Glasgow, one of His Majesty's subjects, while engaged in the execution of his duty, to the serious injury of his person and the danger of his life, and this you did contrary to the Act 10 George IV, chapter 38, section 2; and (3) assault the said James Duncan, engaged as aforesaid, and throw stones and bricks at him, whereby he was seriously injured."

The accused emitted a declaration before the Sheriff-Substitute at Greenock in which he pled "guilty" to the first charge and "not guilty" to the second and third charges. The said declaration also contained the following statement:—"I am a stucco figure maker. I belong to Italy. My last address is 6 Royal Street, Belfast. I am nineteen years of age and unmarried."

The proceedings before the Sheriff were conducted through a sworn interpreter, as were also all communications with the accused at the trial.

The trial took place at the Glasgow Circuit Court on 27th June 1906, when after hearing the evidence the jury unanimously found the panel guilty as libelled under the first charge in terms of his own confession, found him guilty at common law under the second charge, and guilty as libelled under the third charge.

LORD STORMONTH DARLING sentenced the panel to ten years' penal servitude, and having found the said Giovanni Batista Darini to be an alien of Italian nationality recommended that an expulsion order should be made in his case in addition to the said sentence. A certificate of conviction and recommendation for expulsion in terms of the Act of Adjournal of 1st February 1906 was accordingly issued.

Counsel for H. M. Advocate—E. Adam, Advocate-Depute. Agent—W. S. Haldane, W.S., Crown Agent.

Counsel for Darini—J. R. Haldane. Agent—A. Macfarlane, Solicitor, Port-Glasgow.

COURT OF SESSION.

Friday, June 22.

FIRST DIVISION.

[Lord Low, Ordinary.

LADY SEAFIELD *v.* MACBRAYNE.

Statute—Construction—Canal—Pier Dues—Right to Charge Dues subject to Power in Commissioners to Regulate Stated to be in Statute—No Provisions in Statute for such Regulation—Rates Chargeable by Private Owner of Public Pier—"Wharfage" Rates—Right of Owner of Pier to Levy Rates on Vessels Touching—Caledonian Canal Acts 1804 (44 *Geo. III, c.* 62), *sec.* 58; 1857 (20 *and* 21 *Vict. c.* 27), *Schedule; and* 1860 (23 *and* 24 *Vict. c.* 46), *sec.* 10.

The Caledonian Canal Act 1804, sec. 58, after providing for the owners of lands adjoining the canal having power to erect wharfs, quays, landing places, &c., and to land goods, &c. thereon, enacts—". . . and all rates and duties which shall be paid to the use and benefit of the said wharfs, quays, landing places, cranes, weigh beams, and warehouses, shall be (subject to the powers herein contained for the said Commissioners to limit, ascertain, and make regulations of and concerning such rates of wharfage) and are hereby vested in such owner or owners of the lands, grounds, or wastes who shall make, construct, and erect the same respectively as aforesaid, and his, her, and their representatives, so that the rates and powers herein granted to the said Commissioners shall not be thereby reduced or infringed." The Act contains no provisions dealing with the limitation, &c. of such rates and duties by the Commissioners.

Held (1) that the section conferred a power to charge rates and duties although there were no provisions dealing with the exercise by the Commissioners of the power to limit, &c., but (2) that such rates and charges were "wharfage" rates only, *i.e.*, a rate upon goods and passengers landed at or shipped from the pier, and not "tonnage" rates, *i.e.*, a rate on the tonnage of the boat touching at the pier.

The Right Hon. Caroline, Countess-Dowager of Seafield, proprietrix of, *inter alia*, the lands of Urquhart and Abriachan, on the shore of Loch Ness, brought an action against (1) David MacBrayne, shipowner, Glasgow, and (2) the Commissioners of the Caledonian Canal, incorporated by Act of Parliament, who were called for their interest but did not enter appearance.

The conclusions of the action, which dealt with the payments to be made on the defender's ships touching at Temple Pier and Abriachan Pier on Loch Ness, on the Caledonian Canal, were, *inter alia*, as follows:—"And (II) it ought and should be found and declared by decree foresaid that the pursuer is entitled to levy on the defender the said David MacBrayne (*a*) in respect of every ship or boat other than a steamboat belonging to the said defender which shall so touch, load, or discharge, the sum of one penny per registered ton for each time that such ship or boat shall so touch, load, or discharge, and (*b*) in respect of every steamboat belonging to the said defender which shall so touch, load, or discharge, the sum of 1s. 6d. for every time that such steamboat shall so touch, load, or discharge; (III) or otherwise it ought and should be found and declared by decree foresaid that the pursuer is entitled to levy on the said defender in respect of every vessel belonging to the said defender which shall land or receive on board passengers, animals, carriages, or goods at or from either of the said piers, a rate of 2d. for every ton burden of such vessel according to its register or measurement for every time that such vessel shall

so land or receive on board such passengers, animals, carriages, or goods. . . ."

The pursuer pleaded—"(1) The piers mentioned in the condescendence being the private property of the pursuer, she is entitled, subject to such limitations and regulations as have been or may be legally imposed by the Caledonian Canal Commissioners, to levy on the defender dues in respect of all steamboats or other vessels belonging to him which touch at or make use of the same. (2) The rate of 1s. 6d. per visit of each steamboat having been duly approved by the Canal Commissioners, the pursuer is entitled to decree of declarator in terms of the second conclusion. (3) Or otherwise the rate of 2d. per ton prescribed by the Act of 1860, being the only effective limitation of the pursuer's right to levy rates, decree of declarator should be granted in terms of the third conclusion."

The defender pleaded—"(2) The pursuer having no right to levy dues upon the steamboats or other vessels belonging to the defender which touch at or make use of the piers referred to, the action ought to be dismissed."

The Caledonian Canal is maintained by the Caledonian Canal Commissioners under authority of various statutes, and particularly of the Acts of 1803 (43 Geo. III, cap. 102), 1804 (44 Geo. III, cap. 62), 1848 (11 and 12 Vict. cap. 54), 1857 (20 and 21 Vict. cap. 27), 1860 (23 and 24 Vict. cap. 46), and 1896 (59 and 60 Vict. cap. 79). So far as necessary for this case the following are the provisions.

The Act of 1804 in sec. 58 allowed abutting landowners to erect piers and provided for charges thereat (*v. sup. in rubric*). Section 59 allowed the Commissioners to erect piers, &c., if the landowners did not do so. Section 62 provided that nothing in the Act should authorise the Commissioners or other person to use a wharf erected for private use only.

The Act of 1857, sec. 3, enacted—"From and after the passing of this Act it shall be lawful for the Commissioners to levy and receive at every pier, jetty, or landing place erected or to be erected or improved on lands belonging to the Commissioners, or on or in connection with the canals respectively, such rates on passengers, animals, goods, and carriages landed or shipped at such pier, jetty, or landing place as the Commissioners may from time to time deem expedient, not exceeding the rates specified in the schedule hereunto annexed." The schedule did not deal with tonnage dues. Section 4 authorised the Commissioners to enter into agreements with the owners of any lands on the Canal with respect to any piers or landing places erected or to be erected by such owners at their own expense, and with regard to the management and maintenance thereof, and the levying and receiving thereat of rates not exceeding those in the said schedule.

The facts of the case are given *infra* in the opinions of the Lord Ordinary (Low), who on 17th February 1905 before answer allowed a proof.

Opinion.—"The pursuer is proprietor of two piers upon Loch Ness, known as Temple Pier and Abriachan Pier, which are used in connection with the navigation of the Caledonian Canal. The former was built in 1858 and the latter in 1881. The defender is a shipowner in Glasgow, who runs a line of steamers through the canal for the conveyance of passengers and goods. The defender's steamers call daily at Temple Pier. They used also to call at Abriachan, but have not done so since early in 1904.

"From the time that Temple Pier was built the pursuer or her predecessors have made charges for the use of that pier, and since 1869 the defender has paid to the pursuer an annual sum of £22, 10s. The pursuer now proposes, instead of taking an annual payment of a fixed amount from the defender, to charge dues at a certain rate upon passengers and goods landed or embarked at both piers, and also certain tonnage rates upon all vessels touching at the piers.

"I understand that the defender does not dispute the pursuer's right to exact landing charges upon passengers and goods (at all events at Temple Pier), but he maintains that she is not entitled to charge tonnage dues upon vessels touching at or using the piers. The present action is brought by the pursuer for the purpose of having her alleged right to do so declared.

"There are a number of Acts of Parliament relating to the Caledonian Canal, and to these both parties appeal in support of their respective contentions.

"The first Act was passed in 1803, and by it a Parliamentary grant of £20,000 was made to certain Commissioners for the purpose of making the Canal. By an Act passed in the following year—1804—the grant was increased to £50,000, and the Commissioners were authorised to construct all necessary works and to levy rates and duties. The 58th section of the latter Act contains provisions which are admittedly applicable to the piers in question. By it the owners of lands 'through which the said navigation shall be made' are authorised to construct 'wharfs, quays, and landing-places,' and to land goods, wares, and merchandise or commodities upon such wharfs, quays, and landing-places. The section then proceeds:— . . . [*quoted supra in rubric*]. . . .

"In that section it is assumed that rates and duties will be levied for the use of such landing-places, because without express authority being given to anyone to do so it is declared that 'the rates and duties which shall be paid' shall be vested in the owners. Now if rates and duties for the use of the landing-places were vested in the owners I think that it follows that the owners were empowered to levy such rates and duties, and no express limitation is put upon the right except that it shall in some way be regulated by the Commissioners.

"It was argued, however, for the defender that the kind of rates and duties which might be levied was by implication limited to charges for the use of the landing-places for loading and unloading goods and merchandise. It was pointed out that what

was expressly authorised by the section was to construct wharfs, quays, and landing-places, 'and to land any goods, wares, merchandise or commodities upon such wharfs, quays, or landing-places;' and further, that what the Commissioners were empowered to regulate was 'such rates of wharfage'—an expression, it was argued, which is appropriate for landing charges but not for tonnage dues.

"I am not satisfied that the term 'wharfage' when applied to rates or duties is necessarily confined to charges made for landing or embarking goods or passengers. I think that it may include all charges which may be made for the use of a wharf, and if the statutes authorise tonnage rates for the use of a wharf I do not think that the mere use of the expression 'rates of wharfage' is sufficient to exclude such rates.

"The question seems to me to depend in the first place upon what is the true construction of the provision that the rates and duties 'shall be subject to the powers herein contained for the said Commissioners to limit, ascertain, and make regulations of and concerning such rates of wharfage.'

"I confess that when I read that clause I expected to find in the Act special powers given to the Commissioners to fix and regulate the rates and duties which might be exacted at wharfs and landing-places of the kind dealt with by the section, but there is no such provision in the Act. I therefore come to the conclusion that what is referred to are the general powers given to the Commissioners to fix (within the statutory limits) and to regulate the rates and duties which they are authorised to charge for the use of the canal or of the works connected therewith. These included (at the date of the Act) tonnage rates for every vessel entering the Canal, and a certain rate per ton upon all goods loaded or unloaded at the harbours, docks, or basins at the entrances to the Canal (Act 1803, section 23), a rate not exceeding 2d. per ton per mile upon goods carried upon or through the Canal for 'tonnage and wharfage' (Act 1804, section 40), and certain rates for, *inter alia*, using wharfs and quays for loading or unloading goods (Act 1804, section 50).

"Now, of course, the rates which the Commissioners were empowered to charge, whether upon ships or goods, for the privilege of entering or navigating the Canal had no application to wharfs or landing-places of the kind in question, but only such rates as they were empowered to levy for the use of wharfs and landing-places. That I take to be the reason why, in the clause of the section which I have quoted, the reference to the power of the Commissioners to make regulations is limited to 'such rates of wharfage.'

"I am therefore of opinion that the owners of such piers as those in question were authorised to charge for their use such rates as the Commissioners could have charged if the piers had been vested in them, but no other or greater rates.

"How precisely the provision that the rates and duties should be subject to the statutory powers of the Commissioners was intended to be carried into operation is not very clear, but what the pursuer's predecessors did (and I do not understand that the pursuer proposes to adopt any other course) was to obtain the Commissioners' approval and sanction to a table of rates to be exacted at the piers. I think that such a course was quite in conformity with the provisions of the statute, and that the pursuer is entitled to levy such dues as are approved by the Commissioners, provided that they are of a kind and of an amount which the Commissioners could themselves have charged if the piers had belonged to them.

"The last table of dues which is said to have been approved by the Commissioners, and which the pursuer now seeks to enforce, is dated in 1870. So far as I can judge from the excerpts from the statutes which have been printed, the Commissioners had at that date power to charge a tonnage rate on vessels landing or receiving on board goods or passengers as well as rates upon the goods and passengers themselves, but it seems to be doubtful whether they had power to charge a tonnage rate upon vessels merely touching at a pier without landing or embarking goods or passengers. Further, there has been legislation on the subject since 1870, because in 1896 an Act was passed confirming a Provisional Order made by the Board of Trade pursuant upon the Railway and Canal Traffic Act 1888. What the precise effect of that order was I do not know, but the schedule attached does not appear to contain any tonnage rate for vessels using a quay or pier.

"I am therefore not in a position to dispose of the case without further information. I cannot tell from the excerpts from the statutes which have been printed what precisely are the rates and duties now in force. That could only be ascertained by a close comparison of the provisions of the various statutes and schedules, and probably some knowledge of the local conditions to which the statutes are applicable would be necessary. Further, there are certain important matters of fact which are in dispute. Thus the defender denies that a table of rates was ever adjusted and approved by the Commissioners, while the pursuer's case to a large extent rests upon the averment that that was in fact done. Again, the pursuer seeks to have it declared that she is entitled to levy the dues which she specifies, both in respect of Temple Pier and Abriachan Pier. The defender, however, avers that dues have never been levied at Abriachan, and the table of rates of 1870 bears to be for Temple Pier only.

"It therefore seems to me that the safe course to adopt is to allow a proof before answer without disposing of any of the pleas at this stage."

On 26th September 1905 the Lord Ordinary (Low) assoilzied the defender from the conclusions of the summons.

Opinion.—"The provisions of the 58th and 59th sections of the Act of 1804 seem to

me to show that the policy of the Act was to induce the owners of lands through which the Caledonian Canal passed to construct at their own expense such wharfs or landing places as might be necessary to render it fully available for the various districts which it was intended to serve. The provisions of the 58th section, however, in regard to the rates and duties which might be levied at such wharfs or landing places were so vague, and left the position of a landowner who might build a wharf so uncertain, that up to 1856 no landowner had taken advantage of the section, nor had the Commissioners, under the powers conferred upon them by the 59th section, called upon any landowner to do so.

"In 1856, however, Lord Seafield commenced the erection of Temple Pier. The circumstances under which he did so were these—A pier at Temple was very much needed for the Urquhart district, which forms part of the Seafield estates. The Canal Commissioners were not financially in a position to build the pier, and accordingly Lord Seafield ultimately resolved to do so himself. The matter was carried through by Mr Bruce, the commissioner upon the Seafield estates. That gentleman seems to have taken the view that under the 58th section a landowner who built a pier was entitled to fix the rates and duties subject to a power of alteration by the Canal Commissioners. He accordingly proposed, before building the pier, to obtain the approval of the Commissioners to a table of rates of an amount which, while not checking trade, would remunerate Lord Seafield for his outlay and enable him to maintain the pier. His idea was that if such a table was approved by the Commissioners before the pier was built, the rates would not be likely to be subsequently reduced by the Commissioners, and Lord Seafield might proceed to build the pier with a reasonable certainty that he would not be out of pocket. A table of rates was accordingly prepared and sent to the Commissioners, and although there is nothing to show that they formally approved of it, it was put in force when the pier was built and has been in use ever since.

"The construction of Temple Pier was commenced in 1856 and was completed early in 1857. At that time the Commissioners were preparing to apply to Parliament for additional powers, and it naturally occurred to them that the opportunity should be taken to have the difficulties which had arisen in regard to the 58th section of the Act of 1804 cleared up. It was at first proposed to insert a clause in the Bill dealing specially with Temple Pier —transferring it, I understand, to the Commissioners—but Lord Seafield objected to the proposed clause, and it was accordingly dropped and two clauses substituted, which became sections 3 and 4 of the Act of 1857. The 3rd section empowered the Commissioners to levy rates upon passengers, goods, animals, and carriages landed or shipped at piers or jetties belonging to them, not exceeding the rates specified in the annexed schedule. By the 4th section the Commissioners were empowered to enter into contracts and agreements with the owners of lands who had erected piers, jetties, or landing places, 'with respect to the management and maintenance of such piers, jetties or landing places, and the levying and receiving of rates thereat not exceeding the rates specified in the schedule hereunto annexed.'

"I take it that the latter section was intended to supply what had been omitted in the Act of 1804. By the 58th section of that Act the rates and duties to be levied at landing places built by a landowner were declared to be vested in him 'subject to the powers herein contained for the said Commissioners to limit, ascertain, and make regulations of and concerning such rates of wharfage.' No such powers were, however, in fact, conferred by the Act. The result was to render the 58th section incomplete, and the object of the 4th section of the Act of 1857 was to supply the defect in the Act of 1804, and to define the powers of the Commissioners for the purposes of the 58th section in regard to rates of wharfage.

"Accordingly it seems to me that the 58th section of the Act of 1804 must be read along with the 4th section of the Act of 1857, the latter section containing the powers to the Commissioners in regard to the rates of wharfage referred to in the former section. The result of the two sections read together appears to me to be as follows:—(1) A landowner is authorised to erect a pier of the nature of those in question; (2) the Commissioners are authorised to make an agreement with the landowners in respect to the levying and receiving of rates thereat; (3) such rates are vested in the landowner; and (4) they shall not exceed the rates specified in the schedule to the Act of 1857.

"The position taken up by the pursuer is that a landowner who builds a pier at his own expense upon his own land can do what he likes with it, and if he chooses to allow the public to use it can fix his own terms. The only qualification of that right, it was argued, was that the Canal Commissioners were empowered to regulate the rates to be charged; and it was contended that they had in fact done so by having all along recognised the rates contained in the table prepared in 1856. That being so, no third party had a right to object to the rates.

"I cannot assent to the view that a pier built under the 58th section is under the absolute control of the landowner, except in so far as the Commissioners have right to regulate the rates. The 58th, 59th, and 62nd sections of the Act of 1804 seem to me to make it plain that a pier built under the 58th section is a public pier, for the service of the navigation, which the public are entitled to use, and for the use of which the landowner can only charge such rates as are authorised by the statutes and agreed to by the Commissioners.

"That being so, it is not for this Court,

at all events in the first instance, to fix what rates the owner of such a pier is to be allowed to charge. That is a matter to be settled by agreement between him and the Commissioners acting within the limits imposed by the statutes. I have therefore some doubts as to the competency of the action.

"The question raised, however, is as to the legality of a particular rate which the pursuer has been in the habit of charging, and which she desires to continue to charge, and as that is a question upon the construction of the statutes, perhaps I am bound to express my opinion upon it. The table of rates of 1856, besides rates for goods and passengers landed or shipped, contained a tonnage rate upon all vessels touching at the pier. The defender Mr MacBrayne, who has a number of steamers upon the Canal, objected to pay the tonnage rates, and accordingly the pursuer brought this action to have her right to do so declared. The Canal Commissioners have been called as defenders, but they have not entered appearance, so I suppose it may be taken that so far as they are concerned they are willing that the tonnage rates in question should be levied by the pursuer.

"I am of opinion, however, that the statutes do not authorise tonnage rates upon vessels to be levied at piers built under the 58th section. The fourth section of the Act of 1857 only authorises rates not exceeding those in the annexed schedule to be levied at such piers, and the schedule contains no tonnage rate upon vessels.

"It was said that by subsequent Acts the Commissioners were authorised to charge tonnage rates. That may be so, but no authority is given to the Commissioners to agree to such rates being levied at piers built under the 58th section. There is no reference whatever in the statutes to such piers after the 4th section of the Act of 1857, and under that section the rates which may be levied are limited to those specified in the annexed schedule.

"I am therefore of opinion that the pursuer is not entitled to decree."

The pursuer reclaimed, and argued—Section 58 of the Act of 1804 conferred a power on the owner of wharves to levy rates and duties. The power had not been superseded by the Act of 1857. That Act also allowed the Commissioners to enter into agreements with the owners of private piers as to levying rates. The Commissioners had power to levy tonnage dues (2d. per ton) on vessels landing or receiving passengers or goods—Act of 1860 (section 10)—and they might agree to such rates being levied by owners of private piers. That had happened here. The Commissioners were to apportion the rate payable and to charge it partly on the vessel (tonnage rate) and partly on the goods (wharfage rate)—Act of 1860, section 16. There was no such distinction between wharfage and tonnage dues in the Acts cited as the respondent maintained. The rates chargeable were not limited to wharfage rates—Act of 1804, section 41. The reclaimer was entitled to be paid for the use of her pier per ton of ship's burden and per ton of goods landed. On the construction of section 58 reference was made to Maxwell on the Interpretation of Statutes (1905 ed.), pp. 534–6; and to Hardcastle on Statutory Law (1901 ed.), p. 124.

Argued for respondent—The right, if any, conferred on the owners of private piers was a right to levy wharfage dues. Section 58 of the 1804 Act contemplated a rate on goods landed, *i.e.*, a "wharfage" rate. In shipping circles "wharfage dues" meant charges on goods landed on wharves or piers. That was the meaning of the word in the opinion of Lord Mansfield—*Stephen* v. *Costor*, June 10, 1763, 3 Burrow's Rep. 1409, at p. 1415. The rates sanctioned by the 1857 Act were the rates specified in the schedule thereto appended. The "tonnage" rates contended for were not in the schedule. There was a clear distinction in the Acts cited between the powers of the Commissioners to levy rates and those of private owners. The power to levy rates which section 58 assumed had been conferred was not in fact conferred by that Act. A "wharfage" rate could not be imposed on a ship bringing goods to a pier any more than on a porter who carried them off the pier after being landed. The pursuer was not entitled to the declarator craved.

At advising—

LORD PRESIDENT—This is an action at the instance of Lady Seafield, who is proprietrix of, *inter alia*, the lands of Urquhart and Abriachan in the county of Inverness, and it is directed against Mr MacBrayne, shipowner in Glasgow, who, as is well known, runs a service of boats on the Caledonian Canal and Loch Ness.

Lady Seafield, as proprietrix of these lands, is also proprietrix of a pier known as Temple Pier, which is a stopping-place in ordinary course of all boats which run through the Canal, and the conclusions of the summons are directed against Mr MacBrayne in order to have it found that Lady Seafield is entitled to charge a sum against Mr MacBrayne for the uses which his boats make of the pier in bringing up to it in order to land goods and passengers, such sum to be calculated in respect of the tonnage of the vessels so landing. There are different conclusions which propose to institute other different methods of calculating the toll, but practically the question raised in the case is whether the pursuer has right to levy these duties against each vessel over and above duties which may be levied upon the defender's vessels either for goods there deposited or for passengers making their way along the pier to land.

Now the Caledonian Canal was created under an Act of Parliament in the year 1803, and there are a series of statutes dealing with what in the words of the Act is called "the Inland Navigation" extending from sea to sea, which consisted partly of the made canal and partly of various lochs which are there situated. Admittedly

the right to charge dues or tolls must rest upon the provisions of these various Acts of Parliament. The Act of 1804, which was the second Act, *inter alia*, allowed landowners to erect wharfs or piers upon their own land, and I shall immediately give the section which relates to that matter.

As a matter of fact, for a very long time after the opening of the Canal, which was early in the century, no piers or wharfs in intermediate places were erected. There was nothing but a pier at each end. The pier we are dealing with was the earliest of the intermediate piers, and it seems to have been erected about the year 1857. Before the erection of Temple Pier certain negotiations were entered into between Lord Seafield, the proprietor of the ground at that time, and the Commissioners, and the result of these negotiations was undoubtedly that a table of tolls was got ready, and I think it is made clear that a copy of that table of tolls was exhibited on the pier and that the table contained a charge for the touching of a vessel. As a matter of fact every particular toll was not enforced against Mr MacBrayne, for he entered into what I may call a composition arrangement by which he paid a certain sum in respect of all that might be demanded from him on that account. Recently the proprietrix thought that sum ought to be increased, a proposition to which Mr MacBrayne did not give his adhesion, and accordingly the present dispute has arisen.

Now the Lord Ordinary has assoilzied the defender from the conclusions of the summons, and his Lordship's view briefly is this—Although he finds that the 1804 Act gave an inchoate power to charge dues on the piers of private owners which they had put up, he finds that, in so far as the 1804 Act was concerned, that was inchoate for this reason, that while the Act assumed to make provision for the way in which these dues should be regulated and limited, it did not in the succeeding sections make any such provision. His Lordship therefore holds that though there was an inchoate power to charge, the real power of charging was not provided till we come to the Act of 1857. When we look at the schedule of the Act of 1857 there is no provision made for charging a vessel—the only provision being for charging goods put out on the pier, or passengers who go out on the pier, and accordingly he holds that there is no authority for the charge which is sought to be made good in the summons. To finish the matter I ought also to say his Lordship holds the subsequent Act (the Act of 1860) does not apply in its schedule to charges made by a private owner at all, but only to charges made by the Commissioners themselves.

Now the argument to your Lordships by counsel for the pursuer made, I think, but a small attack on the last portion of the Lord Ordinary's view. But what they did say was this, that the power to charge was quite complete under the Act of 1804, and did not at all need the schedule of the Act of 1857, and that the power to charge was a general power subject only to be limited by the Commissioners, and that inasmuch as the Commissioners had sanctioned this table there was nothing wrong with the charge. That will depend upon the provisions of the Act of 1804, and I think it is common ground that the section of that Act on which the case depends is the 58th section. The 58th section provides that owners of ground through which the said navigation should be made might construct wharfs or landing-places upon their lands, and land goods thereat, and then it goes on as follows:—[*His Lordship quoted the section, v. sup. in rubric.*] Now, as I have indicated, his Lordship thinks that is not a complete power, because whereas it says these rates and duties shall be vested in the owners, "subject to the powers therein contained for the Commissioners to limit, ascertain, and make regulations of and concerning such rates of wharfage," yet, in truth, perusing the Act we find there is nothing said about the Commissioners ascertaining and making regulations. So far as I am myself concerned I confess I do not think I could bring myself to that view. It seems to me that on a fair reading of the 58th section it does contemplate that there shall be a rate and duty, and that that duty shall be vested in the owner of the quay—in other words, shall be exigible by the owner of the quay—and I think the only limit put on it is that the Commissioners have a right to regulate the rate, and the mere fact that the Act does not prescribe any regulations, that is to say, does not put a limit on the Commissioners, does not seem to make the taxing clause a bad one. It was check enough that the Commissioners, who were a public body, should be given the power to see that a private owner did not try to charge too much. It was quite unnecessary to put in schedules to check the Commissioners, but it was thought the Commissioners could be trusted to protect the public against private owners. I am therefore inclined to hold that the 58th section is a good charging section and gave the power of charging a rate.

But there remains the question of what rates may be charged. Now, first of all, it is clear that a private owner is not entitled to anything for transit and navigation. In the first place, he had nothing to do with the creating of the canal, and secondly, these matters are all dealt with in the power of the Commissioners to charge a transit rate. For what is he to be paid? There is the accommodation he has given in putting up the quay, which is not to serve himself only but other people who use it. I agree with the Lord Ordinary in that I cannot hold that quays created under section 58 are private quays or wharfs in the proper sense of the word, because I think it is perfectly clear that the statute contemplates private wharfs also. That is very clearly shown by section 62. In other words, I think the statute contemplates three kinds of quays—(1) private wharfs proper which a person would use for his own purposes; (2) wharfs

under section 58 of the Act of 1804; and (3) wharfs not private but built by the Commissioners under the Act, if a private owner will not make a wharf under section 58. That being so, one would not expect a private owner to be paid anything except for the use of a private wharf, and, accordingly, I am not surprised to find the sentence in section 58, which is, "subject to the powers of the Commissioners to limit, ascertain, and make regulations of and concerning such rates of wharfage." Now, that seems to me to refer back quite clearly to the "rates and duties which shall be paid to the use and benefit of the said wharfs, quays, landing-places," &c. And, accordingly, I think, in the language of the statute, all the rate that could be charged by a private owner is the rate of wharfage. I have no doubt that according to the ordinary use of the word it is a rate for things landed on the wharf and not for a ship merely touching at it. Certain evidence was read to your Lordships on that point. I do not know that the evidence could help us very much, because so far as language is concerned we are entitled to deal with it without evidence. If the interpretation of this word depends on some use of language that is different from the use of language nowadays, evidence may be of some value. But there was quoted to us a sentence from a judgment of Lord Mansfield in the case of *Stephen* v. *Costor* (1763, 3 Burr., 1409, at 1415)—"A duty for wharfage and cranage cannot be due where the party has not had the use of the wharf or crane. Wharfage is due for landing on the wharf." The judgment in that case was really an application of that proposition. I am bound to say a judgment of Lord Mansfield as to what wharfage is is excellent authority for interpreting the word in the Act of 1804, because though this Act is connected with Scotland, it is an Act which has the scent of Westminster all over it. It has forms and phrases which are now obsolete, and in my opinion the meaning applied to the word by Lord Mansfield would be the meaning of the word wharfage as used in these Acts of Parliament.

The result is, that I agree with the Lord Ordinary, though not precisely on the same grounds, and I think the defender here should be assoilzied. It is quite true that for a certain time the pursuer has drawn dues of this sort, but that, of course, can never give her the right if she has not got it by Act of Parliament.

LORD PEARSON—I agree in the view expressed by your Lordship. The case is attended with some difficulty owing to the rather loose and indefinite terms in which the older statutes are expressed, and to the necessity of applying them to modern conditions of traffic, which were not contemplated when the Canal was made. In particular, the position of an owner building a pier on his own land was left somewhat vague so far as regards his power to levy dues or rates. As between the pursuer and the defender, the difficulty has for many years been solved in practice by an annual payment of £22, 10s. But the pursuer is dissatisfied with the amount, and we have now to decide whether the larger claim which she makes for tonnage dues on ships touching at or using the piers is well founded.

In my opinion there is no warrant in the statutes for the levying of tonnage-dues on ships at the instance of the private owner of a pier—I mean, of a public pier. I think that such dues are leviable by the Commissioners alone, and that the rights of the private owner are to be determined by the Statute of 1804, section 58, and the Statute of 1857. I am disposed to agree with what your Lordship has said as to the scope of the 58th section, and to think that it could have been made effectual to owners of piers even before the legislation of 1857. But I think it is necessary to distinguish sharply between the rates and dues which the Commissioners can levy and those which a pier-owner can levy. The former are the owners of the whole navigation, with the harbours at each end. The latter is a riparian owner, who is permitted to connect himself with it on certain terms. *Prima facie*, the services rendered by one who builds a pier or landing-stage are, I think, wharfage services only, as that term is used in section 58 of the older Act. It is there used in a wide sense, as including a good many services which, now that things have become much more specialised, might now be called by other names. But, taken generally, they are services of the nature of and ancillary to wharfage and the loading and unloading and storing of goods as distinguished from transit rates on the one hand and harbour rates proper on the other. There may in the case of this pier or landing-stage have been some deepening required to furnish a safe depth of water, and I have no doubt also that a timber construction of the kind may after a course of time have its stability impaired by contact with the heavier class of the ships using it. But I should suppose that *prima facie* the appropriate basis of charge for the service of such a place is not a charge per ton burthen of the ship but a rate per ton or per barrel of the goods shipped or landed, and a rate per head for passengers. As I read the statutes, they are in conformity with this view, and therefore I hold that the claim of the pursuer must fail.

LORD MACKENZIE—I concur.

The Court adhered.

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