CLARK, ... APPELLANT.

GLASGOW ASSURANCE COMPANY, . . RESPONDENTS.

1854.
18th, 19th, 22nd, and 23rd May.
8th August.

Where a conveyance by feu-contract contains a covenant that the purchaser shall keep the premises in repair—if the premises are accidentally burnt down, he is bound to rebuild them.

A subsequent taker from the first purchaser will be similarly bound, if it appear that the obligation was intended to run with the land and form a real burden on the property.

Where the law casts a duty on a man which, without fault on his part, he is unable to perform, the law will excuse him for non-performance.

But where a man by his own contract binds himself to do a thing, he is bound to do it, if he can—notwithstanding any accident—because he ought to have guarded by his contract against it.

Method of compelling specific performance of agreements in Scotland.—Form of prayer.

Semble—Terms of art may have different significations in England and Scotland; but popular language meant to express ordinary agreements ought to have the same interpretation on both sides of the Tweed; and where the English Courts have for a long time attached a certain meaning to certain words, the Scotch Courts, having no decision to the contrary, may safely follow them.

Remarks of the Lord Chancellor as to the time limited for bringing cross appeals to the House of Lords.

IN consideration of a certain annual feu-duty, the Appellant conveyed to David Smith five acres of land, with a mill thereon; the feu-contract containing

an obligation in these terms:—"And the said David Smith, his heirs and successors, shall be bound and obliged, as by their acceptance hereof they bind and oblige themselves, to maintain and uphold the mill now built upon the said lands in a proper and sufficient working condition, and shall also keep the present dwelling-houses in a proper and tenantable state of repair; and shall be further bound to keep the said mill and houses aforesaid constantly insured against loss by fire to the extent of 900*l.*, and regularly to pay the premiums of insurance, and to exhibit the policy at all times when asked by the said William Clark, his heirs and successors."

Smith was duly infeft on this feu-contract; and the instrument of seisin in his favour contained the above obligation.

In 1839 Smith sold the property to Steven & Company; the conveyance to them containing a clause in these terms:—"With and under the whole burdens, conditions, provisions, prohibitions, restrictions, declarations, privileges, immunities, and others contained in the feu-contract entered into betwixt the said William Clark and me, the said David Smith, of date the 3rd day of March, 1838, and in my instrument of seisin thereon, dated the same day, and recorded in the Particular Register of Sasines at Hamilton the 16th day of the said month of March."

Steven & Company were duly infeft, and the seisin in their favor bore to be granted "with and under the reservations, burdens, provisions, restrictions, privileges, immunities, and others contained in the said feu-contract and in the said disposition."

In 1845 Steven & Company conveyed the property to the present Respondents, "but always under the burden of the feu-duties and other conditions and burdens contained in the feu-contract of the foresaid

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lands between the said William Clark and David Smith." The precept of seisin directed infeftment to be given "under the burden of the feu-duties and other burdens and conditions," contained in the feu-contract.

The Respondents were duly infeft, and the instrument of seisin in their favour expressed that infeftment was given under the burden and conditions contained in the original feu-contract.

In February, 1847, the mill was by an accidental fire totally consumed.

The action was by the Appellant in his character of feudal superior against the Respondents as his vassals, requiring them to re-build the mill, and to restore the property as far as possible to the state in which it was before the damage had arisen; and the Court was called upon to decree that all necessary operations should be executed "at the sight of a person properly qualified to be appointed by the Court; and the Respondents were to make payment to the Appellant of 5000*l.*, or such other sum as might be necessary to enable him to rebuild the mill, and put the same in a proper working condition; or in case it should be found that the Respondents were not bound to rebuild the mill, and put the same in proper working condition—then that they should be decreed to lay out 900*l.* in erecting buildings or other permanent improvements on the premises; and in the event of their failing to do so within a reasonable time, then the Court was to ordain the said buildings, houses, or other permanent improvements, to be built or executed at the sight of a properly qualified person, to be named in course of the proceedings; and the Respondents were further required to make payment to the Appellant of the sum of 900*l.* to defray the expense of the said operations (*a*).

(*a*) The prayer above set out is curious, as showing how the

The defence was as follows:

First. The obligations come under by David Smith in the original feu-contract were not constituted a burden upon the property, and cannot be imposed upon the defenders as onerous singular successors.

Secondly. The obligation to maintain and uphold the mill built upon the lands in a proper and sufficient working condition, cannot be extended to import an obligation to build a new mill, when the former one has been burnt down.

Thirdly. According to the terms of the obligation in the feu-contract, the superior could not insist against any party to renew the buildings when destroyed by fire, beyond the extent of 900*l.* for which they were to be insured.

The *Lord Ordinary* (Lord *Ivory*) pronounced judgment as follows:

"In respect that the said mill has perished by a damnum fatale, finds that the defenders are not bound to rebuild and restore the same by force of the clause in the feu-contract, which takes the vassal bound to uphold and maintain the premises in sufficient working condition, and in a proper and tenantable state of repair; and in so far sustains the defences, assoilzies the defenders from the conclusions in the first alternative branch of the summons, and decerns; but under the other alternative, finds that the defenders, as parties who must be held to have adopted the feu-contract originally entered into between the Pursuer and David Smith, and as therefore liable in the whole conditions and obligations imposed by that contract so far as intended to subsist during its entire continuance, —not against the original vassal and his heirs, but against every successive party who should come to

specific performance of an agreement, which it would not be very easy to enforce in England, is compelled in Scotland.

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succeed or be substituted in the full right of the subject as in room and place of the original vassal,—and especially as being thus liable to fulfil the obligation laid upon the vassal to keep the mill and houses which were erected on the said subjects at the date of said contract constantly insured against loss by fire to the extent of at least 900*l.*, are now bound to lay out and expend the sum of 900*l.*, so far as the same will go, in restoring and replacing the mill referred to in the summons."

To this judgment the First Division of the Court below adhered, whereupon the present appeal was tendered.

A cross-appeal was likewise brought on behalf of the Respondents, complaining of the judgment in so far as it was adverse to them.

The *Lord Advocate* (Mr. *Moncreiff*) and Mr. *Rolt*, for the Appellant: A damnum fatale was in the contemplation of the parties, and not ordinary tear and wear merely. The covenant runs with the land, and transmits with the feudal right. *Tailors of Aberdeen* v. *Coutts* (*a*), *Millar* v. *Small* (*b*), *Royal Bank of Scotland* v. *Gardyne* (*c*), *Tulk* v. *Moxhay* (*d*), *Patching* v. *Dubbing* (*e*), *Coles* v. *Sims* (*f*), *Bullock* v. *Dommitt* (*g*), *Bayne* v. *Walker* (*h*).

The cross-appeal is too late. The 6 Geo. IV. c. 120, sect. 25, requires that all Scotch appeals shall be presented within two years from the date of the last decree or order complained of, or any of the first fifteen days of that Session of Parliament which shall immediately succeed the expiration of such two years (*i*).

(*a*) 3rd August, 1840.
(*b*) *Suprà*, 345.
(*c*) *Suprà*, p. 358.
(*d*) 2 Phill. 774.
(*e*) 1 Kay, 1.
(*f*) 1 Kay, 56.
(*g*) 6 Term R. 650.
(*h*) 3 Dow. 235.
(*i*) Macqueen H. of L. 299.

The last interlocutor is dated the 20th June, 1850. This cross-appeal was not presented till the 14th December, 1852, the Session having opened on the 4th November, 1852. It must therefore be dismissed with costs.

The *Solicitor-General* (Sir *R. Bethell*) and Mr. *Anderson*, for the Respondents: The decision of this House in *Millar* v. *Small* (*a*) ought to determine the present case; for it was there held that the original purchaser continues bound notwithstanding a transfer of the property. And there are numerous other authorities to the same effect; the obligation not being expressly made a real burden on the land. *M'Intyre* v. *Masterton* (*b*).

The English cases as to covenants running with the land are all upon leases. But there is here an absolute disposition of the property. The relation is not that of landlord and tenant, but that of superior and vassal.

With respect to the cross-appeal it is merely an incident to the chief appeal. The practice applicable to original appeals does not govern in cross-appeals, which last may be presented within the time limited by the Standing Order 104. If this were not so, any Appellant in an original appeal might defeat altogether the bringing a cross-appeal; for he might refrain from appealing till the last day limited for presenting his original appeal; so that the Respondent could not possibly thereafter present a cross-appeal if the statute were held to apply. Such a construction would leave the Respondent alike without remedy under the statute and the standing order. To exclude this cross-appeal, therefore, would be a great injustice, besides violating a long-settled understanding, and a practice familiar to all who are accustomed to act under the orders of the House.

The *Lord Advocate* replied.

(*a*) *Suprà*, 345.

(*b*) 3 Feb. 1824.

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The LORD CHANCELLOR:

My Lords, two questions arise upon this appeal. First, Are the Respondents bound by the obligation of Smith to maintain and uphold the mill? Secondly, If they are, do the terms of the contract impose upon the Respondents the duty of rebuilding the mill, it having been burnt down? The *Lord Ordinary* held that the Respondents were bound by the conditions of the original feu-contract, and that this contract did not impose upon them the obligation to rebuild, but that it did oblige them to keep the mill insured in the sum of 900*l.*, which he considered they were bound to expend in repairing it. He was of opinion, in short, that the contract was one which, as we should say in this country, ran with the land. The Court of Session adhered to the interlocutor of the *Lord Ordinary*, and from their decision we have the present appeal.

On the first point, namely, whether the contract entered into with Smith ran with the land, and became binding therefore upon the successive purchasers, all the Judges were clearly of opinion in favour of the Appellant. They all thought it clear that the obligations which were originally entered into by Smith were binding on all who came in through or under him. Upon this part of the case I cannot entertain a doubt, and never did. The law applicable to it was fully considered in the case of the *Tailors of Aberdeen* v. *Coutts* (*a*); which I take from Ross's Leading Cases, as being rather more accessible to me than the other Reports. That case has been once or twice lately mentioned before your Lordships, and it is hardly necessary for me to advert to it in detail. The question there was whether the parties were bound to maintain a metal railing round the centre of a square in

(*a*) 28 Dec. 1834, 3 Ross's Leading Cases, 273.

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Aberdeen. The purchasers had undertaken to contribute towards the pavement and to keep the railing in repair, and the question was whether the purchasers under the original takers were bound by that contract. The case came before your Lordships' House. It was remitted back to the Court of Session, in order that all the Judges might be consulted upon it, and that the law of Scotland upon the subject might be well considered, and settled. A more able opinion than that which was sent up by them, I may take the liberty of saying, never was framed. It was understood to have been written by Lord *Corehouse;* and was signed by him as well as by Lords *Gillies*, *Mackenzie*, and *Jeffrey*, the Judges of the other Division concurring in it. That opinion was to the following effect:—

"To constitute a real burden or condition either in feudal or burgage rights, which is effectual against singular successors, words must be used in the conveyance which clearly express or plainly imply that the subject itself is to be affected, and not the grantee and his heirs alone; and these words must be inserted in the seisin which follows on the conveyance, and, of consequence, must appear upon the record. In the next place, the burden or condition must not be contrary to law, or inconsistent with the nature of this species of property; it must not be useless or vexatious; it must not be contrary to public policy, for example, by tending to impede the commerce of land, or create a monopoly. The superior, or the party in whose favour it is conceived, must have an interest to enforce it. Lastly, if it consists in the payment of a sum of money, the amount of the sum must be distinctly specified. If these requisites concur, it is not essential that any *voces signatæ*, or technical form of words should be employed. There is no need of a declaration that the obligation is real, that it is *debitum fundi*, that it shall be inserted in all

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the future infeftments, or that it shall attach to singular successors. It is sufficient if the intention of the parties be clear, reference being had to the nature of the grant, which is often of great importance in ascertaining its import. Neither is it necessary that the obligation should be fenced with an irritant clause, and far less with irritant and resolutive clauses. If the condition is one usually attaching to the lands in a feudal or burgage holding, in particular if it has a *tractus futuri temporis*, or is of a continuous nature, which cannot be performed and so extinguished by one act of the disponee or his heir, words less clear and specific will suffice to create it than when the burden appears to be of a personal nature; for example, the payment of a sum of money, once for all, in terms of a family settlement."

The learned Judges then proceed to give various *indicia* which are to show whether the obligation is meant to be a permanent burden attaching upon the land, or something which is meant to be done once for all. They mention different instances, and they give them all as so many tests to determine whether the condition comes within the description of having connected with it a *tractus futuri temporis*.

Now, surely, nothing can more clearly indicate perpetual endurance than a contract to maintain and uphold a building. This part of the case does not admit of any doubt. Indeed, the Judges below were quite clear upon it. We cannot suppose that the superior meant to look to any one else than the owner of the lands for the time being, as the person who should keep the buildings in repair. At all events, he certainly intended that the owner should be always liable, whether the original feuar Smith and his heirs should or should not also continue liable (*a*).

(*a*) *Millar* v. *Small*, *suprà*, p. 345.

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On this first point, I say, the Judges were unanimous, but on the second point they were divided. Lord *Fullerton* thought that the condition did impose upon the Respondents the duty of rebuilding, but the *Lord President Boyle*, and Lords *Mackenzie* and *Cuninghame*, concurred with the *Lord Ordinary*, and held that a loss by fire was a damnum fatale, to which the condition of keeping in repair did not extend.

My Lords, I confess that I am unable to concur upon this point with the majority of the Judges.

Construe the words according to their obvious meaning, and I think all doubt will disappear. What is the interpretation put upon them in England? It is, perhaps, almost pedantic to cite authorities on such a point, but I will refer your Lordships to two cases. One of them is an old case, which occurred during the Civil Wars, *Paradise* v. *Jane*, reported in Aleyne (*a*), and sometimes called *Prince Rupert's case*. There the Plaintiff brought his action for rent behind upon a lease. The Defendant pleaded, "that a certain German Prince, by name Prince Rupert, an alien born, enemy to the king and kingdom, had invaded the realm with an hostile army, and with the same force did enter upon the Defendant's possession, and him expelled and held out of possession, whereby he could not take the profits." This was set up as a defence against paying the rent. But the plea was resolved to be insufficient; because, although "where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him. As in the case of waste, if a house be destroyed by tempest or by enemies, the lessee is excused. But when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident

(*a*) p. 26.

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by inevitable necessity, because he might have provided against it by his contract; and therefore if the lessee covenant to repair a house, though it be burnt by lightning or thrown down by enemies, yet he ought to repair it." This, my Lords, is a leading case, and proceeds upon very intelligible grounds. It was followed in another case, also a leading authority, that of the *Earl of Chesterfield* v. *The Duke of Bolton* (*a*), in which, just in the same way, there was a covenant to keep in repair, and the property was burnt down. It was urged there:—"The covenant is that he shall keep in repair, not that he shall rebuild; and therefore it could not be the intent of the parties to bind the Defendant beyond the common and ordinary repair, and not to make a new house if, by accident, without the Defendant's default, it should be burnt or demolished." Such was the argument. "*Sed non allocatur*, for when the Defendant covenants he will repair and keep in good and sufficient reparation, without any exception, this imports that he should in all events repair it; and in case it be burnt or fall down, he must rebuild it, otherwise he doth not keep it in good and sufficient reparation; and this is warranted by the cases cited, which show the covenantor must rebuild if necessity require, as where the house is burnt by fire, &c."

The same rule was adhered to in a much more recent case, which came before Lord *Kenyon* in the Court of King's Bench, *Bullock* v. *Dommitt* (*b*), where the doctrine was supposed to be so clear, that Mr. Baron *Wood*, then at the Bar and engaged as counsel for the Defendant, declined to argue it.

So that, in this country, there can be no doubt upon the question. Now, it would be very strange, if the same words, not being words of art, should have one meaning south of the Tweed, and another meaning

(*a*) Comyn's Rep. 627. (*b*) 6 Term R. 650.

north of it. There is no authority in favour of such a proposition.

Reliance, indeed, was placed upon *Bayne* v. *Walker* (*a*), but that was not a case as to the meaning of words by which parties had bound themselves, but as to the law where there had been no express contract. The question was whether a landlord was bound to rebuild a house which had been burnt down. It was held that he was not, because the obligation was not one which he had entered into by contract, but one which it was endeavoured to cast upon him by law.

It is extremely important to leave parties to use their own language, and then the Courts ought to interpret it according to its natural sense. This induces care and accuracy in the selection. Lord *Eldon* observes in that very case of *Bayne* v. *Walker*, that "it will be the fault of the individuals themselves if they do not so stipulate in their contracts as to make the judgment of law attach upon their cases in such manner as they by their conventions may choose that it should attach."

I think there is great force in Lord *Fullerton's* observations as to the covenant to insure. "This," says that learned Judge, "is a contract between superior and vassal—a perpetual feu—and the contingency of the destruction of the subject was contemplated and provided against. The obligation to uphold the building was also perpetual. Its object was to give the superior an effectual security for his feu duty, and for the purpose of preserving that security there is a clause providing that an insurance of 900*l.* was to be effected. Now I really do not see what is the use of this last obligation unless the mill is to be rebuilt. There seems to be no obligation to pay over to the superior the sum recovered under the insurance. I think the obligation imports that the vassal is bound

(*a*) 3 Dow, 235.

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to rebuild the mill, and to keep it insured as an additional security for his ability to perform the leading obligation to rebuild. There is nothing to show that the superior has any right to the sum in the policy. The leading obligation is the obligation to rebuild. Without it the obligation to insure goes for nothing." That covenant, as Lord *Fullerton* remarks, would have no meaning or object if the feuar were not liable to rebuild. The covenant to insure in these cases does not impose an obligation to rebuild—it is merely an additional benefit to the superior by securing to the feuar the means to a certain extent of performing his obligation. Upon that point I may refer to the observation of Lord *Ellenborough*, in *Digby* v. *Atkinson*(*a*). "The covenant to insure was introduced for the security of the landlord, leaving the tenant still absolutely liable on the covenant to repair."

No authority was cited showing that these words ought not to receive their natural construction, and therefore I think we ought to interpret them according to their *primâ facie* obvious import, and to hold that the Respondents are liable to rebuild.

There was a cross-appeal by the Respondents, complaining of the decision below, so far as it was adverse to them; but upon that appeal I am decidedly of opinion that it is out of time.

The statute of 6th Geo. IV., chap. 120, sec. 25, is decisive. The time allowed is two years and the first fortnight after the first day of the ensuing Session of Parliament. I need not state the dates minutely, but it is quite clear that the cross-appeal was presented after the limited period; and there is no exception in the statute as to cross-appeals.

I must remark further, that I think this appeal is not in any fair sense a cross-appeal—it is an original

(*a*) 4 Camp. 278.

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appeal, which the Appellants would probably not have thought it politic to bring, but for the original appeal—but that circumstance does not make it a cross-appeal. The standing order to which we have been referred, No. 10, which says that every cross-appeal shall be lodged within a fortnight after the answer is put in to the original appeal, cannot enlarge the time positively fixed by Act of Parliament. The object of the order was to limit, not to enlarge the time for cross-appeals.

Therefore, what I move your Lordships is, on the first appeal to reverse the interlocutors of the *Lord Ordinary* and of the Court of Session, and to declare that the Respondents are bound to rebuild the mill and other premises destroyed by fire; and with that declaration to remit the cause to the Court of Session. The cross-appeal will be dismissed with costs.

The Lord BROUGHAM:

My Lords, I entirely agree with my noble and learned friend.

Mr. *Rolt*: My Lords, we should have the security of the 900*l.* insurance money.

The LORD CHANCELLOR:

I had better say nothing about the 900*l.* As Lord *Ellenborough* remarked in *Digby* v. *Atkinson*, the stipulation for insurance was only that the tenant might have the means of performing his other covenant.

Interlocutors complained of in the original appeal reversed; and the Cross-appeal dismissed, with Costs.

DEANS & ROGERS—RICHARDSON, LOCH, & MCLAURIN.