superiority of the lands in queſtion, called Lochbank, lying within the barony of Broughton, ſhall belong to the appellants.

For Appellants, *David Dalrymple.* *Sam. Mead.*
For Reſpondent, *Edward Northey.* *Spencer Cowper.*

The judgment here reverſed is founded on in the Dictionary voce *Kirk Patrimony*, vol. 1. p. 531.

Caſe 31. The Corporation of Butchers in Edinburgh, *Appellants*;
The Magiſtrates of Edinburgh, and Corporation of Candlemakers there, - - *Reſpondents.*

29th *June* 1715.

Burgh Royal.—The Court of Seſſion having found that the butchers of Edinburgh ſhould be reſtrained from rinding tallow for ſale, and that the magiſtrates could oblige them to ſell their tallow at a certain price to the candlemakers, which was in terms of a bye-law of the magiſtrates, ratified by a private act of parliament, the judgment is reverſed.

Act of parliament 1540, *c.* 123.—This act was not ſufficient to reſtrain the butchers from melting or rinding their tallow.

1424, c. 32. BY an act of parliament 1424, c. 32. it is enacted, "that na "Taulch be had out of the realme, under the paine of eſ-
1540, c. 123. "cheitte of it to the king." By another act of parliament 1540 c. 123. it is enacted, "that na maner of man, fleſchour nor "others, to burgh nor to land, take upon hand to rinde, melt, "nor barrel tallun, under the paine of tinſel of all their gudes."

The magiſtrates of Edinburgh, by a regulation or bye-law, dated the 15th of September 1517, diſcharged all the inhabitants of the burgh, other than the candle-makers from melting tallow or making candles, except for their own uſe and to burn in their own families. By another regulation or bye-law, dated the 10th of October 1551, the magiſtrates ordained, that no butcher or other perſon within the ſaid burgh, ſhould ſell any tallow to ſtrangers or inhabitants of other towns, but to the neighbours and candlemakers thereof; and that no freeman, other than the candlemakers, by themſelves or ſervants, ſhould melt any tallow for making of candles, beyond what they made for their own uſe, under the pain of eſcheat thereof, payment of 5*l.* to the common works, and *baniſhing the town.* King James the 6th, on the 4th of May 1597, by a ratification of privy council, and a grant under the great ſeal, not only ratified the ſaid acts and ordinances of the magiſtrates, but all ſuch further rules and conſtitutions as ſhould be thereafter made in favour of the candle-makers.

By another regulation or bye-law, dated the 27th of September 1693, the magiſtrates ordained, "that the price of rough tallow "ſhould not exceed 48 ſhillings Scots per ſtone, and that the "price of candles ſhould be 58 ſhillings Scots per ſtone; and "that

" that the butchers of Edinburgh, and others, ſhould ſell all " their tallow to the candle-makers, and to no one elſe till they " were ſerved, on pain of forfeiting their goods, and ſuch further " penalties as the ſaid magiſtrates ſhould think fit to inflict: And " that for the future, all the country butchers bringing meat to " Edinburgh on the market days, ſhould be obliged to bring in " their rough tallow to be ſold on the ſaid market days to the " ſaid candle-makers and burgeſſes, and to no others till they were " ſerved, under the ſaid penalties." The magiſtrates alſo revived a former bye-law, bearing date the 17th of October 1684, impoſing a fine of 20 ſhillings upon the tranſgreſſors. And all theſe regulations and bye-laws, with the ratification under the great ſeal before-mentioned, were ratified and confirmed by a private act of parliament on the 17th of July 1695; but this (the appellants ſtate) the magiſtrates and candle-makers did not, till very lately, put in execution.

The appellants, however, refuſing to ſell their tallow to the reſpondents the candle-makers, at the rates mentioned in the foreſaid bye-law, the magiſtrates, in June 1714, ordained a fine of 20 ſhillings ſterling, to be levied upon all perſons refuſing to obey the ſame. The appellants, thereupon, commenced an action of reduction and declarator before the Court of Seſſion, againſt the reſpondents, concluding, that the acts and regulations before-mentioned, and all other acts, bye-laws, and ordinances whereby any reſtraint was laid upon them as to the price and manner of diſpoſing of their tallow ſhould be reduced and made void; and that it might be found and declared, that they had right to ſell their tallow rough or rinded to any perſons whatſoever, without diſtinction; and to rind and export the ſame to England, or elſewhere as they ſhould think fit. The reſpondents brought a counter action of declarator againſt the appellants, to have it decerned and declared, that the appellants had no right, and ought to be diſcharged to melt down any tallow, or ſell the ſame to any other perſon, till ſuch time as the reſpondents and other free burgeſſes and inhabitants of the burgh ſhould be ſerved; and that the appellants ought to ſell their tallow at the rates and prices ſet thereupon by the magiſtrates, according to the laws and ordinances made by them. Both theſe actions being heard, the court, on the 15th of February 1715, " found that the appellants ought " to be reſtrained from rinding of tallow for ſale, and alſo found " that the magiſtrates and council of Edinburgh could oblige " the appellants to ſell their tallow to the candle-makers, at a " price to be put thereupon by the magiſtrates and town-council."

The appeal was brought from " an interlocutor, ſentence, or " decree of the Lords of Council and Seſſion, made the 15th of " February 1715." Entered, 11 May, 1715.

Heads of the Argument of the Appellants.

The old laws with reſpect to the reſtraint of expoſing the native produce of the kingdom are much altered by the increaſe of trade, having ſince learned by experience that any ſmall inconvenience

nience particular perſons might ſuffer by paying a little more for the home product, is much more than compenſated by the advantage which the nation in general, and the crown, reap by the exportation of ſuch commodities into foreign parts. Although by ſeveral old laws fiſh was prohibited to be exported, yet in after times fiſh was not only allowed to be exported, but a premium given for the export thereof both before and ſince the union. And this is the very caſe, as to the old laws prohibiting the exportation of tallow, which by degrees became obſolete and in defuetude, tallow being now a *ſtaple commodity*, and ſince the union expreſsly allowed to be exported. The act againſt the melting, rinding, and barrelling of tallow, was only to prevent the exportation; and when that act was in force it extended generally to all men, butchers and others, and ſo comprehended even the candle-makers themſelves, and all perſons making candles for their own uſe; which plainly infers, that it muſt be meant only of melting, &c. in order to export it, and ſo falls in conſequence with the prohibition of exporting it.

The ſeveral acts, ordinances, or bye-laws of the magiſtrates and town-council, and particularly that in 1693, whereby any reſtraint was laid upon the appellants as to the price and manner of their diſpoſing of their tallow, ought to be reſcinded and declared void and null in themſelves, for the ſeveral reaſons following, viz.

1. For that the laying ſuch a reſtraint was againſt the common right of the ſubject, both buyer and ſeller, deſtructive to trade, and an unwarrantable and unprecedented impoſition, not only upon the appellants, but upon other free ſubjects who muſt be furniſhed in publick markets, and cannot otherwiſe have an opportunity of buying tallow for their reſpective uſes: And if this bye-law ſhould be binding, it would be a precedent to the magiſtrates of other burghs to make the like regulations, which would be a manifeſt grievance to all ſuch ſubjects as are not free of thoſe burghs.

2. For that the giving the candle-makers ſuch a right of preemption, tended manifeſtly to a monopoly, and gave them power to impoſe upon their fellow ſubjects ſuch rates for their tallow as they thought fit.

3. For that the ſaid act or bye-law of the magiſtrates in 1693, was not only contradictory to their former bye-law in 1551, which allows the ſale of tallow to all the *neighbours* of the burgh, without any reſtriction to burgeſſes only, but is wholly partial in favour of the reſpondents, the candle-makers and themſelves, by excluding their neighbours of the former benefit of buying tallow for their own uſe within the ſaid burgh, as before they might.

4. For that the ſaid bye-law is incoherent and impracticable in itſelf; for how can the appellants know when the candle-makers and other burgeſſes are all ſerved; or how is it poſſible to diſtinguiſh between a burgeſs, and an inhabitant that is not a burgeſs.

5. For

5. For that ſuch an ordinance or bye-law is manifeſtly inconſiſtent even with the Britiſh acts ſince the union, which allow all ſubjects in general to make candles for their own uſe, paying the duty impoſed thereon. And if this bye-law ſhould take place, this privilege of making their own candles would, in many reſpects, be rendered ineffectual to all ſuch perſons as are not burgeſſes, or at leaſt they would be under ſuch inequalities and inconveniences as the law has no where laid upon them.

6. For that theſe bye-laws are unequal and unjuſt, ſince there is no obligation laid upon the reſpondents, to take all the appellants' tallow off their hands at the rate therein preſcribed, whereby the appellants (if this bye-law ſhall be allowed valid) will be put under this inſuperable diſadvantage, that when they have kept their tallow till the candle-makers and burgeſſes are ſerved, it is ſtill optional to them to buy or not, as they think fit. And indeed, if they can have their tallow from the country, as it is well known they may, they will not, and need not, buy it from the appellants, but the appellants' tallow muſt be upon their hands till it be uſeleſs, if they cannot export it as other ſubjects do, or otherwiſe they will be obliged to ſell it at ſuch a price as the reſpondents will pleaſe to give for the ſame; and more eſpecially if they ſhould be reſtrained from rinding it, without which it will putrify, and be of no uſe in leſs than two days.

For that the magiſtrates, as they have not a power to reſtrain the appellants from ſelling their tallow to any perſon that wanted the ſame, ſo they have no authority to ſet a price thereon by any bye-law. For although the magiſtrates may ſet prices upon victuals, as bread, ale, &c. with which the inhabitants muſt neceſſarily be furniſhed within the burgh, yet they have no power to ſet prices upon any original commodity, as tallow, no more than upon wheat, barley, hides, wool, &c. and the acts of parliament, whereon they found their pretended authority, relate only to victuals, or ſuch other things as are therein expreſsly named: and the giving ſuch a power to magiſtrates of burghs, to ſet prices upon tallow, hides, and other original commodities, would prejudice the gentlemen of landed property, ſince it might in a great meaſure tend to leſſen the value of their eſtates.

As to the act of parliament in 1695, whereby the bye-law of 1693 was ratified, ſuch acts of ratification are paſſed of courſe, (as this was without calling the appellants) and by the laws of Scotland have never been reckoned of any importance, for, if the ordinances or bye-laws which are ſo ratified be void in themſelves, the ratification will give no ſanction thereunto; and the cuſtom of Scotland provides againſt ſuch ratifications, where parties are neither heard nor called by an act deſignedly made at the end of every ſeſſion of parliament, the *act Salvo jure Cujuſlibet*. The laſt part of this very bye-law, whereby the country butchers who brought meat on the market days, were enjoined to bring in their rough tallow to be ſold on the ſaid market-days to the candle-makers and burgeſſes, was in 1698, notwithſtanding ſuch ratification, reſcinded by the privy council, and declared to be an abuſe; and

and the appellants have reaſon to believe that if they had complained at that time, the ſaid bye-law, as to them, would have met the ſame fate.

The reſpondents objected, that they were bound by their oaths to obey the ordinances of the magiſtrates, but the appellants are not bound by their oaths to obſerve any ordinances which are illegal and unjuſt in themſelves. The reſpondents objected likewiſe, that the appellants would raiſe the price of candles in caſe theſe ordinances were not obſerved by them; but this was ſtarted only to incline the members of the College of Juſtice to favour the reſpondents. For although the appellants ſhould demand exorbitant prices, the candle-makers would be under no neceſſity of buying from them, but could, and no doubt would, furniſh themſelves from other places, as every perſon knows they might: *And thus, it would be in the power of the candle-makers to ruin the butchers at pleaſure.*

Heads of the Reſpondents' Argument.

The ſtatute 1540, c. 123. whereby the appellants are expreſsly forbid to melt tallow, is not in deſuetude, and there have been continued prohibitions with regard to the appellants' ſelling tallow till the reſpondents and other burgeſſes be firſt ſerved, neither are theſe prohibitions inconſiſtent with the privileges of the ſtaple, becauſe the appellants were to furniſh the reſpondents with their tallow for the uſe of the inhabitants, and the ſurpluſage might be exported. Nor does the treaty of Union unhinge the privileges of burghs, or make void their regulations upon their leſſer incorporations, which are for the good and ſervice of the inhabitants and other lieges; and the general freedom of trading agreed to by the Union was never meant to lay open, deſtroy, or overturn the laws, ordinances, or conſtitutions of the burghs.

All burghs by their charters of conſtitution have power of making by-laws or ordinances amongſt the leſſer corporations, as may be for the benefit and advantage of the whole, by regulating the ſubject of trade belonging to each corporation, viewing the markets and ordering the prices of *vivers*: and the obſerving and exerciſing that power is recommended to the magiſtrates of every burgh by ſeveral ſtatutes ordaining them to ſet reaſonable prices upon wine, ſalt, timber, &c. In purſuance of theſe laws the magiſtrates of Edinburgh have been in the conſtant practice of regulating the prices of ſuch things within the city as they judged neceſſary for the common good, and particularly that of tallow, which has been ratified and confirmed by King James the Sixth in 1597, and by King William in 1695. Neither is the trading in tallow properly the appellants' employment; the reſpondents, the candle-makers, being a corporation ſpecially conſtituted for that effect; and as the ſubject of their trade within burgh comes from the hands of the appellants, it is moſt juſt and reaſonable, that that ſubject ſhould be regulated by the magiſtrates, leſt it ſhould be in the power of one incorporation entirely to diſappoint the trade of another, to the great prejudice of the lieges: and

1540, c. 100.
1551, c. 23.
1555, c. 57.

the magiſtrates have always been ſo careful of the appellants, that they annually rate the tallow higher or lower according to the prices of cattle, of which they are fully appriſed before they make any ordinance concerning the ſame.

That which has been the practice of the appellants for near 200 years, as appears by the ordinances of the city council, is ſtill practicable; and all that is required by theſe by-laws, is, that the appellants be obliged to ſell their tallow to the reſpondents when they demand the ſame at the rates fixed by the city laws, by which the price of candles is alſo to be regulated. As to the inhabitants, not free-men burgeſſes, they were never reſtrained from buying, only that it ſhould not be pretended and uſed by the appellants as a handle to alter the privileges of the reſpondents. 15 Sept. 1517. 10 Oct. 1551.

The diſtinction which the appellants contended for, between raw and manufactured articles, is contrary to the ſtatutes empowering the magiſtrates of every burgh to ſet a price upon timber, which is not ſuppoſed to be manufactured; and if the magiſtrates have a power of rating candles, (which is not denied,) the ſame reaſon will hold as to tallow, becauſe the regulation upon candles follows in proportion with the regulation upon the tallow; and if the price of tallow be not regulated, neither ought the price of candles, by which the city will ſuffer a conſiderable prejudice. 1540, c. 100. 1555, c. 57.

After hearing counſel, *It is ordered and adjudged, that the interlocutory ſentence or decree in the appeal complained of, whereby the Lords of Seſſion found,* "*that the appellants ought to be reſtrained* "*from rinding of tallow for ſale,*" *and alſo found,* "*that the magiſtrates and council of Edinburgh can oblige the appellants to ſell their* "*tallow to the candle-makers for making of candles to be conſumed in* "*the town at a price put thereupon by the magiſtrates and town* "*council,*" *be reverſed.* Judgment, 29 June 1715.

For Appellants, *Spencer Cowper. Rob. Raymond.*
For Reſpondent, *J. Jekyl. W. Lechmere.*