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Court : House of Lords

Decided On : Mar-30-1939

Judge : Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, Lord Wright

Appeal No. : [1939] UKHL 1

Appellant : Kemp

Respondent : Magistrates of Largs

Judgement :

LORD THANKERTON[read by Lord Russell of Killowen].-My noble and learned friend Lord Macmillan, in the opinion which he is about to deliver, has so clearly and fully expressed the views that I have formed in this appeal that it is sufficient for me to express my concurrence in it, and I will only venture to make a small addition to it.

Lord Moncrieff and Lord Pitman, who dissented from the views of the majority in the Inner House, both took the view that there was no ambiguity in the terms of the clause under discussion, and that it clearly expressed a real burden. But, for the reasons explained by my noble and learned friend, I am unable to agree that there is no ambiguity, and I think that, if an instrument of sasine had been necessary in this case, the draughtsman would have been puzzled as to whether this clause-especially in view of its opening words-formed part of the dispositive clause which he was bound to incorporate in its entirety in the instrument. Lord Moncrieff relies

on the case of *Magistrates of Airdrie v. Smith*, but with all respect to the learned judge, it appears to me that, so far as it goes, the case does not support his view, as it was not decided as matter of feudal title only, as the Lord President expressly states, but on the ground of the trust imposed as a condition of the grant, which, inter alia, was made clear in the precept of sasine. As the Lord President states, the Court had to look at the real nature of the transaction.

I therefore agree with my noble and learned friend that the appeal should be dismissed with costs.

LORD RUSSELL OF KILLOWEN.-I also concur in the opinion which Lord Macmillan is about to read.

LORD MACMILLAN.-[After the narrative quoted supra]-

It is not in controversy that the relationship of superior and vassal subsists between the appellants and the respondent, and it is admitted that the appellants have both title and interest to enforce the terms of the feu-disposition, so far as they may be found to affect the respondent. No question was raised by either party as to the validity either of the original feu-disposition or of the disposition by the London Midland and Scottish Railway Company in favour of the respondent. The sole question accordingly is whether, by the terms of the feu-disposition of 1833, there has been effectually imposed on the land thereby granted a real burden or condition, running with the land, prohibiting the use of the land for any other purpose than "the purpose of erecting and maintaining a pier or harbour and other necessary works therewith connected." The solution of the problem has necessitated the consideration by your Lordships of a branch of the feudal law of Scotland on which much learning was expended by the conveyancers of earlier days, and the House is indebted to counsel on both sides for an excellent review of the authorities.

The requirements which must be fulfilled in order to constitute a real burden or restriction binding on singular successors were anxiously discussed and carefully formulated in the leading case of *Tailors of Aberdeen v. Coutts*. The ruling presumption is in favour of freedom. This principle was thus enunciated by Lord

Brougham when the case of the Tailors of Aberdeen was first before this House as follows:

"All conditions annexed to the enjoyment of property, be they merely pecuniary, or be they connected more immediately with the use of it, are to be strictly construed as against the grantor and in the grantee's favour, but especially as between the grantor and parties who have no privity of contract with him, and can therefore only tell by their titles what was the nature of the grant-how much was given, and how much reserved. They have an absolute right, unless in so far as they are fettered; and no fetters are to be raised by implication or conjecture. Some cannot be imposed at all, as being inconsistent with the nature of the property and repugnant to the grant; no declaration, no provision, will suffice to create these. Others are consistent with the nature of the property, and may be imposed; but they must be unequivocally imposed, so that the purchaser may know what he buys and whether he is fettered or free."

Citing this case as the leading authority, Lord Kinnear, an acknowledged master of the law of Scottish feudal conveyancing, stated in this House nearly eighty years later in the case of *Anderson v. Dickie* 1915 SC (HL) 79 that the "rule which requires exact expression for the constitution of real burdens or real conditions has been laid down again and again in a long series of decided cases." He referred also to *Martin v. Paterson*, where "it was clearly laid down after great argument, that the intention 'to constitute a real lien must be expressed in the most explicit, precise, and perspicuous manner,' and that 'where the clause admits of a doubt, onerous singular successors shall not be affected.'" Lord Dunedin, to whom this branch of law was equally familiar, expressed himself to the same effect in the case I have just quoted. After mentioning the case of the Tailors of Aberdeen he says (at pp. 88 and 89) that "the general principle is well stated by Baron Hume in his report of the case of *Calder v. Stewart*, where that learned judge observes: 'This judgment is a confirmation of a well-known and important principle of our ancient and common law ... viz., that a feudal investiture is not liable to be defeated, qualified or abated by any condition or obligation that is not incorporated in the texture of the owner's infestment.'" "Far earlier than this," Lord Dunedin adds, "it had been held that all conditions restricting the use of land must be very

clearly expressed, the presumption being always for freedom."

There was apparently at one time an impression that less exact precision was required in imposing a real restriction on the use of land than in imposing a real burden for the payment of money. But this is emphatically negated by Lord Kinnear in *Anderson v. Dickie*, where he points out that Lord Brougham in the case of the Tailors of Aberdeen had enunciated the governing principle as being "the same in the case of obligations *ad factum præstandum* as in the case of pecuniary obligations."

But, while the conveyancer who would effectually impose a real restriction on land must comply with this exacting standard of precision, it is not necessary that he should employ any technical formula. He need not in terms declare the restriction to be a real restriction, or that it is to be inserted in all future infeftments, or that it shall attach to singular successors. Nor need he fence the obligation with irritant, or irritant and resolute, clauses. It suffices if the words used "clearly express or plainly imply that the subject itself is to be affected, and not the grantee and his heirs alone"-see the opinion returned by Lord Gillies, Lord Mackenzie, Lord Corehouse and Lord Jeffrey in the *Tailors of Aberdeen v. Coutts*. I need not remind your Lordships of the importance of the requirement that any burden or restriction in order to be effectual must enter the records. In Scotland the purchaser of land buys on the faith of the records. He obtains for his protection a search of the Registers, and is entitled to rely on the land being unaffected by any burdens or conditions other than those contained in the deeds found on record to relate to the subject-matter of his purchase. This raises a question as to how far it is legitimate in the present case to look at the Largs Harbour Act of 1832 at all, for that statute is not on record in the Register of Sasines. I think, however, that the conveyancer examining the title tendered to the respondent must inevitably have had to have recourse to the Act. For the feu-disposition which is the root of the title is not in the form which the law required in 1833. It contains no precept of sasine. It is only by virtue of the provisions of section 39 of the Largs Harbour Act that the feu-disposition confers any real right to land at all. But for the special authorisation contained in the Act the feu-disposition would not have been admitted to the Sasine Register. As counsel very neatly put it, the Largs Harbour Act may

legitimately be looked at in so far at least as it is a conveyancing statute, authorising quite exceptional procedure. Probably it would also be natural for a purchaser to look at the Act to ascertain whether it conferred any powers of sale on the harbour company. Section 24, already referred to, would then be found to empower the committee of management on behalf of the company not only to acquire all such lands as might be wanted for the pier or harbour, but again to dispose thereof if they should see cause. Whether this applies to the scheduled land may be a question which it is not necessary to decide. The statute was passed before the Clauses Acts of 1845, and exhibits the imperfections of the embryonic legislation relating to public utilities which preceded the later codification.

While, therefore, the disposition bears to be in pursuance of the Act of 1832 and the statute may legitimately be referred to for some purposes, the question of the scope and effect of the material words in the disposition must be determined on an examination of the deed itself, without extraneous aid. I therefore proceed now to scrutinise the clause which the appellants contend to have effectually imposed a real restriction on the use to which the land may be put by a singular successor.

In the first place, the words of restriction are peculiarly placed in the disposition. They do not occur in the dispositive clause, the appropriate place for expressing both the extent of the grant and any qualifications of it. They occur as a sort of pendant to an unusual statutory form of tenendas. "The only purpose of the clause of tenendas or as it was of old called, *clausula tenoris*, is to express the particular kind of holding in which the vassal receives the lands"-I quote from a work of the highest authority, Duff's "Treatise on the Deeds and Forms used in the Constitution, Transmission, and Extinction of Feudal Rights," published in 1838, p. 81. The learned author proceeds:

"Since the introduction of the records, the tenendas, which is not transferred to the instrument of sasine, has become powerless for expressing limitations on, or the destination of the fee, for which the dispositive is the proper clause of the charter in modern conveyancing."

The present tenendas clause has found its way into the Register of Sasines, but only in consequence of the quite exceptional statutory provision which authorised the recording of the conveyance as a whole; otherwise the critical words would not have entered the record at all and could not in any view have affected a singular successor. A skilled conveyancer accordingly in 1833, intending to impose a real restriction on the use of lands, would not in an ordinary charter or disposition have inserted it in the tenendas clause. It may be observed in passing that, under section 40 of the Act, provision is made for the case of the company being unable to get a conveyance of any lands to be taken for the purposes of the Act; in that case the lands are *vi statuti* to "be vested in and become the sole property of the said company and their successors to and for the purposes of this Act for ever." What would be the effect of such a title from the feudal point of view I need not discuss, but there would apparently be nothing on record at all.

In the next place, the words said to constitute the real restriction are not expressed in the language of restriction. They are not prohibitory. They do not say that the land is to be used only for the erection and maintenance of a pier or harbour and are to be put to no other use. The language is more apt to express a purpose than a prohibition, words which precede, namely, "from thenceforth for ever and in all time thereafter," in my opinion, relate back to the words "to be holden" rather than forward to the words "for the purpose of erecting and maintaining a pier or harbour." This plainly appears from the statutory form from which these words of permanence are borrowed, and they are the counterpart of the words in the ordinary form of a tenendas clause, "to be holden ... in feu farm, fee and heritage for ever." In the disposition of 1833 I read the words of perpetuity as emphasising the absolute and permanent nature of the grant, and not as affecting the words which follow and which express the purpose of the grant. If the tenendas clause were to be read as a prohibition of any alienation of the land at any time by the company, it would of course be ineffectual, and it is obvious that, if the company had failed and had had to be liquidated, the company's land, as part of the assets, would have had to be sold. There is no clause of forfeiture or return in the event of the harbour undertaking ceasing to exist. But the disposition itself contemplates the transmission of the land to a singular successor. There is what I may call a second tenendas clause which I have quoted above and which is in the ordinary

form for a feudal holding; this is followed by the reddendo which stipulates for the doubling of the blench duty "at the entry of heirs and singular successors." It is, to my mind, inconceivable that a superior in making a grant of land to a harbour company should impose a real restriction, absolute and perpetual, on the use of the subject of his grant to the purpose of erecting and maintaining a harbour and at the same time provide for the event of the transmission of the land to a singular successor of the harbour company. I see it is suggested that the singular successor might be someone who could put the land to the purpose of erecting and maintaining a pier or harbour, so that it might not be entirely sterilised in his hands. This seems to me a far-fetched suggestion. Ex hypothesi the harbour company will not sell any part of its land unless the harbour has failed or unless the part sold is unnecessary for the purposes of the undertaking, and it seems fantastic to read the disposition as contemplating that a singular successor of the company to whom the company has sold the land because it has ceased to be able or does not need to utilise it for harbour purposes should be bound to apply it to harbour purposes.

It is true that the words "for the purpose of erecting and maintaining a pier or harbour and other necessary works connected therewith" express in quite precise and definite form the purpose to which the land is to be put by the company, and to which they must put it so long as they hold it. But that is not the question. The question is whether it appears unequivocally from the structure and language of the grant that the restriction, however clearly it may itself be expressed, was intended to be binding on singular successors. "Unless the granter has signified that intention clearly, the law does not hold purchasers bound to know that it was intended, for it is possible that he might not have so intended; and the rule laid down in *Martin v. Paterson* considers it enough if this 'admits of a doubt.'" Those are the words spoken in this House by Lord Brougham in the case of the Tailors of Aberdeen (at p. 665). And I have already quoted his pronouncement that "no fetters are to be raised by implication or conjecture" (at p. 667). What is not to be left to conjecture, what must not admit of a doubt, is not the nature of the restriction, but whether the restriction was intended to run with the lands so as to affect them in whosoever hands they might come to be.

The considerations which I have set out above and which arise from an examination of the structure and terms of the disposition itself appear cumulatively sufficient to establish that the granter has not clearly signified his intention that the land should be subject to a real restriction against its use for any purpose other than that of erecting and maintaining a pier or harbour, no matter into whose hands the land should ultimately come. The granter has not so framed his "conveyance" as to rebut the presumption of freedom. If it is thought that I have read the deed too strictly or too critically I may invoke the examples afforded at an interval of nearly a century and a half by the cases of *Governors of Heriot's Hospital v. Ferguson* and *Anderson v. Dickie*, from which it may be seen that I have applied no more exacting standard than was there applied by judges deeply versed in the principles of Scottish feudal conveyancing.

I am accordingly of opinion that the appeal should be dismissed, and that the interlocutor appealed from should be affirmed.

LORD WRIGHT.-I have had the advantage of reading the opinion of Lord Macmillan and I agree with it. I am also authorised by LORD ROMER to say that he agrees.

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