AUCHINLECK. John Dickson had a title of property, either personal or feudal, to the whole subjects disponed: the disponees are preferable to the heir. As to what is said, that the trustees have no occasion for sequestration, in that I would allow the parties to judge for themselves. If, from appointing a factor, any unnecessary expense should arise, the objection against it will be entire when the trustees come to institute a count and reckoning.

KENNET. In modern practice a disponee is preferred to the apparent heir. David Dickson cannot object that the trustees are willing to quit possession: this is rather advantageous to him than hurtful, for it will leave the rents *in medio*, to which he claims right. As to sequestrating the moveable estate, it appears that the trustees expede a partial confirmation: this gives right to the whole. David Dickson's confirmation is not good, not being *ad omissa*, and being expede *pendente processu*.

PRESIDENT. The case of *Douglas*, mentioned by both parties, is not in point. Mr Douglas was both heir-of-line and had a death-bed disposition in his favour. His titles would have been completed in a day or two: besides, there seemed to be a plan of putting him out of possession, and thereby of disabling him from maintaining his right. Here the trustees are *ex facie* in the right, and desire to have the estates sequestrated: here is a question litigious and proper for sequestration. The difficulty is, that the apparent heir says, Do not load me with the expense of a factor: if Mr Dickson is not himself a proper person to be factor, he may suggest some proper person. As to moveables; of Lord Kennet's opinion, and for the same reason.

COALSTON. My own opinion in the case of *Douglas* proceeded on this, That Mr Douglas was disponee by the death-bed deed.

On the 5th December 1769, the Lords "adhered to their interlocutor of the 1st August 1769, sequestrating the estate heritable and moveable; but remitted to Lord Elliock to hear parties further as to the nomination of a factor."

Act. A. Lockhart. *Alt.* R. M'Queen, D. Rae.

1769. *December* 5. JAMES RIDDEL of Crasteir *against* The MARQUIS of TWEEDDALE.

PLANTING AND INCLOSING.

The clause of the Act 1661, c. 41, respecting Half-dyke, is perpetual.

[*Fac. Coll. IV.* 359; *Dict.* 10,489.]

AUCHINLECK. This is an excellent statute, obliging every one to bear half-dyke. It is understood to be a subsisting law, and justly and happily so.

KENNET. In the case *Wilson* against *Sharp of Houston*, it was found by the Court to be a subsisting law. There, an equitable exception if a high road so

divided the ground of the conterminous heritor that there remained not sufficient space for an inclosure.

JUSTICE-CLERK. The statute still subsists. The inclosing there mentioned does not seem confined to ditch and hedge: the species of inclosure must be determined by circumstances. Every estate is profited by inclosing.

HAILES. It is said that this statute may be turned into an engine of oppression by great against petty landholders: we are not to judge of possible grievances. It is remarkable that this statute has been in full force for upwards of a century, and yet there has been no one instance where it has been used as an engine of oppression; so that here there is nothing more than the apprehension of a grievance.

MONBODDO. I cannot agree to the doctrine that pasture farms are not within the law. There is scarcely any sort of soil which may not be improved by culture, at least by trees.

PITFOUR. Wherever ground enough is left out for making an inclosure, the law takes place. Such was the principle in the case of *Penman*, where the law was found not to apply, because there was no subject fit for making an inclosure.

PRESIDENT. The law has been found not to relate to small feuars, to ministers, nor where the quantity of ground was insignificant or cut by a road. Did the case occur of some great landholder endeavouring to ruin his little neighbour by calling him to bear march dyke for many miles, I should possibly not give way to such a demand, upon the statute.

COALSTON. The law relates to every species of ground except flow mosses, for which no manner of improvement has as yet been discovered; yet I cannot blame the tutors for trying the question.

On the 5th December 1769, "The Lords found that the Marquis of Tweeddale is bound to concur with Mr Riddel in making the inclosures, except where the high road lies upon or near to the march;" adhering to Lord Elliock's interlocutor.

Act. R. Campbell. *Alt.* A. Murray, A. Lockhart.

1769. *December* 7. MESSRS FOGGO and GALLOWAY *against* JOHN SCOTT and WILLIAM OLIVER.

LEGAL DILIGENCE.

Poinding cannot proceed in name of the Assignee, upon a Horning raised by the Cedent.

[*Fac. Col. IV.* 362; *Dict.* 3693.]

PITFOUR. The case of *Stewart* and *Hay* was deliberately considered: I remember it well; and the judgment of the whole writers to the signet was given