May 22, 1826. Dundas, that more care was not taken on her behalf, in the first instance; but that is a matter we cannot supply here in this stage of the cause.

*Respondents' Authorities*—Russel, Jan. 23, 1745 (5211). Campbell, Jan. 4, 1747 (5213). 3 Ersk. 2, 50, 52.

T. DUTHIE—J. RICHARDSON—*Solicitors.*

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## No. 21. MAGISTRATES of GLASGOW and TACKSMAN, Appellants.—*Adam—Keay.*

## DAWSONS and MITCHELL, Respondents.—*Robertson—Campbell.*

*Burgh Royal—Feu—Thirlage.*—The Court of Session having found that certain lands, situated within the territory of the royal burgh of Glasgow, and which had been disponed by the Magistrates in feu-farm for payment of a feu-duty, but to be held burgage, and the titles having been made up as if held in feu, were to be considered as holding feu; and that grain imported within their bounds was not liable to certain burgh taxes, called ladle-dues; and that a clause of thirlage did not apply to invecta et illata;—the House of Lords remitted the case for the opinion of all the Judges.

1ST DIVISION.
May 22, 1826.
Lord Alloway.

THREE questions were involved in this case: 1st, Whether certain lands belonging to Dawson, one of the respondents, were held feu or burgage? 2d, Whether certain dues were exigible by the Magistrates of Glasgow, for grain brought on to these lands? And, 3d, Whether the lands were subject to a thirlage, not only of grana crescentia, but also of invecta et illata? They arose out of these circumstances.

In the immediate vicinity, and on the north side of the burgh of Glasgow, is situated a piece of land or muir called the Easter and Wester Common, which it was alleged had always been regarded as part of the ancient common good, although of this there was no record in existence.

In 1730, the Magistrates sold part of this common or muir to James Rae; and in 1747, they exposed to sale, by public roup,

'the muir of these parts of the lands of Wester Common, be-
'longing to the town of Glasgow, and within the territory of the
'burgh, not yet sold off.' They also bound themselves to 'grant
'to the purchaser a disposition of the said lands, to be holden in
'free burgage for service of burgh used and wont, and for pay-
'ment to the said Magistrates and Council, and their successors
'in office, or their treasurers, factors, and chamberlains, in their
'name. for the use and behoof of the community of the said

'burgh, of the sum of L.20 Scots money, at two terms in the 'year, Whitsunday and Martinmas, by equal portions,' &c., 'the purchaser's heirs, and their heirs, paying the double of 'the said feu-duty the first year of their entry to the said lands, 'and upon their being infeft therein; and their singular suc- 'cessors, legal or conventional, paying the triple of the said 'feu-duty at their entry, and upon their being infeft therein; 'in both which cases, the feu-duty payable for the year of their 'entry is to be included; and it is declared, that the above pro- 'visions and burdens shall be expressly inserted and engrossed 'in the rights to be granted to the purchaser, and infeftment to 'follow thereon, and in all subsequent infeftments in the said 'lands, and every infeftment given otherwise, and not contain- 'ing the above burden and provisions, shall be void and null 'ipso facto; and with and under the above burdens, provisions, 'and conditions, the disposition so to be granted by the Magis- 'trates and Council to the purchaser, with absolute warrandice, 'except as to the cess, teynd, and other public burdens, which 'the lands are to be burdened with, according as the other 'burgh-lands are affected with and burdened.' These lands were sold to John Young for L.150, who received a deed in form of a feu-contract between him and the Magistrates, whereby, in execution of the articles of roup, the Magistrates 'give, grant, 'sell, annailzie, and, in feu-farm and heritage, perpetually let 'and demit to and in favour of the said John Young, his heirs 'and assignees whomsoever, all and haill the muir of Wester 'Common, lying within the territory of the said burgh, and 'which muir above feued extends to twenty-one acres, &c. In 'the which lands, with and under the reservations above writ- 'ten, the said Magistrates and Council bind and oblige them- 'selves, and their successors in office, to infeft and seise the said 'John Young and his foresaids, upon his own proper charge and 'expense in due and competent form, to be holden in free bur- 'gage, for services of burgh used and wont, and for payment to the 'Magistrates and Town Council, and their successors in office, 'or their treasurers, factors, or chamberlains, in their name, for 'the use and behoof of the said burgh of Glasgow, of the sum 'of £20 Scots money yearly of feu-duty, at two terms in the 'year, Whitsunday and Martinmas next, for the half-year pre- 'ceding, and so forth, to continue in the good and thankful 'payment of the said yearly feu-duty thereafter, at the terms 'above written, &c., and the heirs of the said John Young, and 'his foresaids, paying the double of the said feu-duty the first

May 22, 1826.

May 22, 1826. 'year of their entry to the said lands, upon their being infeft 'therein; and the singular successors, legal and conventional, 'paying the treble of the said feu-duty at their entry, and upon 'their being infeft therein; declaring hereby, that the above 'provisions and burdens shall be expressly insert and engrossed 'in the infeftments to follow hereupon, and in all the subsequent 'infeftments in the said lands, otherwise any such infeftments 'given otherwise shall be, and are declared to be, void and null 'ipso facto. Which feu-tack, and right of the lands above 'written, and infeftments to follow thereupon, and ground-'right and property thereof, with the burden of the provisions 'and reservations foresaid, the said Magistrates and Town Coun-'cil bind themselves and their successors in office to warrant; 'acquit, and defend, to the said John Young and his foresaids; 'and the same to be safe, sure, and free from all and sundry 'perils, dangers, burdens, and encumbrances whatsoever, at all 'hands, and against all deadly, except the feu-duty above writ-'ten, and burdens above specified; and also the cess and teind 'payable furth thereof, and other public burdens, according as 'the other burgh lands are affected with and burdened, &c.:— 'And to the effect, the said John Young and his foresaids may 'be infeft and seised in the said lands, to be holden in free bur-'gage for service of burgh used and wont, for payment to the said 'Magistrates and Council, and their successors in office, or their 'treasurers, factors, or chamberlains, in their name, for the use 'and behalf of the community of the said burgh, of the above sum 'of L.20 Scots money, of yearly feu-duty, at the terms above 'written, &c., with a fifth part of the said yearly feu-duty, of 'liquidate penalty and expenses, in case of failzie, &c., and the 'heirs of the said John Young and his foresaids, paying double of 'the said feu-duty the first year of their entry to the said lands 'upon their being infeft therein, and the singular successors, le-'gal and conventional, paying the treble of the said feu-duty at 'their entry, and upon their being infeft therein; in both which 'entries, the feu-duties payable for the year of their entry to be 'included; and which provisions and burdens are to be contain-'ed in the infeftment to follow hereon, and in all subsequent 'infeftments; and with and under these burdens, the said Ma-'gistrates and Council hereby require , one of 'the bailies of the said burgh, or any other of the bailies thereof, 'for the time being, to pass to the ground of the said lands, and 'there give and deliver heritable state and sasine, as also real, 'actual, and corporeal possession of all and haill, &c., to the said 'John Young and his foresaids, or to his certain attorney in

'their names, bearer hereof, by deliverance of earth and stone May 22, 1826.
'of the ground of the said lands, as use is.'

The deed contained no procuratory of resignation, but sasine was taken on the precept in favour of John Young, the instrument of which stated, that the 'said John Young had pro-'duced to the said bailie a feu-contract, passed and perfect-'ed between the Provost of the said burgh and John Young;' and after quoting the contract, it proceeds, 'after open and pub-'lic reading of the said feu-contract and precept of sasine above 'insert, therein contained, in presence of the said bailie, and 'witnesses subscribing, the above-named Thomas Scott, bailie, 'aforesaid, by virtue and power of his said office of bailary, and 'in obedience to the said precept of sasine, gave and delivered 'heritable infeftment, state, and sasine, also real, actual, and 'corporal possession, of all and haill the foresaid muir of Wester 'Common, &c.; and that by delivering to him of earth and 'stone of the said lands, as use is; and did duly infeft and seise 'him therein, with and under the burden of the feu-duties, and 'other prestations above mentioned, after the form and tenor 'of the foresaid feu-contract and precept of sasine above insert.' —The sasine was recorded in the burgh register.

The part of the Common which, in 1730, had been sold to Rae, had also been conveyed to him to be holden in free burgage, for service of burgh, used and wont, and for payment of 100 merks Scots, which, in the right granted to him, was likewise called a feu-duty. In other respects, the deed of conveyance to him was in the same terms as the conveyance to Young. Rae was infeft, and recorded his sasine in the burgh register. He afterwards disponed the lands to James Miller, who took infeftment on the procuratory of resignation contained in his disposition, and recorded the sasine in the burgh register. In the same way, the lands passed to Robert Hamilton, who also was infeft, on the procuratory of resignation in his disposition, and his sasine was in like manner recorded in the burgh register. Hamilton disponed them to John Young, describing them as lying within the territory of the burgh, and binding 'himself, his 'heirs and successors, duly and validly, to infeft and seise the 'said John Young and his foresaids upon their own charge 'and expenses; and that by resignation thereof in the hands 'of the Provost, or any of the bailies of the burgh of Glas-'gow, for service of burgh used and wont, and for payment 'to the Magistrates and Town Council of Glasgow, and their 'successors in office, for the lands before disponed, of the du-'ties and others underwritten,' and then followed a procura-

May 22, 1826. tory for resigning 'in favour and for new heritable infeft-
'ment, state, and sasine, to be given and granted to the said
'John Young and his foresaids in due form, to be holden in free
'burgage for service of burgh used and wont, and for payment
'to the Magistrates and Town Council of Glasgow, and their
successors in office, &c., of the sum of 15 merks, Scots money,
'as being three twentieth parts of the foresaid sum of 100 merks,
'Scots money, of feu duty, payable yearly, furth of the whole
'lands of Wester Common.' In virtue of this procuratory of resignation, Young was infeft, and the sasine was recorded in the burgh register. Being thus in right of the lands so acquired from Hamilton, and also from the Magistrates in 1747, Young disponed them to William Fleming, describing the lands as 'all
'and haill the muir of Wester Common, lying within the terri-
'tory of the burgh of Glasgow.' The obligation to infeft was in the same terms as in the disposition by Hamilton to Young, and in the procuratory of resignation, authority was given to 'resign
'the lands in the hands of the Provost, or of any of the bailies
'for the time being, in favour, and for new infeftment, to be
'granted to the said William Fleming and his foresaids.' The instrument of sasine set forth, that 'in presence of me, and an
'honourable man, John Brown, one of the bailies of the burgh
'of Glasgow, and Robert Hannah, one of the officers of the
'burgh of Glasgow, as procurator specially constituted by John
'Young of Youngsfield,' 'Robert Hannah did resign, surrender,
'and overgive, &c., in the hands of the said bailie, by delivering
'to him of staff and baton, as use is.' Sasine was then given, the symbols used being earth and stone; and the instrument, narrating all the clauses, was recorded in the burgh register. After Fleming's death, the magistrates granted a charter of confirmation of the sasine in favour of his sons, as heirs of provision of their father. The charter began in common form, and, after describing the lands, the titles of which were the subject of confirmation, stated, that 'they are to be holden with and
'under the several burdens, feu-duties, and others therein ex-
'pressed, and as mentioned in a feu-right of the lands made and
'granted by the Town Council of Glasgow, dated 7th May 1747.'
It then ratified all the subsequent titles 'in the whole heads,
'articles, and clauses of the said writings, so far as the same
'regards the foresaid lands in the West Common, and so far as
'not contrary to, and inconsistent with, the original feu-rights
'of the said lands by our predecessors.' Thereafter these lands, after passing through several hands—being described in the titles in the same terms—and the conveyances containing procuratories

of resignation for services of burgh used and wont—and the disponees taking infeftment more burgi—and registering their sasines in the burgh records—came into the person of Adam Dawson, who, in like manner, by virtue of the procuratory of resignation in his disposition, took infeftment more burgi, and recorded the sasine in the burgh register. May 22, 1826.

Soon after acquiring the lands, Dawson erected a distillery on them, and the business of distilling was thenceforward carried on by him and Mitchell under the firm of Dawson and Mitchell.

By the original feu-contract, forming the foundation of Dawson's title, he was bound, by a clause of thirlage, to bring 'the 'whole grain which shall grow upon the said lands, and other 'stuff and corn which they shall happen to grind, to the town of 'Glasgow's mills, and grind the same thereat, seed and horse-'corn excepted, and pay multures and knaveships, and other 'services, used and wont.'

In 1815, Wilson, tacksman of the ladle-dues under the Magistrates of Glasgow, raised an action, before the Burgh Court of that city, against Dawson and Mitchell, for payment of ladle-dues, and multures on the grain imported by them, and used in their distillery for the year 1814.

The Magistrates found 'that the ladle-dues held in lease by 'the pursuer are leviable within the royalty or territory of the 'royal burgh of Glasgow; that in the title-deeds, the lands, on 'which the defender's distillery is situated, are described as lying 'within the territory of the burgh of Glasgow; that the Muir of 'Wester Common, of which these lands are a part, appears for-'merly to have belonged to the town of Glasgow as a corpora-'tion, and to have been included in the royal charters of erection 'and confirmation; that it is proved that these lands have been 'held by burgage tenure for upwards of 40 years; that the con-'version of the whole or part of the price into a perpetual annual 'ground-rent called a feu-duty, or ground-annual, is not incon-'sistent with the nature of burgage holding; that the validity of 'the tenure by which the lands are held cannot be competently 'questioned in an inferior Court;' and therefore found Dawson and Mitchell liable in ladle-dues. Thereafter the Magistrates found that the ladle-dues were leviable within the royalty or territory of the royal burgh of Glasgow, without any distinction, whether the lands were held in feu-farm, or by burgage tenure; and that, under the clause of thirlage, in the title-deeds, the defenders were bound to pay multures on the grain ground, bruised, or hashed, for the purpose of distillation, on the same principle as multures are exigible and payable under the same

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clause, on grain prepared by malting and grinding for the purpose of brewing; and decerned for multures accordingly.

Dawson and Mitchell advocated; and Dawson, as an individual, raised an action of declarator, stating, that notwithstanding the tenor of the original feu-contract, the Magistrates and Town Council demanded from him and his tenants other duties and payments than those therein specified; that in particular, they demanded ladle-dues on the grain brought on his lands; that they insisted his lands were held by burgage tenure, and that he was liable in respect of these lands in burgage taxes and imposts, whereas the lands were held of the Magistrates and Town Council, as superiors in feu; and concluding that it should be declared that he was not liable, in respect of these lands, in payment of ladle-dues, or in any taxes or imposts of a burgage nature; that the lands held of the Magistrates and Town Council as superiors, by the tenure of feu-farm; that the town clerk of Glasgow had no exclusive privilege of acting as notary in taking infeftment thereon; and that the instruments of sasine fell to be recorded in the general register of sasines at Edinburgh, or in the particular register of sasines for the county in which the lands were situated.

The Lord Ordinary conjoined the two actions, and found, 'that the original grant of the land in question, by the Magi-'strates to John Young, in 1747, was really and essentially a 'feu-right, containing a specified feu-duty, and an express de-'claration that the same should be doubled upon the entry of 'heirs, and tripled on the entry of singular successors, voluntary 'or judicial, and containing a precept of clare* and all other 'clauses usual in feu-dispositions; and that it also subjects the 'feuars of the said lands to the thirlage of bringing their whole 'grain and other stuff, and corn they shall happen to grind, to 'the town of Glasgow mills, and grinding the same thereat, seed 'and horse corn, and bear excepted, and paying multures and 'knaveships, used and wont, but which multures can only apply 'to the subjects there astricted; that although the titles to these 'lands have since been completed by resignation in the hands of 'the Magistrates of Glasgow, more burgi, this does not seem to 'affect the original right, nor can it increase the nature of the 'burdens originally imposed on the subject, and which is re-'peated in the new investitures; therefore, with regard to the 'thirlage and multures to which these lands are subject, he 'found that these must be regulated by the clause in the origi-

* A mistake—should be sasine.

'nal feu-right, and which cannot be affected or altered by the 'title having been afterwards made up by resignation more 'burgi; and that the clause of thirlage in the original feu-right 'amounts to an astriction of omnia grana crescentia, but not 'to a thirlage of invecta et illata, and that a more extensive 'thirlage is not attempted to be made out, either by prescription 'or possession, since that period; therefore advocated the cause, 'and decerned in terms of the conclusions of the action of de-'clarator with regard to the thirlage;* but with regard to the 'other conclusions of the libel, and especially with regard to 'the conclusion that the infeftment should be recorded, not in 'the burgh, but in the county books, in respect of the case de-'cided by the Second Division of the Court, Davie *v.* Dennie, '2d June 1814, and in respect it is stated that a communis 'error, or general custom, has prevailed, and in consequence of 'which property of very great magnitude may be at stake, makes 'avizandum with that part of the cause to the First Division of 'the Court,' and appointed informations accordingly. Thereafter his Lordship having recalled the findings in above interlocutor, and reported the whole cause,

*Lord Balgray* observed. The magistrates are bound to give a title according to the contract of parties; and it is clear from the terms of the contract in 1747, that the title was to be burgage and not feu. No doubt, the magistrates stipulate for an annual payment, under the name of a feu-duty; but this is a mere name, and was not, and could not be intended to affect the nature of the tenure, which is distinctly expressed. I am also satisfied that the lands are within the territory of the burgh. They formed part of the common muir belonging to the burgh. If, therefore, these subjects are so situated, (and of this there can scarcely be a doubt,) they must necessarily fall within the original crown charter in favour of the burgh, and, of course, must be held burgage of the crown. In confirmation of their being burgage lands, there is evidence of the possessors having been in the practice of paying local and public taxes, on the assumption of their being within the burgh. But the stipulation of a feu-duty, or whatever you may call it, by the magistrates in favour of the burgh, can never alter the situation of the lands nor the nature of their tenure. The Crown, and by consequence its representatives, cannot dispense with or alter the

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* This was a mistake; the question of thirlage having been discussed in the advocation, and there being no conclusion in the declarator relative to it.

May 22, 1826. law, and therefore cannot blend a feu and burgage holding together. In the charter of the burgh of Campbeltown (Thomson's edition of the stat. vol. xx, p. 204), the Crown stipulates for payment of a certain annual duty (p. 206), while the lands are to be held burgage: and certainly it cannot thence be inferred that they were to be held otherwise. But if the Crown can make such a stipulation, what is to hinder the Magistrates, who are the king's commissioners, from doing the same thing? The question here is one of very great importance, and I think a farther investigation should be made into titles of a similar description.

*Lord President.*—The opinion of Lord Balgray may be right in a general point of view; but I rest my opinion on the particular titles laid before us. If subjects be held burgage, it may be true that an annual payment may be stipulated: but observe what is the nature of the titles here. They are utterly inconsistent with the idea of the lands being burgage. There is, in the first place, a precept of sasine with a sasine taken upon it —then infeftment is given not more burgi, nor by hasp and staple, but by earth and stone—and then (which is quite absurd, on the supposition of their being held burgage) a charter of confirmation is granted. Perhaps the parties originally intended a burgage holding, but assuredly the titles made up by them and laid before us are not applicable to such a tenure. Whether they can cure the blunder, I do not know; but we cannot say these subjects are burgage, although no doubt they appear to be situated within the burgh.

*Lord Balgray.*—I rather think your Lordship proceeds on a mistake in feudal law. It is a general rule, that every man who has an unlimited right of property, may give a precept of sasine. There is an exception in the case of burgage property. But even in the original constitution of that species of holding, a precept of sasine is granted for taking infeftment. It is only in titles by progress that there is no precept. In the original constitution of a burgh, and in the division of the lands, the titles must be completed by sasine; and it is only in those by progress that a procuratory is given for resigning in the hands of the magistrates. Therefore, a precept of sasine is not, as is supposed, irreconcilable with the idea of the lands being burgage. Perhaps here the parties have committed a blunder in making up their titles, but that cannot alter the tenure of the lands.

*Lord President.*—The Magistrates, however, did not hold these lands as commissioners of the Crown. They belonged to them as proprietors and vassals, and as such they have feued them.

*Lord Succoth.*—I rather incline to be of Lord Balgray's opi- May 22, 1826.
nion; and besides, the lands are within the burgh; but the question requires farther consideration.

*Lord Gillies.*—It is not necessary to the decision of this case to go into the general rules of law. There is a plain distinction between res singulares and res universitatis as to the property connected with a burgh, and which has been overlooked both by the parties and by Lord Balgray. The lands in question were the private property of the burgh, and could be disposed of by the magistrates. Although situated within the burgh, yet, in relation to them, the magistrates were not the stewards or commissioners of the crown, but the proprietors. Now, all our institutional writers agree that the magistrates may feu the private property of the burgh; and therefore the question is, did the Magistrates of Glasgow do so in this case? But look at the terms of the original grant itself. 'By the dispositive clause, they 'give, 'grant, sell, annalzie, and in feu-farm and heritage perpetually, 'let and demit,' &c. Then there is a precept of sasine—infeftment is taken by the symbols of earth and stone—feudal casualities are created—and a charter of confirmation granted. It is clear, therefore, that these titles have been made up agreeably to the original dispositive clause by which the lands were conveyed in feu.

With regard to the ladles, they cannot be exacted if the lands be feu, because they are demanded only on the supposition of the lands being burgage, and it is admitted that hitherto they have never been exacted. As to the thirlage, again, the right to it must be regulated by the state of possession, and it has never been extended to invecta et illata.

*Lord Hermand* concurred with the Lords President and Gillies.

The Court then recalled the Lord Ordinary's interlocutor conjoining the advocation and declarator, and disjoined the two actions; and in the advocation remitted to the Magistrates of Glasgow, with instructions 'to alter the interlocutors complained of, to 'sustain the defences, and assoilzie the informants, Messrs Dawson and Mitchell, from the conclusions of the libel, and decern. 'And farther, in the action of declarator at the instance of Adam 'Dawson, they found, that from the conception of the original 'rights in favour of John Young, in 1747, and from the subsequent transactions relative to the property in question, and the 'form of the transmissions and conveyances thereof, as well as 'from the mode of expeding the infeftments, the pursuers are entitled to enjoy the lands and subjects described in the libel as a

May 22, 1826. ‘ feu-holding. But as to the conclusion relative to the town-clerk ‘ acting as notary, and to the recording of the infeftments, they ‘ appointed parties to be further heard, without prejudice to the ‘ taking and recording of the infeftments as formerly, in the ‘ meantime ;’ and to this judgment their Lordships afterwards adhered.*

The Magistrates and their tacksman appealed.

*Appellants.*—Ladle-dues are a tax exigible upon all grain imported within the royalty or liberty of the burgh of Glasgow. It is of no importance at what precise spot within the royalty it was originally collected—that would vary as convenience directed. But the respondent's land, and the distillery erected thereon, are situated within the royalty or territory of the burgh of Glasgow; and therefore grain brought on the lands are liable in these dues. It is proved by the titles of the respondent, that the lands are situated within the territory of the burgh. Besides, this is confirmed by the nature of the holding. No lands can be held by the tenure of burgage, without necessarily being within the burgh; and therefore, if the lands in question are held by that tenure, they must be considered as being within the burgh, and so liable to all the burgage taxes. But it is proved by the titles that such is their tenure. The circumstance of a feu-duty being stipulated cannot affect the express mode of holding. Such a stipulation is perfectly lawful, being in truth of the nature of a ground-annual, forming part of the consideration for which the lands were sold. Lands within burgh are sometimes held feu—such as those which formerly belonged to ecclesiastics ;—but the tenure in these are uniformly declared to be feu, whereas here it is burgage. In like manner, the Magistrates and Town Council may, as a corporation, be proprietors of lands, and which they may dispone, to be held of them as superiors in feu; but where lands are held in burgage, it is the Crown who is the superior, and not the Magistrates, who are merely the bailies of the king.

In the present case, the tenure is expressly declared to be burgage, and infeftment has been taken for upwards of 90 years, more burgi, and the sasines recorded in the burgh register. Earth and stone were the proper symbols where the subject was land, and not houses; and any slight deviations from the usual mode of making up titles, as of burgage subjects, cannot alter the

* See 3 Shaw and Dunlop, No. 93.

tenure. But if so, then the lands must be considered as holding burgage, and consequently as situated within the burgh. Even, however, although the lands in question were held feu, still it is clear from the titles that they are within the burgh, and there is no inconsistency in their being so situated although held feu. The ladle-dues are exigible, not because the lands are held burgage, but because the grain has been brought within the burgh. When, therefore, the Court found that the lands in question were held in feu-farm, that did not exhaust the point at issue. The clause as to thirlage evidently includes grana invecta et illata. May 22, 1826.

*Respondents.*—The contract 1747 is in all its essential clauses a feu-right, and infeftment has followed according to symbols peculiar to feu-rights. The subsequent titles have been made up by resignation in the hands of the Magistrates as ordinary superiors, and not as commissioners of the King. They could not transform the feu-holding into a burgage-holding. It would have been illegal in them to have disponed by any other tenure than feu-farm. Having received, as ordinary superiors, the feu-duty for seventy years, a different set of prestations to a different superior cannot now be exacted. Besides, the lands are held for a feu-duty expressly declared to be pro omni alio onere. The lands in question do not lie within the burgh. If they had, they would have been held burgage, and not in feu-farm; and they have hitherto never paid other burdens than the feu-duty. Ladle-dues are only exigible on grain passing the ports of the burgh. But the respondent's lands are nearly a mile distant from the ports, through which the grain now attempted to be subjected to the ladle-duty, never in fact passes at all. As to the thirlage, considering the terms of astriction, the subject of the servitude, and the practice that has hitherto prevailed, no heavier astriction than that of grana crescentia can be inferred or imposed.

*Lord Gifford.*—Whatever be the holding, if the lands are locally situated within the territory of the burgh, and if grain be imported, (if I may use the expression,) must not the grain be liable in the dues? Has that point been settled? The Court of Session merely find that the holding is in feu-farm, and the arguments of the Judges are occupied by the question of tenure.

*Robertson.*—In the Bailie Court, the question was raised as to the situation of the lands—and the interlocutor of the Court of Session embraces both points.

*Adam.*—The Court proceeded on the tenure. If the lands

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are held burgage, then our claim for ladle-dues stands good—if feu-farm, that does not exhaust the case; for we seek the dues, not in respect of the lands, but because the grain has been actually brought within the territory.

*Robertson.*—The question of locality has been, in effect, decided by the Court.

*Lord Gifford.*—But not directly. Of what consequence is the tenure, if the grain be actually brought within the territory of the burgh?

*Adam.*—Certainly of none. The person who brings the grain within the burgh must pay the dues. We say that the subjects are within the territory, and, as one article of evidence of the fact, we refer to the burgage holding of the lands. See the case of Dixon, 2d vol. p. 176, Shaw and Dunlop's Reports.

*Lord Gifford.*—I do not see what right the tacksman has to sue for multures.

*Adam.*—This right seems to have been taken for granted. The objection was not stated in the Court below—but we have no objection to your Lordship's observation, for we wish the case remitted.

The House of Lords ordered, 'That the cause be remitted back 'to the Court of Session in Scotland, for them to review gene-'rally the interlocutors complained of; and in reviewing the 'same, they are particularly to consider, in the said action of 'advocation, Whether the Magistrates of Glasgow are entitled 'to any, and if to any, to what dues, in respect of corn or grain 'brought within the liberties or territory of the city or burgh of 'Glasgow, for sale, manufacture, or consumption; and if they 'are entitled to any such dues, then, whether the lands in the 'possession of the respondents are within such liberties or terri-'tory? And it is farther ordered, that the Court to which this 'remit is made, do require the opinion of the Judges of the other 'Division, on the whole matters and questions of law, which 'may arise in this case, as well in the action of advocation as in 'the action of declarator, which Judges of the other Division 'are so to give and communicate the same; and after so re-'viewing the interlocutors complained of, the said Court do and 'decern in the said causes, as may be just.'

LORD GIFFORD.—My Lords, the next case to which I will call your Lordships' attention, is the case of the Magistrates of Glasgow, against Dawson and Mitchell, and I shall be under the necessity of troubling your Lordships at some length in the detail of the proceedings, in order that

your Lordships may understand what the proceedings have been, and also the precise nature of the question which is submitted to your Lordships. May 22, 1826.

My Lords, the case, as it affects the appellants, and also as it affects the respondents, is of considerable importance. The question in this case relates to a demand, by the Magistrates of Glasgow, of certain tolls, which are denominated ladle-dues, in respect of grain brought to, and used in a distillery belonging to the respondents, and erected on part of a common near the city of Glasgow, and, as has been contended on the part of the Magistrates of Glasgow, within the liberty and royalty. Another question has been made in this case respecting the right of the Magistrates of Glasgow to certain multures or imposts, as they are called, namely, the right on their part to compel the occupiers of this distillery to grind all the corn and grain which shall be brought, either grown upon the lands belonging to this estate, or brought there, at the mills of the Magistrates of Glasgow. A third question also has been raised, in the course of these proceedings, respecting the tenure of the land on which this distillery has been erected.

My Lords, as I have stated to your Lordships, the Magistrates of Glasgow claim a right to exact these tolls, or ladle-dues, in respect of all corn, or grain, or meal, brought to the royalty or liberties of the burgh; the duty which they claim is called the ladle-due, from its being a ladle-full out of every sack, or load of meal or grain, frequently expressed by the general term of victual, imported or brought into the burgh. I have also stated to your Lordships, that they claim from the respondents, Messrs Dawson and Mitchell, a compensation for the grinding of the corn or grain which was used at their distillery, and in consequence of those claims having been resisted on the part of Messrs Dawson and Mitchell, proceedings were instituted by a person of the name of Wilson, who stated himself to be collector of the ladle-dues of the city of Glasgow, in the Burgh Court of Glasgow, against Messrs Dawson and Mitchell, to recover the sum of £89, 8s. 9d. in respect of those ladle-dues, and in respect of those multures, as they are called, namely, a compensation for the grinding of corn at those mills.

My Lords, in this original action before the Burgh Court of Glasgow, they claimed on the part of this gentleman, the collector of the ladle-dues, against John Mitchell and Company, distillers, Old Basin, Glasgow, defenders, that whereas the defenders ‘ are justly indebted and owing to ‘ the pursuer the sum of £89, 8s. 9d. for the reasons stated in a particular ‘ account herewith produced, and held as herein repeated brevitatis cau- ‘ sa; and although the pursuer has frequently desired and required the ‘ defenders to make payment to him of the foresaid sum, which they as ‘ often promised to do, yet they now refuse, at least delay, unless com- ‘ pelled.’

Answers were put in to this proceeding by Messrs Dawson and Mitchell, in which they contended, ‘ that the pursuer had produced no title ‘ by which he could instruct his right to insist in the present action, and ‘ until he should do so, the respondents could not enter on their defence; ‘ they were confident, however, they should be able to satisfy the Court,

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'in the course of the future procedure, that they could not be subjected 'to the payment of the sum sued for, but that it was unnecessary, in 'hoc statu, to enter on the question. The respondents may also remark, 'that they have been erroneously cited to the action, under the firm 'of John Mitchell and Company, but they will waive any objection to 'the action arising out of this circumstance. When the pursuer shall 'have produced a title to insist in the action, your Honours will no doubt 'allow the respondents to answer farther.' My Lords, I own I cannot find that any sufficient title was ever produced, on the part of this gentleman, to maintain his action, and I should have thought that the objection taken by Messrs Dawson and Mitchell was decisive. He merely states himself to be collector of the dues, that is, the mere servant of the Magistrates of Glasgow, the parties to this suit, and, as such servant, I should have thought, he could not have any right to pursue in this action. However, my Lords, notwithstanding this preliminary defence on the part of Messrs Mitchell and Company, they appear afterwards to have put in special defences, in which they no longer insisted on this preliminary objection to the title to pursue as collector, but they put their case upon the merits, and say, we put him to show a right in his employers, the Magistrates of Glasgow, to that amount of rent they claim; and, accordingly, proceedings went on, on the merits of the case, without any farther objection in respect of the right of this person to pursue. In the interlocutor, it is supposed he held those dues in lease, but I cannot find that any evidence was ever given of any such lease.

My Lords, under these circumstances, I really feel that, after all the proceedings which have taken place in this cause, brought in the Burgh Court of Glasgow, and particularly in this advocation afterwards brought in the Court of Session, it will be too much now to say, that that preliminary objection should prevail; the respondents, appearing to have waived that objection to it, have gone on with Mr Wilson, and afterwards with the Magistrates of Glasgow, upon the merits of the case. At the same time, I cannot but much regret, that in a case of so much importance to both parties, there should be entertained any doubt with respect to the right of the pursuer to pursue in this action, and to bring into Court those very important questions which have been agitated in the course of these proceedings.

My Lords, the case then went on in the Burgh Court, and after some proceedings there, the following interlocutor was first pronounced by the Magistrates. (His Lordship here read the interlocutor.) Now, my Lords, another remark occurs here, with respect to the regularity of this proceeding, that this interlocutor is confined to the ladle-dues, whereas the demand of Mr Wilson was not only to the ladle-dues, but the multures, composing the great part of the demand. No notice, however, appears to have been taken of that omission.

The case was afterwards brought again before the Burgh Court, and this interlocutor was pronounced. (His Lordship read the interlocutor, and then noticed some farther proceedings in the cause.)

My Lords, the questions which were in agitation before the Court below having been exhausted, an advocation was brought by Messrs Dawson and Mitchell in the Court of Session, and in that advocation they contended, that the interlocutors ought to be set aside on certain grounds. In the first place, they stated, that their lands were not within the city, nor liberties thereof; in the second place, that the distillery was not situated within the royalty of Glasgow; and in the third place, they contended, that the pursuer had no right to demand multures on raw or unmalted grain consumed in distilleries, and that the only multures to which they were entitled, was in respect of corn growing upon the lands, upon part of which the distillery was erected. In this way the case came before the Court of Session, bringing before the Court those important questions which had been agitated, namely, the right of the Magistrates of Glasgow to exact those duties, in respect of corn or grain brought upon the lands in question—the defenders in the Court below contending, that the Magistrates of Glasgow had no right to exact those dues, in respect of lands which lie beyond the city or burgh; but next, they contended. that if this right extended to corn brought within that dominion, round the town, which may be considered as being within the liberties or territory, still they were not bound to pay those dues, inasmuch as their lands were not situated within that territory; and next, they contended, that the pursuer had no right to demand multures on raw or unmalted grain, consumed in the distillery, or, according to the language of Scotland, on corn or grain brought there for the purpose of manufacture. May 22, 1826.

My Lords, in consequence of the case having been thus brought before the Court of Session, another action was instituted by Mr Dawson, the proprietor of the lands of Wester Common, in the nature of an action of declarator. The summons in that action, after setting out the title under which he held those lands, sought to have it declared by the Court of Session, 'That the pursuer is not liable, in respect of his lands aforesaid, 'in payment of the said dues called ladles, or in any taxes or imposts of 'a burgage nature; and the same being so found and declared, the Ma-'gistrates and Town Council, and the said Robert Wilson, their tacks-'man,' (treating here again Wilson as the tacksman of the Magistrates of Glasgow), 'ought and should be decerned and ordained, by decree afore-'said, to desist and cease from troubling the pursuer, in respect of his 'lands aforesaid, by the exaction of the foresaid dues called ladles, or any 'other taxes or imposts of a burgage nature; and that it should be found 'and declared, that the foresaid lands of Wester Common hold of the 'said Magistrates and Town Council, by the tenure of feu-farm, and that 'the town-clerk of Glasgow has no exclusive privilege of acting as notary, 'in the taking of infeftment in the lands, and that instruments of sasine 'thereon fall to be recorded in the general register of sasines, at Edin-'burgh, or in the particular register of sasines for the county or regality 'in which the lands are situated.'

Your Lordships perceive, therefore, that this action brought before the

May 22, 1826. Court of Session another question, namely, respecting the tenure of the lands held by Mr Dawson—he contending by this action of declarator, that his lands were not held in burgage, but in feu-farm, and also, that in respect of the lands, he was not liable to pay any ladle-dues, or any taxes or imposts of a burgage nature.

This action came before Lord Alloway, and he conjoined it with the process of advocation (a mode of proceeding in the Court of Scotland, of conjoining two actions which are supposed to involve questions of a similar nature), and this conjoined action coming on before Lord Alloway as Lord Ordinary, he, on the 20th of December 1817, pronounced the following interlocutor. (His Lordship here read the interlocutor.)

Your Lordships will perceive, that by that interlocutor the Lord Ordinary decided with respect to the thirlage, but it appears the question was suspended with respect to the dues.

The case came afterwards before the Court of Session, on the 18th of November 1823, and they pronounced an interlocutor, by which they 'recall the interlocutor, conjoining the action of advocation with the process of declarator, and disjoin the said two actions; and in the action of advocation, remit the same to the Magistrates of Glasgow, with instructions to alter the interlocutors complained of, to sustain the defences, and assoilzie the informants, Messrs Dawson and Mitchell, from the conclusion of the libel, and decern.' They, therefore, in the action of advocation, determined in favour of Messrs Dawson and Mitchell, sustaining their defences and assoilzieing them from the conclusions of the libel. The effect of this interlocutor was to adjudge, that Messrs Dawson and Mitchell were not liable in respect of the ladle-dues; and also to find, in conformity to the interlocutor of the Lord Ordinary, that the multures were only due in respect of grain ground, bruised, and hashed;—'and farther, in the action of declarator at the instance of Adam Dawson, they find, that from the conception of the original rights in favour of John Young in 1747, and from the subsequent transactions relative to the property in question, and the form of the transmissions and conveyances thereof, as well as from the mode of expeding the infeftments, the pursuer is entitled to enjoy the lands and subjects described in the libel as a feu-holding; and, therefore, repel the defences applicable to the first and second conclusions of the libel, and also to the manner of holding, and decern and declare, conform to the said conclusions, accordingly; but, in so far as regards the other conclusions relative to the town-clerk of Glasgow acting as a notary, and to the recording of the infeftments, they supersede the consideration thereof, and appoint parties to be further heard thereon, without prejudice to the taking and recording the infeftments, as formerly, in the meantime.'

My Lords, there was a reclaiming petition presented, but, on the 15th of June 1824, the Court of Session, on considering the reclaiming petition, refused the desire of it, and adhered to the interlocutor reclaimed against.

" My Lords, it is fit I should state to your Lordships, that upon the matter being discussed before the Court of Session, the great question that was agitated there, was respecting the tenure of these lands. It was contended, on the part of the Magistrates of Glasgow, that these lands were held in burgage. On the part of Mr Dawson, it was contended, that these lands were held in feu-farm ; that, therefore, they were only liable to the tolls, dues, and multures, expressed in the feu-contract ; and that, in respect of the land so held, it was not liable to pay any dues for any of the corn or grain brought there for the purpose of manufacture. Very learned arguments, and at great length, were employed upon that very nice, and, perhaps, difficult question ; and the Court of Session were much divided in their opinions, with respect to some of those points,—two of the learned Judges being of opinion, that they held in burgage,—three others being of opinion, that the instrument under which those lands had been held, and the nature of the provisions of that instrument, particularly in respect to the symbols used, showed that they were held in feu-farm. It does appear to me, with great submission to the Court of Session, that they have overlooked one question, namely, Whether the Magistrates of Glasgow were entitled to those dues, in respect of the grain brought upon these lands? because that did not depend altogether upon the nature of the tenure. It is very true, that if they had been of opinion those lands were burgage, it would seem to follow as a necessary consequence from that, that they must be considered either as being within the burgh, or the territory and liberty of the burgh ; and, therefore, if they had come to the conclusion, as far as the locality of the lands was concerned, that they were either within the burgh, or the territory or liberty, and that the Magistrates of Glasgow had a right to exact those dues, not only within the burgh, but the territory and liberty, they would have come to the result, that the Magistrates of Glasgow had a right to those dues. But when they determined that those lands were not held burgage, but feu, it did not necessarily follow from thence, that the Magistrates of Glasgow, represented by Mr Wilson, had not a right to ladle-dues from Messrs Dawson and Mitchell, in respect of the corn brought there ; for it was not a claim made in respect of the tenure of land, but in respect of the corn and grain having been brought either for consumption, or use, or sale, within the liberty or territory of the burgh ;—the Magistrates of Glasgow contending, that they were entitled to the dues on corn and grain so brought ; and I find, that almost all the learned Judges were of opinion, that notwithstanding that the lands were held feu, they were within the territory of the burgh ; for I find, at the conclusion of my Lord President's judgment, pronounced in the year 1823, he says, ' I think these lands ' are within the territory of the burgh.' Lord Succoth, who had been of a different opinion from the Judges with respect to the tenure, says, ' I ' am convinced the lands are within the territory of the burgh.' Lord Gillies says, ' I am of the same opinion.' Lord President—' I am of the ' same opinion also.' So that these learned Judges, although they were

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May 22, 1826. of opinion that those lands, being held feu, were not liable to any other dues than those which the feu-charter imposed, or to any burgh taxes or imposts, were of opinion, that, in point of locality, they were within the territory of the burgh. Then, if they were, comes a question which is distinctly raised in the process in the Court below, Whether the Magistrates of Glasgow had a right to those dues, in respect of corn or grain brought upon this land held by Messrs Dawson and Mitchell,—this land being, as the Court thought, within the territory of the burgh? They appear to me to have at once held, without going at all into that question, that the lands being in feu, the consequence of that conclusion necessarily was, that those gentlemen were not subject to the payment of these dues, but that they were entitled to a judgment assoilzieing them from the demands made against them by Mr Wilson, the collector of these dues. I must confess I do entertain a very grave and serious doubt, whether the conclusion of the Court of Session, in that respect, was a right conclusion,—they appear to have overlooked the nature of this claim, which was not a claim in respect of the tenure of the lands. Whether the lands were feu or burgage, made no difference to the Magistrates of Glasgow, if they could make out that they were subject to this claim, it being a claim for the corn brought upon these lands, and sold or used by Messrs Dawson and Mitchell.

With respect to the multures, undoubtedly the question appears to have been referred to, but not very much entered into, by the Court of Session. The Lord Ordinary was of opinion, that, looking at the terms in which the thirlage had been reserved in the grant, and the nature of the lands, it was to be restricted to grana crescentia. The terms are these, 'bringing 'their whole grain and other stuff and corn they shall happen to grind, to the 'city of Glasgow's mills, and grinding the same thereat, seed and horse corn 'and bear excepted, and paying multures and knaveships used and wont.' Your Lordships see, that it thus subjects the feuars of the lands to the thirlage of bringing their whole grain and other stuff and corn they shall happen to grind, to the city of Glasgow's mills. Upon this question coming before the Court of Session, as I have already stated, their attention was principally directed to the other—the important question—and though the result of their judgment is, that the Judges of the Court of Session coincide with the Lord Ordinary, it does not appear, from the notes handed to me of the speeches made upon that occasion, that they go very much into this question of the thirlage. I observe one of the learned Judges, my Lord Hermand, dropped a very few words upon that subject; the other Judges go at great length into the question of tenure, but hardly any of them advert, at any length, to this question of the multures, but they conclude that the thirlage is restricted to grana crescentia.

My Lords, upon the question of tenure, I have stated to your Lordships very elaborate judgments were given, and great difference of opinion expressed; and I find from these learned Judges, that this is a question not only of great importance between these parties, but of very great

importance, as it affects lands not only in the burgh of Glasgow, but in other burghs. My Lords, it is a little singular, that if these lands are held in feu-farmi the register of sasine has always been in the burgh courts. Perhaps it is hardly necessary for me to state to your Lordships, that where lands are holden in feu-farm, it is enacted by the statute 1617, chapter 16, that for all reversions, regresses, bonds, assignations, and so forth, there shall be one public register, and it appears by that act, that for the greater ease of the lieges of the various places therein mentioned, there shall be a special register appointed in each of them; and it is left by that statute, to every one's option to register in any of those places which may be most convenient to them, provided they did not choose to register them in the general register. But burgage sasines are excepted.

My Lords, as I have already stated to your Lordships, it is in evidence, and not denied in this case, that all the sasines of these lands, and which are supposed to be held in burgage, have been registered in the burgh court of Glasgow. Your Lordships perceive, that in the action of declarator brought by Mr Dawson, after having concluded, that it might be decerned that those lands were holden in feu-farm, he also concludes to have it declared, that the instruments of sasine therein fall to be recorded in the general register of sasines at Edinburgh, or in the particular register of sasines for the county or regality in which the lands are situate. But in the interlocutor pronounced by the Court of Session, although they have adjudged these lands to be holden in feu-farm, they have inserted this reservation:—'But in so far as regards the other con-'clusions relative to the town-clerk of Glasgow acting as notary, and to 'the recording of the infeftments, they supersede the consideration there-'of, and appoint parties to be farther heard thereon, without prejudice to 'the taking and recording of the infeftments.'

My Lords, I may just remark; that one ground on which some of the Judges appear to have proceeded in coming to the conclusion, that these were lands held in feu-farm, was the nature of the symbol employed in the delivery of sasine, namely, earth and stone, and that those symbols were never used in relation to lands held in burgage. Upon that subject it is not my intention to detain your Lordships, but I think, upon the authorities cited at your Lordships' Bar, as well as that stated by Mr Erskine, upon the subject of the symbols, perhaps no great reliance can be placed upon that circumstance. I apprehend, that where a property, consisting of houses and buildings, is held burgage, the proper symbols to be used are certainly those of hasp and staple; but I apprehend, looking at the authorities, that it cannot be said, that where it consists wholly of lands, earth and stone are not the proper symbols to be used in giving sasine, because I do not know what other symbols could be used. I will just call your Lordships' attention to that which is stated by Mr Erskine upon this subject. In respect of symbols, he says, 'The symbols by which the delivery of a feudal sub-'ject is expressed, are different, according to the different nature of the

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'subjects that may be made over by a superior.' He does not say they are according to the nature of the tenure of the subject, but according to the different nature of the subject. 'The symbols for land are earth and 'stone; for mills, clap and happer; for fishings, net and coble; for par- 'sonage tithes, a sheaf of corn; for tenements of houses within burgh, 'hasp and staple; for patronages, a psalm-book and the keys of the 'church; for jurisdictions, the book of the court, &c. Sometimes sym- 'bols are authorised by custom to stand in place of delivery, which have 'no resemblance to the subject conveyed. Thus, the symbol in resigna- 'nation, which was originally a pen, has been now, for centuries past, 'staff and baton, which hath nothing analogous, either to the subject re- 'signed, or the act of resigning;' then he says, that 'Stair and Macken- 'zie are of opinion, that the symbol of a right of annualrent is either a 'penny money, if the annualrent be payable in money, or a parcel of corn 'or victual, if it be payable in victual;' so that I think, my Lords, that it is to be inferred, from what Mr Erskine states, that the symbols by which the delivery of a feudal subject is expressed, vary, not according to the nature of the tenure of the subjects to be conveyed, but according to the nature of the subjects themselves. Therefore, where land is conveyed, I should apprehend, with great deference to the Court below, (though that land may be situated within the liberty of a burgh,) earth and stone would be as proper symbols to be employed in the delivery of that subject, as those of hasp and staple, where a house was to be conveyed.

My Lords, I mention this only, because I do observe that some of the Judges placed very great reliance upon those symbols which were used upon this occasion; while others of them went at great length into the form of the different charters used in transfers of this property. I shall, however, avoid expressing any opinion upon this subject, for this reason, that, considering the great importance of it, not merely as applying to Glasgow, but as applying generally to property situate in burghs, and considering, too, the great difference of opinion of the Judges upon this subject, involving the titles of a very large proportion of property in burghs, I should really venture humbly to submit to your Lordships, that this is a case which requires farther consideration of the Court of Session, and that it would be extremely desirable, in a case of such great magnitude, not only that the Division before which this cause came should review the interlocutors they have pronounced upon this subject, but that your Lordships should have the advantage of the opinion of the other Division of the Court upon this, which I consider a question of great importance.

Your Lordships are aware, that with respect to Scotch causes, you have not the advantage which you have in English causes, of obtaining the opinions of the learned Judges to assist you in your decisions. Where a case of great legal importance occurs in an appeal, or a writ of error brought before your Lordships from any of the Courts of Westminster Hall, your Lordships are in the habit of calling for the assistance of the learned Judges, and of receiving from them their deliberate

opinions upon the questions proposed by your Lordships. In order to obtain the same object, in respect of cases of importance decided in the Courts of Scotland, it was usual, before the Court was formed into two Divisions, that all the Judges acted together, and your Lordships, therefore, had an opportunity, on an appeal, of knowing what the opinions of all those learned persons were. But even in those cases it was not uncommon, but, on the contrary, I believe, very frequent, in the time when Lord Thurlow presided in your Lordships' House, to remit to the Court of Session cases of importance, that they might be considered; and since the division of the Court into two Divisions, where a case of great importance has been heard before one Division of the Court, and there has been a difference of opinion among the Judges,—three being of one opinion, and two of another,—a desire has often been expressed on the part of your Lordships, that the Division before which the cause was heard, would do that which they have a right to do, namely, call for the opinions of the Judges of the other Division, in order that, if the case should ultimately come before your Lordships upon an appeal, you might have the advantage of knowing what the collective opinions of the whole, and the individual opinions of the Judges of each Court were, upon the case before them. In this case, I very much lament, that the First Division, before which this cause was heard, did not take the opinion of the other Division, for this reason, that the question is admitted to be one, not only of great importance, but the decision of which may affect property to a large extent in Scotland. It was a case upon which they themselves entertained a great variety of opinions, and therefore it appears to me it would have been very desirable, that they should have taken the opinion of the other branch of the Court. As they have not done so, I feel that, out of respect to the law of Scotland, and distrusting, as I think your Lordships would, your own opinion upon a subject of this nature, without having all the assistance which you may have to enable you to come to a conclusion, I think it most respectful to the Judges of the Court of Session, and most satisfactory to this House, to move your Lordships, that this case be referred back to the Division from whence it came, for their review; and that they should be directed to take the opinion of the other Division of the Court upon the case.

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My Lords, I cannot help thinking also, as I have already mentioned, that the finding of the Court of Session has not decided one of the questions which was raised in the proceedings in the burgh court;—I mean, the right of the Magistrates of Glasgow to exact those dues. If the determination should be ultimately, that these lands were holden burgage, contrary to the decision which has been already expressed (which I have no right to expect), that might determine the question with respect to the locality of these lands. If, on the other hand, the majority of the Judges should adhere to the opinion already expressed, that these lands are holden in feu-farm, still it appears to be the opinion of several of the Judges at least, that if they are holden in feu-farm, they are still within the territory or liberty. Then comes the question, whether, if they are within the territory or liberty, the Magistrates of Glasgow have a right to exact the dues on

May 22, 1826. the corn or grain brought within that territory?—That question has never been determined. Evidence has been gone into to support the right on the one hand, and the effect of that evidence is contested on the other, but that question has never received a solemn decision. It does appear to me, therefore, my Lords, that the case must be remitted to the Court of Session—the advocation as well as the action of declarator—for the opinion of the learned Judges upon that subject, as well as for further inquiry upon it.

My Lords, with respect to the question of thirlage, if it had not been my intention to propose that the cause should be remitted, perhaps your Lordships would have come to a decision upon that question, though it does not appear to have received so much discussion and deliberation as it perhaps deserves; but as I shall advise your Lordships that the case should go back upon the other questions, it appears to me respectful to the Court of Session, that they should have an opportunity of reconsidering that question at the same time they are considering the rest. I do not mean to express any opinion which can be considered as operating upon the minds of the learned Judges, either upon that, or upon any other question in the cause,—my opinion being, and if that opinion should be sanctioned by your Lordships, the opinion of your Lordships' House being,—that the question is of so much importance and so much difficulty, that it ought to be reconsidered by the learned Judges of the Court of Session, before whom it has already been, and that your Lordships ought to have the opinion of the other Division of the Court; that with respect to the right of the Magistrates of Glasgow to exact these dues, and the question of locality of these lands, those questions have not been sufficiently considered by the Judges in the Court below; that the case therefore should be considered further by them; and with respect to the thirlage, that that also should be reconsidered by them. My proposition, therefore, will be, that this cause should be remitted back to the Court of Session, for them to review generally the interlocutors complained of; and that in reconsidering it, they should consider whether the Magistrates and Town Council of Glasgow are entitled to any, and if to any, to what dues, in respect of the corn and grain brought within the territories of the royal burgh of Glasgow; and if they are entitled to such dues, whether the lands are within the territory of the burgh of Glasgow. I would move your Lordships farther to direct, that the Division of the Court of Session to which this remit is made, shall require the opinion, in writing, of the Judges of the other Division of the Court. Such is the nature of the judgment which I mean to propose to your Lordships. I will delay presenting it formally to your Lordships until you meet again, in order that I may take care that the questions which I propose should be considered by the Court of Session, should be distinctly stated in the judgment, that there may be no misunderstanding in the Court below, with respect to the nature of the inquiries, or the nature of the consideration of the question, which your Lordships wish to have entered into;—the substance of the judgment, I shall propose to your Lordships to pronounce, being, that the cause shall be remitted to the Court of Session, for them to consider, not

only the question of law, but the questions of fact. I would now propose, therefore, to postpone the further consideration of this case till Monday next. In the meantime, I will prepare the form of the remit to the effect I have expressed to your Lordships. May 22, 1826.

*Appellants' Authorities.*—Burgh of Rutherglen, 4th June 1575. Burgh of Lanark, 28th June 1594. Balfour's Practicks, p. 73. Brewers of Glasgow, 20th Jan. 1761. Bakers of Glasgow, 5th June 1792. 1 Craig, 10. Hutchison's Justice of Peace, 2. 46. 3 Ersk. 8. 72. 1 Juridical Styles, 551. Bell's Treatise on Conveyance to Land, p. 120. 2 Ersk. 9. 27. Dixon, Feb. 1, 1823, (2 Shaw and Dunlop, No. 161.)

*Respondents' Authorities.*—1 Bankton, 561. 1 Juridical Styles, 8. § 1. 2 Stair, 3. 38. 2 St. 3. 17. 2 Ersk. 4. 8. 2 Ersk. 3. 36. 1 Craig, 10. 31. and 36. 1491, c. 36—1593, c. 185. Hope's Minor Practicks, page 321. Wight on Elections, 209. Cathie, 30th June 1752, (2521.) Dean, 3d July 1752, (2522.) 1 Bell on Deeds, 466. Town of Inverness, 14th July 1674, (10893.) 1 Stair 4. 45. 5. 4 Ersk. 2. 36. Town of Perth, 16th Jan. 1711, (11861.) 2. Ersk. 9. 27. Duke of Buccleuch, 25th June 1767, (16053.) Yeaman, 17th Nov. 1759, (16044.)

J. RICHARDSON—A. MUNDELL—Solicitors.

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## ROBERT SPIER, Trustee on John Dunlop's Sequestrated Estate, No. 22. Appellant.—*Adam.*—*Jas. Campbell.*

## JAMES DUNLOP, Respondent.—*Shadwell*—*Buchanan.*

*Bankrupt—Stat.* 1696, *c.* 5.—A Jury having found, that within sixty days of an admitted bankruptcy, the indorsee of a bill accepted by a bankrupt, did not enter into an agreement or concert with the bankrupt for the purpose of obtaining security and payment of the bill; but that the indorsee, by means of a sale of the bankrupt's heritage, did within the 60 days obtain from him a sum of money as a provision for payment of the bill when it became due; and the Court of Session having held this transaction not to be reducible under the act 1696,—the House of Lords remitted this latter point for reconsideration.

THE affairs of John Dunlop, grocer and baker in Stewarton, in the county of Ayr, having fallen into embarrassment, his estate and effects were sequestrated under the bankrupt statute, and Spier was appointed trustee. In this capacity, he thereafter raised an action against James Dunlop, the bankrupt's nephew, stating that the bankrupt and another nephew had got involved together in money transactions; that finding it necessary to raise money, Ferguson drew a bill, on the 6th of September 1820, on the bankrupt for £220, which was accepted by him, payable three months after date, in favour of James Dunlop, who indorsed and discounted it with the agent for the Commercial Bank at Beith: That thereafter, and during the currency of the bill, Ferguson having become bankrupt, and James Dunlop having learned that May 22, 1826.

2D DIVISION. Lords Mackenzie and Eldin.