

have appeared; but if he appears and pleads no jurisdiction he must observe the rules of this Court, and this Court has jurisdiction to determine the question of jurisdiction, but it cannot determine any question except upon a record properly made up in accordance with the statute and the Acts of Sederunt.

LORD TRAYNER—I concur in what your Lordship has suggested.

LORD MONCREIFF—I am of that opinion also.

The Court pronounced this interlocutor:—

“Recal *in hoc statu* the interlocutors of 8th November 1898 and 13th July 1899, and remit the same to the said Lord Ordinary to allow the defenders, if so advised, to lodge defences: Find the pursuer entitled to expenses to this date,” &c.

Counsel for Pursuer—Salvesen, Q.C.—Cook. Agents—Simpson & Marwick, W.S.

Counsel for Defender—Lorimer—Laing. Agents—Philip, Laing, & Harley, W.S.

Thursday, February 14.

## FIRST DIVISION.

[Sheriff Court of Ayrshire.

### MAGISTRATES OF KILMARNOCK v. DONALD & MORTON.

*Burgh—Customs—Toll upon Cattle Brought within Burgh for Sale—Method of Levying—Liability of Auctioneer—Process—Action of Exhibition Relative to Claim Against Third Parties.*

The magistrates of a burgh were empowered to levy customs upon all cattle, &c., brought for sale within the burgh, and in particular had right to levy or collect customs at specified rates upon all cattle, &c., “brought for sale within or sold within” an auction mart situated within the burgh.

An action was raised by the magistrates against the proprietor of the mart claiming the amount of customs which they alleged to be due in respect of the cattle, &c., which during the period of a year “have been consigned to the defenders within the said burgh . . . or brought within and sold by the defenders within said auction mart belonging to the defenders.” There was a further conclusion for production by the defenders of a list of the owners or consignors of the cattle, &c., or for exhibition of the defenders’ books to enable the pursuers to ascertain this. The Court *dismissed* the action, holding that there was no ground of personal liability for the dues against the defenders, and that there was no obligation on them to exhibit their books or furnish information relative to a claim upon third parties against whom no action had been brought.

*Observations* by Court as to the method in which it was competent for the burgh authorities to exercise their right to levy customs.

*Opinion* that they could primarily only be exacted from those in charge of the animals at the time they entered the burgh.

An action was raised in the Sheriff Court of Kilmarnock at the instance of the Provost, Magistrates, and Town Council of the Burgh of Kilmarnock, against Donald & Morton, auctioneers, carrying on business in an auction mart at West Langlands Street within the burgh of Kilmarnock. The pursuers craved the Court “to grant a decree against the above-named defenders, ordaining them to pay to the pursuers the sum of £56, 15s. 7d, or otherwise to appoint, ordain, and decern the defenders to produce or deliver to the pursuers a list containing or showing the names and addresses of the owners or consignors, and the numbers of each kind of bestial, of all cattle, sheep, horses, pigs, or other bestial consigned to or brought within or sold within their auction mart at West Langlands Street, Kilmarnock, between the 7th day of October 1898 and the 30th day of September 1899; and further, to ordain and decern the defenders to produce and exhibit to the pursuers their books or other documents in order that the pursuers may verify or check said list, and discover the names and addresses of the owners or consignors, and the number of each kind of bestial, of said cattle, sheep, horses, pigs, or other bestial consigned to or brought within or sold within said auction mart belonging to defenders within the periods above mentioned.”

It was averred by the pursuers on record, and was not disputed by the defenders, that “(Cond. 2) The pursuers have right to levy petty customs or dues, *inter alia*, on all cattle, sheep, horses, pigs, and other bestial brought for sale within the burgh of Kilmarnock, conform to schedule of rates herewith produced dated 23rd October 1854. . . . By judgment of the Sheriff-Substitute of Kilmarnock, dated 16th February 1899, it was decided that the pursuers have right to levy or collect the customs at the rates mentioned in said schedule upon all cattle, sheep, horses, or pigs brought for sale within or sold within the said auction mart of the defenders. A copy of said judgment is herewith produced and referred to.”

The pursuer further averred—“(Cond. 3) Between the 7th day of October 1898 and the 30th day of September 1899 there has been consigned to the defenders within said burgh, or brought for sale within said burgh by the defenders, or brought within and sold by the defenders within said auction mart belonging to the defenders, and on the respective dates therein mentioned, the number of cattle, horses, sheep, pigs, or other bestial mentioned in the list herewith produced by the pursuers. The customs or dues payable to the pursuers upon said cattle, &c., amount to £56, 15s. 7d., all as detailed in said account.”

The pursuers pleaded—“(1) The defenders having brought for sale within or sold within the burgh cattle and sheep, &c., detailed in the list herewith produced, upon which customs are payable, the pursuers are entitled to decree of payment as concluded for. (2) The defenders being the consignees of cattle brought for sale within or sold within the burgh as detailed in said list herewith produced, upon which customs are payable, the pursuers are entitled to decree of payment as concluded for. (3) The defenders being bound to disclose to the pursuers or to allow them an opportunity of discovering the owners and consignors of cattle, &c., to them, upon which customs are payable, and the defenders having refused to do so, the pursuers are entitled to decree to that effect as concluded for.”

The defenders averred that they had not been asked for payment of any customs until an account was rendered on or about 9th March 1899. They maintained that they were not indebted to the pursuers, and pleaded that the action was irrelevant and incompetent.

The Sheriff-Substitute (HALL) on 29th November 1899 pronounced the following interlocutor:—“Finds that as regards the primary conclusion for payment the action is not supported by any relevant averment, except in so far as hereinafter mentioned: Finds that as regards the alternative conclusion for exhibition the action is irrelevant and incompetent: Finds that the following averment, contained in article 3 of the pursuers’ condescendence, is relevant to be remitted to probation, in support of the conclusion for payment, viz., ‘There have been brought for sale within the said burgh by the defenders the number of cattle, horses, sheep, pigs, or other bestial mentioned in the list herewith produced.’ Allows the pursuers a proof of the said averment, and the defenders a conjunct probation: *Quoad ultra* dismisses the action and decerns, reserving in the meantime the question of expenses.”

*Note.*—“In this action the pursuers seek to enforce their right to levy petty customs on animals sold in the auction mart in Kilmarnock belonging to the defenders. The primary conclusion proceeds on the assumption that the defenders are themselves liable in payment of these imposts, and the grounds of their alleged liability are set forth in article 3 of the condescendence. They consist of three alternative averments, viz., that the animals had been consigned to the defenders, or had been brought for sale within the burgh by the defenders, or had been brought within and sold within the defenders’ auction mart. Of these averments the second is admittedly relevant, and a proof of it has accordingly been allowed. The other two are I think irrelevant. Animals consigned to the defenders may, before being so consigned, have been already within the burgh, in which case they are not subject to petty customs, and the same remark applies to animals brought within and sold within the defenders’ auction

mart. Further, I am not aware of any authority for holding that consignees are liable in payment of petty customs, which seem only exigible from the persons who actually bring the animals or other goods across the boundary and within the limits of the burgh. Accordingly, in the well-known case, *Magistrates of Linlithgow v. Edinburgh & Glasgow Railway Company*, 12th July 1859, 21 D. 1215, where the history of these imposts was so elaborately and learnedly handled, Lord Medwyn observes that originally petty customs were always levied at the ports or gates of the burgh, although the goods might not be sold there but merely pass through.

“The second or alternative conclusion is entirely unsupported by averment, except in so far as consignment to the defenders, which is averred, implies that there were also consignors. But the main objection to it is its incompetency. It is in reality a conclusion for exhibition *ad probandum*, having for its object to place the pursuers in a position to raise action against certain persons who are supposed to have sent animals for sale to the defenders’ auction mart. Such a conclusion is, however, incompetent, unless the exhibition is craved with reference to some depending process, to which the action of exhibition *ad probandum* is incidental and accessory—*Crawford v. Campbell*, May 26, 1826, 2 W. & S. App. 440; *Greig v. Crosbie*, December 11, 1855, 18 D. 193; *Campbell v. Campbell*, May 13, 1869, 7 Macph. 759. Here of course we have no depending process, since what the pursuers seek to obtain is information and materials to enable them to sue such of the defenders’ customers, if any, as have incurred liability for petty customs. I apprehend that they are not entitled, at least in this form, to require the defenders to assist them to do so, and that the alternative conclusion would fall to be rejected, even if these vexatious and old-world charges were less unfavourably regarded than they are in modern practice.”

The pursuers appealed to the First Division.

Argued for appellants—There was no doubt that customs were legally due to the burgh by some-one for all cattle brought from outside within the burgh. They had originally been levied at the ports, but it was no longer possible to do this consistently with the circumstances of the town. The defenders, who received the cattle and brought them in from outside, were just as much the cause of their being brought in as the consignors. It was the most convenient way of collecting the dues to collect from the defenders, and would do no harm to anyone, since no doubt they would be paid out of money received from purchasers, and would thus ultimately come from the pockets of the consignors—*Great Eastern Railway Company v. The Mayor of Harwich*, 1880, 41 L.T. (N.S.) 533. The pursuers were accordingly entitled to a general proof of their averments in Cond. 3. 2. Alternatively, they were entitled to succeed on the remaining conclusions, so as to learn the names of the consignors. The

cases quoted by the Sheriff-Substitute were inapplicable.

Argued for respondents—The pursuers' demand placed the consignee for sale in an impossible position. If they had demanded the toll when the cattle or the proceeds of the sale were in the possession of the defenders, they would have had no right to retain and hand over the toll. Their customers would have had a good grievance against the defenders if they had done so, for they were neither in a position to go beyond the terms of their contract and retain money to pay the toll, nor were they collectors of it on behalf of the Magistrates. Such a demand had never been made upon a consignee for sale, still less could it be made for the accumulated customs at the end of a year. The case of the *Great Eastern Company* in no way supported the pursuers' contention, for it turned entirely upon the construction of a particular statute.

LORD PRESIDENT—We do not require to express any opinion in regard to the averment of which a proof has been allowed by the Sheriff-Substitute, as it is not objected to; we have only to consider the relevancy of the two other grounds of claim stated in the record. The two other grounds of claim are that (1) "There have been consigned to the defenders within the said burgh" . . . or (2) "brought within and sold by the defenders within said auction mart belonging to the defenders" certain cattle. The mere fact of the defenders being consignees of cattle, or of cattle being brought by anyone into the burgh and sold by the defenders in their auction mart, is said to render them liable to the pursuers in the petty customs in question. The first ground then is consignment, and the second is sale. It appears to me that the Sheriff-Substitute is right in holding that neither of these constitutes a relevant ground for a petitory action against the present defenders. The position of the defenders is not that of owners of any of the cattle which are in question under these two heads, and therefore we are not called upon to express any opinion as to whether a personal action would lie against the owners of cattle which have been brought within the municipal boundaries without the petty customs having been paid or claimed at the time when the cattle entered the burgh or while they remained in it. It seems to me very clear that neither the fact of cattle being consigned to the defenders for sale, nor the fact of their selling at their auction mart cattle which someone else has brought into the burgh, forms any ground of liability against them.

The right of the Magistrates is according to their printed table "to exact certain dues upon the following articles when brought for sale within the burgh," and the list includes among other things cattle. It is not necessary to consider whether the word "when" as there used means at the time when the cattle cross the burgh boundaries, or whether it has a larger meaning so as to include the case of the cattle being still within the burgh when no

dues had been exacted or asked when they entered it. It matters little for the purposes of the present question which of these constructions is adopted, but I shall assume the larger construction as being most in favour of the pursuers. It is matter of common knowledge that such dues or petty customs were in former times in most burghs, and certainly in walled towns, exacted at the ports or gates as the persons or cattle entered the burgh, and we find this quite recognised in the pursuers' table of dues, as it bears that they are "to be levied at the time the said articles are being brought within the burgh," and empowers them "to collect the same at such ports and places as they may fix and appoint." That is a familiar form in the case of old burgh customs or dues, and probably "port" is the more typical term, as "place" may possibly be a place within the burgh where the person is found in possession of the cattle. There is no doubt that primarily the idea was to make the payment of the due or custom a condition of the cattle being allowed to enter or be in the town. It is not a contract debt. It is a consideration for allowing the cattle to come within the burgh boundaries, in this particular case for sale, but it might be for consumption or some other purpose. Accordingly, it does not take, in its initial form at all events, any direct cognisance of a debtor in an obligation; what is looked to is the cattle and the person in charge of them. If the owner of the cattle wishes the accommodation of the burgh, he gets it on payment of the dues being made by the person in charge of them—just as a person driving a cart desiring to pass through a toll must pay as a condition of his being allowed to do so. Accordingly, in all these cases where the condition of entry or transit is payment the case is not one of proper contract debt. No doubt it might be easy to infer a personal contract from a course of dealing under which the cattle were allowed to enter the burgh without the dues being exacted at the time, the dues being paid upon a weekly or monthly account. There is, however, no such course of dealing alleged here. I shall assume in regard to the word "places" that it would be competent for the Magistrates or their collector to exact payment not only at the "ports" but in any part of the burgh where the cattle might be found. It may be that in such a case the persons in charge might be ordered to remove their cattle if they declined to pay the dues, or that the collector might have a remedy against the cattle. But assuming all those things in favour of the burgh, I am unable to see any ground upon which the auctioneer to whom the cattle are consigned for sale, or in whose mart they are sold—brought by some one else—can be liable for the dues as in a personal debt. The supposition is that he did not bring the cattle into the burgh, and that he was not in charge of them, unless possibly while they were in his mart, and that he was merely executing the office of selling them as an auctioneer. All the cattle in respect of which the claim is made

had long passed out of the defenders' mart, and as has been pointed out by Mr M'Clure, the defenders would probably have no right in settling with their employers to keep back any part of the price except their own commission for selling. The condition of the argument is that no claim was made for these dues while the cattle were in the defenders' hands, but after the cattle had long left the burgh. I am wholly unable to see any ground upon which a claim could be substantiated against the auctioneer under such circumstances. It is not upon contract or upon ownership or upon service rendered by or benefit received from the burgh, or upon statute or any public law, and it therefore appears to me that, assuming all the things that are alleged in article 3 of the condescendence to be true, there is no ground for a personal action against the defenders. The pursuers' averments in support of the petitory conclusions of the summons being thus, in my judgment, wholly irrelevant, it appears to me that we should sustain the judgment of the Sheriff-Substitute in so far as it relates to that conclusion.

The remaining conclusions are of a still more extraordinary character. They ask that the defenders should be ordained to produce a list containing or showing the names and addresses of the owners or consignors and the numbers of each kind of bestial sold within their auction mart during nearly a year—in other words, an order is asked to compel the defenders to disclose to the pursuers their whole business, all their trade connections and their trade secrets, the character and volume of trade they are doing, the names of their employers, and everything which a man engaged in trade has a right to keep to himself. The hypothesis of this part of the claim is that these defenders are not liable to pay the dues, and this is a proposal to compel them to furnish the information for a claim against some other persons unknown to the pursuers. I am unable to see any ground on which the defenders can be compelled to open their books to the pursuers in order to supply information to enable them to judge whether they have grounds of action against unknown third parties. I think it is impossible to grant any part of what is asked in this conclusion.

The next conclusion asks a decree against the defenders to produce and exhibit their books to the pursuers to enable them to verify or check the list, and discover the names and addresses of the owners or consignors, and the number of each kind of bestial consigned to or brought within or sold within the defenders' auction mart during the period mentioned. Of course, if there is no obligation to give the information for the list, then there is no obligation to give the documents which are to enable the pursuers to verify and check it.

The only case which was referred to as giving any countenance to the pursuers' claim was that of the *Great Eastern Railway Co. v. Harwich*, 41 L.T. 553, which related to a charge upon coal coming into the

harbour authorised by a private Act of Parliament, and which the harbour authorities were empowered to exact from the master of the ship. The question was as to the nature of the right conferred by the particular statute, and the case has no bearing upon a customary right such as that to which the present case relates.

LORD ADAM—I agree with your Lordship, and my opinion is capable of being shortly stated. It is not disputed that the Magistrates of Kilmarnock have a right under some ancient charter or other to levy and collect certain customs upon all cattle brought for sale within or sold within the burgh. But we were told that they did not say they had any right except as regards cattle and other beasts brought within the burgh for the purposes of sale. They did not maintain that an animal born within the burgh and sold within the burgh was liable. They limited their claim to demand and collect rates on cattle brought for sale within the burgh. It appears to me that, *prima facie*, seeing we are dealing with nothing but petty customs, the person who is primarily liable is the person who brings them in—who brings them in not in point of law but in point of fact. "There is the person bringing them in; he is the person liable for your rates; go and get them." That is the real meaning of the power of these pursuers. Accordingly, the Magistrates have power to appoint ports and "places," and that means "localities." I have no doubt they have in fact appointed ports and places, but I am not aware that one of the places is the Sheriff Court of the county of Ayr, for according to their view of it that is one of the places where they now propose to collect these dues. Looking at the word, I think it means that you are to collect the dues on the spot; it does not mean that you are to raise an action for payment. The real meaning is that the dues are to be levied or collected from the party in the actual charge of the beasts at the time bringing them into the burgh. Their remedy was, as it appears to me, to refuse passage to the beasts. It may be, if they do admit them into the burgh, they may have some difficulty in levying the dues, because if they allow them to go to the auction mart, and the owner of them refuses to pay, I do not see where their remedy is. Are they to seize the beasts or drive them away again? It appears to me that their remedy is gone. I do not think it was at all according to law or custom that, having allowed the beasts to pass, these Magistrates should have right to insist upon inquiry as to what was the contract under which these beasts were consigned to a particular place, and for whose behoof they were sold. These questions are altogether out of the case. In order to get the right to collect twopence upon every animal passing through the town, are these defenders to be exposed to have this claim made against them and an action brought against them? I do not think that is the pursuers' right at all. It occurred to me that there was not much relevancy in this

case at all, because I think that the demand for the dues must be made at the time the cattle enter into the town. I quite agree that a party conveying any large number of sheep or cattle may well arrange with the Magistrates to pay periodically, but that is a private agreement, and if there is no agreement, and the cattle are allowed to pass, the remedy is gone. The English case was a totally different case from this. It was founded upon a privileged Act of Parliament, and the decision depended upon the construction of the words of that Act of Parliament. It did not deal with petty customs, but related solely to dues upon cargoes of coal, and although consignees were liable in a certain event, that was a statutory liability which could form no authority in this case. With reference to the demand upon the defenders to disclose the names of their customers, I think it is most preposterous. It would mean that all who assisted in introducing cattle into the burgh were to be liable jointly and severally for the dues.

LORD M'LAREN—We have not before us the terms of the Crown grant, but it is admitted that it is a grant of small customs in general terms to be levied upon goods brought into the burgh for sale. While we are not able to do anything further for the Magistrates, I think we may at least give our opinion as to the nature of their right, because they have a right under their charter. I think the only right they have is this—that as a condition of admitting cattle or bestial into the town for sale they may demand the dues which custom has authorised. It is not like a contract right where you pay for admission upon a contract made with the public. It is a right flowing from the grant of the Crown and within the powers of the Crown. Nor is this a lien, because that is a right of detaining a thing until some charge is paid. But this is only a right of refusing to admit cattle into the town until the dues are paid. Now, supposing that a port with a gatekeeper is established, and the cattleman or person in charge of the cattle is not in a position to pay, but he being duly authorised says "My employer is so-and-so, and if you will keep an account he will pay you," then a personal contract is set up upon which, I doubt not, the consignor of the cattle could be sued. But I will go further and say that the mere fact of the cattle being admitted after a demand for payment had been made would go a long way to enable the Court or a jury to infer that there was in fact an agreement to give credit, because in the case supposed the person charged with levying the dues waived his right of exclusion on the understanding that the dues would be paid. I agree with your Lordships that the liability attaches only to the person who is in possession of the beasts at the time when they enter the town, or it may be against anyone who, although not in possession, comes forward and voluntarily guarantees payment. As regards the present case I have great doubt whether any claim exists apart from the demand

made at the time of the admission of the bestial into the burgh; but I think the Sheriff has exercised a proper discretion in allowing the limited proof that he has in order to raise this question. On the second part of the case—the conclusion for exhibition—it appears to me to be a new and alarming extension of the right of search for enemy's goods, and I need hardly say there is no authority for it. You must first find your debtor, and after you have brought an action against him you will get a diligence against his agents to recover excerpts from their books showing how many cattle passed through his hands. I also agree with your Lordships with regard to the *Harwich* case. It gives us no assistance, because a decision upon the construction of one royal or parliamentary grant can be of no authority on the question of the effect of a grant expressed in different terms on a different subject-matter. I agree that we should affirm the interlocutor.

LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Recal the Sheriff-Substitute's interlocutor of 29th November 1899: Find that the pursuers moved for and that the defenders did not object to proof being allowed of the following averments in article 3 of the condescendence, viz.—"There have been brought for sale within the said burgh by the defenders the number of cattle, horses, sheep, pigs, or other bestials mentioned in the list herewith produced": Therefore allow to the pursuers a proof of the said averment and to the defenders a conjunct probation: *Quoad ultra* find that the pursuers' averments are not relevant or sufficient in law to support the conclusions of the summons, and decern: Find the appellants liable to the respondents in the expenses of the appeal," &c.

Counsel for the Pursuers—Solicitor-General (Dickson, Q.C.)—Reid. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders—Salvesen, Q.C.—M'Clure. Agents—Simpson & Marwick, W.S.

Thursday, February 15.

## FIRST DIVISION.

[Sheriff Court of Aberdeen.]

A B v. C D's TRUSTEE.

*Parent and Child—Illegitimate Child—Right to Aliment—Contract with Third Party to Support Child.*

In an action for aliment at the instance of an illegitimate child against the executor of her deceased father, the defender pleaded that the child was in the custody and under the care of a third party, who had entered into an