

also under the express terms of the will, which gives them a power to see to the application of the money. From a very early stage of the argument I have not seen how it would be possible in the absence of the Magistrates to decide the question raised, although of course I express no opinion at all as to the merits of the question between the various parties.

LORD JUSTICE-CLERK—That is my opinion also.

LORD YOUNG was absent.

The Court dismissed the special case and decerned.

Counsel for the First and Second Parties—C. D. Murray. Agents—Kelly, Paterson, & Co., S.S.C.

Counsel for the Third Parties—Munro. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Minuters—H. Johnston, K.C.—W. Æ. Mackintosh. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Friday, March 20.

FIRST DIVISION.

[Lord Low, Ordinary.]

LATTO v. MAGISTRATES OF ABERDEEN.

Superior and Vassal—Feu-Charter—Clause of Relief of Public Burdens—Burdens Imposed or to be Imposed—Poor-Rates—Building on Subjects Originally Agricultural—Rates Levied on Sub-Vassals.

In a feu-charter granted in 1752 the superior undertook to relieve the vassal of all public burdens imposed or to be imposed on the lands. At that date the lands were agricultural subjects. Subsequently the vassal granted sub-feus, on which buildings were erected. He did not assign to the sub-vassals the benefit of the clause of relief in the charter of 1752, nor did he undertake any obligation to relieve the sub-vassals of public burdens. In 1900 the vassal brought an action against the superior, concluding for payment of the sums which had been imposed upon and paid by the sub-vassals as poor-rates on their sub-feus. After a proof, by which it was established that it could not be affirmed that the possibility of building on the lands was not within the contemplation of parties in 1752, held (1) that the superior's obligation was not limited to the sum which would represent the poor-rates on the subjects had they remained agricultural; (2) that the sum payable under the obligation was not limited to the amount of the feu-duty; but (3) that the obligation was a clause of relief expressed as a condition of the feudal contract and not a warranty, and therefore that the vassal, not having been assessed for poor-rates, and not being liable to relieve his sub-vassals of the poor-rates paid by them, was not entitled

to recover them from the superior.

Opinion (per Lord McLaren) that the vassal could not have assigned to his sub-vassals the benefit of the obligation undertaken by the superior, and that even if he had undertaken to relieve his sub-vassals of poor-rates he could not have recovered from the superior sums paid in respect of that obligation.

Montgomerie v. Hamilton, May 27, 1841, 3 D. 942, and *Hunter v. Chalmers*, July 16, 1855, 20 D. 1311, distinguished and commented on.

Superior and Vassal—Mid-Superiority—Liabilities to Feuars.

In 1752, A, a crown vassal, feued lands to B, with an obligation to relieve B of public burdens. In 1806 A granted a disposition containing procuratory of resignation by which he disposed the lands to C. C obtained a charter of resignation from the Crown, on which he was infeft, and then disposed the lands to A, to be held under him (C) in feu-farm. The disposition contained an obligation by A to relieve C of all public burdens. In 1863 B's successor obtained a writ of confirmation from A's successor as his lawful superior. In an action by B's successor to enforce the obligation of relief contained in the charter of 1752, A's successor maintained that the proper defenders were C's representatives. Held that the action was properly laid against A's successor.

This was an action at the instance of Alexander Latto and others, managers of the Aberdeen Trades Widows Fund, against the Lord Provost, Magistrates, and Town Council of Aberdeen, arising out of the following circumstances:—By feu-charter, dated 9th July 1752, Francis Leys, merchant in Aberdeen, the then treasurer of the burgh of Aberdeen, by virtue of his office, and conform to an Act of the Town Council of Aberdeen, bearing date the 30th day of May 1752, appointing him to grant said charter, disposed in feu-farm to John Dingwall, merchant in Aberdeen, and his heirs and assignees whomsoever, heritably and irredeemably, All and Hail the eighth lot of the lands of Gilcomston, consisting of 10 acres 3 roods, Scots measure, lying within the parish of Old Machar and sheriffdom of Aberdeen. The consideration for the feu-charter was an immediate payment of £61, 6s. sterling, and an annual feu-duty of £17, 17s. 5d. sterling to the said treasurer and his successors in office 'for the use and behoof of the public good' of the burgh, beginning the first yearly payment thereof at Martinmas 1752, together with the casualties on entries of heirs and singular successors therein mentioned."

The feu-charter contained a clause whereby Francis Leys, as treasurer aforesaid, undertook "to warrant, acquit, and defend this present charter and infeftment to follow hereon, together with the said eighth lott of the said lands of Gilcomston hereby disposed, with the pertinents, to be good, valid, and effectual, and to be free, safe and sure from all perills, dangers,

burdens, incumbrances, and inconveniences whatsoever that may anyways trouble or molest the said John Dingwall or his foresaids in the peaceable possession of the said eighth lott and pertinents, or uplifting the mails and dutys of the same in time coming, and particularly to free and relieve the said John Dingwall and his foresaids of all feu, teind, and blench duties, ministers and schoolmasters' stipends and sallaries, building, repairing, and upholding of kirk and kirkyaird dykes, ministers' manses, school houses, future augmentations, and for all cesses, taxations, highway money, and other publick burdens whatever, due and payable furth of, or that may anyways be imposed upon, the lands and others above mentioned in all time coming, at all hands, and against all deadly, as law will."

By a series of transmissions the right of the said John Dingwall in the lands of Gilcomston had become vested in 1900 in the trustees of the Aberdeen Trades Widows Fund, and the right of the said Francis Leys, as treasurer aforesaid, in the Master of Kirk and Bridge Works. There was a dispute whether it was held by him *qua* trustee of a fund known as the Bridge of Dee Charge, or for behoof of the Corporation of Aberdeen, but it was ultimately held by the Lord Ordinary, and acquiesced in, that the latter was the case.

In 1752 the lands of Gilcomston were outside the city of Aberdeen, but by successive private Acts the boundaries of the city were extended so as to include them.

From 1864 onwards the managers of the Widows Fund feued the said lands which had previously been agricultural subjects, and by about 1900 almost the whole lands were feued and built upon. In the feu-contracts the managers did not assign to their sub-vassals the benefit of the clause of relief quoted above, nor did they undertake to relieve their sub-vassals of public burdens.

The conclusion of the present action was for payment of the sum of £1371, 2s. 0½d. In their condescendence the pursuers explained this sum as follows:—"The defenders continued to make certain payments in respect of poor-rates levied upon the pursuers' said lands until the year 1873, but for a number of years the defenders have failed to implement said obligation of relief. The trustees and managers of the Widows Fund and their vassals have accordingly paid in respect of the said subjects all the usual public and parochial burdens and taxes payable in respect of the ownership of heritable property in Aberdeen. In particular, the said trustees and managers have paid the following public and parochial burdens, viz.:-

Assessment for repairs to Parish Church for the years 1867-68 and 1869-70,	£1 10 4
Poor-rates from the year 1873,	7 19 2
	£9 9 6

While their vassals have since the year 1862 paid poor-rates in respect of the ownership of the said subjects to the amount of,

1361 12 6½
In all, £1371 2 0½"

In their defences the defenders averred, *inter alia*—"At the date of the said charter (*i.e.*, the charter of 9th July 1752) the said lands were agricultural subjects lying outside the city boundary, and there were no dwelling-houses erected thereon. The said lands were exposed to sale under articles of roup dated 14th August 1749, and recorded in the Baillie Court Books of Aberdeen, 27th July 1765, with relative plan dated May 1749, and conveyed to John Dingwall and the other purchasers as agricultural subjects, and it was not within the contemplation of the parties to the said feu-charter that the said eighth lot should be divided or converted into building stances. The said lands were exposed to sale at an annual feu-duty of 20s. per Scots acre, being the value of the subjects as agricultural subjects. . . . The said clause of relief was intended to apply only to such public burdens as were then known and existing, and which were due and payable furth of the said lands as agricultural subjects. . . . The title to the superiority of the subjects conveyed by the said feu-charter of 9th July 1752 is, and has been since August 1806, vested in John Brebner, merchant, Dublin, and his heirs and successors. On 11th June 1806 the then Master of Kirk and Bridge Works, being vested in the superiority of the lands of Gilcomston (including the said eighth lot and eleven other lots) for behoof of the mortification or fund known as the Bridge of Dee Charge, and holding the said lands under the Crown in virtue of Crown charter of confirmation in favour of the Master of Kirk and Bridge Works of Aberdeen for behoof of the Bridge of Dee Charge and his successors in office, dated 9th December 1692, and sealed 10th January 1693, granted in favour of the said John Brebner (in terms of articles of roup under which the said John Brebner had purchased) a disposition of the said superiority containing procuratory of resignation. The said John Brebner thereupon obtained a Crown charter of said lands, dated 5th July 1806, and expedie an instrument of sasine thereupon, dated and recorded in the Particular Register of Sasines for the counties of Aberdeen and Kincardine, 11th August 1806. Thereafter, in implement of a stipulation to that effect in the articles of roup, the said John Brebner on 3rd March 1808 granted a feu-charter in favour of the Master of Kirk and Bridge Works and his successors in office, for the use and behoof of the Bridge of Dee Charge of the said lands of Gilcomston (including the eighth lot, but excluding part of the ninth lot), to be held of the said John Brebner, his heirs and successors, as immediate lawful superiors for the yearly feu-duty of £1, 5s. The Master of the Kirk and Bridge Works took infeftment on said charter, and he and successors have since duly paid the said feu-duty to John Brebner, his heirs and successors in the superiority of the said lands, and in virtue of the said feu-charter have collected the rents, feu-duties, and casualties (except in so far as redeemed) of the lands of Gilcomston." . . .

In the feu-charter granted by Brebner to the Master of Kirk and Bridge Works the latter became bound to free and relieve the former "of all cess, taxation, ministers' stipend, schoolmaster's salary, and all other public burdens whatever due and payable furth of, or that may in any way be imposed upon the lands and others mentioned in all time coming." In 1863 the pursuers' author obtained a writ of confirmation from the then Master of Kirk and Bridge Works as "lawful superior of the lands and others."

The defenders pleaded, *inter alia*—“(4) The defenders not being superiors of the subjects conveyed by the feu-charter containing the obligation founded on, the action should be dismissed. (7) The pursuers not having paid, or not being under legal obligation to pay, the rates specified in condescence 5, the defenders are entitled to absolvitor from the said claim. (9) The defenders are not, on a sound construction of the said feu-charter, liable to relieve the pursuers of taxes or public burdens, except so far as imposed or laid on the agricultural value of the lands disposed. (10) The defenders, on a sound construction of the said feu-charter, are not in any view liable to relieve the pursuers of taxes or public burdens exigible, or in so far as exigible on the value of the buildings erected on the lands disposed.”

On 15th November 1901 the Lord Ordinary (Low) allowed a proof before answer.

Opinion.—“The defenders, in the first place, maintain that they are not the superiors of the subjects conveyed by the feu-charter containing the obligation founded on by the pursuers, and that therefore the action is not properly directed against them.

“If it is the case that the defenders—the Lord Provost, Magistrates, and Town Council of Aberdeen—would be liable to make good the pursuers' claim, assuming it to be otherwise well founded, I should not be disposed to give effect to a purely technical plea founded upon the way in which the title has for the sake of convenience been taken. The question therefore seems to me to be whether the magistrates have a substantial interest to maintain that they are not the proper defenders.

“As a matter of title the superiority is vested either in the Master of Kirk and Bridge Works of the burgh of Aberdeen or in the representatives of one John Brebner, who purchased the superiority of the subjects in 1806 from the then Master of Kirk and Bridge Works.

“I do not think that the action can be thrown out on the ground that the proper defender is the party now in right of Brebner. The transaction between the Master of Kirk and Bridge Works and Brebner in 1806 was a very peculiar one. The Master first granted to Brebner a disposition of the subjects containing procuratory of resignation, then Brebner obtained a charter of resignation from the Crown, and finally he granted a feu-charter whereby he disposed the subjects to the Master to be holden of him (Brebner) as

immediate lawful superior, giving therefor yearly the sum of £1, 5s. in name of feu-farm-duty. I do not know what the object of the transaction was, but I think that the intention was to leave the substantial estate of superiority in the Master. And that was the view which appears to have been acted upon, because in 1863 the pursuers' author obtained a writ of confirmation from the then Master of Kirk and Bridge Works as 'lawful superior of the lands and others.' That appears to me to have amounted to a mutual recognition by the pursuers and the Master that the relationship of superior and vassal existed between them. Finally, in the feu-charter granted by Brebner to the Master of Kirk and Bridge Works the latter became bound to free and relieve the former 'of all cess, taxation, ministers' stipends, schoolmaster's salary, and all other public burdens whatever due and payable furth of, or that may in any way be imposed upon the lands and others mentioned in all time coming.' Under that clause the Master of Kirk and Bridge Works would, in the event of the present claim being made good against Brebner, be bound to relieve him thereof. Therefore if the present action had been directed against the Master of Kirk and Bridge Works, I should not have sustained a plea that it was not he but Brebner's successor who should have been called as defender, because I do not think that the Master would have had any interest to maintain such a plea.

“How then stands the matter as between the Magistrates and the Master of Kirk and Bridge Works? The pursuers say that the Master is a mere official of the Magistrates, in whose name the titles of certain properties belonging to them are taken for the sake of convenience, just as the titles of other properties are taken in the name of the Treasurer. The defenders do not deny that the title to the subjects in question is taken in the Master's name as their representative, but they aver that the subjects are held under a special trust for the maintenance and if need be the rebuilding of the Bridge of Dee, and for no other purpose, and further, that that trust is practically insolvent, and has not funds wherewith to meet the present claim.

“Now, the interest alleged by the defenders to maintain the plea is that they are not called merely as trustees of the Bridge of Dee Fund, but as the Magistrates and Town Council of Aberdeen, and that therefore any decree which was obtained against them would be enforceable against the common good, or other corporate property belonging to the defenders as Magistrates and Town Council. The pursuers did not indicate that they were willing in any way to restrict their claim; on the contrary, I understand them to maintain that the defenders are liable, *qua* Magistrates and Town Council, and not merely as the trustees of any particular fund.

“I am therefore of opinion that the question whether the Magistrates and Council are properly called as defenders is one of substance, and that as the parties are at

issue upon the facts, these must be ascertained. Upon the merits of the case I may say, that looking to the authorities, I do not think it can be successfully maintained that the pursuers' claim is barred, because the rates in question are in fact paid by their sub-vassals without any right of relief against them, nor can it be successfully maintained that the superiors' obligation of relief is limited to the amount of the feu-duty—*Montgomery v. Hamilton*, 3 D. 942; *Hunter v. Chalmers*, 20 D. 1311; *Dunbar's Trustees v. British Fisheries Society*, 5 R. 350, and in *House of Lords*, 5 R. (H.L.) 221.

"The defenders, however, further maintain that the lands having been purely agricultural subjects when the feu-charter which originally imposed the obligation of relief was granted, and having in recent years been covered with houses and become part of the city of Aberdeen, the superior's obligation should be limited to such an amount as would represent the rates and public burdens to which the lands would be liable if houses had not been erected.

"That raises a question which has frequently been considered but never decided, and raises it too, if the defenders' averments are consistent with facts, in circumstances extremely favourable for the superior.

"I am not prepared to say that in no case, whatever the change of circumstances may be, can the obligation of the superior under a clause of relief such as we have here be limited. In one respect it has been held that such a clause is open to construction, because even where the obligation is expressed in the widest terms as including public burdens, whether imposed or to be imposed, it is settled that the superior is not liable to relieve the vassal of burdens imposed by supervenient legislation, on the ground that it would be unreasonable to suppose that the parties had in contemplation taxes which were brought into existence for the first time by subsequent Acts of Parliament. Now, in this case the defenders aver that in 1852 when the pursuers' authors acquired the land, it was agricultural land, let at £1 per Scots acre, which (as there appear to have been ten Scots acres of land) would give a rental of £10. The feu-duty at which the lands were acquired was £1, 18s. per acre. For more than a century the land continued to be used for agricultural purposes, but in 1864 it was sub-feued, and was finally covered with buildings, and now the assessed rental of the property is over £3750. In such circumstances it might be just as unreasonable to suppose that the parties contemplated such an absolute change in the character of the property as to suppose that they contemplated taxation which might be imposed by future legislation. On the other hand, it may be that the superior is not entitled to get rid of or modify the express words of his bargain, however unfortunate that bargain may have proved to have been. Which of these views is to prevail must depend, I think, upon the terms of the feu-charter when read in the light of the actual facts, and therefore I am

not disposed to decide the question at issue until the facts have been ascertained.

"The question whether the action should be dismissed in respect that the Magistrates are not the proper defenders is a preliminary question which in strictness ought probably to be disposed of before dealing to any extent with the merits of the case. I think, however, that it would be very inexpedient to follow a course which might result in two proofs being required, and therefore it seems to me that the best course to follow is to allow a proof before answer."

Proof was accordingly led. Its import fully appears from the opinion of the Lord Ordinary, *infra*.

On 5th July 1902 the Lord Ordinary pronounced the following interlocutor—"Decerns against the defenders for payment to the pursuers as trustees for behoof of the managers of the Widows Fund of the Incorporated Trades of Aberdeen of the sum of £1368, 2s. 10d. sterling in full of the conclusions of the summons, with interest as concluded for."

Opinion.—[After dealing with the question for whom the Master of Kirk and Bridge Works held the subjects]—"It therefore seems to me that the Master of Kirk and Bridge Works holds the superiority in trust for the defenders, that the beneficial interest is in them, and that it is they who are truly the debtors in the obligation which the pursuers seek to enforce.

"Therefore, although I think that action might have been competently brought against the Master of Kirk and Bridge Works as having the feudal title, I think that it is also competently brought against the defenders, who, it appears to me, must ultimately answer the pursuers' demand if it is well founded.

"The question upon the merits is one of novelty and difficulty.

"When the lands of Gilcomston were feued in 1749 the total feu-duties amounted to some £2600 Scots. As I have said, that approaches to double the upset price. According to the valuation roll of 1859-60 the annual value of the lands of Gilcomston was £8864 sterling, while according to the roll of 1899-90 it had risen to £59,397 sterling. The enormously increased value arises from the fact that the town of Aberdeen has extended over the lands, the bulk of the increase having taken place since 1860.

"In these circumstances the defenders contend that under the obligation in the feu-charter they are only liable to relieve the pursuers of burdens applicable to the lands as agricultural lands, because that was the condition of the lands when the feu-charter was granted, and there is evidence that the parties contemplated that the lands would be used for agricultural purposes only. They therefore argued that it was not reasonable to construe the obligation as being applicable to a condition of matters entirely different from that which the parties had in view when the contract was made, and which they could not possibly have contemplated.

"It is the case that when the feu-charter was granted the lands were not building

lands. From the two earliest plans which have been produced, dated respectively in 1661 and 1746, it looks as if the lands were practically uncultivated—they were probably, I suppose, natural pasture—with very few buildings upon them.

“Then there is some evidence from which it may be inferred that when the lands were feued an increase in their agricultural value was contemplated. Thus in the minute of the Town Council of 13th September 1749, at which it was resolved that the Master of Kirk and Bridge Works should dispoise Gilcomston to the Treasurer, it is narrated that ‘there now appears to be a great spirit for agriculture and improvement of the lands about the town.’ That minute is dated shortly after the lands of Gilcomston were feued, and it suggests that the increased annual rent which had been obtained for the lands was at all events to some extent due to the anticipated rise in their agricultural value.

“A book called ‘A General Description of the East Coast of Scotland,’ by Francis Douglas, Paisley, was also founded on. The book is said to have proved to be accurate so far as it can now be checked, and it strikes me as containing the observations made by an intelligent man. Mr Douglas makes special mention of Gilcomston. He says that the lands were feued in small lots because the Magistrates ‘determined no longer to be plagued with bankrupt tenants.’ He gives the following account of the lands before they were feued, as he received it from an Aberdeen friend who accompanied him—‘While in the hands of the former tenants they were totally neglected, much of them quite soured by stagnant water, in some places so full of large stones that it was perilous to put a plough into them, in others overrun with furze, and all of them almost constantly cropt without any or with a very small quantity of manure. With regard to the former rent, it was very moderate, not above seven shillings an acre at an average, though now they generally let from fifty shillings to four pounds.’ Mr Douglas then speaks of the rate at which the lands were feued, and then he says—‘Those who went vigorously to work and trenched, enclosed, and manured their grounds, had returns which encouraged them to proceed, and found plenty of tenants willing to pay a rent proportional to their expense.’

“Finally, in the feu-charter, the tenants are taken bound to ‘grind their corns growing on their said lands at the mill of Gilcomston as formerly.’

“These are the chief considerations which may be founded on as showing that what the parties contemplated when the obligation of relief was granted was that the lands were agricultural subjects, and would be used for that purpose.

“Upon the other hand, the lands marched with the burgh boundary of New Aberdeen, and if that city extended to the westward (as it has done), it was probable that the lands of Gilcomston, or part of them, would be built upon.

“Further, the plan of 1746 shows, upon

the west side of the town and within the burgh boundary, certain dotted lines which indicate new streets, either proposed or anticipated. The next plan produced is dated in 1773, and it shows that these proposed streets had actually been made, and that otherwise there had been a considerable extension of the town to the westward. It also shows that building had been going on on the lands of Gilcomston, because a number of buildings appear upon this plan which are not shown upon the older plans, and in particular upon a part which I think is called Jack’s Brae there is a whole street of houses. Therefore within twenty-one years of the date of the feu-charter there had been a considerable amount of building upon the lands.

“The next two plans are dated respectively in 1855 and 1862. They show that there had been some, although not a very large, increase of buildings upon the parts of Gilcomston lying nearest to the city. Lot VIII., to which this action relates, was according to the plan of 1855 still wholly unbuilt upon, but the plan of 1862 shows that two houses had then been erected upon it. It seems to have been about 1863 that building upon Gilcomston became general, and between 1860 and 1900 the yearly value of Lot VIII. rose from £58 to £4666.

“It therefore appears that for the first quarter of a century or thereby after the lands were feued there was a considerable amount of building upon Gilcomston, that thereafter, for the best part of a century, very little progress was made, but that since 1863 or thereby the town has spread over the whole lands.

“There is a clause in the feu-charter upon which the pursuers rely—the declaration, namely, ‘that if any houses are built the same shall be built with stone or brick, and covered with slate or tile.’ I am inclined to think that that clause had in view buildings other than such as were required for agricultural purposes, because, considering that the lots in which the lands were feued ran from 18 acres down to a little over 1 acre in size, one would not expect any conditions or restrictions to be imposed in regard to buildings required for purely agricultural purposes. At all events, I think that the building clause and the thirlage clause may be set against each other, and the result is that the charter throws very little light upon the question what use of the ground was in contemplation of the parties.

“I think that it is also worthy of remark that of the persons who acquired the twelve lots of ground into which Gilcomston was divided, only one is described as a farmer. The others are described as advocates or merchants, and one as a vintner in Aberdeen. I think that the probability is that such a class of persons did not acquire the lands at a rate very much higher than that at which they had ever previously been let, solely in view of their agricultural capabilities, although they may have seen their way by the application of capital and the cultivation of such crops as would obtain a ready sale in the town to utilise them

profitably enough as agricultural subjects.

“Weighing the considerations upon the one side and the other, I think that it is impossible to say that the only use of the ground which it is reasonable to suppose that the parties had in view was for agricultural purposes.

“It seems to me that the facts that the lands adjoined the burgh, that the price paid for them was very greatly more than they had ever previously been found to be capable of yielding, and that within a few years after the lands were feued a considerable amount of building was done, point to the inference that in feuing them the parties had in view that they might be required and become valuable for building purposes.

“Now, if it had been shown that at the time when the charter was granted no one could have contemplated that the lands would ever be used except for agricultural purposes I should have thought that the obligation of relief fell to be construed as applicable only to lands in that condition. But for the reasons which I have given I cannot hold that that was the case. On the contrary, I think that the chance of the lands becoming building ground must also have been in view, although it must be conceded that no one could have foreseen that the city would extend entirely over the lands, and that they would become of the enormous value which they have recently attained.

“If, however, the chance of buildings being erected was taken into consideration at all the difficulty is to draw any line. In the case of new rates and taxes it was possible to draw a very distinct line, and to say that burdens imposed for the first time by supervenient legislation could not have been within the contemplation of parties, and therefore did not fall within such an obligation. But it is not possible to say that the parties contemplated building to a certain extent or value, and to no greater extent or value. It seems to me that either the lands must be dealt with for the purposes of the obligation as if no buildings had been erected upon them at all, or they must be taken as they exist—that is, covered with buildings. If, therefore, I am right in thinking that it must be presumed that the parties did contemplate that the value of the lands might be increased by being required for building, then I think that the obligation must be construed as including the burdens upon the lands in their present condition, because to hold that it includes only such burdens as would have fallen upon the lands if there had been no buildings at all, would be to deprive the creditor in the obligation of part of that for which he stipulated. I think that it is a hard case for the defenders, but it seems to me that it is just one of those cases in which a bargain has turned out to be a very bad one.

“In what I have said I have dealt with the whole lands of Gilcomston, although this action only refers to the eighth lot. I have done so because it seems to me that the eighth lot cannot be regarded as a

separate property. It was one of the lots in which the whole estate of Gilcomston was feued out at the same time, and although it was more remote from the town than the bulk of the estate, and therefore might not be likely to be built upon so soon as some other lots, I see no reason to suppose that the considerations which would influence a proposing purchaser of a lot further from the town would be of a different character from those weighing with a person acquiring a lot nearer the town.

“It was contended that the defenders are not liable to relieve the pursuers of rates and taxes which are paid, not by them but by their sub-feuars, and that in any view the obligation is limited to the amount of the feu-duty.

“As I stated in the opinion which I formerly gave in this case, I regard both of these questions as settled by previous decisions, which are, at all events, binding upon me.”

The defenders reclaimed, and argued—(1) On the evidence it was established that the feu granted in 1752 was a feu of agricultural subjects, and that building operations were not contemplated by the parties. On that assumption the amount due under the clause of relief could not exceed the rate which would now be levied on the lands if they had remained agricultural, because that was all that was contemplated by the parties to the feudal contract. The principle that such clauses of relief did not extend to liabilities which the parties could not have contemplated had been always recognised, and was the basis of the rule that supervenient taxation was not covered by them—*Sprot v. Heriot's Hospital*, May 29, 1829, 7 S. 682; *Scott v. Edmond*, June 25, 1850, 12 D. 1077; *Nisbet v. Lees*, June 15, 1869, 7 Macph. 881; *Paterson's Trustees v. Hunter*, December 10, 1863, 2 Macph. 234; *Wilson v. Magistrates of Musselburgh*, February 22, 1868, 6 Macph. 483. The decision in *Dunbar's Trustees v. British Fisheries Society*, December 19, 1877, 5 R. 350, *affd.* July 12, 1878, 5 R. (H.L.) 221, did not conflict with this principle, because in that case building was clearly in the contemplation of both parties. (2) The amount demanded under the obligation to free and relieve of public burdens, if not limited by the feu-duty, must not be out of all proportion to it, because if it was it would be open to the superior to dispoise his superiority to a man of straw and thus extinguish the vassal's claim of relief for the future. (3) The pursuers had no right to recover poor-rates imposed upon their sub-vassals. The obligation in the feu-charter was not a warranty that no rate should ever be payable by the owner of the ground feued; it was a clause of relief—*Duke of Montrose v. Stewart*, March 27, 1863, 1 Macph. (H.L.) 25. In order to avail himself of a clause of relief the vassal must show that he has paid something of which the superior has undertaken to relieve him—*Leith Heritages Co. v. Edinburgh and Leith Gas Co.*, June 7, 1876, 3 R. 789; *Ainslie v. Magistrates of Edinburgh*, November 19, 1839, 2 D. 64; *Welsh v. Russell*, May 19, 1894, 21 R. 769, 31 S.L.R.

611. Here, with the exception of the small sum imposed as rates on the portion of the ground still unfenced, the vassal had paid nothing. Poor-rates were not levied on mid-superiors but on owners and occupiers. The superior undertook an obligation to relieve the vassal of rates imposed on the lands, not of rates imposed on sub-vassals as owners and occupiers. The present case was an exceptionally favourable one for the defenders in this respect, that the vassal had not attempted to assign the clause of relief to his sub-vassals, and had not undertaken any obligation to relieve them of rates. In the latter of these respects it was distinguished from *Hunter v. Chalmers*, July 16, 1858, 20 D. 1311. But the argument would still be valid even if the obligation had been assigned or the liability for rates undertaken. On the principle of *Duke of Montrose v. Stewart* (*cit. sup.*) such an obligation could not be effectually assigned, because it was a condition of the contract between superior and vassal, and not an independent or assignable warranty. An obligation to relieve his sub-vassal would not put the vassal in any better position; it would still be true that the rates of which he claimed relief were not paid by him—*Montgomerie v. Hamilton*, May 27, 1841, 3 D. 942, which the pursuers relied on, was a case of special circumstances from which no definite rule could be extracted. (4) The action should have been directed against Brebner's representatives, who were now the superiors.

Argued for the respondents—(1) On the evidence it could not be stated that the possibility of the lands being built upon was not in contemplation of parties in 1752. Even if it was not, the defenders' case was not improved. Obligations in a feudal contract must be interpreted according to the meaning of the words, not by conjectures as to the intention of parties—*Reid v. Williamson*, February 16, 1843, 5 D. 644; *Preston v. Magistrates of Edinburgh*, February 4, 1870, 8 Macph. 502; *Dunbar's Trustees v. British Fisheries Society*, *cit. sup.* Besides, parties must be supposed, in granting an obligation like the present, to have had in contemplation any legal use to which the lands might be put. The argument on the other side involved the theory that the superiors could only be liable for hypothetical rates which might have been levied if the subjects remained exactly in the state in which they were in 1752. (2) The obligation to relieve was not limited to the feuduty. That was really settled—*Lees v. Mackinlay*, November 11, 1857, 20 D. 6; *Dunbar's Trustees v. British Fisheries Society*, *cit. sup.* No other limit could reasonably be suggested. (3) This was an obligation of warrandice, not of relief, if there was any real difference between the two. It was settled in the House of Lords that such an obligation covered poor-rates—*Dunbar's Trustees*, *supra*—although they were nominally levied on the owners and occupiers, and not on the lands. It made no difference that the rates were paid by the sub-vassals. The superior had no concern with the question who paid

the rates. If the vassal had undertaken to relieve his sub-vassals, the case of *Hunter v. Chalmers*, July 16, 1858, 20 D. 1311, would have been exactly in point, and a conclusive authority in the pursuers' favour. The absence of that obligation made no difference, because it simply meant that the vassal in sub-feuing the lands accepted a less feu-duty than he would have obtained if he had undertaken to relieve the sub-vassals of poor-rates. He could have assigned the obligation of relief, and could do so still by making new arrangements with his feuars. The case of *Montgomerie v. Hamilton*, May 27, 1841, 3 D. 942, was directly in point. (4) There was no substance in the objection that Brebner's representatives were the proper defenders. The transactions in 1806, while they created a mid-superiority for voting purposes, did not in any way prejudice the rights of the vassal against his immediate superior—*Ersk. ii. 5, 4*; *Menzies' Conveyancing*, p. 667; *Bell's Conveyancing*, p. 753; *Archbishop of St Andrews*, 1682, M. 15,015; *Campbell v. Lawrie*, 1781, M. 7786; *Hotchkiss v. Walker's Trustees*, December 6, 1822, 2 S. 70.

At advising—

LORD M'LAREN—In 1752 the Treasurer of the burgh of Aberdeen, being duly authorised by an act of the Town Council, disposed in feu-farm to John Dingwall and his heirs and assignees the eighth lot of the lands of Gilcomston, extending to 10 acres 3 roods Scots, in consideration of an immediate payment of £81, 6s. sterling, and an annual feu-duty of £17, 17s. 5d. sterling, being at the rate of £1, 18s. per acre.

The feu-charter contains a clause of warrandice in favour of John Dingwall and his foresaids in common form, to which is added an obligation to relieve him and them of certain public burdens therein enumerated, and of all other public burdens whatever payable from or that might be imposed upon the lands. The terms of this clause will presently be considered.

The pursuers The Aberdeen Trades Widows Fund are singular successors of John Dingwall. Under their administration the 10 acres 3 roods of the lands of Gilcomston have been feued out under building contracts, the Trades Widows Fund retaining only a mid-superiority, which is holden of the Magistrates and Council of Aberdeen as their over-superiors.

In this state of the title of the lands of Gilcomston the Trades Widows Fund have brought this action, in which they claim from the Corporation of Aberdeen, in the assumed exercise of a right of relief, the payment of a large sum of money, which they describe (Cond. 5) as poor-rates which their vassals have since the year 1862 paid in respect of the ownership of these subjects. The defences as stated include no less than twelve pleas-in-law, but some of these are mere variations.

I shall state the points briefly in the order in which they are treated by the Lord Ordinary, reserving for fuller consideration a defence as to which the Lord

Ordinary has said nothing except that he considers himself bound by the authorities, viz., that poor-rates paid by the pursuers' tenants in feu-farm do not fall within the terms of the obligation of relief.

1. The first defence is to the effect that the Corporation of Aberdeen is no longer the superior of the lands of Gilcomston. It appears that in the year 1806 the Master of Kirk and Bridge Works, an officer of the Corporation in whom the title to Gilcomston was vested *pro forma*, granted to one Brebner a disposition of the superiority of Gilcomston, containing a procuratory of resignation; that Brebner obtained a charter of resignation from the Crown, and then granted to the Master of Works a feu-charter whereby he disposed the estate to be holden of him as immediate lawful superior for payment of £1, 5s. yearly in name of feu-farm duty.

The effect of these deeds was to separate the freehold or Crown tenure from the substantial interest in the superiority. Apparently the object was to create a county voting qualification in the person of Brebner by a process which was very familiar to the conveyancers of these days. Under the extended franchises of the past seventy years this qualification would be of little value, but as a matter of fact the Corporation of Aberdeen never sought to re-acquire the freehold from Brebner, and theoretically the Corporation is still the tenant in feu-farm under Brebner's successors and at the same time immediate superior of the pursuers, Dingwall's successors. I may observe parenthetically that according to Erskine such a "splitting of the superiority" into two estates is competent, subject to the condition that the rights of feuars are not thereby prejudicially affected, and Erskine's opinion has been accepted by lawyers as conclusive of the question. On this point I adopt the reasoning of the Lord Ordinary as set forth at length in his Lordship's opinion of 15th November 1901. In accepting the reconveyance or sub-title from Brebner the Corporation of Aberdeen took over all the superior's obligations to feuars; the Corporation alone has the substantial interest in the estate of superiority of Gilcomston, and I consider that any claim that may be made by Dingwall's successors under the obligation of relief before referred to is properly directed against the Corporation of Aberdeen.

2. The next defence is founded on the fact that in the year 1752, when Dingwall obtained his feu-charter, the lands of Gilcomston were agricultural or pastoral lands, whence it is argued that the obligation to relieve the feuar of public burdens ought in fair construction to be confined to such burdens as would in the ordinary course of public administration be laid upon an estate of that character. Following up this line of argument it is maintained for the Corporation that the poor-rates now levied from the owners of house-property could not be within the contemplation of the parties to the original feu-contract, and therefore the liability of the Corpora-

tion ought to be restricted to such a sum as may be taken to represent a rate on the basis of agricultural value. On this subject the Lord Ordinary allowed a proof, and after hearing parties on the import of the proof, delivered an opinion under date 5th July 1902, in which his Lordship came to the conclusion that it was impossible to affirm with respect to lands situated in the immediate vicinity of the burgh, that the contingency of the land becoming available for building was not within the contemplation of parties. I am of the same opinion, but if necessary I should be prepared to go further, and to hold with respect to rates or public burdens which were exigible by the laws in force at the date of the feu-contract, that the obligation of relief is unqualified. Unless the terms of the feu-contract are prohibitory of building I think it must be taken that building was contemplated as a possible exercise of the feuars' rights, and I do not see how it is possible to find a criterion by which building to a moderate extent, and the rates levied on the increment of value resulting from such building, shall be held to be within the sphere of the obligation, while building to the full extent which the subject admits shall be excluded from the obligation. If, therefore, the pursuers, or the singular successors of Dingwall, whoever these might be, had themselves put up the buildings, then—standing the relation of superior and vassal between the Corporation and Dingwall's successors—I should have held that the claim of relief was well founded.

3. With respect to the defence that the obligation of relief is limited to the amount of the feu-duty, and observing that all such obligations are now held to be conditions, it appears to me that the existence of the suggested limitation must depend on the nature of the condition, *e.g.*, whether the obligation of relief only conditions the feuar's engagement to enter with the superior and pay the feu-duty, or whether it conditions the entire relation of superior and vassal which is constituted by the feu-charter. If an obligation of relief of public burdens were annexed to the *reddendo* clause of a charter or feu-contract, and were expressed as a qualification of the obligation to pay feu-duty, it might be reasonable to infer that nothing more was meant than an abatement of feu-duty equal in amount to the public burdens chargeable on the feu. But in the case before us the superior comes under an independent and perfectly general obligation to relieve Dingwall, his heirs and assignees, of public burdens imposed or to be imposed upon the lands, and I think that this universal obligation and the grant of the lands are the considerations for which feu-duty was agreed to be paid. In this respect I am unable to distinguish the case from the case of *Dunbar's Trustees v. The British Fisheries Society*, where the defence here considered was negated by the judgment of the House of Lords (5 R. (H.L.) 221.)

4. I pass to the consideration of what appears to be the critical point in the case, whether the obligation of relief undertaken

by the Corporation of Aberdeen to Dingwall and his successors (now represented by the Aberdeen Trades Widows Fund), their immediate tenants in feu-farm, can be construed as including an undertaking to pay public burdens for which the Trades Widows Fund were never assessed, and which they have not in fact paid and never can be made to pay, and which are exigible by statute from the actual owners, viz., the persons to whom the Trades Widows Fund have feued out the land under contracts to which the defenders are not parties. The obligation in question is put in the form of an addition to the clause of warrandice or warranty of title by which the superiors oblige themselves "to warrant, acquit, and defend the present charter," &c., and particularly "to free and relieve the said John Dingwall and his foresaids (i.e., the Aberdeen Trades Widows Fund) of all feu, teind, and blench duties, ministers and schoolmasters' stipends and salaries, building, repairing, and upholding of kirks and kirkyaird dykes, ministers' manses, schoolhouses, future augmentations, and for all cesses, taxations, highway money, and other public burdens whatever, due and payable furth of, or that may any-ways be imposed upon the lands and others above-mentioned in all time coming."

In the construction of such an obligation the first point to be determined is the legal character of the obligation, and I may begin by observing that according to the best authorities the clause which I have quoted is not a warranty, but is an obligation of indemnity or relief expressed as a condition of the feudal contract. The distinction between warranty and feudal condition is very clearly drawn in the opinions delivered by Lord Chancellor Westbury and Lord Chelmsford in the case of the *Duke of Montrose v. Stewart*, 1 Macph. (H.L.) 25. The Lord Chancellor, speaking of the engagement to "warrant" the teinds against future augmentations, says—"The obligation relates directly to the subject of the feu-contract and to the enjoyment of it by the vassal, and it is therefore, from the very nature of the engagement, an integral part of the contract, in consideration and return for which, as part of the superior's grant and engagement, the feu-duties and other prestations are rendered by the vassal In principle therefore it appears to me to be clear that the obligation in question is part of the feudal contract, and is transmitted along with that contract." Lord Chelmsford says—"The difficulty in the way of construing this obligation to be more than a personal obligation to relieve from augmentation was strongly urged by comparing it with the clause of warrandice, confessedly a mere personal contract binding only upon representatives." Then to show, as he says, that the two things are entirely different and incapable of comparison, Lord Chelmsford quotes from Lord Cottenham's judgment in *Mailland v. Horne* (1 Bell's App. Cas. 63) to the effect that such obligations

of relief are essentially different from "warrandice" in our law language, or "warranty" according to the term used in English law. Then Lord Chelmsford continues—"The teinds of a parish are subject to the liability to be diminished in the hands of the individual by being taken for the purpose of adding to the stipend of the minister. But the title to the teinds is not affected by the augmentation." Thence his Lordship concludes the only mode in which the granter could give the vassal the benefit for which he contracted was by annexing an obligation to the grant of teinds which should accompany them for all future time, and afford them a permanent protection against diminution. Now, in the *Montrose* case, in which these opinions were delivered, the superior's obligation was in terms to warrant the teinds to be free from all ministers' stipends, future augmentations, annuities, and other burdens, and there it was held (the use of the word "warrant" being immaterial) that the engagement was not a warranty, but a condition of the feudal contract. I need hardly add that while in that case the relief from augmentation of stipend was the matter immediately in view, the grounds of judgment apply generally to clauses of relief from public burdens, including poor-rates. I have therefore in the present case come to the conclusion that the engagement undertaken by the Magistrates of Aberdeen to John Dingwall was a term of the feudal contract or feudal relation which it was the purpose of the charter to constitute; that this engagement cannot be separated from the title of the subaltern estate, which is the creditor in the obligation, but that it may be enforced by the feuar or owner of that estate for the time being against the owner of the estate of superiority for the time being.

I have thought it necessary to make this proposition perfectly clear, even at the risk of dwelling on some things which have passed out of the region of controversy, because I think that it is only necessary to state the nature of the obligation in order to demonstrate the unsoundness of the pursuers' claim. I am not here referring to the claim for the small sum of rates which was assessed on and paid by the pursuers in respect of unsold lands. These rates amount to only £9, 9s. 6d., and as to these, as I understand, the defenders do not dispute their liability. But the substantial claim is for the sum of £1361, 12s. 6d., being poor-rates which it is said the vassals to whom the pursuers have feued out the greater part of their estate have paid in respect of ownership (Cond. 5). Along with this claim I ought to notice the statement in Cond. 4, which is to the effect that in 1864 the pursuers began to feu out their property of Gilcomston (for building), and have now feued out the whole of it. Then it is said—"In the feu-charters granted by them the said trustees have not assigned to their vassals the clause of relief from public and other burdens quoted in the first article hereof, and they still remain in right

thereof." This is a perfectly intelligible proposition as a foundation for relief of the £9, 9s. 6d. which the pursuers have paid, but as a ground for the claim of £1361, 12s. 6d. in repayment of rates paid by the pursuers' vassals I confess that I am wholly unable to follow it. We are here considering an obligation of indemnity. It is so described by Lord Cottenham in his analysis of the nature and effect of such clauses, which is the foundation of the modern law on this subject—I mean in the often-cited case of *Maitland v. Horne*. His Lordship says (1 Bell 64)—"It is a contract that, in a particular event happening to diminish the value of the property sold, the vendor shall come in and indemnify the pursuer against the diminution of income sustained by the exercise of legitimate authority," *i.e.*, the augmentation of stipend in the case his Lordship was considering—the power of assessing for poor-rates in the case with which we have to deal. Now, it is elementary that under a contract of indemnity there can be no claim until the risk emerges. The pursuers have not been required to pay any part of the sum of £1361 (I omit the shillings and pence) for which their feuars have been assessed, and on their own statement they never can be called on to pay it, because they have neither undertaken to relieve their feuars from poor-rates, nor have they professed to assign to their feuars the benefit of the obligation of relief undertaken by their superiors, the Corporation of Aberdeen. Their case on the record (Cond. 4) is that they are entitled to separate the obligation of relief from the estate to which the risk attaches, and while leaving the burden of poor-rates to be borne by the feuars to whom it attaches in the character of "owners" to claim an equivalent sum from the Corporation of Aberdeen, which they do not propose to hand over to their feuars but mean to keep to themselves. But then the ground of judgment in the *Duke of Montrose's* case is that an obligation of relief such as this is an integral part of the contract between superior and vassal, or as it was otherwise put, a condition of the feudal relation of superior and vassal. This implies that the person who seeks performance of the obligation is entitled to relief if he can prove that his return from his feu or estate of property has been diminished by assessments laid upon the lands. He does not satisfy this condition by showing that his tenants in feu-farm have paid poor-rates, because that is not a risk affecting him or the estate which he holds of his superior. It is therefore not a risk which the superior undertook by his obligation of indemnity. It is a liability attaching to a subaltern estate which was not in existence at the time when the Corporation made the grant to Dingwall, and it cannot, as I think, in fair construction be held to fall within the obligation of relief. While I notice as a fact in the case that the pursuers have neither assigned the benefit of the obligation to their feuars nor undertaken by a separate obligation to relieve them, I do not wish it to be supposed that in my opinion the claim

of the pursuers would have been better if any proceeding of this nature had been followed. I am not of opinion that the benefit of the obligation could be assigned to the pursuer's feuars to the effect of indemnifying them against poor-rates, because I am unable to see how an undertaking which is a condition of a contract can be separated from it and made a condition of a different contract to which one of the original obligants is not a party. Again, I do not think that the pursuer's case against the present defenders would have been better had he been in a position to say (which he is not) that he had undertaken to relieve his feuars of their poor-rates and had made payment in terms of his obligation to them. I think the answer would be that the Magistrates of Aberdeen undertook to relieve Dingwall and his assigns of public burdens, but did not undertake to relieve them of liabilities which they might voluntarily undertake with the object of promoting the sale or subinfeudation of their lands. But this second point is only stated as a personal opinion, because in *Hunter v. Chalmers*, 20 D. 1311, the point was considered, and the claim of indemnity was sustained to a limited extent on the principle that sums paid to sub-feuars under an obligation of relief were the equivalent of a direct payment of tax by the principal feu, and were therefore covered by his right of indemnity.

I may point out that according to the judgment in that case Mr Hunter, the superior, was only found to be liable to relieve his immediate feu of a proportional part of the poor-rates paid by the sub-feuars corresponding to the ratio of the value of the land and buildings to the value of the feu-duty. The language of the Lord Ordinary's interlocutor (which was affirmed in the Inner House) is perhaps somewhat elliptical, but the opinions of the Judges in both Courts make the meaning perfectly clear. The ground of judgment, as developed by Lord Wood and Lord Cowan, is that the feu-duty payable by the sub-feu to his principal may be taken to represent the value of the land at the date of the sub-feu. Then it is said that as the over-superior was liable up to the time of subinfeudation in relief of the poor-rate assessed on that value, his position is not to be made either better or worse by the subinfeudation, and therefore his vassal is entitled to a perpetual indemnity against a hypothetical poor-rate calculated on the basis of the feu-duty. I may also point out that one of the grounds of judgment seems to be that the sub-contract of indemnity was equivalent to an assignment of the original contract. Lord Wood says (p. 1316)—"The defender (Chalmers) or his authors might have made a different arrangement by assigning the obligation of relief to the sub-feuars along with the lands, and then, I apprehend, any objection by the pursuer would have been groundless." And Lord Cowan observes that "as it was undoubtedly competent to have given over the subjects

of the feu to an assignee with the privilege of this clause of relief, it is truly *jus tertii* in the pursuers to object to the mode in which that substantially has been effected." Whether this ground of judgment can be reconciled with the later decision of the House of Lords in the case of the *Duke of Montrose* may be left for future consideration should the question hereafter arise, because the obligation to relieve sub-feuars, which was the basis of the claim in *Hunter v. Chalmers*, is in the present case non-existent.

5. It only remains to notice the argument that was pressed on us to the effect that, independently of assignment or sub-contract, claims like the present had been sustained by decisions of the Court. It is the more necessary to examine this argument carefully, because the Lord Ordinary, without however adding the weight of his personal opinion to his decision, has considered himself bound by the decisions to sustain this claim.

Three cases are cited by the Lord Ordinary in his opinion of 15th November 1901, and referred to in the concluding paragraph of his later opinion. One of these cases, *Dunbar's Trustees v. British Fisheries Society* (5 R. 350, and in H. L. 5 R., H.L., 221) has no bearing on the present question, and is apparently quoted by Lord Low only for the purpose of establishing two points, (1) that an obligation in the terms we are considering includes relief against poor-rates, and (2) that the superior's obligation is not limited to the amount of the feu-duty. The case of *Hunter v. Chalmers*, also cited by his Lordship in this connection, has already been considered; but I may again point out that this case (whether distinguishable in principle from *Montrose* or inconsistent with that authority) gives no support whatever to the claim in the present action, because the decision in *Hunter v. Chalmers* was that such obligations might be assigned to sub-feuars by direct cession, or by the grantee of the original feu coming under an equivalent obligation to his feuars. In either alternative the claim of indemnity would be made by the person who was damaged—in the first alternative case by the sub-feuar who paid the poor-rate; in the second case by the tenant in the original feu who had indemnified his feuar in terms of his obligation and who claimed to be relieved in his turn by his superior. I therefore cannot consider the case of *Hunter v. Chalmers* as an authority for the payment of a sum of money in the name of indemnity or relief from taxation to a person who is not affected by the tax.

There remains the case of *Montgomery v. Hamilton* (3 D. 942), and this is the decision on which counsel ultimately relied as supporting the judgment under review. The case of *Montgomery* raised two distinct questions, which are the subject of two interlocutors of the Lord Ordinary, Lord Jeffrey, and which are disposed of in the judgment of the Inner House affirming these interlocutors. The case is a very circumstantial one, involving the consideration of

contracts and proceedings in the Court of Teinds extending over a period of 140 years. The fullest statement of the facts of the case is to be found in Lord Medwyn's opinion, but as we are only concerned with one of the questions in the case, the facts so far as bearing on that question admit of being more shortly stated:—Francis Lord Sempill was proprietor of the barony of Glassford, which consisted, it is said, of two districts, called the Dales of Glassford and the Muirs of Glassford. Prior to 1693 he had granted feus of portions of the Dales of Glassford together with the teinds, the consideration being in each case the payment of certain sums in name of feu-duty and certain other sums in name of teind-duty, yearly, the last-mentioned sums being declared to constitute the whole stipend chargeable against the teinds of the several lands feued out, and the feuars being empowered in case of eviction to retain the feu-duty so far as might be necessary for their relief.

In 1693, Lord Sempill, while standing under these obligations to his feuars, disposed to Alexander Stuart of Torsonce, the whole lands of Dales of Glassford, with the teinds, subject of course to the existing feu-rights, and he further disposed a part of the lands of Muirs of Glassford in real warrandice of the lands and teinds principally conveyed against all evictions by augmentations or otherwise beyond a certain limited amount representing the stipend then payable to the minister. The clause also contained a provision for the release of the warrandice lands applicable to the case of eviction, and that by payment of the value of the teinds that might be evicted at the rate of sixteen years' purchase. One of the questions decided related to the effect of this subsidiary provision, but with this we are not concerned.

Alexander Stuart, the disponee under this deed, and his successors, in course of time feued out the remainder of the estate of Dales of Glassford, retaining only the superiority, on terms similar to those of Lord Sempill's feus, each feu-right containing separate obligations for the payment of feu-duty and teind-duty, and a clause empowering the feuar to retain his feu-duty in compensation of eviction, viz., by being made to pay stipend in excess of the stipulated teind-duty. Lord Sempill or his successors afterwards conveyed away the warrandice lands (Muirs of Glassford). These came in time to be vested in Lady Mary Montgomery (one of the parties to the case), subject of course to the claim of real warrandice which affected these lands. In course of time the minister's stipend was successively augmented, and relief was claimed against the warrandice lands. I do not understand that there was any question as to the liability of the warrandice lands to relieve those feuars whose rights flowed from Lord Sempill, but there was a question at least as to the extent of the liability of the warrandice lands for the relief of the feuars who derived their rights from Alexander Stuart's successors. This liability was certainly affirmed by the

second interlocutor reclaimed against (and adhered to), because in the interlocutor it was found that the pursuer (Stuart's successor) was entitled to demand payment from the defender (Lady Mary Montgomery) of all such portions of the teinds as had been evicted in consequence of augmentations of stipend, "and that whether the vassals to whom the said lands and teinds have been since feued out by the pursuer or her predecessors have by the terms of their titles any claim to relief against the said pursuer for the teinds so evicted."

I have stated the case thus fully in order that it may be made clear that the question raised was essentially different in fact and in principle from the present case. There was no question in *Montgomery v. Hamilton* of the liability of an over-superior for burdens attaching to the right of a sub-feuar. The lands of Dales of Glassford never were sub-feued. Stuart's successors certainly feued out the lands which he acquired from Lord Sempill, but Stuart did not acquire these lands in the character of a feuar, but as a singular successor or disponee of Lord Sempill. If Lord Sempill had undertaken a personal obligation to relieve Stuart of future augmentations (which *ex facie* of the report he did not), then according to the judgment in *Maitland v. Horne* that obligation would only have bound the grantor and his heirs. But apparently Lord Sempill's obligation was not considered sufficient, because the disponee stipulated for and obtained a conveyance of lands in real warrandice. The effect of the conveyance in real warrandice was that in case of the value of the estate of teinds being diminished by augmentations of stipend, recourse might be had against the property and rents of the warrandice lands by way of indemnity. Then when Stuart or his successors feued out the lands with the teinds in parcels, the feuars having paid a full price for their teinds, naturally stipulated for an indemnity against augmentations. The minister's stipend was augmented. Stuart's successors had to submit to an abatement of feu-duty in terms of their obligation of indemnity, and to that extent the value of their titularity was diminished, and their right to recourse against the warrandice lands emerged. It was no doubt held that they had a claim against the warrandice lands irrespective of the question whether their feuars had or had not a claim of relief against them. But the ground of judgment was that part of the estate of teind had been evicted, and it might very well be that where the Stuart family had sold lands and teinds without relief they were content to accept a lesser feu-duty, taking their chance of recovering something out of the warrandice lands in the event of augmentations being granted. Whether the decision on that incidental point in a somewhat complicated case commends itself to our judgment or not, it seems to me to be impossible to apply a judgment in what was really a competition

of heritable rights between the owner of warrandice lands and the holder of a security over those lands in case of eviction of real estate to a question like the present which lies entirely in the region of obligation. Even if the analogy had been more direct than I take it to be, I should not consider that a decision upon a question extremely technical, and I may say unique as to its circumstances, ought to preclude the Court from considering the present question on its merits. My view on the subject of the claim in the present case has already been fully stated, and as I am not satisfied that it is in conflict with the decision in *Hamilton v. Montgomerie*, my conclusion is that, except as to the extent of the sum of £9, 9s. 6d. for which the pursuers have been assessed, the interlocutor of the Lord Ordinary should be recalled, and that the defenders should be assoilzied from the action.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court recalled the interlocutor of the Lord Ordinary, decerned against the defenders for payment to the pursuers of the sum of £9, 9s. 6d., and *quoad ultra* assoilzied the defenders from the conclusions of the action.

Counsel for the Pursuers and Respondents—H. Johnston, K.C.—Chree. Agents—Alexander Morison & Co., W.S.

Counsel for the Defenders and Reclaimers—Sol.-Gen. Dickson, K.C.—Hunter. Agents—Gordon, Falconer, & Fairweather, W.S.

Saturday, March 14.

FIRST DIVISION.

JOHNSTON v. JOHNSTON.

Process—Amendment of Record—Res Noviter—Husband and Wife—Divorce for Adultery—Alleged Act of Adultery not Known to Pursuer when Record Made up—Conduct of Co-Defender with Women other than Defender.

In an action of divorce on the ground of adultery at the instance of a husband against his wife and a co-defender, proof was led in the Outer House, and judgment was pronounced assoilzied the defender and co-defender. The pursuer reclaimed, and lodged a minute of amendment proposing to add to the record as *res noviter* averments as to certain facts, of which he alleged he had no knowledge and no means of knowledge when the record was made up and the proof led. The first proposed averment had reference to an act of adultery between the defender and co-defender, alleged to have occurred in a different part of the country, and unconnected with the incidents as to which proof had been led in the Outer House. The second proposed averment had