1800. *December 3.*

PATRICK CUNNINGHAME, *against* The MAGISTRATES and TOWN-COUNCIL of EDINBURGH.

No. 7.

A bill of suspension and interdict at the instance of an individual member of a Town-Council, complaining of an act of the Council, appointing an additional minister within the burgh, on the ground that its revenue was not in a situation to pay his stipend, held to be incompetent.

THE Magistrates and Town-Council of Edinburgh having resolved to make St. Andrew's Church a collegiate charge, appointed the Reverend David Ritchie to be junior minister, with a stipend of £.200 yearly.

Patrick Cunninghame, then a member of the Town-Council, complained of this resolution by a bill of suspension and interdict, in which he stated, that the expenditure of the City already exceeded its revenues; that the appointment would at all times have been unnecessary, and was peculiarly improper under the present circumstances.

The Town-Council defended the measure on grounds of expediency.

The Lord Ordinary took the case to report.

On advising memorials, the Court thought the measure expedient. But they further thought, that the complaint was incompetent. This Court, (it was observed), in a proper action brought for that purpose, will controul Magistrates in the expenditure of the revenue, when special acts of malversation are charged against them; see No. 94. p. 7366; but they have no power, in this summary form, to recal or prohibit an appointment made by a corporate body, in which a third party has a *jus quæsitum*, on vague allegations that the revenue is insufficient for its support.

The Lords unanimously refused the bill, and found the complainer liable in expenses.

Lord Ordinary, *Cullen*. For Cunninghame, *Jo. Clerk*. Alt. *Lord Advocate Hope*.

R. D. *Fac. Coll. (APPENDIX,) No. 10. p. 19.*

1801. *February 25.*

ALEXANDER MARTIN and Others, *against* The MAGISTRATES of ABERDEEN.

No. 8.

Upon a change in the form in which an article, subject to custom, is sold within a royal burgh, the Magistrates are entitled to levy the duty from it in its new shape.

THE Magistrates of Aberdeen were accustomed to levy weigh-house dues on the tallow sold by the butchers within the burgh, when they sold it privately, as well as when they exposed it in the public market, and had it weighed in the public weigh-house.

By a table, published by the Magistrates in 1777, it is declared, That "all "*tallow*, butter and cheese, brought to the market for sale, are liable in pay-

"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 and selling, than those in which they had previously "thereto been accustomed rightfully to receive the same: And it is further ordered and adjudged, "That the said cause be remitted back to the Court of Session in Scotland, to review their judg-"ment respecting the letters of suspension and the conclusion of the declarator."

No. 8.

" ment to the tacksmen of the weigh-house of 2*d.* Sterling *per* stone of twenty-
" eight pounds avoirdupois;" and " all the inhabitants are prohibited from
" weighing, or allowing to be weighed, in their houses, or any where else, to
" the prejudice of the public weigh-house, any pork, beef, *tallow*, butter,
" cheese, wool, or any other article liable in weigh-house dues, under the pe-
" nalty of 5*s.* Sterling for each transgression, to be paid to the tacksman or
" collector of the weigh-house dues."

Formerly, the butchers refined the tallow before selling it, and the dues were paid about it, after undergoing this operation.

But, upon the date of the table, a practice had commenced, which has since become general, for the butchers to sell, by annual contract, their whole tallow in its rough state, to tallow-chandlers and soap-boilers within the burgh; and the tacksman of the customs was not in use to demand any weigh-house dues for it. The consequence was, that the weigh-house duty on tallow had become almost wholly unproductive.

To remedy this, the tacksman of the customs in 1798 brought an action before the magistrates, against Alexander Martin and other butchers, for the weigh-house dues of tallow sold by them within the burgh, from 1st June 1769 to 29th April 1778. In this action, the magistrates " found that the
" weighing dues on tallow, which are clearly and unequivocally established by
" the act of council of 19th April 1777, and table produced, cannot be evaded
" by any alteration in the mode of selling, if the same be regularly and timous-
" ly demanded; but in respect it is affirmed by the defenders, that these dues
" have not been in use of being levied for several years past, and that the pur-
" suers have not brought any proof of the contrary, assoilzied the defenders
" from the present process, and decerned; reserving to the pursuer to prose-
" cute the defenders for the weighing dues on tallow, incurred since the date
" of citation in this cause, which may be considered as sufficient intimation of
" the intention of levying these dues, &c. in time coming."

The butchers having resisted payment even for the future, the tacksman, in 1799, raised a second action, in which the magistrates " found that the weigh-
" ing-dues on tallow in question are clearly and unequivocally 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 formerly may have been in use
" to be sold in a molten state, if it be at all sold in the town of Aberdeen, as no
" distinction betwixt rough and molten tallow is warranted by the act of coun-
" cil, and table."

The magistrates, at the same time, published another table, declaring " all " fat and tallow" subject to the duty in question.

Upon this the butchers brought an action of declarator, concluding to have it found, that the magistrates had no right to levy any duty upon rough tallow; and that refined tallow was subject to it only when sold in public market, and weighed in the public weigh-house; and that, even under these circumstances, freemen were liable only in 1*d.* a-stone.

No. 8. The Lord Ordinary repelled the defences, in respect "that the Magistrates "decline offering any proof of the exaction claimed on rough tallow, being "formerly levied by their tacksman."

In a reclaiming petition, the Magistrates

Pleaded: The Magistrates are authorised, by the various royal charters, confirmed by act of Parliament, to levy petty customs; Rob. I. 10th December 1319; James, 6th August 1601, and July 1617; Cha. I. 1638; act of Parliament, 17th November 1641. Under this authority, they were in use to levy the duty in question on all the tallow sold within the burgh, whether in open market after being weighed at the public weigh-house, or elsewhere.

Accordingly, the table 1777 makes no distinction, and, provided the article be sold within the burgh, the place of sale must be immaterial; 1st June 1790, Stuart against Magistrates of Edinburgh (not reported). Indeed, the advantage resulting from a public weigh-house, where attendance is constantly given, would be defeated, if encouragement were held out not to frequent it.

True, the butchers formerly sold the tallow in a refined state, but the change in their practice in this respect, can afford no room for an exemption from payment, even although preceding tacksmen may have been inattentive in levying it.

Nor is this to be considered as a new exaction; neither the amount, nor the article on which it is charged, being different, but merely a regulation necessary for the preservation of an old one, the power to make which is inherent in the right to the duty itself; 29th June 1786, Fergusson and others against Magistrates of Glasgow, No. 108. p. 1999. 18th December 1799, Magistrates of Edinburgh against Fleshers, No. 6. *supra.*

Answered: In the charters founded on by the defenders, the right of levying petty customs is limited by use and wont. It is admitted, that the claim for duty on rough tallow is not supported by practice; and it is the province of the Legislature alone to impose a new burden on the subject; 22d February 1775, Boog and Thomson against Magistrates of Burntisland, No. 103. p. 1991. 15th June 1781, Todd against Magistrates of St Andrew's, No. 106. p. 1997. The table 1777 relates only to tallow actually exposed for sale in the public market, and at any rate is not obligatory, in so far as not sanctioned by usage.

Observed on the Bench: The right to exact petty customs is part of the original constitution of all the royal burghs in Scotland. It cannot signify whether the commodity be sold in the public market or in shops, nor in what shape it is exposed. The butchers cannot by an act of their own, acquire an exemption.

The Lord Ordinary alone remained of opinion, that where, in consequence of an alteration of circumstances, an accustomed duty can no longer be exacted *in terminis*, the Legislature only can give a substitute.

The Lords assoilzied the defenders. A reclaiming petition was (11th March) refused, without answers, as to the general point, but remitted to the

Lord Ordinary to inquire further as to the *quantum* of the duty, and the alleged privileges of freemen with regard to it *. No. 8.

Lord Ordinary, *Meadowbank.* Act. *Cha. Hay, W. Baird.*
Alt. *Solicitor-General Blair, Burnet.* Clerk, *Colquhoun.*
D. D. *Fac. Coll. No. 222. p. 502.*

* Upon an after report by Lord Meadowbank, Ordinary, the Court (6th March 1804) found, that the Table 777 must be the rule, without distinction between "rough and refined tallow, or between freemen and unfreemen."

1801. *June 3.*

CHARLES PORTEOUS, Boxmaster of the Incorporation of Tailors in Dumfries, *against* ESTHER MAXWELL, and her Husband, for his interest.

No. 9.
Action denied on a bond granted by a mantua-maker to the Corporation of Tailors, by which she became bound to pay the Corporation a small sum for every apprentice taken by her.

By the decision reported, of date 10th December 1756, Corporation of Tailors in Perth against Lion, No. 71. p. 1947. it was found, That mantua-makers were not bound to enter with the Corporation of Tailors. This corporation in Dumfries had nevertheless been in the use of taking from mantua-makers, on their setting up within the burgh, a bond, by which they became bound to pay to the corporation 6s. 8d. for every apprentice taken by them †.

Esther Maxwell had granted a bond in these terms in 1779, and in 1797 the boxmaster of the corporation brought an action against her before the Magistrates, for payment of £1. as the dues of three apprentices whom she had instructed; and sentence having been pronounced against her for this sum, she suspended the decree;

Pleading: The validity of the bond depends on the right which the chargers had to demand it. Now, the case of Perth establishes, that mantua-making is no infringement on the rights of the tailor incorporation, and therefore the bond is void, as being granted *sine causa;* Bankton, Vol. 3. p. 74. 12th November 1751, Stewart, No. 79. p. 9542; 21st December 1765, Young, No. 96. p. 9564; 22d January 1794, Boyd, No. 109. p. 9583.

Answered: Till the beginning of the last century, the corporation enjoyed the exclusive privilege of making the clothes of both sexes. This came to be altered from a change of manners, and dress. But as the corporation have been losers by this change, it is but just that they should be in some degree compensated by the small dues payable to them on mantua-makers' apprentices, the more especially, as these dues are sanctioned by long usage.

The Lord Ordinary having taken the cause to report on memorials, the Court, on the grounds stated for the defenders, unanimously suspended the letters, and found the chargers liable in expenses.

Lord Ordinary, *Polkemmet.* Act. *W. Robertson.* Alt. *Corbet.*
R. D. *Fac. Coll. No. 232. p. 526.*

† Although this was the general practice of the corporation, instances were pointed out by the defenders where it had been omitted.