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Saturday, May 21.

SECOND DIVISION.

MACPHERSON (TACKSMAN OF FORTROSE HARBOUR DUES) *v.* MACKENZIE.

Royal Burgh—Harbour Dues—Prescription.

A charter of royal burgh is a good title on which to prescribe a right to harbour and shore dues, and the usage of exaction for more than forty years will fix the rule for determining the extent and limits of that right.

Liability of Shipowner for Harbour and Shore Dues.

In an action for harbour dues by the tacksman of harbour dues against a shipowner, the defender pleaded that according to the custom of the harbour such dues had always been levied from the senders and consignees of goods and not from the owners of vessels. *Held* that such a custom was immaterial, and that the tacksman was entitled to levy the dues from the shipowners.

In and prior to 1455 the villa of Fortrose, then known as Chanonry, was the cathedral seat of the diocese of Ross. Adjacent and coterminous lay the burgh of Rosemarkie, which had been erected into a burgh by a charter of one of the Alexanders. The said charter is no longer extant.

By charter, dated 18th June 1455, James II. erected the villa of Fortrose into a free burgh, to be held and possessed by the Bishop of Ross, with all and singular privileges, liberties, and customs as the borough of Rosemarkie, and granted to the inhabitants of Fortrose all exemptions, liberties, and privileges conferred on the borough of Rosemarkie under the ancient charters and writs of Alexander and other kings of Scotland, or enjoyed or possessed by the said burgh past their own limits.

By charter, dated 6th August 1590, James VI., on the narrative of the charter of 1455, and of the general revocation and annexation to the Crown patrimony of ecclesiastical lands and villas, made, erected, and incorporated the villa lands, bounds, and possessions of Fortrose into an entire and free royal burgh to be called the burgh of Fortrose. This charter granted to the magistrates and their successors the power "emendi et vendendi omnes et quascunque mercantias res et bona sicuti aliqui alii nostri burgi intra regnum nostrum gaudent et possident, devorias et custumas ejusdem in talibus usitat. et consuetas ac observatas levandi et precipiendi, ac etiam locos forales infra dictum nostrum burgum et libertatem ejusdem ad effectum prædictum omnibus temporibus futuris quottiescumque eis videbitur expediens assignandi et faciendi." It then proceeded — "Ac etiam Damus, concedimus et nominamus præfato nostro burgo de Forterose præposito ballivis consulibus decanis et communitati ejusdem præsentibus et futuris duos dies mercatorialis, i.e. marcat dayes, unum vero earundem hybdomadatum die luni et alterum die sabbati Ac etiam duas liberas nundinas vulgo, i.e. feair dayes annuatim pro emptione et venditione omnium bonorum et rerum intra nostrum burgum et libertatem eiusdem prout eis videbitur expediens tenendus unus dies nundinarum prædictarum vulgo Saint Boniface day et alter vero vulgariter nuncupat. pardonne day omnibus temporibus futuris cum omnibus custumis devoriis et privilegiis in talibus usitat. et consuetis."

By charter, dated 4th Nov. 1592, James VI. rectified and confirmed the charter of 1455, and ordained that Rosemarkie and Fortrose shall be one burgh, to be called the burgh of Rosemarkie, and "should be held a free burgh, and gave, granted, and disponed all and singular the prerogatives, privileges, and immunities which it ever had or could have, or which in any way belonged to it, or to any burgh whatever within our kingdom, of which they, and any, our free burghs, have had the use or enjoyment. There being no reddendo inserted in the above charter, a new charter was granted by James VI., of date 18th September 1612, in which this defect was supplied, and the reddendo fixed at £3 Scots."

In this charter of 1612 occur these words— "Vnacum omnibus Tholoniis custumis et libertatibus ad hujusmodi pertinentibus vel que de jure ad quemlibet alium burgum intra dictum nostrum regnum dignosci possunt pertinere . . . . Et generaliter cum tantis immunitatibus privilegiis libertatibus et prerogationibus pertinentibus vel que iure cognosci possunt ad quemlibet alium burgum intra regnum nostrum pertinere ut supra Preterea pro causis antedictis pro nobis et successoribus nostris De novo annexavimus univimus et incorporavimus dictam villam de Forterose dicto nostro burgo de Roismarkye sic quod unus sit burgus omni tempore affuturo Burgum nostrum de Roismarkye nuncupandum Et quod inhabitantes dicte ville de Forterose utantur et gubernentur per prefectum ballivos et consules dicti burgi de Roismarkye veluti burgenses et inhabitantes ejusdem burgi nostri de Roismarkye in omnibus que ad ipsum pertinent Tenendum . . . . Adeo libere et quiete in omnibus et per omnia sicuti aliqui alii burgi infra regnum nostrum sine revocatione contradictione impedimento aut obstaculo quocunque."

In September 1879 Duncan Macpherson, tacksman under the Magistrates of Fortrose of the burgh, shore, and harbour dues, brought this action against Kenneth Mackenzie, owner of the steamer "Speedwell" plying between Inverness and Fortrose, concluding for a sum of £30 as harbour and shore dues incurred by him for the use of the harbour, shore, and anchorage grounds of the burgh of Fortrose in landing live stock and goods.

The pursuer averred that from time immemorial, or at all events for upwards of forty years past, the magistrates, by themselves or their tacksman, had been in use to levy dues on "all goods and merchandise loaded or unloaded within the jurisdiction of the burgh, and on all vessels anchoring within the limits of its anchorage grounds," the only exemption being in favour of pleasure and fishing-boats belonging to the inhabitants of the burgh. The district within which he averred

that the magistrates possessed the right of levying dues "is specially described in the minutes of let from 1834 onwards as embracing the whole shore and sea-board of the burgh, the harbour and bays of Fortrose and Rosemarkie, and the point, and as extending from the Burn of Rosemarkie on the one side to the Craigwood Burn on the other." He also averred—"The present harbour was erected in 1814–16, at an expense exceeding £3482, and the whole revenue available for its maintenance and repair is derived from the letting of the harbour and shore dues. Since the completion of the harbour the greater part of the traffic and lading and unlading of goods has been conducted there. But the said dues have always been let, exacted, and paid, not merely within the limits of the harbour, but at all points along the shore between Rosemarkie Burn and Craigwood Burn. There may have been instances of individual escapes or evasions, and individual tacksman may have waived their rights in isolated cases, but the constant course for upwards of forty years has been as averred,"—and alleged that the defender had himself, as a member of town council of Fortrose, for several years frequently approved the minutes of let of the dues, had paid the dues without demur for his own vessel except when exempted from anchorage dues on special application, and had himself, as tacksman of the harbour and shore dues, exacted them for a period of six years. The defender denied that the pursuer had any title to levy harbour or other dues, and averred that the pursuer relied on the burgh charters, which contained no grant of harbour and an alleged immemorial use (which the defender denied) of levying and exacting dues. He pleaded that in law a burgh charter without grant of harbour gives no right to levy harbour dues, and is not, even assuming the possession averred by the pursuer, a competent title on which to prescribe a right to levy dues, and that the action was therefore irrelevant.

He further alleged that the harbour of Fortrose was made in the years 1814–17 by the Commissioners of Highland Roads and Bridges appointed under the Act 43 Geo. III. c. 80, and that these commissioners bore one-half of the expense out of funds intrusted to them under the Act 46 Geo. III. c. 155, which was an Act for applying certain balances arising from forfeited estates towards making canals, harbours, and other public works for the benefit of the Highlands. The other half of the cost was, he averred, raised partly by subscription among individual proprietors in the district around Fortrose, and partly by a grant of £630 from the Convention of Royal Burghs. The imposition of dues began, he further averred, in 1823, when their exaction was for the first time allowed by the Act 4 Geo. IV. c. 56, sec. 35, which gave the commissioners power, for the purpose of maintaining in repair such piers and ferries as had been made by them, to direct that a sum not exceeding 2d. per ton should be paid for every ton of goods landed or embarked at such pier or ferry, and in case of vessels whose tonnage is registered, a sum not exceeding 2d. per ton of registered tonnage should be paid for arrival or departure at such pier or quay. The account sued for was, he averred, charged at a higher rate than that so allowed by the Act of 1823. Further, that Act did not allow anchorage dues, which were therefore improperly charged, the only place in respect of the use of which any charge fell to be made being the harbour made by the commissioners. On this point he pleaded that the "said account is subject to deduction in respect of charges for goods shipped and landed beyond the limits of the harbour."

A second action was raised by the pursuer in October 1879, concluding for an additional sum of £29, 1s. 9d., being the amount of further dues, part of which were incurred before the former action was raised, but payment of which the pursuer stated he then believed was not to be refused. The two processes were conjoined. In addition to the pleadings above narrated, it was pleaded in both actions—"(3) The defender is entitled to absolvitor in respect 1st, any dues which have been claimed have been always charged against senders and consignees of goods and not against owners of vessels; 2d, said rates were never posted up or brought to the defender's knowledge."

After a proof the Lord Ordinary on 7th Feb. 1881 assoilzied the defender, appending this note to his interlocutor:—"These actions are brought by the tacksman of the harbour and shore dues of the burgh of Fortrose for payment of £59, 11s. 1½d., being the amount of shore and harbour dues alleged to have been incurred by the defender between the months of October 1878 and April 1879 inclusive.

"The table of dues with reference to which the present account is charged was framed and published by the magistrates in 1863.

"The question is, Whether the magistrates of the burgh have right to exact harbour and shore dues at the harbour and beach of Fortrose?

"The magistrates maintain that the charters erecting Fortrose into a royal burgh, followed by immemorial use of levying shore and harbour dues, are sufficient to establish a grant of freeport to the burgh, and to give them a title to exact shore and harbour dues not only at the pier or harbour at Fortrose, but also all along the beach, from the Burn of Rosemarkie on the one side to Craigwood Burn on the other, a distance of about two miles, which they say are the boundaries of the burgh.

"It appears from the minute of admissions by the parties, that of the accounts sued for, £33, 1s. 3½d. is charged as the dues on goods landed at the pier or harbour; £17, 17s. 8d. is charged for anchorage dues, which are charged when the vessel comes into a harbour, and for a coble going between the vessel and the pier when she remains without the harbour; the balance of £8, 10s. is charged as dues payable for articles landed on the beach within the boundaries of the burgh.

"It appears to the Lord Ordinary that the right of the magistrates to charge shore and harbour dues and anchorage dues in respect of the use of the pier or harbour depends on different considerations from their right to charge dues on goods landed on the beach, and that it is necessary in the first instance to ascertain the circumstances in which the harbour or pier was constructed.

"By the 46 Geo. III. cap. 155, it was enacted that the balances arising from the forfeited estates in Scotland should be vested in the Commissioners for Highland Roads and Bridges ap-

pointed under 43 Geo. III. cap. 80, and should be applied by them, *inter alia*, in constructing or improving harbours, piers, or quays, under the same powers, rules, and regulations as were directed by the said Act with reference to the making of roads and bridges. By this last-mentioned Act the commissioners were empowered, when one-half of the estimated expense of any road or bridge should be engaged for, to advance the other half as therein mentioned.

"In 1815 the Magistrates of Fortrose and others presented a memorial to the commissioners, stating their desire to have a pier erected at Fortrose, that they were willing to contribute one-half of the expense of the undertaking, and craving the aid of the commissioners. The commissioners agreed to the proposal, and directed their engineer to make a plan and estimate of the pier or harbour. The harbour or pier was erected under a contract between the commissioners and certain persons on behalf of the magistrates of the burgh, and was completed in December 1817. The joint estimated expenditure appears to have been £4015, 6s. 6d., of which the commissioners paid £2007, 13s. 3d. Of the other half, £631, 5s. 9d. was obtained by the magistrates as a grant from the Convention of Royal Burghs, and the balance was raised by subscriptions obtained from parties in the neighbourhood interested in the undertaking. The burgh of Fortrose contributed nothing in its corporate capacity.

"No authority was originally given to charge dues for the use of the piers and quays constructed, as this one was, under the foresaid Acts of Parliament until the year 1823, when the 4 Geo. IV. cap. 56, was passed. By the 35th section of that Act, on the narrative that it was expedient to provide funds for maintaining the same in repair, it was enacted that it might be lawful for the commissioners to direct that no person should be permitted to embark from or to land on such pier or quay by means of any ferry-boat plying for hire, or any other boat, unless and until a sum not exceeding 2d. per boat (at the discretion of the commissioners) should be paid for every such ferry-boat, or other boat arriving at or departing from any such pier or quay, nor should any goods be embarked from or landed at any such pier or quay from any vessel or boat (not being a ferry-boat) plying for hire, not a vessel whose tonnage is registered, unless 2d. a ton be paid for every ton weight for such goods so embarked or landed (and proportionally for fractional parts of a ton), and in case of a vessel whose tonnage is registered, 2d. a ton for every ton of registered tonnage.

"No other or additional power of imposing rates or dues for the use of such piers or quays has ever been granted by the Legislature, and the Lord Ordinary is of opinion that these are the only rates that can be legally exacted for the use of such piers and quays. He is further of opinion that no rates or dues could be legally exacted until the commissioners so directed. There is no evidence in process to show that the commissioners ever directed that rates should be levied at Fortrose, or to show that they ever authorised the magistrates to levy them.

"It further appears from the 19th section of the Highland Roads and Bridges Act 1862, which deals with the transfer of such piers and quays, that the harbour of Fortrose is classed in Schedule B as one of the harbours which have, by local Acts or otherwise, been transferred to, and are now vested in, other bodies and persons than the commissioners. No evidence has been produced in process to show by what Local Act, or how otherwise, the harbour of Fortrose was transferred to or vested in the magistrates of Fortrose.

With respect to the alleged immemorial use and wont of the burgh to levy shore dues, it appears from the earliest records of the burgh which have been produced, and which extend from 1710 to 1717, that the magistrates were at that time making efforts to raise funds for the erection of a harbour, which they considered to be absolutely necessary for the good of the community and privileges of the burgh.

"In the year 1818 the 'customs' of the burgh are let without reference to any other dues.

"In 1722 the customs of the burgh, 'as they are now restricted to the customs of the two markets, of *aqua vitæ*, and the *anchorage of boats*,' are let to a tacksman. In 1723 they are again let in the same terms. In 1726 the "haill customs of the burgh, both great and small,' are set to Alexander Gunn.

On 17th October 1743 a committee of council have a meeting with Thomas Davidson, their treasurer, for the purpose of auditing his accounts. They then pass his accounts, 'reserving the consideration of his accounts of the harbour-money till a full meeting of the council.'

"At a meeting of the council held on 12th May 1744 it was resolved that the quarterly stent and certain other sums should be applied 'to the building of the harbour, aye and until the £10 sterling borrowed from the harbour money for payment of the town's stent be completely satisfied and paid.'

"In October 1744 the magistrates, in settling accounts with their treasurer, find that he has only discharged himself of £55, 16s. 10d. of harbour-money.

"No minutes of council meetings are produced between the above date and 1803. In that year the 'customs of the burgh," with 'the duty paid on malt, spirituous liquors, and other customable goods brought to the town or *shore* for sale,' were exposed to roup, and were let to John M'Allan for £7, 8s. sterling.

"This continued to be the form in which the subjects were rouped down to 1817, when the 'shore dues' were, for the first time, so far as appears, let separately, the customs being let to John M'Allan for £3, 4s., and the shore dues to John Dempster for £4, 13s.

In 1823, by which time the pier or harbour had been erected, the 'shore or harbour dues' are let, and they continue to be let in this form until 1830. In that year the customs, with the duties paid on malt, spirituous liquors, and all other commodities customable brought to the burgh and harbour, with the shore dues from the 'Burn of the Craigwood to the Burn of Rosemarkie,' are let. This is the first time that any territorial limits appear to be assigned to the alleged right of port or harbour.

"At a meeting of the magistrates and council held on 8th June 1837, on the narrative that the principal table of shore dues had fallen aside, and only a printed copy of the same remained in the

collector's hands, they authorised and authenticated the 'presently existing' table of shore dues for this burgh, and declare the same to be as in the table, a copy of which has been produced. When this table was originally framed and published there is no evidence to show.

"The magistrates and council seem to have entertained the idea that they could alter the dues charged as they thought proper, and in 1845 they revised the table of dues of 1837, increasing some and diminishing other charges, and appointed the new table to be the rate of charges in time coming.

"In 1846 the magistrates and council seem to have come to entertain some doubt as to their power to levy harbour or shore dues. In the roup of the dues for that year a condition is inserted that the tacksman of the shore dues or petty customs should not, as such, commence any process at law for the recovery of dues or customs without first consulting with, and obtaining the consent of, the magistrates.

"In the next year there is an additional condition inserted, to the effect that although the exposers considered they had right to levy dues within the bounds of the shore of the royalty, yet it was expressly understood that they do not guarantee power to the tacksman of the shore dues to exact such dues, except so far as they are exigible at the harbour or quay of Fortrose.

"The dues were let under these conditions and restrictions down to the raising of this action.

"It appears at a meeting of the magistrates and town council, held on 24th August 1853, instructions from the Commissioners of Roads and Bridges were laid before them directing that a table of dues in strict conformity with the Act should be published and enforced at Fortrose, where more than the legal dues had been levied, and that they must furnish annual statements of receipts and expenditure on account of the dues levied, on pain of having the power to levy them withdrawn. These instructions were not attended to.

"In 1855 the magistrates and council approved of a new table of dues. It was not at all in conformity with the Act, but was merely an alteration in some respects of the former table.

"In 1863 they again revised the table of dues, and approved and enacted the one now alleged to be in force, and with reference to which the charges sought to be enforced in this action are imposed.

"From what has now been stated it appears that there is no evidence that the Magistrates of Fortrose were in use to levy harbour or shore dues prior to the erection of the pier or harbour in 1817. They were in use apparently to levy certain duties on 'customable goods brought to the town or shore for sale.' What these goods were, or what duties they paid, there is no evidence to show; whatever the duties were they appear to the Lord Ordinary to have been of the nature of custom duties, and not of shore dues.

"Subsequent to the erection of the pier or harbour there is no doubt that the magistrates have been in use to levy shore and harbour dues at the pier or harbour. Before 1837 there is no evidence to show either the amount of dues charged or the articles on which they were charged subsequent to that date and down to the raising of this action—that is, for a period of more than forty years the magistrates have charged dues according to the table of dues issued in that and subsequent years.

"It is said that they have thus acquired by prescription a right to levy these dues. It appears to the Lord Ordinary that the right to levy dues at all depends upon the terms of the Act of Parliament under which the harbour or pier was erected. It is clear that the Commissioners of Highland Roads and Bridges themselves could not have acquired by prescription a right to levy dues higher or different from those specified in the Act of Parliament, which was their only title to levy any. It is equally clear that the Magistrates of Fortrose can have no higher right than the commissioners. The tables of dues of 1837 and 1863 are in no respect in conformity with the rates specified in the statute. They are therefore illegal, and the magistrates have no right to enforce them, in so far as regards the harbour and pier at Fortrose.

"This, however, does not dispose of the charge of £8, 10s., as the dues on goods not landed at the pier, but on the beach.

"The magistrates would appear not to be very sanguine as to their right to exact shore-dues, as they neither guarantee them to their tacksman, nor allow him to sue for them without consent.

"The Lord Ordinary has already said that prior to the erection of the pier or harbour there is no evidence that the magistrates were in use to levy shore-dues. It was not to be expected that after the harbour was erected, and facilities thereby afforded for the landing of goods, the beach should be much used for that purpose. It appears to the Lord Ordinary that the pursuer has entirely failed to prove that the magistrates have for time immemorial levied dues on goods landed on the beach. He is therefore of opinion that the defender is entitled to be assoilzied from the conclusions of the action.

"The charters founded on by the pursuer, which are set forth in the condescendence, contain no express grant of a right of port or harbour, and no definition of any boundaries of a port or harbour. The question was argued at considerable length to the Lord Ordinary whether an express grant was necessary to confer a right of port or harbour, or whether the terms of the charters were sufficient when followed by immemorial use of levying shore or harbour dues, to establish such a right. As the Lord Ordinary thinks that the pursuer has entirely failed to prove immemorial use, he has not thought it necessary to decide that question."

The pursuer reclaimed and argued—(1) The use of levying dues is referable, not as the Lord Ordinary thinks to the statute of 1823, but to the charters. That Act has really no bearing on the case. The words "custumis devoriis et privilegiis" in the charter of 1590 clearly gave a right to harbour dues—Tomlin's Law Dictionary, article "Devoirs," Hale de portibus maris (Hargreaves Law Tracts i. 131), say that anchorage is one of the *custumii*, see *Greig* v. *Magistrates of Kirkcaldy*, 13 D. 975. "Tholonia" is defined by Ducange in his Feudal Glossary as equivalent to portoria or port dues. That word is never used in charters, save with reference to harbours. (2) At all events, the pursuer having a burgh charter, and particularly a charter containing such words,

had a good title on which to prescribe a right to levy dues, and had prescribed such a right. The right was one of the *regalia minora* and could be prescribed by usage explaining a burgh title. Craig i. 15, 15; Stair ii. 1, 5. A barony charter with port and pertinents will, if followed by possession, constitute a right of ferry.

He also quoted—*Heritors of Don* v. *Aberdeen*, Jan. 26, 1665, M. 10,840; *Farquharson* v. *Earl of Aboyne*, Dec. 2, 1679, M. 10,879; Bell's Lectures on Conveyancing, i. 599; *Colquhoun* v. *Paton*, 16 D. 206, and (June 17, 1859), 21 D. 996.

The defender answered—Rights of harbour are either (1) a right over an extent of shore within which the granter can charge anchorage dues, or (2) a right confined to a particular spot. As to the first of these, there must be an express grant and the boundaries must be defined—*Magistrates of Edinburgh* v. *Scott*, June 10, 1836, 14 Sh. 922; *Magistrates of Campbeltown* v. *Galbreath*, Dec. 14, 1844, 7 D. 220 and 482; Stair ii. 3, 61; Erskine, ii. 6, 17 and 18, iii. 7, 14, also ii. 1, 5; Bell's Prin. secs. 654 and 755. A burgh needs an express right to fishings in order to prescription on a burgh title, whereas the words *cum piscationibus* are not needed in order to prescribe on a barony title. Thomson in his Acts of Parliament contrasts Tollonia with "Custuma Portuum" pp. 667 and 671.

At advising—

Lord Justice-Clerk—This is a very important case relative to the burgh of Fortrose. There are two actions raised here at the instance of Duncan Macpherson, steamboat agent, Inverness, against Kenneth Mackenzie, steamboat owner, residing at Rosemarkie, beside Fortrose, and these actions are for the recovery of certain dues said to be due to the tacksman of Fortrose harbour, and shore dues by the defender, in respect of pier and harbour dues payable upon articles brought into that harbour.

The defence to the two actions is that the pursuer has no right to levy pier and harbour dues, and it is said further that even if he had, the charges made in the account are for goods, some of which at all events were landed beyond the limits within which the magistrates or their tacksman can be supposed to have jurisdiction or power to levy rates; that the rates charged are in excess of any rates which can be called legal. It is also pleaded that the magistrates have lost any right that they ever had by reason of the pier having been allowed to fall into disrepair.

We have had a very able argument on the first great question, namely, whether the magistrates have any right to levy dues under their charters or by prescription? and it is that question I am to address myself to. In regard to the details of the account, and the other matters that are suggested, we thought it unnecessary to hear the parties.

The question then is, Whether the burgh of Fortrose or its tacksman has a right to levy these dues? That, as I have said, becomes a very important question. The Lord Ordinary has substantially found that the burgh has no such right; and that whether dues had been levied or not they had no title whatever under which they could do it. The result of that judgment is, that the burgh of Fortrose for the future will be left without the means of maintaining the harbour.

I must say I think that that is a more serious result than the Lord Ordinary had in view. For not only are they left without the means of maintaining the pier, but they will cease from the exercise of the rights that have been exercised far beyond the prescriptive period in any view that can be taken of this case.

We come to the consideration of the case with the admitted, or all but admitted fact, before us, that for a period of sixty-three years these rates have been levied by the Magistrates of Fortrose without any interruption. The rates may not have been identically the same all that time, because I think there is evidence of their having been raised, but practically they have been the same all that time—certainly identical in nature and kind.

I must own that in a matter of custom and prudence I consider that almost conclusive in itself. It will require very little title, in a municipal matter of that sort—not being a matter affecting private right, but seriously affecting the course and progress of trade—to validate a course of exactions that has subsisted for a period so long as that—a half more than the prescriptive period. Accordingly, I should have been very much surprised if the result of the case had been that the burgh of Fortrose had no title.

But the answer of the defender is, in the first place, that the charter of the burgh gives no express grant of port and harbour, and that a right of port and harbour cannot be exercised unless the grant be expressed—that is to say, unless the words "port and harbour" bear to be in the grant. In the second place, it is said that the exaction of dues could only be validated on the idea or supposition that they were exacted in respect of an authority or supposed authority conferred upon them by the commissioners for the making and keeping in repair of the Highland Roads and Bridges Commissioners who, we all know, were appointed with statutory powers to administer the forfeited estates in the last century. It is further contended that the only right, apart from a Crown right, which the burgh could have acquired to levy rates, must have been from the commissioners I have referred to, who, although appointed about the time already specified, continued to exercise their functions down to a much more recent date; that that right never was derived from the commissioners, and that therefore whatever dues were levied and paid the exaction of them could not now be pleaded against the defender.

I am of opinion that all these contentions are not well founded. I think the burgh title—a royal burgh title—was quite a sufficient title to prescribe, or rather to fix, by usage the extent and limit of the powers of the burgh.

I am of opinion, separately, that the Commissioners of Highland Roads and Bridges, while they were entitled to make advances to the burgh for the benefit of the harbour, in the same way as they were entitled to make advances for the carrying on of any other public work in the North of Scotland, were in no respect either proprietors or administrators of the harbour in question, and that the burgh itself derived nothing from them on any such footing. I should have been inclined to think also, even had it been

different, that that would have been no answer whatever to the plea which is made here.

I shall endeavour very shortly to express my opinion upon these somewhat important matters without trying to deal with the questions exhaustively, which in present circumstances I am not in a position to do.

And, *first*, in regard to the charter of the burgh.

It has been laid down by Stair, and it has been ruled in various cases by high authority, that a right of port and harbour—that is to say, a right to exact dues in respect of accommodation afforded in the harbour—may be acquired by prescription. Quite true, the defender says that Mr Erskine (ii., vi., 17 and 18; ii., i., 5) lays it down that it can only be acquired by express grant. Both writers I have mentioned are of the very highest authority as institutional writers; but I venture to say that Mr Erskine must there have been thinking of the title to prescribe. Stair's opinion in both the passages that were quoted is quite precise, and upon such a matter no authority is higher, or even so high, as his. I do not refer again to the opinion of Lord Cowan in *Colquhoun's* case, who lays down the law as a matter beyond all dispute precisely as Stair puts it. And therefore upon that question I am with the pursuer, thinking that it may be ascertained and defined by usage. But I do not say you need not have a title on which prescription can follow.

But then it is said they must have a title on which such a right can be prescribed. I do not think it necessary to deal with the question whether an ordinary infeftment in lands bordering on the sea-shore, coupled with the use to exact dues, would be sufficient to give the right. I am not by any means sure that it may not. But we are dealing here with a community having a charter of erection and *nomen universitatis*; and we are dealing, besides,—which is very important—with a matter cognate and incident to the municipal character. That I look upon as really embraced in this question, and beyond all doubt. It is quite true that the charters have no words of port and harbour; but it will be remembered, in the first place, that this is a sea-bounded burgh, and, in the second place, that it is a harbour—a natural harbour—but still a harbour. And in reference to that, I may refer to an Act of Parliament passed in 1861 in order to facilitate the construction and improvement of harbours by authorising loans to harbour authorities. The interpretation clause of that statute (24 and 25 Vict. cap. 46) bears that "the word harbour shall include harbours properly so called, whether natural or artificial estuaries, navigable," &c. Therefore nature has made a harbour here, and the Crown had set down a municipal authority, within whose limits at all events the harbour was necessarily fixed; and therefore this was a natural incident of the burgh community. In addition to that, in the passage quoted from Craig—which carries great weight, I think—it was explained that the most appropriate recipient of a grant of this kind of port and harbour was a municipal corporation, because such a grant was not usually made to individuals, because it was thought that the means and revenues of an individual would be insufficient for the proper maintenance of harbour works. That is very distinctly laid down in the passage quoted from, book i. tit. xv., sec. 15, where he says—"Portus autem publici juris sunt, et inter regalia numerantur: tamen et privatorum, saltem universitatum proprii aliquando fiunt, ita tamen cuilibet appellere, onerare naves et exonerare in eis liceat, dummodo portoria solvat."

But we are not even left to that. A burgh is a *nomen universitatis*, and it has been argued—although I must say there was not much authority put before us in regard to that matter—whether or not in that respect it is on the same footing as a barony in regard to prescription.

Now, resolving that question absolutely, I should say that in a matter of this kind, Fortrose having a clear municipal character, and necessarily the incidents of a seaport burgh, it has especially a title to prescribe such rights as the present; and, independently of that, this is not a mere erection into a burgh. It is an erection with a considerable amount of specification, and the specification is so wide that I cannot conceive that interpreted by usage it will not extend to and include the right of levying these harbour dues.

There are two charters; the second of them is the widest—the charter of Rosemarkie, dated 18th December 1612—and that gives to the newly erected burgh "omnibus Tholoniis custumis et libertatibus ad hujusmodi pertinentibus vel quo de jure ad quamlibet alium burgum intra dictum nostrum regnum dignosci possunt pertinere. Necnon cum potestate ipsis preposito ballivis et consulibus dicti nostri burgi communitatem eidem pertinentem tam de Roismarkye quam de Forterose eidem unitam cum suis pertinentiis ad particatas burgales hereditarie ipsis burgensibus aliisque inhabitantibus pro edificatione et reparatione dicti nostri burgi disponere. Et generaliter cum tantis immunitatibus privilegiis libertatibus et prerogationibus pertinentibus vel que jure cognosci possunt et quemlibet alium burgum intra regnum nostrum pertinere."

The words in the first part of this clause are capable of one meaning only. They are generic words; and "Tholoniis" is stated by Ducange to be appropriate to customs in relation to matters maritime:—"Tholoniis—that is, customs levied on persons coming by sea."

Therefore on that first question I am of opinion that this burgh charter is a title to prescribe a right of port and harbour.

The next question is, whether a right of port and harbour has been prescribed? On that matter, if nothing had been introduced about the Commissioners for making and repairing Highland Roads and Bridges, no doubt exists whatever, because it is quite plain that since the erection of the pier in 1817 these dues have been levied without exception down to the present time. But the matter does not rest there. I quite grant that the proof of usage is scanty enough between 1717 and 1814, but I think there is quite enough there, joined with the subsequent usage, to make it stand—to infer constant and continuous exercise of this right of harbour. I need not, I think, go over the evidence in detail. From 1717 the burgh authorities levied anchorage dues. The proof of it occurs only from time to time, but that proof necessarily implies continuous use, because the harbour dues were let along with the burgh customs. It is, in my view, in vain to say that anchorage dues are simply dues on goods

brought in. That is not the meaning of the term at all. It is dues for the use of the harbour, and not for the goods brought in from time to time. I need hardly say that I refer to the expressions which occur in the minutes.

It must also be remembered that the burgh people from time to time improved their harbour for the purposes of a harbour—necessarily implying that they were asserting their right to improve the harbour of which they were in the possession and use.

Therefore upon this matter I am of opinion that the title is quite sufficient, and the possession proved beyond all manner of doubt.

But then comes this idea, that the Highland Roads and Bridges Commissioners in some way or other were the proprietors of this harbour—that it was not the magistrates of the burgh who levied the dues but the Commissioners of the Highland Roads and Bridges, or, at all events, that the magistrates in levying the dues were levying them upon the title of these commissioners. On the contrary, I am of opinion that the whole view presented by the Lord Ordinary, and maintained from the bar from first to last, proceeds upon a total misapprehension of the fact. The Lord Ordinary goes so far as to say that the pier, which was begun in 1814 and finished in 1817, was built under an Act of Parliament—"It appears to the Lord Ordinary that the right to levy dues at all depends on the terms of the Act of Parliament under which the harbour or pier was erected." There cannot be a greater mistake. It was no more built under an Act of Parliament than it was built by the Convention of Royal Burghs or by the Commissioners of Supply. Down to 1823 there was no Act of Parliament authorising such a thing. The Act of Parliament having reference to this matter authorised the Commissioners of Highland Roads and Bridges to make advances of money to those persons who were about to build a pier. In this instance they did make advances—they made advances to the Magistrates of Fortrose; and the Magistrates of Fortrose made as strong an assertion of their rights of port and harbour as I can conceive. It was only a subvention that the Commissioners of Highland Roads and Bridges were authorised to make or made. That subvention was not the only means by which the works were brought to completion. It was supplemented by landowners in the neighbourhood, by persons in the burgh, and by the Convention of Royal Burghs, but the Magistrates of Fortrose, who had the right to it, within whose jurisdiction it was, remained administrators of the funds. It is not of the slightest moment whence the funds came, the fact being that the burgh, out of funds they acquired, built the pier.

Now, it is quite clear that a period of six or seven years after that an Act of Parliament was passed which gave these Highland Roads and Bridges Commissioners the power in certain circumstances to authorise or direct the levying of rates for the support of the piers for which they had previously made advances. What would it signify that the Commissioners had authorised the Magistrates of Fortrose to do this? Would that have been a different state of matters in regard to the authority and proceedings of the magistrates? On the contrary, it might be shown that the dues have been in use to be levied or exacted since before the year 1823, and it was only in that year, as the Lord Ordinary says, that authority was given to charge dues for the use of quays and piers constructed as this one was.

But, unfortunately for the defender here, he pleads on his record that the Magistrates of Fortrose have not acquired any such right at all—acquired from the commissioners—and I am of opinion that that plea, which the Lord Ordinary has sustained is as matter of fact perfectly well founded. It is perfectly true that the Commissioners of Highland Roads and Bridges did make over this harbour to the Magistrates of Fortrose—a fact which, I think, has a tendency all the other way. But there is neither grant nor direction by them that the dues which they were authorised to collect were to be levied by the Magistrates of Fortrose. And I rather imagine that such was not the fact. The Magistrates of Fortrose had continued to levy dues from 1814 down to 1824 under their own authority beyond all question. And they continued to do exactly the same thing after that date. Even if they had had a right given them by the commissioners, their continued exercise of the right of levying harbour dues from 1814 to 1817, and down to the present time—a right which so far as we see they never ceased to exercise—did not originate with the commissioners. I cannot possibly get the better of that. Nor is it disputed that the dues that were levied are just the dues which the Act of Parliament authorised. That seems to me to be conclusive; and to put the matter beyond all doubt the magistrates took over the power of the Highland Roads and Bridges Commissioners, and extinguished any connection they ever had with the pier.

In conclusion, let me say that I think there is an entire mistake as to the position of the Commissioners here. Those Commissioners were simply appointed to make advances out of the funds derived from the sale of the forfeited estates, and they were to make these advances, and did make them to great public advantage—to harbours and roads in the Highlands. There was no obligation upon them to administer—they had a certain limited power to administer in cases where they thought fit—a power which they did not exercise, and in so far as they did not exercise any power of that sort, they were simply in the position of trustees handing over funds provided by the estates I have referred to for the benefit of the harbours and bridges, in this case for the benefit of the harbour of Fortrose.

On the whole matter, I have come without any difficulty to the conclusion that the magistrates are entitled to continue the exercise of the right which they have now apparently exercised for so long a period.

Lord Young—I am entirely of the same opinion, and have really very little to add. Perhaps I may usefully make one or two observations of a general character on the law applicable to the case, although I quite agree in all your Lordship has said. If there is a particular case to which that law is applicable, I think it is this. The general question for us, as applicable to the burgh of Fortrose, is of public interest undoubtedly, but I think the public interest is with

the pursuers of the action and not with the defenders. In point of fact there is a harbour at Fortrose. Whatever the legal character of it may be, there is a harbour there—that is to say, there is a place suitable for landing and embarking, and that is conveniently situated with reference to the requirements of the district. There is a district which is conveniently served by landing and embarking at that particular place, which is fitted from its nature for the purpose, and accordingly resort is had there, to a free port and harbour by all who have occasion to land and embark. Now, I repeat that is a harbour; but the question arises, Is it a private harbour? For we all know there are plenty of harbours in the country which belong to private individuals, and used for their own purposes, and the purposes of their own estates, and their own people, and to which the public have no right to resort at all without special permission. Such harbours may belong to societies for instance. Is this a harbour of that sort? or is it what is in legal language called a free port, which means, not that people may resort there without payment, but that it is free to all upon paying such dues for the accommodation afforded as usage has established or law may have established as applicable to the particular place. That I believe is the meaning of a free port—that it is open to all the subjects of the Queen, and, indeed, to all nations and peoples, to resort there, they being liable to pay dues as the price of accommodating them. And I take it that all the world at peace with the Queen are entitled to resort to the harbour at Fortrose, and nobody can prevent them. They are entitled to resort there. Well, then, it is a free port; it is free to all just as an open part of the shore, where without any trespass people may land or embark. It is a recognised harbour—a spot selected and improved at more or less of cost—and to which far beyond the memory of man people have resorted for landing and embarking in order to serve the district of country round about. I suppose, referring to one's general knowledge, we may draw the conclusion that to the existence of this port here the town of Fortrose owes its existence. It was not made a port on account of the village being there. The village had been built because of the convenience of the port. It is because of the existence of the port that Fortrose became enlarged—at all events in point of dignity—I do not know if in point of size—into a royal burgh. There was a good harbour there, and it was erected into a royal burgh. A number—a community—build houses there, and establish a village there, and that community is erected into a royal burgh.

Now, the question is, what is a royal burgh? In order to ascertain the territorial limits of it to begin with, in so far as these are not specified in the charter—and the territorial limits are very rarely specified in the charter, at least very frequently they are not—you must have resort to usage. And there can be no doubt that it is very trite and familiar law that by the proof of usage or possession you may well ascertain the territorial limits comprehended within a grant of royal burgh. It is not that anything may be acquired by the law of this country by usage or possession only. That is not the meaning of the proposition. It is that you explain the grant, or the extent of the grant in so far as it does not express itself, by specifying and prescribing limits by evidence of what is done under it. You prove the usage, not because usage *per se* affords a title to anything, but because it explains and interprets the grant which is the title.

Now, upon the question what is the burgh here? we have to ask, does it extend to the sea-shore, and include the sea-shore? The grant itself does not tell. Although the sea was there as a fact, it does not even mention the sea-shore as a necessary accompaniment of the land. Does the grant in the charter comprehend the sea-shore? The charter, I say, does not tell you, and the question comes to be, how did the community act under the charter? Did they possess the sea-shore? Have they acted in such a way as to explain the grant to include the sea-shore? The answer to that question on the evidence is, Yes, they did possess it. They made such use of it as alone could be made of it. They used it as a place at which they and the people of the district around could land and embark, and load and unload articles of merchandise. They improved it for these purposes. They made charges upon all those who resorted to it for the purpose of preserving it as a place at which landing and embarking, loading and unloading, could take place. That was the only use that could be taken of it—that anybody could make of it. The magistrates have certainly done that for a period of sixty years at least. Having regard to the nature of the particular case, I think there is evidence to show that that use extended a long way back beyond those sixty years. It has been said more than once in the course of the discussion that the proof of usage is scanty—scanty beyond that period. I can hardly wonder at that. No doubt the whole affair is scanty. The burgh itself was scanty, the harbour was scanty, and need we wonder that the resort to the harbour was scanty. Everything about it was scanty, and you cannot have other than scanty proof about it. But you have such evidence as might be expected—as indeed alone could be had—with reference to the usage in such a matter.

Then was the harbour really included in the grant? What I have said shows that it was, for the harbour just consisted in the landing and embarking there; and the duties of the magistrates as harbour authorities consisted in making the charges I have adverted to, and preserving the character and advantages of the harbour as a harbour. The magistrates of Fortrose performed those duties—very scantily performed, I daresay, for the word is applicable there too—of improving the natural features of the harbour, and of making it more commodious for the purpose for which it was designed, and the corresponding duty or privilege of exacting dues for the accommodation afforded. All these rights were exercised, and joining all these things together, with the free resort there without let or hindrance of all the world who were desirous of resorting there, and you have what is called a free port and harbour. Well, the next question is, was that in the burgh or not? It is very commonly included in a burgh—so commonly that I am myself aware of no instance of a royal burgh with a harbour—that is to say with a harbour adjoining—where the harbour was not part of the burgh. And in the course of the discussion

put the question whether there was any instance, and I was informed that if there was it was not known. Where there is a free port and harbour, all the world who choose can resort to it. It happened in the case of Fortrose that a very small portion of the world resorted to the harbour. Still, though comparatively few people found it necessary to take advantage of the port a universal liberty existed all the same. Now, was that in the burgh of Fortrose? The charter does not specify it; but as I have already pointed out, the question what is the burgh, in so far as the charter does not specify the limits, must be determined by usage. There are some things which certainly do not need to be expressed, but would be implied without any proof of usage. Watching and warding, and the right and duty of providing market accommodation — all these things are comprehended in the notion of a burgh. A burgh is not merely a grant of land, but the erection of a community into a corporation for certain purposes advantageous to the whole people. The advantages, moreover, are not limited to that community itself. It is in that sense that a royal burgh is a *nomen universitatis*. I repeat it is not merely a grant of land; it comprehends many things besides the mere property of the land which is granted to the community; and "port and harbour" is one of those familiar things which it frequently comprehends, and if it be not expressed I see no reason for not resorting to usage for an answer to the question, Does this particular burgh include that?

Resorting to usage for an answer, then, I think we have it given here quite distinctly, although no doubt, as far as the evidence for the period beyond sixty years is concerned it is scanty evidence, the reason of the scantiness being, as I said before, that scantiness is the nature of the whole matter. It is all very little—all upon a small scale.

That being so, the magistrates, as the trustees of the community and guardians of the community's interest, being impecunious, as they were likely to be in such a little place, apply for aid to the Commissioners of Highland Roads and Bridges, who have funds at their disposal for improving harbours by building piers and so on. They get that aid which they seek, and forthwith proceed to build this pier or improve the accommodation of the harbour. That is the period at the commencement of the sixty years which the Lord Ordinary refers to. Having so used it, they are able to give more and better accommodation to the public. Their exaction of dues becomes more distinct from that period, and continues down to the present time. What in the world is there against it? Nothing at all that I can see. What does it signify that they got aid from these Highland Roads and Bridges Commissioners? They might have got it by public subscription. Indeed, they appear to have got a part of it by public subscription, and they might have got the whole of it in that way from people who were interested in the locality or in the burgh itself. No matter, the result would be all the same. They got money and applied it to the improvement of their harbour, and they continue te exact dues from the public resorting to it, all the public being entitled to resort to it. The Act of Parliament which the Lord Ordinary refers to has no concern with the matter at all further than has been indicated by your Lordship. To be sure, if there had been no other way of raising money in order to maintain the pier, by that statute of Geo. IV., referred to, the Commissioners themselves were entitled to impose dues on those resorting to the harbour, but that had nothing to do with the existence of the harbour, and the rights and duties of the proprietors or granters of the harbour, that is, the community of the burgh. In that matter I entirely agree with your Lordship.

That being so, we come to the facts under which this case comes before us. The defender is one of the public, and habitually resorts to this harbour with his steamer for his own profit, and he takes the use of the harbour. Did not he maintain, and is it not in the interest of the community that he should maintain successfully, although he is suggesting the contrary here, that the magistrates are bound to repair and preserve the harbour, and to improve it and make it available for his accommodation, and for the accommodation of other people? But according to the judgment he has persuaded the Lord Ordinary to give him, and which he is here defending, there is no obligation in the matter at all. He contends in effect that it is not a free port and harbour—the magistrates have no duty and no right at all. Now, I cannot see—and that is the observation with which I began—that that is the view in which the community is interested, or the view according to which the interests of the community are best protected. I think the community is interested that this shall be a free port and harbour—that the port and harbour shall be vested in the community itself, with the duty of maintaining it imposed upon it, although accompanied with the right of exacting the dues necessary to enable them to perform that duty. According to my view, therefore, the action is well founded. I do not speak to the details of the account, about which I hope we shall hear no more. The sum sued for is only £30. The important question is that which concerns the rights of the community, and the corresponding duty of the community, and the magistrates as representing the community of the burgh to levy dues and preserve the harbour. It is important, I say, that these rights and duties be established. And if these rights be established, and if the dues have been in general uniform and are reasonable in themselves—in general conformity, I mean, with the usage of the last forty years, although some items may be a trifle more, and some of them a trifle less, I hope that about the matter of a few pounds, probably only a few shillings, we shall not have this litigation prolonged. The dues here are not fixed. The harbour is not sufficiently big and important to require a statute to regulate it; if it were so, the statute would fix dues or appoint a board, with powers within certain maximum limits to fix the dues as these may be thought fair. The only measure is "reasonable dues," not transcending, generally speaking, the usage that is established here, and I use the word "reasonable" with reference to the nature of the harbour, and the duties of those who have the exaction of the dues. Mere taxations of this account of £30 may be of interest in views which I confess do not occur to me at this moment, but I imagine it would be very unprofitable litigation in this Court to have it upon the mere taxation of the items.

Therefore I hope the parties will enable us to dispose of the whole case.

Meantime, however, my opinion is—limited as your Lordship has expressed—that the magistrates, as representing the community of Fortrose, have a right of port and harbour, with a duty of maintaining it, and the corresponding duty of levying customary harbour dues necessary to enable them to perform that duty.

Lord Craighill—As I concur not only in the conclusion at which you and my brother Lord Young have arrived, but also in the views that have been presented as the reasons by which that conclusion has been reached, it is not necessary, and it would not be expedient, that I should offer very much in explanation of the legal grounds on which my judgment is rested.

There is no doubt that this question on the present occasion, as all such questions are on similar occasions, is of interest not merely to the parties immediately concerned in the litigation, but also to those living in the district of which Fortrose is the central port; of interest also to the community outside who are in the habit of visiting the port and harbour, the right to which is now in question. The magistrates if they succeed in this action will have a power of exaction—a power to exact as much as may be according to law—but there is involved in the right to make the exaction an obligation in which the world at large is more or less interested, and that is the obligation of maintaining this harbour so that it may be of use to all those who are interested in resorting to it. And it is this last point, quite as much as the first, which lends to all such questions the importance they are likely to possess.

The first question that is raised by the defenders is, there being admittedly here a port and harbour, and the public having been induced from time immemorial to resort to it, and there having been exaction of dues by the magistrates during the same course of time, is there a title in the magistrates to this port and harbour, giving them power to levy that which the defenders object to pay. What the defender says is this, that if there is in the case of a burgh a right of port and harbour, it must be the subject of an express grant. I confess I was startled by the proposition when I heard it, and the very able argument of the counsel for the defender was not sufficient to satisfy me that his conclusion was according to the law as recognised by the authorities. How it should come to pass that a royal burgh should be in a worse predicament than any other of those bodies by whom rights to *regalia* might be possessed, I was utterly at a loss to understand. Because it is *nomen universitatis*, there is no doubt whatever that barony is a title upon which a right of port and harbour may be prescribed. Stair says that without reference to possession, because barony is *nomen universitatis*—if there is a barony on the shore, that there the right of port and harbour is held to be a portion of the grant. But beyond all question, in a case of that sort a barony title is a title with possession. The authority of Stair goes much further than that, if we look at the passages that were cited in the course of the discussion. He says that a right of port and harbour is a thing possessed by the private right of the individual, or it may be possessed under what he calls a public grant. In the first passages in which the question of port and harbour is dealt with by Stair, he says that custom itself—of course upon a title, because custom without a title neither for this nor for anything else will be enough—that where there has been a title and that title has been followed by custom, or as we call it, by prescriptive usage, there the right of port and harbour will be acquired. And I should think in reference to what may be found in the authorities in regard to general considerations of expediency, that the acquisition of a right of port and harbour, instead of being more difficult in the case of a royal burgh than for any other corporation or individual, should be more easy. There is a great deal of presumption in favour of a burgh. There is a shore which is suitable for the purposes of a port and harbour. If a harbour has been called into existence, if magistrates are the parties by whom the harbour has been maintained, if the dues which have been paid for the use of the harbour have been levied by them, and if there has been a grant of royal burgh even without specification of port and harbour, a title can undoubtedly be prescribed. The mere circumstance that it is *res universitatis*, as has been pointed out by your Lordship, is regarded by Craig as of itself sufficient. But in every case, whether it is expressed or not, port and harbour, in the circumstances in which this port and harbour in question are, are to be looked upon as belonging to the burgh. The same thing is mentioned expressly by Bankton, b. i. t. iii. section 4, where he says—"The privilege of ports and harbours, and of exacting certain dues for keeping them in repair, is for the most part granted to cities or burrows where they lie, and sometimes also to private heritors, who are bound to make and hold them sufficient for the public good and encouragement of navigation and commerce." Wherever we have a burgh, therefore, and contiguous to that a port and harbour, surely, the presumption is not against the acquisition of the right, if there has been possession of a right of a port and harbour by the burgh. I should rather think it would all be in favour of the acquisition. Therefore it appears to me that not only is there no ground for making the case of a royal burgh worse than any other possessor of such rights, the case is all the stronger that the burgh is a royal burgh than it would be if it were merely a barony.

That being so, the question comes to be, Has there been possession? Possession for the last sixty years is plain enough. There is no controversy between the parties as to that period. The defender admits there has been something of the nature of usage. As to the early part of this century, however, the evidence is not so good, but that is to be accounted for by the consideration that the period is so much further back than the sixty years about which we have positive evidence. Still we have evidence, although it is of a general character, that harbour dues must have been levied by the burgh of Fortrose as part of what they had to administer. You have "anchorages" mentioned as early as 1718. These are the earliest dues you have any trace of. Then we have a reference to customs, and it seems to have been a matter for consideration what they were to do with the surplus of dues that had been

collected which was not immediately required for the reparation of the harbour. And we have mention of a harbour fund as enabling the burgh from that time to serve all its necessary purposes in regard to the harbour. Then before 1823, or in that year, we have harbour dues expressly specified as one of those rights of the burgh which were exposed to let by public roup, and which passed into the hands of a tacksman. Then the Act of Geo. IV. was passed, under which harbour duties were levied, and the magistrates the parties appointed to administer them. If that is so, coupled with the possession that followed during the long period of sixty years, and which is undisputed, it appears to me that we are necessarily led to the conclusion that there is a title, and that upon this title, so far at least as we can see, those duties were levied.

What, however, is suggested is, that whatever may have been the state of things before 1823, matters were changed by the Act of Parliament 4 Geo. IV. cap. 56, to which reference has been made. I agree with what has been said by your Lordship and Lord Young upon that subject. It appears to me that although the Highland Roads and Bridges Commissioners gave assistance out of the funds of which they had the distribution, yet this duty for which they were appointed never made them owners of any of those piers which were erected in part through their assistance. Moneys were placed in their hands, not that they might become proprietors of the piers that were erected, but that they might assist those who were interested in establishing certain piers in particular parts of the country. They could scarcely be regarded as creditors, because it does not appear when they were authorised to make the advance, that any duty was imposed upon them, or any right conferred, for demanding repayment of the amount. It appears to me that by this Act of 1823 they were empowered to give directions for the levying of that 2d. per ton. But for what purpose? For the reparation or maintenance of the piers that had been erected in part through their subvention.

Now, it is very remarkable that, in this particular case at anyrate, this is a power on the part of the Commissioners of Highland Roads and Bridges that never was exercised. Was it of no moment, then, that this should be maintained? It was of as much moment to maintain it as it was to preserve any other; but this power was given to the commissioners to be exercised only if there was no other body which exacted dues for the accommodation afforded, in order that the funds requisite for the maintenance of the harbour in the future should be obtained. It appears to me that in this and in similar instances where assistance was given to a royal burgh which presumably had a right to collect shore and harbour dues for the maintenance of the harbour, it was not necessary to exercise the power to levy 2d. a ton, because this was a power already possessed by the magistrates as owners of the port and harbour. The magistrates could do everything in the way of exaction that was requisite or expedient for the purpose of raising money to support the harbour.

Therefore we have evidence here almost to the effect that by 1823, or at anyrate at that time, there was in the minds of the commissioners that which satisfied them that this power which was to be exercised for the purpose of getting what was required for the maintenance of the harbour, was not required in the case of Fortrose, because presumably there were other funds available to Fortrose by means of which the harbour could be kept up.

I do not think it necessary to say anything further in support of the views that I have taken on this matter, inasmuch as all that is requisite appears to me to have been advanced by your Lordship and my brother Lord Young.

On the question raised by the defender's third plea the following opinions were pronounced—

Lord Justice-Clerk—This is not a very large matter, and I have no difficulty about it. I am clearly of opinion that the burgh authorities are entitled to levy the dues either from the shipowner or from the customer at the port—not merely from those in the habit of personally frequenting the harbour as the servants or carriers of the goods. I hardly think the claim made here is even stateable.

Lord Young—I am of the same opinion, and I think it a very trifling matter. The dues are payable by the carrier to the person entitled to exact them. If the party liable to relieve the carrier pays them, the carrier will not have to pay, but a custom on his part to pay them is of no value in this question. If the party liable to relieve comes and pays, of course the right is satisfied. A porter or a clerk might be sent to pay, and the man might never go himself. What does it signify? The thing is paid. The defender's counsel admitted that his observations had no importance in regard to the future. He only says—"Well, but your practice misled me. If you had told me, I should have understood that for the future you intended to exact from me, and I should have acted accordingly. But as to the past, it is very hard that without that notice, and having been in the habit of taking from the customer, you should now come upon me." If it had been a big matter we might have listened with some patience to it; but it is a mere bagatelle of a criticism upon a few pounds. It is certain upon the evidence that with some of his customers he carried the goods on the understanding that he was ultimately to pay the dues himself. I think that was his understanding. But after all a few pounds is the limit of the question. I entirely concur with your Lordship that the matter is not stateable, and that a decree in conformity with our judgment on the main question must go out for the account as it shall be readjusted on the footing of the table of 1837.

Lord Craighill—I am of the same opinion. It appears to me that the shipper, the consignee, and the shipmaster are all liable; and I do not see any case made on the part of the defender which entitles him to say that the law against him as a shipmaster should not receive effect. The practice appears to me to have been that money was taken as money was offered, but if the consignee or the owner did not come and pay, then the harbour-master turned upon the shipmaster and exacted payment from him. It seems to me to be inconceivable that an action of that sort

could have been resisted in the Admiralty Court in 1823, since which time the practice has been of the nature I have just indicated.

The Lords recalled the Lord Ordinary's interlocutor, repelled the defences, and decerned against the defender for £44.

Counsel for Pursuer (Reclaimer)—Trayner—Jameson—Kennedy. Agents—Pringle & Dallas, W.S.
Counsel for Defender (Respondent)—Gloag—Millie. Agents—Watt & Anderson, S.S.C.

Saturday, May 21.

FIRST DIVISION.

[Lord Adam, Ordinary.

CLARK *v.* CLARK.

Husband and Wife—Provision to Wife—Conjugal Rights Amendment Act 1861 (24 *and* 25 *Vict. cap.* 84), *sec.* 16.

A married woman for whom no provision had been made by marriage-contract, but who subsequently became entitled to a life-rent of £40 per annum (which was however to go to her husband *stante matrimonio*), received from her father during his lifetime the sum of £440. This sum was invested on deposit-receipt in the wife's name. During several years she periodically uplifted and re-deposited the money, the discharges being granted by her alone. In 1867 the money, which had been slightly increased in amount, was used to purchase heritable property of the value of £450. The disposition was in favour of the wife, the husband receiving the rents. In 1880, the spouses having separated, and the husband having raised an action of declarator and adjudication of the property as being a donation—*held*, under the 16th section of the Conjugal Rights Acts 1861, that the husband had never obtained complete and lawful possession of the subjects, and that they did not exceed and were otherwise a reasonable provision for the wife.

The pursuer in this case, James Clark, farmer, Kirklandhill, near Dunbar, was married to the defender in July 1864. David Denholm, Mrs Clark's father, lived with the pursuer and defender, and some time before his death gave his daughter a sum of £440. This money was lodged upon deposit-receipt in the Dunbar branch of the Commercial Bank in the name of the defender. The first deposit-receipt, which was dated 5th July 1865, was uplifted in November following, and a new deposit-receipt taken for a somewhat larger amount; similarly each half-year, down to March 1867, new deposit-receipts were taken and the old ones discharged, the discharges being in all cases by, and the new receipts in favour of, Mrs Clark only. The money thus deposited was finally uplifted on 28th November 1867. By disposition of the same date certain subjects in Dunbar were purchased from George Denholm of Ninewar, who "in consideration of the sum of four hundred and fifty pounds sterling instantly paid to me by Mrs Agnes Denholm or Clark, wife of James Clark, tenant of Springfield, as the price thereof," thereby sold and disponed "to the said Agnes Denholm or Clark, and her heirs and assignees whomsoever, heritably and irredeemably, All and Haill" the said subjects. The purchase-money was the sum uplifted from the deposit-receipt, the total sum then on deposit being £460. The discharge was granted, as on previous occasions, by Mrs Clark, but the money was actually uplifted and paid to Mr Denholm by her husband.

The parties ceased to live together in March 1880, and the object of this action was to have it found and declared that the conveyance to the defender above referred to was a donation by the pursuer to the defender, and so revocable; and for decree revoking the same and adjudging the subjects to the pursuer.

The pursuer pleaded—"(1) The funds with which the said subjects were purchased having belonged to the pursuer, and the purchase and conveyance to the defender of the subjects having been a donation by him to her *stante matrimonio*, he is entitled to revoke the same, and to have the said subjects vested in his own person, and decree ought to be pronounced in terms of the conclusions of the summons. (2) The said sums not having come to the defender as succession, by donation, bequest, or otherwise than by her own industry, and the same never having been beyond the possession and control of the pursuer, decree ought to be pronounced as concluded for. (3) Provision having been otherwise made for the defender by her father, which is in the circumstances sufficient for her, her claim to the property in question ought to be repelled. *Et separatim*, the defender is not entitled to insist for a provision while the pursuer is solvent and the marriage is subsisting."

The defender pleaded—"(3) The defender having obtained, by donation or bequest, the fund out of which she paid the price of the heritable subjects in question, the same did not fall under the pursuer's *jus mariti* or right of administration, in respect that he did not claim or obtain possession of it as set forth in the Conjugal Rights (Scotland) Amendment Act 1861. (4) The pursuer having been aware and approved of the defender retaining the said money and depositing it in her own name, and investing it in the purchase of the subjects in question, as set forth in the defender's statement, he thereby waived and abandoned all claim which under the statute or otherwise he might have had. (5) The subjects in question being no more than a reasonable provision for the defender's support and maintenance, the present action is, in respect of the provisions of the statute cited, untenable in law. (6) *Esto* that there was a donation, it is irrevocable, in respect that it was a provision made for the defender, and was and is not more than reasonable."

The Lord Ordinary (ADAM) allowed a proof, from which the foregoing facts appeared, and also that there was no marriage-contract between the parties, and that defender's only separate estate was a property of about £40 yearly value, the income of which was enjoyed by her husband *stante matrimonio*. The rental of the defender's farm was £733. The pursuer offered to pay the defender £40 per annum, or alternatively to take her back if she preferred.