

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.

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

THIS cause was called June 15, 1741, when there was a proof allowed:—*1mo*, As to the winter-holding of the dominant tenement; *2do*, 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. *2do*, 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. *2do*, 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

constitution of the servitude; for whatever number the dominant tenement pastured at first, upon the forest, yet, if afterwards it was improved, and became capable to maintain more in winter, the servitude upon the forest would increase in proportion. This general principle, that the servitude increases in proportion to the demands of the dominant tenements, was determined in the case of Colonel Dalrymple's coals, and is entirely consonant to the nature of a prædial servitude; and this is so far true, that it seems to be a very great hardship upon Culdares, to limit the number of cattle in any wise, that he may keep upon the forest, because it deprives him of the benefit he may reap by improving his farms and increasing his forage and winter holding. The law has already laid down one rule for limiting the servitude, *viz.* the number of cattle the dominant tenement can fodder in winter; which seems to be quite sufficient, and to make any other unnecessary.

The Lords sustained Culdares' proof as the most pregnant.

The next question was with respect to the hill-mares, goats, &c. It was argued, That Culdares had no right to pasture them upon the forest, and that they could not fall under the servitude, for this reason, that the rule for limiting servitudes laid down in our law, *viz.* the winter holding, will not apply to those creatures which require no winter holding; besides, the pasturing of these creatures upon the servient tenement is contrary to the nature of a prædial servitude, which primarily respects the utility of the dominant tenement; to which, in this case, the hill-mares, &c. can be of no use, being only brought up for sale, and not for any uses of agriculture.

To this it was ANSWERED,—That though the rule of the winter holding applied to most cases of servitude of pasturage, yet it did not apply to all, and particularly not to a right of pasturing sheep, which require no winter holding, no more than the goats and hill-mares: that the number of these creatures to be kept on the forest was sufficiently ascertained by the proof taken of the possession for several years past: that this servitude could not be said to be *ultra utilitatem prædii dominantis*, the fruits of which consisted almost wholly of cattle and horses, goats, &c.; it was by them that the tenants paid their rents; and particularly, with respect to the hill-mares and goats, it is known that there are no tenants in that country who do not keep a certain number of them.

The Lords allowed the servitude to comprehend the hill-mares and goats.

It was further insisted for Bredalbane; that, in this case, the dominant tenements had certain summer sheilings belonging to them, which could pasture a considerable number of cattle, as appeared by a proof brought; that Culdares' tenants were in use to let these sheilings to drovers, and to pasture their whole cattle upon the forest; which Bredalbane apprehends is an abuse of the servitude that ought to be restrained, and the forest in so far eased as the grazing of these summer sheilings will extend.

ANSWERED for Culdares,—That he apprehended this point was pled and overruled at last calling, in June 1741; and therefore had taken no proof at all as to the extent of these sheilings, and he conceived the Earl's proof to be superfluous, and not warranted by the Act. *2do*, If the point were yet entire, he could contend that he was at liberty to use his property as he thought fit, and either keep his grass for graziers or for himself, as he judged most profitable.

in the same manner as a man, having a servitude upon his neighbour's moss, may spare his own, and cast all his peats in the servient moss.

The Lords found, That Culdares behoved to use his servitude *secundum arbitrium boni viri*, and therefore could not let his own grass, and drive his whole cattle upon the forest.

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1742. November 18. CREDITORS of ROBERT and JAMES ROBERTSONS, Merchants in Glasgow.

[Elch., No. 20, *Arrestment* ; Kilk., No. 10, *ibid* ; Rem. Dec. No. 33.]

THE specialties of this case are carefully to be observed :—*1mo*, At the time of the arrestment, the persons for whose debt the arrestment was laid on, were bankrupts, and consequently no longer partners ; *2do*, The arrestees were managers of the venture ; *3tio*, The arrestment affected only the profits of the current venture. So that it is not yet decided,—*1mo*, Whether, if the copartnery had been yet subsisting with respect to the Robertsons, the arrestment would have been competent, though it is probable, from the reasonings of the Lords, that they would have found it competent ; *2do*, It is not decided, if the Robertsons had been themselves managers, whether an arrestment could have been at all laid on, or in whose hands, or what effect it could have had ; *3tio*, It is not decided whether an arrestment, in such a case, could affect any more than the share of the stock and the profits of the current venture, and whether it could be extended to the profits of subsequent ventures.

*June* — 1748. The Lords found, That the arrestment of company goods in the hands of a factor, for the debt of a copartner, carried only his share of the profits upon a count and reckoning.

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1742. December 8. PATERSON against ———.

[Elch., *Indefinite Payment*.]

FOUND, that indefinite payment is not to be imputed *in duriorem sortem*, according to the rule of the Roman law, but, on the contrary, it is to be imputed towards the payment of that debt which is either worse secured, or bears no interest ; because it cannot be supposed that the creditor would accept of a partial payment of the debt best secured and yielding most profit, without doing immediate diligence for the other debts ; and therefore, it is reasonable that the imputation should be made by the law, in the same manner as it probably would have been made by the express agreement of parties. On this principle, the Roman law, where there are interests due, imputes the payment first to the satisfaction of them before the principal.

This decision was unanimous.