

ANSWERED,—He that has the *commodum* must not grudge the *incommodum* annexed thereto; ye have the benefit of passing over the pavement of my cellar, which both weakens and corrupts it, and so in justice are obliged to uphold it; and I affording you this servitude, it is enough that I grant you a passage over it, without being obliged to uphold it, which is against the nature of servitudes,—*l. 15, sect. 1, D. de Servitut. Non est servitutum natura ut aliquid quis faciat, sed ut aliquid patiat et non faciat in suo*; and where there is *jus viæ ad ædes privatas*, the *onus refectionis* belongs to him *qui servitutem sibi asserit, l. 11, princ. D. Commun. Prædior.* And again, we cannot compel our neighbour *aggeres suos munire, sed nos in ejus agro munimenta sternemus.*

The Lords thought the Dean of Guild had committed iniquity in two several particulars: *1mo*, In allowing him to cover his cellar only with joists and pavement-stone, whereas it should have been by a stone pend, the trees in a few years rotting with the sapping *humoris, urinæ, aquæ, et ponderum*, and so endangering the lives and limbs of passengers, if it sink. And the *2d* was, to discern the heritors to contribute to uphold the cellar; for they, having right to their houses with free ish and entry, could no more be burdened than any others passing that way.

This interlocutor encouraged the defenders to give in a bill to the Lords craving expenses, seeing malicious pursuers, by the late Act of Parliament, are as well finable as calumnious defenders. But the Lords refused the desire of the bill; seeing what he did was *authore prætore*, and *res judicata pro veritate habetur.* And the law says, though the *prætor inique decernit, jus tamen dicere quodammodo videtur*; which is sufficient to excuse from expenses.

*Vol. II. Page 551.*

1710. *January 10.* The DUKE of MONTROSE *against* CLAUD HAMILTON of BARNs and the other FEUARS of KILPATRICK.

KING Robert the Bruce, according to the devotion used in those times, mortifies and dotes the lordship of Kilpatrick, (*cella sancti Patricii*;) to the monks of the abbacy of Paisley, but reserves a feu-duty of five chalders, and half a boll of oatmeal, to be paid out of it to the castle of Dumbarton, which some alleged was meal for the dogs then kept in that place for hunting the wolves which infested that part of the country; but others more probably conjecture, from its name given it by Skeen, *voce* Pension, and others, of the watch-meal of Kilpatrick, that it was for the sustenance of the garrison of Dumbarton. This feu-duty coming by progress to the Dukes of Lennox, and from them to Montrose, he pursues the feuars liable in payment, and obtains a decret *in foro* against them; and some controversies arising betwixt them, the vassals suspend on thir reasons:—*1mo*, That, by the decret, we are allowed deduction of the cess effeiring to the said five chalders of victual, and yet the Duke refuses allowance thereof. *2do*, That they offered to pay him conform to the Linlithgow measure, or at the rate of eight stone per boll by the 6th Act 1696; but the Duke will have it by a greater measure, which he calls that of the shire of Dumbarton, which exceeds the Linlithgow measure in four or five pints; the Linlithgow firloft containing twenty-one pints and a mutchkin, and the Dumbarton being

twenty-five pints and a choppin ; at which rate their five chalders of victual will, by this extravagant measure, be near six. *3tio*, The Duke obliges them to carry it to the Clyde-side, where they have no convenience in delivering it, whereas it were more equal for both that his chamberlain came and measured it upon their barn-floors.

ANSWERED to the *first*,—That this castle-ward duty being a part of the King's patrimony, it can pay no cess ; as was lately found at Exchequer, betwixt my *Lord Kelly* and the *Chamberlain of Fife* : and as to the decret, it is noway *res judicata quoad* that point, but only an interlocutor yet subject to the Lords' review. To the *second*,—When this watch-mail was constituted there was no such measure known as that of Linlithgow, which was not introduced till the 96th Act 1503, and therefore it must be the measure of the shire where the lands lie, the Linlithgow measure being only the rule and standard in buying and selling. To the *third*,—By the feudal law, vassals are bound to bring their feu-duty to their superior's mansion-house ; and yet, for their ease, the Duke is content to receive it from them at the ferry-dyke.

The Lords, as to the cess, being unclear, resolved to hear it in their own presence ; but, for the measure, found that of Dumbarton behoved to be the rule ; and, for the feuars' ease, allowed either party to condescend on and design a particular place, where all the feuars might bring their proportions and quotas, and the Duke to have one yearly there, to see it measured. *Me referente*.

*Vol. II. Page 552.*

1710. *January 14.* CAPTAIN WILLIAM GARRIOCH *against* ROBERT AUCHTERLONY.

CAPTAIN William Garrioch, as factor for Cornelius Vanderpot and Company, merchants in Rotterdam, freights Robert Auchterlony, skipper in Leith, his ship, to transport forty or fifty tons of lead ore, bought from the Earl of Hope-toun, to the foresaid merchants at Rotterdam ; and he desired twenty tons of it to be put on board, as convenient ballast to his ship in the harbour, aye till a convoy should offer, and then he would take in the rest. In the meantime offer of a greater freight is made to him, to bring home a parcel of wines ; whereupon he pretends that the weight of the lead ore had damnified the ship, so that he durst take in no more, and therefore requires Garrioch to take out the ore, and pass from the bargain ; and on his refusal disloads it himself : And being pursued before the High-admiral for damages, having lost the season and opportunity of transporting the said lead for that year ; and he alleging, *1mo*, That it had so bruised his ship that it was not able to sail till fitted and repaired ; *2do*, That no convoy was offered him ; and this being admitted to his probation, he succumbed ; and it appeared that, being in summer, the ship might have performed the voyage ; and, for a convoy, the freighters had not undertaken any such condition, but insured the ship :—therefore the Admiral decerned him in £290 Scots of damages. Of this decret the skipper presented a bill of suspension, alleging it was without probation ; and he was the greatest loser, his ship, by its incapacity, being unfit for any voyage ; and he waited for a convoy, which was never offered ; and the sum modified was exorbitant.