and, with this finding and declaration, it is ordered and adjudged that the appeal be dismissed.

1810.

STILL, &c. *v.* THE MAGISTRATES OF ABERDEEN, &c.

For Appellant, *Sir Samuel Romilly, Mathew Ross, John Clerk, Thos. W. Baird.*

For Respondents, *David Boyle, Wm. Adam, Henry Erskine, Ad. Gillies.*

[Mor. App. "Jurisdiction, No. 10."]

ALEXANDER STILL, JAMES WATT, JAMES KEITH, ALEXANDER DAVIDSON, and GEO. WILLIAMSON, Fleshers in Aberdeen, for themselves and the whole other Fleshers of Aberdeen, . . } *Appellants;*

THE MAGISTRATES AND TOWN COUNCIL of Aberdeen, and ROBERT BRUCE and ALEXANDER BREMNER, their Tacksmen of the Weigh-House Customs, . . } *Respondents.*

House of Lords, 16th June 1810.

TOWN DUES—JURISDICTION—CHARTERS—USAGE.—The Magistrates of Aberdeen were in the practice of exacting a duty in their City Weigh-House, on all tallow, butter and cheese brought into the market. The question here was, Whether this regulation, in reference to tallow, included refined tallow as well as tallow in the rough, and was to be exacted from freemen? Held, in the Court of Session, that it referred to tallow refined as well as unrefined, and to freemen as well as unfreemen. In the House of Lords, remitted for reconsideration, with special findings.

The question in this case was about the right of the Magistrates of Aberdeen, and their tacksmen, to impose city weigh dues on the fleshers, although they did not carry their tallow in a refined state to the market, but sold it to the chandlers in the rough, without resorting either to city weigh-house or the market. It arose out of the following circumstances:—

The town of Aberdeen had a public weigh-house, to which those, by the regulations of the burgh, who frequented the markets behoved to carry their goods, for the purpose of having them weighed, on payment of certain small duties to the magistrates or their tacksmen.

The magistrates were in the practice of making and publishing regulations and tables, from time to time, in regard

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to the exacting of these dues; and, on 19th April 1777, by their act of council, they had made up a table, and declared, "*All tallow*, butter and cheese, brought to the mar- "ket for sale, is liable in payment to the tacksman of the "weigh-house, of twopence sterling per stone of twenty- "eight pounds avoirdupois."

Regulation, Apr. 17, 1777.

The uniform practice at the city weigh-house had been, before and after the passing of this regulation, to charge, in regard to tallow, wrought up in a refined state, and carried to the market for sale, and weighed in the public weigh-house, the duty of twopence per stone from unfreemen, and one penny per stone from burgesses. But when tallow was allowed to remain in its natural state, or what is called rough fat, no such exaction was ever made, nor did it occur to any one that there was any just ground for making it. The appellants, the fleshers in Aberdeen, had been in use, for many years, of disposing of the whole fat of the animals killed by them in a rough state, directly to the tallow chandlers, who came and bought, and took it away from their premises; and, therefore, they had no occasion to carry it to the public market, nor to have it weighed in the public weigh-house. This state of things continued until the tacksmen of the magistrates raised an action against one of the fleshers in 1798, setting forth, that this was a mere evasion of the city dues.

Nov. 19, 1798. In this action, the magistrates found, that "The weigh dues "on tallow cannot be evaded by any alteration in the mode "of selling, if the same be regularly and timeously de- "manded, but, in respect it is affirmed by the defenders, "that those dues have not been in use of being levied for "these several years past, *and that the pursuers have not* "*brought any proof to the contrary*, assoilzies the defend- "ers from the present process, reserving to the pursuers to "prosecute the defenders for the weighing dues on tallow "incurred since the date of citation to this process, which "may be considered sufficient intimation of the intention of "levying the dues in time coming." In January 1799, the tacksmen instituted a new action; to which the same defence was pleaded as in the former; and, during its depend-

Apr. 12, 1799. ence, the magistrates made new regulations, purposely devised to extend their dues to "all rough fat, &c. brought to the "market for sale, and declaring it liable in payment to the "tacksmen of the weigh-house of twopence sterling per stone "of twenty-eight pounds avoirdupois." And, next day, the

magistrates pronounced the following interlocutor:—Finds "that the weighing dues of the tallow in question are clearly "and unquestionably established by the act of council, 19th "April 1777, and table produced, and cannot be evaded by "now selling it in its rough state, whereas it may have "formerly been in use to be sold in a molten state, if it be "at all sold in the town of Aberdeen, as no distinction "between rough and molten tallow is warranted by the "act of council and table: Allows the pursuer to instruct "that the defender was certiorated of the intention of le-"vying the dues in question, by being cited in the former "process mentioned in the debate, and that he has, since "the date of that citation, sold within the burgh of Aber-"deen, tallow to such an extent that the weighing dues "thereon amount to the sum libelled."

The fleshers brought a bill of suspension to the Court of Session, which was passed, and they superadded a declarator against the Magistrates of Aberdeen and their tacksmen, praying the Court to have it found and declared, "That the fees and customs payable for weighing their "tallow, according to the immemorial use of payment, can "be exacted only on such refined tallow as the pursuers "bring and sell in the public market and city, and have oc-"casion to weigh with the city weights; as also, that they "had no right to extend those petty customs beyond the said "former immemorial practice and use of payment, or to the "prejudice of the pursuers, and their right of freedom of "the burgh, and ought to be prohibited from so doing in "all time coming."

This declarator having come before Lord Meadowbank, his Lordship repelled "the defences, and finds and decerns "conform to the conclusions of the libel." On representation, his Lordship adhered. On reclaiming petition to the whole Lords, the magistrates attempted to show, by reference to a series of crown charters in their favour, that they had power of exacting dues; but, on a more critical examination of these charters, the appellants alleged that the powers conferred had always reference to dues and customs exacted by use and wont, or according to the usage of the burgh. Either "*de jure et consuetudine spectantibus*;" or, "*custumis solitis, usitatis ac consuetis:*" or, "*secundum usum et consuetudinem usitat. et consuet.*" And an act of Parliament, 1641, confirmed them in those privileges that they had been in possession "in any time bygone." The appellants founded

Feb. 1, 1800.

May 23, 1801.

Nov. 17, 1641.

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Boog *v.* Magistrates of Burntisland, 22d Feb. 1775. Wallace Decisions, vol. vii. p. 48; Tod *v* Magistrates of St. Andrew's, 15th June 1781, Fac. Col. viii. p. 97. Mor. p. 1997.

Feb. 25, 1801.
Mar. 11, 1801.
Mar. 6. 1804.

on the decisions of the Court of Session, which had been adverse to the claim now made by the Magistrates of Aberdeen, and alleged that the case of Ferguson *v.* The Magistrates of Glasgow, which was decided later than those cases (29th June 1786, Fac. Col. vol. ix. p. 436, *et* Mor. p. 1999), differed materially from the present case; 1st, As regarded the town's title; and, 2d. As to the use and wont which was in favour of the town exacting such dues.

The Lords pronounced this interlocutor:—"Having "advised this petition, with the answers thereto, they as- "soilzie the defenders from this action, and decern; find "the pursuers (appellants) liable to the defenders in ex- "penses, and ordain an account thereof to be given in to "Court." On reclaiming petition, the Court adhered, without prejudice to the parties being heard before the Lord Ordinary upon the quantum of the duty, and any supposed distinction betwixt freemen and unfreemen. The cause went back to the Lord Ordinary as to the quantum, and, after various procedure, and report to the Court, the Court pronounced this interlocutor:—"Repel the objections "stated by pursuers against the quantum of the custom or "duty being twopence sterling per stone of twenty-eight "pounds avoirdupois; and find, That the said duty is exigi- "ble on refined as well as unrefined tallow, and from free- "men as well as from unfreemen of the town of Aberdeen; "and find the pursuers liable for the expense of extract, but "no other expenses, and decern."*

Sept. 17, 1804.

The appellants brought a bill of suspension, but Lord Cullen refused the bill.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—1. The rough fat tallow sold by the fleshers of Aberdeen, without being brought to market, or weighed in the public weigh-house in town, was not formerly subjected to any duty or custom. Neither was refined tallow subject to any duty, unless when carried to

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* Opinion of the Judges:—

"Some of the judges thought that the regulation of the magistrates was strictly local, and could not be extended over the trade in general. But the majority of the Court held, That this regulation, which seemed proper in itself, would be totally nugatory if the commodity sold by the butchers within the burgh to strangers were not to be comprehended under it."—Mor. Dic.

the public market or weigh-house. Therefore the claim now made on the part of the respondents is an unjust attempt to extend their exactions beyond the limits of former usage; and, as such, is not only unauthorized by their charters and other title-deeds, but is directly in the face thereof. 2. It is unjust, besides being illegal, to allow the magistrates of towns and burghs to impose duties and customs upon their fellow citizens of their own accord, and beyond the rights and privileges conferred on them. If such duties be necessary for the support of the body politic, it is to Parliament they must go, who alone can confer the power of laying on such additional duties.

Pleaded for the Respondents.—1. The respondents, by the common law and usage of Scotland, and by virtue of royal grants and acts of Parliament in favour of the burgh, have a right to impose and levy reasonable duties on the sale of commodities within it, to be applied to the use of the community. Such a power belongs *de jure* to all magistrates of burghs, on the footing of market dues, and as a consideration paid for the advantages of market. It is of the same nature with the right which is held to belong to every proprietor in Scotland, whose charter entitles him to "fairs and markets," and who, it never was doubted, had a power to exact small dues for goods brought to his market, a right accordingly every day exercised. The old laws concerning the burghs show very clearly the common law right of magistrates in this matter. In the *Leges Burgorum* and *Iter Camerarii*, various passages occur respecting *Custumæ*, *Tollonii, et Nunindinæ*, which establish the ancient common law right of magistrates to levy small duties upon commodities brought to market; and this right, which is inherent in the constitution of the Scottish burghs, was long antecedent to any special grant or charter in favour of any particular burgh. The burgh charters of the oldest date, constantly refer, as to this matter of levying customs, to "use and wont," which supposes a right antecedent to any special grant. From the origin and nature of this right, it follows that charters in favour of a burgh, which import a right to levy customs, never specify particular rates, or articles on which they were to be exacted, that being necessarily left to the discretion of the magistrates and town council. Had it been otherwise, it would have been highly inexpedient and impolitic, for as, from the change of times, a necessary alteration behoved to take place in the nature of the goods

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brought to market, and in the value of money, specific regulations, fixing either the *quantum* or the articles liable in duty, behoved to have been altered and renewed from time to time by special grants, ascertaining the precise dues on each commodity, which does not appear to have been the case in any burgh. The grants, therefore, are general, giving a power to magistrates to levy custom according to *use and wont*, without specifying either the rate of custom or the goods liable. 2. But, supposing the power of magistrates of imposing *new duties* to be doubtful, there can be no doubt that they have the power of varying the mode of collection, when the former mode becomes ineffectual, by a change in the way of dealing, and generally to make regulations to prevent what is, or may be, a palpable fraud or evasion of the duty, which is just the case in the present instance. This has been decided in various cases. In one from the town of Dumfries, in August 1768, the Court of Session found the magistrates entitled to levy a duty on meal sold from private warehouses, notwithstanding that the act of Parliament seemed to limit their right to exact custom for such meal only sold in the public market, the practice of bringing it to the market having been laid aside. And this was founded on the principle, that if such a power did not belong to the magistrates, the duty would be completely evaded. A still stronger case occurred in 1786, which was most deliberately considered, and has been counted a leading one ever since. This was the case with the Magistrates of Glasgow.

Ferguson and Others *v.* Magistrates of Glasgow, June 29, 1786. Fac. Coll. vol. ix. p. 436; et Mor. p. 1999.

The appellants have no room to complain as to the quantum, which is both moderate and reasonable.

After hearing counsel, it was

Ordered and adjudged that the cause be remitted to the Court of Session to review their several interlocutors complained of, generally, and specially with reference to these considerations, Whether, previous to the year 1777, any payment was legally due to the tacksmen of the weigh-house for tallow brought to the market for sale, and if none was due, or less than twopence sterling per stone of 28 lbs. avoirdupois weight was due, Whether it appears from the proofs and evidence that the magistrates and town council of Aberdeen were, by law, empowered to direct a new or increased duty to be paid upon tallow brought to the market for sale; and Whether, if any such payment was legally due prior

to the year 1777 for tallow brought to the market for sale, or if they were so empowered to direct a new, or increased duty to be paid upon tallow brought to the market for sale, such prior, new, or increased duty appears, either from the meaning of the terms in which it was expressed, or from usage of payment, or upon any other grounds, to be now legally exigible upon rough fat, sold within the burgh in the houses of the inhabitants, freemen or others, and not actually brought to the market for sale. And whether it appears from the proofs and evidence that the inhabitants, freemen, or others, could be, and have been legally subjected to penalties by the magistrates and town council, for weighing, or causing rough fat to be weighed, in their houses or elsewhere, to the prejudice of the public weigh-house; and whether, upon grounds furnished by the proofs and evidence, or by law, if the inhabitants, freemen or others, contrary to any legal prohibition (if any such there be), shall so weigh, or cause rough fat to be weighed, and the same shall be sold by private contract within their houses in the burgh or elsewhere, to the prejudice of the public weigh-house, the inhabitants are not only liable to such penalties, but the same payments are also exigible upon such rough fat so weighed and sold, as are payable upon tallow brought to the market for sale? And whether by law, and upon the proofs and evidence, the magistrates and town council of Aberdeen have any right to impose a new payment or custom upon rough fat sold by private contract within the burgh, within the houses of the inhabitants, freemen or others, or to extend or increase any such payment, if any such hath been imposed, beyond the use or practice of payment, and whether by law such payment, or increased payment, would, as to the *quantum* thereof, be subject to the control of the Court of Session; and the said Court, after reviewing the said interlocutors in this cause, are to do therein as to them shall seem just and meet. And it is further ordered, That as to the interlocutor of the Lord Ordinary complained of, the same be also reviewed.

For Appellants, *Wm. Alexander*, *Thos. W. Baird.*
For Respondents, *Wm. Adam*, *John Burnet.*