

1755. *January 11.*The FEUARS and INHABITANTS of Kelso *against* DUKE of ROXBURGH.

By a charter from the Crown, *anno* 1634, in favour of the Earl of Roxburgh, containing a novodamus, and erecting of new the village of Kelso into a free burgh of barony; the privilege is granted to the baron of a weekly market and two fairs in the year, and to levy the customs and duties thereof, 'et easdem ad commune bonum dicti burgi applicandi.' These are the words of the charter; but this part of the clause, for applying the customs and duties to the common good of the burgh, is left out of the charter 1647, and of all the subsequent charters of the family. The feuars and inhabitants of the town brought a process, concluding that his Grace is bound to apply to the common good of the burgh, the customs of the markets and fairs, in terms of the original grant thereof from the Crown. The defence was, that this claim was lost by the negative prescription.

"THE LORDS repelled the defence, for the following reasons, *1mo*, That a common good is necessary to every burgh, in order to defray the public expense: That these customs appear to be the only common good of the town; and being once granted as such, that it was not in the power even of the King and baron in conjunction, to deprive the town of their common good, more than of their exclusive privileges, or of their incorporation. *2do*, This appears not to have been intended; for when, by the charter 1634, the customs were once fixed to be the common good of the town, it certainly was not necessary to say this over and over in every new charter; and therefore the abridging of following charters, by dropping an unnecessary clause, cannot infer an alteration of will."

And this leads to the defence of prescription. The positive has nothing to do with the case of a sum of money levied for a certain purpose, and not applied. The claim then must be lost by the negative prescription, if at all lost. And with regard to this point, it was observed, *1mo*, That this is a singular case, that the baron who is the debtor, is at the same time the chief creditor, the money being to be applied for the use of his burgh; that the bygone customs fell under executry; that the claim of the present Duke of Roxburgh against the executors of his predecessors, for applying this sum, did undoubtedly subsist 40 years *retro*; and if the claim was not lost by the negative prescription *quoad* him, it could not be lost as to the corporation. *2do*, This is a claim which, for another reason, cannot be lost by the negative prescription. It is not a sum which might have been demanded every day, or every hour, for 40 years *retro*. In this case 10, or perhaps 20 years, may run on, without any thing occurring to make the application of any part of the sum necessary. At another time, there may be at once a demand for a great sum. Such a case cannot fall under the negative prescription; because to qualify that degree of

No 48.

In the original charter of a burgh of barony, a privilege is granted to the baron of levying customs, 'to be applied to the common good.' This clause was omitted in subsequent charters; and the right in favour of the town was found to be lost by the negative prescription.

No 48. neglect which is necessary to forfeit a man of his claim, it must have been in his power to make the demand every day of the 40 years. If such a claim can be lost at all, it must be by desuetude, a total neglect for so long a time as is sufficient to take away the force of an act of Parliament. But *3tio*, The prescription was interrupted by application from time to time of part of this fund. For instance, it appears from the Duke's own showing, that part was allocated to the Bailie, part to the hangman. And payment of a part interrupts as to the whole.

The interlocutor was reversed by the House of Lords, 18th March 1757.

*Fol. Dic. v. 4. p. 93. Sel. Dec. No 75. p. 100.*

1757. June 15.

MR JAMES MILLER, Minister of the Gospel at Hamilton, *against* ROBERT STORIE, Tacksman of Bothwell-Bridge.

No 49.  
Exemption:  
from toll  
acquired to  
the inhabi-  
tants of a  
town by pre-  
scription.

IN the year 1647, the Magistrates and Council of the town of Hamilton obtained a grant from the Privy Council of Scotland of certain tolls and customs, to be levied upon all passengers and goods passing Bothwell-Bridge, for the space of three 19 years, with the burden of repairing and keeping up the said bridge during the continuance of the grant; and, in 1704, obtained a renewal of this grant.

The Magistrates and Council of Hamilton, from the time of obtaining the above grants, were in the constant use of letting the tolls and customs of Bothwell-Bridge to tacksmen for a term of years; and amongst with the tack, there was delivered to the lessee a roll or table of the particular customs he was to levy. None of these tacks contained any exemption from payment of this duty in favour of any particular persons; but the burgesses and inhabitants of Hamilton had, for time past all memory, enjoyed this privilege or exemption for themselves, and their goods and effects, so often as they had occasion to pass this bridge.

In 1744, Robert Storie, the defender, became tacksman of these customs at a public roup, upon the same terms as former tacksmen; and continued for about ten years the exemption to the inhabitants of Hamilton from payment of duty at the bridge.

In June 1755, the pursuer, Mr Miller, having occasion to employ a number of carts and horses to carry to Glasgow a quantity of hay, the produce of a farm which he had in the neighbourhood of the town of Hamilton, the defender, on pretence that the exemption granted to the inhabitants of the town, did not extend to the produce of their country-farms, stopped the pursuer's horses and carts, and made them pay toll.