pursuer *replied*, That he being infeft in the office of Sheriffship, with all emoluments and casualties thereto belonging; long possession can only declare what they are, and neither in this nor any such infeftment is there any thing specially exprest, and though the pursuer cannot say 40 years possession before the pursuit, it is known that he was incapacitated to possess during the Usurpation, while all heritable offices was supprest. No 149.

THE LORDS found that 40 years possession before the Usurpation, or immemorial possession before the fair, of these particulars, was sufficient to extend the general clause of the pursuer's infeftment thereunto.

Fol. Dic. v. 2. p. 110. Stair, v. 2. p. 99.

1674. *July* 14. TOWN of INVERNESS *against* The FEUARS of DRAKIES.

No 150.
In a process against feuars holding of a town, concluding against them to bear a proportion of the private stents of the town, the Lords sustained immemorial possession of the feuars, bearing private stents, as relevant to make them liable in time coming, although their charters from the town bore the reddendo of particular feu-duties *pro omni alio onere*.

THE Town of Inverness having charged the Feuars of the forest of Drakies (which forest was disponed by the King to the Town, and by them feued out for particular feu-duties, *pro omni alio onere*,) for payment of several stents laid upon them by the Magistrates and Council; they did suspend, and raised declarator, that they ought to be free of bearing any stents for the particular use of the Town of Inverness, in respect of their charter, and that they had no part of the burgage land of the Town.

In which process the LORDS sustained immemorial possession of the Feuars bearing private stents, and admitted to the Feuars' probation interruptions; and there being produced many acts of the Town-Council, and witnesses, the sum of the probation amounted to this, that *in anno* 1624, the bridge of Inverness being ruined with an inundation, there was a voluntary contribution of the shire, Town, and its territories, for making it up; and that falling short, the Town did stent their inhabitants, and the heritors of their burgage lands, and also their feuars for L. 1000; they did also stent them for reparation of the kirk, and for the charges of Duncan Forbes who was sent to Edinburgh and London, for procuring to the Town some further freedom of markets, and for freeing them from transgressing letters of intercommuning at the instance of the Earl of Moray against the Clanchattan. There was no more stents proved till the year 1637, when the stipend to an assistant minister that spoke Irish was imposed upon all, but paid by none; but there were frequent stents for public dues in the time of the troubles, and the late stents since the Kings return, which in a short time exceeded 100 months' assessments, a considerable part whereof was for expenses of process against the Feuars, and which were suspended.

THE LORDS found that this probation was not sufficient to infer a right to the Town to stent for their own private use, and did declare, that seeing these Feuars bore no burden within the shire, but with the Town, they should be stented for all taxations and impositions by King and Parliament, and for

No 150. charges of commissioners to Parliament, and conventions of estates, when the other heritors holding burgage did bear, but not for the expenses of the Town's commissioners to the conventions of burghs, whose chief affair was the matter of trade; unless there were a special commission at the Feuars' desire for rectification of the burden of Inverness, as being too high amongst the rest of the burghs, and so of consequence overburthening the Feuars; they found also that the Feuars were not to be stented by the Town-Council for reparation of the bridge, or reparation of the kirk; but that they were liable for these burdens as heritors and parishioners, according to the acts of Parliament, and the method of stenting therein prescribed.

Fol. Dic. v. 2. p. 109. Stair, v. 2. p. 275.

*** Dirleton reports this case much more fully:

1674. *November 7.*—This case having been agitated, not without some heat, amongst the Lords themselves; I thought fit to give an account thereof, at greater length, than I have used in other cases and decisions.

The Town of Inverness having charged the said ——— Robertson of Inches, and Cullodden and other Feuars, who hold the Forest of Drakies, and other lands and mills, and fishings of the said burgh, for payment of their proportions of a stent imposed upon them, for the use of the Town; and they having suspended upon that reason, that the said stent was unequal as to their proportions, and that the Town had not an arbitrary power to impose stents upon their neighbours and feuars, unless there were an unavoidable, at least a pressing, necessity and occasion, relating to the good and interest of the burgh; and in that case, the neighbours and Feuars were to be liable only *in subsidium;* in so far as the patrimony of the Town and common good should be short, and not extend to defray the same.

The Lords (Sir John Gilmour being President for the time) did, by their decreet of suspension, find the letters orderly proceeded; but withal did regulate the way of stenting to be according to the method and rules set down by the Lords as to the future, which are contained in the said decreet, and acquiesced to by the suspenders; the decreet bearing to be of consent, and containing only a protestation, that the suspenders should not be liable to any stent, for maintaining and prosecuting pleas against themselves.

Thereafter, the Feuars being charged upon another stent, did suspend upon that reason only, that the regulation and method appointed by the Lords had not been observed; and did intent a declarator, that they should not be liable to stents, but such as should be imposed in the way and according to the method foresaid.

Though there was no other reason in the said suspension, nor conclusion in the said declarator, but as is immediately related; yet, another reason was

thereafter insisted upon, both in the suspension and declarator; and they did *plead*, that they were exempted, and ought not to be liable to any stent upon any account or method whatsomever; by reason, that their lands, and in special the Forest of Drakies, were feued to them for a reddendo and feu-duty contained in their infeftments *pro omni alio onere.* No 150.

The case not being fully debated at the bar, some of the Lords conceiving, that the lands of Drakies were not a part of the original and ancient patrimony of the Town, but that the same had been acquired by the Town, and thereafter had been feued out by them in the terms foresaid for payment of a feu-duty *pro omni alio onere*; they were of the opinion, that they could not be liable to a servitude, unless the same had been constituted, either by their infeftments or otherways; but specially in this case, they being free by their infeftment, and express clause therein, of all burden or servitude, but their feu-duty; and that they could be in no other case, than if the Town of Edinburgh should feu any of the lands lately acquired by them, for payment of a duty *pro omni alio onere*; and yet the plurality of the Lords were of the opinion, that if the Town could prove and make appear, that they have been in use, by the space of 40 years or above, to stent their Feuars for defraying their affairs and burdens, and works of the Town, that they ought to be liable, notwithstanding of the said clause *pro omni alio onere*; and accordingly before answer a term is assigned for proving the Town's possession.

In the *interim*, the most eminent of the advocates, and in special such as were for the Town, being discharged pleading, upon occasion of the appeals; this case came in agitation the last session, and some of the Lords, even those that were of the opinion formerly, that the Feuars should not be liable to be stented, upon the ground and mistake foresaid, that the said lands of Drakies was not a part of the ancient patrimony of the Town, they were convinced, upon the production of the Town's evidents, that the said lands were a part of the ancient patrimony of the Town, being incorporated and contained in their infeftments with the burgh itself, bearing one individual holding and reddendo; and therefore conceiving, that *est judicis supplere quæ desunt advocatis in jure*, and which arises upon production of the papers, they did argue that the Feuars ought to be liable for these reasons;

1*mo*, That there is a difference betwixt the original patrimony of the Town, which is profectitious, and flows from the bounty of princes, and is given to burghs royal, for sustaining and defraying their necessary burdens and occasions; and betwixt that, which is adventitious, and acquired by burghs themselves, by their own moyen and means.

As to the *first*, The same being given *eo intuitu*, and to the end that it should be a stock for doing and defraying the common affairs and burdens and charges of the Town, it cannot be given away nor feued, but *cum sua causa*; and so that they should be liable to stents and impositions upon occasions requiring the

No 150. same; whereas the other is acquired by Towns as *quilibet*, and the feuars ought to be considered as *quilibet*, and as in the case of other feuars.

2*do*, Upon the consideration foresaid, it is statuted by diverse acts of Parliament, and in special by the 36th act, King James IV. Parl. 3. and the 185th act, King James VI. Parl. 13. that the common good of burghs should be observed and kept to the common profit of the Town; and the said act of King James IV. bears, That lands, fishings, mills, and others belonging to the burghs should not be set but for three years allenarly; and if any be set otherways, that they be of none avail; and as this is law, so it is just, otherwise those who have tenements within burgh, and who upon occasions are liable to be stented, should be unjustly and heavily prejudged, if the lands and fishings which, being in the Town's hands, would be liable in the first place to such burdens, may be given away; so that the whole burden should be rolled over upon them.

3*tio*, The foresaid pretence, That the feuars were liable only to the feu-duty *pro omni alio onere*, was *answered*, viz. that *omne aliud onus* was to be understood of any other ordinary duty payable to the Town as superiors, but does not exempt the feuars from these *munera extraordinaria patrimonialia*, for the use and preservation of the Town; as in the case of lands disponed to be holden of the disponer, for payment of a blench or other duty *pro omni alio onere*, the clause foresaid will not exempt the vassal from taxations, and the superiors relief of the same against his vassal.

4*to*, It appears by a ratification of Queen Mary, produced for the Town, that the Town of Inverness had made diverse acts concerning the setting the lands, mills, and fishings, which are ratified by the said Queen; and which, if they were observed, would oblige the feuars to be liable to be stented.

The said Lords who were of the said opinion, thought, That upon the grounds and production foresaid, the feuars of Drakies ought to be liable without any farther probation, to stents imposed for the use and interest of the Town; the same being imposed necessarily and equally according to the method abovementioned; and yet the Town having adduced probation by production of the records out of their books and witnesses, they considered and thought, that the possession of the Town, by imposing their stents by the space of 40 years, was proved; in respect it appeared, by the extracts out of their books, that from the year 1624 until 1664, they have been in use to impose stents in case of exigency for the private use and concerns of the Town, notwithstanding of what was alleged at the bar against the said probation, and in special that the books themselves ought to be produced; whereas there was nothing produced but extracts of acts; and that the probation, that the Town has been in use to stent for repairing their bridge, did not quadrate to the case and point in question; seeing it was to be proved, that stents were imposed for the private use and concerns of the Town, and the bridge and repairing of the same is of public concern and interest, relating not only to the good of the

Town, but of the whole shire; and the record anent stent in relation to the bridge being out of the way, and not considered as a probation; it was not proved that the Town had been in possession 40 years. No 150.

Nevertheless, the plurality of the LORDS did find the allegeance foresaid of possession, by the time foresaid, not proved; upon that ground that the bridge was not to be considered as the proper concern of the Town; and did suspend and declare in favours of Inches and other feuars, diverse of the said LORDS dissenting upon the grounds foresaid; and that it appears to them, that the feuars, upon the account of their lands, were liable to be stented, being the ancient and proper burgal patrimony of the Town; and albeit a continued tract of possession by the space of 40 years, which is hardly to be expected *in servitutibus*, or impositions that are discontinued, could not be made out, as they conceive it was; yet the feuars having homologated and consented, and submitted to the said impositions without repining until after the year 1664; that they did not so much question the Town's right to impose upon them the said stents, as the exorbitancy and frequency, and inequality of the same as to their proportions; they could not be heard now to plead and pretend exemption from the said stents.

THE LORDS having found as said is, That the lands of Drakies were not liable to the said stents, the said ——— Robertson of Inches, in behalf of himself and some other feuars, having only appeared in the debate, and Forbes of Culloden, who thought himself concluded by the above-written decreet of suspension, and has consented to the same; did notwithstanding desire that he might have the benefit of the said interlocutor, and that the parcel of land which he had in the forest of Drakies, might also be declared free of stents, seeing there was *eadem ratio*, and so there ought to be *idem jus* as to him and the said other feuars.

It was *answered* for the Town of Inverness, That he could not be heard, in respect of the said decreet of suspension *in foro*, and of his express consent therein contained; whereunto it being *replied*, That the consent was only as to the individual stent therein questioned, and did not conclude him as to other stents; and that notwithstanding thereof, it being now found, that the forest of Drakies, whereof his was a part, was free, the immunity foresaid could not be denied to him. It was *answered*, and the said dissenting Lords were of opinion, that a decreet *in foro* did bind him whatever others could pretend; and it was evident by the said decreet, that it was then the Lords meaning (Sir John Gilmour, a person of great parts and integrity, being then President) that all the said lands of the forest of Drakies should be liable in all time coming; and his consent is most positive and express to the regulation of stenting as to the future; and the said consent being permitted to the whole decerniture of the said decreet, doth influence and affect all the articles and heads of the same, unless it had been limited and special as to one or more, and not all; and it was so far from being limited to the stent then in question, that there is a protestation

No 150. subjoined to the decerniture in these terms: That Culloden and the suspenders do protest, that they should not be liable to such stents as should be imposed for maintaining the plea against themselves; and exceptio et protestatio firmat regulam et sententiam in non exceptis, et iis, contra quæ non emissa est protestatio.

The Lords, notwithstanding found, That Culloden should be free of stents as to such parcels as he had of the lands of Drakies.

Thereafter the Town of Inverness did *allege*, That the suspenders ought to be liable as to the mills and fishings, that they held in feu of the Town, seeing they are undoubtedly the ancient patrimony of the Town; and they offer them to prove, that they have been in use, past memory, to stent the same with the burgal lands when occasion required, not only for taxations imposed by Parliament, but for the private use of the Town.

It was *answered*; That the said allegeance was not now competent; seeing the debate, whereupon the interlocutor proceeded, was concerning the suspenders' feus which they hold of the Town, which comprehend both lands, mills, and fishings; and there is no reason of difference why the mills and fishings should be in another case than the lands.

It was *answered* for the Town; That in all the debate there had been no mention of mills and fishings, and they were content to make faith that they did not understand the debate to be concerning the mills and fishings, but only the lands of Drakies; and if they had thought that they had been concerned to prove their possession as to the mills and fishings there was that specialty that they might have proved more clearly their possession as to the mills and fishings, than as to the lands; and now they are able to prove the same.

Some of the Lords thought, That the question being of that importance to an incorporation, and they wanting the assistance of their most able advocates, upon the occasion above-mentioned; and the exception being undoubtedly relevant to infer their right, and the conclusion of their declarator, as to the mills and fishings, that they should be liable to be stented if it were proved; it were hard, that their right should be taken from them upon a quirk and pretence of omission, being upon a mistake, as said is. In end, the plurality of the Lords did declare, by their interlocutor, that if in November the Town should be able to make appear, by ancient records, that they had been in possession of stenting the mills and fishings with the tenements of the Town, when impositions and stents were laid on by the Town only (and not by the Parliament), for their private use, that the same should be liable as other burgal lands.

Dirleton, No 190. *p.* 77.

*** Gosford also reports this case:

In a declarator at the instance of the Feuars against the Magistrates of the town of Inverness, to hear and see it found and declared, that the town had no

power to impose stent upon the feuars, and make them liable to contribute for defraying the charges of that burgh, upon this ground, that they are infeft in their several lands holding of the town feu, with a *reddendo* of a particular sum of money *nomine Albæ firmæ pro omni alio onere*; it was *alleged* for the town, That notwithstanding thereof, they had power to stent them, because the feuar's own charters bear a special quality, that they should be burgesses and inhabitants within the burgh; and the forest of Drakies, which is feued out by the town to the vassals, being interpreted as a part of the town's patrimony, it was not in the power of the Magistrates and Council to grant particular feus to vassals, and free them of the whole stents and impositions to be imposed upon the whole burgesses, and so exhaust the public patrimony, so that the rest of the burgesses who were not feuars, should be only liable for the whole burdens and impositions. Likeas, by an act of the Town-Council, ratified by Queen Mary, it is provided, that no stranger nor widow should possess the tacks or steadings belonging to the town, either in property or superiority, but only heirs-male of burgesses, who should scot and lot, watch and waird, with the rest of the neighbours of the town; and according, the said forest of Drakies, and others, fishings, belonging to the town, have been feued out to burgesses only, and their heirs-male of their body, being burgesses, secluding their heirs-female and strangers. Likeas, the town hath been constantly, past memory of man, in use to stent the said feuars with the rest of the burgesses, not only as to public stents imposed by act of Parliament, but likewise as to stents imposed for the particular use of the burgh. It was *replied*, That the declarator ought to be sustained notwithstanding, because the feuars, by their charters, were only obliged to pay a certain feu-duty *pro omni alio onere*, which did secure them, as well as all other vassals holding feu, either of burgh-royal, or other superiors; otherwise it would be in their power, by voluntary impositions and stents, to ruin their vassals, and force them to renounce their feus, to be free of oppression; and by the principle of feudal law, superiors had only the benefits of escheat and non-entries, and the most that ever was allowed was voluntary contribution, in some special cases, as *pro elocanda filia primagenita* and the like. The Lords did sustain the defence founded upon the special qualities in the charters, they proving immemorial possession; but likewise allowed to the feuars to prove interruptions, and assigned a term to both for probation; after which, the town having produced several acts of the Town-Council, and admitted witnesses for proving their possession; and in special, that the town had been in use to impose stent for building and upholding of the bridge, repairing of the church, and defraying the expenses of Duncan Forbes, when he was sent commissioner to London for the use of the burgh;—it was *alleged* for the feuars, That these instances could not be sustained, because, as to the building and upholding of the bridge, it was by voluntary imposition, whereby the heritors of the shire were stented, as well as the burges-

No 150.

No 150. ses and feuars, in respect that it was a public work, wherein the whole heritors were concerned as well as the town; and that stent being *in anno* 1624, was but one single act, and almost prescribed before intenting of any action against Colloden for the contrary. And as to the stents for reparation of the kirk, the parishioners were bound to contribute according to the worth of their feus, as generally all other feuars do, and cannot be thereby put in a singular condition; and as to the stent for Duncan Forbes's charges, it is evident, by a decreet obtained at his instance before the Lords, that he had only right to pursue the persons that subscribed his commission, but the same could not bind others who were feuars. The Lords having advised the probation and debate for both parties, did find the allegeance of immemorial possession not proved, and therefore assoilzied the feuars upon this ground, especially that the reparation of the bridge was but one single act, and near prescribed; and the reparation of the kirk was that to which they were obliged with all other feuars; and for Duncan Forbes's expenses, it was but a late act, since the King's restoration; but several of the Lords were of a different opinion, upon these reasons:— That the feu-charters were of a singular and different quality from all common charters of feu-lands, and these feus being once incorporated with the common good of the town, it was not in the power of the Magistrates and Council for the time, to dilapidate any part of the revenue to the prejudice of the rest of the burgesses, who got no such benefit; so that unless it had been proved, that the whole common good of the town being exhausted, there being an occasion and necessity for private stents and impositions for the private use of the burgh, the town had been in use to stent the rest of the burgesses only, and not the feuars, so that by prescription they had acquired an immunity and liberty, their own charters being found relevant to make the mliable; the probation adduced was sufficient, seeing the occasion of making such stents, after exhausting the whole common good, might seldom fall out, and in such cases *quæ raro accedunt singularis sufficit instantia.* After this interlocutor, the town *alleged*, That as to John Forbes, it was *res hactenus judicata*, albeit it was not decided until the 16th of this month, yet we think it fit to set it down here, as being most proper. The reasons for putting Colloden in a singular case from Robertson of Inches, and other feuars, were these; 1*mo*, That the only ground whereupon the rest of the feuars were declared free, was, that the town did not prove immemorial possession of stenting them, their feus being very old, and likely to have been purchased for a just rate; whereas Colloden's feu was only granted *anno* 1649, and was obtained by his father when he was Provost, without any onerous cause, and obliged him to scott and lott with the rest of the burgesses, and accordingly he was in use to be stented until the late suspension, where decreet was given against him *in foro contentiosissimo*; 2*do*, It is a decreet of consent, that he should be liable in all time thereafter, if the method agreed upon then for imposing of stents by the Lords should be observed by the town; so that unless upon contravening the said

order and method, he can have no interest to quarrel the decreet; and if he should be declared free, then the whole feuars of the fishing and burrow lands, upon better grounds, might obtain a declarator in their favours, which would be the total ruin of the town and common good. It was *answered* for Colloden, That notwithstanding of these reasons, he could not be put in a singular condition, because, by his charter, he being a feuar, and obliged only in the *reddendo* for a certain feu-duty *pro omni alio onere* as the rest are, it would be an absolute contradiction to declare the rest free, and him liable. 3*tio*, The decreet *in anno* 1664 cannot be obtruded as being given *in foro contradictorio*, or upon consent; because it was only a decreet of suspension upon a particular charge for payment of a late imposition, which did not hinder him to pursue a declarator of freedom with the rest of the feuars; likeas, there being a defence founded upon that decreet, notwithstanding thereof, the declarator, at his instance, with the rest of the feuars, hath been sustained without distinction. 4*to*, That decreet can never be obtruded as being of consent, because the consent is only the assertion of the clerk, but not subscribed by the party; and it bearing a passing from his right, and the *reddendo* of his charter, did necessarily require his subscription, without which he cannot be prejudged by the assertion of a notary, as hath been found in many cases; and albeit it were forced to be obligatory in law, yet it being qualified and restricted to the particular stent therein questioned upon the condition of imposing stents, which hath not been observed, that decreet cannot prejudge him of the benefit of a general declarator of freedom as to all other stents. THE LORDS, by plurality of votes, did find, That notwithstanding the foresaid decreet of suspension, Colloden should be declared free, and could not be put in a singular condition; which was thought hard by some of their number, upon these grounds, that not only they could not agree with the rest to the pronouncing the declarator of freedom as to the rest of the feuars besides Colloden for the reasons foresaid, but because that the whole debate founded upon their charter and the *reddendo* thereof being alleged by Colloden in that suspension most fully and amply, in the decreet, before interlocutor, he did consent judicially to be liable in all time coming, if the method of stenting should be regulated by the LORDS, which was done accordingly; which consent being so recent *in præsentia* of the whole LORDS, who, upon that same decreet, did set down the rules and method of stenting, against which he did never reclaim, but suffered the decreet to be extracted, and accordingly gave obedience by payment, I thought it was hard to repeat those two decreets. Thereafter, upon the 26th of November 1674, there having been a great debate betwixt the town of Inverness and Colloden, upon this ground, that albeit there was a decreet pronounced, and a declarator, at his instance, and the rest of the feuars of the forest of Drakies, wherein the whole feuars were found liable to no more than their feu-duties; yet that ought not to be extended to free Colloden of being stented with the rest of the burgesses of the town for his mills, fishings, and burrow

No 150.

No 150. aikers, as to which there was no debate, the whole dispute running only as to the freedom of the feuars of the forestry ;—likeas, after pronouncing of the foresaid decreet, the Lords having taken the Provost of Inverness's oath of calumny, that in all their former debates he never intented to give in answers as to the mills and fishings, albeit libelled in the declarator, but only as to the forest of Drakies, the extract of that decreet as to all other tenements being supersceded, the Magistrates producing new rights, whereupon they might found their allegeances against the freedom of the mills, aikers, and fishings belonging to Colloden ;—likeas they having now produced his charter to the mill and fishings, with several charters of other burgesses, of tenements of lands within the town, and the principal register, bearing several stents and impositions, whereof the extracts were only formerly produced ; it was *alleged* for the Town, That the decreet as to the mills and fishings could not be extracted, because his infeftment and charter were granted to him and his heirs-male only, being burgesses, and actual residenters, which quality made them liable to all stents and impositions with the rest of the burgesses';—likeas they offer to prove, that all the feuars of these tenements, as well as of other tenements and houses within burgh, were continually in use to be stented past memory of man, and that not only conform to the custom of the burgh of Inverness, but Aberdeen, town of Nairn, and several other burghs, for which they did produce certificates from some of the Magistrates of these burghs, and they did crave Colloden's oath of calumny if he had just reason to deny the town's immemorial possession as he alleged. It was *replied* for Colloden, That the said allegeance could not now be received after litiscontestation and decreet pronounced in the cause. And as to the writs now produced, they are but in effect the same that formerly were produced, and the register did not bear any special stent, but the same whereof the extracts were formerly produced, and yet they should be admitted to propone new allegeances for the mills and fishings, their charters bearing that same *reddendo* as the feu-charters of the forest of Drakies did, there being no difference ; and there can be no ground to found any allegeances of servitude thereupon ; and if it should be sustained, it would be directly contrary to former interlocutors pronounced by the Lords, and consequently they should needs find that they had done injustice and iniquity ; and the allegeance not being now competent, nor any new writs produced to make out immemorial possession, Colloden was not obliged to give his oath of calumny. The Lords having advised the whole debate and writs produced, did find by plurality of votes, That the decreet ought to be extracted as to the mills and fishings, notwithstanding some were of another opinion, upon these grounds ; that the mills and fishings were a part of the whole incorporation, and no part of the shire was liable therewith for payment of the public burdens, and were no part of the forest of Drakies ; and that the town did hold the same from the King *libero burgagio*, and that the quality of the feu did bear that none should succeed but burgesses and their heirs-male, who in law are not exeemed from stent

or other public burdens lawfully imposed for necessary uses; so that the Magistrates, who were only administrators, could not grant such feus as would free the feuars, and prejudge the rest of the burgesses, by making them only liable to the burdens of the burgh. No 150.

Gosford, MS. p. 422. *Nos.* 706. 707. 708.

1677. *December* 13.

THE EARL of MURRAY *against* The FEUARS of the Water of Ness, MARQUIS of HUNTLY, and TOWN of INVERNESS.

No 151.
Salmon-fishing for some days yearly, found constituted by infeftment of a Sheriff, and forty years possession, though the office bore only emoluments in general.

THE Earl of Murray pursues a declarator against the feuars having fishing on the Water of Ness, 'That he and his predecessors, Sheriffs of Inverness, have 'right to three days fishing on the Water of Ness, under the bridge, every 'summers noon, as being a casuality of the Sheriff's office, wherein they have 'been in possession past memory, at the least 40 years.' The defenders having raised a double poinding against the pursuer, and the Marquis of Huntly, do *allege* absolvitor, because they are infeft in their lands, 'with salmon-fishing on 'the Water of Ness,' without any such burden; neither hath the Sheriff any infeftment bearing this *per expressum*, but only 'the office of Sheriffship, with 'the emoluments and casualties thereto belonging,' and no right can extend to salmon-fishing which is *inter regalia*, unless it be expressed, at least be comprehended in the *baroniq*.

THE LORDS repelled the defence, and sustained the pursuer's title, and the declarator upon 40 years possession by him and preceding Sheriffs, and found that this was but a servitude upon the fishing, and might be constituted by long possession, as Sheriff-gloves, and other casualties of offices are.

The defenders did then *allege*, That they could be liable but in single payment, in case the possession were proved, and did *allege* interruption of the pursuer, and preceding Sheriffs, their possession. It was *alleged* for the Town of Inverness, That they are Sheriffs within their liberties, within which this fishing is, and therefore it must belong to them, as being only Sheriffs there. It was *alleged* for the Marquis of Huntly, that his predecessors were heritable Sheriffs of Inverness, as also heritable Constables of the Castle of Inverness, and that they enjoyed this fishing, not as Sheriffs, but as Constables, and therefore, when the King had bought the Sheriffship, yet his predecessors continued this fishing, and have been still in possession thereof, at least have interrupted the pursuer's possession.

THE LORDS admitted the pursuer's possession to his probation as Sheriff, and interruptions to the defenders and the Marquis of Huntly's probation, and under what title the possession of either was reputed to be; and found this casu-