

No 152.

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 dignoscuntur*, 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 dignoscuntur*; 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

never prejudice her Majesty or her donatar ; a servant's possession *qua talis* being the master's possession ; *3tio*, *Esto* the defender, as Sheriff, had a positive right to the duties of such a fair, the Sovereign might dissolve that casualty from the sheriffship, and bestow it otherways ; it being ordinary to diminish the profits and jurisdictions of Sheriffs, by erecting new jurisdictions of Justices, Barons, &c. within theirs. Nor doth it alter the case, that the defender is heritable Sheriff ; seeing the making a right hereditary doth only empower to transmit it to successors, without any further power than what the predecessor had.

*Duplied* for he defender ; That he *qua* Sheriff could prescribe a right to the privilege in question, is clear from decisions, 18th July 1676, Earl Kinghorn *contra* Town of Forfar, *voce* PUBLIC OFFICER ; 9th December 1679, Lord Hatton *contra* Town of Dundee, No 83. p. 10272. ; and, which meets the present case *in terminis*, 13th December 1677, Earl Murray *contra* Feuars of the Fishing upon the Water of Ness, No 151. p. 10903. The privilege of setting up weights, and taking a duty for weighing, is not properly an exaction of custom ; and so not *inter regalia* ; because, the Sheriff is bound, *ex officio*, to see that no false weights be used, and to regulate weights conform to law ; *2do*, The defender did not possess in name of the Sovereign, but in his own name, by the Sovereign's concession ; *3tio*, He shall not here dispute her Majesty's power of taking away any of his casualties, as heritable Sheriff ; but positively contends, that no such thing is done, or designed by the grant in favour of the pursuer.

*Triplied* for the pursuer ; The decisions cited for the defender are not parallel : For there was no positive grant in competition with the Earl of Kinghorn's right of constabulary ; besides, there is some disparity betwixt a Sheriff and a Constable. And the Earl pretended to prescribe no more than was the known and common right of all the Constables in Scotland ; whereas, the right of fairs cannot be called the common right of Sheriffs. The practick betwixt the Earl of Murray and the Fishers of Ness is but a single decision ; besides, salmon-fishing being *inter regalia*, a servitude thereupon might be more easily constituted in favour of the Sovereign's heritable Lieutenant in the place, than the liberty of coming to any weights, which is *meræ facultatis* to every subject, can be lost *non utendo*. *2do*, Our Lawgivers have had a particular care to secure the lieges from the exactions of Sheriffs at fairs, act 59th, Parliament 13th, James II. act 33d, Parliament 5th, James III. It is true, the grant of an office in general, *cum feodis, divoriis, et casualitatibus*, doth imply such fees and profits as arise from the nature of the office, and are a consequence of the jurisdiction ; as the sasine-ox is a perquisite of Sheriffs ; for that they, as the Queen's officers, give sasine of lands held of her by precepts out of the Chancery, and count in Exchequer. But such a general clause cannot extend to exotic profits of a different kind, having no contingency with the office.

No 153.

*Quadrupled* for the defender; Though the grant of an office in general, *cum feodis*, &c. implies only the profits and fees naturally arising, according to the common rule, *Mandata jurisdictione, ea omnia mandari censentur, sine quibus exerceri non potest*; yet a person infest heritably in an office, may, by long possession, prescribe a right to some privilege, that doth not always follow the nature of the office. And it is strange to reckon the privilege of setting up weights, and exacting a small duty from such as weigh their goods there, for defraying the charges, an exotic profit of a Sheriff, who, *ratione officii*, is to inspect and regulate weights.

THE LORDS found, that the Earl's right of heritable sheriffship of Renfrew, *cum feodis, divoriis, casualitatibus*, &c. is sufficient to found a prescription to set up weights, and uplift the duties thereof, at the town of Kilbarchan.

*Fol. Dic. v. 2. p. 110. Forbes, p. 379.*

1727. February 18.

No 154.

MAGISTRATES of the CANONGATE *against* KEEPERS of the HACKNEY-COACHES.

IN the 1669, after hackney-coaches came to be used, the Magistrates of the Canongate made an act, exacting the sum of ten merks for each hackney-coach employed in the burgh, in satisfaction of the damages done to the causeways. This exaction was continued, without challenge, beyond the long prescription, till at last it came to be disputed in a suspension at the instance of the hackney-coachmen; who *pleaded, 1mo*, That the act of Council, imposing the toll, was *ultra vires*, against the public law, and length of time could not give it force; *2do*, The keepers of the hackney-coaches are not incorporated; and the deed of one cannot hurt another.—THE LORDS found, that, in regard the payment of duty of causeway-mail upon the hackney-coaches, since the act of the Council and Magistrates of the Canongate, in the 1669, was acknowledged by the keepers of hackney-coaches, the Magistrates have right to exact that duty, conform to the said act.—*see APPENDIX.*

*Fol. Dic. v. 2. p. 109.*

\* \* \* See, relative to prescription of a right of Constabulary, 18th July 1676, E. of Kinghorn against Town of Forfar, *voce* PUBLIC OFFICER.

See Hatton against Dundee No 83. p. 10272.; *voce* PERSONAL and REAL.