Nimmo, sometime Commissary Clerk there; wherein the case was; the Commissary Clerk being addebted in a small sum of money to Sir William, Sir William pursues him for the same: wherein Nimmo alleged it was paid and discharged, but the discharge had miscarried, and therefore referred the truth of his allegeance to the Commissary's oath; who swore *positive*, it was yet owing. Nimmo in all companies did not stick to assert the Commissary had perjured himself; whereupon the Commissary cites him before the secret council for a defamer and slanderer; there he offers to verify it, and so could not be punished, and produces a discharge of that debt under the Commissary's own hand before his oath. The Commissary storms and offers to improve it as false. The Council sends them to the Judge-Ordinary. There are two witnesses at it; the one of them Sir William's man, who being examined by the Lords, denies his subscription; the other, Mr. Nimmo's man, upon oath, astructed the truth of the subscription.

The Lords, by a kind of trysting interlocutor, assoilyied both parties *hinc inde*, the one from falsehood, and the other from calumny; only found the discharge null, and therefore ordained Mr. Nimmo to pay the sum sworn by the Commissary to be owing: which seems very contradictory. It was thought by many the discharge was a true deed, and though the Commissary was a person of integrity and honour, (which was the great cause of the Lords their decision,) yet it was wondered how he forgot it so soon, seeing *probabilis oblivio in facto proprio recenti non cadit.* This interlocutor may seem strange, *quia inter verum et falsum non datur medium.* See 15*th December* 1680, *Arbuthnot of Knox.*

Advocates' MS. No. 383, *folio* 162.

1672. *December.* SIR JO. HENDERSONE of Fordell *against* MR. ROBERT WEYMES of Cuthlehill.

IN the same month of December, 1672, was debated the declarator raised by Sir Jo. Hendersone of Fordell against Mr. Robert Weymes of Cuthlehill, to hear and see it found and declared that he and his predecessors had for the space of forty years and upwards, been in possession of the harbour of Aberdour, and of a high way leading through the said Mr. Robert's lands of Cuthlehill, for driving their coals to the said harbour from their coalheughs; as also, had right to the said highway and passage, and had accordingly carried their corns and other goods to the said harbour, and exported and imported thereat as the usual harbour and port of that place, till they were wrongously debarred from the use thereof by the said Mr. Robert; and with the which declarator, the Earl of Murray, towns of Innerkeythin and Aberdour, and neighbouring heritors, did concur.

ALLEGED,—That the defender being heritor of the lands of Cuthlehill, within which both the said burn-mouth, called by the pursuers a harbour, and the said way leading thereto, were locally situated, he was founded *in jure communi* to impede and interrupt all others from passing through or using his property, unless the pursuers had a sufficient right in their persons to the said way or harbour, either by the formal constitution of a servitude, by a contract clad with possession, or

by the equivalent prescription, which are the only two ways for establishing servitudes in our law. *2do,* Any possession the pursuers can allege upon is not sufficient for prescription, because without any title; as also the defender offers to prove interrupted both *via facti et juris.* *3tio,* Fordell has acknowledged the pursuer's right, by accepting a tolerance some five years ago from this defender's authors, for driving his coals that way; which is a clear demonstration that Fordell had no right else, seeing the taking of that tolerance is inconsistent by our law with his having a right *jure proprio;* and which tolerance can never give him right either to way or harboury, or sustain this declarator, because his author was long before inhibited, and denuded of his right; however it will import against the pursuer an acknowledgment he had no right.

REPLIED, 1*mo,* The harbour being a common port, resorted to by all the country with their goods, in order to export and import, and so used by them past memory, and having no other so commodious, they must consequently, of all necessity, have right of a passage to it: *concesso consequente conceditur et antecedens, l. 2. D. de jurisdictione.* *2do,* Their declarator is founded in law, viz. the 53d act Queen Mary, Parliament 1555, and act 156 in 1592: where all high ways and passages leading to sea-ports, &c. are commanded to be inviolably observed; and that none interrupt the Burghs or other lieges in their going or passing, under the pain of oppression; which is directly the case of the way and harbour craved to be declared, it leading both from Innerkeythin and Aberdour to the said harbour. *3tio,* Offers to prove immemorial possession beyond the defender's interruptions, they being but recent and unjust, *via facti,* and contrary to the said acts of Parliament. 4*to,* Any tolerance Fordell took was only on thir terms, that this defender's authors should not trouble him or his tenants in their right of driving that way; which was a clear acknowledgment that Fordell had right.

DUPLIED,—That the pursuers take that for granted which is in itself most false, viz. that it is a public harboury; for that being laid down for a ground, certainly a way leading to it must be granted: but there is nothing like a public haven here; for a public port, by its natural signification is a public and open station, free and patent, by immemorial possession, to all who please to make use of them; and by Justinian, or rather Tribonian, par. *2do Instit. de Rerum divisione et acq. r. d.* are reckoned *inter ea quæ sunt juris publici,* that is *quarum proprietas quidem est populi, usus vero omnium communis, nempe ex eo populo: (vide* Sixtium *de Regalibus; et* Craig, pag.) and by the feudal law and ours are placed *inter regalia,* so that with us, he in whose lands they are, hath ever an express disposition of them from his Majesty; and they who have the privileges of a harbour, have it ever specially designed in their infeftments, and get a charter from his Majesty erecting such a place in a port. Likeas Ulpian *l.* 59. *D. de V. significatione* defines a port thus, *Est locus conclusus et tutus, quo importantur merces et inde exportantur, et ut ibi naves a procellarum impetu defendantur:* * none of all which agrees to this burn-mouth, which is *statio maxime privata,* and any face it may seem to have of a harbour is only some few stones tumultuarly and indigestly gathered together by the industry of the heritors of that land, for their

* Yet Suedivin, *ad prædictum par.* interprets that law, *non de portu in mari sed de domo seu cellario concluso.*

own private use and exportation of their own coal; likeas the land on both sides of the said burn-mouth belongs to the defender, down to the very flood-mark, and never looked upon as public harbour, nor used promiscuously or uncontrovertedly by others; but on the contrary, the defender's authors did ever debar the sailors of Aberdour from coming in there, till they were glad to enter in an agreement with him in 1656, and pay him licence money; and which contract was entered into by one Tod, a sagacious fellow, and who bought and cawed Fordell's own coals, and knew well he had no right to defend him, and therefore transacted with the defender's authors for the said way and harbour; and whom Fordell would have maintained if he had had any right as he now pretends, seeing by freeing him of that, the said Tod would have paid him more for his coal. *2do*, There is no high way here, but a mere foot road made by the pursuer's authors through their own property, for their own private uses; and by ocular inspection, in many places, is not three feet broad, as appears by a dike that hath hemmed it in on either side; and on both sides has lately been tilled: so that it is so far from being *via publica regia consularis basilica vicinalis* or *prætoria*, that it is most improperly called *via privata* and *agraria* or *via* at all; it scarce being *servitus actus*, and at most but *iter* for a horse with a load on its back, for *vehiculum* or a cart cannot pass it, it is so narrow. Likeas the law, (so also defines our 8th act of Parliament, 1617, article 8.) defines the latitude of a way to be *octo pedes in porrectum et sexdecim in anfractum:* nothing of which can be observed here. And Cæpolla, *tractatu de servitutibus, Tit.* 3. *de servitute viæ, No.* 17, *pag.* 268, defines *via publica*, to be *cujus solum est publicum, item*, to be *certum solum limitatum directum certis finibus latitudinis publicatum per principem, pro usu publico meandi vel eundi;* none of which quadrates here; yea, there he affirms it is not a proving consequence to say, Publicly all have gone and passed such a way for a long space of time; *ergo*, it is a public way: for it must also be so reputed by all, and must end in a public place: which are not to be found here, neither the *terminus a quo* nor *ad quem* nor *medium* being public, as it ought to be in a public way. See *Tit. Institutionibus et D. de servitutibus prædiorum rusticorum, ibique DD.* But none ever did repute the way controverted a high way. And how might all the heritors of Scotland, lying upon the sea be oppressed, and their lands rendered unprofitable, if upon the pretext of going to burn-mouths within their lands, the lieges could make every bit of their land a road and passage thereto; seeing every time that one came, they might make a new way! *3tio*, As for the acts of Parliament founded on, they have no place here: 1*mo*, Because introduced only in favours of dry burghs that want harbours, such as Lithgow for Borrowstowness; whereas Innerkeythin lies on the sea, and hath one of the best and safest harbours of Scotland, and wherewith they boast all the country. As for Fordell, or the rest of the pursuers, the act is not conceived for them. *2do*, The acts speak only of ways leading to public ports; in which case we are not, there being no public port here. *3tio*, It gives not burghs liberty to make ways, but only to continue those high-gates whereof they had been formerly in possession; which yet differs our case from those acts extremely. *4to*, As to Fordell's tolerance, the just double thereof produced and bearing its true tenor, is opponed. And to make it appear to your Lordships, that his debarring of thir pursuers from this way and harboury is not in *æmulationem vicini*, but rather that their pursuit is such;—this defender hath upon his vast expence found a coal for the public good of

that country, they would hereby prejudge him of the sale of his coal, to enhance the price of their own; and as it would not be esteemed malice in Fordell to deny this defender a level through his ground to dry his coal with, so the defender hath the same reason to deny him this highway through his land. And it is notourly known, that many gentlemen in Scotland who have coalheughs, are forced to buy the privilege of highways to drive their coals to the sea, as in the case of the *Earl of Mar* and *Sauchie;** which were altogether needless, if this declarator were relevant. That a deed is never supposed *in æmulationem, ubi fit ut principaliter agenti prosit, non ut alteri noceat; et animus nocendi non presumitur.* And I do no wrong when I refuse you that which I am not bound to give you; for *alteri prodesse ad liberalitatem non ad justitiam pertinet.* And Fordell will have no prejudice, seeing he may caw his coals (as usually he does) to Innerkeithine, whereto he has a public uncontroverted high way, being almost as near as Aberdour burn-mouth, and on many accounts more commodious.

TRIPLIED, for the pursuer,—Where it is alleged to be but *privata statio,* it is offered to be proven that it has been commonly reputed and esteemed, past all memory of man, a public port, to which ships and boats within the country, and from foreign places, as Norway, &c. usually repair; and that the King's customers exacted custom thereat; and that Aberdour and Innerkeithing have been in use to repair the said harboury, and put in rings to fasten ships; and that ships of good burden with meson sail may come up in it, and lie there at anchor, and be secure; and that they and all the country about have been in use, past memory, to load and unload their goods thereat, and for that effect there are two convenient piers built at the same. Which, as they are unanswerable and most pregnant qualifications of a public harbour, so, if need be, it is farther offered to be proven, that this was the station and port which of old appertained to the abbacy of Inchcolme, and was the place whereat the monks and their provisions were wafted out and in, and was common to all the feuars of the abbacy: and consequently cannot be appropriated now upon a private humour by Cuthlehill, whose predecessors, Stuart of Maynes, got a small feu of some fifteen acres from the Earl of Murray, in King James the 6th his time, as lord of the erection of that abbacy; nor can the rest of the feuars be debarred, or any who possessed and frequented that harbour before the so recent feuing of these lands of Cuthlehill, which in effect was all the lieges who pleased to resort thither. As to the way, it is replied, 1*mo,* They need say no more for their right to it, save that [it] leads to a public port and harboury, and so, without a gross impeaching of the acts of Parliament, none can stop it. 2*do,* Whatever it be, whether *iter actus* or *via,* they have prescribed by possession and custom of going that way, past all memory, uninterrupted, a passage for horse and loads; and they contend *id tantum præscriptum quantum possessum.*

QUADRUPLIED,—All the qualifications adduced do not amount to make a public harboury; but there must be ever an erection, seeing a general disposition will not carry it, nor yet the adjection of pertinents, it being *inter regalia.* As to the pretence that it was the harboury of Inchcolme, it is most false; seeing there is another creek, near a mile shorter way, which was their common port,

* See it at the *26th of December,* 1665, beside me. See also M'Keinzie's Pleadings, *Hayning* and *Town of Berwick.*

and where there is yet an artificial cove that evinces the same. As to [the] second, about the way, that it must follow, because *ducit ad locum publicum;* that is *petere principium,* seeing there is no public harbour here; for then it behoved to be notorious known to all the country about, and controverted by none, and judged by seamen (and not by two mean obscure witnesses, who know not what a public port is, as not falling *sub sensus,*) for such; nothing of all which is here, but a pitiful burn-mouth, never holden for one; else all the strips in Scotland, where they degorge into the sea, should as well deserve that denomination.

The Lords, before answer to this debate, ordained witnesses to be examined for either parties upon thir points, viz. Whether the way in question has been reputed and holden a common high way; and how long; and, if not a public way, then how long the pursuer hath been in use to pass that way with horse and loads, and if he hath any constitution of a servitude: and also ordained the pursuer to prove in what way and manner the said harboury has been reputed and holden a public port, and how it was made use of by the pursuers, or if they prove it such by an infeftment erecting it; and ordained the defender to prove his own and his author's deeds of interruptions and the acknowledgments he got for granting licences to others to go that way: and nominated the Lords Abbotshall and Preston to go and visit the ground, and receive the depositions of the witnesses, in the Yule vacance approaching: which they accordingly did.

Thir depositions falling to be advised on the 13th of June, 1673, and the parties called, much of the former debate was resumed. Likeas, it was added, that any immemorial possession Fordell's witnesses had deponed that he, his tenants, or coalcawers, had through this way to the said harbour, could not be respected to constitute this grievous and odious servitude upon his lands; 1*mo*, Because obscure fellows, practised and drunken on, so that three of them died within some few days after; and cannot prove forty years above the interruptions, which are proven twenty years back. 2*do*, Mr. Robert's authors were sundry of these years minors, and so must cut off many off their prescription; and which he must be allowed to prove, being only in an act before answer. 3*tio*, All they depone is, they ever saw them drive horses and coals that way: which is very consistent with Mr. Robert's allegeance, that they did it by tolerance upon the payment of acknowledgments; and whereof the witnesses either might be ignorant, or make no mention of it, being ignorant country people, and not specially interrogated on it. 4*to*, No presumption could run against Maynes, the defender's author, because absent in Orkney the great part of all that time their possession is proven, and which has been *vi clam vel precario,* or by negligence of servants. And such odious prescriptions ought only to run *sciente et præsente domino;* which was not; at least the common law allows upon most solid and excellent reason, twice as much time to prescriptions *inter absentes* as *inter presentes,* viz. 20 *anni* to the one and but 10 to the other.

The Lords found the tolerance produced by the defender a formal constitution of a servitude; and therefore declared Fordell in right thereof might carry his coals through the said way to the burn-mouth, without any molestation to be made to him by the defender; reserving always to the defender what grounds he had in law for quarrelling the said tolerance by prior inhibitions or otherwise. And in regard the witnesses adduced for the defender did not depone upon the precise time of the interruptions backward, so that it did not appear if there was forty years above the interruptions peaceably prescribed; therefore, they ordained

those witnesses to be re-examined as to that part; their depositions being to lie *in retentis*, to be considered and advised by the Lords, in case the defender shall annul that tolerance granted by his author to Fordell.

This interlocutor surprised both parties: though it was most favourable to the defender; for we never dreamed the Lords should have run to the tolerance, which, as it was not founded on by the pursuer, so it was only produced by the defender to demonstrate that if Fordell had a right to go that way, he would never have accepted that tolerance; and though we knew it to be a clear constitution of a servitude upon the lands, yet we regarded not that, because we had a reduction of it *ex capite inhibitionis*, and which was come that length that we had nothing to crave save a certification against it, for no production; which, when we sought next day, my Lord Craigie being Ordinary, and no friend of Cuthlehill's, he downright refused the same, upon that ground of law, *quod semel approbasti non licet amplius reprobare. (L. 4. D. de Legatis, 2do.)* And after much reclaiming and difficulty, he was content to give Cuthlehill the Lords' answer on it; and thought to have haughed him, had he not taken up his process till a better opportunity should offer; at which Craigie stormed.

Then Fordell stirred up the town of Innerkeythin against him, who were owned by Halton. To whom it was ANSWERED, that the Lords could determine nothing in their favours, as they craved, seeing there were no witnesses led upon their possession; likeas, they had passed from their compearance, and caused eraze all their part of the debate out of the minutes, and now did only produce a charter from King William, giving them all the customs for twenty-two miles in Fife, from Tillibody or Divan water to Levin bridge; and by which they say they reached Dysert and Weimes, after a most litigious debate, and now must have right to this harbour at Aberdour. Which charter signifies nothing to the point in hand, which is not about customs, but about a high-way and public harbour. *2do*, It is a general grant, and contained in a charter of confirmation, without seeing that which is confirmed, and can give them no right: neither have they apprehended possession by virtue of it, either as to this or the most part of the other stations within the said bounds. *3tio*, The said grant can neither in sense nor reason extend any farther than to such as were public ports at that time, and cannot be understood to give away all those which have been since, or may be now made commodious stations; else it were very ridiculous to think they have right to every creek and burn-mouth in all the gentlemen's lands within the said bounds.

I think the Lords did nothing upon Innerkeything's interest.

When this failed, then Fordell gave in a bill, craving the Lords would advise his witnesses' depositions, and find his immemorial possession either proven or not proven as they should see cause: and that their re-examining the defender's witnesses would be but in vain and to no purpose, seeing, by reason of their age, none of them could depone upon older interruptions than twenty years; and he humbly conceived forty years above that was proven. And Fordell made so great moyen, that, though the President was most averse, yet he got it re-advised: and, without allowing any new diligence for re-examining some of the witneses, they, upon the probation before them, found forty years' possession beyond the first interuptions proven; yet they cautioned it so, that he should allenarly have a foot-road that way: as also, they found nothing as to the harbour, whether it was public or private; only Fordell contended, if it was not a pub-

lic station for the good of the country, it ought to be made and declared one now.

After Mr. Robert Weimys had got this stroke, Sir George M'Keinzie came in with two wild notions, and whereof he was so pleased and confident, that he declared they had been blind or mad who had not discovered them till now. The first was, that the forty years' prescription of heritable rights and servitudes not being known nor received in Scotland till the Parliament 1617, Fordell behoved to begin his computation from that year, and prove forty years' peaceable possession after the same; which he neither had done nor could do, seeing interruptions by casting off of loads was proven in 1652, so that he had only proven thirty-five years' possession. But he never considered that the said 12th Act of Parliament 1617, made the years run before the date of the act, profitable for the prescription, unless within thirteen years after the date of it the parties concerned should use due interruptions; and which Mr. Robert cannot say was done. Likeas, in 1623, *G. Neilsone of Kirkcaffy* pursued the *Sheriff of Galloway* (see it in Dury, 27th June 1623,) for the servitude of a way through his land, and which he founded on immemorial possession of forty years, which years were almost all run before the said act of prescription, and yet the Lords sustained the declarator; which seemed more strange, seeing the thirteen years which were allowed to interrupt were not here expired; unless you will say the same was founded upon the 28th act James III, in 1496, ordaining all writs to prescribe not being followed within forty years; but I think that statute no good ground whereon to have founded that action.

His second fancy and chimera was, that Fordell had not proven his libel; in so far as he offered to prove immemorial possession, and had only proven forty years; whereas there was a great difference betwixt *possessio quadraginta annorum et possessio cujus initii memoria non extat*, this being much longer. I find, indeed the civilians put some difference; see Cæpolla, *tractatu de servitutibus, cap.* 19. *Quomodo constituatur servitus.* And our Craig, p. 68, speaking *de feudo burgagio apud Anglos*, calls immemorial possession *sexaginta annorum.* But as to the point of prescriptions, I observe our law makes no difference at all. Yet he so valued himself upon thir light imaginations, that he would have wagered upon their solidity against any, till he saw the Lords reject them with pity and disdain. Yet in the foresaid decision out of Dury, between Kirkcaffie and the Sheriff of Galloway, the Lords seem to require more than forty years' possession only, for constituting of a servitude of a gait to the kirk, and to call immemorial some different thing.

Advocates' MS. No. 384, *folio* 163.

1673. *February.* SIR JAMES RAMSAY of Whithill, *against* JO. ROBERTSONE.

IN February 1673, the following case fell to be debated and decided, remarkable for its singularity and rarity. Jo. Ramsay having been debtor to the Laird of Airdrie Preston, in 900 merks, he paid the same, and obtains his discharge. Both parties deceasing, one Jo. Robertsone in Craill confirms himself executor-creditor to Airdrie, who was his debtor in the like sum, and presses Sir Ja. Ram-