[8th *July* 1834.]

WILLIAM FORBES, Appellant.

ALEXANDER LEARMONTH LIVINGSTON, Respondent. No. 18.

Property—Run-rig.—Question as to the rights of parties in mines and minerals where lands are held in run-rig.

FORBES of Callander raised an action against Livingston of Parkhall, setting forth "that the "Earls of Linlithgow and Callendar, formerly pro- "prietors of the barony of Almond, did at different "periods grant several feu rights to various persons, "inter alia, of the following lands, part of the said "barony, viz. all and whole the towns and lands of "Manuelrig, with houses, biggings, &c., excepting "and reserving always to the said Earls, their heirs "and successors, superiors of the said lands, the pri- "vilege and liberty of digging and winning coal and "coalheughs in any part of the lands above men- "tioned lying as aforesaid, conform to use and wont:" that the pursuer had acquired right thereto, and that Manuelrig embraced certain specific lands. "That in the "year 1724 Alexánder Mitchell of Mitchell, writer to "our signet, acquired right to the feu of the said lands "of Manuelrig with the pertinents, and the same now "pertains and belongs to Alexander Learmonth Living-

2D DIVISION.

Ld. Mackenzie.

No. 18.

8th July 1834.

FORBES v. LIVINGSTON.

" ston, esquire, of Parkhall. That notwithstanding that " the said lands of Manuelrig with the pertinents are " held of the pursuer under an express reservation of " the coal in the same, the pursuer is informed that " for some time past coal has been wrought out of the " lands aforesaid, and sold, used, or disposed of, without " his authority or consent, and the said Alexander " Learmonth Livingston, the present proprietor of the " said lands, refuses to desist from working the said " coal although required by the pursuer so to do." He therefore concluded " that it ought and should be " also found and declared by decreet foresaid, that the " pursuer, his heirs and successors, have the only good " and undoubted right and title to the whole coal in " the foresaid lands of Manuelrig, containing and com- " prehending as aforesaid part of the said lands and " barony of Almond or Haining, and to dig, win, and " carry away the said coal conform to use and wont; " and further, that the said Alexander Learmonth " Livingston, his heirs and successors, have no right " or title to the said coal; and the same being so found " and declared, the said Alexander Learmonth Living- " ston, his heirs and successors, ought and should be " decerned and ordained instantly to desist and cease " from working, using, or disposing of the said coal in " any manner of way in all time coming." Livingston denied that the lands libelled formed part of Manuelrig, and raised a counter action with declaratory conclusions to the effect of having it found that Forbes had not right to the coal in these lands. The actions were conjoined, and a record made up; and the plea in law maintained by Forbes was, that the lands " lie run-rig, and conse- " quently one half of the coal of the whole lands is

" Mr. Forbes's property." On the other hand it was pleaded by Livingston " that this was a new view of his " claim, and that even if the lands did lie run-rig it " does not follow in point of law that Mr. Forbes is " entitled to judgment in his favour upon any of the " conclusions to any extent." Lord Mackenzie pronounced this interlocutor:—" Finds that the lands to " the coal of which the present conjoined actions relate " form part of the lands of Manuelrig: finds that the " lands of Manuelrig consist of two portions, viz., " Manuelrig, being part of the barony of Manuel- " fowlis, and Manuelrig, being part of the barony of " Haining: finds that the pursuer has right under " the reservation libelled by him to the coal of the lat- " ter portion of lands, and that he has not right to " the coal of the former portion, which belongs to the " defender: finds that the portions appear to have " been possessed in run-rig, and at any rate have been " so intermingled that it is not possible now to deter- " mine the boundaries of them: therefore finds, that " the coal under the whole lands of Manuelrig must be " held to belong to the pursuer (under the said reser- " vation) and to the defender in common property, " each having a share proportionate to the extent of the " lands to the coal of which, if the boundaries were " known, each would have right: finds, in defect of " evidence to the contrary, the extent of these lands " must be held to have been equal, and finds no " evidence sufficient to show the contrary; but that in " all the circumstances of the case it appears most likely " that the two portions were of equal extent: therefore " finds, that the coal of the lands libelled belongs to the " extent of one half in common property to the said

No. 18.

8th July 1834.

FORBES v. LIVINGSTON.

" pursuer; and prohibits and interdicts the said de-
" fender from working it in future without his consent:
" finds the defender liable to account to the pursuer
" for one half of the clear profit drawn by him from
" working the same since the raising of this action by
" the said pursuer; and decerns accordingly." Livingston reclaimed, and maintained that the interlocutor was not warranted by the conclusions of the summons. The Court sustained this objection, and therefore recalled the interlocutor.

Forbes appealed.

The LORD CHANCELLOR, in the course and at the conclusion of the argument, made these observations.—Is there any instance of the principle of run-rig being applied to minerals? Run-rig I understand to mean furrow by furrow, that is, a certain narrow space. But how is that to be applied to coals and minerals? how can you ascertain what is under the adversary's furrows, and what is under your furrows? When these divisions into rigs were made the minerals were not at all thought of. How can it be done, unless by rigs you mean large fields? But this I understand means only so many yards. The Lord Ordinary appears to assume, that the moment that it is proved that the surface of the land is run-rig the land under the surface is of another species of tenure; that it is of one description of tenure quoad the surface, and of another underneath it. The holding of run-rig on the surface is perfectly intelligible; it is just as much a tenure in severalty as if it were a separate enclosure; it is not held in common in the least degree. Then I do not see

how the surface of the land can be held in severalty in run-rig, but the bowels of the earth held by another tenure, namely, tenantry in common.

This is not an immaterial question, for if it is answered in the affirmative it completely disposes of the interlocutor; and I have felt throughout, that if it is once ascertained that the idea of run-rig land is not of necessity accompanied with equality, that completely destroys the finding, for the finding is that there is an equality in each of those persons. This is declared to be not a holding in common, but in severalty. If there is a holding in common each of the persons having an interest has a right throughout the close with others equally interested, but that is not the case as to these rigs.

I would move your Lordships that the judgment in this case be postponed, as I wish to have an opportunity of looking farther into it. It appears to me, that it is impossible to uphold the Lord Ordinary's interlocutor; but the learned judges of the Court of Session have given us very scanty materials on which to proceed in judging of the grounds of their opinion. But I will take an opportunity of considering the matter further before I advise your Lordships on the judgment to be pronounced. Adjourned.

His Lordship afterwards moved, and the House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the several interlocutors, so far as therein complained of, be and the same are hereby affirmed.

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL, Solicitors.