

No. 5. The Lord Ordinary took the case to report on informations. Some of the Judges, moved by the words of the statute, were for repelling the reasons of advocacy; but a great majority, on the grounds stated for the defenders, thought their plea well-founded.

The Court “found, That porter, or other beer or ale imported by ship-masters and others into the port or harbour of Borrowtounness, and re-exported without being landed, or breaking bulk, or landed and put into cellars or warehouses, within the limits of the town and liberties of Borrowstounness, but afterward sold in wholesale and not by retail, to persons residing without the district, and not for consumption within it, are not liable in payment of the duty of two pennies on the pint, under the acts of Parliament libelled on; and therefore advocated the cause, and assoilzied the defenders.”

A reclaiming petition for the defenders, praying for an explanation of the judgment, in so far as to have it found, that the duty was not chargeable, in the first instance, on the importers, but on the retailers, was refused, (13th December 1798), without answers.

Lord Ordinary, *Meadowbank,*

For Muir, *W. Stewart.*
Clerk, *Sinclair.*

Alt. *John Clerk, Turnbull.*

R. D.

Fac. Coll. No. 92. p. 211.

1799 December 18.

THE MAGISTRATES OF EDINBURGH, &c. *against* THE CORPORATION OF FLESHERS, and Others.

No. 6.

The cattle meant for consumption in the city of Edinburgh, were formerly purchased by the butchers, chiefly at a market belonging to the city, at some miles from it, where a small duty was exacted by the Magistrates. This market having been deserted, and it having become the general prac-

THE cattle meant for consumption of the city of Edinburgh were for a long time chiefly purchased by the butchers, at a market held by the Magistrates of Edinburgh, at the House of Muir, about eight miles from town, where they exacted 1s. Scots on each ox or cow; 1s. Scots for each calf; 8d. Scots for each sow, and 2d. Scots for each sheep. This custom was paid by the seller, if the purchaser was a freeman butcher of Edinburgh, but in other cases by the purchaser.

The sheep used in the city were chiefly purchased by the butchers at a live market held at the sheep-flakes in the Grassmarket of Edinburgh, where a similar duty was exacted.

Calves and swine were always purchased privately by the butchers, and brought to the flesh-market, after being slaughtered, and the duty there exacted on each carcase.

The right of holding the market at the house of Muir, was acquired from Lord Abernethy of Salton, in 1612, in exchange for some superiorities belonging to the city.

By a Crown charter in 1636, the Magistrates were authorised to hold three weekly fairs within the city, and the two annual fairs of Hallow Fair and Trinity Fair, “*una cum integris minutis customis et aliis customis, ad dict. civitatem nostram pertinent.*” &c.

In 1661, an act of Parliament was passed, ratifying the transaction in 1612, and confirming to the Magistrates and their successors, “the privilege of up-
“ lifting the customs of the said House of Muir, with all infestments, rights
“ and securities, made and granted to them and their predecessors of the same
“ in the hail heads, clauses, and conditions thereof, and as they and their pre-
“ decessors had possessed the same; allowing and approving the uplifting of
“ the said custom by the Magistrates of Edinburgh, and others having their
“ power, of all goods coming to the House of Muir, and discharging all his
“ Majesty’s subjects of keeping any market-places at the Bridge-house Knows,
“ or any other place near the said House of the Muir, but to bring all their
“ goods to be sold at the said House of the Muir, and that under the penalty
“ of all and whatsoever goods sold at the Bridge-house Knows, or any other
“ place within the aforesaid bounds, to the behoof of the Town of Edinburgh,
“ and the sellers to be liable in payment of the fifth of all goods sold by them,
“ and the buyer to be countable for the goods he buys, and the prices and
“ value thereof, with power to the said Bailies, Provost, and Council of Edin-
“ burgh, to uplift and exact the same from whatsoever contraveners, either
“ buyers or sellers.”

The market at the House of Muir became gradually less frequented, and at last it came to be the practice for butchers to supply themselves with fat cattle either from other markets and private dealers, or to purchase lean cattle, which they fattened on inclosures rented in the neighbourhood of the city.

The Magistrates being in danger of losing this branch of revenue, published, in 1776, a table of dues exigible at the House of Muir and sheep-flakes, along with regulations enforcing attendance; or, where the live animal was not purchased there, imposing the same duty on each carcase brought to the flesh-market from the person bringing it there, whether freeman of the butchers or not, other butchers being entitled to bring meat to market on certain conditions.

These regulations were acquiesced in, though probably not very rigorously enforced, till 1793, when a bill of suspension by the butchers was passed. Upon which the Magistrates and the tacksman of the customs raised a declarator of their right to enforce the table and regulations in 1776; and as compulsitors against the defenders to abstain from the alleged recent evasions complained of, the summons likewise contained conclusions against them as being guilty of forestalling, by purchasing cattle on their road to market, and of trespassing against the act 1703, C. 7. which enacts, under severe penalties, that no butcher shall possess any grass ground exceeding an acre in extent

No. 6.

tice of the butchers to bring the carcasses only to Edinburgh, How far had the Magistrates right to charge on them the duty formerly levied at the live-stock market?

The act. 1703, C. 7. against butchers being graziers, now in desuetude.

No. 6. The pursuers

Pleaded: The Magistrates of burghs have an inherent power of levying petty customs, in order to defray the expense of the various branches of police. The erection of proper buildings for public markets is a most useful branch of their duty; and the most reasonable way of repaying the expense is by a small tax levied on the commodities exposed there.

The Magistrates of Edinburgh have been in use to levy petty customs from time immemorial, and various charters and grants have been given them to that purpose.

The right of exacting the duty at the House of Muir was given to the Magistrates as the most convenient shape in which the custom on butcher-meat consumed within the city could be levied. There was no accommodation at the House of Muir, which was a barren heath, for which a duty in any other view could be exacted. It was precisely of the same nature with that drawn at other live-markets within the city, before the contract with Lord Abernethy; Maitland, p. 8. 204; with that received at the sheep-market there, or that from time immemorial on calves and swine, which had always been purchased privately, and brought dead into the city.

The butchers will not be allowed to evade the duty by deserting the House of Muir, or changing the form in which their commodities were brought to market: See 5th August 1768, Lawson, &c. against Thomson, No. 83. p. 1965; more particularly, as the means by which they have been enabled to do so are themselves illegal. They now purchase fat cattle privately before they reach the public market, and are thereby guilty of forestalling; 1592, C. 150; or they purchase lean cattle at distant markets, and fatten them on rich fields in the neighbourhood of the city, which are rented by the defenders, who thus unite the profits of butcher and grazier, and create the monopoly which the act 1703, C. 7. was meant to prevent, Dict. *voce* BUTCHERS.

Answered: The custom levied by the proprietor of a market, is the consideration paid for the benefit derived from frequenting it, and can be levied only from those who do so. The Magistrates of Edinburgh having derived their right to the market at the House of Muir from Lord Abernethy, by a private contract of excambion, can be in no better situation than their predecessor; and a change of times having made it more convenient for the butchers and consequently for the public, either to purchase privately, or at other markets where a similar duty is exacted, than at the House of Muir, the revenue derived from it must of course be lost, and the pursuers have no right to substitute a tax on butcher-meat in lieu of it.

The grants to the city with regard to the House of Muir, create no exclusive obligation to purchase there the whole cattle needed for the consumption of Edinburgh, but merely prohibit the establishment of a rival market at Bridgehouse Knows, or other places in the neighbourhood; and the defenders have not trespassed against these regulations. Indeed, they would have been alto-

gether unnecessary, if it had been understood that the Magistrates might substitute a tax on butcher-meat wherever procured.

The defenders are not guilty of forestalling, and no specific complaint of that nature has been exhibited by the pursuers.

The act 1703, C. 7. is in desuetude, and its regulation, in the present state of society, altogether unnecessary and inexpedient.

The claim of the Magistrates is ill-founded against such of the defenders as are freemen of the incorporation, for this additional reason, that the duty at the House of Muir, was, in their case, levied from the seller, and not from the purchaser.

The pursuers cannot plead long continued possession in support of their demands; as the oldest table enforcing them is dated in 1776; and in their summons, the desertion of the market at House of Muir is complained of as a late evasion.

Replied: As from the modes of obtaining cattle now adopted by the defenders, the duty can in no case be levied from the original seller, no distinction can now be made between freemen and other purchasers with regard to it.

The Lord Ordinary reported the cause on informations.

The Court were much divided in opinion. A majority of the Judges considered the duty at the House of Muir as merely a branch of the petty customs of the city paid for the admission of butcher-meat into the Edinburgh market; and that the live-stock-market being now deserted, the Magistrates were entitled to make the duty effectual by the regulations adopted by them.

Others thought, that as the House of Muir had been deserted without any wilful intention of evading the duty, it was beyond the power of the Magistrates to substitute another tax in place of it, and that they were in the same situation with Lord Abernethy, to whom they succeeded.

It seemed to be the general opinion, that the act 1703 was now in desuetude.

The Lords (18th June 1799) repelled the reasons of suspension; and, in the declarator, found the pursuers entitled to the duties libelled.

Upon advising a petition, with answers, they adhered, but remitted to the Lord Ordinary to hear parties further on any privileges claimed by the freemen*.

Lord Ordinary, *Meadowbank*.
Adv. *Hope, G. J. Bell*.

Act. *Ar. Campbell, jun. Oswald*.
Clerk, *Sinclair*.

D. D.

Fac. Coll. No. 151. p. 337.

* The Lord Ordinary again reported the case on informations. The Lords (15th February 1801) found the freemen of the corporation liable in the duties in question from the date of this judgment.

The House of Lords (24th June 1802) "Ordered and adjudged, That it does not appear by the proofs made in this cause, that the respondents are entitled to any other duties than such as they had been accustomed, previously to the time of publishing the rectified tables of customs mentioned in the pleadings, and dated in November 1776, rightfully to receive, or to demand the