SECT. III.

Mutual Duties betwixt the Proprietors of the servient and dominant Tenements.

1687. *July.* PARSON of DUNDEE *against* INGLISH.

No. 24.

FOUND, That when one hath the servitude of an aqueduct to a mill, through a neighbour's ground, the person who hath the benefit of the aqueduct (and not the party servient) is liable to maintain the same, so as the adjacent grounds receive no prejudice by the water.

Fol. Dic. v. 2. *p.* 374. *Harcarse, No.* 999. *p.* 261.

1715. *June* 24. MURRAY of Mount Lothian *against* DEACON BROWNHILL.

No. 25.
Effect of the servitude of receiving and supporting the joists of an adjoining house.

DEACON BROWNHILL having obtained jedge and warrant from the Dean of Guild, for taking down and rebuilding a ruinous house belonging to him in Blackfriar's Wynd, (on report of tradesmen that it was ruinous) on the north end whereof there is a house belonging to Murray of Mount Lothian, who has a servitude upon the said ruinous house, constituted by long possession, whereby it is obliged to receive and support Mount Lothian's joists, and laid-to chimnies, in the north gavel; the Deacon having accordingly taken down the gavel, and now about to build it up anew,

It was alleged and inferred by Mount Lothian, That since there was a necessity for Brownhill's conveniency to take down his laid-to vents, that the same must be done, and they likewise rebuilt upon Brownhill's expenses, because the using of property must be always without prejudice to a servitude established; for there is the same reason for this, as for Brownhill's supporting the joists until the gavel be rebuilt; *2do*, That in a parallel case, betwixt the Duke of Roxburgh and Town of Dunbar, the Duke being to inclose some ground through which the town had a *servitus viæ*, the Lords ordained him to put up gates for horses and carts to pass, for preserving the servitude.

Answered for Deacon Brownhill to the *first*, That *1mo*, It is directly contrary to the nature of a servitude, which consists allenarly *in patiendo non in agendo*; *2do*, Though property must not prejudge servitude, yet here the gavel was not taken down only for the deacon's conveniency, but from plain necessity, as appeared from the tradesmen's report; yea and really for the utility of the servient tenement itself; since otherwise it must have fallen, and then Mount Lothian,

No. 25. without rebuilding it himself, would have had no gavel to lay his vents to; so that this is the same case as if the gavel had fallen by accident. To the *second*, answered, That what the Lords there ordained, was doing no deed in favours of the town of Dunbar, since the putting up the gates was necessary for the Duke, and the town would have been willing he had put up no gates, but left all open.

"The Lords found the builder of the wall liable to a servitude *oneris ferendi*, both of the joists and laid-to chimnies;—and must not only build that wall in the condition it was in formerly for supporting both joists and laid-to chimnies; but likewise that he must build and lay-to the chimnies as they were before the taking down thereof at his own expenses."

1715, *July* 14.—THERE having passed a decision in this case, the 24th of June last, which is already marked, the state of the question may be there found; but there was a reclaiming petition given in by deacon Brownhill against that interlocutor, where he further alleged,

That, in this case, there is no *servitus oneris ferendi*, but that of *tigni immittendi*, which is quite another thing, and of a different nature and effects in law; for here the servient tenement has not the dominant built above it, nor is it liable to bear the weight thereof, but only to receive its joists into the gabel, or the chimnies leaned thereto, which is precisely *servitus tigni immittendi;* and, if so, then the master of the servient tenement cannot be forced to repair the gabel, far less to rebuild the chimnies; as is plain from L. 8. § 2. D. Si Servit. Vindic. which says, "Distant autem hæ actiones inter se (i. e. actiones oneris ferendi et tigni immittendi) quod superior quidem locum habet etiam ad compellendum vicinum reficere parietem meum; hæc vero locum habet ad hoc solum, ut tigna suscipiat, quod non est contra genera servitutium." The glossary upon that text likewise plainly says, that "servitutes tigni immittendi et oneris ferendi differunt, priore casu qui servitutem debet, pati tantum tignum immitti cogitur; posteriore vero, non tantum pati onus sed et reficere parietem cui onus imponam;" and Lauterbach on the text, says, "Dominus enim servientis in hac servitute, parietem reficere non tenetur."

Answered for Mount-Lothian, 1*mo*, That however the Romans made such a distinction, (not so much materially as in name), from the different kinds of pressure that was to be supported, yet really we have not so much that distinction; for all with us goes under the name of the servitude of support, which may be either of a wall, joist, or dormant, as is plain from the Lord Stair, B. 2. Tit. 7. § 6. and in tenements within burgh, where the *tignum immissum* tends to the support of the edifice, there is no difference; and perhaps that of *tigni immittendi*, which was thus differenced by the Romans, was properly in those cases where the use was not so much the support of an edifice, as for other conveniencies. But where the *immissum* comes to be in the place of the gavel of the house, (as in this case it is), there is no rational distinction, whether the *immissum* or support be the resting of a wall, or the resting of a dormant; so that this is

not *tignum immissum*, which was for a particular convenience, as the law expresses, *facere porticum ambulatorium*, *L.* 8. § 1. *D. Si Servit. Vind.* something like our balconies, and to hang things upon, or lay something over to protect from the weather. But this is really the *servitus oneris ferendi*, which becomes, in a manner, in place of a common gabel to both houses, and is the same as if, in place of the dormants, there had been the superstructure of wall. *2do*, *Esto*, This were *tigni immittendi* only; yet there is a great difference betwixt an action intented by the dominant owner against the servient, to repair, (*V. G.* the under support is like to fail, and therefore the superior pursues the inferior to repair, which, by the law of *oneris ferendi*, he was obliged to upon his own charge, or else derelinquish the right, *L.* 6. § 2. *D. Si Servit. Vind.*) and a claim only, when the servient has for his conveniency taken down his wall, and is rebuilding. In the first, there may be a distinction betwixt *oneris ferendi*, and *tigni immittendi*; but in the last, there is none; nor is there any distinction here, whether this is done out of mere pleasure, or for necessary refection, seeing the dominant owner is, in both cases, as it were, upon the defensive; whereas, if the other were not stirring his wall, and the dominant pursuing, the case might be different; and as to the to-fall chimnies, they are plainly *oneris ferendi*, and therefore have the claim that the other should repair more forcibly on all the arguments before adduced, *L.* 5. *C. De Servit. et Aq.* No. 25.

Replied for Brownhill, That supposing they were in the case of a servitude *oneris ferendi*, though he might be bound to repair his own gavel, yet he would not be obliged to support or rebuild any part of the dominant tenement. The forecited *L.* 8. *pr.* is express in this, " Sicut autem refectio parietis ad vicinum pertinet, ita fultura ædificiorum vicini cui servitus debetur, quamdiu paries reficietur, ad inferiorem vicinum non debet pertinere, nam si non vult superior fulcire, deponat et restituat, cum paries fuerit restitutus; et hic quoque sicut in cæteris servitutibus, actio contraria dabitur, hoc est, jus tibi non esse me cogere." And the gloss, and likewise the forecited author, are as express on this as on the other head, " Refectionis onus servienti, fultura dominanti incumbit, hoc est locum servientem reficere debet, non dominantem."

Duplied for Mount-Lothian, That the true distinction is betwixt a *fultura* at the time the servient is repairing, by a suit at the instance of the dominant, and the *fultura* that is occasioned by the servient's voluntarily taking down his own wall, and repairing for his own conveniency; which is the present case.

Triplied for Brownhill, That there is a difference betwixt the case where the servitude is constituted by express consent, and that where it is constituted by long possession only; which is the present case. In the first, the master of the servient tenement is bound to repair, not indeed the dominant, but only his own tenement, so as to make it capable to bear the weight; but, in the other case, he is not bound to repair at all; for *L.* 33. *D. De Serv. Præd. urb.* lays down the rule, that, in the servitude *oneris ferendi*, the proprietor of the servient tenement must repair. And the gloss states this exception, " Aliter cum quis ex vetustate sibi

No. 25. asserit servitutem, tunc enim adversarius non restituet." And this is also the opinion of the Lord Stair, B. 2. Tit. 7. § 6. where he takes notice of the above distinction.

Quadruplied for Mount-Lothian, 1*mo*, That, in general, prescription is equivalent to paction; 2*do*, That all Brownhill's arguments fail in this, that he applies the rules of the case, where the dominant is pursuing the servient for reparation, to the case where the dominant is doing nothing, but the servient is taking down that which should support the other's fabric, for his conveniency: And as he cannot, by his deed, put his neighbour in a worse case, so, in many instances, law favours that which is reckoned defence, and to preserve the right, where it would not give the same favour, where it turns to an action.

The Lords adhered to their former deliverance, unless Brownhill would allege and instruct, that the gavel was ruinous, and the taking down thereof necessary; in which case, they found, that Brownhill was bound to the expenses of taking down the gavel and chimnies; yet that he would not be bound to put up the tofall chimnies at his expense.

For Brownhill, *Robert Dundas.* Alt. *Sir Walter Pringle.* Clerk, *Mackenzie.*

Fol. Dic. v. 2. *p.* 374. *Bruce, v.* 1. *No.* 108. *p.* 134. & *No.* 117. *p.* 145.

1731. *November.* CARLILE of LIMEKILNS *against* DOUGLAS of KELHEAD.

No. 26.

WHERE the prejudice done to the neighbouring grounds, by restagnation, did arise, not from the insufficiency of the dam-dikes, but from the running in of mud and gravel, by speats and land-floods, the proprietor of the mill was found not obliged to clean the dam, the restagnation of the water not being occasioned by any *opus manufactum* of him, or by his neglect; but that the proprietor of the servient tenement might clean the dam, if he pleased. See APPENDIX.

Fol. Dic. v. 2. *p.* 374.

1747. *June* 25. URIE *against* STEWART.

No. 27.
Whether kirk-roads fall under the act 1661, by which roads may be removed 200 ells?

AT advising a prepared state in a declarator and reduction of a decree of the Justices of the Peace of the shire of Renfrew, whereby a kirk-road had been decerned to be cast about more than 200 ells, it was argued for the defender, That the act 1661, Cap. 41. which gives power to heritors, at the sight of the sheriffs, justices of the peace, or barons, " to cast about the highways to their conveniency, providing they do not remove them above 200 ells upon their whole ground," did not comprehend kirk-roads, and that such private road may *de jure communi* be cast about to a greater extent, for the conveniency of the lieges, provided a road equally commodious be assigned in place of it; which would be admitted to have been done in this case.