loss of the same rent for those four months of the year during which it was treated as not lost to those prior incumbrancers. I think therefore that the amount recovered in the action ought to be reduced to £230.

I do not, however, think that the determination of this point in the appellants' favour ought to make any difference as to costs. Considering the position of the parties, and the nature of the larger question raised by the appeal, my opinion is that all the costs, here and below, ought to be paid by the appellants.

Lord Watson—My Lords, I have had the opportunity of considering a print of the opinion of the noble and learned Earl (the Earl of Selborne), and I concur in it.

The reasoning of the learned Judges who constituted the minority of the Court of Session depends upon two propositions, which are in my opinion equally fallacious. One of these is, that separate fire policies covering the same subjects, effected without privity by independent incumbrancers, for the protection of their several interests, must all be treated as if they had been effected by the owner of the subjects, if he is made a party to each policy in respect of his right of reversion only, and undertakes to pay the premiums of insurance. The other is, that payment to a first incumbrancer of a sum which does not represent the difference between the insurable value of the subjects and their value after deterioration by fire, but is sufficient to reinstate them, must necessarily be regarded as full indemnity to a postponed incumbrancer in any question with his own insurers, although the sum so paid is pocketed by the insured and is not expended on reinstatement.

The Act 14 Geo. III. cap. 78, section 83, was not pleaded in the Court below, and it is not referred to in the appellants' case, although it was founded on in the argument addressed to your Lordships. Having regard to the preamble of the statute, and to the general scope of its provisions, it humbly appears to me that if a question were to arise as to its applicability within the realm of England, beyond the Bills of Mortality, the decision in *ex parte Gorely*, 4 De G. J. & S. 447, would require to be carefully considered. In my opinion the Act was not intended by the Legislature to have any application to Scotland. It was passed in order to amend previous legislation which had no reference to that country, and the whole tenor of its enactments, and the remedies which these provide, appear to me to indicate that they were not meant to be administered by Scottish Courts.

I am also of opinion that the respondents have failed to show that they had an insurable interest in the rent of the subjects embraced in their security, but I agree with the Lord Chancellor that their failure upon that subordinate point ought not to prejudice their right to the costs of this appeal.

The House affirmed the judgment appealed against with a variation deducting the amount given for the alleged loss of rent, the respondents not having an insurable interest in rent for which an allowance had already been made to prior bondholders. Appeal dismissed with costs.

Counsel for the Appellants—Finlay, Q.C.—Wood Hill. Agents—Dawes & Sons, for H. B. & F. J. Dewar, W.S.

Counsel for the Respondents—Rigby, Q.C.—J. Gorell Barnes, Q.C.—J. Hurst. Agents—Lindo & Company, for Smith & Mason, S.S.C.

Monday, July 30.

(Before the Lord Chancellor (Halsbury), Lords Watson, Herschell, and Macnaghten.)

(*Ante*, March 4, 1887, 14 R. 544; 24 S.L.R. 377.)

HUNTER AND OTHERS *v.* NORTHERN MARINE INSURANCE COMPANY, LIMITED.

Harbour—Insurance—Marine Insurance—River—Fairway of Navigable Channel.

Held (*aff.* judgment of First Division) that in a policy of insurance on a ship for the voyage, and "while in port thirty days after arrival," the meaning of the term "port," as applicable to the port of Greenock, did not include the fairway of the navigable channel of the river Clyde *ex adverso* of the harbour works.

This case is reported *ante*, March 4, 1887, 14 R. 544, and 24 S.L.R. 377.

Hunter and others, owners of the "Afton," appealed.

At delivering judgment—

The Lord Chancellor—The question whether the barque "Afton," insured under a policy while she was in port, suffered a misfortune which entitles her owners to recover against the underwriters, depends, first, upon the construction to be given to the word "port," and secondly, when the meaning of that word has been ascertained, upon whether the accident is proved to have happened within the limits contemplated by the contract.

The word "port" is undoubtedly ambiguous. Not dealing with a policy of insurance, then, no doubt what is meant by the word "port" is what Lord Esher, in the *Garston Ship Company* v. *Hickie*, 15 Q.B.D. 580, describes as what shippers of goods, charterers of vessels, and shipowners would mean by a port—that is to say, that a legal port might be, according to the general understanding of the classes of persons described by Lord Esher, either restricted or enlarged by mercantile usage. There are, however, some well-received elements which, I think, according to any usage one would expect to find. I do not know that these ordinary elements are anywhere more concisely set forth than in that treatise ascribed to Sir Matthew Hale. "A port is an haven, and something more—1. It is a place for arriving and unlading of ships or vessels. 2. It hath a superinduction of a civil signature upon it, somewhat of franchise and privilege, as will be shewn. 3. It hath a ville or city or borough, this is the *caput portus* for the receipt of mariners and merchants, and the securing and vending of their goods and victualling their ships, so that a port is *quid aggregatum*, consisting of somewhat that is natural, viz., an access of the sea, whereby ships may con-

veniently come for safe situation against winds, where they may safely lie, and a good shore where they may well unlade; something that is artificial, as quays and wharfs and cranes and warehouses and houses of common receipt; and something that is civil, viz., privileges and franchises, viz., *jus applicandi jus mercati*, and divers other additaments given to it by civil authority."

It is very common that when a port so described is in question no such difficulty as arises here interferes with the determination of the question of fact. The arrival of a vessel at a particular place, and the mercantile usage applicable to such a place, solves the problem without much real difficulty, or what the Master of the Rolls said in the case already quoted. What are the proper tests to apply when the question arises whether the vessel has or has not arrived at the port at which she is to deliver her cargo, to quote the language of the noble Lord—"Now, what will such a port be? What do you go to a port for? Because you want either to load or unload goods. Every one who understands ships knows that you cannot conveniently load or unload goods in a place where the ship itself would be in danger. Therefore all people possessed of common sense, instead of taking their boats on to a beach on an open sea, where they would be knocked to pieces in a storm, go to what they call a port, which is always a sheltered place. It is a place of safety for the ship and the goods whilst the goods are being loaded or unloaded. There will never be a port, in the ordinary business sense of the word, unless there is some element of safety in it for the ship and goods. Now, what will constitute a port as regards the loading and unloading of goods and the safety of the ship during the process? What will more certainly be a port in the sense of all persons concerned in the use of it than a natural port? That is, a place in which the conformation of the land with regard to the sea is such that if you get your ship within certain limits she is in a place of safety for loading and unloading."

But the difficulty in this case arises from the fact that there are, so to speak, rival ports along the course of the Clyde, and it is essential for the pursuers to establish that the "Afton" was capsized and stranded within the limits of the port of Greenock. I entirely agree with Lord Shand that the port as fixed by statute for fiscal purposes has no relation to the question now in debate. The port of Cardiff, for instance, extends for sixty miles for Customs purposes, and within that sixty miles are comprehended several other ports perfectly well known and recognised as different and independent ports in the commercial sense, although comprehended within the ambit enacted for Customs purposes. I also agree with Lord Shand that the test applied by one of the witnesses, namely, that the port must be where a ship can legally call upon a consignee of cargo to take delivery, is obviously unsound. I also agree that the argument derived from the Act of Parliament of 1866 is inconclusive, and I should follow the learned Judge's reasoning, for it is impossible to suppose that that statute has changed the meaning of the "Port of Greenock" as that term was previously understood in its natural and ordinary commercial sense by business men in making their contracts of charter or insurance.

Now, the place where the "Afton" stranded is about a quarter of a mile from the shore of Greenock, and the question whether or not it is within or without the limits of the port of Greenock is a pure question of fact. I think there was some evidence which, unexplained, might have induced me to come to the conclusion that it was. The reception of port dues, the loading or unloading of vessels bound to the port, are the natural and appropriate sources of proof. But the element of doubt which exists in this case arises from the fact that the accident happened in a land-locked waterway, as to which it may be said that the evidence is as applicable in some respects to Glasgow as to Greenock. The place called the Tail of the Bank has been used by vessels consigned to other ports, at which it was common for vessels to anchor when it was intended to lighten them of part of their burden, and the goods so lightered, and the vessels so lightened, have proceeded to ports other than Greenock. The only class of evidence which has made me hesitate has been the exaction by the Greenock authorities of dues from vessels anchoring at places which, if those dues had been lawfully exacted, would be almost conclusive to show that the *locus in quo* was within the limits of the port of Greenock. But the weight of that evidence has in my judgment been so reduced by proof of successful resistance to their dues that I am unable to differ from the Lord Ordinary and the majority of the learned Judges who concurred with him in the conclusion at which they arrived, that the *locus in quo* is not proved to have been within the limits of the port of Greenock. I doubt whether the history of the port throws any light upon the questions under debate. Both in Scotland and in England the right to erect a port is part of the royal prerogative. No port can exist except under the authority of the Sovereign, and if the question were the legal existence of such a port as Greenock the historical evidence would be conclusive, but it does not appear to me to touch the question of the limits of the port thus proved to exist. For these reasons I am of opinion that it is not established that the *locus in quo* was within the limits of the port of Greenock.

The Lord Ordinary decided the case in favour of the defenders, and expressed an opinion that the taking of the vessel into Caird's Dock, or the starting on her voyage, even if within the limits of the port of Greenock at the time of the happening of the accident, would have put an end to the risk. In the view I take of the case it is not necessary to decide these points, but I wish to guard myself against being supposed to concur in either of these views. I move your Lordships that the interlocutor appealed from be affirmed, and this appeal be dismissed with costs.

Lord Watson—The barque "Afton," of Ayr, arrived at Greenock from Java, on January 22, 1885, and discharged her cargo in the Victoria Harbour. On February 6 the vessel was taken for repairs into a shipbuilder's private dock within the ambit of the harbour works, and on the 12th of the month she left that dock in ballast for the port of Glasgow in tow of a tug-steamer, when she was capsized by a sudden gust of wind, and sustained serious damage. At the time when the accident occurred the stern of the "Afton" had reached a point in the waterway of the Clyde

500 feet or thereby outside the harbour works of Greenock. The "Afton" was covered by three policies of insurance for a voyage from Java to any port of discharge in the United Kingdom, "and whilst in port for thirty days after arrival," and the present action was brought by her owners, the appellants, against the underwriters, who are respondents, for the costs of raising and repairing the vessel. The Lord Ordinary (Trayner) assoilzied the respondents, being of opinion that the *locus* of the accident was not within the port of Greenock, and that the vessel had left the port on February 6, within the meaning of the policies, when she went into a private dock for repairs. The First Division of the Court (Lord Shand dissenting) affirmed the interlocutor of the Lord Ordinary upon the first of these grounds, without disposing of the second. Lord Shand was of opinion that the Lord Ordinary was wrong upon both points, and that the appellants were entitled to decree.

The harbour works of Greenock are constructed on the south shore of the river Clyde, and consist of a series of quays or breastworks abutting on the river, with inner docks or basins, the majority of which are tidal. The estuary of the Clyde *ex adverso* of these works is of considerable width, but the navigable channel is contracted by a sandbank on its north side, which extends all the way from the eastern to a point not far from the western extremity of the harbour works. The distance from the front of the works to the edge of the bank averages about 1000 feet, and at the place where the "Afton" capsized is about 800 feet, so that the vessel had crossed the *medium filum* of the waterway. At the west end of the sandbank, to the north of the waterway proper, there is a roadstead known as the Tail of the Bank, which is chiefly used as an anchorage by foreign-going vessels passing up and down the river on their way to and from Greenock or Glasgow and the intermediate ports, of which there are several. It is customary for inward-bound ships of large burthen, whilst anchored there, to lessen their draught of water by discharging part of their cargo, which is conveyed in lighters, sometimes to Greenock and sometimes to Glasgow. It is also customary for outward-bound ships to moor at the Tail of the Bank for the purpose of taking on board their stores and the complement of their crew.

According to the appellants' argument the port of Greenock comprehends what they represent as the bay of Greenock, being a large area of water *ex adverso* of the south shore, between Garvel Point on the east and White Farland Point on the west, extending so far northwards as to include the whole navigable channel used by vessels passing up and down the river, as well as the Tail of the Bank. The case submitted for the respondents is, that the port of Greenock is confined to the artificial harbour works, and to such part of the river as may be necessary for and is actually used by vessels moored alongside the piers or quays. A great mass of evidence—oral and documentary—has been adduced in support of either view. It was not disputed that what is popularly or commercially understood to be the port of Greenock must be taken to be the port for the purposes of this case.

I doubt whether it would be expedient, and I do not think it is necessary, to attempt any definition of the various circumstances or *indiciæ* which will be sufficient to give to a particular piece of water the character of a port in a popular or commercial sense. In many instances its natural or artificial features of themselves go a long way to indicate what must be popularly taken to be the limits of a port; but the case of *The Sea Insurance Company* v. *Gavin*, decided by this House in 1830 (4 W. & S.), shows that an open and exposed roadstead may be a port within the meaning of a marine policy. I think it was rightly held in *Garston Ship Company* v. *Hickie*, 15 Q.B.D. 580, that in ascertaining its popular limits no aid can be derived from statutory definitions of a port for fiscal purposes. That is obviously true in the present case, because the port of Greenock, as defined by Treasury Warrant, in pursuance of the Customs Consolidation Act, 1853, includes the greater part of the Firth of Clyde, and all seaports on the mainland, or in the Hebrides, from Ardnamurchan Point to West Loch Tarbet. The boundaries of the burgh of Greenock, as fixed for police purposes by a series of municipal Acts, appear to me to be equally beside the present question.

In my opinion the most important consideration in all cases like the present must be whether the area in dispute has or has not been used and treated as an integral part of the port by vessels frequenting it as well as by the port authorities. I do not think the oral evidence—which chiefly consists of conflicting opinions derived from facts otherwise proved—throws much, if any, light upon the controversy between the parties. Upon the whole evidence I have come to the conclusion that both Courts below were right in holding that the place where the "Afton" met with her mishap on the 12th February 1885 is not within the limits of the port and harbour of Greenock. The contour of the south shore between Garvel Point and White Farland Point does not indicate the existence of anything like a bay enclosed by two headlands, although the phrase "bay of Greenock" does occur in some of the documents produced. A straight line drawn between these points would include but a small portion of the area claimed as a bay by the appellants. Immediately, or at a very short distance, outside the face of the harbour works there is the navigable channel, of inconsiderable width, which is in constant use by shipping of all sorts and sizes, passing and repassing between Glasgow or other places on the Clyde and home or foreign ports. The Tail of the Bank is not used for these purposes, and affords a safe harbourage for vessels of large size, but there are no physical features to indicate that it is more intimately connected with Greenock than with other ports on the river.

According to the law of Scotland the right of erecting and holding public ports and harbours is vested in the Sovereign, and neither communities nor individuals can possess that right without a grant from the Crown or the authority of Parliament. In some instances the Crown has given a right of free port, with the privilege of levying dues, over a large area of water, as in the case of the royal burgh of Campbeltown, whose grant expressly includes the whole loch or bay—*Magistrates of Campbeltown* v. *Galbreath*, 7 D. 220. The port of Greenock was the subject of

a grant from the Crown in 1670 to Sir John Shaw, the owner of the lands and barony of Greenock, and superior of the burgh, which conferred upon him and his successors power "to repair and build free ports, harbouries, and havening places upon any pairt of the ground of the said lands," with all rights and privileges pertaining to other free ports, including such shore silver, anchorage, and other duties as these were in use to levy. The charter expressly confines the grant to the foreshore of the barony, and to artificial works upon it, and gives the grantee no right of port in the bay of Greenock or in the navigable waters of the Clyde. It appears from the municipal records of Glasgow in 1693 and 1696 that two ports had then been established on the foreshores of the barony, the one at the burgh of Greenock and the other at Cartsdyke, between the burgh and Garvel Point. These were in all probability mere landing places upon the open beach, ports which Sir Thomas Craig (De Feudis, 1, 16, 12) describes as places *in quibus naves appellunt;* but in the year 1705 Sir John Shaw raised a sum of money, by subscription from the inhabitants of the burgh, "for building the harbour there situated on a small beginning." The subscription proved to be insufficient for the completion of the works contemplated, and in 1751 a local Act was passed authorising a tax upon all ale or beer sold within the burgh, to be paid to the Magistrates and Council, who were appointed trustees for cleaning and excavating, building, and repairing the harbour and piers. In 1772 the then proprietor of the barony disponed in feu to the Magistrates and Council "all and whole the harbour of Greenock, and piers and quays of the same, which have been all built and gained off the sea since 1700, consisting of and comprehending eight acres three roods and ten falls, conform to a plan, signed by him of this date, with the anchorages, shore, bay, and ring dues payable by all kinds of ships or vessels coming into the harbour of Greenock or into any other harbours that may be built betwixt the west side of the Kirk burn and the east side of the Royal Closs in Greenock." It is clear that the feu-charter of 1772, which transferred the harbour to the burgh, conveyed nothing except the artificial works defined by plan and measurement, and confined the right of exacting dues to vessels entering or using these works, or any additions which might be made to them. Having regard to the terms of his own title, it is equally clear that the superior made over to his feuars all the dues which he himself had a legal right to exact. The fact may be noticed here that in the year 1816 the Magistrates and Town Council, upon an application to His Majesty's Barons of Exchequer in Scotland, obtained a charter of gift from the Crown of the sandbank already mentioned, with the professed object of building dykes upon it for the protection of the bay and harbour from the east and north winds, and for making it otherwise useful without destroying or injuring the navigation of the river. I cannot understand what assistance the appellants derive from the terms of that deed. In the petition to the Barons of Exchequer, which the charter narrates, the sandbank is not described as lying in or bounding the port of Greenock (which is now the appellants' contention), but as situated in the estuary of the Clyde, and in the dispositive clause of the charter it is described as "opposite to the harbour of Greenock." Thus far the evidence does not suggest that the port of Greenock extends beyond the limits of the artificial works, and so much contiguous water space as may be requisite for the accommodation of vessels which use them.

I do not say that in Scotland the limits of a trading port, as understood by persons engaged in commerce, must of necessity be coextensive with the original grant from the Crown. They may be extended by Parliamentary recognition or by the usage of the port, but it appears to me that the terms of the legal grant are an element of some importance in considering the history of the port and its present commercial limits. Since their acquisition by the municipality in 1772 the harbour works have been greatly enlarged and improved in virtue of powers conferred by a succession of local Acts, commencing in 1773 and ending in 1882. Under these Acts the port and harbours have for a very long period been vested in a body of statutory trustees, who constitute the port authority for Greenock. They levy statutory rates, which are exigible solely in respect of the use of the artificial harbour works, and are applicable to the maintenance, repair, and extension of these works. At the time when the harbour was transferred to trustees the Magistrates and Council retained all rights which they had to levy anchorage, shore, bay, and ring dues, and these, or at least anchorage dues, were until recently collected by the Harbour Trust along with their statutory rates, and paid into the common good of the burgh. The subjects vested in the port authority by these statutes are the port and harbours of Greenock, and their enactments do not appear to me, when closely examined, to contain any recognition by the Legislature of the waterway of the Clyde or of the Tail of the Bank as forming a part of the port. The more recent statutes are decidedly unfavourable to that view. They limit the powers and jurisdiction of the trustees to the artificial works and harbours and the entrances to the latter, and the Act of 1866, which is now the leading statute, expressly distinguishes the port and harbours from the stream of the river and the Tail of the Bank in terms which, taken by themselves, plainly indicate that neither of these places is within the ambit of the statutory port. It must of course be kept in view that the main object of the statutes was to provide for the maintenance and enlargement of the artificial works, and their provisions are therefore not necessarily conclusive as to the limits of the commercial port. It is sufficient for the purposes of the present case to say that their enactments lend no support to the appellants' case. The duty of erecting and maintaining lighthouses and beacons, removing wrecks and other obstructions, of licensing pilots, and of making and enforcing regulations for the navigation of the river and firth of Clyde, including that part of the river which is *ex adverso* of the Greenock harbours, belongs exclusively to a statutory board, known as the Lighthouse Board. The cost incurred by the board in the execution of their Acts is defrayed by special rates, which they are empowered to levy from all vessels which navigate the waters under their jurisdiction. They have also the duty of deepening and dredging the navigable

channel at the expense of these rates, but, so far as concerns that part of the channel which is opposite to Greenock Harbour, it is provided that the dredging shall be performed by the Greenock Harbour Trustees, either at their own instigation, after due notice to the board, or upon the requisition of the board; and, in the case of difference of opinion as to the work necessary to be executed, the Sheriff-Depute of the county is authorised to decide between them. In all cases the cost of the work is borne by the board, and not by the harbour rates.

The appellants' counsel laid considerable stress upon sections 96 and 134 of the Greenock Harbour Act of 1842, which authorise the trustees to cause the harbour, "and the bed of the river opposite the same," to be cleansed and deepened in such manner and to such extent as they may think fit, and also to remove "any wreck and other obstructions to the said harbours and the approaches thereof." The cost of these operations is laid upon the harbour rates, and I think the operations sanctioned upon the bed of the river were to be confined to the immediate vicinity of the works, and were meant to secure a sufficient depth of water, free from obstructions, alongside the piers and at the harbour entrances.

The appellants maintain that for a long course of years anchorage dues were levied from vessels moored in the waterway or at the Tail of the Bank quite irrespective of their intended port of discharge. As already explained, these dues, although collected by the trustees, were in reality levied by the municipality as feuars of the port, and not by the harbour authority. Still, I do not think that circumstance would impair the significance of the fact, if it could be shown that they were regularly exacted as dues for the use of the port of Greenock from vessels which did not enter or use the harbour works for any purpose. But the evidence comes far short of that. The anchorage dues amounted to a considerable sum annually, but the trade of the harbour of Greenock has been very large, and no attempt has been made to prove the proportion of the total sums collected from vessels which merely anchored, but did not break bulk, within the limits claimed by the appellants. So far as regards vessels which did not unload at or into Greenock Harbour, the evidence is both scant and unsatisfactory, and merely proves that attempts were frequently made, often, if not generally, without success, to levy anchorage dues from them. Eventually these dues were acquired by the Harbour Trust, and have not been exacted since the year 1868. There is some evidence to show that many years ago vessels occasionally dropped their anchor outside the harbour works, but it is conclusively established that the narrow waterway is not and cannot, without detriment to the navigation of the river, be used as a place for mooring and loading and unloading ships. There are no doubt several buoys with mooring rings along the edge of the sandbank on the north side of the channel, but these have not been used for loading and discharging, and were placed there for the convenience of vessels warping out of or into the inner harbours.

In these circumstances the appellants appear to me to have failed to prove any facts which can reasonably be held to warrant the inference that the port of Greenock extends to the whole of the navigable channel or to the Tail of the Bank. The ambit of the commercial port must in my opinion be taken to include merely the artificial works vested in the Harbour Trustees, and such contiguous water space as may be necessary for the accommodation of vessels using these works. What the precise extent of that space may be I do not find it necessary to consider, because it cannot embrace that part of the channel where the "Afton" capsized. The roadstead at the Tail of the Bank may be in a certain sense a port, but it is a roadstead over which the Greenock Harbour Trustees have no authority or control, and is used as a common anchorage by ships navigating the firth and river, whatever be their starting place or destination. It is no more an adjunct of the harbour of Greenock than of the harbours of Broomielaw or Port Glasgow.

I am accordingly of opinion that the interlocutor appealed from ought to be affirmed, on the ground that the "Afton" was not at the time of the accident within the limits of the port of Greenock. I am not at present prepared to concur in the second reason assigned by the Lord Ordinary for his judgment. The respondents argued alternatively, that assuming the place of the accident to be within the limits of the port of Greenock, the "Afton" was no longer "in port," within the meaning of the policies, after she had broken ground, and was proceeding on a new voyage. In my opinion that is a question requiring consideration, and is not (as Lord Shand seems to hold) necessarily ruled either by *Garston Ship Company* v. *Hickie*, 15 Q.B.D. 580, or by *Roelandts* v. *Harrison*, 9 Ex. 444, but in the view which I take of the facts of this case it is unnecessary to decide the point.

Lord Herschell—The circumstances which have given rise to this appeal may be very shortly stated. The appellants' barque, "Afton," was insured by an ordinary marine policy, "at and from port or ports in Java to any ports of call or discharge in the United Kingdom, or France, or the United States, and while in port during thirty days after arrival." She arrived at Greenock, to which port she had been ordered, on the 22d of January 1885, and discharged her cargo in the Victoria Harbour. On the completion of her discharge on the 6th of February she went into Caird's Dry Dock for repairs. These were finished on February 12, and on the same day she was taken in tow in order to proceed to Glasgow to load a cargo of coals for Brisbane. She had reached a point about 500 yards distant from the artificial works of the harbour when she was struck by a squall of wind, capsized, and drifted on to a sandbank opposite the Custom House Quay. The disaster happened within thirty days after the vessel's arrival at Greenock, and the question is whether it occurred while she was "in port."

I agree with the view, which has been more than once expressed by learned Judges, that in construing such a contract as that with which we are dealing, the word "port" must be taken to have been used in its popular or commercial sense—that is to say, as applying to what would be understood as the port by shippers, shipowners, and underwriters. Where there is a common understanding among such persons as

to the limits of a port the matter is free from difficulty. Here the appellants attempted to prove such a common understanding. The learned Lord Ordinary came to the conclusion that they had not succeeded in doing so, and after carefully considering the evidence I see no reason to differ from him. In the absence of any such common understanding how is the question to be determined? It appears to me that you must then consider what are commonly understood to be the characteristics of a port, and what are in general the tests for determining its limits, and apply the conclusions arrived at to the particular case.

A port is a place where a vessel can lie in a position of more or less shelter from the elements, with a view to the loading or discharge of cargo. The natural configuration of the land is therefore often a most important element in determining what are the limits of a port. All the waters within given boundaries which possess the common character of safety and protection would be generally admitted to be within its ambit. Where, however, a port is one of several situate on the same river, it is obvious that the natural configuration of the land is not of the same importance, and does not afford the same guidance. I have carefully examined the plans before your Lordships in the present case, but do not find myself led by them to the conclusion that the disaster to the "Afton" occurred within the port of Greenock, or assisted in fixing the boundaries of that port. Under these circumstances I think we must have recourse to the history of the port, and its user, and must ascertain what is the area which has served the purposes of a port.

The port of Greenock is of comparatively recent origin, and the charter which created it is in existence. But I think that the inquiry, what has *de facto* been used as the port, is of even greater importance than an investigation of the limits constituted by the original grant. By a charter bearing date July 10, 1670, Charles II. granted to John Schaw of Greenock the lands and barony of Greenock, comprising the lands of Wester Greenock, and other lands, with the ground within the ebbing and flowing of the sea lying contiguous to the said lands. By the same charter he granted full power to the said John Schaw "to repair and build free ports, harbouries, and havening places upon any pairt of the ground of the said lands," and gave, granted, and disponed "the haill privileges and liberty of free ports, harbouries, and havening places pertaining to any other port, harbourie, or havening place in this kingdom, and haill petty customs, shore silver, anchorage, and other dewties whatsoever of the said port or havening places." I think there can be little doubt that this was the origin of the port of Greenock; the language used points to that, and no evidence has been adduced of its existence at an earlier date. It appears that in the year 1705 Sir John Schaw raised a fund of money by voluntary subscription from the inhabitants of Greenock "for building the harbour there situated on a small beginning," and that a voluntary tax was afterwards imposed by the inhabitants for the same purpose. In the 24th year of Geo. II. an Act was passed, which, after reciting that the superior of the town of Greenock, with the inhabitants thereof, began to raise money about 1705 by voluntary subscription for building a harbour there, gave authority to levy a tax for the repair of the harbour.

In or about 1772, by an instrument which recited that the family of Greenock, who were the only lawful proprietors of the harbour, had been in use to exact certain small taxes called anchorage dues from the ships and other vessels frequenting the said harbour, the administrators and Town Council of Greenock acquired these rights from John Shaw Stewart, and a feu-contract was afterwards entered into between them by which he alienated to the Magistrates and Town Council "all and whole the harbour of Greenock, and piers and quays of the same, which have been all built and gained off the sea since 1700, consisting of and comprehending eight acres," with the anchorage, shore, bay, and ring dues to be paid by all the ships or vessels entering the harbour of Greenock, or any other harbour or harbours within certain limits, with power to the Magistrates and Town Council to move forward and enlarge the harbour and to erect other harbours. I pause here to observe that it appears to me impossible to infer from the terms of the charter or the instruments founded upon it that the port has the wide limits contended for by the appellants. In 1773 an Act became law, entituled an Act for deepening, cleaning, and making more commodious the harbour of the town of Greenock. Several other Acts were passed relating to the harbour or port of Greenock between that date and 1866, when the consolidating and amending Act now in force was enacted.

Both sides have placed reliance upon this legislation. The appellants contend that it recognises the existence of a port extending beyond the artificial works and across the fairway of the river. The respondents deny this, and assert, on the contrary, that the statutes define the limits of the port, and show that it does not extend beyond the artificial works and the waters immediately adjacent to them. I do not propose to enter upon a critical examination of the language of these statutes, for I am not disposed to place the same reliance upon them in determining this case as some of the learned Judges did in the Courts below. Even if it were quite clear that the statutes defined the port in the limited sense contended for it would not to my mind be conclusive of the question with which we are dealing. Such definitions are often inserted merely for the purposes of the Act in which they are found, determining the boundaries within which the regulations or obligations of the statute are to operate. I will only say this—that I can find nothing in this legislation to indicate that the port of Greenock was known or understood to have the extensive limits contended for.

I have already pointed out that, in my judgment, the more important inquiry is what has been used as the port. For if an area outside the charter or statutory limits has in fact served as part of the port, I think it must be held for the present purpose to have these more extended limits. Before proceeding to this inquiry I may observe that I cannot attach any weight to the argument derived from the charter of 1816, by which the sandbank opposite Greenock was granted to the Town Council for the purpose of building dykes

upon it for the protection of the bay and harbour. I think it is consistent with either view. It was no doubt at one time the practice for vessels to anchor near the bank opposite Greenock, principally at the west end, which is known as the Tail of the Bank, and there discharge a part of their cargoes, or occasionally the whole. This practice continued until a few years ago. The appellants lay great stress upon this circumstance, and maintain that these anchorage places were within the port of Greenock. If Greenock had in all cases been the destination of the vessels so anchoring, and of the cargoes discharged from them, I should have felt the weight of this contention, for it would have been cogent evidence that the whole of the fairway opposite Greenock across to the bank had been treated and used as part of the port. But in point of fact many, I believe most, of the vessels which came to anchor in the neighbourhood of the bank were bound to Glasgow and other places on the river, and the part of the cargo there discharged was taken to these destinations. It appears to me that there is no more reason derived from the practice of anchoring and discharging near the bank, for asserting that the water so used formed part of the port of Greenock, than there is for alleging that they were a part of any other of the ports to which the vessels were bound, or to which the goods discharged from them were lightered. The appellants also urged strongly that their contention was supported by the fact that anchorage dues were received by the Greenock authorities in respect of vessels which came to anchor in the neighbourhood of the bank. If these dues had been uniformly paid by vessels so anchoring, one would unquestionably have endeavoured to find a legal origin for payments thus exacted and submitted to. And it may be that the conclusion that the anchoring ground was within the port of Greenock would have been the best explanation that could be arrived at, whatever difficulty might be interposed by the terms of the charter which created the port. But it is clear from the evidence led by the appellants that though many, and even the majority, of the vessels yielded to the claim and made the payments, yet during the entire period over which the evidence extends, payment was at times refused not only in the case of vessels going to Glasgow, but also of vessels destined for Greenock. And when payment was so refused it was never insisted on by the local authorities, nor did they ever assert their right in a court of law. It is common knowledge that where it is sought to establish a right by evidence of its exercise a few instances in which the claim of right has been resisted and not insisted upon outweigh a multitude of cases in which it has been yielded to. I think it is impossible to draw any conclusion favourable to the appellants from the evidence as to the exaction of anchorage dues. It produces upon my mind the impression of a usurpation and encroachment rather than of the existence of a right which could have been established if brought to the test of legal proceedings.

The conclusion, then, to which I am led is that there is nothing either in the nature of the locality or in the documentary history of the port, or in the evidence as to the way in which it has been used, to show that its boundaries extended to the place where the "Afton" was capsized. The learned counsel for the appellants insisted that if the contention of the respondents were supported a vessel going from one dock to another could not be said to be "in port." I do not think this follows. A vessel using in this manner and for this purpose the waters adjacent to the artificial works might well be said to be within the port without compelling the conclusion that it extended to the *locus* in question. All that I decide is that the appellants have not discharged themselves of the burden of proving that the place where the disaster occurred was within the port of Greenock.

It becomes unnecessary, owing to the conclusion at which I have arrived, to express an opinion upon the other question argued at the bar. Inasmuch as the "Afton" had broken ground on a new voyage at the time of the disaster it was urged that even if within the ambit of the port when this occurred she was not "in port" within the meaning of the policy. It was admitted by the appellants that the words "while in port" must receive some limiting construction, and that if the vessel had proceeded—say to Ayr—and then returned to Greenock, and been lost whilst in that port, and within the thirty days, the loss would not have been covered by the policy. Inasmuch as the "Afton" at the time in question would have been covered by a policy "from" Greenock, even though within the limits of the port, it is certainly open to serious consideration whether she can properly be said to have been damaged "while in port" within the meaning of the instrument sued on. I am of opinion that the interlocutor appealed from ought to be affirmed.

Lord Fitzgerald—There is nothing on the face of the policy to guide your Lordships. The contention of the appellants was that the port of Greenock, in its ordinary accepted commercial meaning, included the place where the ship was lost; but, on the other hand, the defence of the respondents is that the ship had left the port, and was in the fairway of the Clyde, and outside the port. I entirely concur with your Lordships that the apppellants have failed to establish their contention that the place where the accident happened was in the port of Greenock. I can add nothing to the reasons already given. There were other questions in the case, especially those arising as to the construction of the policy, but it is not necessary now to go into that. I concur that the judgment of the Court below ought to be affirmed and the appeal dismissed with costs.

The appeal was dismissed with costs.

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