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

from the complaint as to the curve;—but as to the burn, several thought that it depended on what was reported by Gray as to its natural course, and if that was proved, thought that Sir James might again alter it. But as that point was not mentioned in the remit to Mr Gray, his report was no evidence, and therefore were for a new proof; and of this opinion were Drummore and Kilkerran; and at first the President as to the point of law, but thought his report was evidence. I thought the decision did not depend on what was the natural course of the burn in this case, because if it was necessary for Kincaid's mills, he had acquired a servitude on Sir James as well for the burn as for the river, and Sir James could not divert the burn, no more than a part of the river; but if it was not necessary for Kincaid's mills, which was the fact reported, the servitude could not emulously be extended beyond the necessary use of the mills. Kilkerran agreed with me, and the Court came into my opinion, and found that Sir James might dispose of the burn as he pleased. Kincaid then insisted in his conclusion of declarator, that he might from time to time repair his dam-dike of the height it now is, which we found accordingly. The President thought, that if it was necessary he might raise it a foot higher.

SOCIETY.

No. 2. 1736, July 13. WALKINGSHAW *against* CRAWFURD.

THE Lords adhered, and found the society dissolved by the attainder.

No. 3. 1737, Feb. 23. BUCHANAN of Drumankill *against* REID.

THE Lords adhered to the Ordinary's interlocutor, finding no sufficient proof of copartnery with M'Nair as to the sheep in question. I doubted much, but what determined me for the interlocutor was, that there was no evidence that these sheep were at all butchered by M'Nair, and far less that they were butchered at their common stand.

No. 4. 1738, Feb. 15. BOGLE, &c. *against* BOGLE, TROA, &c.

THIS being a process of sale of the effects of a copartnery, (a rope manufactory) consisting not only of the materials, but of houses and debts, in order to a division,—it seemed very doubtful whether we could order a sale of the houses and debts upon a process *communi dividundo*, where the defenders opposed it, or as in this case were absent and infants; since houses might be possessed *pro indiviso*, as in the case of heirs-portioners and others, and debts might be divided or uplifted by a factor, and the sale was not founded upon either of the acts 1681 or 1695. However, the Lords found they could appoint a sale, and did it accordingly.

No. 5. 1738, Nov. 23. FORBES *against* WALKINSHAW.

See Note of No. 6, *voce* ANNUALRENT.