COMMONTY.

1668. *February* 15.

The LAIRD of HAINING *against* The TOWN of SELKIRK.

No 1.
Common pasturage in a commonty of a barony of the King's property, was found constituted by a feu *cum pertinentibus, et cum pascuis et pasturis.* It was not necessary that the muir should be particularly specified, being the commonty of a barony.

THERE being mutual pursuits betwixt the Town of Selkirk and the Laird of Haining, the Town pursuing a declarator of the right of property of the commonty of Selkirk, and Haining pursuing a declarator of his right of pasturage in the said commonty, by virtue of his infeftments of the lands of Haining, which lands are a part of the King's property of the barony of Selkirk; and that this common is the commonty of the said barony, possest by all the adjacent feuars of the barony, and whereof they have been in the immemorial possession;

THE LORDS did, before answer, ordain both parties to produce all rights, writs, or evidents they would make use of in the cause, and also to adduce witnesses, *hinc inde*, of both their possessions, and interrupting others.

Haining produced a charter by the King, in *anno* 1505, of the lands of Haining, being a part of the King's property, bearing *cum partibus et pertinentibus, cum pascuis et pasturis*, but not bearing *in communi pastura*, or *cum communiis*, generally or particularly in the common of Selkirk; he did also produce posterior charters of the same lands, bearing *cum communi pastura*, and did adduce several witnesses, proving 40 years continual possession; but some of his witnesses proved interruptions by the town of Selkirk's cutting of divots, cast by him and his predecessors upon the muir.—The town of Selkirk produced their charter of the burgh, posterior to Haining's first charter, bearing that their ancient evidents were burnt by the English, and therefore the King gives them the privilege of the burgh of Selkirk, with the burgage lands thereof, *cum communiis ad dictum burgum spectantibus*, which the King confirms by a posterior charter, giving the town warrant to ryve out 1000 acres of land of the common; they did also produce several instruments of interruption, not only by cutting of the feal and divots, cast by Haining or his tenants, but by turning their cattle off the muir, as proper to themselves, and turning off all the heritors' cattle they found thereupon, and by yearly riding about the whole marches of

No 1. the muir. They did also produce a decreet, at the Town's instance, against the tenants of Haining, decerning them to desist and cease from the muir; in which decreet, Haining's predecessor was Provost of Selkirk, and is pursuer of the cause. They also produced two missives, written by Umquhile Haining, acknowledging that the town had cut his divots, casten upon the head room, and making apology for casting of the same, denying it to be by his warrant or knowledge. They did also produce two acts of the town court, bearing Haining to have desired liberty to draw stones off the common to build a park-dyke, and to cast some divots for his tenants houses. They did also adduce several witnesses, proving their continual and uninterrupted possession of the muir for 40 years and more; which proved also frequent interruptions against Haining, especially by cutting of divots, and also by turning off his cattle; upon which probation it was *alleged* for the Town, That they had instructed sufficient right to the property of this muir, and that they had debarred the Laird of Haining and his tenants therefrom, whenever they heard they came upon the same.—It was *answered* for Haining, That he did not deny the town of Selkirk's right of pasturage in the muir, but did deny they had right of property therein; but that the property did yet remain in the King, as part of the barony of Selkirk, being of the King's annexed property; but that the said property, (as to the muir) was now burdened with a common pasturage, belonging to the town of Selkirk, and also belonging to the Laird of Haining, and the other feuars of the barony of Selkirk; and therefore alleged that his charter, in the year of God 1507, being long before any charter, granted by the King to the town, did feu to his predecessors, the lands of Haining, *cum pertinentibus, cum pascuis et pasturis*; and this common being the commonty of the barony of Selkirk, the King feuing a part of the barony, *cum pertinentibus, et pascuis*, did certainly thereby grant all that belonged to these lands, as pertinents thereof, as it was the time of the feu, being then possessed by the King's farmorers; but that they had common pasturage in the muir of Selkirk, is not only presumed, (because it is the common of the whole barony, and possest by all the adjacent feuars thereof,) but also by their continual possession since; for possession 40 years is sufficient to prove all bygone possession, since the right capable of that possession, it being impossible to adduce witnesses to prove possession eight score years since otherways; and therefore, as in the case of the Lord Borthwick and William Borthwick, decided the 14th of this instant;* the Lord Borthwick's minute, disponing the lands *cum pertinentibus*, without any word of pasturage, was found to carry common pasturage in the muir of Borthwick, as being a pertinent of the lands disponed the time of the minute, and not reserved; much more the King disponing the lands of Haining, not only *cum pertinentibus*, but *cum pascuis, et pasturis*, did carry to Haining the right of common pasturage in the common of Selkirk, being then the commonty of the barony; so that any interruptions done since, cannot take away the right of common pasturage once constituted by the King. And albeit the King had unquestionably granted

* Stair, v. 1. p. 523, *voce* PART and PERTINENT.

a right of property to the town thereafter, yet that could not prejudge the common pasturage of another constituted before; for if Haining claimed this common pasturage only by possession and prescription, interruptions might be sustained to exclude the same, but he claims it chiefly by virtue of his infeftment, as having right thereto the first day he was infeft; so that his possession since, albeit troubled by this commonalty, yet preserves his right, that the town cannot allege a total and complete possession, excluding him, and thereby taking away his right by prescription in their favour; and as to the town's charter *cum communiis*, it contains nothing *per expressum* of this muir, or pasturage therein, nor gives any thing *de novo*, but bears *cum communiis ad burgum spectantibus*, which the King might have given, though there had not been a commonty within 40 miles; in the same manner, as the common clauses in all charters, bearing coal and chalk, cuningars or ducats, whether there be any or not; and the most the town can pretend by their charter, is, that they being a burgh, erected within the barony of Selkirk, *cum communiis*, may therefore claim pasturage with the rest of the feuars of the barony, but cannot exclude them as to the liberty granted by the King, to ryve out a 1000 acres; it clearly evinceth that they had not the property before; neither did that take any effect, nor could it, because the common pasturage (constituted to the feuars before) would have hindered any posterior power of tillage. As to the decreet against the tenants of Haining, it is in absence, the heritor for the time not being called; and albeit it bears Haining's predecessor, as Provost, to be present, that will neither import his consent nor knowledge; country gentlemen being then ordinarily Provosts of towns, who lived not with them; their affairs at law were managed by their town clerk and Bailies, though the Provost's name behoved to be insert; neither did this decreet take effect, for Haining's tenants never ceased to pasture. As to the letters, they do only acknowledge the town's head rooms; because, in great communities, it is ordinary for several proprietors to have peculiar places, most convenient for them where they law their cattle, and cast feal and divot, and which doth sufficiently consist with the commonty. As for the acts of court, they can prove nothing against Haining. No 1.

The Lords found, That the town of Selkirk had undoubted right of pasturage, fuel, feal, and divot in this commonty, and that they had immemorial possession thereof, without any interruption; and found that Haining had no right by virtue of possession and prescription; but found, that by virtue of his charter, anterior to the town's right, he had right to common pasturage in this muir, it being the common muir of the barony: But seeing he did not sufficiently prove possession of feal and divot, but was therein continually interrupted, much more than in the pasturage, and that nothing appeared, that in the time of his original right, the feuars had privilege of feal and divot; therefore the Lords found that he had no right thereto, albeit common pasturage doth ordinarily carry therewith feal and divot; yet they found that it was a several servi-

No 1. tude, separable therefrom either by consent or custom, and found that the town should enjoy their head rooms, excluding Haining therefrom.

Stair, v. 1. p. 524.

1724. *January* 31.

LORD POLWARTH and HOG of Harcarse, *against* The EARL of HOME and TROTTER of Mortonhall.

No 2.
Heritors, who had a servitude upon a common, of which they obtained a division, were pursued by the superior of the lands, and a wadsetter from him, who insisted, that besides their shares, they should be allowed a fourth part as a *præcipuum*, because the property was theirs, and the others had only a servitude. The Lords allowed the fourth as a *præcipuum*.

The proprietor was likewise found entitled to a share in the division, corresponding to his lands, whereof the tenants had a promiscuous possession with the heritors of the dominant tenement.

IN the process of division of the common muir of Fogo, commenced at the instance of the Lord Polwarth and Hog of Harcarse, who had a servitude on that common; the action was sustained, though they had not a joint property, 31st December 1723. *See* TITLE TO PURSUE.

Thereafter the Earl of Home the superior, and Mortonhall who had a wadset from him, *insisted*, That beside the share effeiring to their lands, the tenants of which had been in possession of the common with the other adjacent heritors, they should be allowed a fourth part of the common as a *præcipuum*, because the property was theirs, and the other adjacent heritors had only rights of servitude.

It was *answered* for the other heritors, That there was no law for giving such allowance, as a *præcipuum*, to one who has the property of the common; that such property is fruitless while the common continues undivided, on account of the use the other heritors make of it; so when it is to be divided, the law has made no provision to the heritor for his property; but the rule laid down by the 38th act 1695 is simply, 'That the interest of the heritors having right in the 'common shall be estimate according to the valuation of their respective lands 'or properties.'

It was *replied* for the proprietor, That the said clause concerned only the case where a common belongs in common property equally to the adjacent heritors; which is very different from the present, where the superior is proprietor of the muir, and the other heritors have only a servitude upon it, which is a much less right; for the proprietor would have the sole right to mines, minerals or marl, if such were found in the common; yea, he might plough part of it, providing he left out what was sufficient for the other heritors their servitude, as was found 21st June 1667, Watson *contra* Feuars of Dunskennan.* And the Lords of Session are, by the said act, directed 'to determine upon the rights and interests of 'all persons concerned, and to value and divide the same according to the va-'lue of the rights and interests of the several parties.' From this it was inferred, that there could be no doubt but the superior ought, in a division of the common, to have an allowance or *præcipuum* upon account of his property, as well as a share corresponding to the valuation of his other adjacent lands, the tenants of which had a promiscuous possession with the other heritors.

* Stair, v. 1. p. 463. *voce* SERVITUDE.