

property of his right, was entitled to be preferred to a posterior adjudger; and the authority of this rule was recognised in the case of the *Royal Bank v. Dixon* (8th July 1868, 9 Macph. 995), where it was held that although infettment on the security completed the assignation to the rents to the effect of securing the creditors' preference in a competition, yet intimation to the tenant personally was necessary to interpell him from paying to the landlord, and that a citation upon a summons of pointing of the ground was not equivalent to such personal intimation.

"Upon the whole matter, therefore, the Lord Ordinary is constrained to sustain the defence of the arrestees so far as regards the rents in the hands of the two arrestees to whom the assignation to rents was intimated. The mere fact that the heritable creditors had personal knowledge of the debt due to the children under the bond of provision will not bar them from obtaining the benefit of their priority in diligence. Knowledge of a prior assignation is no bar to a subsequent assignee obtaining a preference by prior intimation and diligence (*Rollo v. Nidrie*, 1 Br. Sup. 510). At the same time, it is very hard that the rights of the parties entitled now to claim payment of these bonds of provision, which have been recognised for so many years by persons who now challenge them, should be denied effect. If Messrs Edmonds & Macqueen, and the other persons who were acting for the common debtor Gordon Ettershank Gordon, had not continued to pay interest on the money contained in the bonds of provision, the probability is that the children or their assignees would have made their right to the debt effectual by adjudging the liferent of the common debtor long ago.

"Though the defences to the action have been lodged in the name of the arrestees, it appears from the statements upon the record that they have no interest whatever in the matter, they having already paid all their rents to Mr Macqueen under a guarantee to keep them *indemnis*. The real defenders in the case are Humphrey's trustees, who have succeeded in vindicating their right to the funds in the hands of two of the arrestees but not to those in the hands of the third arrestee."

Counsel for Pursuer—Jameson. Agent—R. C. Gray, S.S.C.

Counsel for Defenders—Pearson. Agents—Carmont, Wedderburn, & Watson, W.S.

Friday, March 10.

FIRST DIVISION.

LAIRD & SONS v. CLYDE NAVIGATION TRUSTEES.

(*Ante*, March 5, 1879, vol. xvi. p. 402, 6 R. 756; and H. of L. July 12, 1880, 7 R. 115.)

Harbour—Dues Leviable—Clyde Navigation Consolidation Act 1858 (21 and 22 *Vict. cap.* 149), *sec.* 98.

The Clyde Navigation Consolidation Act 1858 enacts by section 98 that 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 1 of Schedule (H) to that Act annexed. That schedule 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 it includes timber in the list of goods chargeable.

By a previous Act of 1770 the magistrates of Glasgow, then in charge of the harbour of Glasgow, which was at that time of very small extent, were empowered to demand rates on goods, including timber, "carried in and upon" the river, so far as it fell within their jurisdiction. The same Act, by a later section, provided that dues should be paid for all timber "either carried in boats or other vessels or floated in and upon" the river. By virtue of this Act dues were regularly exacted on timber floated up the river to the harbour of Glasgow. In 1840 this 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 of duties was then imposed, but no change was made on the list of goods on which dues might be levied. This Act also divided the "river" placed under the jurisdiction of the Trustees into three stages, of which the third or lowest terminated at its western extremity opposite Newark Castle. Under this Act, as under the previous Act, timber floated up to the Broomielaw and other places on the Clyde was charged with duty. There was, however, no attempt to charge with duty timber arriving from abroad in logs, and floated or towed up a side channel of the river to certain timber-ponds above Newark Castle, and therefore within the limits of the harbour as defined by the Act. This Act was repealed by the Act of 1858, when, as above quoted, the words "shipped or unshipped" were inserted in the enacting clause instead of the words "carried or conveyed."

In 1877, the number and extent of the timber-ponds having largely increased, 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 (diss. Lord Shand)* that the timber so floated up not being shipped or unshipped within the limits of the "river" as defined by the Act, did not fall within the scope of the 98th section of the Act of 1858, and that the usage under that and the preceding Act of 1840 formed a *contemporanea expositio* which strongly supported that view of the statute.

On this case being called in the House of Lords on July 12, 1880, the counsel for the appellants (The Clyde Trustees) stated that when the case was in the Court of Session this erroneous admission had been made regarding dues on timber—"Timber was, however, exempted from river dues, and was made liable for the first time by the Act of 1858 (the Clyde Navigation Consolidation Act 1858)." They stated that the Court of Session had proceeded on that admission in pronouncing the interlocutor appealed from, and that the error had only been discovered after the appeal had been put out for

hearing. They were desirous, if the respondents did not object, to obtain leave to amend their record, and to allege that timber had been subject to duty by various Acts previous to 1858, and to have the case remitted for reconsideration on the footing that they should pay the whole costs of the respondents both in the Court below and so far as yet in the appeal. The respondents agreed to this course in order to avoid the expense of beginning the whole proceedings anew, and the cause was therefore remitted by an order recalling *in hoc statu* the interlocutors appealed from and remitting the cause to the First Division of the Court of Session, with liberty to the appellants to apply for leave to amend "such parts of the record as allege or admit that timber was exempted from river dues before the passing of the Act of 1858, and for the substitution of such other averments on that subject as the appellants may desire to place on record, and with liberty to the respondents to make such answers to any such new averments as they may be advised, and for both parties to enter into further evidence on the subject of any such new averments in such manner as the Court shall think fit."

The Clyde Trustees thereupon obtained leave to put on record an averment (which is fully quoted *infra* in the opinion of the Lord President) to the effect that they had previously to 1858, by virtue of certain older Acts—1770 and 1840,—been in use to charge dues on timber brought into the river Clyde, "with the exception of what is brought into the timber-ponds situated in the third stage of the river, and removed therefrom without going to Dumbarton in the third stage, or on to the first and second stages, which timber has until recent years been small in amount."

They were then allowed a proof of their new averment, the import of which, as well as the terms of the Act of 1770 and 1840, referred to at the proof and at the subsequent discussion, will be found fully detailed in the opinions of the Lord President and Lord Shand. The various sections of the statutes of 1858, which were founded on at this as at the previous discussion, will be found fully quoted in the previous report and in the opinions of the Judges there.

The suspenders argued—That the Act of 1770 having been totally repealed in 1858, any custom of charging timber under that Act which contained the words "floated in" the Clyde was not to be taken into account in the present question.

The whole arguments of the parties will be readily gathered from the opinions of the Judges.

On the construction of a statute imposing rates the Clyde Trustees quoted the following additional authority—*Attorney-General v. Lamplough*, L.R. 3 Exch. Div. 214.

At advising—

Lord President—The complainers in this case ask for interdict against the respondents, the Trustees of the Clyde Navigation, "and all others acting under their authority and instructions, 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 and towed in chains up to the timber-ponds of the complainers situate above Newark Castle, on

the south side of the river Clyde, and from interfering in any way with the complainers in regard to the timber so floated up to their said ponds, or to do otherwise in the premises as to your Lordships shall seem proper." Now, it is admitted on the part of the respondents that no dues have hitherto been levied on the chains or floats of timber going to the ponds. And it is also admitted that these chains or floats passing into the Trustees' jurisdiction at the west of the Trustees' line of boundary above Newark Castle to the point in question, had not, and have not hitherto, been charged with dues. So far the case before us remains exactly in the same position as it did before the appeal to the House of Lords. But in regard to another very important admission which was made by the respondents in the original record an important alteration has been made. The record as it stood when our former judgment was pronounced contained this admission—"Timber was, however, exempted from river dues, and was made liable for the first time by the Act of 1858." The respondents obtained a remit from the House of Lords directing this Court to allow them to amend the record by striking out that admission and substituting for it a different statement, and accordingly we have now the record amended in this way, that in place of that admission the respondents set out the various Acts of Parliament which they had not brought under the notice of the Court in the previous discussion, and after setting out the powers contained in these Acts of Parliament they aver that "the respondents and their predecessors have been in regular use, under the powers thus conferred, to levy dues on all timber brought into the river Clyde within their jurisdiction, with the exception of what is brought into the timber-ponds situated in the third stage of the river, and removed therefrom without going to Dumbarton in the third stage, or on to the first and second stages, which timber has until recent years been small in amount." The proof which has been led substantially confirms that statement, and therefore the state of the fact must now be taken to be, that as regards timber which is unshipped at Greenock and Port-Glasgow, and thereafter towed up to the ponds, which may be described generally as situated in what is called Newark Bay, no dues have ever been exacted unless where these floats of timber are afterwards carried up the Clyde to some port of delivery or some landing-place and there delivered; and, on the other hand, all timber which is carried up the Clyde for delivery at Glasgow, or any other landing-place on the Clyde, either in ships or in the shape of floating rafts, has been charged with dues. Now, it seems to me to be necessary, in dealing with the case as it now stands, to see exactly what was the power that the respondents had under the statutes, which they have now brought under our notice for the first time, to levy dues upon timber.

The first Act of any consequence as regards this matter is that of 1770, the 2d section of which confers this power to levy rates and duties. The magistrates of Glasgow, who were then the persons in charge of the harbour of Glasgow, are empowered "to ask, demand, receive, and recover the rates and duties granted by the said recited Act upon all goods, wares, merchandises, commodities, and other things whatsoever which shall be carried

in and upon the said river Clyde or any part thereof between the lower end of Dumbuck Ford and the Bridge of Glasgow, except with respect to such rates and duties of keelage as aforesaid." It thus appears that the portion of the Clyde which thus fell into the control of the predecessors of the respondents, the magistrates of Glasgow, and for the use of which they were entitled to levy these rates and dues, was comparatively very small, reaching nearly down to the place called Dumbuck Ford. In the same statute there is a very important section—the 22d—which is enacted for the better ascertaining the tonnage of timber and wood to be charged with the rates and duties. It enacts—"That 50 feet of round, or 40 feet of square oak, ash, or elm timber, and 50 feet of fir or deal, balk, poplar, or other wood, shall be deemed, reckoned, and estimated as and for one ton weight, and all timber or wood either carried in boats or other vessels, or floated in and upon the said river Clyde, within the bounds aforesaid, shall be charged and paid accordingly." Now, this 22d section constitutes the section which imposes these rates and duties, and is of importance in this way—it shows, in the first place, that all kinds of timber are liable for these rates and duties, and, in the second place, that the rates and duties are chargeable whether the timber is carried in boats or vessels or floated upon the river. How it happens that with this very express and special power of levying duties upon timber, whether carried in boats or floated upon the river, and the possession following upon it which has been established in the recent proof, the Clyde Trustees thought fit to put upon record an admission that timber was exempt from all dues has not been explained. But so the facts stand. No change was made on the rates which are given by this Act of 1770 until we come down to the year 1840, and then there is an alteration to this effect. By the 56th section of the Act of that year it is "enacted that the powers and authorities granted by the said recited Acts to the Trustees under the same to exact and levy the rates and duties therein mentioned in respect of goods and ships carried or conveyed on the said river, and arriving at the harbour of the Broomielaw or Port of Glasgow, shall be and the same are hereby repealed, and instead of the said rates and duties the Trustees under the present Act shall be and they are hereby authorised and empowered (excepting as hereinafter provided), by themselves, their agents, collectors, lessees, or assigns, to demand, take, levy, receive, and recover the several river or tonnage duties, and the quay or harbour and dock duties following." And then the first head is that "on all goods carried or conveyed on the river Clyde, within the limits and at the stages of the river hereinafter mentioned, the sum not exceeding one shilling and fourpence per ton weight," and so forth. Now, this repealing clause, it will be observed, repeals the right to exact the particular rates and duties which are mentioned in the recited Act, and gives other rates and duties—that is to say, duties different from those which were in the previous statute. But as regards the subject of assessment there does not appear to have been any intention to make any change, and therefore I read this 56th section of the Act of 1840, fortified as it is by the possession which has followed upon it—a possession which is entirely consistent with that which had been previously

had—as meaning that these rates and duties are to be charged as before upon timber as well as other goods—upon timber floated up to the Broomielaw and other places on the Clyde, whether carried in boats or floated up the river. But it is important to observe that in this statute of 1840 there is a very great extension of the area of the river brought within the jurisdiction of the Trustees of the navigation. By this statute, instead of stopping at that very small portion of the river which lies between the Bridge of Glasgow and the Ford of Dumbuck, as in the Act of 1770, the jurisdiction of the Clyde Trustees is made to extend down to a line drawn from Newark Castle upon the south side of the river, and a point on the north side immediately opposite. This brings the jurisdiction of the Clyde Trustees and the right of levying duties down to nearly the point where the harbour of Dumbarton and the harbour of Greenock occupy the Clyde. And it must be observed that it is in the last part of the river—what is called in this Act of Parliament the third stage of the river—that the ponds of the complainers are situated. Now, there is nothing said in this Act of Parliament about timber brought into these ponds for the purpose of storage—not for the purpose of delivery, but for the purpose of interim storing until the timber shall be disposed of and carried elsewhere; and it rather appears to me, considering that no dues upon timber dealt with in this way had ever been exacted before, that if it was intended by the Act of 1840 to make timber liable to duty merely because it came within that limit of Newark Castle—that is to say, was floated up to the ponds to the eastward of Newark Castle,—that ought to have been expressly enacted in this statute—at least one would certainly expect it to be so. But not only is there nothing in the statute to indicate any intention to make timber dealt with in that way subject to dues, but we have it stated that after the passing of the Act of 1840, and down to the year 1876—that is to say, for a period of thirty-six years continuously—no such duty has ever been attempted to be levied. It seems to me that the view which the Clyde Trustees took of the matter was perfectly consistent with the statute, and that the distinction between timber which is floated up to the port of Glasgow, or to a landing-place in the Clyde within the limits of the Trustees' jurisdiction, and timber which is brought within the limits of the Trustees' jurisdiction simply for the purpose of storage, is a very clear one. The timber which is brought up to these ponds really never enjoys what may be called the benefit of the navigation at all. The timber is floated from the harbour of Port-Glasgow or of Greenock, where it is unshipped, up to these ponds, not along the navigable channel of the river, but up the old southern channel, which is not used for navigation at all. The timber-ponds themselves are quite out of the line of navigation, and are constructed for the sole purpose of storing this timber until it is to be disposed of. Now, I think it is of greater consequence when we come to consider the last statute—that of 1858—and the language which it employs in dealing with the imposition of dues. By that Act of 1858 all the previous statutes are absolutely repealed. The repealing clause is not a repealing clause like that which occurred in the Act of 1840, simply substituting one scale of dues for another, but it is

a clause repealing the Acts themselves. The third section is expressed in the most general terms—"From and after the passing of this Act the repealed Acts shall be and are hereby repealed, subject to the provisions of this Act" Now, the statute of 1858 is the only one that can now be used in dealing with any question of imposition or incidence of rates or dues, and the leading section is the 98th, which provides that "Subject to the provisions of this Act, it shall be lawful to 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 1 of the Schedule (H) to this Act annexed; and on all animals and carriages shipped or unshipped in the river or harbour the rates specified in part 2 of the said Schedule (H), and all such rates shall be paid by the owner of such goods, animals, and carriages." Now, the Trustees have continued to levy under this clause the rates and dues upon timber which is floated up to the Broomielaw or other landing-place in the river and there delivered, as well as upon timber carried up in boats or vessels, and so far the usage following upon the Act of 1858 has construed the statute as meaning that timber so floated up the river is to be held as being unshipped in the river, and therefore liable to dues. That is not an unreasonable construction, because the principle upon which such dues are imposed is this, that where goods of any kind have the benefit of transit in the navigable channel of the river for the purpose of reaching their port of destination and are there delivered, these goods may be very fairly said to be unshipped at that port of delivery, and so within the rating clause of the statute. But if it was intended by this Act of 1858 to subject to duty timber which is carried up to these ponds for the purpose of storage, surely there could not have been a more unfortunate expression employed to describe the subjects which are to be liable to the dues than "shipped or unshipped," for I cannot conceive in any reasonable sense that goods which are landed at Port-Glasgow or Greenock, and then floated to these ponds for storage merely, over a few miles on the lowest stage of the river, can be considered as shipped or unshipped. No more unfortunate phrase could have been employed. It seemed to be maintained on the part of the Trustees that the reason why so little notice was taken of this floating timber that went into the ponds was that it was hardly worth while to impose charges upon it. Well, if it was hardly worth while to charge it with duty, that perhaps is a very reasonable explanation of its not being charged with duty in the statute, and of there being no words in the statute of 1858 which could by any reasonable construction cover such a charge. That contention will hardly serve the purpose of the trustees, because there certainly was a sufficient amount of trade of this kind going on to make it worth the while of the Trustees, if they intended goods and timber to be charged with duty, to bring them within the operation of the statute, and as soon as the statute was passed to go on to levy duties under it. No doubt we have it stated that in 1839 the ponds in this Newark Bay were not of any great size. There were only 370 feet of frontage to the river, occupying just $3\frac{1}{2}$ acres, and that may perhaps account for no great attention being paid to the matter in the passing of

the Act of 1840. But before the Trustees went to Parliament in the year 1858 this trade had assumed very large dimensions indeed, for we have it proved that in 1858 the frontage of these ponds to the river had extended to 3470 feet, and occupied 25 acres of ground, and yet there is no attempt made to insert any words in the Act of 1858 that will bring within the operation of the rating clauses that which previously had not been rated. On the contrary, the language of the statute of 1858 is much more restricted and limited than in the previous statute. But still less would that and the increase of the trade account for the Clyde Trustees continuing down to 1876 the practice of allowing these floating rafts and chains of timber to go up to the ponds in Newark Bay without being charged with duty, because both the ponds and their contents must by that time have increased very largely indeed beyond what they were in 1858. We have no precise figures before us applicable to the year 1876, but we learn that at the present time these ponds have a frontage to the river of 14,400 feet, and that they occupy 150 acres of ground, and the greater part of that increase must probably have happened by the year 1876, and yet down to that time there never was an attempt to charge dues upon that timber. Now, I think that the usage following upon the Act of 1840, which in the first place it is said was quite sufficient to enable them to exact these dues, and again following on the Act of 1858, is *contemporanea expositio* of these statutes which is almost irresistible. No attempt is made for thirty-six years after the Act of 1840, and for eighteen years after the Act of 1858, to charge any duty whatever upon timber floated up to these ponds. But apart from that altogether, I confess I think there is no authority in the 98th section of this Act of 1858 for exacting such duties. It appears to me that the words of this section when reasonably construed will not cover the case of timber which in no way is conveyed along the navigable channel of the river, but which is taken by a bye-course a little way up that channel within the jurisdiction of the Trustees, and there not delivered in any possible sense of the word, but put there for storage merely. Five-sixths of that timber ultimately pays dues by being carried to Glasgow or other ports, and then it is unshipped within the meaning of that section, as I have already explained, and the small proportion of one-sixth goes down the river and does not pay duty, and I must say, so far as that timber is concerned, that I cannot see any just principle upon which it can be subjected to duty, because it has not enjoyed the benefit of the improved navigation of the Clyde in any sense whatever. Therefore I come to the conclusion that, notwithstanding the very much altered aspect of this case since it was previously before us, the complainers have made out their case, and that they are entitled to have interdict against the Clyde Trustees charging them dues for timber floated to these ponds.

LORD DEAS—When this case was before the Court in March 1879 the question we had to decide related only to timber that went to these ponds, and, as I understand it, the question which we have to decide now relates only to timber taken to the same ponds. Indirectly it may have a bearing upon timber that goes up the Clyde—

in whatever way it goes—to Glasgow or any other port. As your Lordship has observed, there is a good deal of light thrown upon the facts by the proof that has been led—that is to say, they are, to say the least of it, much clearer than before.

When timber goes up for delivery—whether it is floated or towed up the river, or whether it is carried in rafts properly so called—the usage has been to pay duty upon it. Now, the only matter that there can be said to be anything new in is the question relating to timber that goes to these ponds, and whether there is any authority for charging it with duty. Timber is floated or towed up the river whether it goes to the ponds or whether it stops short at the ponds, and the mere fact that it is towed in rafts or in any other way can no longer be held to make any distinction. But except that distinction in the mode of conveyance or carriage, the question is just the same as it was when the case was before us in March 1879. On looking at the opinion I delivered then, I find it is just the same case as is before us now, and I see from my opinion that I held that there had been no usage following on the Acts up to 1876 of paying duty on the timber that went to these ponds. It would be quite enough as in a possessory question to look at the usage which has occurred from the earlier dates, and this being a mere possessory question, I think that usage is quite enough to settle it. It seemed to me to be the desire of all the parties to make no distinction between a possessory question and a question which could only be decided in a declarator. Such questions are sometimes decided in a suspension, as I think may be done here, and with this explanation I think that the opinion I delivered in March 1879 is just as applicable to the question now as it was then, and therefore I think it unnecessary to repeat it all over again. I agree in the conclusion at which your Lordship has arrived, that timber however it is delivered at these ponds is not liable in dues, because the terms of the Acts of 1840 and 1858 do not seem to me to include it. I can perfectly well understand that if it were going to these ponds for the purpose of storage it ought not to be subjected to the same duties as timber which goes up the Clyde for delivery. I do not understand that the question now before us for decision relates to the whole timber that goes up the Clyde any more than when it was before us in 1879, and I see my opinion is quite consistent that I never doubted that timber going up the Clyde for delivery in any way whatever, whether floated or towed, should pay duty for its going up. There was no doubt thrown upon that in that part of my opinion that applies to it, and still less doubt can be thrown upon that now. The material fact that after the date of the Act of 1858 the Clyde Trustees were not in use to levy duties on timber going up to these ponds sheds a strong light upon their intention when obtaining that Act. And indeed the usage after 1840 and after 1858 are in my opinion most material elements in construing what was intended by the Acts of these years, and I think they are sufficiently construed by that usage to prevent the Clyde Trustees from levying duties upon timber going up the Clyde for storage, and that it was intended that these Acts should only apply to timber going up the river for delivery, and that I understand is your Lordship's opinion, and I entirely concur in it.

LORD MURE—I have seen no reason for qualifying the conclusion I arrived at when this case was formerly before us, that the interpretation given by the Lord Justice-Clerk of the import and effect of the assessing clauses of the Act of 1858 in the matter of levying duties upon timber floated up the Clyde to the timber ponds above Port-Glasgow proceeded upon a sound construction of those clauses. In that opinion I still concur, and I do not think it is affected by the fact that it has since been discovered by the respondents that timber floated up the Clyde to Glasgow and to Bowling was in use to pay duties prior to the year 1858. That practice appears to have been founded upon the 22d section of the Act of 1770 (10 Geo. III. chap. 104), which provided “that all timber or wood either carried in boats or other vessels, or floated in and upon the said river Clyde, within the bounds aforesaid, shall be charged and pay” certain rates. That Act was passed in the year 1770, when the bounds of the river referred to in the 22d section were much more limited in extent than those over which the respondents now have powers and jurisdiction, and did not, so far as appears from the evidence before us, contain any timber-ponds; but that Act was repealed by the Act 3 and 4 Vict. cap. 118, passed in 1840, which has in its turn been repealed by the Act of 1858, under which the present question has been raised. Now, it is by this Act of 1840 that the third stage of the river was extended down to Newark Castle so as to include the ponds above Port-Glasgow, in which timber was then and has ever since been stored after being unshipped on the river and floated up to the ponds, but during all that period it is admitted no attempt was made to levy dues upon timber so floated till the year 1826, that is, for a period of nearly forty years.

Having regard to this state of the facts, the inference is in my opinion strong that the Clyde Trustees of that period felt that they had obtained no power under the Act of 1840 to levy such dues, and I think it proper, looking to the interference which the exacting of dues on timber so dealt with and stored, and which derived little or no special benefit from the operations of the respondents, would have upon that branch of the trade in timber, that no such powers were then applied for. As I have already mentioned, the 22d section of the Act of 1770, which dealt with floating timber, was repealed, and the change of phraseology in the clause substituted for the repealed clause is remarkably distinct. In the clause in the Act of 1770 it is enacted that “all timber or wood either carried in boats or other vessels, or floated in and upon the said river Clyde, within the bounds aforesaid, shall be charged and pay accordingly.” Then by section 56 of the Act of 1840 “the powers and authorities granted by the said recited Acts to the Trustees under the same to exact and levy the rates and duties therein mentioned” are expressly repealed. And I think there was great force in the observations that were made by the counsel for the complainers, that if the earlier part of this clause of the Act of 1840 had stood alone the powers of the Trustees to levy dues would have ceased, and that being so the question comes to be, whether the words substituted in the 22d section confer upon the Trustees power to levy dues on

timber "floating?" In words they do not, but they seem to me to limit the levying to timber "carried in boats," to the exclusion of timber floated upon the river in terms of the 22d section of the Act of 1770. In construing this 56th section of the Act of 1840, apart altogether from any practice that may have followed upon it, I should have been disposed to hold, having regard to the marked change of language, that it was no longer intended that timber when floated should be charged. Whether the continuance of the practice introduced by the Act of 1770 of levying dues upon timber floated up in rafts to Glasgow since 1840 would, if the question were now raised, be sufficient to authorise its continuance notwithstanding the fact that timber floated up is not included in the clause, I do not think it necessary to give any opinion, but I am very clearly of opinion that these words would of themselves afford no warrant for charging dues on timber floated up for storage to the ponds; and I adhere to the view I expressed when the case was last before us, that no such power is given to the respondents by the 98th section of the Act of 1858.

LORD SHAND—It has been my fate, in common with your Lordships, to hear this case fully argued no less than three times. On the first of these occasions I formed the opinion that the Clyde Trustees were right in their contention, and were entitled to charge dues upon the timber that was carried to these ponds, because it was timber that had been floated up the river Clyde; and in my opinion timber which is floated up the river Clyde is liable to Clyde dues. I have seen no reason to change my opinion on that matter. On the contrary, it appears to me that the case for the Trustees has been materially strengthened, if that was necessary, by the additional facts that are now before us.

The first point to be settled in the case is this, whether timber in floats, chains, or rafts floated up the river, or any part of the river, is liable for dues? In the former case I was of opinion, and my brother Lord Gifford agreed with me in thinking, that looking to the words that were used in the statute of 1858 such timber was liable in duty—I mean timber that was floated up the river or any part of it. There were three expressions in the statute which led Lord Gifford and myself to form that opinion. The first of these was the words "shipped or unshipped," and the opinion which Lord Gifford and myself then had, and which I still entertain, is, that giving a reasonable construction to these terms, timber which is brought in in floats and landed on the river-side is within the meaning of the statute unshipped in the river. But in addition to these words there are other terms in the statute that are applicable to timber. Section 99 uses the words, "goods passing in or upon the river," and the schedule to the statute, which contains a note of the dues chargeable, uses another expression, "conveyed upon the river," both of these being expressions which we now find were in the earlier statutes. Taking these expressions as a whole, and having regard to the fact that these Clyde Trustees have made a great navigable channel within a river which was quite unsuited for the purposes of navigation, and that the reason for which they are authorised to charge dues is that they are taking a return for im-

portant services given, it appeared to me that those using the river or part of it are liable in these dues. The state of the facts as then represented to us was that the statute of 1858 introduced a novelty. It was admitted, and indeed represented, by the Clyde Trustees that prior to 1858 timber so floated had been exempt from dues, the reason suggested being in order to favour the trade of shipbuilding. As your Lordship has already remarked, it is singular that such a blunder should have been committed. The respondents now explain that a number of their officials have been changed in comparatively recent times, and that the attention of those who are now in office had not been drawn to the facts as to the earlier practice, and they account for the blunder by saying that there are some provisions in the statute which render timber not liable for shed-dues, and that in that way the mistake had occurred. But however that may be, the particular cause that led to the mistake is of no consequence; the fact now is that from time immemorial timber floated upon the river Clyde has paid dues. I am not surprised that it should be so, for I know of no species of use of the river that I think ought more certainly to be made the subject of a charge, for I should fancy that there is no use of the river that is more inconvenient to others using the stream for navigation. But it appears now that so long ago as 1770, upwards of 110 years ago, the statute of the Clyde Trustees authorised the charging of dues, and from that day to this dues have been charged accordingly upon timber floated up the river. As your Lordship has pointed out, the statute of 1770 expressly mentions floating timber in one of its clauses—I mean the 22d clause—which provides that "all timber or wood either carried in boats or other vessels, or floated in or upon the said river Clyde, within the bounds aforesaid, shall be charged and pay accordingly." From the date of that Act of 1770 to 1840 that Act was the ruling statute. In the Act of 1840 these words are not repeated, but we have words which I think are obviously wide enough to cover the case of floating timber, because, in the first place, in section 56, which gives the table of dues, the provision is that there are to be paid on "all goods carried or conveyed on the river Clyde, within the limits and at the stages of the river hereinafter mentioned," certain sums, and among these goods wood is mentioned. The words are "carried or conveyed on the river." And again in section 69, which describes the river in its three stages, the part with which we are now dealing being part of these stages, there is a provision that "all ships and goods whatsoever passing in or upon the said river Clyde, or any part thereof within the limits aforesaid, shall pay the foresaid rates and duties." I cannot for my part conceive that an argument could be successfully maintained to the effect that wood floated upon the river was not within the meaning of these sections carried or conveyed upon the river, or had not passed in or upon the river. But if there were any doubt upon that matter it is solved by that to which your Lordships have attached some importance—I mean *contemporanea expositio*—for from 1840 down to 1858 these words were read by everybody as including timber floating upon the river Clyde in rafts or chains, and accordingly the case is now in this position, differing from the position in which it was when it was con-

sidered by Seven Judges, that I think it cannot be disputed that timber floated upon the river is within the meaning of the statutes. I do not understand any of your Lordships to indicate that timber which goes up the river to its second and third stages is not fairly covered by the terms of the statute of 1858, repeating in several of its parts the language of the Act of 1840, having regard to the circumstance that is now made perfectly clear that for upwards of a century such timber has paid dues. Now, that being the state of matters, the enactment of the Act of 1858, section 98, that "subject to the provisions of this Act it shall be lawful for the Trustees to levy on and in respect of all goods shipped or unshipped in the river" being to be read as including timber floated in the river—for that I take to be the opinion of the Court now—what is the position of the suspenders in this case? It cannot, I think, be disputed that this timber is floated in the river—that it is within the meaning of the statute, as I have now explained it, shipped or unshipped in the river. Then if it be so within the meaning of the statute, it must lie upon the complainers to show something peculiar with reference to this timber which will enable them to say that it is exempt from the general operation of the statute. There was, no doubt, an argument maintained in the last discussion that this timber was not floated in the river in any proper sense—that it was not shipped or unshipped on the river—but that argument received no countenance from any of the Judges to whom it was addressed, and I do not understand it to receive any countenance now. It would be a very extraordinary state of matters if the Clyde Trustees were to be involved in questions of this kind with traders using the river who were in a position to say, We have not been using the proper navigable channel, but only a side channel of the river, which is not the river Clyde. I think the mere statement of the proposition is enough to show that it cannot be maintained. Well, that being the case—this timber being unshipped in the river Clyde—what else is there that entitles the complainers to say that they shall be exempt from the taxing clause? I think the main argument has really been that they should be exempt now because the Clyde Trustees have not levied dues hitherto—that is to say, that because for the last eighteen years the Clyde Trustees, although they had a clause which would enable them to make this charge for timber, have not thought fit to make it, that gives some sort of prescriptive right to be rid of these charges in all time coming. It would be a very startling proposition if it were so maintained, but I think the complainers must bring their case up to that. It would rather appear to me, if I be right in the view that I have now presented of the general meaning of this statute, that those gentlemen who have had the benefit of the failure of the Clyde Trustees to exact the dues hitherto should be very thankful that it was so. But I do not see any reason in their having been so treated that will enable them now to say that they shall be treated in all time coming in the same way. The question must come to this, Have the trustees the right which they claim under this statute? If they have, the fact that they have thought fit hitherto to allow this timber to pass without payment cannot affect their right to make the charge. But while I make that observation, I think the

Clyde Trustees have given a most satisfactory explanation of the reason why the timber has hitherto escaped charge, because to a very great extent I think it escaped observation. Your Lordship has observed upon the evidence given by Mr Deas as to the extent of these ponds, and I shall only say a word or two about it. Mr Deas explains, as distinctly as I think anything could be explained, that the trade of these ponds has assumed entirely different proportions in later years from what it did at an earlier time. In 1857, as your Lordship has pointed out, these ponds occupied 34 acres with a frontage of 2470 feet; they now occupy 150 acres with a frontage of 14,400 feet; and Mr Deas explains that he may say in round numbers that the ponds have about doubled since 1868. Now, when you have in view the circumstance that much the largest part of that timber did go up the river, and therefore paid dues when the river was used in the course of transit to Glasgow or to Renfrew, one has a very easy explanation of why the charge was not then made with reference to a traffic that was very small compared with what it is now. I suppose in order to check traffic of this kind it would be necessary to have a collector at or near the spot, and the traffic at these earlier times would not have warranted any such expense. But now that the traffic has assumed such enormous magnitude as I have pointed out, with 150 acres occupied by these ponds, which are just wood-merchants' yards, it appears to me that it would be really using a very unreasonable argument as against the Clyde Trustees to say that because the matter was a comparative trifle and they did not exact those dues they shall be precluded from doing so now when it has become a very different matter. So much for the failure to exact dues in the earlier time. It has been pleaded in argument that the element of non-exaction is of great importance as *contemporanea expositio*. I fail to see much force in that with reference to a statute which is dated in 1858, and which the Court is quite in a position to construe now without any lurking difficulty in the language. If the statute fails to tax the timber, then the Clyde Trustees must fail in their claim. But if, on the other hand, it is included in the language which we can construe for ourselves, I cannot see that the circumstance that for eighteen years, while the trade was comparatively limited, the traders have got off the payment of their dues, should entitle them to get off paying now.

The only other argument that I have heard suggested for exemption, which is what the complainers ask, is that the purpose for which they take in this timber is practically storage, on its way up the river. Well, now, in regard to that, is it so? In the admission which was formerly given in this case it is stated "the log timber is usually sold while in the ponds." And in the evidence that we now have before us Mr Keith explains that for the year ending 30th June 1881 the quantity of timber floated up the river from the ponds was 35,000 tons. Again, Mr Simpson, a witness examined by the complainers, says—"Of the whole timber in the neighbourhood I should say that one-fifth goes down the river and four-fifths up the river." So that the state of matters then is, that if you have about 35,000 tons going up the river from these ponds, you have between 9000 and 10,000 tons going down

the river, and, under the system hitherto pursued, the timber which is so taken down the river is entirely free of dues. As to the purpose for which it is there taken, it is not storage only. These ponds are merely woodyards, with this benefit, that the tide floats the timber when it is in. They are in no different position than if they were woodyards on land, and the timber being unshipped was landed and kept on land. The persons who keep the timber, and who use the river to bring the timber there, are wood merchants, who sell that timber there at their convenience, and the timber so sold becomes the property of others who remove it. In that state of matters I have the utmost difficulty in seeing on what principle the proprietor of the timber, unshipping it and bringing it into his woodyard, and keeping it there till he comes to sell it, is to get rid of the dues. We are dealing here with a toll or duty fixed by Act of Parliament. I can understand very well that when you find exemptions in an Act of Parliament, after a general rate is authorised to be levied for the use of a road or a river, the exemptions may be founded on this, that if the use is of a particular kind, you shall give the parties the benefit of the exemption. If in Road Acts you find exemptions given to certain persons in respect of their offices, or if it is said that no toll shall be paid because the road is used on Sundays for persons going to church, the exemption shall receive effect. But it is an entirely new doctrine to me that in levying a toll such as this is, the levying of it is to depend upon the purpose for which the use of the river is taken. It appears to me, I must say, with great respect to your Lordships, that neither the toll-taker nor the person who pays the toll has anything to do with the purpose for which the use is made. If, in fact, the use of the highway, whether a road or river, is taken, then the toll is chargeable, and as I think the toll-takers here, the Clyde Trustees, have no right to ask for what purpose the timber is taken to these ponds, and therefore no concern with it, I think it is no answer to them to say, We are only using a small part of the river, and we only mean to keep the timber there for a time till we get it sold, and when we do so you will get your dues from somebody else. It appears to me that the Clyde Trustees, standing on their statutes, are entitled to say, This timber has passed along a part of the river, and so has used the river, and is therefore liable in dues. All the more is that clear to my mind because reading it the other way leads to this result, that a very large portion of this timber entirely escapes payment of dues although it uses the river in passing up to these ponds or woodyards and down again. Accordingly, I remain of the opinion I formerly expressed, that the Clyde Trustees are entitled to succeed in this case.

The Court therefore sustained the reasons of suspension and granted interdict.

Counsel for Suspenders—Trayner—J. Burnet. Agents—Duncan, Archibald, & Cunningham, W.S.

Counsel for Respondents (Clyde Trustees)—Mackintosh—Lorimer. Agents—Webster, Will, & Ritchie, W.S.

Tuesday, March 14.

FIRST DIVISION.

SPECIAL CASE—CHALMERS' TRUSTEES v.
CHALMERS AND OTHERS.

Succession—Legitim—Policy of Insurance.

Held that policies of insurance taken by a husband for behoof of himself and his wife on the life of a son, and payable to the spouses or "to the survivor of them, their, his, or her heirs, executors, or assignees," formed part of the moveable estate of the husband, who predeceased his wife, and must be computed at their actuarial value at the time of his death, so as to increase the fund for legitim.

Succession—Vesting.

A certain share of a trust estate was, by a mutual trust-disposition and settlement executed by two spouses, destined upon the death of the survivor to a grandson, to be "payable on his attaining the age of twenty-one years." It was directed that if the beneficiary "should die previous to payment" of his provision it should be otherwise disposed of. The beneficiary attained the age of twenty-one years, and survived the survivor of the spouses by eighteen days, and no payment was made to him of his share.

Held that it vested, according to the intention of the trusters, upon his survivance.

William Chalmers, residing in Aberdeen, and Jane Cruickshanks or Chalmers, his wife, executed a mutual last will and settlement on August 16, 1872. Mrs Chalmers survived her husband, who died on October 27, 1872, and in virtue of a power conferred on the survivor under the said mutual deed executed a codicil dated 11th June 1874. Part of the estate conveyed under the said mutual deed and codicil consisted of two policies of insurance, each for £300, which were effected by the said William Chalmers "for his own behoof and for behoof of Mrs Jane Cruickshanks or Chalmers, his spouse," on the life of their son William Leslie Chalmers, one of the second parties. These policies were payable to the trusters or to the survivor of them, their, his, or her executors or assignees. Mrs Chalmers after her husband's death regularly paid the premiums. She died on 4th August 1879, and after her death the premiums were paid by the trustees out of the trust-funds.

William Leslie Chalmers, one of the sons of the trusters, repudiated the provisions in his favour under the mutual deed and codicil, and claimed legitim, which was duly paid to him, he, under certain reservations, granting in return a formal discharge of all claims competent to him against the estates of the trusters or under the mutual deed and codicil. He specially reserved any claim which was competent to him to a share of the value of the said policies as forming part of the legitim fund, maintaining that the actuarial value of these policies as at the date of his father's death formed part of the free moveable estate of his father the said William Chalmers, and became subject to the claim of legitim.

By the said mutual settlement the estate of the spouses had been divided into twelve shares, which were allocated among the children and