answer; the answer says, We did everything we possibly could; what we had to get in has not been a contracted sum of money, the amount of which could have been at once ascertained; we cannot put our finger here and say, pay us £10,000; what we have not got in has been the payments that we claim for extra work,—the railway company dispute the accuracy of our demand in respect of them, and, consequently, there has been obliged to be an arbitration,—we are doing all we can to force it on, but it is not in our power to come to any conclusion without the concurrence of the parties who are acting for the railway company. Therefore there undoubtedly has been that which is injurious to the respondent, though in a twofold degree it has been injurious to the appellants, but over which we have no control. The appellants say: we are doing the best we can—the delay is as injurious to us as it is to you—we have been guilty of no delay that we could avoid—on the contrary, we have done all we could to push the matter forward with all the rapidity in our power.

With all due deference to the learned Judges, it seems to me they have acted in the judgment on which they founded their opinions, upon an assumption of the untruth of the facts stated in the answer, there being nothing to rely on but the answer. If that be untrue, some steps should have been taken,—this is not the proper remedy. Here the only question was, whether a case was made on the petition and answer, shewing that there had been delay. It is alleged there was, and it is positively denied. How can you say, then, that delay is established?

It appears to me that that ground also fails—consequently it was a case in which no order ought to have been made. I shall therefore feel it my duty to move your Lordships that this interlocutor be reversed, and that it be remitted to the Lord Ordinary of the Court of Session with directions to discharge the petition.

LORD BROUGHAM.—My Lords, I entirely agree with the judgment which my noble and learned friend has so voluminously and satisfactorily pronounced. The only question would be, as the judicial factor has already gone in, it is quite clear it would be to the interest of both parties, that whatever he has done should stand—that the interlocutor should be so framed as to enable the parties to go on since the period at which the judicial factor entered; because, as the matter stands, the consequence of this would be, that everything *ab initio* would be upset.

Solicitor-General.—That has been provided for, my Lord, by a subsequent interlocutor. There has been a subsequent interlocutor by which the judicial factor has been permitted to proceed. The respondent has been ordered to answer whatever should be done by the judicial factor in the mean time, in the event of the interlocutor being reversed, and to restore matters to their former state.

LORD BROUGHAM.—It would be simply to reverse the interlocutor.

Solicitor-General.—It would, my Lord, be in this manner:—That this House do order the interlocutor to be reversed, the petitioner being held liable in the expenses of the petition, and remitted to the Court of Session to do in conformity with this judgment. The petition being utterly irrelevant, your Lordships will kindly give us the expenses of the petition; not of this appeal.

Lord Advocate.—I do not think that is the usual course. The course is this—When the interlocutor is reversed, the case goes back to the Court of Session. Your Lordships may leave it to the Court of Session to deal with the question of costs.

LORD BROUGHAM.—No; we give the expenses of the refusal.

LORD CHANCELLOR.—The House decide what ought to have been done below. What is it? That the petition should have been refused with costs. We must so declare—reverse the interlocutor—declare the petition ought to have been dismissed with costs—and remit it back to the Court of Session.

Solicitor-General.—There will be the same judgment in the other case.

LORD BROUGHAM.—Of course.

Interlocutors reversed, and case remitted.

Second Division.—Robertson and Simpson, *Appellants' Solicitors.*—Richardson, Loch and M'Laurin, *Respondent's Solicitors.*

MARCH 17, 1853.

THE RIVER CLYDE TRUSTEES, *Appellants*, *v.* JOHN MORRISON DUNCAN, *Respondent.*

Principal and Agent—Mandate—Factor—Minor—Promissory Note—*A sum of money belonging to a minor was lent out (upon a promissory note) by D of Glasgow in name of C of Liverpool, "curator for J., a minor." D was factor for the curator and minor. At the request of*

the debtor, the curator granted a letter extending the term of payment. The interest on the loan was regularly uplifted by D, who kept in hand the promissory note. D, upon delivery of the note, obtained payment of the principal sum, which he applied to his own purposes, and became bankrupt. In an action against the debtor at the instance of the minor:

HELD (affirming judgment), 1. *That the debtor was liable in second payment to C, and his minor.* 2. *That possession of a promissory note, by a factor, does not* per se *give a title to uplift the principal sum.* 3. *That there was enough in the terms of the note, and the circumstances of the case, to put the debtor on his guard against paying the principal without the concurrence of the minor and his curator.*[1]

The River Clyde Trustees (defenders) appealed, and maintained that the judgment ought to be reversed for the following reasons:—1. The late A.J. Duncan having been in possession of the promissory note, and having acted throughout the whole proceedings as the accredited factor and agent of the respondents, had full power and authority to discharge it, and to deliver it up cancelled to the appellants. 2. The respondents were barred by their own acts from insisting in any claim under the promissory note.

The respondent supported the judgment on the following grounds:—1. At the time when the loan was made, the promissory note granted, and the appellants made the two payments of £500 and £1500 to Mr. Duncan, the respondent was a minor, having a curator—the money lent belonged to him—and the obligation could not be validly and effectually discharged, except by him and his curator jointly. 2. The sum lent had not been paid by the appellants to any person legally authorized to receive and discharge it; and it was therefore still resting-owing. 3. The payments of £500 and £1500 to Mr. Duncan were made without due caution, were not in *bonâ fide*, and did not extinguish the obligation. 4. The respondents were not barred by their own act or deed, or by delay and personal exception, from insisting in their claim.

Sol.-Gen. Bethell and *Sir F. Kelly* for appellants.—From the fact that the curator lived in England, while the minor and his property were in Scotland, it was absolutely necessary for the curator to appoint a person of confidence in Glasgow with large powers to manage the minor's property; and from the circumstances shewn in the correspondence, in reference to their antecedent transactions, A. J. Duncan clearly had at least an implied power from the curator to discharge the debt. This is further shewn by the fact of the curator's having left the promissory note in the custody of A. J. Duncan. This, coupled with express authority to draw the interest, implies that the agent had authority to call up the principal and give a discharge. The business of life could not go on unless the holder of a promissory note were deemed a person to whom payment might be made with safety. By giving the agent power to draw the interest, and confiding to him the security, you make him *dominus* of the debt; it is in his order and disposition. This was held to be the case even with a bond—*Whitlock* v. *Waltham*, 1 Salk. 157; and in a still stronger case—*Owen* v. *Barrow*, 1 Bos. & Pull. N.R. 103—this principle was even carried to the extent of fixing upon the party the penalties of usury. This is a well-known doctrine in England—Paley Pr. & Ag. 274; Story Agency, c. 6, § 98. —and there is nothing to shew that the law of Scotland at all differs. This case is no doubt otherwise when it is a mortgage because there you can give only a discharge by a reconveyance. Nothing can turn on the peculiarity of the relation of curator and minor; and it cannot be said that the curator had no power to give A. J. Duncan the authority we allege, because that would be supposing him to be dealing with the minor's estate without the minor's concurrence. But the rule in Scotland is, that trustees are presumed to have all the powers necessary to the performance of their duty, and there is a distinction between changing the investment of funds, and dealing with property belonging to the minor. Stair and Erskine, on this subject, merely mean, that a curator has no power to deal with the property so as to change the succession of the minor, but he may well uplift monies for investment without the minor's concurrence—Bell's Pr. § 2084. Hence, if it had been an heritable bond belonging to the minor, it might have been different, but we hold a curator has power to discharge a promissory note without the minor's concurrence. What can be done by a curator, may be well done by his agent or factor. Such being the facts and the law, it is a universal principle, that as between innocent parties, he who has neglected the ordinary rules of dealing, ought to suffer, and there is clear evidence here of neglect on the part of the curator, whose conduct all along was such as to lead us to believe that we were at liberty to infer that A. J. Duncan had the authority to discharge the principal of this debt.

Lord Adv. Moncreiff and *Rolt* Q.C., (with them *Gregg* and *Kinnear,*) for respondents. —Though the document here was in the form of a promissory note, yet it was not negotiable, and is not to be treated as a mercantile instrument at all. From the whole circumstances of the case, no authority can be implied in favour of A. J. Duncan to call up the principal debt, and give a discharge. Even the curator himself had no power to give such authority, for every act binding the minor's estate must be concurred in both by curator and minor—Stair, 1, 5, 12, and 1,

[1] See previous report, 13 D. 518; 23 Sc. Jur. 224. S. C. 25 Sc. Jur. 331.

6, 35; Ersk. 1, 7, 14; *Kirkman* v. *Pym*, M. 8977. But even viewing this as a mercantile document, the mere fact of possession does not imply a power to discharge the principal, and there is no such doctrine in the law of Scotland. It may raise a presumption, but that presumption is rebutable, and a document may be held for many other purposes besides that of giving a discharge. Far less does it imply that he is the true creditor, when, on the face of the document, it appears otherwise. *Ex facie*, the note appears to be granted for the use of the minor, and this circumstance imposed on the appellants the responsibility of seeing that the proceeds were properly applied to the minor's behoof—*Sigourney* v. *Lloyd*, 8 B. & Cr. 622. As to the cases cited, the law is not so general as has been stated from Salkeld; and in the other case, *Owen* v. *Barrow*, all that was determined was, that the circumstances were such as to go to a jury. The true rule is, that we must always construe such large powers as are claimed here on the part of the factor, with reference to the subject matter—*Hogg* v. *Snaith*, 1 Taunt. 349; and, according to this view, the appellants are clearly liable.

LORD CHANCELLOR CRANWORTH.—My Lords, the action in this case was raised by a minor, John Morrison Duncan, together with his late curator, William Cochran, who, it seems, was his maternal uncle. It was an action raised by him (I believe he has now attained the age of 21 years) against the defenders, as Parliamentary Trustees of the River Clyde, and it sought to recover from them the sum of £2000, which was the money of the minor, and which had been undoubtedly lent to them. The fact of the loan is not disputed; but the defence is, that though it had been lent, it had been repaid.

The facts of the case, which are very short, are these:—The minor was of an age somewhere between 14 and 21. He had ceased to be in *statu pupillari*, as it is called, and he was a minor with a curator. He had property chiefly in Scotland, and at Glasgow he had a paternal uncle, Mr. Andrew John Duncan, who was a merchant or accountant.

The infant[1] lived at Glasgow with this paternal uncle. What is material is, that the curator lived at Liverpool. That being so, the funds belonging to the minor came into the hands of, and were received by, A. J. Duncan, the uncle, at Glasgow, who was a man of business, and who seems to have had the chief management and control of the funds of the minor. The sum of £2000 having so come into his hands in the autumn of 1843, it was necessary to seek an investment for that sum. And I think it may fairly be taken as being admitted, or as being made out, that the looking out for investments was a duty confided principally, or perhaps exclusively, to the paternal uncle, at Glasgow. He, therefore, casting about to find out how this sum of £2000 could be invested, thought that lending it to the Parliamentary Trustees of the River Clyde would be an eligible mode of disposing of it, they being willing at that time to pay interest at the rate of four per cent., though they could give no real security. Accordingly, whether with the previous consultation with the curator, or most probably without, he took upon himself to undertake that it should so be lent.

The letter in which he communicated that intention to the Trustees, is as follows: "I hereby offer to lend to the Trustees of the River Clyde the sum of £2000 sterling, on a bill to be granted by them. The interest to be at four per cent., and to rise according to the rate of the money market. The bill to be granted in favour of William Cochran, Esq., merchant, Liverpool, as curator for John Morrison Duncan." The loan seems to have been accepted, and it was not till the 9th of January 1844 that, so far as the documents are concerned, we find any communication on the subject between A. J. Duncan and the curator. But on that day Mr. Duncan writes to the curator, Mr. Cochran, at Liverpool, in these terms:—"My dear Sir,—I wrote you some time ago informing you that I had invested the sum of £2000 on John's account with the Trustees of the River Clyde. The interest to be drawn is four per cent.; and although it is not heritable security, it is yet abundantly ample, and the rate of interest considerably more than we could obtain with an heritable security. The obligation to repay is granted at one day's date, but the trustees require three months' premonition before paying up the money, and the enclosed letter requires, therefore, to be signed by you consenting to this arrangement. I shall feel obliged by your returning the enclosed at your convenience." A. J. Duncan sent with this a letter purporting to be a letter from the curator at Liverpool to the Parliamentary Trustees, undertaking that, though the security was given payable on demand, that is, payable at one day's date, yet he would never insist upon a repayment without giving three months' notice, in a letter which seems to be common in transactions of this sort in that part of the world, because they speak of it as a back letter which was perfectly well known.

It seems that Mr. Cochran did not choose to sign the letter so sent to him, because he thought it was incorrect. It was dated from Glasgow, as if he was there, and therefore he said, I will not sign that, but I send you a letter in substance to the same effect. He answers thus—"My dear Andrew, I return you enclosed an acknowledgment in substance in the terms you wanted,

[1] An infant is in England a person under 21.

but not the document you sent me, as it was dated Glasgow. You had not mentioned to me before, to whom the money had been lent, but I think you have chosen a very good security. I do not admire, however, the course pursued by the Clyde Trustees in professing to do in one document what in effect is undone by another, and I should like very much that you would try to get the matter put upon a footing in which the tenor of the agreement is simply stated in one document; and, when done, please return me the enclosed acknowledgment, as I have no doubt you will perceive with me, that the matter as it stands is on a wrong footing in my name as *curator*." That is to say, this gentleman thought it was a sort of fictitious proceeding to be purporting to lend money upon the security of a note payable substantially on demand, and then to give a counter undertaking that it should not be called for, and he wished that it should be put upon a more simple footing. But nevertheless, not wishing to be hypercritical about it, he incloses a back letter in these words, which they might make use of if they thought fit:—"The Treasurer to the Clyde Trustees, Glasgow. *Liverpool, 11th January* 1844.—Sir, I acknowledge to have received from you, through A. J. Duncan, Esq., a promissory note subscribed the 5th December, for £2000 sterling, lent by me, as curator for J. M. Duncan, to the Clyde Trustees, and although it is payable on demand, I hereby oblige myself to give you three months' notice before calling up the amount, or any part thereof." The scruples of this gentleman, however, were not attended to. The Parliamentary Trustees said that was always their mode of proceeding; that was communicated to Mr. Cochran, and he acquiesced in it. So that the matter stands thus:—The £2000, part of the minor's money, is lent to the Parliamentary Trustees of the River Clyde upon their giving a promissory note payable at one day's date—that is, substantially payable on demand—receiving back an undertaking from the curator that it should not be called for without three months' notice. The form of the note was this:—"One day after date, we, two of the Parliamentary Trustees of the River Clyde and Harbour of Glasgow, and the Secretary of the Trust, promise to pay to Mr. William Cochran, as curator for Mr. John Morrison Duncan, the sum of £2000, value received in money borrowed of him for the purposes of the Clyde Navigation Trust.—Subscribed by us at a meeting of the Clyde Trustees at Glasgow, 5th December 1843. JAMES LUMSDEN, Chairman, CHARLES GRAY, Deputy-Chairman, A. TURNER, Secretary." The Parliamentary Trustees therefore borrowed the £2000; they gave a promissory note, payable, as they say, upon demand, and they received back an undertaking from the curator that the money should not be called for without three months' notice. The letter written by Mr. Cochran acknowledged to have received from the trustees the note, though in fact the note remained with Mr. Duncan at Glasgow. Certainly it was with him afterwards, and, I presume, it all along remained with him.

That was at the end of 1843. The interest was regularly paid till, I think, the year 1845, when the trustees intimated that they would not continue to pay interest at a higher rate than 3½ per cent. Very shortly after that, A. J. Duncan, first of all without three months' notice, but asking the trustees to dispense with the three months' notice, applied for payment of a part of the £2000, viz. £500, which the trustees paid to him, and in the course of a very short time afterwards, he without giving any notice of three months, applied for the other £1500, and received that also. He died insolvent, or in some way so misapplied it, that the money is lost.

Now, the question is, whose loss is this? Here are two persons who are innocent. The minor, now come of age, finds his money is gone. It has been lent to the Parliamentary Trustees. They gave a security for it, and they have paid it, not to him or his curator, but to A. J. Duncan, from whom undoubtedly they received it. Is that, or is it not, a valid discharge to them? My Lords, I am clearly of opinion that it is no discharge. I think the learned Judges in the Court of Session came to a most correct conclusion. The way the case was argued was this. It was argued by an analogy to the English law, or what is supposed to be the English law, of this nature. It is said, that where money is due upon a promissory note or a bill of exchange, and the party liable upon the document gets it into his hands from the holder, and pays him the money, there can be no question raised afterwards as to whether the holder was the party properly entitled to receive it or not. It is said that that is just this case. This was a promissory note given to Cochran, as trustee for the infant, and by him left in the hands of A. J. Duncan. Being in the hands of A. J. Duncan, that was complete and conclusive evidence, as between him and the parties indebted upon the note, that the payment to A. J. Duncan would be good. They did pay to A. J. Duncan, and he gave up the note. That, it is said, is clear law,—and, applied to the present case, it operates as a discharge to the Parliamentary Trustees.

It was further said, that this is not a principle depending merely upon the peculiarity of a promissory note; but a case was referred to from Salkeld, in which the same doctrine is said to be applicable to a bond, probably quite accurately,—that is to say, it is applicable to a bond under the circumstances there stated. In that case, the bond was in the hands of a scrivener, who had lent the money. At that time there existed the business of a scrivener, which, as has been often remarked, is not known now. He was a party who performed the conjoint duties of

a banker, a broker, and an attorney,—there being no such trade now existing, at least not ordinarily existing. What was decided in the case in Salkeld was, that where a scrivener had lent the money of another person upon a bond, taking the bond, not to himself, but in the name of the other person, being permitted by that party to claim the bond afterwards, the party paying off the money might safely pay it off upon having the bond delivered up. That I will assume to be the law at this day, as it undoubtedly seems to have been treated then. But, my Lords, there is this very material distinction between the case which has been put, of a promissory note or a bill of exchange and a bond, that there were no third persons interested there except the obligor, and, if I may so say, the obligee—the party liable upon the note, and the holder of it. But in this case, even for the moment treating the document as a promissory note, it was a note which shewed, on the face of it, that it was given, it is true, to the curator, who perhaps, upon that doctrine, might, if it had been a note simply to himself, and to no one else, have made Duncan his agent, so that the delivery of the note payable to him might be a safe discharge to the party liable upon the note: but it was a note in which Mr. Cochran the curator had expressly stipulated that it should appear on the face of the note that it was money due to him in trust for the minor—money of the minor in his hands as curator for the minor.

Now I do not at all admit, that if there were a bond in this country given to A B upon trust for an infant, the party holding the bond could safely receive payment of it, or that the party paying it could safely pay it, disregarding the fact, that he had notice on the face of it, that the money did not belong to the holder of the bond, but belonged to a minor. The case in Salkeld does not appear to me to establish anything like that. But, independently of that consideration, there is another ground which strikes me as distinguishing this case in a most material respect from any of those which have been referred to. It is this. It is said that this money was secured upon a promissory note. Undoubtedly, speaking by the card, that is true. It is secured by a promissory note, because it is literally a promise, though it would require a stamp upon it. This is the note—"We promise to pay to W. C., as curator for J. M. Duncan, the sum of £2000 sterling, value received in money borrowed of him for the purposes of the Clyde Navigation Trust." It is not a negotiable instrument. I do not mean that that would be conclusive. It is not a negotiable instrument, but a promissory note, with a stipulation at the time that it was to be considered in the nature, to some extent, of a permanent investment, and that the trustees were not to be called upon, as if they were under the ordinary obligations of a promissory note, to pay upon demand, but that they were to have a counter undertaking, that it should only be enforced at the end of three months after notice. I take this, therefore, to be nothing more than an informal mode of giving a written acknowledgment of a debt. That is what it really amounts to. It could not have been negotiated. It had none of the ordinary marks of a promissory note. Still less had it anything like the character of a mercantile transaction, and the principles applied to transactions of that sort appear to me to be inapplicable to the present case.

I therefore think that the Court of Session came to a perfectly correct conclusion in holding that there was nothing in this case to shew that the payment to A. J. Duncan was any discharge as against the minor and curator. And I am the more struck with the correctness of that conclusion, by observing—without going into the question as to how far, and in what cases, by the law of Scotland, minors ought to concur with their curators in giving discharges in respect of a promissory note—that, when the £2000 loan came into the hands of A. J. Duncan, to be by him invested as the necessity for investment arose, A. J. Duncan writes to him, and says—I must have the concurrence of you, the curator, in the discharge; and the discharge was accordingly given. I collect from some of the expressions, that that was upon an heritable bond and the Solicitor-General tried to draw a distinction in that respect; but I confess that it was not a distinction with which I can agree. If the money was properly ear-marked as being the property of the minor, I think his concurrence was just as much necessary whether it was secured in one mode of investment as in another. And therefore it is that I entirely adopt the reasoning of Lord Ivory in giving judgment, when the case was before the Court of Session, when he says—"I do not dispute the principle, that the custody of a document of debt may be evidence to go to a jury in order to establish the holder's right to discharge, and, in the absence of evidence to the contrary, may perhaps be sufficient for that purpose. But such *primâ facie* evidence may be rebutted. Now, here I think we have clear proof, not only that here A. J. Duncan had no authority to uplift the debt, but that he did so in breach of the trust committed to him. He was factor, no doubt, for the minor and his curator, and as such, the document was allowed to remain in his hands; but it was for the purpose of custody, not of realization. He was just in the position of the factor for a trust. But could such a factor, though in possession of the writings and documents of his constituents, without authority, uplift the trust funds, or deal with a bill like this, as if it were his own?" Lord Ivory says, clearly not. The stipulated notice clearly shews the nature of the transaction, and that it was a transaction in which, what have been referred to as the principles of the English law, must necessarily be inapplicable, because they relate to a

state of things not contemplated by any of the circumstances of this case. I am therefore of opinion, that the Court of Session and the Lord Ordinary came to a perfectly correct conclusion; and I humbly move your Lordships that this appeal be dismissed with costs.

Interlocutors affirmed with costs.

Second Division.—Richardson, Loch and M'Laurin, *Appellants' Solicitors.*—Law, Holmes, Anton and Turnbull, *Repondent's Solicitors.*

MARCH 17, 1853.

GEORGE MILLAR, *Appellant*, *v.* JAMES SMALL, *Respondent.*

Feudal—Ground-Annual—Burgage—Personal Obligation—Liability of purchaser.

HELD (reversing judgment), *that a personal obligation by S, to pay a ground annual, did* not *transmit against A, a purchaser of the subjects, to the effect of extinguishing the obligation as against S, the original acquirer and obligant, although no infeftment had followed either upon the original contract or the purchase, and although the personal obligation of S was fortified by a clause, whereby certain parties bound themselves as cautioners for him, his "heirs, executors and successors," aye and until property of a certain value should be built upon the ground.*[1]

The appellant sought a reversal of the judgment of the Court of Session on the following grounds:—1. Because, by the deed in question, Small, the respondent, became bound, by an express personal obligation, to pay the ground annuals. 2. Because the respondent could not discharge himself by transferring the lands. 3. Because the relation between the appellant and respondent, with regard to the ground-annuals, was that of creditor and debtor, and could not be affected by the rules applicable to the feudal relation of superior and vassal. 4. Because, even supposing that a personal obligation, in the general case, would cease to be binding on an original disponee after transfer, the respondent, considering the terms of the deed, would remain bound. 5. Because, assuming that a transference of the *real* right, by means of a completed infeftment, would have the effect of liberating the original disponee, that result would not follow here, no infeftment having ever taken place.

The respondent in his *printed case* supported the judgment on the following grounds:—1. Because the unanimous decision of the Judges in the Court of Session in *Soot's Trustees* v. *Peddie*, not appealed from, had established the principle, that a ground annual is properly and substantively a burden on land, to which the personal obligation of the proprietor, whether implied or expressed, is merely accessory,—being coincident with, and lasting no longer than, the personal relation to the land of the party upon whom it is imposed. And the result of this was, that the personal contract binding the disponee, and his heirs and *successors*, creates an obligation transmissible from the disponee to the successor, who, by means of a *bonâ fide* conveyance, assumes that relation to the land, as affected by the real burden upon which the personal liability depends. According to the state of the title here, the respondent duly transferred to Adamson, as his successor, the only right and relation to the subjects burdened with the ground annual, which he himself possessed, and thereby transferred from himself to Adamson the personal liability. 2. Because the cautionary obligation in regard to the building of houses, which could only be built by the proprietor in possession, became, by the conveyance to Adamson, an obligation for the latter as the successor in the property, and did not imply the continued existence of liability on the part of the respondent. 3. Because the notice given to the appellant, in his own title, of the transference to Adamson, and of his acceptance of that party as debtor in the personal obligation for a series of years, without making any claim against the respondent, imported his knowledge of, and acquiescence in, the relief of the respondent from the personal obligation, as having been transferred from him to Adamson, as his disponee and successor.

Sol.-Gen. Bethell, and *Anderson* Q.C., for appellant.—This is a question of construction of a contract. The deed is a disposition in which the price is stated to be a perpetual annuity, which, indeed, is made a real burden on the land, but there is added a personal covenant of the disponee to pay it. The personal covenant is added in order the better to secure payment—in other words, the solvency of the parties was an element of consideration. The real security, however, does not impair the personal obligation. The sole relation thus constituted between the annualer and the disponee, is that of creditor and debtor, and there is nothing in it of a feudal nature. When Small conveyed the subjects to Adamson, it is clear from the terms of the disposition, that he did not believe that he would be freed from liability, and hence an elaborate clause in which

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[1] See previous report, 11 D. 495; 21 Sc. Jur. 143. S. C. 1 Macq. Ap. 345; 25 Sc. Jur. 334.