Matthew v. *Blair*, *Forbes* v. *Monymusk*, and *Miller* v. *Blair*, and the dicta of Erskine and Stair really lead to the same result.

Now, I can draw no distinction between a salmon-fishing in the sea, to which for the purpose of making it available and profitable access must be got through the shoreland, and a salmon-fishing in a river to which it is absolutely necessary to get access by the banks of the stream. The cases are in some respects different, but the principle is precisely the same, and I think the great principle is that which has been enounced by Lord Ormidale, and which follows necessarily not only from the cases in question but from the authority of others, and from the dicta of institutional writers, that when a right is granted—a limited right or a right which requires something accessory to itself in order to its enjoyment—when a right is granted by a proprietor having the accessory rights, he is understood to grant along with it every accessory right which is reasonable and necessary for its enjoyment. Suppose the Crown, originally proprietor both of the land and of the sea salmon-fishings, had given off the salmon-fishings alone, retaining the land, I think it would have followed from the principle to which I have referred that the Crown would have been bound to give the grantee of the salmon-fishings the necessary and indispensable access through the land which was retained by the Crown. Now, I do not think the principle is at all different when the Crown gives off the land but retains the salmon-fishings. The necessary accessory rights of the Crown must be held as reserved along with the salmon-fishings themselves; and this seems to be conclusive of the present case. The admissions contained in the minute show that what is claimed by the Lord Advocate in this case on behalf of the Crown and the Crown's tenant is absolutely indispensable to the beneficial enjoyment of the reserved right. Everything is understood to be conceded along with the grant, without which the grant would be abortive.

Lord Justice-Clerk—I concur in the proposed judgment. I must fairly concede that I do so very reluctantly, because I think that the action of the Crown in this and similar cases lays a new and anomalous burden upon land without any corresponding equivalent; and I further think that the practice of placing stake-nets in the open sea is contrary to the whole spirit, though not prohibited by the letter, of the statutes regulating salmon-fishings for many centuries. Now therein lies the difficulty which I originally felt. The proposition is new, and I think it is also a proposition adverse to the general interests which these statutes were intended to protect. And therein lies the distinction between a salmon-fishing in a river, which never can be exercised in that way, and a salmon-fishing in the sea. But while I had that impression, I think the principle upon which the proposed judgment is to proceed is one which cannot be resisted, and therefore, and without hesitation upon the legal question, I have come to concur entirely with the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for Pursuer (Respondent)—Lord Advocate (Watson)—Ivory. Agent—D. Beith, W.S.

Counsel for Defender (Appellant)—Kinnear—Pearson. Agents—J. & A. F. Adam, W.S.

Friday, November 1.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

BAIRD & COMPANY *v.* SIR W. EDMONSTONE AND OTHERS.

Title to Sue—Tenants under a Mineral Lease—Where they sued Feuars holding of their Landlord as Superior.

Held (*diss.* Lord Deas) that tenants under a lease which gave a right to work the minerals under certain lands "in so far as the landlord has right thereto," had a title to sue an action directed against feuars holding under the landlord as superior, and concluding for a finding that the pursuers had an exclusive right to work and carry away these minerals during the currency of the lease, but to the effect only of requiring the vassals to produce their titles in order to determine the superior's right in the minerals.

Observations upon the difference between such an action and one of declarator of property, and upon the extent to which the former is available.

Property—Right of Commonty—Servitude—Conveyance of Minerals by Feu-Charter.

A feu-charter, after conveying 20 falls of lands within a burgh, proceeded—"Lykeas we, be vertue of the sd contract of allienation, hes sold, annaillzied, and disponed, be the tennor heirof sells, annailzies, and dispones, and in feu ferme and heritage perpetuallie letts and demitts to the said Robert Patrick, his sd spouse, and yr forsds, with the rest of the inhabitants of the sd burgh and toune of Kilsyth (with and under the provisione and conditione contained in the said contract), ane proportionall pairt of our lands of Barrwood with the rest of the inhabitants of the sd burgh as sd is, gress, moss, meadow, and arrable land yrof, effeirand to ane burgess steading of the sd burgh and toune of Kilsyth presentlie possessed be the inhabitants yrof." There was a separate reddendo for the 20 falls and for the proportional part of Barrwood. That for the latter was called "rent" and was not doubled at the entry of heirs. The lands conveyed were discontiguous, but sasine was given "by delivery of earth and stone of and upon the ground of the lands," without its being stated to have been "respectively and successively." *Held* (by the Lord President, Lord Mure, and Lord Shand) that the terms of the charter were sufficient to convey to the feuars a right of common property, and therefore (there being no reservation) a right to the minerals under the lands, and that they did not merely convey a servitude right over the surface.

Observations upon irregularities in sasines, *e.g.*, where in the case of lands being discontiguous the infeftment was not said to be taken "respectively" and "successively" in each different portion—and the interpretation to be put upon them as affecting the grant.

In 1869 the pursuers Messrs Baird & Company obtained from Sir Archibald Edmonstone a lease (of which at the time this action was raised there were twenty-two years still to run) of the coal, ironstone, and other minerals on the estate of Kilsyth, "including those in and under the town of Kilsyth, in so far as the said first party (Sir A. Edmonstone) had right thereto." The action was brought by the pursuers to have it declared that they had the sole and exclusive right to work and carry away during the currency of the lease the whole ironstone and other minerals in and under the said lands of Barrwood. The action was brought against Sir William Edmonstone, the successor of Sir Archibald Edmonstone, and proprietor of the estate of Kilsyth, and against certain parties feuars in the town and neighbourhood of Kilsyth, under titles flowing from the predecessors of the granter of the above-mentioned lease. Sir William Edmonstone did not put in appearance as a defender, but the greater number of the parties called as feuars did do so.

The following pleas of the parties sufficiently set forth the nature of the action. The pursuer pleaded—"(1) The pursuers have right to work the minerals specified in the lease libelled lying in and under the lands of Barrwood, in respect they belong in property to the defender Sir William Edmonstone, and are included in the said lease. (2) The said defender has right under his titles to the property of the said minerals, in respect they have not been feued out or disponed by him or his predecessors or authors. (3) The defenders other than the said Sir William Edmonstone, feuars in the burgh of Kilsyth, or as in right of such feuars, have no right or title to the said minerals, in respect they were not included in the original feu-rights."

The defenders pleaded—"(1) The pursuers have not set forth and do not possess any title to sue the present action. (4) The action should be dismissed or the defenders assoilzied, in respect that the minerals in question belong to the defenders, for their respective rights and interests, by virtue of their titles, and possession following thereon." What was pleaded amounted to this, that while it was not disputed that if Sir William Edmonstone was at the time he granted the lease to the pursuers proprietor of the lands of Barrwood, the pursuers were by that lease entitled to work the minerals in question, the defence was twofold—1st, That this being in point of fact an action of declarator of property, the pursuers had under their lease no title to pursue; and 2d, that on the merits of the case the lands of Barrwood belonged in property to them in virtue of their feu-charters, under which the said lands were conveyed absolutely to them, the feuars, and that no reservation of minerals being mentioned, the minerals were conveyed to them with the property.

The titles were very numerous, but the Lord Ordinary selected from them certain test charters as showing fairly the intended nature of the right, and the same course was subsequently adopted in the Inner House. The principal charter produced was that dated 9th February 1709, and granted by Viscount Kilsyth in favour of Robert Patrick, the terms of which and the other charters chosen as tests will be found, so far as essential, in the Lord Ordinary's note.

It may shortly be stated that the titles produced by the defenders for the lands of Barrwood differed in some respects as regarded the terms in which rights given to the feuars were expressed, but the question came to be whether the words "proportional part of the lands of Barrwood" or "part of Barrwood," by which words rights to the lands were conferred on the respective feuars, could be interpreted to mean a conveyance of a right amounting to common property in Barrwood, or whether they could only be held to convey a privilege or right of servitude over the surface of the ground.

The Lord Ordinary, on March 19, 1878, in an interlocutor of that date, assoilzied those of the defenders against whom decree in absence had not gone forth, on the ground that their titles were sufficient to instruct a right of property in them in the minerals. The Lord Ordinary appended to his interlocutor the following note:—

"*Note.*— . . . . . Kilsyth is a burgh of barony founded prior to the year 1687. The pursuers allege that in or about that year James Viscount Kilsyth commenced to feu out the said burgh into forty-five steadings, each consisting of 20 falls of ground or thereby, for houses and gardens, and these steadings constitute the old town of Kilsyth.' They add that—'By the original feu-contracts under which the several steadings were feued there was conveyed to each feuar, "with the rest of the inhabitants of the said burgh and toune of Kilsyth, ane porportionall pairt of the said Noble Viscount his lands called Barrwood (which is to be ane Commontie to the said whoall burgh), gres, moss, meadow, and arable land thereof effeirand to ane burges steading of the said burgh presentlie possessed by the inhabitants thereof."' As the Lord Ordinary reads the condescendence, the pursuers do not dispute that the whole forty-five feus were given out with a right to a proportional part of Barrwood. Nor do they say that Sir William Edmonstone or his predecessors have re-acquired anything that was given off to the original feuars. Their case is, that the right in Barrwood was short of a right of property, and amounted to a privilege only, though what they meant by this privilege they did not clearly define.

"The defenders have produced certain titles to instruct a right of property in Barrwood. In some cases the original feu-charter is produced. The charters are not, however, all in the same terms.

"One type of the charters is to be found in the charter dated 5th February 1709, in favour of Robert Patrick. It conveys 20 falls of lands within the burgh, with certain privileges thereto annexed, and proceeds thus:—'Lykeas we be virtue of the said contract of allienation, hes sold, annailzied, and disponed, and be the tennor hereof sells, annailzies, and dispones, and in feu-ferme and heritage perpetuallie letts and demitts to the said Robert Patrick, hes sd. spous, and yr. forsds., with the rest of the inhabitants of the

said burgh and toune of Kilsyth (with and under the provisione and conditione contained in the sd. contract), ane proportional pairt of our lands of Barrwood, with the rest of the inhabitants of the sd. burgh, as sd. is, gress, moss, meadow, and arrable land yrof effeirand to ane burgess steading of the sd. burgh and toune of Kilsyth, presentlie possessed be the inhabitants yrof, boundit in manner mentioned in the said contract, as the samen of the date above written, containing divers uyrs clauses and obligements yrintill, at mair length is contained.' There is a separate reddendo applicable to the 20 falls and to the proportional part of Barrwood. The 'feu-ferme dutie,' which is payable for the 20 falls is doubled for the entry of heirs, but with the proviso of 'naeways doubling the rent of the said Barrwood at any entrie in tyme coming.' There is a precept for giving sasine in 'the forsd. twenty falls of land or yrby, tenements of lands, houses, yards, privilledge of burgageshipe, pairt of Barrwood, with all uyr liberties, and privilledges, pairts, pendicles, and pertinents yrof qtsomever, in mainer abune mentioned, to the said Robert Patrick and his said spouse and yr forsds, or to yr certain acturnays in yr names, bearers heirof, be deliverance of earth and staine of the sds lands.'

"The sasine is in terms of the precepts; but in this case the words 'successively and respectively' do not occur. In some other cases these words are to be found in the sasines, though not in any case, as the Lord Ordinary understands, where the title has been traced down as a *pro indiviso* title to any of the present defenders.

"Another form of charter is to be found in the feu-charter granted on 7th February 1681 to John Buchanan. The main difference is that it does not contain words of present disposition, applicable to the 'proportional part' of Barrwood. The words are 'in feu-farm and heritage perpetuallie letts and demitts.' The precept and sasine are the same, with this qualification, that the words 'respectively and successively' occur.

"The titles which the defenders have produced are all more or less connected with feu-charters of the kind of those above mentioned, and the right of the defenders has been recognised by charters of confirmation of precepts of *clare* granted by the predecessors of Sir William Edmonstone. But the pursuers have criticised the terms of these titles, and they maintain that no valid infeftment has been taken in Barrwood either as a *pro indiviso* or several right.

"So standing the case, the defenders, as the Lord Ordinary understood, conceded that they could not maintain their case if a charter such as that granted in favour of Patrick did not convey a right of property in Barrwood. The first question therefore is, Whether it does or does not convey such a right? The Lord Ordinary is disposed to answer this question in the affirmative. It 'dispones, and in feu-farm and heritage letts and demitts' a proportional part of Barrwood. The conveyance seems to be consistent only with a disposition of property. The dispositive words are applicable to Barrwood only, and as a separate subject. There is a separate reddendo for that subject. It is not of importance that it is not doubled at the entry of heirs, nor, as it appears to the Lord Ordinary, that it is called rent; what truly is material is that a proportional part of the lands is disponed, and the right so conveyed cannot, it is thought, be short of a right of property.

"An objection somewhat pressed on the Lord Ordinary, from the fact that the extent of the right given could not be ascertained from the deed itself. But he was relieved of the difficulty from the circumstances that the pursuers attached little if any importance to it, and because the conveyance is in this respect very similar to that which occurred in the case of *Wright*, 8 S. 247, and 5 W. and S. 242, and which was held to carry a right of property.

"The possession held by the feuars is consistent with this view of the charters. They seem to have possessed Barrwood as owners, and even to have divided it into different lots, though the scheme of division was never sanctioned either by the superior or by the Court. Some of the later titles—indeed the greater number—profess to convey a separate portion of Barrwood.

"The pursuers then objected to the sasine, in that, while the lands are discontiguous, it did not set forth that infeftment was taken in the lands respectively and successively. The Lord Ordinary has great doubts whether the pursuers can enter on this question, and to this matter he will afterwards advert. But he is disposed to hold that the sasine is sufficient. It does not set forth that there was one act of infeftment only. On the contrary, it sets forth that in the lands specified in the dispositive clause sasine was given by delivery 'of earth and stone of and upon the ground of the said lands' (see *Gordon*, 5 Broun's Supp. 587). But this point is the less material, because there are sasines to which this objection does not apply.

"These observations relate to the completion of the original title; but the Lord Ordinary may notice a title to which much reference was made in the course of the discussion, viz., Catherine Glen's title. The original feu-charter is not produced, but she produces an infeftment of 1783, in which her predecessor John Hamilton was infeft on a precept of *clare*, *inter alia*, in all and haill a proportional part of Barrwood; a precept of *clare constat*, dated 7th May 1855, in favour of William Hamilton, John Hamilton's heir, in which the granter directs infeftment to be given in all and whole the foresaid ten falls of land, and 'all and haill ane proportional part of the lands of Barrwood, effeiring to the burgess steading foresaid;' and an instrument of sasine dated 8th June 1855, in which the notary gives sasine 'of the foresaid lands above described.' The title of Catherine Glen is deduced from William Hamilton in the ordinary way.

"The pursuers object to the infeftment of 1783 in that it does not contain the words 'successively and respectively.' The only objection to the infeftment of 1855 was that the words 'lands and others above described,' could not be read as applying to Barrwood. This objection, in the opinion of the Lord Ordinary, is unfounded.

"1. The defenders maintain that inasmuch as the original charters conferred a right of property in Barrwood on the feuars, the pursuers are not *in titulo* to try with them whether the title has been validly completed or validly transmitted. In the opinion of the Lord Ordinary this plea is well founded. The pursuers have only a temporary right, which terminates in

twenty-two years. They have a lease of the minerals 'in so far as the first party has right thereto.' Neither Sir William Edmonstone nor his predecessors have challenged the title of the defenders to possess under the charters everything that was given out thereby. On the contrary, the predecessors of Sir William have, in many cases before the pursuers' lease existed, recognised the right of the feuars by granting charters of confirmation or precepts of *clare* in order to confirm or transmit the original feu-rights. It seems to the Lord Ordinary that the defenders are not bound to try with the pursuers every question which may be raised touching the validity of their title or the obligations which Sir William Edmonstone may be under to cure any imperfections that may exist. It is true that Sir William is called as a defender, but he has not entered appearance, and any decision which might be pronounced would not be *res judicata* against him. Indeed, the case, as stated by the pursuers in their condescendence, is not intended to raise the minute examination of title into which they have entered. The only question which is really raised is the extent of the right of the feuars as appearing on their original feu-charters, and if this be decided against the pursuers the case seems to be at an end.

"It is true that the charters are not all the same, inasmuch as some do not contain proper dispositive words as applicable to Barrwood. But this makes no difference in the result. For the right given to those feuars whose charters are not subject to this objection was a *pro indiviso* right of property, and the existence of any one such right would necessarily be conclusive against the pursuers who seek to declare a sole and exclusive right.

"2. But in the opinion of the Lord Ordinary certain *pro indiviso* rights of property were duly created by the original charters and sasine following thereon. It follows that the predecessors of Sir William Edmonstone were divested of the sole right to the minerals in Barrwood, and if the original rights have not been duly transmitted to the defenders, they remain in the *hæreditas jacens* of the grantees, or of those persons in whom they were last duly vested.

"No doubt the pursuers maintain that the whole minerals are in the superior's title subject only to such feu-rights as exist over it. This is true, but in the opinion of the Lord Ordinary the pursuers are not under their lease entitled to try whether feu-rights which have been given off have ceased to exist, nor are the defenders, who are in possession of the subject, bound to enter into that question with them. It must be shown in a competent action that the feu-right is extinguished, and Sir William Edmonstone has the only title to raise such an action. He has never raised or indicated any intention of raising any such action. Nor is it even alleged that any of the original feu-rights have become extinct or have lapsed to the superior. Besides, the lease cannot, it is thought, be read as letting to the pursuers minerals of which the superior was once divested, and which he has not shown by a competent action to have been restored to him.

"3. But the title of Catherine Glen seems to the Lord Ordinary to furnish by itself a sufficient defence to this action. She is infeft in a proportional part of Barrwood, under a precept of *clare* granted by Sir Archibald Edmonstone before the pursuers' lease. It may be open to Sir William Edmonstone to challenge the title, but he has not done so. Nor indeed have any grounds for a challenge been suggested, except that the original feu-right did not convey a right of property. But if it did, and if Catherine Glen stands infeft as a *pro indiviso* proprietor, the pursuers can never claim the sole and exclusive right to the minerals, which is the only question raised in this action."

The pursuers reclaimed, and argued:—

On the competency of the action—

The question upon this point was, Whether, this being in point of fact an action of declarator of property, the pursuers, being tenants under a lease, had a sufficient title to sue?

Argued for pursuers—On the statements made by the pursuers in their condescendence and pleas-in-law there was no competition of right and no question of property—all that they asked was to have it found that they had a right to work these minerals during the currency of their lease. The question of property was not raised by the pursuers, but by the defenders, who claimed the property as against the superior Sir William Edmonstone. Further, the pursuers were in the place of the superior in this matter, for by the lease he directly assigned his right to work the minerals to them, and they were therefore entitled to vindicate his right. They did not seek to challenge or consider every step in the vassals' progress, but they certainly had a right to construe the original feu-charters by which alone the vassals had right to show that the minerals were conveyed away by the superior.

Argued for defenders—What the pursuers really asked was to have it declared that they had the sole and exclusive right to the minerals. The right given by the superior to the pursuers in the lease was qualified by the words "in so far as the first party has right thereto." It was a conditional right to work, and the pursuers could not purify the condition, as the defenders produced writs flowing from the superior prior to the lease habile to convey lands and minerals. The defenders produced a precept of *clare constat* by the superior prior to the lease. While both stood, even the superior could not sue in such an action as the present; he must reduce the precept first. Further, the pursuer had merely a temporary right, and could no more raise this action than a yearly tenant. Also a judgment against this pursuer could not be *res judicata* against the superior.

On the merits—

Argued for the pursuers—The question was as to the construction of the original feu-charter, in the consideration of which it was allowable to take into account the feu-contract which preceded it, the instrument of sasine which followed upon it, and the early transmission from one vassal to another, not with a view to control the charter, but in order to arrive at its true intent and meaning, which owing to the obscurity of the old language could not be fully understood. By the feu-contract there was conveyed (1) a steading in the burgh of Kilsyth; (2) a proportional part of Barrwood. The first was certainly given in feudal form, but the second was different. There only a servitude right was conveyed, or at least something short of property; for while in re-

gard to the burgh the word "dispone" was used in all the charters, there were frequently only the "letts and demitts" with reference to Barrwood. The words "heritably and irredeemably" were also invariably used in the dispositive clause regarding Kilsyth, while they were invariably absent in the deeds regarding Barrwood. In the dispositive clause of this contract (*see* Lord Ordinary's note) it was impossible to say that (there being no particular portion separated from the rest) what was given was a *pro indiviso* right, and the number of disponees being quite indefinite it was impossible to feudalise the right in anyone. The words "grass, moss, meadow, and arable," used in that clause, were taxative of the right which was conveyed. If the word "arable" had not been used it would have been a servitude, and the addition of "arable," while it enlarged the right, kept it short of property. In the reddendo clause the same distinction was kept. The return for the burgh-steading was termed "feu-farm duty," while that for Barrwood was simply called rent. The former was to be doubled at each entry, while the latter was not. Again, while there was an obligation by the superior to infeft the vassal in the burghal steading, there was none to infeft in the part of Barrwood, and it was provided that every person acquiring or taking a tack or burghal steading should receive therewith a proportional part of Barrwood.

Authorities—Duff's Feudal Conveyancing, 112; *Harvie* v. *Stewart*, Nov. 17, 1870, 9 Macph. 129; *Bain* v. *Duke of Hamilton*, May 19, 1865, 3 Macph. 821; *Campbell* v. *M'Kinnon*, March 20, 1867, 5 Macph. 636, H. of L. 8 Macph. 40; *Richardson* v. *Gray*, July 14, 1876, 3 R. 1031, H. of L. 4 R. 176; *Duke of Athole* v. *Stewart*, Nov. 18, 1825, 4 S. 197; *Bowmont* v. *Glen Lyon*, July 11, 1843, 5 D. 1337; *Johnston*, M. 2481; *Balfour* v. *Moncrieff*, Elchies' Notes, title Commonty, No. 8.

Argued for defenders—The terms of the feu-charter were sufficient to convey the property of Barrwood. "Letts and demitts" were words as sufficient at the date of these deeds as "dispone" would have been. The clauses could only, when fairly construed, be held to mean a conveyance of the property in Barrwood, and the precept of sasine authorises infeftment of Barrwood. But if this was not a conveyance of property, of what was it a conveyance? The defenders' contention was intelligible; the pursuers could only say it was a privilege, but they did not say of what kind or to what extent. The enumeration "grass, moss, meadow, and arable" could only be construed in two ways. Either it enumerated the different kinds of lands conveyed to the defenders, or the uses to which the lands might be put. But the pursuers could not adopt either—the first because they wished to modify the dispositive clause by these words; the second, because they could not admit that the defenders were entitled to use the lands for arable purposes, and they therefore said the word "arable" referred to a kind of land. But that did not assist them, for what servitude or privilege could be held over arable lands. The charter being sufficient to convey property, and possession of the surface being the only possession that had followed, being with the feuars alone, the minerals must be held to be the property of the feuar.

Authorities—*Calder* v. *Adam*, March 2, 1870, 8 Macph. 645; *Stobbs* v. *Craven*, March 14, 1873, 11 Macph. 530; *Boyd* v. *Bruce*, December 20, 1872, 11 Macph. 243; *Martin* v. *Millikin*, Dec. 24, 1864, 3 Macph. 326; *Wright* v. *Logan*, Dec. 15, 1829, 8 S. 247, 5 W. and S. 542; *White* v. *Calder*, June 29, 1815, F.C.; Bell's Prin. sec. 871; *Maxwell*, M. 14,318; *Lord Hermiston*, M. 14,326; *Gordon* v. *Brodie*, July 20, 1773, 5 Brown's Sup. 587.

At advising—

Lord Mure—This action has been brought to have it declared that the pursuers have sole and exclusive right to work and carry away during the currency of their lease the minerals in the lands of Barrwood, in the parish of Kilsyth. This demand is made in respect of a lease of which there are about 22 years still to run, granted to them by the late Sir Archibald Edmonstone in the year 1869, and under which he let to them the whole minerals in certain portions of the estate of Kilsyth, including those in Barrwood, in so far as he had himself any right thereto. The action is directed against Sir William Edmonstone, the representative of Sir Archibald Edmonstone, and the present proprietor of the estates of Duntreath and Kilsyth, and against a number of parties, feuars in the town and neighbourhood of Kilsyth, under titles flowing from the predecessors of Sir Archibald Edmonstone, the granter of the lease. Sir William Edmonstone has not entered appearance to defend the action, and decree has been pronounced against him, but the parties called as feuars or the greater number of them have appeared as defenders.

It is not disputed on the part of the defenders that the terms of the lease granted to the pursuers are sufficient to confer on them a right to work the minerals in the property in question provided Sir Archibald Edmonstone was at its date the proprietor of Barrwood. But they maintain that the minerals belong to them in respect of their feu-rights, under which the lands of Barrwood or certain portions thereof were conveyed to them respectively, and have since been possessed by them, and they also maintain that as the action is in substance a declaration of property the pursuers have no title under their lease to insist on the action. The Lord Ordinary, without specifically disposing of the objection taken to the title to sue, has assoilzied the defenders with the exception of those mentioned in the interlocutor of 28th June 1876, upon the ground that the titles produced by them are sufficient to instruct a right of property in the minerals in question.

The titles produced differ somewhat as regards the terms in which any right given to the feuars in Barrwood is expressed; but those which have been made the subject of discussion appear to me to be expressed substantially in the same terms, and they confer on the respective feuars a right to a certain proportional part of Barrwood with the rest of the inhabitants of the burgh of Kilsyth; and the main question in dispute is whether the expression "proportional part of the lands of Barrwood" or "part of Barrwood" so conveyed amounts to a right of common property in Barrwood or only to a privilege or right of servitude thereof. The titles produced are numerous, but the Lord Ordinary in disposing of the case has selected certain charters as affording fair specimens of the nature of the right, and in the discussion upon the reclaiming note the course so

adopted by his Lordship has been followed by the parties.

The principal one of those titles is a charter dated 9th February 1709, by Viscount Kilsyth, in favour of a person of the name of Robert Patrick. It is with reference to the terms of this charter that the Lord Ordinary's note is framed, and I think it may be taken as exemplifying the general nature of the titles. [His Lordship here quoted the terms of the charter, *supra*]. Now, in that charter there is a distinct sale, conveyance, and alienation to Robert Patrick of a proportional part of the lands of Barrwood with the rest of the inhabitants of the burgh of Kilsyth, and that this was intended to be a permanent conveyance to them of a proportional part of those lands is plain from the terms of the reddendo—there being one for the 20 falls of land mentioned in the earlier part of the deed, and a separate reddendo for Barrwood of a proportional part of three score pounds to be paid to the superior by the feuars.

Now, the Lord Ordinary is of opinion that the terms of that title are sufficient to convey to these parties a proportional part of Barrwood in property, and that it is substantially a *pro indiviso* right or right of common property in that part of the number of acres of ground called Barrwood. It is maintained, however, on the part of the pursuers that what was here conveyed was a sort of privilege or servitude over the lands of Barrwood, and no right of common property in those parties, and in order to make out that point they refer back to the feu-contract between Viscount Kilsyth and Robert Patrick in the same year, but of an earlier date, in which there is an expression somewhat different from that in the charter, and where the portion of Barrwood sold at that time is described as part of a commonty to the whole burgh, and they also refer to certain expressions in some of the other titles produced by the defender in which it is called the privilege of Barrwood. No doubt there are deeds passing between the vassals in which it has occasionally passed under the name of the privilege of Barrwood, but in the more important titles—viz., those between the Kilsyth family and the different feuars—I do not find any expression of that kind, and it is by the original grant made by the Kilsyth family to the feuars that I apprehend this question falls to be decided. Now, I do not think that this expression "ane commontie to the whoall burgh" can be held to qualify the right in the way which is contended. I think that is just a loose way of mentioning the subject as a common property which is to be used for certain purposes and in certain proportions by the parties who got the feus. It was more convenient at that time that it should be used in that way than by a division of the subject at that date, and therefore it is clearly a mode of expression not quite accurate as regards the nature of the right, but which cannot be held to control the words of disposition, if these words taken by themselves are sufficient to convey common property.

Now, I think that the Lord Ordinary is quite right in holding that the words of this conveyance, taken by themselves, and when read with reference to the reddendo, where there is a separate payment to be made, not for the privilege of Barrwood, but for a proportion of the lands of Barrwood, import a grant of common property to the feuars.

Reference was made in the discussion, and is also made in the Lord Ordinary's note, to certain others of the titles as illustrative of the nature of the grant and the view here entertained on the subject. There is a title to a person of the name of Buchanan, in which the words "alienate and dispone" appear to be omitted, and the term used is somewhat different, but it appears to me that that is not sufficient to destroy the nature of the right or to alter the character of the right under that charter which is dated in 1681. Under it the portion conveyed to Buchanan has been possessed ever since, and although there are not such absolute words of conveyance in it as are to be found in Patrick's title, it is quite plain that this is a conveyance of property, looking to the terms of the charter and the instrument of sasine following upon it, by which the notary states that "these things were done upon the ground of the said lands, tenements, and part of Barrwood." So it appears that infeftment was actually taken on that part of Barrwood which was conveyed to the feuar, and I can put no other interpretation upon that charter than that it gave him substantially the same right—in a certain portion of Barrwood effeiring to the extent of his own feu—as is given to the other feuars. The title of a person named Adamson was also referred to by Mr Pearson in his argument, and it is important in this view that it shows what the superior's idea was, at all events, of the nature of the grant he had made, because there is a stipulation and an obligation undertaken by him "not to sell nor feu any more burgess steadings of the lands of Barrwood but so far as makes up 44 burgess steadings, which I hereby bind and oblige me and my foresaids to stand firm and sure." That is in 1709, and we have the predecessor of the present proprietor of the estate, in dealing with this party of the name of Adamson, selling and disponing to him a proportional part of the lands of Barrwood, and coming under a personal obligation not to sell any more of it, thereby using an expression which showed that the grant which he made to Adamson in his view was a sale or feu of a portion of the lands of Barrwood. The Lord Ordinary in his note refers likewise to the title of a person named Glen, which shows that at all events with regard to Glen's title there is a distinct conveyance of a proportional part of the lands of Barrwood and an infeftment taken upon it under that deed, and his Lordship's view is, that notwithstanding that title of Glen's there is a *pro indiviso* right given to the feuar in the lands of Barrwood in question, and therefore by that *pro indiviso* right granted to her it is impossible the pursuers can succeed in showing that they under their title from Sir Wm. Edmonstone have exclusive right to that property or to the minerals in it. Now, I adopt the Lord Ordinary's view as stated in regard to that title of Glen, and I also adopt his view in the case of Patrick. If I am right in the construction I put upon that title, there is a right of common property given to Patrick in a certain proportional part of the lands of Barrwood, and there being no reservation or exception of any kind, that that right of property so given is sufficient to carry with it a *pro indiviso* right to the minerals in that property.

The only little difficulty which I had felt in dealing with the case on this branch of it was

with reference to the question of its being described as a commonty to the whole feuars, as if it might be held in one view of it not to amount to a conveyance of common property; but I think the cases which are quoted in the Lord Ordinary's note, and which were referred to at the bar, are sufficient to remove it. The case of *Wright* v. *Logan*, Dec. 15, 1829, 8 S. 247, 5 Wilson & Shaw 542, is substantially the same, the one being lands and the other grass ground, and so it was held by this Court and by the House of Lords that what was given was a right of common property to the grass in question, and that being the interpretation put upon the conveyance in that case I think it throws considerable light upon the question how a disposition of the present description should be construed. But the earlier case of *Johnston* v. *The Duke of Hamilton*, July 1768, M. 2481, comes if anything nearer to the present case, because it was there held, the rubric bears, that "possession of an uncultivated commonty by pasturage and casting feal and divot upon a title of part and pertinent infers a right of common property." Now, that was tried between the feuars and the Duke of Hamilton, who claimed, as proprietor of the moor, to have it all except so far as it was limited by the pursuers' right, and the question was, whether the pursuers' right was only one of servitude over the moor; but the Court, on deliberately considering the matter, though the feuars had only possessed it as a pertinent, and used it in the matter of pasturing, found that they had a right of common property in the moor and were entitled to a division effeiring to the rent of their respective lands, and found that after the division they should in all time coming have the sole and exclusive right of working the coal within the limits of their respective shares of the moor set off to them. Now, that is precisely the question we have here as between those parties, not raised actually with the superior or proprietor as the Duke of Hamilton was there, but raised with a party whose title flows from the superior who granted that feu-right. It was there decided that the feuars had a right of common property, and that they were to have the coal under the proportion of the moor that was given to them.

Now, there have been objections taken to the titles of some of those parties founded upon a critical examination of the instrument of sasine; but if I am right in the construction which the charters themselves bear, then I do not think it necessary that those parties should show that in every particular step that took place as regards the condition of their titles the most accurate expressions are used. I agree with the Lord Ordinary in thinking with reference to such objections as the omission of the words "respectively and successively"—for really that is the main objection—a right of lease of this description, which is the only title the pursuers have to the minerals, does not entitle them to challenge and question the infeftments, in this way raising critical objections and endeavouring to defeat the right by having those objections given effect to. But for my own part I have no difficulty in holding that the omission of these words "respectively" and "successively" does not invalidate the infeftment. There is an expression used in the charter of 1709 which appears to me to be sufficient to obviate any objection of that sort. They are charged to deliver sasine of all and whole the foresaid 20 falls of land and part of Barrwood, with all other liberties and privileges, &c., to the said Robert Patrick "be deliverance of earth and staine of the sds. lands, as use is, after the form and tenor of the said contract of alienation." Now, the instructions there given to the notary are, that it must be done by deliverance of earth and stone "as use is." Well, where the instructions are to take infeftment in different or discontiguous portions, as use is, the meaning of such an expression is, that it is to be done in the usual way—that is, by deliverance of earth and stone for each particular portion of the subject, and the instrument distinctly bears that the notary did it by deliverance of earth and stone of and upon the ground of the said lands as use is. Now, what is "as use is" in such a case? It is to do it respectively and successively. These words are omitted, but "as use is" I think is equivalent to it, and the presumption is that the thing was done in the proper way—that everything was rightly gone about—and I think the principle upon which objections of this sort should be dealt with is that they are not to be construed so as to defeat the right if you can give an interpretation of the words used which is natural in itself and which will have the effect of sustaining that right in favour of the parties who have got the grant upon which infeftment is taken.

Now, upon that general ground I should have been quite satisfied to deal with this objection. But I think the case of *Gordon* v. *Brodie*, 20th July 1773, 5 Broun's Supplement 587, decides the very point. The same objection was there taken, the omission of the words "respectively" and "successively"; and there was another case referred to—that of *Hermiston*, of earlier date—where a critical objection of the same kind was repelled, and I find the same words were there used which are used in this charter of 1709, viz., it was to be done "as use is." It is reported very shortly, but I have no doubt the ground upon which the Court proceeded there was, that there were instructions to do it, and that the instrument bore that it was done "as use is," and they inferred it was done according to the proper way—that infeftment was given separately and distinctly in each subject.

And the principle I have alluded to was, I think, laid down fully and distinctly in a much more recent case by the Second Division—*Barstow* v. *Stewart*, Feb. 18, 1858, 20 D. 612—where the broad principle was applied that you are to construe those instruments fairly, with a view to support the deed if you can, and not to give effect unnecessarily to those objections.

Now, such being the nature of the grant, it is not necessary, in the view I take, to show there has been any possession of the nature which is founded on upon record. The defenders stand upon the terms of their rights, in which there is no reservation of minerals, and in which there are no words leading to the inference that the person making the grant intended to reserve the minerals. But though it is not necessary there should be any possession of that description, I think it is not unimportant, in dealing with the case, that there has been, so far as I can judge from the titles and from the admissions of parties, a possession here of those subjects which shows that the parties considered they were dealing with a right of common property and not a mere right of servitude or privilege. There were various

proceedings with a view to the division of this common property amongst them. They seem to have taken steps in this Court which were not actually carried out, but there were agreements between the parties that this common subject should be possessed by them in certain ways, and the agreements and divisions of this description have been distinctly recognised by the superior and those acting for him in regard to different titles. For instance, there is an excerpt from a precept of *clare constat* in February 1852 by the commissioner for Sir Archibald Edmonstone, which narrates, amongst other things, that "since the date of the original feu-rights of said subjects the said lands of Barrwood have, by virtue of a process of division pursued before the Court of Session and otherwise, been apportioned and divided to and among certain proprietors of subjects in the town of Kilsyth, and that the following portions have been allocated," and so on. It goes on to describe what the portions are that belonged to the predecessor of the party in whose favour this conveyance is granted. Then there is a similar precept in the year 1867—a writ of *clare constat* by Sir Archibald Edmonstone—and there is an excerpt from an instrument of sasine narrating "All and whole that lot of ground lying in the lately divided part of Barrwood commonty"; and there is a missive of exchange in 1818 in which it is agreed by Mr James Davidson, W.S., for Sir Charles Edmonstone, that Sir Charles is to give James and Robert Hay his lot of ground in Barrwood, and that in exchange for it they give Sir Charles their lot in Barrwood, and that the lots thus exchanged are to remain the properties of the parties in all time coming. Now, when we find the superior allowing his feuars to possess it in this way, and making an agreement in consequence of a division of the property which had been made amongst themselves, following out some inchoate proceedings in this Court which were never actually carried out, and recognising those parties as having right to particular portions of Barrwood, I am afraid—possession having followed thereupon—that they all recognised the grant of common property, and not a mere grant of servitude of the nature contended for on the part of the pursuers.

That being the view I take upon the merits of this question raised by the titles, I have not thought it necessary to deal with the abstract objection to the title to sue, because it is unnecessary in the view I take of the case to deal with that question, and I shall only say this, that I think it a very nice question, looking to the peculiar nature of the claim made in the summons, viz., to have it declared that the pursuers have right to work the minerals. They do not ask the property of the minerals. It is not a competition in that respect. Looking to the nature of the conclusion of the action, and to the fact that they have got from the superior a lease of those minerals for a long series of years, I should have very great difficulty in holding that they had not a title to come into Court and call upon the parties who set up an adverse right to meet them in Court, with a view to see whether they had a title to prevent the minerals from being used in the way in which it is proposed to use them. I think the pursuers under their lease have a manifest interest—a very clear interest indeed—to raise the question and have it decided; and when you go the length of admitting that a party pursuing an action has an undoubted and material interest to have the matter decided, it is very difficult to say that he has not a title to sue because a question of property may incidentally be raised in order to enable him to exercise the right which he has got, and which he has a manifest interest to maintain. Now, here the defenders claim to possess in respect of their title. They produce their title. The question is whether it is a good one; and I should have great difficulty in holding that the pursuers had not a title to come into this Court to the extent to which the Lord Ordinary has held they are entitled. I agree with the Lord Ordinary that a party holding a lease of this description is not entitled to go into a critical examination of the different steps of the title, but that he has a claim to be heard whether under that mineral lease he is entitled to work the minerals or not. The proprietor in 1869 granted him that right, and has recognised his right to work. He has granted that right to the minerals in so far as he himself had right to them. It is a very peculiar lease in that way, and I should not say it was safe ground to proceed upon if we were to decide the action upon that objection and not upon the merits of the case with which we have to deal. I think it unnecessary to give any decided opinion on the matter, but shall only say that I should have great difficulty in giving effect to a plea of that sort.

On these grounds, I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

Lord Deas—This is an action of declarator at the instance of Messrs Baird & Co. as lessees of the minerals in the lands of Barrwood, and the action is directed against the feuars of Barrwood, who hold under Sir William Edmonstone as superior. The summons sets forth that by lease Sir Archibald Edmonstone let to the pursuers the minerals in Barrwood for thirty-one years in so far as he himself had right to those minerals. If he had no right to the property of those minerals, there is nothing left to those tenants at all, and the whole question raised is whether Sir William Edmonstone is proprietor of these minerals or not. The summons concludes to have it found and declared that those pursuers are entitled in virtue of that lease to win and carry away the whole of these minerals, but the *medium concludendi* on which they seek to have that right declared is stated in the summons in the usual way—"in terms of the condescendence and note of pleas-in-law hereunto annexed." We must therefore look to the condescendence and pleas-in-law annexed in order to see what is the ground of the case.

The question which has been raised, and which has been very largely discussed, is simply this—Whether Sir William Edmonstone has the property of these minerals, or whether his feuars have? That depends upon a series of titles granted by Sir William or his predecessors to those feuars, commencing in 1686. That question is not raised by Sir William Edmonstone. It is raised by his tenants under a lease for only thirty-one years altogether, and which in twenty years after this will have expired.

If Sir William Edmonstone had been a pursuer in this action it would have been per-

fectly competent; but whether there can be any other pursuer than Sir William is a different question altogether. He is called as a defender, as if he were a hostile party to the pursuers. He is not a hostile party to the pursuers at all. The interest of the pursuers and of Sir William is one and the same. It seems to me nothing less than an absurdity to call him as a defender in order to get a declarator that he has this property. I confess that I never before heard of or saw a declarator which turned entirely upon a question of heritable property raised by a tenant who had a mere temporary right. The question which your Lordship is proposing to determine is precisely the question which Sir William has an interest to raise, and which would have been decided if he had been pursuer of a declarator to that effect. Every plea that has been stated, every argument that has been submitted to us, have just been the pleas and the arguments which would have been submitted and would have been decided in an action of declarator at the instance of Sir William Edmonstone that he was the proprietor. He is in a very safe position in one respect with reference to that question, because if the judgment your Lordships now pronounce be worth anything it is a judgment upon a question of property in which he is interested, but where he is not liable at all for expenses. He is to get the question tried without liability for expenses, because expenses are only concluded for against such of the defenders as may appear to oppose the action. He has no interest to oppose the action—quite the reverse; his interest is all the other way. If the present judgment had been in his favour—it might have been in his favour instead of being against him so far as the merits are concerned—it would have been a question decided in his favour while he had no liability for expenses. Not only that, but it seems to me that he would be getting the action in that view decided in his favour in a case where there never could be *res judicata* against him. Now, that seems to me very anomalous. I do not know whether your Lordships hold the judgment to be pronounced *res judicata* against him or not, but either way it is equally anomalous. If it is *res judicata* against him, it would be *res judicata* for him, and if it is not *res judicata* against him it is not *res judicata* for him. But whether it is *res judicata* for or against anybody or not, it is perfectly plain that the opinions which your Lordships must deliver, and the view which is now taken of this case, are judicial opinions upon the merits of a question which ought to be tried—and for aught I know may yet be tried—between the feuars and Sir William Edmonstone. Now, if you hold it is *res judicata*, that would be intelligible. I do not see how you possibly could, but it would be intelligible. But that you are to deliver judicial opinions which are to be matter of authority in the question with Sir William Edmonstone when that question arises—that you are to deliver judicial opinions upon a progress of titles from 1687 downwards, upon that question of property, upon infeftments and all the clauses of those deeds—to deliver judicial opinions and yet keep it open to yourselves to give different opinions altogether when the question is really raised—surely, if your decision were against Sir William Edmonstone, it would be very difficult for him to say then that those elaborate opinions were not to be looked at and considered, whether they were *res judicata* or not. I confess that since I have been at the bar or on the bench I have never seen an action of declarator of property—that the right of property was in or not in the alleged proprietor—at the instance of a tenant under a lease which in a few years must come to an end. What it might be on a 99 years' lease, which has been decided to be a sort of property, would be a different matter; but an action of declarator of property under a lease like this I confess I never saw before.

The distinction in our law and practice between declaratory and possessory actions is notorious, if anything can be so.—[Erskine, b. iv, t. i, secs. 46 and 47]. There would be the same competency in an action concluding for reduction of all those feuars' titles as there is for a declaratory action of property. A declarator of property is brought at the instance of this tenant, and an action of reduction of all those titles would have been equally competent if that had been the interest of the party bringing the action. That a possessory action would have been competent here at the instance of either party I have no doubt at all. There might have been an action of interdict at the instance of the Bairds, to the effect that the feuars were not entitled to prevent them during their lease from working the minerals, or there might have been an action of interdict at the instance of the feuars to interdict the Bairds from working the minerals, and in either of these actions the question would have been, as it always is in possessory actions—What is to be done in the meantime?—what is the *prima facie* view of the rights of the different parties?—so that one is to be kept in possession in the meantime and the other is not. An action of that kind would have been perfectly competent, but the difference would have been this—it would have settled nothing as to the permanent right of property—it would not have involved the permanent right of property—it would not have involved the consideration of titles for hundreds of years—it would have been enough to look to the *prima facie* state of matters as regards the title, and to determine the question of possession in the meantime, leaving the rights of parties as to property to be tried in the ordinary way at the instance of the superior. I do not know how far the House of Lords may be as familiar with that distinction as we are, but it is very familiar in our law and authorities. I have in my memory that in a very important action—*Gordon* v. *Hughes*, June 15, 1815, F.C.—which we discussed lately in *Brownlie's* case, 15 S.L.R. 718, the reversal of the judgment of this Court by the House of Lords turned entirely upon the form of the action, and, as the Lord Chancellor laid it down, on the ground that it is important to preserve the distinction between forms of action.

This case, I think, is confounding all forms of action together, and that being so, my opinion is that the first plea-in-law for the defenders here is well founded—that is to say, that those pursuers have no title to raise and insist on this action. That being my opinion, I should be very loath to go into the merits of the important and difficult question which the property of those minerals undoubtedly is—requiring great consideration, great study of that progress of titles, and involving a very

doubtful and important question in the end—a question upon which I should not allow myself to form any tentative opinion whatever. Besides, I could not form or express a tentative opinion without trenching upon matter which is not before us. It might very well have been that in a possessory action there might have been enough of title and of posession to sustain the feuars in their position of preventing the other party from working the minerals, on the ground that *prima facie* these belong to them. That would have been very different from the present action. I can only say that if I had to decide this question upon its merits I should have required to study the whole of those titles and the whole of this case with great attention and with great anxiety, but as it stands here it is quite sufficient for me to say that in my opinion there is no title in the pursuers to raise an action of this kind.

Lord Shand — I am of opinion that the defenders are entitled to succeed in their defence to this action. I concur in the views stated by the Lord Ordinary and by Lord Mure; and, with great deference and respect to my learned brother Lord Deas, I feel bound to add that, so far as I am concerned, I think the case is not one that is attended with difficulty either on the question of title or on the merits.

The pursuers of the action obtained a lease for 31 years from Sir Archibald Edmonstone, who professed to be proprietor of the minerals in the lands of Barrwood, and he conveyed to the pursuers by that lease the right to work the minerals so as to exhaust them, if able to do so, before the expiry of the lease. The period of 31 years is considerable. We have not the particulars as to the extent of the subject, but I do not think it is assuming too much that in the period even of 21 years that has yet to run the minerals might be entirely worked out. The words of the lease are, after a description of the minerals, including those in and under the town of Kilsyth and the lands of Barrwood, "in so far as the landlord has right thereto." The effect of this, I think, is to convey absolutely for the period of the lease the whole right which Sir Archibald Edmonstone had. The words "in so far as he has right thereto" are no limitation whatever upon the conveyance. The minerals are conveyed as effectually and as completely as if those words "in so far as he has right thereto" were no part of the deed. The only effect of these words I take to be this, that they express, in a question between the granter and the grantees of this lease, that the granter does not warrant his right, and that if it shall turn out that the granter has no right to those minerals there shall be no claim of damages at the instance of the tenants. The lease does not in terms convey any right on the part of the lessees to dispute or challenge any previous deeds which Sir Archibald Edmonstone or his ancestors in the lands may have granted, and I am not prepared to say that, in the absence of a special right or power to that effect, the pursuers would be entitled to sue actions of reduction challenging previous deeds granted by Sir Archibald Edmonstone or his predecessors. But with that qualification I take it that the right conveyed, being Sir Archibald Edmonstone's whole right in the minerals for the period of the lease, is one which carries with it all that is necessary to its vindication, and therefore carries with it the right to sue in any question with third parties maintaining a competing right to the minerals. Sir Archibald Edmonstone by granting this deed divested himself of the right to the minerals for the term of the lease. That may be so complete a divestiture that the whole minerals may be gone, so that the landlord may never have even a portion of them to work out at a later period, and even if Sir William Edmonstone were proposing to resist the present claim at the instance of the tenants, maintaining that they had no right to sue the action, I would hold that he could not succeed in this contention, because his predecessors expressly conveyed his whole right in the minerals to the Messrs Baird.

That being so, what is the conclusion of the action on which the pursuers now insist? It is that they have the sole and exclusive right during the currency of the lease to work, win, and carry away the ironstone in and under those lands of Barrwood; and they have called as defenders the feuars, who say that the minerals belong to them, and that they (the feuars) are the only parties who have right to work them. I do not disguise from myself that this action necessarily raises the question, in whom the property of these minerals is vested. But I hold it to be clear that, as the landlord has given his right in these minerals for this period—the right to work and carry them away—that must carry with it what is necessary for its vindication, viz., the right to maintain by action that the property of the minerals is in him with any person who raises that question.

It was said that some confusion had been introduced into the case from the circumstance that Sir William Edmonstone had been called as a defender, whereas he should have been a pursuer in the action. In my opinion it was not necessary that he should be here as a pursuer. I think that he or his predecessor, having granted the lease, even though he sought to restrain the action, would not be entitled to restrain or prevent it being brought. But as to his being called as a defender, I find the reason is satisfactorily explained in Cond. VIII., in which the pursuers say that Sir Archibald Edmonstone acquired from various feuars in Kilsyth "their right and interest in certain lots or pieces of the lands of Barrwood, and the defender has now right to these, which by the scheme of division it was proposed to allocate, and which had been possessed by these feuars. The said William Edmonstone is therefore called as a defender as superior of the barony and proprietor of the lands of Barrwood subject to the rights conferred by the feu-contracts . . . . as well as for the interest which he acquired in said certain lots or pieces of the said lands of Barrwood." So that he himself is in some respects—having acquired parts of these lands from the feuars to whom they had been given out — precisely in the position of the other defenders; and while I think that, having got this title of lease, the pursuers were not bound to call Sir William Edmonstone as a defender, I can quite understand that as matter of precaution they thought it right to do so in respect of his rights of property in those feus.

It has been suggested in the course of the argument that a conveyance or lease of this kind

will be good to the effect of sustaining what is called a possessory action, but will not be good for the purpose of sustaining an action of this kind. I confess I am unable to follow the reasoning upon which that view is founded. If there be a title to demand the possession and to vindicate the possession in the meantime, why should there not be equally a title to vindicate the right, which is really what is conveyed, and to try all questions that are necessary for its vindication? Suppose a patentee acquires the exclusive right by letters-patent to exercise his patent for a period of fourteen years, and assigns that right for eight or ten years, reserving for his own use the last four or six years after the patent has been made more public, and become more valuable. The assignee proceeds to exercise his right, and is met by some one who says that the patent is an invasion of an earlier one. Would the person who had acquired that right—the absolute right to the use of the patent for so many years—have neither right nor title to sue a declarator that the patent was valid and effectual in a question with persons who were disputing it, founding on some other right or title? I cannot doubt that the assignation of the right of use even for a time only would give the right to sue an action of that kind. And if that be so, I confess I know nothing in the nature of heritable property which would introduce the distinction that is proposed. A question of this kind is not to be determined by the nature of the property the right to which is conveyed, but by the character of the right which is given, and as the right here given is everything that Sir Archibald Edmonstone had—all right that he had in those minerals—he has thereby given the right to maintain an action in any form that is necessary in order to vindicate the right conveyed. It has been said that the defenders may be subject to some hardship in having this question to try again with Sir William Edmonstone, who now represents the granter of the deed. We cannot decide now what the effect of our judgment will be in a question with Sir William Edmonstone, who is not in the process, but I think there is strong ground for the view that any decision here would be *res judicata* in a question with Sir William Edmonstone. What is required to constitute *res judicata* is that the question shall be the same, that the *medium concludendi* shall be the same, and that the parties shall be same. If this same question substantially were raised again upon the same *medium concludendi*, viz., the nature and effect of the early titles which had been granted to the parties, the only question that would remain would be whether the parties were the same, and I see great room for the argument that as Sir William Edmonstone has assigned or conveyed his right to a person who sues by force of that conveyance, the action being by an assignee is substantially an action between the same persons who would sue in such action as that supposed. But I do not rest my judgment on this question of title on any view of whether the judgment will be *res judicata* or not. I do not think that affects the question; for I do not think the defenders have a right to have an action at the instance of the persons having a right to the subject in dispute, or being in a position to maintain a right to the subject in dispute, thrown out because the decree will not be *res judicata* with someone else, and therefore, so far as this matter of *res judicata* is concerned, it does not enter into the judgment which I have formed upon this question. I may observe that if it could be shown that the pursuers in this action were merely put forward by the true owner of those minerals to sue an action which he desired to be sued for his benefit, but which he would not maintain himself—if it could be shown that the form of action was a mere cover for an action at the instance of Sir William Edmonstone—there would be much to be said for the view that this action should not go on; but that would be on a different ground, viz., that the right was really not meant to be conveyed, and that the action was being sued in a third party's name as a mere cover to avoid liability for expenses. In such a case the Court would require the true *dominus litis* to be here. But we have no question of the kind. The true *dominus litis* is here in the person of those tenants who have acquired the complete—certainly the substantial—right to work these minerals, because a right for 31 years may be as good as one for 99 years or 100 years, and that being so, I take it that they are entitled to maintain the action. So much for that question.

Being of opinion that the title to sue is good, the next question to which I advance relates to the effect of the earlier deeds, which the feuars say gave them right to the minerals so that the lease has practically conveyed no right to the minerals in question. I am of opinion with the Lord Ordinary, on the grounds stated by him, and which have been fully gone over by Lord Mure, that the effect of those deeds was to give a right of property in the lands to the feuars, each feuar obtaining a proportional part of the lands of Barrwood in property, and that as the right of property was conveyed without reservation of minerals the feuars have a right to the minerals. It has been said in argument that it appears from the deeds and the whole circumstances that the superior could not have had the intention of conveying the minerals, but meant to give certain surface rights only. What those surface rights were the pursuers were unable distinctly to say, or to explain what limit was to be put on them. As to intention, I can only say that we have to deal with words of conveyance, and the question simply is, What is the effect of those words of conveyance, and of the description of the subject conveyed? We cannot speculate as to what the intention of parties may have been—we must determine the effect of those deeds having regard to the meaning of the words of conveyance. It may very well be that if it had occurred to the superior at the time the early feu-rights were granted that the minerals would come to be of value, the deeds might have been differently expressed. The fact may be that minerals were not in the minds of the parties to the deeds at the time, but that will not affect the question we have to determine as to the legal effect of the terms of conveyance. The first observation to be made is that the terms used in the deeds—"dispone and in feu-farm and heritage perpetually lets and demits ane proportional part of the lands of Barrwood, which is to be ane commonty for the said burgh, grass, moss, meadow, and arable land thereof, effeiring to ane burgess steading of the said burgh and toune of Kilsyth"—are apt and sufficient to convey property. The subsequent clauses are such as you would expect in a conveyance of property. There is a reference in dealing with the allocation

of burdens to the disponees' "part of the said Barrwood," and again it is provided that certain other persons shall be admitted to have their "proportional parts of the said lands of Barrwood." In the clause regarding entry there is a saving clause added in reference to Barrwood to the effect that while the feu-farm duty payable for the twenty falls is to be doubled for the entry of heirs, in the case of Barrwood the first year of entry is to be without a doubling of the feu-duty. And finally you have an obligation to infeft in the lands of Barrwood, and a precept of infeftment in those lands. Now, all of those things concurring, it would be necessary, in order to save their effect, if minerals were to be reserved, that they should be expressly reserved. In a case in which a limited conveyance only is given, you either have the property subject to an express reservation of minerals, or—what we do not find in one of the titles proceeding from the superior here—a conveyance of a mere privilege, or liberty of using the ground so as to leave the property in the superior. We are quite familiar with clauses of that kind, and indeed there are a number of mere privileges granted by this very deed. I do not find anything of that kind with regard to Barrwood, and accordingly while the pursuers have in their argument maintained that the deeds did not convey a right of property at all, they have had the utmost difficulty in attempting to define what is the right that was conveyed, and what other right they can say was left in the superior except that which they are now contending for—the right to minerals. I agree with the Lord Ordinary and Lord Mure in thinking that the possession which has followed upon those deeds—the ancient possession as well as that of more recent times—is all confirmatory of the view which I have expressed, and which I think is a sound view upon the titles themselves. We have in the minute of admissions a number of acts enumerated, and they are almost without exception of very great importance. You have a great portion of this subject divided in 1750, nearly 140 years ago, by those feuars — a proceeding which certainly must have been in the knowledge of the superior then—and divided under an agreement which has been acted upon ever since. Buildings have been erected upon a number of those subjects which have been divided, and the divided lots have been occupied and possessed as separate property. A similar proceeding occurred in 1808, to which, no doubt, it appears the superior was no party, but of which it appears he must have had full cognisance. In addition, there followed the plotting off of different portions of ground, as mentioned in article 7, with the erection of fences by each particular feuar having his own separate property so occupied—all negativing the notion that those to whom it was originally given off in commonty were not entitled to divide the ground and possess and occupy it amongst themselves. Then, in addition, there are important actings by the superior himself, adopting the same view of the parties' rights—adopting the view on which the feuars were acting—because it appears that the superior acquired in property different portions of those lands of Barrwood from the feuars who had so divided it amongst themselves. An illustration of that occurs in the case of the parties referred to by Lord Mure, in which it appears that the superior bought one of the divided feus, and allowed an exchange of certain others, and thereafter granted deeds of confirmation of the rights. I am quite aware that in the ordinary case a superior is not bound necessarily by a writ of confirmation, and is entitled to say that it was granted merely for entry, and to refer back to the original feu-charter for the nature of the right. But that doctrine surely cannot be applied in a case like this, in which the superior himself becomes a purchaser of certain of those feus upon the footing that they are divided in property, and confirms that proceeding to which he himself was a party in a different character from that of superior altogether. Accordingly, it appears to me that the subsequent actings and possession which have followed upon those deeds have a very material bearing upon the construction of the deeds, and that we derive great light from them, if any were necessary, in confirmation of the view that the property of Barrwood was given to the original feuars.

The only other point upon which I shall say a single word is this, that I agree with the Lord Ordinary and Lord Mure that the critical objections which have been taken to certain infeftments can have no weight in the question. As I have said, I doubt if these pursuers are in a position to bring a reduction of previous rights granted by Sir William Edmonstone's predecessors; but in regard to those critical objections to the infeftments, even supposing the infeftments were bad—which I see no reason to think was the case — it would not alter the matter, because the original deeds divested the superior of the right to those minerals, and if the superior was divested of the right to those minerals, then those who now represent him have as lessees no right to raise any question about them. It is shown that the superior has no title. The personal right to those minerals, even if the infeftment were bad, has been given to other parties, and upon that ground I hold that these objections to the infeftments cannot be entertained.

I am therefore of opinion that the Lord Ordinary's interlocutor should be adhered to.

Lord President—The objection to the title to sue would, in my opinion, raise a question of very great difficulty if it were necessary to determine it upon a consideration of the pursuer's title alone, without reference in any way to the merits of the case. But I am of opinion that it is impossible to consider and dispose of the objection to the title to sue without to some extent considering the merits of the case, and I shall endeavour to explain to what extent I think it is indispensable that the merits of the case should be considered as a preliminary to disposing of the question of the title to sue.

The title of the pursuers is a lease which flows from the proprietor of the estate of Kilsyth, and Sir William Edmonstone, the granter of that lease, is the absolute and unlimited fiar of the estate of Kilsyth in so far as his right is not affected and limited by feu-rights given off by him or his predecessors. He, being in this position, grants a lease of the minerals to the pursuers for a period of thirty-one years, and he grants a lease of the

entire minerals in certain parts of the estate of Kilsyth, including among others the town of Kilsyth and the Barrwood. The title of the tenant is equally good to every part of the minerals conveyed by this lease in so far as the title of the granter of the lease is good, and no further, for no lease can be effectual which is granted by a party who is not the owner of the estate, and therefore when the words, "including those in and under the town of Kilsyth and the Barrwood in so far as the first party has right thereto" are introduced, that does not in any degree limit the conveyance which is made by the lease, but it only intimates very distinctly that the granter of the lease intends to except the minerals of Kilsyth and Barrwood from the absolute warrandice which is implied in a lease. If the title to the minerals under the town of Kilsyth and the Barrwood which the granter had was found to be bad, then the lessee was to have no recourse against the lessor.

But then, on the other hand, it is to be observed that while the tenants' title under the lease is equally good to all parts of the subject let, in so far of course as the lessor's title is good, the lessee under a lease of this kind is not in the same position as a disponee or assignee. He is not vested with the full right of the party from whom he derives his title. He is vested only under lease with a temporary right of possession for particular purposes, and therefore he cannot come in place of the lessor in all questions and to all effects. And so if we were bound to inquire here, upon a consideration of this lease only without going further, whether the pursuers of this action have a title to sue, I think there would be very considerable difficulty in the determination of that abstract question. But then it must be observed that the object of this action is to enable the lessees under this lease to proceed to work the minerals conveyed to them by the lessor. It is to remove obstructions out of their way. In place of proceeding at once to work the minerals under the town of Kilsyth and the Barrwood, which they might have done, taking the risk of being stopped, they think it better in the first place to settle the question which they know must arise between them and certain feuars deriving a right from the predecessors of Sir William Edmonstone as to whether these minerals do or do not belong to those feuars.

Now, I think that the pursuers of this action—and I am not now speaking with reference to the particular form of action, of which I will have a word to say bye-and-bye—as lessees under Sir William Edmonstone, have a right to see the original feu-grant possessed by these parties who say they have a right to the minerals. Suppose the original feu-rights had contained an express reservation of the minerals to the superior, can it be said for one moment that the lessees under this lease would not be entitled to demand a sight of those grants in order that they might be enabled to judge whether they were in right of the minerals under this lease or whether they were not? I think they would certainly be entitled to see those original grants for the purpose of satisfying themselves on that question.

No doubt the form of action at first sight raises a difficulty, which Lord Deas has very forcibly stated, and if this were a proper declarator of property that formal and technical objection would, in my eyes, become extremely formidable. If the conclusion of this action was that the minerals under the town of Kilsyth and the Barrwood belonged in property to Sir William Edmonstone, I should be prepared to pronounce at once that the pursuers of this action had no title to sue such a declarator, and that no man can have a title to sue that declarator except the man whose property is declared. But then I think that is not the nature of this action. It no doubt takes a declaratory form, and I think for a very good reason, which I shall explain immediately. But though it takes a declaratory form, I do not think it belongs to that class of declarators to which a declarator of property belongs. Suppose that, instead of bringing this declarator, the pursuers had raised this question in a possessory action—that they had brought a suspension and interdict to restrain the feuars from interfering with their operations in working out the minerals under this ground; or suppose, on the other hand, that they had proceeded to work the minerals without any previous judicial proceeding at all, and that the feuars had brought a possessory action against them seeking to have them interdicted from so working,—I apprehend that in either of these cases it would have been absolutely indispensable that the original feu-grants should be produced for the purpose of showing whether Sir William Edmonstone had been divested of the minerals in these lands when he granted this lease, or whether his title to the minerals in these lands was not just as good as his title to the minerals in any other part of his estate. The possessory question would not have been determined without the production of the original feu-grant any more than this question. Now, I think that though this takes the form of a declarator, it really is intended to raise no other question than that which would have been raised in a possessory action, viz.—Whether the lease which the pursuers have obtained is an effectual title of possession to them in respect that Sir William Edmonstone was really the undivested proprietor of these minerals at the time he granted that lease? Accordingly, the conclusion of the declarator is that the pursuers have a right to work these minerals for twenty-two years. That decides nothing directly and expressly in favour of Sir William Edmonstone, although no doubt it is necessarily based upon the *medium concludendi*, as Lord Deas observed, that the minerals let by this lease are the property of Sir William Edmonstone. But if the pursuers are, as I have said, entitled to see the original feu-grants for the purpose of establishing the conclusion of this summons—if they are to see the feu-grants for the purpose of discovering whether the minerals are or are not conveyed by them—then we cannot say whether they have a title to sue until we form an opinion upon the construction and effect of those feu-grants, and that is what I meant by saying at the outset that I do not think it is possible to determine the title to sue without examining to some extent—and I have now shown to what extent—the merits of the case. We must enter upon the merits of the case, in my opinion, so far as to read and construe the original feu-grant, and upon the result of that construction to determine whether the minerals are or are not in these feuars, and consequently whether the pursuers have or have not any title to sue under their lease.

Now, upon the construction and effect of the feu-grants I concur so entirely with the views expressed by Lord Mure and Lord Shand, and also by the Lord Ordinary, that I do not think it necessary to say a word. I think these feu-grants conveyed a right of property to the feuars in Barrwood—a right of common property—and that each of the feuars had a proportional *pro indiviso* right of property in the subject, and having come to that conclusion I am therefore of opinion that the title to sue is gone, and that the pursuers cannot advance another step in what may be called the merits of the case, because their author Sir William Edmonstone and his predecessors are divested of those minerals, and they as lessees have no title to inquire where these minerals may be so long as they are not in the party who granted this lease; and therefore I adopt the view which the Lord Ordinary states in the second branch of his note, where he says that "certain *pro indiviso* rights of property were duly created by the original charters and sasine following theron." And it is no use for the pursuers to maintain that the whole minerals are in the superior's title, subject only to such feu-rights as exist over it, for, says his Lordship — "The pursuers are not under their lease entitled to try whether feu-rights which have been given off have ceased to exist, nor are the defenders, who are in possession of the subject, bound to enter into that question with them. It must be shown in a competent action that the feu-right is extinguished, and Sir William Edmonstone has the only title to raise such an action. He has never raised nor indicated any intention of raising any such action. Nor is it even alleged that any of the original feu-rights have become extinct or have lapsed to the superior. Besides, the lease cannot, it is thought, be read as letting to the pursuers minerals of which the superior was once divested, and which he has not shown by a competent action to have been restored to him." I think that expresses most clearly the necessary result of its being established by the production of the original feu-grants that under them those minerals have passed out of the person of the superior into the persons of the feuars. I therefore do not think it necessary to examine the objections which have been stated to the titles in the progress of any one of those existing feuars, because I consider the pursuers of this action have no title to inquire into them. It does not matter whether the titles of the present defenders are well made up or not, or whether they have been well deduced from the original grantees of the feu-rights. Sir William Edmonstone is by the production of those original feu-grants demonstrated to be divested of the minerals, and that put an end at once to the pursuers' right.

Now, it appears to me that as the objection to the title to sue cannot be disposed of without advancing so far into a consideration of the merits of the case, the defenders are very well entitled to say—"We shall not be satisfied with having this action dismissed upon the ground that there is no title to sue, because the exigencies of the case have led of necessity to a consideration of the merits of the question, and therefore we are entitled to a judgment of absolvitor." I think that is a very well founded contention, and it seems to me to be the view upon which the Lord Ordinary has framed his judgment assoilzieing the defenders, which in common with Lord Mure and Lord Shand I am quite prepared to affirm.

Counsel for Pursuers (Reclaimers)—Lord Advocate (Watson) — Kinnear — Balfour — Keir. Agents—Webster Will, & Ritchie, S.S.C.

Counsel for Defenders (Respondents)—Asher — Pearson — Dickson. Agents — Maconochie, Duncan, & Hare, W.S.

Friday, November 1.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

EARL OF DALHOUSIE'S TRUSTEES *v.* EARL OF DALHOUSIE.

(*Vide ante*, June 27, 1876, 3 Rettie 882.)

Entail—Improvement Expenditure on Entailed Estate — What included under.

Lord Dalhousie, the institute in possession of an entailed estate, executed various improvements upon it under a clause in the deed of entail which declared that if he or any heir in possession should at any time lay out money "in enclosing, trenching, planting, or draining, or in erecting farmhouses and offices for the improvement of any of the lands and estates thereby disponed, or in making roads, and building bridges, or in repairing or making additions to the mansion-houses or offices of Brechin Castle or of Panmure," the party so laying out money might constitute as a debt against succeeding heirs of entail three-fourths of the money so expended. *Held*, in an action at his instance (during the dependence of which he died, and his trustees and executors were sisted in his room) brought against the succeeding heir of entail for payment of three-fourths of the money so expended, that under the above clause there fell to be included—(1) cottages for farm-servants; (2) a sum paid to a tenant towards the expense of erecting a new steading, it having been found impossible to carry out an agreement in the lease to repair; but (3) (*rev.* the Lord Ordinary—Rutherfurd Clark) that repairs executed on a thrashing-mill—consisting of a new dam and drain, for laying pipes, a new mill-course, and other apparatus, —were not so comprehended.

Counsel for Defender (Reclaimer)—Lord Advocate (Watson)—Kinnear. Agents—Mackenzie & Kermack, W.S.

Counsel for Pursuers (Respondents)—Dean of Faculty (Fraser)—Rutherfurd. Agents—Gibson, Craig, Dalziel, & Brodies, W.S.
