

1757.

ROXBURGH
v.
JEFFREY, &c.

[M. 2340.]

DUKE OF ROXBURGH, - - - *Appellant.*
JEFFREY and Others, (Kelso case) *Respondents.*

House of Lords, 18th March 1757.

BURGH.—DUES AND CUSTOMS—SERVITUDE—PRESCRIPTION.—

1st, Held though the merchants of Kelso could produce no charter or seal of cause, yet that they were a burgh of barony by the charter in favour of the Earl of Roxburgh erecting his lands and the town into a barony. But, 2d, That their right of entering burgesses, &c., was subject to his regulation and control. 3d, That they were not entitled to uplift the dues and customs, and their claim to have the past dues and customs applied to the common good of the burgh was prescribed. 4th, That though they had immemorial possession of a right of bleaching skins, and drying and washing linen on the island of Ana, yet they had not acquired any servitude over it.

No. BEFORE the Reformation the lands and village of Kelso had belonged to the abbots and monastery of Kelso. They afterwards came into the possession of the Earl of Roxburgh. Thereafter a contract was entered into between His Majesty and the Earl, whereby, on resigning these lands, comprehending the town and lands of Kelso, with the customs and dues of the town, His Majesty agreed to give a charter, “erecting the said town of Kelso, with all
“ and sundry lands, tenements, cottages, houses, and
“ all other pertinents within the territory of the
“ same, in ane free Burgh of Barony, to be called in
“ all time coming the Burgh of Kelso, with all liber-
“ ties and privileges of Burgh of Barony, and to hold
“ weekly upon Saturday ane market-day,” and “with
“ power to hold two fairs, and with power to this
“ said Earl to elect and choose bailies, clerks, offi-

“ cers, and to uplift customs and duties of the same
 “ markets and fairs, and also uniting the same lands,
 “ milns, and Burgh of Barony, to be called the
 “ Lordship and Barony of Haliden.”

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In terms of this contract a charter was granted to
 the Earl by the Crown, in terms as above, erecting
 the Burgh of Kelso into a Burgh of Barony, with
 right to the Earl to admit burgesses, and to uplift
 the customs and duties of the market and fairs. It
 contains no obligation on him to be accountable for
 these any more than for the rents of the other pre-
 mises; but it contains this clause, “ *custumas et di-*
 “ *vorias earundem recipiendi et levandi, et easdem*
 “ *ad commune bonum dicti burghi applicandi.*”

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This clause, authorizing the customs and dues to
 be applied to the uses and good of the burgh, was
 not in the contract, which was the warrant of the
 charter.

In the subsequent charters this clause, “ *ad com-*
 “ *mune bonum burghi*” was omitted: The customs
 and dues were constantly levied by the Duke, and,
 until lately, the respondents had but one cause of
 complaint, which was, that the appellant did not re-
 gularly apply the whole customs to the good of the
 burgh. The Earl never exercised the powers conferred
 upon him. He never admitted burgesses, who might
 have constituted a body politic or corporate: but in
 all time there were bakers, brewers, butchers, and
 other craftsmen in the burgh, who, in process of time,
 formed themselves into societies, and made bye-laws,
 which were approved of by the Earl of Roxburgh,
 but without possessing any express grant or seal of
 cause. Having assumed exclusive privileges of a
 body corporate, in preventing other craftsmen from
 setting up in town, and the exercise of other rights,

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the late Duke of Roxburgh revoked these regulations, and interfered otherwise with what they conceived their rights; whereupon the craftsmen brought the present action of declarator, to have it found and declared, *1st*, That in virtue of the foresaid charter they had been, passed the memory of man, settled and established into six incorporations, and had enjoyed exclusive privileges of prosecuting their trades within the burgh. *2d*, That the incorporation was entitled to the customs of the weekly markets, and of the two fairs granted for the good of the burgh, and the Duke having uplifted these dues, was bound to apply them to the good of the burgh in terms of the charter 1634. *3d*, That there was a piece of ground lying opposite to the Milns of Kelso, in the river Tweed, described to be the Island of Ana, which the skimmers had immemorially made use of for drying their leather and skins, and the whole inhabitants for drying and washing their clothes, until of late they were debarred therefrom. Defences,—1. No erection into a corporation, no seal of cause, and no grant conferring any such privileges. 2. The craftsmen had no right to exact customs or dues, or to prevent other craftsmen from setting up in the burgh; and the charter 1634 founded on did not confer on them any such exclusive privileges. The claim on the Duke to apply the customs and dues uplifted in times past, to the common good of the burgh, was prescribed by the negative prescription. 3. The Duke of Roxburgh, being proprietor of the lands on both sides of the river Tweed, both above and below the island in question, the said island, called Ana, situated in the middle of the stream, which had been recently separated from his other lands, by an irruption of the river, was in law a part of his

property, and he was entitled to exclude the crafts-
 men and the inhabitants of the burgh therefrom,
 who could neither allege nor prove any right of pro-
 perty, or right of servitude over it. They had no
 title from him, or any other. And there was no
prædium dominans belonging to them, to which such
 servitude could attach.

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The Lords, of this date, found that the “pursuers,
 “the merchants, and the several crafts, are incorpo-
 “rations, having perpetual succession, subject never-
 “theless to such proper regulations as the Duke of
 “Roxburgh and his successors, Barons of the Burgh
 “of Kelso, shall by themselves or their bailies make,
 “touching the government of the said corporation, or
 “admission of new entrants; the said regulations be-
 “ing always for the good and well-being of the said
 “corporation and burgh. And found, and hereby find,
 “that the Duke of Roxburgh, by his rights erecting
 “the said burgh, is obliged to apply the whole reve-
 “nue arising from the customs of the weekly markets,
 “and two annual fairs, for the good of the town, and
 “that the application of the custom, commonly called
 “the spoon and ladle, for a salary to the bailie of
 “the said burgh, is a proper application thereof, and
 “for the good of the burgh; and found and hereby
 “find it proven by the defender’s admission, that
 “the burgesses, inhabitants of the said burgh, have
 “been immemorially in the constant uninterrupted
 “possession of whitening and drying their linen on
 “the island called the Ana or Sandbed. And therefore
 “found and hereby find them entitled to continue
 “their said possession of whitening and drying their
 “linen there as formerly, and remitted to the Lord
 “Ordinary.” On petitions and representations the
 Court “adhered, and hereby adhere, to the first part

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“ of their former interlocutor, finding the pursuers,
 “ the merchants and several crafts of the town of
 “ Kelso, are incorporations, having perpetual succes-
 “ sion, subjected to such proper regulation as the
 “ Duke of Roxburgh and his successors, Barons of
 “ the Burgh of Kelso, shall by themselves or their
 “ bailie make, touching the government of the said
 “ incorporations; repelled and hereby repel the de-
 “ fence offered for the Duke with respect to the appli-
 “ cation of the customs and duties of the two annual
 “ fairs and weekly markets; and repelled, and hereby
 “ repel the defence made for the Duke, founded on
 “ the charter 1747, and subsequent charters granted
 “ by the Crown to the Duke’s predecessors; and repel-
 “ led and hereby repel the defence of the positive and
 “ negative prescription with respect to the custom of
 “ the fairs and weekly markets; and repelled and
 “ hereby repel the defence of the right to the cus-
 “ toms, alleged to belong to Learmont and Healley,
 “ in respect no such right is produced. But granted
 “ diligence, at the defender’s instance, for recover-
 “ ing these rights; and when they are recovered,
 “ remitted to the Lord Prestongrange, in place of
 “ the Lord Elchies, to hear parties’ procurators
 “ thereon, and to do therein as he should see cause:
 “ and found, and hereby find it proven, by the
 “ defender’s admission, that the burgesses and in-
 “ habitants of the said burgh have been immemo-
 “ rially in the uninterrupted possession of whiten-
 “ ing and drying their linen upon the island called
 “ the Ana or Sandbed; therefore found and hereby
 “ find them entitled to continue the said possession,
 “ and remitted to the Lord Ordinary to hear parties’
 “ procurators how they are to have access to the use
 “ of the said Ana or Sandbed, with the least prejudice

“ to the defender’s the Duke of Roxburgh’s property.”

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After another petition the Court adhered. Against these interlocutors the present appeal was brought.

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Pleaded for the Appellant:—1st, That the respondents were never erected into a body corporate, and could not hold exclusive privileges as such. That they were never so erected by any of the grants from the Crown above set forth; all these grants being in favour of the Earl of Roxburgh, with power to him and his successors to admit free burgesses as they should think fit; and the Earl had never created any bodies politic or corporate within the Burgh of Kelso; and until this was done no acts or regulations of their own could constitute them into a corporation. 2d, That the charter 1634, with the clause, “ *et easdem ad commune bonum dicte burghi applicandi,*” did not confer the privilege of corporation, or any right to exact the dues and customs. These were conferred on the Baron; and the clause therein of applying them to the common good of the burgh did not originally form a part of his right, and was consequently, in the charter of 1647 and subsequent charters, entirely omitted. 3d, In regard to the island, this being his exclusive property, the pursuers adduce no title or right to the same acquired from him. They do not aver any title by which they could acquire a right by prescription. Nor could the use of it for bleaching and drying belong to them as a right of servitude, because there was no dominant tenement for whose benefit it could be acquired.

Pleaded for the Respondents:—1st, The burgesses and inhabitants of the burgh of Kelso are corporations, having perpetual succession, which are not liable to be abolished and extinguished at the pleasure of the Duke of Roxburgh. They have enjoyed pri-

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vileges as a corporation for time out of mind, subject to regulations approvable by the Baron; the latter only exercising his right for their common good. 2*d*, The erection of the town of Kelso into a Burgh of Barony, although contained in the charter in favour of the Earl, was a sufficient title to them, and a sufficient seal of cause; and seeing the Earl had levied the dues and customs himself, and was bound to apply them to the common good of the burgh by the earlier charter of 1634, it made no difference that the subsequent charters omitted this clause, as the burgh had been in immemorial use and wont of exacting these dues, and applying them to the common good of the burgh. 3*d*, And as to the island of Ana, by charters 1614 and 1634, the burgh is erected “cum omnis et singulis terris, tenementis, &c., et singulis suis pertinentiis,” and the burgesses and inhabitants having possessed the island as a pertinent, the same must be presumed to be comprehended within the grants of the Crown, which being confirmed and followed by prescriptive possession, is at once a sufficient title.

After hearing counsel upon the

Petition of the Duke of Roxburgh, as also upon the answer of Ninian Jeffrey, treasurer of the Merchant Company in the burgh of Kelso, and others, for themselves, and as being the representatives of the several corporations of the said borough, and of the owners of feus and tenements, and of the other burgesses and inhabitants of that burgh, it was ordered and adjudged that after the words “government of the said incorporations,” these words be inserted—“or admission of new entrants, without prejudice to any question that may arise touching the reasonableness of the entries or upsets, or

other conditions to be imposed on any such admissions, or touching any claim of exclusive privileges of trafficking or trading within the said burgh.” And it is hereby ordered and adjudged, That the remaining part of the said interlocutor be, and the same is hereby reversed; and that the defences offered for the appellant with respect to the customs and duties, and the little island called Ana, or the Sandbed, be sustained; and that as to the said customs and duties, and the said little island, the appellant be assoilzied. And it is further ordered and adjudged, That the said interlocutor, and the said interlocutors of the 18th February 1755, adhering thereto, so far as the same are not reversed or varied as aforesaid, be, and the same are hereby affirmed.

For Appellants, *Rob. Dundas, C. Yorke.*

For Respondent, *Al. Forrester, Al. Wedderburn.*

Note.—The particular ground upon which the reversal in the House of Lords proceeded, in regard to the island of Ana, not being known and not appearing, leaves the case in uncertainty; but as the House of Lords has sustained the Duke’s special defence on this head, the grounds of the reversal must, it is presumed, be found within that defence.

Lord Kames, as to the first point, says that “the difficulty in the case was, that no seals of cause were produced. This difficulty was surmounted upon the following considerations. By the erection of a village into a burgh of barony, &c., the houses are incorporated into one feudal subject, and the inhabitants are also united into an incorporation, which holds the feudal subject of the Baron. Next, by erection of every burgh, whether of royalty, regality, or barony, certain exclusive privileges of trade are understood to be granted to the incorporation; because such is the purpose and motive for erecting a burgh. Therefore the town of Kelso enjoys those exclusive privileges without the necessity of alleging that seals of cause were granted by the Baron.” Ont he second point he says,—“The defence was, that this claim was lost by the negative prescription.”—Kames, p. 98 et 100; Elchies, p. 100, *Notes.*

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