the will. That provision is—"On the death of my said daughters respectively, leaving lawful issue, I hereby direct my trustees to divide equally amongst the issue of each of my said daughters the sum of £10,000 sterling." There were three daughters, and to each of these he gave a liferent of £10,000, £30,000 to be equally divided, which was afterwards increased to £36,000, giving £12,000 to each. Well, one of the daughters—and it is only with her we are here concerned—Mrs Macaulay, died in the month of March 1895 leaving two daughters, and she had had a daughter who was married and died sometime before her mother—Mrs Hickling—and the question is whether she is one of the issue entitled to a share of the £10,000 or £12,000 appointed to be divided by the clause of the settlement to which I have just referred. Now, that depends, as I have stated, entirely and exclusively upon the construction of that clause.

I may say at once that I attach no importance to the view which was suggested that this meaning of the clause was affected by the fact that the word "issue," when it occurs for the second time in the clause, is not preceded by the word "such."

It was suggested to us by Mr Mackay that the benefit of the provision was not limited to the issue left in the ordinary sense of the expression by the deceasing daughter, but extended to the whole issue whether surviving her or not. I think the meaning of the clause as employed by a Scotch conveyancer is to create a provision in favour of issue surviving the deceasing daughter, and not a provision in favour of issue predeceasing a deceasing daughter. If it did apply to issue predeceasing it would apply in the case which I put to Mr Mackay, and which he accepted. Suppose a daughter should have died not survived by two children, but survived by none, but who had a son or daughter who had predeceased her by any number of years, is this a provision in favour of the creditors or in favour of the legatees or disponees of such predeceasing child? Mr Mackay accepted that as a fair test of the argument, and maintained that if the argument was good for anything it was good for that, and that the disponees or creditors would take any such provision. I am of opinion that that is not so, that that is contrary to the import of the words, and contrary to the construction which we must put upon them.

I should desire to guard myself against expressing any opinion now as to the case of a child predeceasing her mother and leaving lawful issue of her own, whether upon the *conditio si sine liberis* or upon some analogous principle of law such grandchildren of the testator would not take in the same way as children. He provides in favour of his daughters and the issue of his daughters, and it is a question whether that would not take it, not merely to the daughter or issue of the daughter, but to the issue of the issue of the daughter, and whether, it being a provision by the father to his daughter and granddaughter, it might not extend to great-granddaughters; but there is nothing of that kind here. There is no question of issue having right according to the presumed will of the testator as coming in place of a deceased parent.

My opinion therefore is that under this provision none can be entitled to share in the division of the fund which Mrs Macaulay liferented except the issue which she left to have it divided among. I do not attach any importance to the word "divide," because if she had left only one child that child would have taken the whole. My opinion therefore is that the questions before us must be answered accordingly—that there was no vesting *a morte testatoris* in the children of Mrs Macaulay, but only a vesting of the right to participate in the division of the money liferented by Mrs Macaulay in the children surviving her and upon her death, that being the date of vesting.

The LORD JUSTICE-CLERK and LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

The Court answered the first and fourth questions in the negative, and found it unnecessary to answer the other questions.

Counsel for the First Parties — Cullen. Agents—Horne & Lyell, W.S.

Counsel for the Second and Third Parties—Salvesen. Agents—Horne & Lyell, W.S.

Counsel for the Fifth and Sixth Parties—Mackay. Agents—J. S. & J. W. Fraser Tytler, W.S.

Counsel for the Fourth Parties—J. H. Millar. Agents — J. S. & J. W. Fraser Tytler, W.S.

Counsel for the Seventh and Eighth Parties—Balfour, Q.C. Agents—Kinmont & Maxwell, W.S.

Thursday, March 12.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

GRAHAM *v* MAGISTRATES OF PERTH.

Burgh — Petty Customs — Royal Charter —Liability to Petty Customs of Extended Area included in Burgh under Statute—Police and Improvement (Scotland Act 1862 (25 *and* 26 *Vict. cap.* 101), *sec.* 13 *— Causeway-Mail — Toll — Roads and Bridges (Scotland) Act* 1878 (41 *and* 42 *Vict. cap.* 51), *secs.* 3 *and* 33.

The magistrates of a royal burgh had right under a charter of King James VI. to levy petty customs "on things and goods carried to the streets" of the burgh "that the same might be sold there."

The area of the burgh was extended under the Police and Improvement (Scotland) Act 1862, which provides that the boundaries as extended under the provisions of the Act "shall there-

after be the boundaries of the royal burgh for all municipal purposes." *Held* (1) that the magistrates were not entitled to levy petty customs on animals brought to be sold at cattle auction markets situated within the extended area but outside the ancient royalty; and (2) that they were not entitled to levy dues on cattle which on their way to or from these auction markets passed through the ancient royalty, such an exaction being causeway-mail within the meaning of the Roads and Bridges (Scotland) Act 1878, sec. 3, and therefore illegal under sec. 33 of the same statute.

This was an action at the instance of James Graham, Scone's Lethendy, by Perth, against the Lord Provost, Magistrates, and Town Council of Perth, and against the tacksmen of the customs of that burgh, concluding for declarator that the defenders had no legal right or title to "ask, crave, demand, exact, or levy from the pursuer any duty, custom, or impost whatever upon any animals, commodities, or goods in respect of their being sold, or exposed for sale, or purchased by him at the auction markets kept by Messrs Macdonald, Fraser, & Company, Limited, live-stock salesmen, Perth, situated at Caledonian Road and Glasgow Road, Perth; and the auction market kept by Messrs John Swan & Sons, live-stock salesmen, Perth, and situated at Newtown, Perth; or upon any animals, commodities, or goods in respect of their being imported by the pursuer into, or exported by him from, any of the said auction markets," and for interdict against their doing so.

The defenders had right, in virtue of a charter of King James VI. dated 15th November 1600, to levy certain petty customs on things and goods brought for sale into the burgh of Perth. The charter, after confirming several former charters in favour of the burgh, of new set and demitted and perpetually confirmed "totum et integrum dictum nostrum burgum regium de Perth ejusdemque burgi mœnia portas, &c. . . . . cum annuis reditibus particatarum et burgagiorum firmis toloniis ac parva custuma dicti nostri burgi de Perth portarum et portuum ejusdem commoditatibus privilegiis devoriis et casualitatibus eorund. dicti nostri burgi de Perth ac portarum portuum fororum nundinarum viarum et platearum ejusdem et lie pynorie ac purgationis platearum lie gait dichting et lignorum ac fori lignarii lie tymber et tymber market solitis et consuetis et omnibus custumis et divoriis solvi sen colligi solitis et consuetis per quascunque personas aut personam pro quocunque genere rerum aut bonorum asportandorum ad plateas dicti nostri burgi de Perth ut ibi vendantur." [The authorised ancient translation of this clause was as follows—"together with the yearly rents of the roods of land and burgage farms, tolls and small customs of the ports of our said burgh of Perth, and all things transported thereat, commodities, privileges, and casualties of the samen and of the said ports, and things transported to fairs and markets, ways, and streets thereof, with the pynorie and gait dichting, with the timber and timber-market used and wont, and all customs and exactions collected and accustomed to be collected by whatsoever person or persons for whatsoever kind of things or goods carried to the streets of our said burgh of Perth that the same may be sold there."]

The facts, as admitted on record and in a joint-minute of admissions for the parties, were as follows:—The Magistrates were in the habit of letting the right to levy the customs by public roup. The boundaries of the burgh, as described in the charter of King James VI., and referred to as the ancient royalty, were extended in 1839 by and for the purposes of an Act (2 Vict. cap. 43) for more effectually paving the streets of the city of Perth, for the better lighting, watching, and cleansing the said city and suburbs thereof, for maintaining and regulating the police of the same, and for other purposes relating thereto, dated 14th June 1839. The boundaries were again extended in 1866, under powers contained in the General Police and Improvement (Scotland) Act 1862, and the General Police and Improvement (Scotland) Supplemental Act 1865. They were in 1889 again extended under authority of these two Acts. One of the auction markets (opened in 1875) of Messrs Macdonald, Fraser, & Co. was situated wholly without the boundaries of the ancient royalty, but within the boundaries as extended in 1839. The other auction market of Messrs Macdonald, Fraser, & Co. (opened in 1885) was outside both the ancient royalty and the burgh as extended in 1839, but within the boundary as extended in 1866. The auction market of Messrs Swan & Sons (opened in 1885) was situated wholly without the boundaries of the said ancient royalty, and also without the boundaries as extended in 1839, but within the boundaries as extended in 1866. All goods and animals purchased or sold by the pursuer at these auction markets, and coming from or going to his farm of Scone's Lethendy, by way of Perth Bridge, passed through or across some portion of the ancient royalty before entering or after leaving the auction markets. All goods or animals purchased within and taken out of the ancient royalty, as also goods and animals brought within the ancient royalty and sold there, had always without objection been treated as liable in customs. Custom was, with some exceptions, regularly paid on stock, &c., brought into or taken out of the markets mentioned up till the year 1892. In many cases it was paid by Messrs Macdonald, Fraser, & Co. and Messrs John Swan & Sons, and charged against their customers, whose stock was understood to be liable to the custom. In the debit or deduction side of the sale-notes of Messrs Macdonald, Fraser, & Co., and Messrs John Swan & Sons, there was up till 1892 a printed or lithographed item of custom paid, the amount being filled up in ink when the sale-notes were made out. The tacksmen of customs had not always confined themselves to collecting customs

on goods as they entered or passed out of the ancient burgh; on the contrary, they had, even before the establishment of the auction markets, collected custom at places outside the ancient royalty, on goods and live stock entering the burgh. The town of Perth, or at all events the tacksmen of the Castle Gable and Highgate Port customs, and South West Port customs, with the sanction of the town of Perth, in particular, immediately after the marts of Messrs Macdonald, Fraser, & Co. were erected in the years 1875 and 1885, and John Swan & Sons in the year 1885 respectively, set up collecting boxes far beyond the ancient burgh limits, and there without challenge collected customs on stock, &c., which entered the extended area and passed on to the marts, or came from the marts and passed out of the extended area by traversing roads and streets within the extended area, but wholly outside the ancient burgh. These boxes were erected with the view of preventing parties escaping the payment of customs by using the side roads, or by passing over fields, or in any other way. From time immemorial the defenders and their predecessors had levied and collected dues and customs in terms of their Customs Tables, which had been altered, explained, and modified by Acts of Council of dates 1st November 1791, 1st November 1792, 13th October 1793, 29th October 1798, and 4th November 1816, and had formed the rule or scale by which the dues and customs were levied and collected. The auction market belonging to Messrs Macdonald, Fraser, & Co. was so situated that the goods and animals could not be brought in or taken out without passing through or across some part of the ancient royalty. Custom was not charged on goods, animals, &c. entering the Burgh Muir (or roads leading from the burgh thereto) and not passing through the burgh. The tenants of the Customs of Perth had been in the practice for at least forty years of collecting custom from residents in the Burgh Muir, which was part of the royalty of the burgh of Perth, and the roads leading thereto, as if they were strangers.

The Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. cap. 101), sec. 13, provides (in regard to the determination of boundaries)—"If the Sheriff shall grant the prayer of the petition, he shall issue a deliverance to that effect on the petition, and such deliverance shall be final, and when recorded along with the petition in the Sheriff Court books of the county, the Parliamentary boundaries aforesaid shall thereafter be the boundaries of the royal burgh for all municipal purposes and all matters connected with police, including the right of voting for town councillors."

The Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51) provides, section 33—"From and after 'at latest 1st June 1883' all tolls within such county and within any burgh wholly or partly situated therein, shall be abolished . . . All causeway-mail shall be abolished within any burgh from and after the fifteenth day of May first occurring not less than four years after the commencement of this Act in the county within which such burgh is situated or partly situated," and in any case "from and after the fifteenth day of May 1887;" and section 3—"Causeway-mail shall include through customs and all exactions of whatever kind . . . made or which may be made in respect of the use of or passage over the streets or roads within any burgh but shall not include petty customs or any sum or duty as aforesaid except in so far as they are exacted payable or leviable in respect of goods, articles, things, or animals passing or carried through such burgh."

The Lord Ordinary (STORMONTH DARLING) by interlocutor dated 22nd January 1896 granted decree of declarator and interdict in terms of the conclusions of the summons.

Opinion.—"The purpose of this action is to establish that the persons making use of three auction markets in the city of Perth, which were opened in the years 1875 and 1885, are exempt from every kind of custom or impost leviable by the magistrates upon animals or goods in respect either of their being exposed for sale at, or of their being carried to or from, any of these auction markets.

"The material facts are ascertained by admission of parties, and the questions of law arising thereon are two in number—(1) Whether the right to levy petty customs under the charter of King James VI., dated 15th November 1600, has been extended beyond the ancient royalty of the burgh; and (2) Whether the right to levy anything of the nature of a transit due even within the ancient royalty falls under the definition of causeway-mail, and as such is abolished by the Roads and Bridges Act 1878.

"The boundaries of Perth have been extended more than once under the powers contained in the Police and Improvement Act of 1862, and the auction markets in question are situated outside the ancient royalty, but within the extended area. If the right to levy customs outside the ancient royalty has been conferred on the defenders, it can only be by virtue of the Act of 1862. Now, the Act from beginning to end says nothing about petty customs. But the defenders profess to discover this important addition to their taxing powers in the section which provides that the new boundaries shall, after the sheriff has issued his deliverance, 'be the boundaries of the royal burgh for all municipal purposes, and all matters connected with police, including the right of voting for town councillors.'

"An interesting constitutional argument was addressed to me on the incompetence of Parliament to deal with the prerogatives or patrimony of the Crown without the Crown's antecedent consent. This argument assumes that when the Crown gave out the right to levy customs within the burgh of Perth, it retained the right to levy customs outside the burgh, and that this right was part of its prerogative or patrimony which Parliament could not touch. I hardly think that so high a view of the

Crown's right is consistent with the historical fact that by the Act 1424, cap. 8, and again by the Act 1455, cap. 41, 'all the great and small customs and burrow mails of the realm' were conferred on the Crown by Parliament, and that Parliament was constantly in the habit of ratifying the charters which the Crown granted to royal burghs.

"But it seems to me unnecessary to consider this constitutional question, because even if it be assumed that it was within the competence of Parliament to confer the right of levying customs within the extended area, I do not think that the Act of 1862 has done so. The truth is that petty customs are part and parcel of an obsolete system of burgh administration. On the one side was the duty of watching and warding, of erecting court-houses and jails, of providing and regulating markets, and of maintaining streets. On the other side were the privileges of exclusive trading, the enjoyment of burgh property, and the right of imposing dues on those who frequented the markets and used the streets. But with the abolition of exclusive trading and the institution of assessments on property for all municipal purposes, a new state of things was introduced. And it is not to be assumed that Parliament in 1862 intended by any but the most express words to apply to new areas a kind of impost so little in harmony with the modern scheme of municipal government. I answer the first question, then, in favour of the pursuer.

"On the second question I think he is also entitled to prevail. I do not doubt that, under the charter of King James, and the usage instructed by the 'Custom Table of the Ports of Perth,' the defenders, for more than two centuries and a-half, lawfully imposed certain dues in respect of animals driven through the ancient royalty, altogether irrespective of their being offered for sale. But the right to do so was brought to an end by section 33 of the Roads and Bridges Act, the purpose of which was to abolish all exactions of the nature of tolls. I do not know whether, apart from the statute, the transit dues exacted by the defenders would have fallen under the description of 'causeway-mail,' but clearly the interpretation clause is sufficient to cover them. Nothing can be more searching than the provision that 'Causeway-mail shall include through customs and all exactions of whatever kind . . . made or which may be made in respect of the use of or passage over the streets or roads within any burgh, but shall not include petty customs . . . except in so far as they are exacted, payable, or leviable in respect of goods, articles, things, or animals passing or carried through such burgh.' I confess I think that this part of the case is too clear for argument."

The defenders reclaimed, and argued—It was conceded that within the ancient royalty the magistrates had still right to levy petty customs. The petty customs were part of the common good, and were given to the burgh to enable it to discharge its public functions—*Kerr* v. *Magistrates of Linlithgow*, January 14, 1865, 3 Macph. 370; *Magistrates of Linlithgow* v. *Edinburgh and Glasgow Railway Company*, July 12, 1859, 21 D. 1215. Though in modern times there was a power of assessment for most burgh purposes, there were still expenses to defray for which no fund was available except the common good. It would be inequitable that the area included within the extended boundaries should get the benefit of these expenses, and not be liable to the petty customs out of which these expenses were, in part at least, paid. The clause in the Police and Improvement (Scotland) Act 1862, under which the new area was included in the burgh "for all municipal purposes" was sufficient to extend the right to levy petty customs. In such cases the strict rule as to imperial taxing statutes was not applicable. It had always been held that usage was the measure of the right, and it could be extended or abridged by use both as regarded the articles and the area liable to custom—*Magistrates of Wigton* v. *M'Clymont*, January 15, 1834, 12 S. 289; *Macpherson* v. *Mackenzie*, May 21, 1881, 8 R. 706. Here there was a habile title to acquire the right of levying petty customs over the new area by use, and it had always been assumed since 1839 that the right given to the old royalty extended to the new area. Parliament must be assumed to have known this, and therefore not to have given the right to levy in the extended area in express terms. Since 1866, when the boundaries were extended under the 1862 Act, there had been twenty years' prescriptive use, and in virtue of the Conveyancing and Land Transfer (Scotland) Act 1874, sec. 34, that was sufficient. If the area of the burgh had been decreased, the area liable to custom would have been decreased too, and it was only right that where the boundaries were extended the area liable to custom should be extended also. The magistrates in any view were entitled to levy dues on the pursuer's cattle, because they were driven into the ancient royalty on their way to and from the markets. Such a charge was not causeway-mail, but petty custom. Causeway-mail and petty custom were entirely distinct. The former was originally a tax upon carts with iron-shod wheels, and it was always a charge not upon goods but upon vehicles—*Boyd & Latta* v. *Haig & Son*, June 28, 1848, 10 D. 1433. It was said that the definition in the Roads and Bridges Act 1878 was wider than the common law signification, but even under that definition only dues exacted for "passing through" a burgh were struck at. Here the charge was upon goods brought in or sent out, not on goods passing through, for "transported thereat" signified taken through a gate, not taken through the burgh.

Argued for the pursuer and respondent—The true question here was whether the Act of 1862, brought into operation in this case in 1866, extended the area which was liable to petty custom. It was submitted that it did not. The right to levy petty

custom was patrimonial not municipal, and it might as well be held that a right of property was given in the lands included in the new area as a right to levy petty custom in it. The petty customs were part of the patrimony of the Crown, and the right to levy them within a certain area was given sometimes to burghs, sometimes to religious houses, sometimes to individuals. In the hands of burghs the measure of the right was use, but there was no connection between the area of the burgh and the area within which customs could be levied—*Magistrates of Linlithgow* v. *Edinburgh and Glasgow Railway Company*, *cit.* at p. 1230. In the case of Perth itself the people living on the burgh muir, though within the area of the ancient royalty, were liable to petty custom as strangers. It could not therefore be assumed that when the boundaries of a burgh were extended the area liable to custom was extended also. Prescription could not help the defenders, because the first of these markets was opened in 1875, so that there was not use for twenty years, even if that period would have been sufficient. (2) The right which the Crown had to the petty customs in places where it had not by express grant given it away could not be affected except by express enactment. The Legislature was not in use to affect the rights of the Crown without the Crown's antecedent consent, and no such consent had been obtained to the provisions of sec. 13 of the Act of 1862. It was therefore to be inferred that no right of the Crown was diminished, as would be the case if the defenders' claim was allowable. (3) It was not to be inferred without express provision to that effect that Parliament had intended to extend this obsolete system of supplying funds for municipal purposes to an area formerly free from it. (4) The contention that the pursuer's cattle were liable to dues on account of their passing through the ancient royalty on their way to or from the markets was untenable, because such a charge was causeway-mail and therefore illegal. Even if the defenders' argument that it was not causeway-mail were sound, it only proved at best that the exaction was a toll, and tolls were also illegal—Roads and Bridges (Scotland) Act 1878, sec. 33.

At advising—

LORD YOUNG — The auction markets referred to in the summons are situated outside the boundaries of the ancient burgh of Perth, but within the boundaries of that burgh as extended under the powers contained in the Police and Improvement Act of 1862. The Magistrates and Council had, and I assume have, right to exact customs and imposts of the character referred to in the summons and record within the boundaries of the ancient burgh. The question decided by the Lord Ordinary and argued to us is, whether the right was extended by the extension of the boundaries under the powers of the Act of 1862. There is no case averred of extension by ancient and established use and wont.

The Lord Ordinary is of opinion that the Act of 1862 does not authorise an extension of the right of burgh magistrates to exact customs or imposts of the kind in question or an enlargement of burgh boundaries importing such extension. He thinks the words "for all municipal purposes and all matters connected with police, including the right of voting for town councillors," do not include an ancient royal grant of right to levy customs such as probably could not, and certainly would not be granted now. He assumes that burgh authorities have by modern legislation sufficient taxing powers to meet any increase of expenditure which may be rendered necessary or proper by an enlargement of boundaries under the Act, and that there is no reasonable ground for implying the intention of Parliament to give any others. I concur in the opinion of the Lord Ordinary.

I also concur with his Lordship in his opinion and decision to the effect that the fact that animals or goods passed through a part of the ancient burgh on their way to or from the auction markets outside (assuming the fact to be so) does not subject them to the customs or imposts in question.

The result is that in my opinion the pursuer is entitled to decree of declarator substantially as concluded for. I think, however, that the conclusion for interdict is not only superfluous but quite out of place.

The LORD JUSTICE-CLERK and LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

The Court pronounced the following interlocutor:—

> "Recal the interlocutor reclaimed against: Find and declare that the defenders, the Lord Provost, Magistrates, and Town Council of Perth, and the defenders their tacksmen, have no right to exact from the pursuer any duty, custom, or impost upon animals, commodities, or goods in respect of their being sold or exposed for sale or purchased by him at the auction market kept by Messrs Macdonald, Fraser, & Company, Limited, live-stock salesmen, Perth, situated at Caledonian Road and Glasgow Road, Perth, and the auction market kept by Messrs John Swan & Sons, live-stock salesmen, Perth, and situated at Newtown, Perth, or upon animals, commodities, or goods in respect of their being imported by the pursuer into or exported by him from any of the said auction markets: Further dismiss the conclusion for interdict: Find the pursuer entitled to expenses," &c.

Counsel for the Pursuer—W. Campbell. Agents—Carmichael & Miller, W.S.

Counsel for the Defenders—Balfour, Q.C.—Dickson—Dewar. Agents—Irons, Roberts, & Company, S.S.C.