PITFOUR. The 3000 merks must impute, notwithstanding the critical argument in the information for the pursuer. A wife may be supposed physically capable of heirs-male of her body, while at the same time there is no probability of such event.

PRESIDENT. The deed most inaccurate. Failing sons of the marriage, it was reasonable to provide one daughter: no example of settling a provision upon an eldest daughter.

KAIMES. Doubts as to the consent of the heir-male. If the first claim is to be interpreted literally, why not the second? (*i. e.*) I presume, if the L.3000 merks are to be held as additional, and not to impute to the part payment of the 6000, because it is not so said unequivocally; why not also, as the heir-male of M'Kenzie of Balmaduthy, did not actually consent before the marriage of the eldest daughter, take from her the 6000 merks which had been provided to her upon *that* and another condition.

1766. *November* 21. WILLIAM BUCHANAN *against* JOHN CLARK.

RUNRIDGE.

The Act 1695 *found* not to apply where the fields required to be divided amounted to Thirteen Acres.

[*Faculty Collection, IV.* 83; *Dictionary* 14,142.]

THE twenty-shilling lands of Little Udston belong to Buchanan and Clark; 56 acres to Clerk, 55 and some fractions to Buchanan.

The several fields and acres belonging to each lie not contiguous, but intermixed. The infield land consists of about 12 narrow small fields, containing from four to one acre each. Of them seven belonged to Clark, five to Buchanan.

The outfield land consists of two fields, 13 and 29 acres, and of a field of 41 acres. The former two belonged to Clark, the last to Buchanan.

The field of 41 acres, marked G. in the plan, lies between the fields of 29 and 13 acres, marked in the plan V. T.

Clark insisted, in an action before the Sheriff of Lanark, upon 41st Act Par. 1, Car. II, setting forth that he was about to inclose the fields of 29 and 13 acres, and concluding that Buchanan should be at equal charge with him in making a march dyke to park their inheritances.

On the other hand, Buchanan insisted, in an action before the Sheriff, subsuming that the parcels G. V. T. fell within the statute 1695, and concluding to have them divided.

On the 8th November 1765, the Sheriff found that the ground craved to be inclosed by Clark does not fall within the Act made anent runrig, and that Buchanan is liable in the one half of the expenses of properly inclosing the

said ground, and that he ought to concur with Clark in making a proper fence upon the march which divides their respective properties.

Buchanan advocated this cause. On the 19th July 1766, the Lord Hailes, Ordinary, found that the fields marked V. T. G. *i. e.* those of 29, 13, and 41 acres, do not fall under the Act 1695; and therefore repel the reasons of advocation, and remitted *simpliciter*. On the 2d August 1766, he adhered.

Buchanan reclaimed against the said interlocutor, and answers were put into this petition.

ARGUMENT FOR BUCHANAN :—

Buchanan endeavoured to establish two propositions, 1*st*, That the ground in question did fall within the Act 1695 concerning runrig. *2dly*, Although it did not; neither did it fall within the Act 1661, concerning march-dyke.

As to the *first*, the Act has not determined what is meant by runrig. The Court however has uniformly applied it to fields lying in rundale, rather than runrig. Thus, in the case *Heritors of Inveresk* against *Milne*, 13*th November* 1755, a field of six acres was found to fall under the Act, and, in the noted case, *Chalmers* against *Pew*, fields of two and three acres were found to fall under the Act; although those acres, situated near the city of Edinburgh, were probably of greater value than the largest field in Little Udston.

The reason of this interpretation is obvious. The Act was intended for the improvement of the country by planting and inclosing. The Act therefore merits a liberal interpretation. A literal one, confined to ridges, would not tend to improvement.

Further, it is plain that little Udston was formerly one tenement divided in consequence of the succession of heirs-portioners, or by some sale, either legal or voluntary. The fields in question are the outfield lands of Udston. They are but accessaries of the infield land. It must be admitted that the infield may be divided. Therefore the outfield may be divided also.

As to the second point, the rent of the outfield ground is very inconsiderable, and, therefore, it does not fall under the Act 1661. Thus, in the case, *Penman* against *Douglas* and *Cochran*, 3*d July* 1739, it was found that the Act 1661 does not reach to small feuars who had not above five or six acres of ground. The act does not so much respect the extent as the yearly value of the ground. For the first branch of it requires heritors to plant and inclose more or fewer acres, according to the respective rents.

ARGUMENT FOR CLARK :—

As to the first point, before the statutes 23 and 38 Par. 1695, neither commonties nor lands, lying runrig, could be divided, excepting by voluntary agreement. This was attended with inconveniences; and for obviating them those statutes were made. But as the common rights of property were thereby encroached upon, the statutes are not to be extended beyond their plain intendment. It may be doubted whether the division of fields of two or three acres, lying rundale, can be forced by the statute 1695: but it is plain that that statute never meant to force the division of fields which surpass the size of a common inclosure. One of the fields in controversy consists of 41 acres, of itself no inconsiderable farm. The others of 13 and 29 acres, of themselves large inclosures.

The two decisions quoted are not in point. For, there, the ground was so

situate, as to to be incapable of inclosing, or of any other improvement, unless by being divided.

If an action for dividing such fields, as those of 13, 29, and 41 acres be competent, it is impossible to say where the law would stop. Reasons of expediency might be urged for dividing whole farms and whole estates.

On the 21st November 1766, The Lords adhered.

For Buchanan, J. M'Laurin. *Alt.* R. M'Queen.

OPINIONS.

JUSTICE-CLERK. The law of runrig does not extend to such large parcels of ground. *Adjacent* heritors are mentioned: no matter whether the tenement was originally one or several. The judgment as to half-dyke is also right.

COALSTON. The law, with regard to the division of commonties and runrig lands, is of great utility, and to be liberally interpreted. The statute has not described the meaning of runrig. If this means alternate ridges, there never could be a division. Possession is always by alternate shotts or dales: a single ridge is not sufficient for the purposes of agriculture. Dales are small in infield, large in outfield; for the former are always in corn, the latter sometimes in grass: wherever one tenement has been possessed by different proprietor, so that their properties are intermixed, the law takes place.

BARJARG. All this tenement has been held by the same tenure. It was the view of the Legislature to enforce planting and inclosing. It is most convenient for parties that the law be extended to such cases as this.

AFFLECK. The statute is not to be confined to rig about, although land is sometimes so laboured. The statute does not mean to divide different portions of arable ground. It means to prevent common or intermixed possession: although different authors, still there might be a necessity of division; although the same authors, no such necessity; but this cause does not fall within the law. The portions are large. The law did not mean to lay every man's ground together. Here the ground may be inclosed as it is, and when ground can be inclosed without division, there is no place for the law.

PITFOUR. Where the one statute ends, the other begins; so that, if I cannot get a division, I may get a march-dyke: but I know no instance of a division of outfield land if not plowed: rundale might go the same way as runrig, being an accessary.

The Act 1695 must be interpreted so as to apply to this case; for rundale commonly depends upon runrig.

KENNET. Most outfield ground is only bad by being badly managed. Here the fields are large enough for inclosing. We cannot force the parties to exchange their property.

COALSTON. A dangerous rule to determine by inclosures; for four or six acres may be a convenient inclosure.

PRESIDENT. My difficulty lyes upon the words of the Act of Parliament. In many cases, the possession is by rig and rig, though I confess with manifest inconveniency. Two or three ridges, or more, may be runrig. Out-

field cannot be possessed in runrig. How can I vary the property? Great estates may have belonged originally to one proprietor; it would be dangerous to inquire what was joined originally if now separated.

Diss. Barjarg, Coalston, Pitfour and Gardenston.

1766. *November* 22. WILLIAM WRIGHT, Tenant in the Leekeropt, and MARY GRAHAM, his Mother-in-law,—*Petitioners.*

ADVOCATION.

Any time before extract, Advocation is competent, though after pronouncing a decree.

[Kaimes's *Select Decisions*, p. 322; *Dictionary*, 375.]

IN an action of fine, assythment, and damages, before one of the Sheriff-substitutes of Perthshire, at the instance of the petitioners against Catherine Taylor, the Sheriff pronounced a judgment in their favour.

Catherine Taylor, without reclaiming, appealed to the Circuit Court, but afterwards dropt her appeal.

She then presented a bill of advocation, which was passed.

At discussing this advocation, the original pursuers objected to its competency, in regard that the judgment of the Sheriff, not having been reclaimed against, had become final.

On the 26th July 1766, the Lord Kennet, Ordinary, repelled the objection that the advocation is not competent, in respect of the answer, that the decreet was not extracted when the bill of advocation was presented and past.

On the 13th November 1766, he adhered.

Wright and Grahame put in a reclaiming petition, and pleaded in manner following:—

By the ancient practice of Scotland, advocations were used for the sole purpose of making inferior judges accountable *ob denegatam justitiam:* even the interlocutory sentences could not be brought under review except by appeal. Those appeals proved inconvenient; and, in their place, advocations for correcting interlocutory sentences were admitted. But further than this, practice has not gone. A cause depending before an inferior court may be removed into the Court of Session. A cause concluded, must be brought under review by suspension, reduction, or appeal. Lord Stair says, p. 551, § 534, that the remedy of advocation hath no place after a definitive sentence; and agreeable to this is universal practice. When an inferior judge pronounces a sentence on the merits of the case, of which the party means to complain by advocation, a reclaiming petition is always preferred, for the sole purpose of keeping the action dependant.

The style of the letters of advocation prohibits the Judge to proceed in the cause. This intimates, that the cause is depending. But if he has pronounced judgment, and if no reclaiming petition is offered, he cannot proceed were he