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 exscindere, sed id quod super excurrit in totum adi-'mere licet;' tit. De arb. cæd.

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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.

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

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.

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 interloctuor, and passed the bill of advocation."

Lord Ordinary, *Henderland.* Act. *A. Abercromby.* Alt. *Maconochie.*
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 tenement, 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

No 19.
charges of inclosing would not be compensated by the resulting improvement.

1661, cap. 41. and 1685, cap. 39. be found liable in a half of the charges of the march-fence. Mrs Garioch made answer, that her property, though of large extent, was mountainous and barren, and yielded but a small rent; and of course, that the expense of the proposed inclosure of lands, which could not be meliorated by that operation, would, however little her more opulent neighbour might feel it, be a burden far too heavy for her circumstances to bear.

The Sheriff having "found that the act 1661 did not apply to the case." Lord Peterborough brought that judgment under review, by advocation.

Pleaded for the pursuer; The object of the act of Parliament of 1661, was not so much the private emolument of individuals, as the benefit of the public at large. This appears by the declaration contained in the preamble of that statute, and is illustrated by its subsequent tenor. Hence the statute has not directed Judges to enquire into the comparative advantage immediately resulting from inclosure to the parties concerned; nor has it authorised them to determine, whether, in particular cases, equity might oppose the effect of a law framed for a national purpose. If, therefore, one conterminous proprietor be desirous to improve his grounds, the other will not be permitted to with-hold his share of the expense of inclosing, however contrary that measure may be to his inclination, or even to his interest. Thus, though that expense would, to an heritor who had already set his lands in lease for 99 years at a fixed rent, be just so much certain loss; yet, without regard to his peculiar circumstances, even he, under the authority of the statute, has been found liable to contribute. The present case, far less favourable on the part of the defender, is similar to that of Riddel *contra* Marquis of Tweeddale, No 14. p. 10489. 5th December 1769, determined on the principles stated above.

Answered; That argument represents the statute in question in a singular light; as framed by a wise legislature, not for the benefit, but the oppression or the ruin of its subjects, Such, in a considerable degree, would be the consequence of enforcing its application to the present case. No lawyer, however, has thus interpreted that law; and Mr Erskine, in particular, observes, that it ought never to be so extended as to become 'a cover for oppression,' B. 2. tit. 6. § 4. The case of Riddel *contra* Marquis of Tweeddale is no example to the contrary; for there, of two tenements, the inclosing of one only yielded mutual advantage, and to that the judgment of the Court was confined.

This question was reported by the Lord Ordinary.

The opinion of the Court was, that this act of Parliament ought to be interpreted as respecting cases in which mutual, though not therefore equal advantages were to accrue to the conterminous tenements; and as in no instance authorising an act of oppression, or of injustice to any individual. Accordingly,

THE LORDS sustained the defence.

Reporter, *Lord Gardenston*. Act. *Lord Advocate*. Alt. *Blair*. Clerk, *Orme*.

S. *Fol. Dic.* v. 4. *p.* 80. *Fac. Col.* No 155. *p.* 242.