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ment upon it, ought not to be extended; that the division demanded by Buchannan was highly unreasonable, as the extent of the smallest of the inclosures surpassed what an ordinary inclosure generally consists of. Neither could he be in the least degree aided by the two decisions to which he appealed; because, in both cases, the lands thereby found to fall within the act 1695 were a long small strip, which could not be inclosed separately, as they lay, without an expense superior to their worth; whereas the ground required to be divided by the present action consisted of three fields, the smallest of which extended to 13 acres.

To the *second* reason of advocation, it was *answered*, That Buchannan undervalued his ground much; but even allowing that he had not done so, yet there was no doubt, that the action founded on the act 1661 is properly brought. The great object of that act is the improvement of uncultivated grounds; and wherever such are of so great an extent, as to be fit to be inclosed with advantage to the heritor, they certainly fall within the spirit and words of it; and the decision in Dr Penman's case did not weaken the doctrine pleaded; because it was only thereby found, that the act did not reach small feuars, who had not above five or six acres of ground; whereas, as in this case, Buchannan is proprietor of 55 acres of the lands of Little Udston, and also of a part of the lands of Blantyre, which lie contiguous to, and march with his lands of Little Udston.

THE LORD ORDINARY found, "that the three fields required to be divided by the act 1695, did not fall under that act; and therefore, repelled the reasons of advocation, and remitted the cause simpliciter; to which interlocutor the LORDS adhered; and refused a reclaiming bill, without an answer."

Act. *Maclaurin.* Alt. *Macqueen.*

J. S. Tertius. *Fol. Dic. v. 4. p. 246. Fac. Col. No 47. p. 83.*

1774. *January* 28.

DAVID RUSSEL and Others, Feuars of Tranent *against* The GOVERNOR and COMPANY of UNDERTAKERS for raising the Thames water in YORK-BUILDINGS, and Others.

No 5.
Benefit of the statute 1695 is competent to feuars even against their superior, without regard to the circumstance of some of

IN the neighbourhood of Tranent, there is a tract of ground of about 500 acres, partly belonging to feuars from the family of Winton, and partly to the York Buildings Company as purchasers of the forfeited estate of Winton, comprehending, *inter alia*, the barony and burgh of barony of Tranent.

As matters stood at present, there were in all twenty-six feuars of Tranent, vassals to the York Buildings Company, the original number being reduced from the rights of different feus or plots having come into one person. Of these,

fourteen concurred in instituting an action against the said Company, and the twelve residuary feuars, founding upon the act 1695; and, in respect that the pursuers' lands lay run-rig, or run-dale, interjected with other conterminous lands belonging to the defenders, concluding that the whole should be measured, valued, and divided, and lands allocated to each of them, contiguous and together.

No 5. the feuars, called as defenders, having their several properties in one plot, each by himself, surrounded by the lands lying run-ridge, (these particular feuars making no objection themselves) and although the run-ridge lands lay in the neighbourhood of a burgh of barony.

Competent in the division, to set of the shares of the parties on either side of the town, as shall be most convenient for the general interest, without regard to the previous local possession of individuals.

The feuars, called as defenders, made no opposition, considering the measure to be for the general benefit; but a keen opposition was maintained upon the part of the York Buildings Company, on different grounds.

In limine, it was *objected*; That the action was competent only before the Sheriff, which the LORD ORDINARY over-ruled; and other objections being then resorted to, their import came to receive the judgment of the Court.

1mo, Objected to the title of the pursuers; That, being feuars, they have no title to carry on this action against their superior, by whom these lands must have been originally given off in small parcels; although, perhaps, several parcels may, by progress, have come into the person of one proprietor. They cannot insist against their own superior, contrary to the original intention, to lay together the whole parcels belonging to each man respectively, for the purposes of inclosing upon the run-rig act.

Answered for the pursuers; Were this objection to have any weight, it would, in a great measure, put an end to the benefit of the run-rig act; for, it is believed, that, in most cases where run-rig lands do exist, they have originally been in the hands of one proprietor, and have come to be parcelled out in the manner supposed by these defenders. The same objection, therefore, of a tacit agreement, in the original mode of creating the run-rig interest, would occur in every case of a process upon this act of Parliament; and, were it competent to the superior to plead it against his vassal's suing a division, it would be equally competent to the vassal against the superior, or for one feuar to plead it against another feuar. But the very purport of the act 1695 was to give redress against all such agreements and transactions, which had their origin in times of barbarity, when the inconveniencies of such tenures were not felt or perceived. The law has in view every case where the lands of different heritors lie run-rig; and the right of action is given to either party, (meaning heritors) without distinction, whether they are related in the character of superiors, vassals, or any others whatever. The law says, wherever there are such lands, the action may be brought; and, therefore, vassals having lands run-rig with their superior, are within the precise words of the act of Parliament. Within these few years, James Mill in Loch-hill, one of the defenders' own feuars, brought an action against them, for having his lands lying run-rig with theirs divided; and accordingly the division did take place.

2do, Objected for the York Building Company; That this action is altogether incompetent upon the run-rig act, upon two grounds; *first*, That the act only regards the case of heritors, *in prædiis rusticis*, so considerable in extent,

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as to be the object of inclosing, but lying alternately intermixed, in such a manner, that the same cannot be inclosed; but it cannot apply to small spots, of acres and half acres, which are not the object of inclosing.

In support of this proposition, the defenders *first* referred to the preamble of the run-rig statute, as setting forth the sole object of it to be the policy and improvement of the nation, by planting and inclosing, 'conform to the several laws and acts of parliament, before made thereanent, which were the acts 1661 and 1669, for the encouragement of planting and inclosing of grounds, and which concerned nothing else. Now, here it was said there are many of these spots not the object of inclosing.

Next, it was *argued*; That in the enacting part of the run-rig act, it being directed, that special regard be had to the mansion-houses of the respective heritors, that the object of the act singly, was country estates, belonging to great heritors; and that the act cannot be applied to feuars living together in a burgh, many of whom have only houses and kail-yards, or little more. Again, That the act does not apply to the case of lands in the neighbourhood of burghs; in that it expressly 'provides and declares, that these presents shall not be extended to burgh and incorporated acres; but that, notwithstanding hereof, the same shall remain with the heritors to whom they belong, as if no such act had been made.' Nor will the two cases, Heritors of Inveresk against James Milne, 13th November 1755, No 3. p. 14142.; and Chalmer against Pew, July 29. 1756, No 12. p. 10485., cited by the defenders, support their plea; for that these cases only turned upon the question, what was properly run-rig; but the objections of this being a division, at the instance of vassals against superiors, and a division respecting burgh lands, did not occur in those cases; but are peculiar to the present.

Lastly, It would be a vain thing to divide lands in the neighbourhood of a burgh; for that, supposing the division made, and all the parts laid square and proportionable, it would probably cast up, in the tide of time, that the feuars might sub-feu irregularly, or might succeed to one another's property lying separate; which would make a foundation for a repetition of the like action; so there would be no security for, nor permanency in property.

Answered, The first observation from the preamble is a mere criticism. There is no doubt that the policy and improvement of the country was the inductive cause of the act; but it is not surely from thence to be inferred, that every individual heritor in the run-rig estate, was to have such a quantity of ground as to afford him a spacious inclosure after the division. If the law were to be so construed, no division could ever take place, if there was any one person who had only such an inconsiderable spot, as to render inclosing to him an object of no moment. The Legislature had no such an idea. The intention was, either upon the act 1695, c. 23. concerning run-rig lands, or upon the other act, concerning the division of commonties, to bring the whole lands in the kingdom into a situation capable of inclosing and improvement; and the Court

will not permit that intention to be defeated by critical objections. Several of the heritors, in this case, are possessed of considerable quantities; and, upon looking over the towns and villages in our neighbouring country, nothing contributes more, either to their beauty, or the utility of the inhabitants, than the small inclosures with which they are surrounded. And it is sufficient for the purpose of the present action to say, that there lay in the neighbourhood of Tranent, 500 acres of valuable ground, so blended and intermixed together, as to be altogether incapable of improvement; but which, by division, may be commodiously alloted for the manifest interest and great advantage of all concerned; and, as to this not being a *prædium rusticum*, the pursuers must fairly confess, that they do not know what a *prædium rusticum* is, if 500 acres of arable ground do not fall under that description. In short, if the pursuers had been called upon to give an example of a proper run-rig estate, meant to be remedied by this act of Parliament, they could not have thought of so apt an example as the case in hand.

The observation founded upon the enacting clause, likewise proceeds upon a misapprehension of the statute, and the original state of the country. Formerly it was the custom of every person occupied in the tillage of the ground, to gather themselves together in villages, for their mutual support and defence; so that the whole tenantry of an estate lived together in one place; and they betook themselves to detached dwellings, or farm-steadings, when the change in the manners of the country enabled them to do it with safety. Probably the town of Tranent was originally nothing else than the place of inhabitation, appropriated for the tenantry upon the estate of Winton. It is, therefore, very wild to suppose, that the act should not apply, because some of the proprietors or possessors of the land happen to live in a village. The enactment of the statute is exceedingly just, that, in the division of lands, regard should be had to the situation of mansion-houses, when there are any upon the run-rig lands. But it is most fallacious from thence to conclude, that the law did not mean to apply to any case, except where there were mansion-houses upon the land.

Again, as to the act not being applicable to the case of acres in the neighbourhood of burghs; here too the meaning of the statute is misunderstood; for in no sense is the town of Tranent a burgh, in the terms of this act of Parliament. When the law talks in general of burghs, it always means royal burghs; and the meaning of the Legislature, in this enactment, is nothing more, than that the lands held in burgage tenure, which, in fact, constitutes the fundamental existence of the burgh, should not fall under either this act, or the act for the division of commonties; and accordingly the statute does not talk of lands belonging to any burgh whatever; but it talks of burgh and incorporated acres, which is applicable only to the case of royal burghs; and, where the acres meant to be excepted, were the property, not of individuals, but of the community itself, although, perhaps, afterwards, in part parcelled

No 5. out to individuals, holding by burgage tenure. All this has nothing to do with the case of the feuars of Tranent. There is no obligation upon these feuars to live in the town of Tranent, or to have any connection with it. In fact, some of them live at a considerable distance from it. They are independent landholders, as much as any other in the kingdom. And so little has this objection been understood to apply against a division under this statute, that very considerable tracts of ground, in the neighbourhood both of Inveresk and Dalkeith, have been divided upon this statute ; and yet the objection applied directly to these cases, if such an objection had been understood to exist. The defenders, in this case, endeavour to enforce their argument, by making mention of feuars, with a house and kail-yard, as they are called ; but the pursuers know they have no connection with this cause ; nor are they, in any respect, parties to it.

The defenders' observation upon the two cases quoted by the pursuers, is so far true, as it takes notice of the peculiarities in this case ; for it is truly peculiar, in that the defenders are the first superiors who ever opposed their vassals taking the lead in a matter of improvement ; as in all the cases of divisions of this kind which have hitherto occurred, the opposition has come from the feuars, and not from the superior ; and perhaps, it is likewise true, that the objection arising from the lands lying in the neighbourhood of a village, has the merit of novelty ; but the pursuers do not apprehend, that, for that reason, it will have greater weight, because, that, in the execution of a right which has now subsisted for near a century, the objection has appeared so ill founded, as never to be stated ; although many opportunities must have occurred, when it might have been stated. At the same time, the pursuers must be forgiven to think, that the cases of Milne and Chalmers are extremely applicable to the present case ; that of Milne is directly in point to the next branch of this argument ; and both of them, by repelling objections, which had more force in them than any now offered, clearly show the liberal principles by which the Court are actuated in the construction of this law, very adverse to the spirit which the York Buildings Company breath out in all their objections.

Lastly, Wherever lands are sought to be divided upon this act, it is no doubt a thing possible, however improbable, in the highest degree, that, after a division is once completed, the property of the different heritors may, by some strange concurrence of circumstances, be again so interspersed together in alternate ridges, detached pieces, and confused irregular forms, as to render a second division necessary. And, were the bare possibility of this event to be sustained as a good defence against an action of this kind, every person must see that there could be no such a thing as a division upon the act 1695, where any one of the parties concerned was either so ill humoured or so ill advised as to make the objection. In the present case, these pretended fears of the York Buildings Company, are groundless and chimerical to the last degree. The

feuars of Tranent are too fully sensible of the advantage arising from their having their properties, such as they are, laid together in a commodious form, to be in danger of falling back into that confused inextricable mode of possession, which it is the purpose of the present action to abolish. In a course of ages, their properties may, no doubt, be subdivided; but then the sub-divisions will infallibly be made in compact and commodious figures, so as never more to require the assistance of the act 1695.

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The *second* ground of objection on the head of incompetency, urged for the defenders, was, that the act 1695 does not authorise the division of lands, except those lying run-rig; but that there are lands belonging to eight proprietors, who have no separate parcels, but do presently possess their several grounds in distinct lots; and, therefore, these lands cannot competently be divided under this act of Parliament; therefore, this attempt resolves into an excambion, not a division upon the run-rig act; in support of which objection, a decision was referred to, Sir John Hall against Callender, in December 1744, No 2. p. 14141. And it was argued, that it will not alter the case that these feuars do not object, and are willing to be moved. In all excambions, there are two parties; the consent of one is not sufficient for the excambion, which requires the consent of both; but the York Building Company is not willing to make the exchange.

Answered; In the case of Sir John Hall, there does not seem to have been any run-rig lands whatever; but the one proprietor was desirous to force the other into an excambion of grounds, that happened to be intermixed the one with the other, different from what is authorised by the statute. But that case is *toto cælo* different from the present; for here there are confessedly a great quantity of run-rig lands; only, it happens that a few proprietors have their small parcels united, although, at the same time, intermixed in the heart of the run-rig lands, so that the division cannot possibly proceed, without these few parcels being brought under the general scheme of allotment, and to which these proprietors themselves make no objection.

If this objection were to hold good, it is impossible that any division, under this run-rig act, could possibly take place; for, if there was an heritor in the heart of the rest, who was unfortunate enough to be possessed only of one ridge, this would, of necessity, put an end to the whole intention of division; for, without moving him, the division is inextricable; and, according to the defenders' argument, he cannot be moved.

This is an objection which even the person possessed of the separate lot is not entitled to make; and accordingly the Court did so determine, in the division of Inveresk, where James Milne opposed the division, on account of six acres belonging to him, lying altogether, without any disjunction by alternate ridges. In that case the Court disregarded the objection, even when made by the heritor so circumstanced. But the objection comes in a still weaker form from these defenders, who are pleading in the right of other heritors, in order to

No 5. obstruct a common convenience, which the heritors themselves are not desirous to obstruct. The defenders' argument that, in an excambion, the consent of one party is not sufficient, and that, as they are not willing to submit to an excambion, they cannot be compelled, proceeds upon a *petitio principii*. If there were no other parties concerned but the York Buildings Company, and another party, whose lands happened to be intermixed with theirs, the defenders' argument might be listened to; at least, if the case of Sir John Hall against Callander was well decided. But there is unquestionably a great quantity of run-rig lands, so as to open the way for the application of the act 1695; and, as that is the case, a particular heritor will not be permitted to set himself in opposition to the execution of the act, because there are one or two heritors who have small parcels situated in the heart of the run-rig lands, without any separation of their property, but who are not making any objection themselves; and, upon the principle in the case of Milne, would not be heard, although they were to object. In short, there is not here any proper excambion, but a trivial change in the local situation of a few heritors, necessary to carry the act of Parliament into execution, and which the Legislature must have known behoved necessarily to occur in every such division.

Observed on the Bench; The practice has been to give this act a liberal interpretation, and the objections ought not to be listened to here, as it would put an end to the act altogether. In the case of Barclay Maitland, the division went on between the superior and his whole vassals, and that of Inveresk is strong on the side of the pursuers. The act says, wherever the lands are run-rig, belong they to whom they will, they must be divided. Here, it is said, that the feus were granted when not run-rig. But there is no evidence of that fact; and it appears they have been run-rig for time immemorial, which will be presumed to have been the case *retro*.

The judgment of the COURT was; 'Repel the objection to the title of the pursuers, and to the competency of the action; and allow the division to proceed. Repel the objection, that eight of the feuars have their several properties, as now possessed by them, in one plot, each by themselves; and therefore, cannot be transposed from one situation to another; and find it competent for the commissioner, in making the division, to set off the shares of the parties on either side of the town of Tranent, as shall be most conducive for the general interest, and without regard to the place where their respective possessions were before the division.'

This judgment was 'adhered to, upon a reclaiming bill and answers. *See* APPENDIX.

Act. *Solicitor General, R. Blair.* Alt. *Dean of Faculty, Swinton.* Reporter, *Kames.* Clerk, *Kirkpatrick.*

Fol. Dic. v. 4. p. 247. Fac. Col. No 102. p. 265.