

ducible, not null. There was no statutory provision against it. If the sale was bad, it was so only at common law, and in any event it had been confirmed by the creditors.

Authorities—2 Bell's Comms. (M'Laren's ed.) 344; *Crichton v. Bell and Gillon*, June 25, 1833, 11 S. 781; *Robertson v. Adam and Others*, February 20, 1857, 19 D. 502.

At advising—

**LORD PRESIDENT**—The grounds of suspension, so far as they are now maintained, amount to this—that the chargers have no title because the sale by the trustee for Gray's sequestration was a nullity, and no right could thereby be transmitted to anyone, and none therefore to the chargers. I think that contention is supported entirely upon the argument that Anderson was disqualified from purchasing because he was the agent in the sequestration. Now, there is no statutory nullity which so disentitles him. Indeed, an agent is not an officer in bankruptcy proceedings, and is not so recognised. An "agent in a sequestration" is a misnomer; the party so termed is nothing more or less than the law-agent of the trustee, and there is nothing beyond a common law relationship between them. Therefore, if an agent is disqualified from purchasing at a sale by a trustee on a bankrupt estate, it must be at common law.

I assume that this sale might be reducible at the instance of creditors; but it is just as clear that if not so reduced it is perfectly good not only by express confirmation but by silence, signifying acquiescence. There is no ground here for suggesting that any one connected with the estate offers any objection. That being so, I think the title of the chargers good, and that we must refuse the note.

**LORD DEAS**—I do not enter upon the question whether the complainer's objection to the title of the chargers might not be substantiated. I only say that so far as appears upon this record it is good.

**LORD MURE** concurred with the **LORD PRESIDENT**.

Counsel for Complainer—Kinnear. Agent—J. Watson Johns, L.A.

Counsel for Respondents—Adam. Agents—Pearson, Robertson, & Finlay, W.S.

Saturday, November 4.

### FIRST DIVISION.

[Lord Craighill, Ordinary.

COOK v. COOK.

*Proof—Witness—Adultery—Criminating Questions—Act 37 and 38 Vict. cap 64, sec. 2.*

*Held*, upon a construction of the Act 37 and 38 Vict. cap. 64, sec. 2, that if a witness in an action of divorce on the ground of adultery, who has not "already given evidence in the same proceeding in disproof of his or her adultery, be asked a question tending to show that he or she has been guilty of adultery," it is the duty of the Judge to interfere and, unless the witness

shall volunteer to answer or make a statement, to prevent the question from being put or recorded.

Cook, a miner, separated from his wife in January 1873, five months after their marriage, and since that time he had never seen her. Three years after the separation she gave birth to a child, and in an action of divorce upon the ground of adultery, thereafter raised by the husband, he averred that a man of the name of Mackie was father of the child. The action was undefended, and at the proof Mackie was called, and in the course of his examination Counsel asked, "Whether he had intercourse with the defender at a place named in the condescence, in the month of July 1875?" The Lord Ordinary (CRAIGHILL) doubted whether he should allow the question to be put, on the ground that it appeared incompetent under the Statute 37 and 38 Vict. cap. 64, sec. 2, and the point was reported by him to the First Division.

The case of *Kirkwood v. Kirkwood*, Dec. 9, 1875, 3 R. 235, was referred to.

At advising—

**LORD PRESIDENT**—The Court are of opinion that the object of the statute plainly is that a witness shall not be put in the position of refusing to answer, and therefore it enacts that he shall not be liable to be asked, such a question as that which has been put. In these circumstances, if the question is pressed, it is the duty of the Judge to say no, and to allow nothing to be taken down. If the witness volunteers to answer the question or to make a statement, he must of course be allowed so to do, and what he says may be recorded. The protection afforded by the statute extends to this length, that it is not to be allowed that a witness shall be obliged even to decline to answer such a question as that about which we have been consulted by the Lord Ordinary.

**LORD DEAS** and **LORD MURE** concurred.

Counsel for Pursuer—Rhind. Agent—C. B. Hogg, L.A.

Tuesday, November 7.

### SECOND DIVISION.

[Lord Shand, Ordinary.

AYR HARBOUR TRUSTEES v. WEIR.

*Statutory Trustees—Harbour—Quay Wall—"Free Port"—"Port and Harbour."*

Circumstances in which *held* that the statutory trustees of a harbour were entitled to construct and maintain a continuous line of quay wall, and to require the proprietor of a shipbuilding yard opposite the said quay wall to fill up a launching slip or opening passing through it from his yard.

*Observations (per Lord Gifford)* on the rights implied in grants of "free port" and of "port and harbour."

This was an action raised by the Ayr Harbour Trustees, incorporated by Acts passed in 1855 and 1873, against Alexander Weir, chemical manufacturer and shipbuilder in Ayr. The sum-

mons concluded for declarator (1) that the pursuers have right to "construct and maintain a continuous river quay or wall along the north side of the harbour of Ayr, and also to make and maintain a quay or roadway by or along the top of said river or quay wall sufficient and suitable" for all harbour purposes; (2) that the defender had no right to "form or maintain a dock or launching-slip or other opening" in the said quay wall; (3) that the defender should be decreed at his own expense to fill up the opening now existing, and restore the quay wall and quay or roadway to its original condition prior to the formation of the dock. The summons alternatively concluded for decree ordaining the defender to make and maintain a bridge across the slip or opening in question, and failing his doing so, for authority to fill it up; and further, for interdict against defender's using the slip save with the consent of the Harbour Trustees.

Till 1772 the harbour was vested in the corporation by virtue of charters dated 1236, 1400, and 1621, and of Acts of Parliament in 1633 and 1695. In 1772 trustees were, by 12 Geo. III. cap. 22, appointed to manage the harbour and to execute the necessary works. Then followed the Acts 34 Geo. III. cap. 99, and 57 Geo. III. cap. 20, renewing the Act of 1772, and by 5 and 6 Will. IV. cap. 79, the right and property in all erections, piers, and quays, &c., established under any former Act was vested in the trustees. This last Act was repealed by the Ayr Harbour Act 1855, which instituted a new body of trustees (the pursuers) for carrying out the provisions of the statute. By section 33 it was, *inter alia*, enacted that "the right and property of and in all lands, heritages, buildings, erections, and the materials thereof, and of, and in all the light-houses, works, quays, walks, ways, walls, matters, and things vested in the trustees acting under the said recited Act"—(5 and 6 William IV. cap. 79—"shall belong to, be vested in, and they are hereby vested in, the trustees under this Act." And by section 40 it is enacted "that it shall be lawful for the trustees, and they are hereby authorised, to deepen, cleanse, scour, and preserve the said harbour of Ayr, and to heighten, repair, and make sufficient the quays and other works at present appertaining to the said harbour, and to alter and extend the same, or any part thereof as they shall judge to be necessary for the more effectual improvement of the said harbour, and for securing and cleaning the bed and channel of the river Ayr in, through, and from the said harbour to the bay of Ayr, and also to make, widen, and maintain roads and passages on both sides of the said harbour for the use thereof." Lastly, there were the Ayr Harbour Amendment Acts 1866 and 1873; and by the 3d section of the latter Act it is provided that "in this Act, and in the Act of 1855 and the Act of 1866, the expression 'the trustees' shall, from and after the commencement of this Act, be held to mean the Ayr Harbour Trustees as reconstituted by this Act. In this Act the expression 'the harbour' means the harbour of Ayr, and includes the bed or channel of the river of Ayr, in, through, and from the said harbour to the bay of Ayr, and the wet dock, breakwater, and other works constructed or to be constructed in the said harbour."

The pursuers stated in their condescendence that in 1800 a shipbuilding yard was opened on

the north side of the river Ayr, belonging to the burgh of barony of Newton. D. Andrew & Co., the tacksmen thereof, made on 5th August 1800 application to the trustees for leave to cut a dock or slip 30 feet wide direct from a ship then on the stocks through the wall of the north quay into the harbour, and to be allowed to use the said dock occasionally during their lease of the yard, they being always bound, as soon as convenient after the launch of each vessel, to cover the said dock with timbers, and support it sufficiently, that it might be as useful to the public during the intermediate space betwixt each launch as if no such dock were there, and at the expiry of their lease to rebuild the breach and fill up the dock at the back thereof in a sufficient manner, should it then be thought necessary to do so. This application was granted by the trustees on 12th August 1800, on the condition that the dock proposed to be opened should be covered in a complete and substantial manner within fourteen days after each launch. This shipbuilding yard having been subsequently abandoned, the ground between the harbour and the yard was restored to its original condition, and ever since, the passage along said harbour, and the harbour wall opposite to said yard, and northwards to the north pier, had been, and were at the date of the action, continuous and uninterrupted.

In 1814 C. Connell & Co. made a similar application regarding an adjoining yard, which was also granted. In February 1831 the tacksmen of the same yard (that which had formerly been leased by Connell & Co.) obtained leave to erect a patent slip in connection with the yard, on the conditions and for the period of the lease of the adjoining yard, granted to Messrs Cowan & Sloan by the town of Newton. In 1833 Messrs Cowan & Sloan obtained leave for additional accommodation to enable them to launch a larger ship than any previously built there, and they bound themselves to restore the quay wall, &c., to the same or as good condition as before.

On 24th September 1834 a letter was addressed by Messrs Cowan & Sloan to the Harbour Trustees requesting that for their convenience, and to save them expense, they should not be required to fill up the excavation made by them in the north quay wall under the permission granted to them in 1833, but only to do so partially, so as to form a space "sufficiently wide for the purpose of carts and other conveyances passing up and down to the hurries, &c., leaving an opening towards the river similar to the accommodation formerly afforded to the late D. Andrew & Co.," such opening to be protected by a proper retaining wall, made to terminate and join the quay on both sides of the slip; "it being always understood that when the same shall be found inconvenient to the public we shall be obliged, when required, to fill up this opening at our own expense."

Messrs Cowan & Sloan proceeded to form the roadway as proposed in this letter, and intimated the completion of their works on 21st November 1834, and expressed a desire that the roadway should be allowed to remain as then formed, but they agreed that if it should be found that the public convenience was affected by their said operations they should make any alterations necessary. The Harbour Trustees on 3d December 1834, upon the express conditions mentioned in Messrs Cowan & Sloan's letter of 24th Septem-

ber, agreed to allow the operations "to continue for the present, and during pleasure alienarily."

In 1840 Mr Sloan, the surviving partner, put, without leave of the trustees, a wooden bridge across the opening. The bridge was considered by the trustees dangerous and insufficient, and they called on Mr Sloan to restore the ground to its former state, for else to erect a sufficient bridge to remain at their pleasure. On 9th September 1840 Mr Sloan wrote to the Harbour Trustees a letter, in which he stated as the reason for the proposed bridge over the building slip, that in case of a launch it could be removed and replaced in a short time, and would therefore cause less obstruction to the road than formerly, and he bound himself "to make it a most secure job, and much better than the former road." The trustees deemed this satisfactory, and the bridge was accordingly constructed. In 1845 Messrs Sloan & Gemmell, the then tenants of the yard, were called on by the trustees to repair the bridge, and did so. Subsequently, on the expiry of the lease, the property was in 1871 sold by the community of Newton to Mr Scott, by whom it was sold to Mr Weir, the defender, who was at the time a baillie of Newton, and also one of the Ayr Harbour Trustees. The bridge being then in a bad state of repair, the pursuers called on the defender to put it in order. This he refused to do, on the ground that he was proprietor to the edge of the harbour, and was entitled to make such use as he chose of his own property.

The pursuers thereupon passed a resolution withdrawing the permission for the erection of the bridge, and called upon the defender to fill up the opening. Upon this being intimated to the defender, he agreed to put the bridge into a proper state of repair, but without prejudice to his pleas, and the pursuers in consequence did not carry their resolution into effect.

On subsequent inquiry the pursuers alleged that it was found that the defender had entirely removed the bridge and substituted planks. The consequence was another call upon the defender to restore the bridge sufficiently, so as to allow continuous access to the harbour; and on his refusal another resolution was passed requiring the openings to be filled up.

The pursuers further averred that the ground in question was within the limits of the harbour of Ayr, and had been occupied and possessed by the burgh and town council of Ayr and the pursuers from time immemorial as part of said harbour; that the harbour of Ayr had extended from time immemorial from the sea at least up to the old bridge over the water of Ayr, including the whole of the said water and both banks thereto; and that the harbour of Ayr, including the ground in question, was vested in the pursuers.

The defender in answer said that the boundary of his property was the river of Ayr, and the openings referred to by the pursuers were caused, not by excavations made by the defender or his predecessor, but by the pursuers or their predecessors having erected quay walls on the east and west sides of the defender's property, and also in front of a portion of the defender's property, the effect of which was to leave an opening between the walls so erected having the appearance of a cut or opening in the quay wall. He further denied that there existed any interruption to the communication to and from the harbour for which he

was responsible; and averred that the subjects in question belonged to him, and had been possessed and used by him and his authors uninterruptedly for time immemorial; and further, that the pursuers, as trustees of the harbour of Ayr, had no right by royal grant to any lands or harbour on the north side of the river of Ayr, and that they never possessed or occupied any lands on the said north side by virtue of such grant. Their rights as trustees were confined to the south side of the river, except in so far as they had by purchase or other singular title acquired right to lands on the north side, and that no harbour or harbour works of any kind existed on the north side of said river prior to the passing of the Act 12 Geo. III. cap. 22, and any works executed by the pursuers or their predecessors on said north side had been executed in pursuance and on the authority of statutory provision only. Finally, the defender denied that the traffic must pass along his property, or that he must allow it to do so.

The pursuers pleaded—" (1) The pursuers, the Ayr Harbour Trustees, are, in virtue of the charters, Acts of Parliament, and others founded on, and the possession which has followed thereon, entitled to decree of declarator and interdict against the defender as concluded for. (2) The said dock and launching-slip having been made in the north quay wall of the harbour of Ayr by permission of the Harbour Trustees, and subject to the condition that the same should remain as an opening in the said wall only during their pleasure, the pursuers are entitled to have the same filled up and the said north quay wall restored. (3) In any event, the defender is bound to make and construct over the said dock and launching-slip a good and sufficient bridge for the purposes of the said harbour of Ayr, and thereafter to uphold and maintain the same. (4) In the event of the defender failing to fill up the said dock and launching-slip, the pursuers are entitled to decree authorising them to fill up the said dock and launching-slip, and to restore the said north quay wall and form a solid roadway thereon at the expense of the defender."

The defender pleaded—"The whole operations complained of being upon the private property of the defender, over which the pursuers have no right of servitude, or otherwise the pursuers are not entitled to decree as concluded for.

On 7th June 1876 the Lord Ordinary pronounced the following interlocutor:—"Having considered the cause, finds, decerns, and declares in terms of the declaratory conclusions of the summons, and grants interdict against the defender as concluded for, &c.

"*Note.*—The question in this action relates to a space of 90 feet of frontage on the north side of the river Ayr, situated at a considerable distance below the bridge of Ayr, and in the centre of ground on which the pursuers are in the course of executing extensive operations for the benefit of the harbour. The pursuers, the Harbour Trustees, ask that it shall be declared that they have the right to make and maintain a continuous quay wall along the ground in dispute, and that the defender has no right to maintain any launching-slip or other opening causing a break or opening in the continuity of the quay. At present, beginning at the west or seaward end of the ground, there exists an opening into the

river of 36 feet in connection with a dry dock on the defender's property. Adjoining this is a small tongue of land 19 feet in breadth, and to the eastward another open space of 35 feet, which has been used as an entrance to a patent slip on the defender's ground.

"By recent operations of the Harbour Trustees in widening and deepening the river the small tongue of land now extends a short distance into the waterway. Immediately before the proof began, the defender, by a minute then given in, offered to allow this piece of ground to be cut into and removed so as to bring the ground in a line with the present quay wall, and to maintain a bridge or bridges sufficient for the harbour traffic over the openings complained of. The pursuers state, however, that there is a great deficiency of accommodation for berthage in the harbour; that the daily increasing traffic requires that they should have the frontage in question in a continuous line of quay wall; and that they cannot, therefore, give up what they maintain to be their right by acceding to such an arrangement as the defender has offered. It has been proved that the berthage accommodation in the harbour is very deficient, and that the traffic, already large, is constantly increasing.

"The defender's title to the property belonging to him consists of a disposition by James Scott, shipbuilder, in his favour, dated 31st May 1871. Scott obtained his title to the subjects by a feu-disposition, dated three days before, from the bailies and magistrates of the burgh of Newton-upon-Ayr.

"The property conveyed by this feu-right is specially described in the deed, and delineated and coloured on a plan subscribed by the parties.

"The southern boundary is 'the public road running along the north quay;' and if the conveyance had been limited to the subjects specially described the defender would have had no title to raise the present question. But in the feu-disposition to Scott, and the disposition by Scott in favour of the defender, an addition in the following terms occurs at the end of the special description of the property, viz., 'Together with the buildings and other erections thereon, pertinentes thereof, and whole rights and privileges thereto belonging, including any right of property, servitude, or other right which may belong to us and to the said community of freemen in and to the ground, buildings, and erections situated between the harbour of Ayr and the patent slip and dry dock shown on said plan.' These concluding words refer to the ground in dispute. The defender maintains that this ground belonged to the burgh of Newton, free from any obligation to submit to its being employed for harbour purposes, and that, in right of the burgh he has now right to the ground, unburdened by any right in favour of the pursuers.

"After the parties had by diligence recovered a number of documents, and considerable discussion had taken place between them as to the extent of their legal rights, it appeared that the defender maintained that the harbour of Ayr did not extend to the north or Newton side of the river, and that the pursuers had no right to any lands on that side of the river except in so far as they had acquired such right by purchase or other singular title. Additions were made to the

record by amendments made by both parties, and as it appeared they were directly at issue in regard to the limits and extent of the harbour, a proof became necessary.

"The pursuers maintain, as the result of the proof, that they have established that the port or harbour of Ayr includes the river on both its sides, and includes as part of the north side the ground in dispute. They contend that under the Harbour Acts, following on the old charters in favour of the magistrates and council of the burgh of Ayr, they are vested with the rights of proprietors of the ground in dispute, and are therefore entitled to execute the operations complained of. Alternatively, they plead that even if it should be held that they are not proprietors of the ground in question, yet as that ground directly adjoins the river and port or harbour, they are entitled, without purchasing any property belonging to the defender, to have a quay wall erected along the ground in dispute, inasmuch as it has become necessary to have this accommodation for the public using the harbour.

"The burghs of Ayr and Newton-upon-Ayr respectively were created by Crown charters of ancient date, and speaking generally, the property on the south side of the river was conveyed to the burgh of Ayr, while the property on the north was given to the burgh of Newton. Certain of the charters in favour of the burgh of Ayr give right to the port of Ayr, while no right of port or harbour was ever given to the burgh of Newton. The oldest charters in favour of the burgh of Ayr make no mention of port or harbour. The charter of erection by William the Lion, the precise date of which is not known, but which must have been between 1165 and 1214, describes the lands conveyed as extending by 'Pulle Mullin down to Are, and so by Ayre going down even to the sea.' Passing over two intermediate charters of 1223 and 1226, the charter by Alexander II., dated 20th April 1236, gives right to woods not for sale or disposal, but in so far as necessary 'ad propria ædificia sua de Are, et ad proprias naves suas de Are faciendas.' The succeeding charter, also by Alexander II., of 7th December of the same year, conveys 'omnes piscarios nostras de Are ad sustentationem pontis et ad emendationis pontis de Are.' From these two charters it appears that at that early date in the 13th century the burgh was in possession of the port or harbour of Ayr, and the burgesses were the owners of boats or vessels which resorted to the harbour. By charter, granted by King Robert III. in 1400, the right of port or harbour was conveyed in these words—'una cum portu burgi supra dicti;' and in subsequent charters, of 1567, 1621, 1631, and Act of Charles I. in 1633, the right of port and 'harberie,' or free port or 'harberie,' is given or conferred in favour of the burgh. By an Act dated 16th April 1695, on the narrative that the 'harbour town of Ayr is ruined, and lies in rubbish, and that thereby the trade of ye aforesaid town is quite decayed, and the inhabitants thereof so impoverished that they are not able to repair the said harbour, the which is also a great loss to all ye adjacent country,' authority was given to the port to levy a tax on malt ground at the town's mills for the repair of the harbour and payment of the town's debts. About a century after, viz. in 1772, the administration of the harbour was

vested in a body of trustees by a statute, to the terms of which I shall immediately refer.

“The first charter in favour of the burgh of Newton which has been produced is dated in 1595. The narrative of this deed shows that the ancient charters or writings of the burgh had been destroyed; and the date of the earliest charter is unknown. In the report of the Commissioners appointed to inquire into the state of municipal incorporations (1835, vol. i., appendix, p. 92), the following passage occurs:—‘II. Newton-upon-Ayr.—The date of erection of this burgh is not known. Its origin is traditionally ascribed to a grant by Robert the Bruce in favour of forty-eight of the inhabitants who had distinguished themselves in his service at Bannockburn in 1314. No satisfactory evidence of this can be referred to; but it is matter of history that Robert was at the Parliament held at Ayr, 26th April 1315, when the crown of Scotland was settled on him and his descendants, and it appears certain, from documents which the magistrates of Newton-upon-Ayr made reference, that the erection of the burgh of Newton must have occurred sometime between 1208-14 and 1446.’

“For the purposes of the present litigation it may be assumed that the charters of the two burghs were granted about the same time; and it appears to be a fair inference from the terms of the charters that from the date of the earliest of them the port and harbour of Ayr, in the river Ayr, was in existence, and was in use in connection with the trade of both burghs, although, no doubt, to a very limited extent.

“As to the limits of the harbour, it appears to be the result of the evidence, written and parole, that from the earliest date down to the present time the harbour extended throughout the whole river, so far as navigable, including the north as well as the south sides. In the absence of any grant of port in favour of Newton, and with so limited a space as the river afforded, it is difficult to suppose this could be otherwise. It is true that the burgh of Newton acquired and held the property of the lands on the north side of the river; but in so far as the north bank of the river was available and required for the loading and unloading of ships and vessels, I think it is proved that the ground has been always used, without question and as matter of right, for the purposes of the harbour. A series of minutes of the town council of the burgh of Ayr have been produced, between 1596 and 1771, in which there is constant reference to the north side of the river as forming part of the harbour; and it is enough here to observe that throughout these minutes, of which there are many, the north bank is treated exactly in the same way as the south bank so far as the harbour is concerned, and that the north dykes or quays were maintained and constantly repaired by the burgh of Ayr as part of the harbour works.

“The preamble of the Act of 1772 is important, as throwing light on the state of matters at that date. The narrative there given is that the harbour of Ayr ‘is not in its present state capable of receiving ships or vessels of any considerable burden; and whereas the trade of the town of Ayr and of Newton-upon-Ayr hath of late years considerably increased, and the ships and vessels employed in that trade are more numerous and of

larger dimensions than heretofore; and whereas it would be of great benefit to the said trade that the harbour of Ayr was cleansed, scoured, deepened, and otherwise improved, and that rules and regulations were established for ships and vessels going into or coming out of the said harbour.’ The statute vests the management in persons there mentioned, of whom four are magistrates of the burgh of Ayr, and one of the burgh of Newton-upon-Ayr; and it gives power not only to enlarge and improve the bed of the river, but also ‘to raise, repair, and make sufficient, or cause to be raised, repaired, and made sufficient, the dykes, quays, piers, and other works at present belonging to the said harbour of Ayr, and to alter and extend the same or any part thereof,’ as the trustees shall think necessary; and to erect additional piers, quays, and other works for the improvement of the harbour, and for the safety and reception of ships and vessels. Reading the provisions of this statute in the light afforded by the burgh charters and the minutes of council already noticed, it seems to be clear that in 1772 the harbour and harbour works embraced both sides of the river. The Act of that year authorised the levying of a tonnage duty on all vessels and lighters importing into or exporting from the harbour of Ayr any kind of goods or merchandise, at the rate of sixpence per ton of measurement; on vessels above the burden of 70 tons carrying out coals threepence per ton of measurement; on vessels under that burden, of twopence a ton; and on vessels using the harbour through stress of weather or otherwise, but without loading cargo, threepence per ton—all in addition to the duties which previously subsisted and which continued to be levied by or on behalf of the magistrates and town council of the burgh, being, as appears from a subsequent statute, anchorage duties. That dues were exacted for the use of the north as well as the south side of the river appears from an extract from the minute-book of the community of Newton, dated 26th April 1787, which contains an application for a lease of the Newton property in connection with certain coal-workings, in which the applicants complain of the sums levied from them by the harbour-master, and the arbitrary mode of levying the duties, adding—‘It does not seem clear that these exactions from ships mooring in the Newton side can be legally demanded by the Trustees or their harbour-master. The applicants desired with their proposed lease to have assigned to them ‘any right that Newton has to anchorage dues to put them in a situation to treat with the trustees to put these matters under proper regulations,’ and the burgh agreed to give them this right. There is no evidence, however, that the burgh of Newton ever had such a right, or that there was any exception made in the levying of dues by the magistrates or trustees of the harbour in regard to vessels using the north side or bank of the river. The minutes of the trustees down to the beginning of the present century have not been specially referred to, for the reason, as the pursuers explain, that they contain no special reference to the north side as distinguished from the south side of the harbour.

“The defender contends that even if the burgh of Ayr should be held to have acquired right to the north dyke or quays of the river as pertinents

of the harbour, this heritable right was never transferred to the Harbour Trustees, whose rights under the statute are limited to right of administration only. This contention is founded on the absence of any disposition or conveyance by the Magistrates and Council of Ayr in favour of the Harbour Trustees. It appears to me, however, that, by virtue of the statutes, and without any such conveyance, the right to the port or harbour and the property of the quays or dykes on both sides of the river were transferred to and vested in the Harbour Trustees by the statute of 1835. It is clear that all of the Harbour Acts, and at least those down to and including the Act of 1835, were either promoted by the Magistrates and Council of Ayr, or at least were passed with their concurrence. After the statute of 1772 the sole direct interest of the Magistrates and Town Council of Ayr in the harbour consisted of the anchorage dues, which are referred to in the 41st section of the Act of 1835, but the right to which was afterwards, by the arrangement embodied in the 60th section of the Act of 1855, transferred to the Harbour Trustees. In 1772 the entire administration of the harbour was transferred from the burgh of Ayr to the Harbour Trustees. In 1835, by section 13th of the statute of that year, the property in all the lands, heritages, piers, quays, walks, and ways built or established under the previous Acts or otherwise, was declared to be vested in the trustees. It is clear that this enactment embraced the quays or piers on both sides of the river when the other provisions of the statute are kept in view, and particularly the provision of section 31st, which prohibits encroachments on the land adjoining 'both sides of the harbour of Ayr,' and 50 yards inland. Finally, in 1855, the sole right left in the magistrates, viz., the right to levy anchorage dues, was also transferred to the trustees; and I do not think that any serious doubt can be entertained that under their statutory title the trustees are vested in the property of the harbour and its quays.

"It was alleged by the defender before the proof was adduced [that there was no dyke or quay opposite his property in the beginning of the present century, and reference was made to the terms of Mr George Taylor's letter of 22d June 1814, in which, on behalf of the firm of Charles Connell & Co., of which he was a partner, a request was made that in continuing the building of the quay wall an open space should be left opposite the firm's shipbuilding yard. It was said the terms of the first part of this letter showed that no quay wall had previously existed there. At the close of the proof, however, the defender's counsel could not dispute that the existence of the wall, for many years previous to the date of this letter, had been established. The latter contention maintained was that the wall had been erected merely as a protection to the harbour and not as a quay wall. It does not appear to me that this would make any essential difference; but I think it is proved that there was a rough quay wall there which had existed for many years, and had been used for loading and unloading vessels just as in other parts of the harbour. The letter of Mr Taylor obviously referred to an improvement and heightening of the wall which was then being carried out all along the north side of the harbour, an operation

which was the subject of a tender by Robert M'Lachlan, mason, considered at a meeting of the trustees held on the 24th June 1807. It is farther to be observed that the terms of the different applications by David Andrew & Co., on 5th August 1800, by Taylor & Sons in 1807, by Mr Taylor for Charles Connell & Co., in the letter already referred to, on 22d June 1814, and by Messrs Cowan & Sloan, who had become tenants of the property now belonging to the defender in December 1830, for leave to have works in the banks or openings to the river, or to make such openings at times when required, and the conditions on which these applications were entertained and granted, strongly corroborate the evidence otherwise in proving the existence of a harbour quay along the front of the defender's property, and that the quay had been in possession of the Magistrates and Town Council, and subsequently of the Harbour Trustees, for time immemorial. The stipulations in the leases granted by the burgh of Newton to Sloan and Gemmell in 1846, 1857, and 1875, that the tenants should have power to give up the lease "upon and in the event of the Harbour Trustees requiring them to shut up their accesses to the river for their patent slip and dock for launching vessels," and the application of the burgh of Newton on 9th July 1849 for leave to open the harbour wall, so as to admit of an outlet for a drain, are all strongly confirmatory of the pursuers' rights.

"In this state of the facts, and as there has been no hostile or counter-possession on the part of the defender's predecessors in the property, I am of opinion that the pursuers have established their alleged right of property in the ground in dispute, including the harbour roadway, which I think forms the south boundary of the defender's property. This being so, the pursuers are, in my opinion, entitled to make and maintain the continuous quay wall proposed, and the defender has no right to have the openings which he desires left for launching purposes.

"I am further of opinion that, even if the defender's right in the quay wall and harbour ways along the north bank of the river were not a right of property in the ground itself, they would still be entitled to succeed in this action, for the reason that they are entitled to make and maintain the quay walls that are necessary for the harbour traffic on the north as well as on the south side of the river. In the case of a port or harbour of large extent, including it may be several miles in the course of a river of considerable breadth, it would be difficult for the proprietor of the harbour to maintain that he was entitled to put on quays for the landing and shipment of goods at any part of the properties adjoining the river he might think fit. But in the present case the whole extent of the river which is navigable is small, the traffic is and has always been of importance to both burghs situated on its banks, and the banks on both sides have been used and possessed for harbour purposes as a necessary adjunct or pertinent of the harbour for time immemorial. Holding that the north bank fronting the defender's property is within the limits of the harbour, and keeping in view the entire absence of any possession on which the defender could found as an exercise either of a right asserted by his predecessors or acknowledged by the Harbour

Trustees, to make or maintain openings in the river bank for launching purposes, I am of opinion that in any view the defender holds his property subject to the burden of submitting to the erection of such quays and walls as may be necessary for harbour purposes; and I think the Harbour Trustees, in the *bona fide* exercise of their powers, are the judges of what is necessary for that purpose—Craig, i. 15, 13, and opinion of the Lord Justice-Clerk in *Magistrates of St Monance v. Mackie*, March 5, 1845, 7 D. 586. The right of harbour, which imposes duties and obligations on the proprietor, must, I think, in such a case as this, carry with it the right to use the banks for the loading and shipment of goods, and, if necessary, the right to erect walls, not only as a protection to the harbour, but as quays for the accommodation of the traffic. The erection of walls may be absolutely necessary for the protection of the harbour from the sea, and the grant of harbour implies a power to erect such works at least within the limits of the port. It is only a reasonable extension of the same principle that the power of making the banks available for loading and unloading purposes should be held as included in the grant.

“There appears to be no ground for imposing on the defender the obligation to erect the quay wall which the pursuers desire to have built, or for holding that he is bound to pay any part of the necessary expense.

“The pursuers have been found entitled to expenses only from the date when the proof was ordered, because their record, like that of the defender’s, was in a defective condition until the amendments were made, and because the recovery of documents and discussions which took place prior to that time were mainly useful in enabling the parties to put the case in shape for the proof and debate which afterwards took place.”

The defender reclaimed, and argued—first, against the pursuers’ title; and second, in favour of his own. Against the pursuers’ title he argued—1. That they could have no right as representing the original grantees, because (a) the right possessed by the original grantees gave them no such power as was now claimed. There was no distinction between a grant of “harbour” and a grant of “free port.” In both cases nothing more was conveyed than a monopoly of levying dues and a right of using the shore for the purposes of collecting the dues, and also for the purpose of unloading goods and placing goods for loading, provided in both these latter cases that the part of the shore so used should be accessible from the land without going through enclosed private property. But there was a distinction pointed out by the Lord Justice-Clerk (Hope) in the case of *St Monance* between a grant of free port at a particular place and a similar grant within extensive limits. The first might be held as conveying the buildings existing at the time of the grant; but the second was a mere monopoly of levying dues with the subsidiary rights already stated. The grant in the present case was of the latter description, and had nothing whatever to do with a right of property. That a grant of “free port” has nothing to do with a right of property was clearly pointed out by the Lord Justice-Clerk in the case of

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the *Magistrates of Campbeltown*, and by Lord Ivory in the case of *The Officers of State v. Christie*. (b) But supposing the grant in question to be of the nature stated by the pursuers, it only applied to the south side of the harbour, The charters of Ayr were bounding charters, with nothing ambiguous about them; therefore they were incapable of extension by prescriptive possession, particularly when that possession could more naturally be attributed to a different character. (c) In any view, the trustees were not vested with the rights of the original grantees. Such rights cannot be passed by statute, which can only give powers for the compulsory acquisition of a right on payment of compensation, as was done in the case of *Arbroath* (see *Magistrates of Arbroath v. Strachan’s Trustees*, 4 D. 541) when powers were given to acquire for £10,000 rights which the trustees in this present case say they got for nothing. At all events, the terms of the statutes must be clear; but the statute of 1835, relied on by the pursuers, conveys none of the rights of the original grantees except by remote implication. 2. The pursuers could have no title *qua* statutory trustees under the statutes. The cases of *Eymouth* and *Scrabster* settled this. 3. The alleged possession by the pursuers consisted of the repair, first by the original grantees, and afterwards by the trustees, from time to time of a rough rubble wall on part of the north side of the river, whose origin was unknown, but whose purpose was evidently to keep the river in its course. This wall was a necessity for the proper maintenance of the harbour on the south side, and was never used till a late date as a quay. It was built on ground belonging to the burgh of Newton, and therefore belonged to the proprietor of the ground. But the chief possession relied on by the pursuers, as interpreting the charters, was had by the statutory trustees, who were not vested with the rights conveyed in the charters, and whose possession, therefore, could not interpret these charters.

Second, the defender argued in favour of his own title to the ground in question, that under the Charters of Newton (which, in the circumstances of the case, must be held to be contemporaneous with those of Ayr), a sufficient right was given to found a title by prescriptive possession. The necessary possession was clearly proved by the practice of the burgh from time immemorial to grant tacks giving the use of the ground in question, as well as all the corresponding ground on the north side, for the purposes of shipbuilding, and other purposes inconsistent with the existence of the pursuers’ alleged rights. The permission alleged by the pursuers was asked only by certain of the tenants of Newton, and could not affect the rights of Newton itself.

The pursuers argued—First, in favour of their own title; and second, against that of the defender. They rested their own title (1) on the possession of the rights both of “harbour” and of “free port,” originally conveyed by the Crown to the town council of Ayr; (2) on the statutes by which they, as statutory trustees, were created; (3) on the possession of the ground in question as part and pertinent of the harbour, had by them and their predecessors, the Ayr Town Council. 1. In regard to the charters—while the grant of “free port,” contained in the

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charter of James VI. in 1621, might have only given them a monopoly of levying dues with a right necessarily following therefrom of using the shore and banks of the river Ayr on both sides for the purpose of landing goods from incoming, and depositing goods for loading outgoing, vessels, the grant of "portus," contained in the earlier charter of King Robert III. in 1400, referred (as was shown by charters of earlier date, beginning with a charter by William the Lion in 1202) to a harbour actually in existence, and embracing both sides of the river. Under the grant of King Robert III., not only was the use of the banks and shores on both sides of the river given, but the property therein was conveyed, so that all works existing thereon at the time were passed to the grantees, as well as a right to construct such additional works as might from time to time be found necessary. This right might have been lost by allowing any of the conterminous proprietors, whose lands were described in their Crown charters as bounded by the river, to build structures on the shore and banks, and possess them for the prescriptive period to the exclusion of the grantees. But in the present case neither this nor anything approaching to it had been done by the defender or his authors. As representing the original grantees, therefore, the trustees had right to occupy the ground in question by an extension of their harbour wall. Reference was made to the authority of Craig i., 15, 15, and to opinion of the Lord Justice-Clerk in the case of *St Monance*. 2. In regard to the statutes by which they were created, the trustees pleaded that by the Act of 1835 the property in the harbour previously belonging to the town council of Ayr, and of which they (the Harbour Trustees) had, since 1772, had the administration, was passed to them, including the right of occupying the shore and banks all round the harbour by quay walls, unless where they had been excluded by the exclusive possession for the prescriptive period of a proprietor with a water boundary in a Crown charter. They also appealed to the large powers given to them by the statutes to "heighten, repair, and make sufficient, or cause to be heightened, repaired, and made sufficient, the dykes, piers, quays, and other works at present appertaining to the said harbour of Ayr, and to alter and extend the same, or any part thereof . . . and also to make, widen, and maintain roads and passages on both sides of the said harbour for the use thereof." 3. In regard to the possession, a quay had existed in front of the defender's property for time immemorial, of which the entire management had been first in the grantees, and then, after 1772, in the Harbour Trustees. It was true that this quay had been cut through by the defender's predecessors, tacksmen of the burgh of Newton, and that for the first time in the year 1813; but the minutes of the Harbour Trustees clearly showed that this proceeding had taken place not only by the toleration, but under the express permission of the trustees. Any possession, therefore, had by the defender or his authors in such circumstances was valueless in a question of property.

Second, the pursuers argued against the title of the defender, that the burgh of Newton, from which he derived his whole right, had no charter older than 1595; that neither under that nor any

subsequent charter had Newton a grant of port or harbour; that the lands of Newton were not described as bounded by the water, and that neither the burgh of Newton nor the defender had prescribed any right to the ground in question by adverse possession for the prescriptive period on a habile title.

Authorities—*Mags. of Inverness v. Duff*, 1775, M. 14,257; *Smart v. Mags. of Dundee*, 1796, 3 Paton's Appeal Cases, p. 606, Brown's Cases in Parl., vol. viii. p. 119; *Mags. of Culross v. Geddes*, 1809, Hume, p. 554, Nov. 18, 1813, F.C.; *Boucher v. Crawford*, Nov. 30, 1814, F.C.; *Christie v. Landale*, 1828, 6S. 813; *Fisher v. Duke of Athole's Trs.*, 1836, 14 S. 880; *Mags. of Edinburgh v. Scott*, 1836, 14 S. 922; *Mags. of Arbroath v. Strachan's Trs.*, 1842, 4 D. 538; *Mags. of Campbeltown v. Galbraith*, 1844, 7 D. p. 220; *Mags. of St Monance v. Mackie*, 1845, 7D. p. 582; *Officers of State v. Smith*, 1846, 8 D. 711, 6Bell's App. 487; *Cameron v. Ainslie*, 1848, 10 D. 446; *Hoyle v. M'Gunn*, 1848, 21 D. 96; *M'Callum v. Patricke*, 1868, 7 Macph. 163; *Trustees of Dundee Harbour v. Dougall*, 1848, 11 D. pp. 6-1464; *Mags. of Renfrew v. Hoby*, 1845, 16 D. 348; *Officers of State v. Christie*, 1854, 16 D. 454; *Mags. of Dundee v. Hunter*, 1858, 20 D. 1867; *Colquhoun v. Paton*, 1859, 21 D. 996; *Serabster Harbour Trs. v. Sinclair*, 1864, 2 Macph. 884; *Baillie v. Hay*, 1866, 4 Macph. 625; *Milne Home v. Eyemouth Harbour Trs.*, 1868, 6 Macph. 189; *Hunter v. Lord Advocate*, 1869, 7 Macph. 899; *Agnew v. Lord Advocate*, 1873, 11 Macph. 309; Craig, i. 15, 15; Stair, ii. 1, 5; Bankt. i, 3, 4, ii. 82; Bell's Prin. 654-58; Hall on Sea Shores, p. 144.

At advising—

**LORD JUSTICE-CLERK**—This case has been argued at great length and with much ability. The real question is a narrow one; and I am of opinion that it has been rightly decided by the Lord Ordinary.

The question divides itself into two:—(First), Have the trustees a right to the ground in question under their statutes? (Second), If so, has Mr Weir, in virtue of his building-yard, a right to cut through the road and quay for the purposes connected with shipbuilding.

I do not wish to give any opinion as to whether the property of the *solum* is in the trustees or not. That is a very large question, and it is not necessary for the decision of this case. Nor am I going to define how far back the ground of the trustees goes. No definition has been submitted to us; and Stair rather deals with that question as if the bank of the harbour only was carried. But there is no such question here. The Magistrates of Ayr are not here; nor is the burgh of Newton. This is a question between statutory trustees, representing both Newton and Ayr, and a feuar of Newton.

The matter appears to be made sufficiently distinct by the statutes alone. By these it clearly appears (first) that the harbour extends to both sides of the river Ayr; and (second) that the trustees are entitled to extend and maintain, &c. (Act of 1855, sec. 55).

Thus, I am of opinion that the Lord Ordinary's first finding should be adhered to. The second finding necessarily follows, because anything interfering with the use must necessarily go. The use had by the Newton people was not only by tolerance, but by express permission, and



therefore no ground has been shown for its being allowed to continue. Then the third finding, that of interdict, necessarily follows the other two.

**LORD NEAVES**—I concur with the result arrived at by the Lord Ordinary; but I think it right to say that I consider many of the grounds of his judgment are liable to question.

The pursuers here are in a privileged position. They are grantees with right of harbour, and also statutory disponees. And if there is any ambiguity in the charters as to their rights, that is all put right by the statutes. Under both these titles they have not only incorporeal rights, but also corporeal rights in this quay. Possession on the defender's part, even though it had been proved, which it has not been, would not be enough. The clauses in the later leases are quite conclusive as to the whole matter.

**LORD ORMIDALE**—I am of the same opinion. But I am not prepared to give the same effect to Acts of Parliament as your Lordships. Independently of previous possession, I do not think the mere expressions in the Acts would be enough. But we have ample evidence independently of the Acts altogether. In the first place, we have a grant of harbour in the burgh of Ayr, as contained in the ancient charters. Now, a grant of harbour is not only an incorporeal right, but is also a right to land cargo from incoming ships, and to bring cargo for outgoing ships.

The only question is, what does possession show to have been included in the harbour of Ayr? Why, the old dyke is just the present quay; and the dyke was possessed by the harbour authorities from time immemorial. If Newton ever had right to the ground along the river, then they have lost it, and Ayr has acquired it as part and pertinent of the harbour.

The only difficulty I have had has arisen from the fact that the declaratory conclusions contain no limit of how far backwards from the river the right of the trustees is to extend. But I understand the extent in regard to this particular matter is clearly marked in the plans.

**LORD GIFFORD**—I have come to the same conclusion; but I think that some of the many questions of general importance which this case raises are necessary to its decision. For example, though it is true that the burgh of Newton is not here, still the defender has all the rights of Newton. I think, indeed, that the question of who has right to the *solum* lies at the bottom of the whole question.

First, then, I am of opinion that the Harbour Trustees have a good title to the *solum*. I think that the Harbour Trustees have the rights of Ayr in this matter; whether they have the rights of Newton is a more difficult question. Had Ayr, then, right to the *solum*? I observe that it was not a grant referring to extensive limits which Ayr got. Looking to the circumstances of the place, and the terms of the charters, it appears to me that they got a good title on which to prescribe a right of property. I think it is implied in a right of harbour that a grantee is entitled to fence the harbour, except when that is unnecessary, as, for instance, when the harbour is surrounded by a natural fence of precipitous rock.

As to the north dyke, about which we have heard so much, I have a strong impression that it was originally constructed on proper foreshores. The minutes of the Ayr Town Council speak of the dyke falling in, of its confining the river, and of its not being sufficient to keep the river in its course. At all events the dyke may have been built upon foreshore. Undoubtedly at the point where at the very mouth of the river the pier runs out into the sea it is built upon the *solum* of the sea. The old title was certainly quite sufficient to give a title to the *solum* there, and it appears to me it was equally capable of giving a title to the *solum* on which the old dyke opposite the defender's property was built. Therefore I consider that the old dyke must have belonged to Ayr, and that Newton had no right to the *solum* on which it was built. And now of course all that belonged to Ayr being vested in the trustees, the *solum* belongs to them.

As to the breadth to which the trustees have right, I might have seen a difficulty there had not the possession been quite conclusive.

Second, Has Weir a right to a passage through the quay wall? Now, a general title of free port does not entitle the grantee to exclude the proprietors whose lands border on the sea from the sea. It only gives the use of the shore for the purposes of the harbour. But this is not a general grant of free port. If this had been a case of foreshore in connection with a general grant of free port, I might have decided differently; but this is a grant of harbour proper.

Yet I do not say that Weir might not have prescribed a right such as he claims. But it appears that every act of possession was in virtue of leave. There was no adverse possession whatever. In fact the case is just the same as if the quays had never been cut through at all.

I rest my decision upon the special circumstances of the case—the limited size of the port, the express right to build walls, and the clear way in which the defender's right to cut through the quay walls has been negated.

The Court adhered.

Counsel for Pursuers—Lord Advocate (Watson)—Asher—Blair. Agents—Hunter, Blair, & Cowan, W.S.

Counsel for Defender—Trayner—Balfour—Guthrie. Agents—Fyfe, Miller, Fyfe, & Ireland, S.S.C.

Wednesday, November 8.

## SECOND DIVISION.

SPECIAL CASE—DON AND OTHERS  
(WEBSTER'S TRUSTEES).

*Succession—General Conveyance—Special Destination.*

A trustor by his settlement conveyed to trustees his whole means for certain purposes. Thereafter he acquired certain heritable property, the disposition whereof he took to himself and "his assignees and disponees," whom failing to his sister and "her heirs and assignees whomsoever in