1853.
25th and 26th April, and 13th May.

ROYAL BANK OF SCOTLAND, . APPELLANTS. (*a*).
JOHN GARDYNE, ... RESPONDENT.

Upon a disposition or conveyance, *ex facie* absolute, but qualified by a recorded back bond, the disponee is not personally affected by a ground annual charged on the estate. See the immediately preceding case of *Millar* v. *Small*.

The estate, however, passes and continues subject to the charge into whose hands soever it may come.

The original personal obligation to pay the ground annual still binds the original obligor and his representatives, who do not cease to be liable on parting with the land.

GARDYNE sold and conveyed certain property to one Duff, the purchase-money being a ground annual of 83*l.* 5*s.* a year. Duff, to raise money, conveyed the property absolutely (but subject to a back bond duly recorded) to the Royal Bank, for the purpose of securing by way of mortgage the sum of 15,000*l.* and further advances. The Bank were duly infeft. Duff afterwards became insolvent. His property was sequestrated under the Bankrupt statutes, and the Bank ultimately executed a renunciation.

In 1841, Gardyne instituted proceedings against the Bank, claiming from them payment of the arrears of ground annual, which had become due at the Whitsuntide preceding, and seeking a declaration that he was entitled to receive from them payment for all time to come.

The Bank, by their defence, insisted that they had never come under any personal obligation; and that at any rate their liability could not be extended beyond the period of their actual possession. Secondly, they maintained that whatever might have been their liability, supposing they had been actual proprietors, there was no ground on which they could be held responsible under existing circumstances, they being, not proprietors, but mere creditors holding a security, —the radical right to the property remaining with their debtor down to the date of his sequestration, from which period their possession had entirely ceased.

The *Lord Ordinary* was of opinion that the Bank

(*a*) Reported 8th March, 1851, Second Series, vol. xiii. p. 912.

was not liable. Against his interlocutor there was an appeal to the Court of Session, and all the Judges were consulted. Eight were in favour of Gardyne, and five were in favour of the Bank.

The *Solicitor-General* (*Bethell*), and Mr. *Gordon*, for the Appellants. The *Dean of Faculty* (*a*) (*Inglis*), and Sir *Fitzroy Kelly*, for the Respondent.

The LORD CHANCELLOR (*b*):

Lord Chancellor's opinion.

My Lords, it is plain that the Judges below have in this case been proceeding on a conception of the law, which, after the decision of this House in *Millar* v. *Small* (*c*), cannot be sustained. They 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; and they also assume that Duff was not bound after he had disponed to the Royal Bank, but that his original personal liability then attached to his disponees.

My Lords, according to the decision of your Lordships in *Millar* v. *Small*, it is clear that Gardyne did not lose his personal remedy against Duff, when he made the disposition in favour of the Royal Bank. The principle of that decision also shows that here the Bank never incurred any personal liability. When Gardyne sold to Duff, what he acquired was a personal right against Duff, and against Duff's representatives in all time, for the payment of the ground annual, and further, a right against the land into whosesoever hands

(*a*) In course of this Session the Dean of Faculty appeared in several Scotch appeals, and claimed precedence over Queen's Counsel; and, in fact, over all counsel, except the Attorney-General and Lord Advocate. His claim was not allowed; but he protested, after the manner of his predecessors. See Macq. House of Lords, p. 338. (*b*) Lord Cranworth.

(*c*) *Suprà*, p. 345; and see Ross' Leading Cases, vol. ii. p. 69.

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Lord Chancellor's opinion.

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* (*a*) indeed, 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 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 personal liability arises by reason of what in this country is called privity of estate. But that doctrine has no application to a case like the present, where there is no such relation subsisting.

Your Lordships decided in *Millar* v. *Small* that the person 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

(*a*) *Suprà*, p. 346.

had been sound. But that foundation failing, the superstructure fails also. And on this short ground I must advise your Lordships to reverse the decision complained of.

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Interlocutor reversed.

RICHARDSON, LOCH, & M'LAURIN.—THOS. W. WEBSTER.