description; therefore so far as the safety of trust investments is concerned there is no reason whatever for the provision of the sub-section in question.

But I think it must be held that in dealing with statutes a court of law is not entitled in considering a prohibition contained in a statute to inquire what the object of the prohibition is, and should the object be the prevention of a loss of some kind, to hold that if the possibility of that loss is obviated, the prohibition of the statute may be disregarded. Such a method of reasoning, if generally applied, would make wild work with the application of statutes, and in my opinion is not permissible.

I think that in this case we must confine ourselves to a consideration of the plain question whether the investment made by the trustees in Dunfermline Corporation Stock was an investment which as trustees they were entitled to make at the time and at the price they did. To this there can be only one answer, to the effect that it was not. The result is that the trustees' actings must be held to have been *ultra vires*, and that they are liable for all loss resulting therefrom, and are not entitled in response to the fourth party's request for payment of £20,000 to tender as part thereof the investment in question, but that they are bound to replace in the trust the price originally paid for the said stock. I therefore concur in holding that the first question should be answered in the affirmative.

With regard to the second question, I think it is clear upon the facts stated in the case that at the time the letter of guarantee of date 21st April 1897 was granted, neither Mr Beveridge's trustees nor Mr Heron had in contemplation any other possible loss than the difference between the par value of the stock and the price paid for it, namely, £102, and that the letter of guarantee was intended to cover only that loss. The clause of obligation, it is true, is ambiguous, but I think it is capable of being read as limited to the loss I have just referred to, and the intention of the parties being as I think evident from the rest of the letter of guarantee as well as from the facts agreed on in the case, I think the second question ought to be answered in the negative.

LORD JUSTICE-CLERK—I concur.

The Court answered the first question in the affirmative and the second in the negative.

Counsel for the First and Second Parties—Blackburn, K.C.—Lippe. Agents—Erskine Dods & Rhind, S.S.C.

Counsel for the Third Parties—The Solicitor-General (Ure), K.C.—Constable. Agents—Watt & Williamson, S.S.C.

Counsel for the Fourth Party—Scott Dickson, K.C.—Macmillan. Agents—Mackenzie, Innes, & Logan, W.S.

Tuesday, March 17.

SECOND DIVISION.

[Lord Dundas, Ordinary.

SOMERVILLE AND OTHERS *v.* LEITH DOCKS COMMISSIONERS.

Harbour—Dock—Charges—Statute—Interpretation—Harbours, Docks, and Piers Clauses Act 1847 (10 *Vict. cap.* 27), *sec.* 33 *—Leith Harbour and Docks Act* 1875 (38 *and* 39 *Vict. cap. clx*), *sec.* 76—*Leith Harbour and Docks Act* 1892 (55 *and* 56 *Vict. cap. clxxvii*), *secs.* 58, 60—*Statutory Right of Public to Use Docks and Harbours on Payment of Statutory Rates—Right of Commissioners to Levy Special Charge for Use of Docks.*

The harbour and docks of Leith are under the administration of statutory commissioners whose powers and duties are regulated by the Leith Harbour and Docks Acts 1875 and 1892, with which is incorporated the Harbours, Docks, and Piers Clauses Act 1847.

Under section 33 of the last named Act it is provided that the harbour and docks (defined by section 2 to include "the works connected therewith," and by section 4 of the Acts of 1875 and 1892 to include "the whole other works and property included in the undertaking") shall be open to all persons upon payment of the rates made payable by this and the Special Act, and section 58 of the Act of 1892, with its relative schedules, provides for the payment of ordinary harbour rates. By sections 76 of the Act of 1875 and 60 of the Act of 1892 the Commissioners are entitled to "make all reasonable charges for work done, services rendered, facilities afforded, and use of plant, &c., in so far as such charges are not expressly provided by this Act."

Entrance to portions of the harbour and docks is obtained through locks. For a period of about two hours prior to high water the gates are left open, and vessels can pass directly in or out, but at other times ingress or egress is only possible by using the lock gates.

The Commissioners claimed the right under sections 76 and 60 *supra* to make a special charge for the use of the lock gates, and in the event of non-payment to refuse the right of ingress or egress except during the hours when the gates were open.

Held that they had not the right claimed, and that all vessels were entitled, so far as consistent with considerations of safety and accommodation, to use the lock gates free of any charge beyond the ordinary rates, always, however, without prejudice to the statutory powers of the harbourmaster under the Act of 1847, and the right of the Commissioners to make bye-laws under the Acts of 1847, 1875, and 1892.

The Harbours, Docks, and Piers Clauses Act 1847 (10 Vict. cap. 27), which is incorporated with the Leith Harbour and Docks Acts of 1875 and 1892, provides in section 33 that "upon payment of the rates made payable by this and the Special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers."

By section 2 of the said Act of 1847, which is also incorporated with the Leith Harbour and Docks Acts of 1875 and 1892, "the expression 'the Special Act' shall be construed to mean any Act which shall be hereafter passed authorising the construction or improving of a harbour, dock, or pier, and with which this Act shall be incorporated," and "the expression 'the harbour, dock, or pier' shall mean the harbour, dock, or pier, and the works connected therewith, by the Special Act authorised to be constructed."

By section 3 of the said Act of 1847 it is provided—"The word 'rate' shall mean any rate or duty or other payment in the nature thereof payable under the Special Act."

The Leith Harbour and Docks Act 1875 (38 and 39 Vict. cap. clx) (repeated by section 4 of the Leith Harbour and Docks Act 1892), sec. 4, provides that "the expression 'harbour and docks' means and includes the port and harbour of Leith, and the harbours, docks, quays, piers, and whole other works and property included in the undertaking defined and vested in the Commissioners by this Act, and all future additions thereto and extensions thereof."

By section 76 of the Act of 1875 it is enacted that the Commissioners "shall be entitled to make all reasonable charges for work done, services rendered, facilities afforded, and plant, machinery, or appliances provided by them for the despatch of business at the harbour and docks, or the convenience of shipmasters, merchants, and others concerned with the traffic thereat, in so far as such charges are not expressly provided for by this Act."

The Leith Harbour and Docks Act 1892 (55 and 56 Vict. cap. clxxvii), *inter alia*, sec. 58, provides that "from and after the commencement of this Act section 74 of the Act of 1875 is hereby repealed, and it shall be lawful for the Commissioners, and they are hereby authorised from and after that date, to demand, levy, collect, and receive . . . from the owners of every ship, vessel, bark, boat, or lighter coming into and going out of the harbour and docks or precincts of the port aforesaid, or the agents or managers of such owners, the rates on vessels specified in Schedule (B) to this Act—both subject to and in conformity with the regulations applicable to such Schedules (A) and (B) contained in Schedule (C) to this Act." Schedule (B), which contains a table of the rates payable on vessels, provides that the rates are to be payable "per register ton per inward voyage in each year between Whitsunday and Whitsunday."

By section 59 of the said Act of 1892 it is provided—"The Commissioners may from time to time vary the rates by this Act authorised to be levied, or any of them, by reducing or raising the same in such way and manner and to such extent as they deem expedient or necessary, and may reduce or increase the rates on vessels from any place or places specified in Branch I of Schedule (B) to this Act, without altering the rates on vessels from any other place or places specified in the same group therewith in the said branch of such schedule: Provided always that no rates shall be increased to more than one-fourth above the amount which would have been leviable in conformity with the schedules of rates annexed to the Act of 1875, and that such rates shall at all times be charged equally to all persons in respect of vessels of the same class or description arriving from or sailing for the same port or ports, and in respect of the same class or description of goods, and for and in respect of anything whatsoever for which such rates are exigible, and that, before any increase on the rates shall take effect, at least twenty-one days' previous notice thereof shall be given in at least one newspaper published in Edinburgh or Leith."

By section 60 of the Act of 1892 it is enacted that the Commissioners "shall be entitled to make all reasonable charges for work done, services rendered, facilities afforded, and use of plant, machinery, and appliances provided by them for the despatch of business at the harbour and docks, or the convenience of shipmasters, merchants, and others concerned with the traffic thereat, in so far as such charges are not expressly provided for by this Act."

The Commissioners have extensive powers of making bye-laws under the Act of 1847, sec. 83 and the Act of 1875, sec. 71.

Robert Somerville, Campbell Gibson, and others, shipowners, raised an action against the Commissioners for the Harbour and Docks of Leith, in which they sought declarator "that the pursuers, upon payment of the rates made payable by section 58 of an Act of Parliament, entitled The Leith Harbour and Docks Act 1892 (55 and 56 Vict. cap. 177), and by Schedule B to the said Act, are entitled to have access to and egress from the harbour and docks of Leith given to all ships, vessels, barks, boats, or lighters belonging to them or any of them, free of any rate or charge other than the rates made payable by section 58 and Schedule B of the said Act, and that at all times when access to and egress from the said harbour and docks can be given with safety either by means of the locks in the said harbour or otherwise, and when accommodation is available; and it ought and should be found and declared, by decree foresaid, that the defenders have no legal right or title to ask, crave, demand, exact, or levy from the pursuers or any of them, or their managers or agents, any dues or charges other than the rates made payable as aforesaid for any ships, vessels, barks, boats, or lighters belonging to the pursuers or any of them obtaining access

to or egress from the said harbour and docks by means of the locks through which the said docks or any of them are approached." The summons also contained a conclusion for interdict, and for repayment of various sums set forth which had been exacted.

The pursuers averred, *inter alia*—"(Cond. 1) The pursuers are the owners of a large fleet of steamships trading regularly between Leith and English and Continental ports. . . The defenders are Commissioners for the Harbour and Docks of Leith, incorporated by the Leith Harbour and Docks Act 1875. (Cond. 5) The harbour and docks of Leith include three docks known as the Albert Dock, the Edinburgh Dock, and the Imperial Dock, which are like all modern docks approached through locks. These three docks are the largest and most important in the harbour, and are those suitable for the vessels of the pursuers and the traffic which they carry. The pursuers up to the date of the defenders' resolution after mentioned have always enjoyed the right of access to and egress from the Albert and Imperial Docks through the said locks without payment of any rates or dues other than the ordinary harbour rates under Schedule B aforesaid. On or about 8th September 1905, however, the defenders by minute of that date passed a resolution in the following terms:—'(1) Locking in and out of vessels should be allowed in the Albert and Imperial Docks; (2) Locking should be limited to two hours after high water; (3) No locking should be allowed when the water on the Imperial Dock sill is less than 21 ft. 6 in.; (4) No vessel should be locked unless arrangements have been timeously made with the dock-master, according to regulations to be issued by the superintendent; (5) The dock-master should have power to decline to lock in or out any vessel without giving reasons; (6) A charge of £2 for each locking should be made against each vessel arranging to be locked in or out; £1 to be returned in the event of a ship arranging to be locked in or out and not taking advantage of the arrangement.' This resolution was subsequently modified by minute of the defenders dated 13th July 1906, by which the charge for locking vessels in and out of the Imperial and Albert Docks was reduced to £1 per vessel. The defenders did not publish any notice of the imposition of this charge for locking in any newspaper, in terms of section 59 of the Act of 1892, nor is this rate included in the list of rates posted up at the harbour in terms of section 47 of The Harbours, Docks, and Piers Clauses Act 1847, which is incorporated with the defenders' Acts of 1875 and 1892. No bye-laws have been enacted by the defenders, either under section 71 of the defenders' Act of 1875, or section 83 of the general Act of 1847 incorporated therewith, with regard to the locking of vessels into or out of the Albert and Imperial Docks, or to the charges which they are now exacting for this operation. The only provision in the existing bye-laws applicable to entry to or departure from these docks is contained in bye-law 13, which provides that vessels entering or departing from any of the docks other than the Victoria Dock must 'be in readiness to pass out or in at the proper state of the tide, of which it shall be the duty of masters to inform themselves by inquiries at the dock-master.' . . . (Cond. 6) Following upon the first of the said resolutions the defenders exacted from the pursuers through their agents in Leith, George Gibson & Company, a charge for locking each of the pursuers' vessels which had occasion to use either the Imperial or Albert Docks and which had arrived after the time when the dock gates were closed, by order of the harbour-master or his subordinates, although the depth of water was quite sufficient to permit of locking. The dock gates are opened and remain open for from two to two-and-a-half hours prior to high water at each tide, when no locking is needed. At other times the ingress and egress of vessels is safe and practicable by means of locking in the case of the Imperial Dock at any hour, and in the case of the Albert Dock for from three to four hours after high water. . . . (Cond. 7) In imposing the said charge for locking vessels in and out of the Imperial and Albert Docks, the defenders were acting illegally and *ultra vires*. No power is conferred upon the defenders to make any such charge, either by The Harbour, Docks, and Piers Clauses Act 1847, or by the Acts applicable to the harbour and docks of Leith, and the defenders had, prior to the resolution of 8th September 1905, made no charge whatever for the use of the locks leading either to the Imperial or Albert Docks."

The defenders stated, *inter alia*—"(Stat. 1) The Albert and Imperial Docks are generally open for about three hours each tide for the entrance and egress of vessels. After high water it is impossible for the said docks to be kept open consistently with safety, and one of the lock gates is then closed. Thereafter vessels not exceeding about 300 feet in length, seeking access to or egress from the said docks, can be locked in or out until the depth of water on the sill of the lock reaches about 16½ feet in the Albert Dock and 21½ feet in the Imperial Dock, when it becomes impossible to move the lock gates without imposing too great a strain upon them. Apart, however, from this minimum depth, the question whether the operation of locking in or out can be safely performed at any specific time must depend upon the state of the weather and of the tide, and other similar considerations, and must be determined in each case by the harbour-master or other servant of the defenders acting under their instructions and by their authority. If the pursuers' contention is given effect to, the defenders will be obliged to keep a large staff of experienced men on duty day and night for the purpose of working the lock gates, and will thus be involved in heavy additional expense. (Stat. 3) Only a very few of the vessels frequenting the harbour use the docks so as to be liable to pay the charges in question, the far greater number

either not using the docks in question at all, or entering or leaving, as the case may be, when no charge is exacted. During the period covered by the pursuers' claim the charges were only paid in respect of 221 vessels, of which 112 were the pursuers', the total charges being £221, of which the pursuers paid £112. The locking in and out involves heavy charges and expenses, and if the pursuers' contention were given effect to it would result in the pursuers getting work, services, and facilities from the defenders much beyond what the great majority of the ships frequenting the harbour obtain, without paying therefor. (Stat. 7) No duty is incumbent on the defenders to give access to or egress from either of the said docks at any time except during the said three hours. The locking of a vessel in or out is a facility which they are not bound to afford, and which the vessel's owners are neither entitled to demand nor bound to accept. If the defenders in the exercise of their discretion consent to lock a vessel in or out they are affording a facility and rendering a service beyond what they are bound by statute to afford or render in return for the statutory rate exigible by them in terms of Schedule (B) of the Leith Harbour and Docks Act 1892, and are consequently entitled to make a reasonable charge for the same in terms of section 60 of the said Act above set forth. The sums charged by them for such service as specified by the pursuers are reasonable."

The pursuers pleaded, *inter alia* — "(1) The charge condescended on being illegal and *ultra vires* of the defenders, the pursuers are entitled to decree in terms of the conclusions of the summons for declarator, interdict, and reduction. (3) The resolutions of the defenders relative to the locking of vessels into and out of the said docks not being embodied in any bye-laws duly passed and confirmed, the same are invalid and of no effect."

The defenders pleaded, *inter alia*—"(3) The charge for locking in and out being legal in respect that it was made for facilities afforded or services rendered by the defenders in terms of the section of their Act of Parliament condescended on by them, the defenders should be assoilzied. (5) In respect that the defenders are entitled and authorised to regulate the access to and egress from the docks in question, either by means of regulations or through their harbour-master, and that the pursuers are bound to conform to the defenders' regulations or orders and to the directions of the harbour-master, decree of absolvitor should be pronounced."

On 21st June 1907 the Lord Ordinary (DUNDAS) pronounced the following interlocutor:—"Finds, declares, and decerns in terms of the first declaratory conclusion of the summons, viz., that the pursuers upon payment of the rates made payable by section 58 of an Act of Parliament entitled The Leith Harbour and Docks Act 1892 (55 and 56 Vict. c. clxxvii), and by Schedule B to the said Act, are entitled to have access to and egress from the harbour and docks of Leith given to all ships, vessels, barks, boats, or lighters belonging to them or any of them, free of any rate or charge other than the rates made payable by section 58 and Schedule (B) of the said Act, and that at all times when access to and egress from the said harbour and docks can be given with safety either by means of the locks in the said harbour or otherwise, and when accommodation is available: Further decerns and ordains the defenders to make payment to the pursuers of the various sums set forth in the petitory conclusion of the summons, and that in the manner and with the interest therein stated," &c.

Opinion.—"The pursuers are owners of a fleet of steamships trading regularly between Leith and ports in England and on the Continent. The defenders are the Commissioners for the Harbour and Docks of Leith incorporated by the Leith Harbour and Docks Act 1875 (38 and 39 Vict. c. 160). The main (if not the only) question is whether or not the pursuers, upon payment of the rates made payable by section 58 of the Leith Harbour and Docks Act 1892 (55 and 56 Vict. c. 177), and Schedule (B) to said Act, are entitled to have access to and egress from the harbour and docks of Leith given to their ships and other craft free of any other rate or charge, 'and that at all times when access to and egress from the said harbour and docks can be given with safety either by means of the locks in the said harbour or otherwise, and when accommodation is available.' This question is one of importance to the parties, but I have not found it to be attended with serious doubt or difficulty. It relates, as explained in the condescendence, really to the three docks known as the Albert, the Edinburgh, and the Imperial respectively, which are, like most modern docks, approached through locks. These three docks are the largest in Leith Harbour, and are suitable for and used by the pursuers' vessels. It may be convenient at the outset to explain the general nature and character of the various docks at Leith, all of which are shown on the small hand-map with which I was furnished at the discussion. The old docks (East and West) were opened about 1806. They were constructed under the authority of an old Act, and were, as the map indicates approached by a lock, but I am informed that as matter of fact this lock has not been used for a long period—more than forty years. The Victoria Dock was constructed about 1852 without the authority of any special Act of Parliament. It has a gate but no lock. The Albert Dock was opened in 1869 without the authority of any special Act. It is approached by a lock, and is now connected by water-way with the Imperial and also with the Edinburgh Docks. The Edinburgh Dock was opened in 1881, and was among the works authorised by the said Act of 1875. It lies to the east of and is approached from the Albert Dock through an open passage spanned by a swing bridge. The Imperial Dock was authorised by the said Act of 1892, and was opened in 1902. Its entrance

lock is mentioned in section 22 (2) and (3) of the Act.

"The question now in dispute was sharply raised when the defenders passed, on 8th September 1905, a resolution—varied later by a resolution dated 13th July 1906—both of which are quoted in article 5 of the condescendence, by which the defenders for the first time imposed a pecuniary charge for the locking in or out of vessels going to or from the three docks with which this case is concerned.

"The substantive case stated for the pursuers is based upon the following statutory enactments:—[*His Lordship referred to the Harbours, Docks, and Piers' Clauses Act* 1847, *secs.* 33 (2), (3); *Leith Harbour and Docks Act* 1875, *sec.* 4; *Leith Harbour and Docks Act* 1892, *secs.* 4, 58, *Sched. B*].

"Upon a construction of these sections the pursuers argue that their vessels are entitled upon payment of the rates prescribed by section 58 and Schedule (B) of the Special Act of 1892, to free access to and egress from the whole harbour, docks, and piers of Leith, including those parts of the same which are accessible only by locks, at all times when such access or egress can be accomplished with safety, and when accommodation is available. As to these last conditions they concede that the discretion must lie with the defenders' harbour-master, so long as he exercises it fairly and *in bona fide*. I should here explain that the parties agreed in stating that, for two or three hours before high water at each tide the gates of the locks lie open, and that for some hours thereafter (as to the number of these the parties were not in agreement), the operation of locking a vessel in or out can be carried on with perfect safety, but the defenders say that if the pursuers' contention is given effect to they 'will be obliged to keep a large staff of experienced men on duty day and night for the purpose of working the lock gates, and will thus be involved in heavy additional expense.' The matter is thus one of expenditure pure and simple. I am of opinion that the pursuers' argument is well founded. I think that the statutory provisions to which I have referred give shipowners and others an absolute right, upon payment of the rates prescribed, to demand access to or egress from all parts of the harbour or docks, to or from which such access or egress can be afforded with safety and due regard to accommodation. A contrary hypothesis might, I think, result in anomalies. In the case, for example, of a harbour to which access can only be obtained by the opening of gates, it would seem that vessels could not demand right to enter the harbour at all except on payment of some extra charge over and above the rate. But the defenders argued, in the first place, that the pursuers' construction of the Acts would violate the obligation which is admittedly incumbent upon harbour commissioners to treat all classes of shipping upon equal terms. They explained, and it was not disputed, that many vessels—even of the larger classes—coming to Leith do not in fact go into docks at all, but take up their berths in the areas coloured brown on the hand map; that others are in use to resort to the Victoria Dock, or to the Old Docks; that others, again, are content to obtain entrance to or exit from the three docks in question at the times above referred to, when the lock gates are lying open, and that some of the vessels which frequent the port of Leith are, owing to their great length, unable to enter these locks at all. The defenders put their case so high as to say that they would not be legally entitled, looking to their duty of equal treatment, to afford to the pursuers' ships the privilege of entry to and exit from the docks in question at times when it was necessary for that purpose to work the lock gates, without some special charge being made over and above the prescribed 'rates.' In my judgment this argument is fallacious. It is no doubt true that at all ports there are different classes of shipping with different habits, capacities, and requirements. But if the pursuers' view of this matter is right, as I think it is, all vessels (including those belonging to them) which desired, and were physically able, to enter these docks would require to be equally dealt with, and it is, I think, nothing to the purpose to say that there are other ships at Leith which either cannot or do not desire to enter the docks at all times when it would be possible to do so with safety, and having regard to accommodation. Then the defenders relied strongly upon section 76 of the Act of 1875, which is practically repeated by section 60 of the Act of 1892. These sections authorise the defenders to 'make all reasonable charges for work done, services rendered, facilities afforded, and use of plant, machinery, or appliances provided by them . . . in so far as such charges are not expressly provided for by this Act.' But if the pursuers' view as to the policy of the Acts, and the construction of the sections previously dealt with, is correct, as I think it is, getting in or out of these docks at all times when the gates can with safety and propriety be opened does not appear to me to be a matter of 'work done,' or 'services rendered,' or 'facilities afforded,' 'of use of plant, machinery, or appliances provided.' It is matter of right upon payment of the 'rates.' These sections seem to me to have reference not to anything done in the exercise of that right but to special facilities which may be asked and received after the vessel has obtained due access to the harbour and docks. This view is, in my judgment, confirmed by the total absence in the Acts (with the exception of section 22 (2) and (3) of the Act of 1892) of any reference to locks and of any express right on the Commissioners' part to charge for locking vessels in or out. Such operations must, I think, be regarded as mere incidents in that free access to the harbour and docks which is to be had by vessels upon payment of the rates. The defenders also referred to sections 51 and 52 of the General Act of 1847. But I can find nothing there to authorise the Commissioners or

their harbour-master to impose an extra charge for locking operations, as they bear to do by their 'resolutions,' quoted upon the record. The defenders have power to pass bye-laws for various purposes, and under certain conditions—section 83 of the General Act of 1847, and section 71 of the Special Act of 1875—but for obvious reasons they shrank from saying that the desired result could be achieved in that manner, and I do not think that it could.

"Upon the whole matter, therefore, I am of opinion that the pursuers' argument is substantially right, and that they are entitled to decree of declarator in terms of their first crave of the summons. Their counsel stated that if I should be of that view they would not press for the further declarator sought, nor for the conclusions for interdict and for reduction. The defenders' counsel, on the other hand, conceded that if the first declaratory conclusion were to be granted they did not oppose decree going forth in terms of the petitory conclusion."

The defenders reclaimed, and argued—The Commissioners willingly admitted that every ship was entitled to the ordinary use of the docks upon payment of the statutory rates, and also that the Commissioners were not entitled to impose any rates except those sanctioned by statute. The charge complained of was not a rate. What the pursuers were demanding was not an ordinary but an extraordinary use of the docks, of special value to themselves as compared with ordinary shipowners, and involving a large additional burden and expense upon the Commissioners. Their demand was in fact for a special "service" or "facility," and for such, *inter alia*, the Commissioners were expressly empowered to make a reasonable charge under section 60 of the Act of 1892, and section 76 of the Act of 1875. An analogous special charge was that made for the right to a special berth—Act of 1875, sec. 60. If the charge was legal no exception could be taken to the method of its imposition, the matter being one purely of contract between the Commissioners and the owners, and not falling under any of the matters which required to be dealt with by bye-law—see Act of 1847, secs. 83 to 88; Act of 1875, sec. 71. In any event, the terms of the declarator granted by the Lord Ordinary were too wide and drastic, and would have to be modified, as they impinged upon the discretionary powers as to regulation of traffic, &c. conferred on the harbour-master by section 52 of the Act of 1847.

Argued for the respondents—Leith Docks formed a public and statutory undertaking open to all persons upon payment of the statutory rates—Act of 1847, sec. 33. The locks were an integral and essential part of the docks, falling clearly under the comprehensive words of the definition of "harbour, dock, or pier" contained in sec. 2 of the same Act (and in almost similar language in sec. 4 of the Acts of 1875 and 1892), viz., "the harbour, dock, or pier, and the works connected therewith." The respondents were willing to pay all the rates legally leviable, but claimed in return a free and reasonable use of the docks, including the locks. To deny them such a use of the locks was virtually to exclude them from an integral part of this public undertaking. Having paid their rates under section 58 they were enfranchised of the whole harbour. The proposed charge was not said to be a rate but a charge for work done, or services rendered, levied in terms of section 76 of the Act of 1875 and section 60 of the Act of 1892. These sections, however, applied only to special services over and above those which the Commissioners were bound to render under the Act (*e.g.*, the use of machinery belonging to the Commissioners) and were quite inapplicable to the use of an equipment which formed an integral portion of the public undertaking. The Acts specified with great detail the extra charges which were leviable in respect of such minor matters as the use of sheds and cranes, and it was almost inconceivable that the Legislature should not expressly have dealt with such important charges as those for the use of locks, if it had been in its contemplation that such charges were to be made. In any event, the charges should have been imposed by bye-law, in which case the pursuers would have had an opportunity of stating their objections to the Sheriff. The respondents did not question the right of the harbour-master, if exercised *bona fide*, to regulate the admission of vessels to the locks. The following sections were also cited at the debate—Harbours, Docks, and Piers Clauses Act 1847, secs. 3, 30, 34, 35, 47, 51; Leith Harbour and Docks Act 1875, secs. 3, 4, 7, 41 (2) and (3), 52, 75; The Leith Harbour and Docks Act 1892, secs. 3, 58, 59, Schedules A, B, C, D, E.

At advising—

LORD STORMONTH DARLING—The harbour and docks of Leith are under the administration of a body of statutory Commissioners whose powers and duties are regulated by two local Acts (of 1875 and 1892), with which is incorporated a public Act—the Harbours, Docks, and Piers Clauses Act of 1847. By the latter Act, section 33, it is provided that "upon payment of the rates made payable by this and the Special Act, and subject to the other provisions thereof, the harbour, docks, and piers shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers." The rates here referred to, so far as applicable to rates on vessels, are those specified in section 58 of the Special Act of 1892 and Schedule (B) appended thereto. It is proper to add that by section 59 of the same Special Act the Commissioners have power from time to time to vary the rates thereby authorised to be levied by reducing or raising the same to such an extent as they may deem expedient or necessary, under a certain restriction as to the amount of such increase, and with a proviso that such rates shall at all times be charged equally to all persons in

respect of vessels of the same class or description, and also that before any increase on the rates shall take effect at least twenty-one days' previous notice thereof shall be given in at least one newspaper published in Edinburgh or Leith. It is further proper to add that by section 60 of the same Special Act power is given to the Commissioners "to make all reasonable charges for work done, services rendered, facilities afforded, and use of plant, machinery, or appliances provided by them for the despatch of business at the harbour and docks, or the convenience of shipmasters, merchants, and others concerned with the traffic thereat, in so far as such charges are not expressly provided for by this Act."

The pursuers are owners of a fleet of steamships trading regularly between Leith and ports in England and on the Continent. They complain of a certain resolution passed by the Commissioners on 8th September 1905, by which for the first time, as regards the three newest and largest docks in Leith, a change was attempted to be made in the practice of the Commissioners with respect to the admission of vessels to and from these docks, by limiting the locking in and out of vessels to two hours after high water, by imposing a charge of £2 (afterwards reduced to £1) against each vessel arranging to be locked in or out, and by making other less important changes. These resolutions are said to have been passed without notice in any newspaper, without being posted up as a rate in some conspicuous part of the harbour, and without having been embodied in any bye-law. On the whole matter, it is pleaded that the Commissioners being bound, on a just construction of the statutes, to afford the pursuers' vessels access to and egress from the whole harbour and docks on payment of the statutory rates, are not entitled to make these new and unauthorised charges, and that the resolutions professing to allow them are illegal and *ultra vires*. The Lord Ordinary has sustained this view, and I think he is right. In pronouncing decree in terms of the first declaratory conclusion of the summons his Lordship has adopted the final words of that conclusion—"And that at all times when access to and egress from the said harbour and docks can be given with safety, either by means of the said locks in the said harbour or otherwise, and when accommodation is available." That is a qualification in favour of the defenders, but they say there ought to be a further qualification in order to save the right of the harbour-master to give all lawful directions, and also the right of the defenders themselves to make bye-laws. It may be said that their rights are sufficiently secured by statute, particularly sections 52 and 83 of the Public Act of 1847. But Mr Clyde for the pursuers did not object to these rights being expressly reserved, and I think that our decree should contain some such additional words as these—"And without prejudice to the right of the harbour-master to give directions or all or any of the purposes set out in the Harbours, Docks, and Piers Clauses Act 1847, and also without prejudice to the right of the defenders to make bye-laws as allowed by the same Act or by either of the Special Acts."

The defenders do not attempt to explain why the statutes give no express right to charge for locking vessels in or out, nor why it was not till 1905 that they themselves attempted to impose such a charge. They say a good deal about the additional expenditure which they will have to incur, if the pursuers' contention is given effect to, in wear and tear of dock gates and in keeping a large staff of experienced men to work those gates, but they say nothing to displace the pursuers' argument upon the statutes—an argument which I think Mr Macmillan put very tersely when he maintained, that once the pursuers had paid their rates under section 58 they were enfranchised of the whole harbour. At least the only counter argument which the defenders urge upon the statutes is to refer to section 60 of the Special Act of 1892 which I have already recited. Now the Lord Ordinary's criticism on section 60, with which I entirely agree, is that it deals, not with charges for "work done," or "services rendered," or "facilities afforded," or "use of plant, machinery, or appliances provided by the Commissioners," but to special facilities which may be asked and received after the vessel has obtained due access to the harbour and docks, and for which (I may add) no charges are expressly provided by the Act. One has only to look at the schedules appended to the Act of 1892 to see how many different kinds of special facilities are afforded in those docks, for all of which there are special rates. I need only mention graving dock, cranes, rails, steelyards, and sheds for different kinds of goods. For all of these it is quite right that special rates should be provided, because only special ships require to make use of them. In like manner, according to the progress of mechanical invention, new kinds of appliances may come into use, for which it may be reasonable that the Commissioners should make a special charge, as, for instance, if they make a new installation of electric lighting in a particular part of the docks and allow its use for the convenience of merchants concerned with the traffic thereat. That is the kind of charge which section 60 contemplates, and not the use of a lock, which is truly part of the dock accommodation, and is intended for "all persons" who may frequent the docks on payment of the scheduled rates.

If the Lord Ordinary is right as to the first declaratory conclusion, it was not contended that the rest of the interlocutor could be successfully challenged, and I am therefore for adhering (with the addition which I have suggested) with expenses.

LORD ARDWALL—I agree with the opinion which has been delivered by Lord Stormonth Darling. There is certainly an appearance of equity in the defenders' resolution of 8th September 1905, because undoubtedly the entrance or egress of vessels to and

from the docks by means of the locks after the lock gates have been closed for the time imposes work upon the defenders' servants beyond that which is necessary when the locks are open for three hours before each high tide, when of course vessels pass in and out without causing any more trouble than is involved in the regular opening of the dock gates previous to high tide once every twelve hours or thereby. But this fact does not necessarily entitle the defenders to make an extra charge in respect of the passage of vessels in or out of the docks by means of the locks after the level of the water in the outer harbour has fallen below the level of the water in the docks. They must show that the pursuers are obtaining some privilege over and above the rights conferred on them by statute in return for payment of harbour dues, or otherwise they must show that there is a special provision in the Harbour Acts entitling them to make the extra charge of £1 per vessel.

In considering this case it must be observed that the locks and gates are part of the harbour works specially authorised to be made in virtue of the powers contained in the Acts empowering their construction, just as much as are the docks themselves, and the water lying between the two gates of the locks is as much part of the harbour as the water in the outer harbour is the water in the docks. This being so, I think it follows that all vessels are entitled to the use of the locks and the water therein on payment of the statutory harbour dues entitling them to the use of the harbour in terms of section 33 of the Harbours Act of 1847.

The defenders obtained powers to make these docks and locks presumably with the view to making the harbour of Leith more available for commerce and more attractive to shipping, and, *inter alia*, to shipping consisting of steamers sailing as regular liners at stated periods to and from Continental ports, and I think it is contrary to the policy of the Harbour Acts as well as to sound considerations of public policy that the advantage afforded to steamers of a certain size of being able to get in and out of the docks at any suitable state of the tide should form the subject of a special impost. I am of opinion that it must be held that such extra labour as may be necessary for working the dock gates is labour necessary to render available the ordinary harbour waterways, and therefore should not form the basis of a claim for an extra charge on vessels taking advantage of the convenience afforded by the locks.

Defenders' counsel, however, founded strongly upon section 76 of the Leith Harbour and Docks Act 1875 and section 60 of the subsequent Act of 1892, which are in similar terms and which authorise certain charges to be made. In my opinion these sections do not apply to a charge such as the present, but to charges for work done, services rendered, and facilities afforded, and the use of plant after a vessel has got to her berth in the harbour, and do not apply to the use of the harbour itself or any of the waterways forming part thereof. I accordingly think that the interlocutor of the Lord Ordinary is well founded, but I agree with the opinion that both the conclusion of the summons and the portion of the interlocutor are too wide when they declare that the pursuers are entitled to have access and egress "at all times when access to and egress from the said harbour and docks can be given with safety either by means of locks in the said harbour or otherwise."

Nothing is said in this case as to the engineering questions involved in the use of the locks for the passage of vessels when the level of the water in the outer harbour has fallen to a certain number of feet below the level of the water in the respective docks, or whether the locks may be safely used at all states of the tide provided there is water sufficient in the outer harbour for the passage of vessels, and so on. These matters are not before us, and in fact it was not until the debate had proceeded a considerable length that the Court were given to understand that there was really any question at issue except the right of the defenders to make the extra charge of £1 for the right of passage through the locks when they were not open at any rate. I accordingly concur with Lord Stormonth Darling that there should be a qualification inserted in the Lord Ordinary's interlocutor in case of possible difficulties in the working of the locks at all times of the day and night.

LORD JUSTICE-CLERK—I concur in the judgment of Lord Stormonth Darling.

The Court pronounced this interlocutor—

"Refuse the reclaiming-note: Adhere to the . . . interlocutor reclaimed against with the following addition thereto, viz., 'but without prejudice to the right of the harbour-master to give directions for all or any of the purposes set out in the Harbours, Docks, and Piers Clauses Act 1847, and also without prejudice to the right of the defenders to make bye-laws as allowed by the same Act or by either of the Special Acts,' and with the foregoing variations affirm the said interlocutor reclaimed against, and decern."

Counsel for the Pursuers (Respondents) — Clyde, K.C. — Macmillan. Agents — Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Defenders (Reclaimers)— Scott-Dickson, K.C.—J. H. Millar. Agent— Victor A. Noel Paton, W.S.