

which an heir of entail can grant a right to cut any trees after his death. (See the papers upon this and the other points.)

The interlocutor in this cause affirmed in every point by the House of Peers.

1754. November 15. TOWN of LAUDER *against* BROWN, &c.

[*Fac. Coll.* No. 116.]

THIS town, besides the great customs usually paid in burghs, upon goods imported or exported, and besides the small customs usually paid in burghs, upon goods bought and sold, claimed a certain toll or duty called *cassie mail*, payable upon all goods that passed either through the town or the liberties thereof, even though they did not pass through the streets or highways near the town. This privilege they claimed upon the title of a charter from the crown in the year 1502, confirming their privileges, and granting them fairs and markets, and customs and tolls used and wont; and upon this title they had been in use for time immemorial to levy certain rates and customs upon goods passing through the territory, according to a book of rates entered into the records of their head-courts. The question was, Whether they had acquired a right to such an extraordinary taxation. All the Lords were of opinion that prescription in this case could take no place, because prescription was betwixt man and man, by which one lost and another gained, but could have no place where so many were concerned as in this case; but they thought that immemorial custom would take place here, so far as to explain the grant to the town, but only with this proviso, that the custom was not contrary to law and the good policy of the kingdom; and Lord Kaimes and Lord Justice-Clerk were of opinion that this custom was contrary to law and good policy, in respect that the town had been in use to uplift this tax without applying it, or being under any obligation to apply it, to the reparation of the roads in their neighbourhood; but my Lord President observed that every burgh in Scotland was obliged to keep up and repair the roads in its neighbourhood. The Lords found, by a great majority, that the town had a right to this toll, but not as to lime or coals, which never had been in use to pay any thing.

*N. B.* The Court in the year 1621, November the 15th, seems to have given a contrary judgment in the case of the burgh of Linlithgow.

The President observed that, by an Act in James I.'s time, the customs were annexed to the crown, and our kings took the liberty of giving grants of tolls and customs at pleasure, without consent of Parliament: but this is remedied by statute 57th 1661, by which the imposition of all customs and tolls upon merchandize, without consent of Parliament, was prohibited; to which act the king consented, upon condition that a book of rates should be made up by the Exchequer, according to the prices of goods that then were. It is to be observed in this act, that all oaths of merchants, masters, or mariners, concerning customable goods, are prohibited.