

S E C T. X.

*Servitus Iineris.*1623. *June 27.* NELSON *against* SHERIFF OF GALLOWAY.

No 138.

Prescription
of a road to
the kirk
through a
corn field not
sustained
without a
title, unless
upon posses-
sion past me-
mory of man.

IN an action pursued by Gilbert Neilson against the Sheriff of Galloway, to hear and see it found and declared, that the pursuer was in use, and his predecessors, of a gate and passage through the defender's lands unto his parish church, by the space of 30 years without interruption, and that whether the said defender's land, through which the said pursuer had his said possession, was laboured for corns, or lay lee for hay or grass, by the which way they were in use to pass from their own house to the church, as well on horse as on foot; and therefore the defender to be decerned to desist from troubling of the pursuer, and his men and tenants, in any time to come, or compelling of them to go or come to and from the church otherways than conform to their bypast use of possession; the Lords sustained the action, founded upon the foresaid use and possession uninterrupted, to infer and constitute a servitude, albeit there was no writ nor other ground libelled to qualify the grant of any servitude by the defender, or his predecessors, to the pursuer, or his predecessors, except only the possession uninterrupted; but the Lords found, that the possession ought to be proven to be immemorial and past memory of man, and would not sustain the offer to prove possession for 30 or 40 years.

Act. *Per se & Hope.*Alt. *M'Gill.*Clerk, *Gibson.**Fol. Dic. v. 2. p. 108. Durie, p. 67.*

* * * Haddington reports this case :

IN the action pursued by Gilbert Neilson of Kirkcaffie against the Sheriff of Galloway, for permitting him to continue his gate from his house to the parish kirk through the Sheriff's corn land, according to his possession, the Lords, finding no title libelled but possession, would not sustain the summons, unless he would libel possession past memory of man.

*Haddington, MS. No 2872.*1673. *June 20.*The LAIRD OF FARDELL *against* Mr ROBERT WEMYSS of Cutlehill.

No 139.

Found in con-
formity with
the above.

IN a declarator pursued at Fardell's instance for having the liberty of a passage and highway for carrying of coals from the coal-hill to the port of Aber-

dour, through the lands of Cutlehill, it was alleged for the defender, that the declarator could not be sustained, because, there being no highway through his lands, but a private road, which the pursuer and his predecessors have only bruiked by tolerance from the defender's authors, and they having often interrupted the pursuer's, by casting down their roads and making them pay a duty for their passage, the pursuer having no special constitution of servitude in writ, nor founded upon prescription, there was no ground in law for this declarator. It was *replied*, That the pursuer was not well founded in law, notwithstanding of these alleigances; because the port of Aberdour being a free and public port, where not only the pursuer, but several other neighbours who had coal-works, did carry the same to be loaded thereat, and their corns, to be sold at Leith and other places, by exportation, and that they have been in possession of the said way through the defender's lands, without interruption, past memory of man, which in law was sufficient to constitute their right by prescription, without any writ. THE LORDS, before answer, having granted commission to two of their number to visit and to examine witnesses, for both parties, upon the place, concerning the possession, or deeds of interruption, by casting off of loads; and having perused all the depositions, did find, That the continued possession for the space of 40 years and above, without interruption, was proven by several witnesses, some past 100, 80, and 70 years, and several others under that age, and that there was only one witness who proved interruption during that time; and as to all deeds of interruption, by casting off of loads or exacting money, they were only of late, and done to servants, notwithstanding whereof their masters did continue to pass that way: In respect whereof, the Lords did sustain the declarator for passage to a horse and a load to the port of Aberdour, conform to use and wont, but not to make it a king's highway; especially considering, that albeit there be no constitution in writ of a servitude, but by permission and tolerance, heritors have been in use to carry corns to a public market, or to harbours and ports, or to go to church, by a private road through their neighbours lands, prescription by possession is a sufficient title in law, and it concerns the public good that it should be so, seeing otherways all trade and commerce of native commodities, which cannot be vended at home, would be obstructed.

No 139.

Fol. Dic. v. 2. p. 108. Gosford, MS. No 594. p. 339

1700. February 21.

Mr ROBERT WHITE of Bennochty *against* J. WEMYSS of Bogie-Bennochty.

PHESDO reported Mr Robert White of Bennochty, advocate, against J. Wemyss of Bogie-Bennochty: Being about inclosing some ground, he did take in a passage and road, by which Bogie used to go to his parish church of Abbotshall, and the next market-town of Kirkaldy; and Bogie having complained of it to the

No 140.

An heritor sold lands, through which his road lay to church, neglecting to