

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 decret-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 decret-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.

PRESIDENT. I have some doubt as to *solatium*. Would inquire whether the boy's friends knew that he was to be sent to Havannah instead of Hamburg; for, if so, there was a fraud and a wrong, and the *solatium* given would be too small.

On the 15th February 1769, "The Lords found Loch liable in £40 sterling, and in expenses;" adhering to Lord Gardenston's interlocutor.

Act. R. Sinclair. *Alt.* R. Blair.

1768. *January 8th; and 1769, June 13.* LADY LEITH, and her CHILDREN, *against* EARL of FIFE.

REPARATION.

Amount of Assythment.

THIS case is reported by Lord Kaimes, (Mor. p. 13,904,) who has stated the circumstances, and the argument maintained on the question, whether an assythment was due? That question having been determined in favour of the pursuer, it next came to be considered, What sum should be granted in name of assythment?

The following is Lord Hailes's report of the opinions delivered by the Judges on that point:—

HAILES. We have no *data* by which to determine the extent of the assythment. After the Rebellion in 1715, it was proposed to take five years' rent of the estates of those concerned in the rebellion, and to grant an amnesty. May not something of the same kind be done here?

PITFOUR. That proposal came from a friend of Lord Hailes, who did not like forfeitures. It was three, not five years' rent; but I think that five, or even three years' rent, is by far too much. In punishments, both *consilium et eventus* are to be considered. Here there was no premeditated intention of murder; but still there was a man killed, and consequently an assythment is due. The patrimonial loss of Leithhall's family does not affect me, for that loss is not proved.

AUCHINLECK. Anciently, there were regulations or rates for the price of blood, estimated according to the circumstances of the person slain: there was the *kelcher*, (head money,) "*domini regis, comitis, thani, vel rustici.*" In later practice, assythment has been regulated by other principles: the circumstances of the slayer are attended to as well as the rank of the slain. The assythment, here, ought to be moderate, for the slayer has a wife and nine children, and a small fortune.

KAIMES. I must suppose that there was a voluntary killing. The wife and