mages and expenses, and was fined £5 to the poor, for having given directions to his servant to fill up a blank execution, signed by a messenger and two witnesses, without any direction or information from the messenger; by which means the execution was made *personal*, whereas it was only at the party's dwelling-house, and the witnesses were made attest a fact which they knew nothing about, having seen no execution at all, either personal or at the dwelling-house.

1740. *July* 15. EARL of BREDALBANE *against* MENZIES of CULDARES.

[Elch., No. 21, *Prescription.*]

THE question here was, Whether Culdares had prescribed a right of servitude of pasturage upon the Royal Forest of Mamlorn, of which Bredalbane was heritable keeper.

It was argued for the Earl, 1*mo*, That such a right was not prescriptable, because such prescription was contrary to the nature of a forest, and to the public law, particularly to the Act 12th Parl. 4, James V. Act 210, Parl. 14, James VI. &c. by which all the subjects were prohibited, in the strictest manner, to pasture their cattle, or do any deeds of that kind, within the forest. And as it is impossible that any person, by repeated transgressions of the law, can acquire any right to transgress the law; so it is impossible, in this case, that any possession, how ample and uniform soever, can give any right or servitude of any kind. 2*do*, Supposing a servitude here prescriptable, yet it is not prescribed, because Culdares has no sufficient title for such prescription, being only infeft in part and pertinent, whereas, a title for prescribing a servitude must be more explicit and particular, and it is even doubted by some of our lawyers, whether an infeftment *cum communi pastura* be a sufficient title for acquiring a servitude by prescription on another man's lands.

The Lords had no regard to this last defence, and were all of opinion that part and pertinent was sufficient for the prescription of a servitude. As to its being prescriptable, a great majority were for the affirmative, but upon different principles. The President thought, that, in this case, possession being proved forty years back and upwards, it is presumed to have been before the erection of the forest, by which no antecedent right could have been taken away. Arniston was of opinion, that it could scarcely be supposed that Culdares or his authors had any right of servitude antecedent to the erection of the forest; because he thought, if that had been the case, there could hardly have been any erection; but he thought that such an uniform possession, for so long a tract of time, presumed a grant from the crown, after the erection of the forest, in favour of Culdares' author; which, joined with the infeftment in part and pertinent, made a connected title of prescription. But almost all of them thought that no right in this case could be acquired by possession only, as being contrary to law.