

1741. June 15. LORD BREDALBANE *against* MENZIES of CULDARES.

THE question here was, about the extent of a servitude of pasturage. It was contended for Bredalbane, that it did not extend *ultra necessitatem prædii dominantis*, which, by that rule, could not pasture more cattle upon the servient tenement, than was absolutely necessary for ploughing the ground and other uses of that kind. But the Lords found that the measure of a servitude was not the *necessitas*, but the *utilitas prædii dominantis*; and that, if, in this case, the servitude was circumscribed within such narrow bounds as those above mentioned, it would signify very little, because the rent of the dominant tenements was mostly paid by cattle, and there was but little arable ground: That the known rule in law was, that the *prædium serviens* is obliged to pasture as many cattle in summer as the dominant tenement can fodder in winter; whatever is beyond this, is *ultra utilitatem prædii dominantis*. It was argued likewise for Bredalbane, that the dominant tenements were obliged, first to eat their own grass, and apply it, in so far, towards the maintenance of their cattle, and after it was done, then they might have recourse to the grass of the servient tenement, which was only liable *in subsidium*; but they could not let their own grass to other people's cattle, and oppress the servitude pasturage with the maintenance of their whole stocking.

The Lords found, That, in this matter, the proprietors of the dominant tenements might do as they thought proper, and that there could be no loss thereby to the servient tenement, because, if the grass of the dominant tenement was eat up by other people's cattle in the summer, the fewer it could maintain of its own in the winter, and so the *prædium serviens* would be so far eased.

The Lords, in this case, granted an act, before answer, to prove, *1mo*, How many cattle the dominant tenements can fodder in winter; *2do*, How many wild horses, goats, &c. they have been in use to pasture yearly upon the servient tenement for these 20 or 30 years past. See *November 18, 1742*.

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1741. June 24. KENNEDY *against* CREDITORS of CRICHEN.

[Kilk., No. 8, *Prescription*; C. Home, No. 172.]

The Lords found, That in this case the heir is not *eadem persona cum defuncto*, and that his account is not the account of the defunct, and that no merchant would state the articles furnished to the heir, to the defunct's account, but to his own; and therefore, found the prescription run. This carried only by one vote, *Dissent. Arniston*.

N.B.—It was supposed that a debt could not be constituted by the oath of credulity of the heir, to the prejudice of the other creditors.