shilling land; and Lord President, Lord Dun, and Lord Arniston, were all of opinion that the superior could not divide the superiority without the vassal's consent.

1740. *June* 20. DUNCAN CAMPBELL *against* CHARLES WEIR, and the Sheriff and Procurator-Fiscal of Lanark.

CHARLES Weir, procurator in the Justice of Peace Court of the shire of Lanark, was, by the sentence of the Lords, declared incapable of acting as agent or procurator before any court in Scotland, imprisoned for a month, and condemned to pay the pursuer's damages and expenses, for having fabricated an execution of a charge, upon a decreet of the Justices, against Campbell, to which he got a constable and two witnesses to put their names, and upon which he arrested and detained the said Duncan Campbell in prison.

The Lords apprehending, from some facts that came out in the examination of this affair, that Weir, the sheriff-substitute, and Buchanan the procurator-fiscal, had colluded with Charles Weir, in so far as to endeavour to screen him from punishment, ordered *ex officio* inquiry to be made into the matter. The fact, with respect to them, is shortly this:—The fiscal, *ex proprio motu*, without any application from the private party, who was satisfied with a warrant he had got from the bailie of the regality for apprehending Weir, applied to the Sheriff for a new warrant, not only against Weir, but against the constable and witnesses. This warrant he obtained, and executed in the most rigorous manner against the constable and witnesses, by carrying them most violently, from Hamilton, where there was a sufficient prison, to Ruglen; but, as to Weir, he allowed him to remain in his own house, under the custody of the Sheriff-officers. This being the fact, notwithstanding it was alleged that the prison in Hamilton belonged to the bailie of the regality, whereas the prison of Ruglen was the King's prison, and in the head burgh of the shire, and that Weir was not put into the tollbooth, because the Sheriff was in doubt whether he should not admit him to bail, for which he had given in a petition; yet the Lords found, that the procurator-fiscal had colluded with Weir to screen him from justice, and therefore condemned him to pay six pounds in name of fine, and expenses of the complaint, and the President severely reprimanded him. And the Sheriff-substitute was likewise reprimanded, though more gently, because, notwithstanding there was no direct evidence, yet there was some presumption that he was in the plot with the fiscal, to deliver Weir from justice; and because he ought to have a stricter eye over the officers of the court, and taken more care how his warrant was put in execution. The warrant itself, in this case, was not altogether legal, as it was conceived, it being to commit to *any* sure prison, whereas it should have been to commit to the *next* sure prison.

I shall relate here, *propter contingentiam causæ*, a decision of the like nature against Wilson, procurator in the Sheriff-court of Glasgow, July 12, 1740. This Wilson was condemned to pay £50 sterling to the complainer, Buchanan, for da-

mages and expenses, and was fined £5 to the poor, for having given directions to his servant to fill up a blank execution, signed by a messenger and two witnesses, without any direction or information from the messenger; by which means the execution was made *personal*, whereas it was only at the party's dwelling-house, and the witnesses were made attest a fact which they knew nothing about, having seen no execution at all, either personal or at the dwelling-house.

1740. *July* 15. EARL of BREDALBANE *against* MENZIES of CULDARES.

[Elch., No. 21, *Prescription.*]

THE question here was, Whether Culdares had prescribed a right of servitude of pasturage upon the Royal Forest of Mamlorn, of which Bredalbane was heritable keeper.

It was argued for the Earl, 1*mo*, That such a right was not prescriptable, because such prescription was contrary to the nature of a forest, and to the public law, particularly to the Act 12th Parl. 4, James V. Act 210, Parl. 14, James VI. &c. by which all the subjects were prohibited, in the strictest manner, to pasture their cattle, or do any deeds of that kind, within the forest. And as it is impossible that any person, by repeated transgressions of the law, can acquire any right to transgress the law; so it is impossible, in this case, that any possession, how ample and uniform soever, can give any right or servitude of any kind. 2*do*, Supposing a servitude here prescriptable, yet it is not prescribed, because Culdares has no sufficient title for such prescription, being only infeft in part and pertinent, whereas, a title for prescribing a servitude must be more explicit and particular, and it is even doubted by some of our lawyers, whether an infeftment *cum communi pastura* be a sufficient title for acquiring a servitude by prescription on another man's lands.

The Lords had no regard to this last defence, and were all of opinion that part and pertinent was sufficient for the prescription of a servitude. As to its being prescriptable, a great majority were for the affirmative, but upon different principles. The President thought, that, in this case, possession being proved forty years back and upwards, it is presumed to have been before the erection of the forest, by which no antecedent right could have been taken away. Arniston was of opinion, that it could scarcely be supposed that Culdares or his authors had any right of servitude antecedent to the erection of the forest; because he thought, if that had been the case, there could hardly have been any erection; but he thought that such an uniform possession, for so long a tract of time, presumed a grant from the crown, after the erection of the forest, in favour of Culdares' author; which, joined with the infeftment in part and pertinent, made a connected title of prescription. But almost all of them thought that no right in this case could be acquired by possession only, as being contrary to law.