No. 1.

'ed and adjudged to them the respective parts of the divisions, as shall be most 'commodious to their respective *mansion houses and policy*, and which shall not be 'applicable to the other adjacent heritors.'—In this clause, the terms 'mansion 'houses and policy,' must be understood to include offices, which were a necessary part or accessary of these. It includes, likewise, gardens and the immediately contiguous inclosures. The case of Taylor against Earl of Callender, December 1698, No. 1. p. 14141. was referred to as applicable.

The pursuer, on the other hand, argued, that although the statute excepted mansion houses, it excepted no other kind of houses, which consequently ought to be divisible along with the land on which they stand. Without this the act might be frustrated; for one wishing to evade it, had nothing to do but build straggling houses upon the different parts of his disjointed property.

As the statute had for its object the improvement of the country, the most liberal construction ought to be given to it. Of this, a late instance had occurred, in a case between Sir Lawrence Dundas and Bruce of Kinnaird, where large parcels of ground, not less than 20 acres in extent, had been found divisible upon the statute: And this, although Bruce objected that *houses* had been built for his tenants upon parts of these.

The like extensive application of the act was applied in the cases of Inveresk, 13th November, 1755, No. 3. p. 14142; and Chalmers against Pew, 29th July, 1756, No. 12. p. 10485.

An attempt was made to shew that the offices in question had been erected *currente processu*, but this point did not affect the Court in their decision of the general question.

The interlocutor of the Lord Ordinary was altered, and it was found that the offices could not be included in the division.

Lord Ordinary, *Alva*. For the Pursuers, *Ilay Campbell*.
For the Defender, *Robert Cullen*.

W. M. M.

1777. *January* 21.

ARCHIBALD DOUGLAS of Douglas, and THOMAS FORREST, Writer in Douglas, *against* JOHN INGLIS, and Others.

No. 2.
What lands are to be considered as run-rig in terms of the act 1695, C. 23.

AN action was brought by the pursuers for dividing the ten pound land of the Kirktown of Douglas.

A considerable part of this ground had been feued out from time to time in small parcels to different proprietors. Besides the parcels so feued out, there was a tract of ground under the denomination of a *common*, over which the defenders had been in use to exercise various servitudes, some of feal and divot, and others of common pasturage.

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In opposition to the action brought by the pursuers, it was argued by these defenders, that the lands were not such as fall under the act of Parliament 1695, that they had been feued out in separate and distinct properties, each lying contiguous, and though in process of time different properties, lying discontiguous, may have been acquired by one or more persons, that could not alter the nature of the original right, so as to make the whole run-dale and force an excambion, contrary to the will of the proprietors, under the idea of a division of run-rigg lands.

The Lord Ordinary at first pronounced an interlocutor, "repelling the objections, and sustaining the process, finding the libel relevant, and granting commission to certain persons to divide the run-rigg lands libelled, and also granting commission for taking a proof of the extent, limits, and marches of the commonty libelled," &c. But afterward his Lordship having taken the cause to report, it was

Pleaded for the defenders: 1*mo*, The act of Parliament 1695, Cap. 23. was framed with a view only to parts of considerable estates lying run-rigg, while small properties, even where they actually did lie run-rigg, were not meant to be divided, as is plain from the exception of burgh and incorporated acres. Much less can it be supposed, that the statute meant to give a privilege of pursuing a division to a person who happened to pick up a number of different properties, originally belonging to as many different proprietors, whereby small properties came to be interjected between his several acquisitions, for this truly is not land lying run-rigg, but of a very different sort, land parcelled out in small independent properties. Were the statute to be applied to such, it is not easy to say what bounds could be set to the notion of run-rigg lands. By the same rule, that the purchaser of three or four separate acres, insists for a division so as to lay his full quantity in one spot, the purchaser of separate properties, consisting of as many hundreds, may pretend to the same right, and thus by the acquisitions of a man full of money, the whole gentlemen of the county might be shoved out of their family seats to make way for some overgrown stranger. Again, by the same rule, that the pursuers bring their action of division just now, they may upon acquiring a few additional pieces of discontiguous property, bring a new action of division at any time afterwards to remove the defenders from the places where they may have then been settled; and so on from time to time, while nothing could be pleaded in bar of these processes which is not of equal force in bar to the present. The statute, in this way, instead of being for the improvement of agriculture, would be the very greatest discouragement to it; for no man being secure of his property, he would cautiously avoid laying out any money on its melioration.

The cases referred to as formerly decided in favour of the action now brought by the pursuers, are very different from the present. Neither the case of Heritors of Inveresk against James Milne, 13th November 1755, No. 3. p. 14142. nor that of the Feuers of Tranent against York Buildings Company, 1774, Jan. 28. No. 5. p. 14144. are at all similar to this case. It was there allowed that there

No. 2. was a run-rigg possession of great part of the lands, and the smallness of some particular properties, which prevented their being divided into parts, while these parts were interjected among the other properties, could be no reason for their standing in the way of the general interest of more considerable properties arising from the general mode of possession. Here, there is no such thing as proper run-rigg possession, with respect to the original properties. They were all at first given off and feued out in the situation of separate, distinct, and compact possessions. The circumstance of particular persons having since acquired more than one of these properties, which may thus come to be interjected between the properties of others, cannot alter the nature or effect of the property, as originally feued out, nor compel those who acquired a property not in the way of run-rigg, but of a contiguous feu, to part with it and excamb it with a neighbour, because he happens to have acquired property on each side of him. There is therefore no foundation for pursuing a division of these lands as run-rigg.

2do, With regard to the lands possessed in the way of commonty, the right of the defenders is by no means a right of common property, but a right of definite servitude given off to each feuer, in proportion to the extent of his feu, by the proprietor of this muir. It is therefore (so far as regards Mr. Douglas, the original proprietor,) a burden imposed upon his property by his own act and deed, in consideration of an onerous cause, and he cannot therefore quarrel a burden thus voluntarily imposed, or transfer it into a right of another nature than what it was by its original constitution. Nor will the other pursuer, who has no better right than that of servitude like the defenders, be entitled to alter the nature of his own right, and to transfer it into a right of common property. If any thing is done to the prejudice of the servitude, he may be heard to complain, but he cannot go farther. A similar case is reported by Lord Kilkerran, Sir Robert Stewart of Tilliecoultry against the Feuars of Tilliecoultry, 21st February 1740, No. 8. p. 2472. in which the learned reporter recites likewise another case Lawson of Cairnmuir 1737, which applies precisely to the case of the pursuer Forrest.

Farther, the action brought by the pursuers concludes for a division among the pursuers and defenders, according to their several valuations. But supposing an action of division competent, the valuations affords no rule whatever for the division. The interest of the dominant tenements, by their infeftments, are ascertained to be by the soums of grass, given off to them, and these in general are determined by the quantity of land feued out, while others, who have no land or but very little, have such servitudes, feal and divot for example, as are suited to the use of a dwelling house, as a dominant tenement. The continuance of this servitude is necessary for the very existence of their houses, and they cannot be obliged to exchange it for any right of property whatever, and more particularly at so very trifling and inconsiderable a rate as will correspond to the valuations of their small tenements.

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For the pursuer it was pleaded,

Nothing can be clearer than that it was meant by the statute 1695, to abolish run-rigg throughout Scotland, and the act is framed so as to comprehend the whole lieges without any limitation or exception whatever.

Neither is it any objection to the present division, that one or two of the defenders have their whole property lying together, for were this objection good, an heritor who happened to be possessed of only one ridge, in the heart of the rest, would put an end to any division under the run-rigg act. There is a great difference between the case of two proprietors, whose lands happened to be intermixed, but without any run-rigg or run-dale at all, and the case of a great number of proprietors, whose grounds are all so intermixed, and cannot be brought out of that situation, but by changing the local situation of a few persons who happened to have their small portion accidentally united together. The former case may be considered as a proper excambion, which, however convenient, there is no law for enforcing. The other case is truly a proper division of run-rigg, or run-dale lands, with trivial changes made upon the local situation of one or two heritors, without which the statute could not be carried into execution. The case of the Feuers of Tranent and the York Buildings Company completely ascertained this principle.

As to the exception of burgh and incorporated acres, and that the act does not apply to small feuers, the law cannot be so construed without preventing a division from ever taking place. Property of every kind was meant to be comprehended under the statute, though it became necessary to make an express exception of burgh and incorporated acres, as not thought to be the proper subject of division, but, whatever does not fall expressly under the exception, must fall under the general enactments.

In the second place, as to the competency of the action for dividing the commonty, the decisions of the Court have not been uniform, regarding the proprietor of the servient tenement having right to insist for a division of commonty on the act 1695. Before the 1740, the proprietor was by practice not only entitled to insist in a division, but he also got a *præcipuum* of no less than a fourth of the whole, in lieu of his right of property. As to the decision in the case of Tilliecoultry, the practice established by it was of very short continuance, and another case is observed by Lord Kilkerran, about eight years afterward, (No. 44. p. 14541.) where a different decision was pronounced.

Even upon the case of Tilliecoultry, the present question falls within both the words and intendment of the statute. The act is declared to be in order to prevent the disputes that were apt to occur with regard to commonty, and disputes are fully as frequent, where there are only persons having servitudes, as in the case where there are joint properties.

With regard to the right of one holding a servitude to bring a division under the statute, it does not occur upon what ground this can be denied, since the act allows commonties to be divisible, at the instance of any having interest. Be-

No. 2. sides, commonties belonging in property to the King, would not upon this notion have been as they are, excepted, because such a commonty, according to this construction, would not have been divisible, even if it had belonged to a subject.

The Court, holding that the statute relative to run-rigg ought to be liberally interpreted, ordered that the division should proceed.

Lord Ordinary, *Auchinleck.* Act. *M'Queen, Chas. Brown.* Alt. *Crosbie.*

J. W.