statute was only to encourage the inclosing lands, but not to provide for preserving inclosures already made. No 13.

Answered, It is of no consequence, whether this dyke was built by Seivewright, when proprietor of both estates, or at a time when the estates belonged to different proprietors; since by the disposition to Mr Lockhart, it is declared to be the march-dyke; and, of consequence, is the common property of the pursuer and defender. The act 1661 makes no distinction, whether the heritor who is required to concur in building a march-dyke, will or will not reap any advantage from it, by completing an inclosure upon his own estate; and after the dyke is erected, it must follow, at common law, independent of the act 1661, that each heritor shall contribute equally to uphold and repair their common property.

'THE LORDS found the defender liable to contribute one half of the expense 'of upholding the march-dyke between the pursuer's property and his.'

Act. *Garden*. Alt. *Scrymgeour*.

W. J. *Fol. Dic. v. 4. p. 80. Fac. Col. No 91. p. 163.*

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

No 14.
The clause of the act 1661, c. 41. respecting half-dyke, is perpetual.

JAMES RIDDEL having purchased the lands of Dodhouse and Dodhouse-rig, consisting of about 1300 acres, and bounding with the estate of Tweeddale for the space of 648 roods, insisted that the Marquis should lay out one half of the expense of making an inclosure along the common boundary, in terms of the statute 1661. c. 41.

Pleaded in defence, 1*mo*, The statute was temporary, and the period for which it was to remain in force is long expired. The former enactments inforced with penalties, against heritors who should not inclose certain portions of their grounds, having proved ineffectual, the legislature was willing to try the effect of temporary benefits or privileges. In this view, the act 1661. c. 41. provides, that heritors possessed of L. 1000 Scots of rent, shall inclose 4 acres yearly, and plant them with trees, and that other heritors shall 'plant, inclose, 'and ditch yearly, more or fewer acres, according to their respective rents, 'for the space of 10 years next ensuing.' In order to encourage heritors to the observation of the statute, it declares, 'such parts and portions of their 'ground as shall be so inclosed and planted, to be free of all manner of land-'stents, taxations, or impositions of whatsoever nature, or quarterings of horse, 'for the space of 19 years next after the date hereof.'

These clauses are clearly temporary; and the clause respecting half-dyke being intended to inforce them, must of course be temporary likewise. Indeed that that matter is put out of all doubt by the statute 1685, c. 39. which, upon

No 14. the narrative that the time prescribed in the act 1661, is now elapsed, provides, 'that it shall be observed for the space of 19 years next to come.'

2do, The statute, though allowed to be in force, does not apply to this case, the conterminous lands being of such a nature, as that the inclosure cannot be made by ditch and hedge. But this is the only species of inclosure authorised by law. The act 1457, c. 83. forbids dry stake hedges. Various statutes direct the making of live fences, as 1457, c. 80., 1503, c. 74., 1535, c. 10.; and the act 1671, speaks of planting, ditching, and inclosing, expressions which do not apply to a stone-wall.

3tio, The legislature never intended to compel proprietors to inclose their whole lands indiscriminately. The act 1457, c. 80. obliges freeholders to plant trees and make hedges, 'after the faculties of their mailings, in place convenient therefor;' the act 1503, c. 74. mentions only one acre; and the act 1535, c. 10. mentions three. In like manner, the act 1661 requires four acres to be inclosed annually, and that not indefinitely, but, 'of such lands as the heritors shall think most fit for planting, and capable for inclosing.' The statute, therefore, ought not to be extended to a whole farm or estate, of whatever extent or soil, which might be made the instrument of oppression in the hands of the great and opulent; and, in this case, the lands proposed to be inclosed are store-farms, so hilly and mountainous, as to be incapable of improvement, by inclosing, or otherwise.

Answered; The act 1661, c. 41. consists of various propositions, and contains sundry enactments for promoting the improvement of the country; it ordains heritors of L. 1000 Scots annually to inclose 4 acres, for the space of 10 years successively, and to plant trees of different kinds; it declares the lands so planted to be free of taxes for 19 years to come; it authosises the turning about of roads, for the encouragement of planting and inclosing; and it appoints the adjacent heritors to be at equal expense in drawing the inclosure which parteth their inheritance.

The two first clauses, obliging heritors to plant and inclose, and indulging the lands so planted and inclosed with an immunity from taxation, are expressly declared to be temporary. But there is no such declaration with respect to the other clauses, which therefore, of necessary consequence, are perpetual. Indeed it is clear, that the clause respecting half-dyke, is a separate and distinct proposition, which has no relation to planting, and is not confined to the lands planted and inclosed in consequence of the preceding branch of the statute.

This construction is supported by the terms of the after statute 1669, c. 17. which, upon the narrative of that part of the statute respecting half-dykes, and the difficulties attending the execution of it, where the marches are crooked or unequal, or the bordering ground unfit for bearing a dyke, or receiving a ditch, empowers the judge-ordinary to adjudge from the one heritor to the other, such part of the ground as occasions the inconveniency, and to fix a new line of march, so as may be least to the prejudice of either party. This statute

was intended to inforce that part of the act 1661, and would have been highly absurd, if the first had been understood to be temporary, since, in that case, it would have been within a year of expiring at the time. No 14.

The act 1685, c. 39. is inaccurately expressed; but, upon an attentive consideration, it is obvious, that the legislature did not mean to extend the prorogation to the whole heads of the former statute. If the act 1661 was temporary, it expired in 1671, and it would have been absurd to ratify a statute long ago expired. The ratification, therefore, does not relate to the whole statute, but to those branches of it which were intended to be perpetual; while the prorogating clause respected those branches of it which were temporary.

Accordingly, in a case which occurred after the lapse of the 10 years, the act 1661 was put in execution, so far as respected the expense of a march-dyke, 9th January 1679, Seton *contra* Seton, No 2. p. 10476.; and, in an after case, it was found to be perpetual, with regard to the power of turning about highways; 28th July 1713, Dunbar *contra* Gordon, No 4. p. 10477. On the same principles, a conterminous heritor was found liable in his proportion of the expense of upholding a march-dyke already built, 20th January 1758, Lockhart *contra* Sievewright, No 13. p. 10488; nor, in any case, has the defence been sustained, or even pleaded, that this branch of the statute was temporary.

To the *2d*: The statutes referred to respect not the present question, being intended to compel heritors to make hedges and plant trees, without any regard to march-dykes. But the act 1661 does not specify any particular kind of fence, and provides in general, that 'the next adjacent heritor shall be at equal 'pains and charges in building, ditching, and planting that dyke which parteth 'their inheritance; which words must be understood, *applicando singula singulis*, of ditching and planting where a hedge can be conveniently made, of building, where a stone wall is necessary.

Indeed the act 1669 clearly points out, that march-inclosures are of different kinds. It provides for an exchange of property, 'where the bordering ground 'is unfit or incapable of bearing a dyke, or receiving a ditch;' so that all the defender could at any rate demand, is, that the march should be shifted to ground proper for making the inclosure, either upon his own property, or that of the pursuer.

To the *3d*: The present action is not founded upon the obsolete and temporary statutes referred to by the defender, but upon the act 1661, c. 41. which in the enactment respecting march-inclosures, is general, and not limited to any particular number of acres. Nor is there any reason to say, that the conterminous lands are of such a nature, as that they can reap no benefit from being inclosed. The contrary is evident from the improvements already made by the pursuer, as ascertained by the report of the surveyor authorised by the court.

'THE LORDS repelled the defences, and found, that the Marquis of Tweed-'dale is bound to concur with Mr Riddel, in making the inclosures proposed

No 14. 'upon the marches of their respective property, except where the high road 'lies upon or near the march, and to be at one half of the expense of such 'inclosures.'

Act. *Ro. Campbell.* Alt. ——.

Fol. Dic. v. 4. *p.* 80. *Fac. Col. No* 103, *p.* 359.

1775. *July* 21. LOGAN *against* HOWATSON.

No 15.
Import of the statutes for preservation of planting in a question between master and tenant.

LOGAN instituted an action before the Judge Ordinary against Howatson, his tenant, in a farm called Burnhead, on which there was a considerable natural wood, libelling upon the act 39th, Parliament 1685, and the act 16th, Parliament 1698; and setting forth, That the defender did, by himself, or others by his orders, and without any warrant from the pursuer, cut or destroy at least 100 trees, growing upon the said lands, above the age of ten years, which he used and disposed of as he thought fit; at least, that the said trees were, during the defender's possesion, cut, broke, or pulled up, &c. which he, as tenant of the said lands, was bound to have preserved; and concluding, that the defender should be decerned to make payment to the pursuer of the sum of L. 20 Scots for each of the said trees, in terms of the foresaid acts of Parliament.

Upon the 23d August 1774, the Sheriff pronounced the following interlocutor: "Having considered the libel, proof adduced, and minutes of process, finds it proved, That, during the time libelled, at least twenty trees of different kinds, and upwards of ten years old, were cut in the pursuer's wood libelled: That the stools of several of said cut trees were covered with clay and fog, to prevent discovery: That the defender gave orders for cutting and covering many of the stools of said cut trees: Finds, That any allowance the defender appears to have had from the pursuer, for cutting some timber for the use of the farm, is not a sufficient defence for cutting so many trees in a clandestine manner, and ordering the stools to be covered, as above mentioned; and, therefore, finds the defender liable for L. 20 Scots for each of the twenty trees, upwards of ten years old, cut in the pursuer's wood libelled; and decerns him to make payment to the pursuer accordingly."

Howatson brought a suspension; and *urged*, as his *first* reason of suspension, That the decree charged on is null and void, as having been pronounced when the cause was sleeping; in so far as no step was taken in it from February 1768 to August 1774, when the decree in question was pronounced.

Answered to this objection, It is not pretended that the process was sleeping when the Sheriff took it to avisandum, after conclusion of the proof, in February 1768; and it is likewise agreed, that it remained in that state till the Sheriff pronounced the foregoing judgment. It is no less indisputable, that, by