

1705. *January 12.*The EARL of PANMUIR *against* ROBERTSON of CARNOUSTY.

No 59.
A parcel of annexed church lands came by progress into the person of a Nobleman, with the office of Heritable Bailie. The vassals were, by their *reddendo*, bound to personal suit and presence. They were found to be fineable for non-attendance; although, by the act of surrender 1633, such lands hold of the Crown, and so are bound to answer to the Sheriff Court.

LORD ANSTRUTHER reported William Miln, procurator fiscal of the barony of Barry, and the Earl of Panmuir, his constituent, *contra* Alexander Robertson of Carnousty. Barry was originally a part of the abbacy of Balmerino, and was, on the suppression of Popery, and the annexation of kirk-lands to the Crown, disposed to Secretary Elphinston, Lord Balmerino, with the office of heritable bailie, who conveyed the said office and jurisdiction to the Earl of Panmuir's predecessors, and wherein he by progress stands infeft; and the heritors and vassals in this barony are, by the express *reddendo* of their charters, obliged to suit and present at three head courts in the year, and accordingly have been in use to attend. Robertson of Carnousty having lately purchased these lands lying within that bounds, from Mr Lyon, an advocate, he and his author controverted their being liable; whereon Robertson, for absence, is fined in L. 50 Scots of americiament. He suspends, on these reasons: *1mo*, *Non constat* the Earl is Heritable Bailie; and *esto* he were, he was not cited, and so not bound to appear: *2do*, The decret is null, not mentioning the bailie who then sat as judge his name, as it ought to do; *3tio*, Carnousty being kirk-lands, they, by the annexation in 1587, and act of surrender in 1633, hold now of the Crown, and are obliged only to answer at the Sheriff's head courts, as the Queen's other vassals do, and so not liable to Panmuir's court; and though the foresaid acts give the Lords of Erection the feu-duties of these kirk-lands, yet that ought not to subject the Queen's immediate vassals to such intolerable burdens of answering thrice a-year, and being liable to fines in case of absence. *Answered*; As to the first, it were a rare practice to force a Lord of Erection or Regality to produce his rights and charters to every contumacious vassal, when he has immemorial possession; and there needs no citation or intimation here, seeing his own charter binds him, whereof he cannot be ignorant: If he were called in any process before that court, he behoved indeed to be cited; but when it is a part of his *reddendo* and homage, he must attend at those known and fixed diets with the other *pares curiæ*. To the *second*, Though inferior decreets do frequently name the judge, yet there is no law obliging thereto; and the Lords of Session their decreets do not mention their names, though of old they did. And to the *third*, Is it utterly irrelevant; for, though they be the Crown vassals, and so liable to the Sheriff's head courts, yet that can neither exoner nor exempt them from suit and presence here, being expressly astricted by their charters, and use and wont of coming; and this is no more than what all the kirk-lands in Scotland do.—THE LORDS found it relevant to make Carnousty liable, that, by the *reddendo* of his charter, he was expressly bound to give suit and presence at these head courts; and thought it nowise necessary to try the custom; for if one *per errorem* should come two or three times to a court where

he was not obliged, that would not import an acknowledgment of his subjection to that jurisdiction; but it was clearly determined by the clause of his own charter, which he could not deny nor contradict. The next question arose on the quantity of the fine, if it was exorbitant, seeing these courts cannot exceed L. 10 Scots for contumacy and absence; and Laury of Blackwood being fined by the regality-court of Hamilton, for absence, in L. 50, the Lords, by their decision, 17th July 1676, modified and restricted it to L. 20 Scots. Panmuir *alleged* sundry disparities betwixt his case and that; but the Lords superseded to determine, if exorbitant, till it was proven that he was astricted by his charters to appear and attend at these Courts, and granted a diligence for recovery, and producing the vassal's rights for proving thereof.—*See JURISDICTION.*

THE LORDS at last sustained the fine, and refused to restrict it, not being in the case of an ordinary barony.

Fol. Dic. v. 1. p. 532. Fountainhall, v. 2. p. 257.

ECCLESIASTICAL PENSION.—*See PENSION.*

See APPENDIX.