

No 151. alty might be constituted by long possession, although it were within the liberties of the town.

Fol. Dic. v. 2. p. 110. Stair, v. 2. p. 579.

1707. July 24.

The TOWN of BRECHIN *against* The EARL of PANMURE and the LORD GRANGE.

No 152.

A right to dispose of the fines of a court, found not to have been acquired to a burgh, on the title of an act of council and a contract between the town and two parties concerned in the jurisdiction.

KING JAMES VI. *in anno* 1583, granted a commission of Justiciary, under the Quarter Seal, to the Bailies of Brechin, with a power to uplift fines, to continue during pleasure, till recalled; and some few years thereafter, gave the offices of Constabulary and Justiciary within the said burgh, and its liberties, to David Earl of Crawford, by whose son it was resigned in favour of the Earl of Marr, who obtained a charter under the Great Seal, upon the 20th May 1613, and thereafter conveyed it to the Earl of Panmure's predecessors. Upon the 18th and 13th days of January and February 1637, a tripartite contract was entered into betwixt Patrick Maul of Panmure, the Bishop, and the Magistrates of Brechin; whereby (for sopiting and removing all controversy and difference that used to be betwixt the Depute-justiciary and the Town, anent the jurisdiction in matters of riot and blood, to which both pretended right) it was agreed, that three Bailies should be chosen yearly, one by the Bishop, another by Panmure, and the third by the Town Council, out of a leet of six, to be made by the said Council; and Panmure consented to grant a deputation yearly to the Bailie to be named by him, of the offices of Justiciary and Constabulary, within the city and liberties thereof. Again, by an act of the Town Council, *anno* 1636, (where Panmure's Justiciary-depute was present and consenting,) it was ordained, that the fines of the Court of Justiciary should, as long as Panmure had the naming of one of their Bailies to be his Constable-depute, belong to the Town, to be intromitted with by their Treasurer for the time. After their Treasurer had been in immemorial possession of uplifting these fines, the Constable at length claimed them: Upon which there arose a legal competition for them betwixt the Town and the Lord Grange, who has now a gift of the office of Constabulary and Justiciary, in place of the Earl of Panmure.

Alleged for the Town; That they had prescribed a right to these fines by 40 years possession, conform to the Town Council act 1636; and jurisdiction prescribes by long possession upon any colourable title, which the said act of Council certainly is, being fortified by the solemn contract betwixt the Constable's predecessors and the Magistrates of Brechin, which acknowledges that the Town had a pretension to the jurisdiction of justiciary within itself, and annexes the same to the Town, leaving to the Constable the annual nomination only of the Bailie, to be invested with the power of Justiciary-depute.

Answered for the Lord Grange ; The said private act of the Town, to which Panmure was not consenting, cannot be a ground of prescription, to carry away from him the natural perquisites and fines of his Court, to which he has so clear a right by the charter and documents above mentioned : For the Town's pretended possession of the fines was merely precarious, depending upon the Constable and his predecessors' goodness, and the uplifting thereof *meræ facultatis*. No 152!

THE LORDS found the act of the Town Council of Brechin, in the year 1636, cannot be a title of prescription, to separate the benefit of the fines imposed by the Justiciary-depute from the jurisdiction, and apply the same to the Town.

Fol. Dic. v. 2. p. 110. Forbes, p. 192.

*** Fountainhall reports this case :

1707. July 25.—THE Earl having a right of justiciary and constabulary within the town of Brechin, for judging all riots, and other criminal cases, by a contract in 1635 there was an agreement betwixt the Bishop, the Earl's predecessor, and the Town, whereby, out of a leet of burgesses, given in by the Town Council, the Bishop named one Bailie, Panmure another, and the Magistrates of Brechin the third. The Town did not controvert my Lord's right of constabulary, nor his judging riots, and that they could not discharge the fines his Bailies should impose, nor liberate the prisoners he put in ; but the question was, If my Lord and his Depute-bailie might dispose of the fines as they pleased, or if they were to be paid in to the Town Treasurer, and to be applied to the public uses and affairs of the town, for which the town contended they were in the immemorial use and custom of disposing thereon, and so had prescribed the same. It was *alleged* for the Earl ; That the emoluments followed the jurisdiction, and so could not be separated therefrom ; where the *onus* lies, it is just the *commodum* go the same way, else he had an office of burden, and they reaped the profit. And his depute's connivance in letting the town uplift them, could never divest him of his right, it being a subject not capable of prescription ; besides, there was no title here to inchoate the prescription.—*Answered* for the Town ; The contract was a sufficient title, and their constant possession and disposal of the fines since, abundantly explained to whom the fines should belong. They were a very ancient burgh royal, and under that reduplication, had a necessary power and jurisdiction, involved and implied in the nature of their erection, to judge bloodwits and small riots, which could be no less than a baron's jurisdiction within his own bounds, for preserving the peace ; and by our acts of Parliament, the royal burghs judge causes, both civil and criminal, within their own territories ; and by the 29th act 1469, the Captains and Constables of the King's castles, adjacent to burgh royals, are discharged from being Bailies or Aldermen within these burghs, which good law

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arose from their encroaching on their neighbours, as the Captains of the castle of Edinburgh got themselves sometimes elected to be Provost of Edinburgh, till it was expressly discharged as an abuse. And as to the prescription, any title, though never so defective or lame, is sufficient to found prescription, as a rolment of a Baron Court will infer a thirle, if fortified by 40 years possession; and there is nothing inprescriptible with us, but *res sacra et furtiva*.—*Answered*; The jurisdiction of royal burghs is no more but what is expressly conferred on them; and, therefore, some of them have a right of sheriffship super-added, for amplicating their power; and, of old, the Chamberlain held his eyres in every burgh, and judged all the misdemeanours there; but this concludes no more but a cumulative jurisdiction, for the justice-eyres, held in the several shires, did not divest the Sheriffs of their criminal jurisdiction, but was only superior thereto.—THE LORDS found the town of Brechin's act of Council and contract no sufficient title for prescription; and so preferred Lord Panmure's Bailie to the fines.

Fountainhall, v. 2. p. 386.

1709. December 27.

ALEXANDER CUNINGHAM of Craigends *against* ALEXANDER EARL of EGLINTON.

No 153.

An heritable right of sheriffship, *cum omnibus feodis divoriis, seu casualitatibus, seu spectan, aut quæ ad dictum jus et officium pertinere dignoscantur*, sufficient to found a title of prescription, to set up weights, and uplift the duties thereof, in an annual fair at a burgh of barony, within the shire, altho' the baron's charter of erection carried power to him to hold fairs, and exact all the profits and duties thereof.

ALEXANDER CUNINGHAM of Craigends having, *in anno* 1704, procured, by a grant from her Majesty, his village of Kilbarchan to be erected in a burgh of barony, with power to him to hold fairs, and exact all the profits and duties thereof; he pursued a declarator against the Earl of Eglinton, heritable Sheriff of Renfrew, (where Kilbarchan lies,) for declaring, that the pursuer has the sole right to hold fairs in the said burgh, and exact the duties thereof.

Alleged for the defender; He and his predecessors, as heritable Sheriffs of Renfrew, by themselves and deputes, had prescribed a positive right to set up weights at the fair of Kilbarchan, and to exact a particular duty for weighing such goods as were sold there, by immemorial possession; conform to a charter of the sheriffship, bearing, *Cum omnibus feodis, divoriis, et casualitatibus, seu spectan, aut quæ ad dictum jus et officium pertinere dignoscantur*; which right could not be inverted by the pursuer's charter, which was granted *periculo petentis, et salvo jure cujuslibet*.

Replied for the pursuer; The privilege of holding fairs, and exacting the duties thereof, being ranked *inter regalia* by Sixtinus, and other writers on the subject, it could never be possessed as part and pertinent; and the Sheriff being the Queen's Lieutenant, was in *pessima fide* to make or connive at any exaction upon the subject, without express allowance; nor has the power of exacting customs at fairs any connection with the office of Sheriff; *2do*, Again, the defender's possession, as Sheriff, was but as the Queen's servant, and so can