opportunity of proving any loss that had arisen by this arrangement. On their stating that they had no evidence to lead, he repelled the objection.

The Court adhered, on the ground that the presumption was, that the compensation paid was a fair one.

"(2) The defender has not debited himself with the annual rents and feu-duties and relative casualties due from and exigible out of the surplus lands acquired under the Act of Parliament (Bridge Act), but not required for bridge purposes, consisting of the whole ground on which Athole Street, Dunkeld, is built, with gardens adjoining, and gardens above and below the bridge, and other lands, and for which a claim is made for at least £50 annually, or such other sum as may be ascertained, from 1808, with interest thereon."

Argued that the Duke could not debit the bridge with the price of these surplus lands (said to be £254) without holding them, and all profits therefrom, as belonging to the bridge.

The Lord Ordinary repelled the objection.

The Court (*dubit.* Lord Deas) adhered, on the ground that, even if all the objections stated by the pursuers to the bridge accounts (except that founded on the want of stamped vouchers, already repelled by the Court) it was clear that a very much larger sum than £18,000 had been expended on building the bridge and other works authorised by the statute.

"(7) The defender has not been debited with the sums due by the Postmaster-General, in terms of the decision of the Court, being £800 or thereby with interest.

"(8) The defender has not been debited with the sum of £5000, payable by the Highland Railway, with interest from September 1868.

"(9) The accounts of the income and expenditure of the bridge should be continued from 1867 down to the present time."

The sums mentioned in objections 7 and 8 were sums not received by the Duke till after Dec. 31st, 1867, the close of the account embraced in this action.

The Lord Ordinary repelled these objections.

The Court adhered. As regards the 7th and 8th objections, it was obvious that an account-current, which closed at 31st December 1867, could not embrace sums that might be subsequently paid, without deranging its whole scheme. The proposal in the 9th objection was a very idle one. The 31st December 1867 had been properly chosen as the close of the account, since this action was raised before Whitsunday 1868, and the principal conclusion of the summons was to have it declared that the debt on the bridge had at that date or before it been extinguished. The Lord Ordinary had found that, instead of being free, the bridge was at that date burdened with a debt of £16,000 and continuing the account to the present time could not possibly affect that judgment.

The defender stated three objections to the report, only one of which need be noticed, viz., —the accountant proposes to charge against the defender a sum of £30 per annum from 7th Nov. 1809, on the ground of his Grace reserving in the articles of roup of the pontages a right to pass himself, his family, and servants, in a small boat from one side to the other, in any part of the space between Balmackneil and Murthly Ferries, between which no ferry was allowed to be worked for hire.

The Lord Ordinary repelled the objection.

The Court recalled and sustained the objection. Although the Duke was not entitled to exempt himself or anyone else from pontages, and although it would have been illegal for him to have used a boat for transporting persons or merchandise across the river, either for hire, or gratuitously, for the purpose of defeating the pontage, the alleged use of a boat was in the fair exercise of the Duke's right to pass from one side of the river to the other, the land on both sides being owned by him; *Weir* v. *Aiton*, May 2, 1858, 20 D. 968.

The result of sustaining this objection for the defender is, that the debt on the bridge, as at 31st December 1867, is found to be about £1700 in excess of the sum found by the Lord Ordinary.

The Court *quoad ultra* adhered to the interlocutors of the Lord Ordinary.

Agents for the Pursuers—Wotherspoon & Mack, S.S.C.

Agents for the Defender—Tods, Murray, & Jamieson, W.S.

Thursday, November 16.

SECOND DIVISION.

CURRIE *v.* MACGREGOR.

Disposition in Feu—Condition—Public Burden—Leith Sewerage Act, 1864, *sec.* 47. By the Edinburgh and Leith Sewerage Act, 1864, proprietors of lands are required to connect the drains of houses built by them with the main sewer, at their own expense, and at the sight of the Commissioners. The Commissioners are further empowered to require payment from such proprietors of a "reasonable sum" for the use of the sewer. A proprietor executed these operations according to statute at his own expense, and thereafter disponed the property by a feu-disposition, under which he was bound to relieve the purchaser of all public and parochial burdens payable out of the lands preceding the term of entry. The purchaser entered into possession at Whitsunday 1869, and the Commissioners did not fix the said "reasonable sum" for the use of the sewers until December 1870. *Held* that the proprietor was bound to relieve the purchaser of payment of "this reasonable sum," it being a burden payable out of the lands prior to the term of entry.

Currie in this action sued Messrs W. & D. Macgregor, builders, for the sum of £40, 5s., which he had been called upon to pay by the Commissioners who acted under "the Edinburgh and Leith Sewerage Act, 1864," in respect of certain houses in Leven Street, sold by them to the pursuer. Their sale was carried through by means of a missive offer by Mr Currie, a condition thereof being that the pursuer Currie should bear no part of the expense of forming, macadamising, causewaying, and completing the streets, roads, lanes, and others mentioned in the conditions of feu of the lands of Leven Lodge and Valleyfield, or of the drainage of the said lands.

Following on this, a feu-disposition, of date 13th May 1864, was granted by the defenders to the pursuer, disponing the said subjects to him, with entry at Whitsunday. The said disposition contained a clause binding the defenders to free the pursuer of all feu-duties, casualties, and public and parochial burdens payable out of said subjects at and preceding the said terms of entry.

The defenders accordingly entered into posses-

sion of the subjects at Whitsunday 1869, and previous to that time the drains of the buildings had been connected with one of the main sewers of Leith at the expense of the defenders in terms of the enactments of "The Edinburgh and Leith Sewerage Act 1864."

By section 44 of that Act all sewers shall be in connection with the main sewer, and not discharge their contents into the river or harbour. Section 45 provides that this shall be done at the sight of the Commissioners, and at the expense of the proprietors.

Section 47 is as follows—"The owners of all lands, houses, or other property, any sewer, outfall, or drain from which shall, after construction of the said main and branch sewers and works, be connected with the same, shall be liable in payment to the Commissioners of a reasonable sum of money for the use of the said main or branch sewers and works, which the Commissioners are hereby authorised and required to fix and exact in respect of all such lands, houses, or other property: Provided always that such lands, houses, or other property shall not have been assessed for the expense of making such main or branch sewers or works; but if such lands, houses, or other property shall have been so assessed, and shall have been built upon, enlarged, or altered after the assessment for making such main or branch sewers or works was imposed and levied, the owners thereof shall be liable in payment to the Commissioners of such reasonable sum of money as aforesaid."

On 7th December 1870 there was served upon the pursuer a notice, under the hand of the Clerk to the Commissioners, to the effect that in terms of the last mentioned section the "reasonable sum" for the use of the sewers had been fixed at £40, 5s., and accordingly that the pursuer was liable for that sum.

The pursuer paid this sum to the Commissioners, and the present action claimed relief for the same from the defenders in respect that it was a public burden payable out of the subjects prior to his term of entry.

The Lord Ordinary (ORMIDALE) sustained the claim of the pursuer, and decerned in terms of the conclusions of the summons. He remarked in his note—"The £40, 5s. sued for is the sum fixed by the Commissioners under the Edinburgh and Leith Sewerage Act 1864 as payable by the owners of the subjects in question in respect of the junction or connection of the sewerage and drainage thereof with the main drain and sewers constructed by said Commissioners in the exercise of their statutory powers.

"The important clauses of the Edinburgh and Leith Sewerage Act bearing on the present dispute are set out in articles 3, 4, and 5 of the pursuer's condescendence. By the clause set out in condescendence 3 it is made imperative on all persons constructing sewers on their properties, in place of allowing them to lead or to discharge their contents into the river of Leith, to join or connect them with the main drain and sewers constructed by the Commissioners. By the clause set out in condescendence 4 it is provided that the mode of connection or junction is to be determined by the Commissioners, and that the works necessary for that purpose are to be executed at the expense of the parties requiring the connection or junction. And by the clause set out in condescendence 5 it is enacted that the owners of the subjects, the drains or sewers of which have been connected with the main drain and sewers, shall be liable in payment to the Commissioners of a 'reasonable sum of money for the use of the said main or branch sewers or works, which the Commissioners are hereby authorised and required to fix and exact in respect of all such lands, houses, or other property.'

"With reference to these statutory enactments it is admitted (condescendence 6, and answer thereto) that the connection or junction of the drains and sewerage of the subjects in question with the Commissioners' main or branch sewers had been effected at the expense of the defenders previous to the date of the pursuer's entry to the subjects in question. It thus appears that the defenders had previous to such entry taken and obtained the use of the main or branch sewers, for which the sum now sued for was chargeable.

"The subjects in question were purchased by the pursuer from the defenders on 9th November 1868, per the missive offer and acceptance No. 6 of process. By that missive the pursuer's entry to the subjects is declared to be Whitsunday 1869, and it is made an express condition of the purchase that the pursuer was to bear 'no part of the expense of forming, macadamising, causewaying, paving, and completing the streets made, lanes, or others therein referred to, or of the drainage of said lands.' If then the present question were to be governed by this condition there could be little room for doubt that the defenders and not the pursuers are liable for the sum now in dispute, for that sum must, the Lord Ordinary thinks, be taken as part of the expense of completing the drainage of the subjects in question.

"It was contended, however, for the defenders that the missive of sale cannot now be considered at all, in respect that, according to the general rule applicable to such matters, the feu-disposition (No. 7 of process) which followed on it must alone be held to embrace the conditions of the contract of parties as finally agreed on. But assuming this to be true as a general rule, the Lord Ordinary cannot find anything in the feu-disposition to alter the state of matters or relieve the defenders from the liability which had unquestionably been incurred by them prior to the sale of the subjects in question, and to transfer that liability over upon the pursuer. On the contrary, although the feu-disposition contains no express allusion to the expense of constructing and completing the drainage of the subjects, or to the sum incurred and payable to the Commissioners under the Edinburgh and Leith Sewerage Act for allowing the connection or junction of that drainage with their main or branch drains, it implies very plainly that the drainage had been completed, and of course that the relative expense had been incurred. He accordingly finds that the pursuer is by the feu-disposition taken bound to defray the expense, not of constructing and completing the drainage, but of 'supporting and keeping in repair' the drains; and he also finds that besides the ordinary clause of absolute warrandice the defenders have bound and obliged themselves to free and relieve the pursuer and his successors of, *inter alia*, 'all public and parochial burdens payable out of the said subjects before disponed at and preceding the said term of entry, they freeing and relieving us and our foresaids of the same in all time thereafter.' Now, keeping in view that the liability for the sum in dispute had arisen and been incurred prior to

the pursuer's term of entry (Whitsunday 1869), and that the sum for which liability had so arisen and been incurred was not of the nature of a continuing burden periodically arising, but being once paid and discharged came to an end, and was extinguished for ever, the Lord Ordinary is of opinion that it must be held to have been one of the burdens which fell to be paid by the defenders themselves as the owners of the subjects at the time when the liability therefor arose. He is disposed to think that to have rendered the pursuer liable in payment of that burden as in a question with the defenders an express provision or condition to that effect in their contract would have been necessary. The Lord Ordinary cannot think that it is sufficient to relieve the defenders, as was contended for by them, and transfer the obligation of payment over upon the pursuer, that the Commissioners acting under the Edinburgh and Leith Sewerage Act happened not to fix the precise sum payable for the subjects and exact payment of it till after Whitsunday 1869, the term of the pursuer's entry. Although the precise amount of the burden was not fixed or payment demanded till after that term, the important and, as the Lord Ordinary thinks, the conclusive consideration is that the burden had been created and the liability of the defenders for it as the then owners of the subjects had arisen and taken effect prior to the pursuer's entry. It not unfrequently happens, the Lord Ordinary believes, that payment of burden and taxes are not and cannot well be levied or exacted or their precise amount known till sometime after the lapse wholly or partly of the time for and in respect of which they are payable.

"Upon the whole, and although the point in dispute is somewhat peculiar, and may not be altogether unattended with difficulty, the Lord Ordinary considers the pursuer is entitled to prevail, and he has so decided."

The defenders reclaimed.

The SOLICITOR-GENERAL and BALFOUR for them.

The DEAN OF FACULTY and THOMS in answer.

The Court adhered.

Agents for Pursuer—Hill, Reid, & Drummond, W.S.

Agents for Defenders — Lindsay & Paterson, W.S.

Thursday, November 16.

SPECIAL CASE—ADAMSON'S TRUSTEES.

Trust—Intention of Testator. The trustees of a deceased gentleman being empowered to employ the residue of his estate in the establishment of an institution "in or near Cupar," to be called the "Adamson Institution," determined to build an infirmary at Bridgend of Ceres, which was 2½ miles from Cupar. *Held* that in so doing they had not defeated the purpose of the trust-deed, which was to erect an institution "in or near Cupar."

The question in this Special Case turns on the construction of the words "in or near Cupar" occurring in a settlement providing for the erection of a public institution. The late Mr Adamson of South Callange, Ceres, near Cupar-Fife, on 11th December 1865 conveyed his whole property to certain trustees, one of whom was Mr Andrew Taylor, banker, Cupar. The third purpose of the deed was as follows:—"My trustees shall hold and apply the residue and remainder of my estate and effects for the establishment of an institution in or near Cupar, to be called the 'Adamson's Institution,' the object of which shall either be the education of persons above the age of ten years, or as an hospital or infirmary for the care of diseased and treatment of injured persons, as the trustees for the institution hereinafter appointed may, on a consideration of the comparative benefits to the district of an educational establishment and hospital or infirmary, in their discretion determine to be preferable."

The permanent trustees for the management of the institution were to be the minister of Ceres, two persons appointed by the Parochial Board of that parish, and four by the Town Council of Cupar, who were to be conjoined in the above order with his orginal trustees on the death or resignation of the latter, the number being kept up to seven.

The truster had indicated a preference for an educational establishment, and he provided that if that should be the choice of his trustees, twelve pupils from his native parish of Ceres should receive a free education there. In the event of an hospital being preferred, he expressed a wish that some preference should be accorded to the inhabitants of Ceres, and he further desired that Mr Taylor, one of his original trustees, should be appointed factor and clerk to the institution, on the ground that he was cognisant of his affairs and with his views in regard to it.

Mr Adamson died in 1866, and ultimately the trustees resolved that the institution should be an infirmary, and they fixed Bridgend of Ceres, between Ceres and Cupar, and distant about two miles and a-half from the latter place. Mr Andrew Taylor of Cupar objected to this site, on the ground that it was not in or near Cupar in the sense of the truster's settlement, and a Special Case was brought for the opinion and judgment of the Court on this point.

FRASER and BALFOUR, for the trustees favouring the Ceres site, argued that the truster had clearly indicated a preference towards Ceres, and that the distance from Cupar was not so great as to operate an exclusion of the condition of the trust that the institution should be "in or near Cupar."

SOLICITOR-GENERAL and MILLIE answered that it must be taken to have been the intention of the truster to prefer the immediate neighbourhood of Cupar, as he had appointed the majority of the permanent trustees to be nominated by the Town Council of Cupar, and had fixed on Mr Taylor as factor, who was resident in Cupar. *Separatim*, the district which the truster intended to benefit could not include both Cupar and Ceres parishes, seeing that he had had a school in view, and that for the higher branches of education. In any event Cupar was a more suitable locality for a public institution than Ceres.

To-day the Court unanimously upheld the choice of site made by the majority of the trustees, holding that it was not so far from Cupar as to defeat the purposes of the truster, and that it sufficiently qualified the condition of the settlement "in or near Cupar."

Agents for First Parties—Jardine, Stodart, & Frasers, W.S.

Agents for Second Parties—Fyfe, Millar, & Fyfe, S.S.C.