

of the skilled person on behalf of the pursuers. He has not allowed any charges for the attendance of agents, nor for the expenses of analysis by Dr Macadam. All that he has allowed is for the attendance of a skilled chemist on behalf of the pursuers, and this seems to be a most reasonable charge. Therefore the Lord Ordinary repels the objection to the Auditor's report, and has found the defenders liable in the expenses of the objection."

Counsel for Pursuers—Dundas. Agents—
Waddell & M'Intosh, W.S.
Counsel for Defenders—Murray. Agents—
Tods, Murray, & Jamieson, W.S.

HOUSE OF LORDS.

Thursday, July 19.

(Before Lords Blackburn, Watson, Bramwell, and Fitzgerald.)

LAIRD & SONS v. CLYDE NAVIGATION TRUSTEES.

(Ante, March 10, 1882, vol. xix. p. 486, and 9 R. p. 712.)

Harbour—Dues Leviable—Clyde Navigation Consolidation Act 1858 (21 and 22 Vict. c. 149), secs. 98 and 99.

By an Act of 1770 the magistrates of Glasgow were empowered to levy rates on goods, including timber, "carried in and upon the river," so far as it was within their jurisdiction, the dues to be paid "on all timber or wood either carried in boats or other vessels, or floated in or upon the river," and rates were levied by them for a long period. In 1840 that Act was repealed by an Act which provided that duties should be levied "on all goods carried or conveyed on the river Clyde within the limits hereinafter mentioned." A new scale was then imposed, but no change was made in the list of goods on which dues were to be levied. There was no express provision in that statute for levying dues in respect of timber which had been brought from abroad and was floated up a side channel of the river to timber-ponds which were within the "river" as defined by the statutes. The Clyde Navigation Consolidation Act 1858 repealed the Act of 1840, and sec. 98 enacted that the Trustees should be entitled to levy on and in respect of "all goods shipped or unshipped in the river or harbour the rates specified" in Part 1 of Schedule H. thereto annexed, which is entitled "Rates on goods conveyed upon or shipped or unshipped in the river or at the harbour, or using any transit-shed or warehouse," and contains "timber" in the list of goods chargeable.

In 1877 the Clyde Trustees for the first time proposed to charge dues on the timber on its being floated up to the timber-ponds. In a suspension at the instance of the owners of the ponds—held (aff. judgment of First

Division), on a construction of the statutes, that the timber so floated up did not fall within the scope of sec. 98, and that the dues claimed were not leviable.

Question. Whether there was any distinction between the case before the Court and that of timber floated up to and delivered in yards in the upper parts of river, which timber had admittedly paid dues since the passing of the Act?

Statute—Usage—Contemporanea expositio.

Opinions that in construing a statute so recent as that of 1858, the manner in which it was acted on by persons affected by it could not constitute any *contemporanea expositio* which could assist the Court in its construction.

This case is reported March 10, 1882, ante, vol. xix. p. 486, and 9 R. p. 712.

The Clyde Trustees appealed to the House of Lords.

At delivering judgment—

LORD BLACKBURN—My Lords, this is an appeal against an interlocutor of 10th March 1882 declaring the interdict granted on 17th January 1877 perpetual.

The interdict thus made perpetual was granted on the prayer of Messrs Laird, now respondents, to interdict the now appellants from levying or exacting payment from the complainers of rates or dues for or in respect of timber imported into this country from abroad, and unshipped in the harbours of Greenock and Port-Glasgow, or either of them, and thereafter floated up to the timber-ponds of the complainers situate above Newark Castle, on the south side of the river Clyde.

The appellants have no right to exact any dues except in so far as it is conferred upon them by statute, and as their Act of 1858, after a recital in the preamble that it was necessary and expedient that the rates on vessels and goods should be increased and adjusted, by section 3 enacted "that the recited Acts" (that is, all prior Acts relating to the Clyde navigation) "shall be and are hereby repealed," it was necessary for the appellants to establish that on the just construction of that Act of 1858 they had power to levy and exact payment of rates and dues on timber treated as described above. The question depends on what is the true construction of the Act of 1858, which I shall comment on afterwards. But there is a preliminary question which I will first dispose of.

No rates or dues are imposed except on vessels or things "in the river or harbour," and the respondents contend that the timber in question which is not said to have been within the harbour never was within the meaning of the Act in the river. Of course if this were so there would be an end of the case. The definition of the limits of the river is given by sec. 75, which is as follows—"The limits of the river Clyde shall include the whole channel or waterway of the said river forming the harbour, and as far down the said river as to a straight line drawn from the eastern end of Newark Castle, on the south shore of the said river, to the mouth of Cardross Burn, on the north shore of the said river, and the whole works within the said limits for the improvement of the navigation of the river constructed or

authorised to be constructed by or under the charge of the Clyde Trustees, or the Trustees appointed by this Act, and the whole lands acquired for the purposes of such works, or occupied by the Trustees in connection with the navigation of the said river."

It is not disputed that the timber-ponds in question are east of or above the straight line drawn from the eastern end of Newark Castle to the mouth of the Cardross Burn, nor that the timber is floated up what was formerly the main channel of the Clyde there. But the Clyde Trustees have cut through a sandbank on the northern side of that old channel, and made a deeper channel there. The floating timber does not go along that deeper channel, nor indeed pass over or use any part of the river on which the Trustees have expended labour or money. And it was pleaded below that the definition of "river" was such as to exclude the parts of the river Clyde which though above Newark Castle were not occupied by any works. Not one of the Judges below gave any countenance to this contention. And though the Solicitor-General for England said for the respondents what could be said in its favour, your Lordships did not think it necessary to hear the Lord Advocate and the Solicitor-General for Scotland in reply to him. I think it clear that sec. 75 is extensive not restrictive of the word "river." It included the river and also the works and the lands occupied, but does not exclude such portions of the river as are not occupied by works.

There was at the beginning of the argument a suggestion made that there might be cases in which a vessel lying to the west of the line might discharge her cargo, or part of it, by means of boats on the east of the line, in which case it might be said that the goods were unshipped both within and without the river, but Mr Trayner pointed out that the terms of the note for the interdict exclude any such case.

On the question of the construction of the Act of 1858 there has been much difference of opinion below. Lord Adam as Lord Ordinary decided it in favour of the now appellants. The First Division of the Court of Session called in three consulted Judges. A majority of the seven Judges, consisting of the Lord Justice-Clerk, Lord Ormisdale, Lord Mure, and the Lord President, recalled Lord Adam's interlocutor, and made the interdict perpetual—Lord Gifford and Lord Shand dissenting, and Lord Deas going on a special ground. An appeal was brought to this House, but the appellants obtained leave to amend their statements. Proof was taken on the amended statements, and then the First Division made the interlocutor appealed against, Lord Shand still dissenting, and Lord Deas on this occasion joining the majority, so that the Judges, eight in number (including Lord Adam), are divided five to three.

In addition to the judgments, some of them very elaborate, your Lordships have heard very able arguments from counsel who had the advantage of being able to study these judgments. I think I may fairly assume that you have before you all the assistance which learning and ingenuity can supply towards the solution of the question.

I shall not attempt to go through the arguments on each side. I have come to a different conclusion from Lords Shand and Gifford, and I

have therefore examined carefully what they say, and I shall point out where and why I differ from them, and where I am not sure that I agree with the Lord President I shall examine what he says and state where I doubt if I agree with him, but I shall not waste time by repeating in other words what I agree with in the judgments of the majority.

Under the repealed Acts the Trustees had greatly deepened and improved the Clyde, especially in the upper part of it. And in express terms in the Act of 1770, which however only extended down to Dumbuck, it was enacted by the 22d section that for "all timber or wood either carried in boats or other vessels or floated in and upon the said river Clyde within those points aforesaid" (that is, above Dumbuck) dues "shall be charged and paid." By the 56th section of the Act of 1840, which extended the jurisdiction of the Trustees to Newark Castle, the language is changed, and the duties are imposed on "all goods carried or conveyed on the river." But those enactments are by the Act of 1858 totally repealed, and the language is again changed to what we find in section 98.

Now, I agree with Lords Gifford and Shand in seeing no reason why timber floated on the Clyde should not pay for the use of the improved navigation, at least as much as timber conveyed in vessels. Although I think the shipowners might produce good arguments for saying that goods consigned to a further port, but carried in a vessel which called at Glasgow either to fill up her cargo or to discharge part of it, should not be charged, and as such goods no doubt are carried and conveyed along the Clyde, that therefore the language of the enactment should be altered so as not to include them (and I think it probable that this was one reason at least why the language was changed as it has been), yet I am not able to see any argument in favour of relieving from charge those who floated timber on the Clyde. And therefore I agree that it would have been a reasonable scheme of taxation to charge timber floated on the Clyde, or at least on the upper parts of the Clyde. The Lord President shows that there are good reasons for saying that it is at least by no means so obviously just to tax timber using but a small part of the river Clyde, and that a part which is, as far as the operations of the Trustees are concerned, in a state of nature. I think that if the Legislature were framing a scheme of taxation such as is suggested, those would be arguments in favour of making an exemption in favour of the ponds of the now respondents. Doubtless they would be met by others.

But though I think the reasonableness of a scheme is a very good reason for thinking that the Legislature might have wished to adopt it, and therefore for construing the words used as showing an intention to carry it out, if the words used will bear such a sense, it affords no justification for introducing new words or construing the words used in a sense which they cannot bear, and I find no words in this Act of 1858 capable of bearing a meaning which would show that the Legislature intended this reasonable scheme. I equally fail to see words indicating an intention to make this perhaps not unreasonable exemption from the general rate if it were imposed.

Lord Shand asks (if the 98th section of the

statute be taken alone)—“Is not timber towed in rafts and landed in the harbour, say of Bowling or of Glasgow, in a reasonable sense of the expression unshipped in the river or harbour?” I cannot agree in his answer. He says—“I think it is no strained construction, or anything but a fair and reasonable construction of the term, to hold it to apply to the detaching of timber from the steamer which has conveyed” (*i.e.* tugged) “it.” It is difficult to reason on such a point, or do more than state how it strikes one’s mind.

It does not seem to me a construction of the words at all, but a substitution of other words for them. I cannot think that, in any sense of the words, to attach a tow-rope to a log or set of logs for the purpose of towing them is to “ship” those logs, or that to cast the tow-rope off is to “unship” them.

There may, however, be other things in the Act which put a construction on the words of section 98 different from what they *prima facie* bear. It is said—and I think it is the strongest argument produced for the appellants—that Schedule H, which is a part of the Act, is headed thus, “Rates on goods conveyed upon or shipped or unshipped in the river or harbour.”

Now, if this, however strangely misplaced, could be construed as an interpretation clause declaring that “shipped or unshipped in” should mean and include “conveyed upon” the river or harbour, it would produce this effect, but it would do more. It would render the change of language from that in the 56th section of the Act of 1840 to that in the 98th section of the Act of 1858 wholly nugatory.

The second note at the foot of the schedule confirms my guess that goods conveyed in transit on the Clyde, where bulk was not broken within the Clyde, which were included in the language of the 56th section of the Act of 1840, were meant to be protected by the change of language. By this note it is provided that if bulk is broken for the purpose of transhipment, the goods should not be deemed to be both shipped and unshipped but once only, and that seems to have produced the unlucky introduction of the words “conveyed upon” into the heading of the schedule. Those words are, in my view, useless, but if to avoid leaving them useless they are treated as interpretation, they would produce an effect that could not have been intended. I think it better to treat words as idle useless words than to make them undo the whole effect of the Act. It certainly could not be intended by introducing these words to say that goods conveyed up and down the Clyde in transit, without breaking bulk, should be charged for that conveyance both ways.

As to the 99th section, I think it is what it professes to be, an enactment “for the more equitable payment of the rates hereinbefore granted,” and though it repeats the language used in the 69th section of the Act of 1840 without making the changes which would have rendered it more in harmony with the changed language of the enacting clause, I do not think it can properly be read as making that change in the enacting clause merely nugatory.

There is only one other point on which I shall say anything. The Trustees have ever since the passing of the Act of 1858 down to the commencement of this suit, a period of eighteen years, been in the habit of levying rates and dues on timber

floated to yards on the upper part of the Clyde, and the timber merchants, an acute and wealthy body by no means inclined to pay money gratuitously or to shrink from litigation, have submitted and paid them. I think that raises a strong *prima facie* ground for thinking that there must exist some legal ground on which they could not resist, and I think a Court should be cautious and not decide unnecessarily that there is no such ground.

If the Lord President means no more than this when he calls it “*contemporanea expositio* of the statutes which is almost irresistible,” I agree with him. I do not think he means that enjoyment, at least for any period short of that which gives rise to prescription, if founded on a mistaken construction of a statute, binds the Court so as to prevent it from giving the true construction. If he did, I should not agree with him, for I know of no authority, and am not aware of any principle, for so saying.

In this case Lords Gifford and Shand both argue thus. They say there is no distinction in principle between the case of timber floated from Greenock in a raft to Glasgow, and there stored in a timber yard, and timber floated in a raft to these ponds. True that section 99 causes the amount of the rate to be six times as great in the one case as in the other; true also that timber floated to Glasgow is generally at least in built rafts, and that to the timber-ponds is only in chains; but that makes no difference in principle. This decision, therefore, they said, will, unless they have their Act amended, take away from the Clyde Trustees a large revenue which they have enjoyed for at least eighteen years.

I am not sure how much weight such a consideration ought to have, but it has had such weight with me that I have looked carefully for some distinction satisfactory to my own mind between the two cases. I have not found any, but I am not prepared to say that none exists. It is with regard to the existence of such a distinction, and to that only, that what I have said as to *contemporanea expositio* is in my mind relevant.

I think if there is no such distinction, the consequence apprehended will follow from the construction put upon the statute below; and though I am sorry for it, it does not prevent me from saying that such is the true construction. But I do not decide, and I advise your Lordships not to decide, that there is no such distinction. All that it is now necessary to decide is that there is no authority given to the Clyde Trustees to levy rates on timber towed in chains to those ponds.

I move that the interlocutor appealed against be affirmed and the appeal dismissed with costs.

LORD WATSON—My Lords, I also am of opinion that the interlocutor under appeal ought to be affirmed.

The right of the appellants to levy dues is wholly derived from the provisions of their Act of 1858, which repeals all prior statutes relating to the navigation of the Clyde. Two kinds of rate are sanctioned by the Act of 1858, the one upon ships and the other upon goods. The condition upon which the appellants are (section 98) authorised to exact the second of these rates is, that the goods shall be “shipped or unshipped in the river or harbour.”

I entertain no doubt that the word “river,” as

it occurs in section 98, must be taken to comprehend the whole waters of the Clyde within the limits defined by section 75, and cannot be restricted to those portions of the Channel which have been artificially deepened. If that be conceded, it necessarily follows that the logs which are floated from the harbours of Greenock or Port Glasgow to the respondents' storing-ponds pass over part of the third stage of the river; and consequently that a sixth part of the scheduled rate for timber is payable in respect of these logs if on their arrival at the storing-ponds they are "unshipped" within the meaning of section 98.

Taking the provisions of that clause by themselves; I am unable to come to the conclusion that a number of separate logs, loosely connected at one of their ends, and towed along the river, can in any reasonable sense be said to be "unshipped" when the tow-rope is cast off and they are drawn up on the beach. Whether a raft of logs, so constructed as to be capable of being navigated, can with propriety be said to be "unshipped" when on reaching its destination it is taken to pieces and landed, appears to me to be a question which it is not necessary for the purposes of the present case to decide, and I therefore express no opinion in regard to it.

But it is urged that the language of section 98 must be taken in connection with the terms of Schedule H, Part 1, therewith incorporated, and also with the provisions of section 99. Now, the schedule in question is referred to and incorporated with section 98 solely for the purpose of fixing the amount of the rates payable in respect of the different classes of goods which by section 98 are made liable to duty. The words which occur in the heading of the schedule are these—"Rates on goods conveyed upon or shipped or unshipped in the river or at the harbour," &c. I do not think it can be seriously suggested that these words "conveyed upon" were intended to subject to payment of dues goods conveyed upon the river, but neither shipped nor unshipped within the limits of the harbour or river. If that were the case, a foreign vessel discharging part of her cargo at Glasgow, and thence proceeding to discharge the remainder at Liverpool, would pay a single rate upon the cargo unloaded in the Clyde, and double rates upon the cargo unloaded at Liverpool which was neither shipped nor unshipped in the Clyde. That such was not the intention of the Legislature is apparent from the terms of a proviso annexed to Schedule H, which enacts that cargo transhipped in the river—which is both unshipped and shipped there—shall only pay one rate. Very little weight is in my opinion attachable in any case to the mere title of a schedule as qualifying the enacting words of a statute; and in the present case it does not appear to me that the words relied upon by the appellants are sufficiently explicit, even if full weight were given to them, to produce that effect.

Then section 99 is not a rating clause. It specifies the proportion of the rates leviable by virtue of section 98 which can be exacted in each of the three stages into which the river is thereby divided; and it declares that all goods "passing along the river" shall pay according to the proportions thereby fixed. To my mind it is perfectly clear that the provisions of this

section were intended solely for the apportionment of the rates already imposed, and not for the imposition of any new rate; and I must therefore assume that by goods "passing along the river" the Legislature meant "rateable" goods passing along the river, or, in other words, goods which either had been shipped or were to be unshipped within the limits of the river or harbour.

I have only to add, that in my opinion that usage which has been termed "*contemporanea expositio*" is of no value whatever in construing a British statute of the year 1858. When there are ambiguous expressions in an Act passed one or two centuries ago, it may be legitimate to refer to the construction put upon these expressions throughout a long course of years by the unanimous consent of all parties interested, as evidencing what must presumably have been the intention of the Legislature of that remote period. But I feel bound to construe a recent statute according to its own terms, when these are brought into controversy, and not according to the views which interested parties may have hitherto taken; and in determining the true import of such a statute it appears to me to be quite immaterial to consider whether it was passed in the year 1858 or in 1883.

LORD BRAMWELL—My Lords, I distrust my opinion in this case, for I cannot see two sides to the question, though there certainly are two, as is shown by the different views taken by the very eminent persons who have considered it.

By section 98 "It shall be lawful for the Trustees to levy on and in respect of all goods shipped or unshipped in the river or harbour the rates specified in the first and second columns of Part I of the schedule, and on all animals and carriages shipped or unshipped in the river or harbour the rates specified in Part 2."

Now, if there was nothing in the Act to qualify, explain, extend, or alter this enactment, the only question would be, Was the timber mentioned in this case "shipped or unshipped in the river or harbour?"—but it is said that there is something in the schedule which qualifies, explains, extends, or alters the enactment in section 98, and extends it to goods which are neither shipped or unshipped in the river or harbour. I must say that there ought to be very plain words to have such an effect, as not only would it alter a plain enactment, but it would also make liable to rates goods which had no benefit from the improvements or wharves of the appellants, except indeed that there was less danger to the ship that carried them. Still if sufficient words are there the case should be decided accordingly. I do not stop to consider whether the rates are in the nature of a tax or not. Even if they are, the statute should be correctly construed, bearing in mind that the appellants who make the claim must establish it.

But in the schedule I find nothing to make me think or hold that it was intended to extend, and that it does extend, the words "shipped or unshipped" in section 98. It is true it has the words "Rates on goods conveyed upon or shipped or unshipped in the river or at the harbour," but that cannot mean "conveyed upon" though neither shipped nor unshipped. If it did, I cannot see why goods conveyed upon and unshipped should not pay the rates. For the statute would

then mean that goods conveyed on the river should pay a rate, and that goods unshipped should pay a rate, and there would be no reason why the same goods should not pay both rates. At all events, goods "conveyed upon," though neither shipped nor unshipped, would be liable. This, however, would be wholly unreasonable, and it is admittedly contrary to the practice. The draftsman used "or" for "and," which is shown by his second use of the word "or" when clearly an addition and not an alternative was meant. Again, in the note to the schedule, goods are spoken of in a way which shews that goods on board vessels were meant. Still further, Part 2 of the schedule in words applies to animals and carriages only when "shipped or unshipped." No reason can be given why if other goods should pay which are "conveyed" only, these should not. To hold that the words "shipped or unshipped" in section 98 are extended by the schedule would be to hold that they are as to some things and not as to others. For these reasons I think not only that the schedule does not extend section 98 in plain language, but I really think there is no reason for saying that it does. And I believe that the draftsman in section 98 used the right words to express the intention he had.

But it was said that assuming that goods to be liable to rates must be shipped or unshipped, this timber was unshipped. Now, I agree that almost any construction is allowable to prevent something worse. Unless for such reason I should say it was impossible to hold that this timber was "unshipped" in the river. I must repeat what I have said on a former occasion, namely, that I can give no reason for this except that it was not "unshipped." It is for those who say it was to make it out. It is for them to show that detaching a float of timber from a tug, and each log from the other, is "unshipping." All I can say is that in my judgment it is not. I cannot help thinking that the opinion that it was must have been brought about by some feeling that it was just that it should be. I cannot see this. I think it would be unjust to make this timber pay which has no benefit, or but little, from the improved navigation, and none from the wharves. I think if Parliament had been asked to make this charge it should have refused it. I am of opinion that this appeal should be disallowed.

LORD FITZGERALD—My Lords, the noble and learned Lord on the woolsack has in his judgment stated the terms of the interdict granted in this action of suspension and interdict, and made perpetual by the interlocutor of the 10th March 1882, and I desire to confine myself to cases coming within the terms of that interdict, and not to go beyond it.

I do not intend to express any opinion as to the case so much discussed, of timber built up into rafts outside the limits of the undertaking of the Trustees, and then conveyed over the waters of their portion of the river to the Broomielaw or other part of the harbour of Glasgow, its ultimate destination, or as to timber originally shipped and destined for Glasgow, but unshipped outside the western limit of the waters of the Trustees, and thence conveyed over those waters to the harbour of Glasgow or a landing-place within its limits. The complainers are timber measurers in Port-Glasgow, and proprietors of certain ponds

situated on the south bank of the Clyde, above Newark Castle, between high and low water-mark. Timber in logs unshipped in the harbours of Port-Glasgow and Greenock is floated up the river to those ponds for storage purposes. The Trustees of the Clyde Navigation propose to levy rates on this timber. The question is, Are they entitled to do so? That question in the end was reduced to the construction of section 98 of the Trustees' Act of 1853. I put aside all other questions.

It seems to me to be quite clear and free from any doubt that the Trustees are not entitled under section 98 to levy rates on goods unless the goods be shipped or unshipped within their waters. "Shipped" means put on something which answers the description of a ship or vessel, no matter what its shape or form may be, for the purpose of being conveyed therein to some destination; and "unshipped" means equally taken out of the ship or other vessel in which the article has been conveyed or carried, and delivered to or placed within the dominion of the consignee or owner. The unshipping of the timber-logs in question took place in the ordinary course of business either at the port of Greenock or at Port-Glasgow, and was there complete. The complainants were either the owners of the logs at the time of unshipping or became subsequently owners by purchase. There was no unshipping within the limits of the jurisdiction of the Trustees. The state of circumstances, then, is wanting on which, and on which alone, the authority of the Trustees to levy rates arises.

But it was contended that the 98th section should be read as if the heading of Schedule H was incorporated in it, or by the light of that heading. My Lords, I concur in and adopt the criticism of the noble and learned Lord (Lord Blackburn) on this contention, and also his conclusion. We must reject the words "conveyed upon" altogether; or if we are to take them into consideration, I cannot construe them as making the change in section 98 which the respondents have so strenuously urged.

My Lords, I have listened with pleasure to the judgment of the noble and learned Lord opposite (Lord Watson), and to the terse judgment of the noble and learned Lord beside me (Lord Bramwell), in both of which I entirely concur.

Interlocutor appealed against affirmed, and appeal dismissed with costs.

Counsel for Appellants—Lord Advocate—(Balfour, Q.C.)—Solicitor-General (Asher, Q.C.). Agents—Webster, Will, & Ritchie, S.S.C.—W. A. Loch, Westminster.

Counsel for Respondents—Solicitor-General (Herschell, Q.C.)—Trayner. Agents—Archibald & Cuninghame, W.S.—Simpson, Wakeford, Goodhart, & Metcalf, Westminster.

Monday, July 23.

(Before Lords Blackburn, Watson, and Fitzgerald.)

OSWALD v. AYR HARBOUR TRUSTEES.

(*Ante*, p. 327, and 10 R. 472.)

Harbour—Statutory Trustees—Land Acquired for Statutory Purposes—Ultra vires.

Where the Legislature has for a public pur-