Book 2.

Of private Burdens wherewith real and heretable Rights may be affected.

Private Burdens are those imposed in Favour of private Persons either by Law, or by the Agreement of Parties. Such Burdens are imposed by Law when the same are declared real by Statute, as the King's Annuity out of Tithes Act 15. Par. 1. Ch. 1. Private conventional Burdens with which real Rights are affected are the Reddendo's in Charters Services &c.

Chap. 1.

Concerning Services in general.

Property, or that which one doth call his own, is either entirely and absolutely at his Disposal; or another hath some partial or inferior Interest there or Advantage by it called a Service; because that which is proper to one serves another in Part. Which may be defined: A Burden upon one's Property, whereby the Proprietor, for another's Conveniency, is either forced to allow something to be done upon his Land or Tenement; or hindered from doing that which may be profitable to himself l. 15. §. 1. ff. de Servit. A Service is a Burden upon another's Property: Because res sua nemini servit l. 26. ff. de Servit. præd. urb. We do not give the Name of Service to the Right which the Master of a Land or Tenement has to make use of it for himself. And the Doctors barbarous Distinction of Usufructus in causalem, which a Man hath in his own Thing, and formalem which he hath in that which belongs to another; hath no Foundation in Law, the former being only the naked Effect of Property, and no Service.

Services are acquired either tacitly, or expressly.

Real or prædial Services are acquired tacitly, by Prescription or 40 Years continued and peaceable Possession, without any Title in Writ from the Owner of the Land or Tenement subject to the Service, or which serves l. 10. pr. ff. si Servit. vind. l. 1. C. de servit. l. 1. in fin. ff. de aqu. & aqu. pluv. arcend. l. 5. §. pen. ff. de itin. actuq. priv. Stair Lib. 2. Tit. 7. §. 2. McKenzie Lib. 2. Tit. 9. §. 11. Tho' he who acquires a real Service by Prescription must be infeft in Lands and Pertinents comprehending Services Stair Ibid. McKenzie Ibid. McKenzie Ibid. 40 Years continued and uninterrupted Possession being all that is required to the Prescription of Services. Therefore a Service of laying over a Mill Dam upon another Heretor's Land, was found constitute by 40 Years Possession, whereby the Heretor of the Mill had Right when the Water did wash away the Ground from the End of the Dam to [illegible] it upon the servient Tenement, so as it might be made effectual with the least Detriment, and was not liable for the Damage by washing away or sanding the Ground of the servient Tenement, occasioned by the Dam 20 July 1677 L. Gairlelour contra L. Stevenson. It being proved that the Heretors and Tacksmen of Valleyfield had been in the immemorial uninterrupted Possession of using the Water running from Lochs to a Dam in Colonel Erskine's Ground, and from thence to the Mill and Coal-Works of Valleyfield, and of mending and repairing the said Dam Heads Leads and Aqueducts whereby the Water is [illegible] from the Dam aforesaid to the Works of Valleyfield, and of casting Feal Divots Clay and other Materials necessary for mending and repairing the Dams and Aqueducts upon the Ground next adjacent thereto: The Heretors and Tacksmen of Valleyfield were found to have Right to the said Water [illegible] Mill and Coal Works, and the Privilege of casting [illegible] other Materials necessary for mending and repairing the Dams and [illegible] cent Ground; and that a Service was thereby [illegible] Ground of the said Heretor [illegible] upon the Ground and Land [illegible] 5 Feb. 1714 Bruce [illegible] contra Colonel [illegible] by the Heretor of Valleyfield [illegible] aforesaid exercised by them upon the adjacent Ground [illegible] Mill and Coal Works. [illegible] their [illegible] or Lee to the Parish Church [illegible] uninterrupted immemorial Possession 27 June 1623 Nelson contra [illegible] following to which 40 Years are now equivalent by our Law Stair ibid. It being proved that Fishers of Dunbar had (when they could by Reason of high Winds make the Harbour of Dunbar with their Boats) were in Use of Landing on D. Roxburgh's Ground, and the Lieges in Use of leading Fishes and Necessarys for Fishing to and from Dunbar and the neighbouring Country thro' that Ground, upon Payment of a penny Scots for the loaded Horse, and 1/2 Penny for the loaded Cart; The Duke's Property was declared affected with that Service so as there should be still Access to the Lieges of passing thro' the Ground for such Ends, upon Payment of the Duties aforesaid 5 June 1712 D. Roxburgh contra Town of Dunbar. Which Possession is reckoned ~~[illegible]~~ [illegible] from constrained and involuntary Deeds of the Owner of the Land or Tenement subject to the Service; that is, such as are forced from him by Process of Law or otherwise. For one's bringing his Grain never so many Years to another's Mill, doth not constitute a Thirlage upon his Lands, unless he suffer the Proprietor or Master of the Mill, to cause him or his Tenants to grind there. A Man's opening a Window in his Dike or Wall whereby his Neighbour hath a Prospect, doth not subject him to a Service, unless that Neighbour hinder him to close it up again, or break out a Window himself in the same and enjoy the Benefit thereof till Prescription run. Inhabitants of a Burgh of Barony who in their Erection Charter, had omnimodam potestatem esse piscatores, & piscium mactatores, cum potestate Salmones aliosque id genus piscium