

No. 25.

asserit servitutum, 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 to-fall 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.

No. 26.

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

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.

No. 27.

Whether
kirk-roads fall
under the act
1661, by
which roads
may be re-
moved 200
ells?

1747. *June 25.*

URIE *against* STEWART.

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.

But, from these premises, the Lords formed a very different conclusion; for, being generally of opinion, that by *highways* in the act of Parliament, are only meant the *King's highways*, which are no man's property, they considered the consequence to be, that the Judge Ordinary, who has no power to cast about roads at all other than the statute gives him, cannot turn about any private foot or horse-road to kirk or mill, which is a man's property, even for one ell.

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However, no judgment was given upon this point, in respect of a concession made by the pursuer, with which the defender was satisfied. But so much were the Lords of opinion that the act of Parliament gave no power to alter private roads, that, notwithstanding the party's concession, they refused to give judgment *in jure* for casting about the road in question, and would have left it to the parties to make their agreement as they thought fit;

But the pursuer having restricted his declarator, which the Court had no concern to oppose, the Lords, without giving any judgment *in jure*, "decerned in the declarator as restricted."

Compare the immediate following case, June 25, 1748, Bruce of New Grange *contra* Wardlaw of Abden, No. 28.

N. B.—May it not be doubted what is meant by the provision in this act of Parliament, that the "highways be not removed above 200 ells upon their whole ground," whether it is that the new road be not above 200 ells longer from the point where the alteration begins, to the point where the new and old road again join, as the heritor who proposes to turn the road upon his neighbour's ground is sometimes inclined to explain it? or is it, That the new road is no where even upon his own ground to be above 200 ells distant from the old road?

And it is thought that this last is the meaning; for the words are general, "that it be not removed," that is from the old road, above 200 ells. But it is easy to figure how the new road may be even shorter than the old, and yet be removed from it more than 200 ells. Suppose the old road to form two sides of a triangle, each 300 ells in length, and the new road to be so cast about as to form the base, the new road would be much shorter than the old, and yet removed at one point 300 ells from it, which the act does not permit.

Kilkerran, (SERVITUDE), No. 1. p. 515.

1748. June 25.

BRUCE *against* WARDLAW.

UPON advising the prepared state in the process, at the instance of Bruce of New Grange and others, for declaring their right to a road to the kirk of Kinghorn, through Wardlaw of Abden's close, it being argued for the defender, that where a kirk-road is ever so much established by possession, yet still it is no high-way; it is but a predial servitude; and as other predial servitudes may be

No. 28.
A kirk-road allowed to be altered for one equally commodious.