has thought fit to grant such certificate the Court will be slow to interfere with his discretion.

On the 20th of October 1887 the steamer "Tabasqueno," as she was returning from her trial trip, went aground upon the breakwater at the mouth of the river Carron. A small tug, the "Tweed," went to her assistance, but failed to get her off. Signals of distress were made to a large tug, the "Cruiser," which was seen passing the mouth of the Carron with a vessel in tow. In response to these signals the "Cruiser" at once cast off the vessel which she had in tow, and came to the assistance of the "Tabasqueno." On coming up she passed her hawser aboard of the steamer, and succeeded with considerable difficulty in hauling her off the breakwater. For the services thus rendered by his vessel, Joseph Lawson, the owner of the tug, sued the owners of the steamer, the Grangemouth Dockyard Company, for £500.

In the proof led it was established (1) that the services performed by the tug involved danger to herself, her appliances, and her crew; (2) that in loosing from the "Tabasqueno" the "Cruiser's" hawser, of the value of about £24, got entangled in one of the paddles and was destroyed; (3) that the pursuer lost the hire, £3, of the vessel which the "Cruiser" had in tow, and which it cast off in order to go to the assistance of the "Tabasqueno." On the other hand, the pursuer failed to establish that the "Tabasqueno" was rescued from a position of danger.

The defenders tendered £20.

The Lord Ordinary (FRASER) on 1st February 1888 granted decree for £50 with expenses.

The defenders reclaimed, and argued—The pursuer was only entitled to payment at towage rates for the services rendered. With regard to expenses the certificate of the Lord Ordinary should be recalled, as the case could well have been tried before the Sheriff under sec. 49 of the Merchant Shipping Act Amendment Act, 1862 (25 and 26 Vict. cap 63).

The pursuer argued that he was entitled to the sum awarded by the Lord Ordinary, and that the case was a fitting one to be tried in the superior court.

The Court were of opinion that £50 was not more than sufficient remuneration for the services rendered, which, if towage services, were towage services of an extraordinary kind, involving difficulty and danger to the vessel and crew which rendered them. On the question of expenses the Court declined to recal the certificate which the Lord Ordinary had granted in the exercise of his discretion.

The Court adhered.

Counsel for the Pursuer and Respondent—Dickson—Wilson. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Defenders and Reclaimers—Balfour, Q.C.—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, June 19.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

GOURLAY (MARSHALLS' TRUSTEE) *v.* MACNEILL & COMPANY.

Personal or Real—Ground-Annual—Real Burden—Obligation to Build—Personal Action.

A and B, vassals under two feu-contracts, conveyed part of the subjects possessed by them by a contract of ground-annual to C, which contained a declaration that the lands were disponed with and under the real burdens, conditions, obligations, and others contained in the two feu-contracts; and further, with and under an obligation to erect and maintain certain buildings of a specified value. These obligations C bound himself and his heirs, executors, and representatives whomsoever, and his assignees, to perform, and they were declared to be real burdens, and appointed to be recorded in the register of sasines. C subsequently disponed the same subjects to D, and D to E, the disposition in each case being always with and under the real burdens, conditions, and others contained in the feu-contracts and in the contract of ground-annual.

In an action raised by the trustee on the sequestrated estates of A and B against E, to compel him to fulfil the obligations contained in the two feu-contracts and in the contract of ground-annual to erect and maintain certain buildings—*held* (1) that the pursuer had no title to enforce the obligations contained in the two feu-contracts, as he was not a party to them; and (2) that there was no personal obligation upon E, a singular successor in the lands, to fulfil the obligation to build contained in the contract of ground-annual.

Right in Security—Absolute Disposition—Back Bond—Re-conveyance.

An action having been raised against a creditor infeft in certain lands on an *ex facie* absolute disposition qualified by a back bond, to compel him to fulfil certain obligations alleged to be incumbent on him under his title, he recorded the back bond, re-conveyed the lands, and obtained a decree in absence ordaining his debtor to accept and record it.

Opinion reserved as to the effect of such re-conveyance subsequent to the raising of an action.

This action was raised on the 29th of April 1887 by John Gourlay, chartered accountant, trustee on the sequestrated estates of James Marshall, miller in Glasgow, and Thomas Alexander Marshall, engineer in Glasgow, against Duncan MacNeill, & Company, merchants in London, and the individual partners of that firm. The pursuer sought in the first conclusion to compel the defenders to fulfil the obligations undertaken by the respective second parties in (1) a feu-contract entered into between John Strapp and others, trustees of the deceased John Hinshelwood of the first part, and William Simm of the second part, dated 28th September and 6th October, and recorded 8th December 1876; (2) a feu-contract entered into between William M'Whirter Wilson, clerk to the Commissioners of Police of the burgh of Govan, of the first part, and the said James Marshall and Thomas Alexander Marshall, of the second part, dated 13th May and 18th June, and recorded 21st June 1879; and (3) a contract of ground-annual between the said James Marshall and Thomas Alexander Marshall, of the first part, and John Inglis Bruce and James Walker Bruce, of the second part, dated 5th and 13th May, and recorded 21st June 1879, in so far as relating to the obligations remaining still to be executed upon the second parties under the said two feu-contracts and contract of ground-annual to erect, maintain, and uphold buildings on the two portions of ground after described. There was also an alternative conclusion for payment of £3000 in the event of the defenders failing to commence, and duly carry on and complete the erection of the buildings within such time as the Court might fix.

By the contract of ground-annual mentioned above entered into between James Marshall and Thomas Alexander Marshall, of the first part, and John Inglis Bruce and James Walker Bruce, of the second part, the first parties, in consideration of the yearly ground-rent or ground-annual and other prestations thereinafter written, thereby sold and disponed to and in favour of the said John Inglis Bruce and James Walker Bruce, and survivors and survivor of them, and the heir of the survivor, as trustees and trustee for behoof of the said firm of Bruce Brothers & Company, and partners thereof, present or future, according to their respective rights and interests, and to the assignees and disponees of the said trustee and trustees, heritably and irredeemably, in the first place, certain subjects being part and portion of the lands disponed by the feu-contract entered into between John Strapp and others, trustees of the deceased John Hinshelwood and William Simm, and disponed by William Simm to the first parties on 3d May 1878; and, in the second place, certain subjects disponed by the feu-contract entered into between William M'Whirter Wilson and the first parties. But the subjects first thereby disponed were so disponed always with and under, in so far as applicable and still subsisting, the real liens and burdens, servitudes, reservations, conditions, restrictions, prohibitions, declarations, obligations, and others specified and contained in the feu-contract first above-mentioned; and it was, *inter alia*, declared by said contract of ground-annual, that the proportion of the original feu-duty of £305, 18s. 3d. effeiring to the subjects first thereby disponed was £147, 5s. 10d., which, with the sum of £14, 14s. 7d. of augmentation, in terms of the said feu-contract, amounting together to the sum of £162, 0s. 5d. was the amount of the original feu-duty allocated by the contract of ground-annual on the subjects first thereby disponed; which proportion of feu-duty and augmentation the second party and their foresaids were taken bound, as they thereby bound themselves and their foresaids, to pay, and so free and relieve the first parties and the remaining subjects belonging to them in all time coming from and after the term of entry therein mentioned. And the subjects second thereby disponed were so disponed always with and under the burden of the feu-duty of £26, 12s. 2d yearly, and whole other burdens, conditions, provisions, declarations, and others specified and contained in the feu-contract second above-mentioned. It was further, *inter alia*, declared by said contract of ground-annual that the subjects disponed were so disponed always with and under the further real liens and burdens, conditions, provisions and others thereinafter specified, viz., *inter alia* (First) with and under the real lien and burden of the payment by the second party and their successors to the said James Marshall and Thomas Alexander Marshall, and their heirs and assignees whomsoever, of a yearly ground-rent or ground-annual of £106, 5s. 6d.; and then followed the clause containing the obligation to build which it was specially sought to enforce in this action—(*Second*) "Over and above the obligations already existing as to the erection of buildings on said ground hereby disponed, the second party and their foresaids shall be bound and obliged, as they hereby bind and oblige themselves and them, within one year from and after the term of entry after-mentioned, to erect and build on the said ground hereby disponed, buildings which shall be of a substantial description, and built of stone, or brick and lime, and covered with slates, sufficient to yield a yearly rent equal to at least double the amount of the said ground-annual hereby created, and the foresaid proportions of feu-duty, augmentations, and others, and to maintain and uphold the said buildings in such good order and repair as will make them yield the said rent in all time thereafter." The term of entry was Whitsunday 1879.

It was further, *inter alia*, provided that the yearly ground rent and duplication thereof, and whole conditions, declarations, and obligations contained in the contract of ground-annual were real liens and burdens in favour of the first parties, and that they should be recorded in the Register of Sasines as part of the contract of ground-annual, and be inserted or validly referred to in all future conveyances of the same subjects; otherwise such conveyances should be, in the option of the first parties and their heirs and assignees, null and void, and the subjects should revert to the first parties and their foresaids. Further, John Inglis Bruce and James Walker Bruce bound themselves, "their heirs, executors, and representatives whomsoever, and their assignees, all jointly and severally" to fulfil and perform the obligations incumbent upon them under the contract of ground-annual.

By disposition dated 30th and 31st August, and recorded 23d September 1882, John Inglis Bruce and James Walker Bruce disponed to and in favour of John Inglis Bruce the subjects conveyed by the contract of ground-annual, under the burdens, conditions, and obligations contained in that contract and in the two feu-contracts before mentioned. And by disposition dated 8th and recorded 11th September 1882 John Inglis Bruce conveyed the same subjects to Duncan Macneill & Company, the defenders, heritably and irredeemably, with a clause providing that the subjects "are disponed always with and under the real liens and burdens, conditions, provisions, and others specified and contained in said contract of ground-annual, dated and recorded as aforesaid." This disposition though *ex facie* absolute was merely in security, being qualified by a back-letter granted by the defenders in favour of Mr John Inglis Bruce, dated 4th September 1882.

On June 1st 1887, after the action was raised, the defenders recorded this back-letter. On the 27th of July they executed a disposition and conveyance in favour of John Inglis Bruce, and on the 29th of July they raised an action against him concluding to have him ordained to register the said reconveyance, and failing such registration for authority to execute a warrant of registration in his name, and to have the property adjudged to belong to him.

The pursuer pleaded—"(1) The defenders being bound conjunctly and severally to implement and fulfil, in so far as has not already been done, the obligations to erect and maintain buildings imposed upon the second party and their assignees and disponees under said contract of ground-annual, and upon the respective second parties and their assignees and disponees to said two feu-contracts, in so far as relating to the subjects conveyed by said contract of ground-annual, and the said obligations being conditions of their right to the ground, and being binding on the defenders, decree should be pronounced in terms of the first conclusion of the summons, with expenses. (2) Failing the defenders implementing and fulfilling the foresaid obligations, in so far as not already performed, the pursuer will thereby, through the fault of the defenders, suffer loss, injury, and damage to the amount condescended on, and decree should be pronounced in terms of the second conclusion of the summons, with expenses."

The defenders pleaded—"(2) No title to sue, in respect that the pursuer has no title to enforce the conditions contained in the feu-contracts. (3) The defenders are not personally bound by any of the stipulations in the contract of ground-annual."

The Lord Ordinary (Kinnear) on 29th October 1887 assoilzied the defenders from the conclusions of the summons.

"*Opinion*.—The pursuer avers that as trustee on the sequestrated estate of Messrs James and Thomas Marshall he is in right of a ground-annual payable out of the lands described in the summons, and of certain obligations to build imposed by the contract of ground-annual upon the owners of the ground; and in the exercise of these rights he brings this action against the defenders, as the present owners of the ground, to have them compelled to perform the various obligations to build contained in the contract of ground-annual, and in certain feu-contracts under which the defenders are said to hold.

"The pursuer is no party to the feu-contracts, and has plainly no title to sue upon them, either as trustee in the sequestration or in any other character, and the only question therefore is whether he is entitled to enforce the obligations of the contract of ground-annual against the defenders.

"But the defenders are not parties to that contract. They are the disponees of one of the parties who was proprietor of the ground when the contract was executed, and it is well-settled law, since the judgment of the House of Lords in *Gardyne* v. *The Royal Bank*, that the personal obligations contained in a contract of ground-annual do not transmit against singular successors in the land. It is said that although they do not necessarily transmit with the land, they are yet transmissible, like other obligations, by express stipulation; and that the defenders must be held to have undertaken the obligations in question, because they have accepted a conveyance 'with and under the real liens and burdens, conditions, provisions, and others contained in the said contract of ground-annual.' But these words do not import a personal obligation in favour of the creditor in the ground-annual; and it is admitted that there is nothing else in the deed that can be construed into such an obligation. It is unnecessary to inquire whether the condition as to building could be made effectual as a real burden, because a real burden does not carry with it any personal obligations. Again, it is said that the obligation to build is a condition of the tenure. But if it be, the pursuer, who is not the superior, and has no title of any kind to the land, has no concern with the conditions of the tenure.

"The principles on which the question must be determined are very clearly explained in the judgments of the Lord President and Lord Deas in the *Marquis of Tweeddale* v. *Lord Haddington*, 7 R. 625; and their application to the present case does not appear to me to be doubtful.

"Assuming, therefore, that the defenders were to be treated as proprietors for the purposes of the present case, they could not, in my opinion, be compelled to perform the obligation to build undertaken by their author. But the other ground on which they claim to be assoilzied appears to me to be equally well founded. Although their title is *ex facie* absolute, they are in reality mere heritable creditors, the disposition in their favour being qualified by a back-letter which they have recorded in the Register of Sasines. It may be that the registration of the back-letter does not operate a complete divestiture of the feudal title But it is at least a publication of the true nature of their right; and since the record was closed they have executed a re-conveyance, and obtained a decree in absence against their debtor ordaining him to accept and record it. They have thus taken the step which the majority of the Judges in *Gardyne* v. *The Royal Bank* thought would be necessary and sufficient to extinguish the title, the registration of the back bond being sufficient in the opinion of the minority."

The pursuer reclaimed, and argued—The Lord Ordinary's interlocutor should be recalled. It was not maintained that the pursuer had a title to enforce the conditions in the feu-contracts, but he was entitled to decree against the defenders in respect of the obligation to build contained in the contract of ground-annual. That obligation transmitted against the defenders, and they were personally bound to implement it—*Tailors of Aberdeen* v. *Coutts*, December 20, 1834, 13 Sh. 226—H. of L., August 3, 1840, 1 Rob. App. 296; *Clark* v. *City of Glasgow Assurance Company*, June 20, 1850, 12 D. 1047—H. of L. August 3, 1854, 1 Macq. 668. Here the obligations had that element of continuity founded upon by Lords Deas and Shand in their opinions in *Marquis of Tweeddale's Trustees* v. *L. Haddington*, February 25, 1880, 7 R. 625; *cf. Magistrates of Edinburgh* v. *Begg*, December 20, 1883, 11 R.

352. The case was quite distinct from *Gardyne* v. *Royal Bank*, March 8, 1851, 13 D. 912—H. of L., May 13, 1855, 1 Macq. 358. In that case the obligation sought to be enforced was a money payment; here it was an obligation *ad factum præstandum*, as in the cases of *Coutts* and *Clark*. In *Coutts'* case the judgment amounted to this—that the obligations there in question affected the lands, and were also enforceable by personal action against the defender, who was a singular successor in the lands. *Clark's* case was an authority for the pursuer. It was not a case of superior and vassal *quoad* the obligation in question, which was one of contract, and had nothing to do with tenure. The defenders were bound as assignees of the second parties to the contract of ground-annual. Further, the obligation in question was validly imposed on them in the disposition by which they acquired the subjects. The back-letter, especially as it was not recorded till after the action was raised, could not relieve the defenders of liability—*Gardyne* v. *Royal Bank, supra; Clark* v. *City of Glasgow Assurance Company, supra; Scottish Heritable Security* v. *Allan*, January 14, 1876, 3 R. 333. The obligation must be determined as at the date of bringing the action, and not as at the date of decree, and therefore could not be affected by a re-conveyance of the lands subsequent to the raising of the action.

The defenders argued—The Lord Ordinary's interlocutor was right. (1) The obligation in question was not one of those obligations *ad factum præstandum* of a recurring nature which might almost amount to conditions of the tenure. It was an obligation to erect buildings which should have been performed two years before the defenders acquired the lands. *Gardyne's* case established that an obligation of the kind in question, though real, was not a condition of the tenure. The cases of *Coutts* and *Marquis of Tweeddale* were not opposed to the case of *Gardyne*. In *Coutts'* case the question of personal obligation did not arise, as there was no insolvency on the part of the estate, and the obligations were pecuniary. If it was there decided that such an obligation could be enforced against singular successors by a personal action, *Gardyne's* case overruled that decision. In *Marquis of Tweeddale's* case the obligations said to have the character of personal obligations were obligations of a recurring character. Even if the contract of ground-annual provided that singular successors should be in all times bound, that would not bind such singular successors as there were here, according to the judgment of the House of Lords in *Gardyne*. Such obligations could only arise where there was privity of contract as between superior and vassal. As to the contract of ground-annual, "assignees" did not include singular successors —*Magistrates of Edinburgh* v. *Begg, supra;* nor did "representatives"—*Gardyne* v. *Royal Bank, supra*. The defenders, as security-holders, were not liable for such an obligation as the one in question, which should have been implemented two years before they acquired possession of the lands. At all events they were not liable since they had re-conveyed the lands, and so were free of all obligations running with the lands—*Gardyne's* case; *Liquidators of City of Glasgow Bank* v. *Nicholson's Trustees*, March 3, 1882, 9 R. 689; *Stewart* v. *Brown*, November 22, 1882, 10 R. 192. No demand made could alter the character of the obligation, and as it ran with the lands, re-conveyance of the lands before final decree would transfer it.

At advising—

LORD PRESIDENT—The pursuer brings this action in the character of trustee in the sequestration of two persons named Marshall. That is his sole title to sue. The Marshalls, who are the bankrupts, were in right of two feu-contracts, one granted by Hinshelwood's Trustees, dated 8th September 1876, and the other by the Police Commissioners of Govan, dated 13th May and 18th June 1879. The Marshalls being vassals under these contracts, entered into a contract with two persons called Bruce, to whom they conveyed the subjects they had received under the two feu-contracts before mentioned. The two Bruces then conveyed to one Bruce, who in turn conveyed to the defenders in this action. The defenders accordingly are the successors of the Marshalls in the properties which they acquired under the feu-contracts in 1876 and 1879. One purpose of the present action is to enforce certain obligations contained in the feu-contracts aforesaid, against the defenders, as singular successors in the feu. I agree with the opinion expressed by the Lord Ordinary, that the pursuer not being a party to the feu-contracts in question, has no title to insist on this obligation being fulfilled. The pursuer, however, also proposes in this action to enforce certain obligations contained in the contract of ground-annual, by which the Bruces acquired from the Marshalls the subjects before mentioned.

The question to be decided is, whether he can proceed personally against the defenders as singular successors in the subjects conveyed under that contract of ground-annual to compel them to fulfil the obligations in question?

The obligations are obligations to erect certain buildings, and they are contained in the contract of ground-annual, in which they are made a real burden upon the land. But the contract of ground-annual does not contain any personal obligation to build. The only personal obligation in that contract is the obligation to pay the ground-annual, which is undertaken in the contract by the disponees and their "representatives" and "assignees," which I understand to mean assignees before infeftment. Indeed, it cannot mean anything else. I should suppose it will not be contended that that personal obligation will transmit against singular successors in land. It has been authoritatively settled the other way. The question here is, whether the obligations to build, which are sought to be enforced, and which are not personal obligations, but real burdens, can be enforced as personal obligations against the defenders, who are singular successors in the lands?

No argument has been advanced which to my mind answers the simple view of the Lord Ordinary that a real burden does not carry with it any personal obligation. The obligation to build in the contract is a peculiar one, and if a question should arise whether such an obligation can be made the subject of a real burden, it would, I think, be a question deserving serious consideration, because the obligation is to be fulfilled within a year from the date of entry, and there is no case of such an obligation having been made the subject of a real burden. That question, however, it is unnecessary to decide, because the conclusion in the present case is directed against the defenders personally, against whom no personal obligation has been constituted in any way. The relations of the parties are not those of superior and vassal; there is no question of tenure or of title such as might arise between superior and vassal. The question is one between seller and purchaser, and I agree with the Lord Ordinary that there is no personal obligation upon the defenders here. Indeed, I have never been able to understand how the contrary could be maintained.

Lord Shand—I am entirely of the same opinion, and think that the interlocutor of the Lord Ordinary should be adhered to.

The action in the first and second conclusions seeks a decree, as your Lordship has already pointed out, at the instance of the pursuer as in right of a ground annual, to compel payment of feu-duties which are due to the superior, but the pursuer's counsel in opening the case explained that he did not maintain the pursuer's right to enforce any such liability. He did not present any arguments in support of these conclusions, and for the reason explained by your Lordship I am not surprised that the view of the pursuer that he had a right to compel payment of the feu-duties has been abandoned.

Further, I understand it was not maintained that the pursuer could enforce any demand for payment of the ground annuals themselves, or that there was any personal obligation existing upon the defenders to pay these ground annuals. The defenders were no parties to the original contract of ground annual, but have only been in right of the property for a time under a conveyance in their favour by the disponees under the contract of ground annual.

But then it is said, nevertheless, that although there is no liability to pay the ground annuals stipulated there is a personal liability to fulfil an obligation to build, because that is a condition of the tenure. It strikes me at the outset of this question that it would be a very unreasonable result that a person in possession of the ground on a title of property, though under no obligation to pay the ground annuals themselves, should nevertheless be bound to fulfil an obligation the object of which is to secure payment of the ground annuals. I should feel very great difficulty in sustaining such a claim, and could certainly not do so unless it were made absolutely clear that such an obligation had been undertaken. But it seems to me, on the contrary, to be very clear that the question which is now presented for decision has been always expressly decided by the case of *Gardyne*, which has been the ruling case in regard to obligations for payment of ground annuals since the decision was pronounced.

The argument of the pursuer seems to me to fail for this reason, that the pursuer's relation to the lands is not such as to give him any right to enforce the erection of buildings on the ground, excepting against the original disponees under the contract of ground annual, and their heirs and representatives. The right to the lands in the person of the trustee on this sequestrated estate as representing the bankrupts who had parted with the property is of quite a limited nature. He is a mere security holder. The bankrupts no doubt by the contract of ground annual created certain real burdens, and I shall assume that the obligation to build now in question has been made an effectual real burden on the lands. But the right to a real burden only gives the creditor right to use diligence against the land itself, and not a right to sue as upon a personal obligation. Now, I think the result of *Gardyne's* case is really this, that a security holder in such a position as the pursuer (or his predecessors the bankrupts) has no such right in the lands as can enable him either to exact or enforce what are called conditions of the tenure. When the Marshalls conveyed the lands to Messrs Bruce, what was left in the Marshalls (besides the personal obligation of the disponees) was simply a security right, and a security right of the nature of a real burden which came to depend entirely on the infeftments, which was taken on the disponee's title. I need not say that any person holding such a security even though in right of a real burden is in a totally different position from a superior with a continuing relation towards his vassal. Superior and vassal, changing as their several properties change hands, yet continue in direct relations towards each other; and conditions that are in their titles may be enforced by the superior or by the vassal in consequence of their respective proprietary rights in the lands, and the continuing relation between them. Such a case as this, where the pursuer, the holder of the ground annual, has really parted with his direct proprietary right to the lands and become a security holder only, is in quite a different category from the case of *Tweeddale*, which has been much referred to, for that case was treated as a case of superior and sub-vassal. Again, this case differs also from the cases in which questions have arisen between conterminous feuars deriving their rights from a common superior. There the Court has held as to certain conditions, inserted in all the titles for the common advantage, that one feuar or vassal may in certain circumstances enforce obligations contained in particular deeds to which he is not directly a party. The right, then, I think, arises because the parties have each a direct proprietary right in lands, and also a direct interest, it may be under a feuing plan or special arrangements for feuing which have been embodied as conditions in different feu-contracts. But the right and interest of the parties is very different from that of one having a title as security holder only. The case of *Coutts* v. *The Tailors of Aberdeen*, it seems to me, in so far as it was decided on the ground of existing personal obligations, was regarded in the same light as a case of superior and vassal or of conterminous vassals. The tailors of Aberdeen had given off one of a number of different plots of ground all under the same conditions for the common advantage of all the disponees, and the rights maintained were those of the proprietors of part of the ground, who, though they had not the title of superiors as in feu holdings, had still the same interest as a superior in such circumstances, and a right of property in part of the lands said to be affected with conditions for the common benefit. The same principle was held to apply as in the case of superior and vassal. In all these cases you have a direct proprietary interest in the property in the person seeking to enforce the obligation.

That the view I have stated is borne out by the case of *Gardyne* may, I think, be shown by reading two passages only from the decision. What the Lord Chancellor says is this—"When Gardyne sold to Duff"—now Gardyne was the original seller and Duff the original purchaser—"what he acquired was a personal right against Duff and against Duff's representatives in all time for payment of the ground annual; and further, a right against the land into whosoever 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." That seems to me clearly to support the view that even Duff, who was the disponee, was not in a position to give the holder of the ground annual the right to enforce the personal obligation against a purchaser from him taking the property under a disposition granted by him. The matter is made still more clear in a subsequent passage in these terms—"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." And so, as I read these passages, the judgment in the case of *Gardyne* was rested upon this, that a person disponing lands, and simply retaining right to a ground annual out of the estate, which ground annual he makes a real burden on the lands, has no such title to the lands as will enable him to enforce a personal obligation such as we have here. He cannot enforce even the personal obligation for payment of the ground annual. It would, as I have also observed, be a most extraordinary result that although he cannot enforce payment of the ground annual he would still have a title to compel the proprietor taking the estate from his disponee to put up buildings to cover the ground annual. The argument appears to me to be entirely excluded by the grounds of judgment in the case of *Gardyne*.

It was maintained by the reclaimer that if he could not make his right effectual under the original disposition by the Marshalls to the Bruces against any proprietor for the time, he can do so under the deed which Bruce granted to Messrs MacNeill and Mackinnon. But the Lord Chancellor says in *Gardyne's* case that it was not competent to Duff, the disponee, to give the holder of the ground annual the right claimed against a disponee from him, and if this was not competent to Duff, so here it was not competent to Bruce to give the pursuer such a right as against his disponees the defenders. I have read the disposition in the defenders' favour, and I do not find any terms in it which on a legitimate construction can be held as imposing or attempting to impose upon the defenders, the disponees, a personal obligation to erect buildings to secure payment of the ground annuals. If any clause of the deed could be so read the case of *Gardyne* is, I think, a clear authority for saying it would be ineffectual. The present pursuer, or the bankrupt whom he represents, was no party to the deed by Bruce in favour of the defenders, and he can take no benefit from it. It is *res inter alios* so far as he is concerned, and confers no title by which he can enforce any obligation arising on that transaction, and which does not arise under the original contract of ground annual. And so I agree with your Lordship in holding that the case fails. If the argument were sound, it must, as it appears to me, go the length of this, that the present pursuer is entitled to enforce payment of the feu-duties. The obligation to pay these is an inherent condition of the tenure, but the pursuer has no right or title to enforce it.

There was a second question discussed as to whether there can be liability for an obligation to erect buildings against the defenders in any view, now that they have reconveyed the land to the original disponees. Even if this were held to be an inherent condition of the tenure enforceable by the pursuer as in right of the ground annual, it rather appears to me that the obligation must go with the proprietorship for the time, and cease when the right of proprietorship is transferred to another. Upon that point, however, I give no final opinion, and I have only noticed it because it was the subject of much argument; and upon the whole I agree with your Lordship in holding that we should adhere to the judgment of the Lord Ordinary.

Lord Adam—I am of the same opinion as your Lordships, both as to the judgment arrived at and the reasons on which it proceeds. I merely wish to say, with reference to the last passage in Lord Shand's opinion as to the effect of a reconveyance by Duncan MacNeill & Company, that I reserve my opinion upon that point. I think it involves a very difficult question.

Lord President—I understand we all reserve our opinions upon that point.

Lord Mure was absent.

The Court adhered.

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