1708. *February* 19. NICOLSON *against* MELVILL.

No. 17.
Obligation to contribute in upholding the roof of a house no real servitude, but only a personal obligation.

THE Lord Register reported Nicolson of Trabrown, and James Steven, against Bethia Melvill, relick of Andrew Law. Robert Miln, mason, and Andrew Paterson, wright, having rebuilt the burnt land at the entry to the Parliament close, and covered it with a lead roof, and considering, that if the uppermost stories were burdened with the maintenance and upholding of the roof alone, none would buy them; and it being the interest of the whole land from top to bottom, to have the roof kept tight, otherwise the rain will fall down upon them; therefore, in selling the several tenements and stories of that land, they take the sundry purchasers, in their dispositions, bound and obliged by their acceptation thereof, to repair, uphold, and maintain the roof, at least *quoad* their share and proportion thereof, effiering to the price. Andrew Law having bought the lowmost story, and accepted his disposition with that quality and burden, he infefts Bethia Melvill, his wife, therein; but her disposition mentions no such burden; and she declining to pay her proportion, extending to £3 13s. Sterling, is pursued for the same. Alleged for her, That however that clause was in her husband's disposition, yet not being repeated in her's, how can she be made liable? a singular successor for most onerous causes; it being neither in the dispositive clause, nor procuratory of resignation of her husband's right, nor in her sasine; and so at most is only a personal obligement; neither is this a servitude introduced by custom of burgh, nor universally received, but only in a very few cases, where paction has introduced it; and there it only affects the parties contracters, but not the singular successors; for the nature of servitudes by the common law, is only *aliquid pati vel non facere in suo*, whereof the *servitus oneris ferendi* is the only exception, for the heritor of the servient tenement is obliged to uphold it for the use of the dominant; but no heritor is bound *aliquid facere in alieno;* and thus Stair, Tit. SERVITUDE, lays it down as a principle, that the owners of the inferior tenements are *ex natura rei* bound to uphold them, as being a foundation to the upper stories; and sicklike again, the heritors of the upper stories are bound to preserve them as a roof and cover to the lower; but to oblige the inferior tenements to uphold the roof, is contrary to all the laws anent servitudes. Answered: She cannot pretend to have any better right than her husband had; but *ita est* he was expressly burdened with this reparation, and so must she, though her right doth not mention it; and so it was found in the case of a servitude of pasturage, that a clause in the author's right was effectual against his singular successor, 26th January, 1662, Turnbull *contra* the Laird of Blanerne, No. 1. p. 14499. And it is but reasonable you astrict yourself by paction, to bear a proportionable burden of the roof, seeing you have the benefit thereof, *et quem sequitur commodum eundem et sequi debet incommodum.* The Lords thought, if it was once yielded to be a servitude, it needed no infeftment, but could be constituted by a personal clause; only they saw it was not generally observed within Edinburgh, but only where provided by paction; and, that if this

were once allowed, then other unheard of servitudes might be introduced, such as that you shall bear a share of the expenses of the floors, and glass windows of your neighbouring tenements, seeing you are benefited thereby. The Lords, by a plurality of six against five, found that this was no servitude, but only a personal obligement on her husband; and therefore assoilzied her from any part of the reparations of the roof, her right making no mention thereof, and there being no universal custom as yet within the burgh for the same. In this cause, the servitude was instanced of all within the thirl to repair the mill, uphold the mill-dam, and to bring home the mill-stones; but that was said to be a general known servitude through all Scotland, whereas this was not. No. 17.

Fol. Dic. v. 2. p. 373. Fountainhall, v. 2. p. 433.

1732. *November* 22. INHABITANTS of DUNSE *against* HAY.

No. 18.

THE erection of a town into a burgh of barony, found not to afford the incorporation of burgesses and inhabitants a title to acquire a servitude of pasturage by prescription.

1732, *November* 24.—But an infeftment of a house, with or without a yard, found a sufficient title to the proprietor to acquire by prescription a servitude of pasturage.

Fol. Dic. v. 2. p. 374. Rem. Dec.

*** See No. 4. p. 1824. *voce* BURGH OF BARONY.

1734. *November* 27.

GARDEN of BELLAMORE *against* EARL of ABOYNE.

No. 19.

ONE having given by a writ under his hand, liberty and privilege to a neighbouring heritor to cut timber in his woods, for the use of the neighbouring heritor's lands and tenantry, the Lords found this a real servitude, and good with possession against singular successors. See APPENDIX.

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

1755. *February* 18. JAFFRAY *against* DUKE of ROXBURGH.

No. 20.

THE Lords found, that the inhabitants of Kelso had been immemorially in possession of, and had thence acquired a right of servitude of bleaching and drying