

servitudes imposed by him in the said moor. This 2d and 3d allegiances were found relevant.

Then, 4to, the heritor of the said moor having reserved to himself the property or *jus domini* in this moor, thir tenants, by virtue of the servitude constituted to them, can never be heard to impede the heritor from free and absolute using of the said moor at his pleasure: otherwise this inevitable absurdity should follow, that the right of a servitude should be of greater force, and be more effectual to him to whom the servitude is constituted, than property should be to the heritor; which everts the very nature of dominion. *Item*, where it is said that *unaquæque gleba serviebat*, that is not *Judaice interpretandum*, but *secundum bonum et æquum et κατ' ἐπιεικειαν*. *Item* if the conclusion of this summons were good, then the first feuar having the said privilege of casting in the said moor most amply set down in his charter, might have hindered the 2d, 3d, or 4th feuars, (to whom the said servitude was constituted in the same manner, and as amply as to the first,) from using their said privilege therein, *item* might have impeded the heritor from granting any other servitude in the said moor before his; which were very absurd. (*Item*, *dominium* is *jus libere utendi fruendi nisi lex vel pactum obstat*; but here the heritor's *pactum obstat*, and restricts his dominion.)

To this it was ANSWERED,—That the *ratio disparitatis* was very clear, for the reason why the 1st could not debar the 2d, 3d, or 4th, &c. is, because as yet his servitude is not prejudged by theirs, but the moor is sufficient for them all; which it is not now, in regard the same is overburdened.

The Lords laid weight on the prejudice libelled, and granted a commission for trying the same; the report whereof was, that the said moor was wholly burdened, save only three acres; whereon the Lords sustained the declarator, and restricted the heritor, that he might not burden that moor any farther; but only the three acres that were free. See 20th *January*, 1680. *Muir of Montreumont and Earl of Southesk*. \*

*Act. Mackenzie.*

*Alt. Lockhart and Cheap.*

*Advocates' MS. No. 20, folio 73.*

1670. *June 17.*

ANENT EXECUTORS.

THE Lords found that *juramentum æstimatorium* given by an executor confirmed, did not bind him for any farther nor for the prices he could get, seeing it is only *juramentum credulitatis*; though it was ALLEGED that though it could not operate against a third party, yet it should operate against the giver.

*Advocates' MS. No. 21, folio 74.*

\* The Lords also found that Donykier, the heritor, albeit he had granted servitudes of pasturage and feal and devot on this moor, yet, since before the constitution of the said servitude, he was in use to labour and till parts of the said moor, he might continue his possession of labouring and tilling, though it prejudged their servitudes, because he only constituted them as the moor then stood, and not *seipsum gravare*. See *lex 13 D. De usufructu, et passim dicto titulo.*

*Quod omnes tangit ab omnibus debet approbari, Cap. 29. de Regulis Juris in 6to. L. ult. C. de autoritate prestanda. Argumentum L. 8. D. de aqua et aquæ, &c. valde huc facit. Vide Dumnum eleganter ad dictam regulam 29. in 6to. Vide infra June 1677, No. 579. S. 11. Vide L. 13. S. 1. Digestis de servitutibus rusticorum.*