nating the same species of vessel, but it mentions them as distinct classes, 'passage boats, ferry boats, and pinnaces.' As to the custom, it would be extraordinary if we could suppose that the Magistrates' collector did not know what duties were leviable; and if the rate per ton had been leviable from these passage boats, why did he not insist upon these dues until three years after the steam boats began to ply? We are all of opinion that the construction should be given to this clause in the Act, and to the table of fares, which has been given in the Court below, and that the judgment complained of must be affirmed; and I would now move your Lordships that it be affirmed, with L.50 costs.

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The House of Lords accordingly 'ordered and adjudged, that 'the interlocutors complained of be affirmed, with L.50 costs.'

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL,—Solicitors.

No. 14.

DAWSON and MITCHELL, Appellants.
Spankie—James Campbell.

MAGISTRATES of GLASGOW, Respondents.
Lushington—A. M'Neill.

Burgh Royal—Superior and Vassal—Servitude.—1. Circumstances and clauses in titles held, (affirming the judgment of the Court of Session), to constitute a burgage tenure, and not a feu. 2. In a grant by burgage-holding, the town-clerk is alone entitled to act as notary; and the sasine must be registered in the books of the burgh. 3. Held, (reversing the judgment of the Court of Session), that a clause of thirlage of grana crescentia, having these words adjected, 'and other stuff and 'corn they shall happen to grind, seed and horse corn and bear excepted,' does not import a thirlage of invecta et illata.

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1st Division.

THIS was a branch of the case reported ante, Vol. ii. No. 21. p. 230., which see.

In the original appeal taken by the Magistrates of Glasgow, the House of Lords 'ordered that the cause be remitted back 'to the Court of Session in Scotland, for them to review generally the interlocutors complained of; and on 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

March 31. 1830. 'Glasgow, for sale, manufacture, or consumption? and if they are 'entitled to any such dues, then, whether the lands in possession 'of the respondents (Dawson and Mitchell) are within such 'liberties or territory? And it is further 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 Divi-'sion are 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.'

The First Division of the Court of Session, in obedience to this order, appointed Cases containing the necessary questions to be put to the Judges of the other Division; and having received their opinions, found, (November 14. 1827), '1st, That the sub-'jects are held by burgage tenure; that the town-clerk has the 'exclusive privilege of preparing sasines therein; and that the 'sasines are to be recorded in the burgh register. 2dly, Appointed 'the Magistrates to lodge a condescendence of the usage con-'cerning the levying of ladle-dues. 3dly, Found that the thirlage 'extends to invecta et illata as well as to grana crescentia, seed 'and horse corn and bear excepted.'*

Dawson and Mitchell appealed.

Appellants.—1. The appellants' lands are held in feu-farm. This is obvious from the titles† by which the lands have been granted and passed. It is an unfounded assumption to hold that the tenendas clause proves the holding to be burgage; at the worst, it only leaves the holding to be ambiguous. Neither is the objection, that the holding is not declared to be 'of the Ma-'gistrates' of any importance; for the holding is 'for behoof of 'the burgh,' which is equivalent to a holding 'of the Magis-'trates' for behoof of the burgh. Such a tenendas is incom-patible with a burgage-holding, which implies that all the pay-ments must be to the Crown. But as the property in question formed part of the common property of the town, it could not be lawfully conveyed in burgage. All authorities concur that such an alienation must be in feu; and, in dubio, the presumption is, that it was intended to be so conveyed. All the other parts of

* 6. Shaw & Dunlop, 19. where the opinions of the Judges are given.

† For a full deduction of the titles, see report of the original appeal, ante, ii. 230.

the deed belong to a feu-holding; and the payments and practice have been consistent with that kind of holding. On the one hand, the feu-duty has been regularly paid and accepted; and on the other, burgh taxes have never been paid, which they would if the holding had been burgage. There is no procuratory of resignation, without which no transmission of burgage property can be effected. On the contrary, the infeftment is directed to be given in the common form by a precept of sasine in a feu-contract, which necessarily implies, that the vassal was to hold of the Magistrates. Accordingly, the Magistrates, in an after-transference of the lands, confirmed the sasine, (the only symbols of infeftment being earth and stone); and thus, extinguishing the subaltern right, made themselves the immediate superiors.

2. The fact of the lands being held in feu-farm also settles the point of registration. In that case, the instrument of sasine must be recorded in the Particular Register of the county, or in the General Register in Edinburgh.

3. If the appellants hold their lands in feu-farm, then, as the feu-duty is a payment pro omni alio onere, it excludes the exaction of ladle or any other dues of that description. No doubt such dues are paid, not so much in relation to the tenure, as to the locality. Still the Magistrates had it in their power to depart from such a claim; and by conveying in feu, and stipulating merely for a feu-duty, they have departed from the claim. In point of locality there is no evidence that these lands lie within the limits of the burgh. But, even if the lands formed part of the property of the burgh, ladle-dues are not exigible from grain which does not pass the city ports or enter the city markets. These duties are, as it were, a toll payable from articles that pass the gates. The right to levy them depends on ancient custom. The Magistrates have no express grant to them, nor have they any deed of gift which limits or defines their amount or extent. The right, therefore, being founded on possession, must be regulated by the maxim, 'tantum præscriptum quantum possessum.' But the Magistrates have not been in the use of levying these dues except on articles passing within the 'city of Glasgow,' *i. e.* within the actual limits of the town; whereas the appellants' distillery is landward, and at a distance from the town or houses.

4. As to the thirlage, the Court below have, from an ambiguous clause, and by vague and uncertain inference, subjected the appellants to the heaviest servitude known in law; but in dubio, præsumendum est pro libertate.

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Respondents.—1. The lands in question are held burgage. This is evident from the words of the tenendas clause—'to be holden 'in free burgage.' That holding is not changed because the Magistrates reserved a ground-rent, and called it a feu-duty. The successive transferences all support the same conclusion; and these lands have always been treated as burgage lands in the matter of land-tax, poor rates, teind, &c. It is incorrect to say that the Magistrates had no power to make a grant by tenure of burgage. As a corporation, they can hold and convey heritable property. If the property be land without the burgh, they can hold it feu or blench; if within burgh, they can hold it in burgage; and their power of alienating is equal in both. They can grant the one to a purchaser in feu-farm, and the other in burgage, exactly as a private individual can. Had this property been held in feu, there must on each resignation have been a charter of resignation, with precept of infeftment; but throughout the various alienations, the resignation and infeftment have been (as is peculiar to burgage-holding) unico contextu given by a bailie of the burgh. If this be a feu-holding, there is a radical vice in the appellants' title. The precept in the original grant was introduced, from the distinction not being attended to between the Magistrates as Commissioners of the Crown, and as a Corporation; and it was thought absurd that the commissioners should resign in their own hands. But this precept, if bad, does no harm; if good, the disponee held in free burgage, as is provided in the precept. The symbols are precisely those used where the burgage property is land. It would be anomalous to use the symbol of hasp and staple, where there was no house to admit of symbolical entry. The charter of confirmation was but a blunder, and cannot affect the question. If, till then, the lands were burgage, the confirmation did not change the character of the tenure. Besides, ladle-dues are exigible from all grain brought within the territory of the burgh of Glasgow; and the exaction does not depend upon the passing into the town itself. This the respondents can prove.

2. If the lands are held burgage, then indisputably the privilege of preparing the sasines belongs to the city-clerk, and the sasine must be registered in the burgh books.

3. The property being burgage, the ladle-dues are exigible. Even if feu, the appellants would be liable; for these dues have no relation to the tenure, and can be demanded as a mere impost sanctioned by custom, and not abandoned by any contract. There is abundance of evidence that these lands lay within the limits of the burgh, and were always dealt with as burgh land.

4. The words 'other stuff and corn,' clearly constitute the thirlage of invecta et illata. March 31. 1830.

Lord Wynford.—My Lords, From the respect which I feel, and which I am persuaded every one will feel, who is at all acquainted with the manner in which justice is administered in the Court of Session in Scotland by the learned persons who preside there, and having the misfortune to differ from them upon one point in this very difficult and important case, I requested of your Lordships time to consider it. My Lords, I have devoted all the time that I could spare from other important avocations, since last we met in this place, to the consideration of this case. I have looked into every book, and into every case, and the consequence has been, that I have convinced myself that the view I had taken of one of the points was erroneous; and upon that I now agree with the Court of Session in Scotland. Upon the most important, and perhaps the only point that is worth deciding, I, however, still retain the same opinion that I first formed, which is against the judgment of the Court below. I deliver that opinion with the less embarrassment, because, though I have the misfortune to differ from the opinion last delivered by the Judges of the Court of Session, I am supported by a judgment previously given by that Court; for it so happens, that the first time this case was brought under their consideration, they decided the point on which I cannot agree with them in a different manner from that in which they have since decided it. The first judgment of the Court of Session was brought by appeal before this House, and your Lordships were pleased to send it back for further consideration, in consequence of great doubts entertained by a noble and learned Lord, (Lord Gifford), of whose services the country is now deprived by his much to be lamented death; and it so happens, that, on a reconsideration, twelve out of fifteen of the Lords of Session formed an opinion different from that to which they had previously come upon this case.

My Lords, an action was brought by the Magistrates of the burgh of Glasgow, for ladle-dues and thirlage. Ladle-dues are dues which derive their name from the ladle, with which a portion was taken out of the different articles that were brought to a town for sale, and for manufacture. Thirlage is paid for corn growing within a certain thirl or district, or for corn brought within that district. An action, as I have stated to your Lordships, was brought by the corporation of Glasgow, claiming those dues, against the present appellants. The defenders thought proper to institute what is called an action of declarator,—a proceeding to which we have nothing analogous in this country,—by which the pursuers call upon the Court to decide certain other points, which they conceived would be of importance between them and the other litigating parties. In consequence of this proceeding, these points were raised:—1st, Whether certain lands, which

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are the subject of your Lordships' inquiry to-day, are held by burgage tenure or by feu tenure? 2dly, Whether the town-clerk of the burgh of Glasgow has the exclusive privilege of passing sasines in those lands, and whether the same are to be recorded in the burgh register?—I have the satisfaction of stating to your Lordships, that the decision on the first question will decide the second, so that, upon that part of the case, I shall have no occasion to give your Lordships any trouble. The third, and, I believe, by far the most important point which is raised, is, whether the respondents are entitled to thirlage of 'invecta et illata?' which, your Lordships know, is a duty on corn brought within the thirl; or, whether they are only entitled to thirlage on 'omnia grana crescentia,' that is, on corn which is grown within the thirl?

My Lords, on the first question, namely, whether the subjects, as they are called, are held by burgage tenure, it is, first of all, material to consider under what terms the burgh itself held this land. It is a principle of the constitution, both in England and Scotland, that burgage tenants must hold from the Crown. These burghs were originally created for the improvement of commerce, and to raise up an authority in the country to counterbalance that of the great Barons. It was necessary, therefore, that those who were members of those burghs, should hold immediately under the Crown; that they should derive their interest from the Crown, and be subject to the Crown, and to the Crown only. There are some burghs in Scotland which do not hold in burgage tenure, but hold their lands of certain great Barons, from whom they derived those lands. But I think there cannot be the least doubt, that the corporation of Glasgow hold by burgage tenure from the Crown; for your Lordships will find in the respondents' case, the charter under which they hold, which is a charter of James IV., and is in these words:—'Dedimus concessimus et in feudifirmam pro perpetuo disposuimus:'—It will be material for your Lordships to attend to the word 'feudifirmam,' for we have had a great deal of argument, that burgage tenure can be held only on the performance of burgage services; whereas it is clear, that in the grant of this very property, besides the burgage service, it was to be held in fee-farm—a tenure of a description with which we are very familiar in England:—'Tenoreque præsentis cartæ nostræ damus, concedimus, et in feudifirmam pro perpetuo disponimus, dictis præposito, ballivis, consulibus, et communitati dicti burgi et civitatis Glasguensis, et eorum successoribus, totum et integrum dictum burgum et civitatem Glasguensem, cum domibus, ædificiis, hortis, terris, tam lie outfield quam infield, cultis quam incultis, custumis per terram et aquam, ac etiam fecimus ereximus et constituimus tenoreque præsentis cartæ nostræ facimus constituimus et erigimus dictum burgum et civitatem Glasguensem in unum liberum burgum regalem, cum omnibus libertatibus privilegiis honoribus immunitatibus et jurisdictioni-

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'bus quæ per leges et consuetudinem hujus regni nostri ac liberum 'burgum regalem pertinent.' Your Lordships will perceive, therefore, that this is a grant immediately from the King to these burgesses, and proves that the corporation held from the King.

This brings us to the next point, Whether the Magistrates granted to Mr Young (under whom the present appellants claim) a holding in free burgage? or, Whether they made to him what is called a mere feu-grant? Now, for the purpose of deciding this question, it would be most important that your Lordships should look at the three instruments under which Mr Young took. Mr Young, in the year 1740, purchased by roup or at auction the property in question. Your Lordships will find, that in the contract upon the roup it is expressly stated, in clear and unquestionable terms, that the purchaser is to hold it in free burgage. That I may not mistake, I will take the liberty of directing your Lordships' attention to the very words of the feu-contract,—'to be holden in free burgage, for service of burgh used and 'wont.' Your Lordships will find these words repeated in the other instrument to which I have alluded. Your Lordships will also find the same words repeated in that which, I think, is of more importance than either, in the instrument commanding what is called the sasine in Scotland, or as in England we say, the seisin. Your Lordships know, that, till some modern conveyances were introduced, there was no mode of conveying land in England without livery of seisin; that is, either the actual delivery of some portion of the property, as for the whole, or a symbolical delivery of the whole, as by giving the key. That, amongst our simple ancestors, was the mode, and perhaps a better mode than that now used; for there were fewer words used than at present. In the instrument directing the delivery of sasine, Young was directed to hold that sasine by burgage tenure. Now, my Lords, I think if the appellants were to succeed in their argument, it must be a success which they would be sorry for another day; because, if this person does not hold in burgage tenure, it may become a question, what right he has to the lands?—for the persons who held at the time, and who have given his successors sasine, had no authority to give sasine on any other terms than that of holding on burgage tenure. But I am disposed to relieve him from that difficulty, by recommending to your Lordships to say, by your judgment, in conformity with the opinion of the Lords of Session, that these lands are held by burgage tenure. Having stated the terms of this contract, I shall submit to your Lordships, that when a man takes to hold in burgage tenure, he cannot be allowed to say that he does not hold in burgage tenure, against his own words three times expressly repeated; first, by the executry contract,—then by the contract carrying that executry contract into execution,—and lastly, by the act of delivering sasine. He cannot be permitted to say, that he does not hold the lands in the manner, and upon the terms in which, upon those different occasions, he stated that he was ready to accept them, and did accept them.

March 31. 1830. But, my Lords, it has been very ingeniously pressed,—and those who have to assist your Lordships to administer justice here, must prepare themselves for arguments, which, though they have not much foundation in law, are urged with so much ingenuity that it is difficult at first to get over them;—it has been pressed upon your Lordships, that the Magistrates of the burgh at Glasgow could not convey in free burgage, and therefore it is altogether a void conveyance. Your Lordships were referred to an Act of the Scotch Parliament in support of this objection; and it was insisted with great ability, that a conveyance in burgage tenure would be in direct contravention to this Act of Parliament. My Lords, the terms of the statute are certainly calculated to induce one to think there is something in the argument. By this Act, which passed so long ago as the year 1491, cap. 36. 'it 'is statuit and ordainit, anent the common guid of all our Sovereign 'Lord's burghs within the realm, that the same common guid be 'observit and keepit to the common profit of the town, and to be 'spendit in common and necessary things.' My Lords, I thought those words were merely declaratory of that which had been the law before, namely, that corporations should not employ corporate property for the private purposes of the members of the corporation, but for the welfare of the town: but the statute, after making a provision to prevent this abuse, declares, 'and attour that the rentes of the burghs, 'as landis, fishings, farmes, mails, mills, and yearly revenues, be not 'set but for the year allenarly; and gif any happen to be set other-'ways, that they be of no avail, force nor effect, in time coming.' It struck me at first, that corporations could not grant out property as this corporation had done in the present case; but on looking to the words with more attention, your Lordships will find, that corporations are not restrained from granting lands, but only from granting the rents of lands;—and this is the construction that has been put upon those words of the Act by one of the most learned writers upon the law of Scotland, a passage from whose book was cited in the argument;—but the object of this statute was only to prevent a race of persons growing up, who, I believe, have been found to be most mischievous in another part of the United Empire, namely middlemen, persons who stand between the lessor and the occupier, and impoverish both.

But your Lordships have been referred to a passage of Sir Thomas Hope, in which that writer says, that a burgh royal cannot feu out their common lands. I beg to observe that Sir Thomas Hope must be clearly wrong in this, supposing this to be Sir Thomas Hope's opinion. Your Lordships know perfectly well, that the whole argument assumes that it would be good as a feu, though not as a grant of burgage tenure. 'A burgh royal,' Sir Thomas Hope is made to say, 'cannot feu out their common lands without the King's express consent, 'and without an Act of the convention of burghs allowing that burgh 'so to do.' My Lords, I confess I was surprised by the reference

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here made to the King's consent. But I have the satisfaction to tell your Lordships, that, since this case was before the House, I have looked into Sir Thomas Hope's book, being astonished at the doctrine contained in those words; and I find that these are not Sir Thomas Hope's words. They are contained in a note put in by somebody, I do not know whom, but most likely by Mr Spottiswood, the editor of that book. It is a passage of no authority whatever therefore: It is a passage found fault with by Mr Brodie, in his excellent edition of Lord Stair's Institutes; and unquestionably it is a passage entitled to no consideration:—'Every royal burgh has its own common good or 'common lands pertaining thereto, which pertain to the burgh in com-'mon, and are holden of the King in free burgage, quoad the haill 'body of the town; but if any particular person acquire an heritable 'right of these common lands from the town, this is not holden of the 'King in free burgage, but of the town in feu: which difference is 'necessary to be observed, by reason that sasines of land holden bur-'gage have sundry privileges by Act of Parliament, which do not 'pertain to the feu lands of the town.' That is applicable to quite another case. My Lords, the next passage cited for the purpose of supporting this doctrine, is a passage from Mr Erskine, who says, 'If 'any part of the common lands of a burgh are feued by the Magis-'trates to a private purchaser, such lands hold not of the Crown in 'burgage, but of the burgh in feu-farm.' The question is, in this case, whether they are feued or granted in free burgage? And in another place the same writer says, 'Leases for a longer term than 'three years, of the rents or revenues of burghs royal, whether pro-'ceeding from lands, fishings, mills, or other subjects yielding a year-'ly profit, are prohibited by 1491, cap. 36.; but there is no limitation 'with respect to leases or feus of the lands or other subjects them-'selves, which, therefore, may still be lawfully granted by the Ma-'gistrates and common council, as if the statute had not been enact-'ed.' My Lords, the passage, as quoted here, goes far enough to shew, that the construction I have ventured to submit to your Lordships is the true construction of this statute. But Mr Erskine adds, 'For no more was meant by the Legislature, than to forbid the grant-'ing of leases to those who thereby became entitled to the tack-'duties payable by the proper tacksmen or tenants, and who, under 'the pretence of their undertaking the hazard of the deficiences or 'bankruptcies of those tacksmen, frequently obtained such general 'leases at a considerable undervalue.' These last words shew what was the object of the Legislature in passing this statute, and that we should go beyond that object, if we by construction extended it to a conveyance of land.

It is then said, that burgage tenures must hold from the King. It is added, these persons do not hold from the King, but from the corporation. If that proposition be made out, these persons are not burgage tenants; for burgage tenants must hold from the King. If,

March 31. 1830. therefore, these persons do hold from the corporation, they are not burgage tenants. But your Lordships will find, by the Scotch law, that if a man be regularly made a burgage tenant, (which Young was, unless all the writers on the subject are wrong), he is, by the act of being made a burgage tenant, made a tenant holding from the King, and it is not necessary to make him a tenant of the King by express words. If it does not require express words to make a burgage tenant a tenant of the King, the case of Edgar *v.* Maxwell, which has been cited, will be found directly to support the judgment of the Court below. The tenancy in Edgar *v.* Maxwell was created precisely in the same way as it is here, except that in that case the tenant was to hold of our lord the King and of the burgh. There was no grant immediately from the King; there was no surrender in order that there might be a grant from the King. If a grant is made to hold in free burgage, it must be derived from the King; for a tenant in free burgage can only hold from the King. When a grant imports to be a grant in free burgage, that grant is to hold from the King. There is, therefore, only a nominal distinction between the case of Edgar *v.* Maxwell and the present case; and the decision in the case of Edgar *v.* Maxwell, which is a decision unappealed from, decides the principle on which the present case depends.

The service of watch and ward is a military service. At the period when Scotland and England were divided, particularly upon the borders of the two kingdoms, the watch and ward was an important military service. It is at all times, however, a service for the benefit of the Crown; because, if a town is not protected by the Crown against a foreign enemy, the internal peace of the country is preserved by that service. The sovereign of the country, therefore, derives an advantage from the performance of it. The performance of this service is a consideration for the grant of lands by the sovereign to him who obliges himself to perform it. But your Lordships will find, that the Scotch writers explain how this is to be done. The work of Lord Stair, your Lordships know, is a book of the highest authority; he is the Lyttelton of Scotland. In lib. 2. title 3. paragraph 38. are these words:—' The particular persons infeft are the King's immediate vassals; and the bailies of the burgh are the King's bailies.' In a very able note of Mr Brodie upon this passage, he says, ' The community may take infeftment in what is held in burgage; but then as, by such infeftment, it fills the fee,' (that is, as by the infeftment the feoffer gives up the fee to the feoffee), ' it follows, that whenever it transfers that property to individuals in burgage, the infeftment of the latter denudes the community:' The granter ceases to be a tenant of the King, and the grantee, by the very act of conveyance, becomes instanter a tenant of the King. ' It is a mere impossibility,' continues Mr Brodie, ' that the burgh should fill the fee, and yet that the proprietors should be the immediate vassals of the Crown.' Your Lordships see that he assumes that they are immediate vassals of the

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Crown. 'The latter, however, do hold directly of the Crown; and the 'office of the Magistrates, in giving infeftments, is purely ministerial 'as the King's commissioners.' Another objection has been made in this case, namely, that there is no procuratory of resignation. Procuratory of resignation is only necessary where a tenement has passed from a corporation, to whom it has been granted by the Crown, to an individual. It is not necessary when the tenement remains in the corporation, and is to be granted by the corporation. In the latter case, the corporation are empowered to grant as from the Crown, by the authority given them by the original grant. This is clearly explained in a book called The Juridical Styles, p. 546. 'The charter of erection is in the nature of a commission, constituting the Magistrates commissioners for the Sovereign, by whom they are empowered to receive resignation when necessary, and grant infeftment, 'to be held immediately of the King.' For these reasons I humbly submit to your Lordships, that the subjects in this case are held by burgage tenure.

I mentioned to your Lordships, that the next question, namely, Whether the town-clerk has the exclusive privilege of passing sasines in these lands? depended entirely on the decision of the former. If this be, as I am of opinion it is, a burgage tenure, it was properly registered in the burgh: Had it been a feu tenure, it must have been registered in the county. Burgage tenures, being peculiar to burghs, can only be registered in the registry of the burghs, and by the proper officer of these burghs.

My Lords, this brings me to the last question to be decided by your Lordships, namely, Are the respondents, that is, the corporation, entitled to thirlage on grana invecta et illata, or only on grana crescentia?—Now, I shall humbly submit to your Lordships, that they are entitled to thirlage only on omnia grana crescentia, and not on grana invecta et illata. I stated to your Lordships, that this was the opinion of the learned Judges of the Court of Session in Scotland, when the case first came before them; this was the opinion of two of that learned body when the case was under their consideration the last time; and I am in possession of a very excellent judgment, pronounced by one of those persons, of whose services the country has since been deprived by his death, whom I had the honour of knowing, and whose abilities as a lawyer have long been respected by all Scotland—I mean the late Lord Alloway.* This learned Judge dissented from this judgment; and he expressed that dissent in a most luminous judgment, now lying on your Lordships' table. My Lords, the grounds on which I have formed this opinion (which I form with diffidence, considering the difference of opinion upon it) are these:—

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* See 6. Shaw and Dunlop, 26.

March 31. 1830. Thirlage is a very severe service, and of all thirlage the most severe is the thirlage of grana invecta et illata. This service applies to a much larger portion of property than any other species of thirlage: But the law leans against restraints on the use of property—no service can be established except by clear and unambiguous terms in the instrument by which it is to be established. The right cannot be extended by implication beyond the express terms of the instrument creating it. If the instrument contains only general terms, the extent to which they are to be carried may be ascertained by usage; but if no usage can be proved, they are to be taken to import only the lightest description of service. Thus Mr Erskine says, (Book ii. title 9. paragraph 33.) 'as all servitudes are restraints upon property, they are 'stricti juris, and so not to be inferred by implication.' Mr Erskine, in the same book, says, § 27. 'In thirlage constituted in indefinite terms, 'astricting lands to a mill without mentioning what kind of thirlage, 'usage must determine the nature and degree of the servitude; and 'where there has been no sufficient time to discover its nature by the 'subsequent possession, præsumendum est pro libertate; that meaning 'ought to be received which formed the lightest servitude.' Now, my Lords, I have the authority of all the Judges who delivered their opinion upon this subject, that the servitude on invecta et illata is not the lightest; on the contrary, that it is one of the heaviest servitudes known to the law of Scotland. If the terms were general, without any particular terms to controul their operation, your Lordships would limit them to grana crescentia. But if there be in an instrument terms describing a particular service, these services are not to be enlarged by any general terms, so as to be made to embrace other services besides those which are particularly described. The general terms are held to apply only to other cases ejusdem generis with those particularly described. These are the terms of all the deeds:— 'And bringing the whole grain which shall grow upon the said lands, 'and other stuff and corn they shall happen to grind, to the town of 'Glasgow's milns, and grind the same thereat, seed and horse-corn 'and bear excepted.' Here are words which expressly limit the service to grain which shall grow upon the lands. It is difficult to say what is the meaning of the words 'other stuff.' But it would be contrary to the rules which regulate the construction of every kind of instrument to say, that such loose general ambiguous terms should embrace a different service, and one more heavy than that which is expressed in the particular terms previously used. At all events, such a meaning cannot be put on such terms in an instrument on which a limited and narrow construction should always be put. The introduction of such terms should be attributed to that tautology of which lawyers, both in England and Scotland, are so fond, rather than to any intention of increasing a heavy impost on the necessaries of life. It is said also, that the thirlage of grana invecta et illata is included in the words 'service of burgh used and wont.' But I am of opinion, that

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thirlage is not one of the burgh services. If it were, there would have been no occasion for specifying the case of grana crescentia; for that species of service must have come within the words services of burgh used and wont, as well as thirlage of grana invecta et illata. The specifying any description of thirlage in the instrument shews, that thirlage is not a service of burgh used and wont. The services of burgh used and wont are military services; and thirlage is not a military service. Mr Erskine says, (2. 4. 8.) 'In the erections of the most 'ancient royal burghs, the reddendo is servitium solitum et consue-'tum, which the law interprets to be military service; and in most of 'the later charters erecting burghs royal, the service specially ex-'pressed is watching and warding, which might properly enough be 'said, some centuries ago, to be of the military kind.' Now, my Lords, I am quite clear, therefore, that these terms cannot mean any kind of thirlage. Your Lordships are to construe this in the way most favourable for the tenant; and your Lordships cannot do that, if you are to extend a special provision so as to make that special provision general. I shall, therefore, advise your Lordships to differ from the opinion expressed by the learned Judges upon this question.

I would, upon the whole, humbly move your Lordships, that you should declare that the subjects are held by burgage tenure: Secondly, That the town-clerk has the exclusive privilege of passing sasines, and that the same are to be recorded in the burgh register: And further, that the respondents are not entitled to thirlage on grana invecta et illata, but only on grana crescentia.

'The House of Lords ordered and adjudged, that the interlo-'cutor of the Court of Session of the First Division, of the 14th 'November 1827, complained of in the said appeal, in so far as it 'finds that the subjects are held by burgage tenure, and that the 'town-clerk has the exclusive privilege of preparing sasines there-'in, and that the sasines are to be recorded in the burgh register, 'and in so far as it appoints the Magistrates to lodge a condescend-'ence of the usage concerning the levying of ladle-dues, be affirm-'ed; and it is further ordered and adjudged, that the said interlo-'cutor, in so far as it finds that the thirlage extends to invecta et 'illata as well as to grana crescentia, seed and horse corn and bear 'excepted, be reversed: And it is further ordered and adjudged, 'that the said two other interlocutors of the said Court, of the 30th 'of November and 20th December 1827,* also complained of in 'the said appeal, be affirmed: And it is further ordered, that the 'cause be remitted back to the Court of Session, to proceed there-'in as shall be consistent with this judgment.'

* These interlocutors were orders of Court in regard to the statements as to the fact of usage in levying the ladle-dues.

March 31. 1830. *Appellants' additional Authorities.*—Davie, June 2. 1814, (F. C.) Town of Edinburgh, Nov. 24. 1696, (1898.) 1567, c. 27.; 1681, c. 11.; 4. Geo. III. c. 42.

Respondents' additional Authority.—Edgar, June 1743; Brown's Supplement, vol. v. p. 730.

ALEXANDER MUNDELL—RICHARDSON and CONNELL,—Solicitors.

No. 15.

MARIA CAMPBELL RAE JUSTICE, Appellant.
Lushington—Brown.

WILLIAM BURN CALLANDER, Esq. Respondent.
Spankie—Murray—A. M'Neill.

Adjudication—Warrandice—Passive Title.—A party having sold land, with warrandice against augmentation of stipend; and, with part of the price received for those lands, bought two estates, which he took, under fetters of strict entail, in favour of himself and spouse in liferent, and to his son in fee, and to a series of substitutes; and having granted over one of the estates an heritable bond of warrandice; and that estate having been adjudged for augmentations;—Held, (affirming the judgment of the Court of Session), that an heir who had made up titles to the fiar, and not to the liferenter, could not prevent the other estate from being adjudged for augmentations.

April 6. 1830.

1st Division.
Lord Eldin.

SIR JAMES JUSTICE, proprietor of the estate of Crichton in the county of Edinburgh, having contracted many debts, executed in 1725, in favour of George Livingstone, a disposition of the estate, in form absolute, but truly in trust, with power to sell, and under burden of payment of debts. Sir James having soon after died, his eldest son, James Justice, in 1737, confirmed his father's disposition, conveyed an estate belonging to himself, which lay intersected with the lands of Crichton, to Livingstone, also in trust, to sell the whole subjects, and, after payment of debts, lay out the surplus in the purchase of lands,—the destination to be to himself (James Justice) in liferent, and to Alexander Justice, his eldest son, in fee, and to a line of substitutes.

In 1738 Livingstone sold these estates to Mark Pringle, and he and James Justice granted a disposition bearing this clause: 'And further, because the said Mark Pringle has paid as great a 'price for the teinds of the said lands and others above disponed 'as for the stock, therefore I, the said James Justice, bind and 'oblige me and my foresaids, to warrant, acquit, and defend the 'said Mark Pringle from all minister's stipend, future augmenta- 'tions, and other burdens, of whatever nature, imposed, or that 'shall be imposed upon the said teind, parsonage or vicarage, the