MAY 13, 1853.

THE ROYAL BANK OF SCOTLAND, *Appellants*, *v.* JOHN GARDYNE, (Miller's Trustee,) *Respondent.*

Ground Annual—Real Burden — Absolute Disposition and Back Bond — Right in Security—Burgage—*G, the proprietor of burgage subjects in Dundee, conveyed them to D. for payment of a ground annual, with power to him, his heirs and assignees, to redeem,—but, till redemption, it was to enter all subsequent titles, and form a real burden. D. completed his titles, and conveyed the subjects, under the same conditions and prestations as he himself had acquired them, by* ex facie *absolute disposition, to the Royal Bank, who were at that time creditors for advances. The bank, on receipt of the conveyance, entered into possession, and completed their titles as he had done, delivering at the same time a back bond, obliging themselves to reconvey to D. on repayment of advances, but declaring that, on nonpayment, the subjects should vest absolutely in them. G. having brought an action to have it found that, till redemption, the bank as vassals feudally vest and seised, and in possession, were bound to pay the real burden, the bank denied liability.*

HELD (reversing judgment), *that the conveyance in their favour did not constitute them vassals or proprietors of the subjects, in the true sense of the term, but simply heritable creditors holding possession in security of advances.* [1]

The Royal Bank, in the circumstances generally set forth in the rubric, appealed against the judgment of the Court of Session of 8th March 1851, pleading that it ought to be reversed—Because the apparently absolute disposition in favour of the bank being qualified by the back bond, was a mere right in security, in the same way and to the same effect as if the disposition had expressly borne to be granted in security, and therefore the bank, as being simply heritable creditors in the subjects, who have had no intromission, are not personally liable for any ground annuals falling due after the date when the back bond was produced in judgment, or, at all events, after the date when it was recorded.

The *respondent* maintained in his *printed case* that the judgment was correct, on the following grounds :—1. Because a party who has made up a title to burgage subjects, by resignation in the hands of the magistrates, with infeftment, *ex facie* absolute, granted by one of the bailies of the burgh, is the vassal in the subjects, and liable in all the obligations incumbent on the vassal. 2. The obligation to pay ground annual is one incumbent upon the vassal so long as he remains vested in the fee ; and this burden is not affected by the circumstance, that he lies under a personal obligation to redispone the property to the person from whom he acquired it, on payment being made to him of a sum of money, or upon any other contingency. 3. Because the renunciation or discharge executed by the appellants in July 1845 was not a proper form of divesting them of their title as vassals in the subjects, and did not invest Duff or any other person in their room —1*st*, because the deed was executed only after the action was raised and issue joined ; 2*d*, because it is not the deed of reconveyance which the appellants were bound by the back bond to execute ; and, 3*d*, because it is not a *habilis modus* of divestiture by vassals publicly entered in the fee. 4. The back bond granted by the appellants being a right of reversion, and not having been recorded within sixty days of its date, the same is void and null *quoad* third parties, and cannot be pleaded to any effect against the respondent, an onerous third party.

*Sol.-Gen. Bethell* and *E. S. Gordon*, for appellants.—The decision of the Court below cannot stand after that of *Millar* v. *Small* in this House, *supra*, p. 222, which expressly decided that Duff in the present case has not ceased to be personally liable. The logical consequence is, that his purchaser does not become personally liable, for there is no privity of contract between such purchaser and the annualer. But we do not admit that the bank were purchasers ; they were mere mortgagees or heritable creditors. The disposition, though *ex facie* absolute, yet contained a reference to the back bond, which qualified the right communicated to the bank. In spirit and substance they were not radical proprietors, but mere incumbrancers of the fee, which still remained in Duff. The moment the back bond was registered, this relation of the parties was conclusively fixed—*Keith* v. *Maxwell*, M. 1163 ; *Bartlett* v. *Buchanan*, 21st Feb. 1811, F. C. ; 2 Bell's Com. 240. It is said the bank were liable at all events in respect of their possession of the subjects ; but though they were constructively in possession, Duff was *de facto* in possession, and at all events they never intromitted with the subjects after Duff's bankruptcy. (As to the

[1] See previous report 13 D. 912 ; 23 Sc. Jur. 410. S. C. 1 Macq. Ap. 358 : 25 Sc. Jur. 399.

argument in reference to the *ex facie* absolute conveyance, as the judgment did not proceed on that point, it is unnecessary to state it in detail. The following authorities were referred to :—*Fraser* v. *Wilson*, 2 Sh. App. 162 ; *Lindsay* v. *Giles*, 6 D. 771 ; *Macdougal* v. *Macdougal*, Mor. App. *Terce* No. 2. ; Ersk. 2, 8, 2.)

*Sir F. Kelly* Q.C., and *Inglis* D. F., for respondent.—The appellants were infeft on an *ex facie* unqualified title, and thus became vassals in the subjects—Stair, 2. 3. 38. An absolute disposition, qualified by a back bond, is not the same as a mere right in security—*Robertson* v. *Duff*, 2 D. 279 ; *Keith* v. *Maxwell*, 2 Ross's L. Ca. 730; *Maitland* v. *Cockerill*, 6 S. 109 ; *Russell* v. *Breadalbane*, 7 S. 767. Thus it does not fall under the act 1696, c. 5, like a disposition in security—2 Bell's Com. 234 ; *Riddle* v. *Niblie's Creditors*, 2 Ross's L. Ca. 721. It also differs as to prescription—Ersk. 3, 7, 10 ; 3 Ross's L. Ca. 467 ; *Chambers*, 2 S. 366. And as to mode of acquiring the property—*Miller* v. *Drummond*, Hume 662 ; as to remedies—Bell's Dict. *voce* Mails; and as to mode of extinction or discharge—2 Ross's L. Ca. 706 ; Ersk. 2, 8, 34. The renunciation and discharge executed in 1845 was not a habile form of divesting—Stair, 2, 10, 12 and 13. The back bond not being recorded within 60 days, is null—*Young* v. *Leith*, 9 D. 932.

LORD CHANCELLOR CRANWORTH.—My Lords, this case comes before your Lordships upon appeal from an interlocutor of the Court of Session of 11th March 1851, the result of which was (not to go over it in full) that the Court of Session charged the Royal Bank of Scotland with the payment of a sum amounting to something short of £1000, and with the liability of continuing to pay the annual sum of £83 5*s.* from time to time, till they should have reconveyed certain property, that was (as I may call it) mortgaged to them, to the person from whom it was derived, or some other person. From that interlocutor the bank has appealed. And in order to understand the case, it will be necessary that I should shortly call your Lordships' attention to the different deeds and documents on which it is founded. They are not very numerous, nor at all complicated.

It appears that a gentleman of the name of Gardyne was trustee under the marriage settlement of Mr. and Mrs. Miller, and, in that character, was entitled to some property in the town of Dundee. He sold that property to a person of the name of Duff, and it was duly conveyed to Duff. The purchase-money was not money paid down, but it was that which appears from a number of cases which have been lately argued before your Lordships by way of appeal, and partly adverted to, to be very common in Scotland, as it is now in some towns in the north of England, that, instead of the purchase-money being money paid down, it is an annual rent. It was conveyed by Gardyne to Duff in consideration of an annual rent, or a ground annual as it is called in Scotland, of £83 5*s.* per annum. So that Duff became the owner of the land, and Gardyne was entitled to £83 5*s.* per annum out of it.

In that state of things, Duff, having dealings with the Royal Bank of Scotland, being also a merchant, or person largely engaged in business, wanted to raise money upon this by way of security, and he, immediately after he had become the owner of the property, subject to the payment of the annual ground rent to Gardyne, conveyed it by way of mortgage (I am stating the matter very generally now) to the Royal Bank of Scotland, to secure the sum of £15,000 and farther advances. Duff afterwards became insolvent, and after Martinmas 1840, no ground annual was ever paid to Gardyne by the Royal Bank of Scotland. Up to that time it was regularly paid, but after that time no payment was made. In consequence of that, in the autumn of 1841, (there having been a half-yearly payment due at Whitsunday of that year,) Gardyne instituted the proceeding out of which this appeal arises, against the Royal Bank of Scotland, claiming from them payment of the arrears, which had become due at the Whitsunday preceding, and seeking a declaration that he was entitled to receive from them payment for all time to come. The matter was protracted, and occupied a great length of time. So that, in the result, supposing Gardyne entitled, arrears have accrued to the amount of £985 odds. Finally, the Court of Session decreed in favour of Gardyne, that he was entitled to that sum, and to future payment of the sums as they should become due, and they made their interlocutor accordingly. It is from that interlocutor that this appeal comes before your Lordships.

Now, my Lords, in order to understand the case, it will be necessary shortly to call your Lordships' attention, not in much detail, but still to some extent, to what the nature of the different deeds was. The first deed is the contract betwixt Gardyne and Duff, which is this—"It is contracted and agreed upon betwixt the parties following, viz. John Gardyne, baker in Dundee, only accepting trustee under an antenuptial contract of marriage entered into between Aikman Miller, wright in Dundee, and Charlotte Soutar his wife, dated the 7th day of September 1820, and recorded in the burgh court books of Dundee the 24th May 1832, and as such, heritable proprietor of the subjects after disponed, having power to enter into these presents, with the advice and consent of the said Aikman Miller and Charlotte Soutar on the one part, and Daniel Duff, machine-maker in Dundee, on the other part, in manner following—That is to say, the said John Gardyne, as trustee foresaid, and with advice and consent before mentioned, for and in consideration of the obligations by the said Daniel Duff hereinafter expressed, and in implement of a mutual agreement entered into betwixt the said trustee, with consent foresaid,

and the said Daniel Duff, of date the 7th day of October 1833, has sold and disponed, as he the said John Gardyne, trustee foresaid, does hereby, with advice and consent foresaid, sell, alienate and dispone, to and in favour of the said Daniel Duff, and his heirs and assignees whomsoever, heritably and irredeemably, all and whole that piece of ground situated on the west side of Tay street of Dundee," and describing a good deal of property in the town of Dundee; "in which subjects above disponed, the said John Gardyne, as trustee and with consent foresaid, binds and obliges him, his heirs and successors, to infeft and seize the said Daniel Duff and his foresaids, on their own charges, to be holden of His Majesty in free burgage." Then it makes procurators for the purpose of completing the resignation of the charter of sasine: "But always with and under the real and preferable burdens and declarations after written,"—that is to say, "under the real and preferable burden of the ground annual or yearly payment of £83 5*s.* sterling," "and which ground annual or yearly payment, and interest thereof, shall be, and the same are hereby expressly declared to form real and preferable burdens over and affecting the foresaid subjects out of which the same are payable, and which ground annual, interest and penalty, and the declarations relative thereto, herein inserted, shall accordingly be specially engrossed in the instrument of sasine to follow hereon, and all the future conveyances, infeftments and investitures of the same, aye and until the said ground annual shall be extinguished in manner after mentioned." Then there is a proviso, to which it is not necessary to advert at any length, authorizing the party entitled to the land to redeem the ground annual at any time, upon payment of the stipulated sum of £1665. Nothing, however, turns upon that, it being clear that there has been no redemption. "For which causes," it says, "and on the other part, the said Daniel Duff hereby binds and obliges himself, and his heirs and successors, to make payment to the said John Gardyne and his foresaids of the foresaid sum of £83 5*s.* sterling in name of ground annual or yearly payment, and that in equal half-yearly portions, at two terms in the year, Martinmas and Whitsunday." Then it declares, that if at any time there shall be two years' ground annual in arrear, Gardyne may re-enter. Nothing turns upon that.

Therefore that is a conveyance and disposition, by Gardyne to Duff, of the houses and land in Dundee in question, in consideration of a ground annual of £83 5*s.* payable out of this land, and for the payment of which Duff binds himself and his successors. And there is, in the disposition, a procuratory enabling resignation to be made, if sasine shall be granted. That procuratory was acted upon, and the property in question was duly resigned into the hands of the bailie or trustee, and then sasine was granted by him to Duff in conformity with that resignation, and in conformity with the deed, at the ground annual of £83 5*s.*, which is mentioned in the instrument of resignation, and the charter of sasine.

Then, that having been done, Duff immediately executes the instrument which gives rise to the present question, and it is thus: The date is not given. I take it for granted that it is the same date or immediately afterwards:—"I, Daniel Duff, machine-maker in Dundee, heritable proprietor of the several subjects," and so on, "for certain onerous causes and considerations specified in a back bond granted or to be granted to me by the Royal Bank of Scotland, do hereby sell, alienate and dispone, to and in favour of the said Royal Bank of Scotland, and their assignees and disponees, heritably and irredeemably—1*st*, All and whole." And then there is a great quantity of property described, including a great deal of property besides this in Dundee, but, amongst other property, describing this property in Dundee. Then there is this declaration—"Declaring also, that by the contract entered into between me and the said John Gardyne, of the piece of ground fifth above disponed," that is, the piece of ground in question, "I bound and obliged myself, my heirs and successors, to make payment to the said John Gardyne, and his heirs and successors, of the sum of £83 5*s.*" Therefore it is a conveyance by Duff to the Royal Bank of Scotland, of a large quantity of property, in consideration of a back bond (as it is called), subject, as to this particular property, to the payment of that ground annual. There was a regular procuratory of resignation contained in this deed: and by virtue of that procuratory of resignation, the property was duly surrendered into the hands of the bailie, who is the agent for the crown, for this purpose, and sasine was granted upon that to the Royal Bank.

The instrument of resignation and sasine is set out in the appendix, and it is this. It recites the disposition in favour of the Royal Bank of Scotland from Duff; it describes all the property, and mentions the ground annual. There is no allusion here to the back bond, but there is allusion to the fact, that the property had been conveyed subject to the ground annual, and that a charter was to be granted, also subject to that ground annual. Then there is no allusion to the power of redemption, and to the charter of resignation, and it goes on thus:—"And then and there the said John Fraser, as procurator and attorney foresaid, with all due reverence, and by staff and baton as use is, in virtue of the said procuratory of resignation, resigned, surrendered, upgave, overgave and delivered, all and whole the subjects first, second, third, fourth, fifth and eighth particularly before described, and disponed by the said disposition, lying bounded and described as aforesaid, and here held as repeated *brevitatis causa* in the hands of the said bailie, as in the hands of His Majesty, immediate lawful superior thereof, in favour and for new infeftment of the said whole subjects, to be made, given and granted, to the said Royal

Bank of Scotland, heritably and irredeemably, in due and competent form as effeirs, but always with respect to the subjects first, second, and fifth before described," (that includes the property in question), "with and under the foresaid real and preferable burdens severally affecting the said subjects as before specified." Then pursuant to that—"which resignation, so duly and lawfully made, was admitted of and received by the said bailie, who by virtue thereof, of his office of bailiary in and for said burgh, and at the special desire of the said procurator and attorney resigner, having power as foresaid, gave and delivered to the said Royal Bank of Scotland heritable state and sasine, real, actual and corporal possession of all and whole the foresaid subjects," subject nevertheless to that ground annual. Therefore the effect of that was, that the Royal Bank of Scotland became actually infeft and seised of, *inter alia*, the land in Dundee in question, subject nevertheless to the burden of the ground annual.

Then the next instrument, and the last to which I think it necessary to call your Lordships' attention, is the back bond, which was executed at the same time, and which seems to have been kept in the hands of the bank. The bank had apparently, on the face of these instruments, become the legal owners, for the instrument of resignation and sasine contained no allusion to any back bond; it appeared, upon the face of it, to give to the Royal Bank of Scotland the absolute ownership of this property. They, however, execute concurrently an instrument, which we should in England call a deed of defeasance, but which they call in Scotland a back bond, the meaning of which is obvious, whereby the bank acknowledges and declares that the several heritable subjects, and a number of other things, "have been all assigned, disponed and conveyed to, and are held by us for the purposes, and in manner, and with the powers and under the declarations all as underwritten, viz. in the *first* place, in security and for repayment of the sum of £15,000 sterling, advanced and lent, and to be advanced and lent by us to the said Daniel Duff, and of the interest due and to become due thereon during the nonpayment thereof, and also for security and repayment to us of all further sums of money which we may hereafter advance and lend to the said Daniel Duff." *Secondly*, for keeping up policies of insurance. Then the bank bind themselves their assignees and disponees, "to denude of, and reconvey and redispone to and in favour of the said Daniel Duff, and his heirs and assignees, all and whole the several heritable subjects," upon being repaid: "And it is hereby provided and declared, that the said Daniel Duff and his foresaids shall be entitled to redeem and reacquire the foresaid several subjects, machinery and others, and said policy of life insurance," and other matters. Then it is declared, that if he makes default in doing so, the bank may, after the lapse of a certain specified number of years, if they think fit, sell; and that if they do so, they may then pay themselves, and account for the balance. And the bank are to be at liberty in the mean time to make leases of the property.

In this state of things, it appears that the bank did make a lease of the property *instanter* to Duff, so that Duff continued in truth in possession, though, upon the face of the register and the title deeds, the bank appeared to be absolutely and irredeemably the owners, subject only to a back bond, which was an instrument not appearing on the charter of resignation, but which was a deed between the parties themselves.

My Lords, in this state of things, as I have already shortly stated to your Lordships, the Royal Bank continued to pay the ground annual to Gardyne from the time of the execution of these instruments in 1836, up to the last payment which became due in the year 1840. I say that the bank paid it. I presume that in truth it was Duff who paid it; or if the bank did pay it, there is no doubt they debited Duff with the amount, because this was only a security to them. However, as far as Gardyne was concerned, that was immaterial. He continued to receive his ground annual from the time of the execution of the deeds in October 1836, (for all these deeds bear date in that month,) up to the end of the year 1840. At that time, or before that time, but certainly at that time, Duff had become hopelessly insolvent. The property in Dundee turned out to be either valueless, or nearly so; and the bank repudiated any connection with the property; they said that they had nothing to do with it—that it was not their property—that it was only given to them by way of security—and they refused to make any more payments.

There having been a payment due at Whitsunday 1841, in the autumn of that year, the bank refusing to pay, Gardyne instituted this action against the bank, to compel them to pay, and to have a declaration that they were liable to pay the arrears which had accrued, due at Whitsunday, with all future payments which should become due,—calling upon the Court to make that declaration, and to decree payment of what was and should become due up to the time of the final decree. The case was heard, and the Lord Ordinary did not agree with the pursuer. The Lord Ordinary was of opinion that the bank was not liable, and by his interlocutor so decided. Against that there was an appeal to the Court of Session, and all the Judges were consulted. There was a difference of opinion among them. Eight Judges were of opinion in favour of the pursuer, the present respondent, and five were in favour of the bank.

Now the pleadings were thus:—Gardyne, as I have already stated, sought by his summons to obtain a declaration, that it "should be found and declared, by decree of the Lords of Session,

that the ground annual or yearly payment of £83 5*s.*, and the interest and penalty effeiring thereto, form real and preferable burdens over, and affecting the foresaid subjects, in terms of the foresaid contract: And further, that the said Royal Bank, defenders, as proprietors feudally infeft and in possession of the said subjects, and their successors and assignees in and to the said subjects, are bound to make payment to the pursuer, as trustee foresaid, of the foresaid ground annual during the not redemption thereof," that is, until it should be redeemed: "And further, the said Royal Bank should be ordained to make payment to the pursuer of the proportion of the said ground annual which fell due at Whitsunday last, and of the said ground annual of £83 5*s.*, in equal portions at the *terms of Martinmas and Whitsunday*." It sought to compel the bank to make payment of the arrears then due, and of the future arrears.

The Royal Bank, by their defence, insist upon two pleas. *First*, they say—"Even supposing, what is not the case, that the defenders were proprietors of the subjects in question, they could not be compelled to continue to hold it against their will, and to pay the ground annual, inasmuch as they are singular successors who have never come under any personal obligation to make such payment. Their liability could not, in any view of their right, be extended beyond the period of their actual possession." That is their first proposition. Then they say—"Whatever might have been the liability of the defenders in the case supposed," that is to say, supposing they had been actual proprietors, "there is no ground on which they can be held liable under the existing circumstances, they being, not proprietors, but mere creditors holding a security over the property, the radical right thereto remaining with their debtor up to the date of the sequestration, from and after which their possession entirely ceased.

As I have already stated, the Lord Ordinary thought with the defenders, that they were not liable; he thought that they were to be treated merely as holders of a security. The majority of the thirteen Judges before whom eventually the case came, were of a contrary opinion. Eight thought that the bank was liable, and five that it was not. The result was that the final interlocutor was in favour of the pursuer, and against the bank. Against that the bank has appealed.

Now, my Lords, the decision of the Court of Session rested on these two grounds:—*First*, that Gardyne had a right to treat the bank as being the absolute owners, and not as mere creditors holding an heritable security; and, *secondly*, that, being owners, they are personally liable for the ground annual until they make a *bonâ fide* transfer to a new vassal. The only difference of opinion among the Judges was on the first point. Eight of the Judges were of opinion that, where the procuratory of resignation is absolute, and sasine is given absolutely, as in this case, there the creditor so getting resignation and sasine is vested in the radical and original right of the granter—that he becomes thereby the vassal, and the only vassal of the Crown—that his right can only be extinguished by a resignation made by him as vassal in favour of the debtor, or of some other person, and by such other person being duly infeft thereon—and that, until such transfer has been made, the party infeft continues liable to all the burdens attaching on an absolute purchaser. The other five Judges thought that this was a narrow and technical view of the law—that the question must be decided precisely as it would have been if the resignation, and sasine thereon, had, on the face of the instruments, shewn the transaction to be one of disposition by way of security only—that the circumstance of the back bond which embodies the condition being by a separate instrument distinct from the resignation and sasine, makes no difference in principle—and that a security constituted like this, by an absolute disposition, qualified by a back bond, forms in truth but an heritable security for debt, and cannot subject the party who takes the security, to the burdens and duties of an owner.

The conflicting views on this subject are given with great clearness in the judgments in the Court below. But, in the view which I have taken of the case, it is not necessary for this House to decide on which side the weight of argument preponderates. I will merely remark, in passing, and in accordance with the view taken by the majority of the Judges, that where the law enables and allows parties to charge and burden their property by conveyances on the face of them absolute, it may give rise to great difficulties if the Court should hold that such instruments are not to have all the qualities which, on the face of them, they purport to have.

It is not however necessary to pronounce any judgment here on this point, for it is plain that all the Judges have, on the other part of this case, been proceeding on a view of the law, which, after the decision of this House in *Millar* v. *Small*, cannot be sustained. All the Judges assume, that supposing the Royal Bank to have been actual purchasers, and so owners, they would clearly have been responsible, personally, for the ground annual; that according to the law as laid down in the case of *Soot's Trustees*, Duff was not bound after he had disponed to the Royal Bank, but that his original personal liability then attached to his disponees.

In this view of the law the Court of Session would clearly have been right, if the principles laid down in the case of *Soot's Trustees* could have been sustained. But the judgment of this House has shewn that the law was not correctly understood in that case. It is plain, according to the decision of your Lordships in the case of *Millar* v. *Small*, that Gardyne did not lose his personal remedy against Duff, as all the Judges assume him to have done, when he made the

disposition in favour of the Royal Bank. The principle of that decision also shews, that here the bank never incurred any personal liability. When Gardyne sold to Duff, what he acquired was a personal right against Duff and his representatives, in all time, for payment of the ground annual; and further, a right against the land into whosesoever hands it might come. But he acquired no personal right against purchasers from Duff. It was not competent to Duff to give him any such right. In the case of *Soot's Trustees*, the Court of Session held that the personal obligation passed from the party who had entered into it, and was transferred to the purchaser. But this House decided in *Millar* v. *Small*, that such a personal obligation, or covenant, remains still binding on the original party, and is not affected by the sale and transfer of the land.

It is hardly necessary to remark, that there is here no personal obligation whatever arising from the mere tenure of the land, independently of contract. In the case of superior and vassal, the vassal for the time being is personally liable for the feu duties, just as, in the case of landlord and tenant, the tenant for the time being is personally bound to pay the rent. That is a liability resulting from principles of tenure. In both these cases, the vassal in the one case, and the tenant in the other, is personally liable by reason of what in this country is called privity of estate. But the doctrine has no application to a case like the present, where there is no such relation subsisting. This is very distinctly laid down and commented on by Lord Wood in his opinion given in the case of *Soot's Trustees*, 3 Ross L. Ca. 69. His Lordship there explains, that according to the old forms of the deed constituting a ground annual, there was no covenant or obligation entered into by the purchaser of the land, binding himself personally to make payment. And the consequence was, that the seller—*i. e.* the owner of the ground annual—had no personal remedy. "The land alone," his Lordship says at page 78, "was directly bound in payment of the ground annual," that is, the deed in its ancient form, without a personal covenant, warranted no immediate proceeding against the proprietor. It did not give an active title to enter into possession, by a process of maills and duties. The ground annual was levied by a poinding of the ground, and so forth. Then, after stating that the form of the deed had been altered in modern practice, by making the purchaser enter into a personal covenant, he proceeds to state, that this change was introduced, not for the purpose of retaining a personal right of action against the party binding himself by the original deed, and against his representatives, but in order that this personal obligation might attach on all persons, as they should from time to time succeed to the property, and so that the owner of the ground annual might have a right of action personally against every successive owner, which, but for the original obligation, he would not have possessed.

Your Lordships decided in the case of *Millar* v. *Small*, that the party who had bound himself and his representatives by a personal obligation, did not cease to be liable by reason of his having parted with the land. The principles, on which that decision rests, establish also that no personal liability is transferred to a purchaser on a transfer of the land. This, therefore, decides the question now before your Lordships. The Judges below assumed the law to be such as it was held to be in the case of *Soot's Trustees*. I will take it for granted for the present that the decision now under consideration would have been right if the foundation had been sound. But, that foundation failing, the superstructure fails also. And, on this short ground, I must advise your Lordships to reverse the interlocutor of the 11th of March 1851.

*Interlocutor reversed.*

First Division.—Richardson, Loch and M'Laurin, *Appellants' Solicitors*.—Thos. W. Webster, *Respondent's Solicitor*.

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MAY 30, 1853.

## EBENEZER ADAMSON, *Appellant*, *v.* ROBERT BARBOUR, *Respondent*.

Poor-Law—Settlement—Parent and Child—Derivative settlement. *A man, who had no settlement but that of birth, was transported for theft, leaving a wife and children. The mother did not apply for relief from the parish for herself but only for the children, and there was no averment that she was a proper object of relief:*

HELD (reversing judgment), *that the parish of the father's birth settlement, (or that of his residential settlement, if he had acquired such,) and not that of the children's birth, was liable in their support.*[1]

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[1] See previous report 13 D. 1279; 23 Sc. Jur. 603. S. C. 1 Macq. Ap. 376: 25 Sc. Jur. 419.