not confirmed executor; besides, the Commissary's warrant did not bear that the papers were to be delivered to the appellant. It only directed an inventory to be taken of them. It was therefore wrong in the appellant to present a new petition, charging the respondents with theft, as they did. They appeared before, and declared their readiness to an inventory being taken. But the appellant, choosing to have delivery, it was illegal and oppressive thereafter to obtain a warrant to apprehend and imprison them, by aid of a party of soldiers, and to be treated in the brutal and inhuman manner that was here done. For all which the appellants are answerable in damages.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *Wm. Grant, Tho. Macdonald.*
For Respondents, *Sir J. Scott, W. Adam, W. Tait.*

SIR ROBERT ANSTRUTHER of Balkaskie, Bart. *Appellant;*
SIR JOHN ANSTRUTHER of Anstruther, Bart. *Respondent.*

House of Lords, 18th May 1796.

SUPERIOR AND VASSAL—RIGHT TO THE COAL—PERTINENT—PRESCRIPTIVE POSSESSION.—The respondent was proprietor of the barony of Pittenweem, which included the burgh of Pittenweem, and certain lands called Acredale lands, which had been feued out in small rigs or stripes long before he acquired right to the barony. This right included an express conveyance of the whole coal within the barony. He was also *superior* of the *whole.* Part of those lands, called the Acredale lands, belonged to the appellant. In these Acredale feus, the coal was either excepted, or the right was silent altogether on the subject. Among those, the appellant's right was silent. There was no conveyance of coal to him, and no reservation of it; but he contended that the conveyance of land carries the coal as a pertinent, and that the coal was mentioned as a pertinent in the tenendas of his right. When, therefore, the respondent proceeded to work the Acredale lands for coal, the appellant suspended, and the present declarator was then brought: Held by the Court of Session, and affirmed by the House of Lords, that the respondent had the sole right to the whole coal in the Acredale lands.

The respondent, proprietor of the estate of Newark, in

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the county of Fife, in which he worked a valuable seam of coal, purchased in 1766 from the Earl of Kelly, the lordship and barony of Pittenweem, chiefly induced to the purchase from observing that the continuations of the seam ran in the direction of those lands. The disposition conveyed the barony, with "the coals, coal-heughs, as well wrought as unwrought, discovered and to be discovered, in any part of the said lordship and barony, as well in the arable and ploughed lands, as in the other lands of the same, with special power of breaking and digging the ground, in any part of the said lands and barony, and of working the coal, and throwing out sinks and levels," &c. Upon his having been infeft, he became proprietor of all the lands of the barony not previously feued or disponed, and superior of all such as had been previously feued and disponed.

The barony, which includes the burgh of Pittenweem, had originally belonged to the Priory of Pittenweem; and, in anticipation of the abolition of the religious houses, the monastery had, before the Reformation, feued out their lands. Round the town, where the priory was situated, small feus had been granted to the town's people, generally in rigs or small stripes. These feus were called the Acredale lands, and, in granting them, the monastery either excepted the coal expressly, or the conveyance was silent on the subject altogether. Part of these Acredale lands were afterwards purchased by the appellant, but the greater part by the respondent; and the respondent, by his purchase of the barony of Pittenweem, in which these Acredale lands are situated, became superior of the whole.

After his purchase of the barony of Pittenweem from the Earl of Kelly, he proceeded to work the coal in these lands. He sunk various pits in the properties of the different feuers, without meeting with opposition from any quarter, until having laid a pipe crossing, amongst other rigs of the Acredale lands, those belonging to the appellant, the latter brought a suspension, which compelled the respondent to bring the present declarator of his right to the coal of all these lands.

The general defence of the appellant was, that not only his lands, but all these lands were conveyed, as is shown by the title-deeds, without any reservation of the coal. On the contrary, that though the coal was not expressly conveyed, yet it was mentioned as a pertinent in the clause of tenendas in his right; and it is settled law, that a convey-

Craig, p. 256, § 17.

ance of land carries right to the coal, though it is not expressly conveyed, insomuch that he who is first seized in the land, has a right to the coal in these lands, preferably to one who is afterwards seized *per expressum* in the coal. In answer, the respondent stated, that it was proved by his title-deeds that the priors and monastery of Pittenweem reserved the coal when granting feus of the Acredale lands: That the coal had been by them granted to Balfour of Pittendreich as a separate tenement: That Frederick Stewart, created Lord Pittenweem, acquired from the crown all that remained of the possessions of the monastery at the time of the general annexation of the church lands: That he likewise acquired, by a separate title, the right which the Balfours had to the coal; and that the Earl of Kelly acquired the whole that Lord Pittenween had, and it remained with his descendents till they sold it to the respondent. That when the priory granted the feus of the Acredale lands, in such small stripes or rigs, it could not be intended, from the very nature and smallness of the grant, to give them a right to the coal. These rigs run from south to north, and so narrow as to make it impossible for the proprietor of each to work the coal; whereas the seams of the coal ran east and west. But, as a further proof that no right to the coal was so granted, the priors, although they had feued out to various persons the lands in and about the monastery, as well as those in question, yet continued to possess and dispose of the coal, notwithstanding the feus, as is shown by the several charters granted by them subsequent to the feus of the Acredale lands, with right to coal out of their coal mines, or out of any part of the lordship, for the use of the salt pans. Proof was led of possession of the whole coal of the barony subsequent to the grant of the feus of the Acredale lands, first by the priors, and then by their successors. The witnesses deponed that it had been wrought, especially at a place called the Horse Milne Sink and other places, in Oliver Cromwell's time, of which the coal holes were still visible; and that they had never heard of the coal in the barony being wrought by any but the Earl of Kelly's family.

The appellant produced a charter, under the great seal, passed in the year 1698, in favour of his grandfather, of all the estates which belonged to him, and amongst others, the small detached parcels of land in the Acredale of Pittenweem in question, which, the charter shows, had been originally separate feus from the barony, and describes it as lying within the lordship. In the dispositive and descriptive part of this

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charter, in so far as relates to these parcels, there was not a word of coal or limestone mentioned, although his *other* lands are granted "*cum carbonibus et carbonariis.*" In the tenendas clause, indeed, *the whole* lands are declared to be held "*cum partibus pendiculis pertinentiis, columbis,* "*columbariis, carbonibus, carbonariis,*" *&c.*, but it is known to every lawyer, that in *this part* of the charter, these are words of mere style and superfluity, vesting nothing but what appears in the dispositive clause. Yet, he maintained this to be a sufficient title to the coal of the lands in question, and declined, although called on, to produce the original charters, or grants of the parcel of lands he possessed in the Acredale.

Feb. 18, 1792. "The Lords having advised the mutual informations, "writs, and proof produced, and heard parties' procurators "thereon, they find the pursuer, Sir John Anstruther (re- "spondent), has the sole right to the whole coal and lime- "stone in the Acredale lands, within the lordship and barony "of Pittenweem; and, therefore, in the suspension, find "the letters orderly proceeded, and in the declarator, de- Mar. 9, —— "cern." On reclaiming petition, the Court adhered.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—As the right to coal and lime passes with the lands, unless specially reserved in the conveyance of the lands, and as there is no such reservation in the title deeds of the appellant, he has a clear right to all below the surface of his land. And a party so infeft, without any mention of coal, has a preferable right to the coal, to one who is afterwards seised in the coal, *per expressum;* and the appellant having been infeft under his unreserved and unlimited title long prior to the respondent, has consequently a title to exclude him therefrom.

Pleaded for the Respondent.—The appellant has not produced the vestige of a title to the coal in question. He does not pretend he ever worked any coal, or that his ancestors did so. The maxim he founds on, that coal passes by a grant of land generally as a pertinent, and that possession of the surface is possession what is below it, are incontrovertibly true, provided there is no right to coal vested in another, and no actual adverse possession by that other. But to set up a grant of lands simply with possession of the surface, but not of the coal, against a grant of the same lands with the coal joined to possession, was quite untenable. The respondent has an express grant of the whole coal of the barony. The charters to Lord Pittenweem in 1609, and

of the Earl of Kelly in 1671, give this express right, which, joined to possession distinctly proved, make a title in the respondent by the positive prescription. While the appellant, if he ever had a right, has lost it by the negative prescription.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Sir J. Scott, R. Dundas, Alex. Anstruther.*
For Respondent, *J. Anstruther, W. Adam.*

EARL OF WEMYSS, ... *Appellant;*
SIR ARCHIBALD HOPE, . . . *Respondent.*

House of Lords, 24th Oct. 1796.

LEASE of COAL—RESERVATION CLAUSE—RES JUDICATA.—Held, by the terms of a lease of coal to a tenant, allowing him to work the coal within the barony of Woolmet, excepting that part of the coal which lies within the parks, gardens, and enclosures of Woolmet belonging to the appellant, that this exception or reservation did not entitle the appellant to sink pits and work coal within these grounds; but was to be construed only as a clause to preserve his grounds from suffering injury by the general working of the coal by the respondent. This question having been so disposed of in the Court of Session, and an appeal taken to the House of Lords, but never moved in, and finally dismissed ten years previous to the present appeal: Held, that these proceedings did not constitute a *res judicata* in bar of the present action.

A lease of the coal of Woolmet was granted by the Magistrates of Edinburgh to John Biggar. The appellant is now in right of the Magistrates, and the respondent in right of Biggar. The renewal of the lease to the respondent contained a clause, in the exact same words as the original lease to Biggar, viz. :—" All and haill the coal that is within the " lands and barony of Woolmet and Hill, *excepting always* " *the coal lying within the parks, gardens, and inclosures of* " *the said lands and barony of Woolmet*, unless the consent " of the said Earl of Wemyss be first had and obtained " thereto."

The appellant conceiving, under the meaning and construction of the above clause, he had a right to work the coal within those grounds excepted and reserved, proceeded to sink a pit for this purpose, when the respondent applied