

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

the taxations in the kingdom; and to allow such fairs and markets near to them draws away all their tradesmen, or gives the hail profit to unfreemen, who bear neither scot nor lot within burgh, to their utter ruin and decay; and this can never be called against public utility, seeing fairs are *inter regalia*, and may be given or not given by the Prince as he pleases; and seeing he has the sole power of conferring them, if he once give them, he is so denuded that he cannot by a posterior gift frustrate or annul them; even as when he erects a sheriffship or regality, he cannot in the same bounds erect a new one in prejudice of the former; so that *prior tempore* is here *potior in jure*; and that the King is uncontravertedly the fountain of such grants; and whatever may be in the King's power of revocation, that is not the present question, seeing it is not actually revoked; and fairs given in Parliament pass of course, falling under the act *salvo jure*, and can never prejudice the town's prior right, and must be reputed to have been sought merely *in æmulationem vicini*; and their opposing it was no wrong, for *qui jure suo utitur, nemini facit injuriam*.—THE LORDS, by a plurality of seven against six, found the King denuded by the prior gift to the town, and such a *jus quæsitum* thereby, that Polmais could hold no fairs within that bounds. See Durie, 24th June 1642, Falconer of Glenfarquhar, No 4. p. 4146.

On the 13th current, Polmais gave in a protest to the Parliament against this interlocutor. See APPENDIX.

Fol. Dic. v. 1. p. 294. Fountainhall, v. 2. p. 323.

* * * Forbes reports the same case :

THE town of Stirling having, in the year 1678, obtained from King Charles II. a charter in their favours, containing the sole power of keeping fairs or markets within two miles of the town, exclusive of any other heritor, and providing against the erection of any new burgh of barony or regality within that distance; whereupon they procured a declarator in *anno* 1679 against the neighbour heritors, and the Laird of Polmais in particular; and he and his son, in the Parliament 1705, having obtained an act for two yearly fairs to be held within their barony of Balquhidrock; against this the Town protested, and raised a declarator of their right, against the Lairds of Polmais elder and younger.

Alleged for the defenders; That the privilege granted, and craved to be declared, was *contra jus et utilitatem publicam*; in so far as it was not any positive right, but only a kind of servitude introduced in favours of the town as *prædium dominans*, upon the defender's property, without their consent; whereby they are debarred from acquiring, and Queen and Parliament bound up from granting the right of fairs to heritors upon their own property, which is the inseparable prerogative of the Sovereign, and common interest of the people; and private gifts, so far debording from common rules, are presumed to have proceeded by subreption or obreption. *2do*, If the King could have granted this

No 6. exclusive privilege for two miles, he might have extended it to twenty, and in favours of all the royal burghs, one after another, as well as in favours of the town of Stirling; of the consequences of which kind of encroachment all noblemen and barons would be sadly sensible.

Replied for the pursuers; The royal burghs, who bear a sixth part of the burdens of the nation, have been justly privileged in the matters of trade, markets and fairs, by gifts and acts of Parliament in their favours; and the charter to the town of Stirling was granted also upon a particular reason, viz. as an encouragement to a royal burgh that had shewed great friendship and fidelity to his Majesty, was the ordinary residence of our Princes, an important pass, and the very key of the kingdom betwixt south and north. *2do*, If the King has power to grant fairs and markets, he has also power to refuse them; and, if he refuse them to gratify particular burghs, as here is done in favours of Stirling, then that burgh has certainly thereby a *jus quæsitum* to annul all posterior contrary grants, which is not a servitude upon the defenders, but only a signification of the King's pleasure not to allow fairs within two miles of the town of Stirling, which cannot be kept without his Majesty's allowance, and *qui jure suo utitur nulli facit injuriam*; so that it is an odd notion to call such a gift an encroachment upon noblemen and barons, when it takes nothing from them, more than the granting of an heritable sheriffship can be quarrelled at the instance of the heritors over whose lands it extends, because it debars each of them from obtaining the like jurisdiction. Now, if the Sovereign may simply refuse fairs or markets to barons, may he not *multo magis* refuse them in favours of so deserving a burgh as Stirling, within the small compass of two miles, when other royal burghs of Scotland have the like, or ampler privileges indulged to them; as the town of Edinburgh has such exclusive gifts extending to four miles; and the town of Jedburgh enjoys a fair at five miles distance. Yea, what greater mystery is in this, than for the proprietor of a moss to grant a privilege to one neighbour to win feuel therein, exclusive of any other? Besides, the defender's late act of Parliament was but an act of course, qualified with the act *salvo*, and such as can never prejudge the town of Stirling's prior right.

Duplied for the defenders; It is not to the purpose, that the royal burghs bear a sixth part of the public burdens, that being divided with respect to the burgage lands, and exclusive privileges within the royalty; but, seeing the barons bear two-thirds of the burden, it is highly unreasonable to subject them to any servitude beyond the privileges already granted to burghs royal within their liberties. The prerogative of granting fairs and markets is also foreign to the case in hand; for the charter to the town of Stirling contains no constitution of fairs, but only a certain kind of irregular interdict or restriction of the royal power to the prejudice of the defenders. *2do*, The town's *jus quæsitum* is a servitude upon the prerogative which the negligence of his Majesty's officers in passing the gift could never establish against the Prince who granted

it, and far less against his successors. 3^{to}, The objection from heritable sheriffships not being quarrellable is frivolous; for regalities have frequently been erected within the bounds of heritable sheriffs; and it is obviously absurd to compare the privilege of applying to the Prince for obtaining any immunity within a man's own lands, with the general pretensions to offices; and yet, even in that case, it would be injurious, and *contra utilitatem publicam*, if any burgh or great man should pretend to a gift secluding any of his neighbours within two or three miles from the royal favour in all time coming, and yet such is the embargo laid upon the defenders as to fairs and markets. 4^{to}, The town of Corstorphine keeps fairs at this day within two miles of the town of Edinburgh, notwithstanding the good town's pretended gift. And the case of the town of Jedburgh is this, they have annual fairs upon the seat of the old suppressed town called Roxburgh.

THE LORDS found the King denuded by the prior gift to the Town, and such a *jus quasitum* thereby, that Polmais could hold no fairs within the bounds libelled.

Forbes, p. 90.

See BURGH ROYAL.

JURISDICTION.

APPENDIX.