

"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.

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*."

No 16.

Act. *Jo. Graham.*Alt. *M. Laurin.*Clerk, *Pringle.**Fac. Col. No 197. p. 134.*

1781. July 3. HELENUS HALKERSTON against JAMES WEDDERBURN.

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 advocacy; when the following abstract question came to be considered, viz. Whether a person is bound to allow his property to be overshadowed 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.

No 17.

Right of a conterminous heritor as to trees protruding from another's property.

No 17.

In England, as well as in Scotland, the highways are understood to be vested in the King, for behoof of the public; yet, in both kingdoms, statutes have been found necessary to authorise Justices of the Peace, Way-wardens, &c. to cause prune trees hanging over the road; which could not have been the case, had the common law allowed any such power to a conterminous heritor.

In like manner, though the Roman law allowed the proprietor of a *prædium rusticum* to prune such trees to the height of 15 feet, yet this was not a right inherent in him upon the principles of common law, but was derived from the laws of the twelve tables, and confirmed by an edict of the Prætor; L. 1. § 7, 8, 9. D. De arb. cæd. And this very limitation of the right shews, that the Romans did not think the protrusion of branches in itself any encroachment upon the right of property; except so far as it obstructed or impeded the immediate exercise of it. They considered the air as a *res communis*, incapable of appropriation; and thought, that no encroachment upon it afforded a proper ground of challenge.

Answered for Mr Halkerston; It is understood to be a general rule of law, that no person is entitled to encroach upon the property of another, unless he can show a right of servitude to that effect. One may dig a trench upon his own property, though the effect of it may be, to cut the roots, and destroy the whole of his neighbour's trees. He may raise his wall to any given height; and, in doing so, he may cut down every branch that stands in his way. While a branch from his neighbour's tree does him no harm, he will allow it to remain, upon the same principle of good neighbourhood, that he allows him to hunt over his fields, or to angle in his stream. But the moment this branch does him a real or an imaginary injury; whenever, in short, he wishes to remove it, the law entitles him to do so, in the same manner, and upon the same principles, that it entitles him to protect his property from any other kind of encroachment.

The regulations for the encouragement of planting and inclosing, introduced by the act 1661, can never apply, with any propriety, to two contiguous gardens in the village of Inveresk; and it is not very obvious how the powers given by statute to the public officers entrusted with the care of high-ways, at all derogate from the private right of parties to demand what they are empowered to do.

Neither does the argument on the other side derive any support from the Roman law. The edict referred to, related only to *prædica rustica*; but, where a similar encroachment was made upon a *prædium urbanum*, as seems more properly to be the case here, another edict of the Prætor authorised the whole tree to be cut down; L. 1. § 2. D. De arb. cæd. At any rate, it is nothing to us, in what manner the Romans chose to limit the natural right now contended for. Under an Italian sun, it might probably be thought, that there could not be too much shade; but the same idea can never be entertained in a northern climate; and, accordingly, the learned Groenwegen, in his treatise, De legibus

abrogatis et inusitatis, in *Hollandia vicinisque regionibus*, says expressly, ' Si arbor fundo, vel ædibus alienis impendeat, nostris et Gallorum moribus, non totam arborem a stirpe excindere, sed id quod super excurrit in totum adimere licet ;' tit. De arb. cæd.

No 17.

THE COURT had no doubt upon the principle ; and, therefore, adhered to the Lord Ordinary's interlocutor, " Remitting the cause to the Sheriff, with this instruction, that he find Mr Wedderburn is bound to prune his trees in such a manner, as they may not hang over the mutual wall, and thereby be of prejudice to Mr Halkerston's fruit and garden."

Lord Ordinary, *Braxfield*. Act. *Alex. Abercrombie*. - Alt. *Crosbie*. Clerk, *Campbell*.
L. *Fol. Dic. v. 4. p. 81. Fac. Col. No 65. p. 105.*

1784. *March 3.* JOHN BUCHANAN against DUNCAN MALCOLM.

SOME oak trees, which formed part of a clump of natural wood belonging to Mr Buchanan, having been unwarrantably cut down by Malcolm, the former sued the latter in an action before the Sheriff of the county, for the penalties enacted by the statute of 1685, c. 39.

No 18.
The act 1685, cap. 39. applies to natural woods.

The judgment of the Sheriff was this : " In respect it appears, that the trees libelled were not planted trees, but grew in a natural wood, from stools or roots of trees that had been formerly cut, ordains the pursuer to instruct the value of the trees libelled, at the time of their being cut by the defender, and what value they might have risen to, had they been allowed to grow to maturity."

The pursuer complained of the Sheriff's judgment by bill of advocation ; which was " refused" by the Lord Ordinary on the bills. But he having reclaimed to the Court,

THE LORDS seemed to consider the above mentioned act of Parliament as not exclusively applicable to planted trees, but as likewise relating to natural woods ; and accordingly they " altered the Lord Ordinary's interlocutor, and passed the bill of advocation."

Lord Ordinary, *Henderland*. Act. *A. Abercromby*. Alt. *Macnochie*. -
Clerk, *Home*.
S. *Fol. Dic. v. 4. p. 81. Fac. Col. No 151. p. 236.*

1784. *June 15.* EARL OF PETERBOROUGH against MRS MARY GARIOCH.

No 19.
The act 1661 not to be extended to the case of a conterminous fence, where the

THE Earl of Peterborough, as proprietor of an estate situated in Kincardineshire, preferred to the Sheriff of that county a petition, setting forth his intention of inclosing his grounds, in order to improve them ; and praying, that Mrs Garioch, the conterminous heritor, might, in consequence of the statutes of