

No 11.

his infeftment, which is of the whole estate, and whatever reservation be in favours of the creditors, it is *jus tertii* to the defendr. It was *answered*, That the defender's advocates concurred for a number of the creditors, whom they named, and alleged that they would not suffer the defender to be removed, seeing they only can have interest to these lands in question. The pursuer *answered*, That the creditors' concurrence or interest was not relevant, because they have no real right or infeftment, but only a personal provision, that this pursuer shall dispo and resign the surplus of the estate in their favours, or otherwise pay them 18 years purchase therefor at his option, whensoever they shall insist *via actionis*, the Earl shall declare his option, but they having no infeftment cannot hinder the donatar to remove parties having no right, which is the creditors' advantage, and cannot be stopped by a few of them; likeas the whole barony of Lochow is set out by the said commission, to the pursuer himself, conform to their sentence produced.

" THE LORDS did also repel this defence, and found that the provision in favours of the creditors, could not stop this removing." PERSONAL AND REAL.

*Fol. Dic. v. 2. p. 25. Stair, v. 1. p. 505.*

No 12.

A minute disposing lands with parts and pertinents, found to dispo, common pasturage in a muir at the time of the bargain, possessed along with the lands.

1668. February 14. WILLIAM BORTHWICK against LORD BORTHWICK.

WILLIAM BORTHWICK having charged the Lord Borthwick for payment of a sum of money, he suspends, and *alleges* that William is debtor to him in an equivalent sum, for the price of the lands of Halheriot, sold by my Lord to the charger, conform to a minute produced. The charger *answered*, That the reason was not relevant, unless the suspender would extend and perfect the minute, which my Lord refuses, especially and particularly to subscribe a disposition of the lands, with common pasturage in Borthwick muir. The suspender *answered*, That he was most willing to extend the minute, but would not insert that clause, because the minute could not carry nor import the same, bearing only a disposition of the lands, with parts, pendicles, and pertinents thereof, which he was content should be inserted in the extended disposition, and it was only proper after the infeftment was perfected, that the charger should make use of it, so far as it could reach, which he was content should be reserved as accords. *2dly*, If he were obliged to dispute the effect of it, it could not extend to pasturage in the muir of Borthwick, *1st*, Because a special servitude of a pasturage in such a muir, requires an express infeftment, and cannot be carried under the name of pendicles, parts, or pertinents, albeit the muir were contiguous, and the common muir of a barony; but, *2dly*, This muir lies discontinuous from the lands of Halheriot, and my Lord's lands lie betwixt, and do not belong to the whole barony, but to some of the tenants of it only. The charger *answered*, That this being a minute, behoved to be extended in ample form, expressing all rights, particularly that the right *de jure*.

could carry, and there was no reason to make him accept of lands with a plea; and *de jure* pendicles and pertinents do well extend to common pasturage, when the said pasturage is so possessed; and it cannot be controverted, but the heritors and possessors of Halheriot have been in undoubted possession of common pasturage in this muir, and that the rent payable therefor is upon consideration of the pasturage, without which, it could neither give the rent it pays, nor the price; so that when my Lord disposes the lands, with the pertinents, and at the time of the disposition, this pasturage is unquestionably possessed as a pertinent of the land, the extended charter and disposition ought in all reason to comprehend it expressly; neither is there any difference whether the pasturage be of a muir contiguous, or belonging to the whole barony, seeing it cannot be controverted, but it was possessed as pertinent of this room the time of the bargain; and to clear that it was possessed, the charger produced a wadset granted by the Lord Borthwick to himself of the same room, bearing expressly pasturage in the common muir of Borthwick. The suspender answered, That the wadset made against the charger, in respect this clause being express in the wadset, he had not put it in the minute, which as *jus nobilius* absorbed the wadset, and cannot be looked upon as a discharge of the reversion only, because my Lord was superior by the wadset, and by the minute he is to resign, likeas in the minute there is a disposition of the teinds, which is not in the wadset.

THE LORDS found that the minute ought to be extended, bearing expressly the common pasturage in the muir of Borthwick, in respect the same was a pertinent of the lands, sold the time of the bargain, and was not excepted.

*Stair, v. 1. p. 523.*

1669. July 2.

LAIRD OF GRUBBET *against* MORE.

THE barony of Linton belonging to Sir John Ker of Littledean, the lands of Morbattell and Otterburn are parts thereof; there is a piece of land called Greenlaw, lying in the borders of Morbattell and Otterburn, and there is an heritable right of the lands of Otterburn granted by Sir John Ker to one Young, and by that Young a subaltern right to another Young, bearing the lands of Greenlaw *per expressum*. Both these Youngs jointly dispose to Grubbet the lands of Otterburn, with the pertinents, comprehending the lands of Rashbogs; in the end of which disposition there is a clause, bearing, that because the Youngs were kindly tenants in the lands of Greenlaw, therefore they dispose their right thereof, and kindness thereto to Grubbet. More having acquired the rights of the lands of Morbattell from Sir John Ker; and the Earl of Lothian having apprised Sir John's right of the barony of Linton, *in anno* 1636, gives a particular right of Greenlaw alone, which is now also in the person of More; whereupon arises a competition of right between Grubbet and More,

VOL. XXIII.

53 P

No 12.

No 13.

In a competition, personal service to the superior ascertained by tack or enrolment of Court, was found sufficient to ascertain, of which property the disputed subject was part and pertinent.