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

other of contiguous proprietors; but it does not allow him so to adjudge large parcels of ground, as in the present case, where three acres and a half are meant to be adjudged to Miller. So considerable encroachments on property can only be authorised by the express will of the legislature. The act of Charles II. has not authorised them; and, as it is a correctory statute, it may not be extended by interpretation. No 11.

Answered for Miller; The act 17th Parl. 2d Charles II. although correctory, is framed for public utility. It neither mentions small irregularities, nor determines the quantity which may be exchanged. The march was, in terms of the statute, so uneven, as to occasion great inconveniency in the inclosing; for that the projection could not have been inclosed, but at an expense exceeding the value of the ground. The case therefore is within the statute, which authorises the Sheriff to adjudge such parts of the one or other heritor's ground, as occasion the inconveniency betwixt them, so as may be least to the prejudice of either party. The Sheriff has purposed to follow this rule, by adjudging to Miller the ground projecting into his lands, to Pew, ground of an equal value.

"THE LORDS refused the bill of advocation."

Act. *D. Rae.* Alt. *Miller & Lockhart.*

D. *Fol. Dic. v.* 4. *p.* 80. *Fac. Col. No* 121. *p.* 181.

1756. *July* 29. GEORGE CHALMERS *against* MARY PEW.

No 12.
The act relative to renewing and straighting marches, extended to the division of parcels consisting of two or three acres lying interjected.

IN the year 1718, the Trinity Hospital granted a tack for three nineteen years, of 90 acres of ground near Leith, to James Henderson. In the tack, a power was reserved to the Hospital to feu some acres of the farm. Henderson conveyed this tack to John Pew.

In the year 1734, the Hospital granted a feu of 16 of these acres to Thomas Mercer, who built a house upon them; and soon after the Hospital granted him another feu of above 24 acres more to the southward of the sixteen.

Into the middle of these last 24 acres, there run from west to east, a long narrow strip of ground, of about three roods in extent. This strip belonged to the Hospital, and was contained in the last feu, but being at that time set in tack to Shiells, Mercer purchased from Shiells his tack of it.

Mercer likewise bought another long strip of ground, of above two acres extent, from Lord Balmerino, which run from east to west, along the south-side of the 24 acres.

When the feus were granted to Mercer, John Pew had acquiesced in the first feu of the 16 acres, but brought a reduction of the second of 24.

During the dependence of this process, Mercer had surrounded all the above purchases with a high stone wall, running in four straight lines, and then cut it with a cross-wall, running from east to west, and thrown the whole into