCELLOR.—Yes.

LORD ST. LEONARDS.—If the parties desire it, the House would have no objection to add the words, "without prejudice to any pending action." I do not think it necessary.

The Lord Advocate asked for this reservation.

LORD CHANCELLOR.—The cause is remitted back, but without prejudice to any action which the respondent may be advised to institute.

Interlocutor reversed with a declaration, and cause remitted.

Appellant's Agents, Barron and Hagart, W.S.—*Respondents' Agents*, Ross and Auld, W.S.