sioners of Leith, 4 Macph. 853, H. of L., 8 Macph. 31. I see that Lord Benholme, in giving his opinion in that case, which seemed to present a great deal of difficulty to the Court below, said—"This is a statute which is certainly obscure. I find that 'public street' and a 'private street' are defined very much by negatives. You get at what a 'public street' is by seeing that it is not a 'private street,' and then 'private street' is defined by two negatives." That case came afterwards up to the House of Lords, and was disposed of in 1870, and I see that those of your Lordships who gave opinions in that case were a good deal troubled with the multiplicity of provisions as regards appeals and also with the difficulty of finding the proper provisions with regard to the particular appeal which was the subject under disposal in that case. I think the proper course we should pursue with regard to the judgment in the Court below is, that it should rest upon an approval of the action of the Court in exercising their power of granting an interdict against the Commissioners of Police, rather than enter very carefully into the rules with reference to the form of procedure in the way of appeal.

Interlocutor appealed from affirmed, and appeals dismissed with costs.

Counsel for Appellants—Lord Advocate (Watson) — Maclachlan — Raleigh. Agent—R. M. Gloag, solicitor.

Counsel for Respondent—Badenach Nicolson—Purvis. Agent—W. A. Loch, solicitor.

Friday, July 12.

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

(Before the Lord Chancellor, Lord Hatherley, Lord Blackburn, and Lord Gordon.)

(*Ante*, p. 227, December 19, 1877, 5 Rettie, 350.)

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

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

Public Burden—Clause of Relief—Road Money.

Held [*aff.* judgment of Court of Session] that assessments imposed under certain Private Acts relating to the Caithness County and Wick Burgh Roads, passed in 1830, 1838, and 1860, were not covered by an obligation in a feu-contract, dated in 1823, to relieve a vassal from public burdens payable "now" or "in all time coming."

The appellants in this case, trustees of the late Sir George Dunbar of Hempriggs, had raised an action against the British Fisheries Society to have it declared that they were not bound under their feu-contracts to relieve the respondents from certain burdens consisting of road assessments and poor-rates imposed on lands feued by them from the appellants. The lands had been conveyed by the appellants' predecessors in 1807 and 1823, and each feu-contract contained a clause whereby the superior undertook to free and relieve the vassals of all cess and land-tax in all time coming, and also of all minister's stipend, schoolmaster's salary, and other public burdens payable out of the lands in all time coming. The feu-duties were two sums amounting to £169. The respondents had since built cottages on the land feued, and part of Pulteneytown was now built on it, so that the poor-rates had risen to about £500 a-year. The appellants and their predecessors had always paid the minister's stipend and schoolmaster's salary, which were the burdens existing at the date of the contracts. Since then poor-rates and burgh and county road assessments had been imposed, and these had accumulated in 1875 to a total sum of £8739. The Society now claimed to be reimbursed these sums, and to have the same burdens paid in all time coming by the superior as they became due. The Lord Ordinary [CURRIEHILL] had held that the appellants were bound to relieve the respondents of these burdens, though they exceeded the whole amount of the feu-duty, and assoilzied the defenders. The Second Division adhered as to the poor-rates, but [*diss.* LORD ORMIDALE] held that the road assessments were not covered by the obligations in the feu-contracts [*ante*, p. 227, Dec. 19, 1877, 5 Rettie, 350].

Both parties appealed to the House of Lords against the decision so far as adverse.

At delivering judgment—

LORD CHANCELLOR—My Lords, in this case your Lordships have to dispose of an appeal and a cross-appeal. The action in the Court of Session was instituted by the trustees of Sir George Dunbar, and it is in the form of a declarator of liberation from certain obligations. Those obligations were contained in two feu-contracts, the one dated in 1803 and the other in 1823, between the predecessor of Sir George Dunbar and a society called the British Fisheries Society. I will read only the second of these two contracts, because of the two it is decidedly stronger in words,—"Sir Benjamin Dunbar binds and obliges himself and his foresaids to free and relieve the said Society of the whole cess or land-tax, feu-duties, or other duties payable to his, the said Benjamin Dunbar's, superiors of the said lands, ministers' stipends, schoolmasters' salaries, and other public burdens, due and exigible out of the whole lands and subjects hereby feued, or that may become due and payable for or from the same in all time coming."

My Lords, the two duties which are in question in these appeals are the poor-rate and road-money. With regard to the first of these, the Court of Session have held that the poor-rate comes within the contract of relief, that the poor-rate, as it now stands, is covered by that contract, and the first appeal challenges that decision. The Court of Session have decided that the road-money, for reasons which I shall state, is not covered by this contract, and against this decision the second appeal is brought.

Now, My Lords, the general principle in the law of Scotland regulating these cases is not in dispute, and I think it was stated by Lord Ormidale in words as satisfactory as I could desire to use. Lord Ormidale says—"It cannot, I think, now be questioned, at least in this Court, that while such an obligation as that in question will give relief from all public burdens exigible or payable at its date, or that might thereafter at any time become exigible or payable by virtue of any law or practice existing at its date, it will not afford a relief from public burdens created and imposed for the first time by supervenient laws, that is to say, by laws enacted after the date of the obligation." That I take to be the general rule, and it was not seriously challenged by the argument at your Lordships' bar.

But, my Lords, the question remains, What will be the application of this general rule? Now, I think it is obvious that the rule, from its nature, has a double application. There may be a burden existing at the date of the contract, and subsequently the incidence of that burden may be so altered that although the burden in specie remains the same—the same in name and the same in application—still a change subsequently made by law in the incidence of the burden may be such that it becomes, with reference to a contract of this kind, a new burden, and is no longer covered by the contract; or, on the other hand, the incidence of the burden may remain the same, and yet the application of the burden may be so entirely different that the burden will become, although the same in name, yet a different burden in specie, and no longer be covered by the contract.

Now, my Lords, I will first refer to the second of the burdens which is here in question; and that appears to me to be an example of the first of the two changes to which I have alluded. The description of the change which has taken place with regard to the road-money is given by the Lord Justice-Clerk with such accuracy that I think your Lordships would prefer me to read it rather than to replace it by any words of my own. The Lord Justice-Clerk says [p. 232]-"At the date of the granting of this feu-contract there was a burden imposed, I cannot say upon the land, but upon the occupiers of the land, partly in respect of land, and partly in commutation for personal service. The statute which was in force at the date of the contract was the Statute Labour Act for the county of Caithness—a local Act, which was passed in 1793. The third section of that Act provides that "from and after the passing of this Act the whole statute labour of the said county, except as hereinafter provided, shall be converted by an assessment on the valued rent not exceeding 30s. sterling for each £100 Scots of valuation." So what was imposed was a limited burden, which could not exceed 30s. for each £100 Scots of valuation. There is then a description of who are to be liable, and that is contained in the 26th clause of the Act. "For the better explaining who shall be liable in the performance of statute labour, or the payment of a composition for the same, be it further enacted and declared that all heritors in the natural possession of their own lands, and all lessees and occupiers of land, and householders and cottagers, and all labourers (servants hired by the year or half-year, and continuing in service throughout the year, excepted), and all tradesmen, carters and carriers. and other persons keeping horses for hire or labour, shall be obliged to assist in making or repairing the highways and bridges within the said county, or to pay a composition for their labour, in terms of the enactment of this statute." The assessment thus introduced, in so far as it was a burden on land, was a burden upon those who were in personal occupation of their own land, and in all other respects it was not a burden upon land at all—it was a personal obligation on the parties occupying the land or using the roads."

Then the Lord Justice-Clerk says [p. 232]-"The object of that statute," that is, the Act of 1860, "is to a certain extent the same, viz., the support of the roads in the county; but the result of the statute is, in the first place, to throw portions of these feus into the burgh which never were in the burgh before, and, in the second place, to lay the assessment on the real rent—that is to say, where a subject has been divided and built upon, and the rent enormously increased, the assessment is to be so much in the pound on the real rent, instead of 30s. for every £100 Scots of old valuation as formerly, which was a permanent standard. It is a burden of a different description from that imposed by the Act of 1793—different in its incidence, and wider in its objects. I think, therefore, that this branch of the case falls clearly within the principle of *Scott* v. *Edmonds*. I am of opinion that this is not a burden which falls within that clause of relief—that it is a burden the incidence and amount of which has been entirely altered and increased by subsequent legislation."

My Lords, I must say I entirely concur in that view. The burden remains the same in name. The object of the burden is the same as before, namely, to repair the roads, but the incidence of the burden has been so entirely altered that, although the same name is given to the tax, it has become a tax different in specie. Therefore, my Lords, the burden of the road-money, which is the subject of the second appeal, appears to me to have been rightly dealt with by the Court below, and I shall advise your Lordships to dismiss that cross-appeal.

Then, my Lords, with regard to the poor-rate, the case of the appellants in the first appeal with regard to that is stated by themselves in this way—They assert that the Poor Law Amendment Act imposed an entirely new burden, and that the difference between the assessment since that Act and the assessment before it was this—they say that "under the old law the assessments could be applied to, first, the weekly maintenance of the poor, and, secondly, the maintenance of vagabonds in prison; and that under the new law the assessments can be applied to the payment of, first, the salaries of inspectors; secondly, expenses of actions raised or defended by parochial board; thirdly, erection of poor's

houses; fourthly, medical officers; fifthly, subscriptions to hospitals, dispensaries, and asylums; sixthly, medicines and medical attendance; and seventhly, education of pauper children."

Now, my Lords, upon that subject Lord Ormidale sums up the statement of his view as to what has been the law established as to the poor-rates in Scotland. He says [p. 235]—"In regard to the poor-rates . . . no serious dispute could be, or indeed was, raised, for in this Court at least it is no longer an open question, having been the subject of express decision in more than one of the cases cited by the Lord Ordinary. In particular, it was held in the case of *Reid* v. *Williamson* that poor-rates leviable prior to the Poor Law Amendment Act of 1845 fell under an obligation of relief such as that in the present case, although no such burden was expressly mentioned in it, and that public burdens did not require to be *debita fundi* in order to be comprehended by it. And in more than one of the subsequent cases cited at the debate, and referred to by the Lord Ordinary, it seems to have been held that it makes no difference that the rates were leviable after the passing and in virtue of the Poor Law Amendment Act of 1845, although the date of the obligation was long prior—the object of the law being the same as that existing at the date of the obligation, and the rates being due for or in respect of the occupation of land" (the object and incidence therefore remaining the same). "It appears to have been so held in the cases of *Lees* v. *M'Kinlay*, *Hunter* v. *Chalmers*, *Paterson's Trustees* v. *Hunter*, and *Wilson* v. *The Magistrates of Musselburgh*, all of which have an important bearing on other points as well. The feu-contract in the case of *Hunter* v. *Chalmers* was dated in 1789, and it contained an obligation by the granter (the superior) to relieve the grantee (the vassal) 'of all cess, minister's stipend, and whole other public burdens whatever, due and payable forth or for the lands of all time bygone and in all time coming'—an obligation in essential particulars similar to that in the present case."

Then Lord Ormidale shows that in the case of *Hunter* v. *Chalmers* a defence had been set up upon the same plea as in the present case, and he concludes—"But all of these pleas, and the considerations they were calculated to suggest, were disregarded by the Court, and the superior was found liable in relief. In reference to the plea of non-liability for poor-rates in respect of the supervenient Act of 1845, Lord Wood, who delivered the leading opinion, said—'The burden of which relief is demanded is not a new burden introduced by that statute. It is a burden to which the owners of lands as such were subject, and which was exigible in respect of the laws existing at the time the feu-contract was entered into, the Act, so far as regards the assessment for the support of the poor, only regulating the mode of the assessment, and pointing out the different ways in which it may be imposed. In all of them the assessment is to be imposed to a greater or less extent on lands and heritages, and the owners and occupants thereof, and it is only for that portion of the assessment that relief is here asked." The other Judges concurred. So far, therefore (Lord Ormidale says), "as poor-rates are here concerned, it must be held in this Court that the pursuers' plea, founded on the supervenient Act of 1845, is untenable."

My Lords, I own I see no reason whatever why your Lordships should dissent from this course of decision in the Court of Session in Scotland. It appears to me that all that has happened in regard to the burden of the poor-rates is exactly that which must happen in regard to any public burden. The progressive course of legislation has pointed out improvements in the mode of the application of that burden, and in the mode of the administration of poor-law relief, but in substance the incidence remains the same, and the object to which the burden is to be applied is the same. I therefore propose to ask your Lordships to affirm the decision of the Court below in the first appeal also, and therefore to dismiss both appeals, with costs.

LORD HATHERLEY—My Lords, I have come to the same conclusion upon the full argument that we have had on this subject before the House.

I think that the ground for the rule of construction of engagements to relieve of this character which is found in the judgment given in the Court below seems to be a reasonable rule, and affords an easy mode of solving questions which otherwise in themselves, with regard to the generality of engagements, might have been extremely difficult. Lord Gifford in adverting to the canon of construction says—"Before adverting to the special taxes embraced in the conclusion, it will be well to consider if there is any general canon applicable to clauses of relief similar to that contained in the present feu-charter, besides the general paramount and governing canon to which I have already referred, that the meaning and intention of the contracting parties as expressed in the contract must form the rule and the limit of liability. In addition to this general rule I think it may be said that, unless the contrary be very clearly expressed, the obligation will not apply to burdens or taxes imposed by future or supervening laws which could not be in the prospect or contemplation of the parties at the date of the contract."

I say, my Lords, this seems to me a reasonable construction of that which appears, in the first instance, to be a very large engagement. It is evidently intended to last for all time, and it is not made dependent upon any duration of interest which in itself is speedily to come to an end. It is a permanent and lasting obligation entered into by the superior with his vassal; when he parts with a portion of that property of which he was owner to that vassal, he considers it desirable, when making his arrangements for so parting with the property, to enter into the engagement in question. Now, from this it would seem that an engagement of this character might be carried to an extent far beyond anything whatever that is reasonable. If you adopted the strictest literal construction of the words that are used, it would seem to point to all times, and to be applicable under whatever circumstances it may be imposed. But the construction which has been given to such an engagement is this—and a very reasonable one I think it is,—that it shall apply to all duties which were in existence at the time of the engagement being entered into, and that so long as the incidence of the duty itself be not varied or altered, trifling discrepancies or trifling variations in the mode of raising these duties, or enforcing payment of them, shall not have the effect

of removing or diminishing the obligation. Nor shall a change of circumstances in the character of the property itself amount to such abrogation of the obligation entered into.

The only remark which can be made upon the property becoming, as it is said in this case it does, subject to a burden which is greater than any benefit derived from the feu-duty payable by the vassal, is that which is made by Lord Westbury in the case of *The Duke of Montrose* v. *Stewart*, namely, that the bargain may have turned out a very bad bargain, but it is not the less a bargain on that account. It is plain that the parties contemplated the future, and contemplated a time when the thing would be subject to a certain amount of change, but contemplated at the same time that that would not relieve them from their obligations. The reasonable rule appears to be, that what the superior is not to be fixed with under a contract of this description is the taxes imposed by future supervening laws, which could not have been in prospect or in the contemplation of the parties at the date of this contract.

That being so, my Lords, I do not follow my noble and learned friend upon the woolsack by entering into the two heads upon which we have to pass our judgment upon the present occasion, namely, the poor-rates and the road-tax. On the one hand, the Court below has thought, and as it appears to me most reasonably, that the road-tax having a different incidence altogether—being a substitute for statute labour—being a substitute for a burden which fell at the time of the contract in question upon the occupant and not upon the owner of the property—is not a duty within the contemplation of the parties, but is a duty which has become imposed by a supervening process of legislation by the several Acts which have been passed, and which have been referred to in the case and in the decision of the learned Judges. These road-duties then are not to be held to fall within the contemplation of the contracting parties. On the other hand, the poor-rates would seem to have existed at the time of entering into the contract, though the mode of levying them was afterwards varied, and though perhaps in actual amount they were somewhat increased; and, on the whole, after due consideration they have by various authorities, at all events in the Court below, from which I think your Lordships will not, on account of the reasoning by which the learned Judges support their conclusion, be disposed to depart, been held to fall within this contract for relief between a superior and his vassal.

This being so, there remains only one question, I think, to which I have not adverted, namely, the question whether it is right or equitable that any arrangement, or apportionment as it were, should be made when the duty from which the vassal is to be relieved comes to exceed, as it does in this case, the feu-duty payable by the vassal. Should there be any limitation of the engagement, so that on the superior being content to give up the whole of his feu-duties he should be relieved from the rest of his burden which he has undertaken of relieving the vassal—from the taxes and imposts which he has undertaken to relieve him from? My Lords, to limit the engagement in that way would be adding a term to the engagement; it would be simply relieving the superior from a bad bargain, as Lord Westbury expressed it. There is nothing to justify the Court in introducing a completely new condition which was no part of the original contract between the parties, and in forming a new engagement, by the construction put by the Judges upon the contract, which no words to be found in the contract would bear them out in forming.

I think therefore, my Lords, that the only conclusion we can come to is that suggested by my noble and learned friend on the woolsack.

Lord Blackburn—My Lords, I have also come to the conclusion that both the appeals should be dismissed.

I think it is established by a long series of authorities, ending with *Scott* v. *Edmond*, that the obligation created by a clause of relief in a feu-charter worded in terms such as these does not apply to burdens or taxes imposed by future or supervening laws. And I agree, for the reasons already stated by the noble and learned Lords who have spoken, that the assessments for the roads are imposed by supervening laws.

But as to the poor-rates, I am compelled to say that the lands were, at the time when this charter was executed, already burdened with a legal obligation to support the poor. The Poor Law was at that time, and for many years afterwards, so worked that this obligation imposed no practical burden, or a very slight one. And the Act of 1845, and the practice arising after that Act, has made the burden a very serious one, but it still remains the same burden imposed by the old law, though made practically more onerous. I cannot doubt that if those who framed this charter had foreseen what has since happened, they would not have included the poor-rates in the clause. But they did not forsee it; and I cannot advise your Lordships to relieve them from the obligation they have undertaken, though it has turned out a very improvident bargain. It would be prudent in any such obligations to provide that the superior's liability should not extend beyond the value of his superiority. Such a limitation might be created by words expressing such an intention, but in this case there are no such words. Or it might be created by the general law of Scotland, but it is admitted that there is no authority for saying that such is the general law.

It is, I think, a very hard case, but the decision below was right, and must be affirmed.

Lord Gordon concurred.

Interlocutor appealed from affirmed, and appeals dismissed with costs.

Counsel for Appellant—Lord Advocate [Watson]—Graham Murray. Agents—Connell, Hope, & Spens, solicitors.

Counsel for Respondents—Kay, Q.C.—Trayner. Agent—W. A. Loch, solicitor.