

of other public burdens lawfully imposed for necessary uses ; so that the Magistrates, who were only administrators, could not grant such feus as would free the feuars, and prejudge the rest of the burghesses, by making them only liable to the burdens of the burgh.

No 150.

Gosford, MS. p. 422. Nos. 706. 707. 708.

1677. December 13.

The EARL of MURRAY against The FEUARS of the Water of Ness, MARQUIS of HUNTLY, and TOWN of INVERNESS.

THE Earl of Murray pursues a declarator against the feuars having fishing on the Water of Ness, ' That he and his predecessors, Sheriffs of Inverness, have ' right to three days fishing on the Water of Ness, under the bridge, every ' summers noon, as being a casualty of the Sheriff's office, wherein they have ' been in possession past memory, at the least 40 years.' The defenders having raised a double poinding against the pursuer, and the Marquis of Huntly, do *allege* absolvitor, because they are infeft in their lands, ' with salmon-fishing on ' the Water of Ness,' without any such burden ; neither hath the Sheriff any infeftment bearing this *per expressum*, but only ' the office of Sheriffship, with ' the emoluments and casualties thereto belonging,' and no right can extend to salmon-fishing which is *inter regalia*, unless it be expressed, at least be comprehended in the *baronia*.

THE LORDS repelled the defence, and sustained the pursuer's title, and the declarator upon 40 years possession by him and preceding Sheriffs, and found that this was but a servitude upon the fishing, and might be constituted by long possession, as Sheriff-gloves, and other casualties of offices are.

The defenders did then *allege*, That they could be liable but in single payment, in case the possession were proved, and did *allege* interruption of the pursuer, and preceding Sheriffs, their possession. It was *alleged* for the Town of Inverness, That they are Sheriffs within their liberties, within which this fishing is, and therefore it must belong to them, as being only Sheriffs there. It was *alleged* for the Marquis of Huntly, that his predecessors were heritable Sheriffs of Inverness, as also heritable Constables of the Castle of Inverness, and that they enjoyed this fishing, not as Sheriffs, but as Constables, and therefore, when the King had bought the Sheriffship, yet his predecessors continued this fishing, and have been still in possession thereof, at least have interrupted the pursuer's possession.

THE LORDS admitted the pursuer's possession to his probation as Sheriff, and interruptions to the defenders and the Marquis of Huntly's probation, and under what title the possession of either was reputed to be ; and found this casu-

No 151.

Salmon-fishing for some days yearly, found constituted by infeftment of a Sheriff, and forty years possession, though the office bore only emoluments in general.

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.