No. 28. restricted, provided the *prædium dominans* be equally well accommodated, so a kirk-road may, by the heritor of the servient tenement, be changed to another place, equally commodious for the heritor of the dominant tenement;

The Lords found, "That Bruce of New Grange, his family, and tenants, and the heritor of Innerteil, his family, and tenants, and the parishioners residing in the north and east parts of the parish of Kinghorn, have been in use of a foot-way and passage, to the kirk of Kinghorn, through the defender's close of Easter Abden, on Sundays and other days of divine service; but nevertheless found, That, upon the defender's making a foot-road to the pursuer's, as commodious as that through the defender's close, at the sight of the deputy-sheriff, or any two justices of the peace of the district of Kinghorn, the defender is entitled to, and may shut up the foot-road through the said close."

And this, notwithstanding it was argued for the pursuer, That although, where an indefinite servitude is constituted upon a man's ground, such indefinite servitude may be restricted to a particular part of the ground, sufficient to answer the end of the servitude; yet, where a servitude is not indefinite, but constituted upon a particular spot, no such restriction can take place; here the road in question is fixed to a particular line, and the pursuer has right to that individual road, or to no road at all.

Whether or not this decision shall be held as laying down a general rule with respect to all private roads, one cannot positively say, as this case had some specialties in it; for, not to mention the particular hardship on a gentleman in having a road go through his court, between his house and his stable, which may have had some involuntary influence; in fact, this road had been in a course of being varied; for at one time, it appeared by the proof to have been set about a little, by Abden's building his gardener's house upon the spot through which it had been in use to run, at another time, by building a garden wall: True, notwithstanding these changes, the road still went through the close, which was the ground of the present dispute. But these circumstances may have been thought to bring it a little nearer to the case of an indefinite servitude; and in the preceding case, June 25, 1747, Urie *contra* Stewart, No. 28. p. 14524. though there was no judgment given, the Lords argued very differently from the general principles upon which the present judgment would appear to stand.

Fol. Dic. v. 4. *p.* 280. *Kilkerran*, (SERVITUDE), *No.* 2. *p.* 516.

1752. *June* 11.

WALTER STIRLING, Doctor of Medicine, *against* JOHN FINLAYSON, Commissary of Dumblane.

No. 29.
Servitude of stillicide.

DR. STIRLING is proprietor of a tenement on the north side of the high-street of Stirling; and Commissary Finlayson is proprietor of a tenement adjoining to the gavel of the Doctor's tenement.

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In 1671, the Doctor's tenement was repaired, and the fore-wall brought eight feet forward towards the street; and that addition to the tenement was finished in the manner of a tympany or storm-gavel. At this time, there was lying to the fore-wall of the Commissary's tenement, a fore-shot, which came eight inches farther forward than the new front of the Doctor's tenement; and the drop fell from the roof of the Doctor's storm-gavel upon this fore-shot.

Commissary Finlayson's tenement being in disrepair, he took it down, and rebuilt it on the foundation of his old tenement and fore-shot, and raised this new tenement some feet above the Doctor's; so that the falling of the drop was interrupted. Upon this the Doctor applied to the sheriff of Stirling, setting forth, that he and his authors had acquired a servitude or *jus stillicidii recipiendi*, over the Commissary's tenement, by their drop falling thereon beyond the years of prescription; and craving, that the falling of his drop might not be interrupted. The sheriff allowed a proof of the possession of the drop; which being clearly proved for upwards of sixty years, the sheriff found, that the Doctor had acquired a right of servitude over the Commissary's tenement; and ordained the drop to be carried off in a lead spout, to be fixed on the Commissary's wall; and ordained the spout to be fixed and maintained at the Commissary's expense.

At the same time, the Commissary having declined the jurisdiction of the sheriff, he applied to the magistrates, craving that an inquest might be appointed for cognoscing the matter. Accordingly, an inquest was appointed; who, without determining the right of servitude, ordained the spout for carrying off the drop to be fixed betwixt the two tenements, at the joint expense of both parties, of the form and dimensions described in the verdict.

These sentences came before the Lords by mutual suspensions; and the Commissary admitted, that the drop had fallen from the roof of the Doctor's tenement upon the Commissary's fore-shot past memory; and also admitted, that with respect to houses without the limits of a burgh, the servitude, or *jus stillicidii recipiendi*, would have been thereby constituted; but contended, that, within burgh, there were not *termini habiles* for acquiring such servitude by prescription, because buildings within burghs are regulated by the particular constitutions and policy of the burgh; and if a house be built according to these rules, the proprietors of the neighbouring tenements cannot complain of any disadvantage thence arising to their property. And as the building of a house with a storm-gavel is a lawful manner of building, the Commissary and his authors could not complain, though the drop was made thereby to fall on their tenement; and, consequently, a servitude could not be acquired by a possession which they could not otherwise interrupt, than by raising their tenement, which they were not obliged to do till they thought proper.

Answered for the Doctor, That the servitude *stillicidii recipiendi* is one of the positive servitudes, consisting in *patiendo*, to wit, in suffering the falling of a drop from the roof of the dominant tenement upon the servient tenement; and if it so

No. 29. fall during the years of prescription, without interruption, a servitude must be thereby constituted. The distinction of houses without and those within the limits of a burgh, is without foundation; no such distinction being made either in the civil or our municipal law; neither is there any foundation for it from the constitution and policy of burghs; for it cannot be admitted, that, by the constitution of any burgh, it is lawful for the proprietor of one tenement to throw his drop upon the area or tenement belonging to another, unless he has a right of servitude for that purpose: On the contrary, it is regulated by the policy of all burghs of Scotland, that every proprietor who builds a tenement shall leave a certain space of his own property free, for receiving the easing-drop. It is true, that, betwixt tenements which face the high-street, as those in question do, there is ordinarily no space left; but it will not from thence follow, that the proprietor of one of these tenements can, without a right of servitude, throw his drop upon the adjacent tenement; for as these houses are generally built with erect gavels, the drop of each tenement naturally falls over the fore and back walls thereof. It is, however, no doubt lawful, and often practised, to raise the fore-walls into tympanies or storm-gavels; but it is not lawful, without a right of servitude, to finish these tympanies so as to make the drop fall upon the adjacent tenement; and therefore they are ordinarily built so as not to reach so far as the principal gavel of the house, and thereby the drop still falls over the fore-walls of the house upon the street, or upon the proprietor's own area. And if one should build his storm-gavel so as to throw the drop upon his neighbour's property, his neighbour, no doubt, would have right to stop him; but if the drop continues to fall during the years of prescription, a servitude is thereby constituted.

The Lords were of opinion, That there was no servitude acquired in this case; but did not expressly determine that point. Only, as a consequence thereof,

"They found, That the drop ought to be carried off by a lead spout, to be fixed betwixt the tenements; and ordained the spout to be fixed and maintained at the joint expenses of the proprietors of the two tenements; but varied the form and dimensions which had been appointed by the verdict."

For Stirling, *And. Pringle & Bruce.* For Finlayson, *Haldane & Jo. Grant.* Clerk, *Kirkpatrick.*

B. *Fol. Dic. v. 4. p. 280. Fac. Coll. No. 11. p. 19.*