

coals past memory. The defender *answered*, there was no necessity of an express infeftment of the coal, which is carried as part and pertinent, as Craig observes *in dieg. de investituris impropriis*, to have been decided betwixt the Sheriff of Ayr and Chalmers of Gaithgirth, and so being infeft, and in possession seven years, he has the benefit of a possessory judgment.

THE LORDS found the defence relevant, but repelled the same, in respect of interruption within seven years, which was proponed.

*Stair, v. 1. p. 88.*

1668. January 15. EARL of ARGYLE against GEORGE CAMPBELL.

THE Earl of Argyle pursues George Campbell to remove from a tenement of land in Inverary, who alleged no process, because, the pursuer produces no infeftment of this burgh, or tenement therein. The pursuer *answered*, That he produced his infeftment of the barony of Lochow, and offered him to prove, that this is part and pertinent of the barony. The defender *answered*, That this burgh cannot be carried as part and pertinent, but requires a special infeftment; *1st*, Because, by the late Marquis of Argyle's infeftment, in *anno 1610*, produced, this burgh is exprest, and not in the pursuer's infeftment; *2dly*, Because in the pursuer's infeftment, there are exprest particulars of far less moment; *3dly*, Because a burgh of barony is of that nature, that it cannot be conveyed without special infeftment. The pursuer opponed his infeftment of the barony of Lochow, which is *nomen universitatis*, and comprehends all parts of the barony, although there were none exprest, and therefore the expressing of this particular in a former charter, or less particulars in this charter, derogate nothing; it being in the pursuer's option to express none, or any he pleases; and albeit, in an infeftment of an ordinary holding, without erection in a barony, mills, fortalices, salmond fishings, and burghs of barony cannot be conveyed under the name of part and pertinent, yet they are all carried *in baronia*, without being exprest.

“THE LORDS repelled the defence in respect of the reply, and found that this being a barony, might carry a burgh of barony as part and pertinent, though not exprest, albeit it was exprest in a former infeftment, and lesser rights expressed in this infeftment.”

The defender further *alleged* no process, because the pursuer's infeftment is qualified, and restricted to so much of the estate, as was worth, and paid yearly L. 15,000, and the surplus belongs to the creditors, conform to the King's gift, likeas the King granted a commission to clear the rental, and set out the lands to the pursuer, and to the creditors, who accordingly did establish a rental, wherein there is no mention of the lands of Inverary, and therefore they cannot belong to the pursuer. It was *answered* for the pursuer, That he oppones

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Infeftment in a barony carries a burgh of barony, though not expressed.

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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.*

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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*