

because he was in poverty, and in such a condition from drink that he had been ordered away to some place in Skye for treatment. His wife then said to him, "What shall I do?" and he answered, "My mother will do something for you, but you had better return to your old ways." I think that a man who conducts himself in that way cannot be heard when he says, "I am an injured husband." I am very clearly of opinion that he is not entitled to appeal to a Court of Justice for a remedy. I agree with your Lordship in thinking that the evidence of adultery is the narrowest—there is absolutely no respectable evidence in the case, and such as it is, it is only the evidence of detectives set upon her by the husband's relatives. I am distinctly of opinion that such an action ought not to be sustained, and that it is not for the cause of morality that it should be. I do not like tying this man to this woman, but it is most important that men who marry prostitutes, as this man did, should not do so under the idea that they will obtain divorce as a matter of course on a proof of adultery on their part, or upon proof that in the ordinary case would suffice to obtain a divorce. I think that it is more wholesome that it should be announced that they shall not easily get divorce, and I think especially that when advice such as we have here is given, that the plea of *lenocinium* (though perhaps that is not a very good word) should constitute a bar to decree being granted.

LORD CRAIGHILL—I am quite of the same opinion. If the adultery was in any way conducted to by the husband he is not entitled to get his divorce; but I think that if adultery is proved against a wife, and if it is not proved that the husband is directly or indirectly answerable for it, then whether the wife was a prostitute or not, he is not to be deprived of that remedy which others enjoy. The wife is answerable for her own wrong, and if the husband has not conducted to her guilt, though she was a prostitute before her marriage, she has no right to relapse from virtue and bring forth the facts of her early life as an answer to an action of divorce.

The first question here is, whether this woman did commit adultery? Now, where a woman was of the character of this one, the circumstance that she was such has a material effect on the evidence brought forward to convict her of adultery, for that which would be conclusive proof against a person of hitherto unimpeachable character may not be conclusive against such a woman as this. It is notorious that when a woman, not a professional prostitute, goes to a brothel, it is ascribed to one purpose only, and in such a case adultery would be held to have been established. But here this woman was left by her husband with no friends in the town but those in the walk of life in which she had been before her marriage. When she went to see them there was not the same presumption against her. There is a great deal in this view certainly, but the question is, whether the evidence is all that is required. There is certainly not a strong case on the evidence, but I do not say that I feel warranted in differing from the conclusion arrived at by the Lord Ordinary, who saw and heard the witnesses give their testimony. I am far from thinking that there is a clear case of adultery made out, but I think there is suffi-

cient to warrant the verdict that has been given. That introduces the next question, Are the circumstances such as to disentitle the husband from obtaining redress? It is not necessary for me in answering this to state an exact definition of the plea of *lenocinium*, but this I may safely say, that if a husband must be held to have been in any way contributory to what ensued, the law will not interfere to give him a remedy. The circumstances here are certainly very peculiar. Take one case. In the course of a conversation between the husband and wife, in the presence of a man who had been intimate with the wife before her marriage, he advised her to go back to her former way of life. If it could be shown that this was not meant or taken seriously, of course all that could be said would be that it was a brutal and dangerous joke, but the pair came to Edinburgh, and again in the presence of the same man similar advice is given, and before the effect of the recommendation had passed away the husband left his wife without protection or means of subsistence. Might the wife not have had this advice in her mind when she returned to her former course of life? If what he said can in any way be held to have been contributory in bringing about the result, then all that is required to make me come to the same conclusion as your Lordship has been proved. I think that that is so, and therefore I agree in thinking that this divorce should not be granted.

The Court therefore recalled the interlocutor of the Lord Ordinary and assoilzied the defender.

Counsel for Reclaimer—Millie—Rhind. Agent
—James Henderson, L.A.
Counsel for Respondent—J. P. B. Robertson
—Darling. Agent—George Dunlop, W.S.

Saturday, May 21.

SECOND DIVISION.

[Lord Lee, Ordinary.]

LOUDONS v. HUNTER.

Arbiter—Oversman—Devolution.

In this case the pursuers sued the defender, *inter alia*, for a sum of money as the balance of the alleged price of the white crop on the farm of Newlands, Peeblesshire, taken over by the defender as incoming tenant, and as fixed by the arbiters under a minute of submission between the parties. The defence was that there had been no award by the arbiters, who had differed, and that the reference therefore devolved on the oversman, who had fixed a sum as the price of the crop, which the defender had paid.

After proof the Lord Ordinary (LEE) found that there had been no devolution on the oversman, the arbiters having only failed to fix the price through a misunderstanding between themselves as to the principle of the valuation; the case was accordingly remitted to them to fix the price. The defender having reclaimed, the Lords recalled the Lord Ordinary's interlocutor, being of opinion on the evidence that there had been a difference of opinion and a devolution on the oversman.

Counsel for Reclaimer—Trayner—Guthrie.
Agents—Paterson, Cameron, & Co., S.S.C.

Counsel for Respondent—Strachan. Agent—
Alex. Gordon, S.S.C.

Saturday, May 21.

SECOND DIVISION.

MACPHERSON (TACKSMAN OF FORTROSE
HARBOUR DUES) v. MACKENZIE.

Royal Burgh—Harbour Dues—Prescription.

A charter of royal burgh is a good title on which to prescribe a right to harbour and shore dues, and the usage of exaction for more than forty years will fix the rule for determining the extent and limits of that right.

Liability of Shipowner for Harbour and Shore Dues.

In an action for harbour dues by the tacksman of harbour dues against a shipowner, the defender pleaded that according to the custom of the harbour such dues had always been levied from the senders and consignees of goods and not from the owners of vessels. Held that such a custom was immaterial, and that the tacksman was entitled to levy the dues from the shipowners.

In and prior to 1455 the villa of Fortrose, then known as Chanonry, was the cathedral seat of the diocese of Ross. Adjacent and coterminous lay the burgh of Rosemarkie, which had been erected into a burgh by a charter of one of the Alexanders. The said charter is no longer extant.

By charter, dated 18th June 1455, James II. erected the villa of Fortrose into a free burgh, to be held and possessed by the Bishop of Ross, with all and singular privileges, liberties, and customs as the borough of Rosemarkie, and granted to the inhabitants of Fortrose all exemptions, liberties, and privileges conferred on the borough of Rosemarkie under the ancient charters and writs of Alexander and other kings of Scotland, or enjoyed or possessed by the said burgh past their own limits.

By charter, dated 6th August 1590, James VI., on the narrative of the charter of 1455, and of the general revocation and annexation to the Crown patrimony of ecclesiastical lands and villas, made, erected, and incorporated the villa lands, bounds, and possessions of Fortrose into an entire and free royal burgh to be called the burgh of Fortrose. This charter granted to the magistrates and their successors the power "emendi et vendendi omnes et quascunque mercantias res et bona sicuti aliqui alii nostri burgi intra regnum nostrum gaudent et possident, devorias et custumas ejusdem in talibus usitat. et consuetas ac observatas levandi et precipiendi, ac etiam locos forales infra dictum nostrum burgum et libertatem ejusdem ad effectum predictum omnibus temporibus futuris quotiescumque eis videbitur expediens assignandi et faciendi." It then proceeded—"Ac etiam Damus, concedimus et nominamus prefato nostro burgo de Fortrose propositio ballivis consulis decanis et communitati ejusdem præ-

sentibus et futuris duos dies mercatorialis, i.e. marcat dayes, unum vero earundem hybdomadam die luni et alterum die sabbati Ac etiam duas liberas nundinas vulgo, i.e. feair dayes annuatim pro emptione et venditione omnium bonorum et rerum intra nostrum burgum et libertatem ejusdem prout eis videbitur expediens tenendus unus dies nundinarum predictarum vulgo Saint Boniface day et alter vero vulgariter nuncupat. pardonne day omnibus temporibus futuris cum omnibus custumis devoriis et privilegiis in talibus usitat. et consuetis."

By charter, dated 4th Nov. 1592, James VI. rectified and confirmed the charter of 1455, and ordained that Rosemarkie and Fortrose shall be one burgh, to be called the burgh of Rosemarkie, and "should be held a free burgh, and gave, granted, and disposed all and singular the prerogatives, privileges, and immunities which it ever had or could have, or which in any way belonged to it, or to any burgh whatever within our kingdom, of which they, and any, our free burghs, have had the use or enjoyment. There being no reddendo inserted in the above charter, a new charter was granted by James VI., of date 18th September 1612, in which this defect was supplied, and the reddendo fixed at £3 Scots."

In this charter of 1612 occur these words—"Vnacum omnibus Tholoniis custumis et libertatibus ad hujusmodi pertinentibus vel que de jure ad quemlibet alium burgum intra dictum nostrum regnum dignosci possunt pertinere Et generaliter cum tantis immunitatibus privilegiis libertatibus et prerogationibus pertinentibus vel que iure cognosci possunt ad quemlibet alium burgum intra regnum nostrum pertinere ut supra Preterea pro causis antedictis pro nobis et successoribus nostris De novo annexavimus univimus et incorporavimus dictam villam de Fortrose dicto nostro burgo de Roismarkye sic quod unus sit burgus omni tempore affuturo Burgum nostrum de Roismarkye nuncupandum Et quod inhabitantes dicte ville de Fortrose utantur et gubernentur per prefectum ballivos et consules dicti burgi de Roismarkye veluti burgenses et inhabitantes ejusdem burgi nostri de Roismarkye in omnibus que ad ipsum pertinent Tenendum Adeo libere et quiete in omnibus et per omnia sicuti aliqui alii burgi infra regnum nostrum sine revocatione contradictione impedimento aut obstaculo quocunque."

In September 1879 Duncan Macpherson, tacksman under the Magistrates of Fortrose of the burgh, shore, and harbour dues, brought this action against Kenneth Mackenzie, owner of the steamer "Speedwell" plying between Inverness and Fortrose, concluding for a sum of £30 as harbour and shore dues incurred by him for the use of the harbour, shore, and anchorage grounds of the burgh of Fortrose in landing live stock and goods.

The pursuer averred that from time immemorial, or at all events for upwards of forty years past, the magistrates, by themselves or their tacksman, had been in use to levy dues on "all goods and merchandise loaded or unloaded within the jurisdiction of the burgh, and on all vessels anchoring within the limits of its anchorage grounds," the only exemption being in favour of pleasure and fishing-boats belonging to the inhabitants of the burgh. The district within which he averred