

Tuesday, June 15.

FIRST DIVISION.

NISBET v. LEES.

*Superior and Vassal—Public Burdens—Assessment—Poor-rates.* A feu-contract of a piece of town land in 1805 stipulated that the feu-duty of £6 should be in full of all public burdens claimable furth of the lands, the superiors binding themselves to relieve the vassals thereof now and in all time coming. Buildings were erected, and now let for £60 a year. *Held* that the superior was liable to relieve the vassal of an annual poor-rate of £2, 5s.

*Question* as to the extent of the superior's liability. Observations on the purpose of the parties in feuing the ground.

In 1805 the magistrates of musselburgh feued to Robert Nisbet a piece of ground at the east end of Millhill of Musselburgh, it being stipulated by the feu-contract that the feu-duty of £6 and casualties should be "in full of all cess, minister's stipend, and all other public burdens whatsoever, payable, or which may be claimed or demanded, furth of the said 47 falls of land hereby feued, all which the said magistrates and treasurer, for themselves and in name foresaid, bind and oblige them and their successors in office to indemnify, free and relieve the said Robert Nisbet and his fore-saids, now and in all time coming." Buildings were erected on the ground, and these are now let at a rental of £60 per annum, and the pursuer Nisbet, as owner, is assessed on them in £2, 5s. of poor-rates per annum. He now sued the defender, clerk to the trustees under the Musselburgh Estate Act, for relief of the poor's assessment paid by him since 1845, contending that these poor-rates were a burden on the subjects of which the superiors, now represented by the defender, were bound to relieve him under the clause of relief in the feu-contract.

The Lord Ordinary (ORMIDALE) decerned against the defender, on the principle of the case of *Wilson v. Magistrates of Musselburgh*, 22d February 1868.

GIFFORD and ASHER for reclaimer.

WATSON and STRACHAN for respondent.

At advising—

LORD PRESIDENT—The pursuer of this action is a feuar in the town of Musselburgh, holding under the magistrates, or rather, under the trustees for the town, and he concludes for declarator that the trustees are bound to relieve the pursuer and his heirs and successors of all poor-rates imposed on or payable by him or them as the owners of the subjects in the east end of the Millhill of Musselburgh, feued by him from that burgh, consisting of 47 falls of ground and a tenement of two storeys, with garrets, office-houses, and pertinents thereto belonging, and situated in the parish of Inveresk. And he follows up this declarator by a demand for payment of a sum of £51, being the amount of poor-rates which he has been obliged to pay for a very considerable number of years. He sets out, among other things in his consendence, that the subjects belonging to the pursuer (art. 7) "are let to tenants at a rental of £60 per annum, and the same are rated for the assessment for the poor as of the annual value of £45, one-fourth being allowed for deductions, in terms of the 37th section of the said Statute"—that is, the Poor Law Act. The assessment is imposed at the rate of 2s. in the pound, one-half being payable by the owners, and

the other by the tenants and occupants. The proportion of the assessment payable by the pursuer as owner of the said subjects is accordingly £2, 5s. per annum, being at the rate of 1s. per pound on the said annual value of £45." The subject, therefore, of which the pursuer is proprietor, is a piece of ground with a tenement of houses erected thereon, the tenement of houses with its site yielding a gross rental of £60 per annum. Now, the ground upon which he asks relief from poor-rates is a clause contained in the original feu-contract between the magistrates of Musselburgh and Robert Nisbet, the pursuer's predecessor, in 1805. The contract conveys to the feuar "All and whole these 47 falls of waste ground or thereby, measuring in front 92 feet or thereby, lying on the east end of Millhill of Musselburgh, and on the north side of the high road leading to the stone bridge across the dam," and then the boundaries are described; and this ground is said to be laid out conform to a plan thereof, and of the other lands therein mentioned, subscribed by James Hay, a mason and land measurer, and marked by the magistrates as relative to these presents. There is then a stipulation that the subject is to be holden of the magistrates, treasurer, and council, as representing the community of the burgh," and their successors in office, in feu farm, for the yearly payment of the sum of £6 sterling yearly, for the said 47 falls of land, in name of feu-duty, at the term of Martinmas in the year 1805," &c. "And that in full of cess, minister's stipend, and all other public burdens whatsoever, payable, or which may be claimed or demanded furth of the said 47 falls of land hereby feued; all which the said magistrates and treasurer, for themselves and in name foresaid, bind and oblige them and their successors in office to indemnify, free, and relieve the said Robert Nisbet and his fore-saids now and in all time coming." Now, in respect of this clause of relief, the Lord Ordinary has given judgment in terms of the conclusions of the summons. There are some cases which certainly fix conclusively that poor-rates fall within the operation of such a clause of relief, even although it may be contained in a statute passed long before the Poor Law Amendment Act of 1854. And therefore, so far as that general question is concerned, it is quite in vain to propose to go back upon it now. But the defenders contend that, although they may be bound to free and relieve the pursuer of the poor-rates payable for this subject as it stood when it was feued out by them, they are not bound to relieve him of feu-duties payable out of this subject as it has been altered and increased in value by the erection of an urban tenement upon it. This no doubt is a question of very considerable importance; and though perhaps it can hardly be said to have been directly and conclusively settled, yet I think there are cases which have practically settled the question, and which are applicable to the circumstances of the present case. It appears to me that a question of that kind is in reference to the construction and effect of such a clause of relief almost necessarily a question of circumstances. If one were to feu out a considerable estate, to be held base of the party conveying it—an estate of 500 acres of land it may be—and stipulated a feu-duty representing something short of the full agricultural value of the subject, or just equivalent to the full agricultural value of the subject for the time, and in the course of centuries this large area of land came to be included in the

boundaries of a great city, and to be covered by town buildings, yielding it may be 20, or 50, or 100 times the rental that the estate did when it was first feued out, it would certainly be very startling to say that the superior, in consideration of receiving a feu equal to the old agricultural value of the subject perhaps two or three centuries ago, should be bound to free and relieve the whole inhabitants of that district of a city from the poor-rates and other public burdens imposed upon them. That is just one of these extreme cases that show that there can be no inflexible rule applicable to a case of the kind. Whether a rule might not be found which should limit the liability of the superior under this clause of relief to the amount of the feu-duty, has been more than once suggested, and perhaps there may be equity to justify such a rule if it came to be necessary to apply it. But as we are here in a case in which the burdens from which relief is sought are very much within the amount of the feu-duty, it is not necessary for us to consider or dispose of that question here, and I humbly think the circumstances of the present case don't create any great difficulty, following out the spirit of the different decisions which have been already pronounced in kindred cases. It must be observed that the subject, when it was feued out, was essentially an urban subject. It was in the town of Musselburgh, and it could hardly be represented as in the contemplation of either party to the feu-contract that it was to be used otherwise than as a site for building. It consisted of 47 falls of ground—no great amount, something about a third of an acre or a little more—and it was described as waste ground yielding in the hands of the superiors nothing at all; and yet, although it was waste ground, it was feued out at such a rate of feu-duty as to make a very handsome return indeed to the superiors, for it was at a rate amounting to about £20 an acre that this waste ground was feued out. Now really when a feuar undertakes to pay at the rate of £20 an acre for 47 falls of waste ground in a town, it seems to me to be the irresistible conclusion that he contemplates covering it with buildings. And that is accordingly what has been done. But although it has been covered with buildings, it does not make the application of this clause of relief an unreasonable or very hard result of the contract between the parties. All that the superior is asked to do here is to relieve the feuar of £2, 5s. of poor-rates. What more burdens there may be I cannot tell, but there is a feu-duty of £6, and it was admitted in the course of the argument that this clause of relief, at present at least, could never be enforced to such an effect as to demand relief of anything like £6 worth of public burdens. In these circumstances I think the Lord Ordinary is right in the conclusion at which he has arrived, and that the superiors are bound to free and relieve the pursuer in terms of the conclusion of this summons.

**LORD DEAS**—This is a very important question, because the consequences of holding the liability which is said to exist here to attach to the superiority are very serious. It is entirely in the power and option of the vassal, according to the view contended for, what extent of public and parochial burdens shall become exigible from the superior. The vassal may erect upon the ground buildings such as were in contemplation of the parties at the time the feu was granted, or he may erect on the

ground buildings vastly more expensive than were contemplated, or he may cover the ground with buildings, although no buildings were contemplated at all. The consequences of construing a clause of relief of this kind, therefore, into an absolute obligation to relieve of all public burdens, whatever they may be, are very serious. There is a modification or restriction of that liability which has been mentioned by your Lordship as pointed at in some of the decisions, but it is not a very satisfactory one, viz., that you are to inquire in each particular case whether the buildings are such as may reasonably be supposed to have been contemplated by the parties at the date of the feu-contract—whether they are such as might naturally be expected to be built on such a subject,—and views of that kind, which necessitate an inquiry in each particular case before you can come to a conclusion whether the obligation of relief applies or no. I confess that is not a very satisfactory mode of solving a question of that kind in a matter of feudal rights. The feu may have been granted centuries before, and there may be no possibility of ascertaining what was contemplated by the parties; and I do not understand that the suggestion is confined to what appears on the face of the feu-contract. It is a sort of general inquiry to be gone into in every case, which I think might by no means be a very satisfactory mode of solving such a question. The operation of a clause of relief of this kind is quite different from the operation of a clause of relief that we have had to do with in several important cases,—from ministers' stipends in augmentations, &c., as in the case of the *Duke of Montrose*, and I think in the case of *Scott v. Edmond*, because there the obligation was necessarily to the amount of the teind, and it is not in the option either of the superior or of the vassal what augmentations of stipend shall be given, and in every view it is a very different sort of clause from a clause by which a superior is said to become bound to relieve the vassal of all burdens attaching to the property, to whatever extent these may be increased by the voluntary act of the vassal. Difficulties apply to the one obligation that do not apply to the other. The Lord Ordinary here founds his judgment entirely on the case of *Wilson v. The Magistrates and Town Council of Musselburgh*, and other cases there referred to as precedents; one leading precedent there referred to being *Scott v. Edmond*. His Lordship therefore holds this point which we are now dealing with to have been decided *in terminis* by the case of *Wilson v. The Magistrates and Town Council of Musselburgh*. I confess I cannot look upon the decision in that case as any authority upon this at all. I do not find this point referred to either by the Lord Ordinary or by the judges in the Inner-House from beginning to end of that case; and it is quite plain to me that, if that case be a decision upon the point, it decides it without its being before the Court that they were deciding any such question. But while I cannot hold that case to be an authority, there is much greater difficulty in saying that the case of *Paterson's Trustees v. Hunter*, 10th December 1863, is not an authority. I am rather disposed to think that it is an authority for the principle on which your Lordship goes, for you go no farther as I understand,—that without deciding the more general question to what extent this obligation might go, it must apply in a case like this, where the buildings that are erected cannot be said to be much more extensive than those that were in

the contemplation of the parties, and where the amount of the burdens altogether does not come up to the amount of the feu-duty. I rather think the case of *Paterson's Trustees v. Hunter* does go to sanction that view. I see that I gave a full opinion in that case, and I shall only say that, so far as my view upon principle goes, I adhere to that opinion still; and I do not think it necessary to repeat what I there said. I think the sound construction of a clause of this kind is, that the superior undertakes to pay the burdens corresponding to his estate of superiority, leaving the vassal to pay the burdens corresponding to the *dominium utile*. I think that is the sound and reasonable construction of a clause of this kind; but, while I adhere to that view, I admit at the same time that that view was not taken in the case of *Paterson's Trustees v. Hunter*; but that, on the contrary, I think substantially the view which your Lordships now adopt was taken there,—although I think that is the only case in which it has been taken. I had occasion then, and I have had occasion since, to look fully into all the judgments in this matter, and I think that may be said to be the only case that does decide that point. Whether or not, it is an authoritative judgment I do not feel myself entitled, sitting in the Court, to go against, though, apart from that judgment, I would entirely adhere to the opinion I gave in that case.

LORD ARDMILLAN—I think that there are elements for deciding this case without venturing upon the very difficult and delicate questions which have been adverted to. In the first place, I agree with your Lordship that it is now settled that poor-rates are within the scope of such an obligation of relief as this. I do not understand that there is any difference of opinion about that.

LORD DEAS—No.

LORD ARDMILLAN—In the next place, I do not think it can be maintained that there is absolutely no limit to the liabilities of the superior under such an obligation. The case which your Lordship has put, of ground which was agricultural a century ago, and which has become part of the suburbs, or part of the centre of some great city, and of an enormous annual value, is a *reductio ad absurdum* in regard to such a matter as that. It cannot be held, I think, that the obligation of the superior is an obligation without limit. The question, how we shall ascertain the limit, is a question of great difficulty; but I think that here we have two elements combined, and that it is not necessary at present to decide precisely to which of the two we give effect; because, when we have them in combination, I think all the more recent authorities go to support the effect of them in such combination. And it is quite plain from the words of the contract that it was intended that there should be buildings on the ground. I don't understand your Lordship in the chair to suggest that there should be an inquiry into the intention of the parties to erect buildings; but if the writing which is the title of the party, shows that there was in contemplation the erection of a tenement, then I think it must be held that such building was contemplated by the parties, and that the clause of relief is part of the terms on which the party who takes the feu pays the feu-duty. In this case, he is not paying for the feu-duty the actual agricultural value. He is paying a sum which is only explainable on the footing that building was intended. The provision as to not

disposing of beer and ale on the premises shows clearly that buildings were in the contemplation of the parties. I think the case of *Paterson* is sufficient authority for holding that where the erecting of buildings is, as gathered from the title and not as inferred or as ascertained by general inquiry, within the contemplation of the parties, then the obligation of relief is effectual, although the ground should be covered with buildings. That is the decision in the case of *Paterson*. But another principle has also been suggested,—and I agree with Lord Deas in thinking that there is a great deal of weight in the suggestion,—that the measure of the feu-duty may be the measure of the superior's liability; and in this case the annual payment from which relief is sought is less than the amount of the feu-duty. Therefore, if that principle were adopted, that also would sustain the feuar's demand, or the obligation of relief up to the point now craved. If these two views are taken in combination, I think the case is a strong one for the feuar. When the case occurs, in which there is a claim made beyond the amount of the feu-duty, but within the value of the buildings which were contemplated in the title, a different question will arise, and I reserve my opinion upon that question. But upon the question now before us, where you have the feu-duty greater than the amount of relief now craved, and also the buildings contemplated as appearing from the title, I agree with your Lordship that we should adhere to the interlocutor of the Lord Ordinary.

LORD KINLOCH—I concur in the view on which the judgment of the Lord Ordinary has proceeded, that this case is ruled in favour of the pursuer by the previous authorities, including the case of *Wilson*, which is only one of the series. The case, I think, presents no difficulties in the way of applying the principle which the authorities sanction. The amount of relief claimed yearly by the vassal is within the amount of the feu-duty; and so the question does not arise whether a greater claim than to the amount of the feu-duty could be made. Again, the buildings put on the ground are such as I think may fairly be presumed to have been in the contemplation of parties at the date of the feu-contract; and so the question does not arise whether the superior would be liable in relief of public burdens created by buildings of an extraordinary and presumably unanticipated character. I desire not to indicate any opinion as to what effect would be produced by a variance in these respects. But as the specialties referred to do not occur in the present case, the Court is free from any embarrassment which they might possibly create.

Lord Ordinary's judgment adhered to.

Agent for Pursuer—J. Paris, S.S.C.

Agents for Defender—Paterson & Romanes, W.S.

Tuesday, June 15.

THOMSON v. BUCHAN.

Member of Parliament—Election—Town-Clerk—  
Sheriff—Small Debt Act—Corrupt Practices  
Act—Reform Act. In an appeal under the  
Small Debt Act, held that an alleged irregularity  
in the original action, viz., that the summons  
did not contain the date of the cause of action,  
was not a sufficient objection to the decree