

No 10.

1743. July 24. MAJOR ROBERTSON *against* JOHN ROBERTSON.

IN the question betwixt these parties, the LORDS found, That fruit trees fell under the acts of Parliament for preservation of planting.

C. Home, No 248. p. 401.

* * * Kilkerran reports this case :

FOUND; that fruit trees in orchards, fall under the acts of Parliament for preservation of planting. So much was thought to be imported in the letter of the 41st act, Par. 1. Sess. 1. Cha. II. and therefore no regard was had to the suggestion, that fruit-trees did not seem to fall under the purview of the statute, and that penal statutes were not to be extended.

And whereas a doubt was stirred upon the import of the act of Parliament, 1689, whether the tenant was liable, though it be not proved that he or any of his family did the damage; upon this ground, that although the first part of the act of Parliament be general, subjecting the tenant, whoever may have done the damage, yet in the latter part of the act the tenant is declared liable for his wife, bairns and servants; but *cui bono*, if he was liable, whoever did the damage? The answer was, that without doubt the tenant is by the act liable whoever do the damage; and the reason of the clause subjecting him for his servants, &c. was to obviate a pretence that might have been made by the tenant, that he was free, where the real delinquent was discovered.

Kilkerran, (PLANTING AND INCLOSING OF GROUND.) No 2. p. 403.

1754. December 14. WILLIAM PEW *against* WILLIAM MILLER.

No 11.
Three acres
and a half
adjudged
from one
heritor to
another, in
virtue of the
act 17th Parl.
2d Cha. II.

PEW had right to a lease of certain lands belonging to the Trinity Hospital in Edinburgh. In this farm there is a narrow piece of ground, which stretches for near five hundred ells into the lands of Miller. Miller, purposing to inclose his lands, brought an action before the Sheriff against the Magistrates and Town-Council of Edinburgh, as administrators of the Hospital, and against Pew as their tenant; concluding, in terms of the act 17th Parl. 2d Charles II. That the piece of ground above mentioned, should be adjudged to him in exchange for other ground of equal value. The Magistrates consented to the exchange, but Pew opposed it. The Sheriff appointed certain persons for valuing the ground, approved of their report, and ordained the ground to be measured, in order to complete the exchange.

Pleaded for Pew, in a bill of advocation; The Sheriff has exceeded the powers vested in him by law. The act 17th Parl. 2d Charles II. in order to correct any small irregularity in marches, and thereby to facilitate the inclosing of ground, allows the Sheriff to adjudge little pieces of ground to one or