

rest any person except for merchants accounts, stablers, cooks, or vintners accounts, furnished out of their shops, houses, or stables, for which there is no bond, nor subscribed account; and this bargain could not fall under this clause. It was *answered*, That victual is an ordinary merchandize, and if it had been bought out of any merchant's garner in Edinburgh, it would have fallen under the act, as well as any other merchandize, and there is no odds whether the merchandize fell to the merchant as executry, or if he bought the same, for whole shops fall to merchants as executry. It was *replied*, That the act extends only to furniture received within royal burghs, for which a summary execution was granted, when there is neither bond nor subscribed account, but the selling of victual, which is in the country, was done by the seller, as *quilibet*, and not as a merchant having the same in store, as if a burghess would sell the farms of his lands which were not yet received, but in his tenants hands.

THE LORDS suspended the bond of caution *simpliciter*, as not falling within the warrant of the late act of Parliament.

Stair, v. 2. p. 520.

* * * This case is reported by Gosford, No 97. p. 1984, *voce* BURGH ROYAL.

1712. July 8.

THE BUTCHERS of DALKEITH and MUSSELBURGH *against* The MAGISTRATES of EDINBURGH, and INCORPORATION of SKINNERS there.

THE Butchers of Dalkeith and Musselburgh, pursued a declarator against the Magistrates of Edinburgh, and the Incorporation of Skinners, concluding, That it shall be lawful for them to resort to the market of Edinburgh with their fleshs and skins, and to sell them there at all freedom, and to export out of the market their said skins, in case they be not sold there; and that the Incorporation of Skinners can neither by themselves, nor with the concurrence of the Magistrates, set a determined price upon their skins, or oblige the butchers to sell at a price; nor can the Magistrates, upon their refusal, incarcerate them, or arrest their skins.

Answered for the defenders; two things by law and immemorial custom are understood to belong to burghs, to which markets have been granted; viz, *imo*, To oversee that no insufficient goods be brought to sale, least they impose upon the weak, and break the credit of commerce; *2do*, To set rules and prices to the markets, according to the condition and plenty of goods, and circumstances of trade. It being then granted, That the Magistrates may visit and set prices; it doth follow, by necessary consequence, that goods imported to any market should be sold there, for the current prices, if offered, and cannot be kept up by the proprietors, or carried home again. Because, thereby mer-

Found, that country butchers are at liberty to sell the skins of cattle in Edinburgh, at the best price, and are not bound to sell them at a price fixed by the Magistrates. If they get not their own price, they may carry them back, and neither the Magistrates nor skinners have power to secure the skins, &c. on that account.

No 382.

chants, who are invited in prospect of a fair market, would be disappointed and grossly imposed upon, and a mine would be run under the ancient constitution of the country, to blow up the privileges of the royal burghs, particularly their exclusive privilege to peel and pack skins and hides. Were the out-town fleshers allowed, after they have brought their skins to a public market, and are offered the current prices, to carry them away again, they would sell their skins to others who have no such privilege of packing and peeling, and so buyers would not frequent the public authorised markets, but go to those places where the goods were to be exposed; the encouragement of trade by setting up and countenancing public markets would be disappointed; country butchers, who pay no part of the public burdens of Edinburgh, would take the bread out of the mouths of the in-town butchers and skimmers, who are liable to all burdens; and trade itself must also suffer decay, by the carrying out skins into the country to be unskilfully manufactured. The nature of freedom is not an undoubted faculty to do whatever a man pleases; but to do with the quality *nisi quid vi aut jure prohibeatur*. And the principle, *unusquisque rei suæ liber moderator et arbiter*, is bounded in all societies, with the common interest of the whole. Therefore, as *Reipublicæ interest ne quis re sua male utatur*, and *Salus reipublicæ suprema lex*, are the governing principles in civil societies, so, the Government, in all nations, hath a *dominium eminens*, for directing even private property to the good of the Commonwealth. The markets of Edinburgh were established with a particular regard to the accommodation and serving of the neighbours first, and then of all the lieges, Act 86th Parliament 6th James VI. It is for the same cause that forestalling and regrating are made crimes, because they wrong the freedom and benefit of open markets; forestalling and regrating concerns all manner of merchandize, act 113th, Parliament 7th, James V. act 150th Parliament 12th, James VI. If such keeping up and carrying off the goods be allowed, how can regrating be prevented? To what end did law require that goods should be brought to a market, if they were not to be sold there? Is not a private party's *liberum arbitrium* in the disposal of his goods, restrained as much by the act 21st Parliament 4. James V, discharging to buy goods (and consequently to sell) before the same be presented to the market; or to buy in the market, till market time of day, as that *liberum arbitrium* is restrained, by obliging them to sell at current prices in market? And is not the end the same, that the lieges be supplied? By the seal of cause of the Skinners burgesses of Edinburgh, confirmed under the Great Seal in the year 1631, and ratified in Parliament 1633, it is statuted, 'That the butchers bring the skins with the bulks to the market to be sold; and that the skins be not sold but in open market, while they be visited by the searchers, under the pain of escheat of the skins. Attour, that none of the skins be cutted, tarleathered, &c. under the pain of five shillings Scots, to be taken off the owners for every faulty skin; and that no rough skin be scored, holed, or blayned, under the pain of eight pennies Scots for ilk score or blayne, &c. And it shall be leisome to

‘ the visitors to detain the skins till the unlaw be paid ; and no green skins are to be sold in any booth or flesher’s house, but in open market, under the pain of ten pound to be paid by the buyer, and five pound by the seller, who is to be put in ward till he pay.’ There is also an act of Parliament 1695, confirming all the privileges of the skimmers within royal burghs ; and further, confirming an act of the convention of burghs, requiring Magistrates to put the laws for the sufficiency of skins and encouragement of Skimmers, to execution.

Replied for the pursuers ; They have no design of regrating or forestalling ; they intend only to declare the freedom and liberty of carrying back their own skins, when they, the first sellers, cannot have their price, which seem to be the liberty of markets and all merchandizing ; for otherwise, a set of combining buyers might impose what price they please, to the prejudice of the country whence these things are brought. This, in the consequence, concerns the whole heritors of the nation, whose prices for their bestial is heightened, in expectation of the value of the skins. The seal of cause or charter produced, gives no power to the Magistrates to impose a price on such merchandise ; therefore this must be left to the common rule of property, *quisque est moderator et arbiter rei suæ*. Magistrates have indeed power to restrain abuse in certain things which concern human sustenance, as viviers ; and the Lords of Session have such a particular privilege within the town of Edinburgh ; but this cannot, without a particular law, be extended to the subject in hand. Seeing then Magistrates have no jurisdiction to impose a price upon the skins, and the market price in this circumstantiated case will have no other rule, than what comes from the arbitrement of the incorporation of skimmers, (the variety of skins being such as they can be reduced to no certain general price), it is much better than the common rule of buying and selling be observed ; that is, that every one make the best market he can. Otherwise, the preparative might be drawn to all other commodities brought in upon market days, such as shoes, stockings, wright and smith work, &c. The royal burghs have indeed the privilege of packing and peiling ; that is, exporting and vending abroad, but not the privilege of sole buying upon the market. The market days are for the benefit of the lieges in general, where all may resort to buy and sell.

THE LORDS found the country butchers free to sell their skins or hides to best avail, and that they are not bound to sell them at the price set on them by the skimmers or Magistrates ; but that, if they get not their own price, they may carry back the same ; and that neither the skimmers nor Magistrates have power to secure the skins, or hides, or persons of the contraveners on that account.

Forbes, p. 611.

* * * Fountainhall reports this case :

1712. July 10.—THE butchers living without the liberties of Edinburgh have the privilege on the three market days weekly to bring in their flesh to the

No 382. town, but by immemorial custom are bound to bring in the hides and skins with the bulk and carcasses, that if the goods be quarrelled as stolen, the marks on the skins may give some evidence and light. They are likewise obliged to present and offer the skins in open market, and not to sell them in hidden by-places. And the skimmers of Edinburgh contending that the Magistrates had a power to put a price on them, which the country fleshers are bound to stand to, and when offered they cannot take home the skins, to sell them in the country, but must accept the market price; one John M'Millan, a flesher in Musselburgh, refusing to stand to the town's regulation, was, on a complaint made by the skimmers to the Bailies, imprisoned for his contumacy, and his skins seized on and confiscated. This forced him, and other butchers living in Musselburgh, Dalkeith, Newbottle, and other adjacent places, to raise a declarator against the town and skimmers, for declaring their liberty and freedom to carry home their own skins, when they could not agree. Wherein they yielded these points; *1mo*, That they are bound to bring in the skins to the market, as well as the bulks and carcasses; *2do*, That they cannot sell them in private houses, but only in plain market, at the market time of day; *3tio*, They do not controvert the Magistrates' jurisdiction in naming visitors to inspect their skins, that they be not cut, tar-leathered, holed, nor blained, and to fine them when insufficient: But, *4to*, The precise point is, whether they are bound to accept of the price the Magistrates, at the instigation of their skimmers, may put on them, or may carry them away home with them: As to which, it is the natural effect and characteristic of property to accept of the price offered or not. It is acknowledged that, as to eatables for the mouth and belly, royal burghs have some power to compel them to be sold at the common rate of the country, being necessary to sustain the life of man; but as to skins and such other commodities, it is an invasion on property to force me to sell them at the rate, a powerful corporation, combining amongst themselves, put upon my ware, which is an unjust monopoly and enhancing the whole goods of one kind into their own hands; whereas every man must be *rei suæ moderator et arbiter*, and have the free exercise and power of disposal of his own as he thinks most for his interest. Alleged for the town and their skimmers, That property was not so boundless a thing, but it had its legal limits; for *rei publicæ interest ne quis re sua male utatur, et salus populi est suprema lex*; and the government of all nations has reserved a *dominium supereminens* to restrain abuses of property; and on this principle are the privileges of royal burghs founded. And to question these is to spring a mine under their very constitution, and to blow up their establishment. And Edinburgh has the misfortune to be tossed by invidious neighbours; the country brewers rising up against them on the one hand, and now the fleshers on the other. But they are founded in their seals of causes, and the acts of Parliament against forestallers and regraters of the markets, called in law *flagellatores et dardanarii*. The forestaller prejudices the lieges in buying up goods before, or as they are coming to the market; the regrater grinds

the face of the poor by keeping it up to a dearth, when it is brought there ; and which are punished by our law, act 148th, 1592, (in the new edition it is act 150), under which crimes the landward butchers fall directly ; for they either sell them privately, or keep them up to a dearth, though very competent prices be offered them ; and thus, though they bear no part of the public burdens the town tradesmen pay, yet they eat the meat out of their very mouths. *Replied*, That, at this rate, the town might assume the power to set prices on all the goods brought into their markets from the country, such as shoes, stockings, wright and smith work ; and *esto*, they had possession of such a restraint on the freedom of markets, that is but a *corruptela*, and cannot prevail against public utility, as was found at the instance of the country shoemakers against those of Perth, *vide* PRIVILEGE. And the design here is plain. The skinners of Edinburgh concert among themselves on a small price, and none to go beyond it ; and so to force the poor country fleshers to sell their skins at half nothing, and in case of refusal to lose them by seizure. THE LORDS looked on this restraint as oppression ; and found if they could not agree, they might take home their hides ; and that the Magistrates could neither confiscate nor imprison on that account ; but found they must bring them to the market, and subject them to a visitation as to their sufficiency ; though not bound to stand to their price.

No 382.

Fountainhall, v. 2. p. 752.

1741. July 21.

JAFFRAY *against* The MAGISTRATES and TOWN-COUNCIL of Stirling.

THE Town-council of Stirling, after electing James Jaffray in the council, having discovered that he was minor, did, upon proof taken, suspend him from said office during his minority ; whereof he having presented a bill of suspension, in which he objected to the council's power, informations on that point were ordered ; and upon advising thereof, the COURT was unanimous, " that as the minor was incapable of the office, so the council had power to suspend him."

Were any one convened before the council, it would be a relevant objection to a member of the council that he was minor ; and all courts must have power to judge of declinators against any of their number. And as this is a declinator which reaches every case, the Court may *ex proprio motu* cognosce upon it."

Fol. Dic. v. 3. p. 362. Kilkerran, (JURISDICTION.) No 1. p. 321.

No 383.
Jurisdiction of the Town-council of a burgh, as to who are entitled to be members of council.