to the father, and without his consent, and as there was undoubted evidence given of the father's consent, who might have destroyed the personal disposition, and the charter and sasine would still have been good, the charter could not justly be reduced; whereas here the objection is, that neither David the apparent-heir, nor Durie the superior, had the feudal right that was in Andrew the father, or could convey it to any third party till it was first established in David as heir to his father; and with respect to the personal disposition 1686, though David might have conveyed it to Andrew his son, yet he could not do it without some writing under his hand, and his acceptance of the charter from Durie never could have the effect of conveying to Andrew that disposition, or enable him as assignee to it, or now his sisters to resign it in the superior's hands; that the act 1693 requires the notary in his instrument of resignation to set furth the resigner's right to the procuratory, whether heir or assignee, and no notary could do so upon these implied conveyances. Two several questions were put. First, it was found that Andrew the son had no feudal or real right to the lands;—and next, that the disposition 1686 was not conveyed to him. Some of the Lords were of very different opinions in both;—particularly Drummore. He spoke against both, and voted against the first, and at last agreed to the second, in which lay my greatest difficulty. Murkle was clear for the first, but was against the last,—29th January. 12th June Adhered. The President clear. *Renit.* Drummore, Kilkerran, *et* Kames.

SERVITUDE.

No. 1. 1734, Nov. 27. GARDEN *against* THE EARL OF ABOYNE.

THE Lords found the servitude upon the woods a predial servitude, and may be constituted by a personal declarator with possession even against a singular successor; and remitted to the Ordinary to hear upon the other points, Whether Huntly, the Crown's ward vassal, could constitute a servitude so as to prejudge the Crown when the lands returned by forfeiture? 2dly, Whether immemorial possession will prefer *retro?*

No. 2. 1741, Dec. 11. BRUCE *against* COLONEL DALRYMPLE.

THE Colonel had a gathered dam for draining his coal, whereof a part, as well as of the dike that kept up the water, was on Mr Bruce's grounds, and had been so more than 40 years, only the dike was then but three feet high, and covered little of his ground; but as the caul to the dip required a greater force of water, the Colonel at different times within the 40 years, brought in water from different grounds, and raised the dike, so that it is now three ells high, and stretches much further on Bruce's ground, as the dam also covers much more of it, but I believe he does not yet lose an acre, and the ground I suppose not very valuable. Mutual declarators of immunity and servitude being pursued, the proof was now advised. There was little question that a servitude was constituted by prescription. The question was only as to the *modus,* Whether the dike

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-