JULY 28, 1859.

The EDINBURGH and GLASGOW RAILWAY COMPANY, *Appellants*, *v.* The MAGISTRATES OF THE ROYAL BURGH OF LINLITHGOW, *Respondents*.

Royal Burgh—Crown Charter—Railway Statute 1 and 2 Vict. cap. 58—Construction—Railway—Ancient Tolls and Customs—Implied Repeal.

HELD (reversing judgment), *That, having regard to the act of parliament incorporating the Edinburgh and Glasgow Railway Company, the Royal Burgh of Linlithgow, which claimed right to levy certain dues on all goods passing through the royalty, also across a stream within certain limits of* 12 *miles, was not entitled to levy dues on goods carried in through trains by the Railway Company along their line, though the line fell within the burgh limits.*

Quære—*Whether a transit toll on cattle and goods passing through the burgh is a petty custom, or is a reasonable compensation for expected benefit in using the land? Per* LORDS BROUGHAM *and* CRANWORTH *the former: Per* LORD CAMPBELL L.C. *the latter.*

But whether legal or illegal, the custom or toll, and also the bridge toll here were impliedly abolished by the special railway act which enacted that "all persons shall have free liberty to pass on the said railway," &c. The statutes did not reserve the rights, nor provide any machinery for enforcing payment.[1]

In this action the town of Linlithgow claimed from the Edinburgh and Glasgow R. Co., *firstly*, tolls on cattle, goods, &c., passing by the railway through the burgh as leviable by them under the denomination of town customs or small customs: *Secondly*, bridge customs or duties on goods, carriages, cattle, or commodities carried across the river Avon over a bridge or within certain bounds described.

In 1838 the special act, 1 and 2 Vict. c. 58, was passed to authorize the making of the railway. The railway passed through the town, and the company paid the full value for all land taken by them for the purposes of the railway.

The Court of Session held that these tolls or duties were exigible from the company.

The Railway Company appealed, maintaining (in their *printed case*) that the judgment of the Court of Session should be reversed for the following reasons:—"1. With reference to the town customs, the respondents are not possessed of any charter, or legal grant, giving them a right to exact tolls on goods simply passing through the burgh. 2. Any use to levy such tolls could not confer a legal right, the exaction being illegal, and, besides, not being warranted by any antecedent title, inasmuch as the charter gives no right to such tolls, but to ordinary burgh customs merely. 3. Where possession is made the foundation of the right, the possession cannot be held to extend the right to tolls of a character essentially different from any previously levied, such as are the tolls now claimed on articles carried by the railway. 4. The railway, in its own nature and character, is a mode of passage or conveyance, to which the alleged right cannot apply, not being one of the streets or ways of the burgh, nor any expense of maintaining or repairing it falling on the town. 5. According to the terms of the Railway Act, justly and legally construed, the appellants have power to maintain and use the railway free from the burden of any such exaction as a condition of their doing so. 6. The judgment on this branch of the case (Town Customs) is in any view premature, inasmuch as it pronounces upon a right founded upon usage, and declares that right to affect goods carried by the railway, before the nature and extent of that usage has been ascertained by proof, although the nature and application of the right may materially depend on the result of such evidence. 7. With reference to the bridge customs, the act of parliament, which confers the right, does not authorize the respondents to levy customs indiscriminately at all points of the river betwixt the West Bridge and the mouth of the Avon, but only at those places where there has existed a use and wont of levying. 8. At all events, the charter could not be interpreted into a grant of customs to be levied at any point of the river indiscriminately, without proof of a usage to this effect being brought on the part of the respondents. 9. The judgment is erroneous, in throwing the *onus* of proving immunity on the

[1] See previous reports 17 Sc. Jur. 554; 31 Sc. Jur. 680; 1 Macq. Ap. 1. S. C. 3 Macq. Ap. 691: 31 Sc. Jur. 680.

appellants, before the respondents have duly and legally established the general right. 10. Viewing the claim as only a right to exact customs according to use and wont, there can be no levy made upon goods transported by the viaduct, inasmuch as no customs have ever been levied at the point where the viaduct crosses the river. 11. The viaduct is in itself of such a nature and character, that a tax or custom on goods transported by it cannot be held to come within the purview and enactment of the statute founded on. 12. Under the provisions of the Railway Act, even though the town should establish a right to take custom at this particular point, they could only do so to the effect of obtaining indemnification for the amount of such custom as, but for the existence of the railway, they might have drawn; but not to the effect of levying a tax on all the articles actually transported by the railway, which would be to give them not indemnity, but gain."—Gunning on Tolls, p. 1; *The Town of Linlithgow* v. *The Fleshers of Edinburgh*, M. 10,886; Erskine, b. 1, tit. 4, § 23; b. 4, t. 19, § 6; *Truman* v. *Walgham*, 2 Wils. 296; *The Magistrates and Town Council of Lauder* v. *Brown*, M. 1987: 5 Br. Supp. 819; *Raith* v. *Magistrates of Aberdeen*, Nov. 21, 1804; Dict. *voce* Jurisdiction, No. 13; *Magistrates of Dunbar* v. *Kelly*, 8 S. 128; *Magistrates of Linlithgow* v. *Mitchell*, 2 Murr. 374; 1 S. 476; *The Magistrates of Campbelton* v. *Galbreath*, 7 D. 482; *Anderson* v. *The Magistrates of Linlithgow*, 4 S. 767.

The Magistrates (in their *printed case*) supported the judgment on the following grounds:—"1. In regard to the burgh custom, the charters and acts of parliament, followed by immemorial usage, entitle the respondents to exact the dues claimed. 2. As to the bridge customs, the act of parliament 1685, followed by immemorial possession of levying at certain points within the limits of the grant, entitle the respondents to levy dues on goods passing the Avon by the appellants' viaduct, unless the appellants had averred and offered to prove immunity by a prescriptive usage of passing at that place without payment. 3. Nothing, either in the situation of the appellants—as to the mode of carrying—or anything contained in their act of parliament, can be construed to take away or abridge the rights of the respondents under the charter and acts of parliament founded on."—Ducange, vol. vi. p. 1026; *Magistrates of Wigtown* v. *M'Clymont*, 15th January 1834, F.C.; 12 S. 289; *Magistrates of Edinburgh* v. *Scott*, 14 S. 922; *Magistrates of Linlithgow* v. *Mitchell* (case of Jinkabout); 1 S. 515.

On the 4th August 1848 the House of Lords, after a hearing, remitted the cause back to the Court of Session to take the opinions of the whole Judges. Thereafter, the Court of Session, after discussion, allowed the parties to amend the record, which was of new closed on 22d July 1849, on various new averments of the parties.

Nine of the thirteen Judges held that the claim of the burgh to the tolls were valid; and that the Railway Act had not abolished the tolls.

The case was twice argued at the bar of the House of Lords. In 1851 it was argued before LORD CHANCELLOR TRURO and LORD BROUGHAM, when *Bethell* Q.C., *Hope* Q.C., and *Penney*, appeared for the appellants; and *Rolt* Q.C., *Anderson*, and *Inglis*, for the respondents.

The case was re-argued in July 1859 by the *Attorney-General* (*Bethell*), and *Young*, for the appellants; and by *Lord Advocate* (*Moncreiff*), *Sir F. Kelly* Q.C., and *Anderson* Q.C., for the respondents.

Previous to the second argument the LORD CHANCELLOR intimated that there had been no interlocutor pronounced by the Court of Session on the amended record, and that it would be necessary for the parties to agree, that the original interlocutor should be held as pronounced on the amended record, in order to give the House jurisdiction. The parties therefore agreed accordingly.

The *Attorney-General* (Bethell), and *Young*, for the appellants.—The respondents reason in a circle. They say that the course of usage attributes to the charter a non-natural sense, and then they take that sense to support the usage. But usage is of no avail unless where the words of the charter are flexible and ambiguous. Moreover, a royal charter is not a legal title to such a toll as is here claimed, and no length of usage could support it.—*B. of Linlithgow* v. *Fleshers of Edinburgh*, M. 10,886; *Lauder Case*, M. 1987; 5 Br. Sup. 819; *Olyphant* v. *Town of Ayr*, M. 1971; *Mag. of Wigtown* v. *M'Climont*, 12 S. 289; *Truman* v. *Walgham*, 2 Wils. 296; *Brett* v. *Beales*, 10 B. & C. 508; *Smith* v. *Shepherd*, Moore, 574; Cro. Eliz. 710. And the only legal usage which can be brought in aid of such a grant is that under which some consideration was received by the lieges for the use of the roads on which the toll is levied.—*Newmarket Railway Co.* v. *Foster*, 2 Com. L. Rep. 1617.

Even if the burgh had been once entitled to levy these tolls, the Railway Act quite ignores the right, and treats the company as entitled to pass toll free, §§ 177, 236, 237. There is no express reservation of this right, but only of the right to bridge dues, and the rule *expressio unius est exclusio alterius* applies. Besides, there is no machinery provided by the act for levying these dues on the railway; there is no mode of stopping the railway train, or even getting access to the carriages for such a purpose.

As to the bridge dues, the act of parliament did not contemplate that these should be levied in specie, but merely that compensation should be made for the injury caused by the railway to the

revenue of the town, which is a matter for a jury to decide. But the *Jinkabout case*, 1 S. 515, shews that the dues could only be levied at the accustomed place, viz., at the bridge; and as the railway does not pass over the bridge, there is no use and wont which attaches to goods passing elsewhere.

Lord Advocate (Moncreiff), *Sir F. Kelly* Q.C., and *Anderson* Q.C., for the respondents:—The charter was legal and competent according to the ancient law of Scotland. The word "tolonea," which is identical in meaning with *parvæ custumæ*, means tolls generally, without respect to any repair of a street or road or other consideration, and the kings of Scotland used to grant to royal burghs the right to tolls and petty customs—Craig, De Feudis, 1, 16, 14; 1 Scots Acts (fol. ed.), 303, 56; 1 Chalmers' Caled. 747. Such a grant followed by possession is good. The grant is flexible, and extends to new articles of food which come to be imported, such as potatoes—*Skene's case*, M. 7401; *Boyle*, 4 Br. Sup. 772; *Hill* v. *Mag. of Edinburgh*, 8 S. 449; *Martin* v. *Mag. of Aberdeen*, M. Apx. Burgh Royal, No. 8. Thus it is not necessary that the subject matter of the toll should be specified in the grant; and, therefore, goods carried by railway will be sufficiently comprised in a toll on goods carried through the burgh. The doctrine of a consideration being necessary to the validity of such grants is quite unknown in the law of Scotland. The clauses of the act of parliament do not take away the right to this toll, but merely transfer the right to those who use the land—*Rowe* v. *Shilson*, 4 B. & Ad. 726. Sect. 177 applies only between passengers and the railway, and does not affect other parties.

As to the bridge dues, these are expressly saved by the act of parliament, and the only kind of compensation is to pay the toll at the new point, as it had formerly been paid at the bridge—*Ferguson* v. *Mag. of Glasgow*, M. 1999.

Sir R. Bethell replied.—There is no instance of a toll like this having ever been claimed or recognized in Scotland. The *parvæ custumæ* were merely small dues levied on goods at the market place as part of the ordinary traffic, and were collected at the tolbooth, and had a definite meaning; but could not extend to extraordinary circumstances like the present.

Cur. adv. vult.

LORD CHANCELLOR CAMPBELL.—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 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.

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, 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 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 conterminous 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 *custumarius;* 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 revenues in Scotland as in other European kingdoms. Thus in an extract from the assize of King David, relied on by Lord Medwyn, it is written, "Merchandes alsua outher be land or be se cummand, sall geyff the kyng be his ministeris his richtis 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 Queen of England has been accustomed to make a grant of reasonable tolls to defray the expense of erecting a lighthouse on a dangerous 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 in Scotland is rather novel. In a passage quoted from Chalmers' 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 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 decisions 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 inflict 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 taxation of that nature, except it had been granted for a public good of the realm,—such as bridges, or such like common works."

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 street 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 shewn to be irreconcilable with the case of the *Fleshers of Edinburgh*.

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 shew, that if the transit toll could have been lawfully demanded when the Statute of 1 and 2 Vict. cap. 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 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 the 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 *custumarius*, sitting in his toll booth, 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 *custumarius* 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, and that the company have conducted the train on their own soil, and that but for the railway the goods in all probability never would 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 § 177 of this special act clearly indicates that no transit toll shall be demandable, it being 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 Railway Clauses Act 8 and 9 Vict. c. 33, § 85, 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 an intermediate station, was it the 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 railway should touch? How would it be if the railroad only crossed a very small angle of the liberties of the burgh 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* (4 B. & Ad. 726) 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 lands; 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*, 2 Com. L. Rep. 1617, is much more in point; and the only distinction attempted by Sir F. 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 imposed arbitrarily by the Crown for the benefit of the royal revenue.

I am desirous that it should always be kept in view, 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 shewn by § 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.

I now come to what has been called the bridge toll, 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 12 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 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 of parliament; 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 or 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 on the train passing 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 *lucrati* 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. It may truly say that it has chiefly arisen from an anxiety to decide it 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, either incurred in this House or in the Court below.

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 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 it being re-heard, 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, and I must agree with my noble and learned friend in expressing my admiration of the learning and 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*, (*Olyphant* v. *Ayr*,) and the *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 and Lord Medwyn, particularly of Lord Moncreiff, which, upon that side, appear to me to be most important; as, upon the other side, the very able argument of Lord Murray especially, 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 CRANWORTH.—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 of Scotland as well as to this, as to the legality or illegality of the claim set up. 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, 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* for time immemorial, a transit toll through the burgh has been levied. It is said that that is a levy without consideration. Now, although consideration may not strictly be necessary, there is no doubt that all these grants were made for an implied consideration, that the burgh should, by virtue of the grants that were made to them, maintain the jails, and keep up the other benefits which royal burghs in Scotland were bound to keep up. That being so, I own that I do not see anything more unreasonable in levying 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, if 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.

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 11th and 12th 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 argument that it was not intended that the right of levying such a toll should exist. 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.

Then we come to the bridge toll. As to that, I see no doubt except from the right which is reserved in the act of parliament to levy tolls 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 must 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 town council to obtain indemnity if the company shall, 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 farther 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.

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 question which has been raised in the course of the discussion, and which has received so much attention and drawn forth so much admirable learning from the Judges of the Court of Session. That the kings of Scotland from the earliest times 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 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.

First, the title of the burgh to the town custom depends upon charters confirmed by act of parliament, and followed by usage. 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 therein specified without bearing *in græmio* 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 not therefore put to prove consideration for the toll, unless the royal charters of this description require a 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 shew 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 shewn 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 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 towns, 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 have provided 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.

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 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 mainly depends. In making this 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 at any such spot, the magistrates, according to the decision in the *Jinkabout case*, could have no claim upon them for their bridge customs. 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 deterioration or determination 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 difficulty in assessing this indemnity in this case (more especially after the diminution of the bridge custom produced by their 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 throughout 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.

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 of 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 regard to 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 from 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 should suggest that there should be, in drawing up the decree, a modification to that effect.

LORD CHANCELLOR.—It seems to me to be 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 answers to 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.

LORD CHANCELLOR.—There is nothing in the decision in 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.

LORD CHANCELLOR.—I do not think it 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 shewn that what we are doing may, in future, have an effect which we do not intend, that is a matter for consideration.

LORD CHANCELLOR.—No doubt can possibly arise from what this 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.

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.

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, and 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 ground of your Lordships' judgment will not appear upon the 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, 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 have been against the admissions which have been made at the bar, and the judgment which has actually been pronounced.

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 would 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 was never 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, it is there stated, "the goods and other commodities which are thus conveyed by the defendants have always, when brought into or out of the town of Linlithgow, paid duties according to use and wont; and, as these duties are charged 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, there is the same statement, viz., that goods brought into or out of the town of Linlithgow have paid duties according to use and wont.

LORD CHELMSFORD.—Surely, Sir Fitzroy, that will do.

Sir Fitzroy Kelly.—My Lords, that is the very reason of the application we now make to your Lordships. This condescendence states certain matters which your Lordships' judgment, 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 quite 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 a declaration 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 so 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 upon this record that there is no dispute upon this point, and it is quite right that the defenders should be absolved from the whole, because the defenders are not the persons liable for the toll upon goods brought into the market.

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 question 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; my noble and learned friend, LORD CRANWORTH, 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 above 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 delay which has been occasioned in this case, and 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 knows that, immediately upon taking the Great Seal, and even before he actually took it, 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 this House in its judicial capacity. We then did all that we could, both at that period and before the end of that session in 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 the most important counsel in the case. An attempt was made by the parties to bring on the case, but it was found that they were not really 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 the 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.

Interlocutors reversed, without costs in the Court below, and the defenders assoilzied from the conclusions of the libel, and cause remitted.

Appellants' Agents, Hill and Robertson, W.S.—*Respondents' Agents,* Wotherspoon and Morison, S.S.C.