No 23.
A superior in granting a feu of land reserved to himself a right to the coal. Found, that the feuers were entitled to surface damages, though there was no stipulation to that purpose.

1788. *November* 21. DUKE of ARGYLE *against* FEUERS of SHEARDALE.

IN a precept of *clare constat*, granted by the family of Argyle in 1679, in favour of the heir of a feuer of their lands of Sheardale, the following reservation of coal was inserted, and it was repeated in the after deeds of transmission: 'Et reservando nobis, nostrisque predict omnes carbones et carbonarias 'dict. terrarum, cum libertate nobis fodiendi carbones in aliqua parte dict. ter- 'rarum, exceptis domibus et ædificiis desuper ædificat. et ædificand. ac hortis et 'pomariis desuper existen.'

In 1740, when for the first time, coal-pits were dug in the grounds, or the surface occupied by coal-hills, the lessee of the coal agreed to make some compensation on that account to the proprietor of Sheardale, as succeeding lessees likewise did; and in some instances the proprietor's claim was enforced by the sentence of the Sheriff. But the Duke of Argyle was not a party either to the transactions or to the law proceedings. It appears, however, that in a late instance the Duke had taken the tacksman of his coal bound to pay his tenants and vassals such surface damages as might be warranted by the tenor of the feus and leases, or by law.

The Duke and his tacksman having brought an action of declarator of immunity from that claim of indemnification, they

Pleaded; The reservation of a right to work coal is the same in effect as a new grant of that right, which would plainly imply every power necessary for the exercise of it; *omnia sine quibus explicari nequit.* Damages then cannot be due on account of such exercise. That claim would suppose something done contrary to right; and, if it were well founded, the consequence would be, that the pursuers had no right to this coal; whereas the existence of that right is admitted. The inconsistency here is the same as if the subject of the reservation had been a right to feal and divot, or to a road, and indemnification notwithstanding were then demanded. Besides, the power of digging pits, *fodiendi*, is expressly given; and the exception of houses and gardens, where the damage would be greatest, denotes that less damage was not be considered. No decision of the Court, contrary to this plea, has been pronounced, though in the case of a lease of lands the tenant has been found entitled to surface-damages. For he having, by his lease, an express right to all the surface, for every part of which, indiscriminately, the rent was to be paid by him, it was thus implied, that without indemnification he could not be deprived of the use of any part.

Nor are the trivial concessions of former tacksmen, whose motives cannot be certainly known, nor their chusing to decline litigation, matters in which the family of Argyle had no participation, to be understood, to change the nature of the right, still less by prescription to establish an opposite one. As to the obligation lately laid on the tacksman of the coal, it is a mere hypothetical sti-

No 23. pulation, *ob majorem cautelam*, which by no means imports any acknowlegement of the justice of the claim.

Answered; The maxim, that whatever is essential to the exercise of a right must be held as accompanying it, is fully admitted, when the pursuer's title to dig coal-pits, and to perform the other requisite operations on the defenders' grounds is acknowledged. But it cannot thence follow, that the damage done by the means employed for exercising the right ought not to be repaired. The maxim demands that only which, if with-held, would operate to the annihilation of the right granted; but here the right to coal is as fully exercised, when indemnification of the surface damage is made, as if it were denied.

Though no decision on the point in question with respect to vassals appears, it has been determined in regard to tenants, they having been found entitled in such cases to surface-damages; 15th February 1668, Colquhoun *contra* Watson, *voce* TACK; 21st June 1768, Smith *contra* Hamilton Macgill, IBIDEM. Nor does it seem reasonable to ascribe so much as has been done, to the distinction between an express or conventional reservation in the case of vassals, and a presumed or legal one in that of tenants. In liferented lands the law gives to the proprietor the sole right to coals or other minerals; but surely the liferenter would not be denied reparation of the damage thence arising. In like manner, when in the division of a commonty mines and minerals are reserved to the proprietor, it is understood that he must make compensation for the loss of surface thereby occasioned. Such indemnification as that now claimed, is believed to be universally granted, nor otherwise, in small properties especially, could the working of coal or other minerals be reserved without absurdity, the right granted being thus subject to annihilation at the pleasure of the granter. For here the pursuer's maxim may be retorted on themselves.

The actual payments by the tacksman, sometimes judicially compelled, are not to be presumed to have been unknown to the Duke; while the stipulation in the tacks seems an open recognition of the claim.

THE COURT, on the Lord Ordinary's report, found, 'That the pursuer had a 'right to work the coal under the lands in question, in terms of the reserva-'tion in the feu-rights granted by him or his ancestors, without being liable in 'damages to the defenders or their tenants, occupiers of the surface.'

Afterwards a proof of the practice having been allowed and taken, the cause was again reported, when a majority of the Judges deemed the proof inconclusive. Yet as the Bench was divided on the general point, it is by no means clear, that the circumstance of usage had not an influence on the subsequent determination, by which

THE COURT sustained the defences, and assoilzied the defenders.

Reporter, *Lord Hailes*. Act. *Advocate, Craig*.
Alt. *Dean of Faculty, Rolland. J. Erskine*. Clerk, *Home*.

S. *Fol. Dic. v. 3. p. 306. Fac. Col. No 46. p 80.*