Thursday, December 20.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

THE MAGISTRATES OF EDINBURGH *v.* BEGG.

Superior and Vassal—Real Burden—Personal Action—Condition of Tenure—Singular Successor—Obligation for Payment of Indefinite Sum.

By feu-charter by which certain lands, forming part of the line of a proposed street, were conveyed, the disponee was taken bound to relieve the disponers of half the cost of forming and causewaying the roadway of the street, and of forming the main drains in the roadway, in proportion to the extent of frontage of his feu to the street, on these works being executed by them. The works were executed by the disponers shortly thereafter. The disponee did not take infeftment, but assigned the charter, and several years afterwards the subjects passed into the hands of a singular successor, against whom the disponers raised a personal action for payment of the proportion of the cost of forming the roadway and drains. *Held* that the obligation did not affect a singular successor in the subjects, either (1) as a real burden, or (2) as a condition of the grant.

By feu-charter dated 22d January 1878 the Magistrates of Edinburgh, governors and administrators of the Trinity Hospital, feued to William Baird, and his heirs and assignees whomsoever, part of the lands of Quarryholes, in the parish of South Leith and county of Edinburgh, afterwards known as Albert Street, Leith Walk, Edinburgh. The charter contained the following clause, viz. :—"*Quarto*, That as we [the Magistrates of Edinburgh] and our successors in office, governors and administrators foresaid, are bound to form and causeway the roadway of the street so far as opposite to the said pieces of ground, and to form main drains in such roadway, the said disponee or his foresaids shall be bound, on these works being executed, to repay to us, or to our treasurer on our behalf, one-half of the expense of those works, in proportion to the extent of frontage of his feus to said streets, and uphold and constantly maintain all such roadway and main drains in all time coming at his or their sole expense, in the proportion foresaid, to the satisfaction of the burgh engineer for the time being of the city of Edinburgh; the said disponee or his foresaids shall also be bound to form and constantly maintain, so far as the frontage of his feus is opposite to the said streets, a continuous footpath of the best Caithness stone or of Portland cement concrete of the best quality," &c.

The roadway and drains were formed by 1st October 1878. On 31st October 1878, William Baird, without taking infeftment, assigned his feu-charter to Henry Harding, builder in Edinburgh, and Harding recorded the feu-charter with the relative assignation in the Register of Sasines on 1st November 1878. Thereafter Harding became bankrupt, and the subjects were sold by the trustee on his sequestrated estates to Charles Lawrie and Thomas Scott, builders, Edinburgh. The disposition in their favour was dated 2d, 3d, and 4th April, and recorded 2d May 1879. By disposition dated 15th and recorded 26th April 1881 Charles Lawrie and Thomas Scott disponed the subjects to John Henderson Begg, advocate, Edinburgh. The disposition was granted "with and under the whole real burdens, conditions, provisions, and declarations, and clauses irritant and resolutive, specified and contained or referred to in the foresaid feu-charter in favour of the said William Baird dated the 22d day of January. . . and recorded 1st November, all in the year 1878."

This was an action at the instance of the Magistrates of Edinburgh against Mr Begg, to recover the sum of £86, 15s. 4d., being the proportion of the cost of forming and causewaying the roadway of Albert Street so far as opposite the subjects belonging to the defender, and forming main drains in the roadway.

The defender stated that the works were executed shortly after the date of the original charter, or at least long before he acquired the property, and that he was not aware of any outstanding claim by the pursuers in respect of them till August 1882; further, that Baird, the original feuar, was alive and solvent.

He pleaded — "(2) The defender is entitled to absolvitor with expenses, in respect that the obligation founded on is neither a real burden nor a real condition of his right, nor in any other way incumbent on him."

The Lord Ordinary (M'Laren) on 27th June 1883 sustained the defences and assoilzied the defender.

"*Opinion.*—This is a petitory action by a superior against a singular successor in the feu, for payment of the feuar's proportion of the cost of a roadway and drain. The feu-charter provides that the grant shall be accepted by the disponee, and his heirs and assignees, with and under the conditions, &c., therein contained. The fourth condition binds the disponee and his foresaids to repay to the superior a certain proportion of the cost of a roadway and main drain, and also to uphold and maintain these constructions in all time coming. The defender admits that the obligation to contribute to the maintaining of the road and drain is binding on singular successors, but contends that he is not affected by the obligation to contribute to the cost of their construction. The pursuers contend that the obligation is effectual as a real burden, and, alternatively, as a condition of the grant.

"On the first alternative, it is not necessary to say more than to point out that an action will not lie against a singular successor for the recovery of a real burden. The real burden is the granter's reserved estate, and can only be recovered by real diligence. As the superior may desire to try the question in an action of poinding of the ground, I shall not express any opinion of it at present.

"On the alternative view which was submitted, that the obligation is binding as a condition of the grant of the feu, I have to consider whether this is such a condition as will run with the lands, that is, affect a singular successor in the lands—for the two expressions appear to me to have the same meaning.

"In order that an obligation may be binding as a condition of a feudal grant or contract it is not enough that it is called a condition. It must

fulfil the legal requisites of a condition of such a contract—that is, it must have some relation to the necessary or natural incidents of a grant of land. I think also that the singular successor must be able to discover from the property itself and its titles whether the condition is or is not fulfilled. If the condition had been that the feuar should make the roadway, the purchaser could have found out by inspection of the property whether that was one of the unfulfilled obligations which he had to take over. But in the case of an obligation to repay the cost of construction, the purchaser has no information except what he may receive from the seller to make him aware that the obligation is unfulfilled. I think the claim is open to the objection stated by Lord Brougham in the case of *The Tailors of Aberdeen* v. *Coutts* to the constitution of an undefined sum by way of security upon land; and although his Lordship's judgment had more immediate reference to clauses in conveyances of burgage property, into which the element of feudal relation does not enter, I think that this particular observation would apply with equal force to money clauses in deeds of title of any description. It is not consistent with our system of public holding, and with the security which the public records afford to purchasers and heritable creditors, that any pecuniary obligation of unknown amount should be allowed to become a charge upon landed estate. With these views I must assoilzie the defender from the action and find him entitled to expenses."

The pursuers reclaimed, and argued—That this obligation, though for an indefinite sum of money, might be enforced as a condition of the feu against a singular successor.

Authorities—*Tailors of Aberdeen* v. *Coutts*, Dec. 20, 1834, 13 S. 226—*aff.* Aug. 3, 1840, 1 Rob. 296, at p. 332; *Stewart* v. *Duke of Montrose*, Feb. 15, 1860, 22 D. 755, Lord Deas at p. 802; *Clark* v. *City of Glasgow Assurance Co.*, June 20, 1850, 12 D. 1047—*rev.* 17 D. (H. of L.) 27, 1 Macq. 668; *Ritchie and Sturrock* v. *Dullatur Feuing Co.*, Dec. 16, 1881, 9 R. 358.

Defender's authorities—*Tailors of Aberdeen* v. *Coutts*, May 23, 1837, 2 S. & M'L. App. 609; *Earl of Zetland* v. *Hislop, &c.*, June 12, 1882, 9 R. (H. of L.) 4; *Morrison's Trustees* v. *Webster, &c.*, May 16, 1878, 5 R. 800; *Stewart* v. *Gibson's Trustees*, Dec. 10, 1880, 8 R. 270; *Marquis of Tweeddale's Trustees* v. *Earl of Harrington*, Feb. 25, 1880, 7 R. 620.

At advising—

Lord President—In the original feu-charter by the Magistrates of Edinburgh in favour of William Baird, the fourth head of the conditions of feu contains a number of obligations or burdens upon the feuar, and it is introduced in this way, that as the granters, the Magistrates of Edinburgh and their successors, were bound "to form and causeway the roadway of the street so far as opposite to the said piece of ground, and to form main drains in such roadway, the said disponee or his foresaids shall be bound, on these works being executed, to repay to us, or to our treasurer on our behalf, one half of the expense of those works, in proportion to the extent of frontage of his feu to said street." That is one of the obligations. But then there follow several others, of which the leading is the following, viz., "and uphold and constantly maintain all such roadway and main drains in all time coming, at his or their sole expense, in the proportion foresaid, to the satisfaction of the burgh engineer for the time being of the city of Edinburgh; the said disponee or his foresaids shall also be bound to form and constantly maintain, as far as the frontage of his feu is opposite to the said street, a continuous footpath of the best Caithness stone or Portland cement concrete," and that of the particular description there set forth.

Now, there is a manifest difference between the first of these obligations and the others which are contained in this clause, because the first obligation is for payment of a sum of money once and for all, and that is to be paid upon the work being completed—the work, I mean, of forming the causeway and roadway of the street opposite to the ground feued. As soon as that is done the obligation upon the feuar is to pay a certain proportion of the expense as it is then ascertained.

Now, we have it admitted, on the record as amended, that this work was fully completed by the 1st of October of the same year in which the charter was granted, and therefore at that time—the 1st of October—the sum stipulated for became payable, and the original feuar was the debtor in that sum, and the Magistrates, the granters of the feu, were in a position then to enforce that obligation against him.

In the course of the same year—that is to say, upon the 31st of October—within a month after the same became payable, Mr Baird assigned his feu-contract to a person of the name of Harding, not having himself then taken infeftment upon his feu-contract, and Harding completed his title by recording in the Register of Sasines both the original feu-contract and the assignation. Then at a subsequent period he became bankrupt, and his trustee sold the estate, and so it came to be transmitted into the hands of the present defender.

Now, this action has been raised by the Magistrates against Mr Begg, as the present owner of the the feu, for payment of this sum of money which became payable on the 1st of October 1878, years before Mr Begg had anything to do with the feu, and was payable by the person who held the feu at that time, viz., the original feuar Mr Baird. And the question is, whether Mr Begg is liable under his personal obligation to pay that money?

The conditions in the feu-contract, other than the one we are dealing with here, are all very ordinary and very proper conditions of a feu-contract. They are the natural burdens connected with a property of this description, and therefore they may be fairly said to be conditions of the grant. But whether this obligation to pay a sum of money upon the completion of the works by the Magistrates is a condition of the grant is really the question to be determined. To say that this has been made a real burden would not avail the pursuers of this present case, because this is not an action to enforce a real burden, and therefore cannot be maintained, so far as I can see, unless upon the ground that payment of this money is made a condition of the grant. Now, I do not think it is a condition of the grant at all. It is part of the original feu-contract between the Magistrates and the original feuar, no doubt, that he shall pay that sum of money, that he shall relieve them of the expense of making this road to a

certain extent, and in a certain proportion according to the ground feued to him, but that is all, and unless this obligation is made a condition of the grant in such a way as to pass against singular successors in the feu, it does not appear to me that this action can possibly be maintained. Now, upon that matter I entirely agree with the Lord Ordinary. I think that it is not made a condition of the grant, and cannot competently be. It is an obligation of relief or payment intended to deal with circumstances existing at the time that the obligation was undertaken and the feu granted. The amount was an amount of money to become payable, and therefore it was really an attempt to burden the feu with an indefinite sum of money, and to make that a burden upon singular successors. I am therefore for agreeing with the Lord Ordinary that it is not binding upon singular successors. I do not think it was ever intended to be binding on singular successors. My impression is that the leading intention of the parties to this feu-contract was that as soon as the roadway and main drains were completed, and the expense of them ascertained, the money was to be forthwith handed over by the feuars to the superiors. Of course it is quite true that the disponee and his foresaids are taken bound to pay this sum of money, "his foresaids" being his "heirs and assignees" whomsoever. But that was only inserted in case he should part with the feu before the amount to become due was ascertained, because then it might be found to be difficult after he had disconnected himself from the feu to have recourse against him and recover the money.

If this feu had been assigned to Mr Harding before the amount had been ascertained and paid there might have been a very fair and plausible ground for saying that Mr Harding was personally liable to pay this money, having taken the feu with this unascertained burden upon it—a burden that was in the course of being ascertained by the finishing of the works. But as the case stands at present the Magistrates failed to recover that sum of money from the feuar who was bound in payment of it, and without any explanation of their failure, and in the face of the allegation on record that the original feuar is alive and solvent, I do not think that they can now come against a singular successor in the feu for payment of this sum after the lapse of so many years. It was undoubtedly, I think, beyond the view of the parties when this contract was made.

I am therefore for assoilzieing the defender from the conclusions of the summons, as the Lord Ordinary has done.

Lord Deas—It is quite clear upon the ground stated by the Lord Ordinary that if this burden were regarded as a real burden it could not be recovered in this form of action. We had the same point before us in another action recently, and with the same result. As to qualifying this as an inherent condition of the right, that, as was pointed out in the case of *Coutts* v. *The Tailors of Aberdeen*, requires a combination of a great many things and qualities, none of which are here at all. It is not necessary that I should attempt to enumerate them just now. I think from my recollection I had occasion not long ago to enumerate those qualities which are necessary to make anything an inherent condition of the right. An inherent condition of the right must have something special to the subject, and a great many other qualities, in order to make it a competent claim. This is nothing but a sum of money, and payment of a sum of money was never held to be an inherent condition of a right unless it is inherent upon the subject upon various grounds. The claim here is not even for an annual sum of money, but for payment of a particular debt.

Now, there can be no doubt, upon the principles of our law, that a claim of that kind is not an inherent condition of the right, and cannot be recovered by an action like this. In short, I have no doubt whatever of the correctness of the view of the Lord Ordinary, and I have only to say in addition that I agree with it entirely.

Lord Shand—I agree with your Lordships and the Lord Ordinary in holding that this obligation is not one of a nature that transmits against singular successors.

In the view which I take of it, and as your Lordships have pointed out, it is not an obligation *ad factum præstandum*, nor is it an obligation of a continuing character such as some of the other obligations in this feu-right, as, for example, the obligation to maintain in all time coming certain footpaths and other works in connection with the feu. It is an obligation for the payment of a sum of money, in the first place, of an indefinite amount, and, in the next place, of a sum of money which is to be paid once and for all. And that being its nature, it appears to me, as it does to your Lordships, that the case is ruled by that of *Coutts* v. *The Tailors of Aberdeen*.

The first question that is raised is, whether it is clearly expressed or plainly implied that this obligation is an inherent condition of the grant of such a nature as would transmit against each new disponee, and, looking to its nature, it appears to me that it is not a condition of that kind. I think it is a condition which each new disponee might, before he obtains possession of the feu at all, be entitled to assume has been met by his predecessor. At all events, looking to the nature of the debt, I do not think it could be said that it is of such a nature that it shall subject the disponees in all time coming. And in the next place, and separately, however, I think the obligation is also one which cannot be enforced for the reason which was given effect to as a separate reason in the case of *The Tailors of Aberdeen*, that the sum proposed to be charged is one of an entirely indefinite nature.

For each of these reasons, and taking them separately, I am of opinion that the interlocutor of the Lord Ordinary is well founded.

Lord Mure was absent.

The Court adhered.

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