

so far as they find that Alexander Hog's claim of legitim was not cut off by what passed after his father's death, and in so far as they sustain the said claim. And it is hereby declared and found, that the assignees of the bankruptcy of the said Alexander Hog were competent to release such claim, and that it appears, by facts proved in this cause, that they have released it. And it is further ordered and adjudged, That as to the rest, the said interlocutors be affirmed. And it is further ordered, that the cause be remitted back to the Court of Session to proceed accordingly.

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For Appellants, *Wm. Alexander, J. Clerk, Geo. Cranstoun.*  
For Respondents, *Ed. Law.*

NOTE.—A separate appeal and cross-appeal on other points of the succession was heard for five days, but adjourned to next Session, (1803); and then again adjourned to Session (1804).—*Vide infra.*

[Mor. App. 1. Royal Burgh, No. 6.]

THE INCORPORATION of FLESHERS of the CITY of EDINBURGH, . . . . .	} <i>Appellants;</i>
THE LORD PROVOST, MAGISTRATES and TOWN COUNCIL of the CITY of EDINBURGH, }	<i>Respondents.</i>

House of Lords, 24th June 1802.

BURGH—PETTY CUSTOM—RIGHT TO LEVY—USAGE.—The Magistrates of Edinburgh had a right of exacting dues on all cattle brought into the market of the House of Muir. The fleshers of Edinburgh were in use to resort to that market, and bought the cattle, which they brought into Edinburgh for the purpose of slaughter and consumption. As buyers at the House of Muir market, they stated that they enjoyed an exemption from the duty leviable on cattle brought into Edinburgh. But when the House of Muir market ceased to be resorted to, and the graziers and owners of cattle sold to the fleshers directly, without resorting to any market, the magistrates then changed their mode of levying these dues, (without consent of the legislature), by laying the custom upon all bestial brought into Edinburgh, whether for the purpose of being there *bought* or *sold*, or for the purpose of being *killed* and *consumed*. In a suspension by the fleshers, combined with a declarator by the magistrates: Held, that the magistrates were

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entitled so to levy the dues. Altered in the House of Lords, as to find, that it did not appear by the proofs made in this case that the magistrates had any right to exact any other dues than those they had exacted previous to this change in the mode of levying them; and case remitted for further consideration.

The right of the Magistrates and Town Council of the City of Edinburgh to levy duty or custom on all cattle brought into Edinburgh by the fleshers being disputed, the Magistrates brought the present action of declarator against the Incorporation of Fleshers, to have it found and declared, “ That the said custom is due and exigible on all bestial, “ whether oxen, sheep, calves, or swine, or others, brought “ into the city of Edinburgh, or the liberties thereof, as well “ as to the public markets of the *House of Muir* and *sheep flakes*, whether for the purpose of being there bought or “ sold, or for the purpose of being there slaughtered or “ consumed within the said city and liberties; and that if the “ said custom is not paid in the said public markets, it must “ be paid whenever the carcase is so slaughtered, or otherwise “ disposed of, within the said city and liberties; and it “ being so found and declared, the defenders, and all others “ bringing cattle into the said city and liberties, for sale “ or slaughter, or buying, selling, or slaughtering them “ there, ought and should be decerned and ordained, in time “ coming, to make payment of such duty accordingly, in all “ cases where the custom has not been previously paid by “ the seller in the public markets of *House of Muir* and “ *sheep flakes*.”

The summons further concluded to prohibit the butchers from possessing grazings above the extent of one acre, in terms of the act 1703, and also for discharging them from intercepting cattle coming towards the public markets belonging to the city, which they were in the practice of doing, and thereby forestalling and depriving the magistrates of the duties; and concluding, that if they did so, they should be liable in the penalty exigible from forestallers. This action was conjoined with a suspension. In defence, it was stated, that originally the right so conferred upon the magistrates was derived from Lord Abernethy. That, as then conveyed, it was a right of holding markets at the *House of Muir*, seven or eight miles from Edinburgh, and of levying the small dues and customs thereat on all cattle brought for sale. That the act of Parliament 1661, which ratified this “ right, did not extend it, but only ratifies and approves

“ the privilege of uplifting the customs at the said *House of Muir*,” and “ discharging all his Majesty’s subjects of keeping any market places at the *Bridge House Knowes*, 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 Muir*.” From this duty, however, the defenders (appellants) maintained, that they, as a corporation of freemen fleshers, were exempted, although all other buyers in the market were liable. The black cattle were all taken to the *House of Muir* market, to which place the butchers resorted to buy their bestial for sole consumption in the city ; but at this time the sheep were brought into the sheep flakes in *Edinburgh*. The market, however, at the *House of Muir*, from various causes—the improvement of agriculture,—the convenience of the public, and of farmers and graziers, ceased to be resorted to. The farmers and graziers about *Edinburgh* sold their cattle at once to the butchers, without resorting to any market, or if they did, chose another market than the *House of Muir*. This gradual change in the *House of Muir* market was greatly disadvantageous to the incorporation of fleshers in *Edinburgh*. In place of finding their commodity at a market, at which no duty was exacted from them, they were under the necessity either of sending round the country to purchase from farmers or graziers, who had fattened their cattle for the market, or to go to markets at a greater distance. The change was also disadvantageous to the magistrates of *Edinburgh*, inasmuch as it deprived them of the duties which they had been accustomed to draw at the markets of the *House of Muir*. This was a loss, to which the magistrates, it was stated, were necessarily exposed, like any other proprietors of a market. At the same time, the revenue of the town had been increased in another respect, for the great increase in the consumption had raised the flesh market custom to a great extent. While matters stood thus, it occurred to the magistrates that they might still preserve the revenue which they had formerly drawn from the market ; though now totally deserted, by exacting upon all cattle brought into *Edinburgh*, wherever bought, though at different markets from the *House of Muir*, the same duties which had been paid by those persons who had formerly frequented that market.

With this view, they published a table of customs in 1776 ; which is titled, “ Rectified Table of Custom on Bestial, payable at the *House of Muir*, and sheep flakes, for all sorts of cattle brought thither by sellers, freemen, and unfreemen.”

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The appellants, therefore, contended, that since the magistrates' right was confined to exact dues at the House of Muir, they had no right to exact upon all cattle brought into Edinburgh, so purchased in the country, and at other markets than the House of Muir and sheep flakes.

In reply, the magistrates admitted, that formerly the freemen fleshers of Edinburgh were exempted from the duties exigible from the buyers at the market of the House of Muir. But the reason of this former exemption was, that the duties in question were then paid by persons who sold the cattle, which made it unnecessary to impose any duty on the freemen who bought them; and as it was now impossible, on account of the market being deserted, to levy the custom from the sellers, it was argued that the buyers, whether freemen or not, were liable.

It was also stated by them, that their right to levy the dues was supported by a charter from King James VI. (1636), which gave them right of holding public markets. And, 2nd, Of levying petty customs which they had been in use to levy. They also referred to Maitland's History, to show that they had been in long use and wont to hold markets at the House of Muir and other parts, and exact dues. The respondents, therefore, denied that their right to levy this custom on cattle was derived from the Saltoun family. Because, long prior, and in 1477, they had such a right, and long prior to the contract of excambion between the magistrates and Abernethy of Saltoun, while, in point of fact, the right of holding market was never in that family, so as to entitle them to convey it; and the best proof of this was, the excambion itself, which shows that the right of market was never in the Saltoun family.

June 18 and  
19, 1799.

The Lord Ordinary reported the case to the Court on informations. Whereupon the Court pronounced this interlocutor, "Repel the reasons of suspension: Find the letters orderly proceeded, and decern. And, in the declarator, find the pursuers entitled to the duties libelled, and decern and declare accordingly: Find the defenders liable in the expense of extract, but in no other expenses, and decern."

Dec. 18, 1799.

On reclaiming petition, the Court adhered, and remitted to the Lord Ordinary to hear the "parties further upon any privileges claimed by the freemen, and to do as he shall see just."

Feb. 25, 1802. The Lord Ordinary ordered informations on this last point, and reported to the Court. Whereupon, the Court found,

“ The freemen of the incorporation of fleshers liable in the duties in question ; repel the reasons of suspension ; find the letters orderly proceeded, and decern.”

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Against these interlocutors the present appeal was brought.

*Pleaded for the Appellants.*—The respondents having purchased from Lord Abernethy of Saltoun, the right of holding markets and levying custom at the *House of Muir*, cannot be entitled, in consequence of the desertion of that market, to levy the dues payable there, upon all the cattle brought into Edinburgh, and neither bought nor sold at the House of Muir, unless it can be shown that the authors of the respondents, the family of Abernethy, had a right to the duties which the respondents are here demanding. Now, it is not pretended that such right belonged to the Lords of Saltoun, or could have been exercised by them. In whatever manner the respondents acquired right to levy customs at the House of Muir, such right could no longer exist after the market was deserted, and recourse had to others, and the magistrates had no right, on this event, to impose other duties in their room. Their right extended no farther than to exact duty at the House of Muir ; and, as even then, the corporation of fleshers, as freemen, were exempted from such duty, *a fortiori* must they be exempted from the custom which is imposed in its room and stead.

*Pleaded for the Respondents.*—By charters in favour of the magistrates, they are clearly empowered to levy certain petty duties ; and although some of them do not point out the nature and amount of these customs, nor the articles upon which they are to be levied, but refer to the ancient use and wont, yet it is clear that they have been in the immemorial use and wont of exacting custom on live cattle purchased in the neighbourhood of Edinburgh. This custom was exacted at the House of Muir. It was also exacted at the sheep flakes held at the Grassmarket, within the town. Before they acquired the right to the market of the House of Muir from Lord Abernethy, therefore, they levied a petty custom upon all cattle sold in the Grassmarket, or any other public market in the vicinity of Edinburgh. And the act 1661 confirmed and made that right more effectual than before. Consequently, having enjoyed this right, independently of the right acquired from Lord Abernethy, beyond the memory of man, it must be presumed to be founded on legal authority. When the butchers of Edinburgh, how-

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ever, gave up purchasing at public market, evidently for the purpose of evading the duty, the question was, Whether the magistrates had a right to levy the same petty custom upon every beast slaughtered in Edinburgh; or upon the carcase when brought to sale within the city and its liberties? The magistrates submit, that in laying this duty on the carcase in place of the animal when alive, is not substituting one duty for another; but is levying the precise same duty upon the very same article, although, from various circumstances, it is not now purchased as formerly. Besides, the grant of a public market to a burgh, with a custom exigible, necessarily implies in law that the dealers in commodities exposed at that market shall frequent it, or that, if they do not choose to do so, that they shall pay the same duties which would have been levied from them there. This principle of law is acknowledged in Lawson, *Jardine & Co. v. Thomson*, tacksman of a meat market, where it was found that a duty granted on what was sold at the market place was not to be eluded by selling in private houses and warehouses. So in the case of the city of Glasgow. The butchers were in the habit of going to these markets, but they now found it their interest to go to the country and intercept the very cattle that are intended for sale in the Edinburgh market, and therefore are justly liable to be charged the duty on the carcase. Nor is it any answer to say, that it was only unfreemen fleshers who were liable to duty at those markets, because freemen as well as unfreemen, as is shown by the tables of duty, were liable; and an indulgence was only given to the latter class when they bought at the House of Muir market, but no further.

Aug. 5, 1768.  
Fac. Coll.  
M. 1965.  
Fac. Coll.  
vol. xiii. p. 90.  
M. Ap. Burgh  
Royal, No. 11.

After hearing counsel,

THE LORD CHANCELLOR ELDON said,

“ My Lords,

“ The present appeal arises out of certain interlocutors pronounced by the Court of Session, in a suspension brought by the incorporation of butchers against the magistrates and their tacksman, of the duties of the House of Muir and sheep flakes, and an action of declarator brought by the magistrates against the butchers.

“ The suspension complained of certain duties imposed by the magistrates in lieu of their old market customs, set out in what was called a certified table in the year 1776, (read the purport of the suspension).

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“ On the other hand, the respondents brought their action of declarator, to ascertain their right to the duties in question. Their summons is founded on a charter in 1636, a ratification in parliament, a subsequent act of parliament in 1703 for preventing the butchers from being also graziers, and on an act of parliament against forestallers. (Here his Lordship entered into a detail of the summons).

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“ The first conclusion in the summons is, that the duty is exigible on all bestial, whether the cattle be oxen, sheep, calves, or others, brought into the city of Edinburgh or the liberties thereof, as well as to the public markets of the House of Muir and sheep flakes, whether for the purpose of being there bought or sold, or for the purpose of being slaughtered or consumed; and that all cattle, &c. brought into the city shall pay custom if they had not previously paid it in their markets. It is one thing to pray in a declarator that an individual butcher, in Edinburgh, shall only buy at the markets in question; but it is a very different thing to say, that if he buys cattle at other markets, they shall still pay the toll for the Edinburgh market.

“ It then goes on to pray, that the table of fees should be enforced; that table bears date in November 1776, and regulates the old table, as collected from Maitland's history.

“ The old table showed the duties payable in the markets; the new table *rectifies* the former, so as to preserve the duties, whether the cattle were bought in the market or not. These conclusions respected the duties.

“ 2d. It has a conclusion that the butcher should be discharged from possessing grazings, and that their tacks should be declared void. This last was a pretty strong conclusion, as the lessors were not parties.

“ 3d. It concludes that the old markets should be enforced, to the exclusion of all others. 4th. It concludes for the penalties against forestalling; and, lastly, it concludes for the expense of the action.

“ When I first read this record, I was very much surprised at the nature of this combination of actions. The suit brought by the appellants was as a corporation, praying that the proceedings of the magistrates should be suspended simpliciter. To a mind only practised in English law, it appears difficult to say how a corporation could support such a suit. The declarator raised at the instance of the respondents as a corporation, is against an infinite number almost of individuals, stated to be butchers of Edinburgh. Whether these form all the individual members of the appellants' corporation I have no means of knowing. Another strong difficulty here again occurs to the English lawyer. It is a perfect novelty to him to see three pages of names of individuals prayed to be found guilty of crimes of evading markets, of forestalling, &c. and convictions asked for

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penalties to be imposed. We have no means of prosecuting forestallers here but as individuals, one in each record.

“ The only use that has been made of these conclusions, has been, not to do away the practices mentioned, but avowedly to preserve the custom to the respondents. It were perhaps to be wished that these practices had been done away when they first prevailed. But butcher meat being a necessary article in Edinburgh, it might tend to enhance the price very inconveniently, if these conclusions of the declarator were enforced too harshly. If all the matters of the summons can with propriety in Scotland be thus *lumped* together, we must determine the question arising according to law. The real question here is, what duties are exigible ?

“ The cause came to a conclusion under these circumstances. These questions only were insisted on, namely, whether the butchers, freemen or unfreemen, could be compelled to pay the duties when the markets were gone ; and whether or not the duties were transferable to a different species of commodity. Upon this branch of the cause the judgment solely proceeded.” (Here his Lordship read the three interlocutors appealed from.)

“ There was a good deal of reasoning in the printed papers to show, that it was mercy to proceed in this manner against the butchers, as they were liable to penalties, forfeitures, and incapacities ; and that therefore they ought to pay a toll which was in itself stated to be reasonable. In my opinion, all this must be laid out of the case ; if the respondents wish to do away forestalling, &c. let them do so. But it is impossible to contend that if they forbear to do this, they are entitled to demand toll for their forbearance. If compelling the observance of any of these statutes compels the butchers to reinstate those markets, that is an accidental consequence of law by which the duties may be increased. Another question is, if the respondents have a right to call upon the appellants to buy exclusively in those markets ; it may follow, or it may not, (for this is a question upon which I am not to give any opinion), that the seller of the cattle is obliged to pay the duty as formerly.

“ The question is, if the Court is right in saying that the appellants are liable to pay the duties, because the sellers in the deserted markets were obliged to pay them. This was not the toll which was formerly demandable. It must be upon one of two grounds that the Court found this ; 1st, That by reason of evasion, in the nature of a fraud on the appellants' part, the respondents were entitled to demand from them the duties that would otherwise have been paid at the markets. Or, 2d, That the respondents had, by virtue of some ancient custom, a right thus to tax his Majesty's subjects.

“ In this country, we do not concede to his Majesty the right of granting tolls on things not brought to market. If established markets are evaded, it is damages, not toll, that can be demanded.

“ It is a matter of surprise to me that so little proof has been



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adduced here. Several charters have been argued from which were not produced in Court, and of which I can say nothing. Maitland's history also was referred to, but that was no evidence. In this country, if a right of toll be in question, we examine witnesses as to usage. No usage was proved here. No witnesses were examined. The respondents do not pretend to say that the new duties were ever demanded before the date of the rectified table in 1776. I must make an exception as to calves and swine ; and the appellants say that they never dealt in these.

“ I do not think it necessary to enter into any discussion of the rights of the Saltoun family (Lord Abernethy). I may observe, however, that if the freemen butchers could have brought cattle into Edinburgh, which had paid duty to the Saltoun family, while the market belonged to them, without paying duty to the city also, it goes a great way to establish that they may bring cattle into Edinburgh now, purchased at other markets, without paying duty to the city.

His Lordship had not been fully aware that the ex-cambion shows that the market never belonged to the Saltoun family, (Note by Mr. D. Robertson, the Solicitor in the case.)

“ What is the reason of a grant of market tolls?—the vast convenience surely of the grant of a particular spot, both to buyers and sellers. It follows, of course, that toll is only due upon cattle exposed at market. All grants of toll are confined to this. Other individuals are prohibited, under penalties, from violating markets held under an exclusive claim.

“ It was contended also, that the city of Edinburgh, having a right to levy petty customs, had a right to levy the toll in question. (Here his Lordship read the claim in the charter 1636 as to the petty customs). Petty customs are also well known in this country ; they must be shown either to be founded in charters or usage. We must show what these customs were. Apply this rule to the present question ; does any usage here prove that the respondents have a right to levy this as a petty custom ? If the corporation have a right to say, because we have lost a toll we shall impose a new custom in its stead ; that is a different matter. My opinion is, that no words in any charter produced to us, show that the town of Edinburgh has a right to impose this by a new law.

“ The respondents referred to a decision where the magistrates of Glasgow had been found entitled to impose a duty upon potatoes in 1786 ; and to another, where the magistrates of Edinburgh had been found entitled to market duty on fruit, though sold in shops, in 1790. As to the last decision I shall say nothing, not wishing to prejudice it, and as, in fact, I know nothing of the grounds on which it proceeded.

Ferguson v. Magistrates of Glasgow, June 29, 1786. M. 1999.

Stewart v. Magistrates of Edinburgh, June 1, 1790. (unreported.)

“ As to the Glasgow case, the respondents say that it was by virtue of the clause as to petty customs that it was imposed. The appellants, however, state that the city of Glasgow was specially empowered to impose the custom.

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“ I do not see, in any view, how toll can be demanded but as toll. In my opinion, it is impossible to contend successfully, that, because the seller of a live ox to the butcher at a public market, was liable to payment of a certain toll, that when such markets are deserted, *not the seller, but the butcher*, who buys, shall be liable to pay the old toll leviable on such seller. The only reason given for charging the buyer is, that he does not now put the seller to the trouble of bringing his cattle to market.

“ What I have said does not apply to the conclusions of the libel, as to forestalling, penalties on farming, upholding the markets, &c. As the Court has said nothing as to these, I shall not say any thing to prejudice these topics. Your Lordships' judgment should be confined to a single point, as was the judgment of the Court below. I have to propose a variation upon that judgment, remitting the cause to the Court of Session, not prejudicing the claims of the respondents, if they can be grounded upon other rights.”

LORD THURLOW,—

“ I have no objection to send back the cause, as here proposed, though I came to the House with an opinion that the judgment should be reversed *in toto*.

“ Nothing is stated in this record but that certain charters were granted, and acts of parliament made. As to the absurdity of the conclusions of the summons, I shall only say this, that I conceive that the city of Edinburgh have shown right to a market to be held three times a-week, and to the tolls thereof; but if they insist that the duties are payable on all cattle brought into the city, they give themselves a perpetual market.

“ I hope it will be conveyed to the Court of Session, that when the cause comes here again, as I conceive it will come, I trust it will be specified in the record, what duties are really to be demanded, from what description of persons, and upon what distinct grounds. On this record, I defy any man, either lawyer or layman, to say on what the judgment is founded.”

Ordered and adjudged that it does not appear, by the proof 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 table of customs mentioned in the pleadings, and bearing date in November 1776, rightfully to receive, or to demand the said duties from any other persons than such as had previously thereto been accustomed to pay the same, or in any other cases of buying or selling than those in which they had previously thereto been accustomed rightfully to receive

the same. And it is further ordered that the said cause be remitted back to the Court of Session in Scotland, to review their judgment respecting the letters of suspension, and the conclusions of the declarator.

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For Appellants, *Wm. Adam, Ad. Gillies.*

For Respondents, *Edw. Law, Arch. Campbell, jun.*

JOHN MORTHLAND, Esq., Advocate, and } *Appellants ;*  
JOHN JOHNSTON, Printer in Edinburgh, }  
JOHN CADELL, Esq. of Cockenzie, - *Respondent.*

House of Lords, 26th June 1802.

DAMAGES FOR PRINTING AND PUBLISHING A LIBEL—VERITAS CONVICTI—RELEVANCY—PROCESS.—1. Held that a letter, addressed to a person in Edinburgh, giving an account of a riot and disturbance at Tranent, and reflecting on the respondent's conduct therein, as one of the Deputy-Lieutenants of the county, and which was brought to the Scots Chronicle, and published, was a libel, and £300 of damages awarded to the party. (2.) Held not relevant to charge one of the defenders, who was alleged to be editor, "as legal adviser or abettor of that paper, or as *held*, or *believed* and understood to be concerned in it." (3.) It was objected that here there had been no actual proof of the publication of the letter in the newspaper adduced. But this objection was repelled. (4.) The *veritas convictii* of what was stated in the libel pleaded, but the defence was not sustained. (5.) Objection was stated to the summons, on the ground that, three weeks after it was served, a new summons was raised and signeted, and to which, as was alleged, there was affixed the date of the first summons, and this, it was alleged, was done in order to remedy a defect in that summons. Held the objection not good.

This was an action of damages brought at the instance of the respondent, for a libel published in the Edinburgh newspaper called the Scots Chronicle, of which the appellants were alleged respectively to be the editor and publisher.

It appeared, that on the occasion of the passing of the militia act in 1797, for embodying a militia force in Scotland, the preparation of the lists of the persons liable to be ballotted was thereby devolved upon the schoolmasters and constables of the different parishes, subject to the correc-