holding that the circumstances of the case were not such as to justify a departure from the ordinary practice, and appointed the proof in the cause to be led before him on the 13th of March. To-day the Court, after hearing Mr Munro in support of a reclaiming note for the defenders, unanimously adhered, the LORD JUSTICE-CLERK observing that the judicial examination of a party, in all cases a proceeding of extreme delicacy, was particularly so in consistorial causes, and should not be adopted except in circumstances of a very special nature. No such circumstances had been stated in the present case; and, moreover, he was not aware that that proceeding had ever been followed in a proof of marriage by habit and repute.

JURY TRIAL.

(Before Lord Ormidale.)

JENKINS AND OTHERS *v.* MURRAY.

Road—Right of Way. Verdict for the pursuers in a right of way case.

Counsel for Pursuers—Mr Millar, Mr Balfour, and Mr Mackintosh. Agent—Mr George Donaldson, S.S.C.

Counsel for Defender—The Solicitor-General, Mr Gifford, and Mr Johnstone. Agents—Messrs Russell & Nicolson, C.S.

In this case—in which William Jenkins, junior, salesman, residing in the town of Stirling; and Edward Banks, smith, also residing in the said town of Stirling; John Stewart, tailor, residing in the village of Torbrex, near Stirling; George Finlayson, weaver, also residing in the said village; and William Gillies, pattern-maker, also residing in the said village; Robert Marshall, nailer, residing in the village of St Ninians, near Stirling; George Paterson, nailer, also residing in the said village; Robert Corsair, nailer, also residing in the said village; Robert Andrew, nailer, also residing in the said village; John Dick, nailer, also residing in the said village; and William Wright, nailer, also residing in the said village; Alexander Gordon, gardener, residing in the village of Cambusbarron, near Stirling; John Ure, weaver, also residing in the said village; and John Lamond, flesher, also residing in the said village, are pursuers; and Lieutenant-Colonel John Murray of Touchadam and Polmaise, in the county of Stirling, is defender—the issue was as follows:—

"Whether for forty years and upwards, or for time immemorial prior to 1864, there existed a public right of way for foot passengers from a point on the public turnpike or statute-labour road leading from Stirling to Glasgow, marked C on the copy Ordnance Survey map, No. 4 of process, through the defender's lands, as delineated by a line coloured green on the said map, to another point marked D on the said map, also situated on the said public turnpike or statute-labour road, and near to the Murrayshall Limeworks?"

The trial commenced on Wednesday morning and lasted till Saturday, when the jury, after an absence of about half an hour, returned a verdict for the pursuers.

HOUSE OF LORDS.

Thursday, March 8, and Monday March 12.

LEITH DOCK COMMISSIONERS *v.* MILES.

Poor—Assessment—Harbour. Held (aff. Court of Session) that the Leith docks and harbour are liable to be assessed for the support of the poor.

Res judicata. Held (aff. Court of Session) that a plea of *res judicata* was not well founded, the question at issue not having been before the Court in the previous action.

Counsel for Appellants—The Attorney-General (Palmer), the Lord Advocate (Moncreiff), and Mr Anderson, Q.C. Agents—Mr John Phin, S.S.C., and Messrs Maitland & Graham, London.

Counsel for Respondent—Sir Hugh Cairns, Q.C. and Mr Rolt, Q.C. Agents—Mr Alexander Duncan S.S.C., and Messrs Simson & Wakeford, London.

This is an appeal from the First Division of the Court of Session deciding that the harbour and docks of Leith are equally liable to be assessed for the support of the poor with any other heritable property within the parish (2 Macph. 1234).

The LORD CHANCELLOR—Is not this case identical with the English Case of the Mersey Docks and the Scotch case of Adamson *v.* The Clyde Navigation Trustees, both decided last session?

The ATTORNEY-GENERAL said it was to a certain extent identical, and he would therefore beg their Lordships to trust him that he would argue only those points which he submitted distinguished the present case from those his Lordship had referred to, and exempted it from the rule applied to them. He begged to submit three propositions to the House—1st, That the non-liability of the commissioners was already *res judicata*; 2d, That these docks were not public property in the sense in which the Mersey Docks were; and, 3d, That assuming they were assessable, the assessment ought not to be levied upon the harbour dues.

LORD CHELMSFORD—It was decided in the Mersey Dock case that though the trustees were bound to lay out every sixpence in their maintenance, the docks were nevertheless liable to assessment.

The LORD CHANCELLOR—Did not the Court of Session hold that Adamson *v.* The Clyde Navigation Trustees governed the present case?

The ATTORNEY-GENERAL admitted they did, but said he hoped to show that the two cases were not analogous. With respect to his first proposition, that this matter was already *res judicata*, it would be necessary to show the position of the appellants. The right to the harbour and port of Leith, with right to levy dues, was conferred on the city of Edinburgh—or was sanctioned—by the Golden Charter granted by James VI. in 1603. These dues were expended in the maintenance and improvement of the port and harbour, which had since, and under authority of the statutes to be presently mentioned, been still more enlarged by the construction of works within high-water mark and otherwise. By the Act 28 George III., c. 58, the magistrates were empowered to borrow £30,000 to purchase certain lands, to execute certain works, and to levy additional duties. Additional borrowing powers were conferred by 38 George III., c. 19, and 39 George III., c. 44; and the latter Act authorised the imposition of additional duties, the construction of further works, and provided that the duties should be applied solely in keeping the works in repair, in paying the interest of the money borrowed, and that any surplus which should remain should be kept as a sinking fund to meet emergencies from accidents. Additional borrowing powers were conferred by various subsequent Acts to the extent of £160,000. The Act 6 Geo. IV., c. 103, authorised the advance of £240,000 by the Treasury to be applied in payment of the sums borrowed by the magistrates, to be secured to the Treasury by a conveyance of the harbour rates, and of all the property purchased for the purposes of the harbour. By 1 and 2 Vic., c. 55, the management of the harbour was entrusted to eleven commissioners, of whom five should be appointed by the Commissioners of the Treasury, three by the magistrates of Edinburgh, and three by the magistrates of Leith, and to these commissioners all the rights and powers of the magistrates were transferred. That Act also provided that the debt to the Treasury should be postponed to an annual sum of £7680, to be paid into bank in name of the Remembrancer and Auditor of the Court of Exchequer, to be applied in payment of—(1) £2000 to the ministers of Edin-

burgh, in lieu of certain harbour rates to which they were previously entitled; (2) £3180 to the creditors of the city, in full of all demands competent to them on the harbour, docks, and revenues; and (2) £2500 to the magistrates of Edinburgh for the maintenance of the college and schools of the city, in full of all the demands by the magistrates on the harbour or its revenues. After payment of the said sum of £7680, and the expenses of the establishment, the whole surplus revenue was to be paid to Her Majesty's Exchequer, to be devoted to payment of interest due upon the debt to the Treasury, and to its reduction. There were other Acts, but they only extended the provisions as to borrowing money and constructing works already mentioned, and contain the declaration that the whole revenues are to be applied solely in maintaining the works, in paying interest, and in reducing debts. Such, then were the statutes regulating the management of the harbour and docks of Leith when the decisions to which he would now refer occurred. The first action was raised in 1830, when the revenue was regulated and appropriated under 6 George IV., c. 103; 7 George IV., c. 105; and the previous Acts. In that action the heritors and kirk-session of North Leith sought to impose on the magistrates of Edinburgh an assessment for the poor corresponding to the revenue they derived from the harbour and docks. Lord Mackenzie, Ordinary, dismissed the action, finding that the whole of the dues were applied in maintaining and improving the works, and so were not liable to be taxed for the poor. The second action was raised in 1847 by the Inspector of the Poor of North Leith against the Harbour Commissioners, to compel them to pay the rate imposed, and to have this liability declared in all time coming. The defenders pleaded *res judicata* in respect of Lord Mackenzie's judgment; and (3d plea) that they were not liable, as they held the subjects exclusively for the benefit of the public, and expended the whole rates in the maintenance and repair of the harbour and liquidation of the public debt. The Lord Ordinary ordered cases, and reported the cause to the First Division, and the cases were laid by them before the whole Court. Ultimately, an interlocutor was pronounced finding that the commissioners were liable to be assessed to the extent of the sum of £7680 (before referred to), to that extent repelling the third plea, but *quoad ultra* sustaining it. Against this interlocutor the commissioners appealed to the House of Lords in respect of the said sum of £7680. By the order of the House the interlocutor was reversed with this declaration:—"That this judgment of reversal is not to prejudice or affect any question which shall hereafter arise as to the liability of the said commissioners to be assessed for the poor; and it is further ordered that with this declaration the same shall be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this declaration and judgment." Under that declaration, the Lord Ordinary subsequently assoilzied the defenders from the whole petitory conclusions of the summons, and *quoad ultra* dismissed the action. The parties were the same to that action as the present; the conclusions of the two libels identical; the objects were the same, and also the *media concludendi*.

LORD CHELMSFORD—In the Mersey Dock Case there was also a previous decision in favour of the commissioners.

The ATTORNEY-GENERAL said that was so, but the action then was merely brought for a specific sum of money, while the action he relied on was a declarator.

Lord CHELMSFORD—Do you mean to say the House of Lords is bound by that decision?

The ATTORNEY-GENERAL said surely, as much as any inferior tribunal, it was bound to respect the plea of *res judicata*.

Lord CHELMSFORD—After deciding last session, in the case of Adamson *v.* The Clyde Navigation Trustees, that such property *was* liable to assessment, you say we are now bound to declare that it is not.

The ATTORNEY-GENERAL said he did not ask their Lordships to do that, but to say that they were precluded from entertaining the present case at all.

Lord KINGSDOWN—What is the meaning of the declaration appended to the order of the House to which you have just referred, but that the House thought that by merely reversing the interlocutor as to the sum of £7680 it might be inferred that it approved the rest of the judgment of the Court of Session?

The ATTORNEY-GENERAL said that declaration merely limited the effect of the order of reversal, and that the final order still remained.

The LORD CHANCELLOR—I know there is such a thing as *res judicata;* but is there *lex judicata*, so that bad law can never be overturned?

The ATTORNEY-GENERAL said there was no doubt law involved, but the interlocutor declared the non-liability of an individual. He then referred to the opinions of the Judges in deciding the case of 1852.

The LORD ADVOCATE said the Attorney-General had asked him to conclude his argument for him. The remaining points were, that the dues payable in respect of the port and harbour were not assessable, and that no liability could be imposed on the commissioners at all events as to the sum of £7680. With respect to the first of these points, Adamson *v.* The Clyde Navigation Trustees decided only that the trustees were owners of lands and heritages in the sense of the Poor Law Act.

The LORD CHANCELLOR—You don't question the decision in Adamson's case?

The LORD ADVOCATE said—Not in the least.

Lord CHELMSFORD—The House decided that the harbour and docks were liable to be assessed.

The LORD ADVOCATE said the judgement of the House was an exact affirmance of that of the Court of Session, which was partly an absolvitor and partly a declarator of liability. Now, in the present case, the Court below had made no such distinction.

The LORD CHANCELLOR—Did not the interlocutor affirmed in Adamson's case extend to all the property of the trustees.

The LORD ADVOCATE said it did not.

Lord CHELMSFORD—The dues in Adamson's case were dues in respect of the navigation of the river.

The LORD ADVOCATE said partly, but not entirely; the conclusions in both summonses were the same.

LORD CHELMSFORD—If the harbour dues were exempted, according to the judgment in Adamson's case, that case has been overruled since by the Mersey Dock case.

The LORD CHANCELLOR—You say there was nothing decided in Adamson's case contrary to your contention.

The LORD ADVOCATE said not only that, but that it was a final judgment in his favour.

The LORD CHANCELLOR—Not of this House.

The LORD ADVOCATE said, of the Court of Session only.

Lord CHELMSFORD—And the point was not brought before this House.

The LORD CHANCELLOR—Then you say the law of Scotland differs from that of England in this respect.

The LORD ADVOCATE said he admitted the Mersey Dock case was a difficulty in his way. The Poor's Acts did not include harbours in their enumeration of assessable property.

Lord CHELMSFORD—We cannot allow the argument to go on without question. The Mersey Dock case was not decided when Adamson's case was.

The LORD CHANCELLOR—You are quite right; Adamson's case did not decide the point, but then the Mersey Dock case did. We should not stop you were we not all agreed that you cannot distinguish the one case from the other.

The LORD ADVOCATE said he would not press the matter further, but go on to the third point—namely, that the commissioners were not liable to be rated as to the sum of £7680.

Lord CHELMSFORD—That is merely a question of over-rating.

The LORD ADVOCATE said he contended the appellants were not liable in respect of their whole valuation.

The LORD CHANCELLOR—The principle laid down in the Mersey Dock case was that the only exemption was in the case of the Crown, to which a very extended meaning was attached, so as to include prisons, rooms at the assizes, and other places. The case was not decided as to charities. Lord Kenyon thought hospitals were not liable, because there was no occupier; I should have thought the trustees were the occupiers; but however that may be, it is quite clear that in the Mersey Dock case the trustees were considered occupiers.

The LORD ADVOCATE referred to a decision of the Court of Queen's Bench exempting the University of Oxford.

The LORD CHANCELLOR—That won't do. You can't make this out to be a royal foundation.

The LORD ADVOCATE further referred to the case of the University of Edinburgh decided by the Court of Session.

The LORD CHANCELLOR—But it has been decided that harbours and docks are not occupied for Crown purposes.

The LORD ADVOCATE said he would only then say a few words in supplement of what the Attorney-General had said with reference to *res judicata*.

Lord KINGSDOWN—The two actions were between the same classes of persons, though not between the same persons.

The LORD ADVOCATE submitted that the trustees were a corporation, so that the parties were the same.

Lord CHELMSFORD—The actions were not brought for the same rate; and besides, there are three persons in whose names the action is brought, along with the inspector of the poor. The previous action was not brought in the names of the same persons.

The LORD ADVOCATE submitted that the parties were the same. He referred to Erskine 4, 4, 3, as to *res judicata*, and submitted it had been finally decided by the Court of Session in 1852 that the revenues of the appellants were not liable in respect of the sum of £7680.

Without calling upon the respondents, the LORD CHANCELLOR then rose and moved the judgment of the House. He said—My Lords, after the very full investigation which the point raised in this case has already received, your Lordships can have no difficulty in arriving at a proper conclusion. The two latter points raised by the appellants were, after an intimation from your Lordships, very properly abandoned by them without further contention. We can quite understand that such cases as the present should be brought from time to time before us, because all the courts in the kingdom were in error upon the subject. Lord Mansfield, Lord Kenyon, and Lord Tenterdon, all thought that trustees holding property entirely for public purposes could not be beneficial owners, so as to make the trust property assessable. But in the Mersey Dock case it was finally decided, after a very elaborate argument, that all trustees are beneficial occupiers in the sense in which those words are used in the statute of Elizabeth, which does not differ from the law of Scotland—that, with exception of the Crown, the royal palaces, the House in which your Lordships administer justice, and other places of a similar kind, all the property in the kingdom was liable to be assessed for relief of the poor. Now, harbours, docks, and rivers are not in the occupation of the Crown, and are therefore rateable. Upon the general principle, therefore, there can be no doubt, and he thought that the particular point raised in this case had been decided in Adamson's case; but it does appear that some matters did not form the subject of the interlocutor then. There has therefore been strictly no adjudication upon this particular point. It is now for the first time to be established that in Scotland, as in England, all trustees of harbours, docks, and rivers, for whatever purpose their revenues may be applied, are liable to be assessed for relief of the poor. The appellants further urged that this matter was already *res judicata*—a contention more plausible than substantial. Ten years ago it would appear that the then inspector of the poor brought an action against the commissioners for the time being to recover the rates imposed from 1846 to 1847, and that the latter pleaded *inter alia* that the subjects being held by them solely and exclusively for the benefit of the public, and the rates and revenues leviable by them being by law limited and appropriated to the maintenance and repair of the harbour and liquidation of the debt incurred in the construction of the works, they were not liable to the assessment concluded for in the summons. An interlocutor was pronounced sustaining the plea, with exception as to a sum of £7680, and upon appeal to your Lordships' House that interlocutor was reversed in so far as it constituted that sum an exception, and affirmed as to the remainder. But what was affirmed? Only this, that the dues were not liable to assessment for that particular time. It would indeed be grievous if that had concluded their non-liability for the time, seeing that the liability of harbours, docks, and rivers had never been expressly and finally established. I therefore beg to advise your Lordships to affirm this interlocutor, and to dismiss the appeal with costs.

Lord CHELMSFORD—I am of the same opinion as to the objection of *res judicata*. I shall not enter further into the details of the action in which the former judgment was pronounced than to observe that whether the declaration appended to its judgment by the House of Lords amounted to a reservation of the question, or a declaration of general liability, the matter was equally left open to future question. It would appear that the appellant had not attended sufficiently to what was meant by a plea of *res judicata*. The maxim is, "*res judicata pro veritate accipitur*," and is only applicable when the parties and the cause of action in the one case are identical with those in the other—the rule as laid down by the Digest being "*excepti nem rei judicatae obstare quotiens eadem quæstio inter easdem personas revocatur.*" The plea, therefore, is not competent where the parties only are identical, but, like that of "judgment recovered" in this country, must, so as to operate as an estoppel, refer to a case in which precisely the same question was at issue. In a case where the plea of *res judicata* properly applied, the jurisdiction of the Court is not taken away, though it is impossible to go behind the judgment. With regard to the liability of the harbour dues and the sum of £7680, the objections have been sufficiently answered in the course of the argument, and by my noble and learned friend.

Lord KINGSDOWN concurred.

Interlocutor affirmed.

COURT OF SESSION.

Tuesday, March 13.

FIRST DIVISION.

PETITION—H. H. DRUMMOND.

Process—20 and 21 Vict. c. 56—Petition. Question whether a petition for the recal of an appointment of a *curator bonis* made by the Inner House should be presented to the Junior Lord Ordinary, or to the Inner House.

Counsel for Petitioner—Mr Dundas and Mr Shand. Agents—Messrs Dundas & Wilson, C.S.

This was an application by Mr Home Drummond, in which he stated that he desired to be relieved of an office of *curator bonis*, to which he had been