

No 57.

An abbot granted a feu of lands reserving to himself and successors a right to win coal for their own proper use. It was argued, this could descend only to the abbot's successors in the abbacy. Found he could convey the privilege to other singular successors.

1662. November 25. LORD BURGHLY against JOHN SYME.

LORD BURGHLY, and his authors, being infeft by the Abbot of Dunfermline, in the coal-heugh of Keltie, with power to win coals within the bounds of the lands of Cocklaw and Losodie, pursues John Syme, heritor of Losodie, for declaring his right to win coal in Losodie. The defender *alleged*, Absolvitor, because he and his authors were infeft in the lands of Losodie, with the pertinents, above the ground, and under the ground, long before the pursuer's author's right. The pursuer *answered*, That the defender's infeftment could not furnish him right to the coal of Losodie; because it bore no power to win coal, but being only a feu, which is a perpetual location, it reaches not to coal, not being expressed; especially, seeing in the *tenandas* all the ordinary privileges were expressed, even of peat and turf, and coal was omitted, and because the charter bore expressly a reservation to the Abbot, and his successors, to win coal in Losodie for their own proper use allenary. The defender *answered*, That the right of the land being feu, with the pertinents, did extend to coal, albeit not expressed, seeing it was not wholly reserved, according to Craig's opinion; and for the reservation, it did further clear the defender's right, that seeing the Abbot reserved only power to win coal for his own use, *exceptio firmitat regulam in non exceptis*, whereby the defender had right to the remanent of the coal; neither could the exception extend to the pursuer, but only to the Abbot, and give to his successors only, to those succeeding in the abbacy, viz. the Earl of Dunfermline. The pursuer *answered*, That the defender's infeftment was confirmed long after the pursuer's, and that the defender's confirmation was not of the first feu, but of a second right from the first feu, and by the act of Parliament anent feus, it was declared, that feus since March 1658, not confirmed by the King before 1584, were null; at least another act of Parliament bore expressly, that where there were diverse feus granted of the same thing, the first confirmation with the last feu should be preferable.

THE LORDS found the defence founded upon the defender's rights, relevant, and proved thereby; and therefore found the pursuer had only right to win coals in Losodie for his own use, and found the pursuer successor to the Abbots by his infeftments of the said privilege of winning coal in Losodie for his own use only; and found (as to) the said acts of Parliament, that by the late act, the right of the ancient possessors, and kindly tenants was reserved; so that if they did not confirm before the year 1584, they were only liable for a greater feu-duty, wherein the pursuer not being superior, had no interest; and found the defender's infeftment, that his authors were kindly tenants, and had a 19 year tack before the feu. See No 10. p. 9630.

*Fal. Dic. v. 2. p. 78. Stair, v. 1. p. 146.*