

1636. June 28.

MAXWELL against MAXWELL.

MAXWELL of Orchardton, being infeft in the mill of Drumdenan, with the astricted multures thereof, pursues another Maxwell for payment of the quantity of dry multures, used to be paid yearly, before the crops and years 1634 and 1635, now acclaimed by this pursuit; and the other defending with a prior infestment of his lands *cum molendinis*, anterior to the pursuer's right, by virtue whereof, he *alleged* himself and his lands to be free of that servitude and astriction; and the pursuer *replying*, that he ought not now to be put to dispute upon priority, or posteriority of his right, in respect, that conform to his infestment foresaid of the mills, *cum astrictis multuris* of the lands of Drumdenan, *per expressum*, he has been in use these 40 years by past to up-lift from these defenders, and they have been in use to pay to him, the dry multure now acclaimed, as astricted to his mills; so that in this possessory judgment, he ought to be continued in his possession, and when the defender shall pursue by any ordinary pursuit, for exeeing of him from that servitude, he shall answer thereto, as accords: And *2do*, he *replied*, That he had recovered sentences against these same defenders, for payment of these duties of other years, preceding the years libelled, and payment conform thereto. THE LORDS found both these replies, and ilk one of them *separatim*, relevant in this judgment possessory, being proved, or any of the same, to make the defenders subject in these duties libelled, without prejudice to the defender, to pursue by reduction or declarator, or any other legal manner, any action whereby to free himself of this servitude, as accords of the law.

Act. Gilmour.

Alt. ———.

Clerk, Hay.

*Fol. Dic. v. 2. p. 91. Durie, p. 810.*

1636. June 28.

EARL OF ERROL against TACKSMEN of Teind-Sheaves.

THE EARL of Errol as Tacksman of the teind-sheaves of \_\_\_\_\_, pursuing spuilzie against Gordon of \_\_\_\_\_, and he defending with a right of a tack set to Gordon of Pitlurg long anterior to the pursuer's tack, and by virtue thereof; *alleging*, That the right of that tack, which was now assigned to the excipient, and by virtue whereof he was in possession, ought to defend him against the spuilzie intended upon a tack, long posterior to the excipient's author's tack; and the pursuer *replying*, That he by virtue of his tack, he was in possession of the teinds libelled, diverse years preceding the years libelled; like as, he has recovered sentence against the defender's author, for spoliation of the said teinds, diverse years preceding the said years libelled, and payment conform thereto; so that in this possessory judgment, the defender cannot obtrude the said anterior tack to this pursuer's tack, which is clothed with twenty years continual possession: THE LORDS repelled the exception, in respect of the fore-

No 32.

In a process of abstracted multures, this exception was not admitted, that the defender had a prior infestment *cum molendinis*, because the pursuer had had 40 years possession.

No 33.

A right acquired by an heritor to his teinds, will not defend him in a possessory judgment against a tenant in possession, though the right of the heritor be prior in date.