

1623. July 10.

M'LAY *against* SKELMERLIE.

No 143.

M'LAY, alleging himself to be heritable crowner of Arran, pursued the Laird of Skelmerlie to pay to him a firlot of oats and a lamb for ilk plough horses, as a part of his fee of the office of crowner, whereof he heard his predecessors had been in possession past memory of man. His summons contained the by-runs of 31 years. It was *excepted*, That the pursuer could have no action, because he was not infest *per expressum* in the duties libelled. THE LORDS, considering that the Provosts, stewarts, constables, crowners, mairs of fee, and other heritable officers, had not their fees insert in their infestments, but possessed them as they had done past memory of man, they sustained the action since the date of the summons *in anno* 1621, and would not find process for the 29 years preceding, in respect of the long desuetude of possession.

Fol. Dic. v. 2. p. 110. Haddington, MS. No 2894.

* * * Durie reports this case :

1623. July 10.—IN an action pursued by an Highlandman called M'Kay against the Laird of Skelmerlie, for payment of the duties libelled, pertaining to the office of the crownry of Arran, wherein the pursuer was infest, and which was libelled to be resting and owing by the space of 30 years preceding the intending of the cause, and were specially condescended yearly to extend to a special quantity acclaimed, and whereof the pursuer alléged possession sundry years before the years libelled; the LORDS found no action ought to be granted for the said duties of the saids *bypast* years acclaimed, the pursuer having confessed in his summons that he wanted possession during so long a space; in respect it was a preparative of an evil example, to induce a servitude upon the defender's lands and heritage, which might tend to evict the whole lands; for the pursuer acclaimed, in his summons, as due to his office, a special quantity to be yearly paid for every horse of each plough of land within the isle, viz. half a lippy of meal and half a lamb; which the Lords found ought not to be sustained; seeing, albeit the pursuer was infest in the office of crownry, yet he had neither infestment nor other writ nor constitution which might furnish and give an action for the special quantity acclaimed; and therefore would not sustain the pursuit for the quantity to be proved by witnesses, except the pursuer would prove the same either by infestment, bearing that quantity, or by some constitution or other lawful writ, which may produce action for the same quantity, and that that writ were shewn and produced for the title of the pursuit; and this was found concerning the bygone years acclaimed; but concerning that part of the summons whereby the pursuer desired the defender to be decerned in time coming to pay that quantity, it was not decided.

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