

1688. February 2.

Bailie WILSON against ROBERT RICHARDSON.

THE case of Bailie Thomas Wilson against Mr Robert Richardson, writer, was reported by Lochore. Mr Robert had taken down an old land, which had a timber fore-stair, and was re-building it; but he was re-edifying the fore-stair with plaister, and attempting to carry it so up to the top, seven story high. Thomas Wilson and the neighbouring heritors opposed this, as obstructing their lights, making their chimneys smoke, and by the vicinity endangering them with fire, and theft; for they might step out of one window into the other; and the Dean of Guild of Edinburgh having discharged him, he suspended, *alleging*, The late act of the Town and Privy Council for building in stone, in 1645, allows the fore-stairs to be re-built of the same extent as formerly, that is, no broader nor wider, but provides nothing against heightening them. *Answered*, *Extensio* is all the three dimensions, and comprehends *altitudo* as well as the other two; and the tolerance is only *interdictum uti possidetis*, to have it no otherwise than it was before; and though the adjacent tenements have no servitude *altius non tollendi* upon it; yet *Sneidwin* and *Vinnius ad § 1. Institut. de Servitut. prædior.* give another exception, *viz. nisi statuto civitatis certa ædificiorum forma sit præscripta*, as here; and though *cujus est solum ejus est usque ad cælum*; yet here he has not the *solum*, the ground being the vennel and King's high-street, and he has only a *protectum* cast out. THE LORDS found he could not make this fore-stair higher than it was formerly.

*Fol. Dic. v. 2. p. 274. Fountainhall, v. 1. p. 495.*

1698. December 14.

JOHN HALL against BESSY CORBET.

JOHN HALL, chirurgeon in Glasgow, being heritor of a shop there, and the tenement immediately above it belonging to Bessy Corbet, relict of Robert Saunders, printer, he, for his accommodation, strikes out a chimney in the wall; and when he comes to her tenement, he was to break a hole through the wall of the gavel and carry it up without. She applies to the Dean of Guild, and procures a stop till visitation; who, after inspection with his council, found the same could not be done without her consent. Of this decret he raises reduction upon iniquity, that *nuntiatione novi operis* he could not be hindered to stop his own wall beneath the flooring and joists of the defender's story, seeing *cuique licet quilibet facere in suo dummodo in alienum nihil immittat*, and she has no prejudice. *Answered*, That his inferior tenement was liable in the servitude *oneris ferendi*; or support to her superior tenements, and if this stopping were allowed, the wall might be so weakened as may occasion at some time or other its falling, besides the deformity of carrying up a lum at the back of her wall, and that it would fill her house with smoke *immissione fumi in fe-*

No 8.

Found, that though the neighbours had no servitude, *altius non tollendi*, one could not build a fore-stair higher than formerly.

No 9.

Servitude, *oneris ferendi*, prevents an heritor of an inferior tenement from breaking his wall, so as to endanger that of the superior.

No 9.

*nestras.* THE LORDS thought the Dean of Guild had not given a good reason of his sentence, that he could not stop the wall without her consent; for, unless prejudice be instructed, he may do in his own what he pleases; yet he is the most competent Judge to neighbourhoods, and there was apparent hazard in this case by weakening the wall; and therefore sustained his decret, and repelled the reason of reduction, and found he could not strike out a chimney in that wall.

*Fol Dic. v. 2. p. 273. Fountainhall, v. 2. p. 25.*

1705. June 19.

The MAGISTRATES and TOWN of Dumfries *against* The HERITORS upon the Water of Nith.

No 10.

The building of a controverted mill dam-dike, allowed to proceed, with this quality, that it should be considered at advising of the probation as if no such allowance had been granted.

THE TOWN of Dumfries having formerly a mill upon the Water of Nith, a little above their bridge, served by a dam-dike or watercall cross the water, which by torrents so pooled and sanded that the water took another course, and the mill stood dry and useless; to obviate this inconveniency, they fell to the building of a mill and watercall below the bridge. Of which work a suspension was procured at the instance of the Heritors upon the Water of Nith, upon this reason, That such a dam-dike would hinder fishes to come up to the bounds whereof they are heritors, at least to come over but with a dry back, and so prejudice them of their properties of fishing more than cruives and yairs and other engines for catching or preventing the swimming of fish, which are discharged in all fresh waters where the sea ebbs and flows; and where the sea flows not, are allowed only to stand at certain times of the year, under the limitation of observing the Saturday's slop, mid stream, wideness of the hecks, and other legal cautions for securing the liberty of fishing. Therefore the building of the dam-dike ought to be stopt as having a tendency to elude the laws in favours of fishing.

*Alleged* for the Town; They being Heritors upon both sides of the water, the *alveus* is their property, and they may build through their own water as they please, though some accidental prejudice may thence arise to the Heritors of the upper fishing; as the building of a house cannot be stopped upon the bare pretence that it may damnify some neighbours' lights. *2do*, Mill dam-dikes being low, and not a foot and a half above the ebbest water, are no hindrance to fishes going over. *3tio*, Cruives, yairs, nets, and other engines set on purpose to catch fishes have no relation to mill-dams, which are not designed for that end, but only for furnishing of water to mills, that are very much privileged by our law and custom. Besides, this is not a *novum opus*; for the burgh had a dike for their mill near to the same place, as high as the new one is to be, and as the former dike had a mid-stream open nightly for a free passage to