The Court pronounced the following interlocutor:—

"Adhere to the said interlocutor so far as it ordains the defender to deliver to the pursuers the draft balance-sheet and other documents: *Quoad ultra* recal the interlocutor: Interdict, prohibit, and discharge the defender in terms of the conclusions of the summons: Ordain the defender to make payment to the pursuers, the trustees of the late William Brown of Dunkinty, of £20 in name of damages in terms of the third conclusion of the summons," &c.

Counsel for the Pursuers — Salvesen — Hunter. Agents—John C. Brodie & Sons, W.S.

Counsel for the Defender—J. Wilson—Deas. Agent—Robert Stewart, S.S.C.

Wednesday, July 13.

SECOND DIVISION.

LINDSAY *v.* BETT.

Superior and Vassal—Feu-Charter—Obligation to Pay Public Burdens—Poor Rates and Property Tax.

By feu-charter dated in 1803 a superior undertook an obligation to his vassal and his successors in the feu "to pay the teind-duties, ministers' stipends, schoolmasters' salaries, cess, or land tax, and all other burthens, duties, services, and casualties whatsoever, public and parochial, as well as all others of every description now due and payable, and that shall hereafter become due and payable, or be imposed by any authority whatever for or furth of the said portion of lands or teinds thereof for ever, it having been pactioned betwixt us that he was to pay no more than the said feu-duty and duplication when it shall occur."

Held (1) that the clause only covered those burdens and assessments which affected the land at the date of the grant, and did not impose on the superior an obligation to relieve the vassal of any assessments or burdens laid upon the land by subsequent legislation; and (2) that while the poor rates payable by the owner fell within the clause the property tax did not, the latter being a personal tax on the income derived from the land rather than a tax payable "for or furth of the land" itself —*diss.* Lord Moncreiff, who was of opinion that both poor rates and property tax fell within the clause, because while both were personal taxes in the sense that they were not *debita fundi*, they were payable by the proprietor in respect of his right of property in the land.

By feu-charter dated 29th December 1803, and recorded 5th April 1809, the Honourable Robert Lindsay of Leuchars, then proprietor of the said lands and barony of Leuchars, "in consideration of the feu-duty after mentioned, and of certain other onerous causes and good considerations," disponed in feu-farm to John Young, W.S., and his heirs and assignees whomsoever, heritably and irredeemably, a portion of the estate of Leuchars amounting to 52 acres Scots measure or thereby.

The feu-duty stipulated to be paid by the vassal to the superior was £26 per annum, with a duplication of said feu-duty upon the entry of each heir and singular successor, whether legal or conventional. By the feu-charter the Honourable Robert Lindsay undertook an obligation to the vassal and his successors in the feu in the following terms:—"And I bind and oblige myself and my foresaids" [=heirs and successors] "to pay the teind-duties, ministers' stipends, schoolmasters' salaries, cess or land tax, and all other burthens, duties, services, and casualties whatsoever, public and parochial, as well as all others of every description now due and payable, and that shall hereafter become due and payable, or be imposed by any authority whatever for or furth of the said portion of land or teinds thereof for ever, it having been pactioned betwixt us that he was to pay no more than the said feu-duty and duplication when it shall occur."

Mr Young was infeft upon said feu-charter by instrument of sasine in his favour, dated 8th October, and recorded 16th November 1805. He died in the year 1828, and was succeeded in the said property by his nephew John Learmonth, merchant in Edinburgh, afterwards of Dean, and he, dying in 1859, was succeeded in said property by his son, the now deceased Colonel Alexander Learmonth of Dean. In 1862 the said property was sold by Colonel Learmonth to the now deceased Robert Hawkes Isdale, merchant, Dundee. In 1889 the said property was purchased by James Bett from the trustee on Mr Isdale's sequestrated estate.

The minister's stipend for the estate of Leuchars, and also the old schoolmaster's salary, cess or land tax, and all other burdens imposed upon the valued rent of the estate were paid in full by the superiors of Leuchars Lodge since 1803, no part of these burdens or the valued rent itself having been allocated or laid upon that property. With regard to the other burdens and assessments affecting the feu, these were from time to time the subject of compromises and temporary arrangements between the superior and vassal, but it was admitted by both parties that these did not bar either party from insisting on his full legal rights.

In these circumstances in 1898 questions arose between the superior Sir Coutts Lindsay of Leuchars, Baronet, and the vassal James Bett as to the burdens embraced in the clause of relief. Sir Coutts Lindsay contended that the clause of relief embraced only burdens imposed or which might have been imposed by virtue of laws in existence at the time when the obligation was granted. Mr

Bett contended that he was entitled, under the said obligation of relief, to repayment of every public and parochial burden imposed upon him in respect of the ownership and occupancy, or at least the ownership of the property, of Leuchars Lodge without reference to the date of the statute imposing it. In particular, he claimed repayment of the landlord's and (in so far as he himself occupied the subjects) the tenant's proportions of the poor rate, of the school rate first imposed under the Education (Scotland) Act 1872 (35 and 36 Vict. c. 26), and of the rate leviable for defraying the expense of registration of births, deaths, and marriages which was first imposed by sec. 50 of the Act (17 and 18 Vict. c. 80) passed in the year 1854. He also claimed repayment of property-tax under Schedule A to the Income Tax Act 1853 (16 and 17 Vict. c. 34). Property tax was first imposed in 1799 by 39 Geo. III. c. 13, and was in existence at the date of said feu-charter in 1803, but it expired in 1816, and was not revived until 1842 (5 and 6 Vict. c. 35). Further, he claimed repayment of the landlord's proportion of the county consolidated rate, which embraced the following purposes, viz.:— (1) Valuation expenses first assessed for under the Lands Valuation Act of 1854 (17 and 18 Vict. c. 91; (2) county voters registration expenses, first assessed for under the County Voters Registration (Scotland) Act 1861 (24 and 25 Vict. c. 83; (3) county general assessment, first assessed for under the County General Assessment (Scotland) Act 1868 (31 and 32 Vict. c. 82, by which Act, section 2, it is declared that "it shall no longer be lawful for the Commissioners of Supply of Counties in Scotland to impose or levy the rate or assessment heretofore known as 'rogue money'; (4) lunacy, first assessed for under the Lunacy Act of 1857 (20 and 21 Vict. c. 71; (5) police, first assessed for under the Rogue Money Act of 1839 (2 and 3 Vict. c. 65); (6) contagious diseases (animals), first assessed for under the Contagious Diseases (Animals) Act 1878 (41 and 42 Vict. c. 74); (7) general purposes, first assessed for under the Local Government (Scotland) Act 1889 (52 and 53 Vict. c. 50); (8) road debt; and (9) management and maintenance of highways, both of which were first imposed by the Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. c. 51) by which Act, section 33, it is declared that "the exaction of statute labour and any payments of money by way of conversion or in lieu thereof, . . . shall cease and determine;" (10) militia storehouses, first assessed for under the Militia (Scotland) Act 1854 (17 and 18 Vict. c. 106); (11) court houses, first assessed for under the Sheriff Court Houses Act 1860 (23 and 24 Vict. c. 79; and (12) public health, first assessed for under the Public Health (Scotland) Act 1867. Until this claim was admitted he declined to pay the feu-duty due to Sir Coutts Lindsay. Sir Coutts Lindsay declined to admit the said claim of repayment except in regard to the landlord's share of the poor rate, the statute labour money and rogue money having been abolished as above explained, and he contended that upon a sound construction of the terms of the said feu-charter he was not bound to relieve Mr Bett, a singular successor of the original vassal, further or otherwise than in respect of the assessment above set forth.

In order to settle these points a special case was presented to the Court by (1) Sir Coutts Lindsay, the superior, and (2) Mr Bett, the vassal.

The questions at law were—"(1) Is the first party bound to relieve the second party of the whole burdens and assessments in respect of which he claims to be relieved? or (2) Is the first party's obligation of relief limited to the landlord's share of the poor rate? or (3) To which of the said burdens and assessments specified does the first party's obligation of relief extend, and does the obligation include the landlord's and (in so far as the subjects are occupied by the second party) the tenant's proportion of the said burdens and assessments."

Argued for the first party—With regard to clauses of this kind two rules of construction applied—(1) The clause must be construed according to the intentions of parties, looking to the date and special circumstances of the case, and (2) the clause must be construed in favour of freedom. In accordance with these rules it had been laid down by a long series of decisions that an obligation such as this will give relief "from all public burdens exigible or payable at its date, or that might thereafter become exigible or payable by virtue of any law or practice existing at its date, but will not give relief against public burdens created and imposed for the first time by laws enacted after the date of the obligation—*Scott* v. *Edmond*, June 25, 1850, 12 D. 1077; *Wilson* v. *Magistrates of Musselburgh*, February 22, 1868, 6 Macph. 483; *Stewart* v. *Earl of Seafield*, March 1, 1876, 3 R. 518; *Dunbar's Trustees* v. *British Fisheries Society*, July 12, 1878, 5 R. (H.L.) 221. This disposed of all the taxes mentioned in the special case with the exception of poor-rates and property-tax. He was willing to pay the landlord's share of the poor-rate, but as regards the property-tax, that was a purely personal tax payable from the income derived from the land. It was a tax on money invested in land, not a tax on the land itself. It was therefore in the same position as income-tax, and payable by the vassal.

Argued for the second party—The present case was distinguished from the cases quoted on the other side, because (1) the words of the clause in question were much wider and more comprehensive, and (2) in the present case there was not merely an obligation on the superior to relieve the vassal, but a direct obligation on him to pay the duties referred to. In any event the landlord was bound to pay the property tax. It was in the same position as the landlord's proportion of the poor-rate. In *Reid* v. *Williamson*, February 16, 1843, 5 D. 644, the superior pleaded that poor-rates, though levied in respect of the ownership of the land, were in their nature a personal tax. But the Court held that

poor-rates were imposed on him not in respect of any mere personal ground of liability but in respect of his proprietorship of the lands.

At advising—

LORD TRAYNER—It has been settled by a series of decisions that a clause such as that which we are here asked to construe can be held only as covering those burdens and assessments which affected the land at the date of the grant, and that the clause does not impose on the superior an obligation to relieve the vassal of any assessments or burdens laid upon the land by subsequent legislation, notwithstanding that in expression the clause does provide for all burdens that "shall hereafter become due and payable" for or furth of the lands. That being the meaning and effect of the clause, it only remains to ascertain what public burdens or assessments affected the land in 1803. It is admitted by the first party that the poor-rates, so far as payable by the owner (although not the proportion payable by the tenant) fell within the clause. So far as the tenant's proportion of the poor rates is concerned it was conceded by the second party that he could not maintain his right to be relieved of that. As regards the poor-rates, therefore, the parties are agreed.

The property-tax raises a question which is not unattended with difficulty. That tax was first imposed by the Act 39 Geo. III. c. 13, and was there described as a "contribution for the prosecution of the war." A part of it, however—and no inconsiderable part—was by the Act authorised to be applied to the public services "voted by the Commons." This tax, which expired in 1816, was revived in 1842 (5 and 6 Vict. c. 35), but was so revived to defray Her Majesty's "public expenses" only. In these circumstances the question arises, is the tax of 1842 the same tax as was a burden on the land in 1803. This question I am disposed to answer in the affirmative, because the incidence of the two is the same—they were payable according to the annual rent—and the purposes to which the tax might be applied are to a large extent the same. But then the tax of which the second party seeks relief appears to me to be a personal tax on the income derived from the land rather than a tax payable "for or furth of the land" itself. On this ground I am of opinion (but not without considerable hesitation and doubt) that of this tax the superior is not bound to relieve the vassal.

The whole of the other assessments mentioned in the special case appear to me to have been imposed by supervenient legislation, and therefore not covered by the clause in question.

LORD YOUNG concurred.

LORD MONCREIFF—Except in one particular I agree in the opinion expressed by Lord Trayner. The decided cases are too strong for the second party. According to the natural construction of the words used in the clause on which he relies it imports an obligation on the superior to relieve the vassal by himself paying all burdens "payable for or furth of" the lands feued, however and whenever imposed, whether under existing or future statutes, and an assurance that the feuar should pay nothing but feu-duty and duplication. But this is not the way in which similar clauses have been construed by the Court. I can find no substantial difference between this clause and those in decided cases which were held to be confined to burdens existing at the date of the grant. It may be somewhat fuller and more emphatic, but that is all.

I am of opinion, however, that under the clause in question the first party is bound to relieve the second party, not only of poor-rates but also of property-tax. Both of these rates and taxes, or rather the equivalents, were exigible in 1803 at the date of the feu-charter. They are both personal taxes in this sense, that they are not *debita fundi;* so indeed is the land-tax. But they are due and payable by the proprietor of the land for the time being, in respect of his right of property in the land, and thus in my opinion are, in the sense of the clause of relief, burdens due and payable "for" if not "furth of" the said lands.

LORD JUSTICE-CLERK—I concur in the opinion of Lord Trayner.

The Court answered the first question in the negative and the second question in the affirmative and found it unnecessary to answer the third question.

Counsel for the First Party—Dundas, Q.C. — Blackburn. Agents — Dundas & Wilson, C.S.

Counsel for the Second Party—Craigie. Agent—William Duncan, S.S.C.

Wednesday, July 13.

SECOND DIVISION.

[Sheriff of Lanarkshire.

GEORGE MILNE & COMPANY *v.* NIMMO.

Reparation—Negligence—Safety of Public —Horse Escaping into Public Street.

An employer's horses were yoked and his vans loaded in a private yard separated from the street by a covered pend 40 yards long and 8½ to 10 feet wide, with a shut gate next the street end. On one occasion a driver, after yoking a pony and loading a van in this yard, opened the pend gate, and then went 3 or 4 yards behind the pony and van to get his coat. While he was doing so the pony ran off through the pend into the street. The driver ran after it, but was unable to reach the pony's head on account of the narrowness of the pend. The pony and van collided with another horse and cart, and seriously injured the horse.

In an action for damages raised by the injured horse's owner against the