

DUKE OF  
ROXBURGH  
v.  
JEFFRAY, &c.

*Respondent is a member of the old University of Aberdeen; appellant not a member of either, or of any other university.*

*Mr. Hume Campbell (expt.)*

*Kelso Case.—DUKE OF ROXBURGH v. JEFFRAY and Others.*

House of Lords, 18th March 1757.

Craigie and Stewart, p. 632.

*Lord Advocate for Appellant.*

No attempt by appellant to prevent the respondents from exercising their trades.

The question is, Whether they are a corporation having an exclusive right? or,

1. Whether the burgh of Kelso is a body politic or corporate?

2. Whether said several societies are also incorporations, with perpetual succession?

1. Creation of burghs of barony is in favour of the baron.

All the powers are constituted in the family of Roxburgh.

2. Suppose a burgh of barony and the burgesses are a corporation, yet it does not follow that these corporations have exclusive privileges.

The power is given to the family of Roxburgh to admit all the several kinds of tradesmen.

These societies have no seal of cause, *i. e.* patent or instrument of erection.

3. As to customs.

Have directed the Duke to account.

1. The charter 1607 cum ad usos rusticos burgi ad applicandi.

Not in the contract.

This is discharged by charter 1614 and 1634.

2. Suppose the burgh had anciently a right, it is barred by *prescription*.

Act 22 James VI. anent prescriptions. This relates to the positive prescription.

We are equally entitled to the positive prescription.

*Obj.* That part of the duties are now so applied.

*Ans.* The Duke of Roxburgh only allowed the profits of the spoon and ladle for the salary of his bailiff.

No interruption.

No document has been taken.

3. As to customs which were now vested in Learmont and Heatly.

Those were the common and petty customs.

4. *As to the island.*

The whitening of linen—there was only a tolerance.

Nothing like a servitude in law.

*The words of the charter 1647. The non obtenando, &c.*

Those words are also in the charter 1634, so ought not to be applied to the construction they make.

28th Sept. 1634. The contract on which the charter of 1634 proceeded.

1646. Regulations made by Robert Earl of Roxburgh.

Averment that the town-council are only stentmasters.

The duties which are now in Learmont and Heatly are of the value of £20 per annum.

*Mr. Solicitor-General ad idem.*

Two questions.

1. On the exclusive privileges claimed.

2. On the duties of which the appellants claim the application *ad communum bonorum dicti burghi*.

By the law of England, exclusive privileges of trade cannot arise by charter of the crown; but may by prescription.

The articles of Union give a communication of privileges of trade.

1. Whether the burgh itself is a corporation?

2. If so, whether the subaltern companies are corporations?

3. Suppose both these against us, yet whether these corporations are entitled to exclusive privileges?

In a royal burgh the corporation is immediately erected by the crown.

The burghs are the grantees.

In a *burgh of barony* the baron is the grantee, and the inhabitants the burgh.

The words relied upon by the respondents don't create a grant to *the inhabitants*.

No entry of an admission either after the grant, or in any subsequent time.

The grant is made for the benefit of the baron.

The inhabitants have gone on exercising powers of buying and selling.

2. As to the companies of trades. The great distinction is between *fraternities* and *corporations*.

Fraternities are voluntary societies, exist in many corporations, and have power to make regulations for the governing of themselves, but not to bind strangers.

No seals of cause appear, nor any presumption of them.

There may be fraternities with deacons; but not thence a body politic.

Case of *Burntisland*, in *Stair's Decisions*, vol. ii. p. 837.

I hold that such offices and regulations might subsist without a grant.

*Obj.* That the regulations speak as if an incorporation.

*Ans.* They all contain powers of revocation.

I agree, if there had been an express clause of incorporation, the clause of revocation would have been void.

Therefore this shows intent not to erect an incorporation.

*Obj.* That these words are not in the contract of 1634.

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*Ans.* More probable that the mistake was made in the contract than in the charter, which is the most solemn act.

If a mistake in the contract, proper to set it right in the charter.

The charter 1647 must be taken to have followed it. The charter 1614 was the original investiture.

*If, on failure of issue male, the estate had devolved to the Crown, the fairs and markets and customs would have continued, and been payable and applicable to the benefit of the town.*

Abbot of Strat,—March's Case, Coke.

3d Point. Whether any prescription, either positive or negative, runs against this demand?

There is no prescription between a trustee and his *cestui que* trust.

*Part of the customs have been so applied.*

4th Point. A division of these customs. Those in Learmont and Heatly. Before the creation, the abbot could have no customs of fairs or markets. No market and fair then custom.

*But this question is reserved by the last interlocutor.*

Diligence is granted and remitted to the Lord Ordinary.

5th Point. The sand bank called an island. We say it is a *per-tinent*.—We have a right to whiten and dry our linen by prescription.

This is grounded on the appellant's admission.

*Copy of a grant to the Weavers of Kelso, 1580, by the Baron of Regality.*

To have a Deacon.

1646. Regulations made by the consent of the Duke of Roxburgh.

1720. Presentation of a schoolmaster by the Duke of Roxburgh, with the consent of the *Town Council*.

*Declaring it to be for the good of the corporation.*

3d Feb. 1750.

Regulations by the Duke of Roxburgh, concerning the deacon and conveners of the trades.

*Mr. Wedderburn.*

The usage makes the constitution of every particular burgh.

2. Macdowall, 547, B. iv. Setts or constitutions of burgh either by usage or ordinances of the convention of burghs.

Parl. 1469.—Act 4.

1424.—Act 39.

*Objects to the new regulations made by the late Duke of Roxburgh and his bailies, as vesting too great powers in a Baron-bailie.*

2d Point. *As to the customs.*

The act about the positive prescription don't apply to this case, 2 Macdowal, 163. Prescription.

Lord Advocate, (Rep.)

1 Macdowal. Definition of a coporation. If they are but fraternities, no doubt can exist. But if they are incorporations they may make bye-laws of their own, without the concurrence of the lord.

*Vide* the Scotch acts relating to deacons, and Sir Geo Mackenzie's objections thereon. Case in Lord Stair, Nov. 22, 1677.

Negative Prescription, K. Ja. III. Parl 5, act 28. Positive Prescription K. Ja. VI. Parl. 22, act .2.

4. *If all these against us, the exclusive privileges cannot be supported.*

Even the baron had not the power to give such exclusive privileges, for the charter gives the Earl of Roxburgh no such powers.

If the Court allow them to be an incorporation, yet they ought to have made a declaration against the exclusive privileges.

As to customs.

1. Whether they are a trust or free?

2. Whether the action to recover them is not prescribed?

3. Whether a distinction ought not to have been made between the old duties and the new duties?

1. If there was a trust, *it could affect only the limitation of the grant of 1634 to the Earl of Roxburgh, and the heirs male of his body.*

Not the limitation in 1647, to the *heirs and assigns whatsoever.*

The trust could not exceed the limitation of the grants wherein it is contained.

2. As to Prescription.—By the law of England, I admit that trusts are out of the statute of limitations.

No such distinction in Scotland.

*Mr. Forrester for Respts.*

1614. The town of Kelso is erected into a burgh of barony *per verba de presenti.* And grants thereby made *Incolis ejusdem Burgi.*

Prescription in Scotland is different from England. In England, it must be from time immemorial. In Scotland, 40 years is sufficient,—therefore consistent with the grant.

1. As to the subaltern incorporations.

*The attempt by the Duke of Roxburgh was to rescind solemn acts of his ancestors.*

*We don't assert an independency of the law.*

*He may make regulations.*

*But the attempt here is to extinguish and annihilate these companies.*

The incorporations of the burgh could only be by the Crown.

After that, the baron could create these subaltern companies of merchants and trades.

This appears by the regulations of 1646,—made perfect by possession.

*These companies are not exclusive companies in their own nature; but that arises by laws made by the companies, approved and confirmed by the Duke's ancestors.*

This bye-law, (alluding to a particular bye-law), was confirmed by the Court of Session in Yool's cause.

*The interlocutors don't meddle with the exclusive privileges. Declaring them to be incorporations, don't import it.*

1. *Obj.* That the Duke of Roxburgh has never admitted freemen to the burgh.

*Ans.* But he has ordained regulations for their admission.

2. *Obj.* That the regulations are alterable and revokeable.

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*Ans.* So they are ; but not the companies trading.

3. *Obj.* That the restraint of these trades could not be made by bye-laws.

*Ans.* Those charters could not be worded in any other way. Except in royal burghs, or burghs of barony.

1 and 2 Macdowal, 563.

Not in the power of the lord to rescind them.

*Obj.* The town council not warranted by any of the powers.

*Ans.* 1726. An act for appointing shoemakers and wrights, passed by John, Duke of Roxburgh, *acknowledges the town council.* Many other acts of the same kind since 1646.

2d Point. As to customs.

Under the two first charters, the Earls of Roxburgh were only trustees for the burgh.

#### LORD CHANCELLOR HARDWICKE'S NOTE.

1. No decision in the interlocutors or decree, concerning the town being a corporation.

2. Nor whether the free burgesses or members of the companies have an exclusive right of trading.

tho' in the libel.

But the first is implied, in the decision that the companies of merchants and trades are incorporations.

And the second is neither expressed nor implied, but left to the general rule of law.

The questions are,

1. Upon the claim of those companies or societies to be incorporations.

2. As to the powers of the baron or his bailie over them.

3. As to the customs and duties of the fairs and markets.

1. A clear trust in charter of 1614, and the charter of 1634. This upon an estate tail.

2. No trust expressed in the charter 1647.

3. No evidence of any application of customs to the use of the burgh. Spoon and ladle goes a great way. Strange not to decree what might be the ground of it.

1. The grant of the in 1647, new estate.

2. Those were customs existing before this erection.

Learmont and Heatley.

3. The positive prescription, by the act Ja. VI. cap. 12.

4. The privilege of bleaching and whitening their linen on the little island in the Tweed, called Ana or Sand-bed.

*The fact now is, that it was done for a considerable time by tolerance of the defender and his doers.*

*Negative Prescription, K. Ja. III., Parl. 5, act 28.*

*Positive Prescription, K. Ja. VI., Parl. 22, act. 12.*

Q. 1st, Whether the issue male of Robert Earl of Roxburgh, the first granter, failed ?

2. Whether they have any objection to continuing the usage of whitening and bleaching in the island or sand-bed ?