

*vicini* ; and found, that the said fair might be lawfully impetrated, and may be kept by the defender, upon his said lands, at any time after the end of the pursuer's fair, or at any time before, by the space of a month preceding the pursuer's beginning of his fair ; but found, that the defender cannot have any fair before the pursuer's fair begin, except there intervene the space of a month at least free, betwixt the end of the defender's fair, and the beginning of the pursuers ; and the LORDS decerned accordingly.

No 4.

Act. *Advocatus, Nicolson & Stewart.*

Alt. *Mowat, Gilmore & Nisbet.*

*Fol. Dic. v. I. p. 293. Durie, p. 895.*

1679. December 24. FARQUHARSON against The EARL of ABOYN.

FARQUHARSON being, by the Bishop of Aberdeen, infest in a fair in the Kirk-town of Birse, pursues declarator against the Earl of Aboyn, that a late gift by the King to the Earl for keeping that same day upon his land in the neighbourhood was obtained by obreption, or subreption, the King not knowing that he had granted a fair that same day to the Bishop of Aberdeen, to which the pursuer has right, within a mile or thereby of the pursuer's fair, and which was taken in *emulationem vicini*, and therefore ought to cease ;—The defender *alleged* absolutor, *imo*, Because the King may grant erection of burghs or fairs where he pleases, and ordinarily erecteth burghs of barony at the ports of royal burghs, and burghs royal within the bounds assigned to other burghs royal, which neither was nor can be challenged without incroachment upon the prerogative, much less can this fair be challenged ; *2do*, In granting of fairs, chief respect is to be carried to the public good, which appeareth in giving the Earl this fair ; because it is offered to be proven, that it is above two miles distant from the pursuer's fair ; and there is interjected the water of Dee, which is frequently so impetuous, that passengers or cattle cannot pass, and there is very little accommodation at the place of the pursuer's fair, and good accommodation in the defender's, which is a burgh of barony.—The pursuer *answered*, That there is here no debate of the prerogative, what the King might do, but what he would have done, if he had known there was a fair inconsistent with the Earl's fair, granted to his predecessors some hundred years ago, and therefore the Earl's fair must be declared to have been procured *suppressa veritate*, or *expressa facultate*, and therefore is void. Neither are the allegiances for the Earl relevant, for there is not a mile's distance betwixt the fairs ; but suppose there were two, it were not sufficient ; and as for the passage of the river, it imports not ; for this fair is the greatest fair in the north for cattle, which come always from the north, and are sold there, and then brought to the south ; so that though they were bought in the Earl's fair, they must pass Dee before they go south ; and

No 5.

An infestment by the King, of lands with a fair, was reduced, as impetrated from the King by obreption, *suppressa veritate*, the King not having known that he had on the same day granted a fair to another town, within a mile of the former.

No 5.

it is notour, that there is a boat on Dee sufficient for passengers at all times, and that cattle can swim the river at any time ; and this case, in all the circumstances, after full debate, hath been determined before by the Lords, in the case at the instance of Mr David Falconer against Glènbervie, No 4. p. 4146. ; and if the Lords should sustain such a preparative, that powerful people might set up markets or fairs, near the markets of their inferiors, who by their influence might draw the markets wholly to themselves, it would be of pernicious consequence.

THE LORDS sustained the declarator, and repelled the defences, and found that the Earl could not impetrate nor make use of a fair at this distance, till the pursuer's fair were ended, or a month before the same.

*Fol. Dic. v. 1. p. 294. Stair, v. 2. p. 727.*

1706. February 7.

The MAGISTRATES of the TOWN of Stirling *against* MURRAY of Polmais.

No 6.

A gift from the King to a burgh, of the sole power of holding fairs within two miles of the liberties thereof, so denudes the Sovereign in favour of the burgh, as no posterior donatar could hold fairs within that bounds.

THE said town obtains a charter from King Charles II. in 1678, giving them the sole right of fairs and markets within two miles of their burgh, and that none should have these privileges within that bounds ; and on it they pursued Polmais in 1679 in a declarator, and obtained a decret in absence against him in their favour. Polmais, in the last session of Parliament, in July 1705, procured a right to hold two yearly fairs ; but the burgh of Stirling protested against it, and, for asserting and maintaining their right, raised a new declarator against Polmais, that he has no right to hold a fair within that bounds to the prejudice of their prior right, especially seeing he may keep them on such parts of his barony as lie without the two miles, and not at the village of St Ninian's, which is within a mile of the town. The defence was, the town's gift was, without hearing of parties, procured by subreption and obreption, *contra jus et utilitatem publicam*, to the prejudice of all the adjacent heritors two miles round about Stirling, and so was *periculo impetrantis*, and did not hinder the Crown to give any neighbouring heritor the right of keeping fairs and markets, who ought not to be prejudged by their situation near a royal burgh ; and King Charles was not so denuded, but he might have revoked it as in lesion to the Crown, and so may his successors ; and which *de facto* they have done, by granting Polmais this gift in Parliament ; and no such exorbitant gifts should be granted, without calling and hearing all the adjacent heritors interested and prejudged thereby ; and a gift in Parliament may be as good to Polmais as the town's gift and signature from King Charles. *Answered*, That the town of Stirling has no more by this gift but what the town of Edinburgh and many other royal burghs possess ; and that this, with other privileges, is given them on the account of the many burdens they support, and particularly the 6th part of all