

1590.

HUGH SOMMERVIL *against* DICKSON.

IN a removing pursued by Hugh Sommervil against a woman called Dickson, to flit and remove from a coal in Gilmorton : alleged, That the coal-heugh was in the lands pertaining to the Lord Sommervil and the Laird of Niddrie, *pro indiviso* ; so that the coal under the earth behoved to be ruled according to the superficies of the land above the earth ; and so the defender could not remove before the division. The Lords found that the consequence was not good, *viz.* that the division of coals should be ruled like that of the land ; for they are things that are divided *numero et mensura*, by chalders and loads that come out of them ; and so decerned to flit and remove.

*De Carbonibus et Carbonariis, vid. latè Cr. l. 2. D. 6.*

Page 38.

1590. DAVID BALFOUR *against* The COMMENDATOR of CAMBUSKENNETH.

DAVID Balfour pursued the Commendator of Cambuskenneth for spoliation of a bonnet-case, wherein there was contained an obligation made to him by the commendator, for setting to him a nineteen years' tack of the teinds of the kirk of Tullibody, &c. The spuilie being proven, the quantity thereof was referred to the pursuer's oath ; which being taken, and decret given thereto, the commendator pursued him to hear and see the said decret declared null, in respect that it was *ultra libellata*, because David had given his oath otherwise than was expressed in his summons ; for, in the libel, he made mention of an obligation made for setting of a tack to David Balfour, elder, his heirs and assignees, with this limitation,—*when the commendator had power to set tacks of the lands* ; and in his disposition he declared the tack should be set to David Balfour, elder, and to David Balfour, younger, his heirs or assignees, without the foresaid limitation, *et sic ultra libellata*. Answered, That the decret ought to be taken away *via ordinaria* by reduction, and not by way of nullity. The Lords found that the declaration could not debord from the libel ; and, in so far as it was otherwise, found the decret null in that part, but not *in totum*.

Page 89.

1590.

ELPHINSTON *against* BALFOUR.

DAVID Balfour having used certain executions of a summons, which were civilly improven before the commissaries, Michael Elphinston obtained the gift of his escheat, and thereupon intended a special declarator. Alleged by David, That his goods could not fall under escheat, except he had been convicted criminally of falsehood. Yet the Lords found the contrary.

Page 165.