On these short grounds I think that the interlocutors are right, and that they ought to be affirmed.

LORD KINGSDOWN.—I entirely concur with my two noble and learned friends.

Interlocutors affirmed, and appeal dismissed with costs.

Appellants' Agents, W. Sime, S.S.C.; Domville, Laurence, and Graham, Lincoln's Inn, London.—*Respondents' Agents*, W. Waddell, W.S.; Dodds and Hendry, Westminster.

MARCH 8, 1866.

THE COMMISSIONERS OF THE LEITH DOCKS, *Appellants*, *v.* JAMES MILES (Inspector of the Poor of the Parish of North Leith) and Others, *Respondents*.

Poor—Assessment — Docks—Public Statutory Trustees—Exemption—*The commissioners or trustees of docks, harbours, wharves, and property of that description, are liable to be rated to the poor, in respect of their receipts over and above expenditure, whatever be the purposes to which those receipts are by Statute directed to be applied, if the Statute do not expressly exempt such trustees.*

Res Judicata—Rateability to Poor Rate—*The House of Lords previously decided that the commissioners were not assessable except as to an annual sum of £7860.*

HELD, *That that previous decision was conclusive only as to the rate for that year, and did not preclude the question being again raised, that as to future rates the commissioners were liable, though the circumstances in both years were precisely the same.*[1]

Since the judgment appealed against in this case was delivered, judgment had been given in the appeals of *Clyde Trustees* v. *Adamson*, 4 Macq. Ap. 931; 37 Sc. Jur. 512, *ante*, p. 1351; and *Mersey Docks* v. *Cameron*, 11 H. L. C. 443.

The Attorney General (*Palmer*), *Lord Advocate* (*Moncreiff*), and *Anderson* Q.C., for the appellants.—There are three points on which the appellants rely—(1.) that the point as to their exemption from rateability, in respect of the harbour, is *res judicata*; (2.) that the revenues are appropriated by Statute to certain public purposes; (3.) that dues derived from a harbour are not assessable.

1. As to *res judicata*, the former action was between substantially the same parties, and relating to the same subject matter. The judgment of the Court of Session of 1852, so far as not appealed from, is therefore *res judicata*. The declarator in that action was to have it found and declared, that the said Commissioners and their successors are liable to pay poor's rates in the parish of North Leith, and that on account of the foresaid subjects, in all time coming. The Court of Session there found that the Commissioners were not liable, and only held them liable to the extent of the £7860, part of their revenue, on which last point alone that judgment was reversed by the House on appeal, 2 Macq. Ap. 28; 27 Sc. Jur. 229, *ante*, p. 432. The House, it is true, did not in 1855 go into the general question of liability, but rather assumed there was no liability.

[LORD CHANCELLOR.—My recollection of that case is, that the judgment of the Court below was held to be wrong, because it in form assessed a sum of £7680, instead of assessing the land; and we said nothing at all as to the general question of rateability.]

There was nothing in the judgment of the House on that occasion inconsistent with the finding of the Court of Session, that the docks were not rateable generally. The same interest, therefore, being now represented as in the former case, the judgment is *res judicata*, for the fact that there is a different collector of rates can make no difference—*Marquis of Huntly* v. *Nicol*, 20 D. 374; *E. Leven* v. *Cartwright*, 23 D. 1038; Ersk. iv. 3, 1. It is not intended, on the part of the appellants, to dispute the general principle, which the House had laid down in the last session of Parliament, relating to the rateability of the Mersey Docks and the Clyde Docks; but the present case differed in some points from those cases. If the case of *Adamson* v. *The Clyde Trustees* be examined, it will be found that the conclusions of the summons in that case were much the same as in the present case, and there was no appeal to the House against the decision of the Court of Session, relating to the Clyde harbour itself. Therefore, the House has not yet

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[1] See previous report 2 Macph. 1234: 36 Sc. Jur. 617. 1 S. C. L. R. 1 Sc. Ap. 17: 4 Macph. H. L. 14; 38 Sc. Jur. 279.

decided, that a harbour is a rateable subject. A harbour is not enumerated among the other things which are stated by the Scotch Poor Law Act to be assessable. It is not land in the strict sense, but was a *jus publicum*.

[LORD CHELMSFORD.—I think, if you read the judgment of LORD CRANWORTH as delivered in the case of *Adamson* v. *The Clyde Trustees*, and *Mersey Board* v. *Jones* last year, he certainly assumed, at all events, that a harbour is just as much assessable as other land. It may be, the judgment went further than there was occasion.]

A right of harbour is an incorporeal right, and is not included in the corporeal property enumerated in the Poor Law Act.

[LORD CHANCELLOR.—The point as to whether the trustees or Commissioners of a harbour are rateable to the poor was fully argued before the House last year; and certainly the opinion arrived at was, that the trustees were liable to be rated to the full extent of their receipts or profits over and above expenditure. I do not wish to stop you from trying to make out some distinction between the Leith Docks and the Mersey Docks. It may be that you have grounds for that contention. Still, it is not on the principle that the harbour itself was not included in the *Mersey case;* for it was there clearly included, and what was decided was, that all these commissioners or trustees are rateable for the receipts coming to their hands, and that these receipts are to be deemed as profits, no matter whether the trustees are bound by Statute to apply them to some specified purpose or not. It is a matter, as we all know, about which the courts of this country had gone wrong in former times; but at length a case came to this House last year relating to the Mersey Docks, and, after elaborate arguments, we thought that former errors should be put right. I certainly thought the same rule had been laid down in Scotland, and that the matter was finally set at rest in both countries.]

Then, if that is the view taken by the House, no more need be said as to the general principle; but part of the money received by the Leith Dock Commissioners consisted of a sum of £7680, which they paid in lieu of the old duty of a merk per ton, levied on goods brought into Leith port, and applied to the payment of the ministers of Edinburgh. Now, as regards that amount, the House, in its former judgment in 1854, expressly decided that the appellants were not liable to the extent of that sum. In fact, the appellants were merely trustees as to that sum, and they applied the money for a charitable purpose. The judgment of the House in the *Mersey case* last year expressly left untouched the case of public charities.

[LORD CHANCELLOR.—We did not expressly decide last year, that public charities were rateable to the poor, because that case was not before us; but probably the principle would extend to charities. The old theory on which charities were held exempt from poor rates was, because it was said there was no occupier; but it was, I think, laid down in the *Mersey case*, that in all such cases the trustees or managers are the occupiers, and therefore rateable as such.]

It has not been considered, in Scotland at least, that the *Mersey case*, which was decided last year, would rule the case of charities. There was a case, relating to the University of Oxford, decided several years ago in the Court of Queen's Bench, and it was expressly held, that the University buildings were exempt from poor rate.

[LORD CHANCELLOR.—That was before the late decision in the *Mersey case*. Possibly you may make out, that University buildings are in the possession of the Crown. I say nothing as to that case; all I say is, that if the case of a University comes within the principle of the *Mersey case*, then it must now be ruled by that principle.]

It will be a surprise to those connected with charities and Universities to learn, that these buildings are now rateable to the poor. In a recent case decided in Scotland, it has been expressly held, that the University buildings are exempt from rateability.

[LORD CHELMSFORD.—How does the case differ from the *Mersey Board case?* You derive a certain sum from the subjects, and you apply it to a certain purpose. So did the Mersey Board, and yet they were held rateable.]

This is one of the strongest cases of *res judicata*. The former action was raised between substantially the same parties, and as to the same subject matter. It declared that, in all time coming, the docks should be free from assessment to this rate. The action did not relate only to the rate for the year 1846, but to the rate of all future years. Therefore, on that ground alone, the Leith Docks ought to be held exempt, because it has already been so decided by the Court of Session, and by this House in 1852.

Rolt Q.C., and *Sir H. Cairns* Q.C., for the respondents, were not called upon.

LORD CHANCELLOR CRANWORTH.—My Lords, the question in this appeal, though one of great importance, does not appear to me, after the examination which the matter has received at your Lordships' hands, to be one of any difficulty whatever. With regard to what have been called the two latter points, the Lord Advocate has very properly said, that after the intimation which your Lordships gave in the course of the argument, he would not attempt further to contend for his clients.

My Lords, it is very well that these subjects should be brought here from time to time, and it is not a matter of surprise, that they should be brought from time to time under discussion,

because it is quite clear that all the courts in both kingdoms have been for a long time in error—probably your Lordships' House may have been sometimes in error, though, I hope, it has never decided anything wrongly; but Lord Mansfield, Lord Kenyon, and Lord Tenterden, all thought that there was a distinction in respect of the rateability of property, when it was not occupied by the persons whom they call beneficiaries. That question was raised in the great case of the *Mersey Docks*, which finally came to be adjudicated upon here, and, in the last session of Parliament, after a very elaborate consideration of the subject by all the Judges, was finally decided by your Lordships' House in favour of the rateability of all trustees or commissioners having harbours, docks, wharves, and other property of the same sort in their possession, in respect of which they levied harbour dues, tolls, or other sums of money. It was held, that all these were, in the language of the Statute of Elizabeth in England, and there is no difference in respect of the language of the Statute which regulates the poor law in Scotland, liable with the single exception that, as the Crown is not mentioned in the Poor Law Acts, the Crown is not bound. And that, therefore, Her Majesty's palaces, the building in which your Lordships are now administering justice, and many other matters of that sort, which can be said to be in the occupation of the Crown, are not rateable. But it was distinctly held, that harbours, docks, rivers, and wharves, and matters of that sort, are not in the occupation of the Crown, and consequently are rateable.

Therefore, upon this general principle, I think there is no doubt that this property is rateable. I certainly thought, and I believe both my noble and learned friends thought, that the very point had been decided last session in *Adamson's case*, but from the argument of the Lord Advocate I was induced to look at the journals to see what was the actual interlocutor which came by appeal before your Lordships, and it certainly does appear that some matters, which were held in the *Mersey Dock case* to be chargeable did not form the subject of that interlocutor, and, therefore, there has not been any strict adjudication with respect to all that which is now sought to be held rateable in the present case. As it was not all included in *Adamson's case*, it has not been finally adjudicated upon. But that which was deficient in point of adjudication in *Adamson's case* will now be made good by your Lordships' decision in this case. And it must be now held in Scotland as in England, that the commissioners or trustees of docks, harbours, wharves, and everything of that sort, are liable to be rated in respect of their receipts, whatever be the purposes to which those receipts are to be applied.

There remains the single point of *res judicata*. But, I think, that will appear to your Lordships to be more plausible than substantial. It appears that some ten years ago the question was raised as to the liability of the commissioners of this harbour to contribute to the rate that was levied for the year from Whitsunday 1846 to Whitsunday 1847. The commissioners resisted their liability, and pleaded amongst other things, that "the subjects held by the defenders being held by them solely and exclusively for the benefit of the public, and further, the rates and revenues leviable by the defenders being by law limited and appropriated to the maintenance and repair of the harbour and the liquidation of the debt incurred in the construction of the works, the defenders are not liable for the assessment concluded for in the summons."

That was affirmed, and I am quite ready to agree with the Lord Advocate and the Attorney General, it has been affirmed so as to be incapable of being questioned in any Court, and the circumstance that the law was not rightly understood, and that, if it had been rightly understood, the decision would have been different, makes no distinction. But what was affirmed in that case? It was simply a declaration—I do not care in how general terms it is framed, it could only have been valid as a declaration with reference to that particular cause that was then under consideration—that these docks were not liable for the rate imposed for the year from Whitsunday 1846 to Whitsunday 1847. It would have been indeed a grievous misfortune if it could have been held, that that concluded the question for all time to come upon all other rates that might be made when the liability of the docks came to be conclusively established. I think, therefore, that that plea is just as invalid as the other objections, and I shall move your Lordships to affirm this interlocutor.

LORD CHELMSFORD.—My Lords, I am of the same opinion, that there is no foundation for the plea of *res judicata*.

I will not enter into the consideration of the former judgment in favour of the appellants, and the effect of the declaration which accompanied it in this House, together with the application of that judgment by the Court of Session, with a similar declaration, further than to say, that, whether the declaration is to be regarded as a reservation of the question of the liability of the commissioners, the appellants, to be assessed for the sum of £7680, in some other manner and form, or of their general liability for poor's rates, it would equally leave the question open for future consideration, whether they were liable to any assessment for the relief of the poor in respect of the harbours, docks, and subjects vested in them as owners, tenants, or occupiers.

It appears to me, that the argument for the appellants has not sufficiently attended to the nature of the plea of *res judicata*. The maxim of the civil law, *res judicata pro veritate accipitur*, applied only to the identical question which had been once judicially decided, and was again

endeavoured to be raised between the same parties, the rule laid down in the Digest 44, 2, 3, being, *exceptionem rei judicatæ obstare quoties eadem questio inter easdem personas revocatur.* This plea is not competent, therefore, merely on the ground, that the point raised in the action has been previously determined in some former proceeding between the same parties, but it is exactly analogous to a plea in the English Courts of judgment recovered, in which it is necessary, in order to make the judgment operate as an estoppel, that it should be between the same parties and upon the same subject matter coming directly in question either in the same Court or in another Court of coordinate jurisdiction.

Without considering whether the pursuers are different or substantially the same in the present and in the former action, or whether the circumstances under which the question is now raised have been changed from what they were before by the Act of 23 and 24 Vict. c. 48, it is sufficient to say that the proceeding in the present case being for a different rate from that upon which the former judgment proceeded, the cause of action is different, and the plea of *res judicata* is consequently inapplicable.

If the learned Judges of the Court of Session had thought, that the same point was raised before them under precisely the same circumstances, it would have been right for them to adhere to the former decision, and to have assoilzied the defenders. And if they had done so there can be no doubt, I suppose, that their interlocutor might have been brought by appeal to this House, and the propriety of the former decision might have been questioned, and if found to be erroneous, might have been overruled.

In a case to which the plea of *res judicata* properly applies, and an appeal from an interlocutor in favour of the defender is made to the House, its jurisdiction is not taken away by effect being given to that plea. On the contrary, it is then deciding upon the whole subject of the appeal. The only question in such a case would be, whether there was a previous judgment between the same parties on the same subject matter; and that once established, there would be no possibility of going behind the judgment and examining the grounds on which it proceeded, for as long as it remained in force and unreversed, it would be conclusive between the parties.

For these reasons I think that the plea of *res judicata* cannot be maintained.

With regard to the objection to rating the port and harbour dues, and so including in the assessment the sum of £7680, I think a sufficient answer was given to that in the course of the argument by my noble and learned friend.

LORD KINGSDOWN.—My Lords, I quite agree with my two noble and learned friends.

Interlocutors affirmed, and appeal dismissed with costs.

Appellants' Agents, J. Phin, S.S.C.; Maitland and Graham, Westminster.—*Respondent's Agents*, A. Duncan, S.S.C.; Simson and Wakeford, Westminster.

MARCH 23, 1866.

LORD ADVOCATE, *Appellant*, *v.* DUGALD MACNEILL, Esq., of Kintarbet, *Respondent.*

Bill of Exchange—Donation—Delivery—Onus of proof of Donation—Inventory duty—*L. borrowed in* 1838 £6000 *from his mother, and gave her a bill of exchange accepted by him for that sum. After the death of the mother in* 1844 *and of L. in* 1852, *D., a brother of L., being executor of both, produced the bill indorsed by the mother to D. without any date, and on the back of it were marked receipts for interest up to the mother's death. It was not proved, that the bill had ever left the mother's possession, or that interest had been actually paid. D. claimed the sum as a gift to D. by his mother, therefore, that no inventory duty was due in respect of it as part of the mother's estate.*

HELD (reversing judgment), *That as D. had not proved delivery of the bill to himself by his mother, the presumption against donation was not rebutted; and, therefore, that the bill was part of the mother's estate.*[1]

The facts of this case were shortly these:—

Cross actions had been raised, the object of which was to determine whether inventory duty was payable on a sum of £6000, which had been secured by a bill of exchange, and indorsed to the respondent by his mother, Mrs. Margaret Macneill, to whom the money belonged. In the first action the respondent claimed a return of duty as follows:—He alleged, that he was the

[1] See previous report 2 Macph. 626: 36 Sc. Jur. 304. S. C. 4 Macph. H. L. 20: 38 Sc. Jur. 350.