

No 3. by this exception of buying in a public market ; for the excipient ought to have taken *borgb* and *ham-bold* from the seller, conform to the old laws of the realm, if he would have provided for his own security ; and the dying of the mare, albeit it made it impossible to restore her, yet in place of that, the LORDS found the defender should refund the price. See MOVEABLES.

Act. Nairn.

Alt. Johnston.

Clerk, Hay.

Fol. Dic. v. 1. p. 294. Durie, p. 885.

1642. June 24. FALCONER of Glenfarquhar against L. GLENBERVIE.

No 4.
A person was infeft with the immemorial privilege of a fair. A neighbour obtained a subsequent grant of a fair which interfered with the former. Found, that the second could not keep his fair, except at the distance of a month from the other.

MR DAVID FALCONER being infeft in the lands of Glenfarquhar, with the privilege of an ancient fair, called *Padie Fair*, from Palladius, holden upon the said lands of ——— past memory of man, from the 1st of July to the 7th day thereof, pursues the Laird of Glenbervie, who had acquired from the King a late infeftment, *anno* 1635, of his lands, with the privilege of a fair to be holden on his lands of Dillivard, which lyes within a mile, or less, of the pursuer's lands, whereon his fair holds, to be holden from the 24th of June to the 1st of July yearly, to hear it be found, that the said infeftment ought to be declared null, so far as concerns, or may be extended to the having of any fair on the said lands of Dillivard the time foresaid, as being a privilege privately purchased, and indirectly tending to take away the liberty and privilege of the pursuer's fair, in respect that the pursuer's lands and the defender's, which has the fairs, are not distant from others a mile of ground ; and the time of the holdings is so ewest, without any interval of time, that the defender's fair, (which ends the very day when the pursuer's fair begins,) must necessarily evert all privilege and use of his fair, and prejudice him of all commodity which he can have thereby, and tends manifestly to kindle trouble betwixt the parties, and to disturbe the quietness and peace of the country: Which action being heard in the LORDS presence, and the parties and their advocates being heard to dispute thereupon, they found, That the defender's infeftment ought not to extend to the privilege of a fair, to be holden of such nearness to the said lands, for keeping of the same, within the time contained in his infeftment, which is in such vicinity, and immediately precedes the time of the pursuer's ancient fair ; the defender having taken the same to end the same day when the pursuer's fair begins ; for however he might take a right from the King of his lands, with the said privilege of a fair, yet that privilege ought not to have been sought, to destroy the effect and use of that ancient fair, granted to, and bruiked immemorially by the pursuer, and his authors and predecessors of before ; and therefore they ordained that privilege, so far as concerns that time of the holding thereof, to cease, as impetrate in *amulationem*

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.