SECT. V.

SERVITUS LUMINUM.—Servitude whether implied in a common Tenement within Burgh.

No. 36.

1678. *February* 5. OGILVIE *against* DONALDSON.

ALLEGED a tolerance for light imports only *servitus luminis*, and not *prospectus* or *projectionis*. The Lords found a tolerance for a servitude of light, did not imply a liberty of having open windows to the close, and that the defender might build any thing he pleased, and to what height he pleased, before these windows, at an ell's distance, whereby the light would be free; and that he was not obliged for greater distance, even in the country where parties have large closes and fields to build on; and so rejected his declarator, that the defender had not liberty to dim his lights by peat stacks, &c. in the town of Elgin.

Fol. Dic. v. 2. p. 374. *Fountainhall MS.*

1784. *March* 3.
ALEXANDER ROBERTSON and Others, *against* GEORGE RANKEN.

No. 37.
The proprietors of the upper stories of a tenement have not an implied servitude on those below, to the effect of preventing the owners of the last from making such alterations on their respective parts of the walls as do not endanger the rest of the building.

MR. ROBERTSON and others were proprietors of the upper stories of a tenement, the ground floor of which belonged to Ranken. Purposing to strike out some new doors and windows in that under part of the wall, Ranken applied for the authority of the Dean of Guild's court, which appointed a visitation of tradesmen, in order to ascertain whether the proposed alteration would be attended with any danger to the building. The other proprietors, conceiving that however innocent such an operation might be, and however advantageous to the party, yet not being justified by necessity, it was illegal without their consent, brought the Dean of Guild's sentence under review by advocation, and

Pleaded: Wherever a tenement consists of several stories, belonging to different proprietors, it is implied in the right of each, that without his consent no material alteration that is not necessary, can be lawfully made on the plan of the building in general; because that right comprehends this as well as other circumstances of his property. Thus the various owners come to have a mutual or common interest in all the different portions of the fabric; which, if it be not so extensive as the right of property, is not on that account the less entitled to protec-

No. 37.

tion. As having then a common interest in Mr. Ranken's part of the wall in question, the other proprietors claim the power of putting a negative on his intended proceeding, by which so great an innovation would be effected; their title to exert that authority being recognised both in the Roman law and in the law of Scotland; L. 8. L. 27. § 1. L. 40. D. *De servitud. præd. urban.*; Bankton, vol. 1. p. 677. § 11.

Answered: That the common right which has been now supposed, cannot be a right of property, is obvious. If it existed at all, it would be of the nature of a servitude. But the servitude, *oneris ferendi*, is the only one the law knows in such circumstances; L. 24. L. 33. D. *De servitud. præd. urb.* Stair, B. 2. Tit. 7. § 6.; and therefore the foundation of the opposite party's pretensions is altogether imaginary; for the authorities quoted to support them relate only to the right of common property.

The Lord Ordinary "repelled the reasons of advocation, and remitted the cause in common form." And having advised a reclaiming petition, with answers,

The Lords "adhered to the interlocutor of the Lord Ordinary."

Lord Ordinary, *Westhall*, Act. *Rolland*. Act. *Maconochie*. Clerk, *Menzies*.

S. *Fol. Dic. v. 4. p. 280. Fac. Coll. No. 152. p. 237.*

SECT. VI.

Servitude of a Damhead.—Moss.—Water-run in Coal Works.—Astriction to a Smithy.

1677. *July* 20.
The LAIRD of GAIRLTON *against* The LAIRD of STEVENSON.

No. 38.
Where one had the servitude of a dam-head on the ground of another, and the ground had been carried away by the water, he was found entitled to ex-

THE Laird of Gairlton, as heritor of the mill, called the Sands-mill, pursues the Laird of Stevenson, on whose ground was the end of the pursuer's dam-head, whereof he had been in immemorial possession; but, by a speat of water *in anno* 1674, the ground being washed away from the end of the dam, Gairlton extends the end of the new dam, and Stevenson impedes it; therefore Gairlton craves it may be declared, that he hath right to build his dam to the next adjacent ground thereto. The defender alleged absolvitor, because the suffering of a dam to be laid to his ground was of mere favour, and the occasion that the speats of water washes away the same; likeas, the pursuer hath no right to force him to admit of