

No 13.

viz. two parts to the Commissary, and a third part to the Procurator-fiscal and Clerk, and the compositions of testaments being equally divided amongst them, their burdens should be accordingly proportioned, and each of them have their own share, conform to that general maxim in law, *quem sequitur commodum eundem et incommodum*.—THE LORDS did consider this case as a leading case to all commissariots; and, in respect that the decreet-arbitral, and injunctions ratified by his Majesty, were inserted in the books of Sederunt of the Session, whereby the contribution money was only stated to be due by the Commissaries, without making any mention of relief by the Clerk of the commissariots, who had their own distinct burdens; therefore, they found that they ought to be assoilzied from this pursuit; and that their case should not fall under that general maxim of law, which can give the rule to decide only in societies, or *in re communi*, where the profits were never divided by law, or statute, or agreement betwixt the parties; whereas, the proportions of burdens, in this case, were distinguished by injunctions, decreets-arbitral, ratification, and universal custom, which left no place to a new division, answerable to every member's pain and employment, which could produce inextricable trouble and uncertainty.

Gosford, MS. No 883. p. 564.

1676. July 18.

The EARL of KINGHORN *against* The TOWN of FORFAR.

No 14.

Rights of an
heritable
Constable.

THERE being mutual declarators between the Earl of Kinghorn and the Burgh of Forfar; the Earl pursuing declarator of his right, as Heritable Constable of Forfar, and the Town their privilege, as a free burgh within their own bounds; the LORDS having appointed either party to produce all evidents they could make use of, and to adduce such documents and testimonies as they would make use of, for clearing the possession; the Earl insisted on these particulars, and produced an ancient infeftment by the King to the Lord Gray, containing the office of Constable of Forfar, *cum feodis et divoriis ejusdem*; he did also produce a commission to the Provost and Bailies of Forfar, for uplifting the customs of St James's Fair, and the fines of transgressors at that time, and some acts and scrolls, shewing the Constable had used jurisdiction at the said fair, and at other times; and *insisted*, That it might be declared, that he had right to the office of Constable of Forfar, with power to proclaim and ride their fairs, and to hold Courts, and to punish all transgressors within the bounds of the burgh, and to uplift the customs of their fairs, and that he had right of property to the Castle hill of Forfar. It was *alleged* for the Town, *imo*, That the Earl's right, being general and antiquated, could have no effect, unless it were established; for the ground of that right being as Constable of the King's Castle

of Forfar, and of the bounds adjacent, he might punish transgressors, and might preserve the quiet and good order of public fairs against the disorders of these ruder times; yet now the Castle being razed and demolished, and the people civilized, there is no ground to encroach upon the freedom of an ancient Royal Burgh, but to suffer them to enjoy their customs and jurisdictions as other Royal Burghs in the kingdom; *2do*, Though any thing could be claimed upon the account of that office, yet it could not be extended beyond ancient possession; and by the witnesses for both parties, it appeareth, that the Town hath lifted their own customs, that they paid only 20 merks yearly to the Constable, and that he used jurisdiction only as to disorders in St James's Fair; but now the Town having lately obtained from the King four other fairs, with all their customs, he hath no interest therein. It was *answered*, That the office of Constable had a known power to ride and preserve the peace of public fairs, and, on that account, to receive the customs thereof, and to exercise jurisdiction at all times, which is common to all the Constables in Scotland, whereof there were many; so that, unless these privileges be lost by prescription of liberty, the right continues, and any possession preserves the same; and, as to the new fairs, they are but lately granted, and the Constable's office extends to them as well as to the old fair.

No 14.

THE LORDS found, by the writs produced, and testimonies adduced, that the Constable of Forfar had right to proclaim St James's Fair, which hath always been proclaimed in his own, the King, and the Town's names; and that the Constable gave commission to the Provost and a Bailie to lift the customs and americiaments of St James's Fair, *in anno* 1625; and since that, the Magistrates have constantly raised the same, and paid 20 merks yearly to the Constable therefor; and that the Constable had the keys of the Tolbooth, and exercised sole jurisdiction as to the disorders done during that fair; but found, that he had no interest in the later fairs, nor any customs thereof, nor in any but in St James's Fair: They found also, that neither party had right of property to the Castle-hill; but the Town had been in ancient possession thereof, and the Constable to keep Courts thereon, reserving to the King the right of property, as accords.

Stair, v. 2. p. 452.

1678. June 19.

AGNES WILKIE *against* Mr HENRY MORISON and the CLERK of the BILLS.

No 15.

AN arrestment being loosed on insufficient caution, the LORDS refused a bill, craving a warrant for commanding more sufficient caution, though they had granted it between Mosman and Monteith; only here they gave the Clerk to the Bills a reproof.

Fol. Dic. v. 2. p. 293. Fountainhall, MS.