1742. *July* 2. ——— *against* ———.

A MILL was feued out with the multures of the barony as possessed by Patrick ———, formerly tenant of the mill. The question arose about the mains, Whether it was astricted by this clause, and to what extent. The fact was, that, during the possession of Patrick ———, the proprietor of the mill had his mains in his own hands, and sometimes sent his oats to the mill, and paid insucken multure for them, at other times he sold his own oats and subsisted his family upon his farm meal; but his wheat and malt he always grinded at the mill of the barony, and paid the ordinary in-town multure.

It was contended, That, now the mill and the mains belonged to different proprietors, the same use of payment should continue, and the possessor of the mains should be liable to pay multures for all the corns he should actually grind; which would be considerable, as the mains was set to a tenant. To this it was ANSWERED, That the setting or not-setting of the mains could not alter the nature of the thirlage.

The Lords found that there was no thirlage at all.—*Dissent. Elchies et Drummore.*

1742. *July* 20. HUNTER *against* HUNTER.

THE case here was, an adjudication was led upon a special charge to enter heir, but the lands were not filled up in the letters of charge: this was found to be a nullity in the adjudication. Then the question came, whether the heir afterwards entering in due course of law, did validate the adjudication? It was argued, for the affirmative, That the right the heir acquired by his entry was a *jus superveniens auctori*, which accresces to the adjudication or legal disposition, in the same manner as it would do to a voluntary disposition.

2*do*, The heir entering at any time, must be reputed to have been entered at the time of the death; because, *fictione juris*, the time of the death is conjoined with the *tempus aditionis*, and therefore the adjudication must be considered as if he had been entered at the time it was led.

To the first it was ANSWERED,—That the maxim, *jus superveniens auctori accrescit successori*, does not apply to adjudications in their present form; for this reason, that they do not imply warrandice, which is the principle of accretion in our law. Anciently, indeed, when apprising was a sale of a part of the lands effeiring to the debt, the debtor was bound in warrandice, as appears from our ancient law-books and practicks, and, at present, in special adjudications, the judge determines what warrandice the debtor shall give; but it is otherwise in general adjudications where the debtor's whole estate is adjudged for the debt.

N.B. This was Elchies' reasoning.

2*do*, To the second it was ANSWERED,—That the fiction of the Roman law was never carried so far with us.

The Lords found that the legal of the adjudication was not expired, this being a declarator of expiry of the legal; but they had not occasion to determine whether the adjudication could be sustained as a security. Elchies thought it might; but the President was of another opinion.

1742. *November* 18. MENZIES of CULDARES *against* LORD BREDALBANE.

THIS cause was called June 15, 1741, when there was a proof allowed:—1*mo*, As to the winter-holding of the dominant tenement; 2*do*, As to the number of hill-mares, goats, and such like creatures, not requiring winter holding, which the dominant tenement was in use to pasture upon the forest.

With respect to the first, there were two proofs taken; one by Culdares, who proved, by his tenants of the dominant tenement, the number of cattle they had kept during the winter for 10 or 12 years back. The other was taken by Bredalbane, and consisted of the judgment or opinion of some gentlemen in the neighbourhood, with respect to the number of cattle the dominant tenement might hold during the winter, which was much smaller than the number Culdares had proven they actually did hold.

Against Culdares' proof it was argued,—That it was less credible than Bredalbane's, which consisted of the testimony of gentlemen of character and reputation in the neighbourhood; whereas Culdares' witnesses were low people, his own tenants, and consequently interested in the event of the plea. 2*do*, The proof goes back no farther than 10 or 12 years; which is not sufficient, as the servitude is established by prescription: that we ought, in this case, to look back to the original constitution, (for prescription always supposes an original constitution,) by which it cannot be supposed that the servitude was nearly so heavy as Culdares' proof would make it, considering how much the profits of grass, and consequently the pasture of cattle has increased in that country, and throughout all Scotland, within these few years.

It was answered for Culdares,—That a proof of facts, which fell under the proper knowledge and experience of the witnesses, was stronger and more convincing than any proof of judgment or opinion whatsoever: as the witnesses on one side were Culdares' tenants, and so might be supposed liable to his influence, the witnesses, or to speak more properly, the prizers, on the other side, were Bredalbane's vassals, and it is well known what dependance the vassals of these Highland chieftains have upon their lords; and as to the character of gentlemen, bestowed upon Bredalbane's witnesses, Culdares' proof is likewise supported by the testimony of one or two of that character. 2*do*, The servitude is already established by the proof taken in the question of the property; by which it appears, that Culdares had not only been in use to pasture his cattle upon the forest for time immemorial, but likewise to drive off Bredalbane's cattle. This proof seemed so strong to the Lords, that they gave Culdares the right of property; though this decree was reversed by the House of Peers. As the question therefore now is only about the extent of the servitude, there is no occasion to go back thirty or forty years, or so far as the original