heard the argument I am satisfied that nothing visible to any juryman walking along this road could have affected in the slightest degree his judgment upon any matter really material to the issue which had to be tried.

The Court discharged the rule, and refused to grant a new trial.

Counsel for the Pursuer—Sol.-Gen. Dickson, Q.C.—Macphail. Agents—Melville & Lindesay, W.S.

Counsel for the Defenders — Salvesen. Agent—Marcus J. Brown, S.S.C.

Saturday, November 19.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

BISSET *v.* MAGISTRATES OF ABERDEEN.

Lease—Naturalia of Lease—Obligation to Grant Feu—Whether Personal or Transmissible against Singular Successors.

A lease for 999 years granted in 1768 contained an obligation on the granter to deliver to the lessee, his heirs, executors, and successors, at any time they should desire the same, a feu-charter of the ground contained in the lease on the conditions therein mentioned.

Held (*aff.* judgment of the Lord Ordinary) that this obligation was personal to the granter and did not transmit against singular successors.

Wight v. *Earl of Hopetoun*, November 17, 1763, M. 10,461, *distinguished.*

By tack between George Meek at Gilcomstone and Christian M'Pherson, his spouse, and John Smith, square wright in Aberdeen, dated 22nd February 1768, and recorded 28th May 1866, the said George Meek and Christian M'Pherson let to the said John Smith certain heritable property in Aberdeen for 999 years from Martinmas 1767 at a yearly rent of £1 sterling. This tack contained the following clause :—" And sicklike the said George Meek and Christian M'Pherson oblige them to subscribe and deliver to the said John Smith and his foresaids (his heirs, executors, and successors), upon their own proper charges and expenses, at any time they shall desire the same, a charter upon the foresaid piece of ground which is to contain the above and all other usual clauses, and it is to be thereby declared that the said John Smith and his foresaids are to pay the foresaid sum of One pound sterling as a constant and perpetual feu-duty in all time thereafter, and that every heir is to pay the first year of his entry a tenth part of the said feu-duty, and every singular successor one-half of the said feu-duty upon his receiving a charter, and all the charters and entrys are to contain a power to poind for payment of the said feu-duties, and if two terms run in one, the same to be an irritancy, and both parties bind and oblige them to perform the premises to each other, under the penalty of Five pounds sterling money, to be paid by the party breaker to the party performer or willing to perform the premises over and above performance." In virtue of a series of dispositions to singular successors, the last of which was by Robert Wallace to the Town Council of Aberdeen, and was dated 18th and recorded 21st November 1893, the Town Council became the heritable proprietors of the said subjects. In virtue of a series of assignations, the last of which was dated 21st July 1880, Joseph Bisset, house proprietor, Aberdeen, became the lessee in right of said tack.

On 20th August 1897 John Bisset raised an action against the Lord Provost, Magistrates, and Town Council of the city and royal burgh of Aberdeen, in which he sought, *inter alia* (second), to have it found and declared that the defenders as heritable proprietors of the subjects of the lease were bound to grant in favour of the pursuer, his heirs and successors, upon their own proper charges and expenses, at any time they should desire the same, a feu-charter of these subjects, containing all usual and necessary clauses, and under the conditions, restrictions, and stipulations contained in the lease, and upon it being so found and declared, to have the defenders ordained to execute and deliver to the pursuer or his foresaids a feu-charter in these terms, to be adjusted at sight of the Court under a penalty of £500 damages in case of failure.

The pursuer pleaded—" (2) The defenders being bound, in terms of said tack or lease, to grant a feu-charter of the subjects to the pursuer and his foresaids whenever called upon, decree should be pronounced in terms of the declaratory conclusions of the summons, and for implement. (3) Failing implement of said decree within such time as the Court may fix, the pursuer is entitled to decree for damages as concluded for."

The defender pleaded—" (3) The defenders should be assoilzied from the conclusions seeking to have them ordained to execute a charter in respect that (*a*) no obligation is in terms imposed by the said lease on singular successors of the lessors to grant such a charter, and (*b*) *separatim* the obligation contained in the lease to grant a charter is not *inter essentialia* of a lease, and is not binding on singular successors of the lessors."

On 1st June 1898 the Lord Ordinary (KYLLACHY) assoilzied the defenders from the conclusion of the summons.

Note.—. . . " With regard to the second conclusion I need only say a word. The pursuer seeks to have it affirmed that the defenders being now in right of the subjects of his lease, and as such the singular successors of the original lessor, are bound to grant him a feu-charter in terms of a certain clause in his lease. Now, it is quite true that the lease contains an obligation on the lessor to that effect; but while this is so, I am unable to hold that an obligation of that kind contained in a building lease transmits against singular successors.

No authority was cited for that proposition; and it appears to me upon principle that the obligation in question cannot be held to be *inter naturalia* of a lease, or otherwise than a collateral obligation binding only on the lessors and their representatives. I think, therefore, that the defenders must be assoilzied from this conclusion of the summons."

The pursuer reclaimed, and argued—The mere omission of the words "heirs and assignees" after the name of the lessor did not make the obligation personal—*Croose* v. *Banks*, February 5, 1886, 13 R. (H.L.) 40. It was the duty of a purchaser before completing the contract to look into the titles and see that there were no burdens on the subjects he was dealing with—*Stewart* v. *M'Ra*, November 12, 1834, 13 S. 4. The obligation in question was entered in the record, and was therefore patent to all. This obligation was an inherent condition of the lease, and was therefore enforceable against singular successors of the lessor—*Wight* v. *Earl of Hopetoun*, November 17, 1763, M. 10,461; *Stewart* v. *Duke of Montrose*, February 15, 1860, 22 D. 755.

Argued for defenders—When singular successors of the lessor were not mentioned in the lease, whether an obligation in the lease was binding upon them depended upon whether it was intrinsic or extrinsic of the subject of the lease. If the obligation were of the essence of the lease, a singular successor would be bound by it—*Montgomerie* v. *Carrick*, June 23, 1848, 10 D. 1387. If the obligation were extrinsic or not incident to the tenure of the lease, a singular successor would not be bound—*Ross* v. *Duchess Countess of Sutherland*, June 21, 1879, 16 S. 1179. The present was a claim to terminate the relationship of landlord and tenant. This was not *inter naturalia* of the lease—*Black* v. *Clay*, June 22, 1894, 21 R. (H.L.) 72. The case of *Wight* v. *Hopetoun* did not apply, as in that case the singular successor of the landlord was barred *personali exceptione* from refusing to fulfil the obligation, and the case itself had never been referred to with approbation. The case of *Stewart* dealt with a feu-contract, and was quite distinct.

At advising—

Lord Trayner—I concur in the views expressed by the Lord Ordinary, and do not know that I can usefully add anything to what his Lordship has said. . . . With regard to the second conclusion, the Lord Ordinary says that no authority was cited to him in support of the proposition on which it is based. There was, however, cited to us, as an authority in support of the pursuer's contention, the case of *Wight* v. *Earl of Hopetoun*, M. 10,461. Assuming that case to have been rightly decided (although it may be doubtful whether it would now be followed), it appears to have been decided upon specialties. It was held that Lord Hopetoun, "although a singular successor, was barred *personali exceptione* from objecting to the obligation" to renew the lease, and bound to grant a new lease in terms of it. This decision proceeded chiefly, if not entirely, on the special terms of the conveyance in favour of Lord Hopetoun. The present case may be distinguished from the case cited in at least two important particulars, first, in the cited case the obligation was on the lessor "and his heirs and successors." Here the obligation is on the lessor alone. Second, the obligation in the cited case was one whereby an existing right was to be continued. Here the obligation is to put an end to the right created by the lease, and to substitute for it another and different right—to substitute a right of absolute property for a right merely to use. I agree with the Lord Ordinary in thinking that the obligation to grant a feu-right was personal to the granter of it, and that it did not tranmit against singular successors.

I think the reclaiming-note should be refused.

Lord Moncreiff—I am also of opinion that the Lord Ordinary's judgment should be adhered to upon both points, and substantially for the reasons stated in his note. . . .

The second point is entirely unconnected with the one with which I have been dealing. The lease is one for 999 years from 22nd February 1768. This is practically an alienation of the ground, and the defenders have apparently little interest to object to its being converted into a feu-right in accordance with the obligation undertaken by the original lessors. I should therefore not have been surprised to find that an obligation of this kind was customary and usual in leases of such duration. If this had been established it would have materially aided the pursuer's contention. But the pursuer is not prepared to aver that there is any such practice, and therefore we must deal with the obligation as being an unusual condition in a contract of lease. It is an obligation to alter the tenure from one of lease to one of feu. This can scarcely be said to be *inter naturalia* of a lease, and if it is not it will not affect singular successors. There is also some force in this consideration that it was not unreasonable that the original lessors should bind themselves if the demand were ever made in their lifetime to convert the lease into a feu-right, and yet they might not wish or intend to impose that obligation on their successors. This may possibly account for their having obliged only themselves, and not their heirs and successors, to grant a charter. On the whole matter I think the judgment of the Lord Ordinary is right and should be adhered to.

The Lord Justice-Clerk concurred.

Lord Young was absent.

The Court adhered.

Counsel for the Pursuer—Glegg. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders—Balfour, Q.C.—Cooper. Agents—Gordon, Falconer, & Fairweather, W.S.