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 allegeances; 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 Bennochy *against* J. WEMYSS of Bogie-Bennochy.

No 140.
An heritor sold lands, through which his road lay to church, neglecting to

PHESDO reported Mr Robert White of Bennochy, advocate, against J. Wemyss of Bogie-Bennochy: 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.
reserve it. He continued to possess it 28 years without challenge. The prior possession allowed to connect with this, to secure his right.

Privy Council, they did stop the work. Whereupon Bennochy raised a declarator of immunity, that these lands being sold to him by Bogie's predecessor *prout optimum maximum*, they behoved to be free of all servitudes; and consequently Bogie could make no roads through his corn, but behoved to go through his own ground, though it did cost him somewhat about. *Alleged*, Bogie and his authors have immemorially past that way; and it is a natural servitude on the property of the earth to afford passages to neighbours through the same, it being done with as little damage and inconvenience to others as may be; and as to such cases, the ancient community of the earth reconvalesces; and it is both invidious and unneighbourly to deny him a way to the parish kirk and nearest town: And suppose Bogie had sold the ground adjacent to his dwelling-house, without reserving ways, can any rational man think that he must be cooped up and confined? will not common sense tell us, that free ish and entry is reserved, and that such an alienation is to be understood not *stricte et judaice*, but *civiliter?* What if he had his water to bring beyond Bennochy's land, or had an acqueduct or mill-lead running through his ground, could Bennochy, by this *actio negatioria* of immunity, debar him in these cases? *Answered*, The land through which the road controverted lies belonged formerly to Bogie; and, in 1671, was sold to Bennochy's father. While it was Bogie's own, he could have no servitude on it; for *res sua nemini servit*, and it is only 28 years since the alienation; and though he had possessed all that time, it is not sufficient to infer prescription: And Dury observes, 27th June 1623, Neilson of Craigcathy against the Sheriff of Galloway, No 138. p. 10880. that 30 years possession was not sustained to constitute a road to the church. The Lords considered, if this were done in order to inclosing a park, Bennochy has liberty to cast the way about (even though it were the King's highway) 200 ells; but seeing he insisted in his declarator abstract from that effect, some of the Lords thought a way through another man's corn could only be introduced and established, either by 40 years precription, or consent of the heritor of the servient tenement, or such a necessity as did cast him intolerably far about, or gave him a way very bad and uneasy; in which case, *malitiis non est indulgentum* on either hand; and there appearing humour in this cause, they declared they would hear the parties in their own presence; and, in the mean time, recommended to some of their number to endeavour a settlement betwixt them.

1700. *July* 17.—The declarator at Bennochy's instance against Bogie, mentioned 21st February 1700, being this day debated in presence, and advised, the Lords found a *via vicinalis et privata*, through another heritor's ground to the church or market, if not constituted by paction or consent, required prescription by 40 years possession. But the difficulty here was, there were only 28 years run since Bogie had sold this off to Bennochy; and to take in 12 years preceding the said alienation, to make up the 40 years, were to give an heritor a servitude of a highway in his own ground *contra naturam domini, cum res sua*

nemini servit. Yet the Lords considered, if these two were not conjoined, how many pleas this might awaken where heritors had sold off some of their baronies, and though they had not reserved their ways and passages in their dispostions, yet these servitudes being *innoxiæ utilitatis*, it must be presumed, if they had been mentioned at the time of the sale, they would have been presently granted and yielded to. As to the thirlage, and other more onerous servitudes of pasturage, &c. it may be otherwise, unless they were specially reserved. And therefore the Lords found Bogie had right to this road, he proving immemorial possession, by conjoining his use and custom of going that way either before or after the alienation of the lands of Bennochy. No 140.

Fountainhall, v. 2. p. 91. & 104.

1713. *June* 5.

The DUKE of ROXBURGHE *against* the MAGISTRATES, TOWN-COUNCIL, and COMMUNITY of DUNBAR.

No 141.
Found, that no public way can be made upon a private property, without consent, or uninterrupted prescription for 40 years. But it being proved that the fishers of Dunbar coast, when they could not, by reason of high winds, make the harbour of Dunbar with their boats, were in use of landing on the Duke of Roxburghe's ground, and the lieges of leading fishes, and necessaries for fishing, to and from Dunbar and the neighbouring country, through that ground, upon payment of eight pennies Scots the loaded horse, and sixteen pennies for

IN the mutual declarators, one at the instance of the Duke of Roxburghe against the Town of Dunbar, concluding a declarator of property of the Links of Broxmouth, *usque ad mare*, free of all servitude of passage, and the other at the Town's instance against the Duke, concluding, that it ought to be found and declared, that they had right to all highways through the Links of Broxmouth, possessed by them past memory of man, and to stop the inclosure by a dike his Grace was building; the LORDS, by their interlocutor February 9th last, found, That no public way can be made upon the Duke's property without his consent, or the uninterrupted prescription for 40 years. But found it proved, That when by high winds fishers on that coast cannot make Dunbar harbour with their boats, they are in use of landing on the Duke's ground, and the lieges of leading fishes, and necessaries for fishing, to and from Dunbar and the neighbouring country, through that ground, upon payment of eight pennies Scots for the loaded horse, and sixteen pennies for the loaded cart;—and therefore declared the Duke's property with the said quality, that there should be still access to the lieges for passing through the said ground, for the said ends, for payment of the said duties; and assoilzied from the Town's declarator accordingly. It was *observed* at advising, That in highways through a private subject's ground, the Crown acquires the property of the road, which makes the prescription of 40 years necessary. And it might prove inconvenient, should every use of going through a private man's ground constitute a highway.

The Town of Dunbar reclaimed against this interlocutor, upon the grounds following: 1*mo*, Forty years prescription is not necessary to the constitution of a highway; because that, being *juris gentium*, the rules concerning it fall not under statutes made concerning prescriptions of obligations, property, or servitude.