EDINBURGH AND GLASGOW RAILWAY COMPANY, ... } APPELLANTS.
THE MAGISTRATES OF LINLITHGOW, RESPONDENTS (*a*).

1851. *March* 10*th*, 11*th*, 17*th*, 18*th*, 24*th*.
1852. *July* 1*st*.
1853. *June* 24*th*, 30*th*.
1858. *May* 31*st*.
1859. *July* 20*th*, 21*st*, 22*nd*, 25*th*, 26*th*, 28*th*.

Rubric.

Remit—Amended Record.—Certain Interlocutors of the Court of Session were appealed from. Upon a remit to that Court, the record upon which the Interlocutors had been pronounced was amended; but no new Interlocutor was pronounced. Consent under these circumstances on both sides, that the cause should be argued and disposed of on the same footing as if the Interlocutors appealed against had been pronounced on the record as amended. This course allowed by the House of Lords.

Summary as to Burgh Customs.—The Court of Session having decided that inasmuch as the Magistrates of Linlithgow were entitled, under certain ancient Royal grants ratified by the Scottish Parliament, "not only to "levy customs on goods brought within the burgh for "sale, use, or consumption, or carried out of the burgh, "but, with the explanation and support of usage, to levy "customs on goods carried *through* the borough,"—therefore they were entitled to levy customs on goods brought within, or carried out of, or carried through the burgh *on the Railway of the above Appellants.* Reversal by the House.

Per the Lord Chancellor: When we consider what the nature of this new transit by railway is, I do not think that there could be any intention that it should be liable to a toll; p. 713.

Per Lord Cranworth: The toll could only be levied by the officer of customs coming upon the railway, the train being compelled to stop; but no provision is made for

(*a*) See the first Report of this Case, vol. i. p. 1.

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Rubric.

that purpose. Any man coming upon the railway would be a trespasser; p. 723.

Per the Lord Chancellor: How is the "customer" to stop an express train between Edinburgh and Glasgow when it passes Linlithgow like a flash of lightning? He would have some difficulty in resorting to a distress, the usual remedy for the non-payment of a toll; p. 714.

Per Lord Chelmsford: The description and character of these tolls, and the grounds upon which they depend, are so inapplicable to the new state of things arising out of the creation of a railway, that it would have been almost an idle precaution to provide against the demand by an express exemption; p. 730.

Per the Lord Chancellor: It should always be kept in mind that the transit toll now claimed is not for passing over the land of another, but for making use of land which is the Railway Company's own property, and is exclusively in their possession; p. 717.

Per Lord Chelmsford: If the town customs arise from an obligation to repair, and are a compensation for the use of the streets and ways; if they cannot be taken from persons who do not pass through the town, or over any of the ways belonging to it, then the question upon this toll or custom seems to be capable of an easy solution in favour of the Railway Company, as they use a way of their own over their own property, and derive no benefit at all from the use of any ways belonging to the burgh; p. 729.

Summary as to Bridge Customs.—Under an Act of the Scottish Parliament, the Magistrates were entitled to levy custom in respect of passengers, goods, &c., crossing the river Avon at any point downwards from the Linlithgow Bridge to the mouth of the stream, a distance of twelve miles. Within this range the Railway Company's line crossed the stream by a viaduct. The Court of Session decided that the Magistrates were entitled to claim custom in respect of the traffic by the viaduct, as being an encroachment on or evasion of the rights of the bridge. Reversal by the House.

Of the pleadings and the decision in the Court below,—of the argument at the Bar of the House in 1847,—of the proceedings for a remit in 1848,—and of the Scottish judicial deliberations pursuant to that remit in 1849,—a full account is given (in compliance with a desire expressed by the Law Peers) in the first volume of these Reports (*a*).

Argument of 1851.

The following was the argument on the hearing at the Bar of the House in the Session of 1851, when Lord *Truro* occupied the woolsack, and was assisted by Lord *Brougham*.

The Appellants' argument as to the Burgh Customs.

Mr. *Bethell*, Mr. *Hope*, and Mr. *Penney*, for the Appellants, opened by observing that the question was one of great simplicity, which in this country would be very easily disposed of. The borough of Linlithgow was supposed to have had great privileges, being in the vicinity of the royal palace. It had the privilege of levying certain tolls and customs on articles imported into, and carried out of, the borough.

[Lord Brougham: The Pursuers allege that a consideration was not necessary; and that, if necessary, it was given.]

Their argument is that it is enough if they have a grant. We, on the other hand, maintain that the obligation and the grant are correlative. The railway statute authorizes the Company to traverse a part of the liberties of this borough. The Company have

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made their railroad, in fact, through the borough; and under their Act they are to go over their own land on a road made and to be used only by themselves. The Magistrates contend that the Company should not be allowed to come into their streets, or if they should bring goods there, the Magistrates say a claim would arise to impose tolls, as in the case of toll-thorough. But we contend that the obligation of maintaining the streets and roads is that in respect of which the tolls are to be exacted; and inasmuch as the Company do not travel on those streets or roads, or use them in any way, no toll can be demanded. The Magistrates endeavoured to establish a kind of franchise.

[The LORD CHANCELLOR (*a*): Is it a toll on each package, or how?]

It is a toll upon all goods brought into or carried out of the town of Linlithgow.

[The LORD CHANCELLOR: Is it on each package?]

The railway carriages must stop for inspection.

[Lord BROUGHAM: How was the calculation to be made?]

The pleadings merely say, "according to use and wont."

Upon the question as to the fact of a ratification by Parliament, Erskine (*b*) affirms, as to Private Acts, that they were not properly *laws*, but that they merely confirmed what was formerly validly granted.

[Lord BROUGHAM: In a reduction of a Private Act, the reduction would be confined to the interest of the party suing the reduction.]

Any other party might impeach it.

[Lord BROUGHAM: Where is there a note of what took place here when Lord *Cottenham*, Lord *Campbell*, and myself were present?]

(*a*) Lord Truro. (*b*) B. 1, t. 1, s. 39.

We are afraid there is no note (*a*).

[Lord BROUGHAM: We were rather against the judgment below.]

We contend that the principle of toll-thorough applies here.

[Lord BROUGHAM: The consideration must move from the party claiming, to the other party. It must not be a general consideration.]

The true principle was that applicable to toll-thorough, and was to be found in *Truman* v. *Walgham* (*b*), where the Court held, that there must be a consideration for the grant, and that the consideration must be co-extensive with the right asserted. To the same effect was the decision in *Brett* v. *Beals* (*c*), where it was held that the particular individual sought to be charged must partake of the benefit arising from the obligation on the part of the person claiming the toll. The benefit of the public, in other words, the consideration for the toll must be co-extensive with the right claimed. This was held in *Brett* v. *Beals* (*d*). The particular individual sought to be charged must be shown to have enjoyed the benefit. The Courts are exceedingly jealous of claims of right to levy tolls on the subject; for, as was observed in an old case (*Smith* v. *Shepherd* (*e*)), "The right of the public to pass freely along the highway was a right anterior to all prescription." The Magistrates must show some cause to entitle them to this toll, by doing something in respect of it for the public advantage. Without this or some such consideration, the grant is bad.

(*a*) *Sed vide suprà*, vol. i. p. 8.
(*b*) 2 Wilson, 296.
(*c*) 10 Barn. & Cres. 508.
(*d*) 1 Moo. & M. 416; 10 Barn. & Cr. 508.
(*e*) Cro. Eliz. 10; Moore, 574.

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[The LORD CHANCELLOR: Suppose they are brought in to be sold?]

There is nothing to warrant the notion that it was transit duty. Four cases were cited. The first was called the Fleshers' case (*a*). The reason of the decision in the Fleshers' case agrees with the law of England. It is, in fact, an authority quite conclusive against the present claim. The next case was that of Lauder (*b*).

[The LORD CHANCELLOR: Is every borough in Scotland subject to this obligation of repairing roads? Does such an obligation exist independently of the charters?]

[Lord BROUGHAM: That very point was put to the Bar formerly. It bears very importantly on the case.]

The Session Papers prepared for the Court threw light on that point.

[The Lord CHANCELLOR: Those papers were consequently part of the record.]

The other side did not object to the use of them.

[The LORD CHANCELLOR: There can be no consideration necessary to do that which you are by law bound to do.]

There can be nothing to support the claim of transit duty, unless some accommodation corresponding and correlative be established.

The other two cases were those of Ayr (*c*) and of Wigtown (*d*); but neither the Ayr case nor the Wigtown case had been brought to the House of Lords. From the pleadings in the Wigtown case it appeared that it was decided without any reference being made to the Linlithgow, Lauder, or Ayr cases, and no allusion was made to the argument as to the lawfulness

(*a*) Morr. 10886.
(*b*) Morr. 1987; 5 Brown's Sup. 819.
(*c*) Morr. 1971.
(*d*) Fac. Coll., vol. ix. p. 179; 12 Shaw & Dun., 289.

of the toll. The only question discussed was whether the borough could levy tolls beyond its own limits. The language of the different grants show that they only apply to imports and exports. In the amendments of the pleadings it was alleged that a consideration was given.

[The LORD CHANCELLOR: From the fact of the obligation or of the repairs being made, it is said that a consideration was given; but they say that after such a lapse of time a consideration should be presumed.]

They now allege consideration, and endeavour to support the grant on that ground.

[The LORD CHANCELLOR: Is there no part of the charter which points to a consideration?]

[Lord BROUGHAM: There is no Interlocutor on the new issue joined on the amendments.]

There is not. The Judges simply adhere to the old judgment.

[Lord BROUGHAM: The Interlocutors under appeal are the only judgment before us. There is no different issue. We sent the case back with leave to raise a different issue.]

But your Lordships gave no authority to recall the former judgment.

[The LORD CHANCELLOR: There is a new issue now.]

When the House means to give leave to recall their Interlocutor, it gives express power for that purpose.

[The LORD CHANCELLOR: Suppose our judgment to proceed on the amended matter, it would be on matter not adjudicated upon by the Court below.]

In the Duke of Hamilton's case (*a*) the House gave power to the Court below to recall their Interlocutor.

(*a*) *Suprà*, vol. i. p. 13; 7 Bell, 1.

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Usage is merely interpretative of the grant, and in the Lauder case the matter was determined, and cannot now be varied. There can be no benefit to the Railway Company from any road which the borough does not keep in repair. The facts are not yet ascertained. The order of proceeding in this case is contrary to all precedent. The roads and streets of Linlithgow are utterly useless to the Company. No saving of tolls was introduced in the Act.

[The LORD CHANCELLOR: How was the toll proposed to be taken? There was a case in this House as to the Darlington Railway, where a mode was prescribed for levying the tolls (*a*).]

The argument was that when once the usage was established, it was to be taken as part of the charter; although it was an usage to levy on goods brought by means of the streets and public thoroughfares of the borough, as to which it was impossible that the Railway Company could derive any benefit, as they could not use those streets and thoroughfares. Some reliance was placed on a case of *Roe* v. *Thompson* (*b*), but it had no resemblance to the present. When a grant is very old indeed, it may, perhaps, be supported without any consideration; but we say that usage to levy any toll without any benefit to the public must be bad. The Magistrates originally said that they were not bound to show consideration. Now, it was shown that the ancient decision in the Fleshers' case was founded on a great principle; but this has been lost sight of by the majority of the Judges below. The case, therefore, is one of extreme simplicity. The new allegations are supported by no evidence. They have departed from the original pleadings. In the Fleshers' case no consideration was

(*a*) 11 Cla. & Finn. 590. (*b*) 4 Barn. & Adol. 476.

alleged. The right was claimed *simpliciter*. The judgment negatived it. In short, the grant is good to the extent of the consideration, and no further. In the Lauder case the claim was of a causeway rate or mail, which, by its very terms, imported the consideration of the grant, so that this case was subject to the same principle as the Fleshers' case.

The Appellants' argument as to the Bridge Customs.

As to the bridge dues, under the grant from the Crown, the Magistrates claimed a right to levy certain tolls at certain fords below the bridge. The Company were bound to construct a viaduct. The Magistrates said: You shall pay for crossing over your own viaduct as if all your passengers were travelling over our municipal bridge. This was not very reasonable. The Magistrates endeavoured to give a colour to it by a clause in the Railway Act, which declared that if their receipts should be diminished they should be entitled to compensation, and this right of indemnity was given for the difference. It of necessity followed that they could not exceed the difference, otherwise they would be enormous gainers. In dealing with this question, the laws of both countries were the same. We say that this was a grant of a duty payable only at the bridge for the repair of the bridge. The viaduct is at a place where no toll was previously levied. The Jinkabout case (*a*) is entirely in our

(*a*) 1 Shaw, 515. Of the Jinkabout case, the following account is given by Lord Moncreiff in his opinion as set out in the pleadings:—

"This was the nature of the case, which is commonly called the case of Jinkabout; *Magistrates of Linlithgow* v. *Mitchell and others*, June 21, 1822. The magistrates or their officers having been remiss in attending to their interests at all points, in so long a space, a certain class of the inhabitants of the district had made a practice of crossing the river at a low point, and evading the duty. The very name which the place acquired, Jinkabout, contained in itself evidence that that was the nature of the practice,—the Scotch word plainly meaning a turning round to avoid something which was not convenient. However that might be, the

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favour. That case negatived the present claim. The Railway Act shows that the borough attended fact was so; and when the magistrates attempted to enforce their claim against parties crossing *at that point*, the defence stated was, that there had been an use and wont of parties *crossing* at that point for more than forty years, and that there had *not* been *an use and wont* of the magistrates exacting the duty or stopping parties from crossing at that ford of Jinkabout. The case was brought to trial, and sent by an issue to a jury. But the case was tried on the only principle, and in the only form, in which it could be tried legally or consistently. The title of the magistrates being clear by the statute, and the limits defined, the burden could not be laid on them to prove substantively that they had an use and wont of levying the duty for time immemorial at the particular spot in question. But, there being a positive averment by the Defenders of an use and wont for more than forty years, of crossing at that point, and no use and wont by the magistrates of levying the duty from the parties so crossing in that period, the case was brought to trial on an issue, the real meaning of which was, whether the Defenders had had prescriptive possession of *immunity*. Accordingly, though the magistrates were *Pursuers* of the *action*, the Defenders were made *Pursuers* of the *issue*, whereby the *onus* of proving the *immunity* by prescriptive possession was manifestly laid on them. The issue which was approved of was very awkwardly and obscurely framed, with a view to such a trial; but that this was the nature of it, is plain from the position in which the parties were placed for the trial.

"I speak with great confidence of this, because I was Counsel for the burgh in the case and in the trial. Lord Cockburn was along with me; and Lord Jeffrey was Counsel for the *Defenders* in the *action* and the *Pursuers* of the *issue*. As Pursuer, accordingly, he adduced a very great deal of evidence, to show a *prescriptive* use by the tenants of the Duke of Hamilton and others crossing at Jinkabout with carts, horses, &c., extending that possession beyond forty years, and at the same time proving that the *duty was not exacted or levied* from them. On the other hand, for the burgh, we led a good deal of evidence, with the view of showing that these proceedings had been occasional trespasses, and that on various occasions there had been demands of the duty. But this last evidence was not found to be sufficient, and the evidence for the Pursuers of the issue having been thought so strong, as to establish a prescriptive possession of immunity, the verdict was for the Defenders, Mitchell and others; but it was for them as *Pursuers* of the *issue*.

"There can be no doubt that this was the real nature and state of the case, and no one who was present at the trial can doubt or does doubt it. And taking it to be so, the case cannot

in Parliament to support their interest. The Legislature, therefore, did not intend that the town tolls should not be thrown on the Company, but simply that they were to indemnify the borough for any diminution in bridge dues. The section was divided—one a saving clause simply, the other declaring that if the town were entitled to any such bridge customs, the Company would indemnify them to the extent of the diminution. The object of the argument on the other side would be to throw the indemnity out of the Act of Parliament. What was the right—the public right? The customs and profits of the bridge: if these shall be reduced, then the claim of compensation will arise, but they cannot have both the custom and the indemnity. The bridge must be kept up for the public benefit, and the borough must be enabled to keep it up, and to this extent indemnity is secured the moment a diminution of the profits is established.

Respondents' argument as to the Burgh Customs.

Mr. *John Inglis* (*a*) opened, in the absence of Mr. [illegible] avail the present Defenders; for, in the first place, the very existence of it, and the form of trial adopted, show that there was no doubt whatever of the title of the magistrates by their Act of Parliament; and, on the other, the position which the parties were made to assume in the trial, demonstrates that it was only a case of prescriptive immunity at the particular place that was established by the verdict, and not any immunity against the right of the magistrates generally at any other spot within the limits. At the very best, it was but the verdict of a jury on a special case.

"The case in *fact* then is, that the Railway Company have made a viaduct, by which they carry goods and passengers across the Avon, at a place where no crossing had ever been before. It is said that they have obtained an Act of Parliament authorizing them to do this. But there is nothing in the circumstance of their crossing by a viaduct or bridge which could otherwise exempt them from payment of the duty. If any private party had done the same, having acquired the property on both sides, there can be no doubt that the duty would have been exigible according to its amount by use and wont. And then the question is, whether the Railway Company are exempted from it or not.

(*a*) Now Lord Justice-Clerk of Scotland.

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Rolt, for the Magistrates (*a*). This is a declaratory action peculiarly appropriated by the law of Scotland to the trying of questions of right. We say the borough is entitled to levy upon all goods brought into it, either to be consumed, or to be sold, or to be carried out again. The summons alleges that the duty claimed is paid. The answer made to this by the defence of the Company will show how the case has been changed since it was last before the House. The defence is not that the toll claimed is illegal or bad, but that the Defendants are exempted. They refused to go to trial till this question of law was first settled by a decision. That decision was made on the demand of the Appellants themselves. It is to be supported on the assumption that the immemorial usage alleged can be proved by evidence. In other words, the facts alleged by the borough are at this stage to be considered as established; and the judgment is what in Scotch law is called an "Interlocutor of relevancy."

[Lord BROUGHAM: In the nature of a demurrer.]

[The LORD CHANCELLOR: They must show the exemption.]

The Fleshers' case, so much vaunted, has been discredited by subsequent authorities.

[The LORD CHANCELLOR: I do not see that anything has been done to disturb that case in point of principle.]

We say the Lauder case, the Ayr case, and the Wigtown case are all in conflict with it. When the present case was argued here before (*b*), it was not averred that the grant was bad for want of consideration. This doctrine of consideration sounds strange in the ear of a Scotch lawyer. The *Lord Justice-Clerk* does not understand it. This is not a toll levied on the King's highway. The word toll in ancient Acts

(*a*) Mr. Anderson was also of Counsel for the Respondents.

(*b*) See vol. i. pp. 8, 11.

of Parliament does not mean the same thing as toll in a modern Turnpike Act. Tolls of old were not paid in respect of carriages or in respect of the use of a road, but they were in truth a species of tax granted by the King, and which were as good in the hands of an individual as in the hands of the King. Now, nothing is more certain than that in the hands of the King such tolls required no consideration. The learned opinion of Lord *Medwyn* shows this most clearly, where he goes into the questions as to the borough customs originally constituting part, and an important part, of the royal revenues. The whole of these customs belong to the Crown. There were customs in goods. Boroughs were the marts of such commodities. See what Lord *Murray* says as to the word tollbooth (*a*); that it was the booth in which the King's toll was collected, and where parties refused to pay they were imprisoned. The legal history of Scotland shows that there were two great classes of such customs. The great customs were not granted out, whereas the small ones were frequently granted out. Every royal borough had a grant of small customs. The borough of Linlithgow came into the place of the Crown, not in respect of any such consideration as that referred to by the Appellants, but in respect of the royal favour which moved the Crown to make the grant, namely, the good of the town and its inhabitants. This was the true and only consideration, having nothing to do with the benefit or advantage of those paying the toll. It was, therefore, a great mistake to suppose that the borough must show a consideration moving to the parties subject to the exaction.

Again, it is of no consequence that the goods are not brought in by the roads or thoroughfares of the borough. Reference has been made to Craig (*b*);

(*a*) *Vide suprà*, vol i. p. 30. (*b*) De Feudis.

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and the Respondents are obliged by the reference, for it will be found to be throughout in their favour. He describes the goods subject to toll as either coming into the town, or as going through it. Toll was, in fact, a common name for all kinds of taxes.

[Lord BROUGHAM: It is the same here.]

[The LORD CHANCELLOR: Undoubtedly.]

That the language of Craig will cover transit duties seems very clear. Now, by the practice of the Scottish boroughs, the duties are charged not merely on goods coming into the borough, but on goods going through it. The Assiza de Tolloneis (*a*) establish this. Lord *Moncrieff's* opinion (*b*), too, is with us. Such being the import of the word toll, what is the evidence on which we rely in support of the right of boroughs to exact it? There is first the charter of King Robert, giving to the community of Linlithgow the grant of royal borough, the port of Blackness, and the small customs and tolls. The King gives these to the borough precisely as he had had them himself (*c*). So again in the charter of King James (*d*), reciting that of King Robert, there is a similar grant of the same things. Then there is the ratification by the Act of 1661. The legal effect of ratifications of this description has, indeed, been made the subject of argument on the other side. They have been likened to private instruments; but when all parties are before Parliament the Act is binding on all.

[The LORD CHANCELLOR: A recital in an Act will not bind those who are not within its enacting part.]

These ratifications have the effect of demonstrating that the grants which they confirmed were good in law, and we contend that the grant by the Crown, being ratified by Parliament, not only derives efficacy from that ratification, but must be taken to have

(*a*) Acts of Parl., vol. i. p. 303. (*b*) Vol. i. p. 25.
(*c*) *Suprà*, vol. i. p. 1. (*d*) *Suprà*, vol. i. p. 2.

been originally unimpeachable. Then such being the title of the borough of Linlithgow, what more is required? A proof of usage cannot be expected from the date of the grant several centuries ago. The law of Scotland, therefore, accepts of something short of such impracticable proof. It will be sufficient to show an exercise of the right past the memory of man. Proof of this will be sufficient to support the claim, and proof of this is offered on the record. The complaint of the want of proof of usage on the other side is quite out of place, not only because they refused themselves to go into evidence and demanded a judgment on the question of right, but because, in fact, an appeal to evidence in the present state of the case would have been premature.

[The LORD CHANCELLOR: You say it is to be taken in the strongest sense in which, if well pleaded, it would be put.]

Nothing can be more precise or specific than the allegations on this point.

[Lord BROUGHAM: You plead the table in your summons and in your condescendence.]

We do. Now then as to the authorities. And first as to the much-debated Fleshers' case. If the principle of that case be the law of Scotland, we have misread that law; for according to that case the grant must be supported by a consideration corresponding, and equivalent with it. But in truth the Fleshers' case is of no authority. It arose in a suspension, but suspension is a form of review. The judgment appealed from was by a convention of royal boroughs, and the object was to get rid of a regulation made by that convention. All that the Court of Review did was to refuse the application.

[Lord BROUGHAM: What are the words of the decree of the convention?]

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The reporter puts the case as if it were a judgment in a declaratory suit, whereas what was done was no more than a mere rejection of the appeal. The jurisdiction of the convention of royal boroughs is peculiar. The decision in this case is singular, not to say mysterious. The doors of the Court were closed. But it is said that the subsequent cases do not, in fact, disagree with the Fleshers'. It is said, for example, that the Lauder case was one of causeway rate or mail, and not one of toll or custom ; and therefore the other side maintain that the consideration was matter of necessary implication involving the duty of repair. But royal grants never contained such considerations. The borough was subject to no obligation, except that which arose from its own constitution, which independently of the grant would have bound those boroughs to such repairs. Therefore, the repairs could never have been the consideration of the grant. The next case is that of *Oliphant* against the *Town of Ayr*, and then came *Wigtown* v. *Glover*. The pleadings in these cases were constantly referred to for the purpose of verifying the reports. Some of these were in manuscript and some in print collected under the title of Session Papers. We request particular attention to the form of the Interlocutor in the Wigtown case, because it will be found to be the model followed by the Lord *Wood* in the present case. In the other case of *Oliphant* against *The Magistrates of Ayr*, we likewise have had access to the pleadings in the Court below, which are to be found in the Arniston Collection, v. 3. preserved in the Advocates' Library at Edinburgh. In that case a proof was gone into, and the final judgment was in favour of the town. The defence of the Magistrates was rested on their charters and immemorial possession and usage. The pleadings and a table of the customs in the Ayr case were delivered in.

The twenty cases (*a*) cited are material as showing that in other towns such rates existed; and that the grants of them are in the same terms, or substantially in the same terms, as in the present case.

[The LORD CHANCELLOR: Are the terms of the grants set out?]

They are, and, substantially, they are like those occurring here. If investigation is desired we are ready to enter into it, but in the meantime the case must stand upon averment. Our general position is, that usage is the measure of the right, and the exponent of its exercise. The principle on which we go is this, that wherever goods are found within the limits of the borough, the demand of toll arises. Now, although it may, perhaps, be true that the Crown could not make such a grant as this in the present day, it could in former times; and all the ancient rights of the royal boroughs of Scotland are, by the 21st article of the Treaty of the Union saved to them.

Respondents' argument as to the Bridge Customs.

We now come to the *Bridge Customs*. By the Act of 1685, the extent of the grant appears. The Magistrates are to keep up the bridge; but after doing so the surplus income is to be devoted to works of public utility. The Jinkabout case (*b*) settles nothing. It is said these duties cannot be levied. If this objection were well founded, the toll could only be levied where the mode of carriage was the same, as that which existed at the date of the grant. But it is to be observed that the land over which the railway passes is subject to the jurisdiction of the Magistrates. It is burgage property held under the Crown by burgage

(*a*) *Suprà* vol. i. p. 14. The cases were,—Lauder, Wigtown, Dundee, Ayr, Haddington, Irvine, New Galloway, Sanquhar, Campbelltown, Burntisland, Edinburgh, Stranraer, Annan, Perth, Stirling, Inverkeithing, Dumfries, Dunfermline, Lochmaben, and Musselburgh.

(*b*) See *suprà*, p. 699.

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tenure. How then can this Company pretend to oust the borough of its rights? There are many cases in which it has been decided that the mere mode of carriage made no difference in the right of levying dues. Thus in *Ferguson* v. *The Magistrates of Glasgow* on the 27th June 1786 (*a*), where potatoes were taxed, because they came within the general character of the articles included in the grant, although not named. So likewise in *Martin* v. *The Magistrates of Aberdeen* (*b*), and in the case of the Magistrates of Edinburgh (*c*), where there was a new mode of importing the commodity, it was found that the duty could not be levied under the old plan, and therefore they altered the mode of levying. The Court decided that the charter followed by usage was sufficient. In *Rowe* v. *Shilson* (*d*), the difficulty to take toll would have been as great as in the present case.

Such were the arguments addressed to the House in the Session of 1851. The case was ordered to stand over *sine die*.

1852. *July 1st.*

In the following Session, on the 1st of July 1852, Lord *Truro* (*e*) (Lord *Brougham* being present) made the following observations:—

Lord *Truro*: The attention of the House has been paid to this case, and with more than ordinary labour. It appears to the House to be necessary that the effect of the Railway Act should be more considered by the learned Counsel, than it seems to have been during the former argument. The House are impressed with the idea that the effect of that Act may be important to be considered, and the arguments do not appear to have been addressed so fully to that as, perhaps, the learned Counsel may do on a future occasion. Therefore, we think that the case should

(*a*) Morr. 1999. (*b*) 25th Feb. 1801.

(*c*) 17th July 1711; Suppl. v. p. 74.

(*d*) 4 Barn. & Ad. 726.

(*e*) Lord Truro had, prior to the delivery of the above remarks, resigned the Great Seal, which was now in the hands of Lord St. Leonards.

be re-argued by one Counsel on a side, upon the effect of the Act of Parliament on the dues and customs which are in question.

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Lord *Brougham:* I move your Lordships that this case stand over, in order that it may be re-argued by one Counsel on a side.

Nothing, however, was done in the Session of 1852. In the following Session, on the 24th June 1853, it was again ordered that the case should be re-argued by one Counsel of a side, and that the Judges (meaning the English Judges of the Common Law) should attend. But on the 1st June 1853 this order was discharged, on the ground that in a Scotch cause it was not fit that the Judges of England should assist (*a*). On the 31st of May 1858 an order was made that the cause should be re-argued, but this order was not acted upon.

1859. *July 20th.*

At last, however, on the 20th July 1859, the cause was actually placed in their Lordships' paper for rehearing, and without any restriction as to the number of Counsel to be heard.

The Counsel for the Railway Company on this rehearing were the *Attorney-General* (*b*) and Mr. *Young*. Those for the Magistrates, the *Lord Advocate* (*c*), Sir *FitzRoy Kelly*, and Mr. *Anderson*.

The *Lord Chancellor* (*d*) directed the attention of the House to the position of the Record, consequent on the remit (*e*). The difficulty was got over by a consent "on both sides, that the cause should be argued and disposed of on the same footing as if the Interlocutors appealed against had been pronounced on the Record as amended (*f*)."

(*a*) The rule that the English Judges shall not be summoned on a Scotch Appeal or Writ of Error is settled in practice.

(*b*) Sir Richard Bethell. (*c*) Mr. Moncreiff.

(*d*) Lord Campbell. (*e*) See vol. i. p. 35.

(*f*) See the Lords' Minutes of Proceedings, 20th July 1859, and see also the judgment at the close of this Report.

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In the arguments of Counsel the same ground was traversed as on the two former occasions, namely, in 1847 (*a*) and 1851 (*b*), with this difference that attention was more specially directed than previously to the words of the Railway Act.

The following opinions were ultimately delivered by the Law Peers.

Lord Chancellor's opinion.

1859. *July 28th.*

The LORD CHANCELLOR (*c*):

My Lords, in rising to advise your Lordships as to the judgment which I think you ought to pronounce in this very important and long protracted cause, I cannot refrain from expressing the admiration and the pride with which I have perused the opinions given upon the remit by this House to the Court of Session, with directions that "it should be heard in presence before the whole Judges of the Court, including the Lords Ordinary." Of the thirteen Judges who heard the cause re-argued, only two survive; but the opinions delivered by all of them are on record, and will be a lasting monument of their learning and ability, and of their devoted desire to do their duty (*d*).

As to the Burgh Customs.

On the great question so keenly agitated, whether, irrespective of the Railway Acts, the Respondents had or have a right to a transit toll on cattle and goods passing through the burgh or liberties of Linlithgow (*e*), I shall not find it necessary to say whether I agree with the majority or the minority of the Scotch Judges. At the same time, I must observe that it ought not to be considered that this is settled in the affirmative, although your Lordships should not reverse that part of the Interlocutors appealed

(*a*) See *suprà*, vol. i. p. 1.
(*b*) See the argument in the present volume, *suprà*, p. 693.
(*c*) Lord Campbell.
(*d*) See these opinions, *suprà*, vol. i. p. 15 to 30.
(*e*) See *suprà*, vol. i. pp. 1–30.

against. The question is certainly to be decided purely by the municipal law of Scotland, and I shall studiously abstain from any allusion to the law of England, even by way of illustration.

It has been argued on behalf of the Respondents that this transit toll is a *petty custom*; that the Kings of Scotland, by their prerogative royal, had immemorially a power to tax the lieges without the authority of Parliament, and might, merely for their own benefit, impose such a transit duty within the limits of any royal burgh, they being entitled to make these limits coterminous with a county; that this and all other petty customs were originally imposed with a view to the royal revenue, and were collected by a royal customer; and that they were afterwards granted by the Crown to royal burghs, as they might have been granted to a religious house or to a court favourite wholly unconnected with the locality

Now, my Lords, there is no doubt that the *great customs* upon merchandise and shipping did originally form part of the royal revenue in Scotland as in other European kingdoms. Thus, in an extract from the Assize of King David, relied on by Lord *Medwyn* (*a*), it is written, "Merchandes alsua outher be land or be se cummand sall geyff the kyng be his ministeris his rechtis fullely as it was stablyet in his faderis dayis." But there is some reason to think that *petty customs* generally took their origin from a royal grant to a newly created burgh in consideration of benefit to be expected by the inhabitants of the burgh. For expected benefit, a power to impose reasonable tolls existed in most of the European monarchies. Down to our own times the King of England has been accustomed to make a grant of reasonable tolls to defray the expense of erecting a lighthouse on a dan-

(*a*) See *suprà*, vol. i. p. 15.

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gerous coast, and of keeping a light burning upon it for the safety of navigation. I cannot help doubting whether a *transit toll* properly belongs to the category of *petty customs.* I cannot help doubting whether it ever was imposed in Scotland purely as a tax to increase the national revenue, or otherwise than as a grant of a reasonable compensation for expected benefit, as in crossing a bridge or using the paved streets of a town.

The unlimited taxing power of the kings of Scotland is rather novel. In a passage quoted from "Chalmers's Caledonia," that learned and paradoxical writer says: "The commercial laws of North Britain consisted of a system of slavish and barren monopoly, which entailed on Scotland during five centuries poverty and wretchedness." But Lord *Braxfield* (*a*), a much higher authority, in the Wigtown case, stated the law of Scotland to be, "That the Crown has no power to impose taxations either in favour of the Crown itself, or in favour of third parties, whether individuals or communities." I am likewise made to hesitate by the decision of the Court of Session in the Fleshers of Edinburgh against this very town of Linlithgow, in which the legality of this very transit toll came in question, and in which Lord *Durie,* a great Judge, who concurred in the judgment, and had the reputation of being a very accurate reporter, says: "The Court held that the town of Linlithgow had no right to uplift such customs, and that such customs and consuetudes ought not to be authorized, seeing all the king's lieges have liberty to drive their goods through the king's public way and streets, without any exaction of that nature, except it had been granted for a public good of the realm, such as bridges or such like common works."

(*a*) Macqueen of Braxfield.

The Lauder case, which is supposed to overturn this decision, may perhaps be explained by the fact that the cart carrying the stones found liable to toll had passed through the paved streets of the town, and that the Court there said that immemorial custom might explain the grant, "with this proviso, that the custom was not contrary to law and the good policy of the kingdom."

The Ayr case, and likewise the Wigtown case, may possibly be shown to be irreconcilable with the case of the Fleshers of Edinburgh.

But, my Lords, I hope I may have said enough to excuse myself for observing that this general question respecting the common law of Scotland should still be considered open for discussion as before the present litigation began.

I now proceed to show that if the transit toll could have been lawfully demanded when the statute of 1 & 2 Vict. c. 58. passed, in my opinion it was the intention of the Legislature that the Appellants should not be liable to any such toll for carrying goods by their railway from Edinburgh to Glasgow through the liberties of Linlithgow. For this purpose I do not think that any reliance can be placed on the 81st section of the Act referred to by the *Attorney-General;* for this applies only to the rights of persons who have sold land or other property to the Company; and although the land purchased by the Company is held of the burgh by burgage tenure, I do not think the Corporation of the burgh can be considered as having conveyed it to the Company as vendors. But when we consider what the nature of this new transit by railway is, I do not think that there could be any intention that it should be liable to a toll. The railway does not traverse any street of Linlithgow repaired by the Magistrates, and it is

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constructed entirely and exclusively on land which is the private property of the Company. The cattle and goods, the transit of which we are considering, have not been bred or manufactured in Linlithgow; they are not to be bought, or sold, or consumed in Linlithgow; and they are not to remain within the liberties of the burgh more than a few seconds while the train passes through, perhaps at the rate of fifty miles an hour. No objection is made to the continuance of the toll to be paid by owners of cattle and goods brought into the town to be sold or consumed there, nor to the toll to be paid by the owners of cattle and goods taken from the burgh after having been some time stationary there for the purpose of commerce. They may derive benefit from the paved streets of the town, and the tolls upon them may be easily ascertained and levied. The "customer" sitting in his tollbooth can collect such tolls with ease, and there is the same reason why such tolls should be demandable as if, instead of coming by railway, the cattle walked into the town in a drove, or the goods were brought in carts or on pack horses. But how is the "customer" to stop an express train between Edinburgh and Glasgow when it passes Linlithgow like a flash of lightning? He would have some difficulty in resorting to a distress, the usual remedy for the non-payment of a toll; and it could hardly be expected that the Railway Company should keep an account of all the goods carried by the train, including the carpet-bags and umbrellas of the passengers, with a view to the transit toll demandable on all goods carried through the liberties of Linlithgow and every other burgh town between the eastern and western metropolis of Scotland. Considering that the Magistrates of Linlithgow have done nothing whatsoever to further the transit of the goods, that the

Company have conducted the train on their own soil, and that but for the railway the goods in all probability would never have approached Linlithgow, I do not think that the Magistrates could complain of being robbed, if they were precluded from making any such demand, being still left in the full enjoyment of the tolls on all cattle and goods brought into or taken from their town. This is not an action for evading the toll, or doing anything unlawful, but for toll actually earned and due as such.

Under these circumstances, I am of opinion that section 177 of this Special Act clearly indicates that no transit toll shall be demandable, having enacted "That all persons shall have free liberty to pass along and upon, and to use and employ the said railway, with carriages and engines properly constructed, as by this Act directed, upon payment only of such rates and tolls as shall be demanded by the said Company, not exceeding the respective rates or tolls by this Act authorized, and subject to the provisions of this Act and to the rules and regulations which shall from time to time be made by the said Company or by the said Directors, by virtue of the powers to them respectively by this Act granted."

Further, by the Railways Clauses Act, 8 & 9 Vict. c. 33. s. 15, it is universally enacted, "that upon payment of the tolls from time to time demandable, all companies and *persons* shall be entitled to use the railway with engines and carriages properly constructed." When railways first began, the contemplation was that carriers and private persons might run carriages upon them, merely paying a toll to the Railway Company for the use of the railway. If an individual had engaged in an adventure to carry goods and passengers with great celerity from Edinburgh to Glasgow, without stopping at any intermediate station, was it the

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intention of the Legislature that he should be liable to an action for a transit toll at the suit of the Magistrates of every burgh whose limits the railroad should touch? How would it be if the railroad only crossed a very small angle of the liberties of the borough on some moor several miles distant from the urban part of the burgh? How would it be if the railway never touched the surface of the burgh or its liberties, but for some distance went through a tunnel, the superjacent strata being within the liberties of the burgh? If this individual so carrying goods on the railway of a railway company would not be liable for a transit toll, I am quite clear that the claim cannot be supported against the Appellants, the Railway Company, for using their own railway.

The English case of *Rowe* v. *Shilson* (*a*) was relied upon by the Respondents. But the *ratio decidendi* there expressly stated by Lord *Denman*, and the other Judges of the Court of Queen's Bench, clearly distinguishes it from the present. There "the plaintiffs had a vested right to tolls for the use of their land, and their land being used by others as before, the right to toll for the use of it was intended to continue." Mr. Justice *Parke* (my Lord *Wensleydale*) pointedly says: "This does not enable persons to cross the road of another company without paying the rates before claimable by them."

But the decision of the Court of Queen's Bench in *The Newmarket Railway Company* v. *Foster* (*b*) is much more in point, and the only distinction attempted by Sir *FitzRoy Kelly* between that case and the present was that the toll there must be considered a payment in consideration of the use of the road; whereas, as he contends, what is called *toll* here is a *tax* im-

(*a*) 4 Barn. & Ad. 726. (*b*) 2 C. L. Rep. 1617.

posed arbitrarily by the Crown for the benefit of the royal revenue. I am desirous that it should always be kept in mind that the transit toll now claimed is not for passing over the land of another, but for making use of land which is the exclusive property of the Appellants, and is exclusively in their possession.

That the Legislature had no intention that any transit toll, if any existed before the construction of the railway, should be afterwards payable by the Railway Company, seems to me to be further clearly shown by section 237, which expressly saves to the town of Linlithgow the bridge toll claimed for passing the river Avon. If the transit toll was to continue, why was there not a similar saving to preserve it; *Expressio unius est exclusio alterius.* Indeed, the transit toll was much more likely to be questioned if demanded, and the omission can only be reasonably accounted for by the supposition that the demand being so unreasonable there was no apprehension that it could ever be made.

As to the Bridge Customs.

I now come to what has been called the "bridge toll"(*a*); and to dispose of this I shall only have briefly to refer again to the 237th section of the Act of Parliament. This right, in the extent to which it is claimed, seems more strange than any right that I remember to have seen judicially claimed, viz., a right to levy toll or customs upon any cattle, carriages, goods, or any other thing whatsoever, passing, led, driven, or carried over any part of the river Avon, between its mouth and a place more than twelve miles higher up. This toll would be leviable where the *alveus* of the river and both banks belong to the same proprietor, if in times of flood he should make his cattle swim over from one bank to another, or in

(*a*) See *suprà*, vol. i. pp. 30, 31, 32, 33, 34.

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times of drought he should make them skip across on the shingles. He is at all times debarred from the use of any ford without paying toll.

But it is unnecessary to decide upon the legality of this toll; for, *esto* that it is legal, this action is not maintainable in respect of it. A viaduct has been made by the Railway Company across the Avon, between the specified termini; but the construction of this viaduct is expressly authorized by the Act: "and if anything shall be done by virtue of this Act whereby such customs shall be diminished, or such thing when done shall have the effect to diminish the same, then the Magistrates and Town Council shall and may receive such indemnification from the said Company as shall be agreed upon between them, and in case they cannot agree, as shall be settled by a jury in the manner in which satisfaction is directed to be made by this Act for lands taken and used under the powers thereof." Then follows a proviso reserving to all persons interested "the validity and discussion in the competent Courts of law of rights, jurisdictions, and powers enjoyed or claimed, with all defences which any person or persons can or may plead against the same."

This clause is most strangely framed, and a literal meaning cannot be given to all its contradictory language. But taking the whole together I think that the Legislature certainly did not intend that anything so impracticable should be attempted as actually to levy the tolls as the train passed the viaduct; but that preserving whatever right the Magistrates before had to the toll claimed, then, by agreement, or by the verdict of a jury, they should receive an indemnification from the Company equivalent to the amount of the tolls which they would have been entitled to levy. The tolls were not to be levied in specie, but a pecuniary commutation was to be received for them.

It was argued on behalf of the Respondents (I should think rather jocularly) that they are entitled to levy the amount of the tolls on every train as it passes the viaduct, and therefore they are not damnified; but the enactment seems to me clearly to indicate that the tolls should not be taken, and that having established their right, the Magistrates should receive an indemnity; for if the tolls were actually to be levied as claimed, the Magistrates could not be damnified, but must be lucrated by the erection of the viaduct.

For these reasons, my Lords, I am of opinion that the Interlocutors appealed against should be reversed, and that the Defenders should be assoilzied from the conclusions of the libel.

We all very deeply regret the delay that has taken place in finally disposing of this Appeal. I may truly say that it has chiefly arisen from an anxiety to decide properly. Without the remit, we thought that we could not safely adjudicate upon questions of such general importance. On the second argument, after we were favoured with the opinions of the Judges, delays arose from the illness and death of Lord *Truro*, who had prepared a judgment, I have reason to believe, in the same sense as that which I have now delivered. Unfortunately, a proposal of my noble and learned friend, Lord *Brougham*, which I should have warmly supported had I been able to attend, that the opinion of the English Judges should be taken on the construction of the Acts of Parliament, was objected to on the ground that this would be importing English law into Scotland.

Upon the whole I would recommend that there should be no award of costs, incurred either in this House or in the Court below.

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Lord BROUGHAM:

My Lords, upon this very important and long litigated case I have anxiously considered the opinions of the learned Judges in the Court below, and I have come to the same conclusion with that of my noble and learned friend.

When this case was last before your Lordships, and when Lord *Truro* and myself in some respects differed, it was suggested that there was an additional reason for its being reheard, namely, that the Railway Act had not been sufficiently considered. There was at least that reason alleged for postponing the decision till a future opportunity.

My Lords, we have now had the opinions of the learned Judges (*a*); and I must agree with my noble and learned friend in expressing my admiration of the learning and the ability which those thirteen opinions manifest; and it is a lamentable consideration that of those thirteen learned Judges only two now survive.

From the view which I take in common with my noble and learned friend, it becomes unnecessary to decide the first and general question. I will, however, state, as he has done, that considerable doubt exists upon that question. Nevertheless, I so far differ with my noble and learned friend that the inclination of my opinion is with the great majority of the learned Judges below. I think nine (for Lord *Mackenzie* upon that point agrees with the others) out of the thirteen are clearly of that opinion. There is no doubt that the case of the Fleshers of Edinburgh (subject to the observations which arise upon the incorrectness of that report), and the Lauder case (subject also to a doubt), followed by the Ayr case (*Oliphant* v. *Ayr*) and the

(*a*) See *suprà*, vol. i. p. 15.

Wigtown case, but particularly the Ayr case, do upon the whole leave that question in a state in which it cannot by any means be regarded as having received a distinct decision. Nevertheless, as I have already said, the inclination of my opinion upon that important subject is with the great majority of the learned Judges, I need not refer to the arguments upon which that is grounded, further than to refer to the opinions of Lord *Moncreiff* (*a*) and Lord *Medwyn* (*b*), particularly of Lord *Moncreiff*, which upon that side appear to me to be the most important, as upon the other side the very able argument of Lord *Murray*, and the more elaborate argument of the *Lord Justice-Clerk*, appear the most forcible. It is, however, unnecessary to dispose of that question from the view which we take of the bearing of the Railway Act. In that respect I agree with my noble and learned friend; and a very clear opinion to the same effect was entertained by Lord *Truro*, as expressed in a proposed judgment, which I hold in my hand, and which I have read with great attention.

Lord Brougham's opinion.

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Lord CRANWORTH:

Lord Cranworth's opinion.

My Lords, my noble and learned friend on the woolsack has gone so fully into this case, that, perhaps, it is unnecessary for me to add a single word, concurring as I do with him in the result at which he arrives. Like him, I give no decided opinion upon the great and important point, which applies to other burghs in Scotland as well as to this, as to the legality or illegality of the claim set up (*c*). At the same time, as my noble and learned friend on the woolsack has intimated a leaning, I may say, towards the opinion of the minority of the Judges upon this point,

As to the Burgh Customs.

(*a*) See *suprà*, vol. i. p. 24. (*b*) *Ib.* p. 15.
(*c*) See *suprà*, vol. i. pp. 1–30.

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I think that I am bound to make this observation which has occurred to me, that I can see at least nothing unreasonable in such a toll, if under the grant of *parvæ custumæ*, from time immemorial a transit toll through the burgh has been levied. It is said that that is a levy without consideration. Although consideration may not strictly be necessary, there is no doubt that all these grants were made for an implied consideration, that the burghs should by virtue of the grants that were made to them maintain the gaols and keep up the other benefits which royal burghs in Scotland were bound to keep up; and that being so, I own that I do not see anything more unreasonable in levying that toll upon persons who are passing through the burgh than upon persons who are bringing their goods for sale in the burgh. They get the advantage, a very great advantage in those days, of safe and secure resting places while they are upon their journey; they get the advantage, for a portion at least of their journey, of better roads, better modes of transit than they would have had if there had been no such burghs, and they get the advantage of a better police at their resting place, and probably extending to a large distance around it. If, therefore, it does appear, as is averred in the condescendence, that this has been a usage very common upon the grant of small customs, and that should be established in proof, I do not see anything illegal on the face of such a grant. But inasmuch as we all concur that, whether legal or illegal the toll is entirely done away with as far as regards the Railway Company by their Act of Parliament, it is unnecessary further to discuss that point.

Now, that the Act of Parliament meant to put an end to this toll in respect of goods transported by railway, if otherwise it would have existed, appears to me to be clear beyond doubt. In the first place,

there is not in this Act, as there is in others (certainly in two others which I have seen, relating to the burgh of Dundee), a reservation of this right; there is no reservation in this Act, except as to what relates to the bridge toll.

Then seeing that there is no right to toll reserved, and moreover, that no machinery is given whereby it would be possible to enforce the toll, these considerations appear to me irresistibly to lead to the inference that the toll was not to continue at all. The toll could only be levied by the customer, the officer of customs coming upon the railway, the train being compelled to stop. But no provision is made for that purpose. Any man coming upon the railway would be a trespasser; he would have no right to come upon the railway, except as a passenger; and the absence of any such provision seems to me to be conclusive that it was not intended that such a toll should be levied; and I feel the more confidence in that view of the case from the circumstance that in one, at least, of the cases that are stated in the condescendence (I mean the case of Dundee), upon looking at the Local Act I find that express provision was there made with regard to that state of circumstances, because there the right of the burgh to all toll was preserved, and then in the amending Act, which is referred to, the 11 & 12 Vict. c. 52, there is a provision made that whereas they have been in the custom of levying this toll before the creation of the railway, and as the levying of it upon the railway after the Railway Act was passed, would become difficult or impossible, therefore it is provided that the Company itself shall levy the toll, and keep an account of it for the burgh—an extremely reasonable provision, the absence of which in the present Act appears to me, if further argument is wanted, to afford an irresistible

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argument that it was not intended that the right of levying such a toll should exist.

My Lords, this subject has been so entirely exhausted by my noble and learned friend on the woolsack, that upon that part of the case I shall say no more.

As to the Bridge Customs.

Then we come to the bridge toll (*a*). Now, as to that I see no doubt, except from the right which is reserved in the Act of Parliament to levy toll at any viaduct or bridge erected by the Company. The 237th clause reserves all rights (which is not done as to the transit toll) existing at the time of the passing of the Act. But then the Legislature, foreseeing that the establishing of a viaduct might prejudice the town by abstracting much of the traffic across the river, after saving the rights of the town, further provides a compensation in case the construction of a viaduct should diminish their tolls on the bridge, or other places of passage across the river.

The difficulty arises from the reservation of the rights claimed to levy customs on cattle, goods, and other things passing the water of Avon, by any viaduct or other bridge built across the water by the Company. It must be owned that these words are very difficult to deal with, but still I cannot believe that they were intended to reserve a right to take toll on goods, &c. passing in the ordinary way along the railway. If that had been intended, some provision would surely have been made enabling the Magistrates and Town Council claiming the toll, or their officer, to come on the railway, and obliging the Company to take care that facilities were given for enabling the persons levying the toll to ascertain and enforce their rights. Further, the provision enabling the Magistrates and

(*a*) See *suprà*, vol. i. pp. 30, 31, 32, 33, 34.

Town Council to obtain indemnity if the Company should by any Act cause the tolls to be diminished, would evidently be absurd if the right to levy them on all traffic passing by railway along the line in the ordinary way still existed. It is necessary to put such a construction on the former part of the clause, as is consistent with the possibility that the works of the railway might diminish the profits of the persons entitled to the toll, to be levied after the railway should have been formed. The only rational mode of doing this is by understanding the passage in question to refer, not to the ordinary transit of cattle, passengers, or goods by the railway, but to the possibility that the viaduct or bridge of the Company might be made a mode of transit across the river, not in the ordinary use of the railway, but by allowing it to be used merely like any other bridge for enabling traffic passing by the ordinary roads to cross the river, instead of going to the usual fords or to Linlithgow bridge. This is the explanation suggested by one of the learned Judges below, and it is the best which I can suggest. If it is not altogether satisfactory, it is to my mind much more so than it would be to suppose that the Legislature had made provision for compensating the town for a possible loss of toll, at the same time that it reserved all which it formerly possessed at the old bridge and fords, and gave it, further, the very large addition which must accrue from the traffic on the railway.

For these reasons, I am of opinion, both as to the bridge toll and as to the transit toll, that if either or both of them did exist, the right to them has been put an end to by the Railway Act, so far as relates to goods carried by the railway, or on the viaduct or bridge across the Avon.

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Lord CHELMSFORD:

My Lords, I agree with all my noble and learned friends who have addressed your Lordships that this case may be disposed of without the necessity of expressing any opinion on the important and general questions which have been raised in the course of the discussion, and which have received so much attention and drawn forth so much admirable learning from the learned Judges of the Court of Session. That the Kings of Scotland from the earliest period were entitled to receive, by virtue of their prerogative, certain dues under the names of *magnæ et parvæ custumæ* is matter of historical certainty; and also that it was their practice to make grants of these customs to burghs, to religious houses, and to individuals. Whether within the *parvæ custumæ* was included a tax or toll for entering into or for passing over a royal burgh, or whether the Crown possessed and exercised the right of exacting such a toll, or could create it by royal charter in favour of a burgh or of an individual, without limit and without imposing some duty or obligation as a consideration for it, are questions which I am glad to be relieved from deciding upon the materials before me. Various instances are brought forward by the Magistrates of Linlithgow of royal charters granted in general terms and followed by the perception of tolls or customs for passing through the burgh. But whether the right to take this toll was comprehended within the terms of the grant, or whether the usage originated in the power which the burghs might possess of stopping persons at the town gates and exacting a toll, which might afterwards be extended beyond the town proper, and being acquiesced in might have become established within the entire limits of the burgh, it is probably impossible at the

present day to ascertain. I desire to confine myself strictly to the claim of the Magistrates of Linlithgow against the Railway Company in respect—first, of their town custom; and, secondly, of their bridge custom.

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As to the Burgh Customs.

First, the title of the burgh to town custom depends upon charters conferred by Act of Parliament, and followed by usage (*a*). The words of the charters upon which reliance is placed are "*parvis custumis et tholoneis.*" Some stress was laid in the Court of Session upon the word "*tholonea,*" as importing something different from "*parvæ custumæ,*" and as more directly applicable to the toll in question. But before your Lordships it has been argued that the terms are synonymous, and that nothing is given by the word "*tholonea*" which was not previously comprehended within the words "*parvæ custumæ.*" The object of reducing the word "*tholonea*" to this state of insignificance is obvious. At your Lordships' bar it was contended that the toll was not demandable for the passage through the burgh, but was a tax imposed for coming into the town, and it seemed to be considered that the undefined term "petty customs" was more applicable to such an arbitrary imposition than the word "toll," which usually means a payment in respect of some liberty or privilege, or for something which is to be obtained as an equivalent for the imposition. The Magistrates have, however, always treated this as a passage toll, although I do not understand that they have admitted the necessity of proving a consideration for it. In their revised condescendence they say, "By the law of Scotland the royal charters and ratification thereof by Parliament are in themselves valid and binding, and confer ample right and power on the Pursuers to levy the dues

(*a*) See *suprà*, vol. i. pp. 1–30.

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therein specified without bearing *in gremio* that any consideration was given for the same, and without any such consideration having been given." They then allege that if consideration is necessary, it is to be presumed *post tantum temporis;* and they lastly aver that a legal consideration was given by the obligation undertaken by them to make and maintain the thoroughfares and streets within the burgh, and by the fact of their having so made and maintained the same from the earliest times, from the corporate funds or tolls collected. The Magistrates are, therefore, not put to prove consideration for the toll unless the royal charters of this description require consideration or unless a consideration is not to be presumed.

But their difficulty upon the charters begins a little earlier, as it is necessary for them to show that the term "*parvæ custumæ*" comprehends or may comprehend such a toll as a passage toll within its meaning. Now, we have waited in vain for some definition of the term "*parvæ custumæ,*" and at the close of the argument it has remained as uncertain and indefinite as at the first. The utmost that can be said for it is, that it *may* comprehend such an imposition as the one in question, and that it is one of those varying and flexible terms which is susceptible of explanation from usage. The usage, of course, will not be permitted to extend the charters, nor, however long it has prevailed, will it create a right, but it must be strictly limited to the office of explanation.

What, then, is the proof of usage upon which the Magistrates rely? for the extent of the usage must be the limit of the right. Now, there is no evidence of any right enjoyed under the charter but what is contained in the custom table of the burgh promulgated in the year 1699. With respect to the particular toll in question, it is shown to be literally and

in terms a passage toll; and that it is imposed for the use of the streets of the town I think is evident from the items on which toll is payable in respect of things "passing through the town or ways thereunto belonging." And such a toll for using the streets and ways of a burgh may have a very reasonable foundation, because, as the *Lord President* said in the case of *The Magistrates and Town Council of Lauder* v. *Brown*, "every burgh in Scotland is obliged to keep up and repair the roads in its neighbourhood." Therefore, a toll might very properly and reasonably be exacted from those who take advantage of the ways thus kept in repair for the convenient passage of their cattle or their merchandise. If, then, usage is to be the interpreter of the charter, and I find the town custom, as it is called, claimed merely in respect of passing through the town, or, in some instances, "the ways thereto belonging," it appears to me that the burgh itself has put the fairest interpretation on its own charters, and has confined them by use to the reasonable restriction of making the toll payable only upon the passage through the streets and ways of the town which they are bound by law to keep in repair.

These considerations are useful in enabling your Lordships to decide whether the town customs can be exacted from the Railway Company. If they arise from an obligation to repair, and are a compensation for the use of the streets and ways; if they cannot be taken from persons who do not pass through the town, or over any of the ways belonging to it (which appears from the custom table to be the case), then the question upon this toll or custom seems to be capable of an easy solution in favour of the Railway Company, as they use a way of their own over their own property, and derive no benefit at all from the use of any ways belonging to the burgh. As the custom table

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also must be the definition and the measure of the right to this toll, I do not see how it is possible to bring within the terms, or even within the analogy of the items in the table, either the mode of conveyance, or the description of traffic which belongs to a railway.

I think that this may well account for the silence of the Legislature in not expressly exempting the Railway Company from the payment of these tolls. Their description and character, and the grounds upon which they depend, are so entirely inapplicable to the new state of things arising out of the creation of a railway, that it would have been almost an idle precaution to provide against the demand by an express exemption; and even supposing that the possibility of exacting a passage toll was not so entirely out of the question as it appears to be, and that the toll therefore might have been left to attach upon the goods carried by trains running through the burgh without stopping, yet I think that even under this supposition the 237th section of the Railway Act would afford a very strong argument against its being intended to be continued; as the rights of the Magistrates are saved as to the bridge toll, but as to the bridge toll only; and therefore not only does this saving draw to it the rule *Expressio unius est exclusio alterius*, but it furnishes also an additional reason for thinking that the Legislature never supposed that the Railway Company could be liable to the town custom, and consequently did not consider it necessary to make any provision with respect to it. I think, therefore, that the burgh cannot claim the town custom from the Railway Company.

As to the Bridge Customs.

The bridge toll stands upon a different footing; that was given to the burgh by the Act of Parliament of 1685 expressly upon the consideration of

"holding and repairing the bridge as it is at present for the use of the lieges." The toll is granted "as it is now paid" by all passengers and travellers, &c., "conform to use and wont," passing the river of Avon, "betwixt the West Bridge and mouth of Avon." This cannot mean that in all this extent of the river between these limits (being a distance of twelve miles), wherever and however it was traversed, the toll was to be demandable. If the words "conform to use and wont" would not restrict the imposition to the places where it was constantly taken, I think that the words "as it is now paid" would have that effect. And this seems to be confirmed by the custom table, because it does not state that the tolls are "payable," but "*to be paid*" at Linlithgow Bridge, and "betwixt the West Bridge and the mouth of Avon;" and the table itself is described to be "the only rule for the customers to exact customs in time to come,"—words which all seem to import a place or places of payment and of receipt along the extent of the river. If the receipt of the toll anywhere established the right to receive it for traversing any part of the river within the limits, then the taking toll at the bridge would have been just as good proof of the right to the toll over the twelve miles of the river as the perception of it anywhere else; and the Jinkabout case would never have been decided as it was, as it would have been immaterial whether there had been use and wont to take the toll at that exact spot, as the receipt of it at any other place would have been equally available.

These observations may perhaps assist your Lordships in construing the 237th section of the Railway Act, on which the right to the bridge toll (*a*) mainly

(*a*) See *suprà*, vol. i. pp. 30, 31, 32, 33, 34.

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depends. In making their railway from Edinburgh to Glasgow, the Appellants would necessarily have to cross the Avon. This they might do within some part of the burgh limits where it had not been the use and wont to receive toll; and if the Railway Company carried their viaduct over at any such spot, the Magistrates, according to the decision in the Jink-about case, could have no claim upon them for their bridge custom. But it was very probable that the making this way across the river in any part of the line would have the effect of diverting the traffic from the bridge, and so of diminishing the bridge custom, which, as the Magistrates are bound under the Act of Parliament to uphold and maintain the bridge for the use of the lieges, would have been a hardship upon them. The Legislature, therefore, intended to indemnify them against the probable diminution of these tolls. If, in carrying out this object, it had been merely provided that "nothing in the Act contained should take away, abridge, or diminish any rights, privileges, jurisdictions, or powers which at present belong to and are enjoyed, or which are claimed by the Magistrates, to demand, take, receive, or levy customs upon any cattle, carriages, goods, or any other thing, passing, led, driven, or carried over the water of Avon." This would not have met the case of a viaduct carried over the river in a part of it where the Magistrates had not been accustomed to receive or levy the toll; and they could have been entitled to no compensation or indemnity for the loss or diminution of toll occasioned by such a viaduct. Therefore, the Legislature expressly made the right attach to any viaduct or other bridge that might be built or erected across the said water of Avon by the Company. But this was not for the purpose of empowering the Magistrates to take

the toll in kind upon the viaduct, but in order to lay the foundation for the right to indemnification which it was the object to provide for them. Having thus made the right of the Magistrates to attach upon any viaduct of the Company, they proceed to give their indemnification for the probable or actual diminution of their bridge custom. Now I understand this clause, not as intended to enable the Magistrates from time to time to receive an indemnity for the diminution of their custom. It is quite evident that such a provision would be utterly ineffectual, as it supposes the ascertaining in every instance that traffic has gone over the viaduct which, but for its existence, would have paid custom at the bridge. This, in the case of trains running through Linlithgow without stopping, would, of course, be utterly impracticable. I understand the section to mean that the Magistrates may receive compensation from the Company "for any act, matter, or thing done by the Company whereby the customs *may* be diminished," (for so I think the section must be read,) "or for any act, matter, or thing which when done should have the effect to diminish the same." In other words, the Magistrates may either receive an indemnity for the probable diminution of their customs from the works of the Company, or they may, if they please, wait to see what is the actual effect of such works upon their customs; and in either case, if they cannot agree with the Company, they may have the amount settled by a jury. This compensation or indemnity appears to have been intended to be received once for all—a view of the matter which appears to be confirmed by the mode of satisfaction provided, as it is to be "in the manner in which satisfaction is directed to be made by this Act for lands taken or used under the powers thereof;" and there will be no more diffi-

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culty in assessing the indemnity in this case (more especially after the diminution of the bridge custom produced by the viaduct has been ascertained by years of trial) than in many other cases where compensation is to be given for loss for all time, which must necessarily be speculative, because it is future.

I do not pretend to say that the explanation which I have attempted has removed all the difficulties of this obscurely worded clause, nor that, if the intention of the Legislature was what I have supposed, it might not have been expressed in a clearer and more intelligible manner. One thing, however, is plain to my mind through all the obscurity, that it never was intended to leave the bridge custom to be received in kind at the Company's viaduct; but that it was meant to give to the Magistrates merely an indemnification for the diminution of their tolls likely to be occasioned or actually produced by the viaduct of the Company to be built or erected across the water of Avon.

I think, therefore, that the Magistrates have no right to take the bridge toll for goods passing over the viaduct.

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Sir *FitzRoy Kelly:* Will your Lordships permit me to suggest, that in order to give effect to your Lordships' judgment, the decree reversing the Interlocutor must be slightly modified? Your Lordships will perceive by the record, that the declaration claimed is a declaration that the burgh are entitled to levy the dues described as burgh customs on all goods transported along or brought by the railway within the burgh, whether for sale, use, or consumption within the burgh, or carried out or through the same. No doubt, as to all that are carried through the burgh, your Lordships' judgment will effect a complete reversal of

the Interlocutor, but with goods brought into the burgh and there remaining for consumption or sale, it is clearly necessary that there should be some modification of the decree in order to prevent your Lordships' judgment operating hereafter against a claim which now at the bar, though not on the record, seems to be admitted, and which we are told is actually paid, and I would suggest that there should be, in drawing up the decree, a modification to that effect.

The LORD CHANCELLOR: It seems to me that it is quite unnecessary to make any declaration upon the subject. The *ratio decidendi* of the House will be perfectly well understood. There is no controversy with respect to the toll upon cattle and goods coming into the town or going through the town, and it is quite unnecessary to make any declaration upon that subject. It is not contested by the condescendence on the other side, and I think it is quite sufficient if your Lordships are of that opinion to say that the Interlocutor appealed against be reversed, and that the Defenders be assoilzied from the conclusions of the libel.

Sir *FitzRoy Kelly*: I am sure your Lordships will pardon me for suggesting that when we look at the record, we find that, whatever may now be admitted at the bar, the whole claim is completely denied in terms.

The LORD CHANCELLOR: There is nothing in the decision of this House denying any part of your claim except upon the construction of the Act of Parliament.

Sir *FitzRoy Kelly*: I hope your Lordships will hear my learned friend, Mr. *Anderson*, upon this point of form.

The LORD CHANCELLOR: I do not think it is at all advisable that such discussions should be gone into.

Lord CRANWORTH: We have decided upon the general effect of the Act of Parliament. If it can be

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shown that what we are doing may in future have an effect which we do not intend, that is a matter for consideration.

The LORD CHANCELLOR: No doubt can possibly arise from what the House has now decided. It is not desirable that we should have these discussions. There is no danger of any practical inconvenience.

Mr. *Attorney-General*: None whatever.

The LORD CHANCELLOR: There is no occasion for any declaration.

Mr. *Anderson*: The summons seeks a declaration of our right. All that we ask is that the Defenders should not be assoilzied from that part of our claim which they do not deny. The words of your Lordships' judgment, if you assoilzie the Defenders from the conclusions of the libel, will absolve them from the payment not only of the transit toll, but also of the toll on goods brought in for sale.

Mr. *Attorney-General*: It is the Railway Company that are assoilzied, and not other persons.

Lord CRANWORTH: I quite admit that these discussions are generally very much to be deprecated, but I certainly am impressed with this, that the summons asks for something, amongst other things, to which the Pursuers are entitled, and if we absolve the Defenders generally it might at a future time have an effect that was not intended.

The LORD CHANCELLOR: The record must be examined, and it will be seen upon the record that that was never denied or disputed or doubted. Therefore there is no occasion for a declaration.

Sir *FitzRoy Kelly*: It is denied upon the record, though it has been admitted to a great extent in the argument.

Lord BROUGHAM: If we absolve the Defenders generally, it may be urged that the consequence of that

is, that they are absolved from that to which they do not now deny their liability.

Mr. *Attorney-General:* Your Lordships' judgment absolves the Railway Company upon the ground of the Act of Parliament; they are absolved from paying any dues as a Railway Company.

Lord BROUGHAM: The Act of Parliament is the ground of the absolvitor, but that does not appear upon the record.

Sir *FitzRoy Kelly:* The grounds of your Lordships' judgment will not appear upon this record or upon the decree. We would not waste your Lordships' time by attempting to controvert anything that has been urged, but I am sure that as a point of justice your Lordships will consider whether your decree will not have an effect which you do not intend it to have, and which would be against the admissions which have been made at the bar and the judgment which has been actually pronounced.

The LORD CHANCELLOR: If it should appear upon examination that there is a denial of the right to toll upon goods brought in or carried out of the town, it will be very proper that that should be attended to, and it is never too late to do justice. But during the whole course of the argument it has been understood that that never was contested. The learned Counsel for the Appellants began by saying that he fully admitted it, and I should have thought that, under these circumstances, no declaration would be required or could be of the slightest use; but if there is a possibility of any question arising upon it, that can be guarded against.

Mr. *Attorney-General:* Will your Lordships allow me to put the fact beyond the possibility of doubt. If my learned friend will look at the 7th article of the revised statement of the Railway Company, in

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page 8 of the Appellants' Case, it is there stated, "The goods and other commodities which are thus conveyed by the Defenders have always, when brought into or out of the town of Linlithgow, paid duties according to use and wont; and as these duties are charges upon the goods, they are paid by the receivers or senders; and the Defenders do not contest the right of the Pursuers to demand custom or dues upon them." And again, in the defences, in page 4 of the Case, at the third paragraph from the bottom, there is the same statement, viz., that goods brought into or out of the town of Linlithgow have paid duties according to the use and wont.

Lord CHELMSFORD: Surely, Sir *FitzRoy*, that will do.

Sir *FitzRoy Kelly:* My Lord, that is the very reason of the application we now make to your Lordships. This condescendence states certain matters which your Lordships, assoilzieing the Defenders altogether, will utterly nullify; and as to which it will put upon record, as a judgment by this House, that the burgh is not entitled even to those dues which are thus admitted to be payable. I am content to adopt that which fell from the *Lord Chancellor* this moment, that the matter should in any way that is fair be considered, so that your Lordships' judgment should not have an operation which you really do not intend it should have. And the prayer of our libel being for a declarator as to goods brought for consumption into the town, as well as goods carried through the town, we consider that as your Lordships have disaffirmed the latter claim, but the latter claim only, the decree should be made conformable to the judgment which your Lordships have pronounced. My Lords, I speak with diffidence upon this subject, but my learned friend, Mr. *Anderson*,

suggests that this very condescendence is exactly the very reason why the absolvitor should not be complete.

Lord CRANWORTH: The judgment, as proposed by my noble and learned friend on the woolsack, is quite right,—I thought not, at first. It is quite right that we should always consider these things very minutely, and see what may be the effect hereafter. But it appears that upon this record there is no dispute upon this point, and it is quite right that the Defendants should be absolved from the whole, because the Defenders are not the persons liable for the toll upon the goods brought into the market.

The LORD CHANCELLOR: If, on looking at the record, and seeing what was the issue actually joined between the parties, it should be found that the absolvitor goes too far, that can be rectified.

Sir *FitzRoy Kelly*: I am quite content, my Lord.

Lord BROUGHAM: Now, my Lords, with a view to various other cases which may arise quite unconnected with any Railway Act, I hope it will be quite understood in Scotland that upon the general question which applies to the cases of these burghs, the House has given no opinion whatever. My noble and learned friend on the woolsack only expressed an inclination of opinion one way, and my noble and learned friend opposite and myself expressed an inclination of opinion the other way, carefully guarding ourselves from being supposed to give any decided opinion.

Mr. *Attorney-General*: There are about eighteen or nineteen other cases, which are not to be prejudiced, and which will come in due time to this House.

Lord BROUGHAM: I wish, before this case is parted with, to state, in support of what my noble and learned friend on the woolsack said, that the great

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delay which has been occasioned in this case, in the multiplication of these proceedings, is no fault of the House. We have most strenuously endeavoured, at various times and in divers manners, I may almost say, to force the case on. My noble and learned friend opposite knows that immediately upon his taking the Great Seal, and even before, I urged him most strongly to forward the hearing of this case, inasmuch as I was aware that the delay had been held to be a great opprobrium to the House in its judicial capacity. We then did all that we could, both at that period and before the end of the Session of 1858, to bring this case on. We summoned the parties, and we did all that we could, because at that time there was a chance of Mr. *Inglis* (the present *Lord Justice-Clerk*) quitting the Bar, he being a most important Counsel in the case. An attempt was made by the parties to bring on the case, but it was found that they really were not in a position to make it possible that the case should be brought on. Then again, very early in this Session, we used the same endeavours, and difficulties of the same sort arose, and then came one or two cases requiring to be heard immediately, which made it impossible to force this case on. Therefore, this House is in no respect to blame. I do not say that the parties are to blame; probably, in their circumstances, they could not do otherwise than yield to the necessities of the case and the delay. But it ought to be clearly understood that, at all events, this House is not in fault in this matter.

JUDGMENT.

Whereas Counsel were heard, as well on Thursday the 25th, Monday the 29th, and Tuesday the 30th days of March, as Monday the 19th day of April 1847, upon the Petition and Appeal of the Edinburgh and Glasgow Railway Company; complaining

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of an Interlocutor of the Lord Ordinary in Scotland, of the 21st of December 1844; and also of an Interlocutor of the Lords of Session there, of the First Division, of the 17th of July 1845; and praying, that the same might be reversed, varied, or altered, or that the Appellants might have such relief in the premises as to this House, in their Lordships' great wisdom, should seem meet; as also upon the Answer of the Provost, Magistrates, and Town Council of Linlithgow, put in to the said Appeal: And whereas on Friday the 4th day of August 1848 it was ordered by this House, that the said cause be remitted back to the First Division of the Court of Session in Scotland, with directions that the same be heard in presence before the whole Judges of the Court of Session, including the Lords Ordinary, with liberty to the Court, either before or after the said hearing, to open up the record, and to allow the parties respectively to amend the summons and defences, if they should think fit, both parties having consented by their Counsel at the bar that such liberty should be included in the remit (this House not thinking fit to pronounce any judgment upon the said Appeal until the whole of the said Judges should have given their opinions in the Cause; and this House reserved all questions of costs in respect of this Appeal): And whereas the opinions of the Judges of the Court of Session upon the matter so referred to them have been delivered to this House pursuant to the said Order of Remit: And whereas by an Order of this House of the 4th day of March 1851 it was ordered that the said cause be heard by Counsel at the bar on the remit on the following Monday: And whereas Counsel were accordingly heard on the remit, as well on Monday the 10th as Tuesday the 11th, Monday the 17th, Tuesday the 18th, and Monday the 24th days of March 1851, when the further consideration of the Cause was put off *sine die*: And whereas, by an Order of this House of the 24th day of June 1853, it was ordered, that one Counsel of a side be heard in the said cause on Monday the 4th of July 1853, upon the construction of the Edinburgh and Glasgow Railway Act with reference to the customs or tolls claimed by the Respondents; and that the Learned Judges do then attend; which said Order was discharged on the 30th of June following: And whereas, by a further Order of this House of the 31st day of May 1858, it was, in pursuance of an Application from the Respondents in the said Cause, ordered that the Cause be fully re-argued by Counsel at the bar, and that both parties be allowed to print and lodge a supplemental case, if advised that the same is necessary: And whereas, in pursuance of the last-mentioned Order, it was ordered, that the cause be re-heard by Counsel at the bar on Wednesday the 20th day of this instant July: And whereas on Wednesday the said 20th day of this instant July Counsel were accordingly called in; and Counsel on both sides having consented that the Cause should be argued and disposed of on the footing

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that the Interlocutors appealed against were pronounced upon the Record, as amended, Counsel were heard, as well on the said Wednesday the 20th day of this instant July, as Thursday, Friday, Monday, and Tuesday last; and due consideration being had this day of what had been offered on either side in this Cause:

It is *Ordered* and *Adjudged*, by the Lords Spiritual and Temporal, in Parliament assembled, That the said Interlocutors, complained of in the said Appeal, be, and the same are hereby reversed; and that the Appellants (Defenders) be assoilzied from the conclusions of the libel, without costs to either party in the Court of Session: And it is also further *Ordered*, that the said cause be remitted back to the Court of Session in Scotland, to do therein as shall be just, and consistent with this Judgment.

NOTE.

The preceding Judgment, though really pronounced by the House on the 28th of July 1859, was not drawn up till August 1860. The delay was caused by the disputes of parties as to the real meaning and intention of the House.