the respondent in the appeal occupies. I am therefore of opinion in the present case that the respondent is entitled, in order to the enjoyment of his land for pasture, to put up such swing-gates or wickets as, while they will prevent his cattle from straying, will not impede the public right-of-way."

The case of *Grant and Others* v. *The Duke of Gordon*, 9th March 1781 (Mor. 12,822), which had reference to the floating of timber from the Highlands down the river Spey to the sea, is entitled to consideration in the decision of the present case. It was a question between the upper proprietors of the river Spey and the Duke of Gordon as to the rights of the latter as proprietor of a cruive for salmon-fishing in the river near the sea. The report of the case bears—and the judgment was affirmed by your Lordships' House on 20th February 1872—that the Court "considered a river by which the produce of the county could be transported to the sea to be a public benefit, intrusted to the king as *pater patriæ* for the behoof of his subjects in general, which could neither be given away nor abridged by him; and that this transportation, as the chief and primary use of the river, if incompatible with the cruive fishing, would prevail over it. They were, at the same time, of opinion that those rights were not incompatible if not emulously used, and therefore proceeded to fix certain regulations according to which they were to be exercised."

This case is of importance, in so far as, while it recognises a right of floating timber down the river as a quasi-navigable public right, and as the chief and primary use of the river, and which, if not compatible with the cruive fishing, would prevail over it, the Court at the same time held that that right of navigation was not so absolute that it was not subject to equitable restrictions when in competition with other rights. And accordingly the right of the upper proprietors was held, subject to restriction and limitation as regards the periods during which it could be exercised, a restriction which could not have been recognised by the Court if the right of navigation had been held to be absolute and not subject to equitable limitations.

I am of opinion that the appellants are entitled, as in a question with the respondents as members of the public, to the full and free use of their property, and to erect a bridge connecting their property on the other side of the river with their property on the other. The whole of the intervening *alveus* of the river is their property, and the appellants were entitled to erect piers in the river, provided those piers did not obstruct the navigation. I think it has not been proved that the piers which have been erected do in point of fact, having regard to their position with reference to the catchwater dyke, obstruct the navigation of the river, and therefore I am of opinion that the respondents have no right to demand their removal.

The views upon which I proceed in advising your Lordships are founded upon what I consider to be the law of Scotland, as found by your Lordships in previous Scotch cases. I observe that Lord Shand in his opinion refers to two English decisions as explaining the opinions of English Courts with reference to the case of *Bicket* v. *Morris*. But it is necessary to bear in mind that these cases had reference to the rights of the public in tidal rivers, and according to the law of Scotland, as well as in England, the principles applicable to tidal rivers differ from those applicable to rivers above the influence of the tide; and in these cases the Attorney-General, as representing the right of property of the Crown in the *alveus* of the water, was a party as relator.

I concur in the motion that the appeal should be sustained and the interlocutors complained of recalled, with costs. I think the proper order is to recall the interlocutors appealed against; to find that the river Leven is a navigable river, free and open to the public; that the appellants have no right to execute any works which will interfere with or obstruct the navigation thereof, or the free use of the towing-path along the banks of the river for the purpose of navigation; that the works complained of in the summons do not in point of fact interfere with or obstruct the navigation of the river; and with these findings to remit the case back to the Court of Session, with instructions *quoad ultra* to assoilzie the appellants from the conclusions of the summons, and to find them entitled to the expenses incurred by them in the Court of Session.

Lord Hatherley — My Lords, I omitted to mention what my noble and learned friend on the left-hand side of the House (Lord Blackburn) has mentioned, namely, the concurrence of my noble and learned friend Lord O'Hagan (who is prevented from being here to-day by a slight accident) in the view at which your Lordships have arrived. And I ought also to have mentioned, in suggesting the proper order now to be made, that the order should include the costs of this appeal, to be paid by the respondents, as well as the costs in the Court of Session.

Interlocutors appealed from reversed. Found that the river Leven is a navigable river, free and open to the public; that the appellants have no right to execute any works which will interfere with or obstruct the navigation thereof, or the free use of the towing-path along the banks of the river for the purpose of navigation; that the works complained of in the summons do not in point of fact interfere with or obstruct the navigation of the river. Cause remitted with these findings to the Court of Session, with instructions *quoad ultra* to assoilzie the appellants from the conclusions of the summons, and to find them entitled to the expenses incurred by them in the Court of Session and in this House.

COURT OF SESSION.

Monday, November 16, 1876.

OUTER HOUSE.

[Lord Curriehill, Ordinary.

TAINSH *v.* MAGISTRATES OF HAMILTON.

Burgh—Jurisdiction — Exercise of Dean of Guild Jurisdiction by Police Magistrates under sec. 408 *of the Genera Police Act* 1862.

Held (by Lord Curriehill, Ordinary) that the magistrates of a burgh of regality, which had adopted the General Police Act 1862 (25 and 26 Vict. cap. 101), were entitled, under section 408 of that Act, to exercise all the ordinary functions of a Dean of Guild of a

royal burgh, and possessed similar ædile jurisdiction.

The pursuer of this action was proprietor of certain subjects within the town of Hamilton, which was both a burgh of regality and a Parliamentary burgh, and had adopted the General Police Act of 1862. He was beginning to erect buildings on his own ground, when, on an application by the Burgh Fiscal, he was interdicted by the Magistrates, as exercising the functions of a Dean of Guild, from proceeding with the erection, in respect that he had not complied with the rules laid down by them for the regulation of buildings within the burgh. Having proceeded with the operations in defiance of the interdict, he was cited before the Magistrates, as the Dean of Guild Court, and was fined for breach of interdict and contempt of court. In all these proceedings the pursuer appeared, and resisted, though unsuccessfully, the applications to the Court. He then brought this action of declarator, reduction, and damages against the Provost and Magistrates of the burgh of Hamilton, the Town-Clerk of the burgh, and the Superintendent of Police, in which he asked—(1) To have it declared that no Dean of Guild Court existed or ever had existed in the burgh of Hamilton; that neither the defenders, nor any of the burgh authorities, were entitled to establish a Dean of Guild Court in the burgh, or to promulgate or enforce rules of procedure in such court, or to exercise the powers of jurisdiction of a Dean of Guild Court relative to buildings, or to interfere with the erection of buildings by the inhabitants in the manner specified in the summons; that the rules promulgated by the defenders were *ultra vires* of them, and not binding on the pursuer or any other person, and that the pursuer and all other persons, owners of property within the burgh, were entitled to build thereon on complying with the requirements of the 202d, 204th, and 205th clauses of the said Act of 1862; (2) for reduction of all the proceedings in the process of interdict and breach of interdict already referred to; and (3) for damages in respect of the stoppage of his building operations caused by these proceedings.

The defenders maintained that these proceedings were lawful and competent, and asked absolvitor—(1) In respect that the burgh of Hamilton was a royal burgh; and (2) that assuming the burgh not to be a royal burgh, it was a burgh of regality, and a Parliamentary burgh; and as such, having adopted the General Police Act of 1862, was entitled to exercise through its Magistrates the functions and jurisdiction of a Dean of Guild Court as if it had been a royal burgh.

The Lord Ordinary held that the defenders had not established that Hamilton was a royal burgh, but upon the second ground of defence he pronounced an interlocutor assoilzieing them from the conclusions of the summons. He added a note:—

"*Note.* —. . . The second defence for the Magistrates is based on three statutes:—(1) The Act 3 and 4 Geo. IV. c. 77, which made Hamilton a Parliamentary burgh, and by section 30 declared with reference to it and all such burghs, that the Magistrates and Town Council to be elected for the burghs under that Act 'shall have such and the like rights, powers, authorities, and jurisdiction as is or are possessed by the Magistrates and Council of any royal burgh in Scotland,' but with this proviso, viz., 'that the rights, powers, authorities, and jurisdiction hereby conferred shall in no case be exclusive of the authority and jurisdiction of any Admiralty Court or Dean of Guild Court now lawfully established, or the sheriff or justices of the peace of the county over the territory within the boundaries of such burghs or towns respectively;' (2) the General Police Act of 1850 (13 and 14 Vict. c. 33), which was adopted in Hamilton, but which need not here be specially noticed; and (3) the General Police Act of 1862 (25 and 26 Vict. c. 101), which was afterwards adopted in the burgh, and which provides (section 408) that 'the magistrates of police of a burgh under this Act, or any one or more of such magistrates . . . shall have all such and the like jurisdiction within such burgh as any magistrates of a royal burgh or any dean of guild of a royal burgh has by the law of Scotland within the royal burgh in or for which he acts as such magistrate or dean of guild.' And, founding upon these statutes, the defenders maintain that the Magistrates of the burgh were fully entitled to exercise the functions and jurisdiction of a Dean of Guild Court, and, as such a court was a novelty in the burgh, to frame, publish, and enforce such rules as they, in the proper exercise of that jurisdiction, should deem necessary for the information of the public, and for the regulation not only of the proceedings of the court, but of building operations within the burgh.

"The pursuer, however, maintains that the whole proceedings of the Magistrates were unauthorised, and that the statute, soundly construed, does not truly confer upon them the right to hold a Dean of Guild Court or to exercise the ordinary jurisdiction of a Dean of Guild with reference to buildings within the burgh. He maintains that, although section 408 of the statute quoted above appears in word expressly to confer upon the Magistrates of Police of a burgh which adopts the Act 'all such and the like jurisdiction within such burghs as any magistrate or dean of guild of a royal burgh has by the law of Scotland, the jurisdiction so conferred does not include the ædile jurisdiction of a Dean of Guild, but merely a sort of police jurisdiction to try and punish persons charged with certain petty police offences. It would require some very express limitation or qualification of the words of section 408, either in the clause itself or in some other part of the statute, to deprive them of their natural and obvious meaning, which is, that persons in the position of the defenders should exercise all the ordinary functions of a Dean of Guild and his court. I am unable to find any such qualification in any part of the statute. The Act is divided into parts, and each part is again subdivided into sections. The 408th clause occurs in Part VI., which is entitled 'Powers and Remedies,' and in section 6 thereof, which is entitled 'Jurisdiction, and Recovery of Penalties.' But there is nothing in this part of the statute to show that the Dean of Guild jurisdiction of the Magistrates is to be in any respect less than the ordinary jurisdiction of the Dean of Guild of any royal burgh, which, according to the law and practice of the present time, is almost wholly that of an ædile. Indeed, I am not aware of any penalties which the Dean of Guild could inflict, except for breach of orders pronounced by him in his ordinary jurisdiction as Dean of Guild entrusted with the duty of regulating buildings within burgh.

"But, in the next place, the pursuer maintains that this clause was not intended to authorise the Magistrates, or any of them, to exercise the ædile jurisdiction competent to the Dean of Guild of a royal burgh, because the right to interfere with buildings in the burgh is conferred, not upon the Magistrates, but upon the Commissioners of Police, by clauses 202 to 205, both inclusive. Now, it is quite true that these clauses do require a person intending to build or rebuild a house within the burgh to give previous notice in writing to the Commissioners, with a plan showing the level at which the foundation of the house is proposed to be laid, and power is given to the Commissioners to disapprove of the level, and to fix the proper level, subject to an appeal to the sheriff, and to cause any building erected without notice, or made at a level different from that fixed by the Commissioners or the sheriff, to be altered or demolished. But these clauses of the Act occur in a different part of the statute from that in which clause 408 occurs. They occur in Part IV., which is entitled 'Police Purposes,' and in the subdivision or section 8 thereof, which is entitled 'Drainage of Houses.' Now, the drainage of a town is one of the proper police purposes of the Act, not necessarily or usually falling under the cognisance of the Dean of Guild, and the execution of these purposes is by the statute given, not to the Magistrates who are to exercise the jurisdiction of Dean of Guild, but to a different body, viz., the Commissioners of Police, who are composed of the Magistrates and Town Council (see section 46). It appears to me that the powers of sections 202, *et seq.*, are conferred upon the Commissioners of Police purely for sanitary purposes, and not with the view of regulating the erection of buildings within the burgh. Indeed, this is made quite plain from the tenor of clause 170 and following clauses in a preceding subdivision of Part IV. of the statute, viz., section 6, entitled 'Laying out New Streets,' and from clauses 199, 200, *et seq.*, of the Act, in section 8 or Part VI., which deals with drainage.

"This being so, it seems to be clear that the Magistrates of the burgh, as Magistrates of Police, are entitled under section 408 to the same oversight of buildings that the Dean of Guild of Edinburgh, or of any other royal burgh, has in the royal burgh of which he is Dean of Guild. Now, it cannot be disputed that the Dean of Guild of a royal burgh is entitled not only to prevent an owner within burgh from building so as to encroach upon the ground of his neighbours, but also to prevent the erection or structural alteration of any building, unless and until the exhibition of proper plans, and, if necessary, by personal inspection, he is satisfied that the building may proceed with safety to the community. But further, section 408 of the Act confers on the Magistrates the same jurisdiction in every respect as is or may be exercised not only by the Dean of Guild, but by the magistrates of any royal burgh. Now, it cannot be doubted that in royal burghs where there is no Dean of Guild the magistrates are entitled to exercise the authority of Dean of Guild. This is laid down by Bankton, iv., 20, sec. 7, where he says:—'In some burrows there is no Dean of Guild. In such cases those matters that belong to the Dean of Guild Court are within the cognisance of the magistrates, with advice of the council, to whose jurisdiction that of the Dean of Guild is understood to be annexed, where by the constitution of the burrow no separate Guild Court is established.' Erskine also (ii. ix. 9) says:—'Where the usage is not fixed, the Dean of Guild or other magistrate who is charged with the police appears to be trusted with a discretionary power of directing the buildings within burgh, subject to the review of the Court of Session.' And the law as stated by Bankton and Erskine is fully recognised by the opinions of the judges in the case of *Milne*, 4 D. 3; *Lamond* v. *Cumming*, 2 Rettie 784. Indeed, so necessary is it that some such jurisdiction as that exercised by the Dean of Guild in royal burghs should be exercised by the magistrates or governing bodies of populous places, such as burghs of barony and regality, that the Court has held that the Magistrates of Paisley, a burgh of regality, who had immemorially exercised the jurisdiction as to buildings which a Dean of Guild could have exercised in a royal burgh, were entitled to continue to do so,—*Neilson*, 7 Sh. 182. And I think that the intention of the Legislature in enacting sect. 408 of the General Police Act of 1862, was to confer expressly upon the magistrates of all burghs of every kind which adopted the Act the ædile jurisdiction which, in the case of Paisley, a burgh of regality, the Magistrates had acquired by usage. I am therefore of opinion that the Magistrates of Hamilton were entitled to constitute themselves a Dean of Guild Court, and to issue and enforce the rules mentioned in the declaratory conclusions of the summons. It is indeed asserted in one of the pleas-in-law for the pursuer that these rules are unusual and unreasonable; butt his point was not insisted on at the debate, and I must say that these rules do not appear to me to be either unusual or unreasonable.

"If, then, the defenders had power to make the regulations referred to—as I think they clearly had—it follows that they were entitled, on a proper application by the fiscal, to interdict the pursuer from building in defiance of these rules. The only other point is, whether, as the pursuer thought fit to commit a breach of that interdict, the Magistrates were entitled to punish him by a fine for breach of interdict, and contempt of Court? I can see no reason for holding that they were not entitled to adopt that course; and indeed it seemed to be conceded at the bar that, if the defenders were under the Police Act of 1862 really entitled to exercise the functions of a Dean of Guild Court, the pursuer could not succeed in any of the conclusions of his action; and as I am clearly of opinion that the jurisdiction of Dean of Guild has been to its full extent conferred by the statute upon the Magistrates of Hamilton, it follows that the defenders are entitled to be assoilzied from the whole conclusions of the action, with expenses."

The interlocutor was acquiesced in.

Counsel for Pursuer—Lord Advocate (Watson) —Balfour. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for Defender—Asher—R. V. Campbell. Agents—Morton, Neilson, & Smart, W.S.