

APPENDIX.

PART I.

PLANTING AND INCLOSING.

1805. *January 18.* COOPER *against* CAMPBELL.

ALEXANDER COOPER of Smithston, presented a complaint to the Justices of Ayrshire, against James Campbell, one of his tenants, founded on the act of Parliament 1698, C. 16., for the preservation of planting. The pursuer set forth, that a number of young trees upon the farm had been maliciously broken by the defender, or his family; at all events, that the injury the planting had sustained, arose from the tenant not taking sufficient care to have the plantation preserved; and the summons concluded for the statutory penalties for 140 trees that had been destroyed. A proof was led, from which it appeared, that the defender's children had been occasionally seen to break the tops or branches of some of the trees in the plantation; but there was no evidence that any of them had been destroyed maliciously. The Justices found the tenant liable for the actual damage which had been done to the planting by his children, the pursuer having first instructed the amount.

NO. 1.

The penalties awarded against tenants by the act 1698, c. 16., for the preservation of planting, are subject to modification by the Court.

Upon this the landlord complained to the Court of Session by advocacy; and the Lord Ordinary "being of opinion, that it would be a most rigorous extension of the statutes for the preservation of planting, to apply their several penalties in a case where the injury has been done by children far under the age of pupilarity, and ignorant of the mischief they were doing; finds the pursuer entitled only to damages for the number of 140 trees injured by cutting or pulling off their tops, which is the number libelled for by the pursuer, and proved at least to that extent: And deeming it more advisable to give a final judgment in the cause, by

NO. 1. “ modifying the said damages, therefore recalls the last interlocutor, which
 “ remitted to the Justices for that purpose ; advocates the cause, and finds
 “ the defender liable to the pursuer in the sum of L. 10 Sterling of da-
 “ mages for the injury committed, and decerns for the same, together with
 “ the expenses of extract.”

Against this interlocutor Cooper presented a petition to the Court, and

Pleaded : The act of Parliament, 1698, cap. 16. contains a twofold provision, 1st, That tenants shall be liable to their landlord for all growing wood destroyed on their farm, unless they give up the destroyer. 2d, That they shall be personally liable for the conduct of their family and servants. It is only necessary for the landlord to shew, that trees have been destroyed on the farm, to subject the tenant in the penalties ; Ferguson against Macnigger, July 24. 1734, No. 7. p. 10479. ; Robertson against Robertson, July 24. 1744, No. 10. p. 10484. ; Buchanan against Malcolm, March 3. 1784, No. 18. p. 10497. And accordingly the preservation of planting is accounted among the implied obligations to which a tenant is subjected ; Bank. Vol. 2. p. 100. And as the penalties of the act of Parliament were fixed at a time when the value of money was much greater than at present, there is no reasonable ground for modification.

Answered : It would be a most unjust interpretation of the statute, to oblige a tenant to prove in what way trees are destroyed ; since it is evident that may be occasioned by the inclemency of the weather, and a variety of other causes, for which he is not responsible. The penalties can only be inflicted, upon the supposition that the injury has arisen from the tenant's gross negligence, or from causes which he might have prevented from operating. Besides, the act of Parliament, so far as regards tenants, only applies to planting upon the grounds they possess. Now, with regard to these trees, they were upon ground which the tenant had relinquished for the accommodation of his landlord, and of which he was not in possession. There is no proof that any of these trees were destroyed maliciously ; and the Lord Ordinary's interlocutor awards damages to the extent of the mischief inadvertently done by the defender's children. Farther than this, he cannot be liable.

The Court, upon advising a petition, with answers, adhered to the interlocutor of the Lord Ordinary.

There was some difference of opinion upon the Bench, with respect to the power of the Court to modify penalties, expressly awarded by an act of Parliament. The majority of the Judges, however, seemed to be of opinion, that the Court had such a power of modifying ; and that unless this power were to be recognized, it would be impossible in many cases to do justice.

Lord Ordinary, *Woodhouselee.* Act. *Boswell.* Agent, *W. Patrick.* W. S.
 Alt. *Gillies.* Agent, *Jo. Taylor,* W. S. Clerk, *Home.*