tinguishing the revenue and capital account. That would be a long inquiry to enter into in such a question, what has been the conduct of the company. The present question is, whether certain funds, amounting to £520,000, raised under three different Acts of Parliament, are going to be misappropriated by the directors, and whether, therefore, it is necessary to prevent them by interim interdict from doing so. The complainer says—You have been guilty of so many irregularities that it is probable that you will do it. The respondents say—The only thing in reference to this fund is easily explained. A portion has been credited to revenue, but that is for the purpose of replacing revenue that has been lent to capital. The parties are therefore at variance as to what has been done, and all I can say is, that I don't see sufficient reason to think that the company are going to commit the illegal act complained of. On the whole, I am for refusing the reclaiming note.

Lord Deas—The whole question is as to interim interdict. That question is raised by a shareholder holding £500 of stock. There are other shareholders who hold stock to the amount of twenty millions, and it is obvious that their interests are very deeply concerned in the matter. However small may be the interest of the complainer, he is entitled to have it protected, and if he had offered caution to the holders of the twenty millions for the injury they might sustain through the granting of the interdict, that would have been a circumstance that would have entitled him to very great attention. But he offers no caution at all, and the consequence is that if he gets his interim interdict, the other shareholders have nothing to rely on but his personal responsibility. On the other hand, the company say they are ready to give him caution for any injury he may sustain through refusal of the interdict. He does not think it worth his while to accept that, being satisfied no doubt that the company is responsible without caution. This is not immaterial in the present case, and it would require a very strong *prima facie* case to entitle him to interim interdict. I entirely concur with your Lordship, and therefore I don't think it necessary to go into the details of the case. I shall only say that there is no strong case stated here by the complainer for our granting interim interdict, which might be attended with such serious consequences to the holders of the twenty millions of stock, while he remained perfectly safe. What right he may have, he may vindicate by other modes of procedure. This is a summary process, and is not his only remedy. He may bring a declarator, or he may adopt some other form of procedure, but I think he has not stated such a case as would entitle him to the remedy which he now asks.

Lord Ardmillan—I am of the same opinion. This is simply a question of interim interdict. The interposition of this court by way of interim interdict, at the instance of one shareholder, is a matter of extreme delicacy, and is only to be sanctioned in cases of necessity. It is a valuable part of our law that the Court has power to grant interim interdict, but that is only granted for the purpose of preserving existing rights until the question is fairly tried. I quite agree with your Lordship in thinking that there is no case in which interim interdict has been granted against a proceeding which has been completed. There is neither reason nor authority for such a thing.

The second part of the claim stands on a different footing. My view is that parties are widely at issue as to the facts with regard to the conduct of the company, and we have no sufficient ground on which we are called upon to stop the proceedings of the company at the instance of a gentleman who offers no caution, and declines the caution offered by the other party. That is a very important circumstance in the case. On the whole matter I am for adhering.

Lord Curriehill declined.

Agent for Complainer—Wm. Mitchell, S.S.C.

Agents for Respondents—Hope & Mackay, W.S.

Thursday, May 21.

A., PETITIONER.

Expenses—Husband and Wife—Proof. In an action of divorce, the Court, on the petition of the pursuer, before the calling of the summons, granted commission to be executed in London or Liverpool for examining a witness about to go abroad; and, on the motion of the wife, defender, awarded her £10 of expenses for attending the examination.

A. brought an action of divorce against his wife, and, before the summons was called, he petitioned for a commission to examine an important witness, who was presently resident in London or Liverpool, and was about to go abroad. He alleged that the witness could not attend in Edinburgh, and craved his appointment of a commissioner in London and in Liverpool.

Fraser for petitioner.

Trayner, for respondent, did not object to the commission being granted, but asked an award of expenses to enable the respondent to attend at the commission.

The Court awarded £10 of expenses, and appointed the petitioner to give three days' intimation of the proposed examination of the witness to the respondent and co-respondent.

Agent for Petitioner—J. S. Darling, W.S.

Agents for Respondents—Duncan & Dewar, W.S.

Thursday, May 21.

FLEEMING *v.* HOWDEN.

Property—Entail—Superiority—Reservation—Mines and Minerals—20 Geo. II., c. 51—Prescription. In 1753 an entailed proprietor granted a feucharter, reserving minerals. In 1811, under 20 Geo. II., c. 51, the vassal obtained a disposition of the superiority of his lands in usual style. *Held* that this deed did not convey the minerals, there being neither intention on the part of the granter, nor authority under the Act, to convey anything but the superiority, but that the minerals remained with the heir of entail as a separate property.

In 1857 Lieutenant-Colonel John Fleeming of Biggar and Cumbernauld, heir of entail in possession of the earldom of Wigton and barony of Cumbernauld, brought this action against the Right Honourable John Lord Elphinston, concluding (1) for declarator that all the mines and minerals, excepting stone and lime, in the defender's lands of Auchinkilns, Thorn, and Chapelton, part of the earldom of Wigton, lordship and barony of Cum-

bernauld, belonged to the pursuer as heir of entail in possession of and feudally vested in the said earldom, lordship, and barony, and that the pursuer had right to work the same, paying all surface damages. The title of the pursuer was then set forth, and there was (2) a conclusion for reduction of the defender's titles to the superiority of the said subjects, in so far as these could be held to include the minerals; and (3) a conclusion for interdict against the defender working the minerals.

The Lord Ordinary (MACKENZIE), on 5th February 1859, pronounced an interlocutor finding that, under a disposition in 1811 and following deeds, the defender acquired an *ex facie* valid title to the property of the minerals reserved by the superior in the original feu-charter granted to Archibald Robertson in August 1753; that the pursuer was barred by the negative prescription from challenging the said disposition of 1811 or following deeds, either on the ground that it was *ultra vires* of the granter, or that it was granted under essential error; and assoilzied the defender. The pursuer reclaimed, and after a hearing on the reclaiming note, cases were ordered. Before judgment on the cases the defender died, and various other changes took place among the parties to the action. The action was now insisted in at the instance of Cornwallis Fleeming against James Howden, trustee on the sequestrated estate of John Fleeming, afterwards Baron Elphinstone.

PATTISON and J. MARSHALL for reclaimer.

SOLICITOR-GENERAL (MILLAR) for respondent.

At advising—

LORD PRESIDENT—This action was raised in 1857 by John Fleeming of Biggar and Cumbernauld, then heir of entail in possession of the earldom of Wigton, and he sought to have it found and declared that the minerals in certain lands forming part of the earldom of Wigtown, and called the lands of Auchenkilns, Thorn, and Chappelton [*read 1st conclusion*]. And then he sets out in detail his title as heir in possession. In addition to this conclusion of declarator, there is a farther conclusion for reduction of certain deeds, a disposition dated in 1811, by which the superiority of these lands of Auchenkilns, Thorn, and Chappleton had been conveyed to the vassals of these lands, and various other titles following on that disposition, and feudally vesting that superiority in the defender Lord Elphinstone. Various defences were stated against this action, but there are many of them which it is not necessary to notice. The Lord Ordinary, on 5th February 1859, finds [*reads interlocutor*]. Therefore the Lord Ordinary sustains the defences and assoilzies the defender from the whole conclusions of the action. A reclaiming note was presented against this interlocutor, and the case appeared to be so important that written argument was ordered. Revised cases were lodged in 1860. Since then nothing has been done, but that was not the fault of the Court, but of the parties themselves, who required the case to stand over for various causes, and the case has been considerably complicated. In delivering my opinion on the merits of the case, however, I shall treat it as it stood originally—an action, namely, by John Fleeming, heir of entail in possession of the earldom of Wigton, against Lord Elphinstone, the original defender.

In coming to the question which arises on the deed of 1811, mentioned in the Lord Ordinary's interlocutor, it is necessary to attend to the state of the titles at the time when that deed was granted. The entail was made by the Earl of Wigton, or the trustees appointed by him, at the middle of the last century. These trustees, before the estate descended to any heir of entail, granted a feu-charter of the lands of Auchinkilns, Thorn, and Chappleton, to Robertson, and that feu-charter contained a reservation of the minerals in very express terms, reserving all kinds of minerals, specifying them, except stone and lime, and declaring, further, "that it shall be lawful to and in the power of us and our foresaids, and the said Earl's heirs, to search for, work, and carry away the foresaid metals and minerals so reserved, and to use so much of the ground of the said lands as shall be needful for these ends, we and they always satisfying and paying all the losses and damages which the said James and Archibald Robertson's foresaids shall sustain thereby." The entailer, the Earl of Wigton, died in 1757, and was succeeded by Lady Clementina Fleeming, and she held the earldom and barony with the reserved right to the minerals, this feu-charter being renewed during her lifetime. Indeed, the *dominium utile* during her life was sold to the eleventh Lord Elphinstone, the grandfather of the original defender, and he obtained from her a charter of sale in which the reservation of the minerals was repeated in the terms of the original feu-charter. That Lord Elphinstone was succeeded by the twelfth Lord Elphinstone, the father of the defender, who obtained a precept of *clare constat* containing the same reservation. Lady Clementina was succeeded by Mr Charles Fleeming, who made up a title as heir of entail, and during the whole of this period the titles made up to the earldom of Wigton and barony of Cumbernauld included expressly the lands in question of Auchinkilns, Thorn, and Chappleton. In 1811, Charles Fleeming was heir of entail in possession, and the defender's father, the twelfth Lord Elphinston, was vassal under the feu-charter of 1753. In these circumstances, Mr Charles Fleeming desired to avail himself of the power granted by the Act 20 Geo. II. c. 51, to sell to his vassal the superiority of his lands, and for that purpose he granted a commission to two gentlemen to act for him, and to sell and convey to the vassals the superiority of their lands. In view of these powers they executed a disposition in 1811, on which this matter turns. That disposition makes it clear what the commissioners were doing, and what they were entitled to do. It narrates the Act, and shows that it was on the Statute, and in the exercise of statutory powers that they proceeded. The disposition farther relates the commission by Charles Fleeming to these gentlemen, which granted authority to sell to his vassals, in his entailed estates of Biggar and Cumbernauld, the superiorities, with the feu-duties, and the duties and casualties of superiority of their respective lands.

Acting thus on the double authority of the Statute, and the commission by the heir of entail in possession, the disposition recited that as John Lord Elphinstone, the proprietor, was desirous of purchasing the superiorities and feu-duties and casualties thereof, which are parts of the said entailed estates, we have resolved to sell the same to him in virtue of the powers given to us by the foresaid commission. And then the disposition bears that £480 having been paid as the price of the superiorities, feu-duties, and others of the lands, thereupon the commissioners sold, alienated, and disponed to the vassal the lands of Auchinkilns, Thorn, and Chappleton during all time coming, but

subject to the feu-rights already granted of these lands. The contention of the defender is that the effect is to give him an *ex facie* good title to the minerals of these lands, and that contention was sustained by the Lord Ordinary. Unquestionably, under ordinary circumstances, a disposition of lands not accompanied by a reservation will convey the minerals and every thing under the ground as well as on the surface. But the question is, does that general principle apply here? It is for determining that question that it appears so necessary to see the precise state of the titles in 1811, because, while the vassal, Lord Elphinstone, had a good feu-charter to the lands of Auchinkilns, Thorn, and Chappleton, there was an express reservation of minerals, and therefore the heir of entail in possession of Wigton held not merely the superiority of the lands feued out and held by Lord Elphinstone, but also under his title of earl, and heir of entail of the lands of Auchinkilns, Thorn, and Chappleton, a complete title, undivested and unencroached on, to the minerals. In that state of the titles the mineral estate was separate. It remained part of the entailed barony, and was as completely separate from the lands as if they had been a distinct portion of land, and therefore nothing could interfere with the right of the heir in possession as owners of the minerals, except a deed divesting him of that ownership, and the question is, does this deed so divest him? In the first place, it is clear that neither Charles Fleeming nor the Commissioners had power to sell the minerals to Lord Elphinstone. The Statute only authorised the vassal to get the superiority of that which he held in feu, and therefore it was clearly a contravention of the entail to attempt to convey the minerals. It was also beyond the powers granted to the Commissioners by Charles Fleeming. Even if he, as heir in possession, was entitled to do it, he did not so authorise his Commissioners, and that is clear from the deed itself. In these circumstances, the provision as to the price to be paid specifies it as a price for the superiority, feu-duties and casualties, and nothing else, and is calculated as the price of them, and I cannot read the words of the general disposition of lands as being meant by the party disponing or the party receiving the conveyance as meant to comprehend the minerals. That is not conclusive of this case, because both the *dominium directum* and the *dominium utile* changed hands several times. The question is, is the party now in possession of this superiority, conveying the lands without any restriction, entitled to found on it as a good title to the minerals? If we look at the history of the question we shall find much light thrown upon it. After the superiority was conveyed to Lord Elphinstone, he made use of it. Without going into detail, suffice it to say that his brother Mount-Stewart Elphinstone became owner of the superiority for political purposes very soon after, in 1811. Mount-Stewart Elphinstone acquired the superiority, the feu-right remaining in Lord Elphinstone. Now, this right was kept in the person of Mount-Stewart Elphinstone for some time, and it was not till 1857 that he conveyed that superiority right to the defender. But that Lord Elphinstone, the defender, was also proprietor of the *dominium utile* at that time, and the question comes to be, Whether, after these steps of procedure, singular successors are entitled to found on this disposition of 1811 as conveying to them a right to the minerals?

It is material to observe that the right to the superiority, like every other conveyance of superiority, is given under burden of the feu-right, and therefore it is important for the purchaser to know the extent of his interest. Without knowing the nature of feu-rights, he cannot tell what he has got. If there are no rights, he gets the full estate, but not otherwise. He goes to the feu-charter, and finds there that the feu is a feu of the lands, reserving the minerals. So, then, by the feu-right the estate of the minerals was reserved to the Earldom. Then, he knows that what was originally conveyed by the deed of 1811, was the superiority of that which had been feued out; and, putting these things together, every singular successor taking a disposition of the superiority must know the full effect of the deed of 1811—that is, that it was a conveyance of the superiority of the lands, excluding the minerals. Therefore this deed of 1811, and the titles founded on it, are now, in the person of Lord Elphinstone, not sufficient to give any right to the minerals. I am confirmed in that conclusion by seeing the way in which the holders of this superiority right dealt with the minerals during their possession of the superiority. Mount-Stewart Elphinstone, who acquired it from the first holder in 1811, granted a precept of *clare constat* for infefting his vassal, the defender in this action, in 1829, and in that he sets out that the defender's father, the twelfth Lord Elphinstone, had died last vest and seised in the lands of Auchinkilns, Thorn, and Chappleton, but reserving always to the heirs and successors of the deceased John Earl of Wigtown all mines and minerals, except stone and lime, which belonged to the said deceased John, twelfth Lord Elphinstone. Again, on another occasion in 1833, he executed another deed, a charter of resignation, in which he dispones these lands in favour of the defender, but with a clause of reservation in similar terms. Therefore, throughout the whole history of this estate all the parties concerned, the heir of entail in possession, or the purchaser of the superiority, or the vassal in the feu-right, all knew the fact from their titles that the minerals were reserved to the heir of entail, and therefore the defender is not entitled to found on the deed of 1811 as giving him any more than was meant to be conveyed, and what the granter had power to convey.

The pursuer is therefore entitled to decree in terms of the declaratory conclusions of his summons. The reductive conclusions are unnecessary, and I do not think it necessary to consider them, or to inquire whether, if the pursuer had not had his first conclusion sustained, he could be met with the plea of prescription. I propose to recall the interlocutor of the Lord Ordinary, and decern in terms of the declaratory conclusions of the summons.

The other judges concurred.

Agent for Pursuer—Thomas Ranken, S.S.C.

Agents for Defender—Scott, Moncrieff, & Dalgetty, W.S.

Wednesday, May 20.

TAYLOR & CO. *v.* MACFARLANE & CO.

(*Ante*, vol. ii, p. 33.)

Expenses—Jury trial—Counsel's fees.

In this case the Court allowed the expense of a third counsel.