arrangement is not readily to be credited; while, on the other hand, it is easy to believe that, as joint adventurers along with Weir and the pursuer, the defenders might assent to the pursuer receiving from the first profits which might accrue from a publication of which he was one of the original projectors a salary of £50 per annum, such as he now claims."

The Sheriff-Principal (DAVIDSON) adhered.

The pursuer appealed.

SOLICITOR-GENERAL and CAMPBELL SMITH for him.

DEAN OF FACULTY and ASHER in answer.

The Court dismissed the appeal.

Agents for Appellant—Leburn, Henderson, & Wilson, S.S.C.

Agents for Respondent—Menzies & Coventry, W.S.

Friday, February 4.

SECOND DIVISION.

PRESTON AND OTHERS *v.* MAGISTRATES OF EDINBURGH.

Superior and Vassal—Feu-Contract—Clause of Warrandice—Public Burdens—Ministers' Stipend—Poor-Rates—Liability to Relieve. By feu-contract dated in 1757 the Magistrates and Council of the City of Edinburgh feued certain lands to the pursuer's predecessors. In narrating the subjects of the feu, the lands are specially set forth in the deed as to be holden of the city, "with the houses and planting *built* and planted, or *to be built* and planted thereupon." There is a clause of warrandice in the feu-contract, under which the Magistrates undertake to free and relieve the vassals and their successors "of all teinds, ministers' stipend, king's cess supply, and other public burdens, which do or may affect the same now and in all time coming." There has been some building on the land since the date of the feu-contract. *Held*—in a question as to the import of the clause in the feu-contract, and in accordance with the judgment of the Court in the case of *Cunningham*—(1) that the defenders were bound to relieve the pursuers of augmentations of stipend; (2) that under the term "other public burdens" poor-rates fell within the clause of warrandice; (3) that in the circumstances it must be held to have been in the contemplation of parties that houses would be erected on the lands, and therefore that rating on houses, as well as on lands, was to be held embraced within the clause, notwithstanding the date of erection.

Question—How the clause would be construed if the result of building on the lands should be that the assessment for poor-rates equalled or exceeded the value of the feu-duty?

This is a question between Sir Henry Lindsay Preston of Valleyfield and Others, proprietors of 9 acres of ground in the parish of St Cuthbert's, feued off by the defenders in 1757, and the Magistrates and Council of the city of Edinburgh. The pursuers seek to be relieved (1) of all teinds, ministers' stipend, cess, and other public burdens, including poor-rates, payable for said lands, or out of the teinds thereof; (2) of the claim for underpaid stipend, and interest due thereon, brought out against them at the instance of the over-paying heritors in the parish of St Cuthbert's, and claim repetition from the defenders of the stipend they have paid to the ministers of said parish, and of the poor-rates, cess, and other public burdens paid by them and their predecessors, the vassals in the lands. The following are the material statements of the pursuers:—

"By feu-contract, dated 14th September 1757, entered into by the Lord Provost, Bailies, and Council of the city of Edinburgh, on the one part, and George Lindsay, depute clerk of the said city, on the other, the said Magistrates and Council of said city sold, alienated, and in feu-farm disponed to the said George Lindsay and Christian Tytler, his spouse, and longest liver of them two, in conjunct fee and liferent, for the said Christian Tytler, her liferent use allenarly, and to the children procreated or to be procreated between them in fee, whom failing to the said George Lindsay, his own nearest heirs and assignees, All and Whole the 9 acres of land or thereby, part of the lands of Saint Leonard's, lying within the barony and regality of Canongate, parish of Saint Cuthbert's, and Sheriffdom of Edinburgh, the avenue or great road leading thereto, and the first mentioned stripe or bit of ground described in the conclusions of the Summons in this action. To be holden of the said Magistrates and Council, and their successors in office, as superiors, in feu-farm, fee, and heritage for ever, for yearly payment and delivery to them, or to their treasurers, collectors, or chamberlains, in their name, for the use and behoof of the council and community of the said city, of 5 bolls of wheat, and 12 bolls 2 firlots of barley, betwixt Christmas and Candlemas yearly, to be accounted for and rated, both wheat and barley, conform to the highest fiars for the shire of Midlothian, in name of feu-duty, and further paying and delivering to them and their foresaids the half of the said feu-duty, being 2 bolls 2 firlots of wheat, and 6 bolls 1 firlot of barley, or the prices of the said wheat and barley, conform to the highest Midlothian fiars, at the end of each twenty-fifth year in all time coming, as therein specified, and that in full of all claims and demands which they or their successors could ask or claim for the entries of heirs or singular successors, or for compositions on that account, and in full of all other demands, burdens, or services which could be exacted or demanded furth of the said lands and produce thereof in time coming, but always under the restriction and thirlage of the said lands to the Canonmills, without prejudice to claim an exemption from the said thirlage in virtue of the discharge and renunciation from James M'Dougall, proprietor of these mills, narrated in the said feu-contract.

"The said feu-contract contains a clause of warrandice and obligation by the Magistrates and Council of said city, in the following terms:—'Which feu-contract and lands hereby feued, with the infeftment to follow hereupon, the said Magistrates and Council bind and oblige them and their successors in office to warrant, acquit, and defend, to the said George Lindsay and spouse, and their foresaids, from all and sundry incumbrances and grounds of eviction whatever, at all hands, and against all deadly, as law will, and to free and relieve the said George Lindsay and spouse, and their foresaids, of all teinds, ministers' stipend, king's cess supply, and other public burdens which do or may affect the same now and in all time coming, excepting from the said warrandice the astriction and thirlage of the said lands to the

Canonmills.' By said contract the Magistrates and Council further became bound to grant 'a valid and formal charter of the premises.'

"This charter, in which the said original feu-contract is narrated, contains a clause of warrandice and obligation for relief of teinds, ministers' stipends, and other burdens which then affected or might affect the lands, in these terms:—'Which lands hereby feued, with this our charter thereof, and infeftment to follow hereupon, we bind and oblige us and our foresaids to warrant, aquit, and defend from all and sundry encumbrances, and grounds of eviction whatever, at all hands, and against all deadly, as law will, and to free and relieve the saids Agnes Lindsay and William Hislop, and their foresaids, of all teinds, ministers' stipends, king's cess supply, and other public burdens which do or may affect the same now and in all time coming, excepting from the said warrandice the astriction and thirlage of the said entailed lands to the Canonmills.' Mrs Agnes Lindsay or Preston and William Hislop were infeft on this feu-charter, conform to instrument of sasine in their favour dated the 4th, and registered in the Particular Register of Sasines, at Edinburgh, 15th October 1793."

After setting forth the various transmissions of the said 9 acres of land, and the titles under which they are held by the pursuers, they make the following statements:—

"No teind has been paid by the pursuers or their predecessors, the vassals in the said 9 acres or thereby of the lands of St Leonards and others, which were feued by the Magistrates and Council of the city of Edinburgh to George Lindsay in 1757, nor was any demand ever made against the pursuers or their predecessors, the vassals in said lands, for ministers' stipends out of these subjects until lately.

"In or about the year 1819 a process of augmentation, modification, and locality, was raised at the instance of the then ministers of the parish of St Cuthbert's, in which the said lands are situated, against the heritors and others interested in the teinds of the said parish, under which augmentations of stipend were granted to both the ministers by the Court of Teinds on 24th January 1821. A scheme of locality of the stipends, as augmented, was thereafter approved of by the Court, as an *interim* rule of payment of the stipends, but no part of the stipend was at this time allocated on the said 9 acres or thereby of the lands of St Leonards belonging to the pursuers.

"In or about the year 1859 the said *interim* scheme of locality, which had been acted on from the time it was approved of, and formed the rule according to which the ministers uplifted their stipends, was objected to by the common agent in the process of locality, and a rectified scheme was thereafter prepared, in which the teinds of the pursuers' lands were now localled on for stipends to the extent of their value as brought out in that process, in respect neither the pursuers nor their predecessors, the vassals in said subjects, had heritable rights to their teinds. By this scheme there was laid on the teinds of the pursuers' said lands 10 bolls, 1 firlot, 3 pecks, and 3-4ths of a lippie of meal of stipend to the ministers of said parish.

"The pursuers gave in objections to the said rectified scheme of locality, and founding on the obligation by the Magistrates and Council of the city of Edinburgh for relief of teinds and stipends contained in the feu-contract and charters of their lands, they claimed to have the above stipend which was laid on their lands allocated on the teinds of the lands in the parish belonging to the city. To these objections answers were lodged for the Magistrates, in which, besides denying that the city was liable in relief of the stipends now laid on the pursuer's lands as claimed, it was maintained that the effect of the obligation contained in the charters of the lands could not be competently determined in the process of locality.

"In consequence of the opposition thus offered on the part of the Magistrates to the pursuers' claim of relief being disposed of in the locality, and as it did not appear that there were any lands in the parish belonging to the city, the teinds of which were not previously exhausted for stipend, the pursuers did not insist further in their said objections. The rectified scheme was thereafter approved of as a final locality by an interlocutor or decree of the Court of Teinds, dated 4th February 1864.

"By a state of accounting among the heritors of the said parish for over and under payments of stipend under the said interim scheme of locality prepared by the Clerk of the Court of Teinds under a remit from the Court, it was *inter alia* brought out that the pursuers and their predecessors are chargeable with under-paid stipends to the amount of £401, 11s. 3d. of principal, which, with periodical interest to 5th April 1864, it was brought out, amounted to £829, 1s. 6¾d., and that sum has been claimed from the pursuers by those heritors or their representatives who were over-payers under the interim scheme of locality.

"By said state of accounting it is brought out that the proprietors of the lands of Dean in said parish had over-paid stipends allocated on their lands by said interim scheme, to the amount, with interest to said 5th April 1864, of £4583, 14s. 4¾d., and Lieutenant-Colonel Alexander Learmonth of Dean claiming right to that sum, consisting, as alleged, of stipend over-paid by himself, or by others who have, he alleges, assigned their claims to him, has raised an action in the Court of Session against the pursuer Sir Henry Lindsay Preston, concluding for payment of £215, 9s. 5d., as the share, with interest to said date, of the under-paid stipend, applicable to the said 9 acres or thereby of the lands of St Leonards, to which he claims right as an over-payer, or as representing over-payers under the said interim scheme of locality. The pursuer, Sir Henry Lindsay Preston, and the other pursuers, are also threatened with actions at the instance of the other over-paying heritors, or their representatives, for under-paid stipend in said parish.

"Since the said rectified scheme was approved of as a final locality, the pursuers have paid to the ministers of said parish the stipend allocated on their lands by said final scheme. Converting the victual into money, according to the fiars prices of the county of Edinburgh, as provided for in the decrees of the Court of Teinds, the stipend chargeable against the pursuers for their said lands, and paid by them on or about 19th April 1865, amounts, for crop and year 1864, to £7, 4s. 10d.

"In or about the year 1861 the two ministers of the said parish of St Cuthbert's raised a further process of augmentation, modification, and locality against the heritors and others interested in the teinds of said parish, and augmentations were again granted to both ministers, to commence with the second half of crop 1861. A scheme of locality

of the stipends as augmented was thereafter made up, and the same was approved of by the Court on or about 9th March 1866 as an interim scheme.

"By this interim scheme the stipend payable for the said 9 acres of the lands of St Leonards was raised from 10 bolls, 1 firlot, 3 pecks, and ¾ths of a lippie of meal, to 10 bolls, 3 firlots, 1 peck, and 2⅞th lippies of meal, and 1 firlot, 2 pecks, and 2⅛th lippies of barley, the augmentation thus being 1 firlot, 2 pecks, and 2⅛th lippies of meal, and a like quantity of barley. Under this interim locality the pursuers have been called on to pay, and on or about 10th April 1866 paid, the following sums, viz., for stipend for crop and year 1865, the sum of £10, 9s. 3d., and for the augmentation of stipends for crops and years 1861, 1862, 1863, and 1864, the sum of £2, 16s. 9d.

"The pursuers, and their predecessors and authors, in whose right they now are, have paid the poor-rates, burgh cess or stent, county land-tax, and other public and parish burdens for the said 9 acres or thereby of the lands of St Leonards and other subjects, for the years from 1826 to 1865 inclusive. These various rates for that period, with interest to Whitsunday 1866, amount, conform to state thereof produced with the Summons, to the sum of £489, 15s. 3d."

The defenders maintained the following pleas in answer to the action:—

"On a sound construction of the clause and obligation of the feu-contract and feu-charter, the defenders are only bound thereby to relieve the pursuers of burdens existing at the date of the feu-contract, and not of burdens which supervened subsequent thereto.

"In particular, the defenders are not bound to relieve the pursuers of augmentations granted, of stipend allocated, or of taxes imposed since the date of the feu-contract.

"The pursuers not being proprietors of the teinds, but possessing and intromitting therewith without any title, are bound to pay the stipend allocated from the teinds intromitted with by them, and have no claim for repayment of such stipend.

"The pursuers not having paid the alleged under-payments of stipend and interest, and not being liable in payment thereof, in respect they are neither proprietors nor in bygone years intromitters therewith, they have no claim against the defenders for repayment.

"The pursuers not having paid the poor-rates, cess, and other taxes claimed, and not being in right of the parties who paid the same, have no claim for repayment thereof, and in no view is interest due, repayment never having been demanded till the present action was raised.

"Even supposing a debt to be due by the defenders to the pursuers, in so far as such debt, whether principal or interest, was incurred prior to 1st June 1833, the pursuer can only claim, and the defenders can only pay, such debt by delivery of bonds and coupons, in terms of the Act 1 and 2 Vict., cap. 55."

The Lord Ordinary (Jerviswoode) pronounced the following interlocutor:—

"*Edinburgh, 9th November* 1869.—The Lord Ordinary having of new heard counsel, and made avizandum, and considered the whole process, with the state of specific sums, repayment of which is claimed by the pursuers, which forms No. 312, with the Note of Objections thereto, No. 316 of process, Finds that the pursuers are entitled to obtain relief from the defenders of payments made by them—1*st*, on account of augmented stipend; 2*d*, of the poor's rates, whether payable in respect of the lands held by them, or of the houses now erected thereon; 3*d*, of stent, land-tax, cess, rogue-money, and other public burdens so far as paid by them, or by parties whom they represent, as set forth in the said state No. 312 of process, with legal interest on the several sums paid as aforesaid, so far as the same has accrued since the date of the present action, and before further answer appoints the cause to be enrolled with a view to such inquiry by remit to an accountant, or otherwise, as may be necessary for the ascertainment of the precise sums of which the defenders may, under the conclusions of the summons, be bound to relieve the pursuer, reserving meanwhile the matter of expenses.

"*Note.*—Questions of difficulty, as the Lord Ordinary thought would probably be the case, have now arisen here, and with these he has dealt in the present interlocutor, so far as it seemed to him to be practicable, without further investigation. Any such investigation would, however, probably involve considerable trouble and expense to the parties, and the Lord Ordinary has therefore thought it right to proceed so far in the determination of certain general points of leading importance, which, as it appears to him, must bear materially on the extent and character of any investigation which may ultimately be found necessary.

"The parties have hitherto conducted the litigation with an apparent desire to obtain a judgment regulating their interests in an authoritative way, without incurring unnecessary litigation or expense, and the Lord Ordinary trusts that the points to which the present interlocutor relates, when finally determined, may serve as a guide to a comparatively simple ascertainment of the pecuniary claims which may be competent to the pursuers."

The defenders reclaimed.

Watson and John M'Laren for them.

Solicitor-General and Webster in answer.

At advising—

Lord Justice-Clerk—In this case, at the instance of Sir Henry Lindsay Preston of Valleyfield and Others against the Magistrates of Edinburgh, the Lord Ordinary on 9th November 1869 found that the pursuer was entitled to obtain relief,—(1) On account of augmented stipend; (2) Of the poor-rates, whether payable in respect of the lands held by them, or of the houses now erected thereon; and (3) Of stent, land-tax, cess, rogue-money, and other public burdens. There had been previous proceedings in the case, and on 20th March 1868 the Lord Ordinary found "that the clause of relief contained in the feu-contract referred to in the 1st and 2d articles of the condescendence for the pursuer constitutes a subsisting obligation of relief applicable to all burdens of the classes specified, which at the date of the feu-contract did by law affect, or which under then existing laws might be made to affect, the subjects disponed under the feu-contract, and before further answer appoints the cause to be enrolled, with a view to the ascertainment of such matters of fact and of accounting as shall appear to be necessary, with a view to the disposal of the specific conclusions of the summons," and then it appears we come to the proceedings resulting in the interlocutor complained against.

These judgments proceed on the construction of

a feu-contract, dated so far back as 1757, between the magistrates of Edinburgh and the predecessors of the pursuers. The feu-contract relates to a subject of 9 acres in the parish of St Cuthbert's, and lying to the south of the city of Edinburgh. This property the magistrates of Edinburgh feued to the pursuers' predecessors for a feu-duty, one part of which was redeemed, being commuted to 26 years' purchase of the feu-duty; the other part of it fell to be regulated by the fiars prices, and in substance it appears that the land in 1757 was feued at the rate of £2, 10s. per acre. In this way the land was feued partly for a grassum, or principal sum paid down, and partly for a feu-duty or prospective yearly payment. The feu-duty is neither illusory or unimportant, and probably, although we have no evidence as to that, it was full agricultural value, and I think rather more. The town held of Heriot's Hospital, and in the feu-contract the magistrates do not give right to the teinds; probably they pertained to the Hospital, and the magistrates had no right to them. In that feu-contract occurs the clause that has been the subject of the present discussion,—The magistrates undertake to warrant the lands from all grounds of eviction, and "to free and relieve the said George Lindsay and his spouse and their foresaids of all teinds, ministers' stipends, King's cess, supply, and other public burdens which do or may affect the same, now and in all time coming," and it is in the construction of that clause that the interlocutor under review was pronounced. As regards the proceedings which have taken place under this clause since 1757, first, as to the stipend, it would appear that no stipend was paid or demanded down to 1859, when after an action of augmentation there were proceedings taken in the locality to adjust over and under payments, when a considerable sum was brought out as against the feuars, and a demand made against them. Hitherto Heriot's Hospital had paid the stipend, but after the augmentation an augmented sum was laid upon the lands. The sum localled on the lands, and set forth in article 19 of pursuer's condescendence, amounts, including the augmentation, to the sum of £13, 6d., and a demand was made against the town for relief of this yearly payment, and at the same time preferred in respect of poor-rates, cess, &c. As regards poor rates, they stand on a somewhat different footing. At the date of the feu-contract in 1757 there was no assessment for poor-rates. These were laid on afterwards,but from the beginning of the century—when they were levied—no demand for them was made under the clause of relief. Cess also was paid by the vassal, and not by the superior. This action has been raised, concluding for payment in relief of "all teinds, minister's stipend, King's cess, supply, and other public burdens which have affected the said nine acres of land or thereby." Besides the conclusion for future payments of stipend, there is also a demand for repetition of payments of them for forty years back. And certainly this claim of relief for stipend and poor-rates is a most important matter. As to the former, I confess I have no great difficulty. The words are, "to free and relieve the said George Lindsay and his spouse and their foresaids of all teinds, minister's stipend, burgh cess, supply, and other public burdens which do or may affect the same, now and in all time coming;" and they seem to me to be quite as precise for the future burden as for the past. The cases of *Low* v. *Bethune* and *Cunningham* v. *Cuthbertson*, which have never in any degree been shaken by subsequent decisions, appear to me precisely in point. The authorities were all carefully reviewed in the recent case of *Campbell's Trustees*, 4 Macph.; and the principle affirmed in the former cases was distinctly recognised. Indeed, the principle of the cases of *Low* v. *Bethune* and *Cunningham* v. *Cuthbertson* has never been gone back upon to any effect at all; but, on the contrary, in the case of *Wilson* v. *Agnew*, Lord Balgray indicated a very clear opinion that the cases of *Lord Hopetoun* and *Alexander* had probably stretched the exception to the rule further perhaps than the law required. The view that a general undertaking to relieve of payment of stipend, when adjected to a conveyance, does not necessarily extend to future obligations, seems to have rested on the principle that such a conveyance of land implied an obligation on the part of the disponee or vassal to bear the natural burdens incident to the right. I do not think there is any material distinction between an obligation of this kind contained in the feu-charter or contract and one contained in a disposition. I rather think that the distinction drawn by the Court in these cases rested entirely on the question whether the teinds were conveyed or not conveyed, because where they were conveyed it was argued that the conveyance of the right to the teinds implied an obligation upon the party to whom the teinds were granted or conveyed to bear the natural weight of the burdens upon the subject so acquired. But here the teinds have not been granted, and apparently did not belong to the town, as stipend has hitherto been paid by Heriot's Hospital. Therefore, even supposing that the former decisions which proceeded upon this ground would now be repeated, which I doubt, that element of difficulty does not present itself in the present case.

The second question is one of greater importance and difficulty,—I mean that relating to the poor-rates. Part of this ground is now covered with valuable buildings, and probably the entire nine acres may before long be built on. The rental derived from these buildings, we are told, is several hundreds a-year; it may rise to as many thousands; and the amount of the poor rates—always keeping in proportion to the real rent—is said even now nearly to equal, and may ultimately far exceed, the amount of the feu-duty. Further, these operations are the work of the vassal, resulting in his own great profit, without the chance of gain to the superior, and, if the pursuers prevail, to his loss. It is contended that the clause in question cannot receive a construction which should lead to such a result. Now, we may assume with regard to this clause, in the first place, that it extends to poor-rates. That has been conclusively held in the case of *Scott* v. *Edmond and Others*, that a clause binding the granter to relieve of public burdens implies an obligation to relieve of poor-rates, and that the Act of 1845 is not to be held an Act imposing a new legal obligation; upon the contrary, the regulation makes it not so. Therefore, whatever may be said on that matter, I hold that to be the result. I think we may also assume —because the words seem to me to lead to no other result—that the clause was not limited to existing burdens, but extends to those that may be imposed in future; and therefore, reading the clause in the light of decisions, and applying its own words, I think we must hold that the superiors here, the Town of Edinburgh, bound themselves to relieve the vassal of poor-rates, not only then existing—

(there seems to have been none exactly existing then)—but of poor-rates for the future.

The question which remains is, whether that obligation extends to the full amount levied on the rental, as increased by the vassal's operations. Now, it is quite true that in the several recent cases,—in the case of *Hunter* v. *Chalmers*, in the case of *Lees* v. *M'Kinlay*, and of *Paterson* v. *Hunter*, and in the last and very recent case of *Nisbet* v. *Lees*,—this question as to the extent of our obligations has been the subject of very considerable consideration, and opinions of great weight have been pronounced; at all events, views have been suggested as to whether there is any limitation in a case of this kind. On the best consideration I have been able to give to this case, I do not know that I shall find it necessary to decide the abstract question which has arisen in these cases. I think that on the facts before us there is enough for the judgment to which I shall propose to arrive; but in all the cases that have been cited, although these views have been thrown out in every one of them, the obligation by the superior was found to be effectual, and no case has yet been decided in which effect has been given to any principle of limitation which seems to me to apply to this case. I think the obligation must be construed according to its terms, and must receive the full effect which these terms involve. I think the true principle on which such clauses should be construed is well stated by Lord Curriehill and Lord Ivory in the case of *Lee* v. *M'Kinlay*, and by Lord Wood in his opinion in the case of *Hunter* v. *Chalmers*. I cannot think that the superior's obligations can be read as contingent on the use which the vassal may make of the subject in the future. If that use be one which is legal under the contract, it must, at all events in the general case, be held to have been contemplated by the contract which gave the vassal the right so to use it; and although there is no doubt a show of hardship in some of the views suggested in these cases when they come to be sifted at close quarters, I think at all events it is very difficult to trace them to any canon susceptible of legal definition or allegation. Two canons of limitation have been suggested; the first, that each case must be considered upon its circumstances, and that the Court have to determine in each case to what extent the use made by the vassals of the subject was or was not in contemplation of the parties at the time of the contract; the other, that the superior cannot be liable beyond the amount of the feu-duty.

Now, with regard to the first of these, it is manifestly a rather vague and shifting rule to admit of any satisfactory application, for a rise of value may take place from an infinite variety of causes, apart altogether from the feu-duty on the property. It may result from improvement in agriculture. I suppose that one hundred years ago 5s. an acre were probably in East Lothian the full agricultural rent for land which is now rented at £6 an acre, and which at war times was rented at double that amount. A rise in value may be caused by many other things. It may be the result of a new invention, or any one of the adventitious influences which tend to increase or diminish the value of property. It the argument in the case referred to there was put the case of ground which, without any alteration on its natural state, as a mere depot for goods, would bring a good deal more than the old agricultural rent one hundred years ago; but it seems to me that when a man contracts for futurity he necessarily engages for the uncertain, and cannot be supposed to have intended that the obligation for which he receives full value was to be binding or not according to the extent to which it might or might not turn out to be profitable to him. Now, these are the difficulties that manifestly lie in the way, and the illustrations could be extended much more widely in the way of applying a general rule at that time; but I do not wish to be understood to indicate a fixed opinion upon that matter, because I do not think the present case is one that necessarily presents it for judgment; for in order to apply these difficulties we must assume that the amount as stipulated for was only agricultural value, and agricultural value in which it was not contemplated that the subject of the feu should become feuing ground. Now, I cannot come to that conclusion looking to the facts of this case; but I come to exactly the opposite conclusion. It is very difficult to say that when the town feued this ground in the immediate vacinity of the existing buildings in the city of Edinburgh one hundred years ago, the town did not contemplate, or that it put out of its contemplation, the possibility that in one hundred years the land might be feued. It has waited for a hundred years for feu; and the rent which was stipulated, £21, 0s. an acre, I suspect was in 1750 not the ordinary agricultural value of land in that vicinity. Neither do I think that if that had been stipulated as a building feu it would have been below feu-duties which were exacted from ground more nearly connected with the existing buildings than this was. And therefore I cannot come to the conclusion that there was any materials for assuming that the parties did not contemplate that the ground might at a long distance of time be building ground; and if, instead of one-half of the price or consideration being converted, the whole had been converted, and the town had been in possession of £340 from 1750, although in the end it might turn out that they had a considerable sum to pay in respect of the poor-rates, that sum would have been in the coffers of the town the whole time; and therefore I am of opinion that there is no ground here to say that the claim which is made is one which it could never have been in the contemplation of the parties would be made. On the contrary, I think that this case is one in which we may, without any danger of trenching upon the intention of the parties, give effect to the plain words which they have used.

The other suggestion, to limit the superior's obligation by the amount of the feu-duty, is also one upon which it is unnecessary that we should express any decided opinion here, because there are no materials in the record for raising that question. It is not said that the burden was exceeded, and until a case of that kind is fairly presented I do not think it is necessary we should decide the somewhat difficult questions which have been raised on this matter. I own I see great difficulty in the way of any such limitation. A limitation such as that would not apply to a case where the obligation was contained in a disposition of land for a price paid, and yet the ratio, the theory of the limitation, would be as applicable in such a case as in the case of a feu-contract. But in the present case we have no statement on record, and it does not appear to be the fact, that the amount would exceed the feu-duty; and therefore

that is not a limitation which I think we could introduce into any judgment we pronounce.

The third suggestion is one which seems to me to have been over-ruled by the previous decisions. It has been suggested that the feu-duty should be taken as the value or rental of the lands at the time, and that the obligation undertaken by the feu-contract should be held to be limited to the amount of assessment on that property. I do not think that principle can be reconciled with the judgments already pronounced, and therefore, upon the whole of this matter, I think it safer to rest upon the words of the contract, if we have construed them aright. There was no doubt a point raised—and that was given no more consideration than the rest of the case at this part of it—there was a point raised upon the usage, and certainly there are some dicta in the cases on this head as to the effect of usage in construing a contract of this kind. Now, it is quite plain that usage of submitting to a burden, fulfilling an obligation, or paying a debt, is a much stronger claim for construing an obligation than the mere non-assertion of a right. A debtor may be fairly presumed not to pay unless he thinks he is liable, and means to acknowledge his liability. It does not follow with equal strength that the non-assertion of a right on the part of the creditor implies that he means to abandon his right; and in this case, if the obligation is rightly construed, I do not see that the non-assertion of the right to relief can deprive the creditor of the right now to make a demand. It certainly cannot construe the term "public burden" not to include poor-rates, because by the rule of law it has been held that these terms are equivalent to poor-rates. In point of fact, there was no contemporaneous possession under this clause as regarded poor-rates, because there was none paid at the time, and none for forty years afterwards. It was very ingeniously put to use, and I think there was force in it, although perhaps not to the full extent that it was pressed, that nothing could be made of the non-assertion of the right with regard to poor-rates, because the right was not asserted with regard to any of the other burdens which undoubtedly affected the lands. I am not sure that I should have been disposed to follow that argument out to its full extent, but the general view I take is this—that under the clause there is an obligation to relieve of poor-rates, and I do not think the construction of the clause can be affected by the fact that no demand has been made. Therefore upon these grounds I am of opinion that, without deciding any general question on the matter, the legitimate result of these considerations is, that this obligation extended to poor-rates, and that there are no grounds for limiting the liability of the town under that obligation.

The only other observation which I think it necessary to make is with regard to the cess. It seems that these lands paid cess to the county at the date of the obligation. Since that time an Act of Parliament was passed by which they were brought in to contribute also a portion of cess to the property of the town. Now, I am quite clearly of opinion that that second burden is not one that can fall under the obligation here, it being a burden imposed by subsequent legislation. Therefore, on the whole matter, I am for adhering to the interlocutor of the Lord Ordinary.

Lord Cowan—From the feu-contract dated in September 1757 it appears that the lands were originally taken in feu from the City of Edinburgh in 1738. Their extent was nine acres or thereby, and the feu-duty 25 bolls 6 pecks of barley and 10 bolls of wheat yearly. The contract 1757, after setting forth the feu, narrates that the City had agreed that one-half of the feu-duty should be sold to the feuar at twenty-six years' purchase, and that on payment of the purchase-money the remainder of the feu-duty, consisting of 5 bolls of wheat and 12 bolls 2 firlots of barley, should be inserted in the feu-contract as the reddendo payable by the feuar. The deed then proceeds in usual terms to dispone the lands in feu to be held of the city for the yearly payment of said amount of feu-duty, and that for all other burden, demand, or secular service whatever. There follows the clause of warrandice and relief set forth in the record.

As affecting the construction of this clause, it is material to observe that in narrating the subjects of the feu the lands are specially set forth in the deed as to be holden of the city "with the houses and planting *built* and planted or *to be built* and planted thereupon." This is important, as demonstrating not only that at the date of the deed there were houses on the lands, but that the erection of other houses was within the contemplation of the parties. Nor is it surprising that it should be so, seeing that the locality of the lands was in the near neighbourhood of the city, being described as parts "of the lands of St Leonards, lying on the north side of the Gibbet Loan near Edinburgh, belonging in property to the city."

The grain feu-duty was to be accounted for and rated conform to the highest fiars of the county of Midlothian, payable yearly at Whitsunday. There was farther declared to be payable by the feuar the amount of the feu-duty at the end of each twenty-five years, as commutation for the entry of heirs and singular successors in all time coming.

These are the material parts of the deed in which the obligation for relief which is for construction occurs; and the two questions which have arisen and been argued regard, *first*, the liability of the superiors for augmentations of stipend, and *second*, their liability for poor-rates assessed upon the lands and the houses thereon built.

(1) As regards augmentation of stipend: I concur in the views which have been stated, being of opinion that the case of *Cuthbertson* v. *Cunningham*, and that of *Low* v. *Bethune*, founded on in the case of *Cunningham*, are conclusive authorities on this point. I am not aware that in any of the subsequent cases the authority of these decisions has been disputed, provided the terms of the clause and the circumstances in which the question of relief is raised are substantially the same. And on comparing this case with that of *Cunningham* I do not find that substantially there is any real difference. There the clause obliged the disponer to warrant "from all payments of any teinds or minister's stipend forth of the said lands in all time coming." Here it is all teinds, minister's stipends, &c., which do or may affect the lands now and "in all time coming." The latter is the more stringent of the two. In neither case was there any stipend eligible from the lands at the time, and in neither case were the teinds disponed to the vassal. Augmentations of stipend were held to be within the clause in the decided case, and on the same grounds that conclusion alone can, as I think, be reached in the present case.

(2) The more important question relates to the relief of poor-rates. The construction of similar

clauses has been the subject of much litigation in recent times, more particularly since the passing of the Act 1845, the burden of poor-rates having since then so greatly increased, and the lands having become so much more valuable through the erection of houses on them.

That a clause so expressed includes poor-rates under the term "other public burdens" does not admit of any dispute. It has been so ruled authoritatively. Nor was this questioned at the debate, unless there appear, from the terms and provisions of the deed in which the clause occurs, good ground for holding the parties to the contract to have intended the words to be of a different meaning. In this contract, however, there is nothing on which any argument to that effect can be maintained; and whatever room there may be for limiting the extent of the liability, it must be held that the clause of relief here does embrace poor-rates.

The superiors, however, contend that the relief competent to the vassal cannot embrace the whole assessment imposed on the subjects as they at present exist, but should be limited to that portion of it which effeirs to the value of the lands as at the date of the feu-contract. This question has been frequently the subject of consideration by the Court; and all that can be contended for on the one side and the other will be found in the report of those decisions. The case of *Hunter* v. *Chalmers*, 16th July 1858, was peculiar in this respect, that the only relief claimed by the vassal was of such proportion of the poor-rates assessed upon the lands and houses as effeired to the amount of feu-duty; but the principles recognised in the judgment involved the more general question, Whether relief of the whole poor-rates payable from the subjects, notwithstanding its increased value through the erection of houses, were or were not within the purview of the clause? And that more general question has been expressly before the Court in the more recent cases of *Paterson's Trustees* v. *Hunter*, 10th Dec. 1863, and *Nisbet* v. *Lees*, 15th June 1869. In both these cases the question was considered, whether such a clause of relief as here covered poor-rates imposed on the buildings erected on the ground as well as on the ground itself. It was so ruled. No doubt in these cases there were peculiarities which it was contended must have the effect of shaking their authority as precedents on the general question. In that of *Nisbet* the peculiarity was that from the terms of the contract it appeared to have been within the contemplation of the parties that buildings should be erected on the feu. The same pecularity, however, seems to exist in this case. Having regard to the words quoted from the contract, it is difficult to reach any other conclusion than that, not the houses existing at the date of the deed only, but houses that were to be built on the ground, were in the view of the contracting parties. But apart from this consideration, there does not seem to me any good ground set forth in this record for holding the erection of houses as built at the date of this action other than a legitimate use of the ground by the vassal. There are no data given by the defenders on which any other conclusion can be reached. The valuation, on which the assessment has been imposed, is not apportioned between the lands and houses as these existed at the date of the feu-contract, and houses erected since that date. It is, in truth, only the general question, Whether rating on houses, as well as on lands, was to be held embraced within the clause irrespective of the date of their erection. Further, it is not alleged that a large and expensive manufactory or other unusual erections have been put on the ground. Such a case has been stated in the previous decisions to be exceptional. We have not to consider such a case. Neither have we to consider, under this record, the case of the whole ground being covered with streets and houses. A few houses only appear to have been erected when this action was brought, and the poor-rates, of which relief is sought for the last year in the state, viz., 1864-65, is only £22, 17s. 6d., while the feu-duty, converting the original reddendo into money as at the highest fiar prices, is between £40 and £50. To that may require to be added a proportion of the taxed amount of the casualties on the one hand, and on the other the amount of the other burdens. That is the case with which alone we have to deal.

The defender's counsel said that it was all but certain that in a few years the ground would come to be covered with buildings, the poor-rates on which might be equal to the feu-duty, or exceed it. Along with the Judges who decided questions of a similar kind in the cases to which I have referred, I do not say whether or not the superiors in that event might not have ground to contend that they cannot be liable for any such excess of payment. It may be so. We have no such case before us; and it will be time enough to consider the question when it arises.

A different principle of adjustment has been repeatedly suggested, viz., that the agricultural value of the subject should be estimated by the feu-duty, and a proportional allotment of the cumulo assessment on that footing be laid on the superior. There is much equity in that mode of solving the rights of parties, and I feel the force of the reasoning by which it is supported. The decisions to which I have referred, however, appear to have been pronounced on the footing that such a principle of adjustment was inadmissible. I do not think that the question in this view of it is open in this Court.

Lord Benholme—I concur in the views which have been expressed by your Lordship and Lord Cowan. On the last point I was at a loss to find out from the second whether any distinction was taken between the proper land burdens these nine acres always laboured under and the new burden which is said to have been imposed by the Act of Parliament extending the royalty. I see nothing about that on the record, and I was somewhat at a loss to know what the plea was. At the bar it was certainly stated that this was a new tax levied under a new Act of Parliament; but although the tax was a tax existing *quoad* these nine acres, it was imposed, as I understand, by the Act of Parliament extending the royalty. Now, if that be so, I think the Lord Ordinary has gone beyond his own issue. In his interlocutor of March 1868 he only speaks of burdens of the classes specified which at the date of the feu-contract did by law affect the subject under the then existing law. Now, I do not think that under the then existing law this was a burden. An Act of Parliament passed which made it a burden, thereby relieving the town to a certain extent; but the Lord Ordinary seems to me to have made no distinction between the land-tax and the burgh stent, and has held them both to be included. I understand your Lordship and Lord Cowan to hold that that is

not following out his own ratio. With that exception, I adhere to the interlocutor of the Lord Ordinary.

LORD JUSTICE-CLERK—I wish to make one remark on the case of *Hunter* v. *Chalmers*, which Lord Cowan adverted to, because I think that in some of the other decisions the import of that case has been somewhat misapprehended. It seems to have been thought that the Court there intimated a limited liability corresponding to the feu-duty of the superior. That case did not raise, and could not raise, any question of that kind. It was not an action by a vassal for relief of his feu-duty under the clauses, but an action by the superior for the feu-duty itself; and the vassal pleaded compensation by retention to the extent of the poor-rates paid. The Court gave him the full amount that he had paid. They could not have given him any more; and therefore that case I don't think in any way supports the idea that an obligation of that kind is limited by the amount of the poor-rates.

Agents for Pursuers—J. & J. Turnbull, W.S.

Agents for Defenders—Millar, Allardice, & Robson, W.S.

Saturday, February 5.

M'NEILL *v.* MACKENZIE.

Property—Restrictions in Feu-contract—Servitude of Light—Injurious Operations—Street-Title. Circumstances in which *held*, that while a proprietor of a house had right under his titles to complain of operations alleged to be injurious by a proprietor on the opposite side of the street (who was equally bound with the complainer by conditions in a feu-contract declaring such operations illegal), he had failed to qualify such substantial or appreciable damage as to justify the Court in interfering to give him redress.

In this case Mr Archibald M'Neill, W.S., proprietor of the house No. 8 Hill Street, seeks to interdict, "prohibit, and discharge the respondent from raising or elevating the south side of the roof of the dwelling-house No. 7 Hill Street, Edinburgh, and from erecting dormer or other windows thereon, and from raising the height of the gable or other walls of said dwelling-house No. 7 Hill Street, and generally, from carrying out the operations on the walls and roof of the said house No. 7 Hill Street which the respondent is now carrying on, and from making any alterations or erections on the said roof or walls which will obstruct or exclude the light from the front of the complainer's said house, or which will be injurious and offensive to the complainer and occupants of said house No. 8 Hill Street; and to ordain the respondent to remove the erections already made by him on the walls, and on the south side of the roof of said house No. 7 Hill Street, and to lower and restore the roof of the said house to its former slope, and the walls of said house to their former height." The suspender, after setting forth the boundaries of his titles, founds upon the original charter feued by Lieutenant-Colonel John Hepburn Belshes of Invermay from the Magistrates and Town Council of the City of Edinburgh. By the complainer's titles it is provided that the dwelling-house No. 8 Hill Street is conveyed under the special provisions conveyed in this feu-charter, as well as under the burdens, restrictions, and declarations, *inter alia*, "that *the roof* and chimney-heads of the said dwelling-house shall remain in the same form, height, and construction as they are at present, without any alteration whatever, at least that no alteration shall be made thereupon which shall disfigure the appearance of the street, either to the front or back parts, or be in any respect an annoyance or offensive to the proprietors or occupants of any of the houses in said street." The suspender then alleges "the respondent's titles to No. 7 Hill Street contain similar conditions and restrictions to those expressed in the complainer's title; and, in particular, the said subjects No. 7 Hill Street are conveyed under and subject to the express restriction and declaration that the roof and chimney-tops of said dwelling-house should remain in the same form, height, and construction as they were when the house was erected, without any alteration whatever; at least, that no alteration should be made thereupon which should disfigure the appearance of the street, either to the front or back parts, or be in any respect an annoyance or offensive to the proprietors or occupants of any of the houses in said street," and he afterwards narrates the proceedings complained of and sought to be interdicted.

The respondent, among other pleas in answer, maintained that the suspender had no right or title under which he could enforce against him the declarations or restrictions founded on, whether contained in his own titles or in those of the respondent; further, that the complainers had no servitude of light over the respondent's property, and that the operations complained of were neither annoying or offensive.

The Lord Ordinary (MURE) allowed a proof, and ultimately pronounced the following interlocutor:—"Finds that the complainer has failed to prove that the alterations in question have had the effect of shutting out and excluding the light from the complainer's house to the serious and injurious extent set forth in the record; or that the value of his property has been thereby deteriorated: Repels the reasons of suspension, and decerns: Finds the respondent entitled to expenses, subject to modification, of which appoints an account to be given in, and remits the same when lodged to the auditor to tax and report.

"*Note*—I.—If it had been satisfactorily established in evidence that the alterations which have been made upon the roof of the respondent's house were of the injurious nature complained of, and detrimental to the value of the property of the complainer, it would not have occurred to the Lord Ordinary that there would have been any incompetency, as was strongly contended for by the respondent, in affording the complainer the redress he seeks under the present application; because, although the external portion of the operations may have been substantially completed before the application was presented, the case appears to be one of the description which the 89th section of 'Court of Session Act 1868,' was intended to reach. The prayer of the note is framed in conformity with that section, and there was not, in the opinion of the Lord Ordinary, any unnecessary delay on the part of the complainer in having recourse to the present proceedings after he was made fully aware of the extent to which the operations were intended to be carried. For it is