

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, 1mo, That, in general, prescription is equivalent to paction; 2do, 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.