Sequestration. Averments of fraud and knowledge thereof which were not held relevant or sufficient in law to sustain an action of reduction of a sequestration (the proceedings in which were *ex facie* regular), and of assignations granted by the trustee in the sequestration, and following on a purchase made at a public sale duly advertised, and for a full price.

This was an action brought for the reduction, on the head of fraud, of the proceedings in the sequestration of the defender Kerr, and also for the reduction of certain assignations by the trustee under the sequestration to another defender, Kyle, of several tack rights, the property of Kerr, which had been sold under the sequestration to Kyle at a public sale, after due advertisement, and for a full price. The fraud was alleged to consist in the title of the concurring creditor in the sequestration having been concocted by Kerr in order to obtain his consent. The other defenders to the action are the trustee and the commissioners in the sequestration, but all the creditors under the sequestration are not called. The pursuer alleged that he was in possession of prior assignations to the tack rights, which he had procured from the defender Kerr previous to his sequestration, and for value received, but these assignations were unintimated, and the trustee stated that they were granted with a view to defraud the other creditors of the bankrupt, being in favour of the pursuer, who is brother-in-law to the bankrupt and a conjunct and confident person with him; and that, moreover, the price was illusory and never really paid to the bankrupt. The pursuer averred in his condescendence a general knowledge of the fraudulent nature of the transaction by which the sequestration was obtained on the part of all the defenders, and also that they were warned against proceeding with the sale. The sale took place in May 1868, and the pursuer, in one of his answers to the defenders' statement, stated that he was ignorant of the fraudulent nature of the proceedings until February 1869. The defenders pleaded that the pursuer had failed to make out a relevant case against them. The Lord Ordinary (MURE), after giving the pursuer an opportunity of making a more specific averment of knowledge on the part of the defender Kyle of the nature of the transaction, which the pursuer declined to avail himself of, dismissed the action, on the ground that the pursuer's statement was irrelevant and not sufficient in law to support the conclusions of the summons, the proceedings in the sequestration being *ex facie* regular. The pursuer reclaimed.

MILLAR, Q.C., and RHIND, for him, argued that there was a sufficiently specific averment of knowledge on the part of Kyle, and also that this action of reduction was competent, in so far as the pursuer had been in ignorance of the fraudulent nature of the sequestration until the period allowed by statute for applying for the recal of the sequestration had elapsed.

BALFOUR, for the defenders, was not called upon.

At advising—

LORD PRESIDENT—I do not suppose that there is any doubt in your Lordships' minds that the Lord Ordinary is right. The grounds for this reduction are quite inadequate. There would, moreover, be very great difficulty in setting aside the sequestration proceedings. There is no allegation of fraud against the defender Kyle, nor is there even an attempt at it. He purchased these tack rights at a public sale duly advertised, and for a full price. If the pursuer had been in a position to make a specific averment of fraud or knowledge against Kyle, he had an opportunity given him by the Lord Ordinary to do so; but he refused to take advantage of it, and did not amend his record. I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

The other judges concurred.

The Lord Ordinary's interlocutor was accordingly unanimously adhered to.

Agent for Pursuer — William Officer, S.S.C.
Agent for Defenders—A. Kirk Mackie, S.S.C.

Thursday, November 17.

HARVIE *v.* STEWART.

Interdict—Res Judicata — *Property — Servitude—Charter by Progress, effect of Alterations on—Extinction of Right.* A was superior of the lands of Brownlee; B was vassal in certain parts thereof, called Townhead and Townfoot; and C was a co-vassal of B, under the same superior, holding certain other parts of Brownlee, called Coblehaugh and Peelhouse. In the original grant to C's predecessor, Hamilton of Garion, dated 1530, there was inserted a right to take as many coals from the lands of Brownlee as were necessary for the vassal's domestic uses. This right was gradually extended in various charters of progress till, in 1605, it became a right to coal out of the lands of Brownlee, for domestic uses, and to sell or give away at pleasure. The grant to B's authors, on the other hand, contained the coal in their lands, but reserving Hamilton of Garion's right, as contained in the ancient infeftments of the same. A, the superior, and C, the co-vassal, both claimed to be in right of Hamilton of Garion, and to have a right over the coal of B's lands. B disputed the claim of both. B and C, having come to an amicable arrangement, began to work the coal, and A therefore sought interdict against them, not as superior, but as in right of Hamilton of Garion. C claimed as in right of certain apprisings of Hamilton of Garion's lands, including, as he contended, this right of coal. A claimed on the ground that the right had remained in him by resignation from C, after he had acquired Hamilton of Garion's lands, and had not been given out again by him to C in subsequent charters. A had in 1794 inserted a clause in B's investiture stating that he, A, was now in right of the reservation in favour of Hamilton of Garion, and in an action of reduction in 1810 it was found that B had, under the circumstances, no title to object to that insertion, and obtain its deletion from his titles. It was admitted that there had been no working of the coal by any of the parties, which could be founded on in the action.

Interdict refused (*dissenting* Lord Kinloch) on the grounds, (1) That A, the superior, had failed to instruct that he was now in right of Hamilton of Garion; (2) and that, even if he were so, he had failed to show that Hamilton of Garion's reserved right was one of property in the coal, which would entitle him to interdict

against the proprietor of the land and the coal.

Held that the decision of the Court in 1810 was not *res judicata* against the vassal, so as to prevent him opposing the interdict, and opening up the whole question now. He had then neither title nor interest to oppose the insertion of the clause objected to, but matters were different now.

Opinion by Lord Kinloch—That the decision of 1810 was *res judicata* against the vassal to this extent, that having in 1794 accepted a charter with the clause inserted, and having been found in 1810 not entitled to get rid of that clause, it must now be taken, as between the superior and the vassal, that the superior had the right so inserted. The nature and extent of that right the vassal was entitled to dispute.

Held that alterations might be inserted in a charter by progress, where it was clearly the intention of the granter and grantee to do so. Circumstances in which such intention was not apparent, and it was *held* (*diss.* Lord Kinloch) that it was competent to go back to the original deeds to interpret the extent and nature of the rights conveyed by the charter by progress.

Held (*diss.* Lord Kinloch) that the clause in Hamilton of Garion's deeds of 1530 and 1605, conveying a right of coal, did not import a right of property in the coal, but either a servitude of coal similar to a servitude of fuel, or else an anomalous right unknown to our law.

Opinion by the majority of the Court—That there was no reason in our law why such a servitude should not have been constituted in the terms of the deed of 1530; though those of 1605 were too broad when taken alone, and apart from the previous deeds, to constitute a servitude.

Opinion by Lord Ardmillan—That the terms of the deed of 1605, when read in the light of the previous deeds, only amounted to a right of coal for domestic uses.

Opinion by Lord Kinloch—That the right contained in the deed of 1605 was either an absolute right of property in the coal, or else such an extensive right as to entitle the grantee or his successor to interdict.

Held (*diss.* Lord Kinloch) that the reserved right in question, of whatever nature it was, had not been apprised from Hamilton of Garion; had not been contained in the charter of apprising in favour of C's author; had not been resigned by him to the superior; and had not been given out again to C's author by the superior, and opinion intimated that it had therefore sopited or disappeared in the transactions of 1708.

This was an action of suspension and interdict at the instance of William Harvie of Brownlee, heir of entail in possession of the lands and estate of Brownlee, in the parish of Carluke and county of Lanark, against Robert Stewart, of West Brownlee, in the said parish, and the Right Honourable Robert Montgomery Hamilton, Baron Belhaven and Stenton, Baron Hamilton of Wishaw, craving interdict against them, and each of them, and all others deriving right from them, "from working, excavating, taking away, or in any way interfering with the coal or coal seams within the lands of Townfoot and Townhead of Brownlee, belonging to the respondent Stewart.

After Lord Belhaven's death, his trust-disponee and one of his heirs-portioners were sisted as respondents in his place.

The nature of the case is thus described by the Lord Ordinary on the Bills (BENHOLME) in his note to the interlocutor, passing the note and granting interdict:—"The subject in dispute between the complainer and respondent is the property of the coal within the lands of Townhead and Townfoot of Brownlee, of which lands the respondent Stewart is feuar under the complainer as superior. Mr Stewart's right to the coal within his own lands was, in the original feu-rights, subject to a reservation in favour of Hamilton of Garion, the feuar of neighbouring lands. The complainer alleges that this reserved right had been acquired by his authors from the Hamiltons of Garion; and that, so far back as 1794, his uncle, William Harvie, then superior, after full consultation with Mr Basil Stewart, then the feuar, and his agents, granted to the latter a charter of confirmation, in which the clause of reservation in favour of Hamilton was converted into one in favour of himself. This change involved the supposition that the superior had, in regard to this reservation, come in place of Hamilton. The propriety of this change was disputed by the successor of Basil Stewart in an action of reduction, which, after a lengthened litigation, was decided in favour of the superior. This judicial determination seems, *prima facie* at least, conclusive against the respondent Mr Stewart, the vassal. But Lord Belhaven, the other respondent, is entitled to say that this decree was *res inter alios* as to him. He alleges that he has acquired Hamilton's reserved right to the coal, and that that right, in his person, could not be defeated by any private agreement, or any judicial decision between the superior and vassal of the lands. He alleges that down to the year 1794 the right was constantly reserved in the vassal's titles, and reserved, not in favour of the superior, the granter of these titles, but in favour of the heirs and successors of Hamilton of Garion. He further alleges that he has succeeded to or acquired all the rights of Hamilton of Garion, and, amongst others, that of the coal in Townhead and Townfoot. His Lordship's alleged right in the coal contained in lands of which he is neither the proprietor nor the superior is one which requires to be supported by a clear title; and such does not appear to be produced by his Lordship. No doubt he seems to be *in titulo* of the lands which belonged to Hamilton of Garion. But to the reservation in question he has not produced any clear or distinct title. Apart from this consideration, the Lord Ordinary is disposed to decide this case in its present shape, from a consideration of the following facts admitted or proved," &c.

After a record was made up, and proof led, the Lord Ordinary (JERVISWOODE) granted permanent interdict in terms of the prayer. Against this the respondents reclaimed; and when the case came before the Inner House, it was found that there was no sufficient evidence of working of the coal on either side to found upon as in a possessory action, and that the question must be decided entirely upon the titles. Accordingly, a most careful examination of the titles of the different parties took place.

From this it appeared that the estate of Brown-

lee had belonged during the sixteenth century to the Livingstones of Jerviswoode, and had remained with them until, at any rate, some years after 1622, when the original grant of Townhead and Townfoot was made to Mr Stewart's authors. After this date it passed first into the hands of Sir James Maxwell of Calderwood, and then, not many years after, into those of the Carmichaels of Mauldslie, with whose barony of Mauldslie it appears to have been united. In 1750 Daniel Carmichael of Mauldslie, in virtue of a private Act of Parliament obtained thereanent, disponed to the Rev. William Steel, minister at Dalserf, his lands of Brownlee, or a part of them, in the following terms—"all and haill these parts and portions of the lands of Brownlee, being part of the said Barony of Mauldsley, called Bowmanhurst, presently possest by James Capie, and the mailling in Brownlee, possest by James Weir, with the teinds, parsonage and vicarage, of the same, and whole houses, biggings, yards, orchyards, milns, multures, and sequels, coals, coal-heughs, lime, and limestone, and haill parts, pendicles, and pertinents of the said lands: As also all and haill these parts of the lands of Brownlee now held in feu of me, the said Daniel Carmichael, by William Hamilton of Wishaw, the heirs of the deceast John Davidson in Townfoot of Brownlee and John Davidson in Townhead of Brownlee, together with all right I have to coall within the said lands of Brownlee, pertaining in property to the said William Hamilton of Wishaw:" Upon this disposition a Crown Charter of resignation followed in favour of Mr Steel. Thomas Steel, the successor of the Rev. Wm. Steel, disponed the lands to William Harvie, who obtained a Crown charter of resignation in 1774, which contains the following description of the lands—"Totas et integras illas partes et portiones terrarum de Brownlee, quæ partes olim fuere baroniæ de Mauldslie et deinde separatæ et disjunctæ fuere ex eadem per cartam . . . viz., illam partem prædictæ baroniæ nuncupatæ Bowmanhirst nuper per Jacobum Capie possess et illud prædium lie mailling in Brownlee, nuper per Jacobum Weir possess cum omnibus domibus ædificiis . . . carbonibus carbonariis et integris partibus pendiculis et pertinen prædict terrarum et etiam illas partes terrarum de Brownlee, nuper tentas in feodo de defuncto Daniele Carmichael de Mauldslie, postea de dict Gulielmo Steel, et deinde de Thoma Steel, ejus unico fratri germano per Gulielmum Hamilton de Wishaw, hæredes Joannis Davidson in Townfoot de Brownlee, et Joanum Davidson in Townhead de Brownlee, respective una cum omni jure quod dict Daniel Carmichael, &c., habebant ad carbones infra dictas terras de Brownlee, quæ in proprietate pertinebant ad dictum Gulielmum Hamilton de Wishaw, quæ omnis prædict terræ infra parochiam de Carluke et vicecomitatum de Lanark jacent sed cum et sub onere subalternorum jurium concess in favorem dict Gulielimi Hamilton de Wishaw, et dict Joannis Davidson in Townfoot de Brownlee, et Joannis Davidson in Townhead de Brownlee," &c.

The rights thus vested in this William Harvie are now admittedly transmitted to his successor the present complainer, but it requires to be noticed that certain slight alterations were imported into the subsequent titles. For instance, in a deed of entail dated 1791, Mr Harvie, after describing the lands as above, adds, "Together with all right I have to coal within the said lands of Brownlee, pertaining in property to the said William Hamilton of Wishaw, and to the heirs and successors of the said John Davidson of Townfoot and Townhead of Brownlee." This addition will be seen to be of importance when reference is had to Mr Stewart's titles.

The deduction of Lord Belhaven's titles is a matter of greater difficulty. The first that it is of importance to notice is also that in which the first mention of the reserved right of coal in question is made. It is a conveyance in 1530 by James Livingston of Jerviswoode to James Hamilton of Garion of the lands of Coblehaugh and Peelhouse, being part of the lands of Brownlee, and containing this clause —"Nec non tantos carbones *in* carbonariis de Brownlee qui possint et valeant sustinere ad ignem et usus domus et familiæ dicti Jacobi Hamilton heredum et assignatorum suorum." In a precept of clare of 1597 this clause becomes—"Nec-non de tantis carbonibus *et* carbonariis de Brownlee qui sufficere possint hæredebus et assignatis dicti quondam Roberti Hamilton pro necessariis et vendere vel dare ad eorum voluntatem." Again, in a charter of novodamus by James Livingston of Jerviswoode in favour of James Hamilton of Garion, dated 1605, the grant becomes—"Omnes et singulas terras de Coblehaugh et Peelhouse cum omnibus et singulis terris meis jacentibus ex parte occidentali torrentis de Garien jacen in territoris terrarum mearum de Brownlee. Nec non tantos carbones *cum* carbonariis de Brownlee qui possint sufficere dicto Jacobo Hamilton hæredibus suis et assignatis pro necessariis et vendere vel dare ad eorum voluntatem."

The progress of titles during the seventeenth century is very obscure owing to several apprisings having been led against the lands. We find them first apprised from Claud Hamilton in 1662. The decreet of apprising bears to carry all and whole the lands of Garion, and all and whole the lands of Brownlee, with all parts and pertinents whatsoever, in the most general terms. The inference is, that between 1605 and 1662 this Claud Hamilton, or his ancestors, had acquired all the lands of Brownlee, besides those parts carried by the charter of 1605. We have seen that during this interval the superiority of the lands twice changed hands. By a series of apprisings, the particulars of which it is unnecessary to relate, the lands of Brownlee ultimately came into the hands of William Hamilton of Wishaw, who, on 12th February 1708, obtained from Daniel Carmichael of Mauldslie, the then superior, a charter of apprising which, proceeding on a narrative of the various apprisings in question, gives and confirms "to my well-beloved William Hamilton of Wishaw, his heirs and assignees whatsoever, all and hail the five pound land of Brounlee of old extent, together with all and sundry manor-places, houses, biggings, yards, orchards, woods, fishings, coal, coalheughs, mosses, muirs, meadows, and hail other parts, pendicles, and pertinents of the same, lying and bounded in manner mentioned in and conform to the original rights and infeftments of the said lands, *excepting always* the feu-farm rights granted to Gavin and John Davidson, portioners of Brounlee, and their authors, of a portion of the said lands, *and my right to the coals of the said parts*, all lying within the barony of Mauldslie by annexation, and in the parish of Carluke and sheriffdom of Lanark."

The date of the first grant to the Davidsons is 1622, and the terms of this charter lead to the supposition that after 1622, and before 1662, Hamilton of

Garion had acquired right to the remaining lands of Brownlee, besides Coblehaugh and Peelhouse, but excepting the grants to the Davidsons.

Of the same date as the charter of apprising above mentioned, viz., 12th February 1708, William Hamilton of Wishaw, having completed his own title, executed a disposition of the lands in favour of Carmichael, his superior, with certain reservations. The disposition is not extant, but the following are the terms of the procuratory of resignation as narrated in an instrument of resignation following thereon. "To resign, &c., all and haill the foresaid five-pound land of Brounlie of old extent, together with the pertinents thereof lying within the barrony of Mauldslie and Brounlie, parochin of Carluke, and shirrifedoome of Lanerk, and particularly with the coall, coallheughs, als weel of the lands reserved by the said disposition to the said William Hamilton, and aftermentioned, as of the lands thereby disponed, with all right, title, interest, clame of right, propertie, and possession whilk he had, or anyways might pretend thereto, excepting and reserving allways frae the said resignation to the said William Hamilton, his airs and successors, threscore five ackers of land, and pertinents thereof whatsomever, lying upon the south-west pairts of the saids lands of Brownlie, and upon the north and north-east syd of Gairengill Burne, and west and most adjacent to the lands of Gairen, as they are mett, measured, pitted, and marched, in manner specified in the said disposition and prorie of resignation; and also reserving the lands of Coblehaugh and Peillhous, and all other partes of the saids lands of Brounlie, lying betwixt Gairengill Burn, if any be, with the woods, fishings, and haill other pertinents of the said reserved lands." Upon this resignation of the lands into the hands of his superior, Daniel Carmichael of Mauldslie, William Hamilton of Wishaw obtained from him a charter of novodamus of the reserved or excepted parts, also of date 12th February 1708. the terms of which are as follows:— "Forasmuch as the said William Hamilton of Wishaw. by his disposition and prorie of resignation *ad remanentiam* therein contained, of the date the day of instant, hes disponed to me, the said Mr Daniel Carmichell, All and Haill the ffive pund land of Brounlee of old extent, with the haill pairts, pendicles, and pertinents thereof therein mentioned, lyeing within the parochen of Carlouk and sherriffdome of Lanark, reserving to him, the said William Hamilton, furth of the said disposition, the number of three-score and ffive aikers of the samen lands of Brounlee, lying upon the south-west side yrof and upon the east and north-east side of Gairen Gillburn; And also reserving to the said William Hamilton and his forsds. the lands of Coblehaugh and Peilhowse, and all oyr pairts, pendicles, and pertinents of the said ffive pund land of Brounlie, lying on the west side of the Gairen Gillburn (if any be), with the teinds, woods, fishings, and pertinents of the saids reserved lands, as the said disposition at length proports: And now therefor witt ye me, upon certain good cawses and considerations, to have of new given, granted, disponed, and be this present charter perpetually confirmed, lykeas I by thir presents of new give, grant, dispone, and for me, my airs and successors, perpetually confirm to the said William Hamilton of Wishaw, his airs and assignyes whatsomever, heritably, All and Haill the saids threescore and ffive aikers of the said ffive pund land of Brounlee, lying on the south-west side thereof, and upon the east and north-east side of Garinegillburn, and next adjacent to the said William, his lands of Gairen; Togither also with the said lands of Coblehaugh and Peilhowse, and all oyr pairts, pendicls, and pertinents of ye said five pund land of Brounlee, lying on the west side of Gairen gillburn; Together also with the woods, ffishings, and haill pertinents of the saids lands hereby disponed, excepting and reserving to me, the said Mr Daniel Carmichell, and my airs, furth and from this present charter, the wholl coalls, coallheughs of the said sixty-ffive aikers of land @wryten, herby disponed, with liberty and priviledge to me and my forsds. to sett down shanks, put in heads, make levells and roads for collheughs in any pairt of the saids sixty-ffive aikers land, the said William Hamilton and his airs and successors being always satisfied for what damage shall be sustained thereby." It is not disputed that the lands as they stood in William Hamilton of Wishaw after this charter of novodamus of 1708 are now validly vested, with all right and title pertaining thereto, in the person of Lord Belhaven's representative.

There now remains to deduce the titles of Mr Stewart to the lands of Townhead and Townfoot, containing the coals in question.

The first deed conveying either of the fourteen and sevenpenny lands of Brownlee was a charter by William Livingstone of Jerviswoode granting the lands, which afterwards came to be called Townfoot, to John Davidson senior, his heirs and assignees. It was dated 1622, and its description of the lands was as follows:—"Totas et integras, quatuor decem solidatas, et septem denariatas terrarum antique extentus in Brownlee, per ipsum de præsenti occupatas, cum domibus edificiis hortis carbonibus carbonariis . . . et omnibus aliis earundem pertinentibus quibuscumque, quæ sunt speciales partes et pertenentes nostrarum quinque libratarum terrarum antiqui extentus de Brownlee . . . . Reservatis tamen Claudio Hamiltoun de Gerane, heredibus suis et assignatis carbonibus dictarum terrarum de Brownlee ac terrarum vocat. Peelhouse Craig . . in ipsius originali in-feo-famento earundem content per quondam Wilielmum vel Jacobum Livingstone de Jerviswoode, patri vel avo dicti Claudii assedat, locat et alienat, secundum formam et tenorem eorum originalis infeofamenti earundem, quodquidem in-feofamentum per expressum in hac præsenti carta reservabitur."

Of the same date a similar charter was granted to another John Davidson of the lands of Townhead, containing a similar reservation. The progress of titles in Townhead and Townfoot is not now completely producible from 1622 downwards, but there are enough to show that from 1622 down to 1794 the investitures were renewed in the two families in the same terms, and with the same reservations as were contained in the original grant. In the year 1794, however, certain alterations were made by the superior, which will be seen from a consideration of a charter of confirmation, granted by William Harvie to Robert Stewart, who had succeeded to Townhead. This, it will be observed, is just three years after the date of William Harvie's deed of entail already mentioned, containing the first innovation on Mr Harvie's own titles. This charter of confirmation contained the following clause:—"Reserving to me, my heirs and successors, as in right of the said Claud Hamilton of Garion, the coal and other minerals in the said lands of Brownlee, and of the lands called Peel-

house Craig, . . . and others contained in the original rights of the same, and my own right of superiority as accords of law."

Previously to 1794 Basil Stewart had succeeded to Townfoot, and had got a disposition from Robert Stewart of Townhead, and it was to facilitate the making up of his titles that this deed last mentioned was granted. In October 1794 the said Basil Stewart obtained a similar charter of confirmation, confirming him in both lands in the same terms, and with the same reservation as in the first deed of 1794 already narrated. From 1794 the reservation has remained the same in the investitures of the respondent Mr Stewart and his predecessors.

This alteration by the superior made upon the titles of 1794 and subsequent dates was not submitted to without a struggle. In 1807 William Stewart, nephew and heir of the Basil Stewart who had consolidated the two properties, raised an action of reduction and declarator, seeking to have reduced the deed of 1794, on the ground that it was granted to him at a time when he was fatuous and of imbecile mind, he having been very shortly thereafter cognosced insane, and that it contained clauses and expressions which were not warranted by the previous investitures, and which were to the hurt and prejudice of the said William Harvie, the then proprietor. This referred chiefly to the alteration which had been made upon the clause of reservation of the coal. After very lengthy proceedings, however, their Lordships held that, "in respect that the charter of confirmation challenged, granted by the defender William Harvie to the late Basil Stewart in 1794, was adjusted by the men of business of the parties in Edinburgh upon a production of the original titles, and after a very tedious discussion for years before them; and that by a missive subscribed by the said Basil Stewart upon the 5th June 1792 (at which time it is not proved that the said Basil Stewart was in a state of incapacity to manage his own affairs) he authorised one branch of the reservation contained in the said charter; and in respect that the said charter declares that the reservations therein contained are conform to the ancient right and infeftment, therefore, and upon the whole circumstances of the case, sustain the defences pled for the said William Harvie," &c.

This judgment of the Court, as determining that Mr Harvie was entitled to insert the reservation in the defender Stewart's titles in these altered terms, was of some importance in the present action.

In 1866 Lord Belhaven raised an action of reduction and declarator, seeking to establish his right to the coals under Townhead and Townfoot in virtue of the reservation in favour of Hamilton of Garion, in whose right he asserted himself to be. The action was, however, compromised, and the judgment did not touch on this point. On Lord Belhaven obtaining a lease from Mr Stewart of the coal under these lands, and proceeding to work them, Mr Harvie found it necessary to bring this interdict, in which the question again came before the Court.

Solicitor-General and Deas for the reclaimers.

Watson and Lee for the respondent.

At advising—

Lord Deas—The leading question in this case is whether the complainer Mr Harvie is entitled to have an interdict against the respondent Mr Stewart, to prevent him working all or any of the coal in the two fourteen and sevenpenny lands of Brownlee, which have very conveniently been distinguished as Townhead and Townfoot. I say this is the leading question, because if he is not so entitled, any subsidiary question between Mr Harvie and Lord Belhaven does not arise. Lord Belhaven has a disposition from Mr Stewart, and what he is doing, or wishes to do, may be rested on Mr Stewart's right.

Mr Stewart is infeft in these lands of Townhead and Townfoot under a progress of titles, the earliest of which, as far as they are before us, is dated 1622. There is a pretty regular progress downwards from 1622 in both lands, and nobody doubts that as a general rule the property of the lands carries with it the property of the minerals, and that possession of the lands is possession of the minerals, if no adverse possession interferes. Consequently, Mr Stewart and his authors must be held to have been in possession of the coal from 1622, unless it can be shown that somebody else had such possession. It is admitted that Mr Harvie has had no such possession as can be founded on in this case. It is not necessary to quote authority for the proposition which I have stated, but I could not give it better than in the words of Ersk. Inst. ii, 6, [1] and [6]. In order, therefore, to entitle Mr Harvie to an interdict against Mr Stewart to prohibit him from working the coal in his own lands, Mr Harvie must show that he has the property of the coal. It will never entitle him to such interdict merely to show that he has some lesser right than that of property. The whole question of interdict is a possessory question, but at the same time, in a case like this, I am not disposed to go on the assumption that the question of interdict cannot be decided upon any other ground than that of possession. If Mr Harvie can show that there is in his vassal's titles a clear exception of the coal, and that he has had no active possession of it, I by no means say that the complainer in that state of matters might not be in a position to obtain interdict, though he himself had not, up to that time, worked the coal. But in order to this he must make it very clear that the property of the coal is vested in him. The burden of instructing this lies on him. The only way in which he proposes to do so here is by producing the exception, which he says is in the titles of his vassal, and the great question in the case comes therefore, to be, Whether that exception, be it in his favour or in favour of somebody else whose right is now vested in him, is one of the property of that coal or not? In order to see that, we must see what Mr Stewart's titles really contain. They commence in 1622 with a charter by which Mr Harvie's predecessor, Livingston of Jerviswoode, grants the fourteen and sevenpenny land of Brownlee therein mentioned to John Davidson, and then comes the reservation upon which the whole case of Mr Harvie rests. It does not say in so many words, reserving the coal in the lands of the vassal to Hamilton of Garion, but reserving the coal in the lands of Brownlee, and that I think is substantially the reservation that runs through the whole of Stewart's titles. It appears to me that by recurring to the exception the superior has only so far discharged the obligation upon him to show his title. (I may here add that in the subsequent titles there is a slight alteration in the reservation. It continues the same up to 1784. It is the same even in the renewal of the right granted by Mr Harvie's uncle in 1782. It is in the charter of confimation and precept of clare granted in 1794 that it first

comes to be expressed in the way in which it now stands. That charter narrates the previous right to the Davidsons as having been granted under reservation always to Claud Hamilton of Garion, his heirs and assignees, of the whole coal of the said lands of Brownlee, and lands called Peelhouse Craig, &c.; but itself confirms the right of Mr Stewart, the then proprietor, "reserving to me, my heirs and successors, as in right of the said Claud Hamilton of Garion, the coal and other minerals in the said lands of Brownlee," &c.) I have said that Mr Harvie has only partially discharged himself of the burden of proof. It remains for him to show what the reserved right was, by reference to the original charters confirming that right, and which are always referred to as defining it in all Mr Stewart's titles. Such a reference has the same effect in a question between superior and vassal as if the whole clause referred to had been engrossed in the deed. It is, therefore, in vain for the superior to point to the reservation without going back to show what the old titles themselves said. The *onus* of this lies unmistakeably on Mr Harvie: and it may be when you go back to the original titles that, in the first place, he may be found to have no right to the original privilege which he claims; and, in the second, that, be that as it may, the privilege itself may not amount to a right of property.

Let us now, therefore, look back upon the old titles, in which the reserved right or privilege is said to have been constituted. The first charter is dated 1530, and is a grant of the lands of Cobblehaugh and Peelhouse, with as many coals in the coalheughs belonging to the grantee as will suffice for certain purposes. That this is a grant exclusively for the use and behoof of the dominant tenement therein mentioned becomes still more clear by looking at the clause of warrandice in the same deed. Now, I do not suppose it can be doubted that, in so far as there is a grant of coal contained in this deed, it is a servitude, or of the nature of a servitude. If it is a good and valid right at all, it is of the nature of a servitude, and of a servitude in favour of a dominant tenement, consisting of Coblehaugh, Peelhouse, and whatever "lies on the west side of the burn of Garion." If a servitude of coal is granted anywhere, it is granted here, but everybody knows that you can't have a positive servitude without a dominant tenement, and that "heirs and successors" in the grant of the servitude mean heirs and successors in the dominant tenement. I am not disposed to lay down that there cannot be a servitude of coal like this; a servitude of fuel we are all well acquainted with; and though to constitute a good servitude it must be one known to the law, yet I think it is open to argue that this is practically a servitude of fuel, adapted in its terms to the nature of the property. But the natural thing here is that this, if a good grant at all, is a grant of servitude and not of property. In its origin, therefore, the right which the superior now says is vested in him was not a right of property. This is very much against its becoming so by variation, where the charters are only charters by progress. The first variation we have occurs in a sasine of 21st June 1597. Though this is the first produced to us, it is clearly not the first deed in which the variation was made. The next deed, however, a precept of Clare of 20th November 1597, superseded the precept upon which the last-mentioned sasine proceeded. The terms of this second precept are apparently quite the same as those of that which it superseded. We have no infeftment upon it, however, and we have no continuation of this series of titles. It is, however, important to observe that the only lands granted are those to which the servitude was originally attached; so that, although the right granted is in words here more extensive than before, it is granted to the proprietor of the same lands, and to no one else. No doubt it was given "to him, his heirs and assignees," but that, as I have already said, means "heirs and assignees" in these lands. Now, such a right might be constituted as a personal privilege to a certain person, but if it were so, it could not possibly be a heritable right, so as to descend to heirs and assignees as a separate subject. It is impossible to look upon it as a right separate from the lands; without them it is no right at all. The important result of all this is, that the privilege, be it what it may, is in the party who is in right of the land, and it is not disputed that the right to the lands is not in Mr Harvie at all, but in the heir of Lord Belhaven, who undoubtedly now holds these lands of Peelhouse, &c., with the coal under them, as has been found by a decree of this Court in 1866. The material fact, therefore, is that the only dominant tenement, not only in those old titles of 1530, but also in that, to which I am now coming, of 1605, belongs entirely to Lord Belhaven and his heirs. When you come to the charter of 1605, what is granted there is, "Necnon tantos carbones cum carbonariis de Brownlie qui possunt sufficere dicto Jacobo Hamiltoun hæredibus suis et assignatis pro necessariis et vendere vel dare ad eorum voluntatem." This is the same in substance with what was contained in the precept of 1597 above mentioned. There is no right or privilege of the coal given to any one except in connection with these lands now vested in Lord Belhaven. If I am right in this, the privilege, whatever it was, is not in Mr Harvie. Now, what Mr Harvie says is this, that though his predecessors gave the privilege to Hamilton of Garion in these charters which I have just alluded to, they got it back again by a resignation in the year 1708. It is very important, therefore, to see what took place in that year. First, Daniel Carmichael of Mauldslie granted a charter of apprising to William Hamilton of Wishaw of the lands of Brownlee, &c. This Hamilton was not heir to Hamilton of Garion; he did not even himself apprise, but got right to the apprisings which had been led by singular title. Hamilton of Wishaw then resigned into his superior's hands. But it was only what he got by his assignation to these apprisings that he either did or could resign. Now observe that what is given by the charter of apprising is the whole five pound lands of Brownlee, excepting always the feu farm rights granted to the Davidsons, "*and my right to the coals of the said parts.*" The lands belonging to the Davidson's, and which are now Mr Stewart's, are not in the charter, and therefore could not be in the resignation which followed, and neither could the reserved right to the coal under these lands. There is nothing to show how Claud Hamilton acquired the five pound lands of Brownlee; but what was apprised from him was these lands with certain exceptions. Any right which Carmichael of Mauldslie had, or asserted that he had, to the coal in Townhead and Townfoot of Brownlee, was not included in the apprisings, or in the charter of apprising to Hamilton of Wishaw, or in the resignation, or the charter of resignation, which followed

thereon. The resignation of 1708 contains the five pound lands of Brownlee, with certain exceptions, these exceptions being certain sixty-five acres, together with Coblehaugh and Peelhouse. The five pound lands of Brownlee here resigned do not seem to be given out again, except the excepted parts which were withheld from the resignation; but, at any rate, it is impossible that this can have been a resignation of Townhead and Townfoot, which had been feued out so far back as 1622. It is not a resignation of these lands, but of the five pound lands of Brownlee as they were in Claud Hamilton, with certain reservations, and it is these reservations which are given out again by the ensuing charter of novodamus. The five pound lands here mentioned cannot possibly have contained the lands of Townfoot and Townhead. Neither do they contain Coblehaugh and Peelhouse, for they are reserved. If, then, the superiors got right to the privilege of coal granted to Hamilton of Garion's predecessors, and attached to Coblehaugh and Peelhouse, it is quite clear that he did not get it by this resignation. It was neither one of the things apprised nor one of the things resigned. If therefore he ever got it, he must have got it some other way. These facts are material in more ways than one, because the superior by that resignation had got right to whatever right Claud Hamilton had in the lands of Brownlee, and when we find that the superior in renewing the titles of Townhead and Townfoot reserves the right of Claud Hamilton and his heirs over the coal, we require an explanation, and we find it in this, that while the superior was in right of certain things through Claud Hamilton, he was not in right of this particular thing which he now claims. It shows how dangerous a thing it would be to decide a question like this without looking back into the old titles. The assertion of the superior's being in the right of Claud Hamilton does not make its appearance till 1794; and I rather think that when we come to Mr Hamilton's title-deed we shall find confirmation of the view which I have taken.

Mr Harvie's titles commence in 1750 with a Crown charter of resignation in favour of Mr Steel. Now, observe here the right which is given to coal and coalheughs. It is a right to those in the lands of Brownlee which belonged to Hamilton of *Wishaw*. Townhead and Townfoot never belonged to him; and no right is given of the coal lying under them. Look next to the Crown charter in favour of the first Harvie and the same thing is apparent, only still more distinctly. It is only when you come to the entail executed in 1791 by this Mr Harvie that you find the variation inserted. "Together with all right I have to coal within the said lands of Brownlee, pertaining in property to the said William Hamilton of Wishaw, and the heirs and successors of John Davidson of Townfoot and Townhead of Brownlie." These latter words are introduced here for the first time, and are not in the two previous charters. James Harvie, the entailer's heir, goes to the Crown and gets the charter of resignation of 1820. He seems to have succeeded in getting this charter pretty much in terms of the entail; but when we come to the clause referring to the coal, we find that the Crown refused to insert the clause as in the deed of entail, and went back to the older deeds which were its warrants, and gave him only the coal in the lands pertaining to William Hamilton of Wishaw. The same is the case in the precept of Chancery of 1857 in favour of the present Mr Harvie himself. All this very much confirms the view which I take. Although Mr Harvie's predecessors had acquired the five-pound lands of Brownlee, and certain rights of coal, they never did acquire this special privilege, which Mr Harvie now claims and, as far as we can see, this special privilege, if it belongs to anyone, belongs to the heir of Lord Belhaven as in right of the lands to which it was attached, and this reservation of the rights of Claud Hamilton, or of his own as in right of Claud Hamilton, has not the meaning which Mr Harvie would give to it.

But supposing Mr Harvie was in right of that privilege, the question still remains, is that a privilege which would entitle him to interdict. The servitude might continue good, so far as it was a definite right capable of being extricated, because it is not essential in order to make it definite that some judicial regulation has been resorted to—so long as it can be extricated consistently with the rights of the servient tenement, and with other servitudes if any. It is quite conceivable that some regulation might be applied successfully to this case. There are ways in which it might be done. But assuming that it was as good a right as ever it was, and that, moreover, it was vested in Mr Harvie, the observation is still just that it is not a right of property in the coal which would entitle him to interdict against the proprietor of the land and the coal. It is never in any writ the coal, it is always a right to a certain quantity of coal. I need not observe that coals may be separated from the lands, but they must be so by means of a regular charter, constituting a definite estate of a heritable nature. See Dallas' Styles, and Bell on Deeds, vol. 1, p. 39. Now, we have here neither a disposition of the coal nor any reservation in such terms as can legally carry the right to the coal. The more that we go into the old titles the more we see that the words are quite insufficient to create a feudal title to the coal; and more than that, we see that they were never intended to do so. All that we have, at least in the progress before us, is an enlargement of the right such as it was, and an alteration of the essence of the right. Such was not possible, nor do I think it intended. And if it is not a title to the coal, I do not see how it can be a title to interdict.

All this is stated in Lord Kinloch's interlocutor in the previous case, in which the point came up in a somewhat different way. Lord Belhaven was then laying claim to this privilege of coal, not as proprietor of the dominant tenement, but as in right of those apprisings. To this the answer now is, that the apprisings were all of the lands of Brownlee, and that they went to William Hamilton, and through him to Mr Harvie. Assuming that Mr Harvie had right to these apprisings, was the privilege claimed worth anything? that was what Lord Kinloch then had to decide. He held that it was not, and gave his reasons most distinctly, and I quite concur in them. In the question of meaning and intention, as to whether it was intended to give a right of coal; it is a conclusive fact that the vassal not only gets the land but he gets the coal also, under an exception. If that exception were held to carry the whole coal, it would render the deed a perfect absurdity. His Lordship's opinion is, therefore, that the servitude attempted to be established could not be effectual, and if so, then, neither could the personal right.

It is not necessary for us to determine whether the right is here a right of property. I have answered

the question only because the parties have argued their whole case before us, and I have thought it just to give my opinion as to what their rights are. But this will not prevent Mr Harvie bringing a declarator, if so advised.

Lord Ardmillan—This is an action of suspension and interdict at the instance of Mr Harvie, superior of certain lands known as Townfoot and Townhead of Brownlee, against Mr Stewart, the proprietor of these lands, and against Lord Belhaven's trustees, and Mr Russell as his tenant. The complainer seeks interdict against all and each of the respondents, forbidding them to work any of the coals within the lands known as the lands of Townfoot and Townhead of Brownlee.

The complainer alleges that he is superior of these lands, whereof the respondent Mr Stewart, the feuar, stands infeft in the *dominium utile* on a series of titles open to no objection; and he seeks interdict on the footing of a right in the coal reserved in the titles to the superior of the lands.

The first point to be considered is, whether the procedure by suspension and interdict is appropriate in this case. In the ninth article of the statement for the complainer he alleges long-continued possession of the coal. The words of this article are important—

"The coals in the said lands of Townfoot of Brownlee and Townhead of Brownlee have for time immemorial been possessed peaceably and without interruption by the complainer and his authors and predecessors, the proprietors of the estate of Brownlee and superiors of the lands of Townfoot of Brownlee and Townhead of Brownlee. The vassals in the said lands of Townfoot and Townhead of Brownlee never had any possession of the said coal."

And the relative plea in law for the complainer is the second plea—

"The complainer and his authors and predecessors having uninterruptedly possessed the coal in dispute under *habile* titles for time immemorial, their right thereto cannot be disturbed by any of the respondents."

If this averment of possession has not been instructed, then the plea in law which I have read is not well founded, and ought to be repelled. The Lord Ordinary has expressed an opinion favourable to Mr Harvie on this question of possession. I am not able to concur in that opinion. I think that there is not sufficient evidence to support the plea of possession by the complainer. So far as I can perceive, there has been no possession at all of the coal in these lands by the complainer until a very recent date—so recent as to be of no importance in this question; and during that recent period it appears that both parties have been working the coal. I understood it to be substantially acknowledged at the bar that the complainer has not instructed any possession of the coal to support his action.

On the other hand, the lands of Townhead and Townfoot of Brownlee belong to, and have been long possessed by, the respondent Mr Stewart and his authors; and where there is no competing title to the land, and no adverse possession of the coal, I think that the possession of the land is equivalent to possession of the coal. On this point I agree with Lord Deas; and this possession must be recognised, at least to the effect of making it incumbent on the complainer to proceed by declarator, and not by interdict.

We are here in a possessory action in a process of suspension and interdict. There has been no declarator; and no action of declarator has been proposed. The very foundation of this action, as laid, is, that the complainer and his authors have had immemorial possession of the coal. Now, it is not enough to say that this averment has not been instructed. I think the averment is contrary to the fact, and I am under the impression that it was substantially abandoned in argument. We have, therefore, to consider the complainer's case apart from the plea of possession. Can he, in the absence of possession, demand interdict? I think it is well settled that where there is disputed title, and where the complainer has had no exclusive possession, the procedure by suspension and interdict is not appropriate. This was the opinion of Lord Corehouse in the case of *M'Donald* v. *Farquharson*, 14th December 1836, 15 S. and D., 259, and has been repeatedly recognised as the true principle regulating the remedy of interdict. But, while I am of this opinion, I am not disposed to rest my decision on this ground.

Accordingly, I now proceed to consider the complainer's case on its merits. Here, again, it is necessary to observe the position which the complainer has taken as explained by himself on the record. In statement 8th he makes this averment, —and his case has been argued on the statement and plea which I now read:—"The coal in the said lands of Townfoot and Townhead of Brownlee was never feued out by the superior's authors to the vassals in the said lands, but remained as part of the lands and estate of Brownlee, and was expressly reserved to the superior of the lands in all the titles of the property." It is on this alleged reservation of the coal to the superior of the lands that Mr Harvie takes his stand. It is as superior, and under that reserved right to the superior, that he has brought this action. Accordingly, in the 3d plea in law for him, he puts his legal right thus—"The right to the coal in the said lands having been expressly reserved to the superior in the title of the respondent Mr Stewart and his predecessors, the said respondent cannot pretend a right to the said coal in competition with the complainer, his superior." Nothing can be clearer in point of statement and of pleading than this. The complainer is here maintaining and seeking to enforce a right which he alleges to be in him as superior, under a reservation of the coal to the superior of the lands in the titles of the vassal.

It is accordingly most important to ascertain whether the complainer's statement that the coal was in these titles "reserved to the superior of the lands" is correct in point of fact. If the coal in these lands was never feued out, but was reserved to the superior, then the complainer, who is the superior, would be entitled to succeed in a declarator. But if the coal in these lands was feued out with the lands with no other reservation than a special reservation (of the import and effect of which I shall afterwards speak) in favour of a third party, not the superior, then this complainer cannot succeed in this action, and would not even succeed in a declarator brought on the ground that he is in right of the coal under a reservation thereof to the superior of the lands.

I have applied my mind anxiously to the consideration of this question, which has been earnestly argued, and naturally and rightly felt to be essential to the complainer's case. Has the coal in these lands been reserved to the superior? The com-

plainer is bound to instruct that reservation. I am of opinion that on these titles the coal in the lands was feued out with the lands; that there is no reservation of coal to the superior,—and that the only qualification or reservation affecting the coal is a reservation in favour of Claud Hamilton of Garion, who was not the superior of the lands. The feudal tenure, as originally created, under which the authors of Mr Stewart held these lands and coals, was not qualified by any reservation of coal in favour of the superior. Whatever reservation there was in the old titles was in favour of Claud Hamilton, a third party, and not the superior. It is maintained that the complainer is now in the right of Claud Hamilton; and perhaps it may be so. I am not satisfied that he is. I think it extremely doubtful, on the titles; and I feel the force of the learned argument of Lord Deas on this point. But if he is so, then, at least. it is on some separate title, and not as superior, The right reserved did not remain part of the estate of Brownlee retained by the superior, nor part of the superiority of the lands feued. It passed to the third party, Claud Hamilton, apart from the feudal tenure. Whatever may be its scope or effect, to which I shall next advert, it appears to me abundantly clear that it was not reserved to the superior in the old titles.

Then, in the more recent titles the reservation is expressed as in favour of Mr Harvie, "as now in the right of Claud Hamilton of Garion." The respondent does not admit this; and, as I have already said, it is not free from serious doubt. But at least it is clear that even in these later titles the reservation was not taken to Mr Harvie as superior of the lands, but to him only as in right of, and so far as in right of, Claud Hamilton, who was not superior. This action is, however, brought by Mr Harvie as superior, and his plea and ground of action is, that the right to the coal "was expressly reserved to the superior in the title of the respondent," and that it is now in the complainer as superior.

I am of opinion that this ground of action is negatived by the titles in process. I entertain no doubt, taking the most favourable view of Mr Harvie's case, that, whatever may be the position of Mr Harvie in relation to Mr Hamilton, and whatever may be the nature of Mr Hamilton's right, or of Mr Harvie's right, in respect of that position and relation, and whatever may be the import and effect of the reservation in the old titles, still there is no support to the plea on which the action rests—viz., that the right of coal was in the titles reserved to the superior of the lands.

The next question for consideration is, what is the meaning and effect of the reservation itself?

In the later titles, which are steps in the progress, we do not find the words of original reservation, but we do find reference to the "original infeftments of the same;" and under these words we are naturally and legitimately carried back to the original titles to Mr Stewart's authors, and to the original titles of Hamilton of Garion. We have here a charter by Livingston of Jerviswoode in favour of John Davidson senior, one of Mr Stewart's authors, dated 14th September 1622. By that charter one portion of the respondent's lands of Brownlee is conveyed to John Davidson in feu "*cum carbonibus et carbonariis*," reserving to "Claud Hamilton of Garane carbones dictarum terrarum de Brownlee," &c., "secundum formam et tenorem eorum originalis infeofamenti." This reference to the old infeftments is again repeated in a subsequent part of the charter.

From this title it appears (1st), that Livingston was the superior; and (2d), that the coal was conveyed to Davidson, the only reservation being in favour of Claud Hamilton; and (3d), that the reservation in his favour was according to the form and tenor of his original infeftments, to which we must revert. Now the first of these original titles, the oldest title in which the terms of Hamilton's right can be found, is a charter by Livingston of Jerviswoode to James Hamilton of Garion, dated 12th August 1530; and the words of that charter in reference to the coal of Brownlee are most important. They are as follows;—"Nec-non tantos carbones in carbonariis de brwnle qui possint et valeant sustinere ad ignem et usus domus et familie dicti Jacobi Hamilton heredum et assignatorum suorum." We next have an instrument of sasine, dated 21st July 1597, following on a precept of clare constat by Livingston to James Hamilton, dated 20th July 1597; and next, again, we have a precept of clare constat by Livingston in favour of James Hamilton, dated 20th November 1597. In both of these titles the terms of the grant of coal to James Hamilton are varied from the previous charter, and are more extensive than in the original title in 1530; but in none of these titles is there a conveyance of the property of the coal to Hamilton of Garion. In that original title of 1530 no more was given than sufficient coal for the house and family use of James Hamilton and his heirs. In the two succeeding titles in 1597, the words are 'unacum carbones et carbonariis (sic in origine) pro suis necessariis aut vendere vel dare Jacentes ex occidentali torrietio de Garin," &c. The next title we have which it is necessary to notice is a charter by James Livingston to James Hamilton of Garion, dated 22d March 1605, which had been lost, but of which the tenor was proved in February 1866. In that charter the clause in regard to coal is in the following terms:—

"Nec non tantos Carbones cum Carbonarijis de Brounlie qui possunt sufficere dicto Jacobo Hamiltoun heredibus suis et assignatis pro necessarijs et Vendere vel dare ad eorum voluntatem jacen infra Vice Comitatum de Lanerk."

It is plain that, in this clause, the terms of the precepts in 1597 have been followed rather than the terms in the original charter of 1530; and I am disposed to think that the true intent and meaning of the grant is to be found in the earlier charter of 1530, and that nothing more was really meant to be conferred than a right to use coal for the household purposes of the family. If so, the subsequent reservation of the right in the charter of 1622 is the reservation of a privilege only, and not of a right of property. If the reservation be taken as in the charter of 1530, the right reserved may be a servitude of fuel, somewhat like a servitude of feal and divot. But if it be read as in the later charter, it is an innominate and anomalous privilege, not a known servitude, and not now effectual. Besides, if it be a servitude, there must be a dominant tenement, and that must be the mansion of Hamilton of Garion, which does not belong to Mr Harvie.

But, even if the clause in the charter of 1605 be read as more comprehensive than the clause in the old charter of 1530, even reading it as including a right to sell or give coal at pleasure, still there is, in my opinion, not the creation of a right

of property, but the conferring of a privilege unusually wide,—wider than any known servitude. It does not express a grant of all the coal in the lands, but only a grant of so many coals as may suffice for certain purposes. Tantus in singular means "so much," and in plural tanti or tantos means "so many." So far as I know, there is no authority, in classic Latin or in legal Latin, for reading "tantos carbones," as synonymous with "totos carbones," or "omnes carbones," or "totos et integros carbones;" and again the words "qui possunt sufficere" plainly implied that need, or requirement, is the measure of the grant. There is no grant of the whole coal. The grant is of so many coals as may suffice, or may be required; and that which is beyond what suffices—that which may not be required—is not conferred. This view of the clause, as limited to a privilege of fuel, appears to me to be confirmed by observing an apparently trifling peculiarity of expression, in which the charter of 1530 differs from the subsequent writs. In the old charter the words are "tantos carbones in carbonariis," &c., which I take to mean so much or so many of the coals in the coal-hills as may sustain fires and family use. In the first of the precepts in 1597, the expression is varied, and the words are "carbones et carbonariis" not "in carbonariis," obviously a mistake in Latin grammar, as the word "carbonariis" requires not the conjunction "et," but the preposition "in," which preposition is in the earlier charter. In the second of these precepts the case of the word is varied, and the words are "tantis carbonibus et carbonariis." Then, in the charter of 1605 the words are "tantos carbones cum carbonariis." From this I infer that the true meaning of the original grant in 1530 was a right, not to the coal-hills, but to use coals to the extent of his requirements taken out of the coal-hills; and I am not satisfied that the subsequent extension of that right was effectually or legitimately given, as, unless it was a right of fuel for use, it was not a known servitude, and it could not be pleadable against the proprietor of the lands, under titles conferring the coal with the lands, and under no other reservation thereof than that contained in Hamilton's old titles.

But even taking the clause in its most comprehensive terms,—taking it as bearing the very unusual meaning of a right to sell or to give coal, as well as a right to use coal, I am still of opinion that it is not a right of property in all the coals, but only a privilege of use, however wide. No more is granted than as many coals as may suffice; and the measure of what is given is to be found in what may suffice, while the measure of what may suffice is to be found in the requirement of Hamilton and his heirs. I observe that Lord Kinloch, in the note to his interlocutor of 16th March 1865, expresses his opinion that the clause is "not in terms a conveyance of the coal," and he adds:—"It appears to the Lord Ordinary doubtful in the extreme if this can be considered a conveyance of coal, separating it from the lands above and giving it away in property to James Hamilton of Garion." I concur in this opinion of Lord Kinloch's. Indeed, I would express it still more strongly. I feel quite unable to read this clause as a conveyance of the property of the whole coal in the respondent's lands to Hamilton of Garion. I think there is no right of property here. I never saw, and never heard of a conveyance of property in such terms as these, where we have, not a reservation to the granter, but to a third party, and where that reservation was not followed by possession.

Now the reservation in the subsequent titles, under which the respondent Mr Stewart and his authors have possessed the lands, is not general, but limited. It is according to the form and tenor of Hamilton's original infeftment. If no right of property in the coal was conferred on Hamilton in his old titles, then there is no reserved right of property in the coal to qualify the right in the titles of Mr Stewart. In any view, it is quite clear that there is no such right reserved to the superior of the lands.

I do not know that we are at present called on to decide what is the extent of the privilege of use conferred on Hamilton of Garion. The complainer alleges a right of property, and is not now seeking to enforce a privilege. It is not in respect of such a privilege that this action has been brought, but only in respect of a right of property said to be reserved to the superior. But if the question were before us, I should be inclined to think—1st, that, in the most favourable view of the complainer's case, the true meaning of the privilege cannot go beyond the largest and most liberal amount of family use of coal; and 2d, that, in the absence of any possession by the complainer or his authors of the coal, while the lands, with the coals, have been possessed by the respondent and his authors for a very long period, the existence of a privilege under the titles in favour of Hamilton of Garion cannot, in any view, sustain the complainer's demand for interdict, even though he might have some right to a use of coal of the nature of a servitude or privilege, when that is instructed and regulated in a declarator. On the grounds which I have now briefly explained, I have arrived at the conclusion that, irrespective of the legal proceedings in certain actions in this Court, which have been referred to, the complainer is not entitled to succeed as against Mr Stewart.

If these proceedings are considered, then I am also of opinion that the complainer's pleas arising out of the judicial proceedings are not well founded as against Mr Stewart.

In the view which I have taken of the case it is scarcely necessary to say anything on the separate pleas for Lord Belhaven's trustee, and for Mr Russell. If Mr Stewart is entitled to succeed in resisting this interdict, the interests of Lord Belhaven and Mr Russell will be sufficiently protected.

Lord Kinloch—The present is a process of interdict, under which the complainer, Mr Harvie, asks that the respondents, Lord Belhaven and Mr Robert Stewart, should be prohibited from working the coal under the lands of Townhead and Townfoot, which are parts of the five-pound land, of old extent, of Brownlee. The action is a possessory action. Both parties admitted at the bar that it could not be determined by considerations of possession, and that the Lord Ordinary's interlocutor was erroneous so far as bearing to proceed on a proof of possession. I agree with them entirely in this, there having, as I think, been no such working of the coal on either side as can alone, in such a question, be regarded as affecting the right. It still, however, remains competent for the complainer to ask an interdict, if he can shew sufficient grounds for so doing. If, for instance, he can shew that he himself has a title to the coal, and that the respondents have none; or if he can

show himself placed, by force of contract or otherwise, in such a situation with reference to the respondents, that they are bound, in a question with him, to abstain from working.

I am of opinion that the complainer is entitled to obtain the interdict sought by him.

The two respondents are differently situated with respect to their individual titles; and I shall first advert to the case of Mr Robert Stewart. Mr Stewart is admittedly proprietor of the *dominium utile* of the lands of Townhead and Townfoot. The superiority of these lands is admitted to belong to the complainer, Mr Harvie. The question is, Who has the coal? Or how, as between these parties, the coal stands situated?

It appears to me that a considerable step is made towards a solution of this question by considering the terms of the investiture under which Mr Stewart, as vassal, holds of Mr Harvie as superior. From the year 1794—now seventy-six years ago—downwards, all the deeds of investiture display two peculiarities. One of these peculiarities is, that no right of coal is expressly given with the lands in the superior's deed. Whatever may have been originally the case, no express mention of coals is found for about eighty years back in the superior's confirmations. On the contrary, there is the other peculiarity, that there has been inserted in all the deeds renewing the investiture a clause of reservation, in favour of Mr Harvie and his successors, of the coal in the lands thereby confirmed. The clause has always run in substantially the same words, and bears the deed to have been granted (as in the charter of confirmation of 27th October 1794), "saving and reserving always to me, my heirs and successors, as now in the right of Claud Hamilton of Garion, the coal of the said lands of Brownlee, and lands called Peelhouse Craig, Woodholm, and Dovecotholm, and others, as mentioned in the original infeftments of the same." Under an action raised by the then Mr Stewart, the vassal, against the then Mr Harvie, the superior, it was decided by the Court, in the year 1810, that these were the proper terms of the investiture; and the superior was assoilzied from a reduction of the subsisting title, which had been brought by the vassal against him.

I consider it established by these deeds that, as between the complainer, Mr Harvie, and the respondent, Mr Stewart, the lands are held of the former by the latter, under a reservation to Mr Harvie of the coal in the lands, "as mentioned in the original infeftments of the same." It may remain to inquire what is the precise nature and extent of the right so reserved; but that a reserved right of some kind belongs to Mr Harvie cannot, as I think, be doubted; certainly cannot be disputed by the respondent Mr Stewart, who holds his property of the complainer under this express reservation.

It is further, I think, fairly to be held that this reserved right, whatever be its precise legal character, is, according to what is set forth on the face of the deeds, comprised within the title of superiority in Mr Harvie's person. It is so, presumably, from the nature of the case; for the right is reserved out of the superior's grant: in other words, it forms part of the feudal subjects, all of which, both lands and coal, belong to the superior by the conception of the transaction, and are taken from him by the vassal; but taken under an exception which implies the excepted portion to remain with the superior on his superiority title. Whatever may be reserved beyond, it is clear that the clause carves and keeps something out of the superior's anterior grant; and this is the only object of introducing the clause into the deed. It is the argument for the respondent himself, that his grant from the superior comprehends in its dispositive part, even without mentioning coals, the whole subject *a cœlo ad centrum;* that is, comprehends the coal as well as the lands. This implies that the coals, not less than the lands, are comprised in the title to the superiority. The effect of the reservation is just to retain the reserved right in the superior's title. Such, I think, and no other, is the legal meaning of the phrase "saving and reserving always to me, my heirs and successors, the coal of the said two fourteen shilling and sevenpenny lands of Brownlee," which are the terms of the standing investiture.

It is true that in these deeds the right bears to have accrued to Mr Harvie, as in room of Claud Hamilton of Garion; and whatever mistake may at any time have been made on the subject, I think it undoubted that Claud Hamilton was never superior in the subjects, though he held the *dominium utile* of a certain portion of the lands of Brownlee. But I do not think a reference of this sort, erroneous as it may often be, sufficient to destroy, *eo ipso*, the legal effect of a clause of reservation in a superior's deed. The complainer makes a further answer—viz., that there is sufficient proof of the reserved right, as originally existing in Hamilton of Garion, having, long before this date of 1794, merged in the right of superiority. His argument is to the following effect:—The documents produced show the right in question to have been given off in the 16th century to Hamilton of Garion, by the then superior of Brownlee. In the course of the 17th century the whole rights of Hamilton of Garion in the lands and coals of Brownlee had been apprised by various creditors; and the right to the apprisings ultimately came to centre in the person of Hamilton of Wishaw, and was feudalised in his person by a charter of apprising, followed by sasine. On the 12th February 1708 a variety of deeds were executed between the then Hamilton of Wishaw and Daniel Carmichael of Mauldslie, at that time superior of the lands, with the view of accurately defining their respective rights. These deeds embraced amongst others a resignation *ad remanentiam* into the superior's hands of the whole of the apprised rights, with the exception of those intended definitively to remain with Hamilton of Wishaw, which were anew given out by the superior. The subjects thus resigned comprehended the whole five-pound land of Brownlee, with its coal and coalheughs—comprehended, therefore, the coal now in question in the lands of Townhead and Townfoot, which were part of this five-pound land. The subjects given out contained certain specific lands, with no right of coal in these lands; on the contrary, with the coal reserved. Thus the right to coal in Brownlee, previously held by Hamilton of Garion, and apprised by Hamilton of Wishaw, returned to the superior from whom it flowed. It did so by the resignation *ad remanentiam*, which was, in legal character, just a redisposition to the superior of what had been previously given off by the superior's disposition—the one of these dispositions being legally as effectual as the other. The superior, Carmichael, being thus reinvested with Claud Hamilton's right in these coals, and the right merging in the superiority as before it was given out, he was *in titulo* to convey the right

as part of the superiority of Brownlee to his dispouee in that superiority, the Reverend William Steel, from whose heir, Thomas Steel, the right of superiority passed to Mr Harvie's predecessor.

Such is the argument of the complainer; and it seems to me possessed of sufficient force fairly to corroborate the inference arising out of the terms of the investiture, that the reserved right retained by Mr Harvie, the superior, is expressly so retained as a right comprehended in his title of superiority.

If this conclusion be well founded, it follows that the present question is a proper question between superior and vassal in regard to a reserved right of the superior, and must be so regarded and dealt with in the legal discussion of the case. The consideration is of importance — for it will be especially difficult for the respondent Mr Stewart to shake himself clear of a reservation essentially entering into his relation as vassal to the complainer Mr Harvie as superior. But I would now add that, in the view which I take of the case, its decision does not hinge on the point of feudal title. The case might be assumed to involve a mere reservation to Mr Harvie of a right originally in a third party, and flowing to him simply as that third party's assignee. It still remains true that in the deed which constitutes Mr Stewart's title to the lands, and his deed of covenant with Mr Harvie, and as an essential element of the relation of one of these parties to the other, there stands reserved to Mr Harvie the coal under Mr Stewart's lands; and the coal generally stated, without any restriction or limitation, farther than may be held to lie in the reference to the original infeftments. Looked at as a mere matter of contract, I think that, as between Harvie and Stewart, there is here a right to coal in Harvie, which Stewart must acknowledge and give effect to. I cannot assume the deed to be the same as if no such clause of reservation occurred in it; which, I think, is the substance of the respondent's argument. Whatever the intrinsic character or the right, I think that, between Harvie and Stewart, a legal right exists which Stewart is not entitled to contravene.

Proceeding now to consider what is the precise character of the right reserved, I am of opinion that the words composing the reservation imply, *prima facie*, an absolute right to the whole coal in the lands. Such, and no other, is the natural meaning of the words, "saving and reserving to me, my heirs and successors, the coal of the said two fourteen shilling and sevenpenny lands of Brownlee." *Prima facie*, there is here a reservation of the whole coal to the superior. The result is, at all events, to throw on Stewart, the vassal, the burden of proving a limitation. I cannot accede to the proposition that the *onus* in this matter lies on Mr Harvie. On the contrary, with a reservation thus unlimited, contained in Mr Stewart's own deed of investiture, I am of opinion that Mr Stewart can only, in the best view of his case, qualify or restrict the right by proof on his part of some restriction or qualification, the *onus* of establishing which he must, as respondent, undertake.

What in this view is contended for by Mr Stewart is, that an important qualification of the right is discovered by reference to the original deed by which the feu in which he is now vassal was given off by the superior; and he maintains that it is competent to explain and construe, by such reference, the terms of the existing investiture.

It has been decided, more than once, that as between superior and vassal, the terms of a charter by progress, or other deed purporting simply to renew the investiture, are not conclusive as to the true conditions of the relation; but that these are susceptible of construction, and even of correction, from the terms of the original grant, or of other prior deeds passing between the parties. The doctrine is an important and reasonable one. But great care must be taken that the doctrine be not overstrained, and applied to cases to which it is not fairly or equitably applicable. The whole principle of the doctrine lies in the assumption that nothing was intended except a mere renewal of the former relation. Whenever it is made manifest that a transaction took place at the time of renewal between the superior and vassal, under which the right was either to be enlarged or restricted, the alteration will have effect given to it. Nothing would be more inexpedient than to hold that superior and vassal could not, when the right was renewed, effectually create an alteration on it by the mode in which the renewed right was expressed. The judges in the well-known case of *Graham* v. *Hamilton*, 27th January 1842, expressly saved the case of an alteration of this sort; and nothing can be more reasonable than such a qualification of the doctrine.

In the present case, although presumptively the whole coal under the lands is reserved to the superior, yet the reservation contains two important qualifications:—the one that the right reserved is identical with that once possessed by Claud Hamilton of Garion; the other, that the right is "as mentioned in the original infeftments of the same." The respondent pleads, with great force, that these references warrant and demand an examination of the prior title-deeds, in order accurately to deduce the true measure of the right. It is in this view necessary to consider the previous history of the subjects.

The original constitution of the feu-right now held by Mr Stewart lies, to the extent of one-half the subjects, in a charter dated 14th September 1622, granted by William Livingston of Jerviswoode, the then superior of the subjects, in favour of John Davidson senior. By this charter was conveyed one of the fourteen shilling and sevenpenny lands now in question. The other was conveyed by another charter of the same date in favour of John Davidson junior, running substantially in the same terms. By these charters of 1622 there are, in the first instance, conveyed the lands, "cum domibus, edificiis, hortis, carbonibus, carbonariis, lapicidiis," and other common pertinents, "et omnibus aliis earundem pertinentibus quibuscunque." The lands so conveyed are described as a part of the five-pound lands of old extent of Brownlee; and thereafter, there are declared to be reserved to Claud Hamilton of Garion, and his heirs and assignees, the coals of the said lands of Brownlee (*dictarum terrarum de Brownlee*), and of the lands called Peelhousecraig and others, contained in his original infeftments of the same, granted by umquhill William or James Livingston to the father or grandfather of the said Claud Hamilton, "secundum formam et tenorem eorum originalis infeofamenti earundem." This again throws back the inquiry to a previous deed granted by William or James Livingston to Claud Hamilton's father or grandfather; and such a deed is manifestly found in a charter of 22d March 1605, granted by James Livingston in favour of James

Hamilton of Garion, who is sufficiently proved, and indeed admitted, to have been the father of the Claud Hamilton of 1622, The respondent sets forth in the record:—"The Claud Hamilton mentioned in the said feu-charter of 1622 succeeded his father, James Hamilton of Garion, in or about the year 1612." In this deed of 1605 must therefore be found the reference in the feu-charter of 1622. Beyond and before this deed of 1605 parties clearly cannot go. For this is the right actually subsisting in Hamilton of Garion in 1622, by reference to which the original feu-charter of that year expresses and defines the right of coal thereby reserved. Clearly, it is impossible to go back to any prior and less extensive right. The then subsisting deed of 1605, in favour of Hamilton of Garion, and under which Hamilton of Garion was at that moment actually holding, must be held the measure of the reservation in the feu-charter of 1622.

What, then, is the right given by this deed of 1605 to Hamilton of Garion? Historically it appears a much wider right than was possessed about a century before; for in 1530 all that seems to have been held by the then Hamilton of Garion was a right to coals for family use. It is plain that the right widened in the progress of time; and the deeds indicate also a change in the reddendo. The contrast between the terms of the grants shews that something very different was intended in 1605 than merely to repeat the old limited grant of 1530. A new and more extended right had plainly been transacted for between the parties. The deed of 1605, which is not only a charter of resignation but also a charter of novodamus, conveys to James Hamilton of Garion, "his heirs and assignees whatsoever," the lands of Coblehaugh, Peelhouse, and others:—"Necnon tantos carbones, cum carbonariis de Brownlie, qui possunt sufficere dicto Jacobo Hamilton, heredibus suis et assignatis, pro necessariis, et vendere, vel dare, ad eorum voluntatem." This very extensive grant of coal is made by using the same words of disposition which are employed in the conveyance of the lands. The granter equally comprehends lands and coals in the words—"dedisse, concessisse, assedasse, arrendasse, locasse, et ad feudifirmam seu emphiteosism hereditarie dimisisse." The whole subjects conveyed, both lands and coals, are described as having been resigned by the disponee for new infeftment. A grant *de novo* is made by the superior of the whole subjects, including the coals and coalheughs; and a warrant is subjoined for infeftment in the lands conveyed—"cum carbonibus, et carbonariis, prescriptarum terrarum de Brownlie."

The question is now raised, What is the precise meaning and extent of the grant of coal to Hamilton of Garion contained in this deed? On the part of the respondents, it is contended that there is here no proper conveyance of coal, but the mere grant of a privilege or servitude; the right, namely, of taking as much coal from the coalheughs of Brownlee as might be requisite for ordinary purposes, or as the disponee might either sell or give away. The privilege is of the amplest description, comprising every use likely to be made of coal by a proprietor. It is scarcely conceivable what any coal-owner could do with his coal besides burning it, selling it, and giving it away. But still, it is contended, the right is short of a conveyance, and must have different legal principles applied to it.

Unquestionably, the wording of the grant is peculiar; and it reads at first sight as if it were something less than a conveyance. In deciding a former case at the instance of Lord Belhaven, claiming the coals in question against both Messrs Harvie and Stewart (which, however, ultimately went out of Court without the merits being disposed of), I doubted if there was here a conveyance of coal in the proper sense of the term, though without finding it necessary to rest my conclusion on that ground. I have, on farther and riper consideration, come to lean strongly to the opinion that the grant must legally be held to import a conveyance of coal. A privilege or servitude of coal I cannot discover to be a right recognised by our law. The conception of a servitude is peculiarly inappropriate in the present case, because there is in this deed of 1605 no constitution of a dominant tenement, but the constitution of a grant to an individual, his heirs and successors, which is alien to the idea of a servitude according to the law of Scotland. In the nature of the case a grant of coal implies an entireness of transference which is scarcely compatible with any other view than that of a conveyance of property. Supposing even the grant to be limited, it does not follow that it is not legally a conveyance. If the grant had been of all the parrot coal of Brownlee, or of any other particular seam, reserving all the others, I think that it could not be doubted that this would have been a proper conveyance. And I do not see that the variance in the kind of limitation should affect the legal character of the right. At the same time, the comprehensiveness of the grant, which gives practically the whole coal in the lands, may be fairly held therein to import a conveyance of the property. In the case of *Livingstone* v. *York Buildings Company*, 10th June 1776, Brown's Supp. 5, 559, the Court held a right of property in coal to be reserved to a superior and his successors by the words "excepting and reserving to the said Earl liberty and privilege to win coal, lime, and limestone, make shankholes, and sink ways and passages, for payment of damages at the sight of two honest men." And the same judgment is stated to have been pronounced in the case of the *Magistrates of Inverkeithing* v. *Murray*, 21st January 1778. Here a right of property in coal was found constituted by the use of words which bore merely to give "liberty and privilege to win coal." And this shows, I think, that to constitute such a right of property does not require the full enunciation of the ordinary conveyance of land. In the present case there are the same words of conveyance used in regard to the coals as in regard to the lands: and although the words are undoubtedly "*tanti*" and not "*toti*," yet in practical effect the whole coal is made over. The coals are, besides, not given "*ex carbonariis*" or "*in carbonariis*" but "*cum carbonariis*," which implies a general conveyance of the whole coalheughs in the lands. I am disposed to consider the grant as combining the two things commonly set forth in a deed concerning coal—the conveyance to the coal, and the right to work it—and substantially to convey the coal; but with reference to the right to work it, to define the right as operating to the effect of taking out all necessary for the grantee's own use, for sale, and for giving away. It is the same as if the granter had said: "I dispone the coals and coalheughs; and I grant right to work the same, to the effect of taking out all the coals necessary either for ordinary uses, or to sell, or to give away." In its substance I think the grant a conveyance of the coal; and the deeds passing after the date of

the deed of 1622, and more especially those passing between the parties to this process or their predecessors during the last eighty years, appear to show that this was the construction put upon the grant all along.

If, as this view assumes, the complainer Harvie possesses a legal conveyance to the coal beneath the lands of the respondent, he is, of course, clearly entitled to have the respondent interdicted from working this coal.

But here, again, I would observe that I do not think it necessary that this full conclusion should be reached, in order to support the present demand for interdict. Suppose it not to be clear that the complainer Harvie possesses a legal conveyance to the coal, he undoubtedly possesses, in any question with the respondent Stewart, the entire right which was in 1622 in the person of Hamilton of Garion. He must be held to do so by force of the terms employed in the deeds by which he holds of the complainer. Unquestionably, he must be held to do so until the respondent proves that no such right belongs to him. There is here, therefore, in the person of the complainer, a right, in any question with the respondent, to take from the lands as many coals as he can use for his own purposes, or sell, or give away. It seems to me that there is enough in this right to entitle the complainer to an interdict against the respondent, such as he now demands. For I cannot well see how the respondent can work the coal without infringing on this comprehensive right. The effect of refusing the interdict will simply be to authorise the respondent to work out the whole coal, without hindrance or limitation. Under a judgment to this effect, the respondent will not be bound to leave to the complainer a single inch of coal, either to use, or to sell, or to give away. I cannot accede to a judgment having this effect, when I consider the terms of the respondent's own right as the complainer's vassal. On the contrary, I think the least that can be done on the part of the respondent is to abstain from working till he clear by declarator that he is entitled to work the coal, either exclusively, or to such an extent as will be compatible with the right of the complainer reserved in the respondent's own title. On this ground, though I differ as to the reasons of the judgment, I am of opinion that the interlocutor of the Lord Ordinary, so far as it grants interdict, should be affirmed.

The other respondent before the Court was originally the late Lord Belhaven, and is now Lord Belhaven's trustee. The case, as regards this respondent, appears to me capable of being disposed of in a few sentences. I think it clear, on the face of the deeds, that Lord Belhaven or his representatives have no right whatever to the coal under the lands in question. Their alleged right is created through a transference by means of diligence of the right originally belonging to Hamilton of Garion. Of course, whatever objection lay against the right in the person of Hamilton of Garion would equally attach to it in the person of Lord Belhaven. But I consider it sufficiently proved that whatever right may have ever belonged to Lord Belhaven (or rather to Lord Belhaven's predecessor, Hamilton of Wishaw) as in room of Hamilton of Garion, has, for much more than a century, passed out of their person. The right came, as is alleged, to Hamilton of Wishaw, through certain apprisings led against Hamilton of Garion; and in 1708 Carmichael of Mauldslie, then superior of the lands of Brownlee, granted a charter of apprising in favour of William Hamilton of Wishaw, which was followed by sasine. This charter confirmed to Wishaw the whole five-pound land of Brownlee, with coals, "excepting always the feu-farm rights granted to Gavin and John Davidsons, portioners of Brownlee, and their authors, of a proportion of the said lands, and my right to the coals of the said parts." It may be doubted whether the apprisings warranted so extensive a charter as of the whole five-pound land of Brownlee, with its coals; but the superior granted such a charter in point of fact, having in view the arrangement which had been made between the parties. On the same day with the execution of this charter of apprising, being 12th February 1708, Hamilton of Wishaw executed a disposition and procuratory of resignation to the effect of resigning into the hands of the superior *ad remanentiam* the whole five-pound land of Brownlee, "with the coals and coalheughs," with the exception of 65 acres lying on Garion Burn, and the lands of Coblehaugh, Peelhouse, and others, all described as part of the five-pound land of Brownlee, but not comprehending the coals. On this procuratory, resignation *ad remanentiam* was afterwards made. On the same day, of 12th February 1708, Carmichael, the superior, executed in favour of Hamilton of Wishaw a charter of novodamus, conveying these 65 acres, and also the lands of Coblehaugh and others, excepted from the resignation. The effect, as I think, clearly was to limit all after right in Hamilton of Wishaw to the special lands contained in this charter of novodamus. And these admittedly do not comprehend directly, or by implication, the coals now in question. The whole remaining rights possessed by Hamilton of Wishaw under the apprisings, comprehending the whole five-pound land and its coals, and therefore the coals now in question, returned and were re-disponed to the superior by the resignation *ad remanentiam*. It is not pretended that the right to these coals was ever after in any way re-acquired by Hamilton of Wishaw, or his successors.

In these circumstances, I am clearly of opinion that no right exists in the person of Lord Belhaven, or his trustee, to entitle him to oppose interdict against working applied for at the instance of the complainer on his *prima facie* title to the coal. It was said that the other respondent, Mr Stewart, had transferred his right to Lord Belhaven. But his Lordship could, of course, by virtue of that transference, be in no better position than his author Stewart; and if Stewart's right fails, equally so must that of Lord Belhaven as Stewart's assignee.

LORD PRESIDENT—I have found great difficulty in coming to a decision in this case, and though I am at present with the majority, I do not feel sure that on some future occasion if, like my brother, I had again judicially to go over the details, I might not be found on the other side. However, so far as I can see at present, I am of opinion that Mr Harvie is not entitled to this interdict. The existing investiture as it may fairly be called, in the lands of Townhead and Townfoot is dated 1832, and the reservation contained in that charter is in these terms, —"But saving and reserving always to me, my heirs and successors, as now in the right of Claud Hamilton of Garion, the coal of the said two fourteen shilling and sevenpenny lands of Brownlee, and the lands called Peelhouse Craig, &c., as men-

tioned in the original infeftments of the same." Now, if I could read this as being simply a reservation out of the grant to the vassal of the coal within the vassal's lands, I should have no difficulty. If it had been a reservation in simple terms I should not have been disposed to go back to the more ancient titles, as it is quite possible to introduce a new condition into a charter by progress, when it is quite clear that both superior and vassal intend that it should be so. But it is quite clear that this is not the case here, and difficulties arise on the face of the charter itself which prevent me taking this simple view.

In the first place, the reservation is not in favour of the superior, as superior, but as in right of a person called Claud Hamilton of Garion. Now, if Claud Hamilton had been at one time superior of these lands, this reference to his rights might be of less importance, but it is disputed that Claud Hamilton ever was superior, and I think it is proved by the titles adduced that he never was in the position of superior, but was merely a co-feuar.

In the second place, it is remarkable that what is reserved is not merely the coals of the lands given out in this charter, but also of other lands with which this charter has nothing to do. So that this reservation in favour of Claud Hamilton, said now to be vested in Mr Harvie, could not have been a proper part of the original contract by which this feu-right was constituted.

And lastly, this clause of reservation still farther demands consideration, in as much as it makes special reference to the original infeftments constituting and embodying Claud Hamilton's right.

Now, the result of all this is, that in endeavouring to determine the relative rights of the complainer and the respondents we are not confined to a consideration of the existing investitures, nay, not even of the titles of the particular subjects merely, but we are free to examine, or rather forced to examine, the original constitution of the right to these subjects, and also the original constitution and the transmission of this reserved right.

In doing so, we have two questions to answer—First, What was the nature of this reserved right? Second, Is it now vested in Mr Harvie?

This second question does arise, as between the parties here, notwithstanding the previous legal proceedings on this subject. Had Mr Harvie stood vested in the right as superior, that is, had that which was reserved been part of the estate of superiority, it might not have been possible for the vassal now to raise it; but as it is, there is, I think, nothing to prevent his going fully into the subject.

I am not going into a long examination of the titles, but there are some observations regarding them, which I feel bound to make, to explain my grounds for differing from my brother Lord Kinloch. When we go back to the deed of 1622, constituting the feu of Townfoot of Brownlee, we find the reservation in favour of Claud Hamilton expressed in somewhat different terms from those which it afterwards assumes. There is a reference back to the original grant by William or James Livingston of Jerviswoode to the father or grandfather of Claud Hamilton. Obviously, neither of the parties to the charter of 1622 had recourse to this deed; they were merely conjecturing; therefore I do not consider myself as tied down to any one particular deed; I consider myself at liberty to consult any of the previous deeds to which the reference applies. I am therefore not content to go back to the deed of 1605, because I am not at all satisfied that that was the deed referred to. The deed of 1605 was a deed by James Livingston of Jerviswoode to James Hamilton of Garion. But I find another deed in 1530, also granted by a James Livingstone of Jerviswoode to the then James Hamilton of Garion. It seems to me very probable that this was the deed referred to. There is nothing in the date or names to make it improbable, while it has the advantage of being the original infeftment, which the deed of 1605 is not. That being so, I begin with the deed of 1530, and a very excellent example of a charter of that date it is, very short and very clearly expressed. Now, in this charter, which conveys to Hamilton of Garion, Coblehaugh and Peelhouse, parts of the lands of Brownlee, there is very clearly a right to coal given in the following terms—"Necnon tantos carbones in carbonariis de Brownlee qui possint et valeant sustinere ad ignem et usus domus et familiæ dicti Jacobi Hamilton heredum et assignatorum suorum." Now this right is, I think, plainly not a right of property in the coal. On the contrary, it is a very limited right indeed. It has been argued very plausibly that a servitude of coal is unknown in Scotland; if it be so, then this is an invalid right. If, on the other hand, a servitude of coal may be constituted, as my brother Lord Deas thinks,—and I confess I do not see any very clear legal principle against it, however little it may be known in practice—it is so constituted here in very clear and express terms. However, it does not matter to the view which I take what is the legal decision of this point. This right of coal, whatever it amounted to, is carried on by the charter of novodamus of 1605. It is very obvious that this charter was intended to alter in some respects the tenure of the estate, accordingly the reddendo is changed from masses to money; but the deed of 1605 did not intend to alter the nature of the estate, unless it be in that particular clause by which the right of coal is granted. Even though there is an alteration upon this clause—and I admit there is a material one—the right conveyed still remains one of an anomalous nature, and one which was intended to be of limited extent. The expressions used are inconsistent with a full right to the coal. Neither the granter nor the grantee were dealing with a full right of property in the coal, but were merely carrying on by a different form of expression the same kind of right as was constituted by the deed of 1530.

Let us now pass to the original title of Mr Stewart's property, and see what was the burden laid upon John Davidson. That burden is defined by the terms of the grants of 1530 and 1605. Looking at the question as if it had arisen in John Davidson's time, I ask myself would Claud Hamilton, as in right of that reservation, be entitled to insist, as Mr Harvie is doing now, that "you shall not touch the coal under your own land"—not on the ground that "I am your superior," but "because your superior has given me a right to the coals under your lands." If the right was then of any validity, it was merely one co-existing with the right of property in the feuar, and did not entitle to any such thing. So matters stood in 1622, and I do not think that anything material has happened since to alter the relative positions of parties. They stand much in the same position as Claud Hamilton and John Davidson did in 1622, at any rate up to the

year 1794. There is no doubt that Mr Harvie's uncle inserted in a charter which he granted in that year a reservation of a somewhat different kind, not as affecting the subject matter, but as affecting himself. Here, for the first time, the superior announces that he stands in the right of Claud Hamilton. Now the reservation was a burden upon Mr Stewart and his authors, and it did not matter to him into whose hands it got. Unless it did so on coming into the superior's hands, the vassal had neither title or interest to object to the superior saying that he had become the assignee in Claud Hamilton's right. It was a matter of no consequence to the vassal whether the party in right of this reservation was Claud Hamilton or somebody else. The reservation was a burden on him to whomsoever it belonged; and the transference of it from one person to another would certainly not alter the nature of the right, unless indeed, as seems to be contended, the nature of the right suffered an alteration by coming into the hands of the superior. I shall consider whether this is so immediately. But it is curious that never before 1794 did the superior say that he was in right of Claud Hamilton. For, if he had acquired this right in 1708, why did he not state the fact sooner. There were many investitures in favour of the vassals during the interval from 1708 to 1794. For instance, there were two in 1714, just six years after the assumed acquisition of the right. In both of these the right is described just as in the earlier titles. So also in 1741; and even after the superiority of Brownlee had been separated from the barony of Mauldslie, in 1750, we have no change. Finally, in 1782, Mr Harvie, the uncle of the granter of the deed of 1794, inserts the reservation in the old and usual form. It is then not till 1794, after a lapse of more than eighty years, that it occurs to Mr Harvie to make the alteration. This leads me to observe with some jealousy, how the superior did acquire the right of Claud Hamilton. I am quite unable to find anything like a transference of this very peculiar right to Mr Harvie's predecessors. It must be remembered that Claud Hamilton got the right as an appanage of his feu of Coblehaugh and Peelhouse. Now, what took place in 1708. Certain apprisings had been led against Claud Hamilton's lands, and the right to these apprisings had come in some way to William Hamilton of Wishaw, and he in that year obtains a charter of apprising from his superior, from which it would appear that Claud Hamilton of Garion had some time before this acquired right to the whole five-pound land of Brownlee. Mr Hamilton of Wishaw got by this charter of apprising these five-pound lands of Brownlee with the coal and coalheughs. But the superior makes a reservation in favour of the subvassals, the Davidsons, of the parts feued out to them, and also "of my right to the coal of the said parts, all lying within the barony of Mauldslie," &c. The superior's right to the coal in these parts was thus reserved. The superior was the Davidsons' superior, and they by their charters of 1622 had the coal. This reservation, then, in the charter of apprising of 1708, must have been intended to save the right of the vassals in Townhead and Townfoot, or at any rate it had that effect. If it were otherwise, it was a reserved right which the superior could not maintain in a question with these vassals. It could not have been Claud Hamilton's right, for it is not pretended that the superior acquired anything of Claud Hamilton's right until after the date of this charter. The charter then goes on to narrate the whole details of the apprisings. Now there are no other lands contained in this charter, except those to which I have already referred. No doubt this five-pound land of Brownlee contained the two fourteen shilling and sevenpenny lands, as also Coblehaugh and Peelhouse, &c.; but the subject that is apprised and granted out is the five-pound lands of Brownlee, excepting the feu rights of the Davidsons, and the coal under these feu rights. It is very difficult to see, therefore, how Mr Hamilton of Wishaw extracts from the apprising any right to the coal under Townhead and Townfoot. We next come to a charter of novodamus of the same date as the above-mentioned charter of apprising. This proceeds upon a resignation. The terms of the resignation, rather than those of the charter of novodamus, are supposed to be the strong point in favour of the complainer. He renounces:—"All and hail the foresaid five-pound land of Brownlee, together with the pertinents thereof . . . and particularly with the coal, coalheughs, as well of the lands reserved by the said disposition to the said William Hamilton and after-mentioned as of the lands thereby disponed." There are reserved a certain sixty-five acres, and also the lands of Coblehaugh and Peelhouse with their pertinents, But I think that it will be found that what is meant by the words, "as well of the lands reserved as of the lands disponed" is merely "as well of the sixty-five acres, as of the lands disponed." There is a distinction in the deed narrating the resignation between the lands of Coblehaugh, &c., and the sixty-five acres, and we find this distinction still more clear in the charter of novodamus which followed thereon. We must keep in mind that we have not the disposition containing the procuratory of resignation, we have only a short description of it at the outset of the charter, and then the superior proceeds for good causes and consideration to give, grant, and dispone of new the sixty-five acres, and also Coblehaugh and Peelhouse and their pertinents, "reserving to me, the said Daniel Carmichael and my heirs, furth and from this present charter, the whole coal and coalheughs of the said sixty-five acres above written, hereby disponed." Now, observe that what is resigned originally is the whole five-pound land as Mr Hamilton of Wishaw acquired it under the charter of apprising. I have already said that by his charter of apprising he did not acquire this peculiar right of Claud Hamilton to coal, at anyrate out of Townhead and Townfoot—nothing of the kind. What he afterwards does is to surrender the five-pound land, keeping to himself Coblehaugh and Peelhouse and the sixty-five acres, all but the coal in the last-mentioned sixty-five acres. If I understand this aright, the Coblehaugh and Peelhouse coal was not surrendered, but reserved to the vassal along with the lands. The superior did get the coal under the sixty-five acres, and also under the other lands of Brownlee. But how this could have included the peculiar right of Claud Hamilton, which Hamilton of Wishaw had not under his charter of apprising to give, I am at a loss to see. It seems to me that that right never was apprised, and therefore could not pass under the charter of apprising or any of the conveyances of 1708. The five-pound lands, as far as not otherwise affected, passed to the superior, but no more. If the right of Claud

Hamilton continued to subsist after 1708, it was then a burden upon all the parties to the transaction of that year. It was a burden on the superior, so far as it extended to the coal under the lands resigned, it was a burden on Hamilton of Wishaw, so far as regards the lands acquired by him, and it remained a burden on Townhead and Townfoot as before.

But it rather appears to me that these proceedings in 1708 had the effect of extinguishing the right of Claud Hamilton altogether. The legal diligence divested him of all he had under the charters of 1530 or 1605, while at the same time this peculiar right of coal did not pass to Hamilton of Wishaw, or to the superior, and therefore disappeared altogether in 1708. If it did not, most certain it is that it did not pass into the person of the present complainer.

I am consequently of opinion (1) that the right created in 1530 in favour of Hamilton of Garion, and reserved in the grants to the Davidsons from 1622 onwards, was not a right of property in the coal, and is not such a right as would entitle its possessor to interdict as here craved. (2) That an examination of the titles show that Mr Harvie is not in the right of Claud Hamilton of Garion, as he asserts himself to be. On both grounds, therefore, I am for altering the Lord Ordinary's interlocutor.

Agent for Complainer—Henry Buchan, S.S.C.
Agents for Respondent—Duncan, Dewar & Black, W.S.

Thursday, November 17.

SECOND DIVISION.

DREW *v.* DREW.

Alimentary Fund, Arrears of—Concursus debiti et crediti. A and B, two brothers, were made trustees under their father's trust-disposition and settlement. B received a liferent of certain subjects, under the real burden of paying half-yearly to A the interest of a sum of £250. This provision to A was declared purely alimentary, and not assignable or attachable by his creditors. The father died in 1838, and B entered into possession of the subjects, and drew the rents, but retained the interest due to his brother, who was his partner in business, for debts due to him and for advances. *Held*, in an action by A to recover the arrears of interest, that the debt was extinguished by compensation, there being a *concursus debiti et crediti* between A and B, and arrears of an alimentary provision being attachable by a creditor of the beneficiary.

This was an appeal from the Sheriff-court of Lanarkshire in an action at the instance of Alexander Drew against Peter Drew and himself, as the trustees of his late father, William Drew, brought in the following circumstances. By trust-disposition, dated in 1836, William Drew disponed his whole property to his three sons, as trustees for certain purposes. The pursuer and defender were the sole surviving sons. By this deed it was provided that the trustees were to hold and retain in their hands, for the sole use and benefit of Peter Drew, the subjects described in the 4th, 5th, and 6th places, and allow Peter Drew to uplift the free rents thereof, but under the special condition that part of these subjects should lie under the real burden of a sum of £250 in favour of Alexander Drew. The trustees were directed to pay half-yearly the interest of this sum to Alexander; and it was expressly declared that the said principal and interest should be purely alimentary, and that it should not be competent to Alexander Drew to burden or alienate the same. William Drew died in 1838, and the trustees accepted the trust. It was averred by the pursuer that no part of the principal sum or interest had been paid to him since 1838; and he claimed in this action £761, 1s. 6d., being the interest on £250, at 5 per cent., since 1838, together with £60 of liquidate penalty for non-payment of the interest at the terms when it was due.

The defender explained that, in 1848, the pursuer and defender referred to Thomas Leburn, S.S.C., all claims and disputes between them, including this claim of interest since 1838; and that, in 1859, the arbiter pronounced a judgment which was final and binding on the parties.

The defender produced a decree of the Court of Session for £309 odd against the pursuer, dated in 1853, with a recorded charge thereon; and also an assignation to a debt of £1881, due by the pursuer to the liquidators of the Western Bank, and paid by the defender.

He further alleged—"The defender, on 5th July last, raised an action of furthcoming in this Court against the pursuer and the Sighthill Cemetery Company of Glasgow, founding on said several decrees and horning. The pursuer did not dispute the debts, but pled payment. In this process the present defender lodged a minute, giving credit for the sum of £179, 4s. 5d., being the amount of interest on the £250 mentioned in the summons, from Whitsunday 1848 to Martinmas 1866 inclusive, after deducting the sums mentioned in the defender's statements 4 and 5. On the 4th February last your Lordship, the Sheriff-Substitute, repelled the present pursuer's said defences, and restricted the sum in the diligence as reduced by said credit of £179, 4s. 5d.; and, on the 8th March last, the said interlocutor was adhered to on appeal."

The Sheriff-Substitute (STRATHEARN) on 17th May 1867 pronounced an interlocutor—"Finding, in point of law, (1) that the interest on the principal sum concluded for is due, not by Peter Drew as an individual, but by the said Peter Drew and Alexander Drew as trustees and executors of their father; and that Peter Drew is neither entitled to plead in compensation, nor to retain said interest for or in liquidation of the debts due to him as an individual by the pursuer: (2) Finds that, even if the pursuer, and Peter Drew as an individual, did stand in the relation of debtor and creditor, yet as the interest was declared to be alimentary and inalienable by the pursuer, and not affectable for his debts or deeds, nor by the diligence of his creditors, that the defender cannot lawfully retain it or compensate it by his said debts: Finds, however, that all interest due at and prior to Whitsunday 1848 was finally adjudicated and determined by said award, which operated as *res judicata*: Therefore so far sustains the defence, and assoilzies the defender from the conclusions of the action *quoad hoc*: Finds, with respect to the interest since due on said principal sum, that the pursuer is not entitled to charge the same at the fixed rate of 5 per cent. per annum, but at such rate as was charged from time to time by and paid to the said Bank of Scotland, and other banks, on discounting bills: Therefore, before further answer, allows the pur-