

1752. December 15.

MAJOR GEORGE MONCRIEFF, and Others, against MRS MARGARET BALFOUR
of Burleigh.

By charter under the great seal, bearing date *anno* 1685, there is disposed to Robert, Master of Burleigh, 'all and whole the lands and barony of Strathmiglo, comprehending the villages and lands of Demperston, Easter, and Wester Skelbo's lands, &c. with full power and privilege of commonty in the Lowmonds of Falkland, and the hills of the common muir and commonty of 'Auchtermuchty,' all erected into an hail free barony, by a charter of James VI. called 'the barony of Strathmiglo.'

A division of the commonty of Auchtermuchty having been brought, at the instance of certain of the heritors interested therein, upon act 1695, a question arose, in the course of this process, whether the heritor of the barony of Strathmiglo was entitled to a share of said commonty, effeiring to the valued rent of the whole barony, or only to the valued rent of the lands of Demperston, the only tenement of the barony which had ever been in possession of the said commonty?

Argued for the heritor of Strathmiglo, That, as the whole barony of Strathmiglo lies contiguous, and is naturally united, so the right and privilege of commonty, in the common of Auchtermuchty, is given as appertaining to the whole barony; and consequently a proportional interest in the said common was established in the proprietor of the barony, effeiring to the valued rent of the whole barony: That as it was admitted that possession of the commonty hath been enjoyed to a certain extent, by the heritor of the barony of Strathmiglo, viz. by his tenants of Demperstan; consequently there could be no pretence that his right was excluded by the negative prescription, or acquired to the other heritors of the commonty by the positive prescription; for though, in servitudes or rights of property acquired by prescription, the extent of the right must depend upon the possession, which being the sole foundation of the right, must also be the only measure of its extent; yet, where a right of property or servitude is constituted by express grant, as in the present case, the extent of the right does not depend upon the possession, but upon the terms of the grant.

Answered for the other heritors, The charter in favours of the Master of Burleigh contains also the right of commonty in the Lowmonds of Falkland; and as the proper lands of Strathmiglo are adjacent to, and have been in the constant possession of this commonty of the Lowmonds; so it is admitted, that the lands of Demperston have been in the possession of the commonty of Auchtermuchty; which distinct possessions plainly show, that these different common-ties have been pertinents of the said principal lands respectively, before their union into a barony: the words of the charter can be no otherwise understood, than by applying *singula singulis*.

No 12.

A barony having a right over two commons, of one of which the heritors having interest pursued a division, the Lords found, that the proprietor of the barony was entitled only to a share proportionate to the valued rent of such parts as had been in use of possession; as other parts of the barony had confined their possession to the other common.

No 12.

2do, A barony is an union of distinct tenements and rights for jurisdiction, and other purposes, and, no doubt, comprehends the whole parts and pertinents, whether of property or servitude, which belonged to the several tenements before their erection; but a barony being only *nomen dignitatis et jurisdictionis*, cannot be constructed as a *fundus* or principal tenement, to which a servitude or other pertinent can properly belong. Servitudes, and other pertinents, belong to, and are *correlate* to the particular tenements which compose the barony, but not to the right of barony itself, which is only a *nomen juris*, to which no such servitude or pertinent can belong. And if the common in question should be set off to the heritor of Strathmiglo, in proportion to the valuation of the whole barony, the consequence would be, that the heritor would be entitled to a share in the division effeiring to his fishings, superiorities, mulctures, and others, which all enter into the valuation of the barony; and this, at first sight, appears absurd, seeing none of these are subjects to which a right of commonty or servitude can, in any sense, belong.

'THE LORDS found, that the heritor of the barony of Strathmiglo was entitled to a share in the division of this commonty, effeiring to the valued rent of the lands of Demperston only.'

Reporter, *Lord Elchies.* Act. R. *Craigie.* Alt. R. *Dundas.* Clerk, *Justice.*
M. Fol. Dic. v. 3. p. 138. Fac. Col. No 47. p. 70.

1757. November 23.

ROBERT BALFOUR of Balbirny, and others *against* MRS ISABEL DOUGLAS of Kirkness.

No 13.
In the division of a commonty, the possession by part of a barony, found to preserve the right of the whole barony.

THE predecessors of Mr Isabel Douglas of Kirkness were infeft in the barony of Kirkness and pertinents; and they and their tenants had been in use, past memory of man, to pasture upon the commonty of Boglochty: but, for forty years past, the possessors of two of the farms of the barony had neglected to pasture any cattle upon it, owing to some alterations in the improvement of those farms by the proprietors.

Robert Balfour-Ramsay of Balbirny, and others, were infeft in lands adjoining to the bog of Boglochty, with a privilege of common pasturage in that bog; and they, and all their tenants, had been in use, both in old and late times, to pasture their cattle upon it.

In a division of this commonty, brought by Robert Balfour-Ramsay and others, against Mrs Isabel Douglas, the pursuers insisted, That Mrs Douglas had right to a share in the division of the commonty, not in proportion to her valued rent of the whole barony of Kirkness, but in proportion to those parts of it which had, for above forty years, been in use to pasture upon the commonty.