Brown, the agent of Mr. Colquhoun, in these terms—(reads receipt, dated 7th Feb. 1849). So in the very same way the rent which accrued on 15th July 1849 was paid—not all in one payment, as they seem to have been in difficulty at the time, but in two payments, making altogether £46, the balance being allowed for deductions. In that, as in the former instance, they obtained a receipt from the agent of Mr. Colquhoun, the money being paid by Connor "as due by Jeremiah Borrows and Co." These receipts were given on five different occasions. Now it may be that the partnership was void as against the trustee under the sequestration, or it may be that all profits made would be for the benefit of the trustee, but the fact undoubtedly was, that such a partnership was created, and that the rent was paid by Connor for the company, and so accepted by the landlord on several occasions. I am clearly of opinion, therefore, that this gave a title of possession against the landlord, which could not be questioned by interdict.

It was objected by the counsel for the respondents, that there was no proof of this partnership, or of their tenancy or occupation having ever been recognized by Mr. Colquhoun, inasmuch as the payment had been made only to his factor or agent. But, in my opinion, it would be a very dangerous doctrine to hold that gentlemen absenting themselves from their property, and leaving an agent to manage in their stead, are not to be bound by their acts in a transaction of so ordinary a nature as this. Such a remark is all the more applicable in the present case, especially when it is found that Mr. Colquhoun has in the strongest way recognized the same party as his agent in this matter; for the very petition to the Sheriff in February 1850 was signed, not by Mr. Colquhoun himself, but by his factor, who was authorized to bind him—the same factor who signed the receipts.

It is obvious from the passage read from the Lord Ordinary's note, that an interdict in Scotland is very analogous to an English injunction. If the landlord could not remove the tenant by that kind of process, as I think he clearly could not, it appears to me that the union of the trustee with him could make no difference. Supposing Borrows, instead of working the mine, which he had held since the bankruptcy, had got possession by contracting with the landlord of some other mine, he could only work, it may be, for the benefit of the creditors, but still he could not be removed by interdict at the instance of the trustee. In this case I think the Judges below have not given sufficient weight to the recognized possession of Borrows and Co. It may be that they have no title to resist an action of removing, and that they are accountable to the trustee for all the profits; but that is not the question. The question is, whether, in such a case as this, the tenant can properly be removed by interdict? I entirely agree with the view taken by the Lord Ordinary, that the tenant could not be so removed; and I accordingly move your Lordships to reverse the interlocutor of the Court of Session, and affirm that of the Lord Ordinary.

I may mention that LORD BROUGHAM, who was present during the argument in this case, and has read the notes I drew up for my own guidance, requested me to intimate his full concurrence in these observations.

Interlocutor of Inner House reversed; and that of the Lord Ordinary affirmed.

Robertson and Simson, *Appellants' Solicitors.*—Richardson, Loch and Maclaurin, *Respondents' Solicitors.*

AUGUST 11, 1854.

KING'S COLLEGE OF ABERDEEN, *Appellants*, v. LADY JAMES HAY and HUSBAND, *Respondents.*

Feu Charter—Bond of the Vassal for Feu Duty—Perpetual Obligation—Feudal Relation—Construction—*A bought lands for a certain feu duty from B at a public roup, and, in terms of the articles, gave a bond, binding himself, "A his heirs, executors and successors," to pay the said feu duty for ever. C joined as cautioner for A, but binding himself only for ten years. The bond bore to be in pursuance of the articles of roup. B afterwards granted a feu charter to A, which narrated the granting of the bond, and bore to be in implement of the articles of roup, and A was duly infeft under this charter.*

HELD (reversing judgment), *That A and his general representatives continued liable for ever for the payment of the feu duty, notwithstanding their alienation of the feu.*[1]

The appellants, the King's College of Aberdeen, on 28th May 1818, being heritable pro-

[1] See previous report 14 D. 675; 24 Sc. Jur. 342. S. C. 1 Macq. Ap. 526: 26 Sc. Jur. 643.

prietors of the lands of Bankhead, exposed the same for sale by public roup, for a feu duty of money and victual.

The articles of roup provided.—"*Tertio*, The person who shall be preferred to the purchase of the said lands shall be obliged, within fourteen days after the roup, to grant a personal bond to the exposer's constituents, with sufficient security, to their satisfaction, for the regular and punctual payment of the foresaid yearly money and victual feu duty, at the terms before mentioned, for the space of ten years from the term of Whitsunday last, with the legal interest of each term's payment thereof from the time the same becomes due till paid, and a fifth part more of liquidate penalty in case of failure; and which personal bond shall also contain an obligation on the purchaser and his heirs and successors for the regular and punctual payment of the said yearly feu duty in all time from and after the expiry of the said ten years, with interest and penalty as aforesaid; and in case the purchaser shall fail in granting such bond, he shall not only forfeit his interest in the purchase, but also the sum of £1000 sterling of liquidate penalty. *Quarto*, Upon the purchaser's granting a personal bond as aforesaid, the exposer becomes bound, and obliges himself that the Principal and Professors of said College, or a majority of them, shall execute and deliver to the purchaser a charter to the foresaid lands, &c., in favour of him, his heirs and assignees, containing a right to the rents, maills and duties of the said lands, &c., in all time from and after the term of Whitsunday last past in this present year, which is hereby declared to be the term of the purchaser's entry thereto, but with and under the burden of the yearly feu duty before mentioned, and these provisions and declarations," &c. "And further, that every heir and singular successor acquiring right to the said lands and others, or any part thereof, shall be obliged, within six months thereafter, to take out a charter or entry upon their own expenses from the Principal and Professors of said College as superiors, and to grant a personal obligation, if required, for payment of the said feu duties."

Mr. Duncan Davidson attended the sale, and purchased the lands for James Forbes of Seaton, at a feu duty of £502, and of fifty bolls of best bear. Mr. Forbes, with Mr. Davidson as cautioner, thereafter, on 12th Aug. following, executed a bond, which, after narrating the purchase and the above articles of roup, proceeded thus:—"I, the said James Forbes, the purchaser of the foresaid lands and others, do hereby, in implement of the said articles of roup, so far as incumbent on me, bind and oblige myself, my heirs, executors and successors, duly and regularly to make payment to Dr. Jack, &c., the sum of £502 of money feu duty for the said lands and others, at the term of Martinmas yearly, and of the price of fifty bolls of best bear, conform to, &c.; and so to continue in payment at the terms above mentioned in all time thereafter, with a fifth part more of each term's payment of liquidate penalty in case of failure of punctual payment, and the legal interest thereof during the not payment; and for and with the said James Forbes as principal, I, the said Duncan Davidson, as cautioner, bind and oblige myself, my heirs, executors and successors, for the true and punctual payment of the said yearly feu duty, money and victual, at the terms above specified, during the space of ten years from the said term of Whitsunday last, as well as for the penalties and interest above specified in case of failure; and I, the said James Forbes, bind and oblige myself and my foresaids to free and relieve the said Duncan Davidson," &c.

On the 23d Oct. 1818 the College granted a feu charter in favour of Mr. Forbes, which narrated the purchase and the execution of the bond. Mr. Forbes was duly infeft on this charter, and died in 1842. His only child, Lady James Hay, was infeft on a precept of *clare constat*. She and her husband sold the subjects, in 1847, for £30, to James Gauld, who was duly infeft, and then charged the College to enter him as their vassal. The College suspended the charge, and thereafter raised the present action against Lady James Hay and husband, concluding "that the heirs, executors and successors whomsoever of the said Lady Hay, and all others, the heirs, executors and successors of the said deceased James Forbes, now are, and shall continue personally liable for payment of the said feu duty."

The Lord Ordinary (Wood) held that Lady Hay's liability as the representative of James Forbes did not cease on her selling the land to Gauld, but that the obligation in the bond was a personal obligation, which continued notwithstanding the disruption of the feudal relation of superior and vassal in the lands. Another case involving the same point, viz. *Brown's Trustees* v. *Webster*, occurred at the same time, and the two cases were argued before all the Judges, when ultimately a majority of eight to five of the whole Judges held that Lady Hay's liability had ceased. Against that decision the King's College appealed to the House of Lords.

The appellants, in their *printed case*, contended that the interlocutor ought to be reversed for the following reasons:—"1. Because the covenant of James Forbes, the original feuar, to pay the feu duties, constituted the valid and effectual contract between the appellants and him, and neither he nor his heirs or successors had any power to destroy this contract, or discharge themselves from payment or performance by a sale of the land, or by any other act to which the appellants were not consenting parties. 2. Because the respondents, as representing James Forbes, are liable under his express contract for the feu duties. 3. Because this liability of the respondents would be established, even though the covenant or obligation of Forbes had been

incorporated in, and had formed part of, the feudal grant, inasmuch as a privity of contract would thereby have been established, which would endure until both parties to it should concur in its discharge. 4. Because there is no analogy between the present case and the case of a feu right constituted by a charter or grant, containing a *reddendum*, without any express obligation to pay the feu duty, inasmuch as the liability under such *reddendum* is founded in privity of estate only, and naturally and necessarily comes to an end when the privity of estate is destroyed by alienation. 5. Because the covenant to pay feu duties, having been constituted by a separate personal bond or obligation, imposed on James Forbes and his general representatives a liability for payment of the feu duties, from which they cannot be discharged by any transference of the feu right."

The respondents, in their *printed case*, relied on the following reasons:—"1. Because, at common law, the land conveyed by a feu charter is the proper debtor for the payment of the feu duty. The obligation to pay the feu duty runs with the land, and when the original vassal ceases to be connected with the land, his obligation to pay the feu duty ceases also. 2. Because there is nothing in the deeds founded on to prevent the application of the common law."

Lord Adv. Moncreiff, *Sir F. Kelly* Q.C., and *Anderson* Q.C., for appellants.—This is an ordinary moveable or personal bond, and the words "heirs, executors and successors," are the appropriate phraseology to bind the general representatives of the obligor. The word "successors" does not mean "successors in the land."—*Thomson*, 22d May 1810, F.C. There can be no doubt, therefore, that reading the bond by itself, it amounts to a perpetual covenant of James Forbes and his heirs to pay the feu duty. There is no exception or qualification as to the obligation ceasing when the land shall be sold, and such a condition cannot be implied. It is an elementary rule of construction, that a deed is not to be construed by reference to extrinsic circumstances, but a plain meaning is to be given to plain words. When parties contract, and there is no ambiguity in their language, the contract must be given effect to unless illegal; but there is nothing illegal in such a perpetual covenant.—*Per* Lord St. Leonards in *Millar* v. *Small*, 1 Macq. Ap. 353; *ante*, p. 222: 25 Sc. Jur. 334. What is there, therefore, to prevent the bond from having its obvious and natural effect? The only answer of the respondents is, that the parties here contracting stand in the relation of superior and vassal—that the feudal relation has been established between them. The feudal relation, however, means nothing more than a certain complement of mutual obligations, which the law implies between the parties, where nothing is said. But there is nothing in this feudal relation to paralyze the parties from superadding to their ordinary common law obligations, whatever other obligations they choose to create by contract, and which are not illegal. It is nothing therefore to say, that when a vassal sells his feu and another is infeft, the liability of the former ends at common law; for we are not discussing what the law implies, but what the contract means. It is said the bond is to be read along with the feu charter, and in subordination to the charter. But the essence of the transaction rather was, that the bond was to be executed before the charter was to be granted. It was intended to be a condition precedent to the charter.

[LORD CHANCELLOR.—The bond was, in fact, the price here.]

Yes. But even taking the bond along with the feu charter, this was not such a personal contract as would transmit against singular successors; for, in the *Tailors of Aberdeen* v. *Coutts*, 1 Rob. Ap. 296, it was said that one of the things that would not so transmit was the payment of a sum of money. Again, see the position of the cautioner. He binds "his heirs, executors and successors," just as the principal does; but his obligation was only for ten years certain; and it contains no qualification or condition as to the principal continuing infeft during these ten years. According to the respondents' view, the principal could have sold his feu next day, and thus get quit of all liability, while his cautioner would have continued liable for the whole ten years; which is absurd. The very object of the cautionary obligation was to prevent the feu getting into the hands of a man of straw, but if the first vassal could at once sell to a man of straw, who of course would not require any cautioner, the result shews the absurdity of the entire transaction, if the respondents' views be correct. The effect of the cautionary obligation, as throwing light on the obligation of the principal, was held to be of great importance in *Millar* v. *Small*, *ante*, p. 222: 25 Sc. Jur. 334, by Lord St. Leonards.

[LORD CHANCELLOR.—In that case the subject of the cautionary obligation was one I did not think very much about at the time; but I am disposed now to think that more importance was due to it.]

At the time the present case was decided, the Court below relied on their decision of *Soot's Trustees*, and *Millar* v. *Small*, which have since been reversed, and thus the argument of the respondents greatly weakened, if not entirely upset. It has clearly been established now that these personal covenants cannot be frittered away out of deference to some vague sense of importance attributed to the feudal relation.

Sol.-Gen. Bethell, and *Ross*, for respondents.—Nothing is better established in the law of Scotland than that the feudal relation, when once created between the parties, has this consequence, that all other contracts, as to the same subject matter, are appurtenant and subservient to that

relation. It absorbs, as it were, all minor engagements. It is a thing unheard of in Scotland, that the engagement of a vassal to pay the feu duty is a perpetual obligation, and that it can exist for ever in gross, independent of the feudal relation. For it is to be recollected, this is a covenant simply to pay feu duty, and it is not like a collateral covenant, as for instance to build a house on the land. Now a feu contract is merely a feu charter, *plus* a personal obligation of the vassal, and was merely introduced, and latterly preferred in practice, because it gave the superior a more direct remedy.—1 Jurid. Styles, 32; Ersk. 2, 5, 54; *Soot's Trustees* v. *Peddie*, 3 Ross, L. C. 69. Yet, in a feu contract, though the vassal binds himself personally, his liability ceases when the feu passes into other hands. Here the bond is in the very same terms as the obligation by which a vassal binds himself in a feu contract. The legal effect, therefore, must be the same in both cases. It can make no difference that the obligation here is on a separate piece of paper, for the bond clearly refers to the feu charter, and is subservient to the relation thereby created between the parties. The bond was merely part of the title, and the two deeds must be read as one instrument, being part of one transaction. It was, at most, a mere accident that a bond was entered into here at all; and it was resorted to simply because the sale was by public roup. If this obligation, then, had been incorporated in a feu charter, the vassal's liability would have ceased along with his possession; and the same result must follow here. Besides, the feu charter here plainly contemplated that there was to be a series of such obligations by each successive vassal. The granting of a bond by each singular successor was made a condition of the feu. An obligation *ad factum præstandum* may be made a condition of the feu, though it is not made a real burden.—3 Ross, L. C. 69. The case of *Millar* v. *Small*, recently decided by the House, instead of contradicting, confirms our contention. There it was merely held, that in the case of a ground annual, which contained nothing of the nature of a feudal tenure, but was a simple matter of contract between debtor and creditor, a personal covenant was not extinguished by the alienation of the land. But in that case it was never contended, that if a feudal relation had existed between the parties the result would have been the same. That the case of a feudal relation was excepted from the rule there laid down, appears in the report of the *Scottish Jurist*, xxv. 334, from the remarks of Lord St. Leonards during the argument, and in his judgment.[1] As to the obligation of the cautioner, it was of the same extent as that of the principal for the first ten years. If the principal had transferred the subjects before the end of the ten years, then the liability of the cautioner would have ceased also, for the latter did not bind himself for the singular successors.

Cur. adv. vult.

LORD CHANCELLOR CRANWORTH.—I have come to be clearly of opinion that the view of this case taken by the minority of the Judges in the Court of Session was the right one. I will assume the law to be, that the ordinary contract of the vassal in a feu contract is operative so long only as the relation of superior and vassal subsists. But, of course, that can be true only in the ordinary case, and when there is nothing special in the terms of the contract; for it must always be open to contracting parties to make, if they think fit, a contract which shall be independent of the feudal relation. Now, here I think it clear, whatever may be the ordinary law, that the parties intended there should be a personal obligation independently of the feu contract. In the *first* place, the obligation is contained in a separate instrument. Though this circumstance is not of itself conclusive, yet it tends strongly to shew that an independent liability was meant to be created. It is no doubt true that two or more instruments may so entirely form part of one transaction, that they ought to be read and construed together; but that is not the case here. So far from the bond being a substantial part of the feu charter, it was in truth to be executed by the purchaser before the seller was bound to convey at all. The vendor was under no obligation to part with his land until the bond was given. In such a state of things it is difficult to suppose that the construction of the bond can depend on the terms of a deed not then executed, and which was not, in fact, executed for more than ten weeks thereafter.

Another circumstance of importance is, that there was here no purchase money except the feu duty, and the bond to secure that comes in the place of what, in an ordinary sale, would have been a bond for the purchase money. Such a bond is clearly of an independent character, and is not to be interpreted by reference to what the subsequent deed of conveyance may contain.

The counsel for the appellants strongly urged, that in the present case there was a cautioner bound for a period of ten years. It was said his obligation was in no way dependent on any feudal relation, for he bound himself absolutely for the payment of the feu duty for ten years, into whosesoever hands the land might pass. If, then, the cautioner was liable for that period, it is

[1] The Solicitor General insisted on referring to the report of the appeal case of *Millar* v. *Small*, given in the *Jurist*, in preference to the official report (1 Macq. Ap. 353). He said the official report was curtailed and defective, omitting most material points, while the report in the *Jurist*, he could testify, from having been counsel in the case, contained a faithful record of what took place throughout the discussion.

difficult to suppose that the principal was not also liable. The inference drawn by the appellants can hardly, therefore, be resisted, if we assume that the true construction of the bond is, that the cautioner was absolutely bound for the ten years.

The true ground, however, on which I rest my opinion is this, that, construing the bond according to its plain and obvious meaning, it is undoubtedly binding on James Forbes and his representatives for ever. Its form is that of a mere personal bond, containing a personal obligation. There was nothing unreasonable, or at all events unlawful, in the vendor's requiring such an obligation; and they are not alleged to have used any fraud in procuring it. They are therefore entitled to insist on its plain literal construction, unless it can be shewn that the parties intended to give it a more restricted operation. It is observed by some of the learned Judges in the Court below, that it lay on the appellants to make their meaning more clear—*apertius mentem explicasse.* I rather think, however, that this is to cast the burden on the wrong party. What the appellants wanted, according to their own statement in the articles of roup, was a personal bond, which should bind the purchaser and his representatives for ever; and they obtained such a bond. If the party granting the bond intended that it should not operate to the full extent of the language used, he ought to have introduced words by which its generality would have been qualified. As he has not done so, I must assume that his intention was to allow his words to bear their ordinary construction. If parties were to be allowed in this way to bind themselves, in terms which can be literally interpreted without any ambiguity, and then to cast on those, to whom they have so bound themselves, the burthen of proving that a literal construction was not intended, the greatest inconvenience would result, and the true order of things would be reversed. I can therefore see no reason whatever for withholding from this bond its full operation; and as it is admitted that default has been made in the payment of the feu duty, the heirs of James Forbes must be liable.

I may mention that LORD BROUGHAM, who was present during the argument, and has seen the notes which I have now read, authorized me to say that he entirely concurred.

I therefore move that the interlocutor complained of be reversed.

Mr. Anderson suggested that the cause should be remitted, in order that the Court below might decern in terms of the libel, or that the House should now do so.

LORD CHANCELLOR.—Will the reversal of the interlocutor of the Inner House not set up the interlocutor of the Lord Ordinary?

Mr. Anderson.—No, my Lord. It will be necessary for your Lordships to affirm that interlocutor.

LORD CHANCELLOR.—Then I move your Lordships to affirm the interlocutor of the Lord Ordinary.

Mr. Anderson asked for costs in the Court below.

LORD CHANCELLOR.—I apprehend the interlocutor of the Lord Ordinary gives you costs. You will be put exactly in the same position as you would have been in, if the Lord Ordinary's interlocutor had not been reclaimed against.

Solicitor-General.—We do not object to the pursuers having costs, if the Lord Ordinary's interlocutor allows it to them.

Interlocutor of Inner House reversed, and that of the Lord Ordinary affirmed.

G. and T. W. Webster, *Appellants' Solicitors.*—James Davidson, *Respondent's Solicitor.*

FEBRUARY 6, 1855.

THE COMMISSIONERS FOR THE HARBOUR AND DOCKS OF LEITH, *Appellants*, *v.* JOHN SCOTLAND, Inspector of the Poor of the Parish of North Leith, *Respondent.*

Poor—Poor's Assessment—Port and Docks of Leith--Statute—Clause—Construction—*The Commissioners for the Harbour and Docks of Leith are empowered by royal charter, and by various statutes, to levy dues for the maintenance, improvement, and the payment of debt contracted in the construction of the harbour and docks. By one of the statutes it is provided, that out of the revenue the sum of £7680 should be annually placed in bank, to be applied partly in payment of the clergy, in lieu of a previous statutory charge for maintenance, and partly for behoof of the creditors, and of the college and schools of Edinburgh, in respect of legal rights competent to them:*