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

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

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

The other judges concurred.

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

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

Wednesday, May 20.

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

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

Expenses—Jury trial—Counsel's fees.

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