1679. *January* 9. SEATON *against* SEATON.

No 2.
Where the one heritor built the march dyke, without requiring the other to concur; this last was found liable only *in quantum lucratus*, by not being put to the expense of concurring in the building, which he might have done by his own servants.

SEATON of Garleton pursues Seaton of Barns on this ground, That he having inclosed a park, a part of the dyke whereof is upon his ground, adjacent to the march of Barns's ground, and therefore, conform to the act of Parliament for inclosing of ground, that part of the dyke which is upon the march, should have been made up by equal expense of both parties. The defender *alleged*, 1*mo*, No process, because the defender was never required to concur in building of the dyke, which he might have done by his own servants, and by the land-stones of his own ground, which the pursuer made use of; and the act of Parliament doth not ordain the half of the expenses by either party, but that both parties could concur, which necessarily imports a requisition, though it be not expressed; 2*do*, By a decreet of the Lords, it is already found, that a strip of water running from the Lady-well, is the march between both parties, so that the pursuer's dyke is not upon the march; and this being a new statute, should be strictly interpreted. The pursuer *answered*, That the act of Parliament hath not required requisition, and doth not bear, That both parties shall concur to the dyke on their march; so that when it is an earth-dyke, the whole dyke must be upon the incloser's ground, and the ditch upon the ground of the other party; so that this strip of water is but in place of the ditch, and the pursuer is at the loss, who must build the whole stone-dyke upon his own side; whereas if it were a dry march, the middle of the stone-dyke might be upon the march, and therefore a defence upon a rivulet, burn, or strip of water, was repelled in the case of the Earl of Crawford against Rig, No 1. p. 10475.

THE LORDS repelled the second defence, but found, That seeing requisition was not made, that they would only sustain the process against the defender *in quantum lucratus*, by not being put to the expense in the concurring to the building, which he might have done by his own servants, and therefore would modify the expenses so much the lower.

Fol. Dic. v. 2. *p*. 86. *Stair*, v. 2. *p*. 667.

*** Fountainhall reports this case:

SIR JOHN SEATON of Garleton pursues Seaton of Barns, 1*st*, for payment of as the half of the price and expense of his stone park-dyke, built by him on the march betwixt them, conform to the 41st act, Parl. 1661; 2*do*, To demolish his dam-head, &c. Barns had also a declarator against him. This being reported, 'the LORDS, before answer, granted commission 'to the Lords Newbyth and Gosford, to visit the ground of the well con-'troverted, and there to examine witnesses, not exceeding ten upon either hand, 'how high the dam-dyke hath been these 40 years bygone, how far the water 'from that dam was wont to restagnate upon Garleton's meadow, and if Garle-'ton was in use to interrupt when the water did restagnate, and if the dyke

'was made lower, and how much of the water controverted is necessary for the 'going of the mill; and sustained Garleton's libel, as to the expense of the 'building of the park-dyke, relevant, notwithstanding there was no intimation 'made to Barns, that the pursuer was to build the said dyke, and requiring 'him, &c. reserving to themselves to consider, after probation of the libel, 'what part of the expenses Barns ought to pay, and how far Barns is benefited 'by the building of the said park-dyke; and repel the allegeance, that the 'said park-dyke is not built upon the march, but on the side of the strip, 'which strip is the march; and ordain both parties to condescend upon the 'advantage that doth accrue by building the said dyke.

No 2.

Fountainhall, v. 1. p. 31.

1702. *January* 10. SIR JOHN RAMSAY *against* SIR JAMES PRIMROSE.

No 3.
In a process of streighting marches against an heritor, whose estate was entailed, the Court decerned with this quality, that the lands got in excambion should be under the fetters; and in case money were decerned, it should be tailzied and employed on lands in the same manner.

SIR JOHN RAMSAY of Whitehill resolving to divide a common muir lying betwixt him and the barony of Carington, belonging to Sir James Primrose, and also to make inclosures, conform to the acts of Parliament 1669 and 1695, and craving some lands of Sir James's to make his dyke equal; he *alleged*, By my tailzie and infeftments I can alienate none of my lands, but brook them by irritant clauses, which, if I contravene, my right is null, and the next heir has access in the terms of the act of Parliament 1685 anent tailzies, which being the great fence and security of our properties, the other inferior, lesser interests of inclosures must yield thereto. *Answered*, Irritancies prohibit voluntary alienations, but not necessary and judicial ones appointed for a public good; and here you can have no prejudice, for the Lords shall adjudge as much land to you in excambion as you gave away, and it shall be fettered with the same irritant clauses as the former was; and in case money were decerned, it behoved to be tailzied or employed on land; but the clearest way in such entailed estates is by excambion of land for land, to be subjected to the same burden with the former. THE LORDS decerned and adjudged with that quality.

Fol. Dic. v. 2. p. 86. *Fountainhall*, v. 2. p. 138.

1713. *July* 28.

MR ARCHIBALD DUNBAR of Thunderton *against* SIR ROBERT GORDON of Gordonston.

No 4.
The act of Charles II. in so far as for encouraging inclosing is perpetual, although in other respects temporary.

AT discussing the suspension of a decreet of the Justices of Peace casting about the high-way, and adjudging some pieces of Sir Robert Gordon's lands to Mr Archibald Dunbar, for making his inclosures regular, in the terms of the act 14th, Parl. 1. Ch. 2.; the LORDS found, That the said statute is a perpetual law, in so far, as to encourage inclosing, it empowers Justices of Peace to cast