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

the uniform practice of the Sheriff-courts, processes are not wakened, nor held to fall a-sleep, so long as they lie at avisandum; which is founded on reason, as the parties cannot compel the Judge to give his judgment sooner than he is ripe or ready to pronounce it; and, while he is not so, no calling of the cause can be of any avail to them. Upon a report of some of the Sheriffs, in obedience to an order of Court, that such was the practice in their courts, the LORDS over-ruled this objection. No 15.

Upon the merits of the case, the suspender

Pleaded, That he had a licence from the charger to cut wood for the uses of his farm; and that, at the utmost, he ought to be no further liable than to the amount of the trees that are proved to be actually cut by him, or his family, or servants, which are only nine in number; for that the act 1698 does not make the tenant liable for such trees growing on his possession as are cut and destroyed by others than his family, or servants; especially as many of the trees in question were cut by the pursuer himself, or others whom he employed to cut the wood.

Answered, The suspender does not venture to deny that he actually did cut trees in this wood; and the proof must carry conviction that he even cut more trees than the number of twenty, for which he has been found liable; and that, instead of acting fairly, by licence or authority of the charger, he committed this theft or abstraction in a clandestine or hidden way; while the evidence referred to, of his having had allowance from the charger to cut wood, for the use of his farm, cannot merit the least regard.

As to the objection, in point of number, many statutes had been made before the 1698 for the encouragement and preservation of planting and policy; in particular, the 39th act 1685, which was here also libelled upon. This, as well as the former acts, was found insufficient to prevent the evil, as it only subjected the actual cutters of the wood, or those in whose possession it was found, after being cut; and, therefore, a farther remedy was provided by the act 1698, which ratifies all former acts made for planting and inclosing of ground; and, for making the same more effectual, statutes and ordains, that all tenants and cottars shall preserve all growing wood and planting that is upon the ground they possess, that none of it shall be cut, broke, &c. and that under the pain, to be exacted by the masters allenarly, of L. 10 Scots for each tree within ten years old, and L. 20 Scots for each tree that is above the said age of ten years, unless the same be done by warrant of the master and heritor of the ground. It is abundantly clear, that this act was intended to subject the tenant for all the trees cut or destroyed on his possession, by whomsoever the same was done, unless it proceeded from the order of the master. It is true the act likewise declares, "That the tenant shall be liable for his wife, children, and servants, or any others within his family that shall contravene this present act;" but this proviso must have been meant as ap-

No 15. plicable to the case where the actual transgressor was discovered, and appeared to be one of the tenant's family; and could never be intended to derogate from the former part of the act, which clearly subjects the tenant to his master for all the damage done in his possession, and without which this act 1698 would have been totally inefficient, as the actual cutters of wood had already been subjected to the same penalties by the act 1685.

It is an agreed point, that the British statute of the first of George I. to encourage the planting of timber trees, &c. does not repeal the act 1698, or any of the Scots acts for encouragement of planting. It only gives a further remedy to the party aggrieved, by subjecting the parish, &c. which is nowise inconsistent with the tenant's being also liable in the old penalty, in case the lands happen to be in tenantry, so that the master may then have his option of suing upon either of the statutes. But, where the trees happen to grow upon the lands in the heritor's natural possession, the act 1698 cannot avail him, and consequently he must then have recourse to the British statute, or to a prosecution against the offender.

This construction of the act 1698 has already been received in this Court, where it has been adjudged that the tenant is liable for all trees cut or destroyed on his possession, unless he can prove that the same was done by some others than himself or his family; Ferguson of Auchinblain against M'Nidder, 24th July 1734, No 7. p. 10479. And holding, then, the point as fixed, that the suspender must be liable for the whole trees in question, since he does not prove that they had been cut by any other person than himself or family, it is plain that the decree against him cannot be restricted to the nine trees which he acknowledges to have been cut by him. The proof, as it stands, carries the number greatly beyond the twenty to which he is subjected.

The LORD ORDINARY repelled the reasons of suspension, but gave no expenses, as it was a decree for penalties.

Upon a reclaiming bill and answers, the case of Robertson against Robertson, July 24. 1743, No 10. p. 10484, was cited for the charger.

Observed on the Bench, That the case of Stirling against Christie, December 4th 1762, No 20. p. 9403, was directly in point as to the construction of the statute 1698. But that this case was erroneously collected, in so far it states it to have been an adjudged point in that cause, that the facts were not relevant to be proved by the oath of the tenant; whereas the Court had given no opinion upon the general point as to the relevancy of the proof by the party's oath in such a case, as not being necessary in that cause then at issue: But that the point itself, viz. that it was relevant to prove by oath of party in actions for pecuniary penalties, had been decided in another case, Justices of Peace of Ayr against the Town of Irvine, 24th January 1712, No 17. p. 9398.

" The Court adhered to the LORD ORDINARY'S interlocutor; and farther, awarded the expense of the answers," as the defender ought to have acquiesced then. No 15.

Act. *Rae.* Alt. *J. Boswell.* Clerk, *Kilpatrick.*

Fac. Col. No 183. *p.* 104.

1775. *November* 17. MOIR *against* MORISON.

No 16.

IN this case, the following judgment was pronounced: " In respect that the charger, notwithstanding he has repeated the act of Parliament 1698 in his libel, has concluded nothing against the suspender thereupon, but only for his actual cutting of the trees libelled; and that the interlocutor of the Sheriff allowing the proof was in the same terms; the LORDS find, that the charger having failed in his proof that the suspender did cut the trees libelled, is not now at liberty to amend his libel, and to insist for the penalty contained in the acts of Parliament, and therefore suspend the letters *simpliciter*."

Act. *Jo. Graham.* Alt. *M'Laurin.* Clerk, *Pringle.*

Fac. Col. No 197. *p.* 134.

1781. *July* 3. HELENUS HALKERSTON *against* JAMES WEDDERBURN.

No 17.
Right of a conterminous heritor as to trees protruding from another's property.

MR HALKERSTON, thinking his garden at Inveresk injured by a row of elms, the branches of which hung over it from the garden of Mr Wedderburn, applied to the Sheriff for redress. After various steps of procedure, the cause was removed to the Court of Session by advocation; when the following abstract question came to be considered, viz. Whether a person is bound to allow his property to be overshaded by the trees belonging to a conterminous heritor?

Pleaded for Mr Wedderburn; The climate of Scotland is such as has induced the legislature to encourage the planting of forest-trees in hedge-rows, for the sake of shelter; and, for some time, it was even imposed as a duty upon every proprietor; act 1661, cap. 41. This, however, would have been an elusory enactment, if the common law permitted a conterminous heritor to lop such trees, whenever their branches extended beyond the line of march. By the common law, an heritor may plant so near the march, *in prædiis rusticis*, that the trees will protrude their branches into the air, over the adjacent ground; nor is there any thing in that law, which authorises the conterminous heritor to lop off such branches, unless he can qualify a material damage arising from their protrusion.