might have arrived. But as this case presents itself to us, I concur in the judgment suggested.

Then as to the stable court enclosed by a wall round the stables, it was very natural to enclose that piece of ground. It is detached in a manner different from everything else, but I hardly think it is within the range of the reservation in this case, and I therefore concur in the judgment proposed in that respect also.

*Interlocutor varied, and cause remitted.*

*Appellants' Agents*, Morton, Whitehead, and Greig, W.S.; Connell and Hope, Westminster. —*Respondents' Agents*, Burn, and Gloag, W.S.; Walker and Balfour, Westminster.

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JULY 28, 1871.

## SIR JOHN STEWART RICHARDSON of Pitfour, Baronet, *Appellant*, *v.* MRS. ISABELLA RATTRAY or FLEMING of Inchyra, and Husband, *Respondents.*

Salmon fishings—Boundary—Excambion of lands—Possession—*In* 1745, *by contract of excambion, a meadow abutting on the river Tay for* 270 *yards, was taken from the lands of I., and added to the lands of C. Nothing was said as to the salmon fishings* ex adverso *of the meadow. For the last* 25 *years the owner of I. had fished* ex adverso *of the meadow, and the owner of C. had never fished there. In a declarator by the proprietor of C., concluding that he was entitled to fish there, it appeared, that both proprietors had a habile title to salmon fishings* ex adverso *of their respective lands of C. and I., as these were before the excambion.*

HELD (affirming judgment), *That the owner of I. was rightly assoilzied, inasmuch as the owner of C. had not proved possession for* 40 *years of such fishings as were applicable to the lands of C.*[1]

This was an appeal from judgments of the Second Division. The appellant, Sir John Richardson, raised actions of declarator to have it declared, that Mrs. Fleming of Inchyra had no right to fish for salmon in the river Tay opposite to a certain part of his lands of Cairnie. In the course of the pleadings it appeared, that in 1745 there was a contract of excambion between Sir John's predecessor of Pitfour and the proprietors of Inchyra, and the result of the exchange was, that a small piece of land adjoining the Tay was given to Pitfour. This piece of land was called Pow Meadow, and abutted for about 270 yards on the river. Nothing was said about the salmon fishings opposite to Pow Meadow. The proprietors of Inchyra had continued to fish as before, for a distance of 86 yards opposite Pow Meadow, though it now formed part of Cairnie and Pitfour. Evidence was given of the state of possession for 40 years and upwards. And it appeared, that the Inchyra fishermen had fished for the last 25 years the 86 yards before mentioned, and the Pitfour fishermen had not fished there. The Court of Session held, that no title to the fishing in the disputed place had been shewn by the appellant, who thereupon appealed.

The following interlocutors and judgments were delivered subsequently to the report in 39 Sc. Jur. 295.

"*29th January* 1868.—Finds, *1st*, That the lands of Cairnie, which form a portion of the estate of Pitfour, the property of the pursuer, Sir John S. Richardson, and the lands and barony of Inchyra, which are the property of the defender, Mrs. Fleming, and in which the parties respectively are infeft under the titles set forth on their behalf on the record, lie adjacent on the northern bank or shore of the river Tay, and, that the line of the march between the said lands of the said pursuer and of the defenders, until the same reaches the said northern bank or foreshore of the river, is that ditch or small watercourse which is referred to in the 5th article of the condescendence for the pursuers, and in the 8th statement of facts for the defenders: *2d*, That under the titles referred to in the record, and which are produced in process on the part of the pursuer, Sir John S. Richardson, he has right to and is infeft, *inter alia*, in the said lands of Cairnie, with the salmon fishings and other fishings in the water of Tay: *3d*, That under the titles referred to and produced on the part of the defenders, they have right to and are infeft, *inter alia*, in certain parts of the town and lands of Inchyra, 'together with the just and equal half of the salmon fishings and other fishings of the said lands of Inchyra:' *4th*, That the other

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[1] See previous report 39 Sc. Jur. 295. S. C. 43 Sc. Jur. 448.

half of the salmon fishings and other fishings of the said lands of Inchyra are, and have for a long period been, the property of the Lords Gray of Kinfauns, and that under an arrangement entered into between the predecessors of the defenders and those of the said Lords Gray, the said fishings have been enjoyed, and the right therein has been exercised, by assigning alternate portions of the river as fishing stations to the said proprietors respectively, within the bounds over which their rights extend: 5*th*, That the said right of salmon fishing has been exercised along the northern bank of the water of Tay, not only so far as the same is *ex adverso* of the lands of Inchyra, but also *ex adverso* of a portion of the lands lying on the northern bank of the river which are now within the titles, and are the property of the pursuer, Sir John S. Richardson; and in particular, that the defenders and those acting under their right have for 40 years and for time immemorial, fished for salmon by means of net and coble, and otherwise, in that portion of the said river known as and referred to in the record and in the proof as 'the Hen' fishing station, and that without interruption on the part of the said pursuer, his predecessors and authors, or others: 6*th*, That the pursuers have failed to prove as matters of fact, that the ditch referred to in the 5th article of the condescendence is the boundary to the eastward of the salmon fishings belonging to and possessed by the defenders as above found, or, that the fishing station known as 'The Hen,' is locally situated within the bounds of the parish of St. Madoes, and not within those of the parish of Kinnoull: And with reference to the foregoing findings, sustains the defences; and in respect thereof assoilzies the defenders from the conclusions of the action, and decerns: Finds the pursuers liable to the defenders in expenses," etc.

The *appellant* in his *printed case* gave the following reasons for reversing the interlocutors:—1. Because the appellants, by virtue of their titles, have right to the lands of Cairney and salmon fishings thereof; and the lands to the east of the march ditch form no part of Inchyra, but are part of Cairney. 2. Because it is not competent to qualify, restrict, or burden a right to lands, as against a singular successor therein, by reference to any private arrangement with a previous proprietor, not forming part of the title or entering the public records. 3. Because no question was raised on the record as to any part of the lands east of the march ditch not being truly Cairney land; and it was not competent to hold the appellants' title insufficient on any such ground. 4. Because the respondents have not alleged or produced any title to fishings *ex adverso* of the appellants' lands; or, at all events, any title which can support a valid objection to the sufficiency of the appellants' title to these fishings. 5. Because the respondents' rights of fishing are limited to the parish of Kinnoull, and the fishings on the east of the march ditch are beyond the bounds of said parish and within the parish of St. Madoes. 6. Because the respondents failed to establish their allegations of possession of fishings by a march fixed with reference to a stone upon the appellants' lands to the eastward of the march ditch, and a 12 o'clock line from that stone. 7. Because the respondents failed to establish any prescriptive possession upon their alleged title to the eastward of the march ditch. 8. Because according to the evidence the whole lands and fishings to the east of the march ditch were, from time immemorial, or for upwards of 40 years prior to 1843, possessed peaceably and without interruption by the appellants or their predecessors and authors, by virtue of their infeftments in the lands of Cairney and the salmon fishings belonging thereto. 9. Because the judgment of the Court of Session is contrary to the evidence, and to the true construction and legal import of the titles of the parties. 10. Because the evidence excluded from the appellants' conjunct probation, and deleted in terms of the interlocutor of 12th March 1867, was competent, and ought to have been allowed and considered in the final judgment. 11. Because in conjunct probation it was competent for the appellants to lead evidence to rebut that adduced by the respondents as to the situation of the Hen Cairn; and the appellants were not legally debarred from doing so by reason of that matter having been entered upon to some extent and for certain purposes in the proof in chief. 12. Because, in any view, the evidence deleted and excluded from the conjunct probation by the interlocutor of 12th March 1867 was, at least in great part, relative to special matters in connection with the fishings and cairn brought forward in the evidence of the respondents, and such evidence was not truly a resumption of the proof in chief.

The *Dean of Faculty* (Gordon) Q.C., and *Sir R. Palmer* Q.C., for the appellant.

The *Lord Advocate* (Young) Q.C., and *Jessel* Q.C., for the respondents.

The arguments turned entirely on the details of the evidence.

LORD CHELMSFORD.—My Lords, the appellant, by his summons of declarator, claims the sole and exclusive right of fishing salmon, trout, and all other kinds of fish in the part of the river Tay adjacent or opposite to his lands of Cairnie, and along which the same extend.

His title is founded upon a grant from the Crown, of the lands of Cairnie in the barony of Pitfour, and the salmon and other fishings in the water of Tay, belonging to the said lands. The dispute between the parties relates to the fishings *ex adverso* a portion of the lands of Cairnie formerly called Pow Meadow, and originally parcel of those lands, but added to them in the year 1745 by an exchange with the owner of the neighbouring lands of Inchyra, of which the Meadow at the time of the exchange was part. Since this exchange the Pow Meadow has become one with and undistinguished from the lands of Cairnie.

The appellant, being bound to make out his title to the fishings in question, insists, that he does so, at all events *primâ facie*, by first proving, that by Crown Charter he was vested in the salmon and other fishings belonging to the lands of Cairnie, and that what was formerly Pow Meadow has been for more than a century part of those lands. There can be no doubt, that if this *primâ facie* title had not been disturbed by counter evidence, it would have established the appellant's right to the fishings claimed. It was sufficient, therefore, to cast upon the respondents the necessity of entering upon their defence.

The answer which they gave to the case of the appellants was in the first place by producing the decreet arbitral of 1745, by which the Pow Meadow became part of the lands of Cairnie, that decreet arbitral proceeding upon an agreement between Lord and Lady Gray, to whom the Powlands of Inchyra belonged, and James Hay of Pitfour, the proprietor of the lands of Cairnie, to submit to arbitrators to settle and determine the march between the parties, and how and in what proportion certain pieces of ground lying interspersed among the respective grounds of the parties should be excambed and exchanged the one for the other, and to adjudge, decern, and declare the pieces of ground so excambed to pertain and belong to the heritor to whom they should allot them, as part and pertinent of their land in all time coming. Under this submission the arbitrators declare the march between the lands of Inchyra and of Cairnie, and gave the piece of ground called the Pow Meadow or Powlands, then part of the lands of Inchyra, to James Hay of Pitfour, to be from henceforth part and pertinent of the lands of Cairnie.

The decreet arbitral said nothing as to the fishings *ex adverso* the Pow Meadow, nor had the arbitrators authority to declare anything upon the subject, as the submission to them was merely for an exchange and settling of the boundaries of the lands belonging to the parties respectively.

The lands and fishings of Inchyra were at the time of the decree held *pro indiviso* by the Blairs of Inchyra, the predecessors of the respondents, and Lord and Lady Gray. Some question was raised in the argument whether Lord and Lady Gray were not sole proprietors of Pow Meadow, and of lands called the Prior Lands, mentioned in the submission and decreet arbitral. But even if this were the case, there seems to be no doubt that the whole of the fishings *ex adverso* the lands of Inchyra, including Pow Meadow, belonged to them *pro indiviso* with the Blairs, and therefore they could have no right to make over any part of these fishings to a third person. That the whole of the fishings of Inchyra were thus held *pro indiviso*, appears in a process instituted by Lord and Lady Gray against the Blairs, in the Court of Session, in 1756, and afterwards submitted to arbitration. It is unnecessary to consider whether this proceeding was admissible evidence against the appellant, as it was admitted without objection. The *pro indiviso* proprietors of the lands and fishings of Inchyra had, by agreement between themselves, possessed the lands by separate kavels and the fishings adjoining and opposite to these kavels separately. The Blairs seem to have insisted upon an exclusive right to the particular fishings which they had enjoyed under this arrangement, and Lord and Lady Gray raised a summons against them claiming to have it found and declared, that they had a right to the half of the whole salmon fishings of the lands of Inchyra, and that the Blairs had no exclusive right to any particular fishings thereof. The Blairs in their memorial observed, that as the claimants had some years ago disponed the largest and broadest kavels of the whole lands to Hay of Pitfour, with the water adjoining thereto, they could not demand any share of the respondents' fishings, because they had sold off a considerable part of their own, and so were not capable on their part of making an equal division. To this Lord and Lady Gray replied, acknowledging, "that Lady Gray did excamb some part of her eastmost kavels of the lands of Inchyra with Hay of Pitfour, and that the excambion was settled by a decreet arbitral, from which it would appear, that the claimant gave to Pitfour no right of fishing opposite to that part of the lands given to him, and if there could be any fishing opposite to these lands the same belonged to the heritors of Inchyra, and that Hay of Pitfour had not extended his fishing opposite to the lands of Inchyra, further than he was in right or in use to do before that excambion."

Here, then, only 11 years after the transaction, when the facts must have been well known or might have been easily ascertained, it was asserted, that no right of fishing *ex adverso* Pow Meadow was given to Hay of Pitfour by the decreet arbitral of 1745, and that he had never attempted to exercise any such right. There is no evidence what was the result of these proceedings, but there can be no doubt, that the fishings continued to be held as before upon some arrangement for enjoying them as belonging to different kavels; because in the year 1795 Lord Gray and John Anderson, the *pro indiviso* proprietors of the lands and fishings of Inchyra, agreed to refer to the decision of arbiters the division of the commonty lands of Inchyra "reserving always to both parties the right of the salmon fishing respectively belonging to them according to their present boundaries."

By the decreet arbitral the arbiters find, "that the lowest or eastmost fishings belong to Lord Gray, and are altogether opposite to the lands of Pitfour, being bounded to the west by the old march stone between the lands of Pitfour and Inchyra."

The learned counsel for the appellant found in this proceeding something favourable to his

case; but I am unable to see how it can be serviceable to him. The proprietors of the fishings *ex adverso* the lands of Inchyra had apparently agreed to exercise their right of fishing exclusively upon certain parts of the river. The decree dividing the lands might have disturbed this arrangement of the parties after the division had been confined to the fishings *ex adverso* the lands divided and allotted to them. Hence the declaration in the decreet arbitral founded on in the submission, "that the said fishings respectively belonging to each other of the said parties shall not be hurt or affected by the division now made of the lands." With respect to the special finding as to the fishing opposite to the lands of Pitfour, the description is strictly applicable to the part *ex adverso* Pow Meadow, and is an additional proof, that the fishings *ex adverso* that part of the lands belonging originally to Inchyra did not pass to the proprietor of the lands of Cairnie.

As the habile title of the appellant depended upon the presumption, arising from the absorption of the Pow Meadow into the lands of Cairnie, that his right of fishing *ex adverso* these lands extended to every part of them included under the general name, it might be questionable when it was shown that the fishings *ex adverso* Pow Meadow were not transferred with the land to his predecessor, whether any habile title remained on which to found a prescription. But whatever opinion might be entertained upon this question, the appellant could only succeed in his claim by building upon his title proofs of possession of the fishings in question for the prescribed period. Now, if the appellant has ever exercised a right of fishing *ex adverso* Pow Meadow (which is doubtful) he certainly has not done so for the requisite length of time to establish a prescription. On the other hand, the respondents, whose title is anterior to that of the appellants, have proved that they have been in the habit of fishing on the disputed ground for at least 25 years. This of course would have been insufficient if they had been required to prove a title by prescription. But in the present competition the party who has exercised the right must prevail; or, to put the case upon the proper footing, the party claiming the right being unable to prove the enjoyment of it, cannot prevail in the contest with a person who has proved actual exercise, not as a wrongdoer, but upon a claim and an assertion of a title to that of the appellant.

The appellant cannot of course be permitted to assail the respondents' title before he has established his own; but he has pressed as a circumstance against the defence, that the extent of Pow Meadow along the river Tay being 270 yards, they have only claimed to exercise the right for 86 yards. The reason of this restriction of the right (if it is a restriction) was not perhaps satisfactorily explained. It was said that for the rest of the distance *ex adverso* Pow Meadow there is no practicable fishing. But however this may be, as the appellant has not shown that he fished the other part of the 270 yards, the limitation of their claim by the respondents is immaterial. There is some little difficulty in ascertaining the exact position of the boundary stones which indicate the limits of the Inchyra fishings. But I think there is sufficient evidence to shew, that the Inchyra fishermen fished *ex adverso* the part of the Pow Meadow to which the respondents' right is limited, for a period of at least 25 years. A striking circumstance in support of this being their undoubted right is proved by a witness for the respondents, and admitted by the appellant himself. Upon one occasion (the time is not given) the appellant sent his people, the Pitfour fishermen, to make a shot on the ground in question, when one of the Inchyra fishermen cut the tow rope, and the appellant, as he himself stated, did not repeat the experiment. Now resistance to an act done for the purpose of asserting a right, and acquiescence in such resistance, has always been properly regarded as strong evidence against the existence of the right.

The ground upon which I rest my opinion against the appellant is, that he was bound to give affirmative evidence in support of his claim to the fishings in question, and that, whether he possesses a habile title or not, he has entirely failed to prove the necessary prescriptive possession. I am, therefore, of opinion that the interlocutor appealed from ought to be affirmed.

LORD WESTBURY.—My Lords, when the record in this case was originally made up, there appears to have been a misapprehension on both sides of a very material fact. A portion of the land adjoining the river, forming part of the bank of the river called the Pow Meadow, was treated by both parties as if it had been originally always part of the estate of Cairnie or Pitfour. The result, therefore, was, that, inasmuch as the defendant claimed a right to part of the salmon fishing by virtue of his grant *ex adverso* of these lands, and inasmuch as Sir John Richardson claimed a right by grant of the salmon fishings *ex adverso* of the lands of Cairnie, this state of things would have thrown upon the defenders the obligation to prove a clear undisputed possession of the salmon fishings *ex adverso* Pow Meadow, under a habile title for more than 40 years at least. Now, in course of the proceedings it was discovered, that this Pow Meadow did not originally form part of the estate of Cairnie, but that it was originally part of the land of Inchyra, which is the adjoining estate; and that by virtue of an exchange, made I think in the year 1745, Pow Meadow became a part of the estate of Cairnie.

Now it appears to be unquestioned law in Scotland, that if there be two habile titles to salmon fishings, that is to say, two grants, it does not necessarily follow, that the boundaries of the fishings

are conterminous with the boundaries of the land. The boundary of the salmon fishings may be determined by usage; consequently it came, after this discovery, to be determined who could prove possession by usage of the right to the salmon fishings *ex adverso* that portion of the land of Pow Meadow which is in dispute.

Now that portion appears to be a reach of about 86 or 87 yards running eastward from the terminal boundary stone of the estate of Inchyra. In the course of the evidence the matter became reasonably clear. It was proved, that there was upon the old bank of the river, in the lands of Pow Meadow, an old terminal stone—I call it a "terminal stone," because it was a stone evidently placed as a boundary stone—and it had upon the side that looked eastward the letter "P" cut upon it, and upon the side that looked westward there was the letter "I," that being the initial of the estate of Inchyra, also carved upon the stone. It is quite clear, that it could not be the terminal stone of the estate, because the terminus of Pow Meadow and Inchyra was ascertained in a very different way, and is beyond dispute; neither was it the eastern boundary of Pow Meadow, because Pow Meadow confessedly runs to the east much beyond this boundary stone. There remains, therefore, no other conclusion to be drawn from the fact of its being a terminal stone, but the obvious conclusion, that it was a terminal stone with reference to the salmon fishings, and not with reference to the land, and all the evidence was in harmony with that. Evidence was given with regard to the renewal, or rather the continuation, of the stone on the bank of the river in consequence of the river bank having been made wider from some artificial or natural causes since the original putting in of this terminal stone. And it was also proved to be the terminal stone with regard to the fishings by undisputed evidence, among which I may mention the confession made by Sir John Richardson himself, in which he admits, that at a particular time he sent his fishermen to fish upon the western side of the terminal stone, and that they were there met and resisted by fishermen upon the part of Inchyra, and were excluded from completing that which they went for the purpose of doing, and Sir George Richardson admits, that from that time to the present he never attempted to assert a right of fishing westward of that terminal stone. Also that it was regarded as a terminal stone, is put beyond dispute by the evidence of a variety of fishermen, who had fished for a long period of time at a place which is called the Hen fishings.

It is, therefore, I think ascertained beyond the possibility of doubt, that the habile title to the salmon fishings vested in the defenders. The right of fishing upon the estate of Inchyra has been asserted, and by long enjoyment proved, to extend to the terminal stone boundary, to which I have made such frequent reference, and the assertion of the right, and the enjoyment of the right, up to the stone eastward, is proved by a body of evidence which is not attempted to be met, or, if attempted, has not been at all successfully met.

That being the state of the case, therefore, the enjoyment is clearly referred by the defenders to a habile title, and that enjoyment clearly excludes all possibility of right on the part of Sir John Richardson, and I think it is, therefore, a clear conclusion for your Lordships to arrive at, that the salmon fishings belonging to the estate of Inchyra do extend to, and have by enjoyment been proved to have always extended to, this terminal stone, which may have been put in a great many years ago, or at all events must be deemed to have been put in as long ago as the year 1745. The right, therefore, is a clear one. The enjoyment is established by undisputed evidence. That is the only thing which is now in controversy between the parties, namely, the salmon fishings *ex adverso* to the 86 yards, at the end of which is found this terminal stone, measuring eastward from the admitted boundary of the lands of Inchyra.

I therefore concur entirely in the conclusion which has been stated by my noble and learned friend upon the woolsack, and I advise your Lordships to make your decree accordingly.

LORD COLONSAY.—My Lords, the circumstances of this case have been stated very fully by my noble and learned friend on the woolsack, and it appears to me upon the evidence before us both of title and of possession, that we cannot decide this question in favour of the appellant. With regard to the several facts which came out in the course of the evidence, and particularly that fact about the exchange of the Pow Lands without the fishing being specified in them, that is the most material fact in the case. It might be perhaps a nice question whether these lands, having been so excambed without any other title, and having been exchanged with part of the property of the appellant, they might not, if there had been evidence of possession and usage, have been held to have brought along with them the right of fishing within those boundaries. But there is no evidence of such possession. The evidence of possession rather preponderates in favour of the other party, and taking along with us the circumstances of the position of these terminal stones, particularly that stone marked with the letter P and the other letters, which could not possibly be the boundary stone of the lands, I cannot see anything else that it could be, except the boundary line of the fishings, corresponding as it does with the course of the Pow Lands, and with the evidence that we have of possession.

I therefore think that, upon the whole case, the pursuer has not brought before us such a title and such evidence as would enable us to alter the judgment come to by the Court below.

*Interlocutors affirmed, and appeal dismissed with costs.*

*Appellant's Agents*, Mackenzie and Kermack, W.S.; Loch and Maclaurin, Westminster.—*Respondents' Agents*, Hamilton, Kinnear, and Beatson, W.S.; Grahames and Wardlaw, Westminster.

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JULY 28, 1871.

THE DUKE OF HAMILTON, *Appellant*, *v.* JOHN GRAHAM BARNS GRAHAM, Esq. of Cambuslang, *Respondent*.

Mines—Property—Reservation—Right to use underground passages after minerals worked—*H. being the superior of the lands of C. and other adjacent lands, granted a feu charter of the lands of C., reserving the mines in the lands of C., and right to make shafts, and free ish and entry to the lands to win and take away the minerals, compensation being made for damage by sinking shafts, roads, etc.*

HELD (reversing judgment), *That H. retained his entire right of property in the strata under the surface of the lands of C., and was not restricted to a mere servitude, and that he had a right to use all the underground passages to convey minerals to and from his other adjacent lands, so long as any of his strata was unworked.*[1]

This was an appeal from a judgment of the First Division of the Court of Session, assisted by Judges of the Second Division. The respondent, Mr. Graham of Cambuslang, raised an action against the Duke of Hamilton, concluding for declarator, interdict, and damages by reason of the Duke and his lessees using certain underground roads and passages under the respondent's lands to convey coal from other estates of the Duke. The respondent, Mr. Graham, was proprietor of the lands of Cambuslang, which were feued from the Duke, who was proprietor of the barony, and superior. The conveyance dated 1657, to the respondent's predecessor, contained a reservation to the Duchess of Hamilton and her heirs and successors of all the coal and limestone of the said lands, and power to sink shafts, and win the coal and limestone under all the said lands, and free ish and entry to the same, she making satisfaction for damage done by the working of the coal. The Duke had large coalfields in Cambuslang, Clydesmiln, and Morriston, and his lessees were in the habit of carrying the Clydesmiln coal through the underground passages of Cambuslang to the opposite bank of the Clyde. It was to prevent this that the action was raised. The Lord Ordinary (Barcaple) assoilzied the defenders, but the First Division ordered the case to be argued before seven Judges, and a majority of five decided in favour of the pursuer—Lords Deas and Ardmillan dissenting; whereupon this appeal was brought.

*Sir Roundell Palmer* Q.C., and *Anderson* Q.C., for the appellant.—The interlocutor of the Court below was wrong. The property in the coal and limestone having been reserved out of the feu charter by the granter who had previously the *plenum dominium* of the lands, this necessarily implied, that the superior retained all the former rights vested in him connected with the underground strata. Coal thus reserved has been held to be a feudal estate—*Burly* v. *Syme*, M. 9630. It is true that he could not work the coal so as to endanger the surface, which was granted to the vassal; still all the other rights of property remained in him, subject to that qualification—*Dunlop* v. *M'Nair*, 20th June 1809, F. C.; *Proud* v. *Bates*, 34 L. J. Ch. 406. If then the whole property in the coal were retained by the Duke, he can use that property in any way he thinks fit, and may or may not work the coal. At the date of the feu charter, the Duke was working the coalfields of Cambuslang and Clydesmiln together, and might use one in connection with the other, and if he could do so before the charter, he can equally do so since the date of the charter. The object of the reservation was obviously to save such a right. In *Davidson* v. *Duke of Hamilton*, 1 S. 411, it was held, that the Duke was not prevented under a similar reservation from working coal in the adjacent lands in connection with the shafts made in the surface. The reservation does not amount merely to a privilege or servitude, but is an exception from the grant and is a right of property—Craig, ii. 8. 17; Menzies on Convey. 599 (3d ed.). Nothing that the appellant now claims interferes with the surface, and the surface was all that his predecessor conveyed away to the respondent's predecessor.

*The Lord Advocate* (Young), and *Pearson*, Q.C., for the respondent.—The interlocutor appealed

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[1] See previous report 7 Macph. 976; 41 Sc. Jur. 547. S. C. L. R. 2 Sc. Ap. 166; 9 Macph. H. L. 98; 43 Sc. Jur. 491.