SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

WATT, Esq.—*Appellant.*
PATERSON and others—*Respondents.*

Nov. 10, 1813.

DIVISION OF COMMON.

IN a question of division of common, evidence of once ploughing up and taking a single crop from a piece of ground—on which persons having a right of common usually turned their cattle, without challenge, for 40 or 50 years after that act of ploughing, as being part of a commonty—not sufficient of itself to establish an exclusive right to the piece of ground so ploughed up. Clause "with pertinents" in a bounding charter held in this case sufficient foundation for title to grounds without the boundaries specifically described in the charter.

1799. Action for division of commonty.

THIS was an action, founded on the statute of 1695, 5th session, 1st Parliament of William and Mary, cap. 38, for dividing the commonty of Carpow. The Appellant conceived that the Court, in determining what was the exclusive property of certain contiguous proprietors, and what remained as commonty to be divided among the whole of them according to their respective valued rents, had given an erroneous judgment, by which a considerable piece of ground was partly held to be commonty, and partly adjudged to another, which, in his opinion, was his exclusive property, and therefore he appealed.

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Appeal, and grounds of it.

The grounds of appeal were,—

1st, That the land in dispute was included in his titles.

2d, That there was parole evidence to show that the land belonged to his estate, and particularly that one of the tenants of his estate had once, above 40 years ago, ploughed up a part of the disputed land; and,

3d, That a portion of the land in dispute had been adjudged in exclusive property to the inhabitants of the town of Newburgh, parties to the action of division, though they were excluded by their own bounding charter.

To the first it was answered, That the land in question was not included in the minute of sale relative to the estate to which, as the Appellant pretended, the land belonged, when he purchased that estate; and also that the argument from the old titles proved too much, because it extended to other portions of ground clearly proved to be commonty:—To the 2d, That, though the evidence was contradictory, the weight of testimony was in favour of the land being commonty:—To the 3d, That the Newburgh charter contained a clause "*with pertinents*," which was sufficient ground of title.

Romilly and *Nolan* (for Appellant.) It did not signify what the Appellant purchased: the question was, What was comprehended in his titles? Two pieces of ground, portions of what he claimed, had been adjudged to the Appellant, on the presumption that they were his, from there being

evidence that they had been ploughed up by his or his author's tenants; and, on the same principle, the land now in question ought to have been adjudged to him. In regard to the Newburgh charter, prescription presumed a grant; but that presumption was done away when the grant was produced, and it appeared that the land claimed was not in it. (Ersk. b. 2. t. 6. s. 3.—*Young*.—Dict. p. 9636.)

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Adam and *Horner* (for Respondents) not heard.

Lord Eldon (Chancellor.) This was an appeal against certain interlocutors of the Court of Session, by which Watt, the Appellant, complained that he had been deprived of certain lands to which he was exclusively entitled. Two places claimed by him, and proved to have been ploughed up by his or his author's tenants, had been adjudged to him, and it had been contended at the bar that this was presumptive evidence that he was entitled to the whole. But this presumption might be done away; and the question was, Whether there was sufficient ground in this case to induce their Lordships to reverse the judgment of the Court of Session as to that portion of the land claimed which had not been adjudged to the Appellant?

Judicial observations.

If was often, and he thought with great propriety, intimated to them from the bar, in these cases, that though a Court of Appeal, yet they sat there as if they had to decide upon a motion for a new trial on a question of facts, which they ought to try with great caution, because the law respecting the division of commons was very useful, and, if they en-

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Appeals in questions upon division of common not to be encouraged, lest the utility of the act of 1695, respecting such division, should be destroyed.

couraged speculating in appeals in these cases, they might destroy its utility. He did not mean to say, however, that if a decision in such cases was clearly wrong, it ought not to be reversed; but then it ought first to be very clear that it was wrong: and they might possibly misunderstand the proper effect of these acts of ownership, or interruption, as connected with rights of common. They certainly would make wild work if they were to hold that a ploughing up of a piece of ground 40 years ago would establish an exclusive right, though subsequent to that act the right of servitude had been exercised without interruption.

In regard to the Newburgh piece of ground, the argument for the Appellant did not at all apply, as it might pass under the clause "with pertinents."

Evidence of a tenant of an estate adjoining a common having, 40 or 50 years previous to an action of division, ploughed up a piece of ground, always afterwards considered and used as common, not sufficient to establish an exclusive right in the proprietor of the estate to the ground in question.

Then as to the ploughing up being evidence that the Appellant was entitled to the whole of what he claimed, the Court below appeared to have gone upon this, that the servitude had been exercised subsequent to the act of ownership; and he was not prepared to say that the taking a single crop from a piece of ground, on which the cattle belonging to the neighbours had pastured for 40 or 50 years afterwards without interruption, was conclusive evidence of an exclusive right: that would be going too far. But the Court below had gone a great length, for they said, "Show us specifically what "your tenants, or those of your predecessors in this "estate, ploughed up, and you shall have it." The evidence as to the ground now in question did not go even to that extent. But, at any rate, as to such a claim as this, founded on having once, 40 or 50

years ago, ploughed up, without challenge, a piece of ground of little or no value, on which the neighbours' cattle were afterwards pastured without further interruption, that was all mere moonshine. There was a great deal of evidence on the other side that this was part of the commonty. Were their Lordships satisfied, then, that the decision of the Court of Session was clearly wrong? If not, (and he certainly was not,) it appeared to him that the judgment of the Court below ought to be affirmed without pressing the hearing further.

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Judgment affirmed.

Agent for Appellant, MUNDELL.
Agent for Respondent, ———

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APPEAL FROM THE COURT OF SESSION.

STEWART—*Appellant.*
HALL and others—*Respondents.*

REPAIRS and furnishings done at Hull to a Greenock ship, by order of the agents of the owner, at the instance and under the direction of the master. Account made out to "Captain Cowan (the master) and owners of ship Jeanie," attested by Cowan, and addressed to the agents for payment, but payment not demanded for some months. In the mean time, the owner pays the agents for the repairs. The agents become embarrassed in their circumstances, upon which those who did the repairs apply for payment to

Nov. 10, 1813. LIABILITY OF OWNER FOR REPAIRS DONE TO A SHIP.