

“ interlocutor ‘ any qualified persons whom he may permit,’
 “ whether his tenant at Ballogie or not, is meant any persons
 “ whom the petitioner may permit, that may lawfully exercise
 “ that permission, whether his tenants in Ballogie or not, and
 “ that this is the true construction of the passage of the inter-
 “ locutor in question, and decerns.”

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Against this interlocutor the appellant reclaimed by petition to the Court, but the Lords adhered.

Dec. 7, 1813.

Against these interlocutors the present appeal was brought to the House of Lords, by the appellant.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Sir Sml. Romilly, Thos. W. Baird,*
Fra. Horner.

For the Respondent, *John Leach, Hugh Lumsden.*

[Fac. Coll., Vol. xix., p. 394.]

WILLIAM MAULE, Esq., great grandson of
 Dr Henry Maule, Lord Bishop of Cloyne,
 in the Kingdom of Ireland, and heir-male
 and representative of the family of Pan-
 mure in Scotland, pursuer, . . . } *Appellant;*

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The Honourable WM. RAMSAY MAULE of
 Panmure, defender, . . . } *Respondent.*

House of Lords, 10th July 1819.

PRESCRIPTION—ENTAIL OF LEASES—DECREE-ARBITRAL—REDUCTION—RES JUDICATA—HOMOLOGATION.—The appellant claimed certain property, as well as leases of property, part of the Panmure estate, settled on him by deeds of entail. The respondent stated that these entails had been held by a decree of the Court in 1782, to be prescribed, and he also founded on a decree-arbitral, wherein these rights were put in issue and finally settled. The appellant brought a reduction of this decree-arbitral, but not of the decree of the Court. The Court of Session repelled the reasons of reduction; and on appeal to the House of Lords, the cause was remitted for reconsideration, and under this remit the Court generally sustained the defences pleaded for the respondent. Reversed in the House of Lords,

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and held, *first*, that the instrument purporting to be a decree-arbitral, ought to be reduced; and second, that the interlocutor of Court in 1782, was not to be considered as final and conclusive against the respondent with respect to the leases in question. *Quoad ultra* affirmed.

This is an appeal in regard to the reduction brought of a submission and decree-arbitral, which had followed on a decision in a depending cause, pronounced by the Court of Session of 1st and 4th March 1782, which sustained the entails of the leases of Panmure and Brechin, parts of the property belonging to the family of Panmure, but held the deeds of tailzie (1730) of the estate of Kelly and Balumbie were cut off by the negative and positive prescription. In this competition, Thomas Maule, the appellant's father, had claimed the whole property in dispute, as heir-male under these deeds of entail, executed in 1730; and he was opposed by the late Earl of Dalhousie, for himself, and as administrator-at-law for the respondent, his second son, founding on a settlement adverse to *the entails*, which had been executed by the late Earl of Panmure, in October 1781, in favour of the respondent.

The grounds of reduction were, 1st, That, "although *ex facie* of the foresaid pretended submission, it bears to be a reference of the depending processes, and various points of dispute between the parties therein named, yet, in fact, it was not a submission, but only a bargain, covenant, or agreement of a nature essentially different from what in law is held and understood to be a regular and proper submission or reference; and the said pretended decret-arbitral following thereon, is false, feigned, and destitute of truth. It sets forth that the arbiters had considered the claims of the parties, and had God and a good conscience before their eyes, and were ripely advised therewith." Whereas, the truth is, that "the said arbiters never heard parties on, nor considered their claims, nor had any power whatever so to do, under the said pretended submission. They were fettered and bound down by a previous agreement, to pronounce the said pretended decret-arbitral in the terms in which it is given forth; and were not at liberty to exercise, nor did they exercise their own judgment and discretion upon the questions apparently submitted to them. 2d, The parties to the said pretended submission, bargain, covenant, or agreement, whereon the

“ said pretended decret-arbitral proceeded, had no power
 “ to bind the pursuer, as heir of tailzie, to give effect to the
 “ same, or abide thereby. And, therefore, the same, with
 “ the service of the pursuer as heir male and of provision
 “ under the said pretended decret-arbitral, and whole acts
 “ and deeds done by the pursuer, on the ground and under
 “ the erroneous conception of its being a fair decret-arbitral,
 “ pronounced upon a solemn and legal submission by arbiters
 “ at full liberty to exercise their own judgment upon the
 “ points apparently submitted to them, are null and void so
 “ far as regards the pursuer, and not binding on him. And
 “ it being so found and declared, the said Hon. William
 “ Ramsay Maule, defender, ought and should be decerned
 “ and ordained by decret foresaid, to flit and remove himself
 “ and servants from the lands,” houses and parks mentioned
 therein.

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In defence to this action, the following defences were given.

1st, The two deeds of entail and separate obligation on which the pursuer founds his title to insist in the present action, and his alleged general service, in terms thereof, have not been produced in process.

2d, Among the deeds sought to be reduced, is the disposition and deed of entail executed by William, Earl of Panmure, of the lands, baronies and others therein enumerated, and particularly of the lands and baronies of Kelly and Balumbie, in favour of himself and his heirs of tailzie therein mentioned, by virtue of which disposition and tailzie, the defender now possesses the lands. But, as the heirs of tailzie substituted to the defender, have an interest, they ought to have been called.

Separatim.—The lands of Balumbie were, several years ago, sold under the authority of an Act of Parliament for redemption of the land-tax, and the present proprietor of these lands ought also to be called.

3d, The deeds of entail do not afford any title to the pursuer to insist in the present action, as they have long ago been extinguished by prescription, both positive and negative.

4th, It has been already determined by this Court, as far back as March 1782, that the two deeds of entail and obligation libelled on, were extinguished by prescription, both positive and negative, and the decree of the Court was shortly thereafter extracted. The subject matter of the present action is, therefore, *res judicata*.

5th, Even on the supposition that the pursuer had any

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existing title under the deeds libelled on, he could not be heard in the present action, until he had previously set aside the extracted decree of this Court, in March 1782.

6th, Homologation of the transaction gone into.

The Court of Session repelled the reasons of reduction, and against their judgment, an appeal was taken to the House of Lords.

March 9, 1813.
Vide Dow's
Reports, vol. iv.

Under this appeal, the case was fully heard in the House of Lords; after which,

The LORD CHANCELLOR said,*

“ My Lords,

“ The appellant is the great grandson of Dr Henry Maule, Bishop of Cloyne, and heir male of the family of Panmure in Scotland.

“ The appeal is brought against an interlocutor of the Second Division of the Court of Session of the 9th of March 1813 (which his Lordship read).

“ The Court was equally divided at pronouncing this interlocutor, till Lord Pitmilley was called in. Those Lords who were in favour of the interlocutor said it was a case of great difficulty.

“ It is unnecessary for me to state to you the proceedings out of which the judgment of the Court of Session, in 1782, arose. These are detailed in the first, second, and third pages of this paper of the appellant's.

“ On the 1st of March 1782, the Court pronounced this interlocutor (Here his Lordship read the same). Your Lordships will observe that in this interlocutor, the Court found that certain entails of the estates of Kelly and Balumbie were cut off by the positive and negative prescription; but they found that the entail made as to certain leases still subsisted, and that Lieutenant Maule had a right to take up these by service. The property which was the subject of these leases, is stated to have been very valuable.

“ It appears that an appeal had been entered against this judgment, in regard to the leases, on the part of the Earl of Dalhousie; but an arrangement was afterwards entered into, which superseded this appeal. The discussions, with regard to this arrangement, appear to have been carried on between Mr Campbell, afterwards Sir Ilay Campbell, counsel for the Earl of Dalhousie, and Mr Wight, counsel for Lieutenant Maule. It was completed in what was called a submission, which bore date the 30th of March 1782, and in what was termed an award, which was made as early as the 2d of April thereafter. That award was in substance as follows:—

(Here his Lordship read the substance of the decree-arbitral from the fourth page of the appellant's case, affirming the inter-

* Taken by Mr Robertson

locutor so far as regarded the estates of Kelly and Balumbie, and reversing that part of it which regarded the leases given to Lieutenant Maule; but granting £3500 to be vested in trustees for Lieutenant Maule and the substitute heirs.)

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“I should have noticed that Lord Braxfield, then one of the judges of the Court of Session, had been named oversman in the submission, and it is said to have been principally owing to the weight of his opinion, that the leases had been given to Lieutenant Maule, in the judgment of 1st March 1782; I should have noticed also that, according to the submission, the award was to be given in eight days from its date.

The appellant's case goes on to show why no proceedings had been taken on his part till 1809; but that various documents having then been discovered, he then brought his action, calling for production of the submission and decret-arbitral, and for reduction of them.

(Here his Lordship read the conclusions of the appellant's summons.)

Your Lordships will observe that this action insists that there was in fact no true submission and decret-arbitral, but an agreement which was put into that form, and claims that the respondent should be removed from possession of the subjects contained in the leases, and should account for the profits. What relief the Court would have thought the appellant entitled to, if they had thought this a bad submission and decree-arbitral, we don't know; the majority of the Court were of an opinion which precluded the necessity of there stating what ought to be done, if the submission and decree-arbitral were set aside.

“In these papers I find several questions very ably discussed, which it is not necessary for us to give any opinion upon.

“The first question made in the appellant's case is, If the interlocutor of 1st March 1782, be well founded or not? This may be a very important question, but the Court having given no opinion upon it, we cannot give an opinion upon it; where no decision is given in the Courts below on any point, your Lordships religiously adhere to giving no opinion upon that point; this is more particularly to be attended to in cases from Scotland. In the course of the able argument of Mr Murray,* I intimated that we could give no opinion as to this, and that the only question before us was, if this was a transaction or a submission and decree-arbitral. The same observation applies to the second point made by the appellant, namely, that Lieutenant Maule had no power to enter into a transaction that should affect his son the appellant, then a minor. A similar observation may be made, on the point of *homologation*; it was said by some of the judges, that the homolo-

* Now Lord Murray.

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gation could only be construed to extend to this as a decree-arbitral. If your Lordships shall be of opinion that this was a decree-arbitral, homologation was not necessary; if you shall think otherwise, we have no judgment of this Court upon this matter of homologation.

“The only question before us is, if this be a real submission and decree-arbitral, or only an agreement in that form.

“When I come to discuss this question, it would be a most painful duty to me, if I thought that by any opinion I had formed, I acceded to imputations which have been made, upon the arbitrators, from the bar, or in these papers. In the early part of my life, I have stood at that bar with Mr Wight; with regard to that eminent person, Sir Ilay Campbell, I have known him long and intimately.

“We should impute much too strongly against mankind, if we took this up in the manner it has been urged. These gentlemen, who were counsel on opposite sides, appear to have fallen into this mode of arrangement by decree-arbitral.

Vide ante, vol.
iii., p. 378.

“We heard a good deal of the case of Mr Mackenzie and the York Buildings Company. I know that Lord Thurlow never thought of imputing immoral conduct to Mr Mackenzie, and it was matter of perfect surprise to me now to hear that any imputation of that kind could be brought against him.

“I remember, it was stated, that even judges had been purchasers at judicial sales. But the proceeding was dangerous, not because Mr Mackenzie had not given as much as another, but because, as he had more knowledge of the subject than any others could have, the policy of the law did not permit him to be a purchaser.

“If we come to the question, if this was a real submission, and decree-arbitral or not, I hold it to be the duty of an arbitrator, to go into that room, to make an award precisely as a judge; though he is named by one party, he is indifferently arbitrator between both; and his duty to both is the same as the duty of the king's judges towards the king's subjects.

“I call your attention again to the judgment of 1st March 1782. It finds that Lieutenant Maule had a right to take up certain leases, which are said to have been worth £50,000. I lay the value, however, entirely out of the question.

“Against this judgment, Lord Dalhousie entered an appeal to this House. This is noticed in Mr Wight's letter of the 24th of March 1782, to have been a matter understood between the parties.

(Here his Lordship read this letter.)

“Something was said of the expression ‘*flurried a little*’ in the postscript of this letter. I lay this out of view, however, altogether.

“Another letter appears from Mr Wight, of the 29th of March, the day before the submission was entered into, which is very important.

(Here his Lordship read the same.)

“ This is the statement of Mr Wight, who must have held the character of arbitrator as well as Mr Campbell, otherwise the award was void. Do I characterize this letter too high, when I say, that it affords evidence that Mr Wight spent three hours with Mr Campbell, the other arbitrator, discussing what one party should take and the other should give for these leases; the one struggling to bring the other to a higher sum than £3500, which the other positively refused to give; and that thereupon advised Lieutenant Maule to accept this offer, and he requests to know, whether Lieutenant Maule meant to act upon the terms proposed by the party, as they *expected a speedy answer*.

“ The submission bears date the 30th of March. The scroll has been discovered drawn out by Mr Leslie, Lord Dalhousie’s agent, who, you will recollect, is mentioned in the letter of the 24th of March, in which it is said, that if he had been at home, there would have been no attempt at a service of the appeal.

“ If there had not been a speedy answer, the scroll of the submission could not have been drawn out as we see it, and corrected as we see it afterwards was.

“ Mr Leslie draws it out, stating that a treaty was entered into between the counsel for the parties and a verbal agreement made, of which the import is set out in the scroll.

(Here his Lordship read the draft of the submission.)

“ This scroll, of considerable length, must have been drawn out by Mr Leslie between the afternoon of 29th March, and the 30th, when it was executed. It must have been drawn out either from information or conjecture; whether from the one or the other your Lordships will have to infer from what was written in the letter of the 29th of March.

“ Mr Campbell strikes out of the draft, all that relates to the agreement, and makes it an ordinary submission.

“ On the 2d of April, the arbitrators proceed to make their award. It will be recollected, that an interlocutor had been pronounced by the Court, on the 1st of March 1782, finding that the entails of the estates of Kelly and Balumbie were cut off by prescription, and that these estates belonged to the respondent; and finding as to the leases (chiefly as was said from the weight of the opinion of Lord Braxfield, who had been named oversman in the submission) that these belonged to Lieutenant Maule as heir of entail.

(Here his Lordship read the first part of the award.)

“ Here you see, that the arbitrators make the interlocutor in all respects in favour of Lord Dalhousie, and in all respects against Lieutenant Maule.

“ Then we come to a clause, of which I wish to speak with circumspection; but, I am persuaded, that no court of law in this

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country could sustain an award with such a clause ; for in it both arbiters are of opinion, both for and against each party.

(Here his Lordship read that clause in the award, which begins with these words, and ‘ as we conceive it to be just and reasonable,’ &c.)

“ We find here given, the very sum mentioned in the letter of the 29th of March ; it does everything that had been recited in the draft as the verbal agreement of parties, except in giving the sum awarded in remainder to the heirs of entail.

“ Then we have a clause to prevent any attempt being made to break the award.

(Here his Lordship read the same).

“ Upon the whole, we find mentioned in Mr Wight’s letter, the sum that Lord Dalhousie had agreed to grant. We see the scroll which was intended to carry this into effect. We see this scroll altered so as to resemble an ordinary submission, and two days afterwards we find an award, carrying into effect the very things which we see had been previously agreed to.

“ I don’t think that we should consider this as affecting the characters of the parties ; but we must deal with this as an ordinary case. I cannot consider this as any thing more or less, than an agreement under the colour of a decree-arbitral. I am of opinion that we must set aside this as a decree-arbitral.

“ What will be the consequences of this, I don’t know ; these consequences were not gone into by the Court, and cannot be gone into here.

“ It was proposed to us to decide at once in favour of Lieutenant Maule, on the further points, and not to send the cause back ; but this, according to my view, cannot be done.

“ I should propose, therefore, that your Lordships should find that there was no decree-arbitral in this case, and remit the cause to the Court to proceed accordingly.”

May 10, 1816.

The following judgment was then pronounced: “ Find,
 “ That in this action and proceeding between the present
 “ appellant and respondent, the alleged submission, and
 “ alleged decree-arbitral, of the respective dates of the 30th
 “ March 1782, and 2d April 1782, ought not to be con-
 “ sidered as being, or having in law the effect of, a submis-
 “ sion or decreet-arbitral ; but as a form adopted, in which
 “ an agreement, previously made between Thomas Maule, the
 “ pursuer’s father, and George, Earl of Dalhousie, parties to
 “ the said submission, was concluded ; and remit to the Lord
 “ Craigie, Ordinary, to hear the parties, and to proceed
 “ accordingly to what shall appear to him to be just and
 “ consistent with this finding.”

On the case returning to the Court of Session, Lord Craigie, the Ordinary, ordered memorials on the whole cause to be boxed, with a view to report the case to the Court; and this having been done, further informations were ordered by the Court, and the Lords pronounced this interlocutor: "The Lords having resumed consideration of the mutual memorials for the parties, with the additional informations and whole circumstances of the case, sustain the defences pleaded for the defender, assoilzie him and decern."

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Dec. 2, 1817.

Against this interlocutor the present appeal was again brought to the House of Lords.

Pleaded for the Appellant.—1st, The plea of homologation does not apply, because the acts founded on were, in the first place, done under mistake or misapprehension. This mistake proceeded not from *inadvertency alone*, but was occasioned by some deception used by the other party, for the purpose of obtaining homologation. Homologation is the acceptance of a transaction or deed by an approbatory act of the party. Approbation, however, is an operation the mind is incapable of without a previous *knowledge of the thing to be approved*. Knowledge of the thing to be homologated is, therefore, the essence of homologation; and unless that essence is entirely given up, it is impossible to hold that acts done as applicable to deeds, under *the belief* that they were a real submission and decret-arbitral, can be held applicable to the same deeds, after they have been discovered to be quite different from what the party *believed them* to be, when the acts were committed.

If the appellant disbelieved that those instruments were a transaction, it does not follow, as a necessary *consequence*, that he must have believed them to be a decret-arbitral, because they might have been neither. But if he did *believe* them to be a decret-arbitral, it does follow, as a *necessary consequence*, that he could not believe them to be a transaction; for these two things are quite different, and he could not believe them to be two different things at one and the same time. The most effectual way, therefore, in which the appellant can prove his ignorance, that the instruments in question were a transaction, is to bring forward such evidence as will fully convince all, that *he believed* them to be really a submission and decret-arbitral, as contra-distinguished from a transaction; and it appears, the respondent has himself furnished that evidence, as follows: By the letter from the appellant to

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the respondent, of 7th September 1794. His letters, also, to the trustees, prove that he was under the impression that the instruments in question were a submission and decret-arbitral.

2d, If the instruments in question were also a transaction, they were none such as could be binding on the appellant. The respondent has all along pleaded, that these instruments bound the appellant as a transaction, even though not good as a submission and decret-arbitral. How they were made to assume, also, the form of a transaction, has not been explained. But, now, that these instruments are set aside as a submission and decret-arbitral, they can now be supported and set up only as a transaction, *in equity*. It is a fixed rule in equity, that where a deception has been made use of, either *suppressionem veri*, or *suggestionem falsi*, it renders the transaction, whatever may have been its nature, utterly void. As to how far deception was made use of against the appellant, he will trouble the House with a single observation, in addition to what is apparent from the narrative in this appeal. But, as the instruments in question are now to be pleaded up as a transaction of Lieutenant Maule's valid *per se*, it is necessary to show that deception lies at the root of it, and was practised, in a most material and important particular, against *Thomas Maule himself*. In particular, in consequence of the representation of Mr Wight, advocate, in his letter to Thomas Maule, which set forth that, in the event of his and his son's death, Lord Dalhousie would exclude his daughters, and upon this representation, £500 of his claim was given up, although the point of law was clearly erroneous.

Further, the instruments cannot be held good and valid as a transaction *per se*, because, where they have been set aside on grounds which strike at the validity of all instruments—when they are reduced on the head of force or fear, or of fraud, or circumvention, they cannot stand good to any other legal effect. It was not a transaction by Thomas Maule himself, under the pretence that by himself alone he could effectually cut down the entails, for he acted as administrator for the appellant, *whose right*, under the entails, was thereby acknowledged; and therefore the transaction, in fact, was not Thomas Maule's own transaction. Again, the forfeiture, in the event of challenge, was levelled against the appellant *nominative*, which was another direct acknowledgment of his right. Again, Lord Dalhousie sold his claim under the en-

tails for the above abatement of £500, or what is the same thing, if not worse, Thomas Maule was made to believe so. The validity of the entails, therefore, was part of the *compromise*, which cannot be pleaded against itself. In fact, the whole proceedings in 1782, on both sides, went on the principle, and were concluded on the understanding, that the entails were valid; and now, in 1818, when it is wanted to get rid of them, they are held to have been the reverse of valid.

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3d, Even supposing the decision in 1782 still open, without any previous reduction, the respondent does not represent the original lessees, in the tack of the Mansion House and Parks of Brechin, &c., or Lord Panmure, in the leasehold rights, and therefore is not entitled to enter into any question of prescription regarding them.

4th, That the decision of the Court of Session, 4th March 1782, sustaining the entails of the leases of Panmure and Brechin, was well founded.

Pleaded for the Respondent.—1st, If the entails of the leases founded on were ever effectual in law, they had been entirely cut off by prescription, before the claim was made on them by Lieutenant Maule, the appellant's father, in 1781.

2d, The agreement, or transaction, by which Thomas Maule, for himself, and the appellant, his son, settled a depending lawsuit of very doubtful issue, and for a valuable consideration renounced to the landlord, every claim under the entails or leases, followed by possession, was in itself, an effectual transaction to bar the present claim.

3d, The pursuer is barred from challenging the agreement by his representation of Thomas Maule, and by homologation.

After hearing counsel,

It was ordered and adjudged that the interlocutor complained of be, and the same is hereby reversed, so far as it is inconsistent with the order of this House of the 10th of May 1816, remitting the cause back to the Court of Session to review the interlocutor of the 9th of March 1813, complained of in the former appeal, and so far as it sustains generally the defences pleaded for the defender, and except as hereinafter expressed. And it is further ordered and adjudged, that the instrument of 2d April 1782, purporting to be a decret-arbitral, ought to be set aside and reduced as a decret-arbitral,

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affecting any rights of the appellant. And it is declared that the interlocutor of the 1st of March 1782, is not to be considered as final and conclusive against the respondent, with respect to the leases in question. And, therefore, as to so much of the appellant's action of reduction and declarator, as seeks a declaration of the rights of the appellant to such leases, it is further ordered and adjudged, that the said interlocutor of the 2d December 1817, be affirmed, but without prejudice as to any question between the parties, in any other action touching any property comprised in the deeds of tailzies in the pleadings mentioned.

For the Appellant, *Alexr. Macconochie, Geo. Cranstoun,*
Wm. Erskine.

For the Respondent, *John Clerk, Jas. Moncreiff, H.*
Brougham, John A. Murray.

 [Fac. Coll., Vol. xvi., p. 242.]

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 HUNTER, & C.
 v.
 M'GOWN, & C.

JAMES HUNTER & Co., Merchants in Greenock,	<i>Appellants ;</i>
ARCHIBALD M'GOWN, Merchant in Greenock, and Others, Owners, and JOHN M'GIBBON, Master of the Gab- bart "Janet" of Greenock,	} <i>Respondents.</i>

House of Lords, 12th July 1819.

LIABILITY OF CARRIERS BY WATER—DAMAGES FOR LOSS BY FIRE.

—Goods were lost by fire while on board a lighter at Greenock, to be carried to Glasgow. In an action for the value of the goods destroyed, against the owners of the lighter. Held that they were protected by the Act 26 Geo. III. c. 86, exempting shipowners from loss or damage to goods by fire. In the House of Lords, remitted, with a declaration that the Act did not apply to owners of gabbarts or lighters engaged in inland or river navigation.

The produce of *foreign markets* arriving in the Clyde, was (at the time of this appeal) discharged at Greenock and the Port of Glasgow, from the large vessels in which it was imported, and it was afterwards carried from these places to Glasgow and elsewhere, in small craft called gabbarts or lighters, which ply upon the river Clyde, and Forth and Clyde Canal.