TRUSTEES OF THE DUNDEE HARBOUR, APPELLANTS.

DOUGALL, ... RESPONDENT (*a*).

1852.
12th, 15th, 16th, 18th, 19th, and 22nd March.

The Scotch Statute of 1617, c. 12, respecting prescription does not contain the words *positive* and *negative*. Whether these words have not tended to perplex the subject,—*Quære*

General policy of Statutes of prescription. The old English Statutes of Limitation barred the remedy only, not the right; but the modern ones cut off the right as well as the remedy.

Public Corporations are not less liable to the operation of prescription than private persons.

Immunity or exemption may be prescribed for by dereliction or non-usor for forty years.

Although a variance is introduced in the judgment complained of, the House may award costs to the Respondent where it appears that the variance would have been granted by the Court below if applied to for the purpose.

THE Respondent, Mr. Dougall, having applied to the Court of Session for an interdict to prevent the Appellants from attempting to levy duties upon vessels delivering their cargoes at Ferry-Port-on-Craig, in which he claimed the sole right of property,—the Appellants, as trustees of the port and harbour of Dundee, brought an action against him, concluding that it ought to be found and declared that the port and harbour of Dundee, with the privileges thereto annexed, embraced a large extent of territory, including in particular the quay or harbour of Ferry-Port-on-Craig, with the privilege of levying duties on the shipping of that place, to the exclusion of the Respondent.

The Respondent put in a defence denying the Appellant's title, and asserting that he held his port under a charter from the Crown, upon which he had enjoyed possession from time immemorial.

The Court of Session held that the Respondent's title was capable of being explained by prescriptive possession, and that by dereliction or non-usor for forty years an immunity or exemption from the Appellant's claim might have been established.

The following issues were settled for trial by jury:—

1. Whether, for forty years prior to August 2, 1844, or from time immemorial, the harbours of Ferry-Port-on-Craig have been

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(*a*) Reported Second Series, vol. xi. pp. 6, 181, 1464.

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used for receiving ships and vessels, and for the loading and unloading of cargoes shipped and unshipped thereat, without the Defenders (the Appellants) or their predecessors levying any dues on the said ships or cargoes?

It being admitted that the Pursuer, William Stark Dougall, under the title-deeds in process, has right to the town and lands of South Ferry-Port-on-Craig, and to the havens and harbours of Port-on-Craig, with the sole power, liberty, right, and privilege of the ferry-boats, for transporting the lieges and others, back and fore, from the said town of South Ferry-Port-on-Craig and harbour thereof, upon the Water of Tay, with all feu-duties, privileges, liberties, and profits of the same, and with free ish and entry—

2. Whether, for forty years prior to August 2, 1844, or from time immemorial, the Pursuer and his predecessors or authors, by themselves, or others deriving right from them, have, in virtue of the said grant, levied harbour dues on vessels using the harbours of Ferry-Port-on-Craig, or on the cargoes loaded or unloaded thereat?

With reference to the *first* of these issues, the Appellants consented that the case should be dealt with as if there had been a verdict found for the Respondent.

Upon this admission, the Lords of the First Division were of opinion that there ought to be an end of the case. Accordingly, their Lordships pronounced judgment as follows:—

The Lords, having heard the counsel for the parties, in respect of the minute for the Trustees of the Harbour of Dundee, in which they agree that it should be held that a verdict has been returned in favour of William Stark Dougall, upon the first issue; and in respect of the immemorial use of the harbours of Ferry-Port-on-Craig, for receiving ships and vessels, and for the loading and unloading of cargoes shipped and unshipped thereat, without the said Trustees or their predecessors levying any dues on the said ships or cargoes: Find that the said Trustees have no right or title to interfere with the rights or alleged rights of the said William Stark Dougall: Therefore, assoilzie the said William Stark Dougall from the whole conclusions of the action at their instance against him: And, in the suspension and interdict, SUSPEND, INTERDICT, and DISCHARGE in terms of the prayer of the note of suspension and interdict, and declare the interdict perpetual, and decern; Find the said

William Stark Dougall entitled to expenses in both actions, both prior and subsequent to the conjunction: Appoint an account thereof to be lodged, and remit to the auditor to tax the same and to report.

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The *Solicitor-General* (Sir *F. Kelly*) and Mr. *Bethell*, for the Appellants; Mr. *Rolt* and Mr. *Moncreiff*, for the Respondent.

The LORD CHANCELLOR (*a*):

My Lords, there has been no sufficient evidence at any period of this litigation to show that the harbour of Ferry-Port-on-Craig, belonging to the Respondent, constitutes what is termed properly a free port. Now, nobody has disputed that the harbour of Dundee is a free port. And ultimately the question came before the Courts below upon the double pretension set up by way of defence on the part of the Respondent. He said, first, that the Appellants had no right to sue him, because ships had from time immemorial always been loaded and unloaded at Ferry-Port-on-Craig, directly opposite to Dundee harbour, with which there was an hourly, certainly a daily, communication by the two ferries backwards and forwards. It is utterly impossible, therefore, that the Appellants could be ignorant of what was taking place at Ferry-Port-on-Craig. The Respondent was ready to prove that from time immemorial ships had so loaded and unloaded at his harbour, and that the Appellants had never received any toll in respect of those ships. The second defence was of a different character. It asserted that Ferry-Port-on Craig was in itself actually a free port; and that so far from the Appellants having any right to levy tolls at Ferry-Port-on-Craig, he, the Respondent, enjoyed that right, and enjoyed it exclusively.

Lord Chancellor's opinion.

My Lords, the Appellants were advised to admit the

(*a*) Lord St. Leonards.

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first issue, and then the case stood thus—that their claim in the action of declarator was to be tried upon their own concession, that during time immemorial ships had loaded and unloaded at the harbour of Ferry-Port-on-Craig, and that they had never levied any dues upon them. It became, in the view of the Court below (and I think this is the proper view of the case), unnecessary to consider the question raised in the second issue, and a declarator was thereupon pronounced by the Inner Division. The substantial effect of that declarator was not to establish any title to a free port in the Respondent, but to absolve him wholly from the claim of the Appellants.

Now, there has been a great deal of discussion upon the question, whether this is a case of positive or of negative prescription; and I believe that the law of Scotland has been very much embarrassed by the introduction of those terms. They are not to be found in the Act of Parliament (*a*); they do not properly belong to the subject, nor do they appear to me properly to describe it;—for there are many cases in which you might very well, in point of language, say that there is a negative prescription even where a positive prescription also intervenes. The two must often be blended with each other. And I believe that there has been more contention about the meaning of those words than upon the substance of the cases in which those words have been matter of discussion.

My Lords, the Act of Parliament (*a*) itself is the simplest Act of Parliament that ever was passed. It is a statute which he who runs can read;—there was never anything so plain and so easily intelligible. It applies solely to heritable rights—that is, rights of real property; and it declares that where there has been possession upon a title for forty years, the right shall be

(*a*) The Scotch Statute of 1617, c. 12.

good against the world;—that is to say, no extrinsic circumstances shall ever be brought forward to affect it;—although perhaps originally it may have been defective; for it was not to support good titles, but to fortify infirm ones, that the statute interposed.

All Statutes of Limitation have for their object the prevention of the rearing up of claims at great distances of time when evidences are lost; and in all well-regulated countries the quieting of possession is held an important point of policy. In Scotland this principle was very early recognized.

Our old English Statute of Limitations (*a*) barred the remedy, but it did not bar the right; but our new enactments bar the right as well as the remedy; so that the effect now is not simply to exclude the recovery, but to transfer the estate (*b*).

Now, notwithstanding all that we have heard as to positive prescription and negative prescription, it seems to me that there never were rights which stood upon more distinct grounds, or rights to which the clear provisions of the Act of Parliament more distinctly applied.

If the Respondent here had set up a claim to the harbour of Dundee, I could have understood a great deal of the argument which I have *not* understood as applicable properly to this case. But nobody disputes the title to the harbour of Dundee. It stands upon

(*a*) 21 Jac. 1, c. 16.

(*b*) The 3 & 4 Will. 4, c. 27, extinguishes the right; 2 Sug. Vend. and Pur., 11th edit., p. 608. Under this Act possession destroys the adverse title; and is in many instances equivalent to a transfer of the estate; 1 Spence's Eq. Juris. 257. Nevertheless, says Mr. Hayes (Introduction to Conveyancing, 5th edit., vol. i. p. 269), the *negative* effect of the Statute must not be confounded with the *positive* effect of a Conveyance! Therefore the present English law is not much behind the Scotch in subtlety and refinement; and even an imitation of phraseology is discernible.

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grounds which cannot be shaken; and the Respondent is only *defending* himself. Now I must say that, looking through the authorities, I find every confirmation of that which I had believed to be the true distinction between positive and negative prescription. The words are clear enough—I look at the substance; and I am perfectly satisfied upon the authorities that the prescription applicable to this case is what is called by the Scotch law a negative prescription; and, therefore, I am clear that forty years' enjoyment would be a bar except some other right were set up.

Then an attempt was made to distinguish this case by showing that the Appellants, being trustees for a public purpose, could not, by non-usor or dereliction, injure or prejudice the public right. Your Lordships have had no authority cited to establish any such proposition; but the authorities which have been cited on the other side clearly establish that corporations—that is, public bodies, may be, as they ought to be, dealt with as if they were private persons, the same consequences arising.

We have been told that the Act of Parliament establishing the Appellants as trustees of the Dundee harbour does positively enact, that within the whole limits of the harbour of Dundee and its precincts there shall be levied these particular tolls; and that it is utterly impossible, without repealing that Act of Parliament, to say that this particular harbour of Port-on-Craig, which is admitted to be within those limits, is exempt from the tolls imposed by the Act.

If, however, your Lordships look at the particular words of the Act, you must be satisfied that the Legislature never intended to interfere with any particular right of any particular owner within those limits. There was a clear exemption on the part of Mr. Dougall, and that exemption is not taken away.

The only remaining question will be with respect to the terms of the interdict, and the terms of the declarator.

The interdict was pronounced, as all such interdicts are, before the final decision, when the Court had not before it all those facts upon which it ultimately founded its final decision. I am, therefore, not at all surprised to find that that interdict does go further than appears to be called for; and I therefore propose to your Lordships that you shall save the rights of the Appellants to this extent, that the interdict shall not be deemed to go beyond the finding of the first issue as admitted on the record.

Then we come to the Declarator itself. By the admission of the issue, and the decision of the Court below upon that admission, the Respondent has been absolved from the Appellants' claim. That is all. There is no ground whatever to alter that Declarator.

In former times, my Lords, it was not usual to assign reasons when this House affirmed the decrees of the Courts below (*a*). I must say, however, that I think it better to do so; bearing in mind that the great object is not simply to administer justice, but to administer it in a manner which shall satisfy even the parties that the cause has been thoroughly considered. Therefore I trust that the time has not been wasted which I have occupied before your Lordships. I feel that there is no necessity for going through the authorities cited, because, after full consideration, I entirely agree with the Court below; and I shall move your Lordships to affirm, with the saving which I have specified, the interlocutors complained of, and to dismiss this appeal

(*a*) Lord *Eldon* and Lord *Redesdale* introduced the practice of assigning reasons for affirmances; the judgments of the House, though the same in result, resting often upon grounds quite different from those of the Court below.

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with costs. I say with costs, because, although it is proper that a variation should be made, yet, as it might have been done upon an application to the Court below at the time, without coming here at all, I apprehend your Lordships will hold that an appeal, thus brought up unnecessarily, cannot well be dismissed without costs.

Lord Chancellor's opinion.

Lord BROUGHAM:

Lord Brougham's opinion.

My Lords, I assent to the course suggested by my noble and learned friend.

I abstain from entering into any general discussion of the question of prescription, except in so far as it is absolutely necessary for disposing of the present case.

Now, it has been contended that there can be no negative prescription of a right such as the right here claimed, and upon more grounds than one; among others, because the demand of the Appellants—the trustees of the Dundee harbour—involves a public right, to be exercised for public purposes, for the benefit of the public.

My Lords, I can see no warrant in the text-writers, or in the cases, for this proposition, which, on the contrary, I apprehend, is clearly negatived by the authorities. I would particularly refer your Lordships to the case of *Rolland* v. *Craigevar* (*a*), where a claim was advanced by a Lord of Regality, who had summoned a party before him as owing suit and service to his Court. The defence set up was an allegation of immunity, on the ground of the forty years' negative prescription. Craigevar had charged for non-attendance. The Defender suspended the charge; and the ground of suspension was, that for forty years the Defender had not been summoned; to which he added another ground, namely, that he had during that period been

(*a*) Morr. 10, 724.

cited to the Sheriff's Head Court, whereby he not only prescribed on the one hand for an immunity from attending the Regality Court by a negative prescription; but, on the other hand, seemed to make out something in the nature of a positive prescription in respect of his having actually given suit and service to the Sheriff within the period required. One point taken in the argument was the very point which has been taken here—that the right claimed was a public right, constituted by the Crown, and not subject to a negative prescription. But the judgment of the Court found the reasons of suspension relevant and sufficient, unless (which shows that the decision was confined strictly to negative prescription) the Lord could offer to prove that the Defender had in fact attended his Court within the forty years, which would have been evidence of an interruption of the negative prescription.

My Lords, the case of *Campbelltown* v. *Galbreath* (*a*) has been relied upon a good deal in the discussion in the course of this argument; but I can find nothing there which goes against the present decision. On the contrary, my Lord *Moncreiff*, in his very luminous opinion, goes expressly on the doctrine of immunity by dereliction; and in the case of the *Magistrates of Edinburgh* v. *Scot* (*b*), Lord *Mackenzie* plainly admits the right to set up an immunity on the ground of negative prescription simply—that is to say, a dereliction during forty years.

But, my Lords, it is not sufficient to show that at a particular place no dues have been levied. It must also appear that the non-claim and non-levy has been such as to be wholly inconsistent with the right attempted to be established. If there had been no harbour, no landing of goods, or no shipping and unshipping; if the party claiming the right of harbour had not the means

(*a*) 21 Feb. 1845; 7 Sec. Ser. 488.
(*b*) 10 June, 1836; 14 Dun. Bell. & Mur. 931.

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of levying dues; the case would not be one of negative prescription, because negative prescription proceeds upon a dereliction of right under circumstances in which the party claiming the right might have exercised it. To illustrate what I mean, take for instance the case of a right of thirlage (*a*), which, it is admitted, may be lost by negative prescription. Suppose the Lord has during upwards of forty years possessed his land; but suppose during the whole of that time there was no corn growing. The negative prescription would not apply in such a case, there being no *grana crescentia* upon which the right would operate; so here, if there had been no harbour, of course there could not have been a negative prescription. But here there has been a port; that port by admission, which is to be taken as the verdict of a jury, has been used as a port during upwards of forty years; and vessels there loading and unloading have been suffered to load and unload without any toll;—I therefore hold that this is a case of immunity; that the judgment is correct which affirms that immunity; and that there is nothing in law to render it incapable of enjoyment.

Then, my Lords, as to the argument upon the Act (a private Act) establishing these trustees, I entirely agree with my noble and learned friend, that that statute is to be taken as matters stood at the time when it was passed; and if this right existed in the owner of Ferry-Port-on-Craig from time immemorial, I can see nothing in this statute to take it away.

My Lords, for the purpose of removing all doubt as to the positive scope of the interdict, I think that certain words may be added to the judgment of the House, so as to prevent the prejudicing of any right or question which cannot now with propriety be decided.

(*a*) The obligation to carry grain to the Lord's mill.

IT IS ORDERED and adjudged, that the said Petition and Appeal be, and is hereby dismissed this House, and that the said interlocutors be, and the same are hereby affirmed, subject to the following declaration, viz.: that the suspension and interdict prayed for in the Note of Suspension and Interdict for the said Respondent, and granted and made perpetual by the said interlocutor of the 18th of July, 1849, shall only operate to interdict, prohibit, and discharge the said Appellants, and their clerk, collectors, officers, and servants, from levying any dues on ships or vessels received in the harbours of Ferry-Port-on-Craig, or on the cargoes shipped or unshipped thereat; but the said suspension and interdict shall not operate to prejudice or affect in any other respect the title, rights, or privileges of the Appellants in respect of the free port or harbour of Dundee, or to decide or imply that the Respondent, or his said surviving disponees and trustees, had or have a right of free port at the said harbours of Ferry-Port-on-Craig, or was or are entitled to levy any dues or tolls thereat: And it is further ordered, that the Appellants do pay or cause to be paid to the said surviving disponees and trustees of the said Respondent the costs incurred in respect of the said Appeal, the amount thereof to be certified by the Clerk Assistant.

DODDS & GREIG.—BURN.