

1790. *December 7.* MRS HENRIETTA KER and OTHERS *against* WILLIAM SIMPSON OF VIEWFIELD.

COMPENSATION AND RETENTION—SUPERIOR AND VASSAL.

Found that a vassal was not entitled to retain feu-duties for damages occasioned by the working of a coal originally reserved to the superior, but afterwards sold by him.

[*Faculty Collection*, X. 307 ; *Dictionary*, 2692.]

HENDERLAND. If the claim would have been good against Lord Ross, it is good against Mrs Henrietta Ker : so the question is, Whether it would have been good against Lord Ross ? Damage is *quicquid demitur de patrimonio*, arising from a fact done, or arising from special contract : I see neither here on the part of Lord Ross. Ways and means might have been fallen upon to prevent the proprietor of the coal from doing damage to the proprietor of the land ; but, *sive secus, sive secus*, it matters not as to the condition of Lord Ross.

SWINTON. The security to Mr Simpson, if limited to the proprietors of the coal, would have been nothing ; for they might have been bankrupt, and the coal, being a fungible, might have been wrought out.

DREGHORN. When a man feus with the burden of a coal, he must lay his account with inconveniency. The feuar is entitled to stop the tacksman till security be found to relieve from damages. I go upon general grounds. When a right is granted to a man and his assignees,—when the assignee comes in, the obligation on the assigner ceases. In the case of *Dennis against Trotter*, in 1772, Lord Pitfour held that the assignee, when received without objection by the master, was alone liable for the rent, though the decision of the case went upon other circumstances. If such be the case as to tacks, I think that the feudation of a coal must be judged of in the same way, though the feudation of a fungible seems an odd thing.

ESK GROVE. I proceed altogether on the terms of the clauses. The *heirs and assignees* are the *heirs and assignees* in the subjects.

JUSTICE-CLERK. The contract is accurately drawn, but nothing in it determines one way or other. The question is as to the meaning of the parties. I approve of Lord Eskgrove's commentary and interpretation : there may be different and independent interests in the same subject ; thus, teinds and lands may be totally distinct. Mines and minerals may be held separately from lands. When a charter of mines and minerals is granted under the Act 1592, they are held of the crown, however the lands may be held. Coal reserved is part of the *dominium utile* continuing with the disposer : it is not a burden ; and, if it were, it would be a burden on the *dominium utile*. It is said, Can it be supposed that a person who has a right to surface damages should have no claim unless against

the proprietor of a coal, who may be bankrupt? These are mere words. There is a feu-duty of L.150 in this case; but there might have been a feu-duty of five shillings, which would have been no security. Surface damages are generally and probably not attended to. The damage done to the house was *ex debito*. Mr Clerk ought not to have wrought under the house; and Mr Simpson ought to have stopped him by suspension. I think that, whenever the coal and the superiority part, the damage must be paid by the proprietor of the coal.

PRESIDENT. The rule proposed is a simple one, but I doubt how far it can be adopted. The Marquis of Lothian is in the same case as Lord Ross; that is admitted. Suppose that the Marquis of Lothian and Mr Simpson, instead of being superior and vassal, had been master and tenant; the Marquis exercises the right of working coal; Mr Simpson demands damages; the Marquis of Lothian says, "I have taken a sum of money, and have sold the coal to Mr Clerk." Mr Simpson might say, "That is nothing to me; you cannot relieve yourself from your obligation." What is the difference here? What is Mr Simpson's security? Unless the security be over the whole subject it is none at all. The nature of feu-contracts seems not sufficiently attended to. The superior cannot, by the exercise of reserved powers, make the condition of his vassal worse.

On the 7th December 1790, "The Lords repelled the defences;" altering their interlocutor of the 27th January 1790, and adhering, in substance, to the interlocutor of Lord Dreghorn.

*Act.* William Tait. *Alt.* M. Ross.

*Diss.* Swinton, Rockville, President.

*Non liquet*, Stonefield, Monboddo.

*N.B.* I was in the Outerhouse when the former interlocutor was pronounced, so there are no notes on the 27th January 1790.

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1791. *January 22.* COLONEL ALEXANDER BRUCE *against* HENRY DAVIDSON.

MEMBER OF PARLIAMENT.

[*Folio Dict. III.* 436; *Dict.* 8881.]

PRESIDENT. In the case of *Stewart*, I wrote for the receiving of explanatory evidence, and was unsuccessful. In the case of *Gordon of Whitely*, I wrote against the receiving of explanatory evidence, and there also I was unsuccessful. The claimant ought to have produced *prima facie* evidence, connecting his lands with the valuation, though that evidence might hereafter turn out to be