

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.

The pursuer thereupon brought a complaint before the Sheriff of Lanark, craving repetition of the toll which had been unlawfully exacted from him, and that the defender might be fined in a certain sum, in respect of his wrongous forcible exaction, &c.

A proof having been led of the use of payment of toll at this bridge, and of the exemption granted to the inhabitants of Hamilton, the Sheriff, 30th April 1756, " Found the libel relevant ; and repelled the objections thereto : Found it proved, that the inhabitants and burgesses of Hamilton have, for upwards of 40 years past, been in use to pass the bridge libelled, with their goods and carriages (being their own property) toll-free : Found it proved, by the writs produced, and other evidences, that the pursuer's dwelling-house is situated within the limits and territory of the burgh of Hamilton ; and that the right of passing toll-free being so constituted, the pursuer, as an inhabitant of the burgh, had a right to the said privilege and immunity : Found it proved, that the defender was in the knowledge of the said privilege and immunity ; and, consequently, that he was *in mala fide* to attempt any alteration or innovation thereof. In respect of all which, and that the defender had acknowledged that he levied from the pursuer the tolls libelled, ordained him to restore the same to the pursuer, fined and amerced him to the procurator-fiscal of court in the sum of ten shillings Sterling ; found expenses due, and allowed the pursuer to give in an account."

This cause was brought before the Court of Session by advocacy, at the instance of Robert Storie, complaining of this judgment.

Pleaded for the defender, By the terms of the grant, the toll in question is imposed, as a matter of public concern, indiscriminately upon all persons and goods passing the said bridge, without any exemption in favour of any person or community whatever ; and if any exemption had been to be granted, the inhabitants of the town of Hamilton, who were to reap the chief benefit from the conveniency of this bridge, were least of all entitled to it. As therefore this exemption has no authority from the words or intendment of the grant, although the inhabitants of Hamilton had been allowed immemorially to pass duty-free, this could never found the individuals in a plea of prescription ; because the mere disuse of payment, by the tolerance of the lessees in not exacting toll from the inhabitants, was not sufficient, without a positive right, which could be the title of such prescription. It is peculiar to the law of Scotland, that acts respecting private property may be derogated from, and go into desuetude : And although public statutes may likewise be defeated, or fall into disuse, by an universal contrary usage, which, by reason of the general practice continued for a great number of years, is supposed to imply a repeal of such statute by consent of the legislature itself ; yet no instance has occurred, where such public statute has been found to go into disuse as to some individuals, while it remained in force as to the rest of the lieges. The inhabitants of Hamilton had not, from the beginning, any right to demand this exemption ;

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and the most that could be inferred from the usage in the present case, was, that this was a mere favour or tolerance by the Magistrates and Town-Council of Hamilton. And as the act itself is clogged with no exemption, so the tack granted to the defender is in the same unlimited terms. And there is no reason in law, or expediency, why the defender should be forced to continue to the inhabitants that favour or privilege with which they had been indulged by former tacksmen. But,

2do, Supposing there were here *termini habiles* for a prescription founded on the immemorial usage; yet this privilege can never be stretched so far as to comprehend all carriages passing this bridge from the different parts of the country, merely because they belonged to an inhabitant of Hamilton, though they never entered the town or territories thereof. *Quoad* these, the inhabitants are so many strangers; and therefore ought to pay as others do; and the privilege contended for, ought to be restricted to such carriages belonging to the inhabitants as were passing to and from the town of Hamilton, where they resided. It is but a very late practice, since the inhabitants of the town came to have farms in the country, or to have carriages belonging to them passing along this bridge, without coming to or going from the town; and there is no evidence of the pretended prescription being run, as to carriages of that kind. And therefore, as the carriages belonging to the pursuer, for which toll was exacted, did not come from the town of Hamilton, but from his farm in the country, the defender was not obliged to let them pass without payment of the usual duties.

Answered for the pursuer; To the *first*, The exemption of the inhabitants of Hamilton from payment of this toll, is clearly proved to have been established and admitted by all preceding tacksmen for time beyond memory, and has uniformly been acknowledged and enforced by the Magistrates of Hamilton, the granters of these tolls. The grants were obtained by the Magistrates and Council, for the behoof of the whole community of the town of Hamilton. The grantees are burdened with the expense of upholding the bridge, and the public was so far concerned; but in so far as the tolls exceeded this burden, which they have always done very considerably, the grant was entirely of a private nature, subject to the same rules of law as any other private right; and it certainly was in the power of the Magistrates and Council to have disposed of the surplus tolls, over and above what was necessary for upholding the bridge, to any use which was beneficial for the whole community. And for the same reason, they could certainly grant an exemption to their own inhabitants from payment of the tolls, after the example of the neighbouring burghs of Glasgow and Lanark, reserving the tolls payable by all other persons, which were much more than sufficient for answering all the purposes of the grant. The pursuer is not possessed of the act or deed of the Town-Council, by which this exemption was first established; yet the proof of the possession of the inhabitants for time immemorial is sufficient to establish the right of exemption.

in their favour, as well against the Magistrates and Council, as against their tacksman. And it is against all the rules of law, to consider an exemption so long and uniformly enjoyed by the whole successive inhabitants of this place, without any interruption, as a mere indulgence and tolerance upon the part of the Magistrates and Council, and their tacksman, which it is in their power to recal at pleasure. The exemption was enjoyed by the inhabitants, not as a matter of indulgence, but as a right conferred upon them by the Magistrates and Council, and was always made effectual by their orders, whenever any dispute arose. And indeed this right was so established, and universally known upwards of 40 years ago, that it was unnecessary to mention it as an exception from the different tacks that were granted from time to time; nor did any of the former tacksmen, nor even this defender himself, for many years after he became tacksman, think of calling this exemption in question. And since the commencement of this process, the defender has granted an obligation to the Magistrates and Town-Council of Hamilton, acknowledging this right to belong to the inhabitants, though he has been pleased, with a view to this suit, to except hay growing without their limits.

To the *second*, It is manifest from the proof which has been adduced, that this privilege was not local, or confined to goods carried to or from the town of Hamilton; but was a personal privilege to the inhabitants, by which they were exempted from payment of these tolls, for their whole goods or effects, wherever produced or purchased, and wherever carried, so often as they had occasion to pass this bridge. And it is particularly proved, by concurring witnesses, that since the commencement of the defender's tack, the pursuer was in use of sending his horses and carts with hay, corn, and other things, the growth of his farm, along this bridge to Glasgow, and other places; and that no toll was ever so much as demanded for these goods; and as it is now proved, and indeed acknowledged by the defender's late obligation granted to the Town-Council of Hamilton, that the inhabitants have a right to pass and repass the bridge toll-free, with all manner of goods belonging to them in property, without distinction where these goods were produced, manufactured, or bought; what reason can possibly be assigned, why a cart of hay belonging to an inhabitant should not likewise be allowed to pass the bridge toll-free, without distinction whether that hay was produced within the territory of the town, or in the neighbourhood thereof?

“THE LORDS repelled the reasons of advocacy, and found expenses due.”

Act. *Miller.*

Alt. *Lockhart.*

Clerk, *Gibson.*

G. C.

Fol. Dic. v. 4. p. 92. Fac. Col. No 26. p. 44.