trial, and I see the greatest objection to a course which lays upon the Advocate-Depute the necessity of deserting the diet at the will of the accused.

Upon these considerations I have come to be clearly of opinion that the provisions as to withdrawal of a plea under the 41st section have no relation to proceedings under the 31st section. The case must be treated as one which has been sent here for sentence.

Counsel for H.M. Advocate—Wallace—Harvey. Agent—Procurator-Fiscal for Lanarkshire.

Counsel for the Panel—Younger.

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# COURT OF SESSION.

*Wednesday, January* 11, 1888.

## FIRST DIVISION.

[Lord Trayner, Ordinary.

## JOPP'S TRUSTEES *v.* EDMOND, *et e contra.*

*Lease—Landlord and Tenant—Public Burdens—Relief.*

In 1788 a lease was granted of lands for sixty years, and on the expiry of that period for the lifetime of any person to be nominated. There was a clause by which the tenant undertook to free the landlord and his heirs, executors, and assignees "of and from payment of the feu-duty, land tax, teind duties, minister's stipend, and augmentations thereof, if established, and all other public burdens affecting the foresaid lands." The lands were sold in 1854, when the tack was still in existence, a person having been nominated as tenant at the expiry of the sixty years. The purchaser being desirous of obtaining possession, took a sub-tack from the tenants under the original lease for the remaining years still to run. The sub-tack stipulated that the sub-tenant should pay certain yearly rents, "including the sub-tenants' share of the public burdens." It also provided that the tenants under the original lease should continue to pay the rent under it, "with the poor-rates of the lands, as formerly; and shall also pay, and free and relieve, the proprietor of the feu-duty and other burdens specified in the principal tack."

The sub-tenant entered into possession, and from 1855 until 1884 regularly paid the public burdens due in respect of occupation. In 1884 he for the first time maintained that he was not liable for these payments, founding on the clause in the sub-tack above quoted, and claimed right to retain from the rent due by him the amount erroneously paid. Thereupon the tenants under the original lease, who had during the whole of its duration paid the public burdens exigible from owners, took up the position that under the clause in that lease, above quoted, they were not liable for burdens imposed by supervenient legislation subsequent to the date when the sub-tenant became proprietor of the lands. They therefore claimed repetition of the amount of burdens which had been paid by them. *Held* that the parties were barred from maintaining that the true construction of their respective obligations was other than that which had been acted upon for thirty years.

By tack and assedation dated 12th and 20th November 1788 Alexander Jaffray, proprietor of the estate of Kingswells, in the county of Aberdeen, let to William Black, his heirs, assignees, and sub-tenants, the lands of Kingswells. The lease was for sixty years from Whitsunday 1788, and after the expiry of the sixty years, for the lifetime of any person to be nominated within three months before or after the expiry of the sixty years. A rent increasing to £130 after the first forty years was stipulated—"As also besides the aforesaid rents, the said William Black obliges him and his foresaids to free and relieve the said Alexander Jaffray and his above written of and from payment of the feu-duty, land tax, teind duties, minister's stipends, and augmentations thereof, if established, and all other public burdens affecting the foresaid lands, and to pay the same annually and regularly as they become due, and report discharges therefor to the said Alexander Jaffray and his above written, except always in regard to the parish kirk, kirk yeard dykes, schoolhouse, and minister's manse, and office houses of Newhills, of all which the said William Black and his foresaids are only to relieve the heritor of the expense and repairs, but in case all or any of the said kirk, kirkyard dykes, schoolhouse, manse, and offices are taken down and rebuilt during the subsistence of this lease, and as often as the same shall happen, it is hereby agreed on that the whole expense of such rebuildings shall be paid by the said Alexander Jaffray and his foresaids."

In January 1807 Black assigned to Andrew Jopp, advocate in Aberdeen, and his heirs or assignees, his whole interest in the tack.

In 1829 Mr Jopp died, and his testamentary trustees continued the management of the property, and paid to the proprietor Mr Jaffray, or his representatives, the stipulated rent of £130.

The original lease of sixty years came to an end in 1848, and the trustees nominated a Miss Beattie, during whose life the lease was to continue. Miss Beattie was alive at the date of the present actions, and Jopp's trustees continued to be tenants under the lease.

In 1854 Francis Edmond, advocate in Aberdeen, purchased the estate of Kingswells from Mr Jaffray's representatives, burdened with the tack of 1788. Mr Edmond desired to obtain possession of the estate, and in 1855 Jopp's trustees granted a sub-tack of the lands, by which they let to him the estate "for all the remaining years and crops still to run of the principal tack" from Martinmas 1854.

Mr Edmond bound himself to pay to them during the currency of the sub-tack or the principal tack "the following yearly rents, including the sub-tenants' share of the public burdens, viz., £540, 13s. 2d. for the first crop and year of 1855," the rents gradually increasing till the

nineteenth year, if the principal lease should endure so long, after which a rent of £665, 11s. 7d. was to be paid for the subsequent years.

It was also agreed by the sub-tack that Jopp's trustees should "also continue to pay the principal rent of £130, with the poor-rates for the lands as formerly; and shall also pay and free and relieve the proprietor of the feu-duty and other burdens specified in the principal tack."

Mr Edmond then entered upon possession of the estate, keeping in his own hands the mansion house and home farm, and letting out the rest of the estate upon ordinary agricultural leases.

For the period from 1855 to 1884 Mr Edmond regularly paid to Jopp's trustees the rents stipulated under the sub-lease, and he and his tenants also paid the public burdens due in respect of occupation, consisting chiefly of poor-rates, school rates, registration, and sanitary assessments. He also paid one-half, being the occupier's share, of the assessment for maintenance and repair of roads and bridges imposed under the Aberdeenshire Road Act, which came into force in 1867.

In 1884 he for the first time maintained that he was not liable to make these payments, on the ground that the rents payable under the sub-tack were "including the sub-tenants' share of public burdens." He maintained that he had thus, through error and inadvertency on the part of those representing him, paid to Jopp's trustees under the first of the two heads above mentioned the sum of £919, 7s. 11d., and under the second (since the local Act came into force in 1867) the sum of £254, 18s. 11d. These sums he claimed right to retain as against the rents falling due after 1883, when he discovered the error.

From the date of the sub-tack in 1855 till 1884, when Mr Edmond stirred the question, Jopp's trustees had paid the whole public burdens exigible from owners, as well as one-half of the assessment under the Aberdeenshire Road Act. They then, however, took up the position that Mr Edmond was liable for all burdens imposed by supervenient statutes subsequent to the date when he acquired the lands, and they claimed repetition of taxes paid by them on the footing previously acted on. These statutes were all passed in or after 1854, and were Acts for purposes of police, registration, militia, and local Acts.

They founded this claim for repetition on the words of the principal tack, which bound them as tenants to free and relieve the landlord of "payment of feu-duty, land tax, teind duties, minister's stipend, and all augmentations thereof, if established, and all other public burdens affecting the foresaid lands," the clause above quoted. They contended that these words made them liable only for these existing burdens, not for burdens arising from supervenient law, and therefore that Edmond was bound to make payment to them of sums which they had erroneously paid under statutes imposing public burdens on the lands since he became proprietor.

In these circumstances three actions were raised:—

The *first* was raised by Jopp's trustees for payment of rent under the sub-tack for the years 1884-85-86. Edmond did not dispute the amounts claimed, but based his defence on his construction of the words "including the sub-tenants' share of public burdens," and consequent claim to have repayment of occupier's taxes.

The *second* action was raised by Jopp's trustees for declarator that they, as tenants under the original lease, were not bound to relieve Edmond, as proprietor, of any burdens affecting the lands other than those specified in the tack as already quoted, and for declarator that he was bound to free and relieve them from all other burdens affecting or that might affect the lands, and in particular from the burdens imposed by statutes passed in and after 1854.

Edmond's defence was mainly based on two grounds, on which no decision was ultimately pronounced in the Inner House. The first of these was that under the Valuation Act of 1854 Jopp's trustees were themselves, as proprietors of Kingswells, liable for the assessments of which they sought to be relieved by him as proprietor, because by the 6th section of that Act a lessee for more than twenty-one years is to be deemed proprietor in the sense of the Act. The second of these defences was that the statutes described by them as supervenient were really only Acts coming in place of older local Government Acts in existence at the date of the obligation founded on. He also pleaded—"(7) The pursuers having for a period of thirty years voluntarily paid the public burdens in question without error of fact, and being fully advised with reference to their legal rights, are barred from insisting in this action, and *separatim*, are not now entitled to repayment."

The *third* action was raised by Edmond for declarator that the rents payable by him under the sub-tack included the whole public burdens affecting the lands, or that might affect them at any time during the subsistence of the sub-tack, "so far as the said public burdens are payable by the sub-tenants or occupiers of the said lands and estate," and in particular that the rent payable by him to them included the sub-tenants' or occupiers' share of poor rates, school rates, registration, sanitary, road, and cattle disease assessment, and any other assessment to any extent payable by tenants or occupiers of lands. He further asked declarator that in paying his rent under the sub-tack he was entitled to deduct the occupiers' share of public burdens, and that Jopp's trustees were bound to repay him what he had, through error, omitted to deduct since 1855. Decree was asked for the two sums of £919, 7s. 11d. and £254, 18s. 11d. as above mentioned.

The defence was that the pursuer's construction of the words "including the sub-tenants' share of public burdens" was erroneous, and that the public burdens falling on the occupier were, as well as the rent under the sub-tack, payable by Edmond. It was also pleaded—"(5) The pursuer having for a period of thirty years voluntarily paid the public burdens in question without error of fact, and being fully advised with reference to his legal rights, is barred from insisting in this action, and *separatim*, is not now entitled to repayment of the sums sued for."

The *first* and *third* actions were conjoined.

The Lord Ordinary (TRAYNER) in the *second* action repelled Edmond's seventh plea, and decerned in terms of the first and second conclu-

sions of the summons, being those for relief under the principal tack. In regard to a question of fact relating to the church buildings at Newhills the Lord Ordinary allowed a proof.

"*Opinion.*— . . . . . The defender further maintains that in respect of the 6th section of the Valuation Act 1854 the pursuers are liable in the public burdens in question, subject only to the relief which that section affords. I think this argument is based upon a mistaken view of the section referred to, even if that section has any application in the present case. The Valuation Act is not in any sense a taxing statute; it neither imposes nor exempts from taxation. When by section 6 it declares that in long leases the tenant shall be deemed to be the 'proprietor' for the purposes of that Act, it appears to me to do nothing more than provide means for the convenient imposition and recovery of the burdens which are authorised to be imposed and levied on the basis of the valuation roll. It does not certainly in my opinion lay taxation on one who is deemed to be proprietor apart from the terms of any agreement which may exist between the person deemed proprietor and the actual owner. But has the 6th section of the Valuation Act any application here at all? It applies to leases, 'the stipulated duration of which is more than twenty-one years from the date of entry under the same.' The lands in question are held by the defender, not under the tack of 1788, but the sub-tack of 1854, and the latter is not of the 'stipulated duration' of twenty-one years. It has as matter of fact endured for more than twenty-one years, but that is not to the purpose. Its stipulated duration was the 'remaining years and crops still to run of the principal tack,' and as that depended on the life of a certain person, the defender's lease might have expired at any time. It was not and could not be certain that the lease would last for twenty-one years, and it was not so stipulated. The defender urges the provisions of the Valuation Act in the view that the lands are held under the tack of 1788. But it appears to me that the lease referred to in the Valuation Act is the lease under which the lands taxed are naturally or beneficially held when the tax is imposed, and if that is so, the lease to be considered is the sub-tack of 1854 in the defender's favour. It follows that the lease of 1854 not being of the 'stipulated duration' of twenty-one years the Valuation Act does not apply.

"I repel the defender's seventh plea on the authority of *Hope* v. *Lumsdaine*, 9 Macph. 865."

The Lord Ordinary in the *conjoined* actions repelled the pleas for Jopp's trustees founded on their construction of the words of the sub-tack, and also their fifth plea, and found and declared in terms of the first and second declaratory conclusions in Edmond's action, subject to the declaration that Jopp's trustees "are not liable, and shall not be bound, to relieve the pursuer Mr Edmond of any share of the sub-tenant's taxes beyond the share of such taxes which effeirs to the amount of the rent as specified in the sub-tack."

"*Opinion.*— . . . The different views maintained by the parties may be thus stated. Mr Edmond contends that under the clause in question he is only bound to pay the rent specified, under deduction of the share of public burdens falling upon the sub-tenant, the share being included in the rent so specified. Jopp's trustees, on the other hand, contend (as I understand their argument) that no such deduction is admissible; that Mr Edmond is bound to pay the specified rent, including, *i.e.*, as well as, the sub-tenant's share of taxes; that in any view the public burdens included in the specified rent can only be those burdens which existed at the date of the tack, and not those imposed by subsequent legislation. On this part of the case I am of opinion that Mr Edmond is right. I entertain no doubt that the specified rent was to include the tenant's share of public burdens. If these were paid by the tenant they formed a deduction from the rent; if the specified rent was paid in full, the landlord was bound to pay the tenant's share of public burdens, because a part of the rent he had received was paid to meet these burdens. I can give no other meaning or interpretation to the clause I have above quoted. It is probably not so clear whether the public burdens referred to include all public burdens at whatever date imposed, or only public burdens existing at the date of the sub-tack. I am of opinion, however, that on this matter also Mr Edmond is right. If the clause had been an ordinary clause of relief binding Jopp's trustees to relieve the sub-tenant of public burdens, I should have decided that such an obligation covered only existing burdens, and did not extend to those subsequently imposed. But the clause I am dealing with is not of that nature. The parties stipulate in advance for a certain rent to be paid in future years, that rent so stipulated including the tenant's share of public burdens. That in effect was a stipulation that the amount of each year's rent—that is, the nett rent payable to the landlord—should be ascertained when the burdens for that year had been ascertained. In short, the tenant was never to be bound to pay more than the amount of the specified rent, whether he paid it as rents or public burdens. At the same time I think the share of the sub-tenant's burdens which Jopp's trustees are bound to bear is only such a share as effeirs to the rent specified in the sub-tack, and not to any greater rent which Mr Edmond may be getting from his sub-tenant. If it were otherwise, then Mr Edmond by increasing the assessable rent might seriously reduce his own obligations to Jopp's trustees, and reduce also the benefit conferred on them in name of rent under the sub-tack. I cannot suppose that Jopp's trustees ever intended to leave the amount of their liability practically in Mr Edmond's hands, nor do I think they have done so."

Both parties, having obtained leave, reclaimed.

The arguments on both sides appear from the statement given above. Neither party maintained their plea as to the practice since the sub-tack was entered into.

At advising—

Lord Justice-Clerk — The parties to these actions are Mr Francis Edmond and the trustees of Andrew Jopp. The circumstances under which the questions involved in them arise are somewhat peculiar. It seems that in 1788 the proprietor of the estate of Kingswells let the estate to the authors of Jopp's trustees on a long lease which was to run for sixty years, and for and

after the sixty years "during the lifetime of any person to be condescended upon and nominated within three calendar months before or after the expiry of the said sixty years" by the tenant. The sixty years ran out in 1848, but there was the nomination of a life then made as contemplated, and the lady nominated—Miss Beattie—is still alive, and therefore the lease has not yet expired.

Jopp acquired the tenant's part of the lease in 1807, and Mr Edmond acquired the property of the lands in 1854. At the same time Edmond took a sub-tack of the lands from the tenant in the long lease, and has continued in possession since that time. Thus it appears that on the one hand Edmond is proprietor of the lands, subject always to the principal tack, and on the other is tenant under a sub-lease from the lessee in the principal tack.

In those circumstances the questions arise between Edmond and Jopp's trustees as to their mutual rights, which are the subject of these actions.

The *first* process is an action by Jopp's trustees against Edmond for rent. That is met by Edmond by a counter claim under the sub-tack, and he has raised the *third* action to give effect to it, maintaining that under the sub-tack he is entitled to deduct the public burdens payable by the sub-tenants or occupiers of the lands from the sum of rent he is to pay to Jopp's trustees. The *second* action was raised by Jopp's trustees for relief of a variety of public burdens by reason of a clause of relief in the principal tack.

These in substance are the claims of the parties, but one fact of importance remains to be mentioned—that in regard to both these tacks the course of possession and dealing has been the reverse of what both parties maintain in their pleadings to be the true state of their rights—in other words, the respective positions in these actions were never taken up till 1883. There has been possession under the principal tack for nearly 100 years, and under the sub-tack for nearly thirty years, without such claims being put forward, and without any action whatever pointing in their direction. Therefore the first question is, If there is any foundation for the contentions which have now been raised? Now, in the first place, as to the claim by Jopp's trustees for rent, that depends mainly on the soundness of Edmond's claim for relief from public burdens under the sub-tack, for his answer to the claim for rent is not a denial that rent has been incurred, but is, that the account due must be calculated in a particular way, and that he is only bound to pay it under deduction of certain public burdens. Then the next question is, Whether under the clause in the principal tack Edmond is not bound to relieve Jopp's trustees of a great variety of public burdens? The words on which this question turns are contained in the principal tack, which, after specifying the rent, proceeds—"As also, besides the aforesaid rents, the said William Black obliges him and his foresaids to free and relieve the said Alexander Jaffray and his above-written of and from payment of the feu-duty, land tax, teind duties, minister's stipends, and augmentations thereof, if established, and all other public burdens affecting the foresaid lands." Now, it is maintained by Jopp's trustees that that clause only applies to public burdens which did affect the lands at the date of the granting of the tack, and that it does not extend to burdens imposed by subsequent legislation,

On the other hand, after the clause of warrandice by Jopp's trustees, Edmond in the sub-tack binds himself to "pay to the said trustees and their foresaids during the currency of this sub-tack, or of the principal tack above mentioned, the following yearly rents, including the sub-tenant's share of the public burdens," and then follows a specification of the rents. These clauses raise substantially the whole question. It is said by Jopp's trustees that the obligation of relief in the original tack only extends to burdens existing at the date of the tack, and they found on the case of *Dunbar's Trustees*, 5 R. 350, *affd.* 5 R. (H. of L.) 221, and similar cases, as showing that claims of relief are held not to extend, in the absence of express words, to burdens to be imposed by subsequent legislation. If necessary, I should have held that contention to be well founded, and should have held that the principle of *Dunbar's* case ruled the present, viz., that where there is an obligation of relief between superior and vassal or disponer and disponee—for I think it makes no difference—the presumption is that the obligation refers to existing burdens and not to burdens to be imposed by subsequent legislation. But I am of opinion that the clause is to a certain extent ambiguous, and while my impression is that it does not cover after-imposed burdens, the parties have gone on without raising the question whether it does or does not, for a long period, and the matter must be held to be ruled by the actings of parties who by their actings have construed its meaning. Whatever the law might have been held to be, if at once appealed to, the parties have acted on a certain meaning of the obligation, and Jopp's trustees have paid for many years the public burdens they now bring into question. I apply the same rule to the case of Edmond. He says the expression "including the sub-tenants' share of public burdens" entitled him to make deduction from his rent of the whole public burdens chargeable against the sub-tenants or occupiers of the lands. That is, in the first place, a singular use of language. It would not, I think, occur to anyone who intended to provide that the tenant should pay the sub-tenants' share of public burdens, and then pay as much to his landlord as would make up the sum so paid to the stipulated rent, to employ that language. It is not the natural meaning of the words. On the contrary, I would rather say the words meant over and above the public burdens. But in this instance, also, it is not necessary to come to a conclusion, for from 1855 to 1883 the settlement of accounts proceeded on the opposite principle from that which Edmond now contends for.

I therefore think that neither of these new contentions can receive effect, and that neither party can complain if they are left on the footing they themselves selected. Something was said in the argument in Jopp's trustees' action—the assessments case—as to the effect of the Valuation Act, as if a right had been acquired under that statute to be free of the public burdens in question. I think that proceeded on a complete misapprehension of the matter. The

Valuation Act is for ascertaining the annual value, and nothing else, and the machinery pointed out is that where lands are let to a tenant for not more than twenty-one years—thirty-one years if minerals—the rent, if a fair rent, without grassum or the like, is to be held to be that value for the purposes of the valution roll, and if the lease is for more than twenty-one years the rent payable is not necessarily to be entered on the roll as the yearly value, but is to be otherwise ascertained, and the lessee is to be deemed proprietor. But that Valuation Act does not apply here. Edmond is the proprietor in the sense of it, for he is the person who receives the rents, and consequently comes under the statutory definition of proprietor. On the other hand, his tenants do not hold for terms over twenty-one years. The leases are ordinary agricultural leases not exceeding twenty-one years.

I have thought it right to make these last observations, though they are not really necessary to my decision. I think the rule regulating both cases is that afforded by the construction which both parties have put upon their respective rights.

Lord Young—The relation between the parties is singular, but quite comprehensible. Edmond is proprietor of Kingswells, having bought it in 1854. But it was the subject of a long lease which might be of long duration, and which, indeed, still exists. It had run sixty years, and was to run during the life of Miss Beattie, who is still alive. Its duration is uncertain. Edmond desired when he became proprietor, to get possession, which he could not do without arranging with the tenant who held the long lease, viz., Jopp's trustees. Here the complication begins. The simple course—I presume, however, some difficulty arose as to it—was to have bought up the right of the tenant. But the course adopted was, that Edmond became tenant under a sub-tack from these lessees of the principal tack, his sub-lease being entered into in 1855. The principal tack had then subsisted for nearly seventy years, and that the contract between Jopp's trustees and Edmond related to a principal tack which had subsisted for that time I regard as a material fact in the case. Now, it occurred to Edmond—for we were told it first occurred to him to raise these questions in 1884, that is, thirty years or so after he became proprietor, and twenty-nine after the date of the sub-tack—to do this. He had up till then been paying the tenant's burdens he now disputes. From 1855 to 1884 he paid them without question. In that year it occurred, I say, to him that there was a clause in his sub-tack, "including the sub-tenants' share of public burdens," which was in his favour, and might put the obligation of paying these burdens on Jopp's trustees as granters of the sub-tack, and he began to withhold payment of the rent payable under the sub-tack in order to recoup himself for the burdens which he had theretofore paid, but which, according to this view, were really due by Jopp's trustees. That put them on their inquiry on their own side. The result was that they thought they had misunderstood the principal lease, and the result is that we have three actions—*First*, an action by Jopp's trustees against Edmond for rent which he is withholding, as I have described, and the summons in which action was signeted on 18th April 1887; *second*, a declarator by Jopp's trustees with respect to the meaning of the clause in the principal tack, which in 1884 they had come to think they had misconstrued; and *third*, a declarator by Edmond against them that the clause of the sub-lease, "including the sub-tenants' share of public burdens," imports an obligation on them as lessors to pay the public burdens payable by sub-tenants or occupiers. As this idea of Edmond was the beginning of the strife, I shall state my views as to this last action first.

The conclusion in it is for declarator that Jopp's trustees are bound to free and relieve him, Edmond, in all time coming of the sub-tenants' share of all public burdens affecting the lands, and that conclusion is founded on the clause "including the sub-tenants' share of public burdens." The words occur in the clause of obligation to pay rent. The meaning of these words is not obvious. But we are desired by the summons to declare what the parties meant by them, if they meant anything. At first sight it seems simply inaccurate language, and to have no meaning, and one therefore looks for some indication of what the parties understood, or to see if they understood nothing. We have the usage for twenty-nine years, and find that the parties who made the contract annually—for their attention was annually called to the matter—for twenty-nine years, acted on the footing that the words meant nothing. That is just what they mean, to my view, on reading them—nothing. The parties having thus for twenty-nine years acted on that view of them, one of them now asks us to declare that the other undertook by them to pay all the public burdens of the tenants or occupiers. I cannot declare that. Such an obligation was never so expressed before. The words do not express it, and if we are asked to declare that they imply it the conduct of the parties shows that they do not. The tenants paid their own burdens, and relief was never applied for. But Edmond's view is this, "You are to ascertain what the agricultural tenants pay as tenants or occupiers, and then you are to permit me to deduct from my rent to you a sum corresponding to that." That, I think, is extravagant, and if that construction had been suggested at once, and without the clear light of the usage of many years, my decision would have been the same as it now is, but in the face of the light of so many years' usage, it seems to me as clear a case as I ever saw for refusing decree. I am therefore for sustaining the defences in Edmond's action, and assoilzieing Jopp's trustees from its conclusions with expenses.

Now, I shall next refer to the action at the instance of Jopp's trustees for rent. They are of course entitled to the rent withheld by Edmond on the view of his rights which we are now about to negative. In that action I am for giving decree.

There only remains the action by Jopp's trustees for declarator of the soundness of the counter idea which they took up when reflecting on Edmond's new idea to which I have alluded. It is, that whereas they have been paying under the principal tack all the landlord's burdens, they were really only bound to pay those subsisting

in 1788, and were not bound to pay those imposed by subsequent legislation. Well, there are many decisions to the effect that a clause of this kind in a feu-charter, under which a superior undertakes to relieve of burdens, is limited to those subsisting at its date, and which alone therefore are in contemplation at the date of the feu. But the rule is to ascertain as satisfactorily as may be what the parties intended. Here we have the means of ascertaining that, for we have the usage of nearly 100 years under the principal tack, and a contract made between the present disputants when that tack was sixty-seven years old on the footing of the usage subsisting then, which was and has continued, that the lessee should pay all the landlord's burdens of the character imported by the clause, whether imposed in 1788 or by subsequent legislation. Since 1788 we have, I say, the contract of 1855, and alike, before and since that date, the lessees under the principal tack have paid all the landlord's burdens. This ascertains what the parties understood, and with reference to what they contracted in 1855, and they have acted on the contract then made. I am therefore for dealing with this contention as we are to do with Edmond's new contention. I think we should assoilzie the defender Edmond in this action, so that with respect to the supposed newly discovered rights *hinc inde* the defending party will be assoilzied from the claim made by the other.

Lord Craighill concurred.

Lord Rutherfurd Clark—I am of the same opinion. I think we must hold that the contracts should be construed as the parties themselves construed them for a long course of years.

The Court pronounced these interlocutors:—

In the *conjoined* actions—

"The Lords having heard counsel for the parties on the reclaiming-note of Charles Jopp and others, trustees for Andrew Jopp, against Lord Trayner's interlocutor of 20th July 1887, pronounced in the conjoined actions, Recal the said interlocutor except in so far as it conjoins the actions; and in the action at the instance of the said trustees against Francis Edmond, Ordain the defender to make payment to the pursuers of the sum of Six hundred and sixty-eight pounds sixteen shillings and one penny sterling, with interest at the rate of five pounds per centum per annum, as concluded for: Find the pursuers entitled to expenses, and remit to the Auditor to tax the same and to report, and decern: And in the action at the instance of Francis Edmond against the said trustees, in respect parties have arranged *inter se* for the settlement of the claims for assessments in connection with the repair of parish buildings mentioned in article 10 of the condescendence and answer thereto, Find it not necessary to dispose of the conclusions relating thereto, and *quoad ultra* assoilzie the defenders from the conclusions of said action: Find them entitled to expenses: Remit to the Auditor to tax the same and to report, and decern."

In the *second* action—

"The Lords having heard counsel for the parties on the reclaiming-note for the defender against Lord Trayner's interlocutor of 20th July 1887, and the parties having arranged *inter se* for the settlement of the sum of £41, 17s. 9d. of income-tax sued for, and also of the question raised under the 14th article of the condescendence and answer thereto, Recal the interlocutor reclaimed against: Assoilzie the defender from the conclusions of the summons: Find him entitled to expenses: Remit to the Auditor to tax the same and to report, and decern."

Counsel for Jopp's Trustees—Sol.-Gen. Robertson—Salvesen. Agents—H. B. & F. J. Dewar, W.S.

Counsel for Francis Edmond—Asher, Q.C.—Low. Agents—Morton, Neilson, & Smart, W.S.

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*Wednesday, January* 11.

## FIRST DIVISION.

### CLUGSTON *v.* THE GLASGOW ROYAL INFIRMARY AND OTHERS.

*Trust—Charitable Trust—Alteration of Purposes—Competition—Nobile Officium.*

A fund was raised by means of a bazaar, held in Glasgow under the auspices of the Royal Infirmary Dorcas Society, Glasgow, for the purpose of establishing a home for the reception of patients recovering from fever, in or near Glasgow. The local authority for the city subsequently built a fever hospital for the city fever patients, and the infirmary ceased to admit such patients. A petition was then presented by the holders of the fund to have a scheme settled for its administration. Answers were lodged for the Glasgow Royal Infirmary and the Dorcas Society in connection therewith, who asked that, the particular purpose for which the fund was raised having failed, the money should be applied to the erection of a nurses' home in connection with the Infirmary. Answers were also lodged for the Magistrates of Glasgow, as the local authority for the burgh, and the Dorcas Society in connection with certain fever hospitals in and near Glasgow. The object of this society was to supply fever convalescent patients with clothing, and also occasionally to assist them to go to the country to complete their recovery. They claimed that the fund should be made over for the benefit of the patients treated in these hospitals.

The Court *directed* the fund to be paid to the Magistrates of Glasgow, as the local authority, in trust for the Dorcas Society in connection with the said fever hospitals, in order that the annual income should be applied by the society exclusively for the benefit of the convalescent fever patients in the city fever hospitals.

This petition was presented by Miss Beatrice Clugston, David Davidson Balfour, James Campbell, David M'Cowan, honorary treasurer of the