

SECT. III.

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

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

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.

Fal. 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 viae*, 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 allenaryly *in patiendo non in agendo*; *2do*, Though property must not prejudice 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,