ought to be reduced to the height it was of 40 years ago, or if the raising it higher from time to time, though within the 40 years (at one of which Mr Bruce's tenants assisted) was sufficient evidence that he had a right to raise it to any height necessary for draining his coal, though there was no other constitution of the servitude than prescription, and though these heightenings were occasioned by bringing in more water? The Lords found that Colonel Dalrymple has right to have a reservoir of water sufficient for draining his colliery, and therefore to continue his dam-dike of the height it now is of. The interlocutor seemed pretty unanimous. I observed none against it but Royston and myself, —4th November. 11th December, Adhere.

No. 3. 1743, Nov. 22. THE EARL OF BREADALBANE *against* MENZIES.

THE Lords, 21st December last, found that Culdares having a servitude upon the forest of Mamlorn, and having also a shealing (Benecastle) properly belonging to himself, that he could not set his own shealings, or otherwise use the grass of them than for maintenance of the number of cattle we found he could hold in winter. The question was again brought before us by a reclaiming bill and answer, and the Lords adhered. Kilkerran and Murkle did not vote.

No. 4. 1750, Jan. 12. KINCAID *against* SIR JAMES STIRLING.

SIR JAMES built a lint-mill with a dam quite across a river, betwixt his lands and Kincaid's, and rested the end of it on Kincaid's land, who sued him to remove it. His defence was, that he did it with Kincaid's consent; and on a proof allowed, proved that he said to Kincaid, that if he would not build a lint-mill, he Sir James would; to which the other answered, well well; that he built the mill and dam without objection from Kincaid, though within sight of his house, but who was confined with the gout, and who lent him tools when at the work, and afterwards sent lint to dress at the mill, which seemed to amount to a *non repugnantia*; therefore the question was, Whether he could now oblige him to take away the dam? Kincaid insisted that this was no consent, and that he had other places to build on. 2dly, That servitudes cannot be constituted without writ, nor proveable by witnesses. 3dly, That if he had consented, yet till writ there is *locus pœnitentiæ*. On the other hand it was contended, that Kincaid was barred *personali exceptione*. But it carried to oblige Sir James to take away the dam, 23d November last; and this day after long debate we adhered, *renit.* President, Milton, Drummore, &c.

No. 5. 1751, Jan. 18. MR ALEXANDER ROSS *against* ROSS.

ALEXANDER Ross purchased the lands of Little Dean, and was making improvements by inclosing, which were stopped by Priesthill as heritor of Meikle Dean, lying on the north, who claimed a servitude of a road through these inclosures for carrying turf, &c. from a muir south of Little Dean, belonging to the estate of Balnagowan. On a proof allowed to either party, it appeared that the heritors and possessors of Meikle Dean had been past memory of man in the uninterrupted possession of that road, and of casting turf in that muir, till Mr Ross began to make these inclosures, which the defender immediately in-

terrupted, and it also appeared that he had no other road that with any tolerable conveniency he could use to that muir. On the other hand, Mr Ross proved by documents in writing, that the heritors of Meikle Dean had also got a wadset of Little Dean as old as 1645, which was not redeemed till 1610, that Balnagowan sold the reversion, and the reverser redeemed; and that after redemption the heritors of Meikle Dean got a tack of Little Dean till 1726, after which for some years the heritor of Little Dean possessed it himself; but thereafter till 1744 either the heritor or tenant in Meikle Dean had a lease of that part of Little Dean where the road was. It also appeared that Meikle Dean now holds of Munro of Foulis, and it did not appear from whom he purchased it; and although the pursuer admitted in the act that it also was once part of the estate of Balnagowan, yet now he disputed it. The question at advising was, Whether the possession by the heritor and possessors of Meikle Dean of a road through Little Dean, was sufficient to constitute a servitude, notwithstanding the rights they had all that time either of wadsets or of tacks to Little Dean? The Court thought that 40 years possession in that case would not be sufficient when the beginning of the possession did appear; but that immemorial possession whereof the beginning neither did nor could appear was sufficient, and that their possession must be presumed *retro*; because though the possession had been more than 500 years, it must be impossible to prove more than immemorial possession; and in this case were the dispute with Balnagowan, Little Dean could bring no other proof to support their right to cast turf in that muir than the defender has brought for Meikle Dean, since possession can no other way be proven than by parole evidence. Therefore the Court found that the defender had sufficiently proved his right to the road in question; and assoilzied the defender from a reduction Mr Ross had raised of the Sheriff's decreet against him, and a declarator of immunity from that servitude,—the President alone differing. But we all agreed that if the pursuer could give the defender another road as convenient, though it were a good many yards longer, he could not use his servitude emulously. 19th February, we adhered, the defender making the new road as good, and not above 300 yards about.

No. 6. 1752, June 11. KINCAID *against* SIR JAMES STIRLING.

IN this case, which is marked 12th January 1750, *supra*, Sir James Stirling complained that Kincaid had turned the curve of his dam-dike upward, which before was downward, and thereby took in more water, and Kincaid complained that Sir James had diverted the course of the burn on his side of the river, called Newmill-burn, that before did fall into the river above his dam-dike, but he had now by a sluice carried it to his lint-mill below Kincaid's dam:—On which we remitted to Mr Gray, a mathematician, to inspect and report; and he reported, that the altering the curve in the dike made no alteration in the quantity of water: 2dly, That Kincaid had sufficiency of water without the help of the burn; that it was not quite the 100th part of the water in the river; and that by the old vestige of the natural course of the burn, it appeared to him to have been below Kincaid's dam-dike; that it entered the river till Sir James's predecessors diverted the course of it to serve their own corn-mill, from whence it fell into the river above the dam-dike till Sir James built his lint-mill, and altered the course of the river. We assoilzied