

No 143.

1623. *July 15.*—In this same cause concerning the office of crownry immediately before mentioned, the pursuer having past from the bygone years acclaimed by his summons, and insisting only for payment in time coming, in respect of his infeftment, and that his summons bore that, conform to his infeftment, he was in continual possession, and his predecessors, of that duty libelled, past memory of man; the defender contending that that possession tending to lay on a great servitude upon the defender's lands, wherein he and his predecessors were infeft without all thralldom, which ought not to be prejudged by his alleged use and possession, to be proved by witnesses, but required a more solemn probation by writ, as said is; specially seeing, by the passing from the 30 years libelled, the pursuer confest the desuetude of that possession acclaimed, so that, after so long confessed want of possession, the action should not be sustained, by alleging any preceding possession to be proved by witnesses, to infer the foresaid servitude; the LORDS sustained the action for time coming, the pursuer proving, by sufficient honest and unsuspected witnesses, to be examined in presence of the Lords, that the pursuer and his predecessors have been in continual possession of receiving of payment of the same duties libelled, from the whole rest of the heritors within the isle of Bute, at least from the most part of those heritors of the lands, continually, past memory of man, and to the very date and time of the intending of this cause; and that sicklike he proving that he and his predecessors were in possession of receiving also the same duties, from the heritors of the same lands, for the which the defender was convened, continually, preceding the years libelled, which he had past from, past memory of man, before the said years; which point the Lords found the pursuer should be holden expressly to prove; and so sustained the action.

*Durie, p. 72.*

1634. *March 11.* SHERIFF OF GALLOWAY *against* EARL OF CASSILLIS.

No 144.  
A real servitude of tilling in harvest, &c. found established by immemorial possession, though done only by the defender's tenants, without his knowledge.

THE Sheriff of Galloway being infeft by the Abbot of Sawiset in the Bailiary of certain lands pertaining to the Abbot, with services and dependencies due thereto, pursues the Earl of Cassillis and the tenants of his lands, whereof the Earl was heritor, and likewise Bailie, for payment of the said services, and doing of the same in all time coming; and the particulars craved by the summons were 'furnishing of shear dages in harvest, and tilling in sowing time, and 'leading of fuilzie, and such other services;' and which the pursuer craved by this pursuit the defender to be decerned to do to the pursuer's other lands, pertaining to him heritably, not pertaining to those baronies whereof he was Bailie, but being lands of another nature, holden by the pursuer of another superior than the Abbot; and also he craved the payment yearly for his said Bailie's duty and service of a certain quantity of oats and straw, particularly libelled for

each plough of the defender's lands, together with some hens yearly; the ground of which pursuit was founded upon his infeftment of the bailiary, as said is, with the connexes and services belonging thereto, (for these were the words of his right, and there was no special duty insert therein;) and in fortification thereof he offered to prove that he had been in use, and his forbears, Bailies, of receiving of all these particular services and duties from the tenants of the said lands these 50 years bypast. And the defender *alleging*, That there was no ground nor reason to compel him, who was heritor, to do these services to any lands without the baronies, whereof the pursuer was constituted Bailie, and to go to any other of the pursuer's lands, not being of these baronies, neither holden of that Abbot, but of other superiors, and no use of the tenants, how long soever of doing the same, and paying them to these lands, whereto he was noways astricted, either in law or in reason, or by any constitution, either in infeftment or any other writ, could oblige the heritor, the same being done by and without his knowledge or consent, specially his infeftment, not astricting him to any such thing; and the pursuer's right of bailiary not proportioning the same, and these services and duties being differing, and altogether disagreeing from services due to kirkmen's Bailies;—and as to the oats, straw, and hens acclaimed, it were out of all reason to allow this pursuit for the same, as if Bailie services could extend to such predial duties, the same being a part of the duty and profit paid for the ground, which can belong to none but the master and heritor of the ground, or to such persons as have special right *habili modo* to such duties out of the lands;—these allegiances were repelled, and the action sustained, both for these duties of corns, straw, and hens, to be paid yearly to the Bailie, as duties and services due for his bailiary, and also for the special darges acclaimed to be done to the pursuer in his lands out of the barony, in respect of the said 40 or 50 years possession uninterrupted, albeit the possession was only from the tenants, and not from the heritor, nor of his knowledge, which the LORDS found not necessary, and admitted the said summons and reply of possession to the pursuer's probation; but declared they would reserve to themselves, after probation, to determine upon the special services, and quantity of corns and others, which they would decern to be paid in all time thereafter for the said bailie-duties, as they should find reasonable.

Act. *Stuart & Heriot.*Alt. *Advocatus, Nicolson & Neilson.*Clerk, *Hay.**Fol. Dic. v. 2. p. 109. Durie, p. 711.*

1661. July 18. DOUGLAS *against* The TOWN of JEDBURGH.

SIR ARCHIBALD DOUGLAS being heritable Sheriff of Roxburgh, pursues the Town of Jedburgh for the sum of L. 60 yearly for several years due for Sheriff-gloves, and whereof he and his predecessors has been in possession past memory.

No 145.

Forty years  
possession  
found to give  
right to a  
Sheriff to