HAILES. The half-pay is not a subject affectable by creditors. How can the debtor assign it? To whom is the assignation to be intimated? Arrears of pay, or even of half-pay, may possibly be assigned, but half-pay in time to come cannot.

On the 5th March 1768, the Lords found the pursuer entitled to the *cessio*, and dispensed with the habit.

Act. G. Buchan. *Alt.* G. Ferguson.

1768. *June* 21. THOMAS SMITH *against* THOMAS HAMILTON of Falla.

TACK.

An Heritor may search for Coal, notwithstanding the lands were let without any reservation to that effect.

[*Faculty Collection, IV. p.* 307 ; *Dictionary,* 15,266.]

MONBODDO. If the proprietor has a right to work coal, he need not reserve it. There is nothing in the several reservations which was not *ab ante* implied ; *quæ dubitationis tollendæ causa contractibus inseruntur jure communi non derogant.* Were it otherwise, writers of deeds would have the making of the law, by their inserting clauses wherever they are pleased to think there is any ambiguity in the law.

BARJARG. Where the damage done by working coal is incompatible with the use of the farm, the proprietor is not at liberty to work coal.

JUSTICE-CLERK. This is a point of great consequence. Mines must remain with the landholder. If not leased, the reservation is implied. When a probability of working coal occurs, parties will make a special reservation ; but very often mines and quarries cast up, of which the parties, when entering into the lease, had no suspicion. It is admitted, that in a large farm the landholder may work the coal. Why not in smaller? We cannot draw the line. The law secures the interest of the tenant by providing an adequate recompense for the damage occasioned by working the mines and quarries.

GARDENSTON. If the proprietor has right to the coal, he must have access to it.

COALSTON. The tenant has right to the surface; the proprietor to every thing besides the surface. Coal, lime, minerals are all under one rule. In the case of the *Commonty of Riddingwood,* the Duke of Hamilton was found to have right to the whole coal, although the commonty itself was subject to division.

PRESIDENT. *Unusquisque rei suæ moderator ac arbiter.* Landholders may give up their right; and, by the general practice, there are reservations deliberately made. The case of *Colquhoun,* mentioned by Stair, does not come up to this

case. When a man limits his own property, he cannot deprive the superficiary of his right. Damages will not do. If the master has neglected to reserve his right, he must blame himself for the consequences.

AUCHINLECK. This case is difficult and new. When a man feus out lands with the privilege of pasturing upon a common, the right of property remains with him, and he may set down pits for stone, coal, or other minerals. Most feus were originally no more than grants to those already tenants. Can the proprietor's right be less in leases than in feus? Will you debar him during a temporary right, while he is not debarred during a perpetual right.

On the 21st June 1768, the Lords found the heritor has right to search and put down sinks for coal in the lands set in tack, upon satisfying the tenant for the damage which may be thereby incurred. Adhering to the interlocutor of Lord Pitfour.

Act. D. Rae. *Alt.* R. Blair.

Diss. Alemore, Barjarg, President.

1768. *June* 30. MRS MARY KELSO *against* WILLIAM and GEORGE BOYDS.

PROPERTY.

A Superior Heritor must not, by extending a rivulet over his ground, divert it from returning to its course.

[*Faculty Collection, IV.* p. 307; *Dict.* 12,807.]

AUCHINLECK. A perennial burn cannot be diverted by the superior heritor so as to be prevented from descending to the inferior heritor. *Here,* the superior heritor sets aside the burn for ever.

MONBODDO. The Roman law furnishes us with principles for determining this case. The doctrine of *aqua pluvia* is not to the purpose; for the question here is concerning a *flumen,* not a torrent, but perennial by the Roman law. *Flumen publicum* is not a navigable river, but any streams *usus publici,* whereof a navigable river is composed. To such the Prætor's edict applies, *uti priore æstate, &c.* The right of the inferior tenement is not a servitude, but it is a right owing to the nature of the subject. The superior heritor may use the water even for fructifying his ground, but he must use it so that the water return to its channel. We cannot force parties to use the water *alternis vicibus,* though that may be convenient for both parties.

KENNET. I think the superior heritor may divert the water for a time. *Alternis vicibus* is a good rule, and pointed at by the Ordinary. Kelso cannot appropriate it for a season more than Boyd can.

AUCHINLECK. There is no declarator on Boyd's part, as to his tenement in-