1792. *May* 15. BRUCE *against* BRUCE.

No 8. IN a division of run-rig lands, the LORDS found it was not necessary that the tenants should be made parties to the suit. It is presumed, that the landlord will take care of the interest of his tenants; and if they suffer, they have recourse against the landlord on the warrandice in their leases. See APPENDIX.

*Fol. Dic. v.* 4. *p.* 247.

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1793. *February* 26.

Sir WILLIAM JARDINE *against* Lady DOUGLAS, FRANCIS SHARP, and Others.

No 9.
A decree of the Sheriff, giving off nine contiguous acres, supported.

THE barony of Sibbaldbie, the property of the Marquis of Annandale, is thirled to the mill of Heugh, which belongs to Sir William Jardine. Part of the barony having been inconveniently interspersed with the neighbouring estates, and particularly with those of Lockerby and Hoddam, a process of division on the act 1695, c. 23. was brought before the Sheriff, in which a final decree was pronounced in 1774; but to this process Sir William Jardine was not made a party.

By this decree, the Marquis ceded at one place nine acres. The tenants of these lands from that time discontinued, and those of the lands given in exchange, began to bring their grain to the mill, in terms of the thirlage.

In 1788, Sir William Jardine brought a declarator of thirlage, in which, *inter alia*, he *contended*, that the lands which had been given off to the estates of Lockerby and Hoddam, were not thereby liberated from the thirlage to his mill, and

*Pleaded*; 1*mo*, It is now a settled point, that the statute 1695, c. 23. does not authorise exchanges of land to any higher extent than four acres at one place; 17th January 1782, Lady Gray against Blairs, No 7. p. 14151. This division, therefore, can be considered only as a private excambion.

2*do*, The decree can at any rate have no effect against the pursuer, who was not a party in the action.

When a subject belongs in common to two persons, neither can make either a total or partial exchange, however advantageous for both, without consent of the other, and both must be parties in a process on the act 1695.

By a parity of reason in the case of a predial servitude, no transaction with the owner of the servient tenement can have effect against the owner of the servitude, if he is not made a party to it. In the case, 8th February 1791, Ballardie against Bisset*, if was found, that the proprietor of the servient tenement could not be obliged to go to another mill, though equally convenient.

* *Voce* THIRLAGE.

As little, on the other hand, can one servient tenement be substituted for another, without the consent of the proprietor of the dominant tenement. No 9.

The statute meant to regulate the interest of conterminous heritors, but without injuring third parties. In processes upon it, as the division is only made with a view to equality of value, the exchange may often be such as either entirely to hinder the uses of the servitude, or, as happens in this instance, very much to lessen its profits.

*Answered*; 1*mo*, The decision in the case of Lady Gray was the first which so far limited the application of the act. In the present case, the division was good according to the notions which were entertained of the law at the date of the decree, and it has till now remained unchallenged.

2*do*, It is no objection to the decree, that the pursuer was not a party to it, unless he can also shew that he was a loser by the transaction. Servitudes, and that of thirlage above all others, receive a strict interpretation; Erskine, B. 2. Tit. 9. § 8. 33. They must be exercised in the way least burdensome to the servient tenement; the proprietor of which may make whatsoever alterations on the subject he thinks proper, provided the servitude is not injured, Hence the converse of the decision Ballardie against Bisset would not be supported.

By the decree of division, the lands got in exchange come completely in place of those given away. The superior, though no party in the action, cannot have recourse against the lands ceded by his vassal for his feu-duties. A tenant in the same situation must accept of the lands alloted to him; 15th May 1792, Bruce against Bruce No 8. p. 14152. A liferenter must do the same, and by the like rule, the servitude of thirlage must be transferred.

THE LORDS assoilzied from this conclusion of the declarator, by two consecutive interlocutors.

When the last was pronounced, it was

*Observed* on the Bench; The excambion here made was not a voluntary but a judicial one, under the statute, as it was understood at the time, and cannot now be opened up. Where heritors make voluntary exchanges of astricted lands, there may be room for insisting that the thirlage is not affected; but when divisions are made under the statute, the proprietor of the mill cannot follow the ridges as they were formerly interspersed, and it is not necessary to make him a party more than the superior, though he may appear for his interest, if he pleases.

The COURT at the same time had regard to the pursuer's long acquiescence, and to the circumstance of no actual damage from the transaction being shown.

See THIRLAGE.

Lord Ordinary, *Stonefield.* Act. *Dean of Faculty.* Alt. *David Williamson.* Clerk, *Home.*

*D. D.* *Fol. Dic. v. 4. p. 246. Fac Col. No 36. p. 72.*

See PLANTING AND INCLOSING.

See APPENDIX.