

No 68. of a third part of the entailed money, and that the Representatives of Lady Houston are bound to implement the said obligation.'

Act. *Craigie, Lockhart et Wallace.* Alt. *Ferguson et Stewart.* Clerk, *Forbes.*
W. S. *Fol. Dic. v. 3. p. 129.* *Fac. Col. No 182. p. 271.*

See TAILZIE.

SECT. XII.

Importing an Obligation, or only a Faculty.—Pre-emption.— Redemption.

1755. *February 18.*

NINIAN JAFFRAY, and Others *against* The DUKE of ROXBURGH.

No 69.

A village was erected by a charter into a burgh of barony, with power to the baron to levy certain tolls, and apply them to the uses of the burgh. The tolls having been constantly levied, this was found to import an obligation to apply them; altho' the clause had been omitted in the baron's charter for more than a century past.

Reversed on appeal.

IN the 1614, the Crown granted a charter of the barony of Halydean, comprehending the town of Kelso, to Robert Lord Roxburgh in liferent, and to William Ker his son in fee.

This charter erects the town of Kelso into a burgh of barony; and contains the following clause: 'Cum plena potestate Willielmo Ker forum publicum hebdomadatim tenendi, et annuatim duas liberas nundinas, infra dictum burghum celebrandi, custumas et divorias earundem recipiendi et levandi, ac easdem ad commune bonum dicti burghi applicandi.'

In the 1634, the Crown granted a new charter to the same Robert Lord Roxburgh, wherein the clause aforesaid is repeated; but, in a charter granted to him in the 1647, the customs are simply and absolutely granted; and all the subsequent rights of the family of Roxburgh have been taken in terms of the charter 1647.

Jaffray and others, feuers and inhabitants of Kelso, raised a process of declarator against the Duke of Roxburgh; concluding, that his Grace should, in terms of the charters 1614 and 1634, granted to his predecessors, apply the customs aforesaid for the common good of the burgh.

Objected for the Duke of Roxburgh; *imo*, The pursuers could, at most, have had only a personal right of action on the charters 1614 and 1634: now these charters have never, since the 1647, been a title of possession; and, of consequence, no action can lie on them. Further, the family of Roxburgh has, by the positive prescription, acquired an absolute right to the customs under the charter 1647, and the subsequent charters and infeftments; *2do*, The terms of the charters 1614 and 1634, supposing them to be still in force, import not an obligation to apply, but only a faculty of applying; and so have they been ex-

plained by immemorial possession ; for that the family of Roxburgh has been in the constant use of levying these customs, without rendering any account to the burgh of Kelso.

Answered for the Pursuers ; *imo*, The customs were, by the original grants, appropriated to the town of Kelso ; Lord Roxburgh, and his Representatives, were named by the Crown trustees for these uses ; the right of levying the customs was granted to them in that capacity, and every subsequent right must be deemed granted under the same condition ; as the customs have been levied by the family of Roxburgh in trust for the town of Kelso, possession by the family of Roxburgh must be held to be possession by the town of Kelso ; and therefore no prescription can be here pleaded ; *2do*, Power granted by charter to do a thing for the use of a third party, or for the benefit of the public, imports an obligation to do it ; and, as the Duke of Roxburgh has levied the customs, he must also apply them in terms of the grant.

‘ THE LORDS repelled the whole defences offered for the Duke.’

The pursuers also set forth, That the burgesses and inhabitants of Kelso have been immemorially accustomed to wash and dry their linen on an island situated in the Tweed ; and they concluded, that their right of continuing in possession of this island, for the purposes aforesaid should be declared.

The defender *objected*, That he is proprietor of the ground on both sides of the river, and must therefore be held, in law, proprietor of the island also, unless the pursuers bring evidence that they have acquired right to it, either by grant or prescription. No servitude can, in this case, be pleaded ; for that there are no lands granted to the incorporations, to which, as a *prædium dominans*, the servitude could belong.

Answered for the pursuers ; The charter, erecting Kelso into a burgh of barony, bears, ‘ Cum omnibus et singulis terris, et singulis suis pertinentiis ;’ as the burgesses and inhabitants of Kelso have immemorially possessed the island, the presumption in law is, that it was included in the charter.

‘ THE LORDS found it proven, That the burgesses, inhabitants of the burgh of Kelso, have been immemorially in the constant uninterrupted possession of whitening and drying their linen upon the island ; and therefore find them entitled to continue their said possession of whitening and drying their linen there as formerly.’

Act. *Ferguson, A. Pringle.*

Alt. *Binning, Lockhart.*

Clerk, *Murray.*

Fol. Dic. v. 3. p. 132. Fac. Col. No 138. p. 207.

* * * This cause was appealed :

The House of LORDS ORDERED that the defence offered for the appellant, with respect to the customs and duties, and the little island called *Ana*, or the Sand-Bed, be sustained ; and that, as to the said customs and duties, and the said little island, the appellant be assoilzied.