No 152.

1762. *Febrbuary* 10. SMITH *against* DOUGLAS.

A bill had lain over for five years without diligence. It was found to have lost its privileges, so as not to exclude compensation against an onerous indorsee. *See* No 200. p. 1644.

*** *See* The particulars in the Appendix relative to this title.

No 153.

1777. *July* 16. ELLIOT *against* M'KAY.

COMPENSATION was proponed against a bill in the hands of an onerous indorsee, which had lain over two years after its date, and 18 months after the term of payment without any demand being made, or diligence used. THE LORDS were of opinion, that the statute 12th Geo. III., ought to make an alteration of the former practice of the Court in such questions, and therefore they found that in the present case, compensation was not proponable. *See* No 205. p. 1648.

*** *See* The particulars in the APPENDIX relative to this title.

No 154.
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.

1790. *December* 8.

The TRUSTEES of JANE MARCHIONESS of Lothian *against* WILLIAM SIMPSON.

IN 1748, the father of Mr Simpson obtained, from George Lord Ross, a feu-right of the lands of Pittendriech. The feu-duties were of considerable extent, amounting nearly to L. 150.

In the feu-right the following reservation appeared:

'But reserving to us, and our heirs and assignees, all and singular mines of 'gold, silver, copper, lead, coal, and other metals and minerals whatever, quar-'ries of stone and lime only excepted, which are within the grounds of the 'lands before disponed, or any part thereof; and full power and liberty to us 'and our foresaids, now and at all times hereafter, to search for, work out, and 'dispose of, to our own use, all such metals and minerals, excepting stone and 'lime, as said is; and to make use of such part of the lands before disponed as 'shall be necessary for these ends; we and our foresaids always satisfying and 'paying the whole damages which the said Andrew Simpson and his foresaids 'shall sustain thereby, according as such damages shall be ascertained by two 'indifferent persons, of whom one to be chosen by us and foresaids, and the 'other by the said Andrew Simpson and his foresaids, as arbiters, or by an 'oversman to be chosen by the said arbiters.'

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At the time when the feu-right was granted, and for several years after it, the coal was let by Lord Ross to tacksmen, with whom Mr Simpson's father settled his claim of damages in the manner prescribed.

The superiority of the lands, with the benefit of the reservation as to the minerals, having been transferred by Lord Ross to the late Marquis of Lothian, he, by his marriage-articles, provided his wife in a liferent of the whole.

Afterwards, with the consent of his Lady, the Marquis sold the coal to be found in these lands, to Mr Clerk of Eldin, under the same obligation as to damages that had been inserted in the original feu-contract.

The conveyance in favour of Mr Clerk was in the form of a subaltern infeftment, Mr Clerk paying, in name of blench-duty, one penny Sterling, *si petatur tantum.*

Between Mr Clerk and Mr Simpson's father several settlements took place with regard to the damages occasioned by the working of the coal. But in 1764, the parties having differed, a litigation ensued; which, in 1784, terminated in a decree of the Court of Session, by which Mr Clerk was found liable in damages and expenses.

Two years before this, however, Mr Simpson, his father being then dead, resolved to retain the feu-duties payable by him to the Marchioness of Lothian in virtue of her liferent-right, until the damages already ascertained, as well as those in the course of liquidation, were made good. These last, he alleged, would be very great, the ground on which his mansion-house and offices stood having been in some degree undermined.

An action for the feu-duties having been brought in 1788 against Mr Simpson, by certain Trustees appointed by the Marchioness of Lothian, he, in defence,

Pleaded, By the original feu-contract, Lord Ross became bound to repair the damages that might be sustained by the feuer, in working the coal. This was an essential part of the agreement; and the right of levying the feu-duties could not be exercised unless it was duly fulfilled.

When Lord Ross transferred his right of superiority, including that of working the coal, to the Marquis of Lothian, he at the same time communicated the burden originally annexed to it. Neither the Marquis himself, nor those who, in the character of lessees or feuers, had an authority from him, more or less permanent, could reap the benefit thence arising, without being subjected to the obligation of repairing the damages, the rule in all such cases being, '*Qui* '*facit per alium, facit per se.*'

And the Marchioness of Lothian, in virtue of her liferent-right, as well as her Trustees, must stand precisely in the same situation. The obligation to pay the feu-duties, and that of securing an indemnification to the feuer for the losses arising from working the coal, are counter parts of each other; and he who demands that the obligations incumbent on the feuer shall be performed,

No 154. must show that there has been no delay in discharging those which the latter may lawfully require.

An absolute and unconditional transfer of the coal could not, without the consent of the feuer, relieve the superior from his engagements. A power of assigning in no instance is held to sanction such a proceeding. Thus, in the case of a lease, which is only distinguishable from a feu by the endurance of the right, the original lessee, even after an assignment, continues bound to the landlord. Erskine, 2. 6. 35.; Bank. 2. 9. 14. In the present case, however, there is no room for any reasoning of that sort; the right of working the coal, notwithstanding the subaltern infeftment, still remaining attached to the superiority. Indeed the two rights are inseparable, as it is not in the power of a superior, by any deed not consented to by the vassal, to parcel out his right of superiority; 22d December 1774, Middleton *contra* Earl of Dunmore, *voce* PRESCRIPTION; 31st January 1781, Sir James Colquhoun *contra* The Duke of Montrose, *voce* MEMBER of PARLIAMENT.

In the case of a reserved right of working a coal, an unlimited power of devolving on others the obligation to pay damages, would be singularly unjust. After repeated transmissions of that right, it would be impossible to ascertain in what manner the damages were to be made up by each successive owner of the coal; and after the coal was exhausted, there would be no opportunity of recovering damages, although the extent cannot be previously known or ascertained; so that, thus it might be in the power of the superior to obtain a decree of irritancy, *ob non solutum canonem*, when the vassal, in consequence of proceedings authorised by the superior himself, had been disabled from relieving his property. To these hardships it cannot be supposed, that it was in the view of the parties to subject the vassal; and there is nothing in the subsequent transactions that can authorise such a presumption. The purchaser of the coal having become bound to indemnify the feuer, it was natural that the feuer should, in the first place, endeavour to obtain his reparation from him: but from this it were unreasonable to infer, that the superior was released from his engagements.

Answered: The right of working a coal is not a part of the *dominium directum*, or superiority of the lands containing that mineral; otherwise the reservation which occurs in the feu-contract would have been unnecessary. It is a part of the *domnium utile*, and may be separated from the remaining parts, in the same manner as any one portion of the lands may be separated from another.

If both the right of superiority and that of working the coal had been conveyed away, it is evident, the obligation of indemnifying the feuer would have been transferred to the purchaser; in the same manner as the vassal, by selling the feu-lands, might have relieved himself from the future payment of the feu-duties. Nor can it make any difference, that in this instance the right of working the coal only has been sold, while the right of superiority is retain-

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ed, those two estates, though once vested in one and the same person, being quite separate and independent of each other; and as it is the owner of the coal only who reaps any benefit from it, it is just that he alone should bear the correspondent burdens.

The intention of the parties in this case is sufficiently evident. The manner of ascertaining the damages as prescribed by the feu contract, as well as the various settlements and litigations which have ensued, to which the superior was no party, clearly show, that after the right of working the coal was transferred to another, he was to be no longer concerned in it. Such a transfer has already been made; the conveyance in favour of the purchaser of the coal, though in the form of a subaltern infeftment, completely divesting the superior, who, after the date of the sale, retained no authority over the coal, or the owner of it. To suppose, in such circumstances as these, that the feuer, instead of recovering the damages, as they occurred, from the party occasioning them, should have a power of throwing the loss on the superior; or that, under the colour of a security, he should have an opportunity of retaining those feu-duties which are due for the use of the lands; would be extremely unreasonable and unjust.

The Lord Ordinary, both on the general ground, and in respect of the specialties, found that Mr Simpson had no right to retain the feu-duties.

After advising a reclaiming petition, which was followed with answers, Mr Simpson having waved his claim of retention as to the damages already liquidated,

'THE LORDS altered the Lord Ordinary's interlocutor, and found, that Mr Simpson was entitled to retain the feu-duties stipulated in the original feu-concontract entered into with Lord Ross, in security of any damage which he has sustained, or may sustain, by the reservation in that contract, of working the coal in Mr Simpson's lands subsequent to the period when the damages were liquidated and awarded against Mr Clerk.'

A reclaiming petition was preferred for the Trustees of the Marchioness of Lothian, and answers were given in for Mr Simpson, after which a hearing in presence took place.

THE LORDS altered their former interlocutor, thus returning to that which had been pronounced by the Lord Ordinary.

Mr Simpson reclaimed; but the petition was refused without answers.

Lord Ordinary, *Dreghorn.* Act. *Solicitor-General, Tait.*
Alt. *Dean of Faculty, Mat. Ross, Maconochie.* Clerk, *Gordon.*

C. *Fol. Dic. v.* 3. *p.* 150. *Fac. Col. No* 154. *p.* 307.

*** This case was appealed.

March 28. 1792.—The HOUSE of LORDS ORDERED, That the appeal be dismissed and the interlocutors therein complained of be affirmed.