

in and say—"If we, the Crown, had been a party to this proceeding, we should have required that a sum of money should have been given to us, in lieu of any claim which we might have set up to any part of the land now covered by the river, which might have been laid by for the purpose of improving this navigation"? I do not think, in that case, there would have been a pretence for the Crown claiming to be so entitled. I think there is no more pretence for that claim now. My Lords, it is impossible to get over the words of § 20—"one-half the gross value, after such reduction, shall be paid by the said Trustees, and shall be accepted by the said owners of the adjacent lands as the full price of the ground or soil so required."

With respect to the saving clause, I entirely agree with what my noble and learned friend has said, that you cannot out of this saving clause construe any right to be given to the Crown. The right which the Crown had independently of it and previously to it, is saved, and nothing more. The Crown is not to have its right lessened nor diminished; but nothing whatever is given to the Crown by the saving clause, except the mode of ascertaining its rights by petition to the Court of Session. As, generally speaking, you cannot raise out of a proviso in a statute, nor out of an exception in a statute, any affirmative enactment, so you cannot, generally speaking, raise out of a saving clause any affirmative or positive right whatever.

I am therefore of opinion, that the Court below has well decided this case. I agree, generally speaking, in the reasons upon which their Lordships have proceeded. Perhaps some remarks might have arisen upon one or two of the statements in one of the learned Judge's reasons, with which I do not quite agree; but, generally speaking, those reasons appear to me to be perfectly satisfactory.

I am exceedingly sorry that, according to the inflexible rule in these cases, we cannot here give costs as against the Crown; but the hardship is not inconsiderable, of the party having been obliged to come here by this appeal, and thereby to expend pretty nearly the whole of the money to which, as the fruit of our judgment, he would be entitled.

Interlocutor affirmed.

First Division.—Pemberton. Crawley and Gardiner, *Appellants' Solicitors*.—G. & T. W. Webster, *Respondents' Solicitors*.

MARCH 22, 1852.

THE TRUSTEES of the HARBOUR of DUNDEE, *Appellants*, v. WILLIAM STARK DOUGALL, *Respondent*.

Free Port and Harbour—Regalia—Negative Prescription—Statute—Clause—Construction—*The Dundee Harbour Trustees acquired under statute from the town of Dundee, their right of free port, constituted by ancient charters, which set out the limits as including several miles on each side of a wide estuary, but the statutes spoke only of "the harbour of Dundee and the precincts thereof," not stating the precise limits. The trustees raised an action of declarator, concluding to have the sole and exclusive right of levying dues at Ferry-port-on-Craig, a harbour on the opposite side of the firth, which belonged to the defender Dougall, and was within the limits of the old charters. Dougall shewed no grant of "free port," but of "portus" only, but alleged and proved, that vessels had from time immemorial loaded and unloaded at Ferry-port-on-Craig, without paying dues to the Dundee Harbour Trustees.*

HELD (affirming judgment), that this was a good defence to the action, and that the statute transferring the harbour did not take away any existing exemption.

Public Bodies—Negative Prescription—*Public trustees appointed by statute to discharge public duties, may have their rights cut off by the negative prescription running on a primâ facie title, though no positive prescription is proved.*

Process—Expenses—*If the result of an appeal is only such a variation of the interlocutor appealed against, as might have been obtained by application to the Court below, the appellant must pay costs.*¹

The Trustees of Dundee Harbour appealed against the interlocutors of 26th May 1847, 5th July 1848, and 20th July 1849, and maintained in their case, that they ought to be reversed for the following reasons: 1. Because the statute 6 and 7 Vict. c. 83, empowered the appellants to levy the dues contained in the schedule appended to the act, within the port and harbour of Dundee or the precincts thereof, and Ferry-port-on-Craig is within these precincts.—6 and 7 Vict. c. 83, §§ 56, 58; Lord Medwyn's obs. in *Campbelton case*, 7 D. 223; Hale *de Portibus Maris*, c. 2; Statute 1606, c. 33, Thomson's Acts; *Moncrieffe v. Navigation Commissioners of Perth*, Feb. 15, 1834, noticed in 12 Sh. p. 459. 2. Because the omission to levy dues at one

¹ See previous reports 11 D. 6, 181, 1464; 20 Sc. Jur. 542; 21 Sc. Jur. 35, 551. S. C. 1 Macq. Ap. 317; 24 Sc. Jur. 385.

particular portion of the precincts of a harbour, to which vessels may have from time to time resorted during forty years, is not a good legal ground on which the right of grantees to the harbour should be held to have been lost.—*Magistrates of Campbelton v. Galbreath*, Feb. 21, 1845; 7 D. 482; Ersk. 2, 6, 18; 3, 7, 8. 3. Because the respondent has not only not established any right to a free port at Ferry-port-on-Craig, but does not exhibit any title to which possession of the privileges of a free port could be attributed.—Hale *de Portibus Maris*, p. 2, c. 5, 6; *Girdwood v. Campbell*, 7 S. 840; *Magistrates of Campbelton v. Galbreath*, 7 D. 220. 4. Because the Court of Session, without a proof of good title in the respondent, have virtually erected Ferry-port-on-Craig into a free port, with all the privileges attaching to it, within the limits of the appellants' grant; and because the appellants, who have a good legal title and interest to object to the exercise of such rights on the part of the respondent, have been excluded from such objection.

The *respondent* in his *printed case* supported the interlocutors on the following grounds: 1. Because the appellants or their predecessors never had a right of harbour which they could enforce at Ferry-port-on-Craig. 2. Because, by the verdict which the appellants have consented should be entered up against them, by the admissions upon record, and by the documents in process, it is established that, during the years of prescription, and for time immemorial, the harbour of Ferry-port-on-Craig has possessed an immunity from any claims which the appellants or their predecessors might have pretended against it. 3. Because the appellants, having failed in establishing any right in the harbour at Ferry-port-on-Craig, have no title or interest to challenge the rights of the respondent therein, or in any way interfere with his exercise of those rights.

Sol.-Gen. Kelly, Bethell Q.C. (and *Anderson Q.C.*) for appellants.—We found on various charters, as well as acts of parliament, which clearly set out the limits of our harbour, and shew that Ferry-port-on-Craig was included. The defence raises the question, what must be the effect of the prescription admitted in the first issue. We say our charters and statutes are so clear, that their provisions cannot be set aside and nullified by any admission of a mere negative prescription, which cannot establish a right, but, at most, can only be evidence of dereliction. There was not sufficient evidence of dereliction, for the fact of our not levying dues at Ferry-port-on-Craig is consistent with the supposition, that these were not worth levying. But we go on the broad principle, that the mere omission of a public body (which we are—Craig I. 15, 15) to levy dues at a particular point, within the limits over which our grant extends, cannot destroy our right to levy at that point. Our case is not like that of a private individual, entitled to a debt by bond, where his default in suing within a certain period may operate to cut off, and effectually destroy, his title to recover. Trustees appointed by act of parliament to exact dues on vessels coming within a certain area, have no power to release to the owners such dues; if they cannot release, they cannot abandon; and if they can neither release nor abandon, it seems to follow, they can do no act which could have this legal effect—Ersk. Prin. 1, 2, 8. Their negligence, ignorance, or mistake, cannot relieve them of a duty cast on them by statute, and in the discharge of which their whole interest consists. An act of parliament cannot be repealed by the default of those to whom it entrusts the discharge of a public duty. Mere neglect to levy dues at a particular spot within the limits, was held not to take away the right in *Magistrates of Edinburgh v. Scott*, 14 S. 922, where the grant was in the same terms as here. So in *Magistrates of Campbelton v. Galbreath*, 7 D. 482. In no case has it been held, where a body charged with a public right, and having no benefit or interest save in the exercise of that right, fail to perform their duty at a given spot within the limits assigned to them, that their non-performance amounts to an abandonment. A grant of free port is *unum quid*, and is sufficiently kept alive by being exercised at the most convenient spot—which in this case was at Dundee; and the grantee is not bound to erect a harbour along the whole line of his coast. The mere admission, therefore, of the first issue, could not derogate from our Crown grant. It was incompetent in the respondent to set up a mere negative usage, and say it interpreted our title,—which was not of the kind to be so explained, there being no ambiguity in it. When a title is sufficiently broad to admit of being interpreted by usage, it must be a positive, and not a negative usage. Here a negative usage has been found to entitle the respondent to claim a right of free port, which is a *jus regale*, contrary to the well-known rule, that negative prescription does not run against the Crown. What the Court below should have held in order to ground their interlocutor, was this, that not only had vessels gone to Ferry-port-on-Craig and not paid dues to us, but that these had been paid to the respondent. The Court assumed there was no *tertium quid* between our having the right to levy dues there, and the respondent having that right. A mere non-user on our part could not found a rival and competing title in the respondent, which could only be set up by proof of absolute enjoyment on his part. This was not done, for the Court held the second issue was unnecessary, when the first was admitted in the affirmative. Yet the effect is, to give the respondent a title. Now, our title is a Crown grant of free port by a charter of James IV. 1601, and such grants are always in certain terms, giving not merely the port, but also the right of levying dues within certain defined precincts, as was seen in *Scott's* and the *Campbelton case*.

But the respondent's title is nothing but a right of property in the creek or landing-place, that is, the soil, as distinguished from the right to levy dues. He had nothing to prescribe upon. The kind of possession he ought to have had was possession on a title at least apparently good.—Bell's Prin. § 606. His title was not only not a grant of free port, but it was not even a grant from the Crown, being only from a Crown-vassal, and was no title at all.

[LORD CHANCELLOR.—There was some proof that the respondent had a claim—thus, that he had put up to auction the dues of his harbour, which may go to presume a grant from the Crown. It may have been an imperfect title, but still there was some proof of one.]

A right to levy tolls must be given in express terms, for it is in the nature of a tax on the public.—Comyn's Digest, "Navig. E." Hence a grant of "*portus*" in English conveyancing would not give the *jus regale*.—Hale *de Port. Maris*. The same is law in Scotland.—Craig, 1, 15, 15. Besides, there cannot be two inconsistent grants of free port. If there is a clear grant by the Crown covering a certain area well defined, and a subsequent lesser and ambiguous grant, no length of possession under the latter can avail to defeat the former, in which there is nothing left for usage to explain. Thus the *Finkabout case*, 1 S. 515. 7 D. 486, differs from the present, for there the grant was of dues "used and wont," and here it was competent to admit use and custom to explain the meaning of these words. We say, therefore, our grant was too clear to need either kind of prescription to explain it—that a negative prescription only was proved—but that, inasmuch as the respondent had no title, it ought to have been a positive prescription he should have proved. As to the *statutes*:—Keeping in view the title we have by charter, our statutes tend to confirm in us the sole and exclusive right contended for. The terms used there are always "the port of Dundee and the precincts thereof," which can only mean the precincts so clearly defined in the charter. All the provisions and allusions point to Ferry-port-on-Craig as being within these precincts. Thus, in schedule D. to our act of 1843, all goods coming from Ferry-port-on-Craig in the regular licensed pilot boats are to be exempt from shore-dues, implying that otherwise they would not be exempt. If this were not so, the port of Dundee might be ruined by vessels going in to Ferry-port-on-Craig, and unloading their cargo into the ferry boats, and thus evading dues at Dundee. As to the *interlocutor*:—Supposing even that the negative prescription here had been admissible, the interlocutor went too far. The effect of it is, to erect Ferry-port-on-Craig into a free port, with all the privileges pertaining thereto, and thus to do what required an express grant from the Crown. The Court, in granting the second issue, must have held that the respondent had the burden thrown on him of proving a positive title in himself, and yet, after the first issue was affirmed, that second issue was held to be unnecessary. In *Gordon v. Grant* (22 Sc. Jur. 180), the Lord Justice-Clerk seemed to consider that this case had been pushed too far.

Rolt Q.C., Moncreiff, (and Donaldson), for respondent.—We do not dispute that Ferry-port-on-Craig is within the limits of the appellants' old charters, but we deny it is within "the precincts," as that term is used in their acts of parliament. It is said our title was not such as could be explained by usage, and if it could, that the usage proved is not sufficient. The first issue being affirmed, the usage there found was not a mere non-user, but a user contradictory and in defiance of the appellants' right. It was not the less contradictory, that payment of dues was not proved to have been made to us. Whether the dues were paid to us or to a stranger, was quite the same, so long as they were not paid to the appellants. No title was required in us to support this usage. The rule is, that positive prescription in general requires a title or grant, to which it is to be referred—though there are exceptions, as when a right of way is claimed over an individual's lands. But as to negative prescription, no title whatever is required, except in the single case where feudal rights are to be extinguished.—Bell's Prin. § 2008. Ersk. 3, 7, 8, though loosely expressed, does not contradict this. The reason why feu-dues cannot be prescribed, is, because they cannot be separate from the land, of which they are the fruits.—*Glengarry v. Duke of Gordon*, 6 S. 611.

[LORD BROUGHAM.—In the case of feudal subjects, you say negative prescription does not run, because feu-dues are the fruits of the superiority, and positive prescription alone can have effect:—May it not be argued here, that these port dues were the fruits of Dundee harbour, and that a negative prescription only is useless?]

The rule is founded on subtle grounds of feudal law; and though in one sense the dues here may be looked on as the profits of the appellants' harbour, yet there is no right vested in the appellants as superiors—there is no feudal relation between us. The right, therefore, could be lost by dereliction, or prescriptive immunity, which was proved by the non-user for forty years. Moreover, when a title is necessary either in the positive or negative prescription, it does not require to be the earlier title of the two, nor is it necessary that the title be clear, and free from all ambiguity. It is enough if it *prima facie* import the claim made under the usage. Thus salmon fishing is claimed under a clause *cum piscationibus*.—Ersk. 2, 6, 15; *Duke of Queensberry*, Mor. 14,251; *Duke of Sutherland*, 14 S. 964. So a grant of small customs to a burgh is measured by the possession.—*Fleshers of Canongate*, 4 S. 751; *Boag v. Magistrates of Burntisland*, Mor. 1991; *Tod v. Magistrates of St. Andrews*, Mor. 1997; *Cowan v. Magistrates of Edinburgh*, 6 S. 586; *Hill v.*

Magistrates of Edinburgh, 8 S. 449; *Magistrates of Dunbar v. Kelly*, 8 S. 128. The strongest illustration of the effect of possession, is *Magistrates of Wigton v. M'Clymont*, 12 S. 289. So the property of the sea-shore, though not implied in a grant of barony, may be acquired by possession. These cases shew, that the doctrine of possession is applicable to all grants of this kind, whether as to the mode of levy, or the limits within which, and the parties on whom, the levy is to be made. Now, the question is not, whether our title is such as to enable us to recover tolls in our own right, but whether we can resist the appellants. The substance of the action was to assert a right which had never been exercised before. They admit Ferry-port-on-Craig is our private property, yet they insisted on coming into our ground to levy dues. Their grant was one which was to be measured by possession; and as the latter was confined to Dundee, it may have been good for Dundee; but the possession could no longer be good for the whole limits, the moment an antagonistic usage existed at Ferry-port-on-Craig, and their right was extinguished then and there. Though we do not require a title, yet we have one. Our predecessors, from holding first of the Archbishops of St. Andrews, came to hold directly of the Crown, and our titles all contain a grant of "*portum seu portus*," and then of privilege of ferry—the boundaries mentioned implying the existence of a harbour of the town, and there is a separate *reddendo* for the harbour. There are no *voces signatæ* in the law of Scotland for a grant of "free port." If a Crown-charter of free port cannot be presumed in our favour, it is nevertheless clear, that rights of subjects *inter regalia* can be held of a subject-superior. Ersk. 3, 7, 6; *Duke of Queensberry*, Mor. 14,251; *St. Monance*, 7 D. 582. Our title is therefore sufficient.

[LORD CHANCELLOR.—You mean, there is sufficient colour of title.]

It was said, public trustees could not release or abandon the right of levying this kind of dues. But the appellants are not public trustees in that sense, else they would be bound to keep our harbour in repair, which they have not done—the right to levy dues, and the duty of keeping the harbour in repair, being counterparts.—Craig, 1, 15, 15; Bankt. 1, 3, 4; Ersk. 2, 6, 17; Bell's Prin. § 654; *Christie v. Landale*, 6 S. 813. But even assuming they are public trustees, time will run against them. Thus tolls in burghs, which are rights of regality, have been cut off by negative prescription.—*Rowland v. Craigiever*, Mor. 10,724; *Mag. of Hamilton v. D. of Hamilton*, Mor. 10,738. It applies to every conceivable right—I More's Stair, "Prescr." p. 265; and it makes no difference that such right originally came from the Crown, for if so, time could run against nobody, all being, more or less directly, grantees of the Crown. Ersk. (3, 7, 32) says, both prescriptions run against corporate bodies. See also *Feuars of Kelso v. D. of Roxburgh*, Mor. 10,737; *Miller v. Storie*, Mor. 10,738; *Tarsappie v. Pittendreich*, Mor. 10,770; *Graham v. Douglas*, Mor. 10,745; *Finkabout case*, 1 S. 515. There was no inconsistency between this and *Scott's* and *Campbelton* cases; for in both these no allegation had been made, that ships had come and landed goods at the disputed spot, and had not paid dues—which would have made all the difference. As to the *acts*:—The whole scope of these is to shew that the "port and precincts" meant only the local harbour of Dundee. The penalties are to be enforced in the county of Forfar, not of Fife. The preamble limits itself to the former county, while 11 Geo. IV. c. 119, §§ 29, 35, and 37, point this out still more distinctly, and shew that all that was meant to be conveyed by the town of Dundee to the appellants was the local port. Thus the "liberties of the water of Tay" are spoken of as distinct from "the harbour of Dundee." Those acts, therefore, do not advance the appellants. As to the interlocutor, it found in substance only that we had a good defence, and not that we had a good title as against everybody else. To dismiss the suit, left the general right and title untouched, and the interlocutor merely dismissed the suit. It merely affirmed the first issue, and the affirmative of the second issue would still be thrown on us.

Kelly replied—Where there is a valid grant from the Crown to levy dues throughout the whole limits, and where that right to levy is established, not by prescription—that is, by actual perception of dues, from which a lost grant may be presumed—but by the actual production of the grant itself, setting forth these limits, there is only one way of setting up a defence against claims made at a given spot within the limits, and that is, by shewing positively some earlier grant from the Crown inconsistent with the other. We admit, if the respondent had an earlier grant from the Crown of free port, and of exclusive right to levy dues within that port, it would be a good defence. The Crown cannot, by a subsequent grant, derogate from one already given. Thus, here, if we claimed under prescription or the presumption of a lost grant, the respondent might have rightly set up a longer prescription. But when a positive grant is produced, clearly defining from what time, in what limits, and on whom the levy is to be made, a negative prescription having no lawful origin cannot defeat that grant, and proof of such prescription is immaterial. Evidence is only of use and applicable where the terms of the grant are ambiguous; hence, if it is a grant of dues "used and wont," this expression can only be interpreted by evidence of possession. The cases are somewhat confused, but this principle may be traced throughout them. The *Finkabout case*, the rubric of which in 1 S. D. 476 is incorrect, proves it—the grant of dues there being "conform to use and wont."

[LORD BROUGHAM.—Was this expression used in the *Campbelton case* ?]

No; but that case was decided in our favour. *Miller v. Storie*, the rubric of which is also wrong,

bears out the principle. As to the *interlocutor* :—It goes too far. The suspension and interdict applies to the precincts of Ferry-port-on-Craig as well as to the harbour itself ; whereas there is nothing in the record about such precincts. As to the latter part of the interlocutor, it is a perpetual affirmance of a right in the respondent to levy, which is as extensive as he could have got if the second issue had been proceeded with to trial, and affirmed. The interlocutor also goes too far, inasmuch as it assoilzies the respondent from the whole conclusions of the action. This will operate as a *res judicata*, not only as to Ferry-port-on-Craig, but as to the whole south side of Tay.

LORD CHANCELLOR ST. LEONARDS.—My Lords, in this case, the appeal is from a decision against the Trustees of the Harbour of Dundee, and in favour of the owner of Ferry-port-on-Craig, as far as regards the right claimed by the Trustees to levy tolls on ships loading and unloading in the latter harbour. The question is, not whether the respondent has or has not the right himself to levy tolls upon ships loading and unloading in that place or harbour, but whether the Trustees have that right or not.

Now, my Lords, this question, which has been argued upon so extensive grounds, lies after all in a narrow compass. The Trustees, who claim under the Corporation of Dundee, base their title upon the ancient charters which give them the harbour of Dundee—which is unquestionably a free port—and in the right of theirs of loading and unloading at that harbour ; and those charters give them other rights of taking tolls, which are mixed up with rights of taking tolls at fairs, and they give them rights over the waters for a distance, it is stated, of upwards of twelve miles up the Tay, on the north side and on the south side. It is admitted by the respondent that Port-on-Craig is within those limits, on the south side of the river. The question then, as a mere contest of title to an absolute right of property, as between the appellants and the respondent, might not admit of a great deal of difficulty ; because, although the respondent has shewn some title, and has set up some ancient charters, and those charters contain an express grant of Ferry-port-on-Craig, yet there has not been sufficient evidence produced now, or at any period of this litigation, that the port in question was what is termed properly a free port. Now, nobody has disputed that that is so as regards the harbour of Dundee ; and ultimately the question came before the Courts below upon the double claim, by way of defence on the part of the respondent. He first said, that the Trustees who were pursuing him had no right to pursue him, because ships had from time immemorial always been loaded and unloaded at Ferry-port-on-Craig, directly opposite to Dundee harbour, and with which harbour there was an hourly communication by ferry. It is utterly impossible, therefore, that the Trustees could be ignorant of what was taking place daily and hourly at Ferry-port-on-Craig. The respondent therefore said, that he was ready to prove that, from time immemorial, ships had so loaded and unloaded at his harbour, and that the Trustees had never received any toll in respect of those ships. Now, in that state of the matter, it was contended that that was a defence which could not be set up. The second defence was of a different character. He asserted, that he had himself not only the port of Port-on-Craig, properly or simply so called, but that he had what amounted to a free port—that so far from the Trustees having the right to levy tolls at his harbour, he himself had that right, and exercised that right over it himself.

Now, in the result, the questions coming before the Court, the Lord Ordinary made a declaration which involved the two questions, and ultimately your Lordships will find that the First Division differed from the Lord Ordinary upon those points ; they, as far as they differed, being of opinion in favour of the respondent,—that is, that his right was open to him upon the second ground, and might be proved hereafter. They agreed with the Lord Ordinary upon the question as to the right to prove that which ultimately has been admitted as proved in the matter before your Lordships ; and, therefore, there is no disagreement between the Lord Ordinary and the First Division upon the point in contest, as to the right of non-liability of ships loading and unloading at the harbour of Port-on-Craig. Many of the findings of the Lord Ordinary were not interfered with by the First Division, and, therefore, the limits are not disputed—the right of free port in Dundee harbour is not disputed—the circumstance, that Ferry-port-on-Craig is within the limits, is not disputed ; but it is with this exception, that the findings are to be without prejudice to any right of free port, or to levy dues, which the respondent may instruct. He is at liberty, therefore, to set up that defence.

Then the Lord Ordinary found that the respondent had not produced any title to the free port of Ferry-port-on-Craig, which admitted of being explained by possession, to the effect of being so construed. Now, the Inner Division recalled that part of the interlocutor, in so far as it finds that the respondent has not produced any express title. Upon those points, therefore, which were thus in dispute, the matter only amounted to this,—that the First Division were of opinion that there was sufficient evidence before them to enable the respondent, if he thought he could do so, to establish the title which he thought was in himself.

Then the *fifth* point decided by the Lord Ordinary was in these words,—he declared, “ that apart from any separate title to a right of harbour or free port at Ferry-port-on-Craig, vested in the defender, he has condescended on facts and circumstances which are relevant and sufficient

in law to found a plea of dereliction, and of prescriptive immunity, in his favour against" the Trustees; and that, "the defender is entitled to a proof of the facts and circumstances so averred by him." Now, the First Division appear to have admitted that question with the Lord Ordinary,—so that, so far as regards the right to enter upon the defence which prevailed ultimately in the Court below, the Lord Ordinary and the First Division are entirely agreed. The Inner Division found further than the Lord Ordinary did upon the question of absolute right to this port as a free port, and the right to levy dues; but that question, in the result, according to the opinion of the Inner Division ultimately, it became unnecessary to decide.

Now, that being so, and the matter being remitted, the two issues were directed. The Trustees of the harbour were of course advised to admit, as a fact found by a jury, the *first* issue, and then the case stood thus,—that their claim in the action of declarator was to be tried upon their own admission, that during time immemorial, ships had loaded and unloaded at the harbour of Port-on-Craig, and that they had never levied any dues upon them. It became, in the view of the Inner-House, (and I think this is the proper view of the case,) unnecessary to consider the question raised in the *second* issue, as the *first* issue was positively admitted, and found, by the admission, in favour of the respondent; and upon that a declarator was pronounced by the Inner Division, upon the terms of which a good deal of observation has been made, and to which I shall presently call the attention of your Lordships. The effect of that declarator was not to establish any title as of a free port. I am now speaking of the terms which have been commented upon, but the substance and intention of that declarator was not to establish any right of free port in the respondent in Ferry-port-on-Craig, but to absolve him wholly from the claim, on the part of the Trustees, to levy tolls in his harbour upon ships loading and unloading there.

Now there has been a great deal of discussion, in the first place, whether this is a positive, or whether it is a negative prescription. I believe that the law of Scotland has been very much embarrassed by the introduction of those terms. They are not to be found in the act of parliament—they do not properly belong to the subject—they do not properly describe the subject. You may mention many cases in which you might properly, in point of language, say, that there was a negative prescription even where a positive prescription exists,—they must be so entirely blended with each other, that they only tend to confound; and I believe it has very often happened, that there has been more contention about the meaning of those words, than there would have been upon the substance of the cases in which those words have been a matter of discussion.

Now, my Lords, the act of parliament itself is the simplest act that ever was passed, which whoever runs can read. There was never anything so plain and so simple as that act of parliament. It declares the rights. It must be remembered that it is an act which applies solely and only to an heritable subject. It declares, *first*, that as to lands and other heritages, where possession has actually been upon a title, then forty years' possession upon a title shall be good as against the whole world—that is to say, that if there is nothing *ex facie* which is bad in your title, no extrinsic circumstances shall ever be brought forward to affect that title, although it may not be the best title, if you have had forty years' possession. It does not apply only to good titles; it was intended to operate, as all statutes of limitation are intended to operate, upon that which shall turn out to be really an infirm title. One of the first objects is to secure quiet possession, not to allow claims to be set up at great distances of time, when evidences may be lost, and rights may be held which have been fairly acquired by others, and thus to disturb a title which has been long enjoyed, and, in most cases, with sufficient foundation. All well-regulated countries, therefore, have statutes of prescription, and this statute of prescription applies to Scotland. Now, in Scotland, such a foundation would be sure to have a powerful operation, and there can be no difficulty in applying the rule.

But there were other cases which required a remedy, and those cases are provided for in the same simple manner by a separate clause, that in actions upon heritable rights, and so on, forty years without enjoyment shall operate as a bar. That is an exclusion in fact—it is an exclusion of the right to recover without establishing a right in the party who has the benefit of the exclusion. Our old statute of limitations formerly had something like that effect—that is to say, our old statute of limitations barred the remedy, but it did not bar the right. It seems a contradiction in terms, but the estate was not barred under our old statute of limitations, but the remedy was barred. Now, the statute of limitations, taking a wider view of a case, has barred the estate, the right, and at the same time has barred the remedy. The effect, therefore, is not simply to exclude a man, by the law of England, from the recovery, but the effect is to transfer the right, the legal estate, from the man who is the pursuer, to the party whom he is pursuing.

Now, those rights are quite distinct; and there is only this matter which may lead to a little speculation, that when you come to negative that prescription, it seems to be admitted that there must be some right set up in the respondent—there must be some benefit to be enjoyed by him—that he does not simply and merely say, "You have not recovered this, or you have not asserted it for the last forty years," but "I have, not you,"—and that, therefore, there must be, as there is in this case, such a right set up as would shew a benefit to accrue to the respondent.

Now, notwithstanding all those disquisitions of which we have heard so much, and so learnedly, upon positive prescription and negative prescription, it seems to me that there never were rights which stood upon a more distinct ground, and rights to which a clear provision of the act of parliament more distinctly applied.

My Lords, with regard to authority, not a single authority has been cited at the bar to shew, that these rights are not properly, in the sense in which the word is used, rights of the latter sort, not negative rights, but positive rights. They appear to me to be dependent upon negative prescription—that is to say, I have a benefit by excluding you. If I exclude you—if I can load and unload ships in the port without your being able to levy tolls, I do not take it as an act of absolute property. And a great deal of this argument, as it appears to me, would have been more applicable if the contention had been of a different nature. If the respondent here had set up a right in the harbour of Dundee—if it had been a question between them as to the title to the harbour of Dundee—I could have understood a great deal of the argument, which I have not understood as applicable properly to this case. But nobody disputes the title to the harbour—it stands upon grounds which cannot be shaken—and the respondent is only defending himself against the claim set up by the Harbour Trustees. Now, I must say that, looking through the authorities, I find every confirmation of that which I believe to be the true distinction between positive and negative prescription. The words are clear enough. I look at the substance, and I am perfectly satisfied, upon the authorities, that this is what is called by the Scotch law a negative prescription, and that, therefore, forty years would be a bar, except some other right is set up.

My Lords, it is argued, taking *Mr. Scott's case* and the *Campbelton case*, that the non-user of an extensive right like this, at any particular portion of the harbour, cannot take away the right to levy tolls. Now, those cases have established that beyond all doubt—it is not necessary that you should exercise the right in every part of your limits, and levy at every part. That is admitted. But in *Scott's case* particularly, not only the condescence, but the judgment itself, expressly says, that if the defender had averred a universal usage at a particular point, and, as Lord Mackenzie says, “in defiance of the right granted to the pursuers,” that would have been a different case. Now, when I presented to the learned counsel those words, “in defiance,” it was said that this was not in defiance. Why, it was in defiance in this sense—not that they challenged to see the act done—not that there was a great array and pretence—but that there was a solid and real exercise of right in the face of the pursuers and in the face of the world,—loading and unloading publicly at this port, and never paying any dues. Therefore, by the very admissions of those who decidedly endeavoured to take the other view, in the cases of *Scott* and *Campbelton*, this very case is admitted not to be within the principle of those decisions.

Then an attempt was made to distinguish this case because the pursuers are Trustees, and because they are, under the charter, public officers, and therefore can have no title. Your Lordships have had no authority cited to establish any such proposition; but the authorities which have been cited on the other side, clearly establish that corporations, that representatives, that public bodies, may be, as they ought to be, invested with such a title. If that were not now the construction of the act of parliament—if that were a construction which had never been laid down—I should take the liberty of advising your Lordships to lay down that construction if it were necessary—that is to say, give to that act, the object of which is to secure quiet possession after forty long years, the operation that it was intended to have. I see nothing, therefore, in law, according to the proper construction of the statute, and according to the authorities in Scotch Courts, to take out of the operation of the act the particular case now before your Lordships.

I come next to the act of parliament. My Lords, another ground, and a very strong ground, was said to be the act of parliament. The learned counsel for the appellants stated, that he would not dispute the question if there were a prior grant. Why, if there were a prior grant, there could be nothing to dispute, speaking generally; because, of course, if A has the first grant and B the second, A takes precedence of B. And that is in point of fact the contention here. The Trustees claim the rights over the harbour of Port-on-Craig because their grant is prior in point of time. But the intention, I suppose, is this,—although the argument was not so applied, it was intended to be applied I apprehend in this way,—that when you come to the act of parliament, which is general in its terms, if the grant be prior, the act then is not to apply. Why not? I should desire, my Lords, to be told upon what ground you could distinguish any case of title against the act of parliament, if that construction be the true one. We have been told many times that the act of parliament does positively enact, that within the whole limits of the harbour of Dundee, and its precincts, there shall be levied these particular tolls,—and that there are certain exceptions,—and that, therefore, saving those exceptions, it is utterly impossible, without repealing that act, to say, that this particular harbour of Port-on-Craig, which is admitted to be within the limits, is exempt from the tolls imposed by the act. It appears to me, that if this were the real construction of that act, it would be utterly indifferent to the merits of the question to be decided, in what manner, or upon what ground, the respondent asserted or proved his title to a particular harbour out of the jurisdiction of the Trustees, within their limits, but not

liable to their tolls under such act. Take the case put : Suppose there had been an actual prior grant of free port, for example, or a release of the right to levy tolls from the persons competent to make it, to the persons who then were entitled to the harbour of Port-on-Craig—What difference would that make ? If by general possession, or the exercise of the right in question without paying toll, a right has been obtained against the Trustees, (I am now speaking independently of the act,) where is the distinction between that right thus to exclude the Trustees, and a positive right by grant, or by any other mode that can be suggested, to be exempt from the payment of tolls ? The argument is this, that the stringency of the operation of the act is such that it strikes down all rights—that, taking the points from A to B on the south as well as on the north side, it imposes the toll within the whole of these quarters, and there is therefore no escape, and you are not at liberty to set up a positive prescription, any more than you could a negative prescription.

Now, my Lords, I submit to your Lordships, that, in point of law, there is not the slightest foundation for that proposition. These acts, imposing tolls of this nature, must always be read in favour of the subject ; and unless rights are expressly taken away, the courts of law will never interfere with them. If I look at the particular words of the act, I am satisfied that the legislature never intended to interfere with any particular right of any particular owner, within those limits, to be absolved altogether from paying the toll at the time that act passed. Now, the whole scheme of the act shews what the intention of the legislature was. All the limits on the north side are within the harbour of Dundee. The levy of tolls would necessarily take place there. All the tolls are vested in persons who represent the harbour and town of Dundee, and so on. But the south side, which is wholly in the county of Fife—which has no natural connection with the opposite coast—has no voice whatever. If tolls are to be levied with regard to this harbour, there are no means of having the slightest control over the acts of the Trustees, or interfering at all with them ; it is altogether excluded. That shews clearly, therefore, from the whole machinery which is erected in order to carry the act into execution, the intention of the legislature, that the act shall operate upon the harbour of Dundee, and not affect a right upon the opposite coast.

Now, my Lords, I submit in point of law, that if there was at the time of this act a clear exemption on the part of Mr. Dougall from the payment of tolls to be raised by the Trustees in a particular port or harbour, that right is not taken away by the act ; and so far from some of the exceptions having the operation which has been assigned to them, it does appear to me that one of the exceptions, particularly that of making the ferry, would rather tend the other way. That act must receive the natural and common construction, and cannot be forced, beyond its proper and intended limits, to take away an absolute right, which existed in this party at the time the act passed.

Then, my Lords, that question will really dispose of this case ; because if there is no reason why the respondent should now be subject to the rights of the Trustees, of course the case must be dismissed. The only remaining question will be as regards the points which have just been raised at your Lordships' bar with respect to the terms of the interdict, and the terms of the declarator. Now, my Lords, that interdict was of course granted before the rights were settled by the appellants' admission of the first issue. I am, therefore, not at all surprised that that interdict goes further than is necessary. When it was granted, the Court had not before it all those facts upon which it ultimately founded its final decision. Their Lordships are deciding this only,—that the Trustees of Dundee Harbour have no right to levy tolls, in the harbour of Port-on-Craig, upon ships loading and unloading there. That is all that I understand to be really decided, and that is all that I am prepared to advise your Lordships to affirm ; and I therefore propose that you shall save the rights of the Trustees to this extent, that the interdict should not be deemed to go beyond the finding of the first issue as admitted by the Trustees. The Trustees, in their admission, confined their admission to the harbour of Port-on-Craig. Now, this interdict must go no further than that. It must be co-extensive, and it must be confined to the issue. Then, as regards the subsequent portion, I very much think that that does not establish any right, and is not intended to do so,—but it is ambiguous ; and as the respondent has no right to take advantage of any ambiguous matter found in the interdict, I think that there should be some words introduced in order to shew that this House is not now deciding any positive right in the defender to a free port, or in himself to levy tolls and dues in the harbour of Port-on-Craig. With those alterations, there will be no difficulty in that respect. I am sure that the learned counsel on the other side will have no difficulty as to those parts. If there should be any dispute concerning it, the House itself will set it right. I think it will be best done by a saving clause, not altering the interdict, but expressly saying, that that is to be without prejudice to the rights of the Trustees in the respect which I have mentioned.

Then we come to the question of the interlocutor itself. When the Court had that before them, they had before them everything which has transpired in the cause, and therefore this stands upon a different ground. Now, I am not satisfied that there is any objection to that declarator ; because, although the summons founds itself on assertions of right upon the part of the appellants, those

are merely inducements—they are only to found that which it set forth—namely, the right to levy tolls and dues in this harbour of Port-on-Craig. The appellants did not take these proceedings for the mere purpose of a naked declaration of right to either this or that; but they founded themselves upon certain claims which are set up now at your Lordships' bar. They went into Court for the purpose of making use of those, of course, as the groundwork of their case; for it was the real foundation. They have set forth that foundation for the claim of positive right. By the admission of the issue—by the decision of the Court below upon that admission, it being equal to a finding by a jury—the respondent has been absolved from the claim so set up. Then, when he is entirely absolved, what does it amount to? Not to any declarator upon the rights which they set forth. It does not touch that question—this House does not assume to touch that question; but it amounts to this,—let these rights be sustained if they may—upon which we pronounce no decision—we are not called upon to do so—we have only to decide whether you have a right to demand from this respondent, tolls and dues for ships loading and unloading in this particular harbour,—we say you have not, and therefore we wholly dismiss the respondent. Now that might be, I admit, coupled with the interdict as it stands at present; but when this House takes care, as it will take care, to qualify that interdict, and not to let it have any operation beyond what must have been intended, and which your Lordships are bound to carry into execution, then I submit to your Lordships that there will be no reason whatever to alter the final interlocutor.

My Lords, it is not always usual, in your Lordships' House, to give reasons when you affirm the decree of the Court below. Certainly, formerly, as I know well, it was not the practice of your Lordships' House to give any reason for affirming a decision. I must say that I think it better to do so, bearing in mind that the great object which your Lordships have, is not simply to administer justice, but to administer it in a manner which shall satisfy the parties that the case has been thoroughly considered. Therefore, the time has not been wasted which I have occupied before your Lordships. I feel that there is no necessity for going through all the authorities, as, after full consideration, I entirely agree with the Court below, and I shall move your Lordships to affirm with the saving which I have specified in the declarator of the Court below, and to dismiss the appeal with costs—I say with costs, because although it is proper that that variation should be made, yet as it might have been made upon an application to the Court below at the time acquiesced in by the parties, without coming to your Lordships' bar, your Lordships never will admit a thing of that sort as a valid reason for not giving costs in this House.

My Lords, it is stated that the great object of this appeal has been to settle what has been considered as an unsettled point. That, therefore, shews that the object of the parties is not to have this mere saving, but to endeavour to arrive at a satisfactory conclusion upon a question which is represented to be of such great importance. I hope that your Lordships will do no such act, which would be calculated to unsettle a question which I humbly consider is already perfectly settled, as to remit this case to the Court below. Therefore, my Lords, upon these grounds, I move your Lordships that these interlocutors be affirmed with costs.

LORD BROUGHAM.—My Lords, I agree with the course suggested by my noble and learned friend, and I am for affirming the interlocutors appealed from, and with costs of the appeal. My Lords, I abstain from entering into any general discussion of the question of prescription, except in so far as it is absolutely necessary for disposing of the present case. It has been contended, in the *first* place, that there can be no negative prescription of a right such as the right here claimed; and upon more grounds than one—among others, because it is a claim of a public right to be exercised for public purposes, for the benefit of the public.

My Lords, I can see no warrant, either in the text writers or in the cases, for holding this proposition upon any of the grounds upon which it has been rested. I shall only refer your Lordships to one or two of the authorities in the cases, which clearly negative any such proposition. And I would particularly refer your Lordships to the case of *Rowland v. Craigievar*, Mor. 10,724. It was the case of a claim on the part of the lord, who summoned a party before him as owing suit and service to his court, the head court of regality. Lord Craigievar had charged him for non-attendance, and he suspended the charge, and the ground of suspension was forty years' non-summions—to which he added another ground, more in the character of a positive than of a negative prescription—that he had, during that period, been summoned to the Sheriff's head court, whereby he not only prescribed for an immunity from attending the regality court of Lord Craigievar by a negative prescription, but seemed to set up something in the nature of a positive prescription, that he had acquired something beyond that, by having positively attended another head court. One ground taken in the argument there, was the ground which has been taken here, that it was a public right, and not subject to a negative prescription. The judgment of the Court, however, went on the negative prescription, for it found the reasons of suspension relevant, unless (which shews that the judgment was confined, strictly speaking, to negative prescription) the charger could offer to prove that the party had attended within forty years, which would give evidence of an interruption of the negative prescription.

My Lords, the case of *Campbelton* has been relied upon a good deal in the discussion in the course of this argument. I can find nothing in that case which goes against the present decision.

On the contrary, I find that my Lord Moncreiff, in his very luminous judgment in that case, says this:—The question was, whether Dalintober was within the boundaries of the harbour, and whether a party who had erected a quay at Dalintober had a right to use that quay free from the rights of the other party, the Magistrates of Campbelton, who had a sort of general right—I suppose it is one of the arms of the sea:—His Lordship says—“When it is settled that Dalintober is within the boundaries of the harbour, it appears to me that the decision in the case of *Scott* establishes in point of law, that the burgh holding such a grant, are entitled to levy the dues which they may have been in the use of levying for above forty years at any place within the bounds.” Now, that is just the argument in the present case. But, then, what does his Lordship say?—“Unless the other party could produce either another grant in his own favour, or at all events, clear proof of total immunity at one particular point or quay for above forty years.” That is exactly the contention here.

My Lords, the case of *Scott* has been alluded to, and I find in the report, that my Lord Mackenzie laid down what my noble and learned friend has generally referred to:—“Had the defender averred a constant and universal use to land or to ship goods and passengers at some place within the precincts, and in defiance of the right granted to the pursuers, that would have raised a different case.” Now, this case of *Scott*, both in the *Campbelton case* and in the present case, has been mainly relied upon, and your Lordships see there what my Lord Mackenzie lays down, which is a plain admission of the right to set up an immunity, on the ground of a negative prescription simply,—that is to say, a dereliction during forty years at that particular spot, although there has been usage of that spot as a harbour or quay, it being inconsistent with the right. In all these cases, it is not sufficient that the party shall shew that at a particular place no dues have been claimed; he must shew that the non-claim and the non-levy of those dues has been such as to be wholly inconsistent with the right claimed. If there had been no harbour, if there had been no user, if there had been no landing of goods, or no shipping and unshipping at that particular place; if there had been no means of levying the dues, if the party claiming the right of harbour had not the means of levying dues, because there were no ships resorting thereto,—that clearly would not be a case of negative prescription, because a negative prescription proceeds upon a dereliction of a right in circumstances in which the party claiming the right might, if he had that right, have exercised it. Take, for instance, thirlage, which, it is admitted, may be lost by a negative prescription: Suppose the party has, during upwards of forty years, possessed his land—we might take even the instance of a party within the scope of the thirlage, possessing the land during the whole of those forty years—and suppose, during the whole of that time, there was no corn growing—that would not be a negative prescription, there being no *grana crescentia* upon which the right would operate. So here, if there had been no place where the magistrates' rights of levying dues could be exercised, if there had been no harbour, or no place where they could have levied those dues, of course there could not be a negative prescription. But here there has been a port; that port, by admission, which is to be taken as the verdict of a jury, has been used as a port during upwards of forty years, and vessels there, loading and unloading, have been suffered there to load and unload without any toll. I therefore hold, that in this case there has been an immunity proved by this party from the rights alleged—that the judgment is correct which affirms that immunity—and that there is nothing in law to make it incapable of being enjoyed.

Then, my Lords, as to the argument upon the statute, I entirely agree with my noble and learned friend, that that statute is to be taken, with regard to the rights of parties, (it is a private act,) at the time when the act was passed. If this right existed in the owner of Ferry-port-on-Craig from time immemorial, or for forty years before the year 1843, and consequently for forty years, or from time immemorial, before the passing of the act, we are to enquire whether the intention of the legislature was to take away what the general law so vested in the owner.

My Lords, for the purpose of removing all doubt as to the positive scope of the finding of the interdict, and of the judgment of *assoilzie* and *absolvitor*, I think that certain words can be added without, properly speaking, altering it. It may be done by saying, that this is to have no prejudice, and is not to be taken as deciding those points which really cannot be decided.

Mr. Bethell.—My Lords, I understand that your Lordships desire that we should furnish to your Lordships, or to your officer, a form of saving clause—a form of proviso to be appended to the interlocutor by force of your Lordships' judgment, qualifying the interlocutor thus far—
[LORD CHANCELLOR.—The interdict.]

Mr. Bethell.—Yes, my Lord—the interdict here is the interlocutor in fact—qualifying the order thus far, that it is not to extend beyond that harbour of Port-on-Craig, which is mentioned in the first issue, and, by the condition thereof, found to have been used by the respondent. My Lords, if you will permit my learned friend and myself, we will endeavour to agree upon a form of saving—if we do not agree, we will each hand up our respective forms.

Interlocutors affirmed, with costs, subject to declaration that judgment shall not imply that respondent has right of free port at Ferry-port-on-Craig.

First Division.—Lord Wood, Ordinary.—Dodds and Greig, *Appellants' Solicitors*.—Adam Burn, *Respondent's Solicitor*.