

mean the two provisions of sections 11 and 12 in the first schedule. The 11th section provides for the very case which we are considering—the case where any workman actually receiving weekly payments under this Act may be thought by his employer to be convalescent and therefore no longer entitled to them—and it says that such workman shall, if so required by his employer, submit himself for examination by a duly qualified medical practitioner, provided and paid by the employer, or if he objects to be examined by such medical practitioner, then he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act by the Secretary for Scotland, for the purpose of ascertaining what the man's actual condition really is. Now that is the first step, or may be the first step, if an employer chooses to take it, to ascertain whether the compensation is to go on, and then section 11 proceeds to enact that when a workman is asked to submit himself to an examination in this way if he refuses "to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place." Now, that appears to me quite plainly to imply that the right is not suspended or touched in any way unless the workman is obstructive and refuses to submit to examination. If he does then his right is suspended. If he is not obstructive, but consents to be examined by a medical man and to have his bodily condition ascertained, then his weekly payment is to go on although it may afterwards turn out that he was in a better condition at the time when the examination was proposed to him than he had been since his weekly compensation was originally fixed. And I think if section 11 is read along with section 12, the two taken together provide a perfectly consistent and complete scheme. If the employer obtains his certificate under section 11, he will be entitled to a review under section 12 on the basis so established, and if he takes his procedure under the 12th section without calling into aid the procedure under section 11, the medical facts must be ascertained in some other way. But in that case there is no provision for suspending the weekly payment. It is not provided that the weekly payment shall in that case be suspended at all, and therefore when these two sections are taken together the Act says that, in the first place, if the workman is obstructing and will not let a proper examination be carried out his right to the weekly payment shall be suspended until he does consent to examination. If he is not obstructive, then the amount of his weekly payment shall be reconsidered, and on review—which I take to mean as the result of such consideration—be altered, diminished, or increased as the case may be. As to this last case I am unable to see or infer from anything in the statute that there is any power given to the employer to suspend payment, and certainly there is even less to stop it altogether. I entirely agree with and am much impressed by an

observation made by Lord Adam, that if it is to be held that the new award which is to be substituted for the original award is to run from the date when an application is made, there can be no fund under the control of the Court on which such a decree can operate in so far as regards the period that has elapsed between the date of the application and the date of the decision, because it was conceded—and I think the concession was one which could not be withheld—by Mr Hunter in opening the case that if the employer had not withheld the payment of the compensation, but had paid the payments week by week as they became due, he could have no *condictio indebiti* to recover them. Therefore it appears to me that the whole scheme of the Act works out perfectly when one reads the provisions together and finds that the Legislature has provided for the review of any award of compensation when changed circumstances render it proper that it should be reconsidered, that a workman who has once got an order for compensation must submit to the examination which may be necessary for that purpose, that if he is obstructive his right to weekly payments may be suspended, but that if he is not obstructive there is nothing to prevent his putting his order in force until it is displaced by a new order upon review.

The Court answered both questions in the case in the negative.

Counsel for the Appellants—Salvesen, K.C.—Hunter. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—C. N. Johnston, K.C.—M'Robert. Agent—J. Ross Smith, S.S.C.

Wednesday, June 24.

FIRST DIVISION.

MAGISTRATES OF INVERNESS v.

D. CAMERON & COMPANY.

Burgh—Petty Customs—Liability of Consignees—Goods Conveyed to Consignees in Burgh by Railway—Practice to Render Monthly Accounts to Consignees for Sums Due in respect of Petty Customs—Abatements and Exemptions—Ultra Vires—Inverness Burgh Act 1847, sec. 142, and Schedule A.

Held that under the Inverness Burgh Act 1847, section 142, and Schedule A annexed thereto, quoted *infra*, the Magistrates of Inverness (1) were entitled to demand from consignees within the royal burgh of Inverness petty customs on goods consigned to the latter but conveyed into the royalty and delivered to them by the Highland Railway Company, whether the goods had been consigned without any stipulation as to payment of the carriage or had been sent carriage paid; and to levy petty customs on articles, *e.g.*, soap, coffee, brushes, &c., not expressly men-

tioned in Schedule A, in respect that these articles were *ejusdem generis* with those specified in Schedule A, and therefore fell within the general clause at the end of the schedule; (2) were not barred from suing for petty customs on such goods by a practice of rendering to the several consignees monthly accounts stating the amount claimed as petty customs on the goods received by them during the month; (3) (*diss.* Lord Kinnear) were entitled to levy petty customs on sugar, wine, and tea, as well as on other goods *ejusdem generis* not specially enumerated in the schedule, which were introduced into the royalty in quantities of less than one barrel bulk at a time; (4) were entitled to levy petty customs at the rate of 3d. per barrel bulk on goods brought into the royalty in closed packages which concealed the precise class or character of the goods; (5) were not deprived of the right to claim petty customs at the schedule rates from consignees, by reason of the fact that there had hitherto been granted to the consignees in question and others certain exemptions or abatements; and (6) while not entitled to levy petty customs at any other rates than those specified in the schedule to the Act, might in their discretion exempt certain goods, or allow rebates on the schedule rates in respect of prompt payment, provided always that they granted equal treatment in these respects to all persons liable in payment of petty customs.

The Inverness Burgh Act 1847, upon a preamble referring to various statutes (including the Act 48 Geo. III. cap. 41, which then regulated the collection of petty customs in Inverness) and narrating that "the Magistrates and Town Council of Inverness have for time immemorial been in the practice of levying petty customs and other dues upon articles and effects brought into the said burgh, but in consequence of alterations in the system of weights and measures, and other causes, difficulties have occurred in regard to the collection of these dues and customs, and it is expedient that the same should be clearly defined and that greater facility should be accorded for the collection thereof," enacts as follows—(section 142)—"And whereas the Magistrates and Town Council have for time immemorial been in the practice of levying and collecting certain rates and dues denominated petty customs, and applying the same to the general purposes of the burgh: Be it enacted, That it shall and may be lawful for the Magistrates and Town Council to collect, sue for, and recover the petty customs, imposts, rates, and duties expressed and contained in Schedule A, hereunto annexed, for all goods, cattle, articles, effects, and commodities of every description brought into the ancient and formerly extended royalty of the burgh for sale, storage, manufacture, use, or consumption, as set forth in the said schedule, and to prevent the said

goods, cattle, articles, effects, and commodities from entering the burgh until such customs and imposts are so paid, such customs and imposts, except as after-mentioned, to be administered by the Magistrates and Town Council as part of the ordinary revenue of the said burgh; and it shall be lawful to recover the said customs, imposts, and rates by summary process before the sheriff, on the evidence of one witness, or otherwise in a summary manner, in the same way as other rates and assessments are hereby authorised to be recovered and levied; and it shall not be an objection to any such witness that he is an officer of or in the employment and pay of the Magistrates and Town Council, and any person neglecting or refusing to report to the collector of such customs and imposts any effects liable in payment thereof as aforesaid, brought into the burgh by him, shall, on conviction before a magistrate, forfeit and pay a fine of ten shillings besides the amount of customs and all expenses: Provided always that the Magistrates and Town Council may let, as heretofore, the right of collecting and levying the said customs and imposts to tenants and make such rules and regulations for the collection of the same as to them may appear proper: Provided also that for any goods and commodities for which shore dues may have been paid at the port of Inverness, or at those parts of the Caledonian Canal below Muirton Locks, no petty customs shall be exigible; and that goods, commodities, and effects passing through the town and destined for places beyond the said boundaries shall not be liable in the payment of petty customs."

Schedule A, annexed to the Act, and entitled "Schedule of Petty Customs," sets forth a list of articles, with the rates leviable in respect of each article, as illustrated in the following excerpts:—

"Ale, beer, and porter, for every			
26 imperial gallons	-	-	£0 0 3
Animals—For every horse or			
bull	-	-	0 0 4
All spirits brought into the			
town	-	each imperial gallon	0 0 1
Bark	-	-	per cwt. 0 0 1
Butter	-	per stone of 24 lbs.	0 0 1
	-	Under 12 lbs.	0 0 0½
Cheese	-	per stone of 24 lbs.	0 0 0½
Cabbages	-	each cart	0 0 2
Cloth	-	per 12 yards	0 0 1
	-	And less in proportion below	
	-	12 yards.	
Ditto above 12 yards, per barrel			
bulk	-	-	0 0 3
Linen or tweeling, per 20 yards			0 0 1
	-	And less in proportion below	
	-	20 yards.	
Ditto	-	per barrel bulk	0 0 3
Cloth, harn, sacking, or tick-			
ing	-	per 20 yards	0 0 1
	-	And less in proportion below	
	-	20 yards.	
Ditto	-	per barrel bulk	0 0 3

Boots - - - - - per pair	£0 0 3
Boots and shoes in packages, per barrel bulk	0 0 3
Tallow and grease butter, per barrel bulk	0 0 3
Tar - - - - - ditto	0 0 3
Yarn of every description, ex- ceeding 12 lbs. per barrel bulk	0 0 3
Sugar, wine, tea, and all other goods and articles not specially enumerated in the above schedule, to pay at the rate of threepence per barrel bulk (2½ cwt. or 5 cubic feet)."	

This was a special case brought by the Provost, Magistrates, and Councillors of the royal burgh of Inverness, the first parties, and D. Cameron & Co., merchants, Inverness, and the partners of that firm, who were general merchants and licensed grocers within the royal burgh of Inverness and ratepayers in the royal and parliamentary burgh of Inverness, the second parties, to determine certain questions which had arisen between the parties as to the rights and powers of the first parties under the Inverness Burgh Act 1847 with respect to the levying of petty customs.

The facts of the case were stated in the opinion of the Lord President as follows:—"The 'ancient and formerly extended royalty' of the burgh of Inverness does not include the whole burgh as defined for municipal, police, and parliamentary purposes, it being provided by the Act 43 Geo. III., cap. 41, sec. 33, that from the passing of that Act the royalty of the burgh should be extended over and comprehend the lands therein mentioned, and that the Magistrates and Council should thenceforth have and enjoy the same rights, privileges, and jurisdictions over the said lands thereby annexed to and comprehended in the said royalty, as they then enjoyed and exercised over and within the limits of the then present royalty, and they were thereby empowered to levy the same mails, duties, customs, and other taxations within these annexed lands in the same manner and by such ways and means as the Magistrates and Council were entitled to levy and recover such mails, duties, customs, and other taxations within the then present royalty.

"By resolutions adopted by the first parties from time to time, certain modifications of the schedule to the Inverness Burgh Act 1847 have been made, as they maintain, within the powers to that effect conferred by the Act. The competency of the resolutions and the legality of the modifications are, however, not admitted by the second parties. One of these modifications is that all goods and effects of every description manufactured within the Parliamentary boundaries and beyond the ancient and extended royalty are admitted at one-half less than such articles and effects may respectively be charged according to the schedule to the Act, while others relate to the dues on turnips, rubble stones, firewood and other commodities. It is also declared that eggs, fresh fish, and fresh butter, so far as home

produce, are admitted free of customs. Further, petty customs are not collected on goods or others entering the royalty by post, or on small parcels brought in by hand, the first parties being unable, owing to the Post Office regulations, to obtain the necessary information to enable them to levy customs on parcels entering the royal burgh by post. It is stated that in the case of small parcels brought into the burgh by hand the customs would not defray the cost of collection.

"The revenue derived annually by the first parties from the petty customs is £2000 or thereby. It has been their general practice to treat the consignee of the goods as the person liable in payment, although under arrangement made with the owners of certain distilleries the customs are paid by the consignors at their request and for their convenience.

"Since 1876 a rebate of 25 per cent. upon the full scale of customs contained in Schedule A to the Act has been regularly allowed by the first parties to all persons who have made payment of the customs when demanded, but when legal proceedings have been required the full schedule rates have been sued for. Where a private arrangement has been come to the rebate has been allowed, but when it has been necessary to take decree no deduction has been given.

"When goods are imported by rail they are brought over the royalty boundary by the Highland Railway Company, whose station is situated within the royalty, and these goods cannot be intercepted at the boundary for the purpose of levying the customs. Further, where goods are imported in close packages or cases (such as casks and bales), so that their nature cannot be ascertained by the collector without opening the packages or cases, the practice has been to charge the customs at the rate of 3d. per barrel bulk.* On parcels of smaller dimensions than barrel bulk the customs are charged according to the proportion which the cubic size of the parcels bears to a barrel bulk of 5 cubic feet.

"The first parties demand the customs upon each article delivered to the consignees except in certain cases where for the convenience of the consignees they, at the request of the consignees, make the charge by a monthly account.

"In the case of goods brought into the burgh by rail inspection is made by two officials at the railway station, and the

* In part 1 of the schedule relating to shore dues of the Inverness Harbour Act 1847 a barrel bulk is defined as follows:—"The barrel bulk of all articles not otherwise rated to be 5 cubic feet except when the said measure shall exceed 2½ cwt., in which case 2½ cwt. is to be rated a barrel bulk. Small packages, not measuring 1½ cubic feet or not weighing 28 lbs., to be reckoned one-fourth of a barrel bulk and to be charged one penny." In levying petty customs this definition had always been adopted by the first parties.

accounts of the first parties are made up as accurately as possible from the information obtained by such examination. Another man is stationed at the weigh-house just inside the boundary of the royalty for the purpose of checking all goods coming out of two bonded warehouses which are situated immediately outside that boundary. He makes a note relative to the goods from the Excise permits exhibited to him before the goods are allowed to pass. There is also a man specially engaged to watch all goods coming into the burgh by cart or otherwise for the purpose of collecting the customs due on such goods, and he collects the customs on country produce in the public market."

The case further stated that certain of the goods consigned to the second parties by railway, and delivered by the Railway Company's servants to the second parties at their place of business, in respect of which the first parties sought to charge petty customs, were deliverable by the consignors at the second parties' premises within the royalty "carriage free" or "carriage paid" or "delivered." (Art. 10) The first parties, when they were able to do so, specified in the accounts rendered the nature of the goods consigned to the second parties, but in instances where the goods were so enclosed in cases or wrappings that the exact nature of the goods could not be discovered by external examination, their accounts did not specify the goods, but merely specified a 'case,' 'cask,' 'bale,' 'keg,' 'box,' or 'parcel' without defining its contents, and they charged the customs at the rate of 3d. per barrel bulk according to the practice stated *supra*. The accounts of the first parties against the second parties for the months of May 1896, July 1897, September 1898, and December 1901 were printed as specimens in Appendix III., and formed part of the special case. The specimen accounts printed in Appendix III. included certain articles, *e.g.*, soap, 'waters,' brushes, biscuits, coffee, &c., which were not enumerated in Schedule A. These articles were charged in the accounts at the rate of 3d. per barrel bulk. It was admitted by the second parties that they received by railway or from said bonded stores all the goods specified in said accounts, and all the other goods specified in an account commencing on 1st May 1896 and ending on 27th January 1902, which was produced and held to form part of the case, and that the goods not otherwise described, which were charged in the account at the rate of 3d. per barrel bulk, were so packed that their nature could not be discovered by external examination.

The first parties maintained that the second parties were liable to them for the petty customs charged in the accounts rendered to them, submitting that it could never have been intended that cased goods should escape customs, and that the only practicable mode of exacting the customs was to charge them at the scheduled rate of 3d. per barrel bulk, with a proportional levy on smaller quantities. They further

maintained that as the statute specially authorised them to sue for and recover before the Sheriff in a summary manner the customs on the goods brought into the royalty for sale, &c., the consignees of such goods were liable for the customs; and *separatim*, that they were the persons who brought the goods into the burgh in the statutory sense. They also contended that they were entitled to grant exemptions and rebates provided that they gave equal or similar treatment to all the persons who are in the same or in a similar position.

The second parties maintained that they did not bring the goods into the royalty within the meaning of the Act of 1847, and that consequently they were not liable for the petty customs. They further contended that if they and not the carriers and consignors were liable for the customs, the Act of 1847 fixed the goods and others, and also the actual and not merely the maximum rates to be charged, and that the first parties had no right to make any alterations upon or reductions or rebates of or from the rates fixed by the schedule, and *separatim*, that if they did this in one case they were bound to do it in all. They also maintained that the first parties were not entitled to levy duties on any goods without specifying their nature, and that parcels of tea, sugar, and other goods not specified in the schedule were only liable for duty when the quantity brought in at one time amounted to one barrel bulk, as also that the first parties were not entitled, without the consent of the persons liable in payment, to keep a running account of the sums alleged to be due, only rendering that account monthly.

The questions for the opinion of the Court were:—(1) Are the first parties entitled to demand from the second parties petty customs on the goods contained in the account mentioned in Article 10 of the case, consigned to the second parties, but conveyed into the royalty and delivered to them by the Highland Railway Company, (a) where such goods had been consigned to the second parties without any stipulation as to payment of carriage; (b) where the goods had been consigned 'carriage paid'? (2) In the event of the first query being answered in the affirmative, are the first parties barred from suing the second parties for customs on the said goods by the practice of rendering accounts stated in the case? (3) Are the first parties entitled to levy petty customs from the second parties on the 'sugar, wine, tea, and all other goods and articles not specially enumerated in the schedule,' contained in the said account which were introduced into the royalty in quantities of less than one-barrel bulk at a time? (4) Are they entitled to levy from the second parties petty customs at the rate of 3d. per barrel bulk in the manner stated in the case on the goods contained in the said account which were brought into the royalty in closed packages and cases which concealed the precise class of the goods? (5) In the event of question 4 being answered in the negative, are the first parties entitled to insist on closed packages or cases, here-

after brought into the royalty by or consigned to the second parties, which conceal the precise class of the goods therein, being opened in the first parties' collector's presence or on exhibition being made to the collector of the invoice or advice note of the goods, in order that the class of goods may be ascertained? (6) Are the second parties exempted from payment of the customs claimed from them on the goods contained in the said account, whether the claim be for the full or for the abated rates, by the fact that exemptions and reductions have hitherto been granted to them and others by the first parties as stated in the case? (7) Can the first parties exact from the second parties the full schedule rates on the goods contained in the said account, or must they (a) grant them exemption as regards any class of goods on which exemption from customs has been granted to others; and (b) allow them the same rebates from the full schedule rates of customs as have been allowed to other parties?"

Argued for the first parties—The rights and powers of the magistrates to levy petty customs were regulated wholly by the provisions in the Inverness Burgh Act 1847, and Schedule A, which superseded the old right to levy such customs founded on usage. The purpose of the Act, as stated in the preamble, was that "greater facility should be accorded for the collection thereof." 1. *On the question as to exemptions and abatements*—Sec. 142 of the Act enacted that it "shall and may be lawful" for the magistrates to collect, sue for, and recover" the petty customs, rates, &c., set forth in Schedule A. These words gave a large discretion to the magistrates to levy customs on the included articles, or to refrain from levying them in cases where they considered it inexpedient in the interest of the community that they should be levied. The words "shall and may" conferred a bare faculty or power, and were permissive not obligatory—*Julius v. The Bishop of Oxford* (1880), 5 App. Cas. 214. Accordingly the magistrates were entitled to refuse to make levies in certain cases, or to grant abatements. In the cases where this had been done the magistrates had good reasons for their decision—such reasons, for example, as that the cost of collection would exceed the revenue, or that the collection was unworkable in practice. It was absurd to say that the fact that such exemptions and abatements had been granted could deprive the magistrates of all the rights and remedies conferred on them by the Act. It was nowhere alleged that with regard to any particular thing on which the second parties were rated, anybody else was getting different treatment. Thus with regard to the 25 per cent. abatement upon prompt payment, the second parties might have the abatement if they chose to make prompt payment. The magistrates had express power to make regulations as to the collection of the dues, and the practice of monthly accounts, as well as the various exemptions and abatements complained of, were in reality merely

methods of, or rules regulating, the collection. Petty customs were in a different position from taxes in this respect, that in the case of taxes an unequal assessment meant that if one man paid less another had to pay more, whereas, in the case of dues it made no difference, except to the receivers, that one man paid less. Hence the present case differed from *Stewart v. Isat*, 1775, M. 1993. The enactments as to equality of treatment in the case of railways and canals had no application here. 2. *As to the persons from whom the customs were to be demanded*—These persons were clearly the consignees of the goods. It was the consignees who brought the goods within the burgh. In whatever way the dues were collected it must be the consignees who ultimately paid. This was true even in the case of goods consigned "carriage paid," for this was merely the result of an arrangement between consignor and consignee—*Milne v. Leys*, May 26, 1852, 14 D. 798; *Magistrates of Perth v. Macdonald*, November 24, 1852, 15 D. 85; per Lord Selborne in *Great Eastern Railway Company v. Mayor of Harwich*, 1880, 41 L.T. (N.S.) 533. The case of *Magistrates of Kilmarnock v. Donald & Morton*, February 14, 1900, 2 F. 590, 37 S.L.R. 417, dealing with rights of collecting customs based solely on usage, had no application in construing the statute by which the rights of parties in this case were settled. The statute gave rights to sue for and recover the dues quite independent of the right of stopping at the ports. It was only the consignees who could say whether goods brought in were for sale, storage, consumption, or manufacture. The railway company could not be the person chargeable—*Magistrates of Linlithgow v. Edinburgh and Glasgow Railway Company*, July 12, 1859, 21 D. 1215. If the consignors were held to be the persons liable, the effect would be to bring persons who might be in England or anywhere abroad within the jurisdiction of the Sheriff of Inverness, and endless confusion would result. Further, at common law delivery to a carrier operated delivery to the consignee—*Bell's Prin.*, sec. 117. When the consignor paid the carriage he did so as agent for the consignee—*Dunlop and Company v. Lambert*, 1839, M'L. and Rob. 663, per Lord Cottenham, at p. 681. 3. *As to quantities less than one barrel bulk*, the magistrates, being empowered to levy customs at a rate per barrel bulk, were enabled to charge proportionally on goods introduced in smaller quantities. "Barrel-bulk" was not a unit below which the customs could not be levied; it was mentioned as fixing the "rate" of payment—per Lord Fullerton in *Magistrates of Linlithgow (supra)*. The power to open closed packages was necessarily involved in the right to levy petty customs, and the general clause at the end of the schedule was sufficiently wide to cover the various articles charged in the accounts.

Argued for the second parties—The Act of 1847 must be read as declaratory of previous usage, and further, as a taxing statute it must be construed strictly. (1) The

words "shall and may be lawful," though conferring merely a power, might be obligatory where the power was coupled with a duty. In the case of powers given to a public body to levy dues, these powers, if put in force, must be exercised strictly in accordance with the statute and schedule which fixed the particular goods to be charged and the actual rates to be charged on those goods. There was no ground for treating the specific rates set forth in the schedule as maximum rates. The duty of the Magistrates also was to exact the dues with an even hand. Instead of this the Magistrates, without warrant under the statute, had made all sorts of exemptions and abatements on particular goods and in favour of particular classes of persons. These abatements and exemptions were not in any sense mere rules of collection. As a result of this unequal treatment the second parties were prejudiced. The grounds of public policy on which railway companies and similar bodies were compelled to give equal treatment was fully applicable here. The principle of equality of treatment by public bodies had long been recognised at common law—*Isat v. Stewart*, M. 1993, and provision was made for uniformity of rates in the general Act regulating such imports—the Burgh Customs Act 1870, 33 and 34 Vict. c. 42, section 2. (2) In determining the persons from whom the customs were to be demanded, the usage prior to the Act, as well as the words of the Act itself, must be looked at. The theory and practice of such dues were that the burgh officials sat at the ports and took the money from the persons bringing in the goods. By the nature of the impost the person liable to pay was the person who tendered the goods—*Magistrates of Kilmarnock v. Donald & Morton (supra)*, vide historical account of such imposts, per Lord Medwyn in *Magistrates of Linlithgow v. Edinburgh and Glasgow Railway Company (supra)*. The only compulsitor of payment was a refusal to admit the goods till payment. The provisions of the Act did not alter that state of things. The imposts were on the goods "brought into" the royalty, and the remedy was to "prevent" the goods, &c. "from entering the burgh until such customs and imposts are paid." The first parties founded on the new power given by the Act to "sue and recover." But the effect of these words was merely to facilitate collection, not to make a change in the persons who paid and to transfer the whole burden to consignees. As before, it was the carrier (in this case chiefly the Railway Company) who remained the person who had to pay. The words of the Act "brought into the burgh by him" occurring in the provision dealing with the recovery of the imposts, went strongly to show that the Act made no alteration on the class of persons from whom the collection was to be made. The Act preserved the former mode of collection and the former remedy by stoppage of the goods, and merely gave additional power to recover the dues by granting a right to sue persons who in bringing in goods had evaded the vigilance of the burgh officials

In *Great Eastern Railway (supra)* the Railway Company was found liable. The circumstances of *Magistrates of Linlithgow (supra)* were special. It was a "toll thorough," and the decision proceeded on the ground that the Railway Company under its Act had acquired the property of its land and therefore could not be charged this toll. (3) The Magistrates had no power to charge dues on goods included in the general clause at the end of the schedule when the quantity was less than one barrel-bulk. One barrel-bulk was the unit beyond which the dues did not go, as one lb. was the unit, e.g., of tobacco under the Customs Acts. The contention of the first parties involved that "rate" was to be read "ratio." The incorrectness of this contention was made very clear by the addition of the words in the schedule, e.g., as regards cloth, where the standard taken was 12 yards, "and less in proportion below 12 yards." Instances of the addition of such words occurred again and again in the schedule, and the clear inference was that where such words were not added the magistrates could not charge dues on any quantity less than the unit. There was no warrant in the Act for the magistrates opening closed packages nor for exacting customs on some of the articles charged in the accounts, e.g., soap, brushes, candles, and mineral waters. The general words at the end of Schedule A could include only articles *ejusdem generis* with sugar, wine, and tea, and the articles in question were distinct in use and kind.

At advising—

LORD PRESIDENT—The question in this case relates to the powers and duties of the Magistrates and Town Council of the royal burgh of Inverness with respect to the levying of petty customs upon goods brought into the ancient and formerly extended royalty of that burgh.

[His Lordship read section 142 of the *Inverness Burgh Act 1847*, and narrated the circumstances stated in the special case, as quoted *supra*, and the contentions of parties.]

1. With reference to the first question put in the case, I am of opinion that the first parties are entitled to demand and receive from the second parties petty customs on the goods specified in the account mentioned in article 10 of the case (Appendix III.) consigned to the second parties, but conveyed into the royalty and delivered to them by the Highland Railway Company, and that whether (a) the goods have been consigned to the second parties without any stipulation as to payment of the carriage, or (b) the goods have been sent carriage paid.

In so far as the goods and articles mentioned in the account (Appendix III.) are not expressly mentioned in the schedule of petty customs annexed to the *Inverness Burgh Act 1847*, they appear to me to be sufficiently *ejusdem generis* with those specified in the schedule to fall within the words at the end of it—"All other goods and articles not specially enumerated in the above schedule."

It is true that historically the ordinary mode of collecting the petty customs which Scotch burghal authorities had right to charge was by an official stationed at a port or other entrance into the burgh, and that where such payment was not made there, the primary remedy of the burghal authorities was to decline to admit the goods into the burgh. I consider, however, that the first parties are not limited to this remedy, and that they do not by abstaining from excluding the goods, where this is possible, lose their right to claim petty customs upon them. One of the declared objects of the Act of 1847 was to provide greater facilities for the collection of such customs, and the Magistrates and Town Council are thereby authorised not only to collect but also to sue for and recover them summarily before the Sheriff. A right of action is thus expressly given for recovery of the customs as a debt, and this conclusively proves that the remedy of the municipal authorities is not limited to the power to decline to allow the goods to be brought into the burgh, even assuming that that right still remains to them under the statute. It does not in my judgment make any difference, for the purposes of the present question, whether the goods have been consigned to the second parties without any stipulation as to payment of carriage, or whether they have been consigned to them carriage paid. I think that the first parties have, upon a true construction of the statute, a right of action against the second parties as the receivers of the goods at whatever time the right of property in the goods may pass to them in a question with the sellers. It seems to me that the second parties bring the goods into the burgh in the sense of the law applicable to such questions when they cause them to be brought in for their purposes, whatever their arrangement with the senders as to payment of carriage or risk may be. The provision that the customs may be recovered summarily before the local Sheriff is, in my judgment, quite inconsistent with the view that the persons, or at least the only persons, liable for the customs are consignors who may be in England or abroad, or in Scotland in places outside the jurisdiction of the Sheriff of Inverness. I may add that the general rule is that delivery of goods to a common carrier to convey them to a consignee is equivalent in legal estimation to delivery to the consignee, although this rule is subject to qualification and may yield to any evidence of intention which may appear from the contract or otherwise. It is stated in the case that certain goods received by the second parties in respect of which the first parties seek to charge petty customs against them are deliverable by the consignors at the second parties' premises within the royalty "carriage free" or "carriage paid" or "delivered." This statement is not very precise, but I understand that it applies to or at least includes goods consigned to the second parties by railway companies or other common carriers, and I consider that the second par-

ties are liable to pay petty customs to the first parties upon such goods.

2. With reference to the second question, I am of opinion that the first parties are not barred from suing the second parties for petty customs on goods brought into the burgh by or for them by the practice of rendering accounts mentioned in the case. Such rendering of accounts is for the mutual convenience of the parties, and I do not see any ground upon which it could be held to involve a waiver or discharge of the rights and remedies provided to the first parties by the Act of 1847.

3. I am of opinion that the first parties are entitled to exact petty customs from the second parties on sugar, wine, tea, and all other similar goods and articles not specially enumerated in the schedule, which are introduced into the royalty in quantities of less than one barrel bulk at a time. It is for the mutual convenience of the parties, and certainly of the second parties, that closed packages such as casks, bales or boxes, should not be opened either at the boundaries of the burgh or at any other place outside the premises of the second parties. The rates applied seem to have been those specified in the schedule for goods most nearly *ejusdem generis* with those to which the question relates.

4. I am of opinion that the first parties are entitled to levy from the second parties customs at the rate of 3d. per barrel bulk in the manner stated in the case on the goods comprised in the account mentioned, which are brought into the royalty in closed packages which conceal the precise character or class of the goods. It is, as already stated, for the convenience of the consignees that the packages or cases should not be opened prior to delivery to them, but when the character of the goods is admitted or ascertained I consider that the right of summary action conferred by the statute for recovery of the petty customs is applicable to them.

5. If the views expressed in the preceding answer are correct this question is superseded. I may, however, say that if it was held that the first parties were not entitled to levy from the second parties petty customs at the rate of 3d. per barrel bulk in the manner stated in the case, I should be of opinion that they (the first parties) would be entitled to insist either that the packages or cases should be opened so that the character of their contents might be ascertained, or that the second parties should make to the collector a true statement as to the nature of the contents of the packages or cases. It appears to me that the statutory grant of a right to levy petty customs carries with it a right to ascertain the nature of goods brought into the burgh in closed packages or cases so that the petty customs may be levied upon them if they fall within any of the classes in respect of which petty customs are leviable.

6. I consider that this question should be answered in the negative. I do not see any ground upon which it could be held that the fact of such exemptions having been made, or such reductions having been al-

lowed in time past, could be held to deprive a public body like the first parties of the rights and remedies conferred upon them by a modern statute such as the Inverness Burgh Act of 1847.

7. I may say, in the first place, that if the first parties levy petty customs at all I consider that they are bound to levy them at the rates or of the amounts specified in the schedule to the Inverness Burgh Act 1847. These rates are not described as maximum rates, but as the rates to be levied if a levy is made. I therefore think that it is *ultra vires* of the first parties to levy any rates other than or different from those specified in the schedule. If this view is correct, it follows that the first parties are not entitled to treat different persons differently in the matter of petty customs—exacting the full schedule rates from some and granting abatement or total relief from these rates to others. The result is that although the body of law (chiefly statutory) which requires railway companies and similar bodies to give equal treatment to all persons as to rates and facilities does not apply to the present case, the same or nearly the same result is brought about in the present case in a different way.

I may, however, add what I have just said does not apply to the discount of 25 per cent. from the full scale of customs contained in Schedule A to the Act, which it is stated in the case “has been allowed regularly by the first parties to all persons who have made payment of the customs when demanded, but when legal proceedings have been required the full schedule rates have been sued for. In the event of a private settlement the rebate has been allowed, but when legal decree had to be taken no deduction was given.” This is not in my view fixing different scales or rates of customs for different persons or classes of persons so as to constitute unequal treatment; it, on the contrary, imports that all who pay in the same way are treated in the same way. A deduction for prompt payment is familiar in all mercantile and similar dealings.

I may add that I consider that the first parties are not bound to collect the petty customs on small parcels brought in by post, or other things the customs on which would not defray the cost of collection. To do so would not be beneficial but detrimental to the interest of the community of the burgh.

LORD M'LAREN—I agree with your Lordship.

LORD KINNEAR—I agree with your Lordship generally, and I have but very little to add. I think that there is some difficulty to be found in considering some of the questions, but I cannot say that I find much difficulty in the first question which arises in the order of the argument as to the construction of this statute, and that is whether the Magistrates of Inverness have a discretion to enforce or abstain from enforcing their rights as to petty customs, or whether they are absolutely bound to exact all the customs and duties specified in the Act of Parlia-

ment. The statute says that it shall and may be lawful for the Magistrates and Town Council to collect, sue for, and recover petty customs, imposts, rates and duties specified. Since the decision of the House of Lords in the case of *Julius v. The Bishop of Oxford* there can be no question, as a matter of legal construction, that these words “shall and may be lawful” are optional and not significant of obligation. They are perfectly plain and unambiguous. It was pointed out in the case to which I have referred that the words in question make it possible to do what but for the statutory authority it would not have been possible for the person authorised to do in respect of any private right of his own, but they are words conferring a faculty or power, and nothing more. But then it has often been said, and that quite soundly, that a power of this kind may be coupled with a duty which may be expressed in the statute, or which may be inferred from the purpose and object for which the power is given, or from the conditions under which it is to be exercised, or again from the title of the persons who are to be benefited by it, and therefore we have to look at the statute to see whether there is any duty of that kind to be found either in expressed terms or plain implication in its provisions. I cannot say that I have much doubt that the power is coupled with a duty, but then it is not in my judgment a duty to levy rates and customs or to abstain from levying rates and customs; it is a duty to consider the question as to whether they are to be levied or not. A power of this kind is committed by Parliament to magistrates of a burgh in the trust and confidence that they will exercise it according to a sound discretion for the benefit of the community, and therefore it can hardly be maintained that their discretion is excluded in a matter which eminently calls for discretion from the very nature of the subject. I therefore agree with your Lordship that it is in the power of the Magistrates to abstain from levying certain of the rates and customs specified in this statute if in the exercise of their sound discretion they find good reason for doing so. I do not know what better illustration could be given of their power in this respect than what is stated in the special case, that they find with reference to certain articles that are subject to duty that the money that would be obtained by levying the duty is not sufficient to meet the cost of collection. That appears to be a perfectly good reason for their refusing to levy customs. So far as the general power is concerned, I do not entertain very much difficulty, but then I think with your Lordship that if the Magistrates do levy customs they must do so in exact conformity with the Act of Parliament. They had originally, as appears from the narrative of this Act of Parliament, a right to levy petty customs, founded upon long usage; but that right is superseded entirely by the statute which sets forth that it is passed, among other things, for the purpose of clearly defining the right to levy customs, and also for the purpose of affording greater facility in

collecting the same. I therefore think that the right of the Magistrates must be exercised in exact conformity with this statute, and not otherwise. Now, the statute says that they may levy the customs expressed and contained in the schedule annexed for all goods brought into the ancient and formerly extended royalty of the burgh. When you come to the schedule there is nothing to be found in it that I can see to suggest that the rates specified are maximum rates, or that the Magistrates have any uncontrolled discretion to levy such rates as they think fit. I think that the rates fixed by the schedule are specific rates, and that seems to be the clear meaning of perfectly plain language. They are to levy upon all goods of the description contained in the schedule the rates and duties specified in that schedule, and when any question arises as to whether a particular rate is justified by the Act of Parliament or not, I think the solution must depend on comparing the specific entry in the schedule on which the Magistrates found their right with the rate they are proposing to enforce, and seeing whether they correspond with one another or not.

Now, I do not intend following your Lordship by an examination of all the special questions put to us, because I think it is quite unnecessary, and I agree generally with what your Lordship has said. I make some observations upon certain of the more important points only, or at all events upon points which in this respect are more important than they are significant of the power that the Magistrates may be entitled to exercise. I think in the first place that when the Magistrates say that they have been levying these schedule rates upon all goods of certain descriptions brought into the burgh from places at some distance from the burgh, and have been levying half of the amount of such rates upon goods brought in from places in the immediate neighbourhood of the burgh, they are going beyond the statute altogether. I cannot find any power to make such a distinction expressed or implied in the statute, and therefore I am of opinion that so far their action is *ultra vires*. I do not proceed upon the theory that this proceeding is inconsistent with what is called equal treatment. If the question were whether the method in which these rates have been levied is in accordance with the doctrine of equal treatment which the Legislature has enacted with reference to railway and canal traffic, I am not sure that we have sufficient material before us to enable us to answer it satisfactorily, because there may be conditions affecting a question of that kind which I do not find very clearly brought out in the special case. I do not think, however, that that is the question in this case. The question is, what does the statute say? If the thing done is within the statute the Magistrates are entitled to do it; if it is not within the statute, then they are not entitled to do it. I am of opinion that they are not entitled to make two classes of the persons who send goods into the burgh. I quite agree with what your Lordship has

said, that this rule does not at all affect the right of the Magistrates to allow discount for prompt payment, which they say they have been in the habit of doing. They have no power to modify the rates, but they have an express power to make rules and regulations for collecting them, and it appears to me that the question whether a discount shall be allowed for prompt payment is just a question of collection, and not a substantial question of rating at all. If the Magistrates find it convenient, as they very probably may (and I would assume from their statement that they have found it convenient), to make a certain rebate, and not to be put to the trouble of suing in the Sheriff Court, I think that is quite within their power as collectors of these rates and customs.

The only other specific question which has been raised with reference to the correspondence of the rates charged to the rates specified in the schedule is one as to which I am not quite sure I am in concurrence with your Lordship. That is the question whether the first parties are entitled to levy petty customs from the second parties on articles not specially enumerated in the schedule which are introduced into the royalty in quantities of less than one barrel-bulk at a time. Now the only authority I find in the schedule—I may have omitted to observe some other, and if so the observation I am going to make will fall to the ground—but so far as I see the only authority with reference to a case of this kind is the note at the end of the schedule—"sugar, wine, tea, and all other goods and articles not specially enumerated in the above schedule to pay at the rate of 3d. per barrel-bulk." Now, that, I think, like all the other things in the schedule, is to be rigorously observed, and so far as I see, the lowest unit to be taxed on this ground is barrel-bulk, and therefore I cannot find authority for levying on what is less than that at one time. On the other point which is associated with this I quite agree with your Lordship. That is as to levying on goods brought in in closed packages and cases which conceal the precise class of the goods. If a consignee finds that the rate is too burdensome, then he has the remedy in his own hands, and can disclose what the goods are. The Magistrates are not authorised to open packages without his consent, and if any tax is put upon them, either on the footing of these being goods not specially enumerated, or on the footing that the Magistrates believe that the packages contain goods of some enumerated class for which a special rate is applicable, then the consignee, if he objects to what is levied, has the remedy in his own hands—he can tell the Magistrates what the goods really are. That is so simple a remedy that it is impossible to see what kind of hardship can be inflicted upon traders.

Upon the other leading question which we have to consider I also agree with all that your Lordship has said—that is, the question as to whether the customs may be levied from consignees within the burgh.

I think they may, because these are the persons who, in the sense of the statute and in the sense of ordinary language, have brought the goods into the burgh. The tax is to be levied on goods brought into the burgh, and if a tradesman in the burgh orders goods to be sent to him by railway, and he takes delivery of these goods, then it appears to me that he is the person who has brought the goods into the burgh and is liable for the tax. It is quite true that under the older customary law the right of magistrates to levy petty customs was much more limited, because they could stop the goods on entering the burgh and recover payment from the carrier if they could, or keep the goods out of the burgh. That was their only remedy. But it is because it was a very insufficient remedy that this statute, in addition to defining more clearly the right of taxation given to the burgh, sets out that the methods of collecting the rates are to be improved, and the great improvement which it introduces for the purpose of facilitating the collection is that the Magistrates may bring an action in the Sheriff Court. It appears to me in the first place that that action may very properly be brought against the consignees within the burgh who have ordered the goods and taken delivery of them. On the other hand, it can hardly have been intended to be brought against the consignors, who are not within the jurisdiction of the Sheriff Court of Inverness at all. If a consignee chooses to make arrangements that the consignors are to pay the tax, then I agree that that is a matter with which the Magistrates have no concern, and they are entitled to accept the money from the person who is ready to pay it if the tax is duly accounted for. On the whole matter, therefore, subject to difference on the minor question as to the custom leviable on less quantity than barrel-bulk, I agree with the way in which your Lordships propose to answer the questions.

LORD ADAM was absent.

The Court pronounced this interlocutor:—

“Answer the first question in the affirmative, whether the goods have been (a) consigned to the second parties without any stipulation as to payment of carriage, or (b) consigned “carriage paid”: Answer the second question in the negative, and the third and fourth questions in the affirmative: In respect of the previous answers find it unnecessary to answer the fifth question: Answer the sixth question in the negative; and in answer to the seventh question say that the first parties are entitled to exact from the second parties the full schedule rates specified in the account mentioned in the case, but that they are not entitled under the Inverness Burgh Act 1847 to levy petty customs at any other rates than those specified in the schedule to the Act, without prejudice to the right of the first parties in their discretion to allow

discounts or rebates on the said schedule rates in respect of prompt payments, provided always that they grant equal treatment in this respect to all persons or classes of persons liable in payment of petty customs, and decern: Find no expenses due to or by either of the parties to the case.”

Counsel for the Provost and Magistrates of Inverness (the First Parties)—Clyde, K.C. — M'Lennan — Murray. Agents — Forbes, Dallas, & Company, W.S.

Counsel for D. Cameron & Company (the Second Parties)—Dundas, K.C. — Blackburn. Agents—Dundas & Wilson, C.S.

Wednesday, June 24.

SECOND DIVISION.

TAYLOR'S TRUSTEE v. CHRISTAL.

Succession—Vesting—Direction to Divide among Children on Youngest Child Attaining Twenty-five—Children of Any Predecessor Taking their Parent's Share—Vesting a morte testatoris.

By a codicil a testator recalled the purposes of his settlement containing his directions as to the disposal of the residue, “and in their lieu and place” he directed his trustees to pay the whole income arising from the residue of his estate to his wife until his youngest child should attain the age of twenty-five, upon which event he directed them “to divide the whole residue among my children equally, the children of any predecessor taking their parent's share.” The codicil contained provisions for the maintenance of certain of the testator's children by his widow up to the period of division, or by his trustees in the event of her predeceasing that period. It contained no provision as to accretion. By the purposes of the settlement which were recalled the testator had directed his trustees (1) to pay the income to his children, with a provision for accretion in the event of children dying without issue, and a provision in favour of issue of children dying leaving issue; and (2) on the death of the last survivor of his children to pay the fee to the testator's grandchildren who survived that date, *per stirpes*. Held that under the provisions of the codicil one of the testator's children, who survived him but predeceased the period of division, had a vested right in a share of the residue *a morte testatoris*.

Robert Christal, painter, Kirkcudbright, died in 1884, survived by his wife and by five children, and leaving a trust-disposition and settlement, dated 1st March 1878, and relative codicils.

By one of the codicils, dated 18th April 1884, the testator provided as follows:—“I, Robert Christal, designed in the foregoing trust-disposition and settlement, do hereby revoke and recal the fifth