other of contiguous proprietors; but it does not allow him so to adjudge large parcels of ground, as in the present case, where three acres and a half are meant to be adjudged to Miller. So considerable encroachments on property can only be authorised by the express will of the legislature. The act of Charles II. has not authorised them; and, as it is a correctory statute, it may not be extended by interpretation. No 11.

Answered for Miller; The act 17th Parl. 2d Charles II. although correctory, is framed for public utility. It neither mentions small irregularities, nor determines the quantity which may be exchanged. The march was, in terms of the statute, so uneven, as to occasion great inconveniency in the inclosing; for that the projection could not have been inclosed, but at an expense exceeding the value of the ground. The case therefore is within the statute, which authorises the Sheriff to adjudge such parts of the one or other heritor's ground, as occasion the inconveniency betwixt them, so as may be least to the prejudice of either party. The Sheriff has purposed to follow this rule, by adjudging to Miller the ground projecting into his lands, to Pew, ground of an equal value.

"THE LORDS refused the bill of advocation."

Act. *D. Rae.* Alt. *Miller & Lockhart.*

D. *Fol. Dic. v.* 4. *p.* 80. *Fac. Col. No* 121. *p.* 181.

1756. *July* 29. GEORGE CHALMERS *against* MARY PEW.

No 12.
The act relative to renewing and straighting marches, extended to the division of parcels consisting of two or three acres lying interjected.

IN the year 1718, the Trinity Hospital granted a tack for three nineteen years, of 90 acres of ground near Leith, to James Henderson. In the tack, a power was reserved to the Hospital to feu some acres of the farm. Henderson conveyed this tack to John Pew.

In the year 1734, the Hospital granted a feu of 16 of these acres to Thomas Mercer, who built a house upon them; and soon after the Hospital granted him another feu of above 24 acres more to the southward of the sixteen.

Into the middle of these last 24 acres, there run from west to east, a long narrow strip of ground, of about three roods in extent. This strip belonged to the Hospital, and was contained in the last feu, but being at that time set in tack to Shiells, Mercer purchased from Shiells his tack of it.

Mercer likewise bought another long strip of ground, of above two acres extent, from Lord Balmerino, which run from east to west, along the south-side of the 24 acres.

When the feus were granted to Mercer, John Pew had acquiesced in the first feu of the 16 acres, but brought a reduction of the second of 24.

During the dependence of this process, Mercer had surrounded all the above purchases with a high stone wall, running in four straight lines, and then cut it with a cross-wall, running from east to west, and thrown the whole into

No 12. two fields. In the north part, in which his house stood, he included the 16 acres contained in his first feu, and three acres of the second feu; and in the south-field, he included the remaining 21 acres of the second feu, together with the strip bought from Shiells, and the strip bought from Lord Balmerino.

In this process John Pew prevailed, and Mercer's second feu was reduced.

George Chalmers having acquired right to all Mercer's purchases, brought a process of division against the heir of John Pew; in which he offered Pew's heir the two strips in the south-field, in return for the three acres in the north-field; which by the process of reduction were now found to belong to Pew's Heirs: The Sheriff decerned in the division.

The defender suspended; and *pleaded* her defence in this manner. In ancient times in Scotland, masters were fond of having all their tenants near themselves; the tenants likewise for their own security were fond of the same neighbourhood to each other; by which means the country was stocked, not with single farm-houses, as at present, but with small villages; and agriculture being little known, as there was no difference betwixt the art of one man and that of another, so for the most part they all ploughed the same field which was nearest to the village together; only, to distinguish the property of one from another, they for the most part ploughed it in alternate ridges; one tenant ploughing one ridge or two ridges; another the next one or two ridges, and so on, which was called run-rigg. With regard to the grounds which lay further from the village, being from their distance of less value, and not constantly in tillage, it became necessary to divide them among the tenants in larger parcels; accordingly these for the most part were possessed in the same way, not indeed in alternate ridges, but in alternate fields, one tenant possessing one field, another the next, and so on; which is called in some old deeds cutcherys, and afterwards got the name of rundale: With regard to grounds farthest off again, these being most neglected, and fit only for pasture, and there being no inclosures in the country, they were possessed by all the tenants of the village as a common.

Perhaps some such method of possession had subsisted among our ancestors, the ancient Germans; for Tacitus relates of them, that they lived in villages, and ploughed their fields in common; and perhaps they thought that what was possessed equally by all, would be defended by all equally; might give aid to the natural situation of mankind at the time, both among them and among us requiring such a species of possession.

This method of possessing was tolerable, as long as by the strict feudal system lands were in some degree unalienable, and the same tenants remained with the same master; but when in latter times estates possessed in this manner came to be parcelled out among many purchasers, it became quite unsufferable; and therefore many people of themselves made divisions more agreeable to the altered state of the country; but still many such inconvenient mixtures of property remained; and therefore the legislature resolved to apply their aid.

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The inconvenince of run-rigg was the most striking, and therefore a very violent, but necessary remedy was applied, to wit, the statute 23d 1695, anent run-ridge, which broke through the common rights of mankind in their own property, and impowered the Sheriff to divide as was most convenient.

The inconvenience of commonties got a remedy equally violent in form, but not so in effect; and, by the act 38th 1695, anent dividing of commonties, an opportunity was given for heritors in commonties, by forcing a division of them, to convert an useless promiscuous possession of a whole, into a determinate certain property in a part.

But as rundale consisted of larger parcels of ground, and was more accommodated to the natural deeds and wishes of mankind, so it does not appear that the legislature thought themselves entitled to apply equally violent remedies to it; and therefore, though by the acts 41st 1661, and 17th 1669, they made proper regulations for it, in common with the other unmixed property of the kingdom; yet they no where impowered the Sheriffs to force a division of it. If men were so fond of their small properties in that way, as not to part with them on any terms, all that their neighbours could do, was, by the act 1661, to force them to be at the equal expense of a march-dyke; or, by the act 1669, to straight marches; and as there was no law in neighbouring countries to force men to part with their property, it is probable that the legislature thought they had made stretch enough, in forcing men to divide their run-rigg and commonties, without going any further.

Hence it follows, that the present division cannot proceed on the 23d act 1695; for the ground proposed to be exchanged, lies not in alternate ridges; nor on the act 38th 1695, for they are not a commonty; nor on the act 1661 and 1669, for neither building dykes on marches, nor straighting marches, are sought; nor on the common law, which allows not one person to force an exchange of grounds with another, for the convenience of either.

II. The act 1695, on which alone, with any show of reason, the division can be sought, relates to divisions betwixt heritor and heritor, and not, as in the present case, to a division betwixt heritor and tenant.

The act ordains, That, 'wherever the lands of different heritors lie run-rigg, 'it shall be leisom to either party to apply, &c, that the same be divided ac-'cording to their respective interests; and the Judges are thereby restricted, so 'as special regard may be had to the mansion-houses of the respective heritors, 'that there may be adjudged to them the respective parts of the division, as 'shall be most commodious to the respective mansion-houses and policy, and 'which shall not be applicable to the other adjacent heritors.' And it is declared, 'That burrow-acres shall remain with the heritors to whom they for-'merly belonged.' Thus, it is the heritors who are to apply, it is the interest of the heritors that is to be considered in making up of the division, and the only exception is in favour of heritors.

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Such being the two objections, founded on the letter of the statutes, and particularly of the act 1695, Judges cannot, in statutes which limit the common use of property, go beyond the letter of the statute, however great the obstinacy of the one party, or the conveniency of the other may be.

Answered; That supposing the case in question not to lie within the words of any of the statutes referred to, yet it lies within the spirit of them, and particularly of the 23d act 1695; and it is the duty of Judges to extend a law intended for the beauty and improvement of the country, against those who would disappoint that beauty and that improvement.

THE LORDS repelled the reasons of suspension, and found the letters orderly proceeded.

Act. *Lockhart J. Dalrymple.* Alt. *Ferguson, Miller, Johnston.*

J. D. *Fol. Dic. v.* 4. *p.* 80. *Fac. Col. No* 213. *p.* 309.

1758. *January* 20.

ALEXANDER LOCKHART of Craig-House *against* JOHN SEIVEWRIGHT of South-House.

No 13.
Conterminous heritors are bound to repair and uphold march dykes formerly built.

IN March 1745, Alexander Lockhart purchased the lands of Craig-house from John Seivewright's father. The boundary on the east, between the lands of Craig-house and the lands of Plewlands, the property of Seivewright, is described in the disposition to be a stone dyke, 'which stone dyke, upon the east side, is hereby declared to be, now, and in all time coming, the boundary 'between the said lands of Plewlands and the lands of Craig-house.'

In the year 1757, this stone dyke had become decayed; and Mr Lockhart, with a view to inclose that part of his estate, brought an action against Seivewright, to oblige him to contribute half the expense of repairing or rebuilding it, or of making such other sufficient fence as should be found to be proper.

Pleaded in defence, The dyke in question was not built by two conterminous heritors, in terms of the act 41st parl. 1661, but by the heritor of Craig-house, for the advantage of that estate, when he was proprietor also of Plewlands; and the clause in the disposition, declaring this dyke the boundary, must be understood to transfer the property of it to the purchaser of Craig-house: That the defender will have no benefit from this dyke, because his estate of Plewlands is uninclosed, and is let out to tenants upon leases for a great number of years. The act of parliament 1661, makes no provision for upholding or repairing march-dykes after they are built; and though, at common law, those who have concurred in building, may be obliged to uphold; yet this will not apply to the case, where one heritor has been at the sole expense of building, without following the rules of the act 1661; the intention of which