of the Earl of Kelly in 1671, give this express right, which, joined to possession distinctly proved, make a title in the respondent by the positive prescription. While the appellant, if he ever had a right, has lost it by the negative prescription.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Sir J. Scott, R. Dundas, Alex. Anstruther.*
For Respondent, *J. Anstruther, W. Adam.*

EARL OF WEMYSS, ... *Appellant;*
SIR ARCHIBALD HOPE, . . . *Respondent.*

House of Lords, 24th Oct. 1796.

LEASE of COAL—RESERVATION CLAUSE—RES JUDICATA.—Held, by the terms of a lease of coal to a tenant, allowing him to work the coal within the barony of Woolmet, excepting that part of the coal which lies within the parks, gardens, and enclosures of Woolmet belonging to the appellant, that this exception or reservation did not entitle the appellant to sink pits and work coal within these grounds; but was to be construed only as a clause to preserve his grounds from suffering injury by the general working of the coal by the respondent. This question having been so disposed of in the Court of Session, and an appeal taken to the House of Lords, but never moved in, and finally dismissed ten years previous to the present appeal: Held, that these proceedings did not constitute a *res judicata* in bar of the present action.

A lease of the coal of Woolmet was granted by the Magistrates of Edinburgh to John Biggar. The appellant is now in right of the Magistrates, and the respondent in right of Biggar. The renewal of the lease to the respondent contained a clause, in the exact same words as the original lease to Biggar, viz. :—" All and haill the coal that is within the " lands and barony of Woolmet and Hill, *excepting always* " *the coal lying within the parks, gardens, and inclosures of* " *the said lands and barony of Woolmet*, unless the consent " of the said Earl of Wemyss be first had and obtained " thereto."

The appellant conceiving, under the meaning and construction of the above clause, he had a right to work the coal within those grounds excepted and reserved, proceeded to sink a pit for this purpose, when the respondent applied

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by suspension and interdict, to have it stopped, alleging that this was not the true meaning of the lease; that the coal within the grounds excepted was reserved merely to prevent injury to these grounds from working it; but did not reserve to the Earl a right to work that coal himself; but, on the contrary, as was evidenced from the clause, "unless "the consent of the Earl of Wemyss be first had and ob- "tained thereto," if the coal was wrought at all, no one but the tenant was empowered to do so. The tenant was not to work that coal without the landlord's consent, neither was the landlord to work that coal during the lease. In point of fact, he stated that the Earl having, in sinking his pit, cut through a bed of gravel, a run of water was created, which, running down the pit, would communicate to the respondent's workings, and be for ever drawn by his engine.

The Lord Ordinary remitted to men of skill, who reported that "the sinking of this pit would have the effect of com- "municating *an additional quantity of water* to Sir Archi- "bald Hope's engine from the surface of the earth, and "from cutting through the various strata of metals between "the surface of the coal." And upon this report, and also upon the construction of the lease, the Court held that the appellant was not entitled to put down pits within the parks and gardens of Woolmet. An appeal was taken to the House of Lords, but never moved, and in consequence dismissed. When, ten years afterwards, the appellant again raised the question in the present declarator.

Dec. 11, 1792. The Lord Ordinary, of this date, pronounced this interlocutor:—"Repels the preliminary objection of a *res judi-* "*cata* in this case: And upon the merits of this cause, after "giving what the Ordinary thinks a fair and rational con- "struction to the original lease in 1723, by the town of "Edinburgh to John Biggar, his heirs and assignees, and in "particular to the excepting clause in that lease, which "gives rise to the present question: Finds, that as by this "exception, the tenant was on the one side excluded from "working the coal, within the excepted grounds without the "consent of the master, so, on the other hand, it neither "was nor could be the understanding of parties, that the "master was to be left at liberty, during the currency of the "lease, without the consent of the tenant, to work those "coals either by himself or others, at discretion, which "might be attended with very prejudicial or ruinous conse- "quences to Mr. Biggar, or his successors, in the after-

"working of the main coal of the barony of Woolmet, con- "fessedly set to them without any imposition or restrictions, "and which appears to have been the ground upon which "the Court proceeded when they granted the interdict "which has been pled in bar of the declarator; and, there- "fore, on these grounds, assoilzies the defender." On re- claimining petition, the Court adhered. Feb. 12, 1793.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—As the lease contains a clause of "All and haill the coal that is within the lands and ba- "rony of Woolmet and Hill, excepting always the coal "lying within the parks, garden, and inclosures of the barony "of Woolmet, unless the consent of the said Earl of Wemyss "be first had and obtained thereto," this amounts to an abso- lute and unqualified reservation of the coal in question, and the appellant, as proprietor thereof, was entitled to work the same. And it is no answer to this to say, that the purpose for which this reservation was inserted was quite different from giving the landlord a right to work the coal, because the reservation, as explicitly expressed, is general and suffi- cient not only to comprehend this purpose, but all other lawful purposes. The respondent admits that he has no title to work the reserved coal himself. It is equally clear that such a reservation, in a lease, must always have in view a right to work on the part of the landlord, especially where there is nothing mentioned expressly to exclude this: And what the respondent aims at is to obtain a monopoly of his coal to the exclusion of the landlord's right.

Pleaded for the Respondent.—The original purpose of re- serving the coal was to give the proprietor a surety that his parks and inclosures of Woolmet would not be damaged from working; but it is quite clear from the meaning of the lease, that the *whole* coal of Woolmet was given in lease to the respondent, except the right of working that part of it under the parks and gardens of Woolmet, without the pro- prietor's consent. This last clause, "unless with the pro- "prietor's consent," showed that the *whole* coal was let, and it would, in these circumstances, be extraordinary, and not consistent with the true *bona fides* of the transaction, to see both the proprietor and lessee working the same coal; or after a lease to a tenant, for the landlord to work the coal as here intended, to the great injury and probable destruction of the tenant's right. Such was never the intention by the original lease, nor by the renewal of it to the respondent.

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After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed, with £100 costs.

For Appellant, *Sir John Scott, Wm. Tait.*
For Respondent, *R. Dundas, W. Grant, Wm Dundas.*

NOTE.—Unreported in Court of Session.

JOHN SMART, ... *Appellant;*
The Hon. WALTER OGILVY, . . . *Respondent.*

House of Lords, 26th October 1796.

SALE BY SAMPLE IN OPEN MARKET—LANDLORD'S HYPOTHEC.—The appellant, a corn merchant, purchased from the respondent's tenant, a farmer, a quantity of grain by sample, in public market. Part of the grain was delivered, and bill granted for the price, and was paid. On failure of the tenant, Held, in an action raised by the landlord *against* the purchaser of the grain, that the latter was liable to pay the value of what was delivered, the landlord having a right of hypothec over the same for the rent of which it was the crop; and this, although the claim was not made *de recente*, but *ex intervallo* of two years.

The respondent was landlord of a farm, rented by James Inverarity as tenant, from whom the appellant, a farmer and grain and corn factor, purchased, on 25th July 1789, a quantity of grain by sample, in public market. A bill for £60 (part of the price) was given on the occasion. But only part of the grain was delivered, not amounting in value to the £60 bill, when embarrassed circumstances prevented Inverarity from delivering the remainder.

In February 1791, a year and seven months after the sale and delivery of part of the grain, the respondent (Inverarity's landlord) raised an action against the appellant, setting forth that his tenant was owing him £125, as the half year's rent of the farm, for crop 1788, payable at Martinmas 1789, and, as by law, the corns growing on the farm are hypothecated for the rent of that crop of which they are the product, the intromitters and purchasers from the tenant of such