

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The House of Lords.

THE EDINBURGH AND GLASGOW } APPELLANTS.
RAILWAY COMPANY,

THE MAGISTRATES AND TOWN } RESPONDENTS.
COUNCIL OF THE ROYAL BURGH
OF LINLITHGOW,

BRANCH I.—BURGH CUSTOMS.

BY charter of Robert II., under the great seal of *Scotland*, dated at *Linlithgow* the 23rd of October, 1389, his Majesty gave and granted as follows:—Robertus, Dei gratia, Rex Scotorum, omnibus probis hominibus tocius terre sue clericis et laicis, salutem. Sciatis quod concessimus et ad firmam dimisimus burgensibus et communitati burgi nostri de Linlithcu dilectis et fidelibus nostris, burgum nostrum predictum (a), una cum portu de Blacknes, firmis burgi, et parvis customis ac toloneis cum curiis et curiarum exitibus et ceteris justis pertinentiis quibuscunque, tenendum et habendum, &c. in feodo et hæreditate, &c. Solvendo inde nobis et heredibus nostris dicti burgenses et communitas et eorum successores in Cameram regiam

(a) The terms of this charter are peculiar. The King grants to the burgesses and community “His burgh of Linlithgow;” thereby placing them to a certain extent, as the magistrates contend, in the regal shoes.

1847.

1848.

1849.

Certain Royal grants authorised the Magistrates of Linlithgow to levy certain tolls and customs. These held to be demandable from the Railway Company. On appeal, the cause ordered to be remitted, with directions for a “Hearing in Presence,” and with liberty to open up the record, and to amend the pleadings. Opinions of the thirteen Scotch judges upon the question how far and in what sense immemorial usage is to be taken as explanatory of a Charter from the Crown; and how far and in what sense a *consideration* is necessary to render such Charter effectual.

Position of the Record consequent on the Remit.

E. & G. R. Co.

v.

M. OF
LINLITHGOW.BRANCH I.
Burgh Customs.

quinque libras sterlingorum annis singulis et terminis consuetis, &c.

By charter of James VI., under the great seal of *Scotland*, dated at *Holyrood-house*, the 24th May, 1593, his Majesty gave and granted as follows:—*Jacobus Dei gratia, Rex Scotorum, &c.* Quia post nostram etatem viginti quinque annorum completam, nostrasque revocationes tam speciales quam generales ratificavimus approbavimus ac pro nobis et nostris successoribus pro perpetuo confirmavimus duas cartas et infeodationes burgi de Linlithgow subsequentes; quarum una facta est per quondam Robertum, Dei gratia, Scotorum regem, burgensibus et communitati dicti burgi de Linlithgow, eorumque successoribus pro perpetuo, de predicto burgo una cum portu de Blacknes, firmis burgi et parvis custumis ac toloneis, cum curiis ac curiarum exitibus, et ceteris justis pertinentiis quibuscunque, tenenda in feodo et hereditate;—et altera dictarum cartarum facta et concessa per quondam Jacobum, (a) Dei gratia, regem Scotorum, dictis burgensibus et communitati predicti burgi de Linlithgow, ipsorum heredibus et successoribus burgensibus ejusdem; Illis dantes et concedentes ut ipsi, perpetuis temporibus tunc futuris, liberi, absoluti, et quieti essent ab omni solutione custume salis et pellium, vulgariter dictarum schoirlings, futefailis, scaldingis, lentrenwair, lambskynis, todskynis, calfskynis, cunyngskynis, otterskynis, et fowmartskynis; et quod mercatores et burgenses de Linlithgow, eorum heredes et successores burgenses dicti burgi, quieteclamati et exonerati essent de omni solutione ejusdem imperpetuum. Et similiter volentes et concedentes burgensibus et communitati prefati burgi liberam facultatem et potestatem mercandizandi, vel in excambium

(a) This charter, *per quondam Jacobum*, is a charter by James II. dated the 11th January, 1451. See recital of the act of the Scottish Parliament of 20th May, 1661, *infra*, p. 5.

aut alias permutandi, tam extraneis personis et non liberis quam aliis personis quibuscunque, tam infra quam extra hoc regnum, predicta mercimonia salis et pellium absque ulla custuma per ipsos extraneos, aut alios quoscunque, ullis temporibus tunc futuris persolvenda: ac omnes alios et singulos punctus, articulos, et clausulas in dictis duabus infeodationibus contentos, unacum omnibus et quibuscunque aliis infeodationibus, donationibus, et juribus quibuscunque, per nos aut ullos alios nostros predecessores factis et concessis burgensibus, incolis et communitati dicti burgi de Linlithgow, super eodem burgo, vel super dicto portu de Blacknes, seu quibuscunque pertinentiis, privilegiis, immunitatibus, asiamentis, libertatibus, custumis, proficuis vel commoditatibus ad eundem spectantibus, quibusvis temporibus preteritis. Volentes et declarantes quod eedem et eadem stabunt et efficaces et efficaciter erint in futurum pro perpetuo. Insuper nos considerantes quod illustrissimi nostri predecessores dignissime memorie, respectu incrementi edificiorum et policie in dicto burgo de Linlithgow, in utilitatem et commodum nostrorum liegiorum et in honorem nostri regni, ab antiquo fundarunt et erexerunt dictum burgum de Linlithgow in liberum burgum regalem, eundemque dotarunt omnibus privilegiis et libertatibus libero burgo spectantibus; itaque dictus burgus hactenus fuit unus principalium burgorum nostri regni; tametsi temporis injuria et iniquitati, necnon interventu variarum turbarum, idem nunc maxime decrevit. Igitur et ut dictus burgus ad antiquum suum statum et pristinam integritatem in omnibus privilegiis et libertatibus libero burgo spectantibus restituatur et restauretur, cum extensione privilegiorum et libertatum, et pro incremento politie, et quod magis decora edificia in eodem postea construerentur; ac etiam pro bono, fidei, et gratuito servitio nobis in omnibus temporibus preteritis per incolas et communi-

E. & G. R. Co.
v.
M. OF
LINLITHGOW.
—
BRANCH I.
Burgh Customs.

E. & G. R. Co.
v.
M. OF
LINLITHGOW.
—
BRANCH I.
Burgh Customs.

tatem ejusdem burgi de Linlithgow impensis, et variis aliis rationalibus causis et considerationibus nos moventibus; nunc post nostram etatem, et revocationes supra-mentionatas, ex nostra regia auctoritate, regalique potestate, proprio motu, et ex certa scientia, de novo, presentium tenore, pro nobis et successoribus nostris, infeodamus, erigimus, damus, concedimus, disponimus, et pro perpetuo confirmamus, dicto burgo de Linlithgow, burgensibus, inhabitantibus et communitati ejusdem, Totum et integrum dictum burgum cum dicto portu de Blacknes, firmis burgalibus, parvis custumis, et tholoneis supra specificatis, et cum reliquis particularibus privilegiis et libertatibus supra-mentionatis, unacum omnibus aliis et singulis libertatibus, privilegiis, immunitatibus, liberis, nundinis, custumis, privilegiis, proficuis, commoditatibus, et devoriis quibuscunque dicto burgo de Linlithgow prius spectantibus, et que et quas prepositus, balivi, consules, et communitas ejusdem, vel eorum predecessores, quovis tempore preterito possidebant et gaudebant. Et similiter damus, concedimus, disponimus, et pro nobis nostrisque predictis imperpetuum confirmamus, preposito, ballivis, consulibus, burgensibus, et inhabitantibus, et communitati dicti burgi de Linlithgow, et eorum successoribus, burgensibus et inhabitantibus ejusdem, Totam et integram communem moram et cummunes terras pertinentem et spectantes dicto burgo de Linlithgow, per omnes bondas et limitas prout propositus, ballivi, consules, et communitas ejusdem, et eorum predecessores, pacifice gavisi sunt et perambularunt annuatim temporibus elapsis, unacum dicto portu de Blacknes, viridario eidem adjacente, ac domibus et hortis in Blacknes ab antiquo dicto burgo spectantibus, et quas ipsi et eorum predecessores pacifice ultra hominis memoriam omnibus temporibus preteritis possiderunt; cum omnibus custumis, anchoragiis, et omnibus aliis casualitatibus libero portui spectantibus; una

cum fructibus, redditibus, terris, proficuis et emolumentis quibuscunque spectantibus ad capellaniam nuncupatam capella Sancti Niniani in dicta villa de Blacknes situatam, cujusquidem capellanie patronatus et donatio preposito, ballivis, consulibus, et communitati dicti burgi, per infeofamentum ipsis desuper per predecessores nostros confectum, spectabat, per omnes bondas, metas et divisas, prout dictus burgus semper in usu fuerunt, et pacifice prius possiderunt, unde dictus burgus possit melius sustinere ministros verbi Dei et pauperes infra eundem.

E. & G. R. Co.
v.
M. OF
LINLITHGOW.
—
BRANCH I.
Burgh Customs.

This charter of James VI. contained a precept of seisín, upon which infeftment followed, as appears by an instrument to that effect, dated 4th December, 1593; and the charter itself was further confirmed and fortified by an act of the Scottish Parliament, passed on the 8th of June, 1594.

By an act of the Scottish Parliament, passed on the 20th May, 1661, King Charles II., with the advice and consent of his estates in Parliament, ratified, approved, and confirmed to the provost, baillies, council, burghesses, and community of the burgh of *Linlithgow*, sundry royal grants which had in former reigns been made in their favour; namely, (1.) The above recited charter of Robert II. (2.) A charter of James II., dated 11th of January, 1451. (3.) The above recited charter of James VI. (4.) A charter of James V., dated the 31st of August, 1540. (5.) A charter of James VI., dated 8th of May, 1591. (6.) A charter of James VI., with the advice of his secret council, dated 1st of December, 1601. (7.) A charter of Charles I, dated 11th of February, 1633. (8.) A ratification and confirmation of the said several charters passed upon the 17th of November, 1641. And by the said act of 20th of May, 1661, it was declared that the ratification expressed by it “of the charters and rights aforesaid”

E. & G. R. Co.
 v.
 M. OF
 LINLITHGOW.
 ———
 BRANCH I.
Burgh Customs.

should be as valid and effectual “as if the same and every one of them were at length specially engrossed and inserted de verbo in verbum in this present ratification.”

The Magistrates by their summons and condescendence alleged that in pursuance of the foresaid charters and acts of Parliament, they had been in use from the earliest periods to exact, for the benefit of the burgh, certain tolls or customs “on all commodities, goods, cattle, and others brought into the burgh, whether intended for consumption and sale within the burgh, or simply passing through it; and also, to exact certain dues or anchorages on goods landed at the port of *Blackness*, or shipped therefrom. And that so far back as November, 1699, they had rectified and set down a table of such their town customs; and that in conformity with such table, in pursuance of the said charters and acts of Parliament, and in conformity with immemorial usage following thereon, they had been accustomed regularly to exact and levy the rates therein set forth on all goods brought into or passing through the burgh; at all events for the period of forty years, or from time immemorial.” Such was the general allegation of the Magistrates applicable to the state of things prior to the year 1838, when the Company obtained their act, authorising them to make a railway from *Edinburgh* to *Glasgow*, passing through *Linlithgow*.

The summons and condescendence further stated, that in February, 1842, the line was opened (*a*), and alleged that “since that time, numerous carriages or trucks, carrying cattle, horses, goods, and other commodities, chargeable with burgh custom, passed daily into or through the burgh, whereby the Pursuers were entitled to demand and levy from the Company the

(*a*) The action was not commenced on the immediate opening of the line. The summons is dated, and signeted, 12 January, 1843.

dues payable thereon, conformably to the custom table." And the conclusion of the summons was "that it should be found and declared that the Pursuers were entitled to exact and levy burgh customs on all goods transported along, or brought by the said railway within the said borough, whether for sale, use, or consumption, or carried out of, or through the same, conformably to the said table, charters, and acts of Parliament, and to immemorial usage and wont, prior to the formation of the said Company's Railway." There was also a conclusion for an account, and for payment.

E. & G. R. Co.
v.
M. OF
LINLITHGOW.
—
BRANCH I.
Burgh Customs.

The defence made by the Company was, 1. A general averment that the charters and acts of Parliament relied upon by the Magistrates did not support their claim. 2. That these charters and acts of Parliament did not apply to goods, cattle, &c., passing through the burgh by means "of the improvements and scientific inventions of modern times." 3. That there had been no use and wont to sanction the claim. 4. That the Company were merely *carriers*.

The record having been closed, counsel were heard in the Court of Session, before the *Lord Ordinary* (Lord *Wood*); who, by his interlocutor of the 21st of December, 1844, found as follows:—

"That the charter of the 23rd of October, 1389, the charter of confirmation, of the 24th of May, 1593, and the ratifications in Parliament in 1594, and in 1661, afforded a sufficient title to the Magistrates, not only to levy dues or customs on goods, and other things brought within the burgh for sale, use, or consumption, or carried out of the burgh; but, if so explained and supported by usage, to levy dues or customs on goods or other things passing or carried through the burgh; and, therefore, that, prior to the passing of the Edinburgh and Glasgow Railway Company's Act, the Magistrates had a sufficient title to levy such dues and

E. & G. R. Co.
v.
M. OF
LINLITHGOW.
—
BRANCH I.
Burgh Customs.

customs on such goods or other things, whether brought within, or carried out of, or passing, or carried through, the burgh as they had been in the practice of levying from time immemorial, or at least for forty years prior to the passing of the said act: And, further, that goods or other things transported by the railway of the Company were not by the foresaid act exempted from liability for said dues or customs: And that the Magistrates in virtue of the foresaid title had right to levy the same dues or customs on the same goods and things brought within, or carried out of, or passing or carried through, the burgh, by the railway of the Company, as in any other case.” And all defences inconsistent with these findings, his Lordship repelled.

A Reclaiming Note having been presented by the Company to the First Division of the Court of Session, consisting of the *Lord President (Boyle)*, *Lord Mackenzie*, *Lord Fullerton*, and *Lord Jeffrey*, their Lordships on the 17th of July, 1845, were pleased to confirm *Lord Wood's* interlocutor. Hence the present appeal.

1847.
25th, 29th, and
30th March,
and 19th April.

Mr. Bethell, *Mr. Hope*, and *Mr. Penney* for the Company, contended (a) that the terms, “customs, and tolls,” used in the old charters and acts relied upon by the Magistrates, were terms not properly applicable to the species of transit duty claimed in the present suit. Such customs and tolls were chargeable only upon goods brought into the burgh for sale or consumption, or made within it for disposal elsewhere. They denied that any charter could warrant the exaction of duties on commodities simply passing through the burgh. The acts of Parliament said to confirm these ancient grants were not proper laws, but mere private enactments, which were liable, on sufficient cause shown, to be reduced and set aside by the Court of Ses-

(a) This argument is taken from the notes of *Mr. Bell*.

sion (a). The claim advanced was subject to the same principle as that which governed *toll thorough* in England. Where such a toll is imposed there is always a consideration to support it; a benefit moving to the party subject to the exaction. There must be a *quid pro quo*; and the consideration must be co-extensive with the right asserted. Thus in an old English case (b), the Court emphatically observed that the inheritance of every man to pass along the king's highway was before all prescription. What consideration, then, must the Claimant show for his demand? He must show a benefit redounding to the public, whose right is sought to be abridged or invaded. In *Brett v. Beales* (c), it was determined not to be enough that the Claimant of a toll repaired *certain* streets; for it was held that he must be bound to repair the particular way or thoroughfare along which the article, in respect of which the toll is claimed, passes. This is the law of England. The Scotch law corresponds. In *The Town of Linlithgow v. The Fleshers of Edinburgh* (d) it was decided upwards of two centuries ago, that "all the king's lieges have liberty to drive their goods through the king's public ways and streets." And the claim advanced in that case was negatived upon a principle precisely applicable to the present. It will be alleged on the other side, that *The Fleshers' case* has been over-ruled by subsequent decisions; but this is not so; for the case of *The Magistrates of Lauder v. Brown* (e), which is supposed to be inconsistent with it,

. & G. R. Co.
v.
M. OF
LINLITHGOW.
—
BRANCH I.
Burgh Customs.

(a) Erskine's Institute, B. 1, T. 1, §. 39.

(b) *Smith v. Shepherd*, Moore, 574; Cro. Eliz. 710; Willes, 116; and see Gunning on Tolls, 2, 4, 7, 9.

(c) 1 Moo. & M. 416; 10 Barn. & Cr. 508. See also *Truman v. Walgham*, 2 Wils. 296.

(d) Morr. 10,886. This case is generally for shortness called *The Fleshers' case*. See an account of it infra, p. 20.

(e) Morr. 1987; 5 Brown's Sup. 819.

E. & G. R. Co.
v.
M. OF
LINLITHGOW.
—
BRANCH I.
Burgh Customs.

really confirms it. In both these cases, the question was consideration; and in both the decision coincides. [Lord CAMPBELL: You say consideration should have been alleged in the summons?] Yes. [Lord CAMPBELL: But they say they can support the toll by usage?] We contend that usage is insufficient. The interlocutor says the claim is good “if explained and supported by usage.” We deny this. [Lord Chancellor COTTENHAM: The *Lord Ordinary* having said in his interlocutor, that usage would be sufficient without reference to consideration, must be presumed to hold that mere usage would suffice *without* any consideration.] Usage might be a mere unexplained arbitrary collection. [Lord CAMPBELL: The Court below seem to have considered that the Crown could give a grant of toll for passing along the public highway without consideration. By the ancient law, there *may* have been such a power in the Crown. But, if it did exist, it was a very arbitrary prerogative; and I could wish that the learned Judges had gone more into the matter to show authority for such a doctrine.]

Mr. *Turner*, Mr. *Rolt*, Mr. *Moir*, and Mr. *Anderson*, for the Magistrates. The charter of Robert II. is sufficiently large to embrace toll thorough; and proof was offered in the Court below that it had been exacted from time immemorial. That charter was repeatedly confirmed by Parliament. It was therefore free from all objection even supposing that it had originally exceeded the royal prerogative. For this position the *Mayor of London v. Hunt (a)*, is an authority. [Lord CAMPBELL: The charter of Robert II. does not speak of transit

(a) 3 Lev. 37; and see *Mayor of Nottingham v. Lambert*, Willes, 117, where the Lord Chief Justice said: “There is a further reason for the determination in 3 Lev. 37, that the duty there was claimed by the city of *London*, whose customs and franchises are all confirmed by Act of Parliament.”

tolls. If it did, the argument from that case would apply.] But we aver that usage construing the charter gives the right. A consideration, therefore, is not necessary. But if it were necessary it occurs in the present case. The common profit of the town and the maintenance of prisons constituted a consideration. [Lord CAMPBELL: It must be a consideration beneficial to the person paying; and there must be a correspondence between the payment and the benefit.] There is no such doctrine in the law of Scotland. The English cases cited on the other side fail, because we have here a charter confirmed by the Scottish Legislature. The usage is left to be established. [Lord CAMPBELL: What usage? What is the extent as to time?] From the time of the grant. [Lord CAMPBELL: But the interlocutor says, "or at least forty years before the Railway act."] By Scotch law, forty years is equivalent to time immemorial. [Lord CAMPBELL: Would it be immaterial to show that the usage did not exist fifty years ago?] We submit it would. But the Company have nowhere pleaded the want of consideration. This question was not raised in the Court below. The case should therefore be remitted. [Lord CAMPBELL: In the event of a remit, what consideration would you aver?] We should urge the considerations expressed in the grants. But our contention is, that, by the law of Scotland, consideration is unnecessary. [Lord Chancellor COTTENHAM: According to your argument, a man having land going through a burgh, could not pass over his own property without paying toll.] (a)

The cause was adjourned *sine die*.

In the following session, Lord BROUGHAM advised that the cause should be remitted back to the Court of

E. & G. R. Co.
v.
M. OF
LINLITHGOW.
BRANCH I.
Burgh Customs.

1848.
August 4th.

(a) See note (a) *infra*, p. 23.

E. & G. R. Co.
 v.
 M. OF
 LINLITHGOW.
 —
 BRANCH I.
 Burgh Customs.

Session for reconsideration; his Lordship's opinion being expressed in these terms:—

MY LORDS,—This is a case of great interest to the parties, and to the law. Your Lordships heard it very ably argued by counsel from the Scotch as well as the English bar, some time ago. We then had a strong inclination of opinion against the judgment which had been given below. We were all of opinion that there was a decision, not quite *res judicata*, but not very far short of it, in a case (a) wherein the magistrates of *Linlithgow* were one party, and this very charter the ground of argument and decision, though certainly it was only in a Suspension. In that case the judgment was that this was a wholly illegal toll, and that no grant of the Crown could give it; for it was a toll, not upon goods brought to market, goods imported, or goods exported; but it was a toll upon all goods—what we call a *toll thorough* upon all goods whatever carried through the town from any place to any place. My Lords, we have tolls thorough in this country. But how? A million of years' prescription, if the world lasted so long, and tolls lasted so long, could not make a toll thorough, unless for a consideration. There is a very well-known case (b) of a toll thorough being claimed for all the roads of a town. The consideration was held not to be good, because *non constat* that the toll thorough which the parties were claiming applied to the road in question. My Lords, upon these grounds, and upon the other ground, to which I am not at all disposed to shut my eyes, that here is a toll thorough claimed over a railway (a totally new invention, a thing never dreamt of before), the opinion which we held at the time has been confirmed upon further reflection: and I had a note from my noble and learned friend, the Lord Chancellor (c), this

(a) *The Fleshers' case*. (b) *Brett v. Beales*. (c) Lord Cottenham.

morning, in which he says that he is of the same opinion which I hold, that it would be well to remit this case; consequently, it will go back to the Court below, to have it heard before all the judges.

E. & G. R. Co.
v.
M. OF
LINLITHGOW.
—
BRANCH I.
Burgh Customs.

Mr. *Rolt*: Will your Lordship allow us to ask whether that may be done which was done in a case recently, the *Duke of Hamilton's case* (a); namely, to give liberty to the parties, on either side, if it should be necessary, to open up the record?

Lord BROUGHAM: There can be no harm in that, with the consent of the Court.

The formal order of the House, as afterwards drawn up, was as follows:—"It is ordered that the said cause be remitted back to the First Division of the Court of Session in Scotland, with directions that the same be heard in presence before the whole Judges of the Court of Session, including the Lords Ordinary; with liberty to the Court, either before or after the said hearing, to open up the record, and to allow the parties respectively to amend the summons and defences, if they shall think fit; both parties having consented, by their counsel at the bar, that such liberty should be included in the remit."

The cause being thus carried back to the Court of Session, the record was there opened up, and both parties amended their respective pleadings.

1849.

The Magistrates amended their summons and condescence by introducing an allegation, first, that the charters and ratifications relied upon were valid and effectual without consideration; but if, by Scotch law, consideration were necessary, then, post tantum temporis, consideration should be presumed. Secondly, that, in point of fact, a perfectly legal consideration

(a) 7 Bell, 1. The order is to be found in the Lords' Journals of 20th March, 1848.

E. & G. R. Co.
 v.
 M. OF
 LINLITHGOW.
 —
 BRANCH I.
Burgh Customs.

was given by them for the right to levy the dues or tolls in question by the obligation undertaken to make and maintain the great thoroughfare leading through the burgh from east to west, and the other streets or wynds leading into or out of the burgh in other directions—an obligation which they had, for hundreds of years, implemented for the use of the public from the corporate funds or tolls collected. Thirdly, that grants of customs and dues had been made by the Crown to many burghs on goods, cattle, and other articles, merely in respect of their passing through such burghs (*a*). And, fourthly, that, prior to the grants relied upon, the Crown was sole owner, and in possession of these tolls, and likewise of the *solum* for passing over which they were originally reserved and are levied; that the tolls and the *solum* were acquired by the Magistrates simultaneously; and that the acquisition imposed on them the obligation to maintain the streets of the burgh and roads connected therewith.

On the other hand, the Company amended their defence by introducing an allegation,—First, that the grants in question did not warrant the exaction of transit duties; Secondly, that a grant of transit duties would be illegal, unless supported by consideration; and Thirdly, that the consideration of making and maintaining a particular street or way would not be sufficient, unless such street or way were used by the party from whom the duty was demanded.

Upon these amendments being perfected, the record was again closed; and the Lords of the Second Division

(*a*) In support of this allegation reference was made to the charters of twenty distinct Scotch burghs, namely—*Lauder, Witon, Dundee, Ayr, Haddington, Irvine, New Galloway, Sanquhar, Campbelltown, Burntisland, Edinburgh, Stranraer, Annan, Perth, Stirling, Inverkeithing, Dumfries, Dumfermline, Lochmaben, and Musselburgh.*

appointed a "Hearing in Presence" to take place, in pursuance of the remit.

E & G. R. Co.
v.
M. OF
LINLITHGOW.

BRANCH I.
Burgh Customs.

Of the argument which took place at this "Hearing in Presence," there is no report. But the thirteen Judges of the Court of Session delivered their opinions seriatim; and these opinions, having been printed, were in due course laid on the table of the House. The Judges were not unanimous; the *Lord President (Boyle)*, Lord *Medwyn*, Lord *Mackenzie*, Lord *Moncreiff*, Lord *Jeffrey*, Lord *Fullerton*, Lord *Cockburn*, Lord *Wood*, and Lord *Ivory*, being in favour of the Magistrates' claim; while the *Lord Justice-Clerk (Hope)*, Lord *Cuninghame*, Lord *Murray*, and Lord *Robertson*, were against it (a).

The leading opinion in favour of the Magistrates was that of Lord *Medwyn*. After remarking that the question was one of Scotch law, and that the Scotch law afforded principles amply sufficient for its solution, without calling in the aid of English authorities, his Lordship proceeded as follows:—

It will not be found a useless inquiry to advert, though but shortly, to the origin of such grants as that on which the burgh of *Linlithgow* founds this claim. One branch of the revenues of the Sovereigns of Scotland, and the most ancient one, arose from *custume* and *tollonea* on shipping and merchandise, and on the produce and sale of certain domestic manufactures. This went under the name of *Can*. Both Chalmers and Tytler mention this (b).

*Lord Medwyn's
opinion.*

The Crown's right to levy such dues is confirmed in the Assize Regis David (c), by an injunction given in these terms:—"Merchandis alsua outhir be land or be se cummand, sall geyff the Kyng be his ministeris his richtis fullely as it was stablyet in his faderis dayis." And the payment of this branch of the royal revenue is again con-

(a) These opinions are distinguished by extraordinary research and are full of curious historical learning. They are entertaining too, as well as argumentative and instructive; but the limits of a Law Report compel me to abridge them.

(b) Chalmers' *Caledonia*, vol. i. p. 747. Tytler's *Scotland*, vol. ii. p. 235.

(c) Acts of Parl., vol. i. p. 11, No. 26.

E. & G. R. Co.
 v.
 M. OF
 LINLITHGOW.
 —
 BRANCH I.
 Burgh Customs.
 —
 Lord Medwyn's
 opinion.

firmed by the Assize Regis Willielmi (*a*), which requires that certain enumerated articles shall be sold only to the merchants within burgh, and at the market-cross; and the law ends thus:—"And the custome tharof salbe payit to the King." And the next law prescribes that "stranger (foreign) merchants also buy and sell only in royal burghs." This was a regulation in favour of the burghs, but it was also useful, and intended for the more easy levying of custom on merchandise for the revenue of the Crown.

The Customs were divided into magna et parva custuma,—the great and petty customs. The first vol. of the Acts of Parliament recently printed, gives an enumeration of the articles on which the petty customs were payable, and the amount on each article, in the time of David I., in the "ASSIZE DE TOLLONEIS" (*b*), under the title "Parva custuma que dicitur le Tol." I have already noticed, that in order to admit of the collection of this branch of the royal revenue, all buying and selling of merchandise was confined to burghs. In each of these there was a *custumarius*, an officer of the Crown, who collected these and other dues belonging to the Crown, and who accounted for them annually to the Exchequer through the Great Chamberlain. A valuable collection of the settlements of these accounts has been printed by Mr. Thomson, the President of the Bannatyne Club, commencing with the year 1326, coming down to the year 1553.

The Act 1424, c. 8, ordains "that all the great and small customs and borough mails of the realm abide and remain with the king till (for) his living," and any person claiming them must show his right. This was in the time of James I.; and in the next reign, so anxious was the Legislature to preserve the Customs as entire as possible for the Crown, that the Act 1455, c. 41, first annexes to the Crown "the haille customes of Scotland," and then enacts, "that our Sovereign Lord should content them that has pensions given forth of the Customs with uther things." In the Act 1581, c. 108, they are termed "our Soveraine Lords Customes," and "ane of the parts of the patrimoney of his Crown;" and it appoints "ane table be deliuered to all customers, for uptaking and upbringing of our Soveraine Lord's Customs;" and then follows some directions as to wool, skins, and cloth, as payable among the great customs to the Crown. For it is well known that in the course of time, according to the introduction of new articles of trade or of manufacture, as well as of the necessities of the Crown, new articles came to be customed, as in the time of David II., by the Parliament in 1369 (*c*); and these, it is said, were *ad expensas domus domini*

(*a*) Acts of Parl., vol. i. p. 61, No. 40.

(*b*) Acts of Parl., vol. i. p. 303.

(*c*) Acts of Parl., vol. i. p. 150.

nostris Regis. Similar additions were made in later times. I shall only notice the Act 1597, c. 255, which grants customs on certain hitherto uncustomed articles.

It was further the practice of our kings to make grants of these customs and tolls, or pensions out of them, in favour of burghs, of religious houses, or favoured individuals. By doing so, they imposed no new tax of their own authority; but only so far diminished the sum to be accounted for by each customer, and paid into Exchequer.

Thus, David II. grants Hugoni de Dunbarr 10 marks sterling de custuma burgi nostri de Aberden, and a precept is given to the Chamberlain and Customers of Aberdeen to pay it annually (*a*).

The same king grants Alexandro de Cockburne 20 libras sterlingorum de magna custuma burgi nostri de Hadyngton (*b*).

Robert III. confirms Thome de Moffet annum redditum octo librarum sterlingorum de magna custuma nostra burgi de Edynburgh (*c*).

He also grants to his dear brother Robert Earl of Fyff and Menteth 200 marks sterling annually de magna custuma nostra burgorum de Lynlithgow et de Cupro, and if these quocunque casu seu eventu should prove deficient, this sum is to be paid by the Great Chamberlain (*d*).

In like manner to religious houses. Thus, Robert II. grants to the Chaplain of St. Margaret's Chapel in the Castle of Edinburgh 8*l.* sterling yearly, de magna custuma nostra burgi nostri de Edynburgh, per manus costumariorum nostrorum magni custumi ejusdem (*e*).

It was also common to exempt religious houses from the payment of transit customs and tolls, as in the case of the monastery of Melross, by William the Lyon (*f*).

The grants to burghs were generally of the petty customs of the burgh, and tolls (when these last are mentioned as distinct from the others), not a mere pension out of them: a charter by David II. to the town of Inverness, grants to the community totum burgum de Inverness * * * cum tholoneo et parva custuma dicti burgi (*g*).

The charter by Robert II. in favour of Banff grants totum burgum de Banff cum pertinentiis * * * cum tolloniis parva custuma et stallagiis (*h*).

The burgh of Stirling has a charter from Robert II. cum firma dicti burgi custumis minutis et pertinen. quibuscunque; and

(*a*) Regm. Mag. Sig., No. 10, p. 22.

(*b*) Ibid., No. 31, p. 25.

(*c*) Ibid., No. 19, p. 188.

(*d*) Ibid., No. 52, p. 213.

(*e*) Ibid., No. 9, p. 197.

(*f*) Liber de Melros, No. 17, vol. i. p. 13.

(*g*) Wight on Elections, App., p. 412.

(*h*) Report on Burghs, 1835, p. 99.

E. & G. R. Co.
v.
M. OF
LINLITHGOW.

BRANCH I.
Burgh Customs.
Lord Medwyn's
opinion.

E. & G. R. Co.
v.
M. OF
LINLITHGOW.

BRANCH I.
Burgh Customs.

*Lord Medwyn's
opinion.*

besides other charters, a charter of Novodamus by Charles I. in 1641, una cum omnibus et singulis proficuis privilegiis tholoneis custumi libertatibus et immunitatibus quibuscunque; also giving with an additional minuteness not met with in more ancient charters, totas et integras parvas custumas suprascript. solvend. per personas, who are unfreemen for their goods acciden., et deceden. per portas et pontem dicti burgi nostri (a).

It is not merely in ancient grants that *Tholonea* is introduced. It is in the Novodamus part of the Golden Charter to the city of Edinburgh in 1606, although this word does not occur in the many ancient charters confirmed by it and there narrated: only *custume*. It was plainly with the view of giving some higher right, or to remove any doubt at least, that it was introduced into this later charter.

Besides such direct grants, an immunity is also sometimes given to burgesses from such payments to others, as a charter of William the Lyon declares that he had in perpetuum quietis clamasse omnes burgenses meos de Aberdon a tolneio de propriis cutallis suis per totum regnum meum pro bono servitio quod idem burgenses mei mihi fecerunt (b).

The same privilege is conferred upon the burgh of Dundee by a charter of Robert I. :—" Quod liberi sint et quieti per totum regnum nostrum de tholoneis, pontagiis, passagiis, muragiis * * * et ab omnibus custumis de bonis suis propriis prestandis, nova custuma nostra que dicitur maletort duntaxat excepta."—Burgh Report, p. 238.

Towards the close of the reign of Robert Bruce, the practice was introduced by him of granting to the communities of burghs the burghs themselves, with all their privileges and immunities, to be holden of the Crown in feu-farm, for payment of a fixed feu-duty; and the revenue arising from judicial proceedings of the courts within burgh, and from tolls and petty customs, was very generally granted to the community. The Great Customs were retained by the Sovereign. The accounts of the Chamberlain from 1326 to 1553, show that these consisted chiefly of customs on foreign articles brought by sea to the harbours of the kingdom, and on wool and other articles of domestic produce and manufacture, which are accounted for in Exchequer most regularly by charge and discharge.

I observe that the charter and grant in favour of the town of Linlithgow is altogether according to what was uniformly observed in similar cases, and according to the usual form. It is granted just three years subsequent to the charter to Stirling already noticed; and a subsequent charter in the same terms is granted in 1593, which grants to the burgesses and community of Linlithgow "burgum nostrum predictum una cum portu de Blacknes, firmis burgi et parvis custumis et tholoneis cum curiis et curiarum

(a) Report on Burghs, p. 403.

(b) Report on Burghs, p. 46.

exitibus." I understand, when both terms are expressed, as is done here, that *parve custume* are restricted to the petty customs on goods brought into the burgh for sale ; and that *tholonea* are the transit-duties for goods brought in and passing through the burgh, as more distinctly described in the charter to Stirling. But toll is in one sense a petty custom, and under this term usage will give right to custom on goods brought into the town, and levied as it always was at the ports, although it may not be sold there, but merely pass through ; for, although *tholonea* be the more appropriate term, yet it is included under *parve custume*, as we have seen already, " *Parva custuma que dicitur le tol.*" And as in *Articulis inquirendis in burgo in Itinere Camerarii secundum usum Scocie (a)*, we find this one, *Item si aliqui susceperint superfluas tolloneas ultra constitutionem burgi*, I have no doubt the chamberlain was thus enforcing what was again enacted by 1491, c. 46, "That na customers within burgh tak na mair taxations, customes, or dewties, then is statute and used in the auld law," and that under the term *tolloneas* all these customs were included.

Whatever might be the case with the Sovereign when he continued to exercise the right of levying the petty customs and tolls as a branch of his revenue, and although the neglect of the officers of the Crown to levy customs and tolls for a length of time might not affect the royal privilege, it is well known that the right to customs and tolls in the hands of the donee of the Crown might be lost *non utendo*, so that the inhabitants of the burgh and others, might prescribe or secure an immunity from the payment of some or the whole of them, by the burgh and its customers ceasing to levy these for such a period as to imply immunity. This period we have defined in our law to be forty years, from analogy with the doctrine of the long prescription. Accordingly, when any one claims exemption from the payments authorised by our law, and conferred by a royal charter upon one of our royal burghs, the right to levy will be supported by a proof of levying, or the immunity from it established by a proof of non-levying for the prescriptive period, according as the burden in the circumstances of each case is laid on the party claiming the right, or the other asserting an immunity.

It may be that a particular burgh may cease to levy some customs which it had a right to levy, and at one time actually did levy ; but this will not affect or injure the right in other respects, where they have preserved it by use, and the continued exercise of it. Still less will this affect the right of another burgh, which has continued the usage of levying. For usage being the criterion of right in the case of a burgh, I need only refer to the class of cases in the *Dictionary v. Prescription*, sect. xi., as well as to the title *burgh royal* throughout. Nay, I am not prepared to admit, that though

E. & G. R. Co.
v.
M. OF
LINLITHGOW.
—
BRANCH I.
Burgh Customs.
—
Lord Medwyn's
opinion.

(a) Acts of Parl., vol. i. p. 318.

E. & G. R. Co.
v.
 M. OF
 LINLITHGOW.
 ———
 BRANCH I.
Burgh Customs.
 ———
Lord Medwyn's
opinion.

a burgh at one time could not show such an exercise of their grant as to give a right to levy custom on any particular articles, they might not, under their general right expressly granted, acquire by subsequent usage and acquiescence on the part of the public a right to do so. On these accounts I do not lay so much stress on the case of the Fleshers of Edinburgh in 1621, as seems to be done. It does not in the slightest degree affect the right of the burgh generally to customs and tolls on goods coming into and passing out of the town, and only regards this right of levy on the goods 'transportit or carried about the said burgh by the flesher craft of Edinburgh.' No other party was in the field claiming any such exemption, and the validity of the grant in other respects was not in question. It appears from the decret now printed, that in a convention of burghs at Dundee in 1606, and also in a convention at Dumbarton in 1607, that Court had decerned the burgh of Linlithgow, and other burghs therein mentioned, to desist from uplifting customs from the Fleshers of Edinburgh for goods transported by them through the burgh, 'ay, and while they produce their rights, gif they ony had.' They seem to have acquiesced in this decerniture for some time, and without producing their title in the convention of burghs, in 1621 a suspension of a threatened charge is brought by the burgh and their customers against the Fleshers. The grounds of suspension are, 1st—That the Court of the burghs had exceeded their jurisdiction; and further, that the burgh of Linlithgow had not been warned that such a complaint had been made to the convention, so that their Commissioner might have been instructed to answer it, instead of consenting to it, as it is stated he had done; and 2d—They founded on the charter of Confirmation 1593, confirmed in Parliament in the next year, which gives them "burow maillis, litill customeis, thollis," * * * * which the burgh "hes at ony time bygane possest and enjoyit;" and they further subsume that they "have been in continewall possession in uplifting of customs fra ye flescheris of the said burgh of Edinborough, and their servandis, for the hail guidis quhilk war aither transportit be them throw the said brughe, or be the way at the back yarof, quhilk is within the libertie and friedome of the samyn." It will be observed how distinctly the claim to this transit-duty is put upon usage, and of passing not merely through the principal street, but by any way through the liberty of the burgh. No written answers were given in, and no notice of the verbal debate is recorded. The decret merely bears—"The Lords of Counsall find, the decreets, letters, and charge to be orderly proceedit," but upon what ground does not appear. The Court may have held the consent given, and the delay to bring the case under review to preclude further inquiry, or the burgh may not have undertaken the proof offered in their bill. But at all events, the

deliverance does not affect the right to levy customs and tolls generally. It only secured immunity to the Fleshers of Edinburgh for their goods (cattle of course) "transportit be thame throw ye said brughe, they nawayes makand mercats within the samyn," but leaving the effect of the charter and Act of Parliament in other respects untouched; and this decision will not even protect the cattle of other burghs, such as Glasgow and Stirling, passing through, unless they have received a protecting charter, or the custom or toll has not been levied from them.

It will not be denied that petty customs and tolls on goods have been levied by the burghs of Scotland generally, and in particular by the burgh of Linlithgow, since the date of that decree. If denied, it is offered to be proved, and such proof is relevant, and will support the right. It is quite impossible for me to hold that the refusal of this suspension decided the grant to be illegal, and that on that ground it cannot be supported by usage. The ratio of the judgment given by Durie, we see, is not a finding in the interlocutor, which only found the letters and charge orderly proceeded, the proper form, uniform in those days, for a suspension when refused. It may be that the Court, on that one occasion, thought that *such customs* on cattle driven through the king's public way and streets required a special grant for a public good, such as bridges; but unquestionably no such finding is in the judgment, nor has any such rule been introduced into our practice; or noticed in any institutional writer on our law, so far as I know; or hinted at even in any other proceeding in our courts.

It is no doubt true that grants of tolls and customs were made to burghs for the public good of the community, and the proceeds were to be employed on public objects. It was part of the duty of the Great Chamberlain in his annual Iter to see that this was duly observed. This too is enforced by Act of Parliament, 1491, c. 36, "That the common gude of all our Soverain Lord's burghs be observed and keipid to the common profite of the towne, and to be spended in commoun and necessarie things of the burgh; and inquisition yeirly to be taken in the Chalmerlaine aire;" and the act 1593, c. 185, confirms this. Now, the burdens on which these customs and tolls were to be spent were various. Burghs had to build and keep up a town-house, and a court-house for their own and the King's courts; often too they surrounded their city with walls for the defence of the kingdom "from our auld enemies of England," supporting also the expense of the police of the city, and keeping the streets. One of the most onerous burdens was the building and maintaining a jail in these lawless times, and the burden was much increased when the obligation was extended, so that each burgh was to provide a prison large enough to contain not merely the prisoners, either for crimes or debt, taken up by the

E. & G. R. Co.
v.
M. OF
LINLITHGOW.

BRANCH I.
Burgh Customs.
—
*Lord Medwyn's
opinion.*

E. & G. R. Co.
 v.
 M. OF
 LINLITHGOW.
 —
 BRANCH I.
Burgh Customs.
 —
*Lord Medwyn's
 opinion.*

magistrates within burgh, but also such as “shall be presented for incarceration by the sheriff of the shire, or a bailie of regality”—in short, the delinquents within the whole shire. This was enacted by 1597, c. 277. Now it is quite unknown to me that it ever was contended, or that there is any authority for saying, that the right to levy tolls and customs could not be conferred upon a burgh generally for the good of the burgh, as thus provided by the public law, but that it must be for a specific purpose, such as erecting a court-house, or a jail, or a bridge, or repairing the streets; and that a general grant of tolls and customs is illegal. I do not dispute that in later times, and in the advance of civilisation and the polity of the kingdom, when *a new grant or tax* not covered by any such ancient imposition was to be made in favour of an individual or a burgh for such a work as the building or repairing of a bridge, it was proper and quite customary to express this as the peculiar object and justification of the grant. But again, I say that no such specification of petty customs, or ancient tolls, in any grant to a burgh, has been shown or even alluded to.

There is one expense which now falls upon royal burghs, but which certainly did not exist at the original constitution of such burghs, and when tolls and customs were given to them, but which came to be introduced in the progress of civilisation—I mean for causewaying the streets of the burgh. This has led to the practice in some few burghs of levying what is called causeway-mail, and the right to do so when questioned has been sustained or not, according as it has or has not been supported by usage, which is held to imply a grant. We had this matter recently before us in the Second Division of the Court, in the case of Boyd and Latta, 28th June, 1848, and we held causeway-mail to be quite different from an ordinary petty custom—it was a duty upon carts shod with iron, not on goods properly, and it was expressly claimed for the injury done to the causewayed streets.

Linlithgow probably had a causewayed street in the time of James III., when it was a royal residence; but the magistrates never introduced or claimed any exaction under the name of causeway-mail, although it appears that this was done in Edinburgh, Lauder, and a few other places; and although the magistrates out of their common-good, arising from customs and tolls, among other sources, have kept their streets in repair, at least from 1631(*a*).

This brings me to the case of Lauder, 15th November, 1754. We have two reports of this case, by two very eminent men(*b*), both distinctly supporting this proposition in law, that a general grant of *parve custume*, or by some equivalent term, when supported by usage, will enable the burgh to levy such transit-duties.

(*a*) Excerpts from Treasurer's Books, now produced in process.

(*b*) Lord Hailes and Lord Monboddo.

As to the case of the Magistrates of Wigtown, 15th January, 1834, the interlocutor pronounced by me in the Outer House was supported, after the fullest examination of it, by the Inner House, first in cases, and then by a hearing in presence.

It is quite true that the Railway was made through the territory of the burgh, in virtue of an Act of Parliament obtained for the purpose by the defenders, and that they have indemnified the various burgesses (*a*), whose property was taken from them for the Railway, by giving compensation to them. No portion of the ground belonged in property to the burgh, so they have received no compensation of any kind. But the magistrates say, that the traffic through the burgh will be much affected by the transport of goods by the Railway; and as the company have obtained no exemption by their Act of Parliament, they maintain that the company must pay on goods carried by them such tolls and customs as have been hitherto levied. The toll or custom is given on goods passing through the territory of the burgh; it specifies no particular mode of conveyance. That they are carried through the burgh is all that is sufficient to give the right. The article may have originally formed a back-burden—a wheelbarrow may have been next used—then a carrier’s cart; and, although each successive mode may have been the result of a new invention, this has never been held to exclude the right to levy toll or custom on goods. I cannot think it of any consequence, then, that the mode of transport by the Railway is novel; it is not to the mode of transport, but to the article transported that we apply the usage which our law requires to support such a right. The burgh was not bound to have any clause saving their rights (*b*). It is very clear that an arrangement can easily be made for payment of the transit-duty, without impeding the Railway.

(*a*) It is difficult to find anything in the pleadings to intimate that the property was purchased from particular “burgesses,” and not from the Magistrates, as here suggested by Lord Medwyn. Neither is it easy to discover from the pleadings that the property was purchased partly from the burgesses, and partly from the Magistrates, as suggested by the Lord Justice-Clerk, *infra*, p. 29.

It may be remarked that if the land was purchased from the “burgesses” alone, the Magistrates must have been the superiors or lords of the property. But the Magistrates would have to give an entry to the Company; and that entry, in the case of a perpetual body, was, or may be, the subject of some contract or arrangement. The Court will not compel a superior to receive a corporation—Bell, on completing Titles, 319. This rule is recognised by the law of England; “for,” says Blackstone (2 Comm. 269), “the lord ought not to lose his feudal profits by the vesting of his lands in tenants that can never die.”

(*b*) The Railway Act contains no saving of the tolls and customs forming the subject of contest in this branch of the cause; whereas the “Bridge Tolls,” discussed in the second branch, are secured by a special protecting clause introduced at the instigation of the Magistrates. See *infra*, p. 33.

E. & G. R. Co.
v.
M. OF
LINLITHGOW.
—
BRANCH I.
Burgh Customs.
—
Lord Medwyn's
opinion.

E. & G. R. Co.
v.
M. OF
LINLITHGOW.

BRANCH I.
Burgh Customs.

—
*Lord President's
opinion.*

The *Lord President*, concurring throughout with Lord *Medwyn*, held,

That on a review of the whole decisions applicable to the present case, the legality of the grants in question, and the validity of the rights of the burghs under them would be found to be fully sanctioned by law; while the 21st article of the Act of Union enacted, That the rights and privileges of royal burghs in Scotland should remain entire, as they then were—the union notwithstanding; and, if a contrary judgment were pronounced, it would materially affect the existing rights of many other burghs in Scotland.

Lord *Mackenzie*, Lord *Jeffrey*, Lord *Fullerton*, Lord *Cockburn*, Lord *Wood*, and Lord *Ivory* may be represented as concurring generally with Lord *Medwyn*, and with each other. Perhaps the most reasoned of all the opinions was that of Lord *Moncreiff*, who likewise agreed with Lord *Medwyn*. Lord *Moncreiff* observed, that the cause “was not what we used to call a *concluded cause*; that is, a cause fully prepared and ready for judgment, with all matters requiring proof fully ascertained. The averments of fact put forward by the Magistrates must be assumed to be altogether correct.”

Having premised this general remark, Lord *Moncreiff* proceeded to deal with the argument of *consideration*, which he said was avowedly derived from the law of *England*, was of a very serious description, and diametrically opposed to the most inveterate practice which had prevailed in *Scotland*, with reference to royal burghs; for, said his Lordship,

*Lord Moncreiff's
opinion.*

I must observe that I consider this to be a question which must be determined solely on the municipal law of Scotland. To that law, therefore, I turn as to the only source from which I can derive any solution of the question, whether the custom or toll here demanded is in itself illegal. On the question of pure illegality, the case is evidently the same, as if there were no railway, and the exaction were made simply against parties *carrying goods through the streets of the burgh*, in the old or ordinary ways. It is to that case that the

charters, the statutes, and the usage apply. The proposition of the defenders, if I understand it, is, that by law *there can be no right so established* in the corporation of any royal burgh.

But here, though I should otherwise have been prepared to go into a full investigation of the history and effect of such grants to the royal burghs, followed by long possession, I must confess that, after reading Lord Medwyn's very clear exposition on this part of the case, it appears to me to be altogether unnecessary, and that it would be a waste of time to enter at large on the subject. For, with all deference to other opinions, it appears to me to be demonstrated to be a mere impossibility, that the exaction of such dues or customs, under such titles, and with such possession, *can now be held to be altogether illegal*. I do not think it necessary to enter into any such detail. But I may simply refer to that part of Balfour's treatise which relates, first, to the burgh laws, and then specially *to the customs held by similar grants(a)*.

And I may further observe that, in so far as any question is raised concerning the *meaning* of the *terms* of the grants, upon any criticism of the words, "*Parvis Custumis ac toloniis, &c.*," or as they are translated in the Acts of Parliament 1641 and 1661, "*small customs, TOLLS, and others,*"—I apprehend that they must be explained by the usage averred,—which is quite clear and positive, as relating to custom on all commodities, &c., "brought into the burgh of Linlithgow, and that whether intended for consumption and sale within the burgh, OR PASSING THROUGH THE SAME." This being the only correct state of the case, the usage being distinctly applied to the case of goods *carried or passing through the burgh*, I apprehend that the defenders cannot be allowed to explain away the terms, or to deny the effect of any immemorial possession, *such as that averred*, founded on titles which are clearly sufficient to cover the case; and that to allow them to do so, would be to run counter to the most established principles of the law of Scotland.

I am aware, that it has been said that such grants have no legal effect under other systems of law, unless they *express in the body of them* that they have been granted for some valuable consideration. I must say that I know of no such rule in the law of Scotland. It may be, that if such a grant were made under modern law, and *arbitrarily, without any adequate cause*, it might be effectually objected to, if the objection were raised in due time. But that is not the question here. The case is that of an established right of exaction, founded on express grants, *sanctioned by Parliament, and in full observance for centuries*. In such a case, the presumption of law, and of common sense, is, that the grants were made on due consideration and for lawful cause. If I have under-

E. & G. R. Co.
v.
M. OF
LINLITHGOW.
—
BRANCH I.
Burgh Customs.
—
Lord Moncreiff's
opinion.

(a) Balfour's Minor Practicks, p. 52, and pp. 81—88.

E. & G. R. Co.
 v.
 M. OF
 LINLITHGOW.
 —
 BRANCH I.
Burgh Customs.
 —
Lord Moncreiff's
opinion.

stood the statements made, it is held, even in the law of England, that if a grant of tolls or customs is made *for the general good of the realm*, it cannot be questioned. And when we see that these grants of customs to the burghs of Scotland were all made in favour of the Crown in the first instance, for the support of the royal dignity, and that they were then transferred to the burghs, *distinctly for the support of those burghs*, as of great value to the Crown, the State, and the people; there is no great difficulty in seeing ample considerations which might justify the grant, as for promoting what was then considered by the Crown and Parliament as important for the general interests of the kingdom. But, after they have been so held, and in constant enjoyment, during so very long a period as occurs here, it appears to me to be a very desperate endeavour, now to attempt to defeat, or refuse effect to, the rights so vested, on the mere allegation that there was not at the first any sufficient cause for constituting them. The pursuers have, in their amendment to the condescendence, very precisely averred a direct consideration every way sufficient for the precise custom here exacted, namely, the *support of the streets and roads* of the burgh. The question, whether the peculiar nature of the railway transit makes a difference in this matter, belongs to a different part of the subject. But, in the meantime, it is obvious that, besides the obligation to support the streets and all the bye-ways of the burgh, which may be of great importance to the public, *and even to the Railway Company*, the community of the burgh have very important burdens to sustain in other matters, absolutely essential to the very existence of the burgh, and of vast importance to the safety and the general welfare of the State. In this respect, the case of a royal burgh is very different from that of any private individual, or number of individuals, who might obtain such a grant; which, notwithstanding, would, when sanctioned by immemorial use and possession, in all probability be sustained. A royal burgh is a public corporation, constituted *for the good of the public and the welfare and prosperity of the State*. Men may differ as to the utility of them in the present state of this country. But, unquestionably, this is the theory of the law, on which they were originally constituted, and are still maintained, *as part of the constitution of the realm*. And, as they must of necessity have some revenue to enable them to discharge the duties incumbent on them, and every one must think that they could not legally impose a tax *of their own authority*, it seems a strange thing to say, that *charters from the Crown, ratified by Acts of Parliament, and followed by a usage of centuries*, could give no legal right to levy *the small customs*, provided for the support of the Corporation thus constituted, and the accomplishment of the *purposes contemplated in the erection of them*.

The elaborate opinion of the *Lord Justice-Clerk* in favour of the Company was substantially as follows :—

E. & G. R. Co.
v.
M. OF
LINLITHGOW.

BRANCH I.
Burgh Customs.
—
Lord J.-Clerk's
opinion.

The interlocutor under review might sanction a great number of exorbitant exactions, if there be any foundation for the allegations made as to *other* burghs. Certain views and arguments, drawn from the law of England, have been pressed. But the Scotch counsel who argued before us were not able to make me understand the law of England as to toll thorough, and toll traverse. So far as I collected any distinct apprehension of some of the English doctrines, it was clear that that law had no analogy whatever to anything in the law of Scotland.

There is often in the very nature of the grant, or of the character and object of the exaction, something which may denote that the custom was given for a particular and limited purpose; and which, therefore, will restrain the exaction whenever it is not in conformity with that purpose. It may appear that the custom is exigible only when a certain market is used, or when certain streets are passed through. A demand from persons not using the market, or not passing through the streets, would be beyond the scope of the custom. Lord Justice-Clerk Macqueen, in an opinion printed in the recent case of Wighton, stated the law of Scotland to be “That the Crown has no power to impose taxations, either in favour of the Crown itself, or in favour of third parties, whether individuals or communities.” Nothing less than the authority of Parliament will do. This leading principle of our law seems quite sufficient, without resorting to any doctrine of the law of England. But there is another principle which has been lost sight of. In the Lauder case, Lord Monboddo’s report states, that “all the lords were of opinion that prescription could take no place; because prescription was between man and man, by which one lost and another gained, but could have no place where so many were concerned; but they thought that immemorial custom would take place here, so far as to explain the grant to the town, but only with this proviso, that the custom was not contrary to law, and the good policy of the kingdom.” The rule, that prescription does not apply in such a case, and that the value of usage is only to *explain*, clears this case from all doubt. It leads to the important qualification, that the “custom levied be not contrary to law, and the good policy of the kingdom.” But this implies that the usage must be fairly within the scope of the grant, and not of a kind beyond it. The subject matter of grants to royal burghs was generally petty customs, market dues, port customs, or tolls on the proper traffic of persons residing within the burgh, or of persons entering it for traffic there; designed to raise a fund for keeping the peace, maintaining its streets, markets, and gaols, &c. The produce was never

E. & G. R. Co.
 v.
 M. OF
 LINLITHGOW.
 —
 BRANCH I.
Burgh Customs.
 —
Lord J.-Clerk's
opinion.

very great. Now, as usage can only explain this grant, as it can confer no right by prescription, if the usage be beyond the scope of the grant, it is then an illegal usurpation, and whether long submitted to, or not, is of no avail. The argument of the Magistrates assumes, that wherever there is a grant of customs, every thing that has been levied becomes a legal exaction after forty years. That assumes that prescription applies to the case. From these remarks it will be seen, that I could not have concurred in the interlocutor of the Lord Ordinary, which, though not using the word prescription, practically makes the case one of prescription, and puts it exactly in the form which an ordinary case of prescription would assume. The charter of Robert II. is as short as any to be found. There are no general comprehensive words, expressive of the importance and expense of the place (a very small burgh at all times), as in grants to Edinburgh; and the terms are the *small* customs expressly. These small customs have been uniformly distinguished from the great customs—intended to create a revenue for the Crown. The duty claimed is a general tax, having no reference to the traffic within burgh, and having no connexion with the small customs of burghs which are given by the grant. And as Linlithgow was on the only great road between the east and west of Scotland, it would have been, according to the magistrates' present contention, a tax on most of the inland trade of that part of Scotland. To the ratification of 1661, I attach great importance. The Supreme Court had pronounced a judgment (a), rejecting the claim of this very burgh, under the former grants, to toll on goods passing through it. The small tolls alone are given by the ratification. I think it manifest that the transit duty was not, and could not have been intended to be sanctioned. A solemn judgment had rejected the claim now brought forward, and restricting it to ordinary small customs. Then the ratification is confined to those small customs. How can the burgh after that appeal to any possession in support of the large and general tax now demanded? In my opinion the judgment in the *Fleshers' case* is of great weight and authority. The burgh itself raised the question, and the result was an order interdicting the levying of this transit custom on the goods of the fleshers. Yet, by the interlocutor under appeal, the whole cattle of the fleshers will be subjected to tax. The principle of the *Fleshers' case* has not been disturbed; nor has it ever been decided that the lieges have not a right to pass free from exaction along the King's highways and streets. But the question is, can this burgh, after this judgment, claim the toll in question? In the *Lauder case* it was held that prescription could not apply; and that by mere usage a burgh could not acquire a right. The other cases seem to me to have no application. In the *Ayr case*, the duties claimed

(a) In the *Fleshers' case*.

came within the range of duties claimed at a free port. In the Wigton case, there was an express grant. In *Boyd v. Haig*, the question turned on a claim of exemption. There was no controversy as to the legality of the exaction. The burgh now by their new averments have been at great pains to show that they repaired the streets from 1631. But all burghs royal are bound to keep open streets for the public. But there is another ground for assoilzieing the Company. They have obtained an Act of Parliament, after all the usual notices, for making and constructing this most peculiar sort of way, exclusive of general resort, over the territory of the burgh. They have purchased all the ground which they were empowered to take from the private parties holding burgage, and paid for it. The small portion they acquired from the Corporation they also paid for. Neither was this small portion any part of the burgal lands, but had been acquired by the burgh *tanquam quislibet* (a). This power of making their railway through the burgh the defenders received absolutely from Parliament, without condition or burden. Such being the power given, and such the right conferred, I am of opinion that the claim of the burgh is entirely excluded.

E. & G. R. Co.
v.
M. OF
LINLITHGOW.
—
BRANCH I.
Burgh Customs.
—
Lord J.-Clerk's
opinion.

Lord *Cuninghame*, likewise, in favour of the Company, significantly observed that—

The charter of Robert II. was not a grant of tolls on the *transit of goods*. The magistrates, however, constructed a table whereby they extended their dues to goods *in transitu*—thus attempting, like all other bodies of their class, to enlarge their dues, and make them as comprehensive as possible. It is this mode of rearing up a title (by means of a table framed by the Corporation itself), which raises the difficulty in the present discussion. The table imposed “on each load passing ordinarily through the town,” 8*d.* scots, *i. e.*, little more than two farthings sterling, a rate so trifling as to be more likely to be conceded than resisted by poor carriers and others.

Id. Cuninghame's
opinion.

Lord *Murray* was no less clear to the same effect; for, said his Lordship,

None of the statutes, or institutional writers, which have been referred to recognise any right in the Crown to levy customs on goods passing along the king's highways; but such highways are declared to be free from all obstruction (b). Grants to royal burghs

Lord Murray's
opinion.

(a) These details it will be difficult to collect from anything appearing in the cause.

(b) Lord Murray cited the *Regiam Majestatem*, B. 2, c. 74; the Act 1555, c. 54; the Act 1592, c. 156; *Stair*, B. 2, T. 7, § 8; *Bankton*, B. 2, T. 11, § 28; and *Erskine*, B. 2, T. 1, § 17. *Balfour's Treat. on Customs*, p. 83.

E. & G. R. Co.
v.
M. OF
LINLITHGOW.

BRANCH I.
Burgh Customs.

*Lord Murray's
opinion.*

of small customs and tolls were usual, and the levy was made at a booth erected in the market-place. Hence Ross, in his Lectures (*a*), observes: "The tolbooth was no other than a temporary hut of boards or planks erected in fairs and markets, in which the customs or duties were collected, and where such as did not pay were confined." The tolls or small customs levied at these booths were certainly not tolls or customs on the passage of goods, but small payments on sales made in market. Attempts were sometimes made to levy them on the mere passage of cattle through the town; but that was held to be illegal, unless for repairing the road, in which case a corresponding advantage would arise to the public. A common principle seems to have ruled the English and Scottish decisions.

The last opinion is that of Lord *Robertson*, who remarked that, by the charters,

*Lord Robertson's
opinion.*

There was no express grant of duties on goods carried through the town. No usage, beyond the terms of the Table, was alleged. Neither was it asserted that duties were paid on goods carried in stage-coaches; though these must have been in use much more than forty years. It was admitted that there had been no usage of exacting duties on goods carried through by railway, such mode of conveyance being unknown until the line was established. The streets of Linlithgow were of as little use to the Company as if the railway passed underground.

Such are the recorded sentiments (by necessity reduced and compressed) of the Scotch Judges, on this the *first* branch of the cause.

BRANCH II.
Bridge Customs.

We now proceed to the *second branch*, which relates to what are called the BRIDGE CUSTOMS OF LINLITHGOW. The argument with reference to these "bridge customs" involved considerations very different from those which belonged to the first branch of the cause. And this need not be wondered at; for the subject-matter in dispute was different; the allegations were different; and the documents and evidence were different. In short, the two branches of the cause, though blended in the same suit, had very little in

(*a*) Vol. i. p. 319.

common, except, indeed, that the litigating parties were the same, and that their interests were protected throughout by the same learned counsel and solicitors. The claim to “bridge customs” was put thus :

E. & G. R. Co.
v.
M. OF
LINLITHGOW.
—
BRANCH II.
Bridge Customs.

By an instrument of gift of Charles II., under the Privy Seal, dated at Whitehall, the 23rd March, 1677, his Majesty granted to his right trusty and well-beloved cousin, George, Earl of Linlithgow, a tack of the customs, casualties, imposts, profits, and emoluments due and payable at the bridge of Linlithgow, for the space of nineteen years.

By another instrument of gift, dated 30th Nov., 1681, the Earl assigned the tack to the magistrates, “in consideration of the love, kindness, and respect which he bore to the good town of Linlithgow.

By an Act of the Scottish Parliament, passed on the 16th June, 1685, the right thus assigned to the magistrates was made perpetual, with the following declaration : “That the Parliament prorogates and continues in all time coming the imposition formerly granted, as it is now paid, by all passengers and travellers with pack-loads, cart-loads, cattle, horse, and others, conform to use and wont, passing the River of Avon, betwixt the west bridge and mouth of Avon ; and that, for the sustentation and reparation of the said bridge, from time to time, at the sight and by the advice of the Magistrates and council of the said burgh for the time being, with power to them to appoint collectors for uplifting and receiving of the said imposition ; and in case there be any surplus over and above what is necessary for repairing and upholding of the said bridge, to apply the same to any public use for the good and utility of the town ; the said Magistrates always holding and repairing the said bridge, as it is at present for the use of the lieges.

E. & G. R. Co.
 v.
 M. OF
 LINLITHGOW.
 —
 BRANCH II.
Bridge Customs.

The Magistrates, by their pleadings, stated that, on the 4th of November, 1699, they had established a **TABLE OF CUSTOMS**, setting forth the bridge custom, “which, it was declared, was not only to be paid at Linlithgow Bridge, but also betwixt the West Bridge and the mouth of the Avon, conform to the Act of Parliament in favour of the town.” And they further alleged that, by virtue of the Act, and in conformity with the Table, as well as an immemorial usage following thereon, they had been accustomed regularly to exact and levy the rates of custom therein set forth for forty years, or from time immemorial.

The Magistrates then alleged that the Company obtained their Act authorising them to make a line of railway across the River Avon, by means of a viaduct, at a place where no ford or other passage was previously known or possible; but that in the Act there was a special clause providing “that it should not extend to take away, abridge, or diminish any rights, privileges, or powers of the Magistrates to demand or levy custom upon any cattle, carriages, goods, or other things whatsoever passing over the river by any viaduct or bridge that might be built by the Company.”

The principal conclusion of the summons was for a declaration that the Magistrates were entitled to demand the duties described as bridge customs on “all goods carried across the Avon by the Company’s viaduct, or by any bridge or crossing between the West Bridge over the Avon and its mouth.” And there was also a conclusion for an account and for payment.

The defence of the Company was rested mainly on the following words of the saving clause in the railway Act :—“That if anything shall be done under the Act whereby such bridge customs shall be *diminished*, then the said Magistrates shall receive *indemnification* from the said Company;” a proviso which, while it affirmed

the right of the Magistrates to maintain inviolate the profits of the bridge, negatived their attempt to demand more than simple compensation for any loss they might sustain.

E. & G. R. Co.
v.
M. OF
LINLITHGOW.
—
BRANCH II.
Bridge Customs.

The *Lord Ordinary*, by his interlocutor, found that the Magistrates were entitled to exact custom from the Company at any point of passage over the Avon (within the limits mentioned in the Act of Parliament of 16th June, 1685), except where exemption was established by contrary usage. And this interlocutor was adhered to by the Lords of the Inner House.

Upon the appeal, it was argued (*a*) for the Company that the Magistrates must be content with the indemnity secured to them by the saving clause in the Act. It was further insisted that their claim was unsustainable by any consideration.

1847.
25th, 29th, 30th
March,
and 19th April.

For the Magistrates, it was contended that the saving clause had a two-fold operation: it gave a power to levy, and it provided a means of compensation (*b*).

(*a*) This argument is taken from the notes of Mr. Bell.

(*b*) The clause was as follows: "Provided always, and be it further enacted, That nothing in this Act contained shall extend, or be construed to extend to take away, abridge, or diminish, any rights, privileges, jurisdictions, or powers, which at present belong to and are enjoyed, or which are claimed (in virtue of Acts of Parliament, royal charters, immemorial usage, or otherwise), by the Magistrates and Town Council of the royal burgh of Linlithgow, or by the said Magistrates, or by any of them, to demand, take, receive, or levy customs upon any cattle, carriages, goods, or any other thing whatsoever, passing, led, driven, or carried over the Water of Avon, at Torphichen Mill, or at any other part of the said Water of Avon, by any ford or bridge, or by any viaduct or other bridge that may be built or erected across the said Water of Avon by the said Company; and if any act, matter, or thing shall be done in virtue of this Act, whereby such customs shall be diminished, or such act, matter, or thing, when done, shall have the effect to diminish the same, then the said Magistrates and Town Council shall and may

E. & G. R. Co.
v.
M. OF
LINLITHGOW.
—
BRANCH II.
Bridge Customs.

[Lord Chancellor COTTENHAM: To what extent are these grants to be deemed good? Are they good to any extent whatever, without limit?] They are good to any extent, and without any consideration, when sanctioned by Parliament.

1849.

On the cause being remitted to Scotland, the pleadings, so far as regarded this branch of the case, do not appear to have been amended by the Magistrates; but an amendment was introduced by the Company, alleging that the “grants founded on did not import an unlimited right to levy bridge customs within the range mentioned, but only where there had been a use and wont to levy; and, secondly, that inasmuch as the object contemplated was the reparation and maintenance of the bridge, those only who had occasion to use the bridge (which the Company had not) were liable to the custom.

Eight of the Scotch Judges (namely, the *Lord President*, Lord *Medwyn*, Lord *Moncreiff*, Lord *Jeffrey*, Lord *Fullerton*, Lord *Cockburn*, Lord *Wood*, and Lord *Ivory*) gave opinions in favour of the Magistrates; and five (namely, the *Lord Justice-Clerk*, Lord *Mackenzie*, Lord *Cuninghame*, Lord *Murray*, and Lord *Robertson*) in favour of the Company. As those opinions turned chiefly on the import of the saving clause, it is deemed unnecessary, and would, perhaps, be improper, to set

receive such indemnification from the said Company as shall and may be agreed upon between them, and, in case they cannot agree, as shall be settled by a jury, in the manner in which satisfaction is directed to be made by this Act, for lands taken or used under the powers thereof: Provided always that the validity and discussion in the competent courts of law, of such rights, privileges, jurisdictions, and powers so enjoyed or claimed, with all defences which any of the inhabitants of the counties of Linlithgow and Lanark, or any other person or persons, can or may plead against the same shall be, and the same are hereby reserved to all parties interested any thing herein contained to the contrary notwithstanding.”

them out in a report already somewhat extended by more useful and interesting matter ; more especially as the cause, in both its branches, must necessarily become the subject of a supplemental report, when the final judgment of the House has been pronounced.

E. & G. R. Co.
v.
M. OF
LINLITHGOW.
—
BRANCH II.
Bridge Customs

In the meantime a word may be said as to the practical effect of the remit, and of what has occurred in pursuance of it.

Position of the
record conse-
quent on the
remit.

It appears, by the printed proceedings, that the original closed Record, which formed the basis of the interlocutors appealed from, has been “opened up.” Therefore, as a closed Record, it exists no longer ; and it may perhaps be contended that the interlocutors appealed from have now no Record to which they, or the judgment to be made by the House reviewing them, can be applied.

The next step (after “opening up” the Record) has been to amend the pleadings, so as to embrace fresh allegations. On the 22nd February, 1849, a *new* Record (apparently the only Record now existing in the cause) was “closed ;” and upon this new Record, a “Hearing in Presence” took place in the Court below, which, however, though eliciting “opinions,” was followed by no adjudication.

W. O. & W. HUNT.—DEANS, DUNLOP, & HOPE.