it was essential for the holder of the bill of lading to look to the charter-party to see what was meant. I concur in your Lordships' opinion that the captain's gratuity in a general sense is really part of the freight. It is given for the same thing—the carriage of the goods; and Professor Bell in his Principles lays down the general proposition that freight "includes primage or hat money"—an earning that the general expression "freight" may include, although it is sometimes used in contradistinction, *i.e.*, one part of the freight is used in opposition to the others. Still the primage of the captain is as much payment for carriage as the payment for the use of the ship. And here there is special reference to the charter-party. It is very difficult for the party who receives that bill of lading, and who must look to the charter-party to see its conditions, to say—"Oh! the freight which I undertook to pay is freight in the strict sense of the word, and not that part of the freight which is to be paid to the captain separately." Therefore I hold that on both points both the learned Sheriffs are right.

The Court adhered.

Counsel for Pursuer (Respondent)—Balfour—M'Kechnie. Agent—John Galletly, S.S.C.

Counsel for Defenders (Appellants)—Lord Advocate (Watson)—Trayner. Agents—Mason & Smith, S.S.C.

Wednesday, December 19.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

DUNBAR'S TRUSTEES *v.* THE BRITISH FISHERIES SOCIETY.

Superior and Vassal—Feu-Contract—Liability for Road Assessment and Poor-rates—Clause of Relief from Public Burdens Payable now or "in all time coming."

A feu-contract contained a clause of relief by the superior in favour of the vassals "to free and relieve" them "of the whole cess or land-tax, feu-duties or other duties, ministers' stipends, schoolmasters' salaries, and other public burdens due and exigible out of the whole lands and subjects hereby feued, or that may become due and payable for or from the same in all time coming."—*Held* (1) in respect of previous judgments of the Court upon such clauses of relief, that (*a*) they cover all burdens except such as have been "imposed by supervenient legislation;" (*b*) that they therefore cover poor-rates; and (*c*) that liability under them is not restricted to the proportion of assessments effeiring to the feu-duty; and (2) that under the clause above quoted the measure of the sum demandable in relief was not limited by the amount of the feu-duty.

Observed that the intention of parties as disclosed in the feu-contracts is of importance in deciding the measure of the liability between superior and vassal under clauses of relief from public burdens.

Public Burden—Clause of Relief—Road-Money.

Held (*diss.* Lord Ormidale—*revg.* Lord Curriehill) that assessments imposed under certain Private Acts relating to the Caithness County and Wick Burgh Roads passed in 1830, 1838, and 1860, were not covered by an obligation in a feu-contract, dated in 1823, to relieve a vassal from public burdens payable "now" or "in all time coming."

The trustees of the late Sir George Dunbar, Bart. of Hempriggs, in the county of Caithness, and Garden Duff Dunbar of Hempriggs, raised this action against "The British Fisheries Society," who were previously incorporated as "The British Society for extending the fisheries and improving the sea-coasts of this kingdom," but were re-incorporated under the previous title by the "Pulteney Harbour Act 1857." The summons concluded for declarator "that the pursuers have not been and are not bound to free and relieve the defenders of any sums which have been or may be paid, or have become or may become payable, by the defenders or others deriving right through or from them as or in name of (first) County of Caithness Road Assessments; (second) Burgh of Wick Road Assessments; (third) Poor-rates—all in respect of the lands feued to the British Society for extending the fisheries and improving the sea-coasts of the kingdom by the late Sir Benjamin Dunbar of Hempriggs, Bart., by feu-contracts of dates 25th March and 10th April 1807, and 2d and 19th April 1823 respectively, or of the buildings or works erected thereon, or any part of the said lands, buildings, or works; or otherwise, that the pursuers have been and are liable only for such proportion of the said burdens or any of them as effeirs to the feu-duty payable to them; and further, and in the event of its being found that the pursuers have been, are, and will be bound to relieve the defenders of the sums which have been or shall be paid, or which have become or shall become payable, by them in respect of the said assessments, or any of them, or any part thereof, then it ought and should be found and declared that the defenders have not been, are not, and will not be, entitled to claim from the pursuers, and that the pursuers have not been, are not, and will not be, bound to pay to the defenders, in respect of any single year, in name of relief, any sum exceeding the total amount of the feu-duty paid or payable by the defenders to the pursuers for that year, in terms of the said feu-contracts."

The questions at issue arose out of certain feu-contracts between Sir Benjamin Dunbar, Sir George's father, and the Fisheries Society. By the first of these contracts, dated 11th March 1803, Sir Benjamin, in consideration of the feu-duty therein specified, feued to the Society—"All and Whole that space of ground lying immediately on the south side of the Water of Wick and county of Caithness," therein particularly described, together with a right of moss near the Loch of Hempriggs, "with liberty also to the said Society of quarrying stones, slate, and flag-stones off the land thereby feued, for the purpose of building on any part thereof, and for erecting piers and forming a harbour thereon, and of defending the same with a pier on the opposite side of the Water of Wick," &c.; and, *inter alia*, with liberty to bring the burn of Hempriggs to their grounds for the purpose of supplying any village

they might erect thereon, and also for the use of such mills as may be made by the Society; also with liberty to direct the course of the Water of Wick within the property feued in such manner as they may find necessary for the improvement and clearing out of the harbour, so that the same shall not prejudice the salmon-fishing—and under various other reservations and declarations. The annual feu-duty was £62. There was this clause of relief—"The said Sir Benjamin Dunbar binds and obliges himself and his foresaids to free and relieve the said Society of the cess or land-tax payable furth of the said lands at and preceding the term of Whitsunday 1803 and in all time coming, and also of all feu-duties exigible by the mediate superior, minister's stipend, schoolmaster's salary, and other public burdens payable out of the said lands, not only preceding the term of Whitsunday 1803, but also in all time coming." That contract was afterwards by mutual consent of the parties, in consequence of a mistake as to boundaries, cancelled, and another was entered into, dated March and April 1807, which contained similar clauses as above, more particularly a clause of relief in terms precisely identical. Upon this latter contract the Society became infeft.

An additional contract was thereafter, in April 1823, executed between the parties in terms of a previous agreement between them. The last-mentioned deed of 1807 was therein ratified and confirmed in so far as not altered by the said agreement, and Sir Benjamin further in feu-farm disponed to the Society a certain space of ground which partly surrounded the subjects originally feued, and also certain salmon-fishings in the Water of Wick.

This last contract contained an obligation to infeft *de me* for payment of the yearly feu-duty of £169, consisting of the £62 specified above and a further sum of £107 stipulated for in the agreement already mentioned. There was also this clause of relief—"And further, the said Sir Benjamin Dunbar binds and obliges himself and his foresaids to free and relieve the said Society of the whole cess or land-tax, feu-duties, or other duties payable to his, the said Sir Benjamin Dunbar's, superiors of the said lands, ministers' stipends, schoolmasters' salaries, and other public burdens due and exigible out of the whole lands and subjects hereby feued, or that may become due and payable for or from the same in all time coming." Upon this contract, in so far as it embraced subjects to which their title had not already been made up, the Society became infeft.

The extensive harbour works of Wick and the fishing village of Pulteneytown were built upon the lands thus feued, under sub-feus granted by the Society, the feuars being taken bound to relieve "the Society and their foresaids of and from a proportional part corresponding to the said feu-duty of the cess or land-tax, minister's stipend, schoolmaster's salary, and all other public burdens, parliamentary or parochial, imposed or to be imposed on the said town and lands of Pulteneytown, belonging to the said Society, from and after the term of the feuar's entry."

From the date of the original feu in 1803 Sir Benjamin Dunbar and his successors had continued to pay the ministers' stipends and schoolmasters' salaries due and exigible from the lands, and the whole feu and other duties payable to their superiors.

The assessments of which repetition was now claimed by the defenders were of three kinds—(1) County Roads, £272, 10s. 9d., laid on under certain private Acts relating to Caithness roads, passed in 1830, 1838, and 1860; (2) Wick Burgh Roads, £831, 1s. 6d., also laid on under the above Acts; and (3) Poor-rates, £7635, 16s. 3d., laid on under the Poor Law Amendment Act 1845 (8 and 9 Vict. cap. 83)—amounting in all to £8739, 8s. 6d. which the Society alleged had been paid by them up to Whitsunday 1875. The Society further claimed relief for all future payments.

It was stated that the effect of the success of the defenders' claim would be (1) to create a considerable reduction of the feu-duty from 1842 to 1859, and (2) to produce a complete loss of the feu-duty after that date, and a further payment by the superior to the vassal of sums varying from £20, 1s. 1d. in 1859 to £459, 5s. 4d. in 1876.

The pursuers pleaded—"1. On a sound construction of the clause and obligation of the feu-contracts libelled, the pursuers are only bound thereby to relieve the defenders of burdens which existed at the date of the said feu-contracts, and not of burdens which supervened subsequently thereto. 2. In particular, the pursuers are not bound to relieve the defenders of payments made as (1) Caithness Road Assessments; (2) Wick Burgh Road Assessments; (3) Poor-rates. 3. *Separatim*, the pursuers are only bound to relieve the defenders of such proportion of the said burdens or any of them as effeirs to the feu-duty payable by the defenders to them. 4. The pursuers, the trustees of the late Sir George Dunbar, are not liable in repetition of any payments under the said obligations of relief, inasmuch as the feu-duties accruing to the late Sir George Dunbar have been *bona fide percepti et consumpti*. 5. Upon a sound construction of the aforesaid obligations of relief, in no view is the vassal entitled to demand in name of relief from the superior a sum larger than the amount of the feu-duty."

The defenders pleaded that they were entitled to complete relief from the pursuers from all future assessments, and to repetition of what they had already paid.

The other facts of the case sufficiently appear from the Lord Ordinary's note, and from the opinions of the Court.

The Lord Ordinary (CURRIEHILL) on 9th April 1877 pronounced an interlocutor finding that the pursuers were bound to relieve the defenders of the Caithness Road Assessments and Poor-rates, and that their liability was not limited by the amount of the feu-duty. In regard to the Wick Burghs Roads assessment, he ordered the defenders to lodge a minute stating how far the lands were within the burgh, and whether at the date of the feu-contracts any assessments might have been imposed on lands and heritages within the burghs for the maintenance of roads. He added this note:—

"*Note.*— . . . . . The questions thus raised are—(1) Whether the obligation of relief in the feu-contracts extends to all or any of the three assessments above specified? (2) Whether the obligation, assuming it to extend to all or some of these assessments, binds the superiors to do more than relieve the vassals of so much of the

assessment as would have been imposed upon the subjects if the feu-duty had been taken as the measure of their annual value? and (3) Whether, in any view of the case, the superiors are bound to give relief to a greater extent than the amount of the feu-duty?

"As regards the *first* and *second* of these questions, it was conceded at the bar that, in respect of the judgments of the Court of Session in a long series of decided cases, the answer, in so far as the County Road assessments and Poor-rates are concerned, must be adverse to the views of the superior. The Wick Burgh Road assessments are in a somewhat different position, as I shall afterwards explain. As regards the *third* question, there has not hitherto been any judgment in this Court, and as it is now fairly raised it must be decided. The pursuers, however, are desirous that the judgment in this case should be so framed as to enable them to obtain the judgment of the House of Lords upon all of the questions referred to, and I shall therefore, in the first place, briefly notice the various points which must be regarded as settled by the decisions of the Court, and I shall, in the next place, state my opinion on those points raised by the pursuer, but which have not hitherto been decided.

"(1) It is settled that an obligation of relief in a feu-contract expressed like those under consideration binds the superior to relieve the vassal of all public burdens which, according to any practice or statute existing at the date of the contract, were actually imposed, or might have been imposed, upon the subjects feued, but not of burdens imposed in virtue of any supervenient law.—*Reid* v. *Williamson*, 5 D. 644; *Scott* v. *Edmond*, 12 D. 1077; *Lees* v. *Mackinlay*, 20 D. 6; *Hunter* v. *Chalmers*, 20 D. 1311; *Wilson* v. *Magistrates of Musselburyh*, 6 Macph. 483; *Preston* v. *Magistrates of Edinburgh*, 8 Macph. 502.

"(2) It is settled that under such obligations relief is to be given from the assessments actually imposed upon the subjects, including all buildings erected thereon, in their actual condition at the date of assessment, and the liability will not be restricted to assessments calculated on the footing of the feu-duty being the true annual value of the subjects—*Lees* v. *Mackinlay*, 20 D. 6; *Hunter* v. *Chalmers*, 20 D. 1311; *Paterson* v. *Hunter*, 2 Macph. 234; *Nisbet* v. *Lees*, 7 Macph. 881; *Preston* v. *Magistrates of Edinburgh*, 8 Macph. 502.

"(3) It is settled that the obligation to relieve the vassal of such burdens is not affected or diminished by the vassal having sub-feued the lands to sub-vassals, whether with or without communication of the obligation of relief, all such arrangements being held to be *res inter alios actæ* in so far as regards the original superior and his successors—*Montgomerie* v. *Hamilton*, 3 D. 241; and *Hunter* v. *Chalmers*, 20 D. 1311.

"(4) It is settled that such obligations of relief extend to poor-rates assessed upon lands and buildings thereon in respect of ownership, even although no such assessment was in use to be imposed on the property at the date of the feu-contract containing the obligation. Such property has always been liable to assessment for poor-rates, although these may not have been actually imposed until after the passing of the Poor Law Act, 8 and 9 Vict., c. 83 (1845), or may have been modified in form and increased in amount by the operation of that statute.

"(5) It has been held in a recent case by Lord Young, whose judgment was acquiesced in, that an obligation to relieve of road money, contained in a conveyance at the date of which the only road assessment was the old Statute Labour assessment, extended to assessments imposed under a subsequent statute, by which tolls were abolished in the county, and a general assessment laid upon all lands and heritages—*Steuart* v. *E. of Seafield*, 3 Rettie, 518. That judgment appears to me to be sound in itself, and to be directly applicable to the present case, inasmuch as the assessments imposed by the Caithness Road Act 1860 come in place of and supersede the assessments under the Statute Labour Act of 1669, c. 37, and other later Acts.

"But while it is clear from the foregoing summary of the decided cases that the obligation of relief in the present case extends to poor-rates and to County Road assessments, it is possible that the Wick Burgh Road assessment may be in a different position; but as the record does not contain the information necessary to enable me to form any opinion as to this branch of the case, I have appointed the defenders to state in a minute the position of their lands with reference to the Burgh of Wick and the Road assessments within the burgh.

"The third general question raised in this case is, whether the obligation of relief extends to the whole amount of the assessments imposed upon the subjects, even if these should exceed the annual feu-duty, or whether it is to be restricted to the amount of feu-duty? This is a question which has never yet been purely raised for decision. In several of the cases already cited it was incidently raised in argument, but in all of them the Judges abstained from deciding the point. In particular, in the cases of *Lees* v. *Mackinlay*, and *Hunter* v. *Chalmers*, *Paterson* v. *Hunter*, and *Wilson* v. *Magistrates of Musselburgh*, and *Preston* v. *Magistrates of Edinburgh*, the question was raised, but reserved, whether, in the event of the land originally feued being covered with buildings erected at the expense of the vassal to such an extent as not only greatly to increase the annual value of the subjects, but to change their character, so that the buildings were no longer mere accessories of the land on which they were built, but were truly the principal and important part of the composite subject, the superior should be held bound to relieve the vassal of the public burdens imposed upon the artificially increased annual value in cases where these exceeded the amount of the feu-duty. And the question was also raised, and reserved, whether in such cases there could be any separation of the rate into distinct parts, distinguishing between what was properly exigible for the houses, and the portion properly exigible for the land. But in all these cases, and particularly in the case of *Nisbet* v. *Lees*, 15th June 1869, 7 Macph. 881, it is obvious, from the observations made by the Judges in dealing with this question, that whatever might have been their opinions on the abstract question of the superior's liability beyond the amount of the feu-duty, the intention of the parties as disclosed in the feu-contract would be an important element in deciding each case as it should arise. In a case, therefore, like the present, in which it was clearly the intention of the parties that the subjects feued to the defenders should be used by

them, and by persons to whom they might grant sub-feus, for the purpose of erecting buildings to a very large extent—including harbours, houses, mills, and villages—I can have no doubt that the superior became bound to relieve the vassals of the whole amount of the assessments contemplated by the contract which should come to be imposed upon the whole subjects feued, whether these should remain in their original pastoral or agricultural state, or should be converted into houses, mills, harbours, and villages, and that in doing so he did not intend to restrict his liability to the amount of the feu-duty. It is true that these burdens have now come greatly to exceed the feu-duty, but in the circumstances I must hold that the feu-duty was fixed on the footing that the risk of what has now happened should be undertaken by the superior. I have not arrived at this result without the most anxious consideration, because the question is one of most serious import, not only to the present pursuers, but to many other persons who occupy similar positions.

"In many other localities an enormous increase in the annual value of subjects feued out during the last 100 years has taken place owing to the erection of buildings, the opening of railways, and other causes, and the increase may be expected to continue until in many other cases than the present the annual burdens shall exceed the feu-duty. But it humbly appears to me that the present question is not to be decided upon considerations of hardship to superiors, and indeed there may in many cases be as much hardship to a vassal in refusing to give effect to such an obligation of relief as in the present case there is to the superior in enforcing it. Nor do I think that the question is to be determined by the use to which the vassal has put the subject. I think the obligation must be interpreted by the fair and natural construction of the language in which it is expressed; and, according to the natural construction of the obligation in the present case, I am of opinion that the superior undertook an absolute obligation to relieve his vassals of all public burdens which might come to be imposed upon the subjects feued while in the lawful possession of, and occupied or used in a legal manner by, the original vassals and their tenants and sub-feuars. It may be that none of the parties to the contracts had at their dates any idea that the public burdens would in process of time reach their present large amount, but both parties undertook a certain amount of risk in entering into the transaction, which was more or less speculative in its nature. The superior, on the one hand, must be held to have fixed the feu-duty on the footing that it was large enough to cover the risk of future increase in the burdens; and, on the other hand, the vassals in undertaking to pay the feu-duty, which must be assumed to have been adequate and full, undertook the risk that their contemplated harbour might be unprofitable, that their contemplated fisheries might be unsuccessful, and that they might be left with buildings and villages on their hands, for which they could procure no tenants. In these circumstances, and without expressing any opinion upon the abstract question of a superior's liability in every case beyond the amount of the feu-duty, I think that there are no grounds in the present case for restricting the obligation of relief to the amount of the feu-duty.

"The pursuers, however, further maintain that, as the feu-duties have been paid to them by the defenders for a long series of years—indeed for upwards of thirty years—without any claim for relief from the public burdens, these feu-duties must be held as *fructus bona fide percepti et consumpti*, and that they ought not to be called upon for repetition. It appears to me that this contention is not well founded. Even if it had been expressly declared in the feu-contracts that the vassal was to have his relief by retaining the feu-duties, this claim of the pursuers could not have been sustained. That point was expressly decided in the case of *Hope* v. *Lumsdaine*, 9 Macph. 865. But in the present case there is no such specialty. The superior was entitled to demand and receive his feu-duties in virtue of the obligation to pay these undertaken by the vassal in the feu-contracts. His counter obligation was merely to relieve the vassal of certain other claims which might from time to time be made upon him in the form of public assessments. In other words, each party stood in the relation of debtor and creditor to the other in separate and distinct obligations, and it would be a novelty in the law to hold that one of the parties by paying his debt regularly to the other thereby discharged the debt due to himself to that other party. It is thus plain that there is nothing in the present case approaching to *bona fide* perception and consumption of fruits at all. That plea is only applicable in cases when a party *bona fide* possesses under a good colourable title property afterwards found to belong to another, and draws and consumes the fruits thereof, the maxim being '*Bonæ fidei possessor facit fructus, perceptos et consumtos, suos.*' In such cases the possessor is on equitable grounds held not bound to account to the true owner for the fruits so consumed. But in the present case the pursuers have only received annual feu-duties which were in law their own, and the amount of which was liquidated by the feu-contracts, and to these their right was and is undoubted, and they are not asked to repeat them. What they are now asked to do is to implement their part of the mutual contracts by relieving the defenders of claims of a public character—viz., public burdens which vary in amount from time to time, and which they are bound to pay, not necessarily to their vassal, but either to him or to the parties who made these claims upon the vassal. It is true that the vassal might at the annual settlement of the feu-duties have retained the sums for which the superior was liable in relief; but his omission to do so cannot be held to have discharged his claim for relief or to bar him from now insisting on that claim. But on the equitable consideration which led to the decision in the case of *Hope* v. *Lumsdaine*, I think that interest prior to Whitsunday 1875 should not be allowed on the sums which the pursuers may now be called on to pay under their obligation of relief."

On 29th May 1877 his Lordship pronounced an interlocutor finding the pursuers similarly liable as regards the Burgh of Wick Roads Assessment, and the defenders were therefore assoilzied from the whole conclusions of the summons, with this qualification, that they were not found entitled to interest prior to Whitsunday 1875, when the claim was first intimated. The following note was appended to this interlocutor :—

"*Note.*—From the minute lodged by the defenders . . . the statements in which are not disputed by the pursuers, it clearly appears that, in so far as regards the defenders' right of relief, the Burgh of Wick Road Assessments stand in substantially the same position as the County Road Assessments. The lands held by the defenders under the pursuers as superiors are all locally situated without the boundaries of the royal burgh of Wick, although to some extent they are now included within the boundaries of the Parliamentary burgh as these are defined by the Act 2 and 3 William IV. c. 65. At the date of the feu-contracts these lands were liable to all assessments which were or might be imposed by the County Road Trustees for the formation or maintenance of roads within the county. They were thus liable to the assessments which were or might have been imposed by these trustees under the Road Acts of 1830 and 1838. In 1860 a new Act was passed regulating the assessments for county roads, and by that Statute the roads within the boundaries of the Parliamentary burgh of Wick are placed under the management of the Magistrates of the burgh, who now exercise the powers of assessment within their boundaries which were formerly exercised by the County Road, &c. The subjects within these boundaries are not thereby subjected to any new burden. The Act merely transfers the management from the County Road Trustees to the Magistrates. The defenders therefore are entitled to claim from the superiors of the lands relief from these assessments as well as from the poor-rates and the assessments for roads in the county beyond the boundaries of the Parliamentary burgh."

The pursuers reclaimed, and argued—Since the date of the Lord Ordinary's interlocutor they had discovered that the harbour was partly built out to sea, and therefore, the burdens being rated upon the annual value of the whole harbour, only a portion in any view was due by them. In view of the decisions, the clause of relief must be held to apply to poor-rates, and under *Paterson's* case was not limited to assessment effeiring to the feu-duty. The decisions gradually worked onwards against the superior. And the question really came now to be, Whether a superior was bound to pay for a vassal more than he actually received in feu-duty from him? There must be a canon of limitation somewhere—cf. opinions of the Lord President, Lord Deas, and Lord Ardmillan in *Nisbet*. Suppose ground feued out with a clause of relief became the site of a city, would the superior in that case be liable for all assessments, even for gas and water-rates. This pointed to the existence of limitation somewhere? Was it possible to arrive at the basis of settlement upon the principles of the feudal law without reference to the fact in each case? This kind of contract was a division of one estate into two, into superiority and property, and there was a shifting of the burdens which would otherwise attach to the *dominium utile*. The real meaning was not a personal obligation to relieve, but a re-arrangement of the burdens binding them to the *dominium directum*. In *Stewart's* case the superior had to pay in relief a sum greater than the feu-duty, but in the case of teinds there was a canon of limitation resulting from the nature of the estate. Besides, in *Stewart's* case there was an untaxed entry. Sir George Dunbar's "foresaids" were his successors in the superiority *qua* such, and accordingly, as soon as the *dominium directum* was eaten up, the vassal had taken all he could get. If the liability were more than the amount of the feu-duty, the granter was not a superior but a debtor; and to place the superior under an unlimited liability was inconsistent with the feudal relation. Feudally, the presumption was in favour of the superior who had conferred a favour. But looking at it not feudally, the Court must be guided by the circumstances of the case. What was the meaning of the parties here? Could it be credited that Sir Benjamin Dunbar intended such a result?

With regard to the road assessments, the whole system of laws under which they were levied was different from those in force at the me of the contract. At that time a proprietor was only liable to a limited assessment, which was imposed in supplement of what was raised by a rate on occupiers. Now, the whole burden fell directly on the proprietor.

Argued for defenders—The whole question really was, Whether payment should be operated out of the feu-duties only? From the contract and its terms it was manifest that there was at the outset an intention to build a harbour and a village. The answer to all the pursuers' arguments was a simple reference to the contract. The superior here bound himself and a particular line of representatives. Personal liabilities were only limitable by paction. As to roads, there was a power to tax under the Act of 1669, and so the present Road Acts created no new assessment. Mere change of the standard did not alter the obligation. The answer which it was sought to make by limiting the liability to the amount of the feu-duty was not tenable, for the whole matter was one of contract, though the superior might have made a bad bargain.

Authorities—*Reid* v. *Williamson*, Feb. 16, 1843, 5 D. 644; *Scott* v. *Edmond*, June 25, 1850, 12 D. 1077; *Lees* v. *Mackinlay*, Nov. 11, 1857, 20 D. 6; *Hunter* v. *Chalmers*, July 16, 1858, 20 D. 1311; *Paterson's Trs.* v. *Hunter*, Dec. 10, 1863, 2 Macph. 234; *Wilson* v. *Mags. of Musselburgh*, Feb. 22, 1868, 6 Macph. 483; *Nisbet* v. *Lees*, June 15, 1869, 7 Macph. 881; *Preston* v. *Mags. of Edinburgh*, Feb. 4, 1870, 8 Macph. 502; *Steuart* v. *Earl of Seafield*, March 1, 1876, 3 R. 518; Acts 1669, c. 37, 33 Geo. III. c. 120, 59 Geo. III. c. 135, 4 Geo. IV. c. 56, 5 Geo. IV. c. 38, 8 and 9 Vict. c. 83; *Stewart* v. *Duke of Montrose*, Feb. 15, 1860, 22 D. 755, and 1 Macph. (H.L.) 25.

At advising—

Lord Justice-Clerk—[After stating the nature of the action.]

The grounds upon which Sir George Dunbar maintains his immunity from the obligations sought to be laid upon him, are, in the first place, that the burdens in question were imposed by subsequent legislation, and so did not fall to be set against him; in the second place, that the case of *Hunter* v. *Chalmers*, which, if well decided, was of course conclusive in this case, was not well decided; and third, that, at all events, his liability must be limited to the amount of the feu-duty.

In regard to the claims for road money, it is not disputed that the charge for that money, which is divided into two branches, is made under the Statute of 1860. It seems that in that year there was a division made of the liability for the road assessment, and that a certain portion of the feu given off to the British Fisheries Society was put under the administration of the burgh of Wick, and was consequently liable to be assessed by the burgh for the roads. In regard to the remainder, it was left with the society, but it was assessed under the Act passed in 1860. At the date of the first and second feu-contracts the only statute imposing any burden was the Statute of 1793, to which I shall refer immediately; and therefore Sir George Dunbar says, I am not liable to relieve the feuars of any burden which was different from that which was imposed by statute in 1793, which was the only statute in force at the date of the feu-contracts, and he refers to the case of *Scott* v. *Edmond* as being conclusive authority in his favour. The Lord Ordinary has found that the case of *Scott* v. *Edmond* does not prove this. On the contrary, he says that by a series of decisions it has been established that in a case of this kind where there is only an alteration, though there may be an increase of the burden, the principle of *Scott* v. *Edmond* does not apply, but that the principle of *Hunter* v. *Chalmers* does so. I differ from the Lord Ordinary on that subject.

I am not aware of any series of decisions that lead to that conclusion to any extent whatever. There is a case quoted as decided by Lord Young, and acquiesced in, which certainly comes nearer, but with that exception I am not aware that there has been any decision which fixes that where a public burden has been imposed by previous statutes, a new statute, introducing a much larger burden, although substantially for the same as well as other burdens, will fall within the distinction. On the contrary, the principle of the case of *Scott* v. *Edmond* leads clearly, as I think, to every instance where an existing burden is altered in its incidence or amount by subsequent legislation. I think the principle of that case was that these clauses of relief do not extend to an increase or augmentation by supervenient legislation, although the burden may be directed in whole or in part to similar objects. The case of *Scott* v. *Edmond* stands by no means alone; it was only following out the uniform course of decision, the last case prior to it being that of *Scott* v. *Heriot's Hospital.*

This clause referring to the imposition of burdens was an ordinary clause of style in feu-contracts; and Lord Stair lays down very clearly the principle as recognised by all our writers, that clauses of this kind could only extend to the existing burden which might be imposed at the time the contract was made; and so stood the law in the case of *Scott* v. *Edmond.* The question there was whether under a clause of relief in the ordinary style the assessments which had been introduced and imposed under the Act 2d and 3d Vict. cap. 42, fell under such a clause of relief in a writ granted prior to the passing of that Act. Lord Cuninghame, who was the Lord Ordinary in the case, came to a decision against the superior; but the Court, finding that he had been proceeding upon a mistake, sent the case back to him, and the result was that he came to a very clear conclusion in favour of the superior, and states his views with great clearness and at considerable length; and, on the case being reported by him, it was sent to the whole Court, and, with the exception of Lord Cockburn, who used some very epigrammatic and pungent expressions upon the state of the law, the Court recorded that the principle of Lord Corehouse, laid down in *Scott* v. *Heriot's Hospital*, was conclusive; and the Lord Justice-Clerk took the opportunity of saying that he hoped it would never be disturbed.

The question here is, whether the claim for road money falls under that principle? and I am of opinion that the case is precisely in the position of the case of *Scott* v. *Edmond.* The contention here is that there was a prior burden on the land for the road money, and that the fact that there has been an alteration in the law increasing that burden or altering the administration is not a sufficient ground for preventing the fulfilment of the obligation. But it has not been sufficiently adverted to that in the case of *Scott* v. *Edmond* that might have been urged in regard to both the rates which were in question.

Now, here it is quite true that at the date of the granting of this feu-contract there was a burden imposed—I cannot say upon the land, but upon the occupiers of the land—sometimes in respect of land, and sometimes in respect of personal service; and the question is, whether the supervenient statutes apply? and on that point I do not think there is much room for doubt. The statute that was in force at the date of the contract was the Statute Labour Act for the county of Caithness,—a private and local Act which was passed in 1793. The third clause of that Act provided that the whole statute labour of the county should be commuted for a limited burden of 30s. for every 100 pounds Scots valuation. There is then a description of who are to be liable to pay, and from the 26th clause of the Act we see that the burden, in so far as it was a burden on land, was a burden upon those who were in personal occupation of their own land; and in all other respects it was not a burden upon land at all—it was a personal obligation on the parties occupying the land. It was of the nature of statute-labour assessment.

Now, the question is—Whether the Act of 1860 does or does not impose a new burden by the supervenient law? I do not think there can be much doubt about that. I do not feel much difficulty in coming to a conclusion upon that matter. The object of that statute is to a certain extent the same—viz., that of making roads within the burgh; but the result of the statute is, in the first place, to throw portions of these feus into the burgh that never were in the burgh before; in the second place, the assessment is on the real rent—that is to say, that where a subject has been divided and built upon, and the rent enormously increased, the road money is to be taken up upon so much in the pound on the real rent instead of at 30s. for every 100 pounds Scots as formerly. Therefore it is unnecessary to go at length into the statute. I think in the county the rate is 8d. in the pound of rent, and 6d. in the parish. It is a totally different burden from the one with which we have been dealing. On the whole matter, I think that it falls clearly within the principle of the case of *Scott* v. *Edmond.* Therefore, upon that

first matter I differ from the Lord Ordinary. I am of opinion that this is not a burden which falls within that clause of relief—that it is a burden the incidence and amount of which has been entirely altered and increased by subsequent legislation. I may mention that the recent case of *Steuart* v. *Lord Seafield*, March 1, 1876, 3 R. 518, in the First Division, in regard to the assessment under the Education Act, is a very good illustration of the principle I have been endeavouring to lay down, because there beyond all doubt the assessment was laid on with the same object, others included, as the prior assessment for schoolmaster's salary. But the Court said this is not an assessment for schoolmaster's salary; it is for a large scheme of education which embraces schoolmaster's salary. They found the superior entitled to be relieved of that burden.

I have gone so much into the first branch of the case that I shall not say much upon the second, because I hold it to be entirely ruled in the case of *Hunter* v. *Chalmers*. The ground of decision was that the poor-rate was in no respect altered or increased by the Poor Law Act—that the modes of assessment which were in use before the statute were simply to continue. I should have thought it a materially important circumstance, in the first place, that the mode in which the assessment was to be administered was clearly applicable to the extension of it. Boards and inspectors of poor cannot be kept up for nothing, and nothing of that kind existed prior to the statute; and if the alteration of the mode of administering the whole system had the effect—as beyond all doubt it had—of very largely increasing the burden, I should have thought it very doubtful whether that was not supervening legislation which was not within the principle and meaning of clauses of this kind. But that is a matter in which we need not enter, as it has been already decided, and we need not go back upon it now, as I think it is too late to do so.

Then, the third question is one of very considerable interest, and has been more than once the subject of discussion, and it is, Whether, at all events, the amount of burden must not be limited to the amount of the feu-duty? and we had an able argument from Mr Murray upon that matter, who went very fully into the principle on which that claim was maintained. We had occasion to consider that question in the case of *Preston* v. *The Magistrates of Edinburgh*. At that time I indicated my impression that it was difficult to find ground upon which a distinction could be made; and upon considering it again I have come very clearly to that conclusion. It was said that this is a partition of the real interest in the land between the superior and the vassal, and if it were proved that the superior could get no benefit from his right of superiority except the feu-duty, there would at all events have been some ground for maintaining this argument. But that is not so; the casualties of superiority are as valuable or more valuable than the annual payment of feu-duty. How they are made up is more than I know. The feu-duty is £169, but what the casualties may be I do not think we have information. The benefit thus received by the superior seems to me to be conclusive. But, in the second place, this is a personal contract. Although it transmits as against the superior to those who succeed him in the superiority, it is a contract personal to the superior. This principle is well illustrated in the case of *Stewart* v. *Duke of Montrose*, in which it was decided that it was a contract which had been made with the superior. This contract may have been an improvident one, and may turn out ruinous, but that cannot relieve him of the obligation to fulfil it. Therefore, upon that matter, in accordance with the various suggestions that have been made by other Judges, I am of opinion that that claim cannot be maintained.

On the whole matter, I think that the judgment of the Lord Ordinary should be altered as regards the road money, and adhered to as regards the poor-rate.

No question can arise here as to what was the contemplation of the parties in regard to the use to which the ground was to be put, which was for the purpose of increasing the harbour accommodation; and accordingly the result has been exactly what the parties must have had in view.

Lord Ormidale—In this case questions of importance have been raised, extending, it may be, in their possible operation far beyond the interests more immediately involved.

Bearing in mind the terms of the obligation of relief, it may be well, before considering their effect on the road assessments and poor-rates more particularly in dispute, to dispose of some general principles which have been introduced into the discussion.

Having regard to the authorities, it cannot, I think, now be questioned, at least in this Court, that while such an obligation will give relief from all public burdens exigible or payable at its date, or that might thereafter at any time become exigible or payable by virtue of any law or practice existing at its date, it will not afford relief from public burdens created and imposed for the first time by supervenient laws—that is to say, by laws enacted after the date of the obligation.

This general principle has been recognised and settled by the decided cases referred to on the point by the Lord Ordinary, and notably by the case of *Scott* v. *Edmond*, where the judgment of the whole Court, after full argument, written as well as oral, was unanimously to that effect. Even Lord Cockburn felt himself constrained to assent notwithstanding his reluctance to do so, obviously arising from his opinion being opposed to such a view, had it not been for the previously decided cases. This is very manifest, for his Lordship expressly says—"Nothing surely can be more possible, or even probable, than that two parties should agree that the one should relieve the other of all burdens of every conceivable sort—past, present, or future—which any given accident or authority should have imposed or should ever impose upon a particular piece of ground, no matter whether by old laws or by new laws. This undoubtedly is a conceivable idea. Now, I know no words by which the conception can be more clearly or plainly expressed than by setting forth in a regular deed that the obligation should apply to all legal and public burdens imposed or to be imposed." And the words of the obligation now in question—"due and exigible out of the whole lands and subjects hereby feued, or that may become due and payable for or from the same in all time coming"—are just as comprehensive as those

suggested by his Lordship. I must proceed, however, in the present case upon the assumption that the principle has been determined the other way in this Court. But its operation in the circumstances in which immunity from liability on the part of the pursuers to relieve the defenders from road assessments and poor-rates in the present case is another matter, which will be afterwards dealt with.

It must also, I think, be held as settled by numerous previous decisions (1) that such an obligation of relief as we have here is not limited to burdens affecting the lands as they existed at the date of the feu-contracts, but that it comprehends assessments on the subjects in their actual condition at the dates of assessment; (2) that the obligation is not extinguished or affected by subinfeudation; and (3) that it is not limited to the burdens or assessments effeiring, as it is termed, to the amount of the feu-duties.

As conclusive in regard to these points, I may refer in particular to the cases of *Paterson's Trustees* v. *Hunter*, December 10, 1863, 2 Macph. 234, and *Nisbet* v. *Lees*, June 15, 1860, 7 Macph. 881. In the latter case two of the pleas in defence were to the effect that "the buildings on the lands having all been erected since the date of the feu-contract, they do not constitute part of the subjects feued, so as to entitle the pursuer to relief of any burdens or taxes leviable in respect of them, or in respect of anything beyond the forty-seven falls of ground bargained for;" and "In respect that the buildings voluntarily erected by the feuar increased the value to him alone, and do not enlarge the rights of the superior, which are limited to the fixed feu-duty of the ground and corresponding entry money, the clause of relief must be held to apply only to the ground in its original state, and not to the indefinite increase of the subject by erections thereon." But these pleas were held to be untenable by the Court, all the Judges being agreed on the subject except Lord Deas, who seems to have been disposed to hold that "the sound construction of a clause of this kind is that the superior undertakes to pay the burdens corresponding to his estate of superiority, leaving the vassal to pay the burdens corresponding to the *dominium utile*." But however equitable such a view may appear to be, especially in such a case as the present, I feel that I have no alternative but to yield to the authority of the decision which was pronounced.

And although the point does not appear to have been *in terminis* decided, I think it is clear on principle, and according to the fair and reasonable construction of the obligation of relief, as well as the judicial utterances which have been expressed on the subject in the House of Lords and in this Court, that the liability of the pursuers to relieve the defenders cannot on any other ground be restricted to the amount of the feu-duty, however hard the consequences may be to them. There are no data from which it can be ascertained what were the views of the parties, or what they may have contemplated in regard to this matter when the contracts were entered into, although it can scarcely be supposed that they foresaw what has happened, viz., that the annual public burdens in the shape of road assessments and poor-rates alone should be, as they have turned out, three times larger in amount than the whole of the feu-duties. The contract was, I think it may be assumed, to some extent a speculative one, and necessarily involved elements of risk, which might, according to circumstances, involve some degree of hardship upon one or other of the parties. But at the date of the contracts the feu-duties were, I have no doubt, far above the intrinsic value of the subjects in their then state. The pursuers were consequently at that time, and so long as matters continued in the same condition, the gainers, and the defenders the sufferers. The contracts, however, being obviously what may be called building ones, and as they bear intrinsic evidence to the effect that in entering into them the defenders were to be at liberty to erect houses, and a pier and harbour, the result has been that, as stated by the pursuers themselves in their condescendence, "the society" (the defenders) "which in the year 1857 was re-incorporated by the 'Pulteney Harbour Act 1857,' under the title of the 'British Fisheries Society,' have built on the lands held by them under the said feu-contracts the extensive harbour works of Wick." And further, they say—"The fishing village of Pulteneytown has been erected on a portion of the lands under feu-contracts granted by the society to feuars, who by the terms of the contracts are taken bound to relieve the society of proportionate parts of the public burdens." In this way the subjects feued out to the defenders in 1823 and previous years have become very valuable, and the feu-duties payable by them to the pursuers comparatively small, the result being considerable apparent hardship to the pursuers. I say apparent hardship, because the advantages to the pursuers in regard to their other property in the neighbourhood—immeasurably larger in extent and value than the ground feued to the defenders—arising from the defenders' buildings and harbour works, would, I have no doubt, if investigated, be found to outbalance many times over the hardship of being bound in terms of their obligation to relieve the defenders from payment of the public burdens in question. Again, let it be supposed that in place of the defenders' enterprise turning out successful it had proved the reverse, and that they had been unable to improve and enrich the feus by the erection of houses and harbour works, would the pursuers have yielded to a demand to abate the feu-duties. It is out of the question to suppose they would; and equally out of the question is it for the pursuers to expect the defenders in the actual circumstances which have occurred to abate the relief to which they are entitled under the obligation in question. That obligation stands and has stood in all its integrity for upwards of fifty years; and it is impossible now to disregard it or set it aside. It was matter of contract lawful in itself, and for anything that is said or appears to the contrary was fairly entered into. It must therefore be held to be binding upon both parties, and its legitimate effect must be given to it accordingly.

It is true that here not only do the public burdens exceed the whole amount of the feu-duties, but that this arises from the circumstance of the great amelioration in the erection of a pier, harbour, and buildings on the lands as originally feued; and the Judges in deciding the case of *Nisbet* v. *Lees* appear to have reserved their opinion on such a case till it should come before

them for judgment. For myself, I am unable to see any good ground, even in such a case, for holding that the contract of parties should not be adhered to and enforced. Although, as I have already remarked, the point has not been *in terminis* the subject of judicial determination, it has been repeatedly noticed in such a way as to remove, in my opinion, all serious doubt that can be entertained regarding it. For example, in the case of the *Duke of Montrose* v. *Stewart*, March 27, 1863, H. of Lords, 1 Macph. 25, the Lord Chancellor (Westbury) took occasion to remark, in reference to a similar question—"It is no answer to say that the liability of the superior under such an obligation may exceed the whole value of the feu-duties. This may show that the contract of the superior was originally improvident, but does not affect the legal construction or validity of the obligation." Lord Wood also, in *Hunter* v. *Chalmers* (20 D. 1311), and the present Lord Justice-Clerk in *Preston* v. *The Magistrates of Edinburgh*, 8 Macph. 502, expressed indications of opinion very much to the same effect.

It is with reference, and subject to the principles which have now been adverted to, that I come to deal with the particular burdens—the road assessments and poor-rates—more immediately in dispute. In regard to the poor-rates—and I think it will be convenient to take them first—no serious dispute could be, or indeed was, raised, for, in this Court at least, it is no longer an open question, having been the subject of express decision in more than one of the cases cited by the Lord Ordinary. In particular, it was held in the case of *Reid* v. *Williamson* that poor-rates leviable prior to the Poor-Law Amendment Act of 1845 fell under an obligation of relief such as that in the present case, although no such burden was expressly mentioned in it, and that public burdens did not require to be *debita fundi* in order to be comprehended by it. And in more than one of the subsequent cases cited at the debate, and referred to by the Lord Ordinary, it seems to have been held that it makes no difference that the rates were leviable after the passing and in virtue of the Poor-Law Amendment Act of 1845, although the date of the obligation was long prior,—the object of the law being the same as that existing at the date of the obligation, and the rates being due for or in respect of the occupation of land. It appears to have been so held in the cases of *Lees* v. *M'Kinlay*, *Hunter* v. *Chalmers*, *Paterson's Trustees* v. *Hunter*, and *Wilson* v. *The Magistrates of Musselburgh*, all of which have an important bearing on other points as well. The feu-contract in the case of *Hunter* v. *Chalmers* was dated in 1789, and it contained an obligation by the granter, the superior, to relieve the grantee, the vassal, "of all cess, minister's stipend, and whole other public burdens whatever, due and payable forth or for the lands, of all time bygone and in all time coming"—an obligation in essential particulars similar to that in the present case. It appears also that there was in the case of *Hunter* v. *Chalmers* a subinfeudation of the lands, and that the value of the subjects, and consequent burdens, had been greatly increased by buildings and other erections. And besides founding upon these changes since the date of the obligation as reasons for it not being held that he was liable to relieve the vassal from payment of poor-rates, the superior also pleaded that at the date of the feu-contract there had been no poor assessments in the parish in which the lands were situated, and that at any rate the poor-rates had been subsequently largely increased, the objects for which they were leviable in some important respects altered, and the mode in which they were enforced made materially different by the Poor Law Amendment Act of 1845. But all of these pleas, and the considerations they were calculated to suggest, were disregarded by the Court, and the superior was found liable in relief. In reference to the plea of non-liability for poor-rates in respect of the supervenient Act of 1845, Lord Wood, who delivered the leading opinion, said —"The burden of which relief is demanded is not a new burden introduced by that statute. It is a burden to which the owners of lands as such were subject, and which was exigible in respect of the laws existing at the time the feu-contract was entered into, the Act so far as regards the assessment for the support of the poor only regulating the mode of the assessment, and pointing out the different ways in which it may be imposed. In all of them the assessment is to be imposed to a greater or less extent on lands and heritages and the owners and occupants thereof, and it is only for that portion of the assessment that relief is here asked." The other Judges concurred.

So far, therefore, as poor-rates are here concerned, it must be held in this Court that the pursuer's plea founded on the supervenient Act of 1845 is untenable. Nor do I think that the subsequent Act 24 and 25 Victoria, cap. 37, passed in 1861, which has merely the effect of limiting the subjects on which poor-rates are chargeable to lands and heritages, can be held to affect the matter. That may, no doubt, enlarge the liability of owners and occupants of heritable property, but it does not affect the principle of liability which involves the obligation of the pursuers in relief of poor-rates in so far as they have been or may be imposed on lands or heritages and the owners or occupants thereof. Accordingly, in the cases of *Paterson's Trustees* v. *Hunter*, December 10, 1863; *Wilson* v. *The Magistrates of Musselburgh*, February 22, 1868; and *Nisbet* v. *Lees*, June 15, 1869, which occurred some years after the passing of the last-mentioned Act, the superior was held to be bound to relieve the vassal of poor-rates under an obligation of relief such as we have here.

The next and only other question is, Whether the obligation of relief extends to Caithness County and Wick Burgh assessments? It is unnecessary to deal with these assessments separately, as I think it has been made quite clear by the Lord Ordinary in the note to his interlocutor of 29th May 1877 that it can make no difference that some part of what is now the Parliamentary burgh of Wick was in the county of Caithness at the date of the obligation.

But the plea—and the only one of the pursuers which relates exclusively to these assessments—is, that the obligation of relief in question does not extend to them in respect of the changes which have been made by various enactments subsequent to its date in regard to the making and maintaining of roads in the County of Caithness. It is quite true that there have been various such enactments, and in particular there is the Act of 11 Geo. IV. cap. 102, passed in 1829, and the Act

of 23 and 24 Vic. cap. 201, passed in 1860. Before, however, adverting to the scope and objects of these Acts, it is necessary to explain that at the dates of the feu-contracts in question the roads in the county of Caithness were regulated as regards assessment and otherwise by the local and personal Act 33 Geo. III. cap. 120, passed in 1793. By that Act (section 3) the statute-labour system, which had previously existed, was converted into a money assessment at the rate of 30s. per one hundred pounds Scots of valued rent, payable by the owners, lessees, and occupiers of land. And besides this enactment, it was provided (section 26) that all cottagers, tradesmen, and others keeping horses should either assist in making and repairing the roads or pay a composition for their labour. Such being the law existing at the dates of the feu-contracts, a change was made by the Act of 11 Geo. IV. cap. 102, passed in 1830, to the effect that (sections 20 and 21) the conversion or commutation money payable by proprietors and occupiers of lands and heritages should be £2, 10s. in place of 30s. per one hundred pounds of valued rent; that none (sec. 22) should be liable, the rents and value of whose lands and heritages were under £8; (sec. 31) that small householders, inhabitants of towns and villages, should pay from 2s. to 6s. per cent. of their rents; and that power (secs. 37 and 38) was given to erect turnpikes and levy tolls. And again, by the Act of 1860 power is given (sec. 20) to the road trustees to abolish tolls, and (secs. 24 and 25) real rent is made the basis of assessment on proprietors at the rate of 4½d. per £1, with relief to them from their tenants to the extent of one-half.

These being, I believe, the chief alterations made by Acts of Parliament relating to roads in Caithness passed subsequent to the dates of the feu-contracts, the question arises whether the pursuers' obligation, so far as regards road assessments on lands and heritages, is thereby to be held as rendered ineffectual? I must own my inability to see how this should be so, especially having regard to the decisions of the Court in relation to poor-rates. The changes introduced on poor-rates by the Acts of 1845 and 1861 appear to me to have been greater than the changes introduced on the road assessments by the Acts intervening between these dates and the dates of the feu-contracts. By the Poor Law Amendment Act 1845, assessments for the poor were for the first time authorised to meet the expense of poorhouses, inspectors of the poor, medical officers, medicines, contributions to hospitals, education of pauper children, and other objects quite unknown previously. No such extraordinary changes were authorised by the Road Acts. If, therefore, an obligation of relief, such as there is here, must be held in respect of the decisions of the Court to extend to poor-rates subsequent to the Act of 1845, I do not see how there is any alternative but to hold that it also extends to road assessments, notwithstanding the enactments which have been referred to. In short, it appears to me that in the circumstances the road assessment in dispute must be held to be not a new burden, but just the old one, although presented to the Court under a somewhat different aspect, which existed at and prior to the dates of the feu-contracts.

I am not surprised therefore to find that Lord Young should have so determined very recently in the case of *Steuart* v. *The Earl of Seafield*, March 1, 1876, 3 Ret. 518, and that his judgment, so far as it related to road assessment, should have been acquiesced in by the party against whom it was pronounced, although his interlocutor as regards other matters was brought under review of the Inner House. Neither am I surprised to observe from the Lord Ordinary's note that the pursuers here had, at the debate before him, conceded that the question was no longer an open one in this Court. Notwithstanding, however, of that concession, the pursuers were fully heard on the question, and it has been considered by me as carefully as if no such concession had been made. And although I regret to find, on the one hand, that the result I have come to is not in accordance with the opinion of either of your Lordships, it is, on the other hand, satisfactory to me to know that it is in conformity with that of the Lord Ordinary and Lord Young.

It only remains for me to add, that I entirely concur with the Lord Ordinary in thinking that the defenders are not barred from maintaining any of their pleas by their having abstained for a considerable time from enforcing their claims under the obligation of relief. These claims are not prescribed, nor, for any other reason that I can see, are they otherwise cut off. I agree, however, with the Lord Ordinary in thinking that the defenders cannot be allowed interest except from the date mentioned by him.

On these grounds the Lord Ordinary's interlocutor ought, in my opinion, to be adhered to.

Lord Gifford—Questions as to the effect and extent of clauses of relief similar to that contained in the feu-charter of 1823 in the present case have frequently occurred, and a large number of the decided cases have been referred to and founded on in the present discussion, the defenders maintaining that to a large extent they are conclusive against the pursuers' contention. Of course I hold myself bound by these decisions so far as they are applicable to the present case, and so far as they fix any general principles or rules applicable to contracts like the present. But every case requires to be examined in reference to its precise circumstances. Much may depend on the precise terms or mode of expression of the obligation of relief as applicable to the burdens or public rates which affected the subjects at the time when the contract was entered into, and as applicable to the circumstances of each case, for in all cases the true question is—What was the exact meaning of the contract between the parties?—What was it which the superior really bound himself to pay as in room and place of his vassal—and To what extent did the superior bind himself to pay burdens which the law, apart from special bargain, imposes upon the vassal?

The pursuers submitted, and with great force, a general argument to show that the decided cases have gradually and by steps, which in themselves seemed comparatively small, enlarged the liability of superiors under such clauses of relief to an undue and unreasonable extent, and that now at last, by the combined influence of these decisions, carried out remorselessly, though perhaps logically, not only is the whole estate of the superior sought to be destroyed and annihilated, but a vast and an ever increasing personal obligation is sought to be laid upon him for superven-

ing and enhanced public burdens which were never contemplated by the parties to the feu-contract, but which in the intention of the parties are proper burdens on property attaching, and attaching only, to the *dominium utile* or proper estate of the feuar.

It was pressed upon us that improvements upon the subject—its conversion into a populous city, or into a large and much-frequented harbour—was not in the contemplation of the parties to the original feu-contract (although certainly building houses and a harbour are mentioned in the contract), and it is said that the superior can never be held to have undertaken to pay the whole taxes of a city, or to relieve his vassal, who has succeeded in covering the whole lands with buildings, of the taxes imposed upon these buildings, in the rents of which, however, the superior has no interest. The hardship was enlarged upon, that the more rental the feuar receives for the subjects the more the superior will have to pay, while the feu-duty payable to the superior can never be augmented, and so at last not only the whole feu-duty or rent-charge reserved to the superior will be exhausted, but the whole personal and separate estate of the superior will be made liable to make up the deficiency, so that the estate of superiority becomes a *damnosa hæreditas*, only to be ultimately freed by bankruptcy or repudiation of succession.

I feel very strongly the hardship of the case of the present pursuers, and the force of the pleading urged upon us, that the results now imminent can never have been in the contemplation of the original parties, and if the questions were all open I think it is not improbable that the pursuers' arguments might prevail, and an equitable interpretation be given to the contract as applicable to the extremely changed circumstances in which the parties and the subjects now stand. But I cannot review the decisions already pronounced. They are binding upon me so far as applicable, and if they create hardship I can only regret it.

Three taxes or assessments of the nature of public burdens are involved in the present action. The first two may be taken together as involving very much the same principles. These two are the County of Caithness Road Assessment and the Burgh of Wick Road Assessment, as the same are presently due and leviable from the defenders. The third assessment is the poor-rates, which depend on somewhat different principles, and are differently affected by the decided cases. Of course the reason why all these assessments are so large and onerous is, that upon the ground feued there has arisen the large and important burgh of Wick, with its port and harbour, which now stand where there was originally a piece of moorland and shore, which presumably feued at its full value for £169 a-year.

There is a question which it is right to mention, but that only for the purpose of entirely reserving it. It is this—Supposing, as is alleged, part of the harbour of Wick to have been constructed, in virtue of royal grant or statute, on what was originally the solum of the sea, how far can the superior ever be made liable for taxes imposed upon the harbour, which is not built upon the land, but at least partly on Crown property seaward, and which derives its whole value from the seaward piers or works? This question does not arise at the present stage of the process, and I understand is entirely reserved upon the pleas of both parties.

Before adverting to the special taxes embraced in the conclusions, it will be well to consider if there is any general canon applicable to clauses of relief similar to that contained in the present feu-charter, besides the general paramount and governing canon to which I have already referred, —that the meaning and intention of the contracting parties as expressed in the contract must form the rule and the limit of the liability.

In addition to this general rule, I think it may be said that unless the contrary be very clearly expressed the obligation will not apply to burdens or taxes imposed by future or supervening laws which could not be in the prospect or contemplation of the parties at the date of the contract. The natural meaning of the parties in such a case is this—The superior says to the vassal, You will pay me so much feu-duty for my piece of land, part of my estate, and as I am at present paying the whole taxes on the estate I will continue to pay your share of them without division and apportionment. This is often done, especially where the feu bears but a small proportion to the whole estate. The superior agrees in such cases to continue to pay the minister's stipend and the schoolmaster's salary just as he did before, often because it is not worth while to split such burdens among small and it may be numerous feuars. It is taken into account in fixing the amount of feu-duty. But plainly this only applies to taxes existing at the date of the contract. If in future, or it may be distant, years the Legislature requires to impose a new tax, the superior has nothing to do with that. The Legislature may lay it upon whom it pleases, and if it lays it upon the vassal, the proprietor of the feu or *dominium utile*, he must pay without relief, unless he has made a very special bargain indeed, laying upon his superior all the risks and hazards of future legislation. Of course it is quite competent to do this. The superior may, if he chooses insure his vassal against future taxation. This, however, is not to be presumed, and I scarcely think it can be maintained in the present case that Sir Benjamin Dunbar in 1823 warranted that his vassal should be free from all future taxation which the Legislature might at any time impose. I think it is clear therefore that in the present case it is only with the taxes which were due and leviable in 1823 that we have any concern. If these taxes have ceased, and if new taxes have been imposed which cannot be shown to be in essence and substance mere continuations of the old ones, then for such new taxes I think the superior has incurred no liability. The general rule that clauses like those contained in the present charters do not apply to or include burdens imposed by future and supervening laws, is, I think, completely settled by the case of *Scott* v. *Edmond*, which was carefully considered by the whole Court, and by the other cases to which your Lordship has adverted.

I am not sure that it would be safe to lay down any other general canon, apart from the special circumstances of each case, and so I proceed to consider how far the pursuers are bound to pay the road money, either town or country, imposed upon the defenders.

At the date of the last feu-contract in 1823 the

only law under which the roads in Caithness were maintained was the Act 33 Geo. III. cap. 120, which was a special Act applicable to the county of Caithness. By this statute trustees for statute-labour purposes are appointed, and the general purpose of the Act is to make effectual the statute-labour and the conversion thereof in the county. Now, statute-labour is a burden not on the heritors of lands, still less on superiors, but on occupiers only, that is, on parties in the actual possession of land or other subjects within the district; and so far as statute-labour is concerned, or the conversion thereof, it can hardly be maintained that Sir Benjamin Dunbar's obligation in the feu-contract had any reference thereto, or to any part thereof. The only liability against an heritor *qua* heritor is found in the 38th section, which empowers an assessment for making and repairing bridges to be made against heritors, whether of county or of burgh lands, to an extent not exceeding £2 Scots for £100 Scots of valuation, and this, so far as I can see, is the only thing in the nature of a road tax which could be levied in 1823 from a proprietor *qua* such. If any tax had been levied, and if any tax were now levied under this statute from the defenders as heritors, I am inclined to think the claim of relief would hold, for such statutory road assessment, so far as payable by the heritor, might very reasonably be construed as one of the public burdens exigible out of the lands. But the Act 33 Geo. III. cap. 120, was repealed in 1830, after the feu was granted, by the Act 11 Geo. IV. cap. 120, which repeals the previous Statute of 1793; and the Act of 1830, it is very important to notice, expressly narrates that it has now become necessary to assess proprietors, and for the first time it imposes an assessment on property. This Act in its turn has been repealed, and the existing Act I understand to be that of 1860, the 23d and 24th Vict. cap. 201. This statute not only repeals former Caithness Acts, but declares that certain general Turnpike and other Acts shall not apply to the county of Caithness, so far as assessment is concerned, and a new and independent system of assessment for making and maintaining roads is enacted, and it is under this statute that both the County Roads and the Burgh of Wick Roads assessments are assessed and levied, and these of course are much heavier in amount and quite different in incidence from any road assessment which could have been imposed in 1823.

Now, I am of opinion that under the clause of relief in question the pursuers are not bound to relieve the defenders of the road money now imposed and levied under the existing Act of 1860. When the contract was entered into in 1823, the superior Sir Benjamin Dunbar knew that he could not be assessed for roads to a larger extent than £2 Scots—that is, 3s. 4d. sterling for each £100 of the valued rent of his estate, and this tax at that date would have been the merest trifle. This was the maximum rate at which in any circumstances an heritor could be assessed. The roads were then maintained by statute-labour or by conversion thereof, and that was assessment not on landlords at all but on occupants, and relief from which could never have been demanded by the vassal. The presently existing road assessments in Caithness and in Wick are totally different from anything that could have been exacted in 1823, and having been imposed, in the strictest sense of the words, by subsequent and supervening legislation, I think they are not covered by the obligation of relief. In coming to this opinion I think I am just carrying out the views of the Court in the recent case of *Steuart* v. *The Earl of Seafield*, March 1, 1876, 3 Ret. 518, where it was held that an obligation to relieve of schoolmaster's salary did not extend to the school rate imposed under the Education Act of 1872, although the payment of the schoolmaster was the chief, perhaps the leading, purpose of the Education Act. In short, Caithness and Wick road money are burdens created for the first time, and created only by the Act of 1860, or at least by the Act of 1830, long after the feu-contract in question. I think therefore the pursuers are entitled to decree in terms of this part of their conclusions.

The next question is—Are the pursuers bound to relieve the defenders of existing poor-rates assessed in respect of property on the buildings and harbours erected on the lands feued? The poor-rate assessments now amount per annum to upwards of £500.

If the whole question as to poor-rates under such an obligation of relief had been open, I should have regarded it as attended with very great difficulty, for it is not easy to conceive that parties contracting in 1823 about a subject then worth at its full value £169 per annum, could have contemplated that the superior might have to pay £500 a-year, or even a much larger sum. In 1823 there were no assessments for the poor either in Wick or in that part of the county where the lands are situated. The poor were supported at that date chiefly by church-door collections; and when an assessment did become necessary it was levied either in whole or in part upon the whole inhabitants of the parish according to their means and substance, and this was a personal tax in the strictest sense, and not a tax "exigible out of the lands."

Now, a very serious question might have arisen in 1845, when the Poor Law Amendment Act was passed, whether that Act did not in reality change the nature and incidence of the poor-rates as it had formerly been imposed; whether it did not introduce a new system of management involving far greater expense than could have been expected under the previous state of the law; and whether, therefore, it did not in substance and in reality create a new burden exigible on the land? It is quite true that previous to the Poor Law Amendment Act land or heritage might in some cases be assessed for the support of the poor. The leading statute was the Act of 1579, cap. 74, and the only power which that statute gave to levy a tax was a power to "rent and stent the haill inhabitants within the parochin according to the estimate of their substance." If that had been the only statute or authority for a tax, that would have fallen under the clause. But then the proclamation of the Privy Council on 11th August 1692, whereby the Privy Council act under certain statutes, authorised the assessment of the ratepayers for the sum necessary to supplement the funds for the poor; and under that power given by that proclamation, as explained by a long series of decisions, it was undoubtedly competent to a certain extent to assess the heritors for the support of the poor; and that raised the question

whether the Poor Law Act of 1845 was really and substantially just a continuation of the old law, maintaining the old assessments. I think that question has been decided finally, so far as this Court is concerned, by the cases to which your Lordship has referred. Not only in the case of *Hunter* v. *Chalmers*, but also in the cases of *Paterson* v. *Hunter* and *Wilson* v. *Magistrates of Musselburgh*, it seems to have been expressly held that the Act of 1845 did not create a new tax for the poor, but merely continued the old law with a different administration. I think I am bound by these decisions to hold that under a clause such as that which we have in this feu-contract the superior undertook to relieve the vassal of poor's assessment in respect of property; and I find myself obliged, in respect of these decisions, to adhere to the Lord Ordinary's interlocutor as regards the poor-rates. I do not think, however, that the full force of the argument in these decided cases has been fairly taken into account, for there is one statute which is never referred to in any of the cases, and that is the statute abolishing the competency of assessing upon means and substance, for although that does not in terms infer a new tax, it in substance abolished one source from which the funds were formerly derived, and in consequence threw upon the other forms of assessment which are still competent the whole of that burden of which under the former system they only formed a part. But we cannot reconsider the long chain of decided cases on this point.

Then the only remaining point is, whether the obligation to relieve, if it exists—and I think we are bound to hold that it does exist—is to be limited to the amount of feu-duty. I concur with your Lordship in thinking that we have no alternative but to hold that there is no such limitation in the contract. I assume now that the contract must be read as an obligation to pay all poor-rates, and I do not find in the contract any limitation of that obligation. I think that when I am asked to say that that obligation to relieve shall be limited to the amount of the feu-duty, I am really asked to put a condition in the contract which the parties had not chosen to put in it. I agree with Lord Westbury that a bargain of this kind must be given effect to even although it may have been improvident on the part of those who entered into it. I think therefore that the interlocutor of the Lord Ordinary should be adhered to as regards the poor-rates, but altered as regards the road money.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for Sir George Dunbar's Trustees, and another against Lord Curriehill's interlocutors of 9th April and 29th May 1877, Alter the interlocutors of the Lord Ordinary in so far as they find that the pursuers, the superiors of the lands feued to the defenders, have been and are bound to relieve the defenders of all sums which have been or may be paid or have become due or may become payable by the defenders, or others deriving right from them, in repect of these lands in name of County of Caithness and Burgh of Wick Road Assessments, and in regard to such assessments decern and declare in terms of the conclusions of the summons: *Quoad ultra* adhere to the interlocutors complained of, except as to expenses, as to which recal the interlocutor of 29th May 1877, and find the defenders entitled to expenses, subject to a deduction of one-third of the taxed amount; and remit to the Auditor to tax the expenses now found due, and to report; and decern."

Counsel for Pursuers (Reclaimers) — Lord Advocate (Watson)—Balfour—Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defenders (Respondents)—Trayner—J. P. B. Robertson. Agents—Horne, Horne, & Lyell, W.S.

Wednesday, December 19.

FIRST DIVISION.

[Lord Adam, Ordinary.

WILSON *v.* DE VIRTE.

Entail—Disentail Statutes, 11 *and* 12 *Vict. c.* 36, *(Rutherfurd Act) sec.* 3, *and* 38 *and* 39 *Vict. c.* 61, *sec.* 5—*Valuation of Substitute Heir's Expectancy in Entailed Estate.*

Held that the value of the "expectancy or interest" in an entailed estate of any heir refusing or declining to give his consent to a disentail by the heir in possession, is, in the meaning of the 5th section of the Entail Amendment Act 1875, the value to such heir of his chance of succession, excluding the interests of decendants, but comprehending therein the value of such powers as the heir would be entitled to exercise if the succession should open to him.

Observed that in ascertaining the value of the interests of the substitute heirs of entail in a petition for disentail under the 3d section of the Rutherfurd Act, and the 5th section of the Entail Amendment Act 1875, the interests of the heirs should be valued upon the footing of their being liferenters, and with reference to the expectancy of life of each, and that the surplus sum which must be allowed in addition as representing the money value of the powers open to each in the event of his succeeding to the estate, should be allocated upon the same principle of division.

Entail—Disentail—Objection by heir disentailing to Valuation of Interest of Substitute after Amount already Consigned.

Where, in a petition for disentail, the value of an heir's expectancy or interest in the entailed estate, under the provisions of the 5th section of the Entail Amendment Act 1875 (38 and 39 Vict. cap. 61), had been fixed under a remit, and the money had been consigned in bank by the petitioner—*held* that it was then too late for the latter to dispute the correctness of the valuation.

Statute—Private Act of Parliament—Notice.

It is no objection to the validity of a private Act of Parliament, in a question with parties affected by its provisions, that notice was not given to them before it passed.