

was made lower, and how much of the water diverted is necessary for the going of the mill; and sustained Garleton's libel, as to the expense of the building of the park-dyke, relevant, notwithstanding there was no intimation made to Barns, that the pursuer was to build the said dyke, and requiring him, &c. reserving to themselves to consider, after probation of the libel, what part of the expenses Barns ought to pay, and how far Barns is benefited by the building of the said park-dyke; and repel the allegation, that the said park-dyke is not built upon the march, but on the side of the strip, which strip is the march; and ordain both parties to condescend upon the advantage that doth accrue by building the said dyke.

*Fountainhall, v. 1. p. 31.*

1702. *January 10.* SIR JOHN RAMSAY *against* SIR JAMES PRIMROSE.

SIR JOHN RAMSAY of Whitehill resolving to divide a common muir lying betwixt him and the barony of Carington, belonging to Sir James Primrose, and also to make inclosures, conform to the acts of Parliament 1669 and 1695, and craving some lands of Sir James's to make his dyke equal; he *alleged*, By my tailzie and infeftments I can alienate none of my lands, but brook them by irritant clauses, which, if I contravene, my right is null, and the next heir has access in the terms of the act of Parliament 1685 anent tailzies, which being the great fence and security of our properties, the other inferior, lesser interests of inclosures must yield thereto. *Answered*, Irritancies prohibit voluntary alienations, but not necessary and judicial ones appointed for a public good; and here you can have no prejudice, for the Lords shall adjudge as much land to you in excambion as you gave away, and it shall be fettered with the same irritant clauses as the former was; and in case money were decreed, it behoved to be tailzied or employed on land; but the clearest way in such entailed estates is by excambion of land for land, to be subjected to the same burden with the former. THE LORDS decreed and adjudged with that quality.

*Fol. Dis. v. 2. p. 86. Fountainhall, v. 2. p. 138.*

1713. *July 28.*

MR ARCHIBALD DUNBAR of Thunderton *against* SIR ROBERT GORDON of Gordonston.

AT discussing the suspension of a decret of the Justices of Peace casting about the high-way, and adjudging some pieces of Sir Robert Gordon's lands to Mr Archibald Dunbar, for making his inclosures regular, in the terms of the act 14th, Parl. 1. Ch. 2.; the LORDS found, That the said statute is a perpetual law, in so far, as to encourage inclosing, it empowers Justices of Peace to cast

No 2.

No 3.

In a process of streighting marches against an heir, whose estate was entailed, the Court decreed with this quality, that the lands got in excambion should be under the fetters; and in case money were decreed, it should be tailzied and employed on lands in the same manner.

No 4.

The act of Charles II. in so far as for encouraging inclosing is perpetual, although in other respects temporary.

No 4.

about the high-ways, and inflict penalties against the cutters or destroyers of planting, breakers of hedges or inclosure ; albeit it be temporary in so far as it appoints heritors and liferenters to inclose and plant a certain quantity of ground according to their valuations ; for it was thought proper to tie the heritors for a certain number of years to plant and inclose, with a view, no doubt, that they would find it their interest to continue and go on voluntarily in that practice. But all encouragements were designed to be perpetual, unless such as are limited to a certain time, as the exemption from cess, which is confined to 19 years. Where the act of the Parliament 1685 bears, ' Because the time prescribed in the said act 41st is now elapsed, it is statuted and ordained, That the whole heads contained in the said act, be observed for the space of 19 years next to come ;' these words, though not very exactly conceived, can be applied only to the clauses of the act that were limited to a time, viz. the obligation upon the heritors during the 10 years, and the 19 years freedom then expired.

*Fol. Dic. v. 2. p. 86. Forbes, p. 715.*

1719. November 17.

No 5.

NASMYTH against The INHABITANTS of the WATER of LEITH.

MR NASMYTH having had some young trees destroyed in the neighbourhood of a village called the Water of Leith, insisted in a process against the Inhabitants, founding upon an act, *imo Georgii*, entituled, ' An act for encouraging of planting,' which provides, ' That the inhabitants of such parish, ville, or hamlet, where trees are destroyed, shall be liable for the damages ; the LORDS found it relevant to make the defenders, inhabitants of the Water of Leith, liable *in solidum*, without relief from the rest of the parish, that the pursuer's tenement lies within, or is a part of the ville, or hamlet, called the Water of Leith ; but found, That before execution against the persons liable, competent time ought to be allowed for the defenders to meet, and stent themselves for making up the pursuer's damages, and for proportioning relief to such as shall be obliged to pay more than their share. And if the pursuer's tenement be not comprehended in the Water of Leith, in that case also the defenders were found liable *in solidum*, but with relief against the inhabitants of the whole parish, allowing them time, before execution, to meet and proportion the said relief amongst themselves. See APPENDIX.

*Fol. Dic. v. 2. p. 87.*