

1769. February 14. WILLIAM PORTEOUS and OTHERS *against* JOSEPH ALLAN and ALEXANDER MORTON.

SERVITUDE.

The right of a Drove-Road, for the passage of sheep to and from an annual fair, may be acquired by prescription.

[*Faculty Collection*, VI. 170 ; *Dictionary*, 14,512.]

AUCHINLECK. Drove-roads are a great nuisance. They are like mill-roads, when the whole thirle, according to a barbarous ancient usage, assembles to transport a mill-stone. They are like hunter's roads, where *in via nulla via*. The drovers do not desire the use of any high road ; for a high road is hard for the cattle's feet, and produces no grass. They choose to go upon a soft road ; that is, they choose to consume their neighbour's grass. All the country, if uninclosed, is left exposed to their encroachments. Roads are committed by law to the justices of peace. But can they take the charge of repairing what is called a drove-road ? No ;—nor would the drovers thank them for their care. There is no such thing as a servitude of this kind known in Scotland, unless by oppression, like the oppression of gipsies and sorners. Why not go by the high road ? If it is too narrow, why not make it broader ? The case of *Sir John Douglas* does not apply, for there the Court did not find that there was to be both a highway and drove-road ; but it found that the road which Sir John had stopt was the high road.

MONBODDO. If the servitude of a drove-road was a servitude known in the law of Scotland, I might have some difficulty ; but I know no such roads in our books. It seems rather to resemble a servitude of pasturage without a dominant tenement. Here there is interruption sufficient to prevent a right so anomalous ; for, in such case, I would require either an express constitution of servitude, or a total acquiescence in it. The law is thus,—I must drive my cattle by the highway to the market.

JUSTICE-CLERK. A drove-road is well known in practice. It would be of fatal consequence were the Court to find otherwise. Here has been constant and immemorial possession, and no interruption but that of confining the sheep in as narrow a tract as possible.

STONEFIELD. All servitudes are hardships on the servient tenement. If this was a reason against them, there would be no servitude permitted. A drove-road is a thing established in practice, and in this case there is constant possession of such road.

PITFOUR. I am of opinion of the interlocutor in point of law. A drove-road is a road known in law, and must be protected. When we speak of acquiring a road by prescription, where no other road is to be had, I would not much regard interruptions. But, if another road can be shown, I would not establish it by prescription, when there are interruptions.

KAIMES. From the nature of property there must be a road wherever there is a habitation. Drovers must certainly have a road. If they went down through the muir before the decreet-arbitral, they still have a right. When a country is not inclosed, every man takes a short cut; but there are not as many roads as there are short cuts, for then a country would never be inclosed at all.

PRESIDENT. There are drove-roads in Scotland,—as from Falkirk to Moffat, which is fenced in by a dike on each side; but when, in an open country, cattle are driven anywhere, this will not establish a road. The practice of driving cattle at large was frequent even in Mid-Lothian till turnpike roads were established and the country inclosed. A drove-road cannot be constituted over the whole face of a country. If there is no other road, a passage must be found: but here there are other roads, and the decreet-arbitral points out one.

On the 14th February 1769, “the Lords sustained the defences, and assoilied;” altering Lord Justice-Clerk’s interlocutor.

Act. R. Cullen, R. M’Queen. *Alt.* J. Boswell, D. Rae.

Diss. Stonefield, Justice-Clerk. *Non liquet*, Gardenston.

N.B.—It appears that this interlocutor was afterwards altered. See *Dictionary*, 14,512; and *Sup.* V. 598.

1769. February 15. ALEXANDER HOME against DAVID LOCH.

RECOMPENSE—CAPTIVE.

Ransomer entitled to an Allowance *in solatium*.

(*Faculty Collection*, IV. p. 339; *Dictionary*, 2025.)

GARDENSTON. This boy was sent upon a trying voyage,—not a sailor,—yet he was singled out as a ransomer. I thought that some *solatium* was due: reason and humanity point at this.

HAILES. There is a plain ground upon which the interlocutor may stand. It is an established rule among captors to take the mate as a ransomer. The French captain could never have deviated from this rule and pitched upon a boy to be the ransomer, unless the master of Loch’s vessel had pointed that boy out as connected with people of fashion. The master acted prudently in this, for he thereby saved his mate: at the same time, this was unjustifiable, according to Loch’s own account, for he charges board for the boy as a passenger. Now, no one ever heard of a passenger being given as a ransomer. I think that Loch is liable for the conduct of the master,—wrong in itself, but useful to the voyage; and that the sum awarded is not too high.

JUSTICE-CLERK. I am of the opinion last given, for the same reason. The second in command is always taken as the ransomer. This boy could not have been taken unless he had been suggested by the master of the vessel: herein the master acted profitably for Loch, and Loch must be answerable.