LAND-VALUE TAXATION AND FEU-DUTIES

By James Dundas White, LL.D., M.P.

(This is taken from a pamphlet under the above title, written by Mr. James Dundas White, M.P., and published by Messrs. James MacLehose & Sons, Glasgow. Price Threepence.)—Ed., LAND VALUES.

In my pamphlet, A SCHEME FOR LAND-VALUE TAXATION (Messrs. P. S. King & Son, Ltd., London : 3d.), mention is made of the need for this reform, particularly at the present time, and a description is given of the method by which it should be effected. The principles on which the land-value tax should be apportioned as between the interests in the various properties are also set out, and it is proposed that feu-duties should be dealt with on the same basis as rentcharges and rents. This paper is intended to show how that proposal would work out in the case of feued properties, and to give the reasons for it.

1—APPLICATION OF THE TAX TO FEUED PROPERTIES

The incidence of the land-value tax should be apportioned in the following way.

Feus in existence when Tax begins

In the case of a property which is the subject of a feu when the tax begins, any superior who receives part the land-value as feu-duty should pay a corresponding part of the land-value tax, and the remainder (if any) should be paid by the vassal who is entitled to possession of the land.

To facilitate this plan a certain percentage—say 5 per cent.—of the capital land-value should be regarded as the annualized land-value, and if any feu-duty (stated as usual on an annual basis) which has to be considered represents payment for both the land and certain improvements, the amount which represents payment for the land should be differentiated from the amount which represents payment for these improvements and may be called the land-feuduty—a name applicable also to the whole feu-duty if it represents payment for the land alone.

The manner of allocating the tax may be illustrated by a typical case. If A the subject-superior, has feued a property to B, A should pay the land-value tax on it in proportion as the annualized land-value is absorbed by the land-feuduty which he receives, and the remainder (if any) of the tax should be paid by B. If B has sub-feued the property to C, B should pay the remainder (if any) of the tax in proportion as the remainder (if any) of the annualized land-value is absorbed by the land-feuduty which he receives less the land-feuduty which he pays, and what may be called the second remainder (if any) should be paid by C; and so on, until the whole tax is allocated.

Feudal Casualties

Feudal casualties should be dealt with as if they had been converted into uniform annual payments of additional feu-duties under the Feudal Casualties (Scotland) Act, 1914. That Act provides for the extinction of all outstanding casualties, either by conversion into additional feu-duties or by redemption, before the year 1930, and also provides that no casualties shall be payable in feus granted after the close of the year 1914.

If the Feu is cancelled

In the event of the "irritancy" (*i.e.* forfeiture) of the feu for non-payment of the feu-duty during a period of more than two years—as provided for by the Act of 1597, c. 17, see also the Conveyancing (Scotland) Amendment Act, 1887, section 4—the liability for any part of the tax which had been payable by the vassal should revert to the superior.

Feus granted after the Tax has begun

From the time when the liability for any part of the tax attaches to an interest, it should continue to attach to that interest, notwithstanding any subsequent grant by that interest of any feu or lease of the whole or any part of the property. In any such subsequent feu or lease the parties should be as free as at present to make any arrangements they like as between themselves, provided that no such arrangement should relieve the superior or lessor of the whole or any part of the liability to pay the tax to the taxing authorities.

2—FEU-DUTIES AND GROUND ANNUALS

Ground annuals resemble feu-duties, and should receive similar treatment. The nature of a ground-annual is described in the following passage from a standard work :—

> "Ground-annual is a yearly duty or revenue payable from land, and made a real burden upon it either by reservation or constitution. It is substantially the same as a feu-duty, for which it may be considered a substitute, as it is practically unknown except when sub-feuing is prohibited." (Green's ENCYCLOPOEDIA OF THE LAW OF SCOTLAND, 2nd ed. 1911, vol. 6, p. 224.)

After referring to the origin and development of ground-annuals, the writer says of the modern contract of ground-annual that—

> "The instrument closely resembles a feu-contract, the same general conditions as to irritancies, nuisances, servitudes, &c., being contained in both: 'but in principle the object and effect of the two deeds are perfectly distinct. By the feu-contract an annual return from land is sought to be secured *by the reservation of an intermediate feudal superiority.* The object of the contract of ground-annual is to secure a similar yearly return by burdening the infeftment of the disponee *without creating a new fee.* The fue-contract is employed where there is no obstacle to the reservation of a permanent mid-superiority; the contract of ground-annual is resorted to when the creation of a subaltern right is conventionally prohibited or practically inexpedient. The yearly return in the one case is a proper feu-duty, not dependent upon publication in the register; in the other case it is a real burden merely, and to be effectual must be duly published.'"—(*Ib.* p. 225, quoting JURIDICAL STYLES, 6th ed., 1907, vol. 1, pp. 103-4.)

These distinctions give rise to some minor differences, but for practical purposes both dispositions are of the same character, and recent legislation has dealt with them both in the same way. For the purposes of the Land Value Duties in the Finance (1909-10) Act, 1910, section 42 of that Act provides that both feu-duty and ground annual are included in the expression "rent-charge." For the purposes of the Feudal Casualties (Scotland) Act, 1914, section 3 of that Act provides that:

> "'Superior' shall include the creditor in a ground annual; and 'superiority' shall include the right of such creditor;
>
> 'Feu' shall include lands subject to a ground-annual created either before or after the first day of October, 1874;
>
> 'Feu-duty' shall include ground-annual."

In the proposals made here for the apportionment of the land-value tax, the expressions "superior," "superiority," "feu," and "feu-duty" are used in these larger meanings.

3—Scope of this Paper

In view of what is proposed, special consideration will be given to:

(*a*) the respects in which feus differ from sales on the one hand and from mortgages and bonds on the other;

(*b*) the earlier practice as to the owners of feu-duties contributing proportionally to the Cess or Land Tax;

(*c*) the contractual obligations in relief of burdens, showing that in some feus the superior has undertaken to relieve the vassal of all future burdens on the land, in others the vassal has undertaken to relieve the superior of them, and in others again there is no express mention of them;

(*d*) the rule of Scots law that an undertaking to relieve of all future burdens on the land in general terms is to be construed as applying to those imposed under laws in force when the undertaking was given, but as not applying to those imposed under subsequent laws;

(*e*) certain new clauses of obligation in relief which have been inserted in some recent feu-charters, in order to circumvent that rule and to place the superiority beyond the reach of the taxation and rating of land-values; and

(*f*) various instances showing how from time to time Parliament has varied contractual arrangements in regard to land, has altered the incidence of the future increase of certain rates notwithstanding existing contracts, and has exercised the undisputed right to settle the incidence of the burdens which it imposes.

4—The Feu not a Sale

The feu is not a sale of the land, because the superior continues to possess an "estate in the land" and in fact retains the dominant right. To quote a high authority, the late Professor Bell (Professor of Conveyancing in the University of Edinburgh,) after referring to the personal liability of the vassal to pay the feu-duty, goes on to say:—

> "The feu-duty forms a charge also on the lands. The payment of it is one of the conditions of the grant. And the superior, having a real legal estate in the lands, having in fact the right to the lands, and to eject the vassal if he does not fulfil the condition by paying the feu-duty, the feu-duty is a real and preferable burden on the lands—a *debitum fundi*. It is part of the reserved estate in which the superior stands infeft; and the superior's claim for payment of the feu-duty is ranked as a burden on the feu, in preference to the claim of any third party upon the feu made through the vassal. The lands, as given out to the vassal, and held by him, are subject to the burden; and he cannot give any right to the lands, otherwise than subject to the same burden. The superior's right to the feu-duty is preferable to the vassal's right to the lands." (Lectures on Conveyancing, 3rd ed. 1882, pp. 634-5.)

It may also be observed that the Courts, far from regarding the feu as a sale, have decided that the feuing of land by trustees does not infringe either an obligation to hold the land in perpetuity, *Merchant Company of Edinburgh* v. *Governors of Heriot's Hospital*, 1765, M. 5750, *Magistrates of Elgin* v. *Morrison*, 1882, 10 R. 343; or a prohibition against sale or alienation, *Jamieson and Another, Petitioners*, 1884, 21 Scottish Law Reporter, 541.

5—The Feu not a Mortgage

The feu is also distinct from a bond or mortgage. In these dispositions the land is pledged as security for a specified loan, and the lender, besides being entitled to interest, is entitled to call up the loan when he desires, subject to various conditions as to time, notice, &c. But the feu-contract contemplates a perpetual tenure at a perpetual feu-duty, and does not contain any reference to any loan or to any power of calling it up. As Mr. Alexander Ure (now Lord Strathclyde and Lord President of the Court of Session) said at the Queen's Hall Edinburgh, on 1st March, 1907:—

> "I am told with an air of triumph that feu-duty is not rent. What is it? Interest on a debt, I am told. I wish it was. I would pay up my debt to-morrow, and stop all further payment of feu-duty. What is the amount of the debt on which my feu-duty is said to be interest? No man knows. The debt is recorded nowhere. Here is a debt, then, of a description so extraordinary that no human being can find out its amount. How can a creditor enforce, or a debtor be compelled to pay, a debt which neither of them knows the amount of?"

The distinctive character of the feu-duty is seen even more clearly in the relation which arises between the parties in the event of the feu-duty remaining unpaid for more than a certain period and the superior enforcing his rights. If the superior were in the position of a mortgagee or bondholder, he would be entitled only to take such steps as would secure to him the amount of the debt with interest and expenses, and would hold any surplus in trust for the vassal. But in fact, if these circumstances occur, the superior is entitled to have the feu cancelled and the vassal's rights extinguished. Thus the superior is in a position analogous to that of a ground-landlord, the feu resembles a perpetual lease conditional on the payment of the feu-duty, and the feu-duty is really a rentcharge or rent.

6—Proportional Contribution under the Earlier Law

The feudal system was founded on the principle that the land belonged ultimately to the Crown, and the paramount rights of the Crown were recognised in the Acts which imposed the Cess or Land Tax, which was the earliest form of "Supply" in Scotland. That the

owners of feu-duties were liable for a proportional contribution to this tax may be inferred from some of the old Acts which imposed it, and is confirmed by two cases decided in 1693 and 1696 respectively. In the case of certain *Feuars of Kinross* v. *Sir William Bruce*, 1693, M. 13,071, when it was contended by the feuars against their superior—

> "that they ought not to pay the whole cess of their feus, seeing he got more than the half rent of the lands for his feu-duty, and so he ought to bear a proportional share of the public burdens effeiring to his share of the true rent of the lands: THE LORDS found, that effeiring to their several proportions of the rent, the superior must pay a part of their cess, conform to the valuation of the lands, and that the feuars (who were little better than heritable tenants) could not pay the whole cess; for albeit the rents might be, if the lands were set, 600 merks by year, yet the vassals paid of this 3 or 400 merks yearly to Sir William their superior."

In the case of the *Town-Treasurer of Edinburgh* v. *Co-heirs of Sheins*, 1696, M. 4188, the Lords decided for similar reasons that—

> "the public burdens and cess being imposed *intuitu* of the feu-duty, as well as the vassal's part of the lands, these burdens ought to be borne proportionally by the superior and vassal effeiring to their respective interests, the feuar being only like a *colonus partiarius* in the case."

Mr. Alexander Duff, writing at a time when it had become the practice to bind the *vassal* by an express obligation to relieve the superior "of public burdens falling due subsequent to the period of his entry," observes that:—

> "When this obligation is omitted, the superior seems to be liable in a share of these burdens, in the proportion which the feu-duty bears to the rents of the lands." (FEUDAL CONVEYANCING, 1838, pp. 95-96.)

And the late Professor Bell, in the work to which reference has already been made, says:—

> "It appears formerly to have been held that the feu-duty was liable to bear a portion of various public and parish burdens, as being just so much of the yearly rent or produce of the lands; but the rule is different now." (LECTURES ON CONVEYANCING, 3rd ed., 1882, p. 642.)

These references will suffice to show that the earlier practice of allocating the Cess or Land Tax affords an historical precedent for what is here put forward on principle: that in the proposed Tax on Land-Values the owners of feu-duties should be called upon to pay their proportional shares of the burden.

7—Obligations in Relief of Future Burdens

Clauses of obligations in relief of future burdens are of two kinds. In those of the earlier kind, which were referred to in the Land Tax Act of Convention of 1667 and of which there are instances in many of the older feu-charters, the *superior* has undertaken to relieve the vassal from future burdens; in those of the later and more familiar kind, referred to in the passage from Mr. Duff's work, the *vassal* has undertaken to relieve the superior from them. These clauses, particularly those in which the superior has undertaken to relieve the vassal, have been interpreted by a number of judicial decisions, which have established the rule of what has beer called "reasonable construction"; that clauses of obligations in relief of future burdens are to be construed as importing relief from future burdens imposed under laws in existence when the obligation was undertaken, but as not importing relief from new burdens imposed by supervening laws—to which category the proposed tax on land-values would of course belong.

8—The Rule of Reasonable Construction

The principle underlying that rule found expression as early as 1667, when it was decided in the case of *Watson* v. *Law*, M. 16,588 that "warrandice" or warranty by the superior in a disposition of lands did not extend to give relief against detriment arising "by a supervenient law." In *Lumsden* v. *Gordon*, 1682, M. 16,606, it was held that absolute warrandice, in a tack of teinds did not extend to give relief against "a supervenient burden of augmentation to the minister of the parish by Act of Parliament." In the case of the *Duke of Montrose* v. *Stewart*, 1863, 1 Macph, H.L. 25, 4 Macqueen, 499, there was a similar undertaking by the superior, in a feu-contract dating from 1705 of certain lands and teinds, "to warrant" the teinds free from certain burdens. In later conveyancing the practice developed of applying the clause of warrandice to matters connected with title, and of dealing with the burdens in a separate clause of obligations in relief. A number of decisions on the construction of such clauses are set out in what was subsequently referred to in the House of Lords as "the able and exhaustive note" of Lord Curriehill, as Lord Ordinary, in the case of *Dunbar's Trustees* v. *British Fishery Society* (1877, 5 R. at pp. 354-8). Mention may here be made of several leading cases, in order to illustrate the character of these clauses and to set forth the rule of construction in the words of the Judges themselves.

9—Sprot v. Heriot's Hospital, 1829

In the case of *Sprot* v. *Governors of Heriot's Hospital*, 1829, 7 S. 682, the superior had undertaken in a feu-charter of 1730 to relieve the vassal perpetually from teind, cess, minister's stipend, schoolmaster's salary, and all other taxes or impositions imposed or to be imposed on the said lands ("*et omnium censuum aliorumque impositionum impositorum aut imponendorum dictis acris*"), and the question was whether this undertaking obliged him to relieve the vassal of a tax imposed by a subsequent Act. Lord Corehouse, as Lord Ordinary, held that it imported relief only from the specified burdens and from "all taxes and impositions imposed or to be imposed on the land by virtue of laws then in existence, or at least applicable to the state in which the subjects then were," but that it did not import relief from an imposition payable under the subsequent Act "which could not have been in contemplation of parties when" the feu-charter was granted; and "the pursuers having reclaimed, the Court unanimously adhered."

10—Scott v. Edmond, 1850

In the case of *Scott* v. *Edmond*, 1850, 12 D. 1077, the superior, in a feu-charter of 1789, had bound himself "always to relieve" the vassal "from all payment of teind, minister's stipend, and all legal and public burdens whatsoever, imposed or to be imposed on the said lands, excepting the poor's-money." The question arose whether that undertaking obliged him to relieve the vassal from the prison-tax and the County police

tax, imposed by subsequent Acts of 1839. In view of its importance the case was considered by the whole Court, which decided unanimously that the taxes imposed by these subsequent Acts were not covered by the undertaking. Lord Robertson, who delivered the leading judgment, which was concurred in by the Lord Justice-Clerk, Lord Murray, and Lord Wood, said :

> " It is undoubted law, that an ordinary contract of warrandice does not cover burdens imposed by statute subsequent to the date of the grant. And although the present question does not arise on a clause of warrandice, it is on the import and effect of an obligation which is of a character and description not to be extended beyond what its precise terms were meant to embrace. Parties may no doubt so frame a clause of relief that it shall embrace all burdens, whether the continuation of old taxes, or the extension, or the creation of new taxes, never dreamt of at the date of their contract. But 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. So rigidly, indeed, have such clauses been construed, that an obligation to relieve from teind-duties 'imposed or to be imposed' does not extend to an augmentation of stipend."

Lord Cuninghame expressed his concurrence with this judgment, as did also, though after some doubt, Lord Moncrieff and Lord Ivory. Then Lord Cockburn said :

> " I cannot resist the past decisions. They seem to me to have settled this question in the superior's favour. But I can as little resist saying, that I think them all wrong originally. . . . However, it is too late to urge this now."

At advising, the Lord President, Lord Fullerton and Lord Mackenzie all expressed their agreement with the decision, and the Lord President said at the close :

> " When the case was formerly before us, we thought this a good opportunity to set the question finally at rest. We have now the unanimous opinion of all the Judges. I trust the point will never be raised again."

And in the interlocutor the Court pronounced that the clause of relief in the fen-contract

> " imports relief only from burdens imposed, or to be imposed, on the lands in question, by virtue of laws then in existence—and that the defender, and his heirs and successors, are not entitled to relief from any other assessments or taxes."

11—Dunbar's Trustees' Case, 1878

In the subsequent case of *Dunbar's Trustees* v. *British Fisheries Society*, 1877, 5 R. 350 ; 1878, 5 R. (H.L.) 221 ; L.R. 3 A.C. 1298, the question was whether, in a feu-charter of 1823, the contract by the superior to relieve the vassal of (among other burdens) " ministers' stipends, schoolmasters' salaries, and other public burdens, due and exigible out of the whole lands and subjects hereby feued, or that may become due and payable for or from the same in all time coming " obliged him to relieve the vassal of poor-rates under the Poor Law Amendment Act, 1845, and of Road Assessments under Local Acts of 1830, 1838 and 1860. The case came before the Court of Session, and was the subject of an appeal to the House of Lords. In neither Court was the rule formulated in *Scott* v. *Edmond* seriously challenged. The Lord Chancellor (Lord Cairns) quoted with approval what Lord Ormidale had said at an earlier stage of the case in the Court of Session :

> " It cannot, I think, now be questioned, at least in this Court, that while such an obligation as that in question will give relief from all public burdens exigible or payable at its date, or that might thereafter at any time become exigible or payable by virtue of any law or practice existing at its date, it will not afford relief from public burdens created or imposed for the first time by supervenient laws, that is to say, by laws enacted after the date of the obligation,"

and added :

> " That I take to be the general rule, and it was not seriously challenged by the argument at your Lordships' Bar."

Lord Hatherley (who spoke of the rule as a " reasonable construction ") and Lord Gordon both quoted with approval Lord Gifford's similar observation in the Court of Session that :

> " Unless the contrary be very clearly expressed, the obligation will not apply to burdens or taxes imposed by future or supervening laws which could not be in the prospect or contemplation of the parties at the date of the contract,"

and Lord Blackburn said :

> " I think it is established by a long series of authorities, ending with *Scott* v. *Edmond*, that the obligation created by a clause of relief in a feu-charter worded in terms such as these does not apply to burdens or taxes imposed by future or supervening laws."

Thus the rule, so well established in the Court of Session, was affirmed and applied by the House of Lords. In the application of it to these particular taxes, the House of Lords affirmed the decision of the Court of Session, holding that the superior was bound by his contract to relieve the vassal of the poor-rates under the Poor Law Amendment Act, 1845, as these poor-rates (though more onerous) were the same burden as the poor-rates prior to that Act—following in this respect a series of Court of Session decisions which are mentioned in the judgments—but that he was not bound to relieve the vassal of the road assessments under the Local Acts of 1830, 1838 and 1860, as these were not the same as certain previous burdens, but were new burdens imposed under supervening laws.

12—Obligations by Superiors to relieve Vassals

Thus the rule of reasonable construction was begun and developed in relation to obligations by superiors to relieve vassals of future burdens, and in these cases has exempted the superiors from liability for new burdens imposed under supervening Acts. It may be observed here that in the case of *Steuart* v. *The Earl of Seafield*, 1876, 3 R. 518, the Court of Session held that school-rates under the Education (Scotland) Act, 1872, were not covered by an obligation undertaken by the granter of lands, in a disposition made before that Act, to relieve the disponee of " all schoolmaster's salary "—a provision not unusual in the type of obligations here considered. But even with the protection afforded by the rule, there has been a considerable increase in the amount of the burdens, and particularly of the poor-rates, for which superiors are liable under the general terms of such clauses. In the case of the *Duke of Montrose* v. *Stewart* and in the case of *Dunbar's Trustees* v. *British Fisheries Society*—both already

mentioned—the amount of the burdens had become greater than the feu-duty. But that did not affect the position. In the former case the Lord Chancellor, Lord Westbury, said :

> " It is no answer to say that the liability of the superior, under such an obligation, may exceed the whole value of the feu-duties. This may shew that the contract of the superior was originally improvident, but does not affect the legal construction or validity of the obligation."

In the latter case, Lord Hatherley observed :

> " The only remark which can be made upon the property becoming, as it is said in this case it does, subject to a burden which is greater than any benefit derived from the feu-duty payable by the vassal, is that which was made by Lord Westbury in the case of the *Duke of Montrose* v. *Stewart*, namely, that the bargain may have turned out a very bad bargain, but it is not the less a bargain on that account."

In the allocation of the land-value tax as described on page 3, allowance should be made for the cases in which the superior is under a contractual obligation to relieve the vassal of burdens for which he would not otherwise be liable, by providing that the amount of these burdens should be deducted from the feu-duty in order to ascertain the amount of feu-duty in respect of which the superior should be chargeable with the tax. Thus, if these burdens are less than the feu-duty, he should be chargeable in respect of a reduced feu-duty ; and if they are equal to or greater than the feu-duty, he should not be chargeable at all.

13—Obligations by Vassals to relieve Superiors

The converse obligation by which the vassal undertakes to relieve the superior of future burdens has generally been embodied in a clause providing that the superior shall relieve the vassal of all public burdens falling due up to the date of entry, and that the vassal shall relieve the superior of those falling due afterwards. So far as feus and contracts of ground-annual are concerned there does not seem to be any case raising the question of whether the rule of reasonable construction applies to this obligation by the vassal, and it is not easy to see how the question could have arisen. But if future legislation were to place any new burden on the superiority, the question might be raised, and it is submitted that the rule of reasonable construction, which has been so consistently applied to obligations by superiors to relieve vassals, would be found equally applicable to obligations by vassals to relieve superiors. This view is founded on common justice and on common sense, and is supported by what was said in the next-mentioned case, which turned on an obligation in relief of future burdens, undertaken by the lessee in a lease.

14—Jopp's Trustees *v.* Edmond, 1888

In *Jopp's Trustees* v. *Edmond*, 1888, 15 R. 271, a lease or tack of certain lands had been granted in 1788 for sixty years and a life-time, and the lessee had given an undertaking to " free and relieve " the lessor of various burdens in rather ambiguous terms ; in 1854 the lessee had granted a sub-lease or sub-tack, and the sub-lessee had given an undertaking to " free and relieve " him similarly. The question was whether the undertaking in the lease bound the lessee to bear certain burdens, and there was a similar question as to the undertaking in the sub-lease. On appeal from the Lord Ordinary, the Second Division of the Court of Session (the Lord Justice-Clerk, Lord Young, Lord Craighill and Lord Rutherford Clark) held that, as the terms of the undertakings were ambiguous, the practice which had been followed by the parties to the lease for nearly a century and by the parties to the sub-lease for nearly half-a-century, should be taken to show what the parties had intended, and should receive effect accordingly. The case had been argued on the assumption that the rule of construction would be the same whichever party were under the obligation, and the Lord Justice-Clerk observed :

> " 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."

While this was not necessary to the decision in the case, it goes to show that clauses of obligations in relief in Scottish leases are to be construed in the same way as those in feu-charters and feu-contracts, and that the rule of reasonable construction is to be applied to such clauses, whichever of the parties has undertaken the obligation.

15—Forms of Obligations by Vassals.

The arrangement by which the superior undertakes to relieve the vassal of public burdens falling due up to the date of entry, and the vassal undertakes to relieve the superior of those falling due afterwards, has been in use for a long time. In A System of Stiles as now Practised within the Kingdom of Scotland, by George Dallas, Edinburgh, 1774 (vol. 2, pp. 438-9), there is set out a form of feu-charter which contains a clause by which the superior undertakes :

> " to warrant and relieve the said (*vassal*) and his foresaids, of all cesses, taxations, and other publick burdens and impositions whatsoever, due and payable forth of the said lands, with the pertinents, of all years, terms and months preceding the . . . term of their entry thereto, they always relieving the said (*superior*) and his foresaids, of the like burdens and impositions sincesyne and in time coming."

In Mr. Duff's Feudal Conveyancing, 1838, already mentioned, the clause is set out on p. 96 in this form :

> " And further I (*the superior*) hereby bind and oblige me and my foresaids to free and relieve the said (*vassal*) and his foresaids of all cess, minister's stipend, and other public and parochial burdens exigible furth of the said lands and others preceding the said (*term of entry*), the said (*vassal*) and his foresaids being bound to free and relieve me and my foresaids of the same in all time thereafter."

Forms like this will also be found in later works, such as Juridical Styles (4th ed., vol. 1, p. 16, quoted in

Green's ENCYCLOPAEDIA OF THE LAW OF SCOTLAND, 2nd ed., 1911, vol. 5, p. 478), and Mr. Craigie's SCOTTISH LAW OF CONVEYANCING, HERITABLE RIGHTS (3rd ed., 1899, p. 34), as typical of the forms that were in common use before the simplification of conveyancing by the Infeftment Act, 1845, and the Lands Transference (Scotland) Act, 1847.

16—THE STATUTORY FORMS.

That Act of 1847 provided short statutory forms for various clauses, with statutory interpretations. The statutory form (in schedule A) for the clause of obligations in relief was as follows :

> " I bind myself to free and relieve the said (*here insert the name of the disponee*) and his foresaids of all feu duties, casualties, and public burdens."

and section 3 of the Act provided that—

> " The obligation to free and relieve from feu duties, casualties, and public burdens, unless specially qualified, shall be held to import an obligation to relieve of all feu duties or other duties and services or casualties payable to the superior, and of all public, parochial, and local burdens due from or on account of the said lands, prior to the date of entry."

In the course of time the Act of 1847 and some other Acts of like character were superseded by the Titles to Land Consolidation (Scotland) Act, 1868, which is still in force. That Act provided new statutory forms with statutory interpretations appended, some of them varying slightly from the previous ones. The clause of obligation of relief, in form No. 1 of schedule (B), is one in which the superior gives this undertaking :—

> " I bind myself to free and relieve the said disponee and his foresaids of all feu duties, casualties, and public burdens,"

and section 8 provides that :—

> " the clause of obligation to free and relieve from feu duties, casualties, and public burdens, in form No. 1 of schedule (B) hereto annexed, shall, unless specially qualified, be held to import an obligation to relieve of all feu duties or other duties and services or casualties payable or prestable to the superior, and of all public, parochial, and local burdens due from or on account of the lands conveyed prior to the date of entry."

In each Act the use of the statutory form was left optional. Considerations of convenience, however, brought them into general use, as may be seen from the precedents given in the current edition of JURIDICAL STYLES and the other works already mentioned. The reader will observe that in neither of these forms or interpreting clauses are there any words obliging the vassal to relieve the superior of the burdens subsequent to the date of entry. It was probably considered either that the existing burdens were imposed by law on the vassal and not on the superior, or that the arrangement which bound the superior to relieve the vassal of them up to the date of entry implied that the vassal should bear them afterwards. It is manifest, however, that the legislature has a perfectly free hand in the apportionment of any new tax, and that the implied obligation (if such there be) as to future burdens cannot import more than would have been imported by the express obligation. Thus, in view of the rule of reasonable construction, it will be seen that there is nothing in the ordinary clauses of obligations in relief which would justify the superior claiming from the vassal, or the vassal claiming from the superior, relief in respect of the whole or any part of a land value tax imposed by a supervening law.

17—WHAT ARE THE ALLEGED CONTRACTS ?

Those who take the other view may well be asked to produce the contracts or obligations on which they rely. When the controversy over the Report of the Select Committee on the Land Values Taxation, etc. (Scotland), Bill, 1906, was at its height, Mr. Alexander Ure (now Lord Stratchclyde) definitely challenged them to do so —as for instance in his speech at Fauldhouse on 9th January, 1907—and they did not even attempt it. Speaking in the Queen's Hall, Edinburgh, on 1st March of the same year, he said :

> " Many weeks ago I offered a challenge to those who keep on repeating this talk about existing contracts. My challenge was this—Show me a contract which would be broken if rating were based on land-values to-morrow and the owner of feu-duties were asked to join the ranks of the ratepayers. I need hardly tell you that my challenge has never yet been taken up. No such contract has ever been produced, or ever will be, or ever can be None such exists."

If the opponents of this view assert the contrary, it is for them to produce the " contracts " on which they rely, so as to show what their case is and how far they think it carries them.

18—SOME FURTHER QUESTIONS

They must also be prepared to answer some further questions. Do they suggest that Parliament ought not to tax feued properties in the same way as other properties ? Do they say that the tax on the land-value of a feued property, in so far as that value is absorbed by the feu-duty, ought to be imposed on the person who pays the feu-duty instead of on the person who receives it ? Do they want to get rid of the rule of reasonable construction in the cases where the *vassal* has undertaken to relieve the superior of future burdens ? Do they also want to get rid of it in the cases where the *superior* has similarly undertaken to relieve the vassal ? And do they desire to do so even where the burdens on the superiority are already greater than the feu-duty ? Do they really propose to substitute a literal and unlimited interpretation of clauses of obligations in relief of future burdens for the rule of reasonable construction which is the settled law of Scotland ?

19—RECENT ANTICIPATORY CLAUSES

The position is so well understood that, in some of the feus which have been granted since the taxation of land-values on the basis of proportional contribution entered the sphere of practical politics, the superiors have insisted on new clauses specially designed to circumvent the rule of reasonable construction by requiring the vassal to relieve the superior of future burdens not only under existing laws but also under any supervening laws, or by authorizing the superior, in the event of any public qurden being imposed on the feu-duty in future, to require the vassal to redeem the feu-duty by the payment of a capital sum. These clauses are not even qualified by the proviso " unless Parliament otherwise determines," because they are designed to determine the matter independently of

Parliamentary action. But Parliament, in imposing a new tax on land-values, will probably apportion the burden between the interests in such manner as may seem just, and is not likely to let that apportionment be turned aside by anticipatory clauses.

20—Parliament and Existing Contracts

It is important to observe that, even where contracts have been made on the basis of existing law, Parliament has not hesitated to alter that law in the interests of substantial justice, particularly as between the man who has the land and the man who needs it. In the Irish Land Acts and the Scottish Small Landholders Acts Parliament has varied the arrangement by providing for the revision of agreed rents, the reduction of arrears, and the extension of tenancies. In the Agricultural Holdings Acts, Parliament has altered the conditions of agricultural tenancies in England and elsewhere by requiring the landlord to compensate the outgoing tenant for certain unexhausted improvements, though nothing of the kind was in the contract or in the contemplation of the parties when the contract was made. Even where there is a clause that the tenant shall pay all rates, taxes and outgoings—as is common in English leases, following the English practice of rating the occupier—there is no reason for straining the obligation so as to make it apply to rates or taxes which were not in existence at the making of the contract and had no affect in the financial adjustments. Such clauses ought not to stand in the way of requiring the lessor to pay a share of the land-value tax proportioned to the share of the land-value which he receives as rent.

21—Alterations in the Incidence of Rating

In several instances Parliament has changed the incidence of existing rates, even though contracts had been made on the basis of the former incidence, and has considered that justice was done by requiring the party who had previously been liable for the rate to pay in each subsequent year of the tenancy a sum equivalent to the annual amount of the rate as it stood before the change.

Thus the Local Government (Scotland) Act, 1889, which set up County Councils in Scotland and transferred to them certain rating powers formerly exercised by the County Commissioners of Supply, provided (section 27) that "where at the passing of this Act any rate leviable by the Commissioners of Supply in respect of" certain branches of local government "is payable by owners only, without relief to the extent of one-half against the occupiers," the average of such rate for the ten years preceding the Act should be ascertained and, so far as the future annual amount of such rate levied by the County Council does not exceed that previous annual average, "such rate shall, as heretofore, be payable by owners only," but that any future increase over that average "shall be payable by owners and occupiers equally."

The Local Government (Ireland) Act, 1898, which set up County Councils in Ireland and transferred to them the raising of the poor rate, provides (section 52) that in future, with certain exceptions, the poor rate should "be made upon the occupier and not the landlord," and (section 54) that where under the terms of an existing tenancy the occupier was entitled to deduct from his rent the whole or any specified proportion of the poor rate, his rent should be reduced for each subsequent year of the tenancy by a sum equal to the amount at which the whole or the specified proportion of the poor rate had stood in the "standard financial year" preceding the change—which, as in future the rate was to be paid by the occupier instead of by the landlord, placed any future increase of the rate on the occupier alone.

If it was right for Parliament thus to alter the incidence of the future increase of existing rates, it cannot be wrong for Parliament to settle the incidence of a future rate or tax on land-values on the simple basis of proportional contribution.

22—Precedents in National Taxation

Parliament did not allow any private arrangements to interfere with the statutory incidence of the Income Tax or the Estate Duties. The Income Tax Acts, in providing for certain cases by what is commouly called "collection at the source," also provided that when the Tax has been so collected from the person who pays a rent or feu-duty, he shall be entitled to deduct the amount of it from the amount of the rent or feu-duty which he has contracted to pay—and he is entitled to do so whether the contract was made before or after the setting up of the Income Tax. As Chief Baron Pollock said, in the English case of the *Attorney-General* v. *Shield*, 1858, 3 H. & N. 836, "The Acts imposing the tax break through all private arrangements." Private arrangements were not allowed to stand in the way of the intended and equitable incidence of the Income Tax, and they should not be allowed to stand in the way of the intended and equitable incidence of a Tax on Land-values.

23—Postscript

For some of the references used in this paper I am indebted to the evidence and memoranda submitted by Mr. Edwin Adam, K.C., to the Select Committee of the House of Commons on the Land Values Taxation, &c. (Scotland) Bill, 1906, and I would also take the opportunity of expressing my thanks to those other friends who have assisted in various ways.

J. D. W.