

1773. *January 23.* JAMES BRUCE of Kinross, *against* ROBERT GREIG and OTHERS.

CLAUSE—PUBLIC BURDEN.

[*Faculty Collection, VI. p. 131 ; Dictionary, 2333.*]

HAILES. If the consequence of the clause in the charters of the defenders is, that they are to be relieved of every burden imposed by law on heritors, very unexpected consequences will ensue. I suppose that, in the shire of Kinross, the ten shillings in the L.100 of valued rent for reparation of bridges, &c., is levied according to the Act 1669. The superior must refund this exaction, levied from the heritors, for 40 years back. This will amount to one-fifth of the valued rent for one year. All impositions for the poor, whether according to value or real rent, must, in like manner, be refunded for 40 years back ; and no one knows to what this may amount. The Crown is deeply concerned here : for example, the feuars of the Earldom of Ross hold their lands for a feu-duty *pro omni alio onere* :—The Crown therefore must build and repair all the churches, manses, schoolmasters' houses, &c. in Ross-shire.

PITFOUR. In the case of *Garden of Troup* and *The York-Buildings Company*, a general lessee, liable in *public burdens*, was found not liable to repair manses. The argument there was, no burdens are public, unless due to the public.

JUSTICE-CLERK. Feuars, here, have only relief of common public burdens : annual burdens are not indeed specially mentioned, but all the burdens mentioned are annual.

KAIMES. The property is subjected to all those burdens, unless in so far as relieved by the grant : Here it is not relieved from the reparation of manses, which is no more than an occasional burden.

GARDENSTON. The exemption is very general : Had the question come recently, I should have supposed the feuars to be exempted. The words are so general, that *Rogue-money*, which the heritors may levy or not, would have been comprehended.

On the 23d January 1773, "The Lords found that the defenders have no relief ;" adhering to Lord Kennet's interlocutor.

Act. A. Lockhart. *Alt.* J. M'Laurin.

March 5.—MONBODDO. I should doubt, were it not for the practice. I can hardly make a distinction betwixt minister's stipend and the buildings of churches and manses.

GARDENSTON. All clauses in favour of vassals ought to have a liberal interpretation.

COALSTON. I have the same difficulty. The burden in question seems comprehended under the general words.

KAIMES. The only question is, whether the reparation of churches falls within the general words. From the nature of the contract, the feuar must repair his own house, unless the contrary were stipulated: The church is his own house.

HAILES. Wherever there is any ambiguity in the contract between superior and vassal, usage must explain it. Any other rule would be dangerous.

PITFOUR. Public burden is properly a burden paid to the public: yet still the words ought to be liberally constructed, so as to comprehend every burden generally paid.

AUCHINLECK. *Cujus commodum ejus est incommodum.* If we were to find that the feuars were not to club for upholding the church, what title have they to seats in the church?

PRESIDENT. They are entitled to seats as heritors. The question turns upon the import of the contract. I doubt whether a practice, if erroneous, will form a rule of law. The words are very broad: all the expressions, however varied, seem to tend to this, that the feuars were to pay nothing but feu-duty.

KAIMES. Were the terms clear, I would not open my mouth in defence of the interlocutor; but they are doubtful, and I will explain them from practice.

JUSTICE-CLERK. The parties had not this case in their view. Their only idea was of annual prestations payable to third parties, not of precarious and contingent burdens. I go upon this principle, that the sense and understanding of the parties must be the rule of interpretation.

MONBODDO. The distinction between annual and contingent burdens solves not the difficulty. Anciently, all public burdens were contingent, and may be so hereafter.

On the 5th March 1773, "The Lords found that the vassals were not entitled to relief from their superior;" adhering to their interlocutor of 23d Jan. 1773.

Act. J. M'Laurin. *Alt.* A. Lockhart.

Diss. Coalston, Pitfour, Gardenston, Monboddo, President.

1773. March 10. ROBERT JOHNSTON and DONALD SMITH *against* ALEXANDER CHISHOLM and OTHERS.

BANKRUPT—PERSONAL PROTECTION.

[*Faculty Collection, VI. p. 169; Dictionary, 10,473.*]

COALSTON. I doubt whether the nomination of trustees takes the matter out of the jurisdiction of the Court, so far as to prevent the Court from giving aid.

PITFOUR. As to the powers of the Court, the giving a protection is for the