

object which the testator had in view. I should have great hesitation in expressing an opinion which differs from that of Lord President Inglis, but so far as his Lordship in the case relating to the Society for the Conversion of Israel (5 Macph. 233) professes to apply the principles of interpretation applicable to charitable trusts to a society whose object was solely the conversion of people from one form of religion to another, I should wish at all events to reserve my opinion, first, because his Lordship says that these considerations were not altogether satisfactory to his own mind, and secondly, because it does not appear to me that the case in question was one in which the principle of the special construction of charitable trusts would arise. It was a case of the identification of a particular society which was described in general terms, and was not a case of the determination amongst a class of objects indicated in general terms of the particular object to which the fund was to be appropriated.

While I should not be of opinion that a bequest for purely religious purposes was entitled to the benefit of the benignant construction accorded to charitable trusts, it may very well be that the objects indicated are partly charitable and partly religious, or partly secular objects other than charity. I suppose it is generally known that the foreign missions of the Scottish Churches have education as one of their principal motives, and in Africa especially they have been very successful, whether for good or for harm, in educating the Kaffir races to the ordinary standard of education which prevails amongst the European population. It may very well be that so far as the educational purpose is concerned a bequest of this kind might receive favourable interpretation, and I should certainly not hesitate to say, where the primary object was charity or education, such as a school or college, that the institution would be entitled to the benefit of the "charitable" rule of construction, although it was required that there should be religious services conducted or even a chaplain appointed. Each case must of course depend upon its special circumstances and the character of the body or class of bodies indicated by the testator. In the present case I think there is no difficulty whatever, because missions in the sense in which the testator has obviously used the word are a sufficient limitation of a definite class; and then of course there is the appointment of an executor which is equivalent to the power of selection. I therefore agree that if a claim is put in by the executor it must be sustained.

LORD PEARSON was not present.

The Court recalled the Lord Ordinary's interlocutor, and remitted to him to allow the pursuer and real raiser to lodge a condescence and claim, if so advised, and for further procedure.

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Chree. Agent—Harry H. M'Bean, W.S.

Counsel for the Claimants (Reclaimers)  
Robert Allan and Others—Scott Dickson,  
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S.S.C.

Counsel for the Claimants (Respondents)  
The Church of Scotland Foreign Mission—  
Clyde, K.C.—Hon. W. Watson. Agent—  
Alan S. Menzies, W.S.

Counsel for the Claimants (Respondents)  
U.F. Church Foreign Mission—Clyde, K.C.  
—Cowen. Agents—Cowan & Dalmahoy,  
W.S.

Tuesday, March 17.

SECOND DIVISION.  
BEVERIDGE'S TRUSTEES v.  
BEVERIDGE.

*Trust—Trustees—Ultra vires—Investments  
—Liability—Local Authorities Loans  
(Scotland) Act 1891 (54 and 55 Vict. cap.  
34), sec. 44—Liferenter and Fiar—Pur-  
chase at Premium of Stock Redeemable at  
Par—Arrangement with Liferenter.*

The Local Authorities Loans (Scotland) Act 1891, by sec. 44 (sub-sec. 1), gives trustees who have authority to invest trust funds in the mortgages, &c. of railway or other companies, the same power of investing in stock issued under the provisions of the Act, but provides (sub-sec. 2) that when two or more persons are successively interested in trust funds "no investment thereof shall be made in stock at a price exceeding the redemption value of the stock" unless the instrument creating the trust shall otherwise expressly provide.

Trustees who held a fund in liferent for A, with fee to B, purchased (B refusing her consent) 3 per cent. corporation stock at 2 per cent. above the redemption value, at the same time entering into an agreement with A under which it was arranged that he was to receive interest at the rate of  $2\frac{3}{4}$  per cent. per annum, the remaining  $\frac{1}{4}$  per cent. being retained by the trustees to form a sinking fund to meet the difference between the sum paid for the stock and that at which it was redeemable; it was farther provided that if the stock was not realised at a loss, the sinking fund should be paid to A or his heirs, and A undertook, in the event of the sinking fund proving insufficient to meet any loss arising on realisation or redemption, that the deficiency should form a charge against his estate.

At A's death the stock stood in the market at about 10 per cent. below its redemption value. The sinking fund was sufficient to pay the premium of 2 per cent. paid by the trustees.

Held, in a question between the trustees and the fiar B, that the latter's claim was not limited to the amount of the sinking fund, but that the trustees were

bound to make good to her the full difference between the redemption price of the stock and the amount yielded on realisation, they having acted *ultra vires* in making the investment.

*Guarantee—Trust—Investment by Trustees ultra vires of the Local Authorities Loans (Scotland) Act 1891 (54 and 55 Vict. cap. 34), sec. 44—Guarantee by Liferenter in Favour of Trustees—Construction.*

Trustees, holding for a liferenter and fiar, invested funds *ultra vires* in redeemable corporation stock, paying, contrary to the provisions of the Local Authorities Loans (Scotland) Act 1891, sec. 44, a premium over its redemption value. On the death of the liferenter the stock could only be realised at less than its redemption value, and the Court ordered the trustees to make good to the fiar the difference.

*Terms of a letter of guarantee* by the liferenter to the trustees which were held to apply only to the amount of the premium paid for the stock, and not to any loss which might be sustained on the investment.

The Local Authorities Loans (Scotland) Act 1891 (54 and 55 Vict. cap. 34) provides—Section 44 (1)—“Trustees or other persons for the time being authorised to invest money in the mortgages, debentures, or debenture stock of any railway or other company, shall, unless the contrary is provided by the instrument authorising the investment, have the same power of investing money in stock issued under the provisions of this Act (other than stock for the time being represented by a stock certificate to bearer) as they have of investing it in the mortgages, debentures, or debenture stock aforesaid. (2) Provided that when two or more persons are successively interested in money left subject to a trust, no investment thereof shall be made in stock at a price exceeding the redemption value of the stock, unless the instrument creating the trust shall otherwise expressly provide.”

The late James Adamson Beveridge, of Brucefield, Dunfermline, died at Edinburgh on 16th November 1887, leaving a trust-disposition and settlement, dated 20th April 1883, and, with two relative codicils, dated respectively 13th September 1883 and 10th October 1884, registered in the Books of Council and Session on the 8th December 1887. By his said trust-disposition and settlement and first codicil the deceased conveyed his whole estate and effects, heritable and moveable, to Charles Grey Wotherspoon, John Landale, James Beveridge, and Robert Methven Heron, as trustees for the purposes therein mentioned. By his said trust-disposition and settlement the testator directed his trustees to convey the residue of his means and estate to his sister Elizabeth Mary Beveridge, wife of Dr Alexander Watt Beveridge, residing in Edinburgh. By his second codicil the testator left to Robert Methven Heron, Mrs Mary Heron, and Jessie Campbell Heron, and the survivors and survivor of them, the

liferent of a sum of £20,000 free of legacy duty, and directed his trustees “to set aside and invest in their names, for behoof of the said Robert Methven Heron, Mrs Mary Heron, and Jessie Campbell Heron, and the survivors and survivor of them, for liferent use only, the said sum of £20,000 on the securities authorised by the Acts of Parliament relating to the investment of trust funds,” and he gave directions that on the death of the survivor the capital sum of £20,000 was to revert to and form part of the residue of his means and estate. All the trustees nominated by the truster accepted office, and entered on the administration of the trust, with the exception of Mr Wotherspoon, who declined. Mr Landale died on 21st December 1893, and the surviving trustees assumed Erskine Beveridge of Brucefield as a new trustee. Mr James Beveridge died on 14th February 1903, and Mr Heron on 23rd June 1906. Upon the truster's death his trustees duly set aside and invested the sum of £20,000, as directed by the second codicil. Mrs Mary Heron, one of the three liferenters, predeceased the testator, and the liferent was shared equally by the survivors, Robert Methven Heron and Jessie Campbell Heron, until the latter's death on 2nd September 1896, when the sole right to the liferent vested in Robert Methven Heron. In view of the repayment at Whitsunday 1897 of part of the liferented sum of £20,000, which was invested on heritable security, it became necessary to find a new investment for the sum of £9650. A meeting of trustees was accordingly held on 2nd March 1897, at which all the trustees, viz., James Beveridge, Robert Methven Heron, and Erskine Beveridge, were present, and at which their factor and law agent (Mr William Simpson, solicitor and town clerk, Dunfermline) submitted a list of investments, including certain redeemable 3 per cent. stock about to be issued by the burgh of Dunfermline. After considering the matter the trustees decided to negotiate with Mrs Beveridge as residuary legatee, and endeavour to come to some arrangement whereby the uninvested funds might be paid over to her, and failing such an arrangement the trustees decided to apply for £9650 at par of the Dunfermline Corporation Stock. Subsequent meetings of trustees were held on 23rd March and 13th April 1897. Sundry negotiations took place with Mrs Beveridge, but the trustees failed to come to an arrangement with her. The factor and law agent of the trustees then, by letter dated 19th April 1897, submitted to her a prospectus of the Dunfermline Corporation Stock, and asked whether she would consent to the investment of the trust funds in the stock at the issue price of 102 per cent. Mrs Beveridge, however, declined through her law agents to consent to the proposed investment. A further meeting of the trustees was held on 20th April 1897, at which the trustees present were James Beveridge and Erskine Beveridge. The factor and law agent

informed the trustees that the minimum price of issue of the Dunfermline Corporation Stock had been fixed at £102 per cent., and gave certain advice with regard thereto, and the trustees decided to purchase £9460 of the stock, at the price of £9649, 4s. (being at the said rate of £102 per cent.), subject to an arrangement with Mr Heron which was set forth in the minutes and bore his docket of approval, and which was also embodied in the following letter of guarantee signed by him:—

“To the Trustees of the late James Adamson Beveridge, Esquire of Brucefield.

Gentlemen—I, Robert Methven Heron, sole surviving liferenter of the fund of £20,000 directed by the late Mr Beveridge, the trustee, to be held in trust for the liferent use of me and the late Mrs Mary Heron and Miss Jessie Campbell Heron, my mother and sister, and the survivors and survivor of us, approve of your proposal to invest the sum of £9649, 4s., part of the capital of the said fund, in the purchase, at the price of £102 per cent. (that being the minimum price of issue), of £9460 of the redeemable three per cent. stock about to be issued by the Corporation of Dunfermline; and I further agree to accept interest on the said sum of £9460 at the rate of two and three quarters per cent. per annum—the difference between such interest and the interest payable by the Corporation to be set aside by you as a sinking fund to meet the premium of £189, 4s., being the difference between the amount payable for the stock and the par value at which the same is redeemable, or such proportion thereof as may be lost when the said stock falls to be realised, or has been redeemed by the Corporation, such sinking fund, in the event of the said stock not being realised at a loss, to be payable to me or my heirs: And in the event of the said sinking fund not being sufficient to meet any loss that may be made on the realisation or redemption of the stock, I hereby agree and declare that the deficiency shall form a charge against my estate.”

The £9460 of Dunfermline Corporation Stock was purchased by the trustees at Whitsunday 1897 at 102 per cent., the whole price being paid out of the trust funds, and the dividends received (less the deduction referred to) were regularly remitted to Mr Heron by the factor and law agent of the trustees, accompanied by a statement showing the details thereof. These remittances continued to be made up to the term of Whitsunday 1906, being the last half-yearly term before Mr Heron's death. From each half-yearly remittance of the dividends,  $\frac{1}{4}$  per cent. was deducted and retained by the factor and law agent, in accordance with the terms of the guarantee. At the date of Mr Heron's death the sinking fund accumulated from such deductions amounted to £213, 18s. 11d., including bank deposit interest, a sum more than sufficient to meet the premium of 2 per cent. originally paid on the stock, which amounted to £189, 4s. The stock was issued by the Burgh of Dunfermline

under and in terms of the Local Authorities Loans (Scotland) Act 1891. The dividends were secured upon rates or taxes levied by the Corporation under authority of Act of Parliament, and the stock itself was redeemable at par on 15th May 1947, or in the option of the Corporation, at the term of Whitsunday 1917, or any term of Whitsunday or Martinmas thereafter, on three months' notice to the holder. The whole stock fell to be redeemed on or before Whitsunday 1947. Since the date when the investment was made, it fell in value in common with other corporation stocks. At Mr Heron's death the market price was 89 $\frac{1}{2}$ .

Upon Mr Heron's death questions in connection with the stock arose between Mrs Beveridge and Erskine Beveridge, sole surviving trustee of James Beveridge, and also between the latter and the trustees of the deceased Mr Heron.

A Special Case was presented to the Court, to which Erskine Beveridge, sole surviving trustee of James Adamson Beveridge, was the *first party*, the executors of the deceased James Beveridge the *second parties*, the trustees of Mr Heron the *third parties*, and Mrs Beveridge the *fourth party*.

At the date of the Special Case the market price of the stock was 88 $\frac{3}{4}$ , making a depreciation on the price originally paid of £1123, 7s. 6d., or deducting the amount of the original premium, £934, 3s. 6d.

The following passages excerpted from the Special Case sufficiently indicate the *contentions* and *arguments* of the various parties:—“In consequence of the death of the said Robert Methven Heron, the capital of the said sum of £20,000, liferented by him, now falls to be paid over to the fourth party as residuary legatee of the said deceased James Adamson Beveridge. In the circumstances above set forth she has intimated that she holds the first party, as trustee of the said deceased James Adamson Beveridge, and the second and third parties, as representatives of deceased trustees of the said James Adamson Beveridge, liable for the whole of the depreciation on the said Dunfermline Corporation Stock; the first, second, and third parties agree to pay to the fourth party the premium of 2 per cent. originally paid on the stock, amounting to £189, 4s., but they refuse to pay the rest of the amount by which the stock has depreciated, and questions have in consequence arisen as to whether, in the circumstances, the trustees incurred personal liability for the whole depreciation on the said stock through making the said investment, and if so, whether the third parties are, in terms of the letter of guarantee by the said deceased Robert Methven Heron, bound to relieve the first and second parties of such liability.

“The *first and second parties* primarily maintain that, in respect that the premium on the purchase price of the stock issued by the Corporation of Dunfermline was paid by the liferenter, the said stock was purchased by them at a price not exceeding the redemption value thereof. The investment was accordingly one which the trus-

tees were entitled to make, and does not fall within the prohibition imposed by the Local Authorities Loans (Scotland) Act 1891 (54 and 55 Vict. cap. 34), sec. 44 (2). There is therefore no liability on the trustees to make good the depreciation in value which the said stock has suffered. In any event, these parties maintain that the said investment was one which it was within their powers to make under said second codicil or in virtue of the Trusts (Scotland) Amendment Acts of 1884 and 1898, and particularly of section 3 (6) of the said Act of 1884 and section 3 (a) of the said Act of 1898. The first and second parties further maintain that, if they are primarily liable to make good to the fourth party the amount of the depreciation on the realisation of the said stock, they are entitled to be reimbursed therefor by the third parties, in respect of the obligation undertaken by the said Robert Methven Heron in terms of the said minute of meeting of the trustees held on 20th April 1897, and relative holograph docquet, and of the said letter of guarantee granted to them by the said Robert Methven Heron, dated 21st April 1897.

“With regard to the general question of liability for the depreciation on the stock, the *third parties* maintain that the stock was within the trustees' powers of investment under the said second codicil or within the general powers of investment conferred on trustees by the Trusts (Scotland) Amendment Acts 1884 and 1898, and that the Act of 1898 repealed the proviso contained in section 44 of the Local Authorities Loans Act 1891. In any case, they maintain that on a sound construction of the said proviso it simply prohibited the payment of a higher price than par for the stocks therein referred to as a trust investment; that it created no liability except for the excess of the price paid above par value; and that it is accordingly inapplicable to such a transaction as the present, where provision was duly made for such excess being replaced. With regard to the question of indemnification, the *third parties* maintain that it is incompetent, in construing the letter of guarantee granted by Mr Heron, to look beyond the instrument itself, and that, on a sound construction thereof, it covers no more than the difference between the par value of the stock and the price at which it was purchased.

“The *fourth party* maintains that the first, second, and third parties are jointly and severally liable to make good to the trust estate the whole depreciation on the Dunfermline Corporation Stock purchased by the trustees with the trust funds as above set forth. The only authority which the trustees possessed for investing in said stock was derived from section 44 of the Local Authorities Loans (Scotland) Act 1891, and sub-section 2 of that section is as follows:—(*v. sup.*). The trust funds were, at the time of the investment in question, funds in which two persons were successively interested, and the said stock was purchased at a price exceeding the redemp-

tion value of the stock, without any authority to that effect in the testamentary writings under which the trustees act. The investment in said stock was accordingly one which it was *ultra vires* of the trustees to make, and the first, second, and third parties are bound to restore to the trust estate the whole amount of the depreciation thereon.”

The following *questions* were submitted to the Court:—“1. Are the first, second, and third parties jointly and severally liable to make good to the fourth party the difference between the redemption value of the said Dunfermline Corporation Stock and the amount which it yields on realisation? 2. In the event of the first question being answered in the affirmative, are the third parties bound to relieve the first and second parties of such liability?”

The *third party* cited Bell's Prin., secs. 251, 285; *Baird v. Corbett and Others*, November 21, 1835, 14 S. 41; *Napier v. Bruce*, February 11, 1840, 2 D. 556, 1 Bell App. 78 (guarantees to be construed where possible in favour of guarantor).

The *fourth party*, in addition to the contention already set forth, argued that the Trusts Act 1898, sec. 3 (a), could not be founded on by the trustees, as that Act had not been passed at the date of the purchase.

At advising—

LORD LOW—At the time when the testamentary trustees of the deceased Mr James Adamson Beveridge invested part of the trust funds in Dunfermline Corporation Stock, their only authority for so doing was the power conferred upon trustees to invest trust funds in such stocks by the 44th section of the Local Authorities (Scotland) Act 1891. The power conferred by the statute is, however, subject to the following proviso . . . [*quotes, supra*] . . .

It is admitted that that proviso was applicable to the investment in question, because there were two or more persons—liferenters and fiars—successively interested in the money, and there was nothing in the trust deed which authorised the trustees to go beyond the powers conferred by the statute. Now it appears to me that the language of the proviso is unambiguous and imperative—“No investment shall be made in stock at a price exceeding the redemption value of the stock.” Nothing could be clearer than these words, and the fact is that the trustees did invest trust funds in stock of the kind referred to in the statute at a price of 102 per cent., while the redemption value was only 100 per cent. It is therefore clear that upon the face of the transaction the investment was one which the statute declares trustees shall not make, and was therefore *ultra vires*.

The trustees, however, say that although the full price was in the first instance paid out of trust funds, they made an arrangement with the liferenter whereby the excess of the price was restored to the trust estate, with the result that ultimately, and before the expiry of the liferent, the investment had cost the trust estate only 100 per cent.

or the redemption value. They argued that the plain object of the proviso was to prevent trustees expending more money on the purchase of stock than the ultimate *fiar* would get back when the stock came to be redeemed, and that as the trust estate had in fact only been diminished by the investment to the extent of the redemption value, the mischief struck at by the proviso had not arisen, and they (the trustees) could not be held to have contravened the enactment.

The argument is plausible, but I do not think that it is sound. The trustees unquestionably invested trust funds in the purchase of the stock at a price exceeding the redemption value, and they must in my opinion take the consequences. It seems to me that the arrangement which they made with the *liferenter* was for their own protection and cannot be pleaded against the residuary legatee, seeing that not only was she no party to the arrangement but that she expressly refused to consent to trust funds being invested in the stock at £102.

Accordingly the trustees are in my opinion in the position of having made an investment of trust funds which was *ultra vires* of them, and consequently they are liable to restore to the trust estate the loss which it has thereby sustained. The first question therefore must in my judgment be answered in the affirmative.

The only other question is whether the late Mr Heron, who was the last of the *liferenters* of the fund in question, by a letter of guarantee which he granted to Mr Beveridge's trustees, became bound to make good any loss which might be sustained on the investment, whatever that loss might be, or only to the extent of the premium, that is to say, the amount by which the price paid for the stock exceeded the redemption value?

The answer to that question depends upon the construction of the letter. In it, after approving of the proposal to invest part of the trust funds in the *Dunfermline Stock* at the price of £102, Mr Heron agreed to accept interest on the money invested at the rate of 2½ per cent. only, and that the balance of the interest actually paid should be set aside by the trustees to form a sinking fund to meet the premium, "or" (I now quote the precise words used) "such proportion thereof as may be lost when the said stock falls to be realised or has been redeemed by the Corporation; such sinking fund, in the event of the said stock not being realised at a loss, to be payable to me and my heirs."

I think that the words "when the said stock falls to be realised" refer to the expiry of the *liferent*, when the sum invested fell to be paid to the residuary legatee. That was the event which happened, because Mr Heron died in 1906, which was prior to the date when the stock might be redeemed. At Mr Heron's death the sinking fund was more than sufficient to meet the difference between the price at which the stock had been purchased and the redemption value. Accordingly if

there had been nothing more in the agreement than the clause which I have quoted, it would not I think have been doubtful that the trustees could only have claimed the sinking fund to the extent of the difference between the purchase price and the redemption value, and that the balance would have belonged to Mr Heron's representatives.

The letter, however, contains another clause in the following terms:—"And in the event of the said sinking fund not being sufficient to meet any loss that may be made on the realisation or redemption of the stock, I hereby agree and declare that the deficiency shall form a charge against my estate."

The whole difficulty appears to me to arise from the use of the words "any loss." If the expression had been "such loss" it would, I think, have been clear that what was meant was loss of the premium or any part of it, because that is the only loss which is referred to in the previous part of the letter. When, however, the letter is read as a whole, I think that it becomes sufficiently plain that that was truly the extent of the obligation. It is evident that the letter proceeded upon the view (as I think, an erroneous view) that if the premium was restored to the trust estate the investment would not be challengeable under the statute. Accordingly, a sinking fund was established for the purpose of restoring the premium out of surplus interest, but in order to meet the possible event of Mr Heron's death before the sinking fund had attained the requisite amount he came under an obligation that any sum required, in addition to the sinking fund, to make good loss of premium should be a charge upon his estate. I do not think that it can be disputed that that was the scheme of the letter, and therefore I am of opinion that the words "any loss" must be construed (as I think they are quite capable of being construed) as meaning any loss to the extent of that which alone was the subject-matter of the letter, namely, the premium.

I am, therefore, for answering the second question in the negative.

LORD STORMONT DARLING—I concur in the opinion of LORD LOW.

LORD ARDWALL—I concur in the opinion delivered by Lord Low, but I confess I have found the case to be one of some difficulty. I think it is obvious that the intention of the proviso of sub-section 2 of section 44 of the Local Authorities Loans (Scotland) Act 1891 was to prevent loss falling on the ultimate beneficiary when the stock came to be redeemed at par value in cases where persons were successively interested in an investment. Indeed, so far as I can see, the statute can have no other object, because it authorises the purchase of the same stocks at par value. Now if any stock happens to stand at more than par value, the only inference to be drawn from that would be that it is a very good security and commands a premium because of its superiority to other stocks of the same

description; therefore so far as the safety of trust investments is concerned there is no reason whatever for the provision of the sub-section in question.

But I think it must be held that in dealing with statutes a court of law is not entitled in considering a prohibition contained in a statute to inquire what the object of the prohibition is, and should the object be the prevention of a loss of some kind, to hold that if the possibility of that loss is obviated, the prohibition of the statute may be disregarded. Such a method of reasoning, if generally applied, would make wild work with the application of statutes, and in my opinion is not permissible.

I think that in this case we must confine ourselves to a consideration of the plain question whether the investment made by the trustees in Dunfermline Corporation Stock was an investment which as trustees they were entitled to make at the time and at the price they did. To this there can be only one answer, to the effect that it was not. The result is that the trustees' actings must be held to have been *ultra vires*, and that they are liable for all loss resulting therefrom, and are not entitled in response to the fourth party's request for payment of £20,000 to tender as part thereof the investment in question, but that they are bound to replace in the trust the price originally paid for the said stock. I therefore concur in holding that the first question should be answered in the affirmative.

With regard to the second question, I think it is clear upon the facts stated in the case that at the time the letter of guarantee of date 21st April 1897 was granted, neither Mr Beveridge's trustees nor Mr Heron had in contemplation any other possible loss than the difference between the par value of the stock and the price paid for it, namely, £102, and that the letter of guarantee was intended to cover only that loss. The clause of obligation, it is true, is ambiguous, but I think it is capable of being read as limited to the loss I have just referred to, and the intention of the parties being as I think evident from the rest of the letter of guarantee as well as from the facts agreed on in the case, I think the second question ought to be answered in the negative.

LORD JUSTICE-CLERK—I concur.

The Court answered the first question in the affirmative and the second in the negative.

Counsel for the First and Second Parties—Blackburn, K.C.—Lippe. Agents—Erskine Dods & Rhind, S.S.C.

Counsel for the Third Parties—The Solicitor-General (Ure), K.C.—Constable. Agents—Watt & Williamson, S.S.C.

Counsel for the Fourth Party—Scott Dickson, K.C.—Macmillan. Agents—MacKenzie, Innes, & Logan, W.S.

Tuesday, March 17.

## SECOND DIVISION.

[Lord Dundas, Ordinary.]

### SOMERVILLE AND OTHERS v. LEITH DOCKS COMMISSIONERS.

*Harbour—Dock—Charges—Statute—Interpretation—Harbours, Docks, and Piers Clauses Act 1847 (10 Vict. cap. 27), sec. 33—Leith Harbour and Docks Act 1875 (38 and 39 Vict. cap. clx), sec. 76—Leith Harbour and Docks Act 1892 (55 and 56 Vict. cap. clxxxvii), secs. 58, 60—Statutory Right of Public to Use Docks and Harbours on Payment of Statutory Rates—Right of Commissioners to Levy Special Charge for Use of Docks.*

The harbour and docks of Leith are under the administration of statutory commissioners whose powers and duties are regulated by the Leith Harbour and Docks Acts 1875 and 1892, with which is incorporated the Harbours, Docks, and Piers Clauses Act 1847.

Under section 33 of the last named Act it is provided that the harbour and docks (defined by section 2 to include "the works connected therewith," and by section 4 of the Acts of 1875 and 1892 to include "the whole other works and property included in the undertaking") shall be open to all persons upon payment of the rates made payable by this and the Special Act, and section 58 of the Act of 1892, with its relative schedules, provides for the payment of ordinary harbour rates. By sections 76 of the Act of 1875 and 60 of the Act of 1892 the Commissioners are entitled to "make all reasonable charges for work done, services rendered, facilities afforded, and use of plant, &c., in so far as such charges are not expressly provided by this Act."

Entrance to portions of the harbour and docks is obtained through locks. For a period of about two hours prior to high water the gates are left open, and vessels can pass directly in or out, but at other times ingress or egress is only possible by using the lock gates.

The Commissioners claimed the right under sections 76 and 60 *supra* to make a special charge for the use of the lock gates, and in the event of non-payment to refuse the right of ingress or egress except during the hours when the gates were open.

*Held* that they had not the right claimed, and that all vessels were entitled, so far as consistent with considerations of safety and accommodation, to use the lock gates free of any charge beyond the ordinary rates, always, however, without prejudice to the statutory powers of the harbour-master under the Act of 1847, and the right of the Commissioners to make bye-laws under the Acts of 1847, 1875, and 1892.