

the proprietor of a coal, who may be bankrupt? These are mere words. There is a feu-duty of L.150 in this case; but there might have been a feu-duty of five shillings, which would have been no security. Surface damages are generally and probably not attended to. The damage done to the house was *ex debito*. Mr Clerk ought not to have wrought under the house; and Mr Simpson ought to have stopped him by suspension. I think that, whenever the coal and the superiority part, the damage must be paid by the proprietor of the coal.

PRESIDENT. The rule proposed is a simple one, but I doubt how far it can be adopted. The Marquis of Lothian is in the same case as Lord Ross; that is admitted. Suppose that the Marquis of Lothian and Mr Simpson, instead of being superior and vassal, had been master and tenant; the Marquis exercises the right of working coal; Mr Simpson demands damages; the Marquis of Lothian says, "I have taken a sum of money, and have sold the coal to Mr Clerk." Mr Simpson might say, "That is nothing to me; you cannot relieve yourself from your obligation." What is the difference here? What is Mr Simpson's security? Unless the security be over the whole subject it is none at all. The nature of feu-contracts seems not sufficiently attended to. The superior cannot, by the exercise of reserved powers, make the condition of his vassal worse.

On the 7th December 1790, "The Lords repelled the defences;" altering their interlocutor of the 27th January 1790, and adhering, in substance, to the interlocutor of Lord Dreghorn.

*Act.* William Tait. *Alt.* M. Ross.

*Diss.* Swinton, Rockville, President.

*Non liquet*, Stonefield, Monboddo.

*N.B.* I was in the Outerhouse when the former interlocutor was pronounced, so there are no notes on the 27th January 1790.

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1791. *January 22.* COLONEL ALEXANDER BRUCE *against* HENRY DAVIDSON.

MEMBER OF PARLIAMENT.

[*Folio Dict. III.* 436; *Dict.* 8881.]

PRESIDENT. In the case of *Stewart*, I wrote for the receiving of explanatory evidence, and was unsuccessful. In the case of *Gordon of Whitely*, I wrote against the receiving of explanatory evidence, and there also I was unsuccessful. The claimant ought to have produced *prima facie* evidence, connecting his lands with the valuation, though that evidence might hereafter turn out to be

erroneous ; but here the evidence is not *ex facie* good as to the estate of Bal-michael.

JUSTICE-CLERK. If new evidence were not to be admitted as well for as against the claimant, great injustice would be done : men might be put on or kept off without cause. The freeholders have not time nor opportunity for expiscating a number of facts which, upon more deliberate inquiry in this Court, may be discovered, and prove material.

On the 22d January 1791, "The Lords repelled the preliminary objection."

*Act.* G. Fergusson. *All.* W. Robertson.

*Diss.* as to specialty, Hailes, President.

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