[29th *March* 1834.]

WILLIAM AINSLIE TURNER, Trustee in the sequestrated Estate of CRAWFORD TAIT, Esq., Appellant. No. 9.

Mrs. BALLENDENE or M'ILWHANNEL, Respondent.

Property—Coal.—A party who had a reserved right of coal in an estate carried an existing level under the bed of a stream into adjoining lands (to the coal of which he had also right) so as to drain the coal of those lands, and brought the water within the estate, and, by means of a steam engine, there raised it, and threw it on part of the surface of the estate: Found (affirming the judgment of the Court of Session), that he was not entitled to do so.

1st Division.
Lord Corehouse.

THE Dukes of Argyle were proprietors of various lands in the barony of Muckart in the shire of Perth, and also of the barony and lands of Dollar lying in the shire of Clackmannan, and immediately adjoining to those of Muckart. In 1748 John Duke of Argyle feued to John Ballendene (the predecessor of the respondent) the lands of Wester Pitgobar, subject to a clause of reservation in these terms: — "reserving "always to his Grace, and his heirs and successors, "the coals and coal heughs in the said lands, with the "liberty of digging coals and coal heughs on any part "of the said lands; but if his Grace and his foresaids

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" should make a new level which had not been formerly " made, then and in that case they should be obliged " to pay to the said John Ballendene and his foresaids " the damages which he or they should sustain thereby, " as the same should be ascertained by two fit and " faithful men to be mutually chosen by his Grace and " his foresaids, and the said John Ballendene and his " foresaids."

In September 1808, William Duke of Argyle, with consent of his brother, Lord John Campbell, and James Ferrier, Esq., sold to Crawford Tait, Esq., the lands and barony of Dollar, Campbell, and others, together with the coal and coal heughs within the lands and barony of Muckart, comprehending in particular the lands of Wester Pitgobar, "with full power and liberty " to the said Crawford Tait and his aforesaid of working " coal, and putting down sinks within any part of the " said lands, in so far as we or any of us have right " to do so, agreeable to the charters granted by me the " said Duke, or my ancestors or authors, to our feuars " and vassals within the said lands."

The counties of Perth and Clackmannan are at this point divided by a stream of water called the Kellyburn, the barony of Muckart, (including the lands of Wester Pitgobar,) lying on the Perthshire bank, while the lands of Dollar, Campbell, and others are situated on the Clackmannanshire side. Part of the lands of Wester Pitgobar, called Kellybank, was disponed some years ago to a Mr. Brown. In the field of coal lying within these lands of Wester Pitgobar and Kellybank there were two levels; the one being called the "rough coal level," which was at the greatest depth, and the other the "day level," which was about seven fathoms nearer

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to the surface. This "day level," after passing from Kellybank into the lands of Wester Pitgobar, terminated at the surface of the latter, about eleven hundred yards from the river Devon. A steam engine was erected at a coal pit on Kellybank, by means of which the water was pumped up from the "rough coal level" and discharged into the "day level," through which it flowed to the surface of the lands of Wester Pitgobar, and thence descended into the Devon.

About 1812 Mr. Tait acquired a lease of the coal of Middleton, forming part of the barony of Muckart, and lying adjacent to the lands of Wester Pitgobar. The lands of Middleton stood on a more elevated position than those of Wester Pitgobar, and consequently the water flowed naturally towards the latter. Mr. Tait having begun to drive a level through the coal of Middleton, so as to communicate with the "day level" of Wester Pitgobar, a bill of suspension and interdict was presented by the trustees of the late Mr. Ballendene, but it was refused by Lord Meadowbank, and the communication between the two levels was carried into execution.

In 1826 Mr. Tait acquired a lease of the coal in certain lands called Mackies lands, belonging to one John Mathie, and also a lease of the coal of other adjoining lands belonging to persons of the name of Paton. Permission was also obtained by Mr. Tait from the proprietor of Kellybank to make use of the engine situated on these lands for working and draining his coal. All these lands had formerly belonged to the Dukes of Argyle, and the titles contained clauses of reservation similar to the one above quoted. Mr. Tait then proceeded to form a communicating level from the coal in the lands of Mathie and Paton with the level in

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the lands of Kellybank. To accomplish this a level was carried under the bed of the Kellyburn, and thence to the engine pit, on the lands of Kellybank, so as to connect with the "rough-coal level." By means of the engine the water, not only of the coal field in Kellybank, but in the other lands, was drawn up and discharged into the "day level," after flowing through which it descended along the lands of Wester Pitgobar and found its way into the Devon.

The estates of Mr. Tait having been sequestrated under the bankrupt act, Mr. Turner was elected trustee, and proceeded to work the coals in the manner above mentioned. The respondent, as proprietrix of Wester Pitgobar, thereupon presented a petition to the sheriff of Perthshire against Turner, (to which she also called as parties the proprietors of the other lands,) in which she prayed the sheriff to "interdict, prohibit, and "discharge the said William Ainslie Turner as trus- "tee, &c., in working the coal in the said lands "and estates of Dollar and Campbell," and the lands "of Mathie and Paton, "from pumping up the water "arising from the said coal workings respectively "by the engines erected on the lands of Kellybank, or "by any other opus manufactum, to the height of the "higher level in the same lands, or at least from send- "ing down or discharging the said water, or any part "or portion thereof, when so raised or pumped up, into "or through the level under ground in the petitioners "lands, and from which, according to the present ille- "gal and unwarrantable proceedings, the said water is "made to issue and discharge itself upon the surface of "the petitioners lands;" and also "from doing any "other thing, act, or deed by which the water arising

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" from the coal workings aforesaid may be transmitted
" or caused to flow, by a course altogether unnatural,
" over or upon any part or portion of the petitioners
" lands in all time coming."

In defence, the appellant maintained, 1st, That the matter was res judicata, by the refusal of the bill of suspension and interdict in 1812; and, 2d, That as the Duke of Argyle was originally proprietor both of the lands of Wester Pitgobar and the adjoining estate of Dollar, it was evidently his intention, and it was the true meaning of the clause of reservation in the feu contract, that he should have right to work the coal in any part of the lands which then belonged to him, by means of the levels carried into and through the lands of Wester Pitgobar; and this was made certain by the circumstance, that a similar reservation was inserted in all the titles granted to the other vassals.

The Sheriff appointed an engineer to inspect the operations complained of, and to report " whether, by
" these operations, an additional quantity of water is
" thrown upon the surface of the pursuer's said lands
" to what arises from the working of the coal within
" the same; and if so, the way and manner in which
" that is accomplished, and the quarter from which the
" additional quantity of water proceeds, and the time
" when the operations were made."

The report of the engineer established the facts already narrated; and the Sheriff found, " that by
" means of a steam engine erected on the lands of
" Kellybank, an additional quantity of water to that
" arising from the pursuer's lands is thrown upon their
" surface, and passes over the same a distance of one
" thousand and sixty-five yards, and then falls into the

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" river Devon, which steam engine pumps up the water " seven fathoms from the mine and levels of the rough " coal, and delivers it into the day level, along which it " passes to its mouth or outlet, where it is discharged " on the surface of the pursuer's lands; that the said " additional quantity of water is brought from the coal " workings in the lands of the defenders, John Mathie, " Jean and Anne Patton, and the coal under the feus " of Dollar, belonging to the defender Mr. Turner, " along with the water arising from Kellybank coal; " that under the reservation in the pursuer's title deeds, " specified in the interlocutor of 15th of October last, " the defender Mr. Turner was not entitled, by the " foresaid opus manufactum, to throw the said addi- " tional water on the pursuer's grounds; and no attempt " appears to have been made to do so previous to the " spring of 1826; therefore interdicted the defender " from bringing to the surface of the pursuer's grounds " any of the water arising from the workings of the " foresaid coal in time coming;" and decerned, with expenses.

Turner having brought an advocation, the Lord Ordinary found, " in terms of the Sheriff's inter- " locutor, that, by means of a steam engine erected " on the lands of Kellybank, an additional quantity of " water to that arising from the pursuer's lands is " thrown upon their surface, and passes over the same " a distance of one thousand and sixty-five yards, and " then falls into the river Devon, which steam engine " pumps up the water seven fathoms from the mine and " levels of the rough coal, and delivers it into the day " level, along which it passes to its mouth or outlet, " where it is discharged on the surface of the pursuer's

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" lands; that the said additional quantity of water is " brought from the coal workings in the lands of John " Mathie, Jean and Anne Patton (the other defenders " in the inferior Court), and the coal under the feus of " Dollar, belonging to the advocator, along with the " water arising from Kellybank coal; and therefore " remitted the cause simpliciter to the Sheriff, and de- " cerned; found the advocator liable in expenses, both " in this and in the inferior Court," &c.

Turner having reclaimed to the First Division of the Court, their Lordships, on the 3d of March 1832, adhered.*

Turner appealed.

Appellant.—The judgments appealed from proceed on a mistake in the construction of the clause of reservation. It was assumed that the reserved level was intended only for the purpose of working the coal in the small lot of ground called Wester Pitgobar, whereas the only rational object in making such a reservation was to enable the superior to use it for the whole of his other property, including the coal in all the portions of ground in question. It was on a similar construction that the bill of suspension was refused in 1812, and on which the parties afterwards acted. It was also on a similar construction that the Court gave judgment on a clause of reservation made by the Duke of Hamilton, who had granted feu rights of certain subjects belonging to his Grace.†

* 10 S. & D., 415.

† Davidson v. Duke of Hamilton, 15th May 1822, 1 S. & D. 411. (new ed. 385.)

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Respondent.—The expression of the clause is quite clear and distinct. It is confined to the coals and pits in the particular lands conveyed. Those lands are the lands of Wester Pitgobar, and the reservation is definitely "of the coals and coal heughs in the said lands," with the right and power of working them. Thus, neither the Duke of Argyle, nor any successor, could use the level for working any other coals than those reserved in the said lands, not even in other lands in the barony of Muckart, and still less in lands which form no part of that barony. The decision in 1812, which was merely by a Lord Ordinary in the bill chamber, cannot form res judicata, and was given in reference to circumstances different from those in question. The lands of Middleton being more elevated than those of Wester Pitgobar, the water naturally descended upon the latter, whereas here the lands are situated in a lower position, and it is only by means of an engine that the water is brought into the lands of the respondent.

LORD CHANCELLOR.—My Lords, this case arises upon the construction of a clause of reservation in a charter granted by the Duke of Argyle, in the year 1748; and the question which is here as to the interdict is the same, on which will turn ultimately the decision by the Court below, in any action of declarator which may be brought by the appellant, for having his right ascertained in respect of the subject matter in dispute. That question is, whether or not the reservation of the coal and coal-heughs, and the liberty of digging coal and coal-heughs in any part of the lands feued, is such as to give the party reserving it, or to those standing in his place, a right to dig in the feued lands, for the

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purpose of winning, not only the coal reserved, but other coal, either the property or in the occupation of the lord, or of those standing in his place,—that coal being in fields contiguous to the fields feued out, and which therefore might conveniently be worked through the same pit or level? This question depends entirely upon the construction of the clause of reservation. In the course of the argument, I frequently threw out to the counsel the grounds upon which I think the Court below have come to a right conclusion in construing this clause, so that it is unnecessary to trouble your Lordships with any detailed exposition of my reasons for that opinion, as it would only be a repetition of what I have said before. In construing this instrument, as in every other instrument, we are to look to that which is the main and governing purpose of the parties on each side. The purpose of this clause plainly is, to reserve the coal under the surface of the property feued out by the conveyance. That this is not a servitude is perfectly clear, and I do not find that the respondents have relied upon it as a servitude; and certainly it does not appear that in the Court below that was any part of the reasons upon which the decision was pronounced. Reference is made to the opinion by Lord Craigie; but I see nothing to lead me to believe that the Court disposed of this question, upon the ground of the reservation being that of a servitude, and not of a right to the coal; and it appears to me that it would be doing great violence to this clause, if any such construction had been imposed upon it. Lord Craigie states that he has a doubt upon the matter. He says, "that under the clause of reser-"vation, a question of damage might arise, in conse-

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" quence of the operations of Turner, if they were " injurious to the grounds." This is quite consistent with the argument maintained by the respondents. His Lordship says, " the interest which the superior " reserved in the coal was not of the nature of a " servitude, but of a right of property." Now, what follows from this which can at all help you in that which alone you are now contending about, namely, whether the right to take levels, and so forth, extends to the use of the neighbouring coal fields, or whether it is confined to the coal field in which is the coal reserved. No step is gained towards the point of finding whether or not the right to dig is reserved beyond the uses of the very coal which is reserved. His Lordship then adds, as if it were a conclusion from it, " and the reservation was made in reference to " the great body of coal, then belonging to him, in " several contiguous lands." But that is a complete begging of the question; for that is the very point in dispute, whether it was in reference to the coal particularly reserved, or to other coal belonging to the same proprietor? But it will not do to say that it is a property reserved, and not a servitude, and therefore that the property reserved gives you a right to make levels, and so forth, for the purpose of digging all other coal as well as that coal, because the two propositions have no connexion with one another. You may admit the first, and you may deny the second, or you may deny both together, or you may deny the first and admit the second; the things are perfectly unconnected. This doubt, therefore, of Lord Craigie's does not bear upon the question, or impeach the soundness of the construction put upon this clause. Therefore as

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to the construction of this clause, which is the main question, I have no doubt whatever. The only question is, whether upon other grounds the Court below was right: — The sheriff first of all in granting the interdict, and the Court in confirming the grant? Now, if I found reason to believe that the respondents had been guilty of any laches,—if they had stood by and allowed the other party to dig pits and place levels, and so to expend money upon an operation which they, by obtaining an interdict, were able to stop at any time, and to render ineffectual,—I should then have thought, that, (supposing the practice of the Courts of Scotland upon that subject to be the same as it is in this country), the judge ought not to have protected them, and ought not to have entertained the proceeding. But I do not find that that fact exists in such a manner as to render it at all applicable to this case. Then, the only question is upon the two cases that have been referred to. I throw aside altogether two other cases, which do not appear to me to bear in the smallest degree upon the case. But two cases were cited, which do bear upon the question; the one is that of Davidson v. Hamilton*, to which I have already adverted in the course of the argument. When you look into that, you find that it was in its circumstances in a great degree special. It was not a declarator of right, but an interdict; and I think, looking at the circumstances, considering that it was all one conveyance, and that all the feus were granted out at the same time, (though it would have been better to have reserved the right of digging and driving levels,

* 1 S. & D., No. 468.

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as well for the service of the adjoining coal, as of the coal by which the right was reserved,) still, taking the whole together, I do not see any reason to doubt the correctness of the discretion which the Court exercised in refusing that interdict and sustaining that right. Then we come to the only case upon which I entertained any doubt, and which occurred in 1812, between the same parties, upon a somewhat different subject matter, in regard to a bill of suspension and interdict presented at that period, and which was followed by the decision of the late Lord Meadowbank. I am not prepared to say that the two judgments will not stand well together, even if the earlier decision were upon the same subject matter; but I think there is a somewhat material difference between the two cases, which makes it possible to distinguish the one from the other. I, however, mainly rest upon this, that there having been one result when the matter was not thoroughly investigated, and there being now a more full investigation, and the whole matter of the construction of this important clause being more fully gone into, and the subject of the whole litigation being more completely before the Court, I should consider that it was not necessarily inconsistent with what was done in 1812, that in 1832 the interdict should be granted. The construction of the clause appears to me to be so plain—it is so much a matter of law upon the facts—it seems to be so clear, that that construction which is supposed to have been given to it in 1812, when the interdict was refused, would, if such was given, have been a wrong construction,—that I think it perfectly possible that that former decision may stand together with the present. It was relied upon in the Court below as a res judicata,

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and it is carried much further by the learned counsel for the appellant, for they say that they rely upon the proceedings upon that occasion, as showing an acquiescence by the opposite party in the right so adjudged in favour of the appellant. It is more judicious to regard it not as res judicata, but as a strong consideration or inducement to move the Court, in the exercise of its discretion, to withhold the interdict. Now, as that was between the same parties, and upon the same subject matter, I do not deny that in that point of view it deserved great consideration, and I have no doubt it met with that consideration in the Court below; but seeing, in the first place, that there is no absolute inconsistency between the two cases, and, next, that if there had been an identity of the two judgments, in regard to the circumstances of the case, yet, that, upon a full consideration of the clause, they might well stand together, I am disposed to propose to your Lordships to affirm the judgment of the Court below. I shall not propose that it should be affirmed with costs, on account of the first judgment which was pronounced between the same parties.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

ALEXANDER MUNDELL—THOMAS DEANS, Solicitors.