1739. *July* 3.

DR PENMAN *against* MARGARET DOUGLAS and KATHARINE COCHRANE.

No 9.
The act 41. Parl. 1661, burdening the heritor of the adjacent ground with the half of the march-dyke, does not reach feuars who have not above five or six acres.

THE doctor intending to inclose some acres which belonged to him, lying contiguous to the village of Inveresk, brought a process on the above act against his two neighbours, concluding, That they should, in terms thereof, be at equal pains and charges with him in building a stone and lime dyke, as a march betwixt their respective lands.

The substance of the defence was; That small feuars, who have one, two, or possibly six acres of ground, are not comprehended under the act; and the lands belonging to the defenders do not separately amount to six acres: If so, it would be extremely hard, by the extending of a correctory law, they should be forced to sell one half of their mailing in order to inclose the other. But, with regard to this point, it seems a mistake to suppose the statute is absolute, obliging heritors, without any other exceptions, save that of burrough and incorporate acres, to concur in the charges of a march-dyke; as that would be hard and unreasonable. Take the case, for example, of runrig, where single riggs belong allenarly to a score of heritors; suppose nineteen of these purchased in by one, so as to make a compact inclosure. Would it not be most unconscionable to burden the heritor of the remaining twentieth rigg with half the expence of the march-dyke that runs along the side of his rigg? an expense probably greater than the worth of his land. And, when the act itself is duly examined, it will not be found to comprehend the case of small heritors: It statutes, 'That every heritor of L. 1000 yearly valued rent, shall inclose four 'acres, and plant the same about with trees.' The subsequent clauses likewise, with regard 'to the power of casting about highways, imposing a penalty on 'those who cut or break trees,' &c. are all relative to this case, and to be explained by it: From all which we may conclude, that no heritor is bound to contribute to a march-dyke, save he who falls under the enacting clause in the beginning of the statute, obliging heritors to inclose so many acres yearly, effeiring to their valued rent. It is true, the obligation to inclose is laid upon heritors who have less than L. 1000 of real rent; but then it is obvious, this cannot reach heritors indefinitely, however small the rent be: They must be such who can inclose so much yearly, though the exact limits be not fixed: Nay, the argument may be carried somewhat farther, as there appears no authority from the act for claiming the half of the charges, except in favours of such heritors allenarly who are laid under a necessity of inclosing so much yearly. It may be said, indeed, that this consideration tends to make the regulation anent the march-dyke temporary, seeing the obligation to inclose was to last but for ten years from the date of the act, although by the statute 17th Parl. 1669, the same is made perpetual: But, whatever be in this, one thing seems evident, that the said regulation, which was meant partly, at least, as an

No 9. encouragement for such heritors who are laid under a necessity of inclosing by the said act, can never be extended to march-dykes of small feuars; a case not under the purview of the statute; and who, with respect to inclosing, are left upon the footing of the common law. What further tends to confirm this opinion is, that if the clause in controversy shall be taken by itself, independent of the other clauses of the act, burough and incorporate acres must be subjected to the same regulation with other acres that are not in that state; for the exception of burough acres is not introduced as a limitation of the said regulation; it is in a former part of the act, and introduced as an exception from the obligation to inclose. Now it seems past a doubt, that if the clause anent the march-dyke is to be taken by itself, independent of the other clauses, and not limited by them, it must be taken independent of this clause in particular of burough acres, so as to subject these to the regulation anent the charges of a march-dyke, in common with other acres.

2*do*, Suppose the defenders fell under the statute, they are not bound to contribute to a stone dyke. The act is for the benefit of planting, as well as inclosing, and that view runs through the whole of it; nor is there any other march-dyke specified therein, but that which is ditched and planted.

Answered for the pursuer; Since it is admitted that the clause of the act 1661 libelled on, as explained and amended by the act 1669, is at this day a standing law, the only question that remains, is concerning the sense or interpretation thereof. As to the words of the statute, they are as general as can well be conceived: 'Where inclosures fall to be upon the border of any person's inheritance, 'the next adjacent heritor shall be at equal pains and charges,' &c. Now, the parties here are possessed of the property of lands, which, small as they are, are their respective inheritances, and capable of being inclosed to advantage. Nor does the words of either of the acts entitle the defenders to plead an exception in their case, as the law does not make any distinction of the measure or size of the property of the persons intending to inclose; and, if it be once departed from, it will be difficult to lay down a rule how many acres the property of conterminous heritors must consist of, before the same be subject to, or fall under the law; for if heritors of six or eight or ten acres be exempted, how soon will it begin to take place? Must it be twenty-five, fifty, or a hundred acres; or what other measure?

The strain of the defender's argument is, to tack this general clause, which is the last in the act, to the first, that concerns the obliging heritors of so much valued rent to inclose four acres yearly, what they think cannot apply to small feuars: But, as the one clause has no connection with or dependence on the other, though in the same act; so the first clause statutes in general, that the same rule shall hold proportionally, with respect to other heritors of greater or lesser quantities of ground than that specially therein mentioned. But, in the case of such heritors as are now contesting, there is truly no place for any real hardship, by applying the law to inclosures either excessively great or ridiculously

small; for the least of the defenders' properties being six acres of good ground, situate in a populous country, would make a very compact and commodious inclosure; and, in general, as to the case of small feuars, whereof there are many throughout the kingdom, there seems to be no class of heritors to whom more properly this regulation should be applied for the encouraging inclosures, than to these; for the very intent of giving and taking such feus is in order to improve the ground; and they are generally of such size as are not too small to be worth inclosing, nor too large to be capable of being inclosed; they are in the medium betwixt the two extremes, in which it is possible to put cases where the law could prove a grievance. No 9.

With respect to the *second* defence, That heritors are not obliged to contribute to any march-dyke but what is ditched and planted, it was *observed*, That though the act 1661, with regard to this point, is somewhat ambiguous, yet the statute 1669 clearly provides for an alternative, according to the nature of the ground, as it may be fit for a dyke or ditch. *2dly*, The same law gives the election to the pursuer, who is persuaded the defenders are sensible it would even be a prejudice to themselves to have march-dykes by ditch or hedge.

THE LORDS found the act 41, Parl. 1661, did not reach to small feuars, who had not above five or six acres of ground.

C. Home, No 123. *p.* 198.

*** Kilkerran reports this case:

THE question being reported, upon a bill of advocation of a pursuit by one against his neighbour, on the act of Parliament about inclosing, for bearing equal charges in building the ditch or dyke, Which of the parties should have the choice of the kind of inclosure, that is, whether it should be of ditch or stone-dyke? It was the opinion of the Lords, That neither party should have such choice, but that the judge should determine the one or the other according to circumstances. But another point occurring to the Lords, viz. How far the act of Parliament did at all extend to such a case as the present, where the property of both pursuer and defender was no more than a few acres lying by a town? The bill of advocation was ordained to be passed.

And at discussing this advocation in July 1739, the LORDS, in respect of the extent of the defender's ground, which was admitted not to exceed six acres, "Found the case not to fall under the act of Parliament."

The case, strictly speaking, did not fall under the exception in the act of Parliament of borough and incorporate acres: But as the act appears to relate to landward estates for improvement of the country, and for that end allows roads to be cast about 200 ells, it was thought not to apply to the present case.

Kilkerran, (PLANTING, &c.) *No* 1. *p.* 402.