difficult to suppose that the principal was not also liable. The inference drawn by the appellants can hardly, therefore, be resisted, if we assume that the true construction of the bond is, that the cautioner was absolutely bound for the ten years.

The true ground, however, on which I rest my opinion is this, that, construing the bond according to its plain and obvious meaning, it is undoubtedly binding on James Forbes and his representatives for ever. Its form is that of a mere personal bond, containing a personal obligation. There was nothing unreasonable, or at all events unlawful, in the vendor's requiring such an obligation; and they are not alleged to have used any fraud in procuring it. They are therefore entitled to insist on its plain literal construction, unless it can be shewn that the parties intended to give it a more restricted operation. It is observed by some of the learned Judges in the Court below, that it lay on the appellants to make their meaning more clear—*apertius mentem explicasse.* I rather think, however, that this is to cast the burden on the wrong party. What the appellants wanted, according to their own statement in the articles of roup, was a personal bond, which should bind the purchaser and his representatives for ever; and they obtained such a bond. If the party granting the bond intended that it should not operate to the full extent of the language used, he ought to have introduced words by which its generality would have been qualified. As he has not done so, I must assume that his intention was to allow his words to bear their ordinary construction. If parties were to be allowed in this way to bind themselves, in terms which can be literally interpreted without any ambiguity, and then to cast on those, to whom they have so bound themselves, the burthen of proving that a literal construction was not intended, the greatest inconvenience would result, and the true order of things would be reversed. I can therefore see no reason whatever for withholding from this bond its full operation; and as it is admitted that default has been made in the payment of the feu duty, the heirs of James Forbes must be liable.

I may mention that LORD BROUGHAM, who was present during the argument, and has seen the notes which I have now read, authorized me to say that he entirely concurred.

I therefore move that the interlocutor complained of be reversed.

Mr. Anderson suggested that the cause should be remitted, in order that the Court below might decern in terms of the libel, or that the House should now do so.

LORD CHANCELLOR.—Will the reversal of the interlocutor of the Inner House not set up the interlocutor of the Lord Ordinary?

Mr. Anderson.—No, my Lord. It will be necessary for your Lordships to affirm that interlocutor.

LORD CHANCELLOR.—Then I move your Lordships to affirm the interlocutor of the Lord Ordinary.

Mr. Anderson asked for costs in the Court below.

LORD CHANCELLOR.—I apprehend the interlocutor of the Lord Ordinary gives you costs. You will be put exactly in the same position as you would have been in, if the Lord Ordinary's interlocutor had not been reclaimed against.

Solicitor-General.—We do not object to the pursuers having costs, if the Lord Ordinary's interlocutor allows it to them.

Interlocutor of Inner House reversed, and that of the Lord Ordinary affirmed.

G. and T. W. Webster, *Appellants' Solicitors.*—James Davidson, *Respondent's Solicitor.*

FEBRUARY 6, 1855.

THE COMMISSIONERS FOR THE HARBOUR AND DOCKS OF LEITH, *Appellants*, *v.* JOHN SCOTLAND, Inspector of the Poor of the Parish of North Leith, *Respondent.*

Poor—Poor's Assessment—Port and Docks of Leith—Statute—Clause—Construction—*The Commissioners for the Harbour and Docks of Leith are empowered by royal charter, and by various statutes, to levy dues for the maintenance, improvement, and the payment of debt contracted in the construction of the harbour and docks. By one of the statutes it is provided, that out of the revenue the sum of £7680 should be annually placed in bank, to be applied partly in payment of the clergy, in lieu of a previous statutory charge for maintenance, and partly for behoof of the creditors, and of the college and schools of Edinburgh, in respect of legal rights competent to them:*

HELD (partly reversing judgment), *That if the general revenue of the Commissioners was exempt from poor's rates, on the ground of being held by them as trustees for the public benefit, then that, as the sum of £7680 formed part of the revenue, it was not assessable any more than the general revenue.*[1]

By 7 Geo. IV. c. 105, the superintendence and management of the Leith harbour and docks were transferred from the Magistrates of Edinburgh to Commissioners.

In 1833, the town of Edinburgh became insolvent, and the affairs of the city were ultimately arranged by the statute 1 & 2 Vict. c. 55 (July 1838), commonly called the City Agreement Act. The act was entitled, "An act to regulate and secure the debt due by the city of Edinburgh to the public—to confirm an agreement between the said city and its creditors—and to effect a settlement of the affairs of the said city and the town of Leith." By the 1st clause, the preferable right in security held by the Treasury in terms of 6 Geo. IV. c. 103, was postponed to the annual payment of £7680, to be paid over, as thereinafter directed, for the benefit of the town of Edinburgh. By § 3, Commissioners were appointed, in whom, by § 10, the port and harbour, with the whole dues and rates, were declared to be vested. By § 14 it was provided, that after providing for the sum of £7680 above mentioned, the surplus revenue, after payment of expenses, of the harbour and docks, should be annually paid to the Queen's Remembrancer in Exchequer within 21 days after Whitsunday; and if the sum so remitted should exceed the sum necessary to pay the interest of the debt, so far as not postponed, the excess should be imputed *pro tanto* in extinction of the principal of the debt. By § 17 it was provided, that the Commissioners should —"pay annually, out of the revenues of the said harbour and docks, in preference to all other payments," the sum of £7680 into a separate account to be opened in bank in name of the Remembrancer, for the following purposes:—1st, that in lieu of the old duty of the merk per ton and pack, there shall be paid to or for the ministers of the city of Edinburgh, "the sum of £2000, free of all deductions," in full of all demands competent to the ministers of the said city on account of the duty of the merk per ton and pack as aforesaid; 2nd, that there shall be paid for the behoof of the creditors of the city of Edinburgh "the sum of £2700, and the farther sum of £480, being at present a burden affecting the said duty of a merk per ton and pack, making in all the sum of £3180, in full of all demands competent to the said creditors upon the said harbour, docks, and other property and works, or the income and revenues thereof;" and 3d, that there shall be paid to the Lord Provost and Town Council of Edinburgh "the sum of £2500 for the maintenance and support of the College and schools of the said city, in full of all demands competent to the said Lord Provost, Magistrates and Council, upon the said harbour and docks, and other property and works, or the income or revenues thereof; and in case of failure in the regular payment of such sums, the respective parties, to whom or for whose behoof the same are payable, shall be entitled to follow out, by action at the instance of the parties respectively, all measures competent by the law of Scotland for enforcing payment thereof against the said commissioners, but as commissioners only, and not in their private or individual capacity."

By 7 Vict. c. 20, the Commissioners appointed by the last mentioned act were constituted an incorporation, by the name and style of the Commissioners for the Harbour and Docks of Leith, who, it was enacted, in that capacity—"shall and may hold the aforesaid port or harbour of Leith, and the rates and duties payable thereat, and all lands, tenements, heritages, and other property, real and personal, of and belonging to the said harbour and docks of Leith, and may purchase or acquire other lands, tenements, or heritages, or other property, real or personal, to be held by them for the use of the said harbour and docks of Leith, but for no other use or purpose; and may also sell or dispose of, with the consent of the Commissioners of Her Majesty's Treasury, any part of the said real or personal property, if they shall deem it expedient, for the use and behoof of the said harbour and docks, the price or consideration money obtained upon such sales being always applied in repairing or ameliorating the other or remaining property of or belonging to the said harbour and docks, or in the purchase of other lands, tenements, or heritages, to belong unto the said Commissioners."

The receipts of the Commissioners having for some time exceeded the expenditure, a considerable fund accumulated, and was deposited in bank, in order to be applied in execution of farther improvements contemplated on the harbour. By 10 and 12 Vict. c. 114, this surplus was appropriated to that purpose; and the defenders entered into contracts by which they obliged themselves to pay, within three years from and after March 1848, upwards of £140,000 for improvements on the harbour. They stated, that all the surplus revenue would for many years be absorbed in the works, and that for the year to 15th May 1849, the expenditure exceeded the revenue by £19,451 14*s.* 11*d.*

In these circumstances, the defenders were served with notices of assessment for the poor as owners and tenants of docks, quays, wharfs and yards, in the parish of North Leith, for the year

[1] See previous report, 26th Nov. 1852, 15 D. 95; 25 Sc. Jur. 69. S. C. 2 Macq. Ap. 28; 27 Sc. Jur. 229.

from Whitsunday 1846 to Whitsunday 1847; and thereafter the present action was raised for enforcement of the claim.

The defenders objected to the assessment, and pleaded *inter alia*—1. *Res judicata*, in respect of the judgment pronounced by Lord Mackenzie in the action at the instance of the *Heritors and Kirk Session of Leith* v. *The Commissioners of the Harbour*, 12th Nov. 1833, which became final by acquiescence. 2. The subjects from which the alleged rental is derived, being held by the defenders solely for the benefit of the public, and the rates and revenues leviable being by law limited and appropriated to the maintenance and repair of the harbour, and the liquidation of the public debt incurred in the construction of the works, the defenders are not liable to the assessment.

The First Division of the Court of Session, after consulting the other Judges, held that the sum of £7680, paid out of the revenue of the Leith Harbour, was liable to be assessed for the poor under 8 and 9 Vict. c. 83, though the residue of the revenue was not.

The defenders appealed against the interlocutor of the Court of Session of 26th November 1854, in so far as it imposed an assessment for the poor on the sum of £7680, set apart by the Statute 1 and 2 Vict. c. 22, for the payment partly of the clergy, partly of the creditors, and partly for behoof of the College and Schools of the City of Edinburgh. In their case they maintained that the interlocutor ought to be reversed for the following reasons:—" 1. The sum of £7680 having been specially appropriated by act of parliament 1 and 2 of Her Majesty, c. 55, as a fixed payment to be made, in preference to all other payments by the appellants, into an account in the bank ' into which the Government revenues or public moneys shall be payable, in the names of Her Majesty's Remembrancer of the Court of Exchequer in Scotland, and auditor of the said Court for the time being, to be applied by these officers in manner directed by said act,'—the appellants were not liable to be assessed for the poor in respect of said sum. 2. The said sum being a public charge, and (3) appropriated to public objects, is not liable to be assessed for the poor. 4. Besides, being derived from subjects situated, or dues collected, in other parishes than North Leith, the interlocutor is erroneous in so far as it finds that the whole sum is liable to be assessed in the parish of North Leith."

In support of the interlocutor the respondent (now John Scotland, in room of the previous inspector deceased) argued in his case:—" 1. That revenues arising from harbours in Scotland, after deduction of the expenses applied, under legal obligation, to the maintenance and improvement of the harbour itself, are, by public statute, subject to assessment for support of the poor of the parish in which the harbour is situated. 2. The circumstance that such harbour may belong to a municipal corporation, and that the yearly profits from it may be applicable to public municipal purposes, creates no exemption from poor's rates in reference to the profits so applied. 3. The reserved payments from the revenues of the harbour of Leith, for specific municipal purposes in the City of Edinburgh, and in satisfaction *pro tanto* of the city creditors, secured in consideration of the cession of the right of the city and its creditors in the harbour, are in no more favourable position as to exemption from rates, than yearly profits from the harbour accruing to the corporation of the city, as feudal grantee, would have been. 4. Ministers' stipends not being now exempt from poor's rates, the appropriation of part of the harbour revenues to that purpose cannot import any exemption. 5. The statutory obligation imposed on the Leith Harbour Commissioners to pay the specified reserved sums cannot import an exemption of these from assessment, no such exemption being contained in the statute, nor being implied by law, from the character of the objects to which they are appropriated. 6. The owners of lands and heritages being, by public statute, bound to pay the poor's rates leviable on account of such property, and the appellants being now unquestionably the owners of the harbour and docks of Leith, the respondent is entitled to exact payment, without reference to any questions of relief as between these owners and the parties for whose behoof the profits arising from the harbour are to be applied."

Sir F. Kelly Q.C., and *Anderson* Q.C., for appellants.—The general rule is, that where a public body holds property for the benefit of the public only, and are precluded from applying the revenue to their private purposes, or spending it upon themselves, they are exempt from poor rate. A poor rate is essentially a tax on beneficial occupation, or an income tax; and when there is no beneficial occupation or ownership, the ground for the tax ceases. This fully appears from the Poor Law Act, §§ 34, 37, and is well settled in England.—*R.* v. *Terrott*, 3 East, 513; *R.* v. *Commissioners of Salters Load Sluice*, 4 T.R. 730; *R.* v. *Liverpool*, 7 B. & C. 61, and 9 A. & E. 435; *R.* v. *Beverley Gas Works*, 6 A. & E. 645. In Scotland the same doctrine was adopted. —*Bakers of Paisley* v. *Magistrates of Paisley*, 15 S. 200; *Heritors of South Leith* v. *Magistrates of Edinburgh*, 15 S. 204. And the profession so understood the rule.—Dunlop's Poor Law, 387. The only difference between the law of England and Scotland is, that in the former the test is called beneficial occupation, in the latter beneficial enjoyment. According to that rule, therefore, the Leith Docks are not assessable. The act 1 and 2 Vict. c. 55, vested the property in the Commissioners for the sole purpose of carrying out the act, and paying over the revenues as directed. There is no provision for appropriating any part of the revenues, or any

surplus which might accrue, to their own use. The Statute 7 Vict. c. 20, which incorporated the Commissioners, declares that the property is vested in them "for the use of the harbour and docks, and for no other purpose." The whole revenues, therefore, being held for a public statutory purpose, are exempt from poor rate. It is said, however, that though the whole revenues might be exempt if spent in maintaining the docks, yet that the sum of £7680 is directed to be paid away to third parties, and is a mere burden on the property. If, however, the whole revenue is *per se* exempt, how can it be made assessable merely by a burden being laid upon it? The Poor Law Act, § 37, certainly makes no deduction for heritable burdens or debts on the lands. But this payment of £7680 is not a burden in the sense of the statute. It is an irredeemable and perpetual payment, which must be made out of the revenue in preference to all other expenses; we have no control over it, and no enjoyment of it—our simple duty is to pay it over to the Queen's Remembrancer. It is not like a mortgage on the property, for though the owner of mortgaged property must pay the poor rate on the full value, still he can always get rid of the mortgage by paying it off, and the land is in its nature assessable irrespective of the mortgage. But here we can never pay off the £7680, and the surplus over and beyond the £7680 is admitted to be exempt. This case, therefore, differs from a mortgage of private property. The burden is also in its nature public, and is so described by the act 1 and 2 Vict. c. 55. Moreover, the burden is in its origin public, for it is a substitute for public taxes, and a composition of public debts. The ministers' money was originally a public tax on all the goods imported into Leith harbour. The college and schools' money was formerly an ale tax. The creditors' money was originally a debt contracted by the City of Edinburgh in extending and improving the docks. But, apart altogether from the nature and origin of this burden, the question is one under the act 1 and 2 Vict. c. 55, which is imperative in directing us to pay over the sum of £7680, neither more nor less, to the Queen's Remembrancer. We cannot therefore be assessed for that sum, for we are the mere agents to collect and pay it over. Besides, out of what fund is the poor rate to be paid? It cannot be deducted from the £7680, for that precise sum must be paid to the Remembrancer; nor can it be paid out of the surplus, for the surplus must, by the act, be entirely spent in maintaining the docks. But the interlocutor of the Court below is wrong not only in substance, but in form. It says "the sum of £7680 is assessable." Now, the Poor Law Act does not authorize a sum of money to be assessed; the tax is on owners and occupiers, in respect of the land they own or occupy. Another objection of form is, that we are held liable to be assessed on the whole sum of £7680 in the parish of North Leith, whereas the docks are partly situated in other parishes. The Court "reserves our relief against other parishes;" but this is an incompetent mode of disposing of our liability. The Court should have settled our liability out and out. No Court which professes to do complete justice between parties reserves a right of proceeding against other parties. It is, in fact, saying—"We find you are bound to pay the whole, but you may recover part of the debt from somebody else."

Sol.-Gen. (Sir R. Bethell), *Rolt*, and *Dunlop*, for respondent.—Docks and harbours are clearly included within the term "lands and heritages," as used in the Poor Law Act. The Commissioners stand in the place of the City of Edinburgh, the original grantees of the port, and therefore, *primâ facie*, are just as liable to be assessed as any private owner. That they should not be assessed for the surplus revenue, which is spent on the docks themselves, and so intercepted, as it were, at its source, is perhaps fair; but where a portion of the revenue is dedicated to a purpose quite alien to the docks, and paid for the benefit of strangers, there is no ground of law on which such a sum can be held exempt. Nor is there anything in the statutes which imply such exemption. The annual payment of this £7680 was, in fact, the consideration for which the affairs of the City of Edinburgh were arranged by the statute. The case is the same as if the owner of a house, instead of having paid a capital sum, bound himself to pay a ground annual as the price. He could not claim exemption from the assessment merely because he paid the ground annual. So the Commissioners became the owners of the docks in consideration of their paying a perpetual rent of £7680. This, therefore, is clearly the annual value of the docks for which they are assessable. If a statute directs a man's income to be applied in a particular way, that circumstance would not exempt him from the assessment. It was said, that the purpose to which the payment was to be applied was a public one; but it is not public in the sense of a Poor Law Act. One of the purposes was to pay ministers and schools, which would be called in England a charity, yet it was well known that the application of the rent of a house or land to a charity is no ground of exemption. There is no authority for the proposition that where an act of parliament directs an income to be applied to a public purpose there is any exemption. In England the rule depends on beneficial occupancy, and hence a public lunatic hospital is said to be exempt, because it cannot be said that any person beneficially occupies it. But here the payment is made to creditors enjoying rights essentially private. Besides the law of Scotland repudiates the distinction of beneficial occupancy.—*Officers of Ordnance* v. *Kirk-Session of North Leith*, 7 S. 416. The only Scotch case quoted, viz. the *Paisley Bakers*, turned on the question of means and substance, and had nothing to do with this case. Even in England the doctrine is repudiated, that those who hold property merely as trustees are not rateable.—*R.* v. *Sterry*,

12 A. & E. 84. And the old cases, such as *Salters Load Sluice*, suffered some question in a recent case—*Birkenhead Dock Trustees* v. *Birkenhead Overseer*, 2 E. & B. 148—where it was held, that all such property was held liable *primâ facie*, unless there is something in the special act which has the effect of exempting it. The form of the interlocutor cannot be objected to, for it was consented to by both parties. It is said the assessment cannot be paid out of the surplus, because the surplus must be applied to pay the expenses of the docks, but the payment of poor rates may well be considered one of the expenses of the establishment. This may be considered as property yielding a revenue of £7680, and mortgaged to the full extent of that value; and it is rightly rated for that full value, for if the creditor sold the property in order to realize his debt, he would only do so after first paying the poor rate and other charges.

Sir F. Kelly replied.—The reason why property which is mortgaged pays on the full value is, that the creditor cannot get at the property so as to realize his debt, except on payment of all public charges. He takes his security subject to the preferable burden of the poor rate. That rule applies to a private owner, but it is a different thing where the owners are public statutory trustees, who have no further interest in the income than what the statute gives, and who are tied up to apply the money in a specific way. It is said the sum of £7680 is paid to private individuals. But take the case of the Scotch Post Office, and suppose its revenues burdened with a pension to some individual, as the English Post Office was with a pension to the natural children of Charles II., it could not be said that such a circumstance rendered the revenue of the post office assessable to that amount. The case of the *Birkenhead Trustees* was the case of a private company, managing the docks for the purpose of profit, like any railway company, dividing the surplus among the shareholders. The payment of poor rate cannot be treated as one of the expenses of upholding the docks, for that would be to assume that the surplus is in its nature assessable, which all the Judges agree it is not.

Lord Chancellor Cranworth.—My Lords, I confess that I feel the most entire confidence that this judgment is one which your Lordships can do nothing else than reverse. I do not rely simply upon its being so entirely wrong in point of form, for if it were mere matter of form your Lordships might be inclined to get over that defect; but, in truth, the errors of form here are so entirely interwoven with, and growing out of, the substance, that it is impossible to attempt to reform that which is altogether wrong.

Now let us consider what the question brought before the Court of Session was. Certain Commissioners for the management of the harbour and docks of Leith were rated for the relief of the poor, upon the notion of their being the owners and occupiers of property worth £12,000 odds a year; the principle of the rate being, that half of it was imposed upon the owner and half upon the occupier, and the rental was taken as being to the occupier £12,000 a year, but to the owner one fifth less, namely, £10,000 odds. I leave out the fractional sums. Upon that sum they were rated. They objected that they were not liable, because they were a public body; that they had no beneficial ownership; and that they would therefore come within the principle of the several cases of *R.* v. *Inhabitants of Liverpool*, *R.* v. *Commissioners of Salters Load Sluice*, and some other cases which have been decided in the English Courts; and there was a similar principle laid down in one of the cases in Scotland, which has been cited, that persons, who have no other enjoyment of property than that of occupiers of it for the benefit of the public, were not liable to be rated.

Now, the propriety of that doctrine, which was established in the *Salters Sluice case* in Lord Kenyon's time, has been called in question. I cannot but think that some cases at least must exist, to which the doctrine is clearly and properly applicable. For instance, would it not be a sort of absurdity to rate a poor house for the relief of the poor? Would it not be an absurdity to rate a prison? The test that has been applied is this—Is there anybody who can be represented as being the occupier of the subject matter in question?

This case came before the Court of Session, and the learned Judges were unanimously of opinion that this body of Commissioners had been erroneously and improperly rated as the occupiers and owners of the docks; for that they were not the occupiers and owners within the principle of the Poor Law Act, inasmuch as they had no beneficial enjoyment. In one sense they were owners, because the fee simple had been vested in them by the act of parliament. In one sense they were occupiers, because it was their duty to see that there was a clerk appointed to levy dues, and to have the management of the whole. In that sense they were occupiers. And the legal fee being in them, they were in that other sense the owners. But the Court of Session held that they were not owners and occupiers, to be rated in respect of their ownership or occupation.

But then it was suggested, that although, taking the value to be £12,000 a year to the occupier, and £10,000 a year to the landlord, they were not to be considered as owners and occupiers within the meaning of the Poor Law Act to that amount, yet that they might be so considered with respect to a portion of that amount. The mode in which they were directed by the act of parliament to deal with the tolls they should levy was this. They were directed to pay into the Remembrancer of the Exchequer the large sum annually of £7680, partly to the ministers of the

City of Edinburgh, in lieu of something to which those ministers had been entitled under an ancient right to levy a merk per ton upon all goods brought into the port, and partly to keep down the interest of a large debt due to the city, and partly also for the purposes of the University of Edinburgh. And it was suggested, with great acuteness and ingenuity, (whether soundly or not I do not stop to inquire,) that, although it might be inconsistent with the principle of the decisions to hold that the Commissioners were the occupiers of the whole of the docks, so as to be rated, yet that, inasmuch as a portion of the revenues there levied went to other purposes than the maintainance of the docks, which, in the opinion of those learned Judges, were not public purposes, therefore, in respect of that portion of the value, they might be considered as being occupiers and owners within the Poor Law Act. And they desired the question to be discussed with that view, to see whether the counsel, who were insisting upon the rate, could satisfy the Court that to that extent, namely, to the extent of the sums that they were so directed to pay out of their revenues, they ought to be considered both as owners and occupiers within the meaning of the Poor Law Act. After a very long discussion upon the subject, when the learned Judges gave their opinions, the result was a determination (not, in truth, by the majority of the Judges, though, from accident, they formed the majority of those who were alive to give the judgment, and it was really the judgment of the minority) in favour of that view of the case. They found that, in respect of £7680, the amount of the sums which the Commissioners were so directed to pay out of their revenues, they were to be considered as owners and occupiers. Against that judgment so pronounced the Commissioners have appealed to your Lordships, and I conceive that all that your Lordships can reasonably be called upon to consider, or, in truth, can by possibility consider, in this case is, whether, assuming that this body of Commissioners are not liable as the owners and occupiers of the whole of Leith Docks to the full extent of the value of those docks, treating as the value the sum for which they might be let, you can parcel out the supposed rent that might be obtained for the docks, and charge the Commissioners as being the owners and occupiers, to the extent of that portion of the value.

Now I have no hesitation in saying, though, perhaps, I ought not to say that, till the question is before us, that I cannot conceive of there being any *tertium quid.* Either they are owners and occupiers of the whole, so as to be, in respect of such ownership and occupation, liable to be assessed, or they are not liable as owners and occupiers at all. It seems to me almost preposterous to speak of their being owners and occupiers only of that part of the revenue which, by act of parliament, they never can own or never can occupy for a single moment, and as to which they are only the mere agents, the mere hands to receive the money, and to pay it into the Exchequer for certain purposes directed by the statute. It seems to me, therefore, with respect to the question which alone your Lordships are called upon to decide—that is to say, whether this judgment can stand, assuming the Court of Session to have been right in saying that they are not liable to be assessed for the whole, they, nevertheless, can be liable to be assessed for that part; it seems to me that that is a proposition which cannot by any possibility be successfully maintained.

If I had any doubt upon the subject, the very form in which the interlocutor is drawn up conclusively proves to me, that the proposition established by the Court of Session cannot be sustained, because, in order to arrive at this result, the Court is obliged to draw the interlocutor in a form that is utterly inconsistent with the Poor Law. What the Poor Law authorizes is the rating of the occupiers and the owners of the docks. Then, that being the subject matter, in order to carry into effect the views of the Court of Session, what ought to have been done would have been to have rated the Commissioners as being the owners and occupiers of a dock and harbour, worth £7680 a year. If the facts warranted such a rate as that, and if the state of the law warranted the persons, whose duty it was to impose the rate, in treating the Commissioners as being the owners and occupiers, such a rate might have been sustained in point of form; but the Court of Session says, or the form adopted is, that the £7680 is rateable. The argument as put at the bar is unanswerable upon that subject. If that is so, then out of that £7680 the rate must come, which clearly is not what is contemplated. Then again, there is no authority whatsoever in the Poor Law Act to rate any sum of money. All that can be rated is persons in respect of their ownership and occupation of lands and heritages which they hold, which words undoubtedly include docks. Therefore, in order to have made this an interlocutor that could be sustained in point of form, it must have been framed as imposing a rate upon these Commissioners as being the owners and occupiers of docks worth £7680 a year. That, of course, would have struck the persons drawing up such an interlocutor as something preposterous, because there are no such docks—there are no docks worth that sum and no more. If the docks are docks in respect of which the Commissioners are liable to be rated, they are worth a great deal more than that.

That is one objection; but another, which is quite unanswerable, is this—that these gentlemen are rated in the parish of North Leith, upon the whole of these docks; it being quite clear that only a portion of the docks are situated in that parish. And then they are told—You may recover a proportion, if it is improperly assessed, from the other parishes. But that is a mode in which it is utterly impossible for any Court of Justice to deal with the suitors who come for relief at

their hands. The Court cannot tell them—We wilfully charge you with more than you are liable for, but we do not prejudice your endeavouring to recover it back again from somebody else, or from some other parish in which you may be liable to some other amount.

It appears to me, therefore, that the whole principle of the decision is entirely wrong: that either these gentlemen are liable to be rated for the whole value, or they are not liable at all. And even if they were got over, there are difficulties in point of form which appear to me insuperable, and which your Lordships cannot be called upon to remedy by any reformation of the interlocutor. And therefore the course which I propose to take, is simply to move your Lordships that this interlocutor be reversed, but that the order shall be drawn in such a form as not to prejudice the parties in respect of the declarator that is asked for, so that there shall be no declarator either prejudicing the one party, as making them liable, or prejudicing the other party, as making them not liable to any rate that may be imposed.

The Solicitor-General.—I would suggest that it would be the better course to reverse the interlocutor, and to remit the cause, because then the action will proceed. We should only have to bring again the same action.

LORD CHANCELLOR.—No, I think that is not the right course. That may be a very useful course where the subject matter is a subject matter that is disposed of once for all; but as rating is a matter that is renewed from year to year, you may just as well make a new and proper rate.

The Solicitor-General.—I do not think the House understands that we laid the rate upon the whole subjects.

LORD CHANCELLOR.—I perfectly understand that. I distinctly stated that the rate was imposed upon the whole. That was argued before the Court of Session, and the Court were unanimously of opinion that the Dock Commissioners were not liable to be rated upon the whole. But the question was raised—whether they were not liable to be rated upon a part, and the Court decided, that though they were not liable to be rated upon the whole, they were liable to be rated upon a part. I propose to this House to come to the conclusion, that they, not being liable to be rated upon the whole, certainly are not liable to be rated upon a part.

Sir F. Kelly.—I would suggest that the form of the order should be, that this interlocutor be reversed so far as appealed against, and the summons dismissed, because the interlocutor as to the general rating is in favour of the appellants. Therefore it would be, that this interlocutor be reversed so far as appealed against, and the summons dismissed.

LORD BROUGHAM.—I entirely agree in the view taken of this case by my noble and learned friend. I hope it will not be supposed in any future proceedings, either in this case, or in any similar one, that our reversal goes merely upon the discrepancy between the rating which has been allowed and the rating which has been disallowed—I mean with respect to the principle adopted by the Court below in distinguishing between the rating of the £7680, and the rating of the residue, that is, of the whole subject, which all the Judges are unanimous in saying could not be allowed. For even if that discrepancy were got rid of by any future case, so as to furnish an answer to that argument, I should regard that as not affecting the principle of this decision. It is unnecessary to anticipate by giving any general opinion upon the question of property used for public purposes. I have a very strong opinion, however, upon that question, and I hope and trust that we shall not have occasion to have that matter again argued in this House.

LORD CHANCELLOR.—The interlocutor will be reversed so far as appealed against, and the summons dismissed.

Solicitor-General.—That interlocutor sustains a part of the third plea, which you intend to leave an open question. Therefore I submit that you should reverse the interlocutor, with a declaration that it is not to prejudice or affect any future question between the parties as to the liability to rating.

Sir F. Kelly.—That will be done by the language I have ventured to suggest, that this interlocutor be reversed so far as appealed against, and that the summons be dismissed.

Solicitor-General.—No, because the interlocutor finds that the third plea shall be sustained. That will make it *res judicata* that the property is not liable to the rate with respect to the whole amount; but the House has distinctly stated that that question is to be left unprejudiced. If your Lordships will adhere to what you originally stated, to reverse the interlocutor, but with a declaration that it is not to prejudice or affect that question, then the whole thing will be left open for a fresh arrangement.

LORD CHANCELLOR.—I think that is right. I see what the Solicitor-General means. The Court of Session has allowed the third plea to a certain extent, and has disallowed it for the rest. If we simply disallow the residue, it will stand as if the third plea was a good plea to all intents and purposes. That is not what we mean. I think the proper way will be to reverse the interlocutor, with a declaration that this is without prejudice to any future question between the parties as to the liability to rating.

Sir F. Kelly.—I believe we mean the same thing. If the interlocutor is reversed so far as appealed against, and the summons dismissed, that will put an end to the whole question.

LORD CHANCELLOR.—If the interlocutor were simply reversed so far as appealed against, they might set up the rest of the plea. It should be without prejudice to the disputed question.

Sir F. Kelly.—I hope your Lordships will think that we are entitled to the costs below, especially considering that this is a public body with public funds.

Solicitor-General.—They gave no costs below in our favour, by reason of the great diversity of opinion among the Judges.

LORD CHANCELLOR.—Both of you are public bodies. There was a very great difference of opinion below. I think there ought to be no costs given.

The judgment was as follows:—"It is ordered and adjudged, by the Lords spiritual and temporal in parliament assembled, that the said interlocutor, in so far as complained of in the said appeal, be, and the same is hereby, *reversed:* And it is hereby declared, that this judgment of reversal is not to prejudice or affect any question which shall hereafter arise as to the liability of the said Commissioners to be assessed for the poor, by virtue of the Act 8 and 9 Vict. c. 83, for the harbour, docks, and subjects vested in them as owners, tenants, or occupiers, as in the pleadings is mentioned: And it is further ordered, that, with this declaration, the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this declaration and judgment."

Appellants' Agent, John Phin, S.S.C.—*Respondent's Agent,* W. Lorimer, S.S.C.[1]

MARCH 8, 1855.

ALEXANDER DREW, *Appellant, v.* PETER DREW and THOMAS LEBURN, *Respondents.*

Arbitration—Submission—Summons—Relevancy—Misconduct—Stopping the Arbitration—*An arbiter, at the suggestion of one of the parties to the submission, examined witnesses behind the back of A and P, the two parties; but afterwards told what he had done, and offered to examine the witnesses again more formally, and no objection was made, and further meetings were held. Before the award was made, A raised an action to put a stop to the submission on the ground of misconduct in so examining witnesses.*

HELD (affirming judgment), *This was no relevant ground to stop the submission, for the award could not be reduced on any such ground.*

HELD FURTHER, *It is no objection that one of the parties examined was not sworn, if the objection was not made at the time.*

Question whether, if fraud or corruption were alleged, it would be a ground for stopping a submission.[2]

The late William Drew, coppersmith, Glasgow, left his business and property to three sons, who, on certain disputes arising, referred these to the arbitration of Thomas Leburn. The arbiter heard parties, and made orders, and the regularity of the proceedings was challenged by Alexander Drew, one of the brothers.

He raised an action of declarator and count and reckoning, and he stated as follows his grounds of complaint:—That subsequent to the execution of the submission, his brothers entered into legal proceedings against him in reference to the management and disposal of the heritable property left by their father. That in the course of the submission, the defender Leburn had "in various

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[1] It will be seen that the above judgment did not purport to decide whether the Dock Commissioners were or were not really liable to be assessed to the poor rate in respect of their docks and harbours as owners and occupiers of lands. At that time the general question as to the supposed exemption of public trustees from liability to the poor rate had not been thoroughly discussed; but it was discussed and settled soon afterwards. And the House decided, in the leading case of *The Mersey Docks* v. *Jones,* 11 H.L.C. 443, that the old decisions were based on a misconception, and that trustees of public works such as harbours, railways, schools, and hospitals were not exempted from liability, and that the sole exemption was in the case of buildings and lands occupied by the government, strictly so described, whether imperial or local government. That rule was acted on in subsequent appeals. See *Clyde Trustees* v. *Adamson,* 4 Macq. Ap. 931, and *post; Leith Harbour Comrs.* v. *Inspector,* L. R. 1 Sc. Ap. 17. *Greig* v. *University of Edinburgh,* L. R. 1 Sc. Ap. 348.

[2] See previous reports 14 D. 564; 24 Sc. Jur. 97; 268. S. C. 2 Macq. Ap. 1: 27 Sc. Jur. 273.