

S E C T. XII.

Positive Prescription of other Rights.

1666. February 6. TOWN of GLASGOW *against* TOWN of DUMBARTON.

THERE being mutual declarators, one at the instance of the town of Dumbarton, for declaring that they had right by their infestments, that all ships coming within Clyde should make their entries at Dumbarton, and that they should pay anchorage for all ships anchoring in the river of Clyde, being within their infestment, even from the water of Leven to the head of Lochluny, within which bounds is the ordinary station of New-wark, Potterig and Inchgrein, and above which no vessel above 24 tons goes up Clyde; and likewise for the measurage, whereby all ships casting anchor there, took the firlots of Dumbarton and measured with, paid eight pennies of the boll therefor; and weightage, which is a duty for their weights; and also tonnage, being so much out of every ton of the burden of each ship;—and, on the other part, Glasgow pursues declarator of their liberty to traffic freely in the river of Clyde, and to make entry at their burgh, and to be free of any such burden at Dumbarton :

The LORDS, before answer, having ordained either party to adduce such writs and witnesses as they will make use of in the cause, for instructing these burdens, the possession thereof, interruptions of the same, and liberty therefrom; which all being adduced, Dumbarton produced their original charter, erecting them in a free burgh, by King Alexander, *in anno* 1221, and another charter also by King Alexander, repeating their privileges of burgh, as free as Edinburgh, or any other burgh within the kingdom, *cum custumiis & teloniis*; and also a charter *in anno* 1609, ratifying the former charter, and particularly expressing all these burdens in question in the *novodamus* thereof; and also produced their entry books, bearing, the merchants of Glasgow to have entered their ships at Dumbarton, and to have taken the measures of Dumbarton, for measuring their salt, and to have paid the duties thereof, and obliging themselves to make use of no other, these voyages beginning at the year 1616, and continuing till the year 1657; in the beginning whereof there was ordinarily one ship every year, and thereafter several ships every year. Glasgow did also produce their ancient infestments by King Alexander, mentioning a prior infestment by King William, erecting them into a free burgh, with their books of entries, of several ships, for divers years, with an interlocutor of the Lords, *in anno* 1609, wherein Dumbarton having charged for all the duties now in question, Glasgow *suspended*, and Dumbarton *insisted* for none of those in

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question, but only for entries, and the LORDS found, That the merchants of Glasgow might either enter at Glasgow, Dumbarton, or any other free burgh where the King's customers were, and might break bulk there; with a contract between Dumbarton and Glasgow, *in anno* 1590, obliging them to concur against unfreemen, and not to break bulk upon the river, but in their towns; and, in case of any difference, six of each town to meet at Renfrew, and decide the same; and thereupon *alleged*, That being a free burgh, and having the precedence of Dumbarton, both in Parliament, and so acknowledged by the said contract, and enjoying equal and free trade in the river of Clyde, without any such burden, whereof no mention is made in the foresaid contract, and being charged for, *in anno* 1611, there was not so much as an allegiance of any possession of Dumbarton's of these dues at the time, and the entry decerned to be free at either town; and, therefore, they *alleged*, that their privilege of trading as a free burgh ought to be declared, and they *assoilzied*. It was *answered* for the town of Dumbarton, That they had good right to these duties, by his Majesty's several infestments granted to them; for the King having power to impose petty customs, not only in ports built, and preserved by industry, but in stations, and rivers, creeks and bays, as is the custom of all kings and princes; such are the customs upon the rivers of Rhine, Garonne, Thames, and others, to all ships that anchor there, or pass that way; and whereof there are severals in Scotland, as the tonnage due to Edinburgh of all the ships breaking bulk at Leith, and the petty customs of Alloa, Cockenzie, and other places; *2do*, Albeit the King's grant was not sufficient alone, yet being clad with immemorial, or 40 years possession, instructed by witnesses, and the books of entry, it is more than sufficient. It was *answered* for Glasgow, to the *first*, That petty duties imposed for ports, having a mutual clause, may be appointed at any time by kings and princes, it being free to those who are burdened therewith to come in to that port or not: they also appoint petty customs to be paid to any city, for goods imported, and sold there, in consideration of the upholding of their harbours, and markets, as the tonnage of the harbour of Leith, or anchorage at any shore, where anchorage is cast upon the land, or any goods laid out upon the land, or where imposition for anchorage, or other dues in a river, or station, hath been approved by long custom and acquiescence; but where burghs royal, have not only by their privilege of trading, but by immemorial possession, prescribed a liberty of making use of stations without burden, no right granted, or impetrate by any party in prejudice thereof, if it be quarrelled before prescription, can take away the liberty of trading: Nor is the King's gift any way to be understood but *periculo petentis*; and Dumbarton's second charter did expressly bear, that these petty customs were due, and accustomed before; so that the King's express meaning is, not to gift them *de novo*, or to impose a servitude in their favours, upon a far more eminent city than themselves. And as to the point of possession, nothing is proved thereanent till the year 1616, and then it is

neither universal, seeing more entered at Glasgow than at Dumbarton; nor is it peaceable, nor voluntary, nor is it continual, but uninterrupted; and albeit it were uninterrupted, yet it is but by single persons, which cannot infer a servitude upon the burgh, and if the King's gift be *periculo petentis*, and be surreptitiously impetrate upon a false narrative, no possession can validate it, as no possession of itself, without a title, could infer such a servitude.

The LORDS having considered the depositions of the witnesses, books of entry, and the hail writs produced, they found that the allegiance against Dumbarton's declarator, as founded upon their charters, without relation to possession, was not relevant, and that the first charter could not extend to these particulars, not being expressed, unless it had appeared that they had been in immemorial possession, before the second charter, and the interruption by the suspension, raised by Glasgow, and the Lords interlocutor thereupon, *in anno 1611*, for albeit immemorial, or 40 years possession immediately preceding, might have presumed possession continually before, since the first charter; yet they found that interruption, or suspending that particular in question, and no alleging of possession by Dumbarton then, but, on the contrary, an interlocutor, as to the liberty of entry at Glasgow, takes off that prescription: And likewise they found, that there was nothing proved as to 40 years possession, save only 13s. 4d. for the anchorage of each ship, and 8d. for the use of Dumbarton's measures of salt, for each boll: and seeing that possession was also proved to be interrupted, in that several ships of Glasgow resisted, and came away free, and that they had several salt measures of their own there; therefore they found the charter not validate by 40 years possession uninterrupted, and assoilzie from Dumbarton's declarator, and declared upon Glasgow's declarator of liberty.

Stair, v. 1. p. 349.

* * * Newbyth reports this case :

IN mutual declarators pursued by the Town of Dumbarton against the Town of Glasgow, *et e contra* the Town of Dumbarton, upon the titles and rights granted by King Alexander II. and other kings of Scotland, to them, for exacting certain customs upon the river of Clyde, and upon certain deeds of possession, libelled by them, pursues the Town of Glasgow to hear and see the samen so declared and found liable accordingly. Glasgow, on the other hand, pursues a declarator of freedom from all such exactions and customs. After a great and long debate, the LORDS found that the Town of Dumbarton had no right to the customs, and other rights contained in their summons, notwithstanding of their charters and titles produced: And found likewise that they had no such possession as would be a ground for the Lords to decern, in the declarator raised at their instance against the Town of Glasgow, from the pursuit.

Newbyth, MS. p. 55.