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freeholders were entitled to complain to the Court of Session have expired. The question thus came to be, Whether the freeholders have a right to object and investigate the qualification of a person upon the roll, although no complaint be lodged against his enrolment within four months?

Dec. 8, 1790. The Lords found that the freeholders did wrong in striking the complainer off the roll; and, on reclaiming petition, ——23, —— they adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *S. Douglas, J. Anstruther.*

For Respondent, *W. Grant, Wm. Dundas.*

WM. SIMSON, Esq. of Viewfield, . *Appellant;*

The Honourable Mrs. HENRIETTA ANN KER, Sister of the deceased JANE, Marchioness of Lothian, DOUGALD STEWART, Professor of Moral Philosophy in the University of Edinburgh, & JOHN PITCAIRN, Merchant there, Trustees appointed by the said deceased Marchioness of Lothian, and JOHN WM. MARQUIS OF LOTHIAN, . . . *Respondents.*

House of Lords, 28th March 1792.

SUPERIOR AND VASSAL—RETENTION OF FEU-DUTIES—DAMAGE IN WORKING COAL.—Held, in the special circumstances, that the superior was not liable for the damage sustained by his vassal, in working the coal by the proprietor, to whom the superior had conveyed the coal; but that the owner of the coal was alone liable, and therefore, that he had no right to retain the feu duties.

July 3, 1748. Lord Ross sold, and in feu farm conveyed, in consideration of the sum of £700, and the feu duty of £50, &c. per annum, the lands of Pendriech, with the mansion house thereon, situated in the parish of Lasswade, and county of

Edinburgh; but under this reservation, " reserving to us " and our heirs and assignees, all and singular the mines of " gold, silver, copper, lead, coal, and other metals and min- " erals whatever (quarries of lime and stone only excepted), " with full power and liberty to us and our foresaids, now " and at all time hereafter, to search for, work out, and dis- " pose of to our own use, the said metals and minerals, and " to make use of such parts 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 Simson and his foresaids shall sustain " thereby, according as such damages shall be ascertained " by two indifferent persons mutually chosen."

June 5, 1759.

Some years thereafter, Lord Ross conveyed the foresaid lands of Pendriech, under burden of the above feu right, to the late Wm. Henry, Marquis of Lothian, his heirs male of tailzie and provision, whom failing, to his heirs snd assignees whatsoever, " together with the whole coal, metals, " and minerals of every kind, with full power to the said " Marquis to search for, work out, and dispose of to their " own use all such metals and minerals, and to make use of " such parts of the said lands as shall be necessary to those " ends, *he and his foresaids always satisfying the whole da-* " *mages which the feuars and tenant* of the said lands shall " sustain thereby."

The above disposition to the Marquis of Lothian excepted from the conveyance therein the said feu rights, and specially *that* granted to the appellant's father, and excepting also the tack of the coal granted to Andrew Henry.

May 8, 1762.

The Marquis of Lothian having given these lands, with the coal, to the Marchioness of Lothian in liferent, he, of this date, and with consent of the Marchioness for her right of liferent, conveyed to John Clerk of Eldin the coal in the lands feued to the appellant's father, *to be holden* of *and under* the Marquis and his heirs or successors; and Mr. Clerk was taken bound in the usual way to pay the whole damages occasioned by the working of the coal.

The coal, it appeared, came to be wrought immediately under the mansion house of Viewfield, and considerable damage was done to the house by rents and sets in the walls thereof. These were duly intimated by the appellant to Mr. Ainslie, the Marquis of Lothian's factor; and at Whitsunday 1782 he further gave notice of his intention to retain the feu duties of the foresaid lands in security and pay-

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ment of the damages occasioned for the working of the coal.

Action was then raised by the respondents for payment of the arrears of feu-duties due by him to the Marchioness. In defence to this action, it was contended that the Marquis, as superior, was liable for his vassal Mr. Clerk, to whom he had sold the coal, and that Mr. Clerk had wrought the coal from under the appellant's house of Viewfield, and other buildings on the lands of Pendreich; and otherwise conducted his operations below ground, in such way and manner as tended greatly to the hurt and prejudice of the appellant, and by which he had sustained great loss and damage. In reply, the respondents stated, that when the property of the coal was transferred to Mr. Clerk, the obligation to pay the damages accruing from that period, was also transferred against him, just as it had been when the superiority of the lands, with the coal, were conveyed to the Marquis by Lord Ross, so also the obligation to pay the damages was transferred against him. Accordingly, against Mr. Clerk, the appellant's father had raised legal proceedings, and had obtained decree for the sum of £236 as damages done by the working of the coal, which was a tacit confession that he alone was liable.

Jan. 31, 1789.

The Lord Ordinary pronounced this interlocutor.—" Finds, " That as in the original feu right granted to Andrew Sim- " son, the defender's father, in 1748, there is a reservation " of the coal, and of full power and liberty to search for, " work, and dispose of the same, in favour of Lord Ross the " grantor, he and his foresaids always satisfying and pay- " ing the whole damage sustained thereby, it follows, that " upon the property of the coal being transferred to a third " party, the obligation to pay the damages was of course " transferred against the disponee, from the commencement " of his right, and the obligation on Lord Ross and his " heirs ceased, except as to bygones; and that, in the same " way, when the property of the coal, and the power of " working it, came, after passing through the hands of the " late Marquis of Lothian, to be vested in Mr. John Clerk " of Eldin, in consequence of his purchase from the Marquis " in the year 1762, the obligation to pay the damages was " of course transferred against Mr. Clerk, and against him " alone: Finds that, accordingly, from the time of Mr. " Clerk's purchase, it was from him that the damage was " claimed on account of his working the coal; and that it

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" was between the defender and Mr. Clerk alone, that first " an ineffectual submission, and afterwards a tedious litigation " took place, with respect to the amount of that damage; " which last terminated in a decree of this Court in the year " 1784, ascertaining the total amount of the damage from " the year 1764 to the year 1784, and decerning Mr. Clerk " to pay the same; and which sum he accordingly agreed to " pay, and a discharge was wrote out, but to which his sub- " scription was refused; some dispute having arisen which " of the parties was entitled to the custody of the decree in " the expense of extracting, which Mr. Clerk had been " found liable; and which settled a variety of other points " of dispute between the parties, besides the extent of the " damages. Therefore, both on the general ground, and " the particular circumstances of the case, repels the de- " fence; finds the defender liable to the pursuers in the " feu-duties libelled."

Mar. 2, 1789.

On representing against this interlocutor, the Lord Ordinary adhered. On representation by the respondents, the Lord Ordinary pronounced this interlocutor:—" In respect " that Mr. Simson insisted for his damages, first before ar- " biters, and afterwards before this Court, where he obtain- " ed a decree against Mr. Clerk, and against him only, with- " out ever making any intimation to his superior,—that it is " admitted Mr. Clerk is solvent, and that he suspended the " charge given for the sum decreed for damages by his " Court, singly on pretence that he was entitled to the cus- " tody of the decree, and that it is plain his suspension must " at any rate have been refused, had Mr. Simson so inclined, " except *quoad* as much as was sufficient to pay for another " extract; alters the interlocutor, in so far as it finds the de- " fender liable in no other expense but that of extracting " the decree; and finds him liable in the expense of process, " and modifies the same, as hitherto incurred, to £10, and " decerns. And as to interest now claimed, finds the de- " fender liable for interest on the feu-duties libelled from " the date of citation in the action, and decerns."

June 27, 1790.

The appellants presented a petition to the Court, who at first altered the interlocutor of the Lord Ordinary, but, on petition by the respondents, " they alter the interlocutor " formerly pronounced: Find that the respondent, Mr. Sim- " son, is not entitled to retain the feu-duties payable by him " to the superior, on account of any damage which he has " sustained, or may sustain, by the working of the coal now

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"belonging to Mr. Clerk of Eldin, within the respondent's "lands, after the commencement of Mr. Clerk's right. "Therefore repel the defence made by him against payment "of the feu-duties." On petition to the Court against this interlocutor the Court adhered. Then he offered a bill of suspension of these judgments,—the bill was refused. And, lastly, he brought a declarator, but the Lord Ordinary assoilzied "the Marquis of Lothian, and decerns."*

Jan. 18, 1791.

May 31, 1791.

Feb. 2, 1791.

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* Opinions of Judges:—

Lord President Campbell.—"This is a question between superior and vassal, for damages sustained by working the coal, and retention of the feu duties in consequence of such damage.

"By the original principles of the feudal law, the superior could not alienate the *dominium directum* without the consent of his vassal. Craig, lib. 2, tit. 12, § 35. The power of alienation is now complete in him; but it must be a total, not a partial alienation. Hence superiors cannot be multiplied over the vassal, and a subaltern superior cannot be interposed between and the vassal without his consent.

"When the superior reserves to himself a power of working coal, or any other mineral below ground, this, although not one of the *essentialia* of the *dominium directum*, becomes one of the *accidentalia*, or, in other words, one of the rights reserved to the superior by *stipulation* out of the feu. It must, in a feudal sense, belong either to the superior or to the vassal, both of whom are infeft in the whole *dominium* of the lands, for although it may be assigned, *i. e.* the liberty may be communicated to a third party, yet such third party can only enjoy it under the granter, as a mere liberty or privilege, which he derives from him, in the same way as he would do a power of cutting down the trees, or reaping the grain upon the solum of the feu. The superior and the vassal still continued bound to one another as the two contracting parties. The feu duty is a security to the one, and the rents to the other, against all breach of the feudal contract.

"The superior and the vassal, though less intimately connected now than formerly, are still liable in mutual duties and obligations to one another; and these may be more or less extensive according to the bargain which they make. Each party may now sell his right; but the question is, Whether he must not convey it entire if he means to liberate himself from the feudal engagement. The vassal may grant a subfeu of a part; he may even sell a part to be holden *a me, but he cannot do so without remaining bound to the superior in the whole prestations of the feu contract.* Neither he nor the purchaser can insist that the feu-duty or casualty should be divided.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded by the Appellant.—By the feu charter to the appellant's father, Lord Ross, the grantor, at the same time

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"In the same way, the superior cannot parcel out the superiority, or the prestations incumbent on the vassal, by dividing them into parts, without consent of the vassal, though he may convey the whole as a *jus individuum, e. g.*, suppose he should grant an assignment of the feu duties to a creditor, he still continues as much bound to his vassal in every counter prestation as if no such thing had happened, and the vassal may retain the feu duties for implement of any prestation incumbent on the superior.

"In the present case, he has done less;—he has only assigned one of the adventitious prestations, which he stipulated to himself out of the feu, leaving the feu duties still payable as before, which feu duties the vassal is entitled to retain, if the counter part of the obligation in the feudal contract is not made good to him.

"The petitioner considers a stratum of coal as a *separatum tenementum*, which, like a reserved farm, may be granted in feu to another vassal, and what gives rise to this idea is, that in granting the privilege of working the coal to Mr. Clerk, he has done it in the form of a disposition with a *precept of sasine.* But this seems to be a deception. A lease has often been constituted by infeftment, and yet is not a proper subject of a feudal grant. A piece of stone, or a piece of coal below the surface of the earth, is as little a proper subject of it. The petitioner, as crown vassal in the lands of Pendriech, has right to the lands *a cœlo ad centrum.* Mr. Simson, as subvassal, has exactly the same right *quoad* the *dominium utile*, excepting only that he has agreed to suffer the superior, and his heirs and assignees, to work out the seams of coal, and certain other minerals, if they are found within the lands. If there shall happen to be no such minerals, the whole solum of the estate *usque ad centrum*, belongs to Mr. Simson. He has right to every thing except these minerals, *e. g.*, stone, lime, sand, earth, water, &c. The wastes will also belong to him after the coal and minerals are wrought out. The subject therefore of reservation is a mere privilege of working certain mines and minerals, which does not radically affect the feudal title, but is merely a servitude or burden upon it. This the vassal must submit to, because it is a condition of his grant; but, it is equally a condition, or inherent quality of this grant, that his surface damages shall be paid; and this last is as much a servitude, or burden upon the *dominium directum*, as the other is a burden upon the *dominium utile.* It is admitted to be a burden upon the re-

he reserved the coal, also bound and obliged him, and his heirs and assignees, to pay all damages to be occasioned by the working of the same. The same obligation was impos-

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served right of working, *i. e.* upon the mineral which is to be wrought, but it is said to be no burden upon any of the other reserved rights, particularly the feu duty. But where is this distinction to be found in the feu contract? Every burden to which the vassal is subject is a burden upon the whole *dominium utile* given to him; and there is no reason why every burden to which the superior has subjected himself, should not be equally upon every part of the estate or interest which he has reserved.

"It is said that he may assign, and that the word assignees in the clause of reservation, means, assignees in the coal. That he may assign, *i. e.* convey his total right, is undoubtedly true. That he may also assign it in parts, he himself remaining liable, is equally true. But the question is, Whether he can be entitled to render the condition of his vassal worse by any partial alienation? It is a possible case, that by undermining the surface, the whole of it may be rendered waste. If this shall happen, may not the vassal retain his feu duty, which was the full rent of the surface at the time? Will it be said, you shall continue to pay your feu duty to the superior, and have recourse to a personal action against the proprietor of a subject which does not exist, viz. the coal now wrought out?

"It seems to be admitted, that if the coal was only let on lease, supposing for 99 years, or for 1000 years, the superior, as granter of the lease, would be liable, as well as the lessee, for the damages. But where is the difference between this and a total sale of the coal, if it be exhaustible in a much shorter period? It is easy, at this rate, to avoid the obligation, by only calculating the number of years within which the coal may be wrought out; and instead of a tack duty, and the form of a lease, taking a price or grassum payable at once, equivalent to the whole rents for so many years. In fact, the right to the coal in this case is held by Mr. Clerk as a subaltern proprietor, *under the Marquis of Lothian*, the disposition containing only a precept of sasine *de me*, so that the Marquis is his superior in that right, and ought to answer for him to Mr. Simson, the vassal in the lands, in the same way as if Clerk's right was only a lease.

"But after all, upon reconsidering these notes, I rather incline now to think that the coal and the surface may be held as *separata tenementa* by different proprietors or vassals with different redendos; and that it may be a condition in their different rights, expressed or implied, that the superior is not to be liable for damages done by the one to the other. In the present case, there is no express stipula-

ed upon the Marquis of Lothian, by a clause in the conveyance by the heirs of Lord Ross to him, in the same words with that in the feu charter to the appellant's father. And

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tion of that kind; but it may be understood, that when the vassal in the lands agreed to accept of his feu right, under the condition of a reserved right in the superior to dispose of the coal at pleasure, he tacitly consented to what has happened."

Lord Henderland.—" As to the contract, it was doubtful, in point of law, whether a party using a reserved right was to pay damages or not. The clause here has been put in to settle that question. He binds his heirs and assignees in the right reserved. He might have sold the superiority, reserving the coal."

Lord Swinton.—" I am for adhering to the interlocutor. A feu contract is *optima fide*. There may be no coal there, and yet much damage occasioned by searching for it. It may be sold to bankrupts (in which case he may insist for caution for the damage that may accrue from working the coal). Besides, coal is a fungible, and may be exhausted. Heirs and assignees, not only in the coal, but in the whole subject. See clause of tenendas which sets forth ' our heirs and assignees in the lands of Pendriech,' " &c.

Lord Hailes.—" The words ' may be,' &c. must be left out."

Lord Dreghorn.—" This is a condition as well as a reservation, and appears to be made real. If sold to a bankrupt, he may stop the tacksman until damages paid, or caution found. In all cases where right is assignable, the cedent is liberated when the assignation is completed. There is a case in 1792, Trotter *v.* Denniston. Pitfour's opinion was that assignee in such a case was alone liable. Being a fungible, I do not consider the coal a separate property, and therefore not a proper subject of feu."

Lord Eskgrove.—" I am against the interlocutor. The clauses referred to by Lord Swinton are applicable to the superiority alone. Suppose he had sold the superiority itself, would his heirs have continued bound ?'

Lord Justice Clerk.—" This question might have been settled by a few words in the contract; the question being, What the parties meant by it? Different estates may be created in land, *e.g.* lands and teinds—and may hold of different superiors. Mines and minerals may also belong to different parties, because they are proper subjects of feudation, and may hold of different superiors. The statute 1592, about mines of silver, allowed to feu them to the *freeholders*, which meant *proprietors*. Coal is not a part of the *dominium directum* but a part of the *dominium utile;* and when sold goes to the purchaser *cum suo onere*."

the liferent right granted to the Marchioness of Lothian by the Marquis, was made subject to the same obligation to pay damages, by a similar clause in her contract of marriage. But the conveyance of the coal to Mr. Clerk did not free the Marquis or Marchioness from that obligation, because that conveyance gave to Mr. Clerk only a subordinate right, holden under the Marquis of Lothian; according to the principles of the feudal law, by which the rights to landed estates in Scotland are governed, the Marquis of Lothian is, in law, the proprietor of the coal. Besides, where a superior feus lands to a vassal, reserving the coal and other minerals, under an obligation to pay all damages to be occasioned by the working thereof, the superior cannot get quit of the obligation he has come under, and throw it exclusively on any third party to whom he may convey the right to work the coal. Until the vassal has consented to hold another bound, the superior must remain liable to the vassal.

Pleaded for the Respondent.—By the terms of the feu contract, by which the appellant acquired the *dominium utile* of the lands, Lord Ross was not barred from separating the superiority of the lands from the right of the coal. On the contrary, Lord Ross was at full liberty to give the superiority of the land to one person, and the right to the coal to another. There is no clause in the feu contract saying, that when these two estates, that is, the estate consisting of the superiority of the lands, and the estate consisting of the property of the coal, which are two estates altogether distinct, belong to different persons, the proprietor of the superiority shall be liable to the vassal for the damage done to his lands by the owner of the coal. As there is no express clause in the feu charter to this effect, so neither is there any clause, the meaning of which imports that it was the intention of parties to lay the superior under such an obligation. It is true that the feu contract, after reserving the coal, says that Lord Ross and his foresaids, that is, his heirs and assignees, shall be liable to the vassal for the damage done to his property by working the coal. But, by the fair rules of construction, no more is here meant, than that Lord Ross' assigns in the coal shall be liable for the damage which they do to the vassal in the exercise of their property. The obligation is laid upon them in the clause of reservation, and it must be understood *applicando singu-*

la singulis. It would have been a most absurd stipulation upon the part of Lord Ross, had he subjected his successors in the superiority in the damage which might be done to the vassal by his successors in the separate estate of the coal, with which his successors in the superiority were to have no connection. And nothing is more absurd and untenable in law, than to say that, independently of the absence of all express stipulation, the superior was at common law liable for the deeds of his vassal.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Sir J. Scott, J. Anstruther.*

For Respondents, *R. Dundas, W. Tait.*

[M. 8193.]

THOMAS HOG of Newliston, Esq., *Appellant;*
REBECCA LASHLEY or HOG, and THOMAS LASHLEY, her Husband, *Respondents.*

House of Lords, 20th April and 7th May 1792.

LEGITIM — LEX DOMICILII — DISCHARGE OF LEGITIM — HOW IT OPERATES — HOMOLOGATION — CHILD'S SHARE OF GOODS IN COMMUNION—HERITABLE OR MOVEABLE—GOVERNMENT ANNUITIES—FRENCH FUNDS.— A Scotsman by birth left his country early in life, and settled in London, and married an English lady there. He acquired a large fortune, and purchased the estate of Newliston in Scotland, to which he sometime thereafter retired, and died there. By will the appellant was left the whole heritable and moveable estate. The eldest daughter, the respondent, was married to Dr. Lashley, and, on her marriage, it was proposed to give her £2000 as her fortune. A correspondence was entered into, by which £700 of this sum was paid them on bond, and further correspondence was entered into in regard to the balance when the father died. The younger children had all discharged their father for their shares of the legitim. But the respondent claimed her legitim, and also a share of the goods in communion, as due at her mother's death, and she raised an action against the appellant, her brother, concluding for payment. Held, 1. That she was not