

which he behoved presently to lay down over the board ere they would exped the gift to him. This quality being so heavy, made him doubt much if he should so accept the gift or no. This speaks the king's privilege of a tacit hypothec, by which the law prefers him to all others for his dues, though never so lawful creditors.—See June 10, 1631, and my marks there, *Peebles against Scot.*—See Manuscript E, *June 16, 1681, Broomhal*, page 202.

*Advocates' MS. No. 163, folio 95.*

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1671. *March 9.* SIR ANDREW RAMSAY of Abbotshall, *against* The LAIRD of Bogie.

THE lands of Abbotshall, Milnetoun, Bogy, Benochy, Basusney, Walkerlands, commony of the burgh of Kirkcaldy, and divers other lands lying thereabouts, being all ancient feus of the abbacy of Dumfermling, are clogged and affected in the very bosom of their original rights and infestments with this express burden and reservation, that it shall be leasum and lawful to the burgesses, indwellers of the burgh of Kirkcaldy, owners of the saltpans there, to dig, win, work, and carry away coals, limestone, clay, and quarrell, within any part of the bounds of the lands liable in manner foresaid, for furnishing of coal to the use of their saltpans; by which it appears the pans have been the oldest feu, and the foresaid lands being feued out thereafter by the abbot and convent, they reserved the whole coal for the use of the said pans. Henry Millar, James Turpie, and several other persons in anno 1632 having the heritable and irredeemable right of the saltpans within the burgh of Kirkcaldy, and consequently the sole right to the coal within the lands aforesaid, finding themselves unable to compass so great a design as the bringing of a coal to be a workable coal, and that it would require a person of substance and power to effectuate it, they enter in a transaction with the Earl of Dalhousie, then heritor of Abbotshall, by which they dispone to him the hail right they and their predecessors have or derive from the monastery of Dumfermline, to the coal not only within his own lands, but also within Bogie and the hail other lands, which by their old infestments stand liable to them in coal; providing he furnish them coals for the use of their pans at such reasonable rates as he and they should agree upon from time to time. In prosecution of which right the Earl in 1637 did put down an eye within his own lands, (and as they say, did cost L.10,000 Scots in the whole,) brought it to be a workable coal, and conform to his agreement with the pan owners, he served them upon their own expenses. Notwithstanding of this right in the Earl of Dalhousie's person, Sir John Weimes of Bogie, in anno 1646, clandestinely procured a signature from his Majesty, ratifying to him four saltpans, the right whereof he had acquired from the pan-owners; and withall takes a gift from his Majesty, (as having succeeded in place of the commendator,) of the whole coal within the bounds of the hail lands, standing obliged by their original feu charters, to furnish coals to the saltpans of Kirkcaldy; and in a compliment, forsooth, sends a discharge of this his gift, in so far as it might extend to Abbotshall and Westmilne, to the Earl of Dalhousie.

In this posture affairs stood till Bogie having of late acquired the right of two other saltpans, and grudging that Sir A. Ramsay (who had succeeded in the right

of the lands of Abbotshall, &c. to the Earl of Dalhousie,) should have the benefit of the renunciation foresaid, and calling to mind it was allenary of the right he had to the coal by virtue of that charter 1646, and so would not meet any new gift of that coal if he should acquire the same; therefore, he causes draw a new signature, ratifying all his former rights to the pans and coal, with a *de novo damus* of the coal within the hail lands of old liable, and *per expressum* of the Westmilne and Westmilne lands, which is Abbotshall, thinking this way to evacuate and elude his bond or discharge; this signature he was to get past by my Lord Dumferling's moyen, for which he was to pay him a sum of money. This coming to Sir A. Ramsay's knowledge, out of a principle of pure and absolute necessity, and for mere self preservation, he procures the just double of Bogie's intended signature (only *mutatis mutandis*) past his Majesty's hand in his own favours; narrating the pan-owners' right, both to pan and coals, their disposition of the whole affected coal to the Earl of Dalhousie, Bogie's renunciation of his signature 1646, and giving to Sir A. the right of bigging new pans, not only within the bounds of his lands, but within the town of Kirkcaldy, and giving him the hail coal, not only within his own property, but within all the lands contained in the pan-owners' disposition.

Sir A. having presented this his signature to be past in Exchequer, the Laird of Bogie stopped it, craving to see, which was granted; and being heard thereupon, he declared he was content the gift should pass for the coal within Sir Andrew's own land; but for the salt pans and the coal within his lands of Bogie, and all the other lands above mentioned, he alleged he had a prior right thereto, by virtue of his charter 1646, whereupon infestment had followed.

To which it was ANSWERED,—That Sir Andrew would not controvert his right to four salt pans, he making it appear he derived his right thereto from the pan-owners; but for the coal, his gift thereof from the king in 46, could not be respected, because any right the king could lay to that coal was as coming in the place of the commendator of Dumfermline; but *ita est*, if the said commendator and convent were debating with Sir Andrew, he would exclude them eternally, in so far as they were denuded of any right they had to that coal in favours of the pan-owners of Kirkcaldy, which pan-owners in anno 1632, fourteen years before Bogie's signature, disposed their right to the Earl of Dalhousie, in whose right Sir Andrew has now succeeded; and so Bogie's right to the coal proceeds *a non habente potestatem*.

REPLIED,—That the pan-owners' right to the coals within Abbotshall, Bogie, and the other lands above written, was not a right to the property of the coal, but allenary a servitude upon the coal within these lands, affecting them to the pan-owners for pan-wood, and the superplus of the coal was reserved to the convent, to dispose upon at their pleasure; so that the king, upon the suppression of the convent, having come in their place, had undoubted right to all that superplus; and, consequently, it must belong to Bogie, the king's donatar therein. And for the disposition 1632, made by the pan-owners to the E. of Dalhousie, the same is evidently null, in so far as all the right they had to the coals, within the bounds mentioned in that disposition, being only a servitude, in so far as may serve their salt-pans, they could not dispoise the same in part without the pans; but the Laird of Bogie, who has since acquired the right to the pans, must also have the sole right to that servitude of coal and pan-wood, else how should the

pans be served? they should fall to ruin, and the king shall lose his feu-duty, payable to him yearly furth thereof.

TRIPLIED,—It is a great mistake, that the pan-owners' right to the coal is only a servitude, whereas, to the contrary, by the feu charters of Abbotshall, Bogie, and others, the very property of the coal is reserved to them; and for the ruining of the salt-pans that is but *ab incommodo, et incommodum non solvit argumentum*. Bogie, for proving of his reply, produced a contract betwixt Robert Pitcairn, commendator of Dumfermling, and the convent, and twenty or twenty-three burgesses of the town of Kirkcaldy, owners of the salt-pans within the said burgh, dated at Dumfermling, the day of January, 1575, wherein the said commendator and convent, for sums of money paid them, confess, as notourly known to them, that the said pan-owners and their predecessors were duly and lawfully infest in the salt-pans, houses, girnells, yairds, &c. by the convent of old, for the time heritably in feu-farm, for payment yearly of eight bolls of salt, and forty shillings money for ilk pan, and acknowledge the payment of the said salt penny maill for all years preceding that contract; and because of the late troubles, *viz.* the pest in Kirkcaldy in 1574, and by the French their coming into Fyffe from Leith with Monsieur Dosell in 1560, all their evidents and infestments are perished, and not now gettable, at least some of them, being then hid under ground, were now so consumed as they were not now legible; all which consisting in the convent's special knowledge, therefore they oblige them to infest and seize the said persons and their successors of new ilk ane for their own parts, as is therein divided, to be holden of the convent in feu-farm, for payment of the above-mentioned duty, they doubling the feu-farm at the entry of each heir; and some of them are ordained to be infest in half pans, and some in whole pans, and there will be in all above twenty pans. Then their infestments are appointed to contain licence and full heritable liberty to the said owners, their heirs, and assignees, to win coals and pan-wood, for serving of the said coals in any part of the bounds of the lands of Abbotshall, Myletown, Bogie, Bennoch, Balsusney, Smeiton, commonty of the burgh of Kirkcaldy, borrow acres, feu acres, East Milne and West Milne lands, wherever they please, &c. *item* with liberty to them to seek clay, quarrell, and limestone, within all the bounds from Ravenscraig on the east to the Westburnmouth on the west. *Item*, if any new pans besides these disposed be bigged, then that the pans already bigged be first served with coals, and if any want, through scantiness of coals, that it be the new pans; *item*, the convent are to have their coal greives concurring with the owners' coal greives, to the effect they may perceive what pan-wood, with fire to the owners, and polkfulls foresaid, shall be necessary for their staking, that the rest and superplus of the daily coals, to be win and brought to the coal-heughs within the said commonty of Kirkcaldy, shall come to the utility and profit of the said commendator and convent; at the least, that it may be in their option to bestow the same on the owners or not. This contract proves noways the allegiance made by Sir John Cunyghame, except only for the superplus of the coal win within the commonty of the burgh of Kirkcaldy, and scarce for that. For, *1mo*, there is not one word of a servitude in all this contract, but a full and heritable licence to the owners to use that coal for their pans. *2do*, That the very property of the coal is affected to the pans appears by this, that besides the twenty pans here disposed, new pans may be bigged, and which pans must all also be served by that same coal; now, if it were a servitude only the pans had, there

could be no new pans bigged, seeing that way they will do more than exhaust the whole coal within the foresaid lands ; and so the property should be altogether useless to the heritor, for *non aliter licet uti servitute nisi secundum modum a domino fundi concessum*; next the heritable licence of winning coal is given to them, their heirs, and assignees.

Bogie also ALLEGED,—That Dalhousie's accepting the discharge 1646, was a clear concession he had no right to that coal himself, and a homologation of Bogie's new acquired right. But this did not deserve an answer. Sir G. Lockhart was of opinion that Bogie's renunciation, (though it renounce only all right he can lay to the coal of Abbotshall by virtue of that signature,) yet that it would have defended against any new right he should acquire to that coal thereafter, because he being Dalhousie's author in that renunciation, he could do no deed in prejudice thereof, and he behoved to warrant it; of this I am not so clear. The Lords of Exchequer refused to remit the discussing of the competition of rights to the Judge Ordinary, and in the mean time to pass the signature, which is their ordinary practice in the like cases, (as was desired by us,) but delayed to give any answer till Sir Andrew should produce the pan-owners, (who be authors to the E. of Dalhousie,) their rights. They should have considered the 51st act of the Parl. 1661.

*Advocates' MS. No. 164, folio 95.*

1671. June 10.

LORD DRUMLANRICK *against* SCOT.

THIS Scot having adjudged the lands of one of my Lord Drumlanrick's vassals, upon the renunciation of the apparent heir ; and having charged my Lord to infeft him thereon, he suspends upon this reason, that being superior, it is leasum to him upon payment made to the creditor of all his just sums, to take the lands to himself ; which he is content to do ; and, therefore, craves the adjudger may assign him to his diligence. And though this be an adjudication led before the act of Parliament 1669, which equiparates *in omnibus* adjudications to comprisings, (and so by it there can be no doubt of adjudications after the act,) yet the *ratio* being *eadem*, and no imaginary disparity assignable why the superior should have right more to use that method with the appriser, than an adjudger, we must say the same law obtains in both.

The Lords found a superior might redeem a creditor adjudger ; but if he did he should have no year's rent. Neither when the debtor comes to redeem the lands from him within the legal shall he get deduction or retention of a year's rent ; so that the debtor is bettered by the superior taking the right of the said diligence, than if it had stayed in the person of his creditor.

*Advocates' MS. No. 165, folio 97.*