up and in force at the said colliery." The man died as the result of personal injuries received through the explosion, and the prohibition against the possession and use of matches in the mine was known to Robertson.

Now, under these circumstances, it appears to me that beyond all question the conduct of the deceased added a peril which was really not incident to the employment. In my opinion he did not suffer these injuries from anything arising out of the employment; he suffered them because he did something which was extraneous to his employment, and created a danger which would not have materialised but for what he did.

It was said that the risk of his employment arose from the gas which was there, that this was known to everyone, and it was part of his employment to face the risk of gas. That is perfectly true, but then the explosion took place owing to the fact that after having partaken of his meal, with full knowledge of the prohibition against it and with full knowledge of the danger being incurred, he lighted his pipe in order to have a smoke before returning to his work. Under these circumstances it appears to me that this is a typical example of the doctrine of added risk which has been thoroughly established by decisions of your Lordships' House, and, indeed, is based upon the necessity of bringing the case within the words of the Act in order to recover compensation. I do not feel that I can profitably add anything to what is said in the judgment of Lord Mackenzie. I desire to adopt what Lord Mackenzie said in this case as the reasons for my judgment.

Something was said, not very much but still something, as to whether the act of the deceased in striking the match was the proximate cause of the accident. It seems to me that no connection could be closer. The gas was there, and when the match was struck the explosion inevitably occurred.

Under these circumstances it appears to me that the appeal must be dismissed, with costs.

VISCOUNT CAVE—I entirely agree, and I do not think I could express my opinion better than by quoting a short passage from the opinion of Lord Skerrington. He says—"One must ask oneself—What was the man doing at the time when he was injured? Was he doing anything which he was employed to do or which he was entitled to do, or which he mistakenly thought that it was for the interests of his employers that he should do, or which was reasonably incidental to what he was employed to do? The answer to all these questions is in the negative. The man was doing something purely for his own purpose, something which he was not entitled to do in any shape or form, and which he was absolutely forbidden to do not merely by the rules of the pit but by an Act of Parliament. In these circumstances the arbiter ought, I think, to have found that the accident did not arise out of the employment." I agree with every word of that opinion, and I think the appeal should be dismissed.

LORD DUNEDIN—I concur.

LORD ATKINSON—I concur, and I agree also, as my noble and learned friend opposite has done, with what is said in Lord Skerrington's judgment, which I think puts the question as well and as clearly as it is possible to put it.

LORD MOULTON—I concur.

Their Lordships dismissed the appeal.

Counsel for the Appellant—M. P. Fraser, K.C.—W. D. Patrick. Agents—Cormack & Roxburgh, Dumbarton—Warden, Weir, & Macgregor, S.S.C., Edinburgh—D. Graham Pole, S.S.C., London.

Counsel for the Respondents—MacRobert, K.C.—Harold W. Beveridge. Agents—W. T. Craig, Glasgow—W. & J. Burness, W.S., Edinburgh—Beveridge & Company, Westminster.

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# COURT OF SESSION.

*Friday, March* 12.

## FIRST DIVISION.

[Lord Blackburn Ordinary.

## NORTH BRITISH RAILWAY COMPANY *v.* LORD PROVOST, MAGISTRATES, AND COUNCIL OF CITY OF EDINBURGH.

*Superior and Vassal—Rates—Assessments—Relief—Construction of Clause of Relief—Usage.*

Feu-charters granted by a city conveyed to the vassals certain subjects "free of all the town's burdens, burrow and county cess, stents, taxations, and all other public burdens of whatever kind now imposed or hereafter to be imposed, and all feu and blench duties, ministers' stipends, and schoolmasters' salaries imposed or to be imposed, due and payable for or furth of the same in all time coming, and to relieve the [vassals] . . . of all the burdens generally and particularly before mentioned excepting" an illusory feu-duty. The charters were granted in 1769 and 1770. Down to 1915-16 the superiors in fact exempted the lands from rating, first by omitting the subjects from the stent rolls, and later by inserting them in the valuation rolls but assessing themselves for the rates both of the vassals and of their tenants. The rates and assessments imposed in 1915 had come to include some imposed for the first time by supervenient legislation, *i.e.*, legislation later in date than the charters. *Held* (1) that the usage of parties fixed the meaning of the clauses as applicable to burdens imposed by supervenient legislation, and redargued the presumption to the

contrary effect—*Dunbar's Trustees* v. *British Fisheries Society*, 1878, 5 R. (H.L.) 221, 15 S.L.R. 772, *distinguished;* (2) that the vassals were entitled to be relieved of all local assessments imposed in 1915, viz., burgh assessments, poor and school rates, and lunacy assessments; and (3) following *Ainslie* v. *Magistrates of Edinburgh*, 1842, 4 D. 639, that the relief extended to assessments imposed on the tenants of the vassals.

The North British Railway Company, *pursuers*, brought an action against the Lord Provost, Magistrates, and Council of the City of Edinburgh, *defenders*, concluding as follows:—"Therefore (*first*) it ought and should be found and declared by decree of the Lords of our Council and Session that the defenders are bound in all time coming to exempt and relieve the pursuers and their successors in the subjects situated at the east end of Princes Street in the city of Edinburgh, known as numbers ten, eleven, twelve, thirteen, and fourteen Princes Street, and numbers two, four, six, and eight West Register Street, Edinburgh, and described and contained in the titles of the pursuers to be produced in the process to follow hereon, from all town's burdens, burgh and county cess, stents, taxations, and all other public burdens of whatever kind now imposed or hereafter to be imposed upon the said subjects or upon the proprietors and occupiers *qua* such, and in particular from burgh assessments, poor and school rates, and lunacy assessments; and (*second*) the defenders ought and should be decerned and ordained by decree foresaid to make payment to the pursuers of the sum of Nine hundred and thirty-two pounds two shillings and fourpence, with interest thereon at the rate of five per centum per annum from the date of citation to follow hereon until payment."

The *titles* referred to in the summons went back to three charters, two of which were granted in 1769 and the other in 1770. They all contained obligations of relief of public burdens in practically identical terms; one of those clauses, taken from the charter in favour of John Humble dated 8th November 1769, was—"To be holden the said piece of ground and houses erected or to be erected thereon of and under the said magistrates and town council and their successors in office for payment of one penny Scots yearly if asked allenarly, in feu-farm, fee, and heritage for ever, free of all the town's burdens, borough and county cess, stents, taxations, and all other public burdens of whatever kind now imposed, or hereafter to be imposed, and of all feu and blench duties, ministers' stipends, and schoolmasters' salaries imposed or to be imposed, and due and payable for or furth of the same in all time coming, the said Magistrates and Town Council and their successors in office being obliged to relieve the said John Humble and his foresaids of all the burdens generally and particularly before mentioned, excepting the said yearly feu-duty."

The pursuers *pleaded, inter alia*—"1. The said property of the pursuers being, in virtue of the contract between the predecessors of the pursuers and the predecessors of the defenders contained in the said feu-charters free of all public burdens of whatever kind imposed at the dates of the said charters or thereafter to be imposed, the pursuers are entitled to decree of declarator as concluded for, and to payment from the defenders of the sum sued for. 2. In respect that the burgh assessments, poor and school rates, and lunacy assessments are town's burdens or public burdens, or otherwise fall within the obligation of exemption and relief in the original feu-charters of the said property, the pursuers are entitled to decree of declarator and for payment as concluded for. 3. In virtue of the decree [in *Ainslie* v. *Magistrates of Edinburgh*] founded on, the liability of the defenders, of which declarator is sought in terms of the first conclusion of the summons, is *res judicata*, and the pursuers are entitled to decree in terms of the said first conclusion. 4. The defenders are barred by homologation, *rei interventus*, and usage, from opposing the conclusions of the summons, and decree should be granted in terms thereof."

The defenders pleaded, *inter alia*—"3. In respect that the obligation of relief in the said charters does not apply to the assessments and rates particularly specified (other than the poor rate to the extent condescended on) in the first conclusion of the summons, the defenders should be assoilzied from the conclusions of the action. 4. The pursuers being legally liable in the rates and assessments under dispute and having no right of relief other than as aforesaid, the defenders should be assoilzied from the conclusions of the summons. 5. *Separatim*, the pursuers are not entitled to recover from the defenders in virtue of said clause of relief the amount of any rates or assessments paid by pursuers to or on behalf of the tenants, except in so far as such rates or assessments are recoverable by said tenants from the pursuers in virtue of the law regulating such rates or assessments. 6. In any event, in respect that the pursuers have not transmitted said obligation of relief to their tenants by lease or otherwise, the pursuers are not bound to relieve their said tenants of occupiers' rates and assessments, or entitled to recover any amount thereof paid by them to or for their said tenants. 7. In respect that the same subject-matter does not now come directly in question, the decision in the case of *Ainslie* v. *The Magistrates of Edinburgh* is not *res judicata* against these defenders, and in any event it can form *res judicata* in favour of the pursuers only in so far as they are successors of Ainslie in his feu."

On 4th April 1919 the Lord Ordinary (BLACKBURN) after a proof pronounced the following interlocutor—"Finds and declares that the defenders are bound in all time coming to exempt and relieve the pursuers and their successors in the subjects mentioned in the summons from all town's burdens, burgh and county cess, stents, taxations, and all other public burdens of whatever kind now imposed or

hereafter to be imposed upon the said subjects or upon the proprietors and occupiers *qua* such or upon any tenants to whom they may be bound in relief thereof by the warrandice of their leases, and in particular from poor rates; assoilzies the defenders from the conclusions as to burgh assessments, school rates, and lunacy assessment; continues the cause to ascertain the sum which the pursuers are entitled to recover under the petitory conclusion of the summons in respect of said poor rates; reserves the question of expenses and grants leave to reclaim."

*Opinion* (from which the *facts* of the case appear)—"The pursuers are the owners of lands and buildings at the east end of Princes Street, which comprise the subjects now known as Nos. 10-14 Princes Street and Nos. 2, 4, 6, and 8 West Register Street. They were purchased by the pursuers in the year 1891 at the price of £85,000.

"The subjects in question are held of the defenders as superiors and include (1) parts of land originally feued out by their predecessors under a charter in favour of Charles Robertson, dated 8th November 1769; (2) the whole lands feued out by their predecessors under a charter in favour of John Humble of same date, and (3) the whole lands feued out by their predecessors under another charter in favour of John Humble, dated 21st February 1770.

"Before they acquired these subjects the pursuers' authors were themselves proprietors of other lands situated partly on and partly to the south side of Princes Street in the immediate vicinity of the lands in question. The defenders' predecessors desired to acquire these other lands for the town and a contract of excambion was entered into between them and the pursuers' authors, following on which the charters referred to were granted. One of the conditions of this transaction related to the rates and taxes payable by the vassals in respect of the subjects conveyed to them and is contained in the tenendas clause of each charter. These clauses although not expressed in precisely the same language are in similar terms, and I take that in the charter in favour of John Humble, dated 8th November 1769, as typical of all three. It is in the following terms:—. . . *quotes, v. sup.* . . .

"It is admitted that the obligation contained in this clause has been repeated in all the writs granted by the superiors renewing the investiture and that the pursuers are now in right thereof, but the parties are at issue as to its meaning and effect.

"The pursuers maintain that the clause is one of exemption, the effect of which was to enfranchise the subjects for all time coming from all taxes no matter by whom imposed and whether levied on the owner or occupier. In their summons they ask a declarator that the defenders are bound to exempt and relieve them 'from all town's burdens, burgh and county cess, stents, taxations, and all other public burdens of whatever kind now imposed or hereafter to be imposed upon the said subjects or upon the proprietors and occupiers *qua* such, and *in particular* from burgh assessments, poor and school rates, and lunacy assessment.' There follows in the summons a petitory conclusion for the sum of £932, 2s. 4d. which is the amount of the said burgh assessments, poor and school rates, and lunacy assessments levied on and paid by them and their tenants during the year 1915.

"The defenders, on the other hand, while they admit that the effect of the clause may originally have been to exempt the land from some assessments levied by the superiors themselves in their capacity as magistrates of the burgh and which were payable to the Common Good, maintain that *quoad* any other municipal assessments the clause is merely one of relief and must be construed as applicable only to taxes in existence at the date of the charter or to such more modern taxes as are similar to them in object and in incidence.

"The pursuers support their argument as to the meaning and effect of the clause by a reference to the construction which has been placed upon it by the defenders themselves from the date of the charters down to the year 1914. It is the fact that during that period of nearly 150 years practically all assessments payable both by owners and occupiers in respect of the subjects have been paid by the town.

"It will, I think, be convenient to refer at once to the history of this, which is remarkable. It divides itself into two periods, the one prior and the other subsequent to the year 1833.

"In that year the affairs of the City of Edinburgh having become embarrassed, trustees for the creditors were appointed by Act of Parliament to take over the town's estates and wind up the debts. These trustees refused to acknowledge any obligation to exempt or to relieve the properties in question from public burdens, and accordingly from 1833 to 1837, when the trust was brought to an end, the proprietors and tenants were compelled to pay the taxes and impositions leviable from them. Thereupon Alexander Ainslie, who was proprietor at that date of a portion of the pursuers' property which is included in the charter in favour of Charles Robertson and which is shown hatched in red on the plan produced with the summons, refused to pay to the trustees certain feu-duties in which he was liable to the town in respect of other properties belonging to him, and claimed right in virtue of the obligation in question to retain these feu-duties as against the taxes levied on him by the trustees. Thereafter in 1836 he raised an action of declarator against the trustees and the magistrates, which contained one conclusion in somewhat similar terms to that in the present action but applicable to the then existing taxes, and another that he was entitled to retain the feu-duties. I shall have to consider this case, which is reported 1839, 2 D. 64, and 1842, 4 D. 639, at some length hereafter, but in the meantime it is sufficient to say that the effect of the judgment was to find that one way or another the magistrates were bound to free the owner and occupier of the subjects of all the existing taxes with the ex-

ception of an improvement tax, which being of a 'temporary nature' was held not to fall within the obligation, but 'without prejudice to any question arising from the peculiar nature of any new tax which may be hereafter imposed.' It appears from the session papers in the case that up to the date of the action the method adopted by the magistrates of giving effect to the obligation had been to instruct the stent-masters, who were their servants and by whom the stent rolls which were the basis of taxation were prepared, to omit the subjects from the roll altogether. This ingenious plan must not only have enfranchised the property but also have freed the magistrates from the necessity of relieving their vassals of assessments which might otherwise have been levied upon them by the heritors or other bodies. At the date when the final judgment in *Ainslie's* case was pronounced the trust for creditors had come to an end and the magistrates being again in control of their own affairs were the only defenders in the action. In spite, however, of the reservation in the interlocutor as to 'new taxes' they continued to pay all assessments on the owners and occupiers of the subjects down to the year 1915 with the exception only of imperial taxes. They could no longer follow their previous plan of omitting the subjects from the roll, but they exempted the subjects from all assessments leviable by and payable to themselves and paid all other taxes levied on the subjects by any other assessing body. This includes all the assessments specially referred to in the summons. It was not until the year 1915 that it seems to have occurred to the defenders that the reservation as to new taxes in the interlocutor in *Ainslie's* case might apply to some of the taxes which they were paying, and accordingly they repudiated liability for the whole of the taxes specially mentioned in the summons. It is not surprising that such a course of dealing over so long a period led to the universal and popular belief that the properties in question were completely enfranchised, and that numerous transactions of a most onerous character have been entered into with regard to them on this understanding. The price paid for the subjects by the pursuers themselves and the rents paid to them by their tenants were all fixed and ascertained on this basis. If the effect of a clause of this character can be determined by the actings of parties it would be difficult to conceive a stronger case than that which the pursuers are in a position to present.

"Turning now to the clause itself, and leaving for future consideration the effect that usage may have upon its construction, it appears to me that the first thing to ascertain is whether its legal meaning is to exempt the lands or to bind the superiors in an obligation of relief, or whether it is partly the one and partly the other. I think the third alternative was the view taken by the Court in *Ainslie's* case, but unfortunately no attempt was made to mark the clear distinction which exists between exemption and relief or to indicate the particular assessments from which the vassals were supposed to be exempt and those from which the superiors were bound to relieve them. The result is a somewhat perplexing judgment, parts of which I have found it difficult to understand. I think it quite clear that the defenders' authors intended so far as lay within their powers to exempt the land from burdens of all kinds, and the position of the clause in the tenendas seems to support this impression. But both parties to the charter may have doubted whether the granters had any power to exempt, and they must at all events have realised that such powers as they might possess could not extend to all assessments. I think the obligation of relief, which applies generally to all the taxes specified in the clause, must have been intended to cover not only the burdens from which it was realised that the Magistrates could not grant exemption, but also those as to which their powers of exemption were considered doubtful or open to challenge. In other words, if exemption proved ineffectual the vassal could fall back upon the obligation of relief.

"There is no doubt that it was within the powers of the defenders' predecessors as superiors of the subjects in question to exempt them from feudal prestations. This does not concern the present question, but so far as the clause relates to feudal prestations it is effectual as a clause of exemption.

"There is, I think, equally little doubt that neither as superiors nor as magistrates vested with statutory authority to assess and levy taxes in the burgh for some particular purpose, had the defenders' predecessors any power whatever to exempt the subjects from such assessments. These are imposed by law, and exemption by either the superior or the assessing body would be quite ineffectual. It may be, as the Lord Advocate suggested, that in their joint capacity as superiors and magistrates they were entitled in giving a grant of property from the Common Good to exempt the subjects from assessments made for the purpose of reimbursing the Common Good for outlays on the town establishment. Such assessments are no longer levied. Accordingly, the conclusion I come to as to the legal effect of the clause is that while it effectually exempts the lands from certain feudal prestations and may originally have done so to a limited extent from certain burgh assessments, it is only effectual to-day so far as taxation is concerned as an obligation of relief.

"I do not think that this conclusion conflicts with anything decided in *Ainslie's* case. Dealing with the effect of the clause in his first interlocutor (2 D. 67) the Lord Ordinary (Lord Moncreiff) pronounced the following findings, the italics being my own—'Finds, that the clause is effectual to give both the pursuer and his tenants in the property *exemption and relief*, first, from all burdens, stents, or taxations, payable "for," or on account of the subjects of the feu-right, directly to the Magistrates of Edinburgh, or their collector, or which have come in place of taxes previously paid to them in the administration of the affairs of the city, whether the same are or are not

strictly payable "furth" of the said lands; and finds that it does specially comprehend the burgh and county cess: Finds, that it is effectual, secondly, to give *exemption or relief* from all feu and blench duties exigible either by the magistrates or by any other party as superiors at and prior to the constitution of the right other than the stipulated feu-duty: Finds that it is effectual, thirdly, to entitle the pursuer and his tenants *to relief* from all ministers' stipends and schoolmasters' salaries which may in any manner be exigible "for" the said lands or subjects.'

"The first of these findings deals with taxes levied by and payable directly to the magistrates, and recognises that the clause is effectual to give both exemption *and* relief from such taxes. Although the learned Judge does not discriminate between the taxes to which exemption and those to which relief apply, the finding seems to me to indicate clearly enough that in his opinion there were or had been taxes payable to the magistrates from payment of which they could exempt their vassals and others in which the only obligation effectual against them would be that of relief.

"The second finding relates to feudal prestations, and the third to assessments by bodies other than the magistrates. In the latter case the Lord Ordinary finds that it is only under the obligation of relief that any liability rested on the Magistrates.

"I do not think these findings are in any way inconsistent with the view I have expressed that to-day there is nothing left so far as concerns taxation but the obligation of relief.

"The next question I propose to consider is the effect of the clause as to tenants' taxes.

"It is with regard to this question that the decision in *Ainslie's* case has caused me most difficulty. It will be observed that in the findings already quoted the tenants, who were not parties to the action, are expressly dealt with as if they had a direct personal right of relief against the superiors. If the lands were exempted from taxation it is intelligible that the tenants should be free, but I am quite at a loss to understand how an obligation to relieve a vassal of taxes could be extended to give the vassal's tenants a direct claim of relief against the superior. But this appears to be the plain meaning of the third finding, and it is emphasised by the following passage in the interlocutor. Dealing with the question of retention, the Lord Ordinary found that the pursuer was entitled to retain his other feu-duties payable to the trustees against the taxes assessed on or paid by him 'or any tenants to whom he may be bound in relief thereof by the warrandice of their leases.'

"In the note attached to his interlocutor the Lord Ordinary says—'Whether the tenants could themselves claim relief of the taxes from the defenders may possibly admit of doubt. But assuming that they could, they could not plead retention of the pursuer's feu-duties due to the trustees for other feus. The point therefore must come to this, that in extricating the matter the pursuer must show that the exaction of the taxes from the tenants does in fact bring the burden upon him personally. It is on this point that the Lord Ordinary has found the most difficulty; and as the facts are not sufficiently explained, he has found it necessary to qualify the interlocutor so as to leave the point open.'

"This interlocutor was affirmed by the Second Division 'as to the effect to be given to the clause of exemption in the charter,' but a remit was made to the Lord Ordinary to hear parties further on the question of retention. Voluminous cases were lodged in which the effect and meaning of the clause was again fully canvassed on both sides. The Lord Ordinary then issued a second interlocutor (4 D. 640), in which he again found that the pursuer was entitled to retain the feu-duties with the same qualification as to tenants' taxes, and in which he inserted a fresh finding dealing with the effect of the clause. After referring to the previous interlocutors in the case, he 'finds and declares that the Lord Provost, Magistrates, and Town Council of the City of Edinburgh, as representing the said city and the community thereof, are bound to exempt or relieve the pursuer and his successors in the subjects libelled from all town's burdens, burgh and county cess, stents, taxations, and all other public burdens, of whatever kind, now imposed or hereafter to be imposed upon the subjects libelled, or upon the proprietors and occupiers thereof *qua* such, subject to the qualification as to tenants above expressed, and in particular from the special impositions libelled, with the exception of the improvement tax, without prejudice to any question arising from the peculiar nature of any new tax which may be hereafter imposed.'

"In form this interlocutor was recalled, but in effect it was affirmed and the above finding was incorporated *ipsissimis verbis* in the new interlocutor pronounced by the Division. This final interlocutor varies the former one by omitting the suggestion that the tenants have a direct claim against the superior; by finding that the vassal can claim against the superior for tenants' taxes where he himself has come under a similar obligation in his tenant's lease; and finally by reserving the question of subsequent taxation.

"I do not understand on what legal grounds this method of extending the superior's obligation to tenants' taxes can be justified, but had the pursuers in the present case undertaken any such obligation in their tenants' leases, I think that I should have been bound to follow the decision in *Ainslie's* case so far as to find the defenders liable under their obligation to relieve them of their liability to their tenants. The pursuers aver in the condescendence that the property has been let by them to their tenants on the footing that the same was free of taxes, and a proof was allowed on this point. This established without doubt that the rents were fixed on

the understanding that the properties were free from all municipal taxes. It was also stated that the burgh assessor in entering the subjects in the valuation roll made a deduction of 15 per cent. from the gross rent as representing the consideration paid for the exemption from taxation, and no evidence to contradict this was led by the defenders. Under these circumstances the pursuers have considered themselves bound to relieve their tenants, and have paid the municipal taxes levied on them. They may feel that they are under a moral obligation to do so, but this falls far short of a legal obligation such as was desiderated in *Ainslie's* case as a condition of their recovering the taxes from their superiors. In the absence of any such legal obligation to relieve their tenants the decision in *Ainslie's* case does not apply, and I know of no authority or legal principle to justify me in holding that the pursuers are entitled to recover tenants' taxes from the defenders.

"Assuming now that the obligation on the defenders, so far as present day taxation is concerned, is only one of relief, I have next to consider the taxes to which the obligation extends. I had not thought it doubtful that it was well settled by the law of Scotland that as an ordinary rule of construction an obligation of this character applied only to taxes exigible at its date, or to taxes becoming exigible thereafter similar in character and in incidence to those in existence at its date. After much litigation this was unanimously held to be settled by the whole Court in the case of *Scott* v. *Edmond*, 1850, 12 D. 1077, and this decision was afterwards approved in *Dunbar's Trustees*, 1878, 5 R. (H.L.) 221, 15 S.L.R. 772. In both these cases the clauses under consideration were as wide and as general in their terms as that now in question. But it was argued for the pursuers that these authorities must be reconsidered, if indeed they are not overruled, by the recent decision of the House of Lords in *Associated Newspapers, Limited* v. *City of London*, [1916] 2 A.C. 429. This case dealt with a statutory exemption 'from all taxes and assessments whatsoever,' and it was held that the exemption applied to all local taxes and assessments whether present or future, except so far as any act imposing a new tax qualified or repealed the exemption. I should have been slow to assume that a decision in an English appeal, in which no reference was made to the law of Scotland, was intended to override the result arrived at by a long train of Scottish decisions culminating in one by the House of Lords itself, but I am satisfied that the case referred to has no such effect. The Legislature which grants an exemption from taxation in an Act of Parliament retains the power to prevent the exemption being extended to include taxes imposed by supervenient legislation. The superior contracting with his vassal has no such power, and having made his bargain is bound by it for all time. Accordingly it appears to me that the considerations which apply to the construction of a clause of exemption in an Act of Parliament can have no application to the construction to be placed on a similar clause in a feu-contract.

"It was next argued for the pursuers that the rule that such a clause in a feu-contract is not to be construed as applying to supervenient legislation is founded on the presumed intention of the parties to the contract and that any presumption as to their intention must give way to the construction which they themselves have placed upon the obligation by their subsequent actings. This argument derives support from a passage in the judgment of the Lord Ordinary (Lord Cunninghame) in *Scott* v. *Edmond*. He states (12 D. p. 1083) that the general rule that an obligation of relief only refers to existing taxes applies 'unless it appear from a long course of payments and from the conduct of the parties that they themselves actually understood and admitted the obligation to comprehend new taxes enacted by subsequent laws.' His authority for this statement are the cases of *Ainslie* and *Reid* v. *Williamson*, 1843, 5 D. 644. I shall have to refer again to the former of these decisions, but the latter does not appear to me to afford any support to Lord Cunninghame's conclusion. The obligation in *Reid* v. *Williamson* was the usual one to relieve the vassal of certain named taxes and generally of all 'other public burdens whatever.' It was argued that poor's rates—the tax in question—not being in the enumerated list could not be held to fall under the general words. The Lord Ordinary (Lord Ivory) in refusing effect to this argument, which he appears to have done on general grounds, pointed to the fact that the superior had himself relieved the vassal of other taxes which were not specially referred to in the enumerated list, and accordingly that the conclusion that the general words might apply to poor's rates was only 'to follow out the charger's own principle of construction.' The ultimate decision that the obligation applied to poor's rates was on the ground that it was an existing public burden at the date of the obligation, and does not appear to have depended in any way whatever on usage.

"But the opinions of the other Judges in *Scott* v. *Edmond* do not appear to me to favour this part of Lord Cunninghame's opinion or to support the pursuer's argument. Lord Robertson, who gave the leading opinion, and with whom several eminent Judges concurred, assimilates an obligation of relief to an ordinary clause of warrandice. This undoubtedly can only refer to a state of matters existing at its date, for 'nothing can infer eviction or recourse but that which had a cause anterior to the warrandice'—*Watson*, 1667, M. 16,588; see also More's Notes to Stair, vol. i, note M. In my opinion *Scott* v. *Edmond* definitely decides that a clause in such terms as that now under consideration has a clear and unambiguous meaning which is independent of any presumed intention of the parties as to the construction to be put upon it. The pious hope expressed by the Lord President (p. 1087) that the question was finally at rest and might never be raised again is quite inconsistent with the

suggestion that every such clause is liable to be interpreted by the actings of the parties.

"Had such a method of construction remained open an admirable opportunity of giving effect to it was afforded by the subsequent case of *Dunbar's Trustees.* There the obligation was contained in two feu-charters dated 1803 and 1823. Down to 1875 the only relief demanded from or given by the superior had been from minister's stipend and schoolmaster's salary. By that date the whole character of the subjects had changed, a harbour having been made and a large village built on the lands feued. The vassals then for the first time claimed relief from road assessments and poor's rates, the annual amount of which was about three times that of the feu-duty payable to the superior. The case was admitted by all the Judges who took part in it to be a hard one for the superior, but the construction put upon the clause for far more than the prescriptive period availed him nothing, and he was found bound to relieve the vassals of poor's rates, which in the year in question amounted to £500 and were much in excess of the feu-duty. Lord Gifford in the Inner House stated the general paramount and governing canon of construction to be 'that the meaning and intention of the contracting parties as expressed in the contract must form the rule and the limit of liability,' and in addition to this general rule 'that unless the contrary be very clearly expressed the obligation will not apply to burdens or taxes imposed by future or supervenient laws.' These words were quoted with approval by Lord Hatherley in the House of Lords (5 R. 225), and seem to me to be conclusive that it is from the language of the contract alone that you can arrive at the intention of parties. It appears to me that it was on this ground that no effect was given to usage in the case, and not on the special ground that failure by the creditor in an obligation to enforce his rights does not necessarily imply abandonment.

"The subsequent case of *Jopp's Trustees* v. *Edmond* (1888, 15 R. 271, 25 S.L.R. 211), which was founded on by the pursuers as an authority for their proposed reference to usage, contains dicta by L.J.-C. Moncrieff and Lord Young which certainly do not support the view I have expressed as to the effect of the decision in *Dunbar's Trustees.* The facts of the case are somewhat complicated. In 1807 Jopp had acquired the tenant's part of a long lease of land granted in 1788 at a rent of £130. At the date of the action the lease still subsisted, and his trustees were the tenants under it. In terms of the lease the tenants were bound to free and relieve the proprietor of land tax, teind duties, stipend and augmentations thereof, and all other public burdens affecting the lands, and to pay the same annually and regularly and report discharges to the proprietor. In 1854 Edmond acquired the property, and being anxious to obtain full possession he took a sub-lease of the tenancy from Jopp's trustees. In terms of the sub-lease he was taken bound to pay 'the following rents, including the sub-tenant's share of public burdens.' It was also agreed in the sub-tack that Jopp's trustees should 'continue to pay the principal rent of £130 with the poor's rate for the lands as formerly, and shall also pay and free and relieve the proprietor of the feu-duty and other burdens specified in the principal tack.' From 1854 to 1884 the occupier's rates were paid by Edmond in addition to his rent, and the owner's rates were paid by Jopp's trustees. Edmond then claimed for the first time that in terms of the clause in the sub-lease the occupier's rates were included in the rent and should not have been paid by him in addition to the rent, and he raised an action accordingly. Jopp's trustees thereupon retaliated by raising an action of declarator that the clause of relief in the principal tack only applied to taxes existing at its date. These actions were heard together, and Lord Trayner (Lord Ordinary) substantially decided in favour of the pursuers in each action. The Second Division, however, reversed his interlocutors, and decided that the parties by their actings had construed the meaning of both clauses. The ground of decision in the case in which Jopp's trustees were pursuers was that the construction of the clause itself, coupled with the subsequent agreement between the parties contained in the sub-lease, created ambiguity as to the meaning of the contract between them. If there be ambiguity in the meaning of the contract a reference to usage for its interpretation is legitimate, but I do not think the clause in the present case now admits of other than one construction, and it follows that in my opinion the decision in *Jopp's Trustees* has no application. But the dicta of both the Lord Justice-Clerk and Lord Young go far enough to make me doubtful whether I have not over-estimated the effect of the decision in *Dunbar's Trustees.*

"The case of *University of Glasgow* v. *Kirkwood,* 1872, 10 Macph. 1000, 9 S.L.R 634, which was also founded on by the pursuers, and in which effect was given to usage in construing a clause of exemption, does not, I think, support the pursuers' argument. The obligation was contained in a series of royal grants ratified by Acts of the Scots Parliament. 'Such grants,' says Lord President Inglis (p. 1008) 'are liable to be controlled and explained by usage in the same manner and to the same effect as grants by Crown charters, grants of customs, dues or tolls on transit, and the like. These can only be enforced in so far as they are supported by usage. And in like manner an exemption such as we are dealing with at present can only be supported in so far as it is in conformity with the usage which has followed on the grant.' These words, used in justification of a reference to usage seem to indicate that in the Lord President's opinion such a reference would not be legitimate in order to ascertain the meaning of a clause of exemption or relief in a charter by a subject superior,

"So far then as actual decisions go, *Ainslie's* case, in which effect was undoubtedly given to usage, appears to me to stand alone. It is difficult to extract from the report to what extent the judgments

depend upon it. All that Lord Moncreiff claims for it in dealing with the taxes specially referred to in the summons is that they should not be 'disturbed by strained criticisms.' The taxes in question in 1836 as compared with those in existence in 1769 are conveniently shown in a table in the joint minute in the present case. The only ones with respect to which any question could be raised were poor's rate, police tax, Bridewell assessment, and improvement tax. The last of these was held not to be included in the obligation, being for 'temporary purposes,' and poor's rates is now decided not to have been a 'new' tax so that usage can have had nothing to do with the decisions as to these two. The Bridewell assessment, though it certainly appears to have been a new tax, only amounted to one shilling according to the statement by the Magistrates in their case, and cannot have been treated as a matter of much importance. There remains only the police tax. As the first Police Act was passed in 1771, and the City Guard was not abolished till 1817, and the incidence of the police tax and the City Guard assessment were entirely different, I do not think that any criticism directed to show that they were different taxes could be fairly described as 'strained.' But the question whether a tax is 'new' or merely a continuation of an old tax is one of fact and not of law, and in 1833 the police were undoubtedly discharging one of the duties which fell upon the City Guard in 1769, viz., that of watching, and to this extent at any rate the police tax might be regarded as a continuation of an existing burden. If usage was relied upon at all with reference to the taxes I think it can only have been with regard to this tax and founded on as establishing an admission in fact that the one tax was a continuation of the other. It is quite clear that the Court did not consider that usage had extended the obligation to all supervenient legislation for in addition to the exclusion of the improvement tax the question as to new taxes emerging after 1840 was expressly reserved. I think it is probable that the usage was mainly founded on for the extension of the obligation to include tenants' taxes, and this seems to have been the view of the case taken by Lord Cowan in *Wilson* v. *Magistrates of Edinburgh* (1868, 6 Macph. 483, at 488, 5 S.L.R. 312). I can suggest no other explanation for this extension, but even with regard to the tenants the Court placed a limitation on the usage that had been followed. But whatever be the extent to which the Court proceeded to interpret the obligation by reference to usage, I think that the decision of *Dunbar's Trustees* precludes me from applying a similar method of construction based on usage to the taxes which have come into existence since 1842.

"But I feel bound to follow the actual decision in *Ainslie's* case so far as it goes and so far as it can be applied to the present action, and it remains to consider how far this is the case.

"I think that I am bound to grant decree in terms of the general part of the declaratory conclusion of the summons which is taken *verbatim* from the final interlocutor in *Ainslie's* case, subject to this that it omits the qualification as to tenants which I shall restore in my interlocutor.

"As to the assessments specially referred to in the summons, the defenders admit liability for poor's rates so far as directly exigible from the pursuers. It was hardly disputed for the pursuers that school rates and lunacy assessment were new taxes. The latter was first imposed in 1857, and the former was held in *Stuart* v. *Earl of Seafield* (1876, 3 R. 518, 13 S.L.R. 318), to be a different burden to schoolmaster's salary.

"The principal discussion centred on the burgh assessments. Treated as a single indivisible assessment this is of course entirely different to any tax in existence either in 1769 or in 1836. But as the assessment form shows, the general assessment is divided into five heads, and the proportion of assessment applicable to each head is ascertained. I see no reason why in connection with the question in this case the assessments under each of these heads should not be regarded as separate assessments grouped together for purposes of administration and collection, but which can be quite easily extricated from the general assessment levied as burgh assessments (see *Islington Borough Council* v. *London School Board*, [1903] 2 K.B. 354). If any one of these heads represented an assessment levied either in 1769 or in 1836 I should be prepared to hold that the defenders were obliged to relieve the pursuers to that extent, on the ground that it either was a continuation of a former assessment or that it had been held to be so in *Ainslie's* case. The only head which has any resemblance to former assessments is the first, which is for general police purposes and is levied upon occupiers only. The purposes embrace watching, lighting, cleansing, fire-engines, public parks, baths, wash-houses, libraries, and various miscellaneous purposes. In 1769 there was no assessment in any way corresponding to this. In 1836 the police assessment, held to be included in the obligation by the decision in *Ainslie's* case, was levied on tenants, occupiers, and owners, and appears to have embraced only watching, cleansing the streets, the maintenance of order and of a fire brigade establishment. But the distinction now existing between the police rate in 1836 and to-day does not include all the changes which have taken place in the interval. In 1854 the police assessment was extended to include a rate for the Water of Leith Sewerage Works and in 1867 a general sewer rate and a rate for inprovement expenditure. In my opinion the present assessment for general police purposes is not only a 'new' tax as compared with those in existence in 1769 but one differing so entirely in character and in incidence from the police tax dealt with in *Ainslie's* case that I do not feel bound by the decision in that case to hold that it falls within the obligation. I may add that in *Scott* v. *Edmond* county police assessments created by Acts of Parliament subsequent to the decision in *Ainslie's* case

were held to be 'new' taxes. The result is that, in my opinion, the only one of the assessments specially referred to in the summons which falls under the obligation is the poor's rate. It will be necessary to continue the cause to ascertain the sum which the pursuers are entitled to recover under the petitory conclusion in respect of the poor's rates paid by them as owners, but meantime I shall pronounce an interlocutor in terms of the above findings and grant leave to reclaim."

The pursuers reclaimed, and argued—The Lord Ordinary was wrong and his interlocutor should be recalled. The clauses here in question were in plain and unambiguous terms. It was immaterial whether the right conferred was of exemption or relief. The words were absolutely universal; obviously great care had been taken to omit nothing. The words "of whatever kind" distinguished the clause from all others previously considered, and clearly indicated that what was covered was not only the future impositions of existing taxes but also taxes introduced by later legislation for the first time. On the plain meaning of the clauses the pursuers were entitled to succeed, and the observations of Lord Gifford in *Dunbar's Trustees* v. *British Fisheries Society*, 1877, 5 R. 350, at p. 369, 15 S.L.R. 227, applied. Apart from a consideration of the words themselves, the clauses in question had been interpreted by the actings of the parties. Apart from the period between 1833 and 1837 which led to *Ainslie* v. *Magistrates of Edinburgh*, 1839, 2 D. 64, and 1842, 4 D. 639, the usage of parties had been uniformly in favour of the pursuers' contention. The Court should be slow to give a meaning to a deed other than that which the parties had accepted and acted on practically since 1769. But in the present case usage was especially potent as a key to interpretation, for the question arose each year; further the usage had persisted in spite of the change from the stent to the valuation rolls. In the stent rolls the pursuers' authors were omitted: the subjects necessarily had to go into the valuation roll, and year after year the defenders assessed themselves in respect of the subjects. Further, the right had been challenged in the period between 1833 and 1837 and litigated in *Ainslie's* case, and thereafter the usage had still persisted. Even if *Dunbar's* case was not distinguishable upon the words of the deed and laid down an interpretation against the pursuers, the usage in the present case put a different interpretation on the words. The usage in the present case was consistent with the natural meaning of the words used. When there was no usage and the Courts had to construe the words merely, they endeavoured to discover the intention of the parties as expressed in the words, and they assumed that the words related to the then existing state of affairs and were meant to cover the then existing taxes and future impositions of those: it was not thought reasonable that the parties were bargaining about the unknown taxes which might come into existence in the future for the first time. The result was a canon of construction or a presumption whereby such words were considered not to cover new taxes imposed by supervenient legislation. That was the whole effect of *Dunbar's* case, 1878, 5 R. (H.L.) 221, 15 S.L.R. 772. Where usage existed the meaning of the parties ceased to be matter of conjecture or inference and became definitely fixed by the usage, consequently the canon of construction or the presumption had to yield to the usage. Whenever there was usage the Courts proceeded upon it and disregarded presumptions or conjectures as to the meaning. In *Sprot* v. *Governors of Heriot's Hospital*, 1829, 7 S. 682, the vassal had paid the taxes in dispute and the Court decided in accordance with that usage. *Scott* v. *Edmond*, 1850, 12 D. 1077, was a case of pure construction of the words and proceeded on conjecture, see Lord Robertson at p. 1085, but Lord Cunninghame at p. 1083 correctly stated the effect of usage. In *Hunter* v. *Chalmers*, 1858, 20 D. 1311, *per* Lord Cowan at p. 1317, the usage was not proved. In *Reid* v. *Williamson*, 1843, 5 D. 644, the decision was in favour of the interpretation set up by the usage. Lord Ivory, at p. 647, recognised *Ainslie's* case as proceeding upon usage, and Lord Fullarton, at p. 648, applied *Ainslie's* case. In *Wilson* v. *Musselburgh Magistrates*, 1868, 6 Macph. 483, 5 S.L.R. 312, the usage was against the vassal but the principle maintained by the pursuers was affirmed and *Ainslie's* case regarded as one example of its application—*per* Lord Cowan at p. 488. In the *University of Glasgow* v. *Kirkwood*, 1872, 10 Macph. 1000, 9 S.L.R. 634, usage again was decisive. *Jopp's Trustees* v. *Edmond*, 1888, 15 R. 271, 25 S.L.R. 211, was an express decision affirming the contention of the pursuers. In *Dunbar's* case there was no usage. The question as to the poor rates was regarded as fully covered by authority, and *quoad ultra*, there being no data to rebut the established canon of construction, the Court proceeded upon it. Usage was the best guide for the interpretation of ambiguous phrases in deeds, especially those of ancient date. Only ancient statutes could be so construed, but all contracts, including modern contracts, could be so construed; the usage need not be ancient—Dickson on Evidence, sec. 1087, referring to *Bruce* v. *Carstairs*, 1773, M. 2333, and *Attorney-General* v. *Drummond*, 1842, 1 Dru. & War. 53, *per* Lord Chancellor Sugden at p. 368; Broom's Legal Maxims, 8th ed., p. 529; *Chapman* v. *Bluck*, 1838, 4 Bing., N.C. 187; Beal, Rules of Legal Interpretation, 2nd ed., pp. 125-6; *Macgill* v. *Park*, 1899, 2 F. 272, 37 S.L.R. 203; *Sadlier* v. *Biggs*, 1853, 4 H.L. Cas. 435, *per* Lord Cranworth at p. 455. In England a clause in a statute similar to the present had been construed to cover all taxes—*Associated Newspapers Limited* v. *City of London*, [1913] 2 K.B. 281; [1914] 2 K.B. 603; [1915] A.C. 674; *Associated Newspapers Limited* v. *City of London*, [1914] 2 K.B. 822; [1915] 3 K.B. 128; [1916] 2 A.C. 429; *Sion College* v. *London Corporation* [1901], 1 Q.B. 617. There was no reason why a statute should be interpreted differ-

ently from a contract. *Ainslie's* case was directly in point; the usage was shorter but the decision was that all taxes, including those imposed by supervenient legislation, were covered. The reservation of new taxes of a peculiar nature implied that all ordinary new taxes were covered. *Sprot's* case had not been cited because in it the usage was against the wider interpretation. The point that it was *ultra vires* to grant exemption from taxes imposed by statute had been taken and was rejected. *Ainslie's* case was *res judicata* as regards the new taxes imposed up to its date; *quoad ultra* it was an authority covering the present case. As regards tenant's taxes the usage had again been uniformly in the pursuers' favour, and no distinction had been taken as between tenants and occupiers. The lands had been regarded as enfranchised no matter how they were used. *Ainslie's* case had decided that. Even if the claim in question only applied to the vassal it covered tenant's taxes if it was shown that the burden of those fell upon the vassal, which was the case when he had bound himself to relieve his tenants. If that was a change upon the original clause a written contract could always be modified by writing—Dickson on Evidence, sec. 1016 — and the leases and other writs plus the usage showed that even upon that view the obligation to relieve of those taxes had been set up. *Hunter's* case, *per* Lord Mackenzie at p. 1313, Lord Wood at p. 1316, and Lord Cowan at p. 1318, was directly in point. *Montgomerie* v. *Hamilton*, 1841, 3 D. 942, was in the pursuers' favour. *Latto* v. *Magistrates of Aberdeen*, 1903, 5 F. 740, *per* Lord M'Laren at p. 756, 40 S.L.R. 488, was distinguished.

Argued for the defenders—The clauses in question must be construed as clauses of relief. It could not be construed as an exemption of the lands, for at the date of the charters the town's burdens were imposed under statute, and the magistrate had no power to exempt from statutory provisions. The present clauses were historically both in fact and in form clauses of warrandice. They were regarded as warrandice clauses in all the earlier decisions and must be so construed. They must be therefore strictly construed, and had reference to the state of things existing at their date, *i.e.*, the risks to which it was then known the lands were exposed by way of increase in then existing taxes. It was quite unreasonable to suppose the clauses contained an indemnity against every possible tax which might be imposed in the future. The fair construction was just that which applied to a warrandice clause, viz., indemnification against any increase of the burdens existing at the date of the deed—Duff on Deeds, p. 89; Stair, ii, 3, 46; More's Notes, Note M, at p. xciii; Ersk. Inst. ii, 3, 29; *Watson* v. *Law*, 1667, M. 16,588. Consequently such clauses were construed to cover future impositions of taxes existing at their date, but not new taxes imposed by supervenient legislation—*Elliot* v. *Lothian*, 1824, 3 S. 348, N.S. 248; *Sprot's* case; *Scott* v. *Edmond*; *Preston* v. *Magistrates of Edinburgh*, 1870, 8 Macph. 502, 7 S.L.R. 291; *Dunbar's* case; *Latto's* case. That was in effect construing the clauses in the light of what the parties had in contemplation. "All" was not universal. The *Associated Newspapers* case had no bearing on the present question, for exemption was always legitimate and possible for the Legislature but never for the parties to a private contract. In the present case there was no room for the application of usage as an aid to construction. An appeal to usage was competent only when the words were ambiguous—Dickson on Evidence, referring to *Magistrates of Dunbar* v. *Heritors of Dunbar*, 1835, 1 Sh. & M'L. 134, *per* Lord Brougham at p. 195; Broom, *op. cit.*; Beal, *op. cit.*; *North-Eastern Railway Company* v. *Hastings*, [1900] A.C. 260, *per* Lord Halsbury at p. 263. Here there was no ambiguity, for even if such clauses were originally ambiguous they had received a fixed and definite meaning by the series of cases ending in *Dunbar's* case. If usage was appealed to in the present case it was to contradict that crystallised meaning. Further, usage could not be appealed to to construe modern deeds—*Scott* v. *Howard*, 1881, 8 R. (H.L.) 59, *per* Lord Watson at p. 67, 18 S.L.R. 454. The rule that such clauses as the present did not apply to taxes imposed by supervenient legislation was difficult to apply, and when usage was appealed to it was solely to decide what were taxes imposed by supervenient legislation and what were not. Usage had never been utilised to decide whether or not such a clause covered taxes imposed by supervenient legislation. In *Bruce's* case usage was considered to determine the meaning of "public burden." The same applied to *Reid's* case and *Scott's* case. *Wilson's* case did not depend on usage. *Kirkwood's* case turned on specialties. In *Hunter's* case the question was, was the poor rate after 1845 a rate imposed by supervenient legislation? *Jopp's* case turned on the specialty of the sub-lease, and in it *Dunbar's* case was applied *per* Lord Traynor at p. 276. That case contained no more than dicta which were against the defenders, and there was no decision applying usage for the purpose which the pursuers sought to apply it. Had usage been available for that purpose it was difficult to understand why usage had not been pleaded in *Williamson's* case, *Dunbar's* case, and *Latto's* case, where it would have afforded an easy solution. In the present case the usage existed, because the attitude of the Courts as to what were taxes imposed by supervenient legislation had hardened in the course of time. That explained why the usage included some taxes which would now be regarded as supervenient. But the usage as a whole was to be explained as being due to the belief that the taxes in question were not supervenient. If usage could be appealed to it would not in the present case support the contention of the pursuers, viz., that all supervenient taxes were covered. For that it would be necessary to prove usage with regard to every supervenient tax as it was imposed. The usage must be flawless, and if it applied to some only of the supervenient taxes it was useless for the pur-

suers' purpose. Here there was no such uniformity of usage. *Ainslie's* case could not have meant that the clause applied to all supervenient taxes, because if so it would have covered the improvement tax. The truth was that the taxes of a peculiar kind referred to in *Ainslie's* case were just taxes superveniently imposed. The other defect in the usage was the case of the public water rate. From that the defenders had never relieved the pursuers. *Ainslie's* case was not in that connection against the defenders. It merely raised the question of what taxes were the modern equivalents of the older taxes existing at the date of the charters. Lord Moncreiff in that case considered the improvement tax to be of a peculiar nature because it had no earlier prototype, *i.e.*, it was supervenient. That was clear from Lord Moncreiff's opinion in *Scott's* case (*cit.*) at p. 1086. Further, any usage subsequent to *Ainslie's* case could not avail the pursuers, for in that case the defenders had tabled their opposition to the wider view of the clause. Such usage alone was founded on by the pursuers, for the taxes now in question were different from those in *Ainslie's* case. Further, usage was useless in the case of recently imposed taxes. In any view usage only gave a right to relief in so far as it had actually been operating, and it was competent to split up a consolidated rate in order to distinguish its parts—*Sion College* v. *London Corporation; Islington Borough Council* v. *London School Board*, [1903] 2 K.B. 354—and to consider how far usage applied to each. The clauses in question had no effect as regards tenant's and occupier's taxes. There was no authority to the contrary, unless it be *Ainslie's* case. That case was on a different clause and applied to different taxes, and was very special—*Wilson's* case (*cit.*), *per* Lord Cowan at p. 488. If it did decide that question the decision was erroneous. The clauses were plainly in favour of the vassals only. They neither expressly nor inferentially applied to tenants. *Hunter's* case raised no question of tenant's rates. In *Nesbit* v. *Lees*, 1869, 7 Macph. 881, 6 S.L.R. 569, the decision was as to owner's rates. *Latto's* case decided that the right of relief was co-extensive with the feudal relationship. Consequently it could not extend to that of landlord and tenant. Such an obligation was personal in character, and could only be enforced by the vassal—*Maitland* v. *Horne*, 1842, 1 Bell's App. 1; *Sinclair* v. *Marquis of Breadalbane*, 1846, 5 Bell's App. 353; *Spottiswoode* v. *Seymer*, 1853, 15 D. 458; *Stewart* v. *Duke of Montrose*, 1863, 1 Macph. (H.L.) 25, 4 Macq. 499; *Campbell's Trustees* v. *Dingwall*, 1865, 4 Macph. 50, *per* Lord President M'Neill and Lord Curriehill at p. 55, 1 S.L.R. 31. In *Wilson's* case that claim had been negatived. Usage was unavailing here, for it would contradict the clause in question. In any event tenant's taxes would only be covered in so far as the vassal had taken burden upon himself for those. Of that in the present case there was no evidence.

At advising—

LORD PRESIDENT—I am unable to agree with the conclusion reached by the Lord Ordinary in this case. The ground on which I differ from him is that I consider the words of the contract, on the just interpretation of which the controversy turns, are not in themselves ambiguous; and that on the assumption that they must be presumed to bear a meaning which they do not in themselves convey, that presumption has, by the usage and actings of the parties extending over about a century and a half, been overcome. In short, inveterate usage of the parties demonstrates that they interpret the words of their contract according to their natural meaning. This contract, construed by the parties' actings, means exactly what it says—neither more nor less. In 1769 the Magistrates of Edinburgh contracted with the predecessors in title of the pursuers that the lands to which the action relates were to be free of "all public burdens of whatever kind, now imposed or hereafter to be imposed" in all time coming; and they undertook to relieve the owners of all these burdens. This obligation the Magistrates of Edinburgh faithfully observed year by year for the long period I have mentioned. And we are now asked to say that they were in error when they did so, and that their contract did not (as they supposed) mean what it says. When the Magistrates of Edinburgh undertook to relieve the pursuers' predecessors of all burdens imposed or to be imposed it is said they did not mean all burdens to be imposed, but only such burdens as were not imposed by laws passed subsequent to the date of the contract. Burdens imposed by supervenient legislation are, it is said, excluded from the obligation because, as Lord Robertson points out in *Scott* v. *Edmond* (1850, 12 D. 1077, at p. 1085) "they could not have been in the view of the parties when entering into that contract." "... Clauses to have this effect must be very clearly expressed, and under such general words as 'imposed or to be imposed' total relief from new and unthought of burdens is not to be presumed." But if the actings of parties show distinctly that they had such burdens in view when they made their contract, and that they meant precisely what they said, then it follows that relief from burdens imposed by supervenient laws would be presumed. The parties to the contract have so willed it as evidenced by their words and acts. "The general rule is," said Lord Cuninghame in *Scott* v. *Edmond* (12 D. at p. 1083), "that such obligations of relief only comprehend burdens imposed on the ground under existing laws, and not under later and recent enactments, unless it appear, from a long course of payments and from the conduct of the parties that they themselves actually understood and admitted the obligation to comprehend new taxes enacted by subsequent laws." This statement of the law I take to be sound and it is directly applicable to this case. Confessedly there is no decision to the contrary. In support of it Lord Cuninghame cites the very case we have before us as seen in *Ainslie* v. *Magistrates of Edinburgh* (1839, 2 D. 64, and 1842, 4 D. 639), and in the case of *Wilson* v. *Magistrates of Musselburgh* (1868, 6 Macph. 483 at p. 488, 5

S.L.R. 312), Lord Cowan said, referring to the case of *Ainslie* and to the clause of the contract now before us, "from the date of this contract, in 1769 till 1833, the proprietors and tenants of the houses and shops built on the property enjoyed the exemption or received the relief stipulated for, of every manner of town's burdens, inclusive of poor-rates. The transaction between the parties had thus been interpreted by the best of all interpreters—that of contemporaneous and continuous exemption for more than sixty years. When a different effect was proposed to be ascribed to the obligation in 1833 for the first time the Court had no difficulty in recognising the same privilege and exemption. The passage in Lord Moncreiff's note, therefore, on which stress was laid at the debate, admitting it to apply to taxes and assessments imposed upon tenants or occupants of the subjects, cannot be held a precedent by which to judge of the true construction of such a clause as that in the feu-contract now before the Court. The decision was pronounced in circumstances altogether special, which Lord Moncreiff is at pains to explain fully in the note to his interlocutor; for the Magistrates, he says, had power to grant, and did grant, for what was considered a full onerous consideration, 'a most important privilege to the vassal, which must of necessity have entered seriously into the estimate of the rights and considerations given to them in return'; and further, after sixty-eight years, during which the relief claimed in the action had been recognised, it was too late to consider whether the consideration was adequate or not."

If this be good law, and if it describes with accuracy, as I think it does, the effect of the decision in *Ainslie*, then undeniably the pursuers are entitled to our judgment. For the Lord Ordinary very justly observes in his opinion that, "If the effect of a clause of this character can be determined by the actings of parties it would be difficult to conceive a stronger case than that which the pursuers are in a position to present." Although it is perhaps not accurate to say that the question was contested and decided in *Ainslie* its decision is, I think, involved in the judgment there. The pleas of the Magistrates are set out in detail in the report (2 D. pp. 66-67). But there is no plea to the effect that their obligation of relief does not extend to burdens imposed by supervening legislation. The burdens which they were found liable to bear embrace all the burdens laid on at that date (1839) whether by laws passed subsequent or anterior to 1769. The only burden from which they sought, and in the judgment of the Court obtained, exemption, was an improvement tax, and that on the ground that it was "laid on for a temporary purpose, with a view to the advantage of individual inhabitants, and from which the Magistrates and Council, as a Corporation, derive no benefit." As appears from his note Lord Moncreiff seems to have felt considerable doubt about the soundness of his view relative to this improvement tax. But the magistrates obviously thought that the clause of relief embraced this burden also, for we were informed that they never took advantage of their exemption, but continued to relieve the feuars of this tax. The grounds of judgment in the case of *Ainslie* are summed up in the following passage from Lord Moncreiff's opinion, viz.—"The question, what taxes are covered by the obligation, may possibly admit of difference of opinion, but the Lord Ordinary thinks that the clause must be fairly interpreted according to its plain meaning, and that after such a possession as that which has taken place here without objection, in the course of which various sales and leases of the most onerous character must have passed on the faith of it, it is not to be disturbed by strained criticisms, and it has appeared to him that it does comprehend the various taxes referred to in the interlocutor. Perhaps it may be thought that it should comprehend the improvement tax also, but, on the whole, he thinks that it should not, for the reason expressed in the interlocutor."

Now the various taxes referred to in the interlocutor embraced some which were imposed by laws passed subsequent to the date of the contract. Assuming then that if we are to confine our attention to the plain words of this contract we must presume that the parties meant what they did not say—that burdens imposed by supervening legislation were excluded from the obligation—I hold it to be well-settled law that it can be shown by the actings of the parties that they meant what they said, and that they did have in contemplation what they are presumed not to have had in contemplation. The proposition in law is, as I think, so obviously correct that no further authority need be cited in support of it. But I mention only the case of *Jopp's Trustees* v. *Edmond*, 1889, 15 R. 271, 25 S.L.R. 211, because of all the decisions brought under our notice it appears to me most apposite. For there the Lord Ordinary, disregarding usages and actings extending over a long period of years, decided adversely to one of the parties on the authority of *Dunbar's Trustees*, 1877, 5 R. 350, 15 S.L.R. 227; 1878, 5 R. (H.L.) 221, 15 S.L.R. 772. That was his sole ground of judgment. The Inner House reversed this decision on the ground that the rule laid down in *Dunbar's Trustees* was not applicable where the parties to the contract had by their actings placed a different construction on the clause of relief. Nothing could be clearer than the opinion of Lord Justice-Clerk Moncreiff, who says—"It is said by *Jopp's Trustees* that the obligation of relief in the original tack only extends to burdens existing at the date of the tack, and they found on the case of *Dunbar* and similar cases as showing that claims of relief are held not to extend, in the absence of express words, to burdens to be imposed by subsequent legislation. If necessary, I should have held that contention to be well founded, and should have held that the principle of *Dunbar's Trustees* v. *British Fisheries Society et e contra*, 5 R. 350, which was affirmed July 12, 1878, 5 R. (H.L.) 221, ruled the present, viz., that where there is an obliga-

tion of relief between superior and vassal or disponer and disponee—for I think it makes no difference—the presumption is that the obligation refers to existing burdens and not to burdens to be imposed by subsequent legislation. But I am of opinion that the clause is to a certain extent ambiguous, and while my impression is that it does not cover after-imposed burdens, the parties have gone on without raising the question whether it does or does not for a long period, and the matter must be held to be ruled by the actings of parties who by their actings have construed its meaning. Whatever the law might have been held to be, if at once appealed to, the parties have acted on a certain meaning as the meaning of the obligation, and Jopp's trustees have paid for many years the public burdens they now bring into question."

And Lord Rutherfurd Clark states the ground of judgment in a single sentence thus—"I think we must hold that the contracts should be construed as the parties themselves construed them for a long course of years '—especially in this case, I would add, if the parties have construed them according to their plain and natural meaning. It was not disputed by counsel for the defenders that this decision is directly in point. Its soundness was not questioned. It applies, I think, in terms to the case before us, and I am disposed to follow it.

I may sum up my view of this case thus, First, I hold that the words of the clause of relief in the contract before us are clear and unambiguous although by judicial interpretation they must now be presumed, standing by themselves, to have a meaning different from their natural meaning. Second, I hold that the actings of parties over a long course of years have been in perfect harmony with the plain and natural meaning of the clause and have displaced the presumption set up by judicial decision as to its true meaning. In other words, I hold that the presumption may be redargued, and in the present case has been redargued by the actings of the parties.

I am not disposed to grant a declarator in the terms sought in the summons, which merely re-echoes the clause in the feu-contracts, but I think we should confine our declarator to the burdens specially mentioned in the summons, to which alone the controversy is confined. The question whether the relief from these burdens extends to occupants as such was decided in the affirmative in the case of *Ainslie*. Lord Moncreiff found that the clause was effectual to give both the proprietor and his tenants in the property the relief there claimed. His judgment was affirmed by the Second Division, the Lord Justice-Clerk observing—"The Lord Ordinary appears to me to have decided rightly upon the nature and effect of the obligation." We were not invited to send this question for reconsideration to a larger Court. That being so, we are, I think, bound to follow the judgment in *Ainslie's* case, which for my own part I think was sound. I propose that we should pronounce an interlocutor in the following terms. [*His Lordship stated the terms of the interlocutor quoted infra.*]

LORD MACKENZIE—My opinion may be expressed in the language used by Lord Rutherfurd Clark in *Jopp's Trustees* v. *Edmond* (1888, 15 R. 271, at p. 282, 25 S.L.R. 211)—"I think we must hold that the contracts should be construed as the parties themselves construed them for a long course of years." I refer to the following passage in the Lord Ordinary's opinion—"If the effect of a clause of this character can be determined by the actings of parties it would be difficult to conceive a stronger case than that which the pursuers are in a position to present." The Lord Ordinary, however, feels that the decision in *Dunbar's Trustees* v. *British Fisheries Society* (1877, 5 R. 350, 15 S.L.R. 227; 1878, 5 R. (H.L.) 221, 15 S.L.R. 772) precludes him from applying the method of construction based on usage to the taxes in question, which have come into existence since 1842. His Lordship refers to *Scott* v. *Edmond* (1850, 12 D. 1077) as deciding "that a clause in such terms as that now under consideration has a clear and unambiguous meaning which is independent of any presumed intention of the parties as to the construction to be put upon it." The Lord Ordinary also refers to the fact that the opinion of Lord Gifford in *Dunbar's Trustees* was quoted with approval by Lord Hatherley in the House of Lords. Lord Gifford said—"Unless the contrary be very clearly expressed the obligation will not apply to burdens or taxes imposed by future or supervening laws." The Lord Ordinary says these words seem conclusive "that it is from the language of the contract alone that you can arrive at the intention of parties."

The case law is what has caused the Lord Ordinary difficulty, and it is therefore necessary to examine the cases in order to see how far they go. The words to be construed are —"To be holden the said piece of ground and houses erected or to be erected thereon of and under the said magistrates and town council and their successors in office for payment of one penny Scots yearly if asked allenarly, in feu-farm, fee, and heritage for ever, free of all town's burdens, borough and county cess, stents, taxations, and all other public burdens of whatever kind now imposed or hereafter to be imposed, and of all feu and blench duties, ministers'stipends, and schoolmasters' salaries imposed or to be imposed and due and payable for or furth of the same in all time coming." Now Lord Gifford in *Dunbar's Trustees* says that the paramount and governing canon applicable to clauses of relief is that the meaning and intention of the contracting parties as expressed in the contract must form the rule and limit of the liability. The words above quoted, if read in their ordinary and natural meaning, are as wide as words can be—the ground is to be held free of all public burdens of whatever nature now imposed or hereafter to be imposed. It must be borne in mind that the contract in *Dunbar's* case provided for a feu-duty of £169, and it was with reference to this that Lord Gifford said—"It is not to be presumed, and I scarcely think it can be maintained in the

present case, that Sir Benjamin Dunbar in 1823 warranted that his vassal should be free from all future taxation which the Legislature might at any time impose." In the present case we are dealing, not with an individual but with a Corporation, and there is no information as to the advantages which the Corporation secured in the bargain they made in 1769. Lord Gifford goes on to say—"The general rule that clauses like those contained in the present charters do not apply to or include burdens imposed by future and supervening laws, is, I think, completely settled by the case of *Scott* v. *Edmond*, which was carefully considered by the whole Court, and by the other cases to which your Lordship has adverted. I am not sure that it would be safe to lay down any other general canon, apart from the special circumstances of each case." Lord Gifford's opinion therefore clearly implies that the rule laid down in the previous cases was only a general rule, and that there may be special circumstances which affect its applicability. When the case went to the House of Lords the Lord Chancellor said he saw no reason to dissent from the course of decision in the Court of Session which Lord Hatherley described as laying down a reasonable rule.

The case of *Scott* v. *Edmond* shows the limitation of the general rule. The Lord Ordinary (Cuninghame) says—"The general rule is that such obligations of relief only comprehend burdens imposed on the ground under existing laws, and not under later and recent enactments, unless it appear from a long course of payments and from the conduct of the parties that they themselves actually understood and admitted the obligation to comprehend new taxes enacted by subsequent laws. On that ground the cases of *Elliot* against *Lord Lothian* in 1824 and of *Sprot* v. *Heriot's Hospital* in 1829 were decided in favour of the superior, while the cases of *Ainslie* in 1839 and of *Reid* and *Williamson* in 1843 received a different determination, apparently solely in respect of the vassal's long possession and of the recognition by the superior for a long tract of years of the vassal's right to relief." A long course of payments and the conduct of parties are therefore relevant to the question what burdens was it that parties had in contemplation when the contract was entered into. This is made clear in the opinion of the Lord Justice-Clerk (Lord Moncreiff) in *Jopp's Trustees*. The importance of the Lord Justice-Clerk's view is that he was one of the Judges who decided the case of *Dunbar's Trustees*. The passage is as follows—"It is said by Jopp's Trustees that the obligation of relief in the original tack only extends to burdens existing at the date of the tack, and they found on the case of *Dunbar* and similar cases as showing that claims of relief are held not to extend, in the absence of express words, to burdens to be imposed by subsequent legislation. If necessary I should have held that contention to be well founded, and should have held that the principle of *Dunbar's Trustees* v. *British Fisheries Society et e contra*, 5 R. 350, which was affirmed July 12, 1878, 5 R. (H.L.) 221, ruled the present, viz., that where there is an obligation of relief between superior and vassal or disponer and disponee—for I think it makes no difference—the presumption is that the obligation refers to existing burdens and not to burdens to be imposed by subsequent legislation. But I am of opinion that the clause is to a certain extent ambiguous, and while my impression is that it does not cover after-imposed burdens, the parties have gone on without raising the question whether it does or does not for a long period, and the matter must be held to be ruled by the actings of parties who by their actings have construed its meaning." In the opinion of Lord Young, what the parties did ascertains what they understood and with reference to what they contracted. Lord Craighill concurred. The judgment of Lord Rutherfurd Clark is referred to in the opening sentence of the present opinion.

The views entertained in the earlier cases as to usage are illustrated by a reference to Lord Ivory's note in *Reid* v. *Williamson* (1843, 5 D. 644, at p. 647)—"The late case of *Ainslie*, 19th November 1839 (2 Dunlop 64), is so far an authority to the same effect, for there too there was no special mention of poor rates in the clause of relief, and yet by dint of construction of general words contained in the clause the relief was held to extend to poor rates not less than to the specified taxations. No doubt in that case the interpretation thus given effect to was aided by a reference to the usage of the parties as further explanatory of their meaning." The explanation of *Ainslie's* case (1839, 2 D. 64, 1842, 4 D. 639) given by Lord Cowan in *Wilson* v. *Magistrates of Musselburgh* (1868, 6 Macph. 483, at p. 488, 5 S.L.R. 312) is entirely against the contention of the present defenders. Lord Cowan says that *Ainslie's* was a very special case—"From the date of this contract, in 1769 till 1833, the proprietors and tenants of the houses and shops built on the property enjoyed the exemption or received the relief stipulated for of every manner of town's burdens inclusive of poor rates. The transaction between the parties had thus been interpreted by the best of all interpreters—that of contemporaneous and continuous exemption for more than sixty years. When a different effect was proposed to be ascribed to the obligation in 1833 for the first time the Court had no difficulty in recognising the same privilege and exemption. The passage in Lord Moncreiff's note therefore on which stress was laid at the debate, admitting it to apply to taxes and assessments imposed upon tenants or occupants of the subjects, cannot be held a precedent by which to judge of the true construction of such a clause as that in the feu-contract now before the Court. The decision was pronounced in circumstances altogether special, which Lord Moncreiff is at pains to explain fully in the note to his interlocutor."

It was not until forty-seven years after this decision in *Wilson's* case that the Magistrates put forward the contention that the feu-contracts here in question did not contain what it had previously been held they

did, viz., exemption or relief of every manner of town's burdens. It is instructive to observe that although the Lord Advocate now contends on behalf of the town that the clause excludes any burden imposed by supervenient legislation this was not the town's argument in *Ainslie's* case. They did not then repudiate the idea that the language of the clause gave total exemption. They only said that it was illegal for them so to exempt the subjects feued.

The points which Lord Cowan emphasises are to be found in the opinion of Lord Moncreiff in *Ainslie's* case, in which, speaking in 1839, Lord Moncreiff said—"There can be no doubt that the magistrates, as proprietors of the ground, had power to grant a feu-right for onerous considerations. They did grant such a right sixty-eight years ago, evidently upon what was considered as a full onerous consideration; and it is surely too late now to inquire whether it was really adequate or not. In doing so they chose to grant a most important privilege to the vassal, which must of necessity have entered seriously into the estimate of the rights and considerations given to them in return. That privilege immediately or very soon took effect, and it is not denied that from the first constitution of the feu in 1769 till 1833 the proprietors and tenants of the property have without exception enjoyed the exemption or received the relief which is here claimed." The interlocutor pronounced by Lord Moncreiff accordingly "finds that the clause is effectual to give both the pursuer (Ainslie) and his tenants in the property exemption and relief—first, from all burdens, stents, or taxations payable 'for,' or on account of the subjects of the feu-right, directly to the Magistrates of Edinburgh or their collector, or which have come in place of taxes previously paid to them in the administration of the affairs of the city, whether the same are or are not strictly payable 'furth' of the said lands, and finds that it does specially comprehend the burgh and county cess: . . . Finds that under these heads the right of exemption or relief applies to all the particular taxes mentioned in the summons and defences, except that which is described as 'improvement tax': Finds that that tax having been imposed by special statutes, and put under the administration of statutory commissioners for particular and temporary purposes, supposed to be for the general benefit of the community or some classes thereof, apart from the maintenance of the permanent establishment of the city, the general words of the clause of exemption and relief cannot be held to extend to a tax of so special and peculiar a nature." The particular taxes mentioned in the summons were "city cess, impost duty, annuity tax, poor's rates, police tax, improvement tax, cholera tax, Bridewell assessment, and road money." It was argued that the improvement tax was excepted as of a peculiar nature because it did not come in place of taxes previously paid, and that therefore Lord Moncreiff's interlocutor (which was affirmed by the Inner House) really was intended to except taxes imposed by supervenient legislation. It is impossible to reconcile this theory with the fact that Lord Moncreiff's interlocutor expressly found that the pursuer was exempt from police tax, which it is conceded did not come in place of a tax previously paid. In spite therefore of the argument founded on Lord Moncreiff's opinion in *Scott* v. *Edmond*, where it is suggested taxes imposed in virtue of supervening laws and taxes of a peculiar nature are used as synonyms, I construe the interlocutor in *Ainslie's* case as containing a general finding of exemption with an exception of taxes of a special and peculiar nature which would not apply to burgh assessments, school rates, and lunacy assessments. Though the judgment in *Ainslie* is not *res judicata* applicable to the whole of the subjects it is a decision exactly in point, and the interlocutor of the Lord Ordinary was affirmed by the Inner House. The effect of usage is dealt with in *Associated Newspapers, Limited* ([1916] 2 A.C. 429, at p. 440), where it is said that "before resort can be properly invoked to what has been called 'contemporaneous exposition,' it is essential to show that the interpretation relied on has been distinct and has been substantially uniform." In that case, as here, it sufficiently appeared that the exemption was from local as distinguished from imperial taxes. The argument for the pursuers is that usage in such a case as the present is analogous to possession in a question of prescription, *tantum prescriptum quantum possessum*, and that explicative usage cannot be extended beyond the taxes which it expounds. It appears to me that if the usage has only been consistent with a construction of the feu-contract which means total exemption except as regards the improvement tax, then the parties have by their actings for 150 years construed their own contract. This is so even if the construction of such a clause forms part of the chapter of the law of warrandice. Burgh assessments in their modern form depend on the Statute of 1879; school rates until recently were the result of the Act of 1872; and lunacy assessment is imposed under an Act of 1913. The meaning of the clause in the feu-charters having been established, these rates and assessment fell under its terms. The point attempted to be made in regard to water-rates does not appear to me to affect the construction of the contract. Any payments that the vassals made before 1874 were in conformity with the obligation imposed on them by their charters. The payments made since then do not matter.

Upon the separate question of the position of the tenants the interlocutor in *Ainslie's* case above quoted is against the defenders here. There is no difference between owner and occupier in so far as the treatment by the corporation of the subjects feued. It was the subjects that were to be immune, and the Magistrates originally took the best possible course to show that this was their meaning by omitting them from the stent roll altogether. Later on they gave effect to the exemption stipulated by making payment in relief. As

regards this part of the case the parties by their actings have construed their contracts. Upon the whole matter I am of opinion that the pursuers are entitled to decree of declarator as regards burgh assessments, poor and school rates, and lunacy assessments.

LORD SKERRINGTON—The first question which we have to decide is whether the Lord Ordinary was right in thinking that in endeavouring to arrive at the true meaning and legal effect of the obligations to relieve from public burdens contained in the three feu-charters in favour of the pursuers' authors he must shut his eyes to the manner in which the superiors and vassals have interpreted their agreements by a long continued and consistent course of conduct from the creation of the feu-rights in the years 1769-70 down to the present time. The Lord Ordinary recognised, I think, that the evidence which he felt himself compelled to disregard would, if it were admissible, be extremely material and valuable. As a general rule *contemporanea expositio* may legitimately be appealed to as throwing light upon the question which of two possible constructions of a writing was the one which the parties contemplated and intended, and the cases of *Jopp's Trustees* v. *Edmond* (1888, 15 R. 271, 25 S.L.R. 211), and *Ainslie* v. *Magistrates of Edinburgh* (1839, 2 D. 64, 1842, 4 D. 639), are illustrations of the application of this rule to the interpretation of obligations of relief from public burdens. The present is a peculiarly favourable case for admitting such evidence, and that for two reasons. In the first place, Mr Ainslie, the pursuer in the case last cited, was the owner of a portion of one of the three adjoining feus at the north-east extremity of Princes Street which together make up the property of the present pursuers as described in their summons. The obligations of relief in the three feu-charters are substantially, though not verbally, identical. In the second place the pursuers appeal to usage, not for the purpose of imposing any unnatural or secondary meaning upon a written agreement, but in order to rebut a presumption established by a long series of decisions to the effect that obligations of relief from public burdens contained in a feu-charter or conveyance of land ought to receive an exceedingly limited construction and one which appears to be contrary to the natural and primary signification of the language used by the contracting parties. It would be idle to consider whether the application of a general presumption or canon of construction to all transactions falling within a particular category, *e.g.*, to purchases of land or again to discharges, is a safe way of arriving at what was really in the minds of the contractors, or whether it might not have been better to avoid wholesale methods in the case of transactions which though superficially alike are often individually very dissimilar. Though one may dislike some of the technical rules of our system of conveyancing, it would be unfair and inexpedient to disturb a presumption upon the faith of which properties have been bought and sold for generations—"Non omnium quæ a majoribus constituta sunt ratio reddi potest" (D., i, 3, 20). The pursuers' counsel admitted to the full the existence of this presumption, but they maintained that it was only a *prima facie* presumption, and that it might be rebutted in any particular case by reference to the special circumstances, including the contemporaneous actings of the parties. On the other hand the defenders' counsel argued, and the Lord Ordinary has apparently held, that the presumption is one *juris et de jure*, and that the decisions require him to hold that the word "all" occurring in a clause of relief not only may, and *prima facie* ought, to be construed as "some," but that it never can bear its own natural and proper meaning. In short, he attributes to judicial decisions much the same effect as must be conceded to an Act of Parliament which, like the Titles to Land Consolidation (Scotland) Act 1868, section 8, enacts that a given form of words when used in a conveyance of land shall, "unless specially qualified, be held to import an obligation" to relieve from public burdens of a specified and defined character. I think that the Lord Ordinary's judgment proceeds on a misapprehension of the true meaning and effect of the decisions and of the nature of the presumption in question, and that he ought to have admitted instead of rejecting the evidence of user to which his attention was directed by the pursuers' counsel.

The bearing and effect of usage on the interpretation of a written contract must depend, of course, upon the circumstances of each individual case and upon the nature and duration of the actings founded on. The parties are at issue upon the question whether the school rate, the Edinburgh burgh assessment, and the lunacy assessment, or any of them, have been proved by the conduct of the parties to fall within the general words of the obligations of relief. These three assessments are each and all of recent origin (1872, 1879, and 1913). Admittedly they are the result of what is called "supervenient legislation." Admittedly none of them is the "equivalent" of a tax which could have been levied in the years 1769-70, or of a tax which could have been levied at any time prior to 1836, when Ainslie raised his action. Further, the pursuers' counsel expressly disclaimed any right to dissect the burgh assessment for the purpose of showing that in part at least it was the "equivalent" of some older tax, *e.g.*, the police tax referred to in *Ainslie's* case. The usage as regards each of these three assessments has been uniform and entirely in favour of the pursuers from its first imposition until November 1915, when the defenders denied liability and ceased to pay to the rating authorities the amounts assessed upon the pursuers and their tenants. I doubt whether a usage of so recent a character could, if it had stood alone, have been competently referred to as throwing light upon the meaning of an agreement made more than a century before such usage began. In the actual circumstances, however, I see no reason why

the comparatively recent actings of the superiors and vassals with regard to the new taxes laid on for the first time in and since 1872 should not be regarded as a continuation of the general course of conduct which began shortly after 1770 and which was uniformly followed as regards every new tax from the date when it was first imposed until its abolition. The new police taxes payable to commissioners of police and imposed first for lighting and subsequently for general police purposes under the authority of statutes passed in 1785, 1805, 1812, 1816, 1817, 1822, 1826, 1832, 1834, 1848, and 1854, and thereafter made payable to the Magistrates and Council by the Acts of 1856 and 1867, constitute a very remarkable body of evidence in support of the natural and primary interpretation of the obligations of relief. With two exceptions, which in my opinion are only apparent (the "peculiar" improvement tax referred to in *Ainslie's* case and the public water rate), the evidence derived from the actings of the parties is all one way both as regards the generality which they attributed to the expression "all other public burdens of whatever kind imposed or hereafter to be imposed . . . and due and payable for or furth of the subjects in all time coming," and also in regard to the nature of the relief which they had in view, viz., that the feuars should be placed by their superiors in the same position in fact as if the subjects were in law free from taxation. Though we were not asked to hold that the judgment of the Second Division amounted to *res judicata* in favour of the present pursuers, it constitutes in spite of certain obscurities and difficulties which it presents a very weighty authority in their favour.

For the foregoing reasons I am of opinion that the Lord Ordinary's interlocutor should be recalled and that we should follow the course suggested by your Lordship in the chair.

LORD CULLEN—The words of the clause in the feu-charters here in question read in their natural sense are habile to express a right conferred by the granters of the amplitude for which the pursuers contend. The clause, which occurs in the *tenendas* of each charter, has this special feature about it that the primary conception embodied in it is that of the land being granted out with an exemption or immunity from public burdens at the hand of the civic authority by whom assessments within the burgh were at that period levied, according to rolls which they kept and controlled. The legality of such an exemption operated directly is not here in point. For the clause contains an obligation of relief of commensurate scope, and it is this obligation that the pursuers now seek to enforce. The conception of exemption, however, has a bearing on the meaning and intention of the parties and on the scope of the corresponding obligation of relief. And if *contemporanea expositio* is to be looked to, it is important to keep in view this conception of exemption, for the actings which immediately followed the granting of the feu-rights and continued for sixty years thereafter took a course which shows an intention to give it literal fulfilment.

But if the clause be taken on its terms alone it may be that the defenders are right in their contention that by force of a series of well-known decisions it would fall to be read as not extending to relief from what may be called, *brevitatis causa*, burdens imposed by supervenient legislation. On this question I do not think it necessary to express an opinion, because (1), differing from the Lord Ordinary, I am of opinion that it is legitimate, in endeavouring to reach the true meaning of the clause according to the intention of the parties to the feu-rights in 1769 and 1770, to seek aid from the manner in which it has been carried into effect by the course of actings during the period of about a century and a-half which has elapsed since then; and (2) I am of opinion that the course of acting demonstrates that the above-mentioned limited construction which the defenders seek to impose upon the general words of the clause is not according to the intention of the creators of the feu-rights.

The Lord Ordinary observes—"If the effect of a clause of this character can be determined by the actings of parties it would be difficult to conceive a stronger case than that which the pursuers are in a position to present." Of the justice of this observation there is, I think, no room for reasonable doubt. In the Lord Ordinary's view, however, the actings of the parties, although so significant that they would be conclusive of the question if adverted to, fall to be ignored as irrelevant. The Lord Ordinary's ratio is as follows:—He holds (1) that the words of the clause are unambiguous, their unambiguous meaning being the limited one which the pursuers say is impressed on them by the course of decisions before referred to; and (2) that the actings of parties appealed to by the pursuers cannot be allowed to contradict that unambiguous meaning. I am unable to agree with this view. According to it the clause stands in exactly the same position as it would have done if it had contained an explicit proviso that it was not to extend to burdens imposed by supervenient legislation. I do not so understand the effect of the decisions referred to. None of these decisions has ever laid down the proposition that a clause of this kind cannot lawfully be construed in light of the actings of parties under it, nor, so far as I am aware, has any judge previously enunciated it. On the contrary, the actings under one of the feu-rights here in question were taken into account and allowed weight in *Ainslie's* case (1839, 2 D. 64, 1842, 4 D. 639), such actings were the basis of the judgment in the case of *Jopp's Trustees* v. *Edmond* (1888, 15 R. 271, 25 S.L.R. 211), and dicta of various judges elsewhere are to be found which refer to usage or actings as a relevant factor. The decisions on which the Lord Ordinary bases his view bear to proceed, in holding the obligation limited by an exclusion of burdens imposed by supervenient legisla-

tion, on what is called the contemplation of the parties. And as the limitation is, *ex hypothesi*, never found in the words actually used in the deeds under dispute in the decided cases, and therefore has always been reached otherwise, I am unable to see that the effect of the decisions goes further than this, that in cases where there was nothing but the words of a clause to go on, the Court by an extrinsic process of reasoning has *presumed* the contemplation of the parties to have been that the clause should be so limited in its operation although unlimited in its terms. It is difficult to think that any court would assume the power to go so far as to override the capacity and freedom of the contracting parties to demonstrate effectively by a voluntary course of dealing in any particular case that their contemplation actually was as expressed in the words of the contract.

Assuming the parties' course of acting here to be relevant to the construction of the clause in question, the inference to be derived from it appears to me to be clear and to exclude the limitation for which the defenders contend. Not the least significant chapter in that course of acting was that which began on the constitution of the feu-rights, and it furnishes immediate *contemporanea expositio*. At that date all the town's burdens were levied by the magistrates according to stent rolls or assessment rolls kept and controlled by them. What was done by the magistrates in order to give the intended effect to the said clause in each of the feu-rights which they had granted was to leave the subject out of the rolls so that no assessment could be levied on them. This was a very significant course. It was obviously intended to answer to and fulfil literally the conception of exemption or immunity from burdens primarily expressed in the clause. So long as it might be continued no burdens leviable according to the magistrates' rolls, whether under antecedent or supervenient legislation, could be levied on or in respect of the land contained in the feus. It continued in fact for sixty years or so until the bankruptcy of the town occurred and the case of *Ainslie* came before the Court.

Whatever is *res judicata* under that decision, the question of *res judicata* is of minor importance to the pursuers owing to the fact that the ground held by Ainslie to which it related forms only a part of the ground of the three feus here in question. Apart from *res judicata* the case is, however, a very apposite authority.

As I read the case of *Ainslie* the Court regarded the clause in question as general and not limited in its scope—that is to say, as not limited by an exclusion of burdens imposed by supervenient legislation. The main contention on behalf of the Town seems to have been that the grant of such exemption or relief was illegal, and that contention was not sustained. The question, however, was raised whether the clause extended to certain specified burdens. Some of these undoubtedly were new burdens imposed by supervenient legislation, and should have been ruled out on the present defenders' view. They were, however (with the exception of the special and peculiar improvement tax), held to fall under the clause. The Town did not advance the distinction sought to be made by the present defenders as to supervenient legislation. Notwithstanding the full discussion which took place in the case, no reference to it is to be found in the papers or in the only recorded opinion, that of the Lord Ordinary, Lord Moncreiff. This does not seem surprising when one keeps in view that the effect of usage or actings was imported into the case, and that the usage in this particular aspect of it showed that the magistrates down to the period of the action clearly evinced their understanding of the clause by omitting the subjects from their assessment rolls with a view to securing their exemption from all rating. It would accordingly be strange if, in the absence of any plea or contention about, or reference to, the distinction in the pleadings or in the opinion of Lord Moncreiff, the passage in the interlocutor of that learned Judge, of date 28th November 1837, founded on by the present defenders, should have been intended nevertheless to express that distinction, while by the same interlocutor Lord Moncreiff held as falling within the scope of the clause various burdens which would have been ruled out if the distinction had been applied. That interlocutor, unlike the final interlocutor of the Inner House, does not deal with the general declaratory conclusion of the summons or with the whole subject-matter thereof, including the words "all other public burdens of whatever kind." It contains a limited series of findings leading up to and intended to justify the finding that all the particular existing taxes in dispute (except the special and peculiar improvement tax) fall within the clause. It will be noticed that the first finding—that here founded on—affirms the vassals' right to exemption and relief from "*all* burdens, stents, or taxations payable . . . directly to the Magistrates of Edinburgh," without qualification. It proceeds by way of extension to add—"or which have come in place of taxes previously paid to them." The difference between the two cases relates to the authority levying or collecting the burdens, and does not represent the distinction as to burdens imposed by supervenient legislation. And when one goes on to the part of the interlocutor ruling out the "improvement tax," one finds that while it was undoubtedly a new tax imposed by supervenient legislation, it was not ruled out on that ground at all, but on account of certain intrinsic qualities which, rightly or wrongly, were held to make it of too "special and peculiar" a nature for inclusion.

The final interlocutor of the Inner House of 9th February 1842 contains a declaratory decree as to the obligation of the magistrates to exempt and relieve Ainslie in the future. This declarator to some extent follows the language of the clause in dispute, but is shorter. The only qualification of the general or universal terms in which the declarator expressed the obligation is as

follows—"Without prejudice to any question arising from the peculiar nature of any tax which may be hereafter imposed." This exception corresponds in quality with the case of the improvement tax which was found to be too "special and peculiar" to be covered by the clause. It does not embody the broad distinction here contended for by the defenders. The decree of declarator seemed to be treated in the argument of the present defenders as being of the nature of a mere duplicate of the clause in the charter, and as deciding nothing (apart from the above-mentioned qualification in it) about the scope of the latter; their view being as I understand that if the clause in itself falls under the rule of *Dunbar's Trustees* (1877, 5 R. 350, 15 S.L.R. 227; 1878, 5 R. (H.L.) 221, 15 S.L.R. 772) so does this decree of declarator. I do not so view the matter. The decree is one pronounced *in foro contentioso* where all available pleas for limitation were competent to the defenders, and, subject to the qualification above adverted to, it affirms the scope of the clause to extend in all time coming to "*all* town's burdens, burgh and county cess, stents and taxations, and *all* other public burdens of whatever kind now imposed or to be imposed," &c. I do not see why the decree should not be read according to its terms. The words which express the amplitude of the obligation are words of ordinary language, as well fitted to carry the meaning as any others, and the fact that they substantially coincide with the words in the charter does not seem to me to lessen their force. I therefore do not see why the limitation which the defenders say falls to be read into the clause of the charter if taken by itself under the rule of *Dunbar's Trustees* should on any view be read into this decree.

After the decision in the case of *Ainslie*, it appears that the practice of omitting the subjects from the rolls with the view of securing a direct immunity from assessments was discontinued. The Magistrates, however, followed an equivalent course. During the seventy-five years or so which elapsed before the present dispute arose they paid all the assessments or public burdens levied in respect of both the proprietorship and occupancy of the subjects by way of relief or reimbursements, with the exception of the water rates, which stood in a special position under a clause in the charters not yet referred to. If one puts aside for the moment the matter of the water rates, and considers the variety of the rates or public burdens of which relief was thus given, and the prevalence among them of the character of new rates or burdens imposed by supervenient legislation, which was clear and unmistakeable, this long course of acting seems to me as significant as was the previous course of omitting the subjects from the rolls of the Magistrates' understanding that their obligation was not subject to the limitation which the present defenders now seek to attach to it. And it was applied not only to Ainslie's ground but to the whole of the three feus.

With regard to the water rates, the ground in each of the feus is disponed "together with the privilege of the City's water upon the same terms with the other inhabitants within the extended royalty." The information contained in the case is to the effect that at the date of the charters rates were imposed on persons who had water introduced into their houses or premises, but that no rates were charged in respect of the supply at public wells. Since 1874 there has been both a domestic and public water rate. As to the course of acting it appears that the vassals paid the rates for domestic or trade supply down to 1874. Since then they have paid both the domestic and the public water rates. Payment of the domestic rate was, the defenders say, according to the above-quoted clause in the feu-charter, but payment of the public rate was not. The latter proposition may be true, but this does not seem to me to be clear. Assuming it to be true, the defenders seek to turn the fact of payment of the public water rate by the vassals since 1874 to account as entirely displacing any inference from the otherwise uniform course of acting of the Magistrates in giving relief of rates and burdens. I think this is an unreasonable view, and I am unable to adopt it.

A secondary but important question is raised as to rates levied in respect of occupancy of the subjects. Assuming the pursuers' claim to be otherwise well founded, the defenders maintain that they are not bound to pay rates in respect of occupancy where the occupier is a tenant, although they admit liability for such rates where the proprietor is the occupier. This is an unusual distinction, and in none of the cases cited by the defenders was it presented. It appears to me that the question thus raised was specifically decided in the case of *Ainslie*. Lord Moncreiff by his interlocutor of 28th November 1838 found, *inter alia*, "That the clause is effectual to give both the pursuer and his tenants in the property exemption and relief," &c. This finding was affirmed by the Inner House in their interlocutor of 19th November 1839. The decision appears to have proceeded partly at least on the usage. Since the decision in *Ainslie* the Magistrates have acted in conformity with it, paying tenants' rates not only in the case of the Ainslie feu but in the case of all the three feus. I agree with your Lordships in thinking that we should follow that decision in the present case.

In accordance with the views above expressed I concur in the judgment which your Lordships propose.

The Court recalled the interlocutor of the Lord Ordinary, and found and declared that the defenders were bound in all time coming to relieve the pursuers and their successors in the subjects mentioned in the summons from all burgh assessments, poor and school rates, and lunacy assessments imposed or hereafter to be imposed upon the said subjects or upon the proprietors and occupiers *qua* such, and *quoad ultra* remitted the cause to the Lord Ordinary to dispose of the petitory conclusions of the summons.

Counsel for the Pursuers (Reclaimers)—Sandeman, K.C.—Macmillan, K.C.—E. O. Inglis. Agent—James Watson, S.S.C.

Counsel for the Defenders (Respondents)—The Lord Advocate (Clyde, K.C.)—Constable, K.C.—W. J. Robertson. Agent—A. Grierson, S.S.C.

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*Tuesday, March* 16.

## FIRST DIVISION.

[Lord Blackburn Ordinary.

## TRAILL AND OTHERS *v.* TRAILL'S TRUSTEE.

(See *Traill's Trustees* v. *Free Church of Scotland*, 1915 S.C. 655, 52 S.L.R. 524.)

*Process—Special Case—Contract—Construction—Agreement to Create Separate Fund in a Trust Estate Sought to be Made out of Special Case.*

Valuable pictures forming part of a trust estate were sold by the trustee with the consent of the creditors, who agreed "that the price or prices realised by the pictures, under deduction of all expenses connected with the transaction, should be held by the trustee until the rights of all parties concerned should be definitely ascertained and agreed upon." The estate was mainly heritable and some of the creditors held securities over the heritage while others were unsecured. Questions having arisen as to the interests of parties in the proceed of the pictures, a special case was presented, which contained the following question, "Do the . . . proceeds fall to be distributed among the whole creditors, secured and unsecured, of the truster and of his ancestors or predecessors in title *pari passu?*" To that question an affirmative reply was given. Certain unsecured creditors who were represented in the special case thereafter raised an action of accounting against the trustee and claimed that the special case constituted a contract under which the proceeds of the pictures were to be treated as a fund separate from the general trust estate, exempt from the expenses of the trust administration save in so far as dealt with in the special case, and available for immediate division. *Held* that upon the proper construction of the agreement embodied in the special case the proceeds in question formed part of the general trust estate, and action *dismissed.*

Sinclair Traill, solicitor, Blandford, Dorsetshire, and others, *pursuers*, brought an action against John Little Mounsey, W.S., sole surviving trustee acting under the trust-disposition of the late James Christie Traill of Rattar, *defender*, concluding for decree of accounting for his whole intromissions with the proceeds of the sale of the Raeburn portraits forming part of the trust estate, and for payment of the proceeds of the sale of the portraits "to the pursuers and the other creditors of James Christie Traill, under deduction only of such charges and expenses as may be found in the course of the proceedings to follow hereon to be proper charges against the said proceeds," and, failing an accounting, for consignation in Court of £12,000, which should be held to be the balance of the proceeds of the pictures. The pictures had, with consent, been sold, and a Special Case to settle the rights of parties in the fund thereby produced had been presented to the Court. The *fourth question of law* in that Special Case (*Traill's Trustees* v. *Free Church of Scotland*, 1915 S.C. 655, 52 S.L.R. 524) was—"Do the . . . proceeds fall to be distributed among the whole creditors, secured and unsecured, of the truster and of his ancestors or predecessors in title *pari passu?*" To that question an affirmative answer had been returned.

The pursuers *pleaded*—"1. The pursuers as creditors of the truster being entitled, along with other creditors, to have the proceeds of the said two pictures, less lawful charges thereon, divided amongst them, decree of accounting should be granted as concluded for. 2. The defender being entitled to deduct from the said proceeds before division only such charges and expenses as may be found in this process to be proper deductions therefrom, decree should be pronounced in terms of the declaratory conclusions of the summons. 3. In the event of the defender failing to lodge an account as concluded for, an order for consignation should be pronounced in terms of the last conclusion of the summons."

The defender pleaded, *inter alia*—"2. The action is ill-laid and incompetent in respect that (*a*) it is only competent to sue the defender as trustee under and in virtue of the said trust-deed and under and in terms of its provisions, while the pursuers propose to ignore the said deed and to set up an independent trust; and (*b*) the present action proposes to select one item of a general estate for which the defender is entitled to a right of general accounting, and to treat that item as a separate fund. . . . 5. The defender never having refused to account for the proceeds of the portraits, the declaratory conclusion is unnecessary and should be dismissed. 6. The defender being willing to account for the whole trust estate in a proper process, and at the instance of all parties having interest in the said accounting, the action should be dismissed."

On 24th May 1919 the Lord Ordinary (BLACKBURN) assoilzied the defender.

*Opinion* (from which the *facts* of the case appear)—"The defender in this action is the sole surviving trustee acting under an *inter vivos* trust-disposition for behoof of creditors, dated 5th January 1887, granted by the late James Christie Traill of Rattar, who died on 6th February 1899. The heritable debts amounted to £179,058, secured over different estates, and there was also a number of unsecured creditors. The pur-