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It was ordered and adjudged that the interlocutors complained of in the said appeal be reversed; and find that the extraordinary dividend or *bonus* given by the Bank of Scotland to the proprietors of the stock of the late Alexander Houstoun, deceased, ought not to be considered as belonging to Mrs. Houstoun, as the liferenter of the stock of the Bank of Scotland, belonging to the said late Alexander Houstoun, but that the same ought to be considered as belonging to all the persons interested in the said stock of the said late Alexander Houstoun; and that Mrs. Houstoun is therefore entitled only to the interest thereof for her life: And it is further ordered that the said cause be remitted back to the Court of Session in Scotland to proceed accordingly.

For Appellants, *Wm. Alexander, J. Abercromby.*
For Respondent, *Wm. Adam, Samuel Romilly.*

JOHN ANDERSON of Windygoull, Esq., *Appellant;*
Messrs. WILLIAM and JOHN CADELL, Merchants in Cockenzie, - - } *Respondents.*

House of Lords, 27th July 1803.

PRESCRIPTION—PROPERTY—COAL — NOVODAMUS — SIGNATURE.—This was a competition for the property of the coal, which had been disjoined from the property of the land by the superior selling the land under reservation of the coal; the superiority, with this reserved right of coal, reverted to the crown, by the forfeiture of the superior in 1715. The vassal, in 1716, obtained then a charter from the crown, under the Clan Act, in the novodamus of which, but not in the dispositive clause, the coal was mentioned. This, it was alleged, was a fraudulent interpolation. Three years thereafter, the York Buildings Company purchased the forfeited estates from the Government Commissioners, and obtained a charter, expressly conveying the coal of these lands; and, in 1779, the respondents purchased their right at a judicial sale, the decree conveying to them expressly the coal. The former (vassal) had a charter earlier in date, expressly mentioning the coal, upon which the long prescription had run, but there was no possession. The latter (purchasers) had also charter, expressly conveying the coal. fortified by prescriptive possession and working of the coal. Held the latter to have right to the coal.

This was an action of declarator brought at the instance

of the respondents against the appellant, concluding to have it found and declared that they, as purchasers of the lots of Tranent, at the judicial sale of the estates belonging to the York Buildings Company, *had right to the coal* under the appellant's lands of Windygoull, which was formerly part of that barony belonging to the Earl of Winton, and forfeited to the crown on the earl's attainder.

In defence to this action, it was maintained by the appellant that the coal was his property, having been expressly conveyed to his ancestor by the crown, and vested in his ancestor by infeftment, three years before any part of the Winton estate had been acquired by the York Buildings Company.

It appeared from the appellant's title, that in 1668 George Earl of Winton had granted a feu charter of the lands of Windygoull, in favour of George Anderson of Nether-Brotherstones, the ancestor of the appellant. 1668.

By this charter, the property only was conveyed to him, the superiority remaining with the family of Winton; the superior also reserved to himself, by the same charter, all the coals situated in the lands so conveyed, in the following manner: "Reservatis tamen nobis hæredibus et successo-
" ribus nostris, totis et integris carbonibus et carbonariis in-
" fra totas bondas omnium terrarum aliorumque supra dispo-
" sit. quae sub dispositione et jure script. nec hoc nostro
" infeofamento desuper sequen. minima comprehendi decla-
" rantur; cum libero passagio in et ad dicta carbonaria," &c.

The Earl of Winton was attainted of high treason on account of his accession to the rebellion of 1715; and of consequence all his estates, and those rights belonging thereto, devolved on the crown by his forfeiture.

It was alleged by the appellant, that by the Clan Act all vassals who "continued in dutiful allegiance to his Majesty, 1 Geo. I. c. 20.
" his heirs and successors, holding lands and tenements of
" such offender who holds hislands immediately of the crown,
" shall be vested and seased, and are hereby ordained to
" hold the said lands of his Majesty, his heirs, &c. in fee and
" heritage for ever;" and the Court of Exchequer was ordered accordingly to "revise, compound, and pass signatures,
" and that without paying any composition to such vassals
" accordingly." Another clause in the same act provided, that if a vassal should be guilty of high treason, that his estate or property should revert to his subject superior remaining at peace with the king.

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The appellant's predecessor, instead of following the fortune of his superior, remained at peace with his Majesty, and availed himself of the privilege conferred by this act; and, of this date, obtained a charter from the crown of these lands of Windygoull, with a clause of *novodamus*, in which a right to the

1716. coal is expressly mentioned. "Ad et in favorem prædict. "Joannis Anderson hæredum ac assignatorum quorumcunque "totam et integram justam et æqualem dimidietatem dict. "terrarum de Easter Windygoull cum æquali dimidietate "decimarum garbalium et rectoriarum prædict. totarum ter- "rarum ac pertinen. earum cum hujusmodi inclusis cum par- "tibus pendiculis et pertinen. dict. æqualis dimidietatis dict. "terrarum et decimarum supra script. una cum æquali di- "midietate pratarum maresii pasturarum communitatis et "communis pasturæ et totarum privilegiorum et pendiculo- "rum et pertinen. quorumcunque pertinen. ac attinen. ad "eadem. Et etiam totam et integram aliam justam et æqualem "dimidietatem prædict. terrarum de Easter Windygoull, cum" (as before). At the end of these descriptions there was thrown in the mention of coal, "una cum omni jure titulo interesse "jurisclameo proprietate possessione tam petitoria quam pos- "sessoria quæ nos vel nostri predecessores ac successores "vel dict. Georgius quondam comes de Winton habuimus "habemus seu alio quo modo habere clamare aut pretendere "poterimus prædict. terres *carbonibus carbonariis earund.* "vel aliaqua parte aut portione hujusmodi," &c.

Mar. 7, 1717. Upon this charter infeftment followed, of this date.

On the part of the respondents, it was stated, that about two years after this infeftment, the estate of Winton, forming a part of the forfeited estates, was bought by the York Buildings Company; and was subsequently acquired by the respondents.

In the title then exhibited as belonging to the portion of the estate purchased by the respondents, it appeared that the barony of Tranent had always been conveyed, under re-

1603. servation of the coal. In particular, in 1603, the same lands had been conveyed to Alexander Seton "Salvo tamen et "reservando nobis hæredibus et successoribus nostris, car- "bonibus cum carbonariis, sub prædictis terris quibuscun- "que." In consequence of a contract, the lands again came into the possession of the Winton family, who again

1614. granted a charter of novodamus in favour of one Turnbull and his wife, containing a reservation of the coal.

This property again reverted to the superior; and was in

1663 conveyed by the Earl of Winton to his second son, William Seton, with an express reservation of the coal, as before.

It again reverted to the superior; and in 1668 the earl granted a feu-charter thereof in favour of George Anderson, the appellant's ancestor, to him and his spouse in liferent, and to John Anderson, his son, in fee, conveying these lands with the following express clause of reservation of the coal: "Reservatis tamen nobis hæredibus et successoribus "nostris, totis et integris *carbonibus* et carbonariis infra "totas bondas omnium terrarum aliorumque supra disposit "quæ sub dispositione et jure supra script. nec hoc nostro "infeofamento de super sequen. minime comprehendi de- "claruntur, cum libero passagio in et ad dicta carbonaria, "cum libertate effodiendi et effringendi solum et fundum "totarum et integrarum terrarum prædict. pro effodiendis lie "sinks, levels, aliisque necessariis pro lucrandis carbonibus, "et pro exponendis hujusmodi carbonibus super solam ullius "partis dict. terrarum ubi hujusmodi pro tempora lucrari "contigerint," &c. Then followed a clause about the sinking of shafts and the paying of surfage damage. On this charter infeftment followed, of this date; and under these titles the appellant's family had alone possessed the property of Windygoull down to the year 1715, at which time, as before mentioned, the family title and estate of Winton was forfeited to the crown, and the estate vested in the Government Commissioners, who sold it to the York Buildings Company.

1663.
1668.
Mar. 5, 1688.

The act of Parliament already alluded to, authorized vassals who held of rebel superiors to enter with the crown. And it was in virtue of an entry thus effected that the charter 1716, above alluded to, was obtained. But the respondents maintained that this act was never intended to alter or improve, or benefit the estates and patrimonial interests of the vassal in any respect, but only to enable them to obtain the benefit of an entry.

The signature and warrant for this charter to John Anderson's ancestor, contained no mention about coal in the dispositive clause, but disponed the lands exactly in terms of the original feu right of the family, "as the same has been formerly "possessed by the former feuars thereof, and tenants of the "same past memory of man." And John Anderson was infeft in virtue of the charter which passed on this signature; and, of

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this date, 1752, he conveyed the lands by general disposition, to his son Richard, who took infeftment on the precept in this disposition, and continued base infeft until his death.

The appellant, John Anderson, succeeded his father Richard, and expeded a general service as heir to his father, in order to carry right to the procuratory of resignation in the disposition granted by his grandfather in

Dec. 10, 1786. 1752; whereby, of this date, he obtained a crown charter of resignation, in which the words carbonibus carbonariis

Jan. 25, 1787. are introduced. On this charter the appellant was infeft.

Upon the sale of the barony of Tranent by the Commissioners of the Crown (16th October 1719) to the York Buildings Company, upon their disposition, a crown charter was obtained, in which his Majesty conveyed the baronies, &c. *cum carbonibus carbonariis*, &c. Within this barony Windygoull was included. And at the judicial sale of the York Building Company's estates, the following words appeared in the decree of sale in favour of the respondents, with reference to the second lot, the barony of Tranent,

Feb. 15, 1779. "Together with the whole salt pans within the boundaries "of this lot; and not only the coal contained in this, but "also the coal below the houses and yards of the village of "Tranent, and below the whole feued lands in the barony "of Tranent, with the whole rights and benefits of working "the said coal competent to the York Buildings Company, "with the whole gins, waggons, utensils, and machinery "presently employed in the coal and salt works of the said "whole estate, so far as the Company have right thereto." On this decree of sale the respondents expeded a crown charter in exactly similar terms; and, conceiving that their right upon the above titles, fortified by prescriptive possession, was indisputable, they brought the present action to have it found that they had right to the coal within the property of "Easter and Wester Windygoull," as mentioned in the titles of the York Buildings Company.

Mar. 11, 1801. The Court pronounced this interlocutor: "Upon report "of Lord Craig, and having advised the informations for the "different parties in the cause, with the minutes given, &c. "the Lords find that the pursuers (respondents) have right "to the coal in question; ordain the defenders to cede the "possession thereof; prohibit and discharge them from "working the same in time coming, and decern and declare

"accordingly, in terms of these conclusions of the libel."* On reclaiming petition the Court adhered.

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

Pleaded for the Appellant.—By the act of attainder, there was vested in the crown every right in the lands of Windygoull which had belonged to the former superior, the Earl of Winton, who had reserved to himself the property of the coal, and held the same as an accessary of the superiority of the lands, from which it was never disjoined. By the act 1 Geo. I. the appellant's ancestor became entitled to obtain a charter from the crown, as his immediate superior; and, without entering into the question whether the officers of the crown, in granting that charter, might not have disjoined the coal from the superiority, and retained it as a separate subject, it is plain, in point of fact, that no such intention was entertained or attempted to be carried into execution, but, on the contrary, that the officers of the crown had then resolved, agreeably to the spirit of the act of Parliament, to convey the coal to the appellant's ancestor as an accessary or appendage of the superiority. Accordingly this crown charter was granted in 1716, *by which, three* years before the York Buildings Company had acquired the rest of the estate of Winton, the lands of Windygoull were disjoined and disannexed from the barony, and were granted to the appellant's ancestors expressly *cum*

May 28, 1801.

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* Opinions of the Judges :—

LORD PRESIDENT CAMPBELL said,—"This is a question about the right of coal claimed by both parties. It is of importance to know if there was a feu-duty payable out of these lands to the family of Winton, and who receives it now. The defender, in my opinion, cannot plead the positive prescription on the charter 1752 (1716), as the possession seems to be against him. The coal of this barony has uniformly been reserved as a separate right belonging to the superior. See the case of Sir J. and Sir R. Anstruther, 19th Feb. 1792, determined in the House of Lords 19th May 1796; see also the late case of Morris of Hillhouse *v.* Officers of the Prince of Wales.

Vide ante, vol. iii. p. 483.

LORD HERMAND.—"The right is now in the vassal, and the Clan act has fortified that right."

LORD JUSTICE CLERK.—"This is not the meaning of the Clan act. Besides, to enter upon possession by the Clan act required certain forms, which have not been gone into here."

Lord President Campbell's Session Papers, vol. 102.

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carbonibus carbonariis. Upon that charter infeftment followed in the year 1717, and, from that time downwards, the progress to these lands cum carbonibus et carbonariis is regular and uninterrupted down to the present moment, where they stand in the appellant. It seems therefore impossible to dispute that there is not only a solid feudal title to the coal of these lands in the person of the appellant, but that this title is fortified by a prescription of more than forty years. No doubt, it is objected that the clause cum carbonibus et carbonariis is not contained in the dispositive clause of the charter 1716, but only in the novodamus, and in crown grants it is the dispositive clause alone which is held to convey the thing to the vassal. But a clause of novodamus is commonly inserted in charters of resignation for the purpose of remedying defects, real or supposed, in the former title of the vassal; and it has been uniformly held, that every express grant contained in such clause is effectual, even although the subject conveyed did not formerly belong to the vassal, and although no mention of it is made in the dispositive clause. It is so laid down by Erskine, B. ii. tit. 3, § 23. And the cases referred to by Erskine support this doctrine most completely, namely, that an express grant in the clause of novodamus is sufficient to convey to the vassal a subject which he had not resigned, and to which he had no previous right.

Pleaded for the Respondents.—In consequence of the reservation in the charters from the Winton family, the separation of the estate of coal from that of land, and the investment of the former in the person of the superior, were complete, and had continued so for above a century prior to the forfeiture in 1715, at which time the superiority and coal passed into the person of his Majesty. It was therefore only by an express grant from the crown that any person could establish a right to the coal. The appellant's charter in 1716 proceeded upon the Clan act, which was made for the sole purpose of changing the tenure of loyal vassals from their rebel superiors to the crown, and indicates no intention to improve the situation of the vassal in any other respect, much less to surrender any profitable interest of the crown. This intention is further illustrated by the act 1 Geo. I. c. 50, made for the express purpose of prohibiting and declaring ineffectual and void all gratuitous alienations by the crown, of the interests it had acquired, or might acquire, through these forfeitures, whether the same should happen either through mistake or design, and which of

itself would have been sufficient to render void an express grant of coal to the appellant's ancestor. But the signature or warrant for the charter, in this case, contains within itself the strongest presumptions that no conveyance of coal was intended by the crown. The lands are conveyed *as possessed by the former feuars;* none of whom had right to their coal. There is no mention of coal in the dispositive clause, the only one that is held to convey any thing in crown grants. And the clause of novodamus cannot in any degree improve the situation of the vassal, as not proceeding on his Majesty's sign manual. It was merely inserted in consequence of the general provision of the statute, as a more formal foundation of the vassal's new tenure under the crown, and as a discharge of all arrears of feu-duty or other casualty due to the superior. Besides, it is obvious from inspection of the signature, that the introduction of the words conveying coal is a fraudulent interpolation after it had been settled in Exchequer. The words "*cum carbonibus et carbonariis*" appear to be interlined, and are not attested by the revising Baron, as the marginal notes upon the signature appear to be. No doubt the appellant says that all these irregularities are wiped off by the forty years' prescription. But this is no answer to the effect the respondent pleads these irregularities. He only refers to them as clear indications that the crown never, in this grant, intended to convey the coal, and as affording proof positive that no such intention of parting with the coal existed. Nay, further, the respondents apprehend that, in a question of competition of heritable subject, where the titles of both parties are beyond the years of prescription, and where possession has varied betwixt the two, it is competent for a judge to consider the presumptions afforded by the titles themselves, and to give the preference to those who appear to him the most exceptionable. How much more then must these presumptions weigh, in the present case, where the possession has been uniform on the respondents' part, and where there is not a vestige of possession on the part of the appellant upon which he can plead prescription.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For the Appellant, *C. Hope, Ad. Gillies.*
For the Respondents, *Wm. Adam, James Abercromby.*

Unreported in the Court of Session.