

1676. *November.* ANENT HERITABLE BONDS.

THEY say the Lords inclined to find that the assigning of an heritable bond made it moveable, like to a charge of horning or a requisition, and that Stairs has something of it in his System, tit. . Of Real Rights, *in principio*: but I think it must only be a mistake; though, by the act of Parliament in 1617, the assigning of a liferent tack makes it moveable, and to fall under single escheat. *Vide supra, hoc eodem numero, § 2.*

In the case betwixt Doctor Craig and Riccarton, they say, the Lords found bonds bearing clause of infestment, though no infestment actually followed thereon, belonged to the heir of conquest; and yet it would seem more agreeable to law, that they should fall to the heir of line, as moveable heirship, tacks, reversions, &c. do. But they answer, that only such real rights fall to the heir of line whereupon infestment cannot follow; but this decision is dubious. See Stair's System, tit. . Of *Heirs*, where he speaks of conquest. *Vide infra, No. 526, about the three sisters called Mitchelsones.*

*Advocates' MS. No. 508, § 12, folio 267.*

1676. *November 24.* ————— *against* WILLIAM WEIR.

THE Lords this day reduced two decreets of adjudication, &c. obtained by Mr William Weir, at least assigned to him against Mr Edward Ruthven, son to the Lord Forrester, and, by his mother, apparent heir to the Earl of Bramford. The reasons were, *Imo*, Because the heirs of line were not first discussed. *2do*, The decret was extracted after an intimated stop untaken off. *Vide supra, June, 1676. Tenants of Bathgate, No. 479.*

In this action, Mr William Weir was much frightened by a rumour, as if the Lords had designed to turn him out of his employment as an advocate *cum nota infamiae*, and to make him an example; because, it was alleged, he had taken an assignation to it while it was a depending plea, contrary to the act of Parliament; *vide supra, No. 482, Eleiston, in June, 1676*: but he affirmed to me, it was decerned before he took assignation. However, there was nothing of it; and the Lords contented themselves with the reprimand to Wauchop, the macer, for the like deed at the same time. See the story of it in my Remarks of the occurrences in Session, on the 17th of November, 1676.

*Advocates' MS. No. 509, folio 267.*

1676. *September, and November 30.* LORD HALTON *against* The TOWN of DUNDEE.

*September.*—My Lord Halton, treasurer-depute, as coming in the place of the late Earl of Dundee, by the gift of *ultimus hæres*, obtained a decret at Secret

Council against the town of Dundee, finding, that as Constable of Dundee, he had the haill criminal jurisdiction within that burgh privatively, and the civil *cumulativé*; and thereon has expedé a signature, and took infestment about this time, in that his jurisdiction, at the Market-cross of Dundee. This insignificates their privileges as a burgh royal.\*

They have raised a declarator before the Session against Halton; but as it is now packed, they can scarce expect ordinary justice there, and may well fortify his right by a decret *in foro contentioso*, which even the subsequent Lords will be tender to reverse: so it were more advisable that *res* be left *integræ in statu quo*, till an equal hearing can be got; for it seems uncontroverted, that he arrogates and assumes more than ever Scrimgeor of Dudhope had, who were men inferior to none in vanity and pride; for their power was only to keep the king's peace, and guard the town of Dundee during the time of a fair, during which there was a great resort and confluence of strangers, and much bargaining and drinking, and so a probable fear quarrels might ensue; and this is the only reason for which I find constables were ordained in burgh towns. (A German has writ *De jure constabularii*.) Our burghs of old were so inconsiderable they needed this auxiliary assistance: as Kennedie of Carmucks was Constable of Aberdeen, and Erskin of Din was Constable of Montrose; and for their pains in guarding the town during the time of their fairs, they had some obventions and casualties and fines. Hence, I find by the 60th and 61st acts of the Parliament 1456, complaints were given in against the constables of castles as a grievance, in exacting stresses of the subjects that came to the fairs with their crains, and which oppression is forbidden till the Parliament consider if their infestments bear them to these exactions or not. And to prove that the constable's power was not universal all the year, but only at set particular times, the jurisdiction of the High Constable, the Earl of Erroll, is a convincing argument thereof, for his power was only during the sitting of the Parliament in that town where it held, for guarding the King, nobility, and members of Parliament, and his old writs bear four miles about. See the Report in 1631, sent to the King by some he had commissioned for that effect, containing an account of the High Constable's privileges.

*Quæritur*—If the constable of the castle of Edinburgh has any jurisdiction within the town during the time of their fairs?

*Advocates' MS. No. 495, folio 259.*

*Nov. 30.*—THIS day the town of Dundee was convened by my Lord Halton before the Secret Council, for judging a riot, which only belonged to him, and refusing to keep prisoners for him, &c. conform to the decret he had got against them. *Vide supra*, Sept. 1676, No. 495. He got their provost and bailies imprisoned in the tolbooth of Edinburgh, and fined the provost in 4000 merks, and each of the bailies in 3000 merks; and the town of Dundee ordained to find caution of lawburrows under the pain of 20,000 merks, for Halton and his servants' security at the hands of all the inhabitants of Dundee. Which was thought very strange and hard to bind, for the humours of people, who might in a pique to the magistrates cause them incur the failie, and it wants an ordinary style. This caused great outcry.

*Advocates' MS. No. 511, folio 267.*

\* The least that can be granted them as a burgh-royal, is a baron's power,—*Mixtum imperium ad vindicandam et explicandam suam jurisdictionem sine quo subsistere nequit*; L. 2, D. de Jurisdictione.