1724. *July.*

JUSTICES of the PEACE of MID-LOTHIAN *against* TENANTS of LIBBERTON, &c.

No 6.

AN heritor taking benefit of the act of Parliament to cast about the high-way, was found bound to make up the new way all upon his own charges. See APPENDIX.

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

1734. *July* 24. FERGUSSON of Auchinblain *against* M'NIDDER.

No 7.

IN a pursuit against a tenant, upon the act of Parliament 1698, entituled, 'Act for preserving of planting,' it was proved, that a great number of natural growing trees in a glen, possessed by the defender, were cut during his possession; but that the ground where natural growing trees were, had been in use to be pastured upon by horse, nolt and sheep, as well before as since the defender's possession; and that these trees had not been preserved in time bygone to be cut for sale, and that they were not of such value as to be worthy of preserving and securing for sale: Therefore it was found, That they were not comprehended under the meaning of growing wood upon the defender's possession, which, by the said act, tenants are bound to preserve and secure, and assoilzied from the penalty of the said act of Parliament.

IN the same pursuit against a tenant for cutting of wood within his possession, upon the act 1698, entituled, 'Act for preserving of planting,' the act was found to infer a presumption, That growing timber cut or destroyed in a tenant's possession, is cut and destroyed by the tenant, unless the tenant will instruct that the same was done by a third party. See APPENDIX.

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

*** See No 22. p. 8254.

1738. *February* 23. GEORGE ORD *against* CHARLES WRIGHT.

No 8.
No action lies for half the expense of a march-dyke, if no requisition has been made to concur previous to the building.

THE point in dispute betwixt these parties resolved in this question, Whether an action lay for payment of the half of the expenses of a march-dyke, which was begun to be built without requiring the defender to concur, in terms of the act 41, Parl. 1661?

For the pursuer it was *argued*, That the law did not make any requisition necessary, the clause founded on only requiring, 'The next adjacent heritor 'shall be at equal pains and charges in building, &c. that dyke which part-'eth their inheritance.' By the first part whereof, the adjacent heritor may, if he thinks proper, lessen the expense, by adhibiting the labour of his ser-

No 8. vants; but if he neglects, in due time, to be at the equal pains necessary for building his half of the dyke, then the other alternative takes place, viz. That he pay the equal half of the charges laid out upon it. Nor is there any reason why the law should make a requisition necessary, seeing every heritor, when he sees his neighbour beginning to build a march-dyke, as he knows the law, so he must know that this work is an equal concern to each, and that both are equally liable; so that if he imagines he can do it in a cheaper way, or that he can save any of the expense, by employing his own servants, it is more his business to require his neighbour to vary the plan, than it is his neighbour's to require him. But 2*dly*, Suppose such intimation were necessary, it could be to no other purpose but to certiorate the other heritor, so as he might either propose a cheaper or easier method of building, or lessen the expense by his own concurrence; consequently, if intimation has not been made, the omission should go no farther than to exoner the other party of such part of the charges as he could have freed himself of, if he had been required, and to restrict the action to so much as it would have cost him to build his share of a sufficient dyke in the cheapest manner he could have gone about the same, had it been intimated to him from the beginning.

Answered for the defender; There could be little doubt, if an heritor took the benefit of a march-dyke when inclosing his ground, before the act of Parliament, he would be liable to the half of the real expence *in quantum lucratus* But the act in question goes a great deal further, as the neighbouring heritor is thereby obliged to concur in building, whether he propose to make any benefit by inclosing his own grounds, yea or not; for this law is merely statutory, and consequently must be strictly followed furth; so that if the terms thereof are not observed, no action can lie for the half of the expenses, that being a benefit or privilege introduced in favours of the builder, which it is to be presumed he throws up, if he goes on with his work without requiring his neighbour to concur with him: And if the pursuer's doctrine were to take place, that no requisition is necessary, it would be in the power of an heritor to rear up a fence upon his march, of any fashion he has a mind, without consulting his neighbour, and yet oblige him to pay one half of the expense; a consequence no ways founded upon the statute, which enacts, 'That neighbouring heritors 'must equally concur;' and, of course, each must have a vote as to what kind the march-dyke should be: The application of which to the case in hand is obvious; for, if the pursuer had intimated his design of building the dyke, the defender would have insisted for a fence, with ditch, hedge, and other planting, in which, it is believed, he must have been preferred in the choice, because in terms of the act: Therefore, it is incongruous the pursuer should obtain a preference of choice by neglecting the law, which no heritor can have who conforms himself to the regulations thereof.

THE LORDS found the defender not liable in any part of the expense.

C. Home, No 90. p. 142.