

force the Council to consent, if they could not show reasonable grounds of their dissent; in the same way as a woman, when she is left a provision upon condition she marry with consent of certain persons, can force, by process, these persons to consent to her marriage, unless they can show good reasons for not consenting.

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1739. December 8. DUKE of ARGYLE against SIR ALEXANDER MURRAY, &c.

[Elch., No. 1, *Regalia*; Kilk., *ibid.* No. 1.]

THE question here was, about the property of mines found in Sir Alexander's ground, whether they belonged to the Duke, the superior, or to Sir Alexander, the vassal?

Both of them had grants from the crown of all mines within their lands and heritages; but, as the extent of these grants was to be regulated by the Act of Parliament 1592, about mines, the whole question turned upon the meaning of that Act. By this Act, (which is among the unprinted Acts,) the mines, which, by the Act of James I., were the property of the crown, were dissolved from it, and the king was empowered to set in feu-farm to every *earl, lord, baron, and other freeholder*, all and whatsoever mines found, or to be found, within their own lands and heritages, with this proviso, that, if the lord of the ground, being advertised of mines in his lands, refused to work them, then it should be lawful to the king to set them to any body else.

For the Duke, it was argued that the word freeholder denoted the immediate vassal of the crown, not the sub-vassal of the crown: that this was the uniform language of our statutes: that, in the Acts imposing taxations, freeholders are expressly distinguished from feuars and sub-vassals,—Act 281, *anno* 1597; Act 2, *anno* 1621: that, not only in the Acts relating to levying of taxes and the constitution of Parliament, does freeholder denote an immediate tenant of the crown, but likewise in other Acts which have no concern with either of these two things; *e. g.* 71 Act. p. 14, Ja. II., whereby lords, barons, and freeholders are allowed to set their lands in feu-farm; and even in the year 1593, which was the year immediately after the Act in question was made, the word freeholder denotes the immediate vassal of the crown, and is used in contradistinction to a great baron. And lastly, as, by the Act 12th Ja. I., the mines were taken from the Lords of Parliament and given to the king, so it is most probable, and ought *in dubio* to be presumed, that, by the Act 1592, they were given back to those from whom they were taken, *viz.* the Lords of Parliament, *i. e.* the immediate tenants of the crown.

To this it was ANSWERED, That freeholder signified the same with heritor or proprietor of lands; which signification is established both by the authority of our most ancient law-books and lawyers; [see Skene (who lived at that time,) his annotation upon the word *Baro*, in cap. 1, b. 3, of Malcolm II. statutes. See likewise those statutes, cap. 8, § 7, and cap. 9, (with the *Quoniam Attach.*, cap. 45 and 46,)] and by the constant style of our statutes, Act 54, p. 8,

Ja. III.; Act 19, Parl. 1641; Act 35, Parl. 1, c. 2.\* *2do*, Were there any ambiguity in the word freeholder, it is sufficiently explained by other words in the statute, wherein mention is made of mines found within *their own lands and heritages*, and *within the lands pertaining to any subject of this realm*; of the Lord† of the ground, (which, by Skene, under the word *Feodum*, is rendered proprietor of the ground,) and *Owner of the ground*. So that the question comes to be, Whether Sir Alexander Murray's lands belong to himself, or to the Duke, his superior? *3tio*, By the preamble of the Act, it appears to have been intended for the benefit of all the lieges who should undertake to discover and work mines within their grounds, and is not alone calculated for the benefit of superiors.

The Lords found that the word freeholder denotes any proprietor of lands. Dissent. *Preside*.

N.B. The narrative of the Act 1592 bears, That all mines belong to his Majesty; which contradicts Act 12, Ja. I., and is either erroneous or relates to ancient times, before Malcolm II. feued out the lands of Scotland.

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1739. December 11. WILKIE against ———.

The question here was, Whether a sasine given within burgh, by the bailies, with the town-clerk subscribing as notary, to a singular successor upon a disposition and resignation, was of itself a good foundation of a possessory judgment, without any adminicle whatsoever, such as a disposition, procuratory of resignation, or precept of sasine?

The Lords found that it was; upon this principle, that any sasine whatsoever, though wanting adminicles, is so. It is probable that the Lords would sustain a sasine within burgh without adminicles, to be good *in petitorio* as well as *in possessorio*, as resting upon the faith of the bailies and town-clerk; which distinguishes it from sasines in landward. See Dec. *Wilson* against *Stuart*, July penult. 1629, (reported by Durie,) and the decision there quoted.

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1739. December 11. CREDITORS OF BALQUAN against MISS CUNINGHAM.

[Elch., *Faculty*, No. 5; Kilk., *ibid.* No. 2; C. Home, No. 134.]

It being established by decisions, that a reserved faculty of burdening an estate inserted in a disposition would not create a real right upon the estate

\* In the inscription of Parliament 7th, Ja. I., there are mentioned *libere tenentes, qui de rege tenent in capite*.

† This is the meaning of the word *Lord* in several statutes, Act 126, Ja. I., Act 18, Ja. II.