tantly, because I have taken occasion to say whenever this Act has come under my notice that I think it creates a monstrous injustice—that a wealthy Corporation shall be entitled to hold *in terrorem* over any person that litigates with them the risk that he may be subjected not merely to expenses as between party and party, but whatever expenses the Corporation may choose to incur as between agent and client, and that, I suppose, irrespective of the fact that the Corporation has the services of a town clerk who undertakes this work for a salary, with the result that the award of expenses goes not to pay for the litigation but to reduce the other expenses of the Corporation by being credited to the general fee fund. I have never been able to understand the policy of the statute. The ordinary expenses of litigation are quite sufficient to deter responsible people from engaging in litigation against a wealthy corporation, and actions by persons who are of no substance will not be diminished in number by the risk of the litigants being subjected to expenses between agent and client, because they litigate with an absolute sense of freedom from responsibility. Accordingly while I agree in the judgment which your Lordships propose, I think it is right that I should state my views as to the policy of the statute.

LORD GUTHRIE—I agree with your Lordship in the chair.

The Court found the defenders, the Corporation of the City of Glasgow, entitled to expenses against the pursuers in connection with the appeal, to be taxed as between agent and client.

Counsel for Pursuers and Appellants—Hon. W. Watson, K.C.—Paton. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for Defenders and Respondents the Corporation of Glasgow — Dean of Faculty (Clyde, K.C.) — M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Counsel for Defender John Lauder—Duncan Millar, K.C.—W. Wilson. Agents—Carmichael & Miller, W.S.

Friday, November 12.

SECOND DIVISION.

[Lord Cullen, Ordinary.

FRASERBURGH HARBOUR COMMISSIONERS *v.* WILL.

Harbour—Statute—Construction—Exemption from Rates—Fraserburgh Harbour Order 1891, *Schedule B.*

The Fraserburgh Harbour Order 1891, Schedule B, gives the rates which may be charged by the Harbour Commissioners. It gives this exemption — "Empty boxes, casks, bags, and pack sheets returned to the original shipper after importation or exportation with goods. Empty casks or other stores shipped for or on being returned from the seal and whale fishing, as also all ships' provisions necessary for the voyage."

Held (*aff.* Lord Ordinary Cullen) that "ships' provisions" did not include bunker coal.

Opinion that the exemption of ships' provisions applied only to the seal and whale fishing.

Harbour — Rates — Undue Preference — Exemption from Liability for Rates.

A coal merchant who supplied for bunker purposes rail-borne coal to ships in a harbour refused to pay harbour rates thereon, on the ground that other coal merchants had not paid such rates. It appeared that the harbour commissioners, relying on an exemption in their schedule of rates—"Where rates shall have been paid for goods on importation, and such goods shall be re-shipped in the original packages, and shall not have changed ownership, but shall continue to belong to the same owner as when imported, such goods shall be exempt from the payment of rates on exportation"—had not charged rates on sea-borne coal, and had so far, the trade therein being of recent date, been unable to recover on rail-borne coal, but had made no agreements with regard to, and had granted no discharges for, such rates.

Held (*aff.* Lord Ordinary Cullen) that the harbour commissioners had given no undue preference, and decree for the rates claimed *granted.*

Opinion (*necessary for a declarator granted*) that the exemption in the schedule of rates did not apply to coal, as it was not in "packages."

The Harbours, Docks, and Piers Clauses Act 1847 (10 Vict. cap. 27), enacts—Section 3—". . . The word 'goods' shall include wares and merchandise of every description, and all articles in respect of which rates or duties are payable under the Special Act." Section 30—"The undertakers may from time to time vary the rates or any of them respectively in such manner as they think expedient by reducing or raising the same, provided that the rates do not in any case exceed the amount authorised by the Special Act to be taken, and provided also that the rates be at all times charged equally to all persons in respect of the same description of vessel and the same description of goods."

The Fraserburgh Harbour Act 1878 (41 and 42 Vict. cap. cii) enacts—Section 78—"From and after the commencement of this Act the Commissioners may levy, demand, and take for all goods shipped or unshipped, loaded into or unloaded out of any vessel in any part of the harbour, any sums not exceeding the rates specified in the Schedule B (*now Schedule B of the Fraserburgh Harbour Order* 1891) to this Act annexed." Section 83—"The rates specified in such schedules as raised or reduced under the authority of this Act shall at all times be charged equally to all per-

sons in respect of the same class or description of vessel and the same description of goods." Section 86—". . . The rates hereinbefore authorised to be levied for goods shipped or unshipped in any part of the harbour shall be paid by the owners, consignees, or agents of the owners or consignees of such goods respectively, who shall be each and all liable in the payment of the said rates."

The Fraserburgh Harbour Order 1891 (confirmed by 54 and 55 Vict. cap, xlviii), sec. 6, substitutes, *inter alia*, Schedule B of the Order for Schedule B of the Order of 1884, which again had been substituted for Schedule B of the Act of 1878. The new schedule gives the "rates for goods," and amongst the rates "coals, per ton, 8d." It gives the exemptions *quoted supra in first* and *second rubrics*.

On 7th October 1912 the Fraserburgh Harbour Commissioners, *pursuers*, brought an action against William Will, coal merchant, Fraserburgh, *defender*. The conclusions of the summons were—"Therefore *First* it ought and should be found and declared, by decree of the Lords of our Council and Session, that the defender is bound before shipping any coals for any purpose whatever on board of any vessel lying within the limits of the harbour of Fraserburgh as defined by section 58 of the Fraserburgh Harbour Act 1878, to give to the collector of rates for the pursuers a true account signed by him of the quantities or weights of such coals; and that the pursuers are entitled to levy, demand, and take from the defender for all coals shipped or loaded into any vessel in any part of the said harbour, rates amounting to eightpence for every ton of coals so shipped or loaded, and that irrespective of whether the said coals are shipped or loaded for bunker purposes or for any other purpose: *Second* the defender ought and should be decerned and ordained, by decree of our said Lords, to exhibit and produce before our said Lords a full and particular account of all coals shipped or loaded by him into any vessels lying within the limits of the said harbour of Fraserburgh during the period from 1st January 1911 to 30th August 1912, both inclusive, whereby the amount of rates payable by the defender to the pursuers in respect of the shipment of such coals may appear and be ascertained by our said Lords: And the defender ought and should be decerned and ordained, by decree of our said Lords, to make payment to the pursuers of the sum of £200 sterling, or of such other sum more or less as shall appear and be ascertained by our said Lords to be the amount due by the defender in respect of said rates, with interest thereon at the rate of 5 per cent. per annum from the date of citation hereon until payment; or in the event of the defender failing to produce an account as aforesaid, he ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuers of the sum of £200 sterling, which shall in that case be held to be the amount due to the pursuers as aforesaid, with interest thereon at the said rate from the date of citation hereto until payment. . . ."

The defender pleaded, *inter alia*—"(4) In respect that the bunker coals shipped by the defender as condescended on are 'ships' provisions necessary for the voyage' within the exemption clause of Schedule B of the said Order of 1891, they are not liable to rates, and the defender is entitled to decree of absolvitor. (5) In respect that the imposition of rates on the bunker coals shipped by the defender in view of the exemption of other coals and other traders *et separatim* other ships' provisions, all as condescended on, is contrary to the provisions of the Harbour Clauses Act 1847 and the Fraserburgh Harbour Act 1878, and in any event constitutes an illegal and undue preference at common law, such imposition of rates on the defender is illegal and *ultra vires* of the pursuers, and the defender should be assoilzied."

The *facts* are given in the *opinions* of the Lord Ordinary (CULLEN), who on 15th March pronounced this interlocutor—"Finds that the defender is bound before shipping any coals for any purpose whatever on board of any vessel lying within the limits of the harbour of Fraserburgh, as defined by section 58 of The Fraserburgh Harbour Act 1878, to give to the collector of rates for the pursuers a true account signed by him of the quantities or weights of such coals, and that the pursuers are entitled to levy, demand, and take from the defender for all coals shipped or loaded by him into any vessel in any part of the said harbour rates amounting to 8d., or such other sum as the pursuers may be authorised by the Harbour Statutes to levy, demand, and take for the time being for every ton of coals so shipped or loaded, and that whether the said coals are shipped or loaded for bunker purposes or for any other purpose: And with this finding, allows parties before further answer a proof of their averments on record."

Opinion.—"The first question raised in this action is whether the pursuers are entitled under their Harbour Statutes to levy rates on coal shipped at the harbour on board steamships for bunker purposes. Under Schedule B of the Fraserburgh Harbour Order 1891, which is presently current, there is a rate of 8d. per ton on 'coals' without any qualification. The pursuers accordingly say that they are entitled to levy this rate on any coals shipped at the harbour, whatever the object of the shipment may be. In connection with the fishing industry a large amount of coal is sent to Fraserburgh and is shipped for bunker use on board steam trawlers and drifters, &c., which frequent the harbour.

"At the end of Schedule B above mentioned there are to be found certain 'exemptions.' These include, *inter alia*, 'empty casks or other stores shipped for or on being returned from the seal and whale fishing, as also all ships' provisions necessary for the voyage.'

"In answer to the pursuers' contention the defender maintains, in the first place,

that the rates mentioned in the schedule are leviable only on goods which are shipped or unshipped at the harbour as cargo proper, and that accordingly bunker coal which is shipped for the purpose of navigating steamships is exempt. Now while it is on cargo proper that such rates will for the most part be charged, it does not seem to me that the statutory provision draws the line there so as to exclude the case of bunker coal. Further, if cargo proper were the sole subject of rating, the special exemption of certain kinds of stores and of ships' provisions necessary for the voyage above quoted would be out of place. On ordinary principles of construction I must take it that such stores and provisions would have been rateable had they not been specially exempted.

"As I have said, there is a large traffic done at the harbour in the shipping of bunker coal, and the same kind of use is thereby taken of the quays and harbour conveniences as in the case of shipping cargo. And as the rates are levied for the maintenance of the harbour, there would seem to be no very clear reason for the view that the bunker shipments should escape rating. In any case I do not think the statutes exempt them.

"The defender, however, contends, alternatively, that bunker coal is one of the things specially exempted from rating. He appeals to the part of the exemption clause above quoted, and argues that such coal falls within the words 'ships' provisions necessary for the voyage.' The words 'ships' provisions,' however, in their ordinary use refer to the victualling of the ship. And while a particular context might expand their meaning, there is no such context here, because the use of the word 'stores' in the earlier part of the quoted clause shows that the word 'provisions' is used in its ordinary and limited sense.

"I am of opinion that the pursuers are right in their contention that bunker coal forms a subject of rating under their statutes. Their declaratory conclusion is subject to the observation that it introduces the schedule rate of 8d. per ton without qualification, while the rate is an alterable one. This, however, is a matter of detail, and the necessary qualification can readily be introduced by an amendment.

"In addition to their declaratory conclusion the pursuers have a conclusion against the defender for an account of coal shipped by him at the harbour between 1st January 1911 and 30th August 1912, and for payment of the sum of £200 as the estimated amount of rates thereon. Under this head there must admittedly be an inquiry. But as I think it doubtful whether all the grounds of defence put forward by the defender are relevant I shall allow a proof before answer."

And on 12th February 1914 the Lord Ordinary, after a proof, pronounced this interlocutor — "Finds and declares that the defender is bound before shipping any coals for any purpose whatever on board of any vessel lying within the limits of the harbour of Fraserburgh, as defined by section 58 of The Fraserburgh Harbour Act 1878, to give to the collector of rates for the pursuers a true account signed by him of the quantities or weights of such coals, and that the pursuers are entitled to levy, demand, and take from the defender for all coals shipped or loaded by him into any vessel in any part of the said harbour, rates amounting to eightpence, or such other sum as the pursuers may be authorised by the Harbour Statutes to levy, demand, and take for the time being, for every ton of coals shipped or loaded, and that whether the said coals are shipped or loaded for bunker purposes or for any other purpose: Decerns against the defender for payment to the pursuers of the sum of £91, 13s. 4d. in full of the conclusions of the summons for accounting and payment."

Opinion.—"At an earlier stage of this case I held the pursuers right in their contention involved in the conclusion for declarator that they are entitled to levy rates on coal shipped at the harbour of Fraserburgh for bunker purposes. In accordance with this view the pursuers under the summons go on to claim from the defender an account of his shipments during the period between 1st January 1911 and 30th August 1912, and payment of rates thereon. The defender advances on record several special grounds of defence to this claim, and as to these I allowed a proof which has been taken.

[*His Lordship then discussed a question which is not reported.*]

"I turn now to the second plea in defence to the pursuers' claim which is based on an alleged preference given by the pursuers during the period of claim, whereby shipments of coal at the harbour falling within a certain category have not so far been made the subject of rating. The plea relates itself to section 83 of the Fraserburgh Act of 1878, which provides—'The rates specified in such schedules as raised or reduced under the authority of this Act shall at all times be charged equally to all persons in respect of the same class or description of vessel and the same description of goods.'

"There is a rate for coal shipped at the harbour of Fraserburgh in the schedule. It is, and has been for a number of years, 8d. per ton. The defender's case is not that the pursuers in levying a rate on coal, where it has been levied, have differentiated among traders, as by charging one trader 8d. per ton, another 6d., and another 4d. It arises in a different way. There is an exemption clause at the end of the current schedule, which provides, *inter alia*, as follows:—'Where rates shall have been paid for goods on importation, and such goods shall be reshipped in the original packages, and shall not have changed ownership, but shall continue to belong to the same owner as when imported, such goods shall be exempt from the payment of rates on exportation.'

"The pursuers have construed this exemption clause as applying to the case of coal which has been first imported at the

harbour and paid import dues and has subsequently been exported from the harbour. And for the period of their present claim against the defender they have not so far exacted the rate of 8d. on coal which was exported from after being imported at the harbour.

"The defender challenges the pursuers' construction of the exemption clause. He says that it does not apply to coal, because coal is not shipped 'in packages.' He further says that coal exported after being imported changes ownership before being shipped. The pursuers say that the words about 'packages' in the exemption clause apply only to goods which are shipped in packages, but are not to be read, on a fair construction of the clause, as excluding from its scope goods which are customarily not shipped in packages. And further they say, and I think correctly, that the matter of change of ownership depends on the terms of the contract made in any particular case, and that no contract made during the period of claim has been tabled so as to enable an opinion to be formed on the question of change of ownership at export of previously imported coal.

"The pursuers further say that the due construction of the exemption clause is not *hujus loci*. I think that they are right in this. There is a fixed rate, and there is an exemption from it. In applying the rate and the exemption, according to the pursuers' construction of that exemption, the pursuers have made no differentiation among traders. On the assumption that their construction of the exemption clause is wrong, they have not differentiated in the sense of discharging from rateability exports of previously imported coal during the period of claim. Their claim for rates on such exports, if the defender is right on the construction of the exemption clause, remains vested in the pursuers and is capable of enforcement as much as their present claim for the same period against the defender. Having granted no discharge the pursuers cannot be said, on the defender's view of the exemption clause, to have done more than omitted so far to exact certain rates legally due. If the pursuers had sued for such rates prior to suing the defender it would have been an equally good answer for the parties sued that the pursuers had not yet recovered the amount of rates for the same period due by the defender.

"If the defender desires to effectively challenge the pursuers' construction of the exemption clause he can do so by an action of declarator in which it may be necessary to combine with the pursuers some one who is interested in opposing the defender's view. The pursuers have no interest to oppose his view, as the admission of it would not diminish the harbour revenue. If the defender should succeed by such an action in establishing his contention, it would remain open to the pursuers to pursue claims for rates on coals re-exported after import during the period between 1st January 1911 and 30th August 1912, which claims have not been discharged but remain legally in abeyance.

"The parties are agreed, on the matter of accounting, that the correct amount of the pursuers' claim against the defender is £91, 13s. 4d. Following the views which I have expressed I shall grant decree for that sum."

The defender reclaimed, and argued—(1) Bunker coal was not liable for rates, because it was not freight-earning cargo, and it was included in the exemption clause contained in the Fraserburgh Harbour Order 1891, Schedule B, being "ships' provisions necessary for the voyage"—*The "Nicolay Belozwetow,"* [1913], P. 1; Murray's New English Dictionary (1909), *voce* "Provision," 2 (*b*). (2) The defenders being a statutory body were not entitled to single out the defender and bring this action against him alone. The evidence showed that it was not their practice to charge rates on sea-borne bunker coal. Accordingly to charge rates against the defender amounted to an undue preference at common law—*Pedrus Steamship Company, Limited* v. *Burntisland Harbour Commissioners*, 1909 S.C. 1421, *per* Lord Ardwall at 1430, 46 S.L.R. 1004, at 1012; *Sommerville* v. *Leith Docks Commissioners*, 1908 S.C. 797, *per* Lord Ardwall at 805, 45 S.L.R. 590, at 597. Railway cases turned on the interpretation of railway statutes, but the decisions in these cases were instructive, and in them the principle of equality of treatment was recognised—*Caledonian Railway Company* v. *Cross & Sons*, (1889), 16 R. 584, 26 S.L.R. 447; *London and North-Western Railway Company* v. *Evershed*, (1878) L.R., 3 A.C. 1029, *per* Lord Cairns, L.C., at 1034; *Great Western Railway Company* v. *Sutton*, (1869) L.R., 4 (H.L.) 226, *per* Blackburn, J., at 236. The case of *Lambert* v. *Rowe*, [1914] 1 K.B. 38, was also referred to.

Argued for the respondents—(1) Bunker coals were liable for rates, because (*a*) they were "goods" within the meaning of the Fraserburgh Harbour Act 1878 (41 and 42 Vict. cap. cii), sec. 78, in respect that they were "wares and merchandise" which the Harbour, Docks, and Piers Clauses Act 1847 (10 Vict. cap. 27), sec. 3, expressly declared to be "goods;" (*b*) they were not included in the exemption clause contained in the Fraserburgh Harbour Order 1891, Schedule B. The exemption clause only applied to "seal and whale fishing." Moreover, "provisions" meant victuals, not stores. "Provisions" did not include bunker coals—Maclachlan, Merchant Shipping (5th ed.), pp. 269, 274, 759, 760, and 1093; Abbott, Law of Merchant Shipping (14th ed.), Index, *voce* "Provisions," pp. 1168, &c.; Arnould, Marine Insurance (9th ed.), vol. i, sec. 220, and vol. ii, secs. 713 and 718; Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), secs. 294 to 300, and Merchant Shipping Act 1906 (6 Edw. VII, cap. 48), secs. 25 to 27; Carver, Carriage by Sea (5th ed.), secs. 420 and 421. Provisions in the plural meant food—Encyclopædia Britannica (11th ed.), *voce* "Provision." (2) The charging of rates against the defender did not amount to an undue preference. The pursuers were entitled to the declarator sought against the defender although it would not be binding against the other shippers, for the pursuers would

not be precluded from claiming against them. The defender had neither averred nor proved that the pursuers had a policy whereby they gave an undue preference to other shippers, and in fact they had made no preference in favour of any individual or class of things. Admittedly the pursuers had not charged rates on sea-borne bunker coal, but that was because according to the interpretation they put on the Act sea-borne bunker coals were exempt. Sea-borne bunker coals were covered by the exemption contained in the Fraserburgh Harbour Order 1891, Schedule B, viz. — "Goods . . . re-shipped in the original packages which had not changed ownership." The railway cases cited by the defender were different. They related to overcharges, and were decided under different statutes and on different principles — *North British Railway Company* v. *North British Grain and Storage Transit Company*, (1897), 24 R. 687, 34 S.L.R. 563; *Phipps* v. *London and North-Western Railway Company*, [1892] 2 Q.B. 229, *per* Lord Herschell at 236.

At advising—

LORD JUSTICE-CLERK—In this case the pursuers, the Fraserburgh Harbour Commissioners, brought an action against the defender, who is a coal merchant at Fraserburgh, to have it found and declared that the defender was bound before shipping any coals for any purpose whatever on board any vessel lying within the limits of Fraserburgh Harbour to give to the collector of rates there a true account signed by him of the quantities or weights of such coals; and further, that the pursuers were entitled to levy rates from the defender for all coals shipped or loaded into any vessel in said harbour at the statutory rates irrespective of whether the coals were shipped or loaded for bunker purposes or for any other purpose. Then there were petitory conclusions for accounts and for £200 for rates due. The parties have agreed that if the defender is liable in rates for the coal during the period in question, viz., from January 1911 to August 1912, the proper amount is £91, 13s. 4d.

The Lord Ordinary practically granted decree of declarator in terms of the conclusions of the summons, and also decree for this agreed-on sum of £91, 13s. 4d. The defender reclaimed, and ultimately before this Court the only points in controversy were whether the defender's 4th and 5th pleas-in-law should be given effect to. The defender conceded that the first portion of the declarator which craves that the shippers of coal were bound to send accounts to the pursuers of the amount of coal loaded must be granted.

The 4th and 5th pleas for the defender raise two separate questions. The 4th plea raises the question whether bunker coals fell within the term "ships' provisions necessary for the voyage," and so were exempt under the exemption clause of Schedule B of the Order of 1891. The 5th plea raises the question of whether the pursuers were making a charge against the defender which was struck at either by the statutes of 1847 or 1878 or at common law as being an illegal and undue preference. The pursuers' position was that the Lord Ordinary's interlocutor should be affirmed to the effect that all coal, whether for bunkers or otherwise, was liable to pay rates.

On the first question, whether bunker coals can be held to fall within the exemption clause, I am of opinion that the Lord Ordinary was right. The clause in question is printed, and is in these terms—"Empty boxes, casks, bags, and pack sheets returned to the original shipper after importation or exportation with goods. Empty casks or other stores shipped for or on being returned from the seal and whale fishing, as also all ships' provisions necessary for the voyage." The defender argued that bunker coals were necessary for the voyage and were included within the terms "ships' provisions." He founded on the case of "*Nicolay Belozwetow*," [1913] P. 1, where the President (Sir Samuel Evans) found that in construing a local Act applicable to the Humber bunker coals fell within the term "stores." The phraseology of that local Act was to the effect that "Any ship or vessel putting into the river Humber for the purpose of shelter or of obtaining stores or provisions only" is exempt from compulsory pilotage. The President found that bunker coals were "stores" within the meaning of that Act. He says (at p. 5)—"Sails, oils, ropes, &c., procured for the use of a vessel and required to enable her to navigate are undoubtedly 'stores' within the meaning of the section. Why should bunker coal procured for the like use and required for the like purpose not be 'stores'? The necessary bunker coals in the case of a steamship must be provided before the ship can be seaworthy, and they have, of course, been held to be 'necessaries.' They are required for her navigation, just as sails are essential for a sailing ship. Some steamships carry a little sailing tackle as well as bunker coals. It would be strange if the former were included in 'stores' and the latter not. It does not help much, perhaps, to look at other Acts of Parliament in which the word 'stores' has been used." The President then went on to consider the use of the word "stores" in the Merchant Shipping Acts. I agree that we cannot derive much useful assistance from the construction of one Act of Parliament in determining the construction of another Act of Parliament, but it does seem to me that a reasonable inference from what the President said in "*Nicolay Belozwetow*" is that if bunker coals were "stores" in that case they could not be "provisions." But however that may be, I am satisfied on the argument submitted to us here, where we had a citation of authorities, as well as several references to the Merchant Shipping Acts, that the clause of exemption cannot be held to cover bunker coals.

There were two grounds upon which it was said by the pursuers that that conclusion must be reached. In the first place they submitted that the exemption clause read as a whole only applied to stores or provisions supplied to ships going on seal or whale fishing. The Lord Ordinary does not

refer to that argument which we were told was presented to him, but I think that that argument was sound. I think also that the second argument which the pursuers advanced is sound, to the effect that bunker coals cannot be held to fall within the terms "ships' provisions necessary for the voyage." Accordingly I am of opinion that the Lord Ordinary's view which he expresses as follows is sound—"He (the defender) appeals to the part of the exemption clause above quoted, and argues that such coal falls within the words 'ships' provisions necessary for the voyage.' The words 'ships' provisions,' however, in their ordinary use, refer to the victualling of the ship. And while a particular context might expand their meaning, there is no such context here, because the use of the word 'stores' in the earlier part of the quoted clause shows that the word 'provisions' is used in its ordinary and limited sense." I adopt that view of the Lord Ordinary, and so far as the case of "*Nicolay Belozwetow*" can be said to have any bearing upon the judgment here, I think it is more in favour of the pursuers than of the defender. Accordingly upon that point I am of opinion that the defender fails.

The second question that was raised was as to the legality of the charge, and an attempt was made to show that the result of enforcing payment of rates for bunker coals from the defender would be to create in the language of the plea-in-law a rate contrary to the statutes, and in any event to constitute "an illegal and undue preference at common law." That plea is introduced into the record in this fashion—The defender avers that "the pursuers during the period in question, in the case of other traders in both sea-borne and rail-borne coals, have not charged the export rates here claimed in respect of bunker coal shipped in a similar way by said traders at Fraserburgh Harbour, and in particular have not levied export rates on any sea-borne coal supplied to fishing-vessels by" certain named merchants. Then he goes on to make an averment as to coal which was sold to fishcurers and shipped for export to Balta Sound. It was stated in the course of the argument that the averment as to Balta Sound introduced no circumstances into the case which would affect our judgment, and it was accordingly departed from, as were also the averments designed to make out that in addition to the exemption of coal there had been exemption on other kinds of goods, such as food, salt, &c. The only averment accordingly insisted in by the defender was that bunker coal shipped by others than the defender had been exempted from the schedule rates, the particular instance, however, being sea-borne coals shipped as bunkers. The answer for the pursuers is thus expressed—"Explained and averred that the pursuers have not given any preference as regards harbour rates to any trader or class of traders. In any cases in which the pursuers have not received rates in respect of coals shipped, that has been because the shippers as in the defender's case have refused or neglected to furnish accounts prior to or at the time of shipment. It is only in recent years, and since the employment of steam-drifters for herring fishing, that rail-borne coals have been shipped at Fraserburgh. When this traffic was found to be developing to considerable dimensions the pursuers demanded payment of dues from all coal merchants in respect of all rail-borne coals and all sea-borne coals which had changed ownership after being imported. With a few exceptions these demands have been ignored, and no accounts have been furnished to the pursuers. The present case is brought by way of a test case, and there is no intention of allowing any trader to escape dues justly resting-owing." It is quite true that the defender is described in the condescendence only as a trader who brought coal by rail, but I think we were satisfied by the evidence that while that formed the bulk of his coal trade he was also to some extent—a much smaller extent apparently—an importer of coal by sea. I doubt very much whether the defender has upon the record sufficiently stated the case which he sought to make out in the argument before us. Apparently the Commissioners so far as sea-borne coal was concerned, which was imported and then exported as bunker, only exacted rates on importation, while they may have been entitled to exact rates both when the coal was discharged on to the quay and also when it was loaded on to the ship as bunkers. The pursuers formed the opinion that it would be unfair to charge on both occasions, and they only charged once on sea-borne coals used as bunkers. In that respect they treated all sea-borne coals equally. The case of rail-borne coal was different. When the coals came in by rail no dues were paid on coming into Fraserburgh, but the pursuers exacted dues when the coals were shipped as bunkers or for any other purpose—there again one set of dues being exacted. If that had been the kind of case which it had been proposed to challenge it would have required a much more specific record than what we have got in this case. But leaving that out of account the defender has, I think, failed to prove that there was illegality or undue preference, or any inequality which would entitle him to redress to the effect of saying that he was not to be called on to pay dues for any rail-borne coals because his or other sea-borne coals had only been charged once. Whether the proper remedy open to him, assuming his plea to be otherwise sound, is to say that he was to pay nothing seems to me more than doubtful. My impression is that that was not the proper remedy. But the case fails upon the proof as insufficient to justify us in granting the remedy even if there had been any inequality or preference.

A number of railway cases were referred to. I confess that I have not found that these cases were of much, or indeed of any, use in enabling us to arrive at a decision. In this case there has been no discharge by the Harbour Commissioners to any of the sea-borne importers, nor has there been any agreement by the Harbour Commissioners with these sea-borne importers to take

less than 8d., the rate mentioned in the schedule. Accordingly the pursuers would be entitled to raise action against the seaborne importers and claim the full dues, just as they have claimed them from the defender. In the course of the argument it appeared that the Commissioners had not quite fully considered all the aspects of the case that was presented to us. The pursuers argued that their practice was justified under the exemption clause, which is in the following terms:—"Where rates shall have been paid for goods on importation, and such goods shall be re-shipped in the original packages, and shall not have changed ownership but shall continue to belong to the same owner as when imported, such goods shall be exempt from the payment of rates on exportation." It was argued that coals landed in bulk and then transferred as bunkers to the ship were to be regarded as re-shipped in the original packages (the fact being that there were no packages, original or otherwise), and also that they were to be held as not having changed ownership. They came into Fraserburgh the property either of the consignor or of the consignee. After they were landed they presumably became the property of the consignee, and after they left Fraserburgh they were the property, not of the consignor or of the consignee, but of the owner or charterer of the ship. A judgment in favour of the Commissioners on this point would not be final with any merchant other than the defender, who had a title to raise the question, but it seems to me that neither of these contentions can possibly be of assistance to the pursuers. The pursuers here have, after full consideration, stated that they want the Lord Ordinary's interlocutor affirmed, and that interlocutor finds and declares that "the pursuers are entitled to levy, demand, and take from the defender for all coals shipped or loaded by him into any vessel, in any part of the said harbour, rates amounting to eightpence, or such other sum as the pursuers may be authorised by the Harbour Statutes to levy, demand, and take for the time being for every ton of coals shipped or loaded, and that whether the said coals are shipped or loaded for bunker purposes or for any other purpose." The result of that is that the defender will undoubtedly after this be bound to pay the 8d. per ton so long as that is not altered according to the provision of the statute for all coal which he ships as bunkers or otherwise, whether seaborne or rail-borne. The Harbour Commissioners will no doubt make no distinction between the defender and any other merchant, but of course our judgment on that matter will not be *res judicata* as regards any other merchant who chooses to raise the question.

The result is that the pursuers are entitled to get the decree of declarator they ask for, as the defender has failed to establish by his defence the construction of the exemption upon which his 4th plea-in-law is based, or the inequality and undue preference on which his 5th plea-in-law is based. Accordingly the Lord Ordinary's judgment should be affirmed in all its heads, including that decerning against the defender for the sum of £91, 13s. 4d.

LORD DUNDAS—I am entirely of the same opinion. I do not think that either of the points argued at our bar is attended with much difficulty.

The defender maintained, in the first place, that bunker coals shipped at the pursuers' harbour are exempt from rates. Mr Macmillan frankly abandoned the first line of argument presented in the Outer House and in the opening speech at our bar, to the effect that bunker coals are not "goods" within the meaning of section 78 of the Special Act, and section 3 of the general Act of 1847. But he did maintain the alternative argument—scarcely to my mind more hopeful than the first—founded upon the exemption clause at the end of the schedule. I should be prepared to negative the defender's contention upon the grounds stated in the Lord Ordinary's opinion, and the decision by Sir Samuel Evans—(*The "Nicolay Belozwetow"*, [1913] P. 1.)—on which the defender relied, seems to me to be, so far as it goes, an authority against him, for the learned Judge, while holding that bunker coal might be "stores," appears to decide, at least inferentially, that they are not "provisions." But perhaps the strongest ground for rejecting the defender's argument—though, oddly enough, it is not noticed by the Lord Ordinary—seems to be that the whole of the clause founded upon, must be held, upon a fair construction, to refer only to the seal and whale fishing trade.

As regards the arguments put forward in support of the defender's 5th plea-in-law, I think it enough to say that I do not find any relevant or sufficient case stated on the record or established by the proof either of undue preference or of disparity of treatment among traders on the part of the pursuers. I may add that I quite agree with your Lordship's interpretation of the clause of exemption contained in the "rates" at the end of Schedule B appended to the Order of 1891, which, so far as I can see, has plainly no application to coals shipped in the ordinary way.

LORD SALVESEN—The first question in this case is whether the pursuers are entitled to exact harbour dues on coals shipped or loaded in the harbour into steam-drifters or other vessels, where such coals are not shipped as cargo but merely as bunkers. The defender founds his claim to an exemption upon a paragraph which appears under the head "Exemptions" in an appendix to an alphabetical list of rates for goods. The paragraph is in these terms—"Empty casks or other stores shipped for or on being returned from the seal and whale fishing, as also all ships' provisions necessary for the voyage." As a matter of construction I think this exemption relates only to vessels employed in seal and whale fishing, although that may not have been the intention. It is not necessary, however, to decide this point, because I am of opinion that "ships provisions" do not include bunker coal. The word "provisions" must be construed

in its ordinary and not in its etymological sense. When the plural form of the word is used I agree with the Lord Ordinary that it means things necessary for the sustenance of man. In relation to a trading vessel, the provisions exempted will be those necessary for the support of the crew on the voyage; in the case of a passenger steamer they will probably include the food and drink required for the passengers carried. The word, however, is, in my opinion, not to be taken as equivalent to "stores," but is generally used in contradistinction. We were referred to the case of the "*Nicolay Belozwetow*," [1913] P. 1, as supporting the defender's contention. In my opinion it does not do so. What was held by Sir Samuel Evans in that case was that the word "stores," in the case of a steamer, included bunker coal which are necessaries for the voyage of such a vessel, just as in the case of a sailing ship it includes spare sails, ropes, &c. The word "stores" may also include victuals if used by itself, but one generally finds that in Acts of Parliament and other writings dealing with this matter both words are used—"stores and provisions." I accordingly agree with the note of the Lord Ordinary, which he issued along with his interlocutor of 13th March 1913.

That interlocutor contains a finding, *inter alia*, that "the pursuers are entitled to levy, demand, and take from the defender for all coals shipped or loaded by him into any vessel in any part of the said harbour rates amounting to 8d., or such other sum as the pursuers may be authorised by the harbour statutes to levy, demand, and take for the time being for every ton of coal shipped or loaded, and that whether the said coals are shipped or loaded for bunker purposes or for any other purpose." This finding is in terms of the first conclusion of the summons, and the pursuers maintain that they are entitled to it without qualification. Oddly enough, in the evidence which was led with regard to the matters of which the Lord Ordinary allowed a proof, their leading witness Mr M'Cranna, who is the harbour treasurer, admitted that the Commissioners had never levied dues upon bunker coal which were sea-borne, and had paid the dues leviable on importation. He stated that, in the opinion of the Harbour Commissioners, they were not entitled to do so, on the ground that such coal fell under another exemption which is thus expressed —"Where rates shall have been paid for goods on importation, and such goods shall be re-shipped in the original packages and shall not have changed ownership, but shall continue to belong to the same owner as when imported, such goods shall be exempt from the payment of rates on exportation." Now there is a great deal to be said in equity for the view that there is no real difference between goods imported in bulk and goods imported in packages, provided that the Commissioners are satisfied that the same goods are being exported on which the importation dues have already been paid. On the other hand, I think the reason for the exemption being expressed in such precise language was that there might be no dubiety as to the goods which were shipped having already paid dues on importation. This could easily be established if they were still in their original packages, which would form a ready means of identification. I cannot, however, read this exemption clause as covering coal which is imported in bulk, and that altogether apart from the other conditions of the exemption that it should only apply where the goods have not changed ownership. In my judgment, therefore, the practice of the Harbour Commissioners not to exact rates on coal shipped as bunkers which have previously paid dues on importation cannot be sustained. Our judgment on this point cannot be *res judicata* against some person other than the defender, who only or mainly ships sea-borne bunkers, but it is necessary in order to support the unqualified finding which the pursuers have succeeded in obtaining from the Lord Ordinary.

The fact that the practice has obtained of not demanding rates from shippers of sea-borne bunker coal, while the defender is being sued to pay 8d. per ton on rail-borne bunkers, in which he mainly deals, has enabled the defender to put forward the contention embodied in his fifth plea-in-law. He says that the fact that the pursuers demand from him payment of dues on rail-borne bunkers, and have hitherto made no such demand against shippers of sea-borne bunkers, constitutes an illegal preference; and that as the shippers of sea-borne bunkers have in fact paid nothing on shipment, he as a shipper of rail-borne bunkers is entitled for that reason to escape payment. The contention is ingenious, but is in my opinion unsound. There has in fact been no differentiation, because neither the shippers of rail-borne bunkers (with some trifling exceptions) nor the shippers of sea-borne bunkers have at any time paid rates on shipment. The present action was a test one to ascertain primarily whether rail-borne bunkers fell within the exemption relied on by the defender. They also successfully contended, as in a question with the defender, that he must pay the same rates on any sea-borne bunkers which he ships. It follows, I think, that it is the duty of the pursuers to collect the same rates from other shippers of bunkers. If they have been acting under an error of law in not making a demand for dues on sea-borne bunkers, they have done nothing to foreclose themselves from making the demand now. As the Lord Ordinary points out, they have never given the traders in sea-borne bunkers a discharge of any claims which they may have against them. The logical result of their having failed to demand these rates, which *ex hypothesi* are their right, from traders in sea-borne coals is not to exempt the traders in rail-borne coals, but to make it the duty of the Commissioners to put them on an equality by making all pay. The cases decided in connection with railways seem to me to have no application. In each case where a trader was found entitled to get repayment of an

overcharge, his rival had in fact had his goods carried at a lower rate, and the railway company could exact no more from the latter under the contract of carriage into which they had entered. The only way therefore of redressing the inequality was to refund the overcharge. Here, on the other hand, all the traders are still liable to be sued for the rates properly leviable on goods which they have shipped; and the Commissioners, in the person of their representative Mr John Anderson, have expressed their willingness to adopt this course and indeed consider themselves in duty bound to do so. In these circumstances I am unable to give any effect to the defender's fifth plea-in-law, and I am for affirming in its entirety the interlocutor reclaimed against.

I would only add that I do not think that the Commissioners will be bound to exact dues on ships' provisions shipped in small quantities if they think that the expense of doing so would exceed the amount of the revenue derived. In matters of this kind the Commissioners must have a certain discretion, which it may be assumed they will exercise in the interests of the harbour which they administer.

LORD GUTHRIE—I am of the same opinion.

The Court adhered.

Counsel for the Reclaimer (Defender)—Macmillan, K.C.—Watson, K.C.—Cooper. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondents (Pursuers)—Horne, K.C.—A. M. Mackay. Agents—Alex. Morison & Company, W.S.

Friday, December 3.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

SCHULZE *v.* INLAND REVENUE.

Revenue—Income Tax—Interest—The Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec*, 100, *Schedule D, Third Case—The Income Tax Act* 1853 (16 *and* 17 *Vict. cap.* 34), *sec.* 2, *Schedule D—Assessment of the Interest in a Decree for a Sum with Interest from a certain Date.*

In November 1911, A, a trustee on the estate of the late B, raised an action against the representatives of the late C, to recover from them an asset of B's trust estate, which owing to the negligence of C had not been ingathered. Decree was given for payment with interest at 3½ per cent. since the date at which the sum should have been ingathered. *Held* that the interest was assessable for income tax when paid to A.

The Income Tax Act 1842 (5 and 6 Vict. cap. 35) enacts, section 100—"The duties hereby granted, contained in the Schedule marked (D), shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, and to refer to the said last-mentioned duties as if the same had been inserted under a special enactment. *Schedule D*—The said last-mentioned duties shall extend to every description of property or profits which shall not be contained in either of the said Schedules (A), (B), or (C), and to every description of employment of profit not contained in Schedule (E), and not specially exempted from the said respective duties, and shall be charged annually on and paid by the persons . . . receiving or entitled to the same." . . . *Third Case*—"The duty to be charged in respect of profits of an uncertain annual value not charged in Schedule (A). First—The duty to be charged in respect thereof shall be computed at a sum not less than the full amount of the profit or gains arising therefrom within the preceding year, . . . to be paid on the actual amount of such profits or gains, without any deduction. Second—The profits on all securities bearing interest payable out of the public revenue (except securities before directed to be charged under the rules of Schedule (C)), and on all discounts, and on all interest of money, not being annual interest, payable or paid by any person whatever, shall be charged according to the preceding rule in this case."

The Income Tax Act 1853 (16 and 17 Vict. cap. 34) enacts, section 2—"For the purpose of classifying and distinguishing the several properties, profits, and gains for and in respect of which the said duties are by this Act granted, and for the purposes of the provisions for assessing, raising, levying, and collecting such duties respectively, the said duties shall be deemed to be granted and made payable yearly for and in respect of the several properties, profits, and gains respectively described or comprised in the several schedules contained in this Act, and marked respectively (A), (B), (C), (D), and (E), and to be charged under such respective schedules—that is to say . . . Schedule (D)—For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever . . . and to be charged for every twenty shillings of the annual amount of such profits and gains. . . . And for and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act, and to be charged for every twenty shillings of the annual amount thereof."

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the county of Selkirk, held at Selkirk on the 13th day of May 1914, and at an adjourned meeting of the said Commissioners also held at Selkirk on 16th September 1914, Charles William Schulze, Brunswickhill, Galashiels, *appellant*, appealed against an assessment made on him by the Additional Commissioners of Income Tax, as a trustee on the estate of the late Hugh Lees, Galashiels, under Schedule (D), for the year ending 5th April 1914, on the sum of £462 in respect