

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. 1748, 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-